MISSOURI COURT OF APPEALS
WESTERN DISTRICT

ALL STAR AWARDS & AD SPECIALTIES INC.,	)	**WD83327 consolidated with WD83352**
Appellant-Respondent,	)	**OPINION FILED:**
v.	)	**January 12, 2021**
HALO BRANDED SOLUTIONS, INC.,	)	
Respondent-Appellant.	)	

Appeal from the Circuit Court of Jackson County, Missouri
Honorable John M. Torrence, Judge

Before Division Two: Lisa White Hardwick, P.J., Thomas H. Newton and Karen King Mitchell, JJ.

All Star Awards & Ad Specialties, Inc. appeals an amended Jackson County Circuit Court judgment reducing the punitive damages awarded by a jury against HALO Branded Solutions, Inc. on claims of civil conspiracy to breach the duty of loyalty arising from the conduct of a former employee and ensuing tortious interference with business expectancy.[1] The jury awarded All Star actual damages of $25,541.88 for the employee's breach of the duty of loyalty and HALO's civil conspiracy to breach that duty; $500,000 in damages for the employee's and HALO's tortious interference;

[1] Former employee Mr. Doug Ford is not a party to this appeal or cross-appeal.

and $12,000 in punitive damages against the employee, as well as $5.5 million in punitive damages against HALO. The circuit court reduced the punitive-damages award against HALO to $2,627,709.40. All Star challenges the circuit court's action as a misstatement and misapplication of the statutory damages cap, § 510.265.1,[2] and to the extent that the circuit court may have reduced the jury's punitive-damages verdict as a matter of constitutional due process or remittitur. HALO files a cross-appeal, contesting the court's refusal to grant it a directed verdict on the tortious interference claim, its admission of certain evidence and testimony, and its denial, in part, of the motions for directed verdict and judgment notwithstanding the verdict as to the punitive-damages award. We affirm in part, reverse in part, and remand to the circuit court for further proceedings.

HALO is a large, full-service promotional-products distributor with some 2,000 employees.[3] Its emphasis on growth relies, in part, on bringing into the firm account executives with an existing book of business when hired from other promotional-products companies, such as All Star. Many of HALO's account executives work on straight commission. All Star is a family-owned operation with 20 employees. It imposes no sales quotas, and, while employees build customer relationships, customers do not "belong" to individual employees. All Star has never missed payroll, but it occasionally has cash-flow problems.

[2] Statutory references are to RSMo. (2016), unless otherwise indicated.

[3] "We view the evidence in the light most favorable to the jury's verdict, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict." *Moody v. Kansas City Bd. of Comm'rs*, 539 S.W.3d 784, 787 n.1 (Mo. App. W.D. 2017) (citation omitted).

Mr. Doug Ford, who began working at All Star in 1994, announced early in 2018 that he would leave the company to take a sales position with HALO. All Star's owners permitted him to remain at the company with an indeterminate last date of employment. The owners did not learn for about a week that Mr. Ford was, in fact, already working for HALO, had communicated with All Star customers about his move, moved customer orders to HALO, and took artwork and files from All Star.[4] This activity had occurred since the final months of 2017, was done in coordination with a HALO regional vice president, and involved multiple members of HALO's management and staff. All Star terminated Mr. Ford immediately after discovering, from a review of his emails, evidence of this conduct. Among other things, at HALO's request, Mr. Ford sent it a list of All Star customers he believed could be moved to HALO, including confidential information about those customers, which HALO distributed within the company. Mr. Ford also engaged other All Star employees in preparing material, including reports on key customers, that, unbeknownst to the other employees, was intended to be shared with HALO. While Mr. Ford continued to be employed at All Star, HALO processed orders for All Star's customers, including Garmin and Olathe Ford, a number of whom no longer do business or have reduced their annual promotional orders with All Star. Mr. Ford promised HALO that he could bring $450,000 in sales from All Star, and HALO's regional vice president increased this expectation to $550,000 for the coming year.

[4] According to the evidence, Mr. Ford copied and still possesses hundreds of pages of All Star's artwork and customer files and has taken proprietary All Star information, to which he had access as a trusted employee and sales manager, for use in developing business in the future as an account executive with HALO.

All Star demanded that HALO cease taking orders from its customers, but HALO's CEO initially refused to do so. Instead, HALO's CEO decided that the company would take orders from any customer as long as Mr. Ford explained to the CEO that he had a long-standing prior relationship with the customer; Halo did not, however, institute any process to determine whether Mr. Ford actually had such relationships. HALO instructed Mr. Ford not to solicit business from Cerner, one of All Star's customers, "for the time being" because of the litigation instituted by All Star. Despite express "loyalty" policies for its own employees, HALO has not disciplined anyone involved in taking business from All Star customers brought to it by Mr. Ford and intends to compete with All Star in the future with Mr. Ford continuing to use information improperly obtained.

All Star filed a petition in Jackson County Circuit Court against Mr. Ford and HALO in March 2018 and amended the petition a month later. Among the seven counts were two at issue in this appeal: Mr. Ford's breach of the duty of loyalty and the civil conspiracy related to this claim, and tortious inference with business expectancy. As to HALO's civil conspiracy and tortious interference with business expectancy, All Star alleged evil motive or reckless indifference to support liability for punitive damages, which were tried in a bifurcated proceeding after the jury returned a verdict in All Star's favor. The jury also found in All Star's favor as to Mr. Ford's counter-claim for alleged unpaid commissions.

The trial court entered judgment on the jury's verdict, awarding All Star $525,541.88 in actual damages, $5,500,000 in punitive damages against HALO, and $12,000 in punitive damages against Mr. Ford. Thereafter, ruling on HALO's motion

for judgment notwithstanding the verdict, motion for new trial, or motion for remittitur, the trial court determined that All Star had "presented sufficient evidence at trial to establish each element of its claims against [HALO]." The court also determined that HALO was not prejudiced by any of its evidentiary rulings, no prejudicial error occurred in the jury instructions, and the jury verdict was not against the weight of the evidence presented at trial. Still, applying section 510.265 "because [All Star's] claims are not common law claims," the trial court capped the punitive damages. The court reduced the award to five times actual damages, or to $2,627,709.40. Accordingly, the court denied the motions for judgment notwithstanding the verdict or for new trial, but granted the motion for remittitur. All Star files this appeal, and HALO files a cross-appeal.

Legal Analysis

Statutory Punitive Damages Cap

All Star raises four points, all of which challenge the trial court's reduction of the punitive-damages award against HALO. Because the first two are dispositive and our resolution of them requires further action by the trial court, we do not consider points III and IV. In the first point, All Star contends that the trial court misstated the law for the application of the section 510.265.1 punitive-damages cap.[5] All Star argues that the applicable analysis "is not whether [All Star's] claims are 'common law

[5] Section 510.265 states, in relevant part:

> 1. No award of punitive damages against any defendant shall exceed the greater of:
>
> (1) Five hundred thousand dollars; or
> (2) Five times the net amount of the judgment awarded to the plaintiff against the defendant.

§ 510.265.1.

claims.'" Rather, the question, according to All Star, is "whether the claims for which the jury awarded actual damages, namely, civil conspiracy to breach the duty of loyalty and tortious interference with business expectancy, are civil actions for damages involving a fact issue that would have been determined without limitation by a jury in 1820 when Missouri's Constitution was first adopted." In the second point, All Star makes the same argument but prefaces it by claiming that the trial court "misapplied" the section 510.265.1 punitive-damages cap. As to each point, All Star contends that the court's purported misstatement or misapplication of the law violated All Star's right to trial by jury.

We review constitutional challenges *de novo*. *Lewellen v. Franklin*, 441 S.W.3d 136, 143-44 (Mo. banc 2014) (ruling that the right to a jury trial "as heretofore enjoyed shall remain inviolate," Mo. Const., art. I, sec. 22(a), in our constitution means that any change in the right to a jury determination as it existed when the constitution was adopted in 1820 is unconstitutional).

HALO addresses both points together and argues that because breach of the duty of loyalty and tortious interference with business expectancy were not recognized by Missouri courts until the middle of the last century, they are not claims that would have been tried by a Missouri jury in 1820. In HALO's view, All Star's argument would radically expand *Lewellen*, where our supreme court held that the trial court erred in reducing a punitive-damages award under section 510.265 in a case involving a cause of action for fraud. *Id.* at 150.

HALO has, however, disregarded that part of *Lewellen* in which the Missouri Supreme Court observed that, despite Missouri's tardy recognition of certain common-

law claims, because fraud claims were recognized as a matter of English common law, such claims were a part of the Missouri common law when the state constitution was adopted. *Id.* at 143 n.10 (quoting *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633, 638 (Mo. banc 2012), and section 1.010. to note that "'Missouri's common law is based on the common law of England as of 1607.'").[6] Accordingly, the court opined

[6] *See State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 87 n.9 (Mo. banc 2003), where the court identified the types of claims that existed at common law when the Missouri Constitution was adopted. The issue arose in a case for damages brought under the Missouri Human Rights Act and involved the plaintiff's claim that she was entitled to a jury trial. *Id.* at 87. Noting that "an action for damages for discrimination based upon age, sex and retaliation for filing a discrimination complaint" was "analogous to those kinds of actions triable by juries at the time of the Constitution of 1820," the court identified actions in trespass, "now commonly referred to categorically as torts," as those types of actions, including "actions for a variety of wrongs to the person, [that] were tried to juries in the courts in 1820." *Id.* Explaining the common-law history giving rise to tort claims, the court stated in *Diehl*:

> "Trespass" has come to mean "an unlawful act committed against the person or property of another." BLACK'S LAW DICTIONARY, 7th Ed. (Bryan A. Garner, ed.), p. 1508. At common law it referred to the form of action in which a pleading was framed. The analogy to modern-day torts is the action (or writ) referred to as trespass on the case: "This writ gave a form of action in which the court was enabled to render judgment of damages in cases of fraud, deceit, negligence, want of skill, defamation oral or written, and all other injurious acts or omissions resulting in harm to person or property, but wanting the *vi et armis,* the element of direct force and violence, to constitute trespass." Edwin E. Bryant, The Law of Pleading Under the Codes of Civil Procedure 7 (2d ed. 1899), quoted in Black's Law Dictionary, p. 1509. *See also,* The Forms of Action at Common-Law, A Course of Lectures by F.W. Maitland (Cambridge Univ. Press 1936), Lectures VI and VII; and Benjamin J. Shipman, Handbook of Common Law Pleading (3d Ed. Ballentine 1923), Chapter III. For examples of actions involving wrongs to the person, see Vol. 26A, Missouri Digest (1821 to Date) (1956), Chapter: "Torts."

Id. at 87 n.9; *see also La Plant v. E.I. Du Pont de Nemours & Co.*, 346 S.W.2d 231, 245 (Mo. App. 1961) (rejecting party's effort to limit court's role to finding only whether the common law encompassed those actions existing in 1607, and stating, "Our Supreme Court has defined the common law as a system of elementary rules and of general judicial declarations of principles, which are continually expanding with the progress of society, adapting themselves to the gradual changes of trade, commerce, arts, inventions, and the exigencies and usages of the country." (citation omitted)).

Maitland similarly discussed the evolution of the trespass writ or form of action as follows:

> Gradually during Edward III's reign we find a few writs occurring which in form are extremely like writs of trespass---and they are actually called writs of trespass---but the wrong complained of does not always consist of a direct application of unlawful physical force to the body, lands, or goods of the plaintiff; sometimes the words *vi et armis* do not appear. Sometimes there is no mention of the king's peace. Still they are spoken of as writs of trespass, they appear in the Chancery Register as writs of trespass, mixed up with the writs which charge the defendant with violent assaults and asportations. The plaintiff is said to bring an action upon his case, or upon the special case, and gradually it becomes apparent that really a new and a very elastic form of

that section 510.265 could not be applied to cap punitive damages for a fraud claim without violating the constitution's jury-trial protection. *Id.* at 144.

We are constrained to agree with All Star that, under *Lewellen*, the trial court erred in applying the statutory punitive-damages cap to the jury award in this case. Conspiracy to breach the duty of loyalty and tortious interference with business expectancy would have been cognizable at English common law when our constitution was adopted in 1820. These are wrongs to the person or property for which money damages are claimed, i.e., a trespass on the case as discussed in *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 87 n.9 (Mo. banc 2003), and they would have been tried by a jury.[7]

William Blackstone, writing in 1765, discussed the right of a master to bring an action in damages against his servant and the person hiring or retaining the servant, who yet remains in the master's employ, but "departeth from me and goeth to serve the other." 1 WILLIAM BLACKSTONE, COMMENTARIES *417. Civil conspiracy, or persons

---

> action has thus been created. I think that lawyers were becoming conscious of this about the end of the fourteenth century. Certain procedural differences have made their appearance---when there is *vi et armis* in the writ, then the defendant if he will not appear may be taken by *capias ad respondendum* or may be outlawed---this cannot be if there is no talk of force and arms or the king's peace. Thus Case falls apart from Trespass---during the fifteenth century the line between them becomes always better marked. In 1503 (19 Hen. VII, c. 9) a statute takes note of the distinction; the process of *capias* is given in "actions upon the case." Under Henry VIII Fitzherbert in his *Abridgment* and his *Natura Brevium* treats of the *Action sur la Case* as something different from the action of trespass---each has its precedents. The title of Case covers very miscellaneous wrongs---specially we may notice slander and libel (for which, however, there are but few precedents during the Middle Ages, since bad words are dealt with by the local courts, and defamation by the ecclesiastical courts), also damage caused by negligence, also deceit.
>
> The Forms of Action at Common-Law, A Course of Lectures by F.W. Maitland (Cambridge Univ. Press 1936), Lecture VI.

[7] For a particularly illuminating discussion of the common-law right to a jury trial when contested facts are in issue, see *Klotz v. St. Anthony's Medical Center*, 311 S.W.3d 752, 774-77 (Mo. banc 2010 (Teitelman, J., concurring).

acting in concert, has been litigated in England since the early 1600s. RESTATEMENT (SECOND) OF TORTS § 876, Reporter's Note (1979). Similarly, "[t]hat one has a common law right 'to conduct one's business without the wrongful interference of others' has been recognized *at least* since 1621." Note, "Tortious Interference with Conduct of a Business," 56 Yale L.J. 885 (1947) (emphasis added); *see also* RESTATEMENT (SECOND) OF TORTS § 766, comment c, § 766B, comment b (describing development of the tort of interference with prospective business relationships in English common law). English common law also recognized that "an employee can be liable for disclosure of secrets learned during the course of employment" before the adoption of Missouri's 1820 constitution. Christopher A. Moore, *Redefining Trade Secrets in North Carolina*, 40 CAMPBELL L. REV. 643, 646 (2018).

It is clear that the date that the Missouri courts *recognized* a particular common-law cause of action is irrelevant under *Lewellen* to the question of whether the action or an analogous action existed at common law when our constitution was adopted. Applying the section 510.265 punitive-damages cap to awards made for civil conspiracy to breach the duty of loyalty and tortious interference with business expectations violated All Star's constitutional right to trial by jury, and thus the trial court erred in reducing the punitive-damages award against HALO on this basis. All Star's points one and two are granted.

Reduction of Punitive Damages Award Based on Due Process Considerations or Remittitur Statute

HALO also challenged the punitive-damages award on constitutional due process grounds and for remittitur under Rule 74.10, which are addressed in All Star's

points three and four.[8] In point three, All Star contends that the trial court erred in granting HALO's post-trial motion to reduce the jury's punitive-damages award to the extent that it did so on constitutional due process grounds.[9] In point four, All Star contends that the trial court had no basis to remit the punitive-damages award under section 537.068. According to All Star, due process was not implicated given the trial court's determination that the jury verdict was not against the weight of the evidence, the award was not unconstitutionally excessive or arbitrary, and the award was justified by HALO's conduct.

We decline to address in the first instance All Star's points three and four, i.e., whether the trial court properly reduced the punitive-damages award as a matter of due process or as a matter of remittitur, and we express no opinion as to whether it should or should not do so. The court clearly determined that it lacked any discretion under the statute and reduced the award accordingly. Because we have determined that the statute does not apply, the trial court must consider whether (1) the punitive-damages award violates due process, and (2) the punitive-damages award should be remitted under section 537.068. Accordingly, we remand for it to do so.

---

[8] *See Lewellen v. Franklin*, 441 S.W.3d 136, 145 (Mo. banc 2014). Though the court determined that the section 510.265 damages cap could not be applied to the punitive damages awarded in that case, it also conducted an analysis to determine if the award "comports with due process." *Id.* ("The constitutions of the United States and Missouri guarantee that no person will be deprived of 'life, liberty, or property without due process of law.' U.S. Const. amend. XIV, section 1; Mo. Const. art. 1, sec. 10. This due process guarantee prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." (citation omitted)).

[9] The trial court did not discuss the due process challenge; rather, it simply applied section 510.265 and stated that it had given due regard to "both statutory and due process considerations" under *Lewellen*. The court granted HALO's motion for remittitur without further discussion; that motion was based, for the most part, on the insufficiency of All Star's evidence to support the punitive damages award.

Submissibility of Punitive-Damages Claim

HALO claims in its third point on cross-appeal that the trial court erred in denying, in part, its post-trial motions to the extent that it only reduced the award. According to HALO, All Star did not make a submissible case for punitive damages because it failed to elicit clear and convincing proof that HALO's conduct warranted a punitive-damages award, and the award is unconstitutionally excessive. As to HALO's contention that the evidence was insufficient to warrant a punitive-damages award, the following standards apply. "Whether there was sufficient evidence for an award of punitive damages is a question of law." *Ellison v. O'Reilly Auto. Stores, Inc.*, 463 S.W.3d 426, 434 (Mo. App. W.D. 2015). "A submissible case for punitive damages requires clear and convincing proof that the defendant intentionally acted either by a wanton, willful or outrageous act, or reckless disregard for an act's consequences (from which evil motive is inferred)." *Id.* (citations omitted). "In determining whether the evidence was sufficient to submit the claim for punitive damages, the evidence and all reasonable inferences are viewed in the light most favorable to submissibility." *Id.* "A submissible case is made if the evidence and inferences are sufficient to allow a reasonable juror to conclude that it is highly probable that the defendant's conduct was outrageous because of evil motive or reckless indifference." *Id.* "Evidence of a defendant's financial status is admissible as an indication of the amount of damages necessary to punish the defendant." *Poage v. Crane Co.*, 523 S.W.3d 496, 524 (Mo. App. E.D. 2017).

We begin by reviewing more closely the evidence of HALO's misconduct both as to civil conspiracy and tortious interference, in light of the jury's determination that HALO was liable for punitive damages on both counts.

Apparently dissatisfied with his ongoing employment at All Star, Mr. Ford reached out to HALO in November 2017 to explore employment opportunities with that company. When HALO's regional vice president Mr. Darryl Haddox learned that Mr. Ford did not have a non-competition agreement with All Star and had estimated that he could bring about $450,000 in annual sales from All Star, which would help Mr. Haddox meet his annual business targets, efforts quickly began to bring Mr. Ford into HALO as an account executive, before his employment with All Star ended. Despite HALO's written policy that defines confidential client information as the types of material Mr. Ford took from All Star and that prohibits HALO employees from disclosing the information, personally profiting from it, or rendering services for another company, HALO specifically requested this information. Mr. Maddox asked that Mr. Ford send him a customer list with specific contact information and annual sales volume per customer, and Mr. Ford did so. This list was shared inside HALO. Mr. Ford admitted that he brought 20 orders from five All Star customers to HALO while he was still working for All Star, and he admitted that he told some customers negative things about All Star, such as purported ownership struggles, production problems, and cash-flow troubles, to give these customers a reason to follow him to HALO with their business. HALO's management did not have any concerns about processing the orders from All Star customers before Mr. Ford left that company. Mr. Ford also admitted sending emails to All Star vendors while he was still working at All

Star, speaking ill of All Star with vendors, and attempting to move customer artwork a vendor had prepared to HALO. Mr. Ford had All Star employees send him pdf files of customer logos for use at HALO and forwarded the files to his personal email account. While still working for All Star, he also shared with HALO a login and password at its request for an All Star customer's "company store" where employees can purchase shirts and other items with the company's logo, a promotional-website concept that had been created by All Star and that Mr. Ford hoped to bring to HALO. No one at HALO dissuaded Mr. Ford from sharing this information or from sending it to them, despite that he was still working at All Star and express company policies making such conduct by HALO employees actionable. The evidence showed that HALO has informal agreements with other large promotional distributors not to poach each other's sales people, but it does not have such understandings with smaller companies, such as All Star.

The evidence of misconduct as to HALO's conspiracy with Mr. Ford to breach the duty of loyalty and to interfere with business expectancy was sufficiently clear and convincing to submit All Star's claim for punitive damages to the jury.

HALO hired Mr. Ford and started taking and processing orders from All Star customers in the weeks before he was terminated. It has admitted that it did so and that profits from these orders amounted to $25,541.88 in business. HALO did so relying on Mr. Ford's assurances that financial difficulties at All Star were interfering with the ongoing service he could provide to these customers. HALO management knew that Mr. Ford had not told anyone at All Star that he was leaving, when a call made to All Star from HALO about a customer order was identified in an email by Mr.

Ford as a "little whoopsie" that must not be repeated. HALO hired Mr. Ford, or more accurately poached him from a competitor, despite having informal agreements with other large distributors not to do so. Taking business from a small mom-and-pop awards and promotions shop with supposed cash-flow issues *while its sales manager was still in its employ* is the definition of evil motive and reckless indifference. Even though All Star did not require its employees to sign non-competition agreements, and Mr. Ford and HALO are therefore under no legal obligation not to compete for All Star's customers, they did so in breach of the duty of loyalty before he left All Star's employ and plan to do so in the future with the benefit of proprietary information improperly taken from All Star's files to ensure a seamless transition for All Star's customers moved to HALO.[10]

This business diverted from All Star customers was expected to bring in $450,000 to $550,000 in Mr. Ford's first year with HALO by interfering with All Star's justifiable business expectancy, i.e., Ford/HALO's solicitation and processing of recurring orders from All Star's long-time customers. One loyal All Star customer refused to place an order with Mr. Ford and HALO, despite incentives to do so,

[10] To prove liability for tortious interference with a business expectancy, a plaintiff must show "(1) a contract or a valid business expectancy; (2) defendant's knowledge of the contract or relationship; (3) intentional interference by the defendant inducing or causing a breach of the contract or relationship; (4) absence of justification; and, (5) damages resulting from defendant's conduct." *Cmty. Title Co. v. Roosevelt Fed. Sav. & Loan Ass'n*, 796 S.W.2d 369, 372 (Mo. banc 1990). The plaintiff has the burden of proving the absence of justification, which requires showing the use of improper means to interfere with the business expectation. *Id.* at 372-73. Such means include those that "are independently wrongful, notwithstanding injury caused by the interference." *Id.* at 373. "[E]very employee owes his or her employer a duty of loyalty." *Scanwell Freight Express STL, Inc. v. Chan*, 162 S.W.3d 477, 479 (Mo. banc 2005). The jury here determined that Mr. Ford breached the duty of loyalty owed to All Star, and that breach certainly supplies the proof needed to show an absence of justification for the tortious interference claim.

believing that it was not the right thing to do. Misconduct in derogation of HALO's own written policies with the expectation that hundreds of thousands of dollars of business would be taken from All Star using the fruits of that misconduct meets the clear-and-convincing-evidence standard required to submit the question of HALO's liability for punitive damages to the jury. We do not consider whether the award is unconstitutionally excessive, leaving that determination to the trial court. Accordingly, HALO's point three is denied.

Motions for Directed Verdict and Judgment Notwithstanding the Verdict as to Tortious Interference with Business Expectancy

HALO's first point on cross-appeal asserts trial court error in denying the motion for directed verdict as to tortious interference, in instructing the jury that it could award future damages on the tortious-interference claim, and in denying the motion for judgment notwithstanding the verdict as to tortious interference, because the evidence was insufficient to substantiate the jury's award of $500,000 for this claim.[11] The gravamen of HALO's argument is that All Star's evidence of lost profits was based on lay testimony and All Star, accordingly, lacked sufficient evidence of future lost profits.

[11] In its entirety, point one of the cross-appeal states the following:

> *Tortious Interference with Business Expectancy.* The trial court erred in denying HALO's motion for directed verdict on the claim for tortious interference with business expectancy, in instructing the jury that it could award future damages on that claim, and in denying HALO's motion[] for judgment notwithstanding the verdict on the tortious-interference claim, because All Star failed to submit any legally sufficient evidence of damages, in that the only legally sufficient evidence of damages was the $25,541.88 in lost profits from a handful of one-time diverted orders, which All Star expressly conceded and the trial court held was not the basis for the jury's $500,000 award for tortious interference, leaving that award unsubstantiated by any competent evidence.

We agree with All Star that this point relied on violates Rule 84.04 by combining separate errors—motions for directed verdict and for judgment notwithstanding the verdict and a jury instruction—what is known as a "multifarious point" that is subject to dismissal. *In re Kirk v. State*, 520 S.W.3d 443, 450 n.3 (Mo. banc 2017) ("A point relied on violates Rule 84.04(d) when it groups together multiple, independent claims rather than a single claim of error, and a multifarious point is subject to dismissal.") We may in our discretion review the defective point ex gratia, *id.*, but we will not review the claim of instructional error, because it was not raised below, the instruction is not set forth in HALO's brief, and it is not argued, thus it has not been preserved.[12] Rule 84.04(e) ("If a point relates to the giving, refusal or modification of an instruction, such instruction shall be set forth in full in the argument portion of the brief.").

As to our review of the denial of motions for directed verdict and judgment notwithstanding the verdict, the standard is essentially the same: "To defeat either motion, the plaintiff must make a submissible case by offering substantial evidence to support every fact essential to a finding of liability." *Ferguson v. Curators of Lincoln Univ.*, 498 S.W.3d 481, 490 (Mo. App. W.D. 2016) (citation omitted). "We view the evidence in the light most favorable to the jury's verdict, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict." *Id.* (citation omitted). We "will reverse a jury verdict only where we find a complete absence of probative facts to support the jury's conclusion." *Id.* at

[12] In the motion for new trial, HALO argued error regarding the trial court's submission of instructions to the jury on future damages, but it did not do so as part of its motions for directed verdict or in the motion for judgment notwithstanding the verdict, which are the motions specifically referenced in the point relied on.

490-91 (citation omitted). We review the decision as to whether the plaintiff made a submissible case *de novo*. *Johnson v. Auto Handling Corp*., 523 S.W.3d 452, 459 (Mo. banc 1017).

The only element of tortious interference with business expectancy that HALO addresses in arguing the point is the fifth—damages.[13] The company contends that a plaintiff must prove lost profits to support liability for tortious interference and that proof of lost profits is "exacting." Because All Star relied on the testimony of a lay witness, Ms. Moira Vogt, who was the owner's wife and All Star's chief financial officer, and because her method for calculating the net profits that All Star estimated would be lost due to tortious interference were subject to certain purported shortcomings, HALO argues that All Star "failed to introduce any evidence of any *actual* loss in sales or profits."

All Star claims that HALO has failed to preserve this point for appellate review. We agree. In the motion for directed verdict submitted and argued at the close of All Star's evidence and renewed at the close of all the evidence, HALO addressed the submissibility of lost profits as an independent claim of error[14] and focused its challenge to the submissibility of the tortious-interference claim on All Star's valid business expectancy with its customers, the first element needed to prove a tortious-interference claim.

> Because a judgment notwithstanding the verdict is a motion to have judgment entered in accordance with a motion for directed verdict, a

[13] See footnote 10 above, for a recitation of the tortious interference elements.

[14] HALO's motion for directed verdict addressed three "claims": All Star's claim for lost profits, All Star's claim for tortious interference with business expectancy, and All Star's claim for punitive damages. The lost-profits argument was completely unmoored from the tortious-interference-with-business-expectancy argument.

> sufficient motion for directed verdict is required to preserve the motion for judgment notwithstanding the verdict and for appeal. Rule 72.01(a) requires that a motion for directed verdict "state the specific grounds therefore." A party cannot save an insufficient motion for directed verdict by making specific allegations in the motion for JNOV. Issues not raised in a motion for directed verdict, but raised in the motion for JNOV, are not preserved for appellate review of the motion for JNOV.

Wolf v. Midwest Nephrology Consultants, PC., 487 S.W.3d 78, 83-84 (Mo. App. W.D. 2016) (citations omitted) (ruling that what Midwest Nephrology failed to raise in a motion for directed verdict precluded it "from obtaining judgment notwithstanding the verdict in its favor on these grounds" and further precluded it "from obtaining appellate review of the trial court's failure to enter judgment notwithstanding the verdict on these grounds.").

HALO has framed the first point relied on as trial court error in denying the motions for directed verdict and for judgment notwithstanding the verdict as to intentional interference and claims on appeal that All Star did not present any evidence of lost profits, i.e., damages, the fifth element for proving a claim for intentional interference with business expectancy. This claim has not been preserved because the motion for directed verdict specifically based its challenge to the submissibility of the intentional-interference claim on the first element, i.e., a failure to prove business expectancy.[15] If we were, nevertheless, to address on the merits HALO's claim that *no* competent evidence supported the submission of lost profits to the jury, we refer to the

[15] All Star also contends that because HALO conceded liability as to conspiracy or intentional interference, it cannot challenge as error the trial court's submission of the intentional-interference claim to the jury. *Hampe v. Versen,* 32 S.W.2d 793, 796-97 (Mo. App. 1930) (ruling that a party, having taken a position and itself bringing about a judgment of liability, cannot withdraw it and complain of the court's action prior thereto. "By making the concession, they have condoned any error that may have been committed by the court, . . ."). HALO had stated throughout trial that it had made a mistake and that All Star was entitled to damages on either theory.

discussion below regarding the admissibility of Ms. Vogt's testimony. All Star clearly submitted some evidence of lost profits. This point is denied.

Evidentiary Rulings

In the second point on cross-appeal, HALO argues that the trial court erred (1) in allowing All Star to introduce Exhibit 235 to support its damages claim for tortious interference, characterizing it as unreliable, because it was "a made-for litigation document containing a lay witness's calculations prepared through an unreliable methodology," and (2) in refusing to strike Ms. Vogt's testimony about the exhibit and All Star's "lost profits," in that her testimony "was not based on actual facts or data that supported a rational estimate of lost profits."

> Our standard of review of a trial court's decision to admit evidence over an objection is for abuse of discretion. A trial court abuses its discretion when the evidentiary ruling is clearly against the logic of the circumstances ... and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration. If reasonable persons could disagree about the propriety of the trial court's ruling, then we will not conclude that the trial court abused its discretion.

Terpstra v. State, 565 S.W.3d 229, 244 (Mo. App. W.D. 2019) (citations omitted). "We review for prejudice, not mere error, and will reverse only if the error [if any] was so prejudicial that the defendant was deprived of a fair trial." *McGuire v. Kenoma, LLC*, 375 S.W.3d 157, 164 (Mo. App. W.D. 2012) (citations omitted).

It would appear that HALO has preserved this issue by filing motions in limine before trial to exclude a document it referred to as a worksheet to estimate lost profits and to exclude Ms. Vogt's testimony to the extent that she would offer an opinion, as a lay witness, as to the value of past and future lost profits. HALO objected to Exhibit 235 during trial as speculative regarding "anticipated lost profit" and sought to have

Ms. Vogt's testimony stricken because she was a lay witness.[16] HALO also addressed these issues in the motion for new trial.

HALO argues that Ms. Vogt's testimony consisted of unfounded conjecture that cannot support a claim for lost profits because "she was neither an expert nor an economist and had no experience calculating lost profits." The cases HALO cites are not persuasive because they involved personal-injury plaintiffs who either tried to make complex calculations they were not qualified to make or introduced expert testimony that relied on assumptions not supported by the evidence. *Tennison v. State Farm Mut. Auto. Ins. Co.*, 834 S.W.2d 846, 847-48 (Mo. App. W.D. 1992) (finding any calculation of future loss to plaintiff in retirement income as a result of loss of sick leave and annual leave was more than mere mathematical calculation of hours lost at a given value); *Hobbs v. Harken*, 969 S.W.2d 318, 324-25 (Mo. App. W.D. 1998) (holding erroneous trial court's admission of expert opinion estimating future damages on basis of unproved assumption that injury sustained in accident was permanent and symptoms would continue for 20 years). HALO also overlooks that Ms. Vogt had been working for the business for more than thirty years, had been overseeing All Star's financial records for that time, and had personal knowledge about customer orders, vendor

[16] The trial court described Exhibit 235 for the record as "three pages of about 20 or so customers. And it shows revenue data generated from late 2017 through 2018. Some of it is from 2015 to 2018." The court further noted, "It varies actually. Some of it goes way back into the 90s. Unless I'm missing something, none of it has to do with anything involving projections of future revenue, gain or loss." The parties further disputed whether a column on the document that was labeled "anticipated losses" was just another term for "lost profits." During the sidebar discussion about Exhibit 235, HALO submitted a brief to the court expanding on its objections to the exhibit and to Ms. Vogt's testimony, although not all of the points included in the brief were argued to the court at sidebar. Because this was the first time the trial court had seen the document, it expressed concern about having to absorb the brief's points in the middle of trial. The trial brief's more comprehensive objections are reflected in the motion for new trial. It is arguable that those matters not discussed at sidebar were not actually ruled on by the trial court and are not therefore preserved for appeal.

relationships, and cash flow. She testified about how she had calculated the numbers populating Exhibit 235, and documents containing the data and information she compiled and used in calculating those figures were admitted into evidence without any objection by HALO.

Missouri courts have long held that a business owner, president, or chief executive officer (CEO) may testify to lost-profit damages where the testimony is based on personal knowledge of business operations. *Smith Moore & Co. v. J.L. Mason Realty & Inv., Inc.*, 817 S.W.2d 530, 534 (Mo. App. E.D. 1991) (finding CEO's testimonial evidence sufficient to provide trier of fact with a rational basis for estimating damages, including lost profits and ruling that trial court did not err in allowing CEO to testify as to lost profits); *see also BMK Corp. v. Clayton Corp.*, 226 S.W.3d 179, 196 (Mo. App. E.D. 2007) (finding that where fact of lost profits is clear, to establish the amount of lost profit with reasonable certainty, "all that is required by Missouri courts is that it be supported by the best evidence available," and concluding, "[A] business owner's testimonial evidence is sufficient to provide the trier of fact with a rational basis for estimating damages to the plaintiff, including lost profits."). The courts have also acknowledged that "[w]hile an estimate of prospective or anticipated profits must rest upon more than mere speculation, uncertainty as to the amount of profits that would have been made does not prevent recovery." *Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.*, 155 S.W.3d 50, 54-55 (Mo. banc 2005). "The claimant must establish the fact of damages with reasonable certainty, but it is not always possible to establish the amount of damages with the same degree of certainty." *Id.* at 55. Ms. Vogt compiled information about actual sales from a designated set of customers over previous years,

deducted a number of specified variable expenses to estimate the profits received and then extrapolated those numbers up to the time of trial to estimate that HALO's interference with All Star's business expectations amounted to about $111,000. *Id.* at 56 (holding that "in tort actions, variable expenses, not fixed expenses, should be deducted from estimated lost revenues in the calculation of lost profits damages."). This was not a series of calculations that required a doctorate in mathematics or accounting. The trial court did not abuse its discretion in refusing to strike her testimony.

Nor did the trial court err in overruling HALO's objection to Exhibit 235. HALO first argues that the exhibit contained opinions based on out-of-court statements to which no hearsay exception applies. Because this purported error was not included in the point relied on, we do not consider it further. Rule 84.04(e). *Lusher v. Gerald Harris Constr., Inc.*, 993 S.W.2d 537, 544 (Mo. App. W.D. 1999) ("A reviewing court is obliged to determine only those questions stated in the points relied on. Issues raised only in the argument portion of the brief are not presented for review." (citation omitted)). HALO also argues that "[a] self-serving document prepared solely for use in litigation lacks the required indicia of reliability to be admissible." In this regard, it does not state what exactly is self-serving about the document, and, indeed, at sidebar, HALO indicated its willingness to have the document admitted into evidence except for the column labeled "anticipated losses." And as indicated above, HALO did not object to any of the documents introduced as Ms. Vogt testified, showing the sources for the information contained in Exhibit 235. She testified that Exhibit 235 was "a summary of sales for the clients that [Mr. Ford] either took with him to HALO

or started approaching after he joined HALO." She also testified that "it's an average of 2015, '16 and '17, to determine what we would have lost from January 1st of '18 through the first quarter of 2019." She testified that she prepared the exhibit and did the calculations. Thereafter, she explained the sources of the data included in the exhibit.

HALO cites *In re Estate of White v. Delano*, 665 S.W.2d 67, 69 (Mo. App. S.D. 1984), for the principle that "[a] self-serving document prepared solely for use in litigation lacks the required indicia of reliability to be admissible." The document at issue in that case was a record of debt payments that was not made in the regular course of business and was missing material information. *Id.* at 69-70. Its proponent introduced the exhibit to prove that the statute of limitations had not tolled to collect the debt. *Id.* at 69. Here, the exhibit was more in the nature of a summary of voluminous records, testified to by the compiler for the sake of convenience. *Killian Constr. Co. v. Tri-City Constr. Co.*, 693 S.W.2d 819, 834-35 (Mo. App. W.D. 1985) (finding summary exhibit admissible). Exhibit 235 was also a demonstrative exhibit to show how Ms. Vogt had reached her estimate of the losses that All Star would incur in the future due to HALO's tortious interference. HALO cites no rule or caselaw proscribing the admission of a demonstrative exhibit to illustrate a party's calculation method. Whether the methodology was flawed went to its weight which HALO does not challenge.

The trial court did not abuse its discretion in admitting Exhibit 235. This point is denied.

Conclusion

Finding error in the trial court's reduction of the punitive-damages award on the basis of section 510.265, we reverse, in part, and remand for the trial court to determine whether the jury's $5.5-million punitive-damages award must be reduced as a matter of due process or remittitur. We find no error in the court's submission of the tortious-interference and punitive-damages claims to the jury, and no evidentiary errors, therefore we affirm in part.

/s/ *Thomas H. Newton*
Thomas H. Newton, Judge

Lisa White Hardwick, P.J. and Karen King Mitchell, J. concur.