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No. 364682

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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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DAVID CEBERT, an individual,

Appellant,

v.

KENNEDY, PATRICK and JANE DOE KENNEDY, a marital  
community; JOHN KENNEDY and JANE DOE KENNEDY, a marital  
community; and MITIGATION OF DISEASE, INC., a Delaware  
corporation,

Respondents,

and

AXTEL SCIENTIFIC, INC., a Nevada corporation,

Defendant.

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**BRIEF OF RESPONDENTS**

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## TABLE OF CONTENTS

INTRODUCTION.....	1
STATEMENT OF THE CASE.....	3
A. THE KENNEDY BROTHERS, THE PATENT, AND THE PRODUCT. ....	3
B. CEBERT MET JW KENNEDY, AND AFTERWARD “CHECK[ED] OUT TRADE SECRET STATUS”.....	3
C. MITIGATION OF DISEASE, INC. WAS FORMED TO HOLD THE MODI PATENT APPLICATION. ....	3
D. CEBERT’S MODI-RELATED PRE-TRIAL TESTIMONY: ‘ORALLY OFFERED PRESIDENCY OF MODI IN 2011’; AND ‘ACCEPTED OFFER TO BE PRESIDENT OF MODI IN JANUARY OF 2012 BY TELEPHONE’. ....	4
E. CEBERT’S TRIAL TESTIMONY: “WORKING WITH THE KENNEDYS”.....	6
F. AXTEL SCIENTIFIC, INC. WAS FORMED, IN OCTOBER OF 2012, TO COMMERCIALIZE THE PRODUCT. ....	6
G. JW KENNEDY COMMENCED THE FOREIGN PATENT APPLICATION PROCESS. .	6
H. JW KENNEDY OBTAINED FIRST TIER TOXICOLOGY STUDIES; HUMAN EFFICACY DATA WAS NEEDED FOR FOREIGN PATENT APPLICATIONS. ....	7
I. CEBERT PROMISED IN WRITING TO COLLECT AND MAINTAIN THE PATIENT DATA. ....	7
J. L.H. FORMED THE JOHN WAYNE KENNEDY FOUNDATION. ....	7
K. JWK FOUNDATION CLIENTS’ DATA, AND OTHER PATIENTS’ DATA, WAS SENT TO CEBERT. ....	8
L. CEBERT QUIT “WORKING WITH” KENNEDYS, MODI, AND AXTEL IN SEPTEMBER OF 2014 BECAUSE THE JOHN WAYNE KENNEDY FOUNDATION COULD NOT GIVE FREE PRODUCT TO ONE OF CEBERT’S FRIENDS. ....	9
M. PATIENT DATA REQUESTED; HOSTAGE PRICE DEMANDED BY CEBERT. ....	9
N. COST TO RE-START RUSSIAN PATENT APPLICATION PROCESS. ....	10
O. CEBERT HELPED MICHAEL NODER PLAN LITIGATION, AND THE CEASE AND DESIST LETTERS. ....	11
P. CEASE AND DESIST LETTERS SENT. ....	13
Q. CEBERT’S INITIAL LITIGATION THREAT TO KENNEDYS: PRETENDING TO CONTROL AXTEL.....	14
R. CEBERT’S SECOND LITIGATION THREAT: COMPLAINT SERVED BUT NEVER FILED.....	14
S. CEBERT FILED HIS FIRST OF SEVERAL DECLARATIONS IN NODER’S CASE, CLAIMING TO BE PRESIDENT OF “THE COMPANY RESPONSIBLE FOR” THE PRODUCT. ....	14
T. CEBERT’S THIRD LITIGATION THREAT: COMPLAINT FILED ON FEBRUARY 16, 2016.....	15
U. CEBERT FILED MORE DECLARATIONS IN THE NODER CASE, SPECIFICALLY CLAIMING TO HAVE BEEN MADE PRESIDENT OF MODI IN 2012. ....	15
V. CEBERT WROTE IN HIS YELLOW PAD NOTES ABOUT A \$750 MILLION CLAIM AGAINST KENNEDYS. ....	16
W. CEBERT’S CLAIMS WERE DISMISSED ON SUMMARY JUDGMENT.....	16

<b>X. KENNEDYS' / MODI'S MOTION TO COMPEL PRODUCTION OF CEBERT'S YELLOW PAD NOTES WAS GRANTED; AND MOTION TO COMPEL PRODUCTION OF THE PATIENT DATA WAS PENDING.....</b>	<b>16</b>
<b>Y. THE JURY TRIAL ON THE COUNTERCLAIMS RESULTED IN VERDICTS FOR RESPONDENTS. ....</b>	<b>17</b>
1. <i>As it pertained to out-standing discovery, the trial court left the parties as they were at the outset of trial. ....</i>	17
2. <i>Cebert proposed telling the jury his claims were "resolved". ....</i>	17
3. <i>Cebert proposed telling the jury he was president of MODI; the trial court invited him to.....</i>	18
4. <i>Kennedys' case-in-chief.....</i>	20
5. <i>Cebert testified at trial he used to "work with" the Kennedys, Axtel, and MODI, but 'resigned as advisor' when the JW Kennedy Foundation was unable to give free Product to one of Cebert's friends. Cebert did not testify he was president, or that he was offered the presidency. ....</i>	21
6. <i>Cebert testified the patient data was of poor quality. Kennedys requested that a spoliation instruction be given. ....</i>	22
7. <i>The trial court dismissed Kennedys' fraud claim on Cebert's CR 50 motion. ....</i>	22
8. <i>The jury rendered verdicts in favor of Respondents on their counterclaims. ....</i>	23
9. <i>The trial court awarded exemplary damages, costs, and attorneys' fees, to which no error is assigned. ....</i>	23
<b>ARGUMENT.....</b>	<b>23</b>
<b>A. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT ON CEBERT'S CLAIMS. ....</b>	23
1. <i>Standard of review.....</i>	23
2. <i>Taking the claims and testimony of Cebert at face value, his 'president of MODI'-related claims accrued more than three (3) years prior to February 16, 2016, the filing date of the Complaint. ....</i>	25
3. <i>On appeal, Cebert identifies no genuine issue of material fact in the portions of the record cited. ....</i>	26
4. <i>Trial testimony not presented in opposition to summary judgment is immaterial to this Court's de novo review. ....</i>	30
5. <i>Cebert's claim that he became president of MODI pursuant to a 2011 oral promise accrued no later than September of 2012, when Cebert wrote that 'JW Kennedy is president of MODI'. ....</i>	31
6. <i>The Court may also affirm summary dismissal on the Statute of Frauds, as Cebert's claim of an oral promise of three years of employment at a specific increasing wage falls within the statute, and no exception applies... ..</i>	40
<b>B. CEBERT'S ASSIGNMENTS OF ERROR TO ADMISSION OF A STIPULATED EXHIBIT AND THREE 'CEASE-AND-DESIST' LETTERS PROVIDE NO BASIS TO REVERSE THE TRIAL COURT AND INVALIDATE THE JURY'S VERDICTS. ...</b>	<b>41</b>
1. <i>Trial court decisions admitting documentary evidence are reviewed for abuse of discretion.....</i>	41
2. <i>The trial court did not err in admitting an exhibit pursuant to stipulation of the parties. ....</i>	43

3.	<i>The trial court did not err in admitting the 'cease-and-desist' letters for the facts of their existence and receipt, not truth of the contents.</i>	44
4.	<i>Any error in admitting the stipulated exhibit and the 'cease-and-desist' letters was harmless.</i>	46
5.	<i>The trial court did not err in trying the counterclaims after Cebert's claims had been dismissed.</i>	46
6.	<i>"Russian patent loss" was not the issue: damages were the application process costs to return to the position Kennedys were in before Cebert's intentional tort.</i>	49
C.	<b>COSTS AND ATTORNEY'S FEES ARE REQUESTED, PURSUANT TO RCW 19.108.040, RAP 18.1, AND EAGLE GROUP.</b>	49
	<b>CONCLUSION</b>	<b>50</b>

**TABLE OF AUTHORITIES**

**Cases**

*1000 Virginia Ltd. P’ship v. Vertecs Corp.*, 158 Wn.2d 566,  
146 P.3d 423 (2006).....34

*Allen v. Dameron*, 187 Wn.2d 692, 389 P.3d 487 (2017) .....32

*Baetschi v. Jordan*, 68 Wn.2d 478, 413 P.2d 657 (1966) .....35

*Brown v. General Motors Corp.*, 67 Wn.2d 278, 407 P.2d 461 (1965) .....47

*Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188,  
668 P.2d 571 (1983).....41

*Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432,  
191 P.3d 879 (2008).....41, 45

*Cent. Wash Bank v. Mendelson-Seller, Inc.*, 113 Wn.2d 346,  
779 P.2d 697 (1989).....24

*Club Envy of Spokane v. Ridpath Tower Condo. Ass’n*, 184 Wn. App. 593,  
337 P.3d 1131 (2014).....31

*Corbit v. J.I. Case Co.*, 70 Wn.2d 522, 424 P.2d 290 (1967) .....44

*Council 28, AFL-CIO v. Office of Fin. Mgmt.*, 121 Wn.2d 152,  
849 P.2d 1201 (1993).....30

*Davis v. Cox*, 183 Wn.2d 269, 351 P.3d 862 (2015).....31

*Dep’t of Labor & Indus. of State v. Kaiser Aluminum & Chem. Corp.*,  
111 Wn. App. 771, 48 P.3d 324 (2002) .....24

*Dickson v. Kates*, 132 Wn. App. 724, 133 P.3d 498 (2006) .....40

*Driggs v. Howlett*, 193 Wn. App. 875, 371 P.3d 61 (2016).....43, 44

*Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 58 P.3d 292 (2002) .....2, 48, 49

*Eckert v. Skagit Corp.*, 20 Wn. App. 849, 583 P.2d 1239 (1978).....39

*Escobar v. Baker*, 814 F.Supp. 1491 (1993) .....33

*Estate of Dormaier v. Columbia Basin Anesthesia PLLC*, 177 Wn. App. 828,  
313 P.3d 431 (2013).....45

*Fetty v. Wenger*, 110 Wn. App. 598, 36 P.3d 1123 (2002) .....39

*French v. Sabey Corp.*, 134 Wn.2d 546, 952 P.2d 260 (1998) .....41

*Friedl v. Benson*, 25 Wn. App. 381, 609 P.2d 449 (1980).....40

*Green v. A.P.C.*, 136 Wn.2d 87, 960 P.2d 912 (1998) .....34

*Haslund v. City of Seattle*, 86 Wn.2d 607, 547 P.2d 1221 (1976) .....31

*Holland v. City of Tacoma*, 90 Wn. App. 533, 954 P.2d 290 (1998).....48

*Hoskins v. Reich*, 142 Wn. App. 557, 174 P.3d 1250 (2008).....41, 42

*In re Kelly and Moesslang*, 170 Wn. App. 722,  
287 P.3d 12 (2012).....23, 24, 30, 36

*In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 10 P.3d 380 (2000) .....42

*Macchia v. Salvino*, 64 Wn.2d 951, 395 P.2d 177 (1964).....34

<i>Malnar v. Carlson</i> , 128 Wn.2d 521, 523, 910 P.2d 455 (1996).....	31
<i>Markov v. ABC Transfer</i> , 76 Wn.2d 388, 457 P.2d 388 (1969).....	38
<i>Moritzky v. Heberlein</i> , 40 Wn. App. 181, 697 P.2d 1023 (1985).....	48
<i>Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.</i> , 178 Wn. App. 702, 315 P.3d 1143 (2013).....	41
<i>Plein v. Lackey</i> , 149 Wn.2d 214, 67 P.3d 1061 (2003).....	40
<i>Pope et al. v. University of Washington</i> , 121 Wn.2d 479, 852 P.2d 1055 (1994).....	33
<i>Saldivar v. Momah</i> , 145 Wn. App. 365, 400, 186 P.3d 1117 (2008).....	36
<i>Schoeman v. New York Life Ins. Co.</i> , 106 Wn.2d 855, 726 P.2d 1 (1986).....	47
<i>Schwindt v. Commonwealth Ins. Co.</i> , 140 Wn.2d 348, 997 P.2d 353 (2000) .....	34
<i>Seattle Professional Engineering Employees Ass'n v. Boeing Co.</i> , 139 Wn.2d 824, 991 P.2d 1126 (2000) .....	32
<i>Shepard v. Holmes</i> , 185 Wn. App. 730, 345 P.3d 786 (2014) .....	35
<i>Smith v. Twohy</i> , 70 Wn.2d 721, 425 P.2d 12 (1967).....	40
<i>State v. Garland</i> , 169 Wn. App. 869, 282 P.3d 1137 (2012) .....	36
<i>State v. Jackson</i> , 102 Wn.2d 689, 689 P.2d 76 (1984).....	41
<i>Stiley v. Block</i> , 130 Wn.2d 486, 925 P.2d 194 (1996).....	35
<i>Trethewey v. Bancroft-Whitney Company</i> , 13 Wn. App. 353, 534 P.2d 1382 (1975).....	40
<i>Young v. Savidoe</i> , 155 Wn. App. 806, 230 P.3d 806 (2010).....	38
<i>Young v. Young</i> , 164 Wn.2d 477, 191 P.3d 1258 (2008) .....	39

## Statutes

RCW 4.16.005.....	33
RCW 4.16.080.....	25, 35
RCW 4.16.080(3) .....	32, 33, 39
RCW 4.16.280.....	33
RCW 19.36.010(1) .....	40
RCW 19.108.040.....	<i>passim</i>
RCW 60.04.130 (repealed).....	48

## Rules

CR 13(a).....	47
CR 42 .....	47
CR 54(b).....	47
CR 56 .....	23, 47
RAP 9.12.....	23, 30, 32
RAP 18.1 .....	49

## INTRODUCTION

The jury rendered verdicts against Appellant David Cebert (“Cebert”) and in favor of Respondents on the three claims presented to it: misappropriation of a trade secret; conversion; and tortious interference with a business expectancy. Cebert does not assign error to the jury instructions, or to the special verdict forms. Cebert’s appeal is limited to the trial court’s dismissal of his claims on summary judgment as being time-barred because they accrued in 2012; and the admission of several of Respondents’ trial exhibits at the jury trial on the counterclaims, although Cebert does not explain how their admission materially affected the jury verdicts.

As to Cebert’s assignment of error to summary dismissal of his claims as being time-barred, Cebert testified before trial that he had been made president of Respondent Mitigation of Diseases, Inc. (“MODI”) by oral promise in 2011, despite corporate documentation, electronic records, and Cebert’s own writings to the contrary. Cebert’s president-of-MODI-related claims are subject to the three (3) year statute of limitations, and the undisputed facts demonstrated that Cebert knew he was not president of MODI when, *inter alia*, he wrote “John Wayne Kennedy is the President of MODI” in September of 2012. Since Cebert did not file and serve his suit on the alleged 2011 oral promise of MODI presidency until February 16,

2016, his claims were time-barred, and the trial court did not err in dismissing them.

With respect to Cebert's assignments of error concerning the jury trial, Cebert stipulated on the first day of trial to the admission of his handwritten notes as an exhibit. Based upon the stipulation of the parties, the exhibit was admitted. Later in the trial, Cebert objected to the stipulated exhibit, but only after it had been discussed in opening statement and during direct examination of a witness. On appeal, Cebert assigns error to its admission, though he does not identify it by number, does not designate it as part of the record on review, does not demonstrate that it was inadmissible, and does not explain how its stipulated admission materially affected the jury's verdicts. Cebert also assigns error to the admission of several "cease and desist" letters – which were not admitted in error – but again does not identify the exhibits by number, does not designate them as part of the record on review, and does not explain how their admission materially affected the jury's verdicts.

Finally, Respondent MODI requests its attorney's fees on appeal, as it was awarded fees by the trial court pursuant to RCW 19.108.040, predicated upon the jury's finding that Cebert's trade secrets misappropriation was "willful and malicious". See *Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 424, 58 P.3d 292 (2002).

## STATEMENT OF THE CASE

### **A. The Kennedy Brothers, The Patent, And The Product.**

John Wayne Kennedy (“JW Kennedy”) is a 79-year-old scientist who resides in Stevensville, Maryland. (CP 199) Patrick Kennedy (“P Kennedy”), his brother, is a 78-year-old businessman who resides in Breckenridge, Texas. (CP 204) In 2012, JW Kennedy filed a patent application regarding the mitigation of diseases in plants and animals, using cationic bioavailable minerals (“MODI Patent Application”). (RP 194-98, Ex. R-101) The MODI Patent Application describes a formula by which a Product can be produced that has a number of beneficial applications to plants, animals, and humans. (*Id.*)

### **B. Cebert Met JW Kennedy, And Afterward “Check[ed] Out Trade Secret Status”.**

P. Kennedy had previously helped Cebert on a business venture that did not work out. (RP 533-35) JW Kennedy was introduced to Cebert telephonically in 2012, through P. Kennedy. (RP 202) Not long after, Cebert wrote in his personal diary: “CHECK OUT TRADE SECRET STATUS”. (RP 479-81, Ex. R-118)

### **C. Mitigation of Disease, Inc. Was Formed To Hold The MODI Patent Application.**

Mitigation of Diseases, Inc. (“MODI”), a Delaware company, was formed to hold the MODI Patent Application, which JW Kennedy assigned

to it. (CP 226; RP 198-99; RP 536-39) On February 14, 2012, MODI held its first board meeting and elected JW Kennedy President. (CP 256-57) On March 5, 2012, Cebert attended MODI's second (telephonic) board meeting at which the minutes from the first meeting were read, including "John Wayne Kennedy was elected President and Chairman of the Board of Directors." (CP 234; CP 243; CP 259)

**D. Cebert's MODI-Related Pre-Trial Testimony: 'Orally Offered Presidency Of MODI In 2011'; And 'Accepted Offer To Be President Of MODI In January Of 2012 By Telephone'.**

Cebert, in his March 6, 2018 deposition, testified he was orally offered the presidency of MODI in 2011. (CP 232-33) Cebert testified that he accepted the offer to be president in January 2012 by telephone call "that could have been at the first board meeting." (CP 235)

Cebert specifically contended, both in response to written discovery requests and confirmed at his deposition, that the oral promise was that his salary was to start in 2012 at \$1,000 per month for 3 months, then move to \$7,000 per month for 2 months, and then \$8,000 per month "for the duration of a 3-year funding proposal." (CP 235; CP 361) Cebert testified that his first pay period for his work as MODI's President was in January of 2012. (CP 235) Cebert testified that he never received a check the first month, in January of 2012, or first two-week pay period of his alleged employment, which would have been at the end of January, 2012. (CP 235)

Cebert also testified Patrick Kennedy promised Cebert was / would be president of MODI in an email dated August 28, 2012. (CP 364-65; see also CP 233 and CP 241) The email is not addressed to Cebert, and on its face contains no offer of the presidency of MODI. Instead, the email concerns a draft Williams Investment Group stock purchase sale agreement, which is attached to the email. (CP 290-91) The draft document provides, *inter alia*: “The officers of MODI immediately prior to and after Closing shall comprise John W. Kennedy as president, Patrick Kennedy as Chief Executive Officer and Robert Fritzes as secretary/treasurer.” (CP 241; CP 376; CP 379)

Cebert testified in his March 6, 2018 deposition that between August 2011 and October 2012 he worked 20 hours to create a label and logo. (CP 236) Cebert stated in written discovery responses that the brand and logo were created on August 19, 2011. (CP 367) The MODI website Cebert created in 2011 is private to Cebert by password. (CP 231)

In August/September 2012, Cebert drafted a “MODI Business Plan”. (CP 261-65) Cebert wrote, at page 35: “John Wayne Kennedy [is] the president of MODI[.]” (CP 247, 264) On page 43, Cebert wrote “John Wayne Kennedy is the President of MODI[.]” (CP 265) Cebert stated in a declaration on March 16, 2016 that the last time the MODI business plan was edited was on June 3, 2013. (CP 316)

**E. Cebert's Trial Testimony: "Working With The Kennedys".**

Cebert testified at trial that the Kennedys had initially "called me because they wanted to tell that story. Pat [Kennedy] knew I had the skill set to do that." (RP 721) Cebert testified that he "... was working with Pat Kennedy and Robert the most. I don't know that there would be any reason for hierarchy, but that's who I was talking with the most at MODI." (RP 745) Cebert testified that his "job was to create the brand. Create the website. Create the names, MODI. MODI was already created. To create the name Accilion to put a face on the product." (RP 724)

**F. Axtel Scientific, Inc. Was Formed, In October Of 2012, To Commercialize The Product.**

Axtel Scientific, Inc., was formed to commercialize applications of the MODI Patent Application and the Product. (RP 202; RP 537-38)

Axtel is in bankruptcy, filed under Chapter 7 after the conclusion of the trial in this matter. No claims by or against Axtel are the subject of this appeal.

**G. JW Kennedy Commenced The Foreign Patent Application Process.**

In 2012, JW Kennedy began the process to obtain patent protection for the MODI Patent Application in the European common market, Russia and its affiliated countries, and the United Kingdom. (RP 200-01)

**H. JW Kennedy Obtained First Tier Toxicology Studies; Human Efficacy Data Was Needed For Foreign Patent Applications.**

Kennedys obtained first tier toxicology studies on the Product, satisfying the FDA's requirements to establish safe use on humans. (RP 203-04) After establishing the Product was safe for use on humans, Kennedys needed to obtain data on the Product's efficacy when used on humans for, *inter alia*, the foreign patent application process. (RP 204-05)

**I. Cebert Promised In Writing To Collect And Maintain the Patient Data.**

Using informed consent forms, data was collected from human patients who were using the product. (RP 205-06; RP 542-42; RP 572-73) Cebert promised in writing to collect the patient data, and that "it will be treated with the upmost privacy and confidentiality." (RP 230, Ex. R-106; RP 474, Ex. R-106) Cebert collected patient data using informed consent forms, and obtained patient medical records using an authorization for records release form. (RP 474-77, Ex. R-102, Ex. R-103, and Ex. R-105) Patient data was sent to Cebert to collect and store. (RP 542-45; RP 613-14; RP 616-18; RP 495-96, Ex. R-119)

**J. L.H. Formed The John Wayne Kennedy Foundation.**

L.H., a retired urban planner for the city of Los Angeles, has experience setting up and running non-profit organizations. (RP 398-402) L.H. was introduced to both Cebert, and P. Kennedy, in the mid-2000s. (RP

402-04) Talking to P. Kennedy, L.H. learned about the Product, and began using it. (RP 404-08)

L.H. decided, as a volunteer, to form the John Wayne Kennedy Foundation, whose mission was to provide the Product to those in need. (RP 408-12) L.H. used his Social Security income to finance the Foundation, and to purchase Product to distribute. (RP 405-12; RP 455-57)

**K. JWK Foundation Clients' Data, And Other Patients' Data, Was Sent To Cebert.**

While the JWK Foundation was operating, it requested that patients receiving the Product consider volunteering to provide data concerning themselves and their treatment to MODI, pursuant to a detailed informed consent form. (RP 416-18, Ex. R-104)

One such patient who volunteered to provide data was M.S. She and her husband B.W. heard about Kennedys and the Product through a friend. (RP 462) They filled out the informed consent form on the webpage, and purchased and used a supply of the Product. (RP 462-63) Over the next weeks, as they tried the Product, they also emailed their experiences and results. (RP 464-68) Cebert sent that patient data to an AMC<sup>1</sup> customer for sales purposes, in contravention to the informed consent forms. (RP 513-14, Ex. R-126, Ex. R-127)

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<sup>1</sup> Advanced Mineral Compounds, Inc., is Michael Noder's company, discussed *infra*.

**L. Cebert Quit “Working With” Kennedys, MODI, And Axtel In September Of 2014 Because The John Wayne Kennedy Foundation Could Not Give Free Product To One Of Cebert’s Friends.**

Cebert testified at trial that he was “working with the Kennedy brothers” (RP 722), and that he “quit working with the Kennedys” when he “submitted [his] letter of resignation on September 17<sup>th</sup>, 2014.” (RP 521) Cebert confirmed that he “resigned as advisor”. (RP 524) Cebert testified at trial that he sent the email resigning as advisor, but “agree[d] to keep working with... Michael Noder,” (RP 771) and that the reason he “quit working with Axtel and MODI” was that he “learned” that the Foundation could not give free Product to one of Cebert’s friends. (RP 768)

**M. Patient Data Requested; Hostage Price Demanded By Cebert.**

The Russian Patent examiner informed JW Kennedy that without the efficacy data being provided by December of 2014, the patent application would be deemed abandoned. (RP 372-73, Ex. R-107) Cebert received an email from JW Kennedy on October 22, 2014, requesting the patient data Cebert had been collecting, for the purpose of responding to the Russian patent examiner. (RP 477, Ex. R-107)

Cebert refused to release the patient data to JW Kennedy, when requested in October of 2014. (RP 207-08; RP 546) Cebert produced no data to Kennedys in response to the first request. (RP 478) Cebert received a second request for the patient data from JW Kennedy, on November 2,

2014. (RP 478-79, Ex. R-115) Cebert refused to provide the data in response to the second request. (RP 845-47; RP 479-80; RP 505-06, Ex. R-185; RP 231-33, Ex. R-184)

More specifically, Cebert refused to provide the patient data, unless JW Kennedy gave exclusive global rights to the Product to AMC and Noder. (RP 388-89, Ex. R-113; RP 679-83; RP 845-47; see also CP 267-72 and CP 246) Shortly thereafter, Cebert recorded the following personal note: “RUSSIAN PATENT EXPIRED”. (RP 483, Ex. R-124) Since Cebert refused to provide the patient data, Kennedys have no way of knowing its contents. (RP 389; RP 93-94; RP 798-802)

**N. Cost To Re-Start Russian Patent Application Process.**

The Russian patent application was deemed abandoned when JW Kennedy could not respond to the request for human efficacy data by December of 2014. (See RP 372-73, Ex. R-107; RP 207-09) To get the Russian patent application back to the point it was when Cebert refused to provide the collected patient data, would cost as much as \$500,000, and take five (5) years. (RP 238-41; RP 373-74) This includes \$60,000 to \$120,000 for fresh first tier toxicology studies (RP 347); updating the chemistry at approximately \$30,000 (RP 374); re-collecting fresh efficacy data from human patients, at a cost of \$80,000 to \$150,000 (RP 374-75); an

application fee of \$89,909 (RP 237); and JW Kennedy's time in re-applying at a cost of \$50,000. (RP 375-76; RP 377-81)

**O. Cebert Helped Michael Noder Plan Litigation, And The Cease And Desist Letters.**

Cebert was copied by Michael Noder ("Noder") on email correspondence scheduling a teleconference with Noder's attorneys. (RP 520, Ex. R-167) Noder testified he asked Cebert to talk with, and work directly with Noder's and AMC's attorneys, because Cebert "has a lot of documentation, and I asked him to talk to this Seattle law firm and explain your and his understanding of the case." (RP 885) "I don't know the extent of all the conversations because I wasn't part of them... Dave did some research and provided some information to the attorney per their request." (RP 886)

Cebert testified that he helped Noder and AMC's attorneys while they were drafting the cease and desist letters. (RP 789-90) Cebert also admits to performing work for AMC starting as early as December of 2014. (RP 902; RP 236, Ex. R-128, Ex. R-129, and Ex. R-130; RP 513, Ex. R-129) In fact, in December of 2014, Cebert drafted a 92-page Powerpoint presentation to Noder and AMC's attorneys concerning the Kennedys. (RP 489; see also CP 274-81 and CP 244)

After conferring with AMC's first attorneys, Cebert wrote:

12.19.14 ROGER HILMAN/RACHAEL  
WHAT MIKE SHOULD GET RHEEM

1. IMMEDIATE SHIPMENT ON ACQUISITION HE PAID FOR ALL JATL
2. 10 GALLONS OF 5/2 TECH IN EXCHANGE FOR THE 2500 STARS GIVEN AWAY BY PAT
3. RESUMATION OF "GATEWAY" STATUS GRATED HIM FOR RISK & DOLLARS
4. HIS 5% COMMISSIONS ON <sup>AND ZIG</sup> PRODUCT SOLD TO OTHER PARTIES (CERECHEM, BIOMINIX, JUK FOUND)
5. 3 SOURCES FOR TECHNICAL, ONE WHICH INCLUDES THE ABILITY TO MANUFACTURE WITH A FIRM/SCIENTIST APPROVED BY AMC
7. IMMEDIATE CESS & DESIST FOR BIOMINIX, MTM, CERECHEM + JUK FOUNDATION ON ALL ACTIVITIES, INCLUDING DISABLING WEBSITES
8. DISCLOSURE OF ALL DEALS INVOLVING ACQUISITION OR DERIVATIVE PRODUCTS BY AXTEL
9. DISCLOSURE OF ALL Z6S1 ACTIVITIES AND ITS THEFT OF ~~RECORDS~~ EXCLUSIVITY
10. ALL AXTEL BOOKS & ~~RECORDS~~ INVENTION RECORDS ~~RECORDS~~ EXCLUSIVITY TO THE PRODUCT

RIGHT TO DEVELOP ANY DERIVATIVE PRODUCTS

(RP 488-89; RP 491; Ex. R-157)

HUMAN DATA USED FOR PATENT. IF IT WAS MY DATA, WHAT WOULD BE MY CLAIM

...

15% COMMISSION ON ALL SALES TO AMC  
15% COMMISSION ON ALL FUNDS RAISED WITH DATA SUPPLIED BY ME  
7% TO ME 8% TO J.H. S.S. E.M. S.D.  
15% COMMISSION ON ALL REVENUES (GENERATED) FROM PATENTS PROTECTED BY DATA SUPPLIED BY ME  
7% TO ME 8% TO EITHER DOCTORS OR J.H. S.S. S.D. E.M.  
10% NON DILUTABLE STAKE OF ALL COMPANIES DIRECTLY ASSOCIATED OR BUYING PRODUCT ON A FIRST TIER BASIS (Z6S1, CERECHEM, MTM-EX)  
5% TO 5% J.H. S.S. S.D. E.M.  
15% COMMISSION ON ALL AXTEL SALES TO THOSE COMPANIES  
5% COMMISSION ON ALL Z6S1 SALES

(RP 486-87, Ex. R-122)

**P. Cease and Desist Letters Sent.**

Cebert had email communications with Noder and his attorneys about the contents of, and the targets of the cease and desist letters, in the weeks before the letters went out. (RP 510-11, Ex. R-169)

The claims made in the cease and desist letters are false: Noder and AMC had no exclusive distribution rights. (RP 548-49) Yet, the cease and desist letters falsely claiming exclusive rights to JW Kennedy's MODI Patent Application stopped people in need from receiving the Product. (RP 369-71) Cebert, and everyone else who helped, were volunteers for MODI; MODI was never profitable, and the cease and desist letters effectively shut it down. (RP 572-73)

L.H., as director of the John Wayne Kennedy Foundation, received a cease and desist letter in January of 2015. (RP 412-414; RP 491-92, Ex. R-177) The cease and desist letter ultimately caused the Foundation to fold. (RP 414-16; RP 455-57) R.F., corporate secretary of Axtel and MODI, received the cease and desist letters sent to MODI and to Axtel in his capacity as corporate officer. (RP 651-52, Ex. R-158 and Ex. R-177)

To cover Cebert's participation, Noder and Cebert had the attorneys send a cease and desist letter to Cebert; but it was sent to Cebert's AMC email address, [@advancedmineralcompounds.com](mailto:@advancedmineralcompounds.com). (RP 493-95; RP 511-12)

**Q. Cebert's Initial Litigation Threat to Kennedys: Pretending to Control Axtel.**

In early 2015, Cebert and Noder retained shared counsel, who sent a letter dated March 20, 2015 to Kennedys, claiming: 1) to be the true representatives of Axtel Scientific, Inc.; and 2) that the Kennedys “unlawfully misappropriated Axtel’s intellectual property rights[.]” (CP 283-86) The demand letter makes no mention of Cebert’s claim that Cebert was president of MODI. (*Id.*)

**R. Cebert's Second Litigation Threat: Complaint Served But Never Filed.**

On May 6, 2015, a signed complaint was served, though never timely filed. (CP 288-300) This complaint does not claim that Cebert was offered and had accepted the presidency of MODI. (*Id.*) Rather, it provides: “if [Cebert’s] efforts, the company, and the formula... were successful, [Cebert] would be offered the position of President[.]” (*Id.*)

**S. Cebert Filed His First Of Several Declarations In Noder's Case, Claiming To Be President Of “The Company Responsible For” The Product.**

On January 22, 2016, Cebert filed, in Spokane County Court Cause No. 15-2-02870-1 (“Noder Case”), the “Declaration of David Cebert in Support of Plaintiffs’ Response to Motion for Protective Order.” (CP 305-11) That declaration provides, in pertinent part:

Patrick Kennedy and John Kennedy agreed that I would be President of the company... I accepted Defendants Patrick

Kennedy and John Kennedy's offer... After I accepted Defendants Patrick Kennedy and John Kennedy's offer, they each recognized and acknowledged me as President of the company responsible for Accilion.

(CP 307)

**T. Cebert's Third Litigation Threat: Complaint Filed On February 16, 2016.**

On February 16, 2016, Cebert filed the Complaint commencing this action, which alleges that Cebert was offered and accepted the position of president (as does the Amended Complaint). (CP 1-15; RP 381; CP 24-36)

**U. Cebert Filed More Declarations In The Noder Case, Specifically Claiming To Have Been Made President Of MODI In 2012.**

On March 16, 2016, Cebert Declared:

Defendants Patrick Kennedy and John Kennedy agreed that I would be President of the company... I accepted Defendants Patrick Kennedy and John Kennedy's offer... During the third quarter 2012, MODI drafted a comprehensive business plan... A true and correct copy of the first 20 pages of MODI's draft business plan from August/September 2012 is attached as Exhibit 1.

(CP 316)

Cebert only included the first 20 pages because, as noted above, on p. 35 of this same plan Cebert wrote "John Wayne Kennedy [is] the President of MODI..." and on page 43 Cebert wrote "John Wayne Kennedy is the President of MODI and Chairman of the Board." (CP 264-65; CP 247)

On September 26, 2016, Cebert filed two separate declarations with identical language in the Noder Case: “In 2011... Defendants Patrick and John Kennedy offered me to be President of the company... and I accepted.” (CP 343; CP 356)

**V. Cebert Wrote In His Yellow Pad Notes About a \$750 Million Claim Against Kennedys.**

(RP 487-88, Ex. R-132)

**W. Cebert’s Claims Were Dismissed on Summary Judgment.**

Kennedys moved for summary judgment as to all of Cebert’s claims. (CP 166-91; CP 192-499) Cebert filed a response brief, and a declaration of counsel with documentary exhibits. (CP 513-29; CP 530-635) After reply pleadings, and oral argument, the trial court issued its oral ruling granting the motion. (CP 636-55; CP 656-766; CP 78-84) The order granting the motion was entered June 29, 2019. (CP 1452-55)

**X. Kennedys’ / MODI’s Motion To Compel Production Of Cebert’s Yellow Pad Notes Was Granted; And Motion To Compel Production Of The Patient Data Was Pending.**

The above-referenced note written by Cebert was obtained through a motion to compel, as were a number of other trial exhibits derived from

Cebert's personal Yellow Pad Notes. (CP 1 \_\_\_<sup>2</sup>) (See RP 91-94) Kennedys had brought a motion to compel production of the patient data prior to trial, as well as for terms. (CP 1 \_\_\_<sup>3</sup>) (RP 91-94)

**Y. The Jury Trial on the Counterclaims Resulted in Verdicts For Respondents.**

*1. As it pertained to out-standing discovery, the trial court left the parties as they were at the outset of trial.*

One of the issues that the Court wanted to get right out is one of your complaints is conversion of the data and tortuous interference. You're saying compel them to give us the data and asking for sanctions because can't attempt to get it at least it try to respond to that. I think at this point, I'm going to just leave it up for trial. That's one of your claims. He has the data. He hasn't given it to us and their response, and so I'm going to just kind of leave it at that and let the jury decide because conversion is your issue. If the Court orders him to hand it over, I think that could be a defense that they handed it over already. So I'm just going to let the chips go where they're at at this point and move on with that. As far as any of the sanction issues, I'm going to hold it to the end of trial.

(RP 93-94)

*2. Cebert proposed telling the jury his claims were "resolved".*

Before trial, Cebert proposed the following jury instruction:

You will notice that the claims in this trial are by the respondents against the petitioner. The Petitioner's claims have been resolved, and the Respondents' claims are at issue in this trial. You are not to speculate on why or how the petitioner's claims were resolved, or the alignment of the

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<sup>2</sup> Superior Court Docket Sub. No. 128. Respondents submitted a Designation of Clerk's Papers and Trial Exhibits on August 21, 2019. The Supplemental Clerk's Index was not available at the time of filing of this Brief of Respondents.

<sup>3</sup> Superior Court Docket Sub. No. 169, p. 13 of 31. See note 2, *supra*.

parties in this case as petitioner or respondent. That is not relevant to this matter and speculation would be improper.

(CP 1460)

3. *Cebert proposed telling the jury he was president of MODI; the trial court invited him to.*

Among Kennedys' motions *in limine* was one concerning Cebert's lack of affirmative defenses to the counterclaims, which was granted. (CP 1303-05; CP 1607-10) Nonetheless, Cebert's counsel informed the trial court he intended to use at trial his 'president of MODI' claims as an affirmative defense to the counterclaims. (RP 104) Specifically, Cebert intended to use a March 29, 2013 email, and an April 10, 2013 email. (RP 104; CP 534-37) The March 29, 2013 email was Cebert's proposed exhibit P-14, which Cebert elected to not offer at trial. (CP 1649) The April 10, 2013 email was Cebert's proposed exhibit P-15, which was admitted into evidence at trial. (RP 257; CP 1649)

On appeal, Cebert argues: "*Prior to trial the court ruled that there would not be any mention of Mr. Cebert's claims. RP 117... The fact Mr. Cebert was not allowed to talk about his improperly dismissed claims prejudiced him to the jury.*" App. Br. at 28-29.

RP 117 provides:

THE COURT: Okay. Because this case is so intertwined, you didn't have any affirmative defenses in the response, but I'm going to let [Cebert] testify to what his story is. As far

as saying I filed a claim, a wage claim, no, the Court's not going to allow you to bring that up or their prior claim. If it does come out or slips out, then the Court will -- you can always ask the Court to give a limiting instruction to the jury that those claims were dismissed and give him a full picture of it.<sup>4</sup>

I am going to let [Cebert] argue whatever his theory is as far as a defense goes, and then you can rebut it if you need, but as far as talking about specifically filing claims, no. Those would be out.

I don't know. If you say I wasn't paid, and that's why I didn't give the data back, that will come to some interesting issues when we get to jury instructions because you can't keep something just because you weren't paid, and we may have to look at what kind of jury instructions to instruct the jury that that's not a defense for conversion.

...

As far as that goes, then the Court's going to go ahead and rule that there won't be any mention of the claims. If he wants to use it as a defense, then I'm going to let him bring it up or I believed I was president. So, therefore, I have it. You can counter that with other documents and otherwise. We're just not going to talk about he filed claims.

(RP 116-17)

On appeal, Cebert argues: "*Regardless of that order, the jury was instructed that Mr. Cebert had claims, and they had been resolved. RP 127.*"

App. Br. at p. 28. Recall, Cebert proposed telling the jury that he had claims, and that they had been resolved (CP 1460) "THE COURT: Correct. We're going to mention they've been resolved." (RP 127)

Prior to jury selection, by stipulation, the trial court admitted into evidence a number of exhibits, including Ex. R-132. Cebert argues on

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<sup>4</sup> Cebert never subsequently made such a request.

appeal it was error to admit Ex. R-132 into evidence. (Compare App. Br. at p. 4, p. 11, and pp. 33-34 with RP 139-43, RP 208, RP 289, RP 487, and RP 946; see also CP 1651)

At jury *voir dire*, the trial court read Cebert's proposed instruction concerning his claims having been "resolved". (Compare CP 1460 with RP 1045-47) During *voir dire*, Cebert's counsel claimed Cebert was the defendant, and this case existed because Kennedys sued Cebert. (RP 1109-11) Cebert having opened the door, Kennedys explained that in fact Cebert began the litigation by suing Kennedys. (RP 1114)

In opening statement, Cebert's counsel made claims about the content of the patient data which was subject to a pre-trial motion to compel, and which had not been produced before trial. As a consequence, Kennedys raised the issue of spoliation. (RP 162-63)

#### 4. *Kennedys' case-in-chief.*

At the beginning of Respondents' case-in-chief, Cebert objected to Ex. R-132, which had already been admitted into evidence by stipulation, and discussed during opening statements. (RP 141-42; RP 208-09; RP 1134-35)

On appeal, Cebert argues: "*The court ruled that if Mr. Cebert brought up his claims at trial then the jury would be instructed that the court*

*had dismissed the claims. RP 127; 212.”* App. Br. at p. 4; p. 11, and pp. 33-

34. Page 127 is quoted *supra*. Page 212, discussing Ex. R-132, provides:

THE COURT: ... As far as getting into the actual I filed claims and they know there was the plaintiff’s claims and that they were resolved. So the Court put that out there already that Mr. Cebert had claims, and they were resolved. So they already know there’s claims out there.

(RP 212) Subsequently, Ex. R-118, Ex. R-121 Ex. R-123, Ex. R-124, Ex. R-125, Ex. R-155, Ex. R-122, Ex. R-157, and Ex. R-132 were discussed without objection before the jury. (RP 219-25; see also RP 289-90)

Also discussed before the jury at the outset of Respondents’ case-in-chief were the cease and desist letters sent to MODI and to Axtel. (RP 226-29) Cebert objected on the basis of hearsay; Kennedys argued that the letters were being offered into evidence to demonstrate that they were received by their intended targets, and because their contents are false. (RP 226-29, Ex. R-158 and Ex. R-177)

5. *Cebert testified at trial he used to “work with” the Kennedys, Axtel, and MODI, but ‘resigned as advisor’ when the JW Kennedy Foundation was unable to give free Product to one of Cebert’s friends. Cebert did not testify he was president, or that he was offered the presidency.*

Cebert testified at trial that he “quit working with the Kennedys” when he “submitted [his] letter of resignation on September 17<sup>th</sup>, 2014.” (RP 521; RP 524) Cebert testified he “quit working with Axtel and MODI”

because he “learned” that the John Wayne Kennedy Foundation could not give his friend free Product. (RP 768)

6. *Cebert testified the patient data was of poor quality. Kennedys requested that a spoliation instruction be given.*

Cebert testified in his case-in-chief that the content of the patient data he had withheld from Kennedys was of poor quality, and was private data merely of family and friends. (See, e.g., RP 774-75 and RP 748-54) As a consequence, Kennedys asked the trial court for a spoliation instruction.

[W]hen they’re asking for the data and you’re saying well, it’s locked in a computer and you got to get it, and if you choose not to get it but you’re going to say it’s not valuable, it’s a catch-22. If you’re saying yes, we do have the data, and we just can’t get to it, you can’t come in and say it’s not valuable if we can’t see it. So the Court may consider that unless you can come up with the data so they can at least at that point counteract that or not counteract it.

...

You should work with your client on trying to get it. If not, you can’t say it’s not valuable and then not get that kind of [spoliation] instruction. I’m telling you where it’s going.

(RP 798-803)

7. *The trial court dismissed Kennedys’ fraud claim on Cebert’s CR 50 motion.*

The trial court dismissed Kennedys’ fraud claim on a CR 50 motion. No review of that decision is sought. Cebert asked the trial court to dismiss Kennedys’ remaining claims, which it declined to do. Cebert did not appeal that decision.

8. *The jury rendered verdicts in favor of Respondents on their counterclaims.*

The jury was instructed on the counterclaims – “Number one, conversion; number two, misappropriation of trade secrets; and number three, tortious interference with business expectancy”. (RP 952-53) Cebert has not assigned error to the trial court’s giving of any jury instruction. The jury rendered verdicts in favor of Respondents on their counterclaims. (CP 1641-46) Cebert has not assigned error to the special verdict forms.

9. *The trial court awarded exemplary damages, costs, and attorneys’ fees, to which no error is assigned.*

Post-trial, MODI moved for exemplary damages, costs, and attorneys’ fees, pursuant to RCW 19.108.040, which the trial court awarded, and which Cebert has not appealed. (CP 1\*\*\*<sup>5</sup> and CP 1\*\*\*<sup>6</sup>)

## ARGUMENT

### A. **The Trial Court Did Not Err In Granting Summary Judgment On Cebert’s Claims.**

#### 1. *Standard of review.*

Summary judgment decisions are reviewed *de novo*. See RAP 9.12; CR 56; *In re Kelly*, 170 Wn. App. 722, 737–39, 287 P.3d 12 (2012). A “motion for summary judgment should have been granted if there are no

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<sup>5</sup> Cebert designated the judgments in a supplemental designation filed August 8, 2019. The Supplemental Clerk’s Index was not available at the time of filing of this Brief of Respondents.

<sup>6</sup> Superior Court Docket Sub. No. 288. See note 2, *supra*.

genuine issues of material fact as to when [the] cause of action accrued.” *Id.* at 737-38. “The cause of action needed to accrue [within three (3) years of the filing date] for her action to be timely.” *Id.* at 738.

“A party cannot create genuine issues of material fact by mere allegations, argumentative assertions, conclusory statements, and speculation.” *Kelley*, 170 Wn. App. at 737 (internal citation omitted). Similarly, a party cannot create a genuine issue of material fact by contradicting, without explanation, prior sworn testimony or writings. *Kelley*, 170 Wn. App. at 737–39. An “affidavit in opposition to a summary judgment motion” is insufficient to create a question of fact where it contradicts, without explanation, prior sworn deposition testimony or interrogatories, or “uncontroverted and unrebutted e-mails that were attached to a sworn declaration.” *Id.* at 738. Similarly, when unambiguous answers to interrogatories clearly eliminate any genuine issue of material fact, a party cannot thereafter create such an issue merely by contradicting, without explanation, previous admissions. *Dep’t of Labor & Indus. of State v. Kaiser Aluminum & Chem. Corp.*, 111 Wn. App. 771, 778, 48 P.3d 324 (2002). If the nonmoving party fails to controvert material facts, those facts are deemed established for purposes of summary judgment. *Cent. Wash Bank v. Mendelson-Seller, Inc.*, 113 Wn.2d 346, 345, 779 P.2d 697 (1989).

In the present case, Cebert supplied no declaration in response to the motion for summary judgment, relying upon his response brief, and a declaration of counsel. (CP 513-29; CP 530-635) Cebert's responsive pleadings created no question of fact, since the motion for summary judgment relied upon Cebert's uncontroverted testimony and writings concerning the dates of events in his 'president of MODI' claim being taken at face value, comparing them with the filing date of the complaint, and applying RCW 4.16.080. (RP 78-84)

2. *Taking the claims and testimony of Cebert at face value, his 'president of MODI'-related claims accrued more than three (3) years prior to February 16, 2016, the filing date of the Complaint.*

Cebert claimed, through written discovery responses and deposition testimony, that he was orally offered the presidency of MODI in 2011 (CP 232-33); that he accepted the oral offer by telephone in January of 2012 (CP 235); that Kennedys "recognized and acknowledged" Cebert was president (CP 307); that the oral promise of the presidency was for a three-year term, starting January of 2012, at specific increasing amounts paid per month (CP 235; CP 361); that his first pay period was January of 2012 (CP 235); and that he did not receive a paycheck in January of 2012, or ever (CP 235).

Documents drafted by Cebert, as well as minutes of meetings Cebert attended, demonstrate that Cebert knew JW Kennedy is and has been MODI's president. (CP 247; CP 261-65)

In response to summary judgment, Cebert supplied a response brief, and a declaration of counsel, but no declaration of his own to state that he did not and could not find out that he was not president of MODI until after February 16, 2013, three (3) years prior to the filing date of the Complaint.

As in *Kelley*, Cebert's pleadings in response to summary judgment did not address or attempt to explain Cebert's knowledge of and possession of a variety of documents, including those drafted by Cebert himself in 2012, which show JW Kennedy as president of MODI. Cebert's silence on the matter was insufficient to create a genuine issue of material fact, and the trial court did not err in dismissing Cebert's claims as a matter of law. See *Kelley* at 737-39.

3. *On appeal, Cebert identifies no genuine issue of material fact in the portions of the record cited.*

Cebert refers the Court to CP 235, which is four pages of the Cebert deposition transcript, described in detail *supra*. Cebert refers the Court to CP 268 and CP 271, which are two emails written by Cebert, on November 3, 2014 and September 17, 2014, respectively, neither of which mentions MODI, and wherein Cebert states that he resigns as 'advisor' to Axtel and applies for the job of president of Axtel, but only if certain of his conditions are first met.

Cebert refers the Court to CP 372-409,<sup>7</sup> an August 28, 2012 email, authored by P.Kennedy and sent to three recipients, none of whom are Cebert, with an attached “Draft Dated August 23, 2012”. A page in the draft document provides “The officers of MODI... shall comprise John W. Kennedy as president...” (CP 379) Cebert also refers the Court to CP 386 and CP 437, which are miscellaneous pages of the draft agreement, and CP 376, which is the aforementioned cover email not addressed to Cebert.

Cebert refers the Court to several non-consecutive deposition transcript pages of JW Kennedy. CP 554-55 concern the formation of Axtel. CP 560-61 are two pages which include JW Kennedy testifying “Cebert... wasn’t the president of the company[.]” At CP 562-64, JW Kennedy testified “Cebert’s a very good volunteer, but he’s a musician with absolutely, as far as I know, no business experience and absolutely none in the medical area[.]”

Cebert cites CP 569-71, wherein JW Kennedy testified: “But when [Cebert] was mentioned as being the president of the company, it was like taking somebody out of high school and putting them as head of GMC. You know, it just wouldn’t fit.”

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<sup>7</sup> Likely CP 376-444.

Cebert refers the Court to CP 535 (CP 534), which is a March 29, 2013 email by JW Kennedy, and which was also marked as Cebert's proposed Exhibit P-14, which Cebert elected to not offer at trial. (See CP 1649) This March 29, 2013 email from JW Kennedy to 3 people, P.Kennedy (president), R.F. (corporate secretary), and Cebert, concerns an attached email chain from Robert Fritzges about a potential joint venture in 2013.

Cebert then cites CP 571, which is the portion of the JW Kennedy deposition where the email is introduced as an exhibit. JW Kennedy is asked "Do you remember this email?", and he responds "That doesn't look familiar. But I was really against making David Cebert president." (CP 571, discussing CP 534 and Ex. P-14)

Cebert had already written to AMC's attorneys, as part of his 92-page powerpoint, that the March 29, 2013 email did not mean Cebert was already president of MODI, but instead was proof that Kennedys offered that Cebert would eventually become president of Axtel 'if the conditions were right.' (See CP 274-81; CP 244; see also RP 489)

Cebert refers the Court to CP 537 (CP 536), which is an April 10, 2013 email from JW Kennedy. This email, admitted into evidence at trial as Ex. P-15 (CP 1649), is a response from JW Kennedy to a request to purchase a particular amount of the Product: "we need to call sue and have another batch prepared." (CP 536) Cebert did not include in the record before the

trial court the portion of the JW Kennedy deposition transcript concerning this email. (See CP 551-73)

Cebert refers the Court to CP 579-81, which are three (3) miscellaneous pages of P.Kennedy deposition transcript, discussing the MODI website, and arranging a meeting with a third person. Cebert refers the Court to CP 581-91, which are ten (10) pages of the P.Kennedy deposition transcript, discussing MODI in early 2012. Cebert also refers the Court to CP 591-600, which are ten more pages of the P.Kennedy deposition transcript, discussing miscellaneous events in 2012. CP 538-45 and CP 541 are immaterial pages of a sub-license agreement between Axtel and a non-party entity.

Cebert refers the Court to CP 259-60, also cited *supra*, which is the minutes of MODI's second meeting, which Cebert attended telephonically. The document provides that at the meeting, the minutes of the first meeting were read, including the portion concerning the unanimous election of JW Kennedy as president.

Finally, Cebert argues that the "trial court incorrectly weighed evidence and found facts". The trial court took Cebert's testimony at face value (orally offered presidency in 2011, orally accepted by telephone in January of 2012, was later held out to be president to the public by Kennedys), and also took Cebert's uncontroverted September 2012 writing

at face value (“John Wayne Kennedy is the President of MODI and Chairman of the Board”), and concluded that Cebert knew or had reason to know he was not president of MODI at least by September of 2012, when he wrote that JW Kennedy was president. (RP 78-84)

4. *Trial testimony not presented in opposition to summary judgment is immaterial to this Court’s de novo review.*

Review of a summary judgment order is *de novo*, and the Court is only to consider facts and issues presented to the trial court. RAP 9.12. On appeal, Cebert refers this Court to sections of trial testimony when setting forth the facts presented to the trial court on summary judgment. See App. Br. at pp. 5-8, referencing RP 723-25 (Cebert direct); RP 725-29 (same); RP 730-35 (same); RP 760-64 (same); RP 770-71 (same); and RP 198-99 (JW Kennedy direct). This trial testimony does not create a question of fact as to Cebert’s dismissed claims; Cebert is bound by his testimony under oath that he became president of MODI in January of 2012 by oral promise in 2011 of a three-year term of employment. But, since it was not called to the trial court’s attention in response to the summary judgment motion, Cebert may not rely upon this trial testimony now as a basis to reverse the summary judgment decision. *Wash. Fed’n of State Emps., Council 28, AFL-CIO v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993)

(“The purpose of this limitation [RAP 9.12] is to effectuate the rule that the appellate court engages in the same inquiry as the trial court.”).

5. *Cebert’s claim that he became president of MODI pursuant to a 2011 oral promise accrued no later than September of 2012, when Cebert wrote that ‘JW Kennedy is president of MODI’.*

A claim accrues when a party “knows or should know of the relevant fact.” *Kelly*, 170 Wn. App. at 734; 737-39. Cebert’s claim that he was orally promised, and actually became president of MODI in January of 2012, accrued no later than September of 2012, when Cebert wrote that ‘JW Kennedy is president of MODI’.

Cebert cites *Club Envy of Spokane v. Ridpath Tower Condo. Ass’n*, 184 Wn. App. 593, 599, 337 P.3d 1131 (2014), which provides: “Whether a claim is time barred is a legal question we review *de novo*... A statutory period begins to run when the plaintiffs’ cause of action accrues.” *Id.* at 599 (citations omitted). *Haslund v. City of Seattle*, 86 Wn.2d 607, 619, 547 P.2d 1221 (1976), relied upon by Cebert, provides that “a court may be able to conclude as a matter of law that no triable issue of fact exists as to when plaintiff suffered actual and appreciable damage giving rise to a practical legal remedy.” *Id.* at 619-621 (internal citation omitted). *Malnar v. Carlson*, 128 Wn.2d 521, 523, 528, 530-32, 910 P.2d 455 (1996), cited by Cebert, provides “The statute of limitation for an action on a contract ... which is not in writing ... is three years. ... The statute of limitation time period

generally runs from the time an action has accrued. ... A cause of action accrues when a party has a right to apply to a court for relief.” Finally, Cebert cites *Davis v. Cox*, 183 Wn.2d 269, 289, 351 P.3d 862 (2015), abrogated on other grounds by 191 Wn.2d 392 (2018), which provides that “it is well established that when there is no genuine issue of material fact, summary judgment proceedings do not infringe upon a litigant’s constitutional right to a jury trial.” *Id.* at 289.

a. Wage claim.

The statute of limitations for a claim under the wage claim act is three years. RCW 4.16.080(3); *Seattle Professional Engineering Employees Ass’n v. Boeing Co.*, 139 Wn.2d 824, 838, 991 P.2d 1126 (2000).

Cebert knew he was not receiving paychecks as of January 2012, when he did not receive a paycheck. At the latest, Cebert knew he was not president of MODI pursuant to an oral promise in 2011, when Cebert wrote in 2012 that “John Wayne Kennedy is the President of MODI”.

Cebert refers the Court to trial testimony of Cebert (RP 770-71), which does not create a question of fact, and was not before the trial court on summary judgment. RAP 9.12.

Cebert refers the Court to CP 268 and CP 271, which are two emails written by Cebert, on November 3, 2014 and September 17, 2014, respectively, neither of which mentions MODI, and wherein Cebert resigns

as ‘advisor’ to Axtel and applies for job of president of Axtel, if certain of his conditions were first met.

None of the cases Cebert cites permit him to avoid the consequences of his testimony under oath. Cebert cites *Allen v. Dameron*, 187 Wn.2d 692, 705, 389 P.3d 487 (2017), which provides that “the WRA must be liberally construed”, but does not stand for the proposition that Cebert can wait more than three years after not receiving any paycheck to commence suit. Cebert cites *Pope et al. v. University of Washington*, 121 Wn.2d 479, 489, 852 P.2d 1055 (1994), which is a class action suit concerning deductions from paychecks, and *Escobar v. Baker*, 814 F.Supp. 1491, 1507 (1993), which also concerns deductions from paychecks. Cebert never received a paycheck. Deductions from paychecks are not at issue. Presumably, Cebert’s last pay period was either 1) when he did not receive his first paycheck in January of 2012, or any paycheck thereafter; or 2), at the latest, when he wrote, in “August / September” of 2012, that “John Wayne Kennedy is the President of MODI and Chairman of the Board”.

b. Oral contract.

The statute of limitations on an oral contract is three years. RCW 4.16.080(3). “No acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation

of this chapter, unless it is contained in some writing signed by the party to be charged thereby[.]” RCW 4.16.280.

Statutes of limitations do not begin to run until a cause of action accrues. RCW 4.16.005. Usually, a cause of action accrues when the party has the right to apply to a court for relief; a cause of action accrues when the plaintiff either discovers or through the reasonable exercise of diligence should have discovered the salient facts underlying the elements of a cause of action. See *Green v. A.P.C.*, 136 Wn.2d 87, 95, 960 P.2d 912 (1998).

Accrual of a contract claim occurs upon breach; the discovery rule does not apply. *1000 Virginia Ltd. P’ship v. Vertecs Corp.*, 158 Wn.2d 566, 576, 146 P.3d 423 (2006); see also *Schwindt v. Commonwealth Ins. Co.*, 140 Wn.2d 348, 353, 997 P.2d 353 (2000).

Cebert argues on appeal that he had a continuous contract. However, Cebert cannot create a question of fact by arguing in contradiction to his sworn testimony. Here, Cebert knew he did not get a paycheck in January of 2012, when he did not get one. If nothing else, Cebert knew he was not president of MODI pursuant to an oral contract no later than “August / September” of 2012, when Cebert wrote John Wayne Kennedy is the President of MODI and Chairman of the Board”.

Cebert cites *Macchia v. Salvino*, 64 Wn.2d 951, 955, 395 P.2d 177 (1964). In that case, the claim accrued upon the first non-payment of salary,

and the court notes that the plaintiff's "services were terminated December 31, 1960. His cross-complaint for unpaid salary was filed March 20, 1962, well within any applicable statute of limitation." *Id.* at 955.

c. Fraud.

The statute of limitations for fraud is three years; the time period begins to run upon "the discovery by the aggrieved party of the facts constituting the fraud." RCW 4.16.080. "In applying the discovery rule, actual knowledge of fraud will be inferred for purposes of the statute if the aggrieved party, by the exercise of due diligence, could have discovered it." *Shepard v. Holmes*, 185 Wn. App. 730, 739-40, 345 P.3d 786 (2014).

Cebert's fraud claim is that JW Kennedy orally promised him presidency of MODI, which Cebert orally accepted in January of 2012, and that Cebert was not ever actually president, and that constitutes fraud. (CP 124-36) Cebert testified he received the alleged oral promise of presidency in 2011, that he orally accepted in January of 2012, that his first pay period was January of 2012, and Cebert himself subsequently wrote in September of 2012 that John Wayne Kennedy was president of MODI, meaning his claim arose sometime prior to September of 2012.

Fraud has nine (9) elements. See *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996). "The burden is upon the plaintiff to prove the existence of all these essential and necessary elements that enter into [a

fraud claim's] composition." *Baetschi v. Jordan*, 68 Wn.2d 478, 482, 413 P.2d 657 (1966). "All of the ingredients must be found to exist. The absence of any one of them is fatal." *Id.*

Taken at face value, given the documents and records available to Cebert contemporaneously, as well as Cebert's own writings, he neither was "ignorant" of the alleged false promise, nor did he rely on the "truth" of the alleged representation that he was president the whole time.

Through argument counsel only, with no corroborating testimony, Cebert points to the March 29, 2013 email discussed *supra*. As to MODI, Cebert has previously offered sworn testimony that the document he drafted in "August / September of 2012", and which states John Wayne Kennedy was president, was last edited on June 3, 2013. (CP 316) Since Cebert did not modify the document he wrote which says John Wayne Kennedy was president of MODI after he received the March 2013 email, he neither was 'ignorant of the falsity' nor 'relied on the truth.'

Finally, Cebert wrote in the November/December 2014 powerpoint to AMC/Noder's attorneys that the March 29, 2013 email does not mean he was president. (CP 244; CP 274-81) This admission of a party opponent is binding, particularly where, as here, Cebert has failed to submit testimony attempting to rebut his written admission. *Kelly*, 170 Wn. App. at 734; 737-39. "[P]arty-opponent admissions may be admitted as substantive

evidence.” *State v. Garland*, 169 Wn. App. 869, 886, 282 P.3d 1137 (2012) (citing *Saldivar v. Momah*, 145 Wn. App. 365, 400, 186 P.3d 1117 (2008)).

Cebert may not escape the consequences of his declarations, or his written discovery responses. Cebert testified that he was made president of MODI by oral promise in 2011. (CP 232-33) Cebert testified he accepted by telephone and became president of MODI in January of 2012. (CP 235) Cebert testified his first pay period was January of 2012. (CP 235; CP 361) Cebert never received a paycheck. (CP 235) Cebert wrote, in “August / September” of 2012, that “John Wayne Kennedy is the President of MODI and Chairman of the Board”. (CP 247; CP 261-65)

Cebert argues through counsel, with no supporting testimony from Cebert, that he did not learn until the “shocking” deposition of JW Kennedy in 2017 that JW Kennedy never intended to make Cebert president, referencing CP 105-21, Cebert’s motion for leave to amend. Argument of counsel is not evidence. Regardless, in order for this to be true, it means Cebert never read the Answer to the Complaint in this matter, filed in 2016. (See CP 37-60) Moreover, in order for this to be true, Cebert cannot have known in “August / September” of 2012 that “John Wayne Kennedy is the President of MODI and Chairman of the Board”. But Cebert did know that, because he wrote it.

Cebert refers the Court to CP 386 and CP 437, which are miscellaneous pages of the draft agreement which was attached to an email that was not addressed to Cebert. Cebert refers the Court to CP 535<sup>8</sup> and CP 537<sup>9</sup>, which are also Cebert's trial exhibits, Ex. P-14 (Not Offered) and Ex. P-15 (Admitted). (CP 1649) They are discussed *supra*. That Cebert presented them at trial, or had the opportunity to, disproves his claim that the trial court forbid him from putting on his claim as an affirmative defense.

Cebert refers the court to CP 562-64 and CP 569-71, portions of the JW Kennedy deposition testimony. "But when [Cebert] was mentioned as being the president of the company, it was like taking somebody out of high school and putting them as head of GMC. You know, it just wouldn't fit." (CP 569) Asking JW Kennedy about CP 534 and Ex. P-14, he testified that the email "doesn't look familiar. But I was really against making David Cebert president." (CP 571)

Cebert cites *Young v. Savidoe*, 155 Wn. App. 806, 823, 230 P.3d 806 (2010), which provides that the "plaintiff bears the burden to establish that she did not discover the facts constituting the fraud and that she could

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<sup>8</sup> CP 534?

<sup>9</sup> CP 536?

not reasonably have discovered them within the statute of limitations period.” *Id.* at 823 (internal citations omitted).

Finally, Cebert cites *Markov v. ABC Transfer*, 76 Wn.2d 388, 396, 457 P.2d 388 (1969), which concerns oral promises to renew a written commercial lease. Here, no written promise is alleged by Cebert. Rather, Cebert knew the alleged 2011 oral promise to be president of MODI starting with a paycheck in January of 2012 was not fulfilled when, a) he did not receive a paycheck in January of 2012; and b) he wrote in “August / September” of 2012 that JW Kennedy was president of MODI.

d. Quantum meruit.

The three-year statute applies to quantum meruit claims. RCW 4.16.080(3). An alleged promise to pay, for use or for labor, is broken when the pay is not received; and the aggrieved party’s cause accrues upon the event of non-payment. *Eckert v. Skagit Corp.*, 20 Wn. App. 849, 850-51, 583 P.2d 1239 (1978). Even where “the record does not reflect the precise time of the ‘breach’... [t]he cause of action fully matured at that time [because] [m]ore than 3 years passed between the breach and the commencement of this lawsuit.” *Id.* at 851.

Cebert cites *Young v. Young*, 164 Wn.2d 477, 486, 191 P.3d 1258 (2008), which states the elements of a contract implied-in-fact. In *Young*, “After reviewing the trial court’s findings of fact and conclusions of law,

we find it is unclear whether there was a contract implied in fact or a contract implied in law.” *Id.* at 486. Here, the issue is not “what type of implied contract is it”, but rather ‘taken at face value, when did the claim accrue’.

Cebert cites *Fetty v. Wenger*, 110 Wn. App. 598, 601, 36 P.3d 1123 (2002), which found that an “action in quantum meruit is similarly based on implied contract arising out of the parties’ contingent fee agreement”. Here, Cebert has no written employment agreement with MODI, Axtel, or Kennedys.

6. *The Court may also affirm summary dismissal on the Statute of Frauds, as Cebert’s claim of an oral promise of three years of employment at a specific increasing wage falls within the statute, and no exception applies.*

As presented to the trial court<sup>10</sup>, the statute of frauds provides that “any ... contract ... shall be void, unless such... contract... be in writing, and signed by the party to be charged... that is to say... Every agreement that by its terms is not to be performed in one year from the making thereof[.]” RCW 19.36.010(1). Application of the statute of frauds is a question of law for the court. *Dickson v. Kates*, 132 Wn. App. 724, 733, 133 P.3d 498 (2006).

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<sup>10</sup> See *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003).

“The statute of frauds is not a doctrine in equity, it is a positive statutory mandate which renders void and unenforceable those undertakings which offend it.” *Trethewey v. Bancroft-Whitney Company*, 13 Wn. App. 353, 360, 534 P.2d 1382 (1975) (citing *Smith v. Twohy*, 70 Wn.2d 721,725,425 P.2d 12 (1967)). See also *Friedl v. Benson*, 25 Wn. App. 381, 387, 609 P.2d 449 (1980) (internal citations omitted).

Alleged oral promises for employment for a specific duration of more than one year are barred by the statute of frauds. RCW 19.36.010. An alleged oral contract of employment for a fixed term of more than one year remains barred by the statute of frauds, even if the contract is terminated early, regardless of which party terminates. *French v. Sabey Corp.*, 134 Wn.2d 546, 554, 952 P.2d 260 (1998).

**B. Cebert’s Assignments Of Error To Admission Of A Stipulated Exhibit And Three ‘Cease-And-Desist’ Letters Provide No Basis To Reverse The Trial Court And Invalidate The Jury’s Verdicts.**

*1. Trial court decisions admitting documentary evidence are reviewed for abuse of discretion.*

A trial court’s admission of evidence is reviewed for an abuse of discretion. *Hoskins v. Reich*, 142 Wn. App. 557, 566, 174 P.3d 1250 (2008).

“The trial court abuses its discretion if it relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal

standard, or bases its ruling on an erroneous view of the law... the underlying questions of law [are reviewed] *de novo*.” *Id.* (citation omitted).

Error without prejudice is not grounds for reversal. *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983); *Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn. App. 702, 728–29, 315 P.3d 1143 (2013). An error will be considered harmless unless it affects the outcome of the case. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

The erroneous admission of evidence “is harmless unless it was reasonably probable that it changed the outcome of the trial.” *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 452, 191 P.3d 879 (2008). Moreover, where the jury could have reached its verdict and damages determination without reference to the erroneously admitted evidence, the error is harmless. *Hoskins*, 142 Wn. App. at 572.

Furthermore, under the invited error doctrine, a party may not set up an error at trial and then complain of it on appeal. *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 723, 10 P.3d 380 (2000). The doctrine applies when a party takes affirmative and voluntary action that induces the trial court to take an action that party later challenges on appeal. *Id.* at 723–24.

2. *The trial court did not err in admitting an exhibit pursuant to stipulation of the parties.*

Cebert stipulated to the admission of Ex. R-132, which is a page of Cebert's handwritten notes. (RP 141-43) The contents of Ex. R-132 were discussed in Respondents' opening statement to the jury, without objection by Cebert. Ex. R-132 was later discussed by Cebert. (RP 487) Having stipulated to the admission of Ex. R-132, and having permitted it to be discussed before and shown to the jury, Cebert has either waived the issue, or invited the error.

Cebert argues that the 'Court allowed speculation on Cebert's dismissed claims'. App. Br. at 33-34. Pre-trial, Cebert proposed the instruction the trial court actually gave about Cebert's claims having been "resolved". (CP 1460) Further, Cebert stipulated to the admission of the exhibit which said "claim". (RP 141-43) Having drafted the jury instruction given, and having stipulated to the admission of the exhibit, Cebert cannot now assign error to the same.

Cebert cites *Driggs v. Howlett*, 193 Wn. App. 875, 903-04, 371 P.3d 61 (2016) which concerns whether exclusion of evidence was harmful. Here, Cebert complains about the admission of evidence. *Driggs* is inapplicable. Cebert, having proposed the instruction given concerning "claims", and having stipulated to the admission of the exhibit, and having

opened the door by claiming in jury *voir dire* that Cebert was the defendant, either waived these issues, or invited the error, if any.

3. *The trial court did not err in admitting the 'cease-and-desist' letters for the facts of their existence and receipt, not truth of the contents.*

Cebert assigns error to the admission of certain cease and desist letters, though he does not identify them by number, and did not make them part of the record on appeal. See App. Br. at 30. Although not identified, it is presumed Cebert is referring to Ex. R-158, Ex. R-176, and Ex. R-177.

Cebert argues:

*These letters were the foundation of Kennedys' claims for tortious business interference[.] ... These letters were let in over objections of relevancy and hearsay. RP 226-27... The trial court's basis for letting them in was because Mr. Cebert and others 'received' them. RP 511, line 7... The trial court allowed these letters because Mr. Cebert received them. RP 511, line 7. That is an error since receiving hearsay is not an exception to hearsay.*

In fact, the foundations of the tortious interference claim, as described *supra*, were: the testimony of Noder; the testimony of Cebert; Cebert's Yellow Pad Notes, especially those concerning his telephonic meeting with AMC / Noder's attorneys about the cease and desist letters; Cebert and Noder's email exchanges; the testimony from the Axtel and MODI representative who received the letters; the testimony from Hamasaki who received the letter to the Foundation; and, also, the cease and desist letters themselves. Cebert cites *Driggs*, 193 Wn. App. at 897,

which concerns whether exclusion of evidence was harmful. *Id.* at 903-04. Here, Cebert complains about the admission of evidence. *Driggs* is inapplicable.

Cebert argues: “*These letters were only relevant based on unpled claims of civil conspiracy*”. App. Br. at 31. In fact, the letters were relevant to the tortious interference with business expectancy claim. Cebert did not object to the inclusion of the tortious interference claim when Kennedys filed their Answer and counterclaims to Cebert’s amended complaint. Cebert moved for summary judgment as to the tortious interference claim, which was denied. (CP 1456-58) Cebert did not appeal that decision.

Cebert cites *Corbit v. J.I. Case Co.*, 70 Wn.2d 522, 528, 424 P.2d 290 (1967). The page cited describes the elements of a civil conspiracy claim. Cebert cites *Estate of Dormaier v. Columbia Basin Anesthesia PLLC*, 177 Wn. App. 828, 854, 313 P.3d 431 (2013). At the page cited, the court says that “a complaint must identify the legal theory upon which the plaintiff seeks relief.” Here, in response to Cebert amending his Complaint, Kennedys added a statute of limitations affirmative defense, and a tortious interference cause of action. (Compare CP 37-60 with CP 137-58)

Cebert argues the letters are hearsay, but hearsay is only where the contents are submitted to prove the truth of the matter asserted. Here, the tortious interference claim is predicated upon the contents of the cease and

desist letters being false. The letters were relevant and admissible as proof that they were sent and received. Regardless, live testimony described the cease and desist letters, their drafting, their content, their receipt, and the effect they had, meaning their admission into evidence would be harmless error, if any.

4. *Any error in admitting the stipulated exhibit and the ‘cease-and-desist’ letters was harmless.*

Cebert cites *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 450, 191 P.3d 879 (2008), in which the court held that it was error to admit into evidence a 1997 OSHA investigative report, but held that the admission of the report into evidence was harmless error.

Similarly, if *arguendo* the admission of the stipulated exhibit and of the ‘cease-and-desist’ letters was in error, then the error was harmless. Cebert does not demonstrate that the jury was unable to reach its verdict on any of the three (3) claims presented to it without reference to the allegedly-erroneously-admitted documentary evidence. Absent such a showing by Cebert, any error in their admission was harmless, and provides no basis to reverse the verdicts.

5. *The trial court did not err in trying the counterclaims after Cebert’s claims had been dismissed.*

Cebert claims he is entitled to a new trial to ‘test the claims against the counterclaims.’ See App. Br. at 24. Yet, “I was president of MODI” is

not a defense to conversion, trade secrets misappropriation, or tortious interference. Moreover, as the trial court explained, Cebert was free to put on whatever evidence he wanted; doing so would simply open the door for cross examination on the same subject. Cebert elected to testify as he did.

Citing CR 13(a), Cebert argues that “*Kennedys’ are compulsory counterclaims and must be tried at same time.*” App. Br. at 25-26. Kennedys counterclaims were timely filed and served. Cebert’s claims were dismissed on summary judgment pursuant to CR 56. Contrary to Cebert’s argument, CR 13(a) does not stand for the proposition that when a plaintiff commences suit, has counterclaims pled against him, and then loses his claims on summary judgment, that the counterclaimants cannot then proceed to trial. See also CR 54(b).

Cebert cites *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 866, 726 P.2d 1 (1986). This case is inapplicable to claims dismissed pursuant to CR 56, with already-pleaded counterclaims that proceed to trial.

Cebert cites CR 42, which concerns consolidation and separate trials. Here, there was no consolidation. Instead, Cebert commenced suit against Kennedys, who in turn pleaded counterclaims against Cebert. Kennedys were successful on a CR 56 motion as to Cebert’s claims. Contrary to Cebert’s argument, CR 42 does not stand for the proposition that when a plaintiff commences suit, has counterclaims pled against him,

and then plaintiff loses on summary judgment on his claims, that counterclaimants are not entitled to proceed to trial on their counterclaims.

Cebert cites *Brown v. General Motors Corp.*, 67 Wn.2d 278, 282, 407 P.2d 461 (1965). *Brown* does not concern CR 56 dismissal of claims, with counterclaims proceeding to trial. It is inapplicable.

Cebert assigns no error to the MODI judgment, the verdict form, or the jury instructions. Yet, Cebert argues that “*MODI’s Judgment cannot stand against Mr. Cebert’s claims since it rests on MODI being the prevailing party.*” App. Br. at 26-27. “Prevailing party” is not the standard under RCW 19.108.040. Rather, an award of fees under the statute is predicated upon a finding that the tortfeasor’s act was “willful and malicious”. Here, the jury found that Cebert willfully and maliciously misappropriated MODI’s trade secret. The trial court, upon the ‘willful and malicious’ filing, awarded attorneys’ fees pursuant to RCW 19.108.040. See *Eagle Group, Inc. v. Pullen*, 114 Wn. App. at 424.

Cebert cites *Moritzky v. Heberlein*, 40 Wn. App. 181, 183, 697 P.2d 1023 (1985), which is not a case under RCW 19.108 *et seq.* and is inapplicable. Cebert also cites former RCW 60.04.130, which was repealed by the laws of 1991.

6. “*Russian patent loss*” was not the issue: damages were the application process costs to return to the position Kennedys were in before Cebert’s intentional tort.

Cebert argues: “*Kennedys never proved damages of Russian patent loss.*” App. Br. at 34-36. Cebert refers the Court to his pre-trial summary judgment motion and his mid-trial CR 50 motion, “But trial court briefs cannot be incorporated into appellate briefs by reference.” *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) (citation omitted).

Moreover, “Russian patent loss” was not the issue. As was presented to the jury at trial, the application process itself costs money, and damages were the application process costs to return to the position Kennedys were in before Cebert’s intentional tort. Cebert does not refer the Court to the portions of the record where these damages were discussed, which are RP 207-09; RP 237; RP 238-41; RP 347; RP 372-73, Ex. R-107; and RP 373-81.

**C. Costs And Attorney’s Fees Are Requested, Pursuant To RCW 19.108.040, RAP 18.1, And *Eagle Group*.**

Respondent MODI requests an award of its attorney’s fees on appeal, pursuant to RAP 18.1 and RCW 19.108.040. When the trial court has awarded attorney’s fees pursuant to RCW 19.108.040, attorney’s fees are likewise available on appeal. *Eagle Group*, 114 Wn. App. at 424. Moreover, the Court should not require segregation of fees per Respondent.

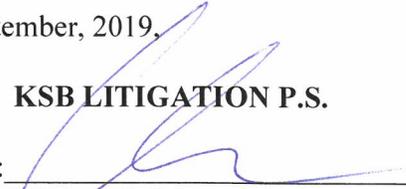
Had Ceibert appealed only as to MODI, substantially the same Brief would have been necessary.

### CONCLUSION

For the foregoing reasons, Respondents request that the Court affirm the trial court's decisions on summary judgment, and to admit certain documentary exhibits at the jury trial on the counterclaims. Respondents further request an award of attorney's fees on appeal, pursuant to RCW 19.108.040.

Submitted this 9<sup>th</sup> day of September, 2019,

**KSB LITIGATION P.S.**

By: 

William C. Schroeder, WSBA #41986  
Anne K. Schroeder, WSBA #47952  
Attorneys for Respondents

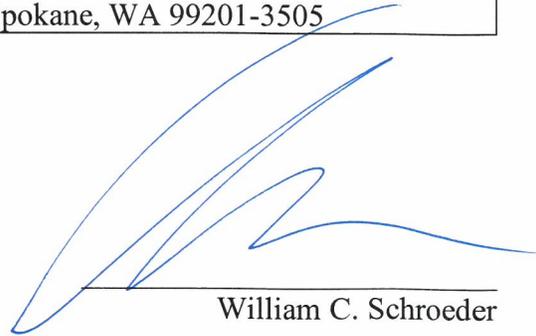
**CERTIFICATE OF SERVICE**

I hereby certify that on this 9<sup>th</sup> day of September, 2019, I caused to be served a true and correct copy of the foregoing **Brief of Respondents** via the Washington State Appellate Court's Secure Portal Electronic Filing System for the Court of Appeals, Division III, as well as to the following:

Marshall Casey Counsel for Appellant Cebert	<a href="mailto:marshall@mcaselawfirm.com">marshall@mcaselawfirm.com</a> <a href="mailto:larisa@mcaselawfirm.com">larisa@mcaselawfirm.com</a>
Gregg R. Smith Special Counsel for Debtor Axtel Scientific, Inc.	<a href="mailto:gregg.smith@paineambly.com">gregg.smith@paineambly.com</a>

In addition, I caused the above-referenced pleading to be mailed via U.S. Mail this 9<sup>th</sup> day of September, 2019, to the following:

Marshall Casey M CASEY LAW, PLLC 1106 N. Washington St., Suite B Spokane, WA 99201-2205	Gregg R. Smith PAIN HAMBLEN LLP 717 W. Sprague, Ave., Suite 1200 Spokane, WA 99201-3505
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William C. Schroeder

# KSB LITIGATION

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