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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/Cross-Appellant

v.

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

Appellants.

APPEALED FROM SPOKANE COUNTY SUPERIOR COURT
CAUSE NO. 08-2-037431

THE HONORABLE GREGORY D. SYPOLT

**KASSA INSURANCE SERVICES, INC.'S
RESPONDENT/CROSS-APPELLANT BRIEF**

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Appendix A

I. INTRODUCTION

In February of 2007, Ryan Pugh, an employee of Kassa Insurance Services, Inc. (“Kassa”), was meeting with RJC/CAK, Inc. (“RJC”) to discuss employment with RJC. On Sunday night, February 18, 2007, Ryan Pugh and his wife went to Kassa’s office, rifled through Kassa’s clients’ insurance files, extracted client information and compiled a client list, including the clients’ insurance information, and emailed it to their home. The only compilation of similar information was in Kassa’s Master Client List that was saved in a password protected file that Pugh was prevented from accessing. When Pugh was questioned about being at the office on a Sunday night, Pugh did not disclose he was using Kassa’s client files to recreate a Master Client List. Instead, he claimed to be doing his taxes. When Pugh announced he was leaving to work for a competitor, RJC, Tim Kassa specifically told Pugh that Pugh did not own the clients and instructed him not to sabotage Kassa.

On February 26, 2007, Pugh accepted employment with RJC and was 100% vested in any clients that he was able to bring with him. Pugh and RJC used Kassa’s client list he had wrongfully taken

to send out solicitation letters and change of agent letters to Kassa's clients. As a result, Kassa was damaged by Pugh and RJC's use of Kassa's confidential information.

In 2007, Kassa obtained a contract to perform adjusting work for Continental Western Insurance. The relationship was built upon prior business relationships between Kassa and employees of Continental Western. The contract was abruptly terminated when RJC, who was in a dispute with Kassa over Pugh's former employment, contacted Continental Western and made the baseless claim that Kassa was using the adjusting files to "drum up" and "cross-sell" insurance business. RJC was a key agent and large customer of Continental Western. As a direct result of RJC's interference, Kassa lost the Continental Western contract and was damaged.

After a four day trial, Judge Sypolt weighed the evidence and credibility of the witnesses. Based on the evidence, he correctly determined Pugh had willfully and maliciously misappropriated Kassa's trade secrets and had been unjustly enriched. Judge Sypolt also correctly concluded that RJC had tortuously interfered with

Kassa's business expectancies with Continental Western. Judge Sypolt awarded damages in the range of the evidence presented. RJC and Pugh's appeals fail to establish that Judge Sypolt's findings are not supported by the evidence or that the conclusions of law are not supported by the findings. Instead, they simply ask this Court to second guess Judge Sypolt and re-weigh the evidence. As explained below, the Court should not do so and the Judgments entered should be affirmed.

The only err Judge Sypolt made was not finding RJC vicariously liable for the misappropriation and use of Kassa's trade secrets. This was a result of RJC misleading the Trial Court by focusing on Joe Connor individually, instead of the actions of RJC as an entity. This err of law ignored the fact that RJC wrongfully ratified the actions of Pugh by using and benefitting from the client list that was wrongfully misappropriated, as well as participated in the misappropriation. Accordingly, RJC should be found vicariously liable for Pugh's wrongful willful misappropriation and the resulting Judgments.

II. ASSIGNMENT OF ERROR

A. Findings of Fact

1. Trial Court erred by entering Finding of Fact Number 26.
2. Trial Court erred by entering Finding of Fact Number 27.
3. Trial Court erred by entering Finding of Fact Number 28.

B. Conclusions Of Law

1. Trial Court erred by entering Conclusions of Law No. 7.
2. Trial Court erred by entering Conclusions of Law No. 24.

III. ISSUES

A. Restatement of Issues Raised By RJC/CAK Appeal

1. Did the Trial Court exercise its discretion by finding the RJC tortiously interfered?
2. Did the Trial Court properly exercise its discretion by relying on admissible evidence not objected to at trial?
3. Did the Trial Court correctly exercise its discretion by determining the damages caused by RJC/CAK?
4. Did the Trial Court properly award prejudgment interest based on Kassa's loss of use of those funds?

B. Restatement of Issues Raised By Pugh Appeal

1. Did the Trial Court correctly exercise discretion by finding Kassa's confidential client information was a trade secret?
2. Did the Trial Court correctly exercise discretion by finding Pugh's clandestine misappropriation of Kassa's trade secrets was willful and malicious?

3. Did the Trial Court properly exercise discretion by considering unobjected to admissible evidence?
4. Did the Trial Court properly exercise its discretion to determine the amount of damages caused by Pugh?
5. Did the Trial Court correctly exercise its discretion by awarding Prejudgment Interest?
6. Did the Court correctly exercise discretion to determine reasonable attorney fees and costs?
7. Did the Trial Court correctly find the willful misappropriation was for Pugh's marital community?
8. Did the Trial Court properly exercise discretion by finding Pugh did not prove a failure to mitigate?

C. Kassa's Cross-Appeal

1. Did the Trial Court err in rejecting the claim RJC was vicariously liable for the damages caused by Pugh's willful misappropriation?
2. Did the Trial Court err by only considering the individual actions of Joe Conner rather than the actions of the entity, RJC?

IV. STATEMENT OF THE CASE

A. Background

On June 1, 2003, Pugh began his employment with Kassa. RP 277. Prior to starting his employment at Kassa, Pugh had been Tim Kassa's friend and neighbor; Tim Kassa had known Pugh since

Pugh was 12-years old. RP 49-50, 170. Pugh accepted a position with Kassa as an agent. RP 277. Pugh's insurance training included ethics classes, and continuing education courses on the subject of ethics. Pugh was hired to produce insurance clients for Kassa and was paid a salary, along with commissions of 50% on new policies produced and 25% on policy renewals. RP 278-79. During Pugh's employment, all commissions earned from the clients Pugh serviced were paid directly from the insurance companies to Kassa. RP 434. After Kassa received the commission payments from the insurance companies, which Kassa received pursuant to Kassa's contracts with the insurance companies, Kassa then paid Pugh a commission based upon his employment agreement. RP 433-34. Pugh never received direct payment from an insurance company for any of the Kassa clients. RP 433-34.

Pugh was never appointed by an insurance company to sell insurance, nor has Pugh ever had a contract with an insurance company to sell insurance. RP 457. In order for Pugh to sell insurance, he must be affiliated with an agency that has been appointed by an insurance company or possesses a contract with an

insurance company to sell their insurance. Without being appointed by an insurance company to sell insurance or possessing an insurance contract, Pugh as an affiliated agent, lacks the authority to bind clients to insurance contracts. RP 457. Pugh's ability to bind clients stems solely from his affiliation with an agency that has been appointed or possesses a contract with an insurance company, like Kassa or RJC RP 457-59. At no time during the period Pugh was employed at Kassa, did Pugh ever have an ownership interest in Kassa. RP 37-38.

During Pugh's employment, Kassa maintained individual client information in manila files that are kept in a secure location at Kassa. RP 78-81, 230-31. Kassa maintains an alarm system for its building to protect its client information, and keeps its building locked during non-business hours. RP 82. Kassa maintains a master client list on the computer of Julie Kemink that is password protected. RP 77-78, 231-32. Pugh was not provided access to this list. RP 429-30. At all times, Kassa had company policies in place to preserve the confidentiality of the information contained in the manila client files. RP 72-75. Only employees at Kassa have access

to client information, and Tim Kassa specifically communicated to Pugh that the client files at Kassa were confidential and were not to be disseminated or taken. RP 72-75, 230.

B. Willful and Malicious Misappropriation

Early in February of 2007, Pugh had meetings with RJC regarding employment. RP 436. Pugh discussed his employment agreement at Kassa with RJC, and whether Pugh had a covenant-not-to-compete with Kassa. RP 437, 583. Overall, Pugh met with the representatives from RJC at least three times regarding employment prior to signing an employment contract with RJC on February 26, 2007. RP 435-47. Joe Connor understood that Pugh was employed as an affiliated agent with Kassa. RP 629. Pugh went to work for RJC as an affiliated agent. RP 629. Mr. Connor recognizes that an agency, Kassa in this instance, and not the agent, Pugh in this instance, owns the client accounts; as the agency is listed as the agent of record and holds the contracts with the insurance companies necessary to bind clients and earn commission. RP 595-600, 628-29.

Once Pugh signed the RJC employment contract, all clients brought from Kassa to RJC by Pugh became the property of RJC.

Ex. P-2. Thus, the 100% commission that Kassa had been receiving from the clients that Pugh was servicing while employed at Kassa, transferred directly to RJC, who then received Kassa's 100% commission. RP 431-32.

On February 18, 2007, after meeting with RJC and while still employed by Kassa, Pugh and his wife went to the office at night and used Kassa's files to create a client list. RP 296-99. Pugh then emailed the client list from his work email address to his personal email address. RP 299.

Pugh signed an employment contract with RJC on February 26, 2007, with a start date of employment of March 1, 2007. Ex. P-2. When Pugh informed Tim Kassa that he was terminating his employment at Kassa and was going to work for RJC, Tim Kassa told Pugh not to take any clients or sabotage Kassa. RP 87. Pugh ignored this direction and provided the client list that he created to RJC. RP 411-412. RJC used the Kassa client list to input the client information and to solicit Kassa's clients. RP 393, 412, 448-49. In February of 2007, prior to leaving his employment with Kassa, Pugh solicited some of the clients appearing on the client list he created

and caused those clients to transfer their business from Kassa to RJC. RP 464. Once Pugh began his employment at RJC on March 1, 2007, Pugh began calling and soliciting clients who appeared on the client list that Pugh created from the paper files at Kassa. RP 393, 412. Pugh and RJC sent letters on RJC letterhead to clients appearing on the client list. RP 481-82, 630; Exs. P-4 and P-5. Pugh and RJC employee Karen Morris drafted the letter together and Pugh directed Ms. Morris to send out the letters to the clients appearing on the client list that Pugh created. RP 481-82, 630. Pugh used the client list he created as a source of information for contacting and soliciting clients during the course and scope of his employment at RJC. RP 412, 630.

Included with each letter was an “agent of record form,” which the client was to sign and return to Pugh so that he could submit the change in agency from Kassa to RJC. Exs. P-16 and P-17; RP 395. Pugh used the “agent of record forms” to transfer clients on the client list he created from Kassa to RJC. Ex. P-16 and P-17; RP 395. The “agent of record form” showed the clients being

transferred from Kassa, the agent of record, to RJC, the new agent of record. Ex. P-16 and P-17; RP 395.

When Pugh terminated his employment with Kassa on February 28, 2007, he remained an affiliated agent with Kassa until March 8, 2007. RP 456-461; Ex. P-3. Despite still being affiliated with Kassa, Pugh solicited Kassa clients on behalf of RJC and caused Kassa clients to be transferred from Kassa to RJC from March 1, 2007, through March 8, 2007. RP 436-61; Ex. P-3. Pugh became an affiliated agent with RJC on March 13, 2007. RP 456-61; Ex. P-3. Pugh also solicited clients from the client list he created on behalf of RJC from March 9, 2007, through March 12, 2007, when Pugh was not affiliated with any agency. RP 456-61.

C. Tortious Interference With Business Expectancy

Kassa had a valid contract to adjust insurance claims for Continental Western Group. Ex. P-18. After Pugh had taken Kassa's confidential client information and solicited clients away from Kassa to RJC, RJC contacted Continental Western Group. RP 125-26. As explained in detail below, RJC interfered by claiming Kassa was misusing adjusting files to "drum up" insurance business

and to “cross-sell”. RP 125-26. It was only after the dispute arose between Kassa and RJC regarding RJC taking Kassa’s clients via Pugh that Mr. Connor made the call to Continental to urge them to stop using Kassa as an adjuster. RP 616. As a direct result of RJC’s claims, Continental stopped using Kassa as an adjuster which caused Kassa to lose its insurance adjusting business with Continental. RP 112-14, 125-26.

In order to recover the damages caused, Kassa filed the present action and has spent the last 5 years in litigation. CP 8-12. Following a 4 days trial, Judge weighed the evidence and entered Judgments in favor of Kassa. The Findings of Fact and Conclusions of Law are supported by the evidence presented at trial.

V. ARGUMENT

A. Standard of Review

Challenged findings are reviewed to see if they are supported by substantial evidence. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 879 (2003). The evidence and all reasonable inferences from it are viewed in the light most favorable to the prevailing party. Korst v. McMahon, 136 Wn. App. 202, 206

(2006). The reviewing court does not reweigh the evidence and substitute its judgment just because it may have resolved a factual conflict differently. Instead, it defers to the fact finder for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. Burnside v. Simpson Paper Co., 123 Wash.2d 93, 108, 864 P.2d 937 (1994); Boeing Co. v. Heidy, 147 Wash.2d 78, 87, 51 P.3d 793 (2002). In determining the sufficiency of evidence, a reviewing court need only consider evidence favorable to the prevailing party. Bland v. Mentor, 63 Wash.2d 150, 155, 385 P.2d 727 (1963). Thus, the issue on appeal is whether the findings are supported by substantial evidence, not whether different findings would have also have been supported by the evidence. Challenged conclusions of law are reviewed to determine whether they are supported by the findings of fact. Hegwine v. Longview Fibre Co., 132 Wn. App. 546, 555 (2006), aff'd, 162 Wn.2d 340 (2007).

B. Kassa's Cross-Appeal On Vicarious Liability

A future employer may be found vicariously liable under the Uniform Trade Secret Act (UTSA). Thola v. Henschell, 140 Wash.

App. 70, 77-78 (2007). The evidence in this matter supports Defendant RJC/CAK, Inc. being held vicariously liable for Pugh's willful trade secret misappropriation. A person may be held legally responsible for another's tort if the tortfeasor was "(1) an employee acting in the course and scope of employment; (2) an agent whose tort is imputed to her principal; or (3) a family member for whom the other is legally responsible." Id. at 79. In addition, a principal may be held vicariously liable under a theory of ratification if the principal accepts benefits of an act with full knowledge of the act's material facts. Thola v. Henschell, 140 Wash. App. at 86 (citing Consumers Ins. Co. v. Cimoch, 69 Wash. App. 313, 232 (1993)).

The Trial Court erred as a matter of law by finding that RJC was not vicariously liable for Pugh's misappropriation by applying the facts and evidence to Joe Connor, President of RJC/CAK, individually, and not considering the actions of RJC as an entity. The Trial Court also abused its discretion and erred as a matter of law by finding the facts and evidence in this matter did not support a finding of vicarious liability with regard to RJC/CAK.

In the Trial Court's "Letter Opinion/Decision," the Trial Court applied facts and evidence to Joe Connor as an individual and not to RJC/CAK as an entity when determining that RJC/CAK was not vicariously liable for Pugh's misappropriation of Kassa's trade secrets. CP 22-39. RJC was Defendant in this matter, not Joe Connor. CP 8-12. As such, no claims were brought by Kassa against Joe Connor as an individual. CP 8-12.

In Washington, "*a corporation is to be regarded as a legal entity, existing separate and apart from natural persons composing it...*" J.L.Cooper & Co. v. Anchor Sec. Co., 9 Wash.2d 45, 69 (1941). The facts and evidence in this matter show that RJC should have been held vicariously liable for Pugh's willful misappropriation of Kassa's trade secrets. RJC's only defense to vicarious liability was its unjustified belief that Pugh owned the clients he took from Kassa. The evidence does not support RJC's defense.

The most telling evidence showing that RJC should be held vicariously liable is that RJC knew the information Pugh took from Kassa was confidential, knew it was wrong for an employee to take information from an employer's client files, and knew the book of

business belonged to Kassa. RP 629, 631. RJC, through Joe Connor, testified that after Pugh took the client list and solicited clients for RJC, Safeco mistakenly paid RJC commissions that Kassa should have received. RP 595-96. RJC knew that it had to return the Safeco payment to Kassa because Kassa owned the commissions not Pugh. RP 596. RJC attempted to send Kassa the money for the commissions earned on Kassa's clients. RP 595-96. This led to a conversation between Tim Kassa of Kassa and Joe Connor of RJC, where Joe Connor testified:

We talked a little bit about - - I asked him, I said what I'd like to so really, I don't want to get into a big, you know, confrontation with him over the book of business, Ryan coming down here. I don't want to get into a lawsuit like we are today over this thing. It's ridiculous. I asked him to let me buy his book of business. I want to buy the book of business...

RP 598 (emphasis added.) RJC even called a representative from Safeco to attempt to correct the commission payment that should have gone to Kassa. RP 599-600.

If RJC knew that its employee Pugh did not own the clients he took from Kassa, RJC would not have attempted to pay Kassa back its commissions due to Safeco's error. If RJC truly believed

that Pugh owned Kassa's clients, RJC would not have felt obligated to pay Kassa back for the clients that Pugh claimed he owned. Certainly, RJC would not have offered to buy Kassa's book of business. RP 598.

RJC's President, Joe Connor, testified that none of his employees own clients and it was unusual for an employee to develop ownership in clientele. RP 632. RJC knew Pugh was an employee of Kassa, and had never seen anything in writing showing that Pugh had any ownership interest in Kassa's clients. RP 629. When asked whether RJC believed Pugh was an owner in Kassa, RJC responding by saying, "*I believe what he told me. He said he was an employee.*" RP 629.

Kassa owning the clients, and not Pugh, is consistent with the industry custom and was supported by RJC's own expert at trial. RJC presented Thomas Lees as an expert at trial. The Court asked Mr. Lees at trial:

Mr. Lees, is there an industry custom regarding ownership of a book of business. That is, does it ordinarily belong to the producer, the individual, or does it - - is it the agency's property?

RP 513. Mr. Lees responded as follows:

It's the agency's property. And that is contingent with the contracts that they have with each individual company that they do business with...

Now there are exceptions where there's a financial agreement, but it would be set up on a contract, indicating that the ownership of that book is owned by the individual producer. And that's probably not real common. Maybe one or two in town here.

RP 513.

Mr. Lees also provided the following testimony showing that RJC's belief that Pugh owned Kassa's clients was unjustified:

- (1) Mr. Lees testified that clients' lists are valuable compilation of information that allowed agents to target market and solicit clients. RP 531-32.
- (2) Mr. Lees testified that producers (agents) of an agency do not have contract with insurance companies, which is the reason that the industry custom is that the agency owns the clients, not the individual producers. RP 537-38, 562.
- (3) Mr. Lees testified that he had never seen any written agreement between Kassa and Pugh providing Pugh with ownership of the Kassa clients. RP 546.

Based on RJC's own expert's testimony above, RJC's belief that Pugh owned Kassa's clients is unjustifiable and unreasonable.

The industry custom is that the agency owns the clients in the absence of a written agreement stating otherwise. RP 513, 537-38, and 562. Despite Pugh not having a written agreement stating that he owned the clients at Kassa, and despite an individual producer owning clients being uncommon in the industry, RJC did not conduct any independent investigation into whether Pugh's statement of ownership was in fact true. RP 513, 629.

Despite RJC's knowledge, and without any investigation, **RJC testified that it directed Pugh to take Kassa's clients over to RJC on a Broker of Record form.** RP 628. RJC directed Pugh to take the clients via a broker of record because RJC knew that Kassa, not Pugh, was the agent of record, Pugh could not walk out of Kassa with the client files. RP 629.

"A principal may be held liable under the ratification theory only if he or she accepts the benefits of an act with full knowledge of the act's material facts." Thola v. Henschell, 140 Wash. App. 70, 86 164 P.3d 524 (2007). Implied ratification occurs:

[I]f the corporate principal, with full knowledge of the material facts (1) receives, accepts, and retains benefits from the contract, (2) remains silent, acquiesces, and fails to repudiate or disaffirm the contract, or (3) otherwise exhibits conduct demonstrating an adoption and recognition of the contract as binding.

Smith v. Hansen, Hansen, & Johnson, 63 Wash. App. 355, 369, (1991), *review denied*, 118 Wash.2d 1023 (1992). Conduct of the principal is to be liberally construed in favor of ratification. Miller v. Denman, 49 Wash. 217 (1908).

Here, RJC fully ratified the conduct by participating in the use of the client list and accepting all of the benefits of the solicitation of those clients even after learning that without question Pugh did not own the client list. RJC's conduct demonstrated that it accepted the benefit of the wrongful use of the client list because by its contract with Pugh RJC became the owner of those accounts. Ex. P-2. Further, RJC acquiesced by retaining Kassa's commissions received from the clients brought to RJC.

The evidence shows that RJC, as Pugh's principal, ratified Pugh's misappropriation and should be held vicariously liable. At the very least, the evidence supports implied ratification by RJC,

which supports a finding of vicariously liability for Pugh's trade secret misappropriation.

In addition to RJC being vicariously liable under the ratification theory, RJC is vicariously liable because Pugh was acting as an agent at the time Kassa's client list was misappropriated, which is imputed to RJC. Thola v. Henschell, 140 Wash. App. 70, 77-78 (2007).

Looking at the facts and evidence as to how Pugh became employed at RJC, the evidence supports that the Kassa client list was created specifically for RJC. During the first meeting between Pugh and RJC, Joe Connor, President of RJC, asked Pugh how much he made in commissions at Kassa. RP 579, 582. Pugh informed RJC that he brought in between \$40,000.00 and \$50,000.00 in commission at Kassa. RP 580. RJC asked Pugh if he had an employment contract or a covenant not to compete. RP 437, 582-83. After learning that there was no employment contract or covenant not to compete, RJC discussed Pugh being vested in any clients he brought with him to RJC. RP 442, 585, 627. RJC asked Pugh if he

had a client list, and was aware that Pugh would be bringing a client list with him from Kassa to RJC. RP 440-41, 584, 627-28.

RJC handed Pugh an employment contract that stated Pugh would be vested in the clients he brought from Kassa, that RJC would own the clients brought from Kassa, and offered Pugh a salary of \$42,000.00; similar to the commission that Pugh told RJC he earned in commission at Kassa. Ex. P-2; RP 347, 580, 586-87, 604. Pugh had never created a client list prior to meeting with RJC, and created the client list for the specific purpose of having it in the event he accepted other employment. RP 435-47. Prior to being offered employment by RJC, Pugh had never been offered employment by anyone else during the time he was employed by Kassa. RP 436. After meeting with Joe Connor, Pugh returned to Kassa and began creating a client list, and after meeting with RJC a second time, Pugh returned to Kassa, completed the client list, and emailed it to his personal email address. RP 435-47.

As of March 1, 2007, when Pugh started employment with RJC, Pugh was acting on behalf of RJC. RP 629-30. Pugh brought the client list he had created from Kassa on his first day of

employment at RJC. RP 411. Pugh then began to immediately use the Kassa client list to solicit clients on behalf of RJC. RP 412. RJC testified that Joe Connor personally oversaw Pugh, and that RJC employees assisted Pugh with his solicitation. RP 594, RP 630. All of the solicitation letters sent out by Pugh were on RJC letterhead, and were written and sent by an RJC employee Karren Morris. RP 481-82, 630. All of the information that Pugh had taken from Kassa was entered into the RJC client management system once Pugh's solicitation began. RP 448-49. Pugh also provided the actual client list he took from Kassa to Ruth Beach, an employee of RJC, and the Kassa client list was maintained by RJC in Pugh's employee file. RP 411-12 & 590.

In Washington, it is not necessary for Pugh to have been formally employed by RJC when he began the process of misappropriating Kassa's client information to make RJC vicariously liable for his misappropriation. Thola, 140 Wash. App. at 87. "*A contractual or formal business employment relationship is not necessary for an agency relationship.*" Id. It was only after RJC's discussions of employment with Pugh that he created a list

from Kassa's confidential information, and only after he was provided a contract that Pugh took the list he created from Kassa. The client information was for the benefit of RJC, who gained 100% ownership of the Kassa clients, and offset Pugh's starting salary at RJC. RP 580, 604.

There is substantial evidence presented above that Pugh was acting on behalf of RJC when he misappropriated Kassa's client list. The evidence above shows that RJC knew that Pugh could not own Kassa's clients, yet RJC provided Pugh with an employment contract vesting Pugh in the clients that he took from Kassa, and providing RJC with ownership of the Kassa clients. The evidence above shows that all of the solicitation that occurred using Kassa's information was performed while Pugh was acting within the course and scope of his employment.

RJC even directed Pugh to take the Kassa clients on a Broker of Record, so that the clients could be transferred without Kassa's consent. RP 628. RJC knew Pugh, as an agent, could not take the client files from Kassa. Pugh does not possess a broker's license and cannot sell insurance without being affiliated with an agency. RP

457. Without the ability to transfer the Kassa clients on a Broker of Record Letter to RJC, Pugh would not have been able to use the misappropriated list to take the clients from Kassa. Without RJC, Pugh could not have accomplished the misappropriation of Kassa's trade secrets.

RJC should be found vicariously liable for Pugh's misappropriation of Kassa's trade secrets.

C. RJC/CAK's Appeal

1. RJC Tortiously Interfered With Kassa's Business Expectancies.

a. Evidence Supports the Findings and Conclusion.

Tortious interference with a business expectancy occurs when it is established Plaintiff: (1) had a valid contract or business expectancy; (2) the Defendant is aware of the contractual relationship or business expectancy; (3) the Defendant intentionally induces or causes interference with the contractual relationship or business expectancy; (4) the interference is for an improper purpose or by improper means (intent to harm); and (5) the conduct was the proximate cause of harm to Plaintiff. WPI 352.01 and WPI 352.03. After hearing the evidence in this case and deciding the credibility of

the witnesses, Judge Sypolt entered Findings of Fact confirming Kassa met the elements for tortious interference. CP 868-871. RJC's argument does not establish a lack of support for those findings. Instead, it takes issue with how the Court resolved conflicting evidence and decided credibility. As a result, the Trial Court did not abuse its discretion and the Trial Court's determination after hearing the evidence should be upheld.

Unable to dispute that the findings are supported by substantial evidence, RJC claims that despite supporting a prima facie case, this Court should second guess Judge Sypolt's resolution of conflicting evidence and make the determination that RJC's actions were "good faith efforts". However, the evidence at trial established that RJC's actions were not made in good faith. The evidence was that RJC did more than merely request that Kassa not be used to adjust RJC claims. Instead, RJC "*demanded they* [Continental Western] *they not use us* [Kassa]". RP 115, ll. 23-25; 166, ll. 1-3. Furthermore, RJC made the false claim to Continental Western that Kassa was improperly using the Continental Western adjusting files to "*drum up business*" for the insurance agency. RP

126, ll. 13-18. This went beyond merely requesting that Continental stop using Kassa on claims for RJC clients.

Notably, the testimony confirming RJC's baseless claim that Kassa was misusing adjusting files was not objected to at trial. Id. The evidence also confirmed RJC was telling Continental Western Kassa was using the adjusting files to "cross-sell" from the insurance side to the agency side. RP 255, ll. 19-24. The testimony at trial contradicted the claims that RJC attempts to reargue with regard to the "dual agency" issue. The evidence at trial confirmed Kassa did not misuse adjusting information and took steps to insure that the adjusting business and the insurance agency business were kept separate. See RP 251 – 53. This includes having Tonya Kassa only work as an adjuster and a company policy to keep the two types of work separate. RP 252.

Q. Can you please explain for the Court what that policy is.

A. Is it is made clear that the agents and agency side would not commingle with the adjusters and adjusting work and adjusting side and vice versa. There's no reason for it. And it's made clear.

RP 252, ll. 11-15. The evidence confirmed Continental Western did not complain about Kassa's performance or the fact Kassa was both an adjusting business and an insurance business. RP 257, ll. 16-24. Based upon the evidence, including the timing, the findings entered by the Court are supported.

The evidence also provided a basis for Judge Sypolt to find RJC used an improper means to interfere with the Contract. Without any factual basis, RJC intentionally misled Continental Western by claiming that Kassa was using confidential adjusting information to "*drum up business*" and to "*cross-sell*". Supra. There simply is no evidence supporting a claim that such statements had any factual basis. Indeed, the evidence at trial was to the contrary. Supra. This all occurred during the time when RJC and Kassa are in disputes concerning Pugh's employment.

RJC attempts to claim that having both an adjusting business and an insurance agency is somehow improper. However, there was no evidence indicating that is the case. As a result, the Trial Court correctly weighed the evidence and credibility of the witnesses and determined "*Ms. Kassa adhered to the highest standards of ethical*

conduct as a claims adjuster.” CP 869. See also RP 250-257. The Court also found that Ms. Kassa was “*credible and persuasive*”. Id. Judge Sypolt then considered the fact the relationship with Continental Western was based upon existing personal relationships that Kassa had with employees of Continental Western and the abrupt termination of the agreement after RJC’s interference based on assertions by RJC of “*Kassa misusing contacts with adjusting business clients to generate sales business.*” CP 869. The Court correctly found that there was no evidence supporting RJC’s claim that Kassa was benefitting from any “*actual or perceived conflict of interest situation*” and there was no evidence that a “*dual aspect*” business was prohibited, and that in weighing the evidence the improper claims by RJC were the cause of the termination of the contract. The Court’s decision is also supported by the fact RJC testified that there were “bad vibes” between it and Kassa. RP 616. Judge Sypolt also weighed the credibility of Mr. Mallory and found his “*characterization*” unpersuasive. RJC’s appeal is premised on the position that this Court should re-weigh testimony by Mallory that Judge Sypolt discounted.

b. The Trial Court Considered Properly Admitted Evidence and Testimony to which RJC did not Object.

RJC claims Judge Sypolt should not have considered the testimony by Mr. Kassa relating to RJC's claim Kassa was trying to "drum up business". However, a review of the record confirms that the testimony with regard to RJC claiming Kassa was trying to "drum up business" was not objected to at the time of trial and should not be reviewed. RP 126, 13-18. See also State v. Kronich, 160 Wn.2d 893, 899 (2007)(a party may not raise an objection not properly preserved at trial).

The hearsay objection referenced by RJC was made in response to the question/answer : "Q...how did you –what did you find out how you lost Continental Western Group?" "A. By reading the interoffice memos of Continental Western." RP 125, ll. 23-25; 126 1-6. The answer merely stated what Kassa did to find out how the Continental Western contract was lost. "[R]eading the interoffice memos" does not constitute hearsay and at very least the Trial Court properly allowed it to establish state of mind. It is later

testimony that is referenced by RJC in this appeal. However, that testimony was not objected to and is not a proper assignment of err.

In addition, the “*drum up business*” testimony was not the only testimony that supported Judge Sypolt’s findings. Tonya Kassa also testified RJC contacted Continental Western and claimed “*someone in our office had tried to cross-sell from the agency side...*” RP 255, ll. 19-24. With regard to Ex. P-34, RJC attempts to mislead this Court by failing to point out that the Court addressed the reference in the Letter Opinion cited in RJC’s brief and explained that its decision was not based on Ex. P-34. See CP 893-5.

2. The Damages Awarded were Based on the Evidence.

An appellate court will not disturb an award of damages made by the fact finder unless it is outside the range of substantial evidence in the record, or shocks the conscience, or appears to have been arrived at as the result of passion or prejudice. Mason v. Mortgage Am., Inc., 114 Wash.2d 842, 850, 792 P.2d 142 (1990). “*Once the fact of damage has been established by a preponderance, the plaintiff is obligated to produce only the best evidence available which will afford the jury a reasonable basis for estimating the*

dollar amount of his loss.” Seattle W. Indus., Inc. v. David A. Mowat Co., 110 Wash.2d 1, 6 (1988). As recognized by RJC, then the amount of damages awarded is a question for the trier of fact. Island Air, Inc. v. LaBar, 18 Wn. App. 129, 145 (1977). In this case, it is undisputed that the award arrived at was within the range of evidence presented to the Court. Id. As a result, RJC improperly asks this Court to reweigh the testimony and second guess Judge Sypolt’s determination of resulting damages.

The evidence presented supported the expert testimony establishing the amount of damages incurred as a result of RJC’s Tortious Interference. Dan Harper is an experienced CPA and business valuation expert. RP 303-305. Mr. Harper specifically testified that in reaching his opinion with regard to the damages, he specifically considered both the growth in the amount of business with Continental Western over the last several months prior the contract being terminated and compared it to a similar adjusting client which started at the same level and experienced increase in business. RP 323; Ex. P-33 (Schedule 2). Mr. Harper also explained he used an industry accepted method to calculate the

damages that resulted from RJC's Tortious Interference. This included using an income approach and applying a capitalization rate to the contract based upon market data. RP 324, 362 and 363. In a conclusory fashion, RJC's brief merely indicates it disagrees with Mr. Harper. However, RJC had the opportunity to present those arguments to Judge Sypolt and to use cross-examination to make those points. Judge Sypolt, the finder of fact, reviewed the evidence and agreed with the calculations provided by Mr. Harper. CP 890-891 (*"The Court finds persuasive and credible the testimony of Dan Harper...."*). Whether to admit expert testimony is within the discretion of the trial court. State v. Ortiz, 119 Wn.2d 294, 310 (1992). Notably, RJC does not claim Mr. Harper was not qualified to render the opinions and did not object to the testimony. The damages are supported by the record and were within the discretion of Judge Sypolt to award.

3. Prejudgment Interest was Appropriate.

Prejudgment interest is awardable *"(1) when the amount claimed is liquidated, or (2) when the amount claimed is unliquidated but is determinable by computation with reference to a*

fixed standard in a contract.” Lakes v. Von der Mehden, 117 Wn. App. 212, 217 (2003). Prejudgment interest is appropriate if “*the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion.*” Prier v. Refrigeration Eng.’r Co., 74 Wn.2d 25, 32, 442 P.2d 621 (1968)(emphasis added). See also Burnside v. Simpson Paper Co., 66 Wn. App. 510, 832 P.2d 537 (1992). “*The fact that the parties disputed the amount owed does not affect this result. Mere difference of opinion as to the amount is . . . no more a reason to excuse [a party] from interest than difference of opinion whether he legally ought to pay at all, which has never been held an excuse.*” Taylor v. Shigaki, 84 Wn. App. 723, 732, 930 P.2d 340 (1997). The Court was provided the evidence which if believed established the amount of income Kassa would have realized but for the tortious interference. The Trial Court believed the data provided and relied upon it to award the damages. As a result, it was proper to award pre-judgment interest on the amounts that Kassa had been deprived the use of and the Trial Court did not abuse its discretion.

D. Pugh's Appeal

1. The Trial Court Properly Exercised Its Discretion to Find the Client Lists Taken by Pugh Were Trade Secrets.

Appellant Pugh argues the Trial Court erred by finding that the client list taken from Kassa was a trade secret. In 1981, Washington adopted the Uniform Trade Secrets Act (UTSA), *RCW 19.108*, to “*maintain and promote standards of commercial ethics and fair dealing in protecting those secrets.*” Ed Nowogroski, Inc. v. Rucker, 137 Wash.2d 427, 438, 971 P.2d 936 (1999) (citing, Boeing Co. v. Sierracin Corp., 108 Wash.2d 38, 58, 738 P.2d 665 (1987)). The UTSA defines a trade secret as follows:

“Trade Secret” means information, including a formula, pattern, complication, program, device, method, technique, or process that:

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain secrecy.

RCW 19.108.010(4).

The Supreme Court in Nowogroski set forth a three-part factual test to determine whether a customer list is protected as a trade secret. Nowogroski, 137 Wash.2d at 442. The three part test is as follows: “(1) *whether a list is a compilation of information; (2) whether it is valuable because unknown to other; and (3) whether the owner has made reasonable attempts to keep information secret.*” Id. at 442.

In Washington, “[g]enerally, taking an employer’s confidential customer list without permission is a trade secret misappropriation.” Thola, 140 Wash. App. at 78 (2007). “A customer list is one of the types of information which can be a protected trade secret if it meets the criteria of the Trade Secrets Act.” Nowogroski, 137 Wash.2d at 440 (citing, American Credit Indem. Co. v. Sacks, 213 Cal. App. 3d 622, 262 Cal. Rptr. 92 (1989)) (finding an insurance company’s list of policyholders was a trade secret protected by the Uniform Trade Secrets Act and finding solicitation by former employee constituted a misappropriation within the meaning of the Act).

Pugh does not challenge on appeal that the client list he took from Kassa and brought with him to RJC had independent economic value or that the client list is a compilation of information. Instead, Pugh challenges that the client information he took does not constitute a trade secret because the information was known by others and was not reasonably protected by Kassa.

2. Kassa's Client List Constitutes a Trade Secret.

The Kassa client list created and taken by Pugh contained the following client information: (1) names, (2) addresses, (3) phone numbers, (4) and insurance policy numbers for each client. Ex. P-1. By possessing the policy numbers for each client, it provided Pugh with information including but not limited to: (1) social security numbers, (2) income, (3) types of coverage, (4) family information, (5) number of vehicles, (6) expiration dates, and (7) whether the client owned a home. RP 472, 78-80, 453-54.

Pugh created the client list from Kassa's manila client files Pugh only had access to as a result of his employment with Kassa. RP 450. The policy numbers were only made available to Pugh within the course and scope of his employment with Kassa. RP 79,

83, 230. “As a former employee of Kassa, Pugh had a duty “not to use or disclose the employer’s trade secrets.” Nowogroski, 137 Wash.2d at 439.

The insurance policy information is not generally known and readily ascertainable by proper means, and without the policy information Pugh possessed nothing more than names of people. The Washington Supreme Court supports the above proposition by providing the following citation in Nowogroski:

The RESTATEMENT (THIRD) OF UNFAIR COMPETITION takes the position that “the general rules that govern trades secrets are applicable to the protection of information relating to the identity and requirements of customers.” (citation omitted) The RESTATEMENT explains that “customer identities and related customer information can be a company’s most valuable asset and may represent a considerable investment of resources.”

Nowogroski, 137 Wash.2d at 442-43 (citing, RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. F (1995)).

The two cases that Pugh cites in support of his argument that the Kassa client list is not a trade secret are not applicable. In McCallum v. Allstate Prop. & Cas. Ins. Co., 149 Wash. App. 412, (2009), the issue before the court was whether an insurance claims

manual constituted a trade secret. The McCallum court found that the only requirement met by Allstate was the effort to maintain secrecy, and that Allstate had failed to show that its manuals met any of the other requirements necessary to be found a trade secret. McCallum, 149 Wash. App. at 426.

In making its decision in McCallum that the Allstate claims manuals were not a trade secret under the UTSA, the Appellate Court relied upon Woo v. Fireman's Fund Insurance Co., 137 Wash. App. 480, 154 P.3d 236, *rev'd in part on other grounds*, 161 Wash.2d 43, 164 P.3d 454 (2007), which concerned a similar issue regarding whether a claims manual constituted a trade secret. The Appellate Court in Woo focused on whether the insurance claims manual had "novelty and uniqueness." McCallum, 149 Wash. App. at 425, (citing, Woo, 137 Wash. App. at 484). Like, McCallum, the Woo court concluded that the manuals were not trade secrets. Woo, 149 Wash. App. at 492-93 (holding that insurance manuals were not trade secrets because they lacked novelty and there was no effort to maintain secrecy; Fireman's Fund did not even make an effort to protect the information from public disclosure at trial).

Pugh's focus on the two cases above ignores Washington's long history of providing protection of an employer's client list from disclosure and use by a former employee. See John Davis & Co. v. Miller, 104 Wash. 444, 177 P. 323 (1918); See also J.L. Cooper & Co. v. Anchor Sec. Co., 9 Wash.2d 45, 113 P.2d 845 (1941); and See also Nowogroski, 137 Wash.2d 427 (1999). In John Davis & Co., the Supreme Court of Washington found it would be unfair competition for a former employee after leaving his employment "*to use his acquaintance with customers of that company there acquired and the knowledge of the business which he transacted, as a reason why customers should transfer their business to him or his company.*" John Davis & Co., 104 Wash. at 449. The court further stated that it was unfair competition whether the information had been reduced to writing or whether carried away in the former employee's memory. Id.

The decision in John Davis & Co., was followed by the Supreme Court in J.L. Cooper & Co. v. Anchor Sec. Co., 9 Wash.2d 45, 64-67 (1941), where the Supreme Court once again found that an employee could not use an insurance customer list he had obtained

during his employment with a former employee, whether written or memorized, to solicit the former employer's clients. J.L. Cooper & Co., 9 Wash.2d at 67. Washington's long policy of protecting the former employer's client lists was again affirmed in Nowogroski, 137 Wash.2d 427 (holding an employee may not use or disclose trade secrets belonging to a former employer to actively solicit customers from a confidential list.)

The decisions in J.L. Cooper & Co. and Nowogroski are directly on point, as each case dealt specifically with insurance customer lists used by a former employee to solicit the former employer's clients. See J.L. Copper & Co., 9 Wash.2d 45 (1941) and Nowogroski, 137 Wash.2d 427 (1999). With regard to the decision made by the Supreme Court prior to the adoption of the UTSA in 1981, "*[i]n the absence of legislative intent to the contrary, prior common law which is not contradicted by the Uniform Trade Secrets Act should continue to guide courts in the interpretation of the Act.*" Nowogroski, 137 Wash.2d at 444-45.

The client information that Pugh misappropriated from Kassa meets the requirements necessary to make it a trade secret. The Trial Court's decision should be undisturbed.

3. Kassa's Used Efforts to Protect Its Trade Secrets That Were Reasonable Under the Circumstances.

Part three of the three part test set forth in Nowogroski, for determining whether a customer list is a protected trade secret, is whether the owner of the list made reasonable attempts to keep the information secret. Nowogroski, 137 Wash.2d at 442. The reasonable attempt to maintain secrecy stems from RCW 19.108.010(4)(b), which requires "efforts that are reasonable under the circumstances to maintain its secrecy." RCW 19.108.010(4)(b).

In 2002, Tim Kassa, President of Kassa, started the small insurance agency in Spokane, Washington. RP 45. Kassa only employed family members and close family friends. During the time Pugh was an employee at Kassa, Kassa's agency employees consisted of (1) Tim Kassa, President, (2) Tonya Kassa, wife of Tim Kassa, (3) Julime Kemink, Tonya Kassa's college roommate, (4) Donald Sagendorf, Tim Kassa's brother-in-law, (5) Donna Larson,

family friend of Tim Kassa, and (6) Ryan Pugh, Tim Kassa's neighbor since Pugh was 12-years old. RP 49-50, 70.

With regard to Tim Kassa's personal relationship with Pugh, Tim Kassa considered Pugh a part of his family. RP 70. Tim Kassa attended Pugh's high school football games, went to Pugh on the field with him when he was injured, engaged in social activities with Pugh outside of work, and Tim Kassa's children were in Pugh wedding. RP 70-71.

On a daily basis Tim Kassa would discuss the need to protect the sensitive customer information, and put in place policies and procedures for protecting private client information. RP 66-67. Tim Kassa testified at trial that Kassa did not maintain a written policy regarding confidentiality because "*[w]e are a very small office, family, mom and pop, and we talk about it all the time.*" RP 66. In addition to discussing client confidentiality, Tim Kassa held company meetings regarding confidentiality and personally trained Pugh to not disclose and to protect client information. RP 72-75, 232-34. Tim Kassa also personally monitored all of Pugh's work during his employment at Kassa. RP 75.

Kassa maintained a master client list that was password protected with only two people having access to the information; Tim Kassa and Julie Kemink. RP 77-78, 231-32. Pugh did not have access to the master client list, and Pugh knew the master client list was protected from him. RP 78, 429-30. In addition to the master client list, Kassa maintained manila client folders that contained client information, and only Kassa employees had access to the manila client folders. RP 79, 230-31. Further, Kassa's employees' computers were password protected and Kassa maintained a security system for the building where the client information was stored. RP 82-83.

In addition to the steps taken by Kassa to ensure the confidentiality of its client information, the insurance companies themselves made it known that the client information was not to be disclosed. Ex. P-23. Each time a policy is issued, the insurance company issuing the policy would provide a notice to the insured and Kassa informing the insured that their information would be protected and not disclosed. RP 84-85, 229. Kassa placed a copy of this privacy notice in the client file, and all Kassa employees were

aware of the notice. RP 229. At trial, Tonya Kassa, a licensed insurance agent, testified that in the course of taking her continuing education classes required of all licensed agents, there is an ethics requirement that specifically discusses “*information gathered is not to be redistributed or disseminated to any outside party for your own benefit or the benefit of any other party.*” RP 249.

Finally, Pugh himself knew the client information at Kassa was confidential and was not to be disclosed. RP 450-55. Pugh specifically testified that he knew not to disclose client information to “*a random person off the street.*” RP 453. Pugh also testified that it was his personal belief that the information contained in Kassa client files was confidential, and that he would not want someone to sell his confidential information. RP 455. Finally Pugh testified that Tim Kassa specifically told Pugh not to take the client information with him to RJC/CAK. RP 430.

WPI 351.08 provides factors to consider when determining whether efforts to maintain secrecy were reasonable under the circumstances:

- (1) *The extent to which the information is known outside the plaintiff's business;*

- (2) *The extent to which employees and others in the plaintiff's business know the information;*
- (3) *The nature and extent of the measures the plaintiff took to guard the secrecy of the information;*
- (4) *The existence or absence of an express agreement restricting disclosure; and*
- (5) *The extent to which the circumstances under which the information was disclosed to others indicate that further disclosure without plaintiff's consent was prohibited.*

WPI 351.08. Looking at the factors above, Kassa took reasonable steps to maintain secrecy under the circumstances.

It is important to note that all employees in Kassa's small office were either family members or close family friends. RP 49-50, 70). Thus, the measures set forth above taken by Kassa to protect its client information were reasonable under the circumstances.

With regard to the first WPI factor above, Pugh has provided no evidence showing that Kassa's client information was known outside Kassa's business. Pugh simply states that he was provided the information in the course and scope of his employment, which is not evidence the client information, was known outside of Kassa's business. Second, Pugh had access to the client information because it was a requirement of his employment; he was an insurance agent,

he needed client information to sell policies. To argue because Pugh had access to client information the information was not confidential is nonsensical.

There was no covenant not to compete restricting Pugh's competition with Kassa after termination of his employment; however, a covenant not to compete is not necessary to prevent Pugh from disclosing and using Kassa's trade secrets. A "former employee, even in the absence of an enforceable covenant not to compete, remains under a duty not to use or disclose, to the detriment of the former employer, trade secrets acquired in the course of previous employment." Nowogroski, 137 Wash.2d at 437.

Finally, the circumstances under which Kassa's client information was taken and disclosed to RJC indicates that Pugh needed to have Kassa's permission. Pugh testified at trial that when he informed Kassa he was taking employment at RJC, Tim Kassa instructed him not to take the clients. RP 430.

Kassa's took reasonable steps under the circumstances to protect its client information.

4. The Evidence Supports the Finding of Willfulness.

A trial court's award of punitive damages pursuant to RCW 19.108.030(2) for willful and malicious misappropriation of trade secrets is discretionary, and "*will not be reversed unless clearly erroneous.*" Boeing Co. v. Sierracin Corp., 108 Wash.2d 38, 62, 738 P.2d 665 (1987). Pugh testified at trial that he willfully created the client list to use in the event that he left employment at Kassa. RP 296, 435, 439.

At trial Pugh testified that prior to leaving his employment at Kassa he never made an attempt to see whether he owed any continuing obligation to his former employer Kassa. RP 456. Specifically, Pugh never inquired or researched whether he could disclose Kassa's client information to his new employer. RP 456. Further, Pugh never made any inquiries and did not conduct any independent research with the Washington State Insurance Commissioner as to his ability to sell insurance after leaving Kassa. (RP 457). As a result, when Pugh began his employment at RJC and began soliciting Kassa clients Pugh was still affiliated as an agent with Kassa. RP 458-59. In fact, there was also a period of

time after Pugh left his employment with Kassa that he was selling insurance despite not being affiliated with any agency at all, which is a perquisite for Pugh to sell insurance in Washington. RP 458-60; Ex. P-3; and WAC 284-17-473.

Pugh testified at trial that Tim Kassa specifically told Pugh not to take the client list with him to his new employment at RJC. RP 385 & RP 430. Tim Kassa testimony at trial supports the above testimony of Pugh, as Tim Kassa testified, *"I trust that you won't sabotage any of the files of our office or our information."* RP 87. Tim Kassa further testified that Pugh had informed him that he met with RJC, and Pugh understood that if he did not have a written contract that Pugh could take the client information. RP 88. At this time, Tim Kassa warned Pugh that if he took any client information he would be sued. RP 88. Pugh also testified that Tim Kassa threatened suit if he were to take clients from Kassa, and that Pugh needed to speak with RJC to see whether his employment was contingent on Pugh taking Kassa's clients. RP 386.

Pugh argues in his brief that he did not possess a subjective intent to harm Kassa by taking Kassa's clients. The evidence at

trial showed that Pugh willfully created and took the client list to his new employment at RJC. RP 435, 439. Further the evidence at trial showed that Pugh acted with a total disregard for the law and his duty of loyalty owed to Kassa as an employee. RP 456-60. In Ely v. O'Dell, 146 Wash. 667, 264 P. 715 (1927), the Washington Supreme Court reviewed whether a judgment for willful and malicious injury was dischargeable under the bankruptcy act. In Ely, the Supreme Court stated that “willful” meant nothing more than intentional, and that “malice” meant nothing more “*than that disregard of duty which is involved in the intentional doing of a willful act to the injury of another.*” Ely, 146 Wash. 667, 669 (citing, 1 *Collier on Bankruptcy* (11th ed.) 619).

Pugh’s argument in his brief is that his actions of creating a list of Kassa clients and taking that list to his new employer to solicit Kassa’s clients away was not willful and malicious because Pugh believed he owned the clients. Pugh’s belief that he owned the clients stemmed from the fact he did not have a written contract with Kassa or a covenant not to compete. RP 451. This is not a justifiable belief. A “*former employee, even in the absence of an*

enforceable covenant not to compete, remains under a duty not to use or disclose, to the detriment of the former employer, trade secrets acquired in the course of previous employment.” Nowogroski, 137 Wash.2d at 437.

Following Pugh’s employment at Kassa he still owed a duty of loyalty to Kassa, and not to use or disclose Kassa confidential client information. Id. The Trial Court’s decision to award exemplary damages pursuant to RCW 19.108.030(2) was supported by the evidence at trial, and certainly was not clearly erroneous.

5. The Willful and Malicious Misappropriation By Pugh Was Done For the Benefit Of His Marital Community.

A martial community is liable for intentional torts where the act constituting the wrong either “(1) results or is intended to result in the benefit to the community or (2) is committed in the prosecution of the business of the community.” Clayton v. Wilson, 168 Wash.2d 57, 63, 227 P.2d 278 (2010). Ryan Pugh committed the willful and malicious act of misappropriating Kassa’s trade secrets that was both for the benefit of his marital community and committed in the prosecution of community business. Indeed, Lindsey Pugh was present during the misappropriation. RP 85-86,

260. The client information misappropriated by Ryan Pugh was provided to RJC and Pugh was given a vested interest in the value of the clients taken from Kassa. Ex. P-2. Mr. Pugh's marital community directly benefits from the value of clients that he is vested in at RJC; clients that were willfully and maliciously misappropriated from Kassa. Further, Mr. Pugh used the willful and maliciously misappropriated client information to gain employment with RJC, which financially benefits Mr. Pugh's marital community, in that the wages earned from his employment at RJC/CAK are comingled with community funds and are used to pay community expenses, gain community assets, and management community property. Ex. P-2. Therefore, Mr. Pugh's conduct meets the first prong of the test set forth above, the act was intended to result in the benefit to the community.

Mr. Pugh's conduct also meets the second prong of the test set forth above in Clayton. Washington has broadly construed the second prong of the test for marital community liability in intentional tort cases. Clayton, 168 Wash.2d at 65. Application of the second prong is evidenced by the facts of Clayton.

In Clayton, Douglas Wilson and Mary Kay Wilson hired Andrew Clayton to perform yard work around a rental property owned by the Wilsons. Id. at 61. Prior to paying Mr. Clayton with community funds for the yard work performed, Mr. Wilson would molest Mr. Clayton. Id. Mr. Clayton brought suit to recover damages for the molestation at the hands of Mr. Wilson. Id. The issue on appeal before the Supreme Court was whether the marital community's assets were subject to the damages awarded for the intentional torts committed by Mr. Wilson. Id. at 62.

The Supreme Court of Washington examined whether the molestation occurred within the prosecution of community business. Id. at 63-64. The act of molesting Mr. Clayton occurred after Mr. Clayton had performed work for the benefit of the community and the payment for the work performed was provide out of community funds. Id. Therefore, the Supreme Court held, "*the Wilsons' marital community is liable for Mr. Wilson's intentional torts because he committed them while conducting community business.*" Id. at 68.

Similarly, Ryan Pugh intentionally misappropriated client information from Kassa for the financial gain of his martial

community. The Court's determination to hold Mr. Pugh's marital community liable for his willful and malicious misappropriation of Kassa's client information should be left undisturbed.

6. The Court Correctly Exercised Its Discretion to Find Pugh Did Not Prove A Failure to Mitigate Damages.

Defendant Pugh caused the damages to Kassa, he had the burden to establish that Kassa failed to use reasonable care in mitigating damages and that the plaintiff's failure to mitigate aggravated the plaintiff's injury or otherwise increased the damages suffered. Fox v. Evans, 127 Wn. App. 300, 304-05 (2005) (holding that the record provided sufficient evidence for a jury to find that the plaintiff acted unreasonably in her effort to mitigate her damages.).

A wide latitude of discretion must be allowed to the person who by another's wrong has been forced into a predicament where he is faced with a probability of injury or loss. Only the conduct of a reasonable man is required of him. If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen.

Fox, 127 Wn. App. at 305.

Defendant Pugh's argument that he makes on appeal is that Kassa failed to mitigate damages by not obtaining an injunction to

prevent Pugh from using the trade secrets he willfully and maliciously misappropriated. However, this argument fails as a matter of both fact and law. First, as a matter of law, Kassa had the right to elect his remedy. Indeed, RCW 19.108, et. seq. provides the employer can seek either an injunction or an award of actual damages. See also Ed Nowogroski Ins., Inc. v. Rucker, 137 Wn. 2d 427, 437 (1999) (acknowledging that the UTSA provides an employer in a misappropriation of trade secrets case with a choice of remedies: an injunction or an award damages). The statute is permissive.

Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.

RCW 19.108.020(1).

Second, there was no evidence that if there were an injunction the damages would have been less. In other words, Pugh did not present any evidence that if an injunction was in place the clients would have returned to Kassa. Indeed, Defendant Pugh failed to

rebut the evidence offered by Kassa that an injunction would not have reduced or prevented its damages. As a result, Defendant Pugh failed to prove the affirmative defense and the Court's decision should be upheld.

7. Prejudgment Interest was appropriate.

The Trial Court was presented evidence that established the value of the book of business that was misappropriated by Pugh. RP 319-320. The evidence provided data which allowed the damages to be calculated with exactness. The Trial Court believed the evidence and as a result, an award of interest to compensate Kassa for the loss of the use of those funds was an appropriate use of discretion.

8. Damages were based upon the evidence.

“[D]amage questions are usually discretionary and therefore for the trier of fact, so long as damages fall within the range of relevant evidence.” Womack v. Von Rardon, 133 Wn.App. 254, 263 (2006). Like RJC, Pugh's appeal does not dispute that the damages awarded are within the range of evidence presented. See RP 319-325. Also like RJC, Pugh did not object to the testimony offered by Kassa or Harper with regard to the damages incurred. Instead, Pugh

now attempts to re-argue the factual dispute. However, the Trial Court properly weighed the evidence and made a proper determination of the amount of damages incurred as a result of Pugh misappropriating trade secrets.

9. The Attorney Fees and Costs Awarded Were Reasonable.

“In order to reverse an attorney fee award, an appellate court must find the trial court manifestly abused its discretion.” Chuong Van Pham v. City of Seattle, 159 Wn.2d 527, 538 (2007) (holding that the trial court did not abuse its discretion in calculating the lodestar amount). This is because trial courts are required to *“independently determine what is a reasonable fee.”* Steele v. Lundgren, 96 Wn. App. 773, 780 (1999) review denied, 139 Wn.2d 1026 (2000). In this case, the Trial Court independently determined what constituted a reasonable fee and entered findings of fact in support of its conclusion. CP 1003-1006. Pugh does not assign error to any of the findings entered by Judge Sypolt in support of the award of attorney fees and costs. As a result, they are verities on appeal and a review of them confirms they support the determination of the amount of fees and costs awarded.

Not only do the findings support the award, but Washington law does as well. Attorney fee awards are not required to be reduced when the plaintiff fails to succeed on each claim brought. *“In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim by claim basis. Such a lawsuit cannot be viewed as a series of discrete claims.”* Brand v. Dept. of L&I of State of Wn., 139 Wn.2d 659, 672 3 (1999). See also Blair v. WSU, 108 Wn.2d 558 (1987) (when parties prevail on any significant issue that is inseparable from issues on which the parties did not prevail, a court may award attorney fees on all issues). Pugh has forced years of litigation and forced Kassa to incur attorney fees and costs. Based on Pugh's willful conduct, the Trial Court correctly awarded reasonable attorney fees and costs.

In an odd argument, Pugh claims the Motion for Attorney Fees and Costs were not timely filed. This assertion is directly contradicted by the record. The Judgment against Pugh was filed June 8, 2012. CP 895-897. The Motion and Affidavits supporting

the Motion for Attorney Fees and Costs were filed on June 15, 2012. See e.g. CP 902-941. The argument otherwise is spurious. With regard to an award of all costs Pugh forced Kassa to incur as a result of the misappropriation, as the finder of fact, Judge Sypolt had the discretion to award these as part of the “*actual loss*” caused by Pugh’s misappropriation. RCW 19.108.030.

VI. RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS

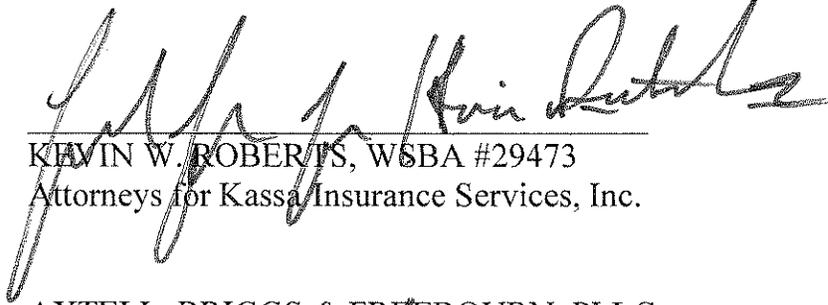
Kassa respectfully requests an award of the reasonable attorney fees and costs incurred in the appeal against RJC and Pugh based on RAP 18.1 and RCW 19.108.040.

VII. CONCLUSION

Pursuant to the foregoing, Kassa Insurance Services, LLC respectfully requests the Trial Court’s rulings in this matter be affirmed.

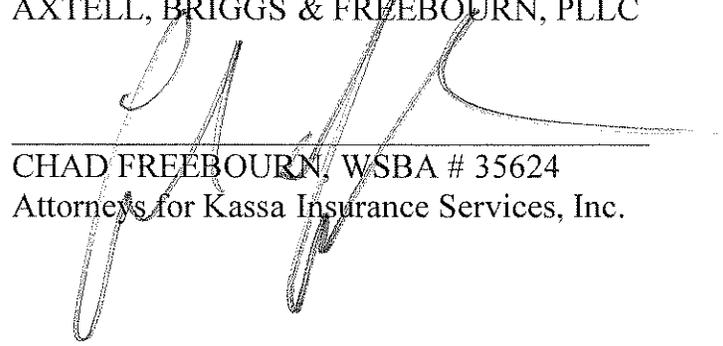
DATED this 15 day of August, 2013.

DUNN & BLACK, P.S.

A handwritten signature in black ink, appearing to read "Kevin W. Roberts", written over a horizontal line.

KEVIN W. ROBERTS, WSBA #29473
Attorneys for Kassa Insurance Services, Inc.

AXTELL, BRIGGS & FREEBOURN, PLLC

A handwritten signature in black ink, appearing to read "Chad Freebourn", written over a horizontal line.

CHAD FREEBOURN, WSBA # 35624
Attorneys for Kassa Insurance Services, Inc.

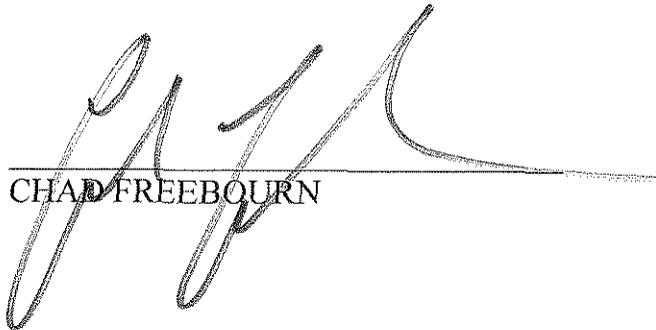
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15 day of August, 2013, I caused to be served a true and correct copy of the foregoing document to the following:

- HAND DELIVERY John F. Bury
- U.S. MAIL Murphy, Bantz & Bury
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CHAD FREEBOURN

RCW 19.108.010

Definitions.

Unless the context clearly requires otherwise, the definitions set forth in this section apply throughout this chapter.

(1) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means;

(2) "Misappropriation" means:

(a) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(b) Disclosure or use of a trade secret of another without express or implied consent by a person who:

(i) Used improper means to acquire knowledge of the trade secret; or

(ii) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was (A) derived from or through a person who had utilized improper means to acquire it, (B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or (C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(iii) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(3) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(4) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process that:

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

[1981 c 286 § 1.]

APPENDIX A

RCW 19.108.040

Award of attorney's fees.

If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or wilful and malicious misappropriation exists, the court may award reasonable attorney's fees to the prevailing party.

[1981 c 286 § 4.]

RCW 19.108.030

Remedies for misappropriation — Damages.

(1) In addition to or in lieu of injunctive relief, a complainant may recover damages for the actual loss caused by misappropriation. A complainant also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss.

(2) If wilful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subsection (1).

[1981 c 286 § 3.]

RCW 19.108.020

Remedies for misappropriation — Injunction, royalty.

(1) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.

(2) If the court determines that it would be unreasonable to prohibit future use, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time the use could have been prohibited.

(3) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

[1981 c 286 § 2.]