



Defendant's Damages Theory Does Not Provide Separate Basis for Award

***Glattly v. Air Starter Components, Inc.*, 2010 WL 3928480 (Tex. App.-Hous. (1 Dist))(Oct. 7, 2010)**

The plaintiff sued the defendant for misappropriation of trade secrets, including stolen drawings and customer lists, and tortious interference with contract. A jury awarded damages on both counts, for \$168,000 and \$600,000, respectively. The defendant appealed, claiming failure to prove lost profits to a reasonable degree of certainty.

Plaintiff relies on owner's assertions. At trial, the plaintiff's expert testified that total damages amounted to over \$1.4 million. She did not allocate the damages between the two different claims, however. Nor did she allocate the trade secrets damages between the stolen drawings and the stolen customer list. Instead, the expert assumed the plaintiff would have made 100% of the defendant's sales, based on the owner's assertions. She did not independently verify the owner's statements or review customer depositions, which in fact revealed that several had stopped doing business with the company because they were dissatisfied with its products and/or service.

Under these facts, the plaintiff did not produce "a single complete calculation based on objective data" showing lost profits to a reasonable certainty, the court held. The plaintiff tried to argue that the defendant's rebuttal expert provided an alternative basis for the jury's award. In his critique of the plaintiff's damages, the defendant's expert indicated a market share model might have been more reliable. For instance, the plaintiff's 40% to 50% market share might have produced damages ranging from \$53,000 to \$67,000.

Contrary to the plaintiff's assertions, however the defendant's expert did not testify that the plaintiff had been damaged. He only offered "conditional testimony" that, even if the plaintiff's expert's assumptions were correct, she had failed to reduce her conclusions by the parties' respective market shares. His testimony was "no evidence of lost profits" to the plaintiff, the court held, and ordered a "take nothing" judgment against the defendant.

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