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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.

BRIEF OF APPELLANT
RJC/CAK, INC.

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I. INTRODUCTION

Appellant/Cross-Respondent RJC/CAK, Inc. is an insurance sales agency that has been in business in Spokane since 1992. Respondent/Cross-Appellant Kassa Insurance Services, Inc. began adjusting insurance claims in 1998 and began selling insurance in early 2003. RJC/CAK was sued by Kassa Insurance for, among other things, tortious interference.

This case asks the question whether or not RJC/CAK, Inc. has the right to protect a legitimate business interest without being liable for a claim of tortious interference. Specifically, must RJC/CAK be required to allow claims of its insured's to be adjusted by Kassa Insurance Services, Inc., which not only adjusts claims but also sells insurance?

Further, is it error for a trial court to refer to, and rely on evidence which was specifically excluded from trial or improperly admitted, when it renders its decision?

Finally, was the amount of damages awarded error and was the award of prejudgment interest error?

II. ASSIGNMENTS OF ERROR

A. Findings of Fact.

- 1). The trial court erred in making Finding of Fact No. 6.

- 2). The trial court erred in making Finding of Fact No. 11.
- 3). The trial court erred in making Finding of Fact No. 20.
- 4). The trial court erred in making Finding of Fact No. 30.
- 5). The trial court erred in making Finding of Fact No. 31.
- 6). The trial court erred in making Finding of Fact No. 33.
- 7). The trial court erred in making Finding of Fact No. 34.
- 8). The trial court erred in making Finding of Fact No. 36.
- 9). The trial court erred in making Finding of Fact No. 38.

B. Conclusions of Law

- 1). The trial court erred in entering Conclusion of Law No.8.
- 2). The trial court erred in entering Conclusion of Law.
No.10.
- 3). The trial court erred in entering Conclusion of Law No.14.
- 4). The trial court erred in allowing prejudgment interest on
the damage award to Kassa Insurance Services, Inc. against
RJC/CAK, Inc.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1). Did the trial court err when it found RJC/CAK, Inc.
tortiously interfered with a Kassa Insurance Services, Inc., business
expectancy or contract?

2). Did the record support the trial court's finding of an inference of improper motive by RCJ/CAK, Inc.?

3). Did the trial court err when it relied on evidence which was excluded or improperly admitted?

4). Did the record support the trial court's conclusion it did not abuse its own discretion when it considered the questioned evidence?

5). Did the record support the trial court's award of damages against RJC/CAK, Inc.?

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

IV. STATEMENT OF THE CASE

RJC/CAK, Appellant, Cross-Respondent, is an insurance sales agency which was founded in 1992. It was first known as Connor & Kelly and at the time of trial was known as RJC/CAK. (Report of Proceedings (RP) 574, 575). At all material times, Joe Connor was the sole owner of RJC/CAK (RJC) (RP 574).

In 1998, Kassa Insurance Services, Inc. (Kassa Insurance) was formed to adjust insurance claims. (RP 42-43). As an adjusting company, Kassa Insurance would be hired by insurance companies to adjust claims made by policyholders of various

insurance sales agencies. Assignment of the claims to be adjusted by Kassa Insurance was made by the insurance companies involved, and not the insurance sales agencies. (RP 46).

In late 2002, Kassa Insurance expanded its business and also became an insurance sales agency. (RP 131, 132). In 2003, Ryan Pugh was hired by Kassa Insurance to sell insurance as a "producer" in the new insurance sales business. (RP 277, 278). Pugh remained as a producer with Kassa until March 1, 2007 when he went to work at RJC/CAK, Inc. (RJC). (RP 389, 588).

Pugh believed he owned the business clients and information he had developed while working at Kassa. (RP 381). Kassa believed Pugh took trade secret information with him when he left Kassa. Kassa Insurance took no formal steps to pursue a trade secret claim at the time Pugh left.

About a year after Pugh began working for RJC, RJC learned that Kassa Insurance was assigned to adjust a claim for one of its clients by Continental Western Insurance. (RP 615). RJC contacted Continental Western and requested that Kassa Insurance not be assigned to adjust that claim due to the potential conflict of a sales agency also adjusting claims for a competing sales agency. (RP 615-617).

RJC did not request that Continental Western stop using Kassa Insurance for claims adjusting entirely, only that Kassa Insurance not be used for that RJC claim. Continental Western then removed Kassa from its vendor's list of adjusters entirely.

On August 11, 2008, and then on August 26 by Amended Complaint, (CP 3; 8), Kassa Insurance filed suit against Ryan Pugh, Jane Doe Pugh, and RJC alleging: Pugh misappropriated trade secrets in violation of the Trade Secrets Act, Chapter 19.108 RCW involving client list information; Pugh breached an employment contract between Kassa Insurance and Pugh; Connor & Kelly (RJC) misappropriated trade secrets in violation of the Trade Secrets Act, Chapter 19.108 RCW; Connor & Kelly (RJC) tortiously interfered with the business relationship between Kassa Insurance and Continental Western Ins.; Connor & Kelly (RJC) violated the Consumer Protection Act, Chapter 19.86 RCW; and that Connor & Kelly (RJC) was unjustly enriched through clients wrongfully obtained from Pugh. (CP 10-11).

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

On May 23, 2012, Judge Sypolt rendered a letter Opinion and held, pertinent to this RJC appeal: 1) RJC was *not* vicariously liable for misappropriation of trade secrets because there was insufficient proof to demonstrate Joe Connor had knowledge Pugh had misappropriated client information from Kassa Insurance, and that Pugh had stated to Joe Connor that Pugh owned the information in question, and there was no covenant not to compete between Pugh and Kassa Insurance (CP 31-32); 2) RJC *did* tortiously interfere with the relationship between Kassa Insurance and Continental Western. The court relied in part on Ex. 34 at trial for this finding. (CP 32-34).

The trial court awarded damages against RJC for the tortious interference claim in the amount of \$86,000; awarded zero for misappropriation against RJC; awarded zero exemplary damages against RJC; and awarded zero attorney's fees against RJC. (CP 35-37). The total award against RJC was \$86,000 for the tortious interference claim.

Following the trial court's letter Opinion, it was noted by plaintiff Kassa Insurance's counsel that Ex. 34, which the trial court relied on and referenced in its letter Opinion, had been excluded from trial. (CP RJC Supplemental Designation of Clerk's Papers,

Sub No. 236). In response, the trial court issued a second letter Opinion in which the court concluded there was no abuse of discretion regarding the exhibit, any error was harmless and the trial court's conclusion was supported elsewhere in the record. The court determined there would be no changes as to the ultimate findings and conclusions. (CP 38-39).

The trial court then entered its Findings and Conclusions incorporating its prior letter Opinion and Opinion regarding Ex. 34, on June 8, 2012. (CP 861-894).

Also on June 8, 2012, the trial court entered a separate Order dismissing with prejudice, Kassa Insurance's claim against RJC for Vicarious Liability under the Trade Secrets Act, as well as Kassa Insurance's claim for attorney fees against RJC. That order also dismissed with prejudice Kassa Insurance's claim against RJC for violation of the Consumer Protection Act on the basis that claim had no evidence or argument presented and was deemed to have been withdrawn by Kassa Insurance. (CP 858-860). CHECK THIS ON THE ORDER

On June 14, 2012, RJC filed a Motion to Reconsider and Amend Judgments (CP 74) and a Motion for Reconsideration Re:

Tortious Interference. (CP RJC Supplemental Designation of Clerk's Papers, Sub. No. 212).

Kassa Insurance brought a Motion for Attorney Fees, Costs and Prejudgment Interest on its successful claims. On September 21, 2012, the trial court entered an Amended Judgment Summary against RJC awarding interest at 5.25% on the \$86,000.00 award for tortious interference. (CP 75-77). At that time the trial court orally ruled that RJC's Motions for Reconsideration would be denied.

On October 8, 2012, RJC filed a Notice of Appeal seeking review of the Amended Judgment and the trial court's oral denial of RJC's Motion for Reconsideration regarding the tortious interference claim which was made on September 21, 2012. (CP 85-86).

On October 18, 2012, Kassa Insurance filed a Notice of Cross Appeal regarding the claims which had been separately dismissed by the trial court's June 8, 2012 Order of Dismissal. (CP 90-91).

Ultimately, by Order dated October 23, 2012, the trial court entered its written Order which Denied RJC's Motion for Reconsideration for Tortious Interference (CP 98-99) and entered a

Supplemental Judgment against RJC which included an award of \$18,480.57 as prejudgment interest in addition to the underlying award of \$86,000.00 on the tortious interference claim. (CP 100-102).

On October 31, 2012, RJC filed a Supplemental Notice of Appeal addressing the Orders entered by the trial court on October 23, 2012. (CP 103-104).

V. ARGUMENT

1. Standard of Review.

When a trial court hears all the evidence and enters findings of fact and conclusions of law, the scope of review is to determine whether the findings are supported by substantial evidence and, if so, whether the findings support the conclusions of law and judgment. Substantial evidence is "evidence of sufficient quantum to persuade a fair-minded person of the truth of the declared premise." Quadra Enterprises, Inc. v. R.A. Hanson Co., Inc., 35 Wn.App. 523, 526, 667 P.2d 1120 (1983) (Quoting Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 373, 617 P.2d 704 (1980)).

2. Facts Admitted at Trial.

RJC has been an insurance sales agency since 1992. (RP 574, 575).

RJC primarily deals with commercial lines of insurance, and approximately 85% of its business is in the commercial area. RJC had no interest in expanding its personal line of insurance sales. (RP 584-85).

Through its affiliation with ISU Insurance Services in San Francisco, RJC has the ability to represent multiple preferred insurance companies. Joe Connor is personally licensed to sell insurance in 37 or 38 states and through his affiliation with ISU, his agency is able to sell in all 50 states. (RP 603-604).

Kassa Insurance Services began adjusting insurance claims in 1998. (RP 42-43). Tim Kassa obtained his independent adjuster's license in October, 1991. He worked solely as an insurance adjuster until he became dual licensed to adjust claims and also sell insurance in November 2002. (RP 131). After that time, Kassa Insurance was both an insurance sales agency and a claims adjusting business. (RP 132).

As an independent insurance adjuster, Kassa was not affiliated with any one insurance company, but could be affiliated with a number of insurance companies. (RP 131, 132). The insurance claims adjusting business involves investigating,

negotiating and settling insurance claims after an insured has reason to make a claim under an insurance policy. (RP 46).

Kassa Insurance is the only business in the Spokane area that both sells insurance and adjusts claims. (RP 615). Although Kassa Insurance is the only business in Spokane that both sells insurance and adjusts claims, it did not set up separate corporate entities for the work, both businesses were run out of the same office building and there was no separation of rent for each business being run out of the same building. (RP 205, 263-64, 271). There was no written policy regarding separation of the sales and adjusting business. (RP 252). Tim Kassa continued to both sell insurance and adjust claims. (RP 132).

In 2003, Ryan Pugh was hired by Kassa Insurance as a "producer" for the insurance sales side of the business and was the only full time "producer" in the company. (RP 134, 135). Pugh worked at Kassa Insurance until March 1, 2007 when he left to work at RJC. (RP 389, 588).

When Pugh left, he took with him information regarding insurance clients he believed he owned through his work at Kassa Insurance. Many of those clients followed Pugh to RJC. Kassa

Insurance claimed the information belonged to Kassa Insurance Services.

After Pugh began working at RJC, there was a dispute regarding his final paycheck from Kassa Insurance. RJC and Kassa Insurance communicated with each other concerning Pugh's final payment. (RP 595-600; Ex. 215). After RJC received an April 5, 2007 letter from Kassa Insurance, RJC heard nothing more from Kassa Insurance until Kassa Insurance filed its suit. (RP 600).

Also in April 2007, Kassa Insurance entered an agreement with Continental Western Insurance to perform independent claims handling. (RP 123, 176). The agreement only placed Kassa Insurance on a vendor's list for potential adjusters to be used by Continental Western. (RP 176).

The agreement was also terminable at will by Continental Western and Kassa Insurance was not guaranteed a specific number of claims to adjust, nor was Kassa Insurance guaranteed a minimum level of income under the agreement. (RP 176). In fact, if there were one hundred claims in Spokane, Continental Western could decide to not send a single claim to Kassa Insurance and that would not violate the terms of the agreement between Continental Western and Kassa Insurance. (RP 177).

Continental Western added Kassa Insurance to their vendor's list because personnel who had worked for a different insurance company and had used Kassa Insurance for adjusting claims, moved to Continental Western and wanted to continue to use Kassa Insurance as adjusters. (RP 255). No evidence in the record shows the individuals who joined Continental Western went to Continental Western in a policy making capacity.

Tonya Kassa was the contact person for the Continental Western business. (RP 263-64). When Kassa Insurance was added to Continental Western's vendor's list, she did not tell anyone at Continental Western that Kassa Insurance was also an insurance sales agency. (RP 265).

When an insurance claim is adjusted, confidential and proprietary customer information is given to the adjusters. (CP, RJC Supplemental Designation of Clerk's Papers, Sub No. 103, Defendant's Trial Brief; RP 622-625).

3. The Trial Court Erred In Finding RJC Liable for Tortious Interference. (Issues 1 and 2).

Interference with a contractual relation is an intentional tort and in all its forms, the interference must be both intentional and improper. Quadra Enterprises, Inc., *supra* at 526. In order to

establish a claim for tortious interference, a plaintiff must prove all five elements of the claim. They are: 1) the existence of a valid contractual relationship or business expectancy; 2) that defendants had knowledge of that relationship; 3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; 4) that defendants interfered for an improper purpose or used an improper means; and 5) resultant damage. Tacoma Auto Mall, Inc. v. Nissan N.Am., Inc., 169 Wn.App. 111, 132, 279 P.3d 487, *rev. den.* 175 Wn.2d 1024, 291 P.3d 253 (1012).

Exercising one's legal interest in good faith is not improper interference. Elcon Const., Inc. v. E. Washington Univ., 174 Wn.2d 157, 168, 273 P.3d 965 (2012). *See also:*

Exercising one's legal interest in good faith is not improper interference. "A defendant who in good faith asserts a legally protected interest of his own which he believes may be impaired by the performance of a proposed transaction is not guilty of tortious interference." ("[I]nterference [with a business expectancy] is justified as a matter of law if the interferer has engaged in the exercise of an absolute right equal or superior to the right which was invaded.").

Tacoma Auto Mall, *supra* at 132-33. (Internal citations omitted).

In addition, Washington Courts take the position that:

..if two parties have separate contracts with a third, each may resort to any legitimate means at his disposal to secure performance of his contract even though the necessary result will be to cause the breach of the other contract.

Dauphin v. Smith, 42 Wn.App. 491, 495, 713 P.2d 116 (1986).

If a *prima facie* case is made, interference will still not be found if the actions of the *purported* interferor were privileged or justified. Pleas v. City of Seattle, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989); Hudson v. City of Wenatchee, 94 Wn.App. 990, 998, 974 P.2d 342 (1999).

With the above standards in mind, review of the properly admitted evidence presented in this case shows that Kassa Insurance failed to prove a *prima facie* case of interference.

No actions by RJC were for an improper purpose or were achieved through improper means. (Element 4). Even if a *prima facie* case were established, RJC's actions were good faith efforts to protect a legitimate business interest, were justified, and would not result in liability for the intentional tort.

Joe Connor, an insurance executive with over 40 years experience in the industry (RP 573, 615) believes that a business that both sells insurance and adjusts claims creates a conflict. The conflict exists when that dual agency is assigned to adjust an insurance claim for a competing sales agency's client.

Mr. Connor explained the nature of the conflict at trial. The trial testimony was:

Q. And when you said you thought it was a conflict of interest, what did you base that on?

A. I based that on the fact that he's assigning claims and he's selling claims. To me that's a conflict of interest.

Q. Do you believe that that's a belief held industry-wide?

A. I think so, 'cause I've talked to other people about it. Yes, you know, I've talked to other people.

(RP 616-17).

When pressed on the issue, in a failed attempt to impeach Mr. Connor, Kassa Insurance's counsel read from Mr. Connor's deposition as follows:

So we're not talking about a conflict. We're talking about a confidentiality issue?

"No, I don't agree with you. I think it's a conflict of interest. The confidentiality has nothing to do with it right now.

"Question: Conflict because why then?
And you started to explain to me:

"Answer: Yeah, for adjusting the claim. But at the same time he's going to go ahead and he has that. If he is selling over here, those are all future clients. That's a conflict of information because he can take that information and come back and say the claim is all fine and dandy and come back and let's put that information over to his prospects list, come back and prospect that insured. That's B.S. That's not right. That's wrong."

And I edited that a little bit, correct?

A. Correct.

Q. Now, your concern was an adjuster gets the type of information that would be contained in an insured's agency file, correct?

A. That was one of them. Yes, that's correct.

Q. And you believe that someone who's adjusting and also has an agency then would be able to use the information for an unfair advantage, right?

A. Yes.

Q. And they could put those clients on a prospect list?

A. Yes.

Q. And do target marketing, right?

A. Yes. One of my concerns.

(RP 624-25).

Joe Connor's testimony remained consistent and reasonable. Not only did Joe Connor have a good faith belief a dual agency represented a conflict situation, Mr. Connor also testified that he had never seen any other dual agency that sold insurance and adjusted claims apart from Kassa Insurance. (RP 615). That testimony was uncontroverted.

Thus, when one of RJC's insured's had a claim and RJC learned that Continental Western was going to assign Kassa

Insurance to adjust the claim, RJC called and requested that Continental Western assign a different adjuster to RJC's insured.

Mr. Connor explained the situation at trial:

Q. And there was a time was there, when Tim Kassa was assigned to adjust one of your clients?

A. Yes.

Q. Who was the client?

A. Actually I had a loss between – it was a large water-damage claim. And my insured was Ripley Plumbing and the other one was Lombard Living. I turned in the company – you know, a loss because – it was an issue with the plumbing. So we turned in the loss to Continental Western. They said they were going to, you know, assign Kassa. And I called him and I said, "I would prefer that you not do that."

Q. Can you tell me exactly as you can remember what you said to Continental.

A. I talked – it was Scott Jackson, I believe his name was. And we talked and he said that he was going to go ahead and assign, you know, Kassa's agency. I said, "Please don't do that. I would prefer not to do that. Can we get somebody else?" He said, "Let me see what I can do." He called me back later and he assigned a fellow by the name of – I think his name is Scott Hamilton out of Lewiston, Idaho.

Q. Did you discuss it with Mr. Jackson again?

A. No.

Q. Can you tell me more precisely as you can what you told Mr. Jackson.

A. Well, what – like I just said. I said that I prefer that he not assign Kassa because I felt it was a conflict of interest.

There was bad vibes between the agency and ourselves and I just didn't think it was the right thing to do, could he please assign somebody else.

Q. And when you said you thought it was a conflict of interest what did you base that on?

A. I based that on the fact that he's assigning claims and he's selling claims. To me that's a conflict of interest.

(RP 615-617).

What is significant is that RJC *did not* tell Continental Western to stop sending any business to Kassa Insurance. RJC only wanted to protect itself from potential use by Kassa Insurance of confidential information that would be provided during the course of the adjusting process. The irony of the current situation is the information RJC did not want shared with an adjuster who also sold insurance, *was the exact same type of information Kassa Insurance sued Ryan Pugh for allegedly taking from Kassa Insurance.*

RJC had a legitimate business interest in keeping confidential information out of the hands of a direct competitor who was a sales agency as well as an adjusting business. There is no evidence of bad motive or improper means in RJC's action. RJC had a legitimate business interest at least as great as Kassa Insurance in preventing confidential information regarding RJC clients from being given to a competitor.

There is also no basis to attribute ill motive to RJC's actions. If RJC intended ill motive against Kassa Insurance, why would RJC have waited until April 2008, over a year after Pugh moved to RJC, to inform Continental Western of Kassa Insurance's dual agency status? It was not until the conflict nature of Kassa Insurance's business had a direct impact on RJC that RJC took good faith action to protect its business interests.

If RJC had bad intentions or ill motive to interfere with Kassa Insurance's business relationships, RJC would have acted a year earlier. If RJC had revenge or ill motive in mind, RJC would have called not only Continental Western, but every other insurance company that used Kassa Insurance for adjusting services. Ill motive would have had RJC inform each of the insurance companies that used Kassa Insurance for adjusting services of Kassa Insurance's dual selling and adjusting business and urged them to stop using Kassa Insurance. RJC did not do that and the record simply does not support a finding of ill motive for RJC's actions.

Joe Connor believed that an agency that both sells and adjusts claims has an inherent conflict. That belief was shared by the claims manager of Continental Western. As noted above, when

Kassa Insurance was placed on Continental Western's vendor list, Kassa Insurance *did not* inform Continental Western that Kassa Insurance sold insurance as well as adjusted claims. Continental Western Vice President for claims, John Mallary, testified:

Had I known that in the beginning, I would not have added him as an authorized agent. (Deposition of John Mallary, p.7, lines 6-7).

(CP, RJC Supplemental Designation of Clerk's Papers, Sub No. 213, Defendant's Memo in Support of Motion for Reconsideration; CP, RJC Supplemental Designation of Clerk's Papers, Sub No. 103, Defendant's Trial Brief).

RJC did not ask that Kassa Insurance be removed from Continental Western's vendor's list. Continental Western took that action on its own. RJC just asked that Kassa not adjust RJC claims.

Continental Western explained the reason for its action and belief a dual agency created a conflict. John Mallary, also testified at his deposition:

Q. In about April of 2008, did you make a decision to stop choosing Kassa Insurance Services to do Continental's adjusting?

A. Yes.

Q. And why did you do that?

A. I was advised by somebody in underwriting, whom I do not recall, that a current agent for Continental Western Group had informed us that we apparently assigned Kassa to adjust a claim for one of their clients, and they were upset about that. And that that agent informed us that – you know, he thought it was a conflict of interest, and we were sending accords, loss information, insured client information to an independent adjusting firm that also has a (sic) independent adjusting firm that also has a (sic) insurance agent.

Q. And in your view is it a conflict of interest to use an agent as an adjustor?

A. Had I known that he also – actually, his wife does the adjusting, and he has they (sic) agency as I understand it. Had I known that in the beginning, I would not have added him as an authorized agent.

Mallory Deposition, page 6, line 14 through page 7, line 9.

Q. Your position on this – represents a conflict of interest to use an agent as an adjuster. Is this something unique to Continental or unique to your management area?

A. I wouldn't think it would be unique to any company that you have agents that you are doing business with directly. They are your primary customer. You must service those agents that are your primary customer. They write your book of business. They expect top of the line customer service. They don't want proprietary information being handed over to someone else that shouldn't get it necessarily ...

Mallory Deposition, page 8, line 10 through line 21.

(CP, RJC Supplemental Designation of Clerk's Papers, Sub. No. 103, Defendant's Trial Brief at p.13).

The evidence showed proprietary information was provided to an insurance adjuster when a claim was handled. Continental

Western agreed that created a conflict when the adjusting agency also sold insurance. Continental Western also stated that opinion was not unique to Continental Western.

That testimony was un rebutted. No evidence was presented that dual agencies were common in the industry. Regardless, the trial court rejected both RJC and Continental Western's good faith belief a dual agency created a conflict. That was error and not supported by substantial evidence in the record.

Kassa Insurance attempted to deflect the reality of the conflict as expressed by both RJC and Continental Western by claiming Kassa Insurance never had an *internal* conflict between their insurance sales and insurance adjusting. (RP 252). That does not, however, address the conflict identified by Mallery and RJC when a sales agency does adjusting work for a competing sales agency. As Mallery stated, "Had I known that in the beginning I would not have added him as an authorized agent."

Under the circumstances of this case, Kassa Insurance does not get to define what Continental Western and RJC perceive to be an inappropriate conflict when an insurance sales agency wants to do adjusting work as well. The fact that Kassa Insurance is the only agency in Spokane and was the only agency known to very

experienced insurance people to try to do both, is evidence enough of the conflict inherent in the arrangement.

Further, just because Kassa Insurance may claim they would not inappropriately use information gained through the adjusting process to further their sales business does not mean the conflict does not exist.

In addition, the potential for improper use of information and conflict is exacerbated by the fact that Kassa Insurance does not separate the two businesses with a separate corporate entity and does not apportion rent between the sales agency and adjusting business in the building they share. Further, Tim Kassa continued to both sell insurance and adjust claims for Continental Western. The fact Tonya Kassa, who was the direct contact for the adjusting business with Continental Western, did not inform Continental Western that Kassa Insurance was a dual agency highlights the conflict concern.

While the evidence at trial clearly showed the concern of a *conflict created by a dual agency was legitimate*, the trial court ignored that evidence and instead applied a non-existent standard to the good faith privilege defense. Rather than examine the good faith belief of both RJC and Continental Western regarding the

impropriety of a dual adjusting and sales agency, the trial court required proof that Kassa Insurance was actually benefiting from the conflict of interest that RJC and Continental Western feared.¹

That is contrary to case law. Case law holds that a business which shows a good faith belief in the legitimacy of actions taken to protect a legitimate business interest will not be guilty of tortious interference. It does not require a showing of actual damage to the business interest being protected. The trial court erred by adopting and applying this new standard.

4. The Trial Court Erred By Relying On Evidence Which Had Been Excluded then Improperly Admitted to Find Tortious Interference. (Issues 3 and 4).

The trial court excluded Ex. 34 on hearsay grounds. (RP 116, 117, 118). Ex. 34 contained email messages from Continental Western regarding removal of Kassa Insurance from the Continental Western vendor's list. The evidence contained in Ex. 34 was later offered through Mr. Tim Kassa's testimony that he had read the memos of Continental Western. Objection was again made, however, the trial court admitted the testimony under Rules of Evidence, ER 803(a)(3) as an exception to the hearsay rule as state of mind testimony. (RP 126).

¹ "The evidence that Kassa was improperly benefitting from an actual or perceived conflict of interest situation is absent." (CP 889).

ER 803(a)(3) provides:

(3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

As hearsay testimony admitted under ER 803(a)(3), the testimony *cannot* be used to show the truth of the matter involved. State v. Aaron, 57 Wn.App. 277, 280, 787 P.2d 949 (1990). Mr. Kassa was then allowed to testify that the Continental Western emails said an agent called Continental Western and said Kassa Insurance was "trying to drum up business" while doing adjusting work. (RP 126).

The problem with the court's ruling was that Mr. Kassa's state of mind was not at issue. It was not necessary to explain any actions Mr. Kassa took. The testimony was clearly intended to show that someone had complained to Continental Western that Kassa Insurance was trying to "drum up business" while adjusting claims and that complaint regarding drumming up business was the reason Continental Western removed Kassa Insurance from its

vendor's list. The evidence was improperly admitted. State v. Aaron, *supra* at 280.

The trial court compounded the error by relying on that testimony as well as the language that appears in Ex. 34 to justify its finding that RJC's actions were in the nature of "revenge". (CP 868-69, Finding of Fact #30; CP 34, Letter Opinion). The trial court's letter Opinion quotes from that very exhibit when it explains its reason for finding RJC tortiously interfered with Kassa Insurance's agreement with Continental Western.

That Opinion states that Continental Western terminated the Kassa Insurance agreement because RJC had:

"...complained about an independent adjuster Kassa. Apparently (sic) he's also an independent agent and has tried to drum up business when adjusting claims for us.." see Exhibit 34.

(CP 68; 889).

It is apparent the trial court viewed the statement of trying to drum up business as evidence of ill motive and specifically referenced the complaint of trying to "drum up business" as a reason Continental Western removed Kassa Insurance from its vendors list. (CP 870, Finding 34). In reality, there is no properly admitted evidence which shows there was an allegation of

drumming up business made by RJC. The only non-hearsay testimony on the matter was that Joe Connor specifically denied making that comment or having that discussion with anyone from Continental Western. (RP 622).

Tonya Kassa's testimony does not rectify the trial court's error. She merely stated it was her "...understanding 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). Tonya Kassa's "understanding" is not probative of the issue.

There was no evidence from Continental Western that a claim of cross-selling was made by Joe Connor or RJC. Joe Connor denies he made any comment beyond the statement it was his belief an agency that sells insurance and adjusts claims creates a conflict situation that was a threat to his business interest.

Continental Western's John Mallary did not indicate his action was based on an accusation that Kassa Insurance was trying to sell to another agency's insured's or drum up business through its adjusting work. Mr. Mallary's decision was based on his

business belief that a sales and adjusting agency was a conflict and he never would have placed Kassa Insurance on Continental Western's vendors list if he had know of their dual agency status. It was essentially a policy decision of Continental Western that conflicts inherent in dual agencies would prevent their use as adjustors for Continental Western.

The trial court's consideration of this evidence clearly was not harmless.

A harmless error is an error which is *trivial*, or *formal*, or *merely academic*, and was not prejudicial to the substantial rights of the party assigning it, and *in no way affected the final outcome of the case*.

Blaney v. International Association of Machinists and Aerospace Workers, Dist. No. 160, 151 Wn.2d 203, 218, 87 P.3d 757 (2004) (emphasis in original, quoting State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)).

Absent the improperly considered evidence, there is no substantial evidence to support a finding and conclusion that RJC's actions were based on revenge or that they amounted to tortious interference through an improper motive.

5. The Trial Court Erred in Awarding \$86,000 in Damages for the Tortious Interference Claim. (Issue 5).

An award of damages in a tortious interference claim is for the trier of fact. Island Air, Inc. v. LaBar, 18 Wn.App. 129, 145, 566 P..2d 972 (1977). In this case, the trial court erred in awarding \$86,000 for tortious interference against RJC.

Any damage award for tortious interference with a business relationship must necessarily be related to the actual relationship disrupted. Kassa Insurance's own expert identified the lost profit related to the Continental Western adjusting business to be \$6,080.00 after deduction of certain expenses.² (RP 359). Only through application of opinion approaching fantasy did the value \$86,000 come into being.

Kassa Insurance's expert, Mr. Harper, testified he performed two forms of analysis to determine the value of the Continental Western adjusting business. One was to look at the actual numbers involved over the course of time that Kassa Insurance did adjusting work for Continental Western. That "static" number was a marginal profit of a little over \$6,000 a year based on the sixteen months Kassa Insurance did work for Continental Western. (RP 323-324). Mr. Harper then applied a value multiple and came up

² Even this amount is improperly high because Mr. Harper, Kassa Insurance's expert admitted his figure did not deduct all proper expenses when he made this calculation. (RP 359-361).

with a valuation for the Continental Western business of \$26,128.00 based on an average for the work that was actually done over a sixteen month period. (RP 324; Ex. 33).

That multiple valuation, however, is not applicable to the loss allegedly incurred by Kassa Insurance through the Continental Western situation. Mr. Harper used a buildup rate based on rates of return starting with treasury securities and then adding a premium. (RP 362). It was essentially a capitalization approach for an investment that would get paid back in a little over four years. (RP 324, 363-364).

The problem with that approach is the Continental Western agreement was not an investment. It was a terminable at will agreement which had no set value, had no minimum payment guarantee and any and all potential payments to Kassa Insurance were entirely at the discretion of Continental Western.

The tenuousness of Mr. Harper's analysis and conclusion is shown through the fact there is no evidence regarding actual lost opportunities from Continental Western business. There is no evidence regarding the number of claims Continental Western actually had adjusted in the Spokane area during the relevant time period, or what the value to the adjusters might have been. There

is no evidence that of the number of claims adjusted for Continental Western in the Spokane area, how many of them might have been assigned to Kassa Insurance.

The *only* legitimate means to arrive at a value for the Continental Western agreement is to look at the actual numbers over the course of the agreement. Kassa Insurance's own expert identified the lost profit to be approximately \$6,000.00. One year's lost profit under a contract which has been tortiously interfered with is an appropriate measure of damages. Island Air, Inc. v. LaBar, *supra* at 146.

In order to increase the alleged loss, Mr. Harper also performed a computation that was based on the growth of Kassa Insurance's Alaska National account, *an entirely different Kassa Insurance adjusting account*. (RP 324). Mr. Harper assumed the Continental Western account would increase over time at the same rate as the Alaska account³. (RP 324-325).

Mr. Harper then used the growth associated with the Alaska account as a barometer of what could have been the Continental

³ Mr. Harper's assumption of growth is contrary to Tim Kassa's deposition testimony that his gross revenue from his adjusting business was not growing. At trial, Tim Kassa testified that he believed his gross revenue for adjusting had gone up, but that testimony was impeached by his prior deposition testimony when he admitted his gross revenue for adjusting had not increased annually. (RP 201).

Western account had it grown in the same manner as the Alaska account. (RP 325).

That calculation was not based on any evidence the Continental Western account would have performed in the same manner as the Alaska account. There was no evidence presented that the Alaska business was of the same scope and nature as the business that was generated by the Continental Western account. There was also no evidence presented regarding the terms of the Alaska account, whether it had a guaranteed minimum payment or whether it was terminable at will. The fact a contract is terminable at will has an impact on calculation of damages in a tortious interference claim. Jewett-Gorrie Ins. Agency, Inc. v. Visser, 12 Wn.App. 707, 717, 53 P.2d 817 (1975).

Based on that Alaska account estimate, however, Mr. Harper arrived at an \$86,490 loss figure, a number over fourteen times the value of the actual lost profit associated with the Continental Western account. (RP 324, 325)

An additional problem with Mr. Harper's analysis is the base used for this computation already reflects years of growth. Mr. Harper then added his value multiplier to the additionally calculated growth. So the basis for an \$86,000 loss actually represents years

of growth of an unrelated account, plus a multiplier. (RP 324, 325). This all purportedly represents the value of a contract which had an actual profit of \$6,080. The calculation is simply beyond reason, yet the trial court awarded \$86,000 in damages for the tortious *interference claim*.

When determining damages, the standard is:

The evidence of damage, however, must be sufficient to afford a reasonable basis for estimating loss *so that speculation and conjecture do not become the basis*.

Burkheimer v. Thrifty Inv. Co., Inc., 12 Wn.App. 924, 928, 533 P.2d 449 (emphasis added).

The award of \$86,000 in damages was based on speculation and conjecture. At the very least, damages awarded for purported interference with a business relationship must be related to the actual numbers involved *with that business relationship*. The only relevant evidence shows history of the Continental Western account with Kassa Insurance had a value \$6,080 for lost profits. Any other number is simply too speculative and not supported by substantial evidence.

Even if the market capitalization, value added approach could be applied to a terminable at will contract with no set value or *rate of return*, the value of the business *as it relates to the actual*

Continental Western agreement had a maximum value of \$26,128 according to Kassa Insurance's own expert. (Ex. 33).

The trial court abused its discretion by awarding damages based on a speculative comparison to a different account in an amount that was over *fourteen times* the value of the lost profits shown under the agreement with Continental Western.

6. The Trial Court Erred in Awarding Prejudgment Interest. (Issue 6).

Prejudgment interest is only appropriate when the damages are liquidated. Liquidated damages are damages which can be determined by "reference to a fixed standard contained in the contract *without reliance upon opinion or discretion*," State Dept. of Corr. v. Fluor Daniel, Inc., 160 Wn.2d 786, 789, 161 P.3d 372, (2007) (emphasis added).

A trial court's award of prejudgment interest is subject to the abuse of discretion standard. A trial court abuses its discretion if it exercises discretion on untenable grounds or for untenable reasons. Hadley v. Maxwell, 120 Wn.App. 137, 141, 84 P.3d 286, *rev. den.* 152 Wn.2d 1030, 103 P.3d 200 (2004).

The damages involved in the tortious interference claim were dependent on the opinion of Mr. Harper and the discretion of the

trial court.⁴ Not only was the award dependent on opinion testimony, that testimony at best provided a range of damages, relied on comparison to a separate contract agreement not part of the instant litigation, and did not result in a certain specific amount being identified which was derived from the agreement between Kassa Insurance and Continental Western.

The nature of the agreement between Kassa Insurance and Continental Western made it incapable of determining a liquidated sum for damages. It did not call for a specific number of claims to be handled by Kassa Insurance, it did not set a minimum amount of work that would be given to Kassa Insurance and it did not set a minimum value that would be paid to Kassa Insurance. The contract simply put Kassa Insurance on a vendor's list from which Continental Western could decide to choose Kassa Insurance or not. Actual assignment of claims was completely at the discretion of Continental Western. If Continental Western had 100 claims in Spokane, they were not obligated to assign Kassa Insurance to a single claim. (RP 177).

⁴ The argument presented in this section applies to the award of damages regardless of whether the award was for \$86,000 or for \$26,128 because both numbers were the result of the opinion testimony of Mr. Harper and were not readily ascertainable from the contract itself.

Claims assignment also was dependent on the number of occurrences which might occur in any given year. Prediction of the number of accidents that *might* lead to Continental Western assigning a claim to Kassa Insurance clearly required opinion testimony and would be pure speculation.

Mr. Kassa testified that the adjusting business was cyclical and dependent on a number of factors including the weather, the number of claims brought in, and the number of accidents. (RP 200-201).

Tonya Kassa, who was in charge of the adjusting business with Continental Western, testified that the agreement with Continental Western did not call for any flat annual payment. (RP 264). Ms. Kassa also testified:

Q. And the amount of work then that you get from Continental Western is based on a number of factors, isn't it; weather, car accidents, how many policies they have?

A. Sure. Yeah, I don't have any control over that. So I don't know what controls that.

(RP 264).

Further unpredictability was shown through Mr. Harper's valuation method. Mr. Harper admitted his valuation for damages for the loss of the Continental Western adjusting business was

based on factors such as, "if it would have grown or expanded along the lines that the Alaska Account did..", and ".presuming that what they had been doing would continue at that average level.." (RP 324). With regard to the capitalization rate used, the rate "..comes from market data... So we get average return on public companies, small public companies, micros, and then adjust for specific company where we add some more risk." (RP 324).

The evidence clearly shows that any computation of damage under the tortious interference claim was completely dependent on opinion, discretion and fate. The very nature of the agreement between Continental Western and Kassa Insurance precluded a liquidated damage sum.

In addition, the damage valuation was presented in a range, not as a specific amount. When a trial court must use its discretion to determine the measure of damages, the sum is not liquidated and prejudgment interest is not appropriate. Maryhill Museum of Fine Arts v. Emil's Concrete Const. Co., 50 Wn.App. 895, 903, 751 P.2d 866, *rev. den.* 111 Wn.2d 1009 (1988). When a trial court is forced to rely on opinion testimony and a measure of discretion is involved, the sum is not liquidated. Douglas Nw., Inc. v. Bill O'Brien & Sons Const. Inc., 64 Wn.App. 661, 691, 828 P.2d 565 (1992).

The damage award for tortious interference relied on both opinion and discretion and was not liquidated. Award of prejudgment interest was error.

VI. CONCLUSION

RJC had a good faith belief that a business which both sells insurance and adjusts claims for other insurance agencies creates a conflict of interest. Allowing a dual agency to adjust claims for RJC's clients would adversely impact RJC's business interests.

There is no substantial evidence in the record to find that RJC acted with ill motive or improper means. RJC was entitled to take the action that it did and it was error for the trial court to find RJC guilty of tortious interference. The decision of the trial court should be reversed.

Should the trial court's decision regarding tortious interference be upheld, there is no substantial evidence in the record to support the trial court's award of \$86,000 in damages. That award was based on speculation and conjecture. The damage award should be dismissed and an award of \$6,080 should be entered as damages for tortious interference. In the alternative, the damage award should be dismissed and the matter remanded for a proper calculation of damages.

Prejudgment interest is not available on a non-liquidated sum. The damages, if any in this matter, are not capable of being calculated with sufficient specificity to be liquidated. The trial court's award of prejudgment interest must be reversed.

The previously separate appeal of Ryan Pugh was consolidated with this appeal. Accordingly, RJC hereby adopts and incorporates the arguments presented by Ryan Pugh in this appeal.

RJC seeks appropriate fees and costs for this appeal under RAP 18.1.

Respectfully submitted, this 11th day of April, 2013.

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