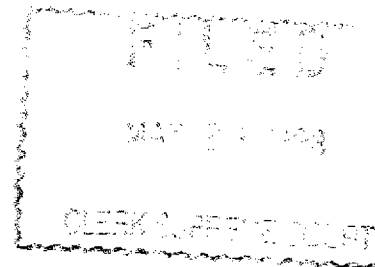


IN THE COURT OF APPEALS OF IOWA

No. 8-135 / 97-174



**KIRK HUISENGA, WILLIAM PEARSON and HUISENGA-PEARSON
AGENCY, INC.,**

Plaintiffs-Appellants/Cross-Appellees,

vs.

**GREAT AMERICAN INSURANCE COMPANY, VIRGIL A. KAHL, NORTH
IOWA GENERAL AGENCY, INC. d/b/a ELLERBROEK & ASSOCIATES,
WADE ELLERBROEK, HENRY TIMMERMAN, DAVID G. SIEPERDA,
JOHN HULSHOF, JAMES GERBER, LINDA KLEVE, STATE BANK
INSURANCE & REALTY, CORP., SECURITY FINANCIAL AGENCY, INC.,
and OTTER VALLEY INSURANCE & REAL ESTATE, LTD.,**

Defendants-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Osceola County, Frank B. Nelson,
Judge.

The plaintiffs appeal the judgment entered by the district court, following a jury trial, in their favor on their action against defendants for intentional and improper interference with the purchase of an insurance agency owned by a third party.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Michael McDonough and Paul D. Gamez of Moyer & Bergman, P.L.C., Cedar
Rapids, for appellants.

Randy L. Waagmeester of DeWaay & Waagmeester, Rock Rapids, and
Richard P. Mahoney and Victor E. Lund of Mahoney, Dougherty & Mahoney, P.A.,
Minneapolis, Minnesota, for appellees.

Heard by Cady, C.J., and Huitink and Vogel, JJ.

VOGEL, J.

The plaintiffs, Kirk Huisenga, William Pearson, and Huisenga-Pearson Agency, Inc. (“H-P” or “Plaintiffs”), appeal portions of the judgment entered by the district court, following a jury trial, in their favor on their action against defendants for intentional and improper interference with H-P’s purchase of an insurance agency, previously owned by Gale Howe. Defendants cross-appeal.

Background facts. Kirk Huisenga has been a licensed independent insurance agent since 1976. In 1983, Huisenga signed a contract with Great American Insurance Co. (“Great American”), a company that specialized in crop insurance, for the purpose of obtaining the right to provide federal crop insurance known as multi-peril crop insurance (“MPCI”).

William Pearson has been a licensed independent insurance agent for eleven years, selling MPCI insurance in both Osceola and Lyon Counties through Rain & Hail Insurance. In 1991, Pearson joined forces with Huisenga to form the Huisenga-Pearson Agency, located in Sibley, Iowa.

In May 1992, Gale Howe, an insurance agent in Lyon and Osceola Counties, informed Huisenga and Pearson he intended to sell his insurance agency and retire. Huisenga and Pearson agreed to purchase Howe’s agency for \$100,000. The primary asset of this transaction was Howe’s customer list or “expiration list,” which is a highly-guarded and valued asset within the insurance industry. Following their

agreement, Howe provided a list of his customer names to H-P. Pursuant to this purchase, H-P obtained approximately 350 customers from Howe's customer files. As a result, H-P's crop business was anticipated to increase to an annual premium volume of \$300,000, with the percentage of H-P's business from crop insurance increased to forty percent.

In order to finance the \$100,000 purchase, H-P chose North Central Crop Insurance ("NCCI") as its MPCCI insurance company, as it offered them a cash grant. H-P then informed Great American it intended to roll the crop insurance business over to NCCI. Virgil Kahl, assistant vice-president of Great American's farm and crop division, informed H-P they would regret their decision and that Great American would not take their decision to go with NCCI lying down. In September 1992, Kahl arrived in Sibley and canceled Great American's contract with H-P. Over the next several months, Great American proceeded to appoint new agents in Lyons and Osceola Counties.

H-P continued its efforts to ease the transition from Howe to their agency and new crop insurance company. Howe personally introduced his former customers to Huisenga and brought his customer files to the corporate office in Sibley. Howe additionally sent out an introductory letter designed to inform his former customers about the impending sale.

In the fall of 1992, several Great American agents conducted a meeting at the Pizza Ranch in Rock Rapids to discuss various marketing techniques and their respective territories with regard to soliciting Huisenga and Howe's Great American customers. The agents discussed calling, and ultimately did call, Great American to ask whether the names they received on a potential customer list were already Great American insureds. Among the agents present at this meeting were Henry Timmermans, David Sieperda, James Gerber, and John Hulshof.

Gerber, Timmermans, and Sieperda sent out a fact sheet stating to potential customers that H-P failed to tell their customers they would no longer be insured by Great American if they remained H-P's customer. One of Great American's agents, Wade Ellerbroek, sent out solicitation letters to approximately 150 people in an effort to solicit business for Great American. Ellerbroek had purchased the names of Huisenga's customers for \$400 from Linda Kleve, who had previously been an executive secretary to Huisenga and had been fired. Timmermans obtained names directly from Great American and Sieperda similarly obtained customers through the acquisition of H-P's customer list.

Various customers of H-P and Howe informed them they had received letters from Great American introducing new agents for MPCl and a transfer form suggesting the recipient transfer their account with H-P or Howe to Great American. H-P and Howe sent out letters to all customers on their client lists in an attempt to

stem the flow of business back to their agency. According to H-P, as a result of Great American's campaign, it lost a significant portion of the MPCl insurance business, almost 160 customers, which severely curtailed their insurance commissions.

I. Defendants' conduct and attendant damages.

A. Intentional interference with existing contract. The jury returned a verdict finding both Great American and Kahl intentionally and improperly interfered with the existing H-P contract to purchase the Howe agency. Defendants, Great American and Kahl, appeal the district court's denial of their motion for a directed verdict based on a lack of defendants' interferences. We review the motion for directed verdict for errors of law. Iowa R. App. P. 4; *Lawrence*, 534 N.W.2d at 418.

Restatement (Second) of Torts § 766A is concerned with the actor's intentional interference with plaintiff's performance of his own contract, either by preventing that performance, *or* making it more expensive or burdensome. *Id.*; *see Nesler v. Fisher & Co.*, 452 N.W.2d 191, 195 (Iowa 1990). The *Nesler* case is instructive in defining what constitutes "improper interference":

In determining whether the interference is improper, it may become very important to ascertain whether the act was motivated, in whole or in part, by a desire to interfere with the other's contractual relations The desire to interfere with the other's contractual relations need not, however, be the sole motive. If it is the primary motive it may carry substantial weight in the balancing process and even if it is only a casual motive it may still be significant in some circumstances.

Nesler, 452 N.W.2d at 197; accord *Berger v. Cas' Feed Store, Inc.*, 543 N.W.2d 597, 599 (Iowa 1996).

H-P intended to use the income from the book of business purchase from Howe to pay off leftover debt. The defendants' improper solicitations caused a staggering loss of customers and revenue, impacting H-P's ability to pay off the debt to NCCI, making it difficult to perform the entire contract. Thus, an increase in cost, or loss of profits resulted. Further, the improper solicitations caused H-P to have to spend additional time with each of their customers to negate confusion engendered by the Great American agents' mass solicitation campaign. H-P's damages derive from their failure to receive the benefit of their bargain with Howe. Under the cost/time burden analysis, we find all elements of this claim are proven, and H-P was entitled to be compensated for all damages proximately caused by the breach of duty. *Nesler*, 452 N.W.2d at 194.

We thus find support in the record of the jury's findings both Great American and Kahl intentionally and improperly interfered with H-P's contract to purchase the Howe agency; accordingly the district court did not err in its denial of the motion for directed verdict; we affirm as to these defendants.

B. Prospective business relationship. Again, the defendants moved for a directed verdict, which the court denied. The jury found that Great American, Kahl, Ellerbroek, Timmermans, Sieperda, and Gerber all intentionally interfered with H-P's

prospective business relationship. On appeal, the defendants do not single out Great American's conduct from any of the agents but simply combine all of the defendants' conduct into the same argument.

The tort of intentional interference with a prospective contract or business relationship imposes liability on a person who intentionally and improperly interferes with a person's business expectations, such as causing a third person not to enter into a prospective business relationship or contract. *Nehring v. Upchurch*, No. 95-1541 (Iowa App. Nov. 27, 1996) (citing *Gordon v. Noel*, 356 N.W.2d 559, 563 (Iowa 1984); *RTL Distrib., Inc. v. Double S Batteries, Inc.*, 545 N.W.2d 587, 590 (Iowa App. 1996)). It is similar to the tort of intentional interference with an *existing* contract, except a greater degree of proof is required to establish the motive element of intentional interference with a *prospective* contract. *Burke v. Hawkeye Nat'l Life Ins. Co.*, 474 N.W.2d 110, 114 (Iowa 1991). In a claim involving interference with a prospective contract, the plaintiff is held to a strict standard of substantial proof the defendant acted with a predominantly improper purpose. *Holdworth v. Nissly*, 520 N.W.2d 332, 334 (Iowa App. 1994); *see Nehring*, No. 95-1541 (Iowa App. Nov. 27, 1996). It requires the plaintiff to prove the defendant intended to financially injure or destroy plaintiff. *Holdworth*, 520 N.W.2d at 336. This strict standard serves "to avoid opening the door to virtually limitless suits of a highly speculative and remote

nature.” *Page County Appliance Center, Inc. v. Honeywell, Inc.*, 347 N.W.2d 171, 178 (Iowa 1984).

Evidence at trial indicated customer names in the insurance industry are a trade secret and that they belong to the agent and are not to be disclosed. Improper interference by defendants would prevent in this case third parties (Howe’s former customers, as well as Huisenga’s customers) from entering and/or continuing the business relationship with H-P. *See Nesler*, 452 N.W.2d at 199. Restatement (Second) of Torts section 766B deals with interference with potential contracts and provides:

One who intentionally and improperly interferes with another’s prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation.

While the defendants would characterize their conduct of going after H-P’s prospective clients from the purchase of the Howe agency as “competition,” we note the facts support the jury’s conclusion of improper interference with prospective business relationships.

The evidence in the record revealed at least two meetings were initiated or attended by Great American representatives wherein marketing strategies were

discussed to solicit MPCl and to obtain Huisenga and Howe's customers. In the fall of 1992, a meeting was held in Lyon County at the Pizza Ranch Restaurant which defendants attended. Timmermans, Gerber and Sieperda acknowledged a joint marketing plan was discussed. Also discussed was a plan to divide up territory among Great American's new agents in order to solicit individuals who had previously placed their insurance with Great American through Huisenga or Howe. Moreover, Timmermans testified the attendees at this meeting discussed calling (and ultimately did call) Great American with a list of people, asking Great American to disclose or "verify" whether the persons on their lists were insureds of their company. Additionally, Gerber's testimony revealed he believed customers' names constituted trade secrets; Timmermans conceded in his testimony that the customer name is guarded and protected in the insurance industry; Sieperda testified that the customer name should be protected, and not disclosed to anybody—that this is "understood" in the insurance business and the people who worked for him were aware of the need to guard customer names and to not disseminate the information to others. Then the agents sent a solicitation letter to individuals formerly insured by Great American through Huisenga or Howe. Timmermans admitted his letters were directed specifically to individuals who had Great American MPCl. Gerber and Timmermans admitted they had made inaccurate representations, characterized as "facts," in the solicitation letters and falsely asserted H-P was not forthright with its customers as

to its intent to ask the customers to transfer to NCCI. Essentially, the defendants/agents knew their acts were wrongful, but nevertheless forged ahead with the aforementioned solicitations in an attempt to induce H-P's and Howe's former customers into believing H-P was not being honest with them, thereby thwarting H-P's efforts to enjoy the very benefit for which it bargained: Howe's customers' names. This reaches beyond the boundaries of what the defendants characterize as competition, and constitutes an improper interference with the prospective business relations respecting the future relationships of H-P.

II. Motion for directed verdict. H-P argues that the district court erred in granting defendants' motion for directed verdict dismissing Kleve, Hulshof, and State Bank Insurance & Realty Corporation.

Our review is at law; when reviewing a trial court ruling in a motion for directed verdict, we review all the evidence to determine whether or not a jury question was generated. *Toney v. Casey's General Stores, Inc.*, 460 N.W.2d 849, 852 (Iowa 1990). The evidence is viewed in a light most favorable to the party opposing the motion. *Id.* If reasonable minds might draw different inferences from the facts, a jury question is engendered. *Id.*; Iowa R. App. P. 14(f)(17).

A. Hulshof/State Bank Ins. & Realty Corp. Regarding the dismissal of Hulshof/State Bank Ins. & Realty Corp., Plaintiffs argue Hulshof had numerous opportunities to obtain a list of customers from Great American and he was present

at a meeting initiated and/or attended by Great American where customer names were discussed. H-P contends there was evidence presented that Hulshof gave his employee a list of highlighted names to use in soliciting Howe's former customers, yet this list of names was never found despite a request to produce the list. We agree with the trial court that the evidence supporting Hulshof's wrongdoing was conjecture and, even taken in a light most favorable to H-P, was insufficient to submit this claim to the jury.

B. Kleve. The court dismissed Linda Kleve because the three-year statute of limitations regarding the trade secrets claim had run. H-P contends the court failed to consider its other claim alleging Kleve improperly interfered with H-P's existing and/or prospective business relationships by disseminating H-P's expirations. "Expirations" is a special term used in the insurance industry and "refers to a list of policies or copies of policies which show the name and address of the insured, a description of the article insured, expiration date of the policy, premium and all other information necessary to execute an insurance contract." *Ballagh v. Pol-Warren Mut. Ins. Ass'n*, 257 Iowa 1334, 1337, 136 N.W.2d 496, 497 (Iowa 1965). Either of these claims could have survived as to the applicable five-year statute of limitations for claims brought for injuries to property, fraud, or other actions. (Iowa Code § 614.1(4)).

Defendants assert this argument was not preserved as H-P did not move for a new trial following the trial court's grant of the directed verdict. Defendants' contention misstates the law. "In order for a party to preserve error when challenging the grant of a motion for directed verdict, the party merely needs to challenge the motion and inform the trial court of the grounds for the challenge so that the trial court may pass on those grounds." *Lawrence v. Grinde*, 534 N.W.2d 414, 417 (Iowa 1995). Our appellate review is limited to those grounds the challenger has raised. *Id.*

We now examine whether Kleve was properly dismissed. H-P must prove Kleve improperly interfered with either the existing contract, (the contract to purchase Howe's business), or interference with a prospective business relationship. However, the record establishes only that she assisted Ellerbroek in obtaining *Huisenga's* current clients for purposes of solicitation, not *Howe's* former clients sold to H-P pursuant to a contractual agreement. Thus, we conclude no factual basis existed to prove Kleve interfered with the contract in question—the Howe purchase agreement or the attendant prospective business relations stemming from that purchase. Accordingly, the district court properly dismissed Kleve as a party to this action.

III. Submission of misappropriation of trade secrets. All defendants, excepting Sieperda, appeal the decision of the district court to overrule their motion for a directed verdict based on a lack of evidence to establish a misappropriation of trade secrets. The district court submitted the misappropriation of trade secrets claim

to the jury. Our review of this issue is at law; when reviewing a trial court ruling in a motion for directed verdict, we review all the evidence to determine whether or not a jury question was generated. *Toney*, 460 N.W.2d at 852. We view the evidence in a light most favorable to the party opposing the motion. *Id.*

It is helpful to turn to both Iowa statutory and case law regarding trade secrets.

Iowa Code section 550.2(4) (1997) defines a trade secret as:

4. [I]nformation, 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.

Id.

Under Iowa case law, there are three recognized prerequisites for relief based on the misappropriation 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. *Lemmon v. Hendrickson*, 559 N.W.2d 278, 279 (Iowa 1997) (citing *Basic Chems., Inc. v. Benson*, 251 N.W.2d 220, 226 (Iowa 1977)).

“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.”

Economy Roofing & Insulating v. Zumaris, 538 N.W.2d 641, 647 (Iowa 1995) (citing *U.S. West Communications, Inc. v. Office of Consumer Advocate*, 498 N.W.2d 711, 714 (Iowa 1993) (citations omitted).

Defendants repeatedly cited *Lemmon v. Hendrickson*, 559 N.W.2d 278 (Iowa 1997), for the proposition that the defendant/former employee was entitled to compete by soliciting his former employer's customers—whose names were recalled from memory—after period of non-competition expired. *Id.*; see Restatement (Second) of Agency § 396. We do not find the *Lemmon* case apposite as it is factually distinct.

In *Lemmon*, defendant solicited from memory only seven out of 350 to 400 of his former employer's customers (roughly two-percent), with no evidence he intended to solicit any more of them. *Id.* at 282. In this case, H-P lost a substantial amount of Huisenga's and Howe's former customers to Great American agents. Whereas the defendant in *Lemmon* operated in a different geographical area from his former employer, *Id.* at 280, the Great American agents targeted for solicitation H-P's customers in the same geographic area. Moreover, in *Lemmon*, unlike this case, defendant's solicitations took place after the expiration of a two-year covenant not to compete, and the court ruled Hendrickson's solicitations were not wrongful. *Id.* In this case defendants/agents and Great American's corporate representatives testified that Great American did not have the right, contractual or otherwise, to solicit their agents' insureds at any time. In fact, Kahl, as a representative for Great American,

executed with Huisenga in December 1983 a standard Crop Insurance Agency-Company Agreement wherein the language regarding expirations states in relevant part:

9. Expirations. During the term of this agreement, both the Agent and the Company shall have rights in the expirations and records of the policies of the Company serviced by the Agent. *In the event of termination of this Agreement, if the Agent has properly accounted for and paid all premiums due the Company, the Agent's records and use and control of expirations shall continue and become exclusive and the interest of the Company in such records and use and control of expirations shall then terminate.*

(Emphasis added.) Great American customarily entered into identical agreements with other agencies, including Timmermans' agency.

Furthermore, it is axiomatic in the insurance industry that insurance companies employ a "hands off" policy with regard to soliciting customers belonging to their agents. *Burke* articulated this industry-wide custom:

[W]hile the company furnishes the product, the agent provides the customers; . . . customer loyalty to the company is fostered through agency relationships; and . . . agents are recruited and retained on the prospect of generating a customer base that—if left undisturbed—will provide years of renewal premiums for the company and renewal commissions for the agent.

Id., 474 N.W.2d at 113-14.

Defendants further assert that even if the expirations lists were a trade secret, H-P did not become owners of trade secrets until January of 1993 when they paid Howe and received bill of sale. This is in accordance with Judge Barlow's pretrial

ruling: “[T]he Plaintiffs had no interest in the expirations of the Gale Howe Agency until they paid Gale Howe the full purchase price and received a bill of sale from Mr. Howe on January 4, 1993.”

This alternate argument must fail as the jury instructions are not so finely tailored. Jury Instruction No. 13 clearly states, “[t]hat *plaintiffs’ customer names* [H-P’s] and the customer names the plaintiffs purchased from Gale Howe, are trade secrets.” (Emphasis added.) The inference drawn from the vague instruction, and use of the past tense regarding Howe’s clients, is that the jury was to consider H-P’s current expiration list as well as Howe’s clients from the time period *after* the January sale had been completed. Thus, the jury did not need to address the issue of ownership or completion of sale as the instructions were not sufficiently tailored to so limit the jury’s consideration.

We find Huisenga and Howe’s customers’ names constituted trade secrets. Accordingly, we find the district court properly submitted the issue of misappropriation of trade secrets to the jury and affirm on this issue.

IV. Damages for transfer to Hulshof of non-defendant agents. Plaintiffs argue the district court erred in failing to submit damages for customers who transferred to State Bank Insurance & Realty Corporation and John Hulshof, or those who transferred to the non-defendant insurance agents. We similarly review this

motion for directed verdict on appeal for errors of law. Iowa R. App. P. 4; *Lawrence*, 534 N.W.2d at 418.

Plaintiffs must put on evidence which allows jury to conclude that the loss would not have occurred but for wrongful conduct by defendants. *Scoggins v. Wal-Mart Stores*, 560 N.W.2d 564, 567 (Iowa 1997). This evidence, defendants argue, is lacking in this case.

While no one disputes that H-P had a certain book of business for the 1992 crop year and that about a third of that book did not renew with plaintiffs for the 1993 crop year, H-P has the burden of showing that the decline in business was due to the improper conduct by defendants and not for other reasons such as the customer's free choice.

We distinguish the case of *Orkin Exterminating Co., Inc. v. Burnett*, 160 N.W.2d 427 (Iowa 1968), cited by H-P, wherein H-P relies on that case to suggest it satisfied its burden to show causation by showing some business transferred from H-P to other agents. *Orkin* involved a covenant not to compete; the employee there quit, and instead of waiting for the expiration of the contracted three years, immediately solicited his Orkin accounts. *Id.* Our supreme court stated in *Orkin* if it is speculative and uncertain whether damages had been sustained, recovery is denied; 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.” *Id.* at 429-30.

H-P argues they are entitled to an inference that the transfer of insurance clients was due to improper interference.

However, in *Orkin*, the only “inference” that needed to be drawn was whether defendant had competed in violation of the covenant not to compete. *Id.* The court there rejected defendant’s argument there was no competent evidence any customer canceled the contract because of defendant’s acts and therefore damages were speculative. *Id.* Unlike the H-P situation, it was irrelevant in *Orkin* why plaintiff’s former accounts chose to do business with defendant; the fact defendant did breach the covenant not to compete raised more of a presumption of damages, rather than conjecture, or speculation thereof. In other words, the breach itself proved both wrongful conduct and damages. *Id.* We therefore find H-P’s arguments attenuated as there was no “reasonable basis from which the amount [of damages] can be inferred or approximated.” *Id.* at 429-30.

H-P further contends they met their burden to show causation and principally rely on the *Garrett* case. While it is true that the most elementary concepts of justice and public policy require that a wrongdoer shall bear the risk of the uncertainty which his own wrong has created, (*see Garrett*, 520 S.W.2d 102, 112 (Mo. App. 1974)), the problem is there does not appear to be proof—as aforementioned, with respect to

Hulshof and non-defendants—of a “reasonable basis from which the amount can be inferred or approximated.” *Orkin*, 160 N.W.2d at 429-30. In *Garrett* there was sufficient proof of damages as the agent produced evidence he had a specified number of policies before any wrongful acts occurred and was able to only retain one-third of those policies, so he claimed damages for 700 policies lost. In this case, we cannot determine through any evidence presented there was a reasonable basis to infer or approximate losses because of business being re-channeled to Hulshof and non-defendants.

Accordingly we find the court did not err in failing to submit damages for clients who transferred to State Bank Insurance & Realty Corporation/John Hulshof, nor did it err in failing to submit damages as to the non-defendant insurance agents.

V. Damages.

A. Punitive. Defendants argue there was no clear, convincing, and satisfactory evidence that any defendants willfully or wantonly disregarded the rights of H-P as required by Iowa Code section 668A.1(1). We review the punitive damages award to ensure the district court did not abuse its discretion. *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 577-78 (8th Cir. 1997). An abuse of discretion is established when the punitive damages award is so disproportionate to the factors relevant to the size of the award that improper motives or a clear absence of the honest exercise of judgment is revealed. *Id.*

The jury originally awarded H-P \$244,130 in compensatory damages and \$774,500 in punitive damages. The district court conditionally granted a judgment notwithstanding the verdict on a proposed remittitur of compensatory damages from \$244,130 to \$86,670, with the punitive damages award remaining intact. H-P accepted remittitur. The record so supports the award.

Punitive damages “cannot arise from conduct which is merely objectionable.” *Coster v. Crookham*, 468 N.W.2d 802, 811 (Iowa 1991). There must also be proof of defendants’ persistent course of conduct with disregard for the consequences. *Beeman*, 496 N.W.2d at 255. H-P presented substantial evidence at trial that defendants committed their improper activities knowing their acts were wrongful, directed their activities only at H-P and not the public-at-large, and accepted all profits gained from these activities without remorse. Defendants make no arguments regarding the amount of punitive damages awarded. We agree with the district court’s decision to leave the punitive damages award intact when it stated “[i]t is this Court’s conclusion that the evidence warranted a finding of punitive damages, the jury was properly instructed, and the punitive damages amount, although substantial, will not be disturbed.”

We find the damages award was well within the permissible range when compared to the compensatory award. *See Kimzey*, 107 F.3d at 577-78.

B. Duplicative. Defendants argue the jury impermissibly awarded damages against individual defendant agents, more damages against Virgil Kahl, and more damages against Great American. They contend the district court, while it did reduce the amount of compensatory damages, should have stricken the damages awards against Kahl and Great American completely as Kahl and Great American could not have caused H-P any damages beyond what the defendant agents caused. When the instructions given to the jury, viewed as a whole, fail to convey the applicable law, we will find reversible error. *Benn v. Thomas*, 512 N.W.2d 537, 539 (Iowa 1994).

A jury's award is not duplicative simply because it allocates damages under distinct causes of action; a defendant's inability to show duplication beyond the verdict itself results in a failure to establish that the awards are duplicative. *Indu Craft, Inc. v. Bank of Baroda*, 47 F.3d 490, 497 (2nd Cir. 1995). In reviewing the jury instructions as a whole, we find that there was no error. Additional jury instructions, when fairly read, advised the jury to avoid awarding duplicative damages. We also note the verdict form directed the jury to focus its analysis on each defendant and each claim separately. Error in giving or refusing jury instructions does not merit reversal unless it results in prejudice. *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 539 (Iowa 1996). We do not find prejudice where, as here, the jury clearly identified differing damages for different defendants pursuant to clear instruction to only award damages directly caused by each defendant against that defendant.

We accordingly find the damages were not duplicative, that the applicable law was conveyed through the jury instructions, and uphold the jury's determination of damages with regard to this issue.

VI. Attorney fees. H-P contends the district court erred in denying their application for attorney fees. H-P also requests appellate attorney fees. We review the district court's ruling on this issue for errors of law. Iowa R. App. P. 4. The trial court relying on *Recker*, deemed the application for attorneys fees under Iowa Rule of Civil Procedure 179(b) to be waived and abandoned when H-P filed its notice of appeal. However, the district court, in ruling on post-trial motions, failed to distinguish between an appeal on the merits and a post-trial application for collateral relief.

The trial court retains jurisdiction to proceed on issues collateral to and not affecting the subject matter on appeal. *See Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 897 (Iowa 1990) (holding district courts retain jurisdiction to consider matters, such as attorney fees, which are collateral to and do not affect subject matter of appeal; "the matter of attorney fees separate and distinct from the underlying [subject matter on appeal]"); accord *Shedlock v. Iowa District Court for Polk County*, 534 N.W.2d 656, 658 (Iowa 1995); see also *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 454, 102 S. Ct. 1162, 1167-68, 71 L. Ed. 2d 325, 333 (1982) (stating fee determinations may be made by a federal district court pending an appeal on the merits).

No re-examination of the merits were requested by the application for attorney fees; it was a collateral matter and accordingly should have been addressed by the trial court. We therefore reverse on this issue and remand to the trial court for a determination of both trial and appellate attorney fees. *See Hylar v. Garner*, 548 N.W.2d 864, 866 (Iowa 1996).

Having carefully considered all issues properly before us, we reverse and remand as to trial and appellate attorney fees, and we affirm on all other grounds. We do not retain jurisdiction. Costs on appeal assessed to defendants.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.