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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 311961

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

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.

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT
RJC/CAK, INC.

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I. REPLY BRIEF OF APPELLANT RJC/CAK

1. RJC/CAK Did Not Tortiously Interfere.

RJC/CAK had a legitimate business interest in not having a competing sales agency adjust claims for RJC/CAK insureds. A good faith effort to protect a legitimate business interest with a third party is not tortious interference. Elcon Const., Inc. v. E. Washington Univ., 174 Wn.2d 157, 168, 273 P.3d 965 (2012); Tacoma Auto Mall, Inc. v. Nissan North America, Inc., 169 Wn.App. 111, 132, 279 P.3d 487, *rev. den.* 175 Wn.2d 1024, 291 P.3d 253 (2012); Dauphin v. Smith, 42 Wn.App. 491, 495, 713 P.2d 116 (1986).

RJC/CAK never admitted or agreed that Kassa Insurance Services (Kassa or Kassa Insurance) established a prima facie case for its tortious interference claim.¹ RJC/CAK's appeal is not about "second guessing" the trial court. It is about the fact substantial evidence in the record does not support the trial court's conclusion there was tortious interference, and that the trial court failed to properly apply the standards involving tortious interference claims.

First, the claim that RJC/CAK did not act in good faith is not supported by the properly admitted evidence in the record.²

¹ See RJC/CAK Opening Brief at p. 14-15.

² Response to Kassa Opening Brief beginning at p.26

Kassa argues bad faith is shown because RJC/CAK “demanded they [Continental Western] they not use us [Kassa]”, citing to RP 115, ll. 23-25; RP 166 (sic), ll. 1-3. (Presumably that is a typographical error and Kassa actually meant RP 116).

That testimony, however, was preceded by the following testimony of Tim Kassa:

Was that initially when I e-mailed Continental Western, they – the adjuster told me that he did not know why they were not supposed to – he said that they received a memo saying that they were no longer to use Kassa Insurance. And he didn’t know why. They didn’t give him an explanation. And so I called Bob Connor and talked to him. And he said, “I just don’t know. You have to” –

Mr. Bury: I have to object here on hearsay. This document, written document is an exception to the hearsay rule because its one of his business records, so I agree it comes in. But for him to tell us what conversations he had on the telephone with the people, that’s a different bit of hearsay. That’s not a business record. That’s his hearsay recollection and that is objectionable.

(RP 114, lines 22-25; 115, lines 1-11).

The trial court then sustained the objection (RP 115, line 21) and allowed Kassa to read Kassa’s *own handwritten notes*. It is Kassa’s own notes which say “an agency that demanded that they not use us.” (RP 116, line 2-3). It was not direct evidence from a Continental Western employee or agent that said RJC “demanded they not use us.”

Next, Kassa points to the claim that RJC alleged Kassa was trying to “drum up business” and cites to RP 126, ll. 13-18.³ Kassa then concludes that evidence went beyond merely requesting Continental Western stop using Kassa. The problem with that argument and conclusion is that information was objected to, and improperly admitted.⁴

Kassa then states the testimony was not objected to at trial with an Id. citation, referring to the transcript citations discussed above. As shown, the testimony was, in fact, objected to at trial.

Finally, Kassa supports its argument that RJC/CAK acted in bad faith by referencing the self-serving testimony of Tonya Kassa that it was her “understanding that Joe Connor contacted Continental Western in some way and told them he had a conflict of us handling claims that are his insureds and that someone in our office had tried to cross-sell from the agency side to sell insurance to one of his insureds. That’s my understanding.” (RP 255, lines 19-24; Kassa Opening Brief at p.27).

No admissible direct evidence or testimony from a Continental Western representative supports Ms. Kassa’ “understanding” of the cross-selling claim. Joe Connor denied he made such claims. (RP 621-622).

Kassa argues the evidence at trial confirmed that it did not misuse adjusting information because it took steps to keep the adjusting business

³ Kassa Brief at p.27.

⁴ See RJC/CAK Opening Brief beginning at p. 25.

of Kassa separate from the insurance sales business. Kassa points to the fact that Tonya Kassa only worked as an adjuster. That argument ignores the fact that Tim Kassa continued to do both insurance sales, and adjusting work. (RP 190-191).

Kassa also argues that an improper motive can be attributed to RJC/CAK because the actions occurred “during the time when RJC and Kassa are in disputes concerning Pugh’s employment.”⁵ The facts do not support that conclusion.

Contrary to Kassa’s statement, there was *not* a continuing dispute between Kassa and RJC/CAK. The evidence clearly showed that when Tim Kassa agreed that commissions earned by Pugh after March 1, 2007 belonged to RJC/CAK, *there was no further contact between RJC/CAK and Kassa until Kassa filed the instant litigation.* There was no continuing dispute.⁶

RJC/CAK only contacted Continental Western when it learned that Kassa had been assigned to adjust a claim for one of RJC/CAK’s insureds. That involved a January 2008 claim. RJC/CAK did not contact Continental Western and ask Continental Western not use Kassa to adjust claims for other Continental Western clients prior to that occurrence. RJC/CAK did not request that Continental Western stop using Kassa

⁵ Kassa Opening Brief at p.28.

⁶ See discussion re: waiver below.

altogether. It was only after RJC/CAK had a reason to protect a legitimate business interest of its own that it took good faith steps to protect that interest. Continental Western decided to stop using Kassa because if they had known Kassa Insurance Services was a dual agency, they never would have placed them on Continental Western's vendor's list.⁷

The evidence relied on to show Kassa Insurance Services did not abuse their dual agency status misses the point of the conflict of a dual agency as it pertains to Kassa adjusting claims for a competitor selling insurance. The fact that Kassa might not have abused the rights of their own insureds when they adjusted one of their own insureds claims does not overcome the problem presented when Kassa adjusted a claim for a competing agency. In the course of that adjusting, Kassa obtains the exact same type of information from the competing agency's clients that Kassa claimed was subject to the UTSA in the instant lawsuit.⁸

Finally, the trial court's requirement that RJC/CAK needed to show actual harm in order to support a claim that a dual agency presented a conflict was an improper addition to the standards involving a tortious interference claim. The fact courts recognize the right of a business to protect a legitimate interest also recognizes the fact that business must

⁷ See RJC/CAK Opening Brief beginning at p.15.

⁸ RJC/CAK won't repeat the arguments set forth in its Opening Brief, but refers the Court to that Brief beginning at p.15.

necessarily be allowed to take action *prior* to suffering a loss of that interest.

2. The Trial Court Abused Its Discretion With Its Damage Award.

A trial court abuses its discretion awarding damages when the exercise of discretion is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. In addition, an award of damages will be reversed even if it is within the range of relevant evidence if the award shocks the conscience or results from passion or prejudice. Banuelos v. TSA Washington, Inc., 134 Wn.App. 607, 613-614, 141 P.3d 652 (2006).

In this case, the evidence showed the value of Kassa Insurance Services' contract with Continental Western was approximately \$6,080.00. (RP 359). The trial court awarded \$86,000.00 in damages for the loss of the \$6,080.00 terminable at will contract.

The value of the award was based, not on the contract between Kassa and Continental Western, but rather, on an entirely different contract Kassa had with another insurance company. (RP 324). There was no evidence that contract was structured in the same manner as the Continental Western agreement. There was no evidence the value of claims for Continental Western in the Spokane area was comparable to the alternative contract.

Calculation of the damage amount for the Continental Western Contract was based only on “what ifs”. (RP 324-325). The estimated value for the Continental Western contract, if it had been exactly like the other non-related contract, was \$86,490, an amount over *fourteen times* the value of the actual lost profit associated with the Continental Western account. (RP 324, 325).

The evidence of damages must be sufficient to afford a reasonable basis for estimating loss so that speculation and conjecture are not the actual basis for the loss. Burkheimer v. Thrifty Inv. Co. Inc., 12 Wn.App. 924, 928, 533 P.2d 449 (1975). Basing an award of damages on an entirely unrelated business contract which results in an award of over fourteen times the actual value of the contract in question shocks the conscience and is an abuse of discretion.

3. Prejudgement Interest Was Improper.

Prejudgment interest may only be awarded on a liquidated sum. A sum may only be liquidated if it can be determined by reference to a fixed standard in a contract and without reliance on opinion or discretion. State Dept. of Corr. v. Flour Daniel, Inc., 160 Wn.2d 786, 789, 161 P.3d 372 (2007).

As shown in RJC/CAK’s Opening Brief, the amount of the award in the instant case was based solely on speculation of what the damages to

Kassa Insurance Services *might have been* if the Continental Western contract was the same as an unrelated contract with another insurance company.⁹

Contrary to Kassa's assertion, the problem with the damage award in this case is not merely that there is a dispute as to the amount of damages.¹⁰ The problem, as it relates to prejudgment interest, is that the award was based entirely on speculation and conjecture.

. . . a defendant is not required to pay prejudgment interest in cases where it is not possible to ascertain the amount owed to the plaintiff until the court has exercised its discretion in determining that amount. The amount owed must be ascertainable without the aid of a discretionary court ruling concerning the amount due before the obligor can be liable for prejudgment interest.

Dautel v. Heritage Home Center, Inc., 89 Wn.App. 148, 154, 948 P.2d 397 (1997); *rev. den.* 135 Wn.2d 1003, 959 P.2d 126 (1998). The award of prejudgment interest was improper.¹¹

II. RJC/CAK RESPONSE TO CROSS-APPEAL

1. The Trial Court Correctly Found RJC/CAK Was Not Vicariously Liable for Any UTSA Violation.

⁹ See RJC/CAK Opening Brief beginning at p.35.

¹⁰ Response to Kassa Opening Brief at p.34.

¹¹ If the trial court had awarded damages of \$6080.00 based on the actual value of the Kassa contract with Continental Western, an award of prejudgment interest might have been proper. When the court declined to rely on the actual value of the Continental Western contract and instead computed damages based on speculation and conjecture, the amount became speculative by definition, required opinion and was not a liquidated sum.

Review of a trial court's decision following a bench trial is to determine whether substantial evidence supports the findings and whether the findings support the court's conclusions. Substantial evidence is evidence sufficient to persuade a rational fair-minded person that a finding is true. Casterline v. Roberts, 168 Wn.App. 376, 381, 284 P.3d 743 (2012).

Also, following a bench trial, the findings of the trial court cannot be disturbed by the reviewing court if there is substantial evidence to support the findings, even though the reviewing court might have made different findings if it had been the trier of fact. Lamm v. McTighe, 72 Wn.2d 587, 589, 434 P.2d 565 (1967). In the instant case, the trial court's Findings of Fact regarding the claim of UTSA violations against RJC/CAK are supported by substantial evidence and those findings support the trial court's Conclusions of Law to dismiss those claims.

In order to find a future employer vicariously liable for a future employee's violation of the UTSA, a plaintiff must show the future employee was acting as an agent for the future employer when the improper act occurred. Thola v. Henschell, 140 Wn.App. 70, 88, 164 P.3d 524 (2007). To support a finding of vicarious liability a plaintiff must also show the future employer controlled the actions of the future employee when the UTSA violation occurred, had a right to control the actions of

the future employee, and had knowledge of the wrongful nature of the actions of the future employee. *Id.* at 88. The future employer must also *knowingly* benefit from a future employee's tortious conduct if there is to be any vicarious liability under the UTSA. *Id.* at 77.

Vicarious liability also generally requires an employee must be fulfilling his or her job function at the time the improper conduct occurs and will not attach when the action is intentional or criminal and outside the scope of employment. Robel v. Roundup Corp., 148 Wn.2d 35, 53, 59 P.3d 611 (2002). Where an employee steps aside an employer's purposes in order to pursue a personal objective of the employee, the employer is not vicariously liable. Smith v. Sacred Heart Medical Center, 144 Wn.App. 537, 543, 184 P.3d 646 (2008).

The burden of establishing all the elements of vicarious liability is upon the plaintiff. Davis v. Early Const. Co., 63 Wn.2d 252, 256, 386 P.2d 958 (1963).

The evidence at trial included:

Pugh had no written agreements of any kind with Kassa Insurance Services. (RP 280).

Pugh began organizing his client list information in the event he left Kassa Insurance. (RP 296).

Pugh worked on the list for approximately a week. (RP 298).

Pugh emailed the list to his own home email, but he has never sent the list to anyone else. (RP 299).

When the list was created, Pugh had not accepted employment at RJC/CAK. (RP 296, 377).

Pugh was at a luncheon where he met an employee of RJC/CAK who asked Pugh if Pugh would be interested in listening to what RJC/CAK had to offer. Pugh said he would. (RP 370-371).

Approximately a week later, Joe Connor called Pugh and a breakfast meeting was arranged. (RP 371-372). Joe Connor was always looking for young producers. (RP 578).

Pugh met with Joe Connor and two other employees of RJC/CAK. The meeting lasted approximately one hour. (RP 372).

At that meeting, Pugh learned what he would be expected to do as a producer. They discussed commissions in general, although no specific salary was discussed at that point. (RP 373). Joe Connor referred to it as a "howdy" meeting. He did not ask any specific questions about Pugh's employment but did ask him what kind of commission income he had. Connor's interest was to find out if Pugh actually could produce. He also informed Pugh that RJC/CAK paid a straight 35% commission on new and renewal business. (RP 374, 579-580).

Pugh also testified that he told Connor at that meeting that Pugh had no covenant not to compete. (RP 375)

At that first meeting, Connor did not ask Pugh if he had a list of his clients or his book of business. Connor did not ask Pugh if he owned his book of business at that first meeting. (RP 375, 581). At the end of the meeting, Connor left it up to Pugh to get back to Connor. (RP 581-582).

Significantly, there is no evidence that Connor asked Pugh to create a client list. There is no testimony that Connor told Pugh he needed to bring clients to RJC/CAK in order to get a job or that any job with RJC/CAK was contingent on Pugh bringing clients with him. There is no testimony that RJC/CAK offered payment to Pugh for any clients of Kassa that Pugh could get to move to RJC/CAK. There is no evidence RJC/CAK asked or ordered Pugh to solicit Kassa clients. There is no evidence that after the meeting RJC/CAK had any sort of control over Pugh's actions.

The next meeting occurred approximately a week later at Joe Connor's office after work hours. (RP 376, 582). The discussion was more in depth about what work at RJC/CAK would look like as far as benefits of working at RJC/CAK and how much commission income Pugh was producing at Kassa. Connor asked Pugh if he had any written contract at Kassa or "anything". Pugh told Connor that Pugh didn't have

anything at Kassa. They then looked at a sample employment contract for RJC/CAK. (RP 376-377, 582-583).

After Pugh told Connor what amount of commissions he was generating at Kassa, Connor asked if Pugh had a list of those clients. Pugh replied he did, but Connor never asked to see the list and he was not shown a copy of the list. (RP 377-378, 584).

Connor didn't ask to see the list or have it brought to him because Connor wasn't interested in Pugh for his book of business. Pugh's book was personal lines and RJC/CAK was not a personal-lines agency, but was a commercial-lines agency. RJC/CAK's business was 85 percent commercial. Connor did not pursue asking Pugh to give Connor the list at all. (RP 584-585). Pugh did not produce the list for RJC/CAK and the list was not requested. (RP 378). Further, it was not a condition of employment that Pugh bring a book of business to RJC/CAK. Even if Pugh did not have a single client, RJC/CAK would have hired him. (RP 593-594).

Connor did ask Pugh about the ownership of his book of business and Pugh told Connor that Pugh owned his book of business. (RP 381-382; 583). There was no need for Connor to buy the book because Pugh owned it and there was no other discussion about the book. (RP 381-82).

The contract they discussed at the second meeting had a vesting schedule that called for an employee to vest in his business after a five year waiting period at a rate of 20% per year. (RP 379-80, 585).

At the end of the second meeting, Connor told Pugh to let him know if Pugh wanted to go to work for RJC/CAK and to give them a call. At that point, Pugh had not decided whether he would go to work for RJC/CAK or not. (RP 382, 586).

Again, there was no evidence Connor or RJC/CAK asked Pugh to produce a list. There was no evidence that Pugh's compiling of a list had been done at the request or direction of Connor or RJC/CAK. Connor and RJC/CAK did not tell Pugh that any employment was contingent on Pugh having or bringing a list or book of business to RJC/CAK. Connor's inquiry about the list was to ask whether or not Pugh owned the list and Pugh specifically told Connor that Pugh did, in fact, own the list.

Pugh then met with Tim Kassa on a weekend day and told him he had another job offer and Pugh was thinking of taking it. (RP 382-383). At that point, Pugh told Kassa that Pugh had not decided whether or not he would accept the offer. (RP 384). Tim Kassa admitted he knew Pugh had not made a decision whether or not Pugh was going to accept the other job at that first meeting. (RP 87).

The next discussion Pugh had with Kassa was the morning of February 27, 2007 in Kassa's office. At that point, Pugh informed Kassa that Pugh had decided to leave. (RP 385). Pugh told Kassa he was going to take his clients with him and Kassa threatened to sue Pugh. (RP 385-386). Kassa also told Pugh to call Joe Connor. Pugh understood that to mean Pugh was to discuss the client list with Connor and whether or not Pugh's job was contingent on bringing the clients. (RP 386-387).

Pugh decided he would not call Connor because Pugh's mind was made up and there was no need to pursue it further. Pugh called Kassa and told him that Pugh felt he didn't need to call Connor, it wasn't necessary, and that Pugh was going to leave and take the clients with him. (RP 387-388).

At that point, Kassa knew that Pugh was asserting ownership and control over the clients and client list. He also knew that Pugh was going to take the clients with him to RJC/CAK. Further, Kassa knew that Pugh was not going to tell Connor or RJC/CAK there was any dispute between Kassa and Pugh over the ownership of the clients and client list. Kassa made no effort to contact Connor or RJC/CAK about the issue.

After telling Kassa he wasn't going to call Connor and talk further about Pugh going to RJC/CAK, Pugh then called Connor and told him that he wanted his vesting to be immediate rather than subject to a five year

waiting period. The reason was because Pugh believed he was bringing value to RJC/CAK and it was not Connor's value. Pugh wanted protection so that if he brought his book of business to RJC/CAK and then was let go, Pugh would not be back to zero. (RP 389-90).

Connor agreed to change his standard employment contract from one that required a five year waiting period before vesting a producer's business in a producer, to one that allowed immediate vesting because Pugh said Pugh owned his book of business. (RP 588). Pugh then signed his contract on March 1, 2007 with RJC/CAK which provided for immediate vesting. (RP 390-91, 392, 588; Ex.2).

Ryan Pugh went to work for RJC/CAK on March 1, 2007. (RP 391). He filed his change of affiliation with the appropriate state agencies on March 1, 2007. (RP 473-474). The different date in the state records was a processing date only. (RP 458-460). The effective date of his transfer was March 1, 2007.¹² Any delay in changing the affiliation would have been the prior employer's fault. (RP 458).

The state agency had no problem with how Pugh changed his affiliation. (RP 461). Kassa offered no testimony from any state agent to dispute the fact the date of change in the state records was a clerical process. There was no credible evidence that disputed March 1, 2007 as

¹² Response to Kassa Opening Brief at p.11.

being the effective date when Pugh began working at RJC/CAK. That was a date both Tim Kassa and Ryan Pugh agreed was proper. (RP 85).

When Pugh came to work at RJC/CAK, Connor did not know if he had his client list with him. The first time Connor ever saw the list was in December 2008 when answering interrogatories for the instant litigation. (RP 589-90).

Prior to signing his employment agreement, Pugh never showed the list to any other employees at RJC/CAK. (RP 411, 413). Pugh never showed the list to Joe Connor. (RP 413). Pugh never told Connor the list was in his file and nobody else with RJC/CAK indicated they knew the list was there. (RP 590). The last time Pugh spoke with Connor about the list was at their second meeting prior to Pugh accepting employment at RJC/CAK. (RP 413). That was the meeting where Pugh told Connor that Pugh owned the business.

When Pugh came to work on March 1, 2007, he brought the list with him, but Pugh kept the list in his possession until March 12, 2007. (RP 411, 412). On March 12, 2007, Pugh gave the list to Ruth Beach, a bookkeeper at RJC/CAK who put the list in Pugh's locked personnel file. (RP 412). After the list was placed in his personnel file, Pugh never got into the cabinet. (RP 412).

Tim Kassa agreed that Pugh left on March 1, 2007. (RP 111). All letters concerning change in agents were written after March 1, 2007 and none were ever sent out while Pugh was still at Kassa Insurance Services. (RP 409, 476).

When Pugh came to RJC/CAK, in order to transfer the clients he needed to have the clients file change of agent letters. The only way to have a carrier know the customer had a new agent was through this process. (RP 628, 629).¹³ The change would be necessary even if there were no dispute over the ownership of the business.

Not all information from Pugh's list was automatically entered into RJC/CAK's file system. Only after a client agreed to change agencies and the policy was renewed by the carrier was the information entered into RJC/CAK's system. That information was downloaded directly from the carrier and occurred only after a client agreed to the change after Pugh had discussed it with the client. (RP 398, 471-473).

After he began working at RJC/CAK, Pugh was assigned to commercial lines beginning January 1, 2008. (RP 605).

In April, 2007, Kassa and Connor discussed the commission payments that would be made subsequent to change of agents. Safeco had made an error concerning the effective date of one of the Broker of Record

¹³ Response to Kassa Opening Brief at p.19.

letters and had transposed the date and it was impacting Pugh's final paycheck from Kassa Insurance. (RP 400-401, 595). The error was holding up Pugh's final paycheck from Kassa. (RP 597).

Because of the error, Connor sent Kassa a check to cover the error. (RP 596). In discussing the matter with Kassa, RJC/CAK and Kassa agreed that commissions that were going to be paid from March 1, 2007 forward would all be RJC/CAK's, and any commissions paid prior to February 28, 2007 would belong to Kassa. (RP 167, 402, 598).

After the conversations and letters (Ex. D215) regarding the commission payments, Connor had no more conversations or contact with Kassa. He received no letters or phone calls. (RP 600). The next time Connor heard from Kassa was when Connor received the instant lawsuit in August of 2008. (RP 601).

Kassa discussed the commission agreement with Pugh as well. Kassa agreed that Pugh would be paid the commissions owed him by Kassa for commissions prior to March 1, 2007 and by RJC/CAK after March 1, 2007. Kassa made no statement that he had a right to commissions after March 1, 2007. (RP 401-402, 410).

Significantly, Kassa was not called as a rebuttal witness to deny, dispute or attempt to challenge the validity of these conversations and the nature of the agreement regarding the commissions.

The reason RJC/CAK offered to pay Kassa for the single premium claim was because Safeco had made a processing error. The issue was whether or not that single commission had been earned prior to Pugh leaving Kassa or after. If it had been earned prior to Pugh's leaving Kassa, RJC/CAK would pay for that single claim. It was not a recognition that any other money was owed for commissions of clients Pugh believed he owned. The discussion concerning that single client and the potentially improper commission payment for that client was followed by the specific agreement of Kassa that any commissions earned after March 1, 2007 would belong to RJC/CAK.¹⁴

In summary, the above evidence showed:

Ryan Pugh compiled a list for his own benefit in the event he were to leave Kassa Insurance Services;

When Ryan Pugh met Joe Connor, Joe Connor never asked to see a customer list and never asked for names from that list;

Ryan Pugh's employment with RJC/CAK was not contingent on bringing business or a customer list;

Ryan Pugh had no written agreement with Kassa Insurance and no covenant not to compete;

¹⁴ Response to Kassa Opening Brief at p.16.

Joe Connor never directed Ryan Pugh to compile a list of customers;

Ryan Pugh was not under Joe Connor or RJC/CAK control while Pugh was at Kassa Insurance Services;

Joe Connor asked about buying the customer list and Ryan Pugh told Joe Connor that he, Ryan Pugh, owned the list and business;

Joe Connor changed his standard employment contract regarding vesting for agents to immediate 100% vesting for Ryan Pugh on the basis of Pugh's representation that Pugh owned his business and clients;

Ryan Pugh went to work for RJC/CAK on March 1, 2007;

Tim Kassa knew that Ryan Pugh did not tell Joe Connor or RJC/CAK about any dispute regarding ownership of the list and business Pugh was going to take with him;

Tim Kassa never called Joe Connor or RJC/CAK to complain about the transfer and use of the list;

Tim Kassa never took action with any insurance company to complain or stop Pugh's use of the list;¹⁵

Tim Kassa voluntarily entered an agreement with Joe Connor and RJC/CAK that commissions earned after March 1, 2007 when Pugh went to RJC/CAK, would belong to RJC/CAK;

¹⁵ See waiver argument below.

After entering that agreement, Kassa never told Joe Connor the agreement was incorrect and never sent any sort of warning about alleged improper use of the list until Kassa filed the instant lawsuit;

When Pugh sent out change of agent letters while at RJC/CAK, Connor and RJC/CAK believed all the clients and business was owned by Pugh because that is what Pugh had told Connor. When the letters were sent, Connor and RJC/CAK had no knowledge there was a dispute regarding ownership of the list or business. Connor and RJC/CAK had no knowledge the list may have been improperly obtained. Kassa did not contact or complain to RJC/CAK or Connor about the use of the list or its ownership during the time the letters were being sent.

There is no evidence that anyone at RJC/CAK knew anything different than the information Joe Connor knew and testified to at trial;

Joe Connor never knew a physical list had been produced by Pugh;

Joe Connor had never seen the list produced by Pugh until discovery for the instant lawsuit;

Joe Connor never asked Pugh to produce the customer list;

Joe Connor did not want to hire Pugh for Pugh's customer list;

RJC/CAK was not interested in personal lines of insurance, and Pugh's list was comprised mainly of personal insurance lines;

Joe Connor would have hired Pugh even if Pugh had no business;

Shortly after beginning work at RJC/CAK Pugh was assigned to sell commercial lines of insurance;

On the basis of the above evidence, the trial court found:

26. RJC/CAK had no control over the individual actions of Mr. Pugh prior to his beginning work for RJC/CAK at the time of Pugh's e-mail to himself of the complete client lists. Further, Mr. Pugh was not acting within his job authority and scope of employment for RJC/CAK at the time he misappropriated the client lists belonging to Kassa.

27. There is insufficient proof to demonstrate that Mr. Connor had knowledge that Mr. Pugh had misappropriated the book of business from Kassa. The knowledge of Mr. Connor that Pugh had sent out change of agent of record letters does not constitute knowledge of actions by Mr. Pugh that there were violations of prior agreements or prior terms between Kassa and Pugh.

28. The comments in February 2007 by Mr. Pugh to Mr. Connor in reference to the book of business are most reasonably construed to convey Mr. Pugh's stated but untrue belief that Mr. Pugh owned the book of business and, further, that there was no covenant not to compete between Pugh and Kassa. The emphasis on commercial insurance and the greater comparative magnitude of RJC/CAK's overall business to that of Kassa's also provides support for this resulting finding. The facts and reasonable inferences, therefore, demonstrate that RJC/CAK, apart from renewed commissions following Mr. Pugh's start with that company, was not of great interest to RJC/CAK. The greater weight of evidence bolsters the conclusion that Mr. Connor was not aware of Mr. Pugh's misappropriation.

(CP 867-68).

The trial court's Findings and Conclusions are supported by substantial evidence in the record.

The trial court's findings are also supported by the reasoning in Thola, *supra*. There, a chiropractor, Mahan, decided not to purchase her employer's business and began looking for another job. *Id.* at 76. As early as October 23, 2002, another chiropractor, Henschell, *asked Mahan to conduct direct solicitation for Henschell's clinic* and promised to pay her \$100 for each client who transferred care. In November, 2002, Mahan agreed to go to work for Henschell. Mahan continued working for Thola for a few months and appropriated Thola's client list. She then urged those clients to transfer to Henschell's clinic.

In remanding the case for retrial, the Court of Appeals noted:

But our review of the record reveals that Thola did not present sufficient evidence to prove that Mahan was acting as Henschell's agent when she stole the customer list. The evidence was sufficient to establish that possibly as early as October 23, 2002, Henschell Chiropractic asked Mahan to conduct direct solicitation for the clinic and promised to pay her \$100 for each client who transferred care. But there is no evidence that Henschell controlled her client solicitations, had a right to control Mahan's pre-employment solicitations, or had any knowledge of her wrongful actions until around July 2003, when Thola sent a letter to Henschell informing it of the impending litigation.

Id. at 88.

In the instant case, there is no evidence which shows RJC/CAK asked Pugh to solicit clients from Kassa Insurance Services for

RJC/CAK's benefit.¹⁶ There is no evidence which proves Pugh was acting as RJC/CAK's agent when he compiled his client list. There is no evidence that RJC/CAK controlled Pugh's actions while he was still employed at Kassa. There is no evidence RJC/CAK had a right to control Pugh's actions while he was still employed at Kassa. There is no evidence that RJC/CAK or Connor knew of any alleged wrongful actions by Pugh either while he was employed by Kassa or after he went to work at RJC/CAK. That is especially true since Connor and RJC/CAK were specifically told by Pugh the clients belonged to Pugh.

Finally, Kassa failed to inform Connor or RJC/CAK of a claim to the clients and commissions and Kassa specifically agreed that any commissions paid after March 1, 2007 belonged to RJC/CAK. Kassa never indicated to Joe Connor or RJC/CAK that he claimed Pugh had misappropriated the clients he took with him. Unlike Thola, *supra*, there was no letter of complaint or warning from Kassa to put Connor and RJC/CAK on notice of a potential claim by Kassa prior to his actually filing a lawsuit.

Kassa's implication that Connor and RJC/CAK should have made an independent investigation regarding Pugh's claim of ownership of the

¹⁶ Compare the facts of the instant case to the Thola court's finding that even when a direct solicitation for clients is shown, a plaintiff still must prove the future employer who made the direct solicitation actually controlled the improper behavior of the future employee in obtaining the misappropriated material.

list and clients is specious. Pugh told Connor and RJC/CAK that Pugh owned the list and business. Kassa *never* complained to Connor or RJC/CAK that Pugh had misappropriated the material even though they discussed commission payments after Pugh had left Kassa. Kassa *agreed that commissions earned after March 1, 2007 should be paid to RJC/CAK.* Under those circumstances, there was no reason for RJC/CAK or Connor to conduct an independent investigation of the ownership of the list or business.

Kassa's argument that contrary presumptions and implications can be derived from the actual evidence produced at trial is simply not supported by the trial record.

2. RJC/CAK Did Not Ratify Any Improper Acts.

In order for an employer to ratify an improper act it must be proven that a principal accepts the benefits of an act *with full knowledge of that act's material facts.* Thola, *supra* at 34, citing to Consumers Ins. Co. v. Cimoch, 69 Wn.App. 313, 323, 848 P.2d 763 (1993).

In this case, a material fact is whether or not Pugh's accumulation of his client list constituted a violation of the UTSA. Pugh specifically told RJC/CAK and Connor that he owned the client list he brought with him. He told Connor that Connor did not have to take steps to purchase the list from Kassa Insurance Services. Further, Pugh had no covenant not

to compete with Kassa and had no other written documents involving his employment with Kassa. Connor believed what Pugh told him about the client list and his employment situation with Kassa.

There is no credible, substantial evidence which could lead a rational person to conclude that RJC/CAK or Joe Connor *knew* Pugh did not own the business he stated he did. There is no credible, substantial evidence which could lead a rational person to conclude that when Pugh was sending out change of agent letters, that RJC/CAK or Connor *knew* the action was inappropriate and could have resulted from a violation of the UTSA. Kassa *never* complained to, or notified Connor or RJC/CAK of, its belief Pugh had misappropriated the list.

When Connor and Tim Kassa actually discussed the client commission payments involving the customers Pugh had taken with him, Kassa *never stated to Connor those are my clients and Pugh stole them*. In fact, Kassa agreed that any commissions made on those clients after Pugh moved to RJC/CAK belonged to RJC/CAK.

RJC/CAK did not know, and had no reason to know that the client list Pugh took from Kassa was in any way improper. Again, Kassa's argument that a different implication should be drawn from the actual testimony of record fails in the face of the evidence produced at trial.

3. Kassa Insurance Services Waived Any Claim Against RJC/CAK for any Alleged Violation of the UTSA.¹⁷

As shown above, the trial court found there was no violation of the UTSA by RJC/CAK and there was no ground to find RJC/CAK vicariously liable or that RJC/CAK ratified any improper actions. In addition, the trial court could have also found Kassa Insurance Services waived any claim against RJC/CAK regarding purported violation of the UTSA.

A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such a right. It may result from an express agreement or be inferred from circumstances indicating an intent to waive. It is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego [sic] some advantage. The right, advantage, or benefit must exist at the time of the alleged waiver. The one against whom waiver is claimed must have actual or constructive knowledge of the existence of the right. He must intend to relinquish such right, advantage, or benefit; and his actions must be inconsistent with any other intention than to waive them.

Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398, 409-410, 259 P.3d 190 (2011).

¹⁷ An appellate court may uphold a trial court's ruling on appeal on any basis supported by the record. An appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider the theory. Stienke v. Russi, 145 Wn.App. 544, 559-560, 190 P.3d 60 (2008); *rev. den.* 165 Wn.2d 1026, 203 P.3d 381 (2009); *see also* RAP 2.5(a) "...A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground." Further, this argument is timely because it is being raised in response to Kassa's Cross-Appeal. Kassa has the opportunity to address the issue in their Reply Brief.

When Pugh informed Kassa that Pugh was leaving and taking the client list with him, Kassa threatened Pugh with litigation. Kassa clearly knew he could claim a right to ownership of the list at that time. However, in April of 2007, a month after Pugh left Kassa Insurance Services, Kassa agreed with RJC/CAK that any commissions paid after March 1, 2007 for work performed after Pugh began work for RJC/CAK would belong to RJC/CAK. Any commission paid for work earned before March 1, 2007, for work earned by Pugh prior to his leaving Kassa, would belong to Kassa. Kassa himself memorialized the agreement in writing. Through this action, Kassa waived any claim against RJC/CAK involving those commission payments, including any claim for a violation of the UTSA against Connor and RJC/CAK.

In describing this situation, Mr. Kassa testified at trial:

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 166-167).

Further, Kassa made no complaint to the insurance companies when they actually sent Kassa change of Agent of Record forms.

Q. Now, if you can turn to Exhibit 24. Exhibit 24 is one of a number of letters that you received from Safeco telling you that you're no longer agent of record?

A. Correct.

Q. And that's no longer agent of record for, in this case, Terri Hastings. But you knew that those Agent of Record letters had been sent out by Ryan Pugh; you knew that those were being changed over to Connor & Kelly? That's your belief anyway, correct?

A. That was my belief, correct.

Q. And it says that this change is effective April 5, 2007. "If you have any questions, please contact your Safeco branch office." Did you contact the Safeco branch office?

A. On this one specific?

Q. On any of the ones you received.

A. Yes.

Q. And what did you do? What did you say?

A. I was talking about the effective dates of the Agent of Record forms that were sent through and that were a mistake, what was their procedures with dealing with that.

Q. Did you say, "Hey, don't send those commissions to Connor & Kelly. Those are mine. This is my book of business. Stop"? Did you tell them anything like that?

A. No.

Q. Did you tell them you had any argument or complaint or issue?

A. No.

(RP 167-169).

Kassa went on to testify that he didn't make any such complaint for other insurance agencies that provided changed Agent of Record forms. When he claimed the "damage was already done", he admitted:

Q. But you could have stopped the damage if you would have written within ten days, couldn't you?

A. No.

Q. You could have written within ten days to Joe Connor and said, "Send me those commissions when they come in; they're mine," couldn't you?

A. No.

Q. You couldn't have written to –

A. I could have written a letter, yes. I'm sorry.

Q. You could have demanded them?

A. I could, yes.

(RP 169).

RJC/CAK is entitled to rely on the actions taken by Kassa at the time he waived his claim, not nearly two years later when he changed his mind and filed a lawsuit. Kassa waived any claim against RJC/CAK in April of 2007.

4. There is No Basis To Find Separate Liability For the Corporate Entity RJC/CAK.

RJC/CAK was a closely held corporation wholly owned by Joe Connor. Joe Connor testified at length at the trial. Based on that testimony, the trial court found that RJC/CAK was not liable for any violation of the UTSA.

Kassa argues because the Letter Opinion of the trial court referred to Joe Connor personally, and that no claims were personally brought

against Joe Connor, the trial court's ultimate decision is somehow faulty. That argument has no merit.

There is no evidence which shows the corporate entity RJC/CAK should be considered separately from Joe Connor for purposes of this lawsuit, or that Joe Connor's testimony would not represent his solely owned corporation. Clearly, as the sole owner of the company, Connor represented the company. There is no evidence any other RJC/CAK employee had any knowledge that was different or conflicted with the testimony presented by Joe Connor. There is no evidence the corporate entity had any other knowledge or evidence other than that which appeared at trial through Joe Connor.

Joe Connor, as owner and agent of RJC/CAK, was qualified to speak for and testify on behalf of the corporate entity as a speaking agent. Wright by Wright v. Group Health Hosp., 103 Wn.2d 192, 202, 691 P.2d 564 (1984). As a result, that testimony would also allow a trial court to determine corporate liability for the alleged violations set forth in Kassa's Complaint. Further, Kassa made no objection to Connor's appearance as a speaking agent for RJC/CAK at trial.

More importantly, if there was some basis to find the corporate entity knew something other than what Joe Connor knew, where was it at trial? Kassa called no RJC/CAK employees as witnesses to dispute the

testimony provided by Connor. There is absolutely no basis to argue any such evidence exists.

Following four days of trial, the trial court rendered a decision based on the evidence presented at trial and entered Findings of Fact and Conclusions of Law. In addition, the trial court entered a separate Order of Dismissal. On the basis of the evidence presented at trial, all of those Findings and Conclusions and Orders found that Kassa had failed to prove a claim against RJC/CAK on the basis of alleged violations of the UTSA. The Findings and Conclusions and Order of Dismissal belie Kassa's argument. The trial court clearly considered the corporate defendant and applied the testimony to the claims filed by Kassa and dismissed the claims filed by Kassa.. Kassa's argument is a red herring.

III. CONCLUSION

RJC/CAK had a right to protect its legitimate business interests. RJC/CAK acted in good faith to protect that right. RJC/CAK did not demand Continental Western stop using Kassa entirely. Only after RJC/CAK learned Kassa had been assigned to adjust a claim for one of its insureds did RJC/CAK request that Continental Western assign a different adjuster. Continental Western removing Kassa from its vendor's list was an action taken by Continental Western of its own volition because if Continental Western had originally known Kassa was a dual agency, they

never would have used them in the first place. RJC/CAK did not tortiously interfere with Kassa's business relationship.

The trial court erred in entering a damage award which was not based on the actual agreement which was found to be interfered with. The award was over fourteen times the value of the contract the trial court found had been interfered with. The award was an abuse of discretion.

The actual damage award was not a liquidated sum. Opinion and speculation were necessary to derive the amount the trial court awarded. As a result, prejudgment interest was improper.

Substantial evidence in the record supports the trial court's Findings of Fact that RJC/CAK was not liable, vicariously or otherwise, for any breach of the UTSA. There was no substantial evidence that showed when Pugh created his list that he was acting as an agent of RJC/CAK. He was not under RJC/CAK's control, but was acting in his own interest. There was no substantial evidence that RJC/CAK directed Pugh to compile a list or indicated his bringing his personal line business was a contingency of his potential employment with RJC/CAK.

There was no substantial evidence that RJC/CAK ratified any improper acts of Pugh. Pugh told RJC/CAK he owned his business. RJC/CAK had no knowledge of any possible wrongful acts of Pugh when he compiled his list. When Pugh sent out change of agent records,

RJC/CAK had been told Pugh owned the business and Kassa had not contacted or complained to RJC/CAK to indicate Kassa believed Pugh had misappropriated the list.

Kassa, by his actions, waived any claim he had against RJC/CAK. Kassa specifically agreed that commissions earned by Pugh after he left Kassa and went to work at RJC/CAK belonged to RJC/CAC.

There is no reason to find any sort of liability against the corporate entity RJC/CAK on the basis of the evidence presented at trial.

The trial court's Findings of Fact support its Conclusions of Law and claims against RJC/CAK for UTSA violations were properly dismissed.

With regard to RJC/CAK's appeal, RJC/CAK requests this Court reverse the trial court's finding RJC/CAK tortiously interfered with Kassa's business relationship.

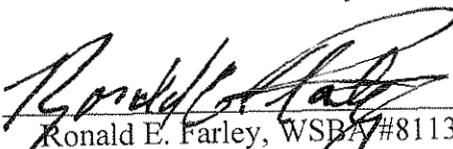
In the alternative, if the finding of tortious interference is affirmed, RJC/CAK requests the damage amount awarded be reduced to the actual value of the contract between Kassa and Continental Western.

RJC/CAK also requests the award of prejudgment interest be set aside.

With regard to the Kassa Cross-Appeal, RJC/CAK requests this Court affirm the decision of the trial court.

Respectfully submitted this 16th day of September, 2013.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury of the laws of the State of Washington that on the date given below I caused to be served in the manner noted below a copy of the Reply Brief of Appellant, Cross-Respondent RJC/CAK, INC. upon the following person(s):

<p><input checked="" type="checkbox"/> Counsel of Record</p> <p>John F. Bury Murphy, Bantz, & Bury, PLLC 818 W. Riverside Ave. Suite 631 Spokane, WA 99201-0910</p> <p>Timothy R. Fischer Winston & Cashatt 601 W. Riverside, Ste. 1900 Spokane, WA 99201</p> <p>Kevin W. Roberts Dunn & Black P.S. 111 N. Post Street, Suite 300 Spokane, WA 99201-0907</p> <p>Chad Freebourn Axtell, Briggs & Freebourn, PLLC 621 W. Mallon, Suite 509 Spokane, WA 99205-2181</p>	<p>BY: <input checked="" type="checkbox"/> U.S. Mail</p> <p><input type="checkbox"/> E-Mail/PDF Format</p> <p><input type="checkbox"/> Electronic Filing</p> <p><input type="checkbox"/> Hand Delivered</p> <p><input type="checkbox"/> Overnight Mail</p> <p><input type="checkbox"/> Facsimile to:</p> <p>DATED this <u>16th</u> day of <u>September</u>, 2013 at Spokane, WA.</p> <p> _____ Ronald E. Farley</p>
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