IN THE COURT OF APPEALS OF IOWA

No. 0-640 / 10-0136
Filed November 24, 2010

MONONA COUNTY MUTUAL INSURANCE ASSOCIATION,
Plaintiff-Appellee,

vs.

THE HOFFMAN AGENCY, INC.,
Defendant-Appellant.

Appeal from the Iowa District Court for Monona County, Steven J. Andreasen, Judge.

Defendant The Hoffman Agency, Inc. appeals the district court's denial of its motions for directed verdict. **AFFIRMED.**

Paul D. Lundberg of Lundberg Law Firm, P.L.C., Sioux City, for appellant.

Jeff W. Wright and Rosalynd J. Koob of Heidman Law Firm, L.L.P., Sioux City, for appellee.

Heard by Eisenhauer, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

Defendant The Hoffman Agency, Inc. appeals the district court's denial of its motions for directed verdict. The Hoffman Agency, Inc. contends the district court erred in failing to direct a verdict against Monona County Mutual Insurance Association, arguing the evidence was insufficient to find: (1) the expirations list was a trade secret; (2) it misappropriated the alleged secret; (3) there was evidence from which Monona County Mutual Insurance Association could approximate damages; and (4) it misappropriated the trade secret willfully and maliciously. Upon our review, we affirm.

***I. Background Facts and Proceedings*.**

From the evidence presented at trial, a reasonable jury could have found the following facts:

Plaintiff Monona County Mutual Insurance Association (MCM) is a mutual insurance association licensed in Iowa to write insurance policies covering property located in Monona, Crawford, Harrison, and Ida counties. Its license only allows it to insure property; the license does not allow MCM to sell other types of insurance policies, including policies covering automobiles and commercial properties. MCM's office is located in Onawa, Iowa.

MCM has an agent within its company that sells its policies. Additionally, MCM contracts out with other businesses and individuals to sell its policies. One such company was Valley Insurance Agency (Valley).

Valley, an independent insurance agency, was part of Valley Bank and Trust located in Mapleton, Iowa. As an independent agency, Valley contracted with many insurance companies, including Progressive, Grinnell Mutual, United

Fire and Casualty, as well as MCM, to sell those companies' insurance policies. As part of its regular business, Valley sought out customers to purchase insurance policies, though many of its customers were persons who were also customers of Valley Bank. Based upon the needs of the customer, Valley would submit a customer application to an insurance company with whom it had contracted, and that insurance company would underwrite a policy based upon information provided on the application. As part of the arrangement between Valley and the insurance policy providers, the customer paid his or her premium to the insurance company underwriting the policy, and that company would in turn pay Valley a commission based upon the premium.

In the insurance industry, it is understood that persons with insurance policies generally continue their policies until the date of the policy's expiration, which is typically one year from the date of the application. At that time, the customer is more likely to update their policy due to needed changes in coverage, or to shop around to compare premiums. Insurance agents generally have an "expirations list" created from information contained in the customer's insurance policy, including the insured's name, type of coverage, policy premium, and the expiration date of the policy. Agents reference their expirations list to tell when to contact their customers. Before the expiration date of the policy, the insurance agent contacts the customer to see if the customer's needs have changed and to ensure the customer's continued business. Expirations lists are shared within a company, but not shared with competitors. MCM kept its expirations list in a vault that was only accessible to two secretaries, its agent, and its manager; MCM's expirations list was not shared with the public.

Valley utilized its own computers to keep track of its customers and their insurance business. Valley, by its employees, inputted customer insurance policy information into Valley's computers, and, from that information, generated its own expirations list for its agents, including information from MCM policies. Valley did not share its list with competitors.

On January 1, 2004, Valley renewed its agency contract with MCM. That contract provided, in relevant part:

> Ownership of Expirations. This contract shall not be assignable, and upon its termination, . . . this agency contract shall have no redeemable value and all records, use and control of expirations shall be the property of [MCM].

Three years later, Valley received notice that United Fire and Casualty planned to terminate its contract with Valley. Valley Bank and Trust made the decision to sell its insurance agency business.

In March 2007, Steve Hamers, then president and CEO of Valley Bank and Trust and agency manager of Valley, contacted Tim Huepke, a partner and secretary of defendant The Hoffman Agency, Inc. (Hoffman). Hoffman, also an independent insurance agency, has offices in twelve locations in Iowa, including its home office in Mapleton. Like Valley, Hoffman contracted with numerous insurance companies to sell those companies' insurance policies. Hoffman was also paid a commission based upon the insurance premium paid to the insurance policy provider. Hoffman kept records of its business and also generated its own expirations list based upon its customers' policy information. Though Hoffman contracted with many of the same insurance companies as Valley, including United Fire and Casualty, Hoffman did not have an agency contract with MCM.

Hamers and Huepke began negotiations for the sale of Valley. Hamers communicated to Huepke that MCM would not be extending an agency agreement to Hoffman, and Huepke understood that the book of business written by Valley with MCM would not be part of the sale. Nevertheless, Hamers believed Valley's MCM business was still of some value to Hoffman and wanted to include it in the sale. On behalf of Hoffman, Huepke had agreed to pay 1.5 times Valley's annual commissions for the other parts of Valley's business, an amount typical for such a sale. However, Huepke did not want to pay that amount for Valley's MCM book of business it would not receive. Huepke asked if Hoffman could receive Valley's expirations list concerning MCM's policies. Hamers advised Huepke he would have to check with Valley's attorney and let him read the MCM contract to see if that would be a problem.

A finalized letter of intent was signed by Valley and Hoffman on April 3, 2007. The letter of intent stated, in relevant part:

> It is acknowledged by [Valley] and [Hoffman] that the property and casualty book of business written by [Valley] with [MCM] is not marketable and all records, use and control of expirations of business written by [Valley] with [MCM] remain the property of [MCM].

The total purchase price was agreed to be $109,329, which included $15,896 for MCM's expirations list, though no language about the expirations list was expressly contained in the letter. Additionally, Valley agreed it would contact all of its insurance customers explaining that its book of business had been sold and recommending that the customers contact their new agent to schedule an insurance review.

After the letter of intent was signed by Valley and Hoffman, Hamers took to Valley's attorney the question whether Valley could provide the MCM expirations list to Hoffman. As a result of miscommunication between Hamers and the attorney, the attorney believed the list contained only the names, addresses, and telephone numbers of the insureds. The attorney advised Hamers that Valley could provide the list to Hoffman.

Pursuant to the agreement, Valley sent a letter out to all of its customers, including those with MCM policies, advising Valley was being sold to Hoffman. The letter further stated: "We have provided many of you with insurance through [MCM] for your home or farm. Please contact Chris Blake of [Hoffman] for your option on renewal of these policies."

On April 10, 2007, the sale of Valley to Hoffman was finalized, and a "book of business purchase agreement" was executed by Valley and Hoffman. The purchase agreement contained language similar to the letter of intent, stating: "It is expressly acknowledged that [Valley's] book of business written with [MCM] is not marketable and all records, use and control of expirations of said business remains the property of [MCM]." After the sale, Valley provided Hoffman with all of its expirations lists for its customers' policies, including the policies written by MCM.

On April 20, 2007, Hoffman sent a letter out to all of Valley's customers, including those insured by MCM. The letter stated, in relevant part:

> We will provide you with the same excellent service as you have been accustomed to. Anyone that has a [MCM] policy will be contacted 45 days prior to your renewal date. Renewals with all of the other companies will continue as usual.

Hoffman's president, Clarence Hoffman, felt uncomfortable with the language of that letter, and another letter, removing the language about contacting those with MCM policies, was sent out to all of Valley's customers.

Chris Blake, an agent employed by Hoffman, began calling MCM customers using the expirations list provided by Valley to solicit business for Hoffman. Blake spoke with one former Valley customer who, after speaking with Blake, switched his business from MCM to one of Hoffman's insurance providers.

Thereafter, MCM filed its petition at law, later amended, against Valley and Hoffman, asserting, among other things, claims of misappropriation of MCM's trade secrets against both Valley and Hoffman. Specifically, MCM asserted that its expirations list was a trade secret that Valley and Hoffman misappropriated by use of the list, causing MCM damages. Hoffman answered and filed cross-claims against Valley. Valley ultimately settled with both MCM and Hoffman and was dismissed from the case. Pursuant to an agreement between MCM and Hoffman, Hoffman returned the expirations list to MCM on June 28, 2007.

The matter proceeded to trial in 2009. There, MCM introduced a list of thirty-four policies it claimed it lost to Hoffman between April 30, 2007, and September 30, 2007. The list showed the customers' original policy dates; one customer had been an MCM policy holder since 1972. The list stated those policies' total premiums, ranging from $72.75 to $7481.45, equaling a total of $30,623.05. MCM's secretary testified that the loss of thirty-four policies was numerous compared to past years' losses.

Former Iowa Insurance Commissioner, Bruce Foudree, an attorney who practices in insurance law, testified as an expert witness on behalf of MCM. He testified that the definition of "expirations" included the names of the insured, their addresses, phone numbers, policy information and premium, type of insurance, and policy expiration dates. He explained the use of the words "expirations" referred generally to the information and "expirations list" pertained to the information in list form. He testified the value of an expirations list went to the heart of a business, and if a competitor received a company's expirations list, business would essentially be handed to the competitor on a plate. He testified that an expirations list is very valuable, so valuable that Hoffman paid for it. He testified that based upon the language in Valley and Hoffman's purchase agreement, Hoffman should have known Valley could not give Hoffman MCM's expirations list and that it was receiving the information improperly. Additionally, Foudree testified that in his opinion "a larger number than normal, far larger than you would expect, left and went over to [Hoffman]." He also testified that once an insurance company loses business, it is difficult to get that business back.

Hoffman's agent, Blake, testified that only one customer changed to Hoffman as a result of his calling MCM customers, and that no business came as a result of the letter he sent out. He testified that many of the other customers walked into Hoffman's office or contacted him to switch to Hoffman's insurance providers on their own initiative. He testified that Hoffman's expirations list was not shared with competitors and was considered confidential.

One customer who switched from MCM to Hoffman testified that he was a Valley Bank employee and planned to switch anyway. A member of the family

that switched their eight policies from MCM to Hoffman testified that the family planned to switch from MCM anyway because the family had been upset by a claim handled by MCM. Another customer testified he initially purchased insurance with Valley due to his relationship with Valley Bank, and, when he learned Valley was going to be sold, he contacted two other insurance offices for quotes on premiums. He testified he ultimately switched to Hoffman because its premium was lower.

The manager of MCM testified and admitted there was no evidence that Valley and Hoffman wanted or conspired to do harm to MCM. He also admitted that there was no evidence, other than one customer, that customers switched from MCM to Hoffman because of Hoffman's use of the expirations list.

At the end of MCM's case-in-chief and again at the end of Hoffman's case, Hoffman moved for a directed verdict, which the court denied. Thereafter, the court provided the parties with a final set of jury instructions and verdict forms, and asked for objections. Although Hoffman objected that there was insufficient evidence to submit the questions of whether the expirations list was a trade secret and whether Hoffman misappropriated the alleged secret, it did not object to the substance of the instructions. The case was then submitted to the jury.

The jury returned a verdict in MCM's favor. The jury specifically found the expirations list was a trade secret of MCM and Hoffman misappropriated that secret. Additionally, the jury found Hoffman's misappropriation was "willful and malicious." The jury awarded MCM $69,465.61 in "actual damage[s] and unjust enrichment."

After trial, MCM requested the court award attorney fees and exemplary damages, which Hoffman resisted. Hoffman also filed a motion for judgment notwithstanding the verdict and a motion for a new trial. The court, in ruling on the post-trial motions, denied Hoffman's motion and granted MCM's motions. As to exemplary damages, the court's ruling stated:

> [T]he court would note again that the jury awarded damages in the amount of $69,465.61. The court would further note that although the jury found the conduct of Hoffman to be willful and malicious, there was little or no evidence suggesting Hoffman's conduct was specifically intended to harm [MCM] or was otherwise committed with ill will, as opposed to reckless disregard. Finally, the court would note that Hoffman returned the expirations list to [MCM] after the present lawsuit was filed and had use of the expirations for only a short time. Considering these circumstances, the court believes a reasonable and appropriate amount of exemplary damages under [Iowa Code] section 550.4(2) [2007] is $60,000.

Hoffman appeals, contending the district court erred in failing to direct a verdict against MCM, arguing the evidence was insufficient to find: (1) the expirations list was a trade secret; (2) it misappropriated the alleged secret; (3) there was evidence from which MCM could approximate damages; and (4) it misappropriated the trade secret willfully and maliciously.

***II. Scope and Standards of Review*.**

The standard of review from a denial of a motion for a directed verdict is for errors at law. *Jackson v. State Bank of Wapello*, 488 N.W.2d 151,155 (Iowa 1992). In reviewing rulings on a motion for a directed verdict, we simply need ask whether there was sufficient evidence to generate a jury question. *Id*. We, like the district court, view the evidence in the light most favorable to the party against whom the motion for a directed verdict is directed. *Id*. The evidence is

considered in the light most favorable to the nonmoving party. *Heinz v. Heinz*, 653 N.W.2d 334, 338 (Iowa 2002).

III. Misappropriation of Trade Secrets.

MCM's trade secrets claim is based on the Iowa Uniform Trade Secrets Act, Iowa Code chapter 550. Under chapter 550, "an owner of a trade secret is entitled to recover damages for the misappropriation." Iowa Code § 550.4(1). Thus, before damages can be recovered, it must be found that (1) an owner possessed a trade secret and (2) that secret was misappropriated by another. *See id*.

A. Existence of a Trade Secret.

Hoffman first contends there was insufficient evidence to generate a jury question on whether the expirations list was a trade secret. We disagree.

Iowa Code section 550.2(4) defines a trade secret as

> information, including but not limited to a formula, pattern, compilation, program, device, method, technique, or process that is both of the following:
>
> a. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by a person able to obtain economic value from its disclosure or use.
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

See also Cemen Tech, Inc. v. Three D Indus., L.L.C., 753 N.W.2d 1, 6 (Iowa 2008). Among other things, "[a] trade secret can . . . relate to other aspects of business operations such as pricing and marketing techniques or the identity and requirements of customers." *Cemen Tech, Inc*., 753 N.W.2d at 7 (citing Restatement (Third) of Unfair Competition: Definition of Trade Secret § 39 cmt. d (1995)). Additionally, the Iowa Supreme Court has stated:

> Business information may also fall within the definition of a trade secret, including such matters as maintenance of data on customer lists and needs, source of supplies, confidential costs, price data and figures. One commentator explains:
>
> > Trade secrets can range from customer information, to financial information, to information about manufacturing processes, to the composition of products. There is virtually no category of information that cannot, as long as the information is protected from disclosure to the public, constitute a trade secret.
>
> We believe that a broad range of business data and facts which, if kept secret, provide the holder with an economic advantage over competitors or others, qualify as trade secrets.

US West Commc'ns, Inc. v. Office of Consumer Advocate, 498 N.W.2d 711, 714 (Iowa 1993) (internal citations omitted) (concluding that "the lease, sale and purchase information possessed by West and its subsidiaries fit[] within the term 'information' as used in section 550.2(4)"); *see also S & W Agency, Inc. v. Foremost Ins. Co.*, 51 F. Supp. 2d 959, 979 (N.D. Iowa 1998) (holding a reasonable jury could have found that an insurance company's expirations list constituted trade secrets, which had independent economic value based upon the evidence in that case); *Basic Chems., Inc. v. Benson*, 251 N.W.2d 220, 230 (Iowa 1977) (applying common law and determining that formula books, "buy books," "cost books," and customer books constituted trade secrets).

Factors to consider in determining whether information constitutes a trade secret under Iowa law include

> "(1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken . . . to guard the secrecy of the information; (4) the value of the information [to the business and its competitors]; (5) the amount of effort or money expended . . . in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others."

Cemen Tech, Inc., 753 N.W.2d at 7-8 (quoting *Kendall/Hunt Pub'g Co. v. Rowe*, 424 N.W.2d 235, 246 (Iowa 1988)). The method by which an individual obtains information is also probative on whether certain information was intended to remain confidential and not available to the general public. *Id*. at 10. Generally,

> [i]nformation that is readily ascertainable by proper means is not protectable as a trade secret, and the acquisition of such information even by improper means is therefore not actionable. . . . However, the accessibility of information, and hence its status as a trade secret, is evaluated in light of the difficulty and cost of acquiring the information by proper means.

Id. (quoting Restatement (Third) of Unfair Competition: Improper Acquisition of Trade Secrets § 43 cmt. d).

Considering the evidence in the light most favorable to MCM, along with the abovementioned factors, we conclude there was sufficient evidence to generate a jury question on whether the expirations list was a trade secret. Here, the expirations list at issue, which contained detailed MCM customer information including policies' expiration dates, types of business, and policy premiums, clearly falls within the type of information contemplated by section 550.2(4). The information contained in the expirations list was not available to MCM's competitors. The evidence at trial indicated that insurance businesses, including Hoffman and MCM, protected their expirations lists because they are of great value to their businesses. In fact, MCM's agency contract with Valley specifically detailed that, in the event the contract was terminated, it, not Valley, retained control of its expirations. Hoffman acknowledged this in the purchase agreement. Although Hoffman claims the information on the list was readily available to it, it is unclear how Hoffman would know who to contact and when,

without the information contained on the list; a list that provided Hoffman with the crucial information, including MCM's customers' premiums and policy expiration information, needed to win over MCM's accounts before renewal occurred. Moreover, Hoffman admitted it purchased the information for over $15,000, a large amount to pay for, as claimed by Hoffman, "readily available" information. Finally, the amount paid by Hoffman supports that MCM's list was of independent economic value to Hoffman. Because we agree there was sufficient evidence generate a jury question on whether the expirations list was a trade secret, we conclude the district court did not err in failing to direct the verdict in Hoffman's favor on this issue.

***B. Misappropriation*.**

Iowa Code section 550.2(3) defines "misappropriation" as doing any of the following:

> a. Acquisition of a trade secret by a person who knows that the trade secret is acquired by improper means.
>
> b. Disclosure or use of a trade secret by a person who uses improper means to acquire the trade secret.
>
> c. Disclosure or use of a trade secret by a person who at the time of disclosure or use, knows that the trade secret is derived from or through a person who had utilized improper means to acquire the trade secret.
>
> d. Disclosure or use of a trade secret by a person who at the time of disclosure or use knows that the trade secret is acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use.
>
> e. Disclosure or use of a trade secret by a person who at the time of disclosure or use knows that the trade secret is derived from or through a person who owes a duty to maintain the trade secret's secrecy or limit its use.
>
> f. Disclosure or use of a trade secret by a person who, before a material change in the person's position, knows that the information is a trade secret and that the trade secret has been acquired by accident or mistake.

Subsections (e) and (f) were the only two definitions submitted to jury, based upon MCM's allegations against Hoffman. Hoffman contends there was insufficient evidence to submit the question of misappropriation to the jury under either definition.

1. Iowa Code section 550.2(3)(e).

Hoffman does not dispute the information was disclosed to or used by it. Rather, Hoffman argues it did not know Valley had a duty to maintain the expirations list's secrecy, and therefore subsection (e) should not have been submitted to the jury. We disagree.

"'Knows' or 'knowledge' means that a person has actual knowledge of information or a circumstance or that the person has reason to know of the information or circumstance." *Id*. § 550.2(2). Here, Valley and Hoffman's letter of intent and purchase agreement were introduced into evidence, which contained explicit language that Hoffman acknowledged that "*all records*, *use and control of expirations of business* written by [Valley] with [MCM] remain[ed] the property of [MCM]." (Emphasis added.) The expert's testimony evidenced that the term "expirations," an insurance industry term of art, includes the name, address, and phone number of the insured, policy and premium information, type of insurance, and policy expiration dates. All agents and party representatives testified as to the use of an expirations list in their insurance business. The expert testified that the value of an expirations list went to the heart of a business, and that if a competitor received a company's expirations list, business would essentially be handed to the competitor on a plate. Based upon this

evidence, we agree with the district court there was sufficient evidence to submit the section 550.2(3)(e) definition of misappropriation to the jury.

2. Iowa Code section 550.2(3)(f).

Hoffman also argues it did not know that the information was a trade secret acquired by accident or mistake, and therefore the question should not have been submitted to the jury. Again, we disagree.

At trial, the expert, along with Hoffman, MCM's, and Valley's representatives, testified concerning use of expirations lists in the insurance business. Hoffman's agent Chris Blake testified that Hoffman's own expirations list was considered confidential and was not shared with the public. Additionally, the parties agreed that Valley's attorney's testimony would be that he told Hamers that Valley could provide the expirations list to Hoffman, without knowing the list contained expirations information due to a miscommunication between Hamers and the attorney. We agree with the district court there was sufficient evidence to submit the section 550.2(3)(f) definition of misappropriation to the jury.

3. Confidential Relationship.

Hoffman also argues:

> If the jury's misappropriation verdict is upheld in this case, it will be the first reported Iowa case where misappropriation of a trade secret is deemed established against a party (Hoffman), who was not in a confidential relationship with the alleged owner of the trade secret.

Hoffman notes that Iowa Code section 550.2(3) is silent on the requirement of a confidential relationship, but that Iowa cases have indicated such a relationship is required. *See*, *e.g.*, *Lemmon v. Hendrickson*, 559 N.W.2d 278, 279 (Iowa 1997)

("There are three recognized prerequisites for relief based on the appropriation of a trade secret: (1) existence of a trade secret, (2) acquisition of the secret as a result of a confidential relationship, and (3) unauthorized use of the secret"; and citing *Basic Chemicals*, 251 N.W.2d at 226, a case which relied solely on the common law). However, MCM contends that error was not preserved on this issue based on Hoffman's failure to object that the jury instruction on the misappropriation claim, which did not include the existence of a confidential relationship as an element, and based on its failure to assert the issue in its motion for directed verdict. We agree.

Here, Hoffman did not object to the jury instruction and challenge the instruction's definitions of "misappropriation" for failing to state that a confidential relationship was required. The objection made by Hoffman only concerned whether there was sufficient evidence, under the definitions stated within the instruction, to submit the misappropriation question to the jury. Iowa Rule of Civil Procedure 1.924 prohibits raising an objection to a jury instruction on appeal unless a timely objection was made in the trial court. *See also Spencer v. Spencer*, 479 N.W.2d 293, 297 (Iowa 1991) ("Failure to timely object to an instruction not only waives the right to assert error on appeal, but also the instruction, right or wrong, becomes the law of the case.").

Additionally, Hoffman did not raise the issue in its motion for directed verdict. Our review of a ruling on a motion for directed verdict is limited to the grounds raised in the motion. *Leaf v. Goodyear Tire & Rubber Co*., 590 N.W.2d 525, 528 (Iowa 1999). Our preservation rule requires that issues must be presented to and passed upon by the district court before they can be raised and

decided on appeal. *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998). Moreover, error must be raised with some specificity in a directed verdict motion. *See Ragee v. Archbold Ladder Co.*, 471 N.W.2d 794, 798 (Iowa 1991). We find Hoffman has failed to preserve this issue for our review. Accordingly we conclude the district court did not err in failing to direct the verdict in Hoffman's favor on the issue of misappropriation.

***C. Damages*.**

***1. Actual Damages and Unjust Enrichment*.**

Hoffman argues there was insufficient evidence to support the jury's award of actual damages and unjust enrichment. Although this is a close question, we disagree.

Iowa law permits damages for Hoffman's misappropriation of MCM's trade secret. "Damages may include the actual loss caused by the misappropriation, and the unjust enrichment caused by the misappropriation which is not taken into account in computing the actual loss." Iowa Code § 550.4(1).

> There is a distinction between proof of the fact that damages have been sustained and proof of the amount of those damages. Damages are denied where the evidence is speculative and uncertain whether damages have been sustained. But "[if] the uncertainty lies only in the amount of damages, recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated."
>
> Thus, some speculation is acceptable. On this point, we have noted that "[w]hile it may be hard to ascertain . . . a loss with preciseness and certainty, the wronged party should not be penalized because of that difficulty. . . ."
>
> Courts and commentators have noted that trade secret valuation is particularly difficult:
>
> > [A]lthough the burden to prove damages is upon the plaintiff, where there are damages which cannot be ascertained with reasonable certainty under the standard formulas for measure of damages,

> establishing a rule of damages for the case rests in the sound discretion of the trier of fact, based upon the best evidence available.
>
> This court has previously allowed damages for lost profits based on a market analysis in a common-law trade secret misappropriation case. The court [has] noted that the process the district court used was a "reasonable basis from which the amount of damages can be inferred or approximated."
>
> Given the difficulty of assessing damages in trade secret cases, courts have frequently analogized damages in a trade secret action to those measures of damages usually employed in patent infringement cases:
>
> > Despite the fact that patent infringement and trade secret misappropriation are distinct wrongs, the courts tend to apply what is essentially a patent standard of damages, referring to either defendant's profits or plaintiff's losses. . . .
> >
> > . . . .
> >
> > . . . As mentioned, courts likewise allow considerable leeway on speculation involving damages in trade secret misappropriation cases to prevent unfair competitors from profiting by their wrong-doing.

Olson v. Nieman's, Ltd., 579 N.W.2d 299, 309-10, 313 (Iowa 1998) (internal citations omitted). "[A]ll that is required to justify an award of damages 'is that the plaintiff produce the best evidence available and that this evidence afford a reasonable basis for estimating the loss.'" *Smith v. Smithway Motor Xpress, Inc*., 464 N.W.2d 682, 688 (Iowa 1990).

Here, MCM produced a list of thirty-four policies it claimed it lost between April 30, 2007, and September 30, 2007. The list contained the customers' total premiums paid on those policies, totaling over $30,000. It also contained information about how long those policies had been with MCM, the majority of which had been with MCM since 1999 or before. Based upon the timing of the change of business, along with the amount of time the customers had been customers of MCM, we find there was proof of a reasonable basis from which the

amount of damages could be inferred or approximated by the jury. Accordingly, we conclude the district court did not err in failing to direct the verdict in Hoffman's favor on this issue.

***2. Exemplary Damages*.**

Finally, Hoffman contends the district court erred in denying its motion for a directed verdict because Hoffman had no confidential relationship with MCM and Hoffman did not acquire the trade secret by improper means. Additionally, Hoffman argues there was insufficient evidence to support submission of the question of whether Hoffman committed a willful and malicious misappropriation. We disagree.

***a. Improper Means*.**

Having already found that Hoffman waived its claim concerning the alleged requirement of a "confidential relationship," we turn to its argument that the district court erred because there was no finding that it acquired the trade secret by improper means. Under chapter 550, "[i]f a person commits a willful and malicious misappropriation, the court may award exemplary damages in an amount not exceeding twice the award made under subsection 1." Iowa Code § 550.4(2).

Section 550.4(2) does not expressly exempt any of definitions of "misappropriation" set forth in section 550.2(3) from the availability of exemplary damages. In fact, the section does not reference any specific definition of misappropriation. The statute only requires a finding that the misappropriation was committed willfully and maliciously. *See id.* § 550.4(2). Because the theories of misappropriation in this case were submitted under the definitions

contained in subsections (e) and (f) of section 550.2(3), which do not require a finding of "improper means," we look to the actions of Hoffman to determine whether the record supports a finding of willful and malicious conduct.

***b. Willful and Malicious*.**

As stated above, the court may award exemplary damages if a person commits a "willful and malicious misappropriation." *Id*. § 550.4(2). Exemplary damages serve as a form of punishment and to deter the defendant and others from repeating similar outrageous conduct. *Olson*, 579 N.W.2d at 316. The decision whether to award exemplary damages pursuant to Iowa Code chapter 550 is an issue left to the discretion of the district court. *See 205 Corp. v. Brandow*, 517 N.W.2d 548, 553 (Iowa 1994).

Actual malice is characterized by such factors as personal spite, hatred, or ill will. *Schultz v. Sec. Nat'l Bank*, 583 N.W.2d 886, 888 (Iowa 1998). Legal malice is shown by wrongful conduct committed or continued with a willful or reckless disregard for another's rights. *Id*. Another court has explained:

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

NCMIC Fin. Corp. v. Artino, 638 F. Supp. 2d 1042, 1081 (S.D. Iowa 2009) (quoting *X-It Prods., L.L.C. v. Walter Kidde Portable Equip*., *Inc.*, 227 F. Supp. 2d 494, 532-33 (E.D. Va. 2002)).

The testimony at trial constituted sufficient evidence that Hoffman knew or should have known the expirations list was a trade secret. Additionally, the letter of intent and purchase agreement between Valley and Hoffman evidenced that Hoffman was aware that MCM retained the use and control of its expirations list. Yet Hoffman paid over $15,000 to acquire MCM's list. We find the district court did not abuse its discretion in awarding MCM exemplary damages. Accordingly, we affirm the district court's ruling denying Hoffman's motion for a directed verdict.

***IV. Conclusion*.**

Upon our review, we agree with the district court there was sufficient evidence to generate a jury question on whether the expirations list was a trade secret and whether Hoffman misappropriated that trade secret, as defined by Iowa Code sections 550.2(3)(e) & (f), (4). We find Hoffman failed to preserve for our review its argument that a finding of a "confidential relationship" was required. Additionally, we conclude the district court did not err in submitting the issue of damages to the jury, as there was proof of a reasonable basis from which the amount of damages could be inferred or approximated by the jury. Finally, we conclude a finding that the trade secret was acquired by "improper means" was not required under submission to the jury of sections 550.2(3)(e) and (f) as the statutory grounds for misappropriation, and the district court did not

abuse its discretion in awarding MCM exemplary damages. Accordingly, we affirm the district court's ruling denying Hoffman's motion for a directed verdict.

AFFIRMED.