NO. 94435-1

SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 74511-5-I

ALLYIS, INC. and MATTHEW F. DAVIS,

Petitioners,

v.

SIMPLICITY CONSULTING INC.,

Respondent.

Answer to Petition for Discretionary Review

Submitted by:

Jeffrey A. James
Jennifer A. Parda-Aldrich
SEBRIS BUSTO JAMES
14205 S.E. 36th Street, Suite 325
Bellevue, WA 98006
Tel: (425) 454-4233
Fax: (425) 453-9005

Attorneys for Respondent

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I. INTRODUCTION

According to Petitioners Allyis, Inc. ("Allyis") and its counsel Matthew Davis ("Davis"), the trial court judge—as well as Judges Applewick, Becker, and Mann of Division One of the Washington State Court of Appeals—have taken deliberate steps to rule against them by impermissibly acting as advocates for Respondent Simplicity Consulting, Inc. ("Simplicity") This absurd proposition lines up with the remarkable admissions on Davis' LinkedIn profile, in which he represents himself as particularly well suited at making "chaos out of sense."[1]

Instead, the trial court's order imposing sanctions on Allyis and Davis under RCW 4.85.185 and CR 11 is what finally restored sense out of the litigation chaos caused by Allyis' and Davis' failure to produce any evidence in support of Allyis' frivolously asserted claims; continued refusal to participate in any way in the discovery process; recurring contempt of court in their blatant disregarding of court orders compelling discovery and imposing sanctions; and threatened actions that the trial court concluded rose to the level of "litigation blackmail." The trial court acted well within its discretion in awarding sanctions under RCW 4.85.185 and CR 11, as the appellate court properly concluded in upholding the trial court's order.

This Court should deny review.

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[1] A true and correct copy of a portion of Davis' public LinkedIn profile, with the link to the full profile, is attached as Appendix A.

II. RESTATEMENT OF THE CASE

A. Schroder's Purported "Agreements" with Allyis are Unenforceable.

More than two months after EWD[2] hired Joseph Schroder ("Schroder") in 2002, Schroder signed several pages of EWD's Employee Handbook entitled "Noncompetition Agreement" and "Confidentiality Agreement." (CP 2, 457-461) The handbook containing the purported agreements had an express disclaimer that the contents of the handbook "do[] not establish any . . . contract with employees."[3] (CP 459) No evidence was produced showing that EWD provided Schroder any consideration at the time he signed the handbook.[4]

B. Schroder Begins Working for Simplicity After Voluntarily Terminating his Employment with Allyis.

In April 2014 while employed with Allyis, Schroder contacted Simplicity to express an interest in employment. (CP 185) Simplicity offered Schroder an

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[2] Allyis states EWD changed its name to Allyis, Inc. and is the same legal entity as Allyis. Except for a statement in the Verified Complaint (CP 1) and Declaration of of Chanbir Mann (CP 450-454) no evidence was produced to show when, or how, the name change occurred.

[3] Allyis asserted only that at some vague time "[a]fter executing the [handbook]," Schroder was provided access to unspecified confidential information and "repeatedly promoted." (CP 4). Allyis never produced evidence that Schroder's access to such information was contingent on his signing the handbook or that it promised any of the alleged promotions to Schroder in exchange for his signing the handbook. When Simplicity brought the lack of consideration to Allyis' attention early in the litigation, Allyis responded only that "[u]nder a decade of employment and promotions, the agreement is enforceable" without citing to any legal authority supporting its position. (CP 337) As addressed below, and in the Opinion, the legal authority upon which Allyis and Davis rely in their underlying petition to this Court does not support their asserted position.

Account Manager position, which he accepted. (CP 186-187) In this position, Schroder was given various Simplicity accounts he was responsible for managing and growing. (CP 188-189) He was not responsible for developing new business or recruiting persons to join Simplicity—from Allyis or otherwise—nor was his compensation linked in any way to recruiting employees.[5] (CP 189-190)

Simplicity required Schroder to sign an agreement that he would not use confidential or proprietary information of any former employer. (CP 194-204) After receiving a demand letter from Allyis' counsel, Simplicity required Schroder to sign a document that he was not subject to any restrictive covenants; did not possess any of Allyis' confidential or proprietary information; and would not use any confidential information of Allyis.[6] (CP 194-196, 205-206)

C. Allyis Asserts Four Frivolous Claims Against Simplicity, Which It Later Withdraws And Replaces with a Frivolous Unjust Enrichment Claim.

On September 22, 2014, Allyis, through Davis, filed its Verified Complaint against Jeremy and Nicole Schroder and Simplicity. It asserted four

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[5] Simplicity's CR 30(b)(6) representative, Annie Gleason, testified that one of Simplicity's clients told Schroder that it needed a worker with specific skills and that Schroder, in turn, told her he knew someone whom he believed would be a good fit for the position and whom he knew was looking for a new job as her contract was ending. (CP 469-470) There is no evidence, however, that Simplicity hired the employee or that, if hired, she continued performing the same work for the same client that she had at Allyis. (CP 468-470) Notably, despite scheduling the deposition to last "most of the day," Davis questioned Gleason for only 45 minutes before announcing: "That's all my questions. Appreciate it." (CP 191-192)

[6] Simplicity and Allyis are not competitors. (CP 466) Simplicity has never done business or had contact with Allyis other than as a result of this lawsuit. (CP 194) Allyis has never conferred any benefit on Simplicity, directly or indirectly, and Simplicity has never accepted any benefit from Allyis. *Id.*

claims against Simplicity: (1) tortious interference with a contract; (2) violation of the Washington State Consumer Protection Act ("CPA"); (2) injurious falsehood; and (4) misappropriation of trade secrets in violation of the Uniform Trade Secrets Act ("UTSA").[7] (CP 1-11) Simplicity repeatedly explained to Allyis in detail why its claims against it had no basis in fact or law. (*See e.g.*, CP 336-37) Allyis later withdrew all its claims against Simplicity and asserted a frivolous unjust enrichment claim in an Amended Complaint.[8] (CP 31-37)

D. Allyis Repeatedly Fails to Comply with Its Discovery Obligations.

1. After Allyis Refuses to Respond to Discovery Requests, The Court Grants Simplicity's Motion to Compel and Awards Sanctions.

On March 16, 2015, Simplicity served discovery requests on Allyis attempting to uncover any basis for the unjust enrichment claim. (CP 55-68) On May 4, 2015, after Simplicity had received no responses from Allyis, Jeffrey James ("James"), counsel for Simplicity, reminded Davis that Allyis' discovery responses were long overdue and asked if Allyis intended to respond. (CP 84) James also notified Davis of Simplicity's intention to seek summary judgment and offered to forego its right to seek fees and costs if Allyis withdrew its solely asserted unjust enrichment claim. *Id.*

Davis responded a week later, informing James that Allyis was "just

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[7] Allyis asserted these same claims against the Schroders, plus a claim for breach of contract. (CP 1-11) All claims were eventually dismissed with prejudice by the trial court.

[8] Allyis did not withdraw its breach of contract claim against the Schroders. (CP 31-37)

finishing up the discovery responses and w[ould] have them to [Simplicity] soon." (CP 82) Ten days later—on May 21, 2016—Allyis still had not served its discovery responses on Simplicity. (CP 357) That day, James informed Davis that if Allyis did not provide meaningful discovery responses in 10 days, Simplicity would file a motion to compel and seek sanctions. (CP 357)

During this time, James was attempting to hold a discovery conference with Davis regarding the outstanding discovery responses. (*See e.g.,* CP 52, 79, 82) Finally, on June 22, 2015—68 days after the responses were due—James reached Davis by phone. Davis cursed at James and refused to engage in a discovery conference. (CP 88) James then emailed Davis stating that if Allyis did not produce discovery by July 6, 2015, Simplicity would move to compel. *Id.* After Allyis failed to produce any responses, on July 9, 2015, Simplicity filed a motion to compel discovery. (CP 44-50) Allyis did not respond to the motion and made no attempt to fulfill its obligation to produce discovery. (CP 90-92) On July 17, 2015, the trial court granted Simplicity's motion and entered an order: (1) requiring Allyis to respond to Simplicity's discovery requests by July 23; and (2) awarding Simplicity $4,041.50 in reasonable attorney's fees Simplicity incurred in bringing the motion to compel, for which Allyis and Davis were jointly and severally liable and required to pay to by July 24.[9]

[9] The trial court also ordered Allyis to pay interest on the sanction amount at 12% per year. *Id.*

2. Allyis' CEO and CFO Fail to Appear for Their Depositions.

On June 22, 2015, Simplicity served two deposition notices on Allyis for its CEO, Chanbir Mann, and CFO, Rakesh Garg to take place on July 23, 2015.[10] On July 23, James, Simplicity's CEO Lisa Hufford, and a court reporter waited for Davis, Mann, and Garg to appear for the noticed depositions. (CP 117) After waiting for roughly half an hour, James called Davis and asked why he and his clients were not at their noticed depositions. *Id.* Davis responded that the depositions would not take place and promised to contact James again by phone at 2:00 p.m. to provide additional details. *Id.* Davis, however, did not contact James as he had promised. *Id.* He subsequently explained to James in an email that he had "received the [deposition] notice, but because of a vacation and a few other things, it just did not get scheduled. And for that I apologize."[11] (CP 132)

Davis would later change his story when arguing to the trial court (and to the appellate court), claiming that he "simply did not notice the [deposition] notices at the end of [James'] letter" (CP 212), and that Davis and Allyis' representatives had failed to appear for the depositions due to a "scheduling error." In a declaration submitted with the trial court, Davis even "question[ed]

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[10] Mann and Garg had each been identified by Allyis as having "knowledge of all aspects of plaintiff's claim." (CP 116)

[11] Davis did not offer to make the deponents available at another time or offer to pay Simplicity's fees and costs.

the manner in which [the deposition notices] were delivered," insinuating that they were hidden at the end of an ambiguous letter.[12] (CP 212)

3. Allyis Refuses to Comply with the Trial Court's Order Compelling Discovery and Imposing Sanctions.

Allyis failed to comply in any way with the trial court's July 17, 2015 order compelling discovery responses and imposing sanctions payable to Simplicity by court ordered deadlines. (*See, e.g.*, CP 118) On August 6, 2015, Simplicity filed a motion to hold Allyis and Davis in contempt of the court's order and to recover its fees associated with the depositions that Davis, Mann and Garg failed to attend. (CP 110-115) On August 14, 2015, the trial court granted Simplicity's motion, holding Allyis and Davis in contempt of its July 17, 2015 order. (CP 236-237) The court also awarded Simplicity $5,932.49 as its reasonable fees and costs incurred in preparing for the depositions for which Davis, Mann and Garg failed to appear and in bringing the motion for sanctions, holding Allyis and Davis jointly and severally liable. *Id.*

E. Allyis Engages in "Litigation Blackmail."

In late July 2015, James asked Davis for Allyis to voluntarily dismiss its frivolous unjust enrichment claim to allow both parties to avoid the expense of a summary judgment motion. (CP 378-79) Davis did not respond. (CP 330)

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[12] Davis' representation to the trial court in this regard was odd given that James' letter, to which Davis referred, was just two short paragraphs long, the second of which stated clearly: "Enclosed are deposition notices for Chanbir Mann and Rakesh Garg. We will proceed with the depositions if we do not receive back the signed Stipulation by July 6, 2015." (CP 223)

Simplicity moved for summary judgment on August 7, 2015, which Allyis did not oppose, prompting the trial court to cancel oral argument. (CP 146-155, 262) Three days before the unopposed motion was to be decided, Davis emailed James and counsel for the Schroders offering to voluntarily dismiss all of Allyis' claims asserted against both parties with prejudice *if* Simplicity would agree to not collect the awarded sanction amounts previously entered by the trial court in its July 17, 2015 and August 14, 2015 orders. (CP 388; *see also* CP 93-94, 236-237) In the alternative, Davis threatened that Allyis would voluntarily dismiss the lawsuit *without* prejudice and "in all probability refile [its claims] when [his] client ha[d] more time to focus on them." *Id.* Davis also threatened that if Simplicity did not agree to waive the court ordered fee awards, Allyis would subpoena Simplicity's clients at Microsoft for depositions in any future action.[13] *Id.* Simplicity did not accept Allyis' blackmail offer and awaited a ruling on its then pending (and unopposed) summary judgment motion. (CP 331)

F. The Trial Court Dismisses Allyis' Unjust Enrichment Claim With Prejudice Based on Davis' and Allyis' Conduct Throughout the Case.

The day before the trial court was scheduled to decide Simplicity's unopposed summary judgment motion, Allyis sought to put its threatened plan into action by filing a motion for voluntary nonsuit. (CP 261) Recognizing that

[13] This threat was particularly galling because Allyis had refused to provide the most basic discovery, including contemptuously ignoring the court's order to produce discovery. (CP 118)

Allyis was entitled to dismissal despite having missed the deadline to oppose Simplicity's summary judgment motion, Simplicity filed a motion asking the trial court to dismiss Allyis' claims with prejudice. (CP 262-270)

The court granted both Allyis' motion for nonsuit and Simplicity's motion for dismissal with prejudice. (CP 316-318) In so doing, it found that Allyis and Davis were in contempt of both of its earlier July 17, 2015 and August 14, 2015 orders sanctioning Allyis and Davis and ordering Allyis to respond to Simplicity's discovery requests. (CP 316) The trial court also found that Allyis had engaged in "'litigation blackmail' to try to avoid complying with the Court's [prior] order[s]." (CP 317) Accordingly, the court concluded that the "extraordinary sanction of dismissal [was] appropriate in this case because of Allyis' and Davis' extreme discovery abuse and willful contempt of [the trial] court's orders." (CP 317)

G. The Trial Court Finds that Allyis' Asserted Action Was Frivolous and Advanced for Improper Purpose.

After the trial court dismissed Allyis' action with prejudice, Simplicity moved to recover its fees and costs (the "Fee Petition") incurred in defending against Allyis' frivolous action. (CP 319-326) It also moved for sanctions under CR 11. *Id.* On October 16, 2015, the trial court granted the Fee Petition and ordered Allyis and Davis, jointly and severally, to pay all of Simplicity's attorney's fees and costs incurred in defending against Allyis' action in the total amount of $58,758.95. (CP 481) For judicial economy, the court included its July 17 and

August 14 sanction awards in the October 16, 2015 order, ruling that the new order superseded the prior sanction orders. *Id.*

Allyis and Davis moved for reconsideration of the trial court's ruling, arguing that the trial court's order failed to make the necessary findings to support an attorney's-fees award under RCW 4.84.185 and CR 11. (CP 491-493) They also argued that the court used an incorrect legal standard when evaluating Allyis' unjust enrichment claim.[14] (CP 485-490)

The trial court accepted Allyis' invitation to re-consider its prior order and on November 19, 2015 entered an amended order denying Davis' and Allyis' motion for reconsideration and granting Simplicity's Fee Petition. (CP 518-524) (the "Amended Order"). In the Amended Order, the trial court awarded Simplicity an additional $4,214.50 for fees incurred in responding to Allyis' motion for reconsideration–for a total of award of $62,973.45. It additionally set forth specific factual findings underlying its reasoning for granting Simplicity's Fee Petition. (CP 518-524)

In the Amended Order, the trial court addressed Petitioners' arguments regarding the asserted unjust enrichment claim and the basis for rejecting their position that the claim was not frivolous. (CP 520) The trial court found that Allyis presented no evidence showing it conferred any benefit on Simplicity or

[14] Simplicity responded in opposition to Allyis' motion at the trial court's request, arguing that the trial court's order awarding Simplicity reasonable attorney's fees and costs under RCW 4.84.185 and CR 11 was properly made. (CP 498-511)

showing Simplicity was unjustly enriched at Allyis' expense. *Id.* The court also made clear that Allyis' and Davis' conduct throughout the lawsuit–including their refusal to engage in discovery, contempt of court and threat to exploit voluntary dismissal as a weapon to harass Simpliclity–reflected there was no evidence to support any of the asserted claims and that Allyis and Davis initiated the claims for an improper purpose. (CP 520-21, 523) Allyis and Davis moved for reconsideration of the Amended Order, which was denied. (CP 525, 541)

H. The Appellate Court Properly Upholds the Trial Court's Order Imposing Sanctions.

Allyis and Davis appealed the trial court's October 16, 2015 ruling granting the Fee Petition and subsequent Amended Order denying Allyis' motion for reconsideration. (CP 542-544) Notably, they did not challenge the dismissal of Allyis' claims against Simplicity (or the Schroders) with prejudice. *Id.* Thus, the sole question on appeal was whether the trial court abused its discretion in awarding sanctions under CR 11 and RCW 4.84.185.[15]

In a well-reasoned and legally sound opinion, the appellate court upheld the trial court's ruling awarding sanctions under CR 11 and RCW 4.84.185, concluding that the trial court did not abuse its discretion in awarding sanctions. The appellate court also found that the appeal was frivolous and awarded Simplicity its fees and costs pursuant to RAP 18.1 and 1RAP 18.9(a). As

[15] *See* Opinion, at 4, 18 (Appendix A to Petition for Review).

discussed below, contrary to Allyis' and Davis' contention, the appellate court's Opinion is not inconsistent with any prior opinion of this Court or the appellate court. Review should be denied. In addition, Simplicity requests an award of fees and costs pursuant to RAP 18.1(j).

III. ARGUMENT SUPPORTING DENIAL OF REVIEW

A. The Opinion Affirming the Trial Court's Sanction Award is Consistent with this Court's Decisions in *Studd, Young, Biggs I & II and Labriola.*

Petitioners seek review under RAP 13.4(b)(1). In an "everything but the kitchen sink" approach, they identify multiple opinions of this Court with which they claim the Opinion is inconsistent.[16] As addressed below, they are wrong.

1. The Opinion is Consistent with *Studd.*

Allyis and Davis claim that the appellate court failed to give any "serious consideration" to their asserted arguments or to otherwise assess the trial court's findings. *See* Petition, at 11. Instead, they claim the appellate court impermissibly acted as an "advocate" for Simplicity—in contradiction with this Court's opinion in ***State v. Studd***[17]—by making its "own findings" in the Opinion. *See* Petition, at 11. Their argument has no merit.

In ***Studd,*** criminal defendants contested whether erroneous jury instructions formed a basis for new trials, although the instructions were

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[16] *See* Petition, at 11-17.

[17] 137 Wn.2d 533, 973 P.2d 1049 (1999).

requested by the defendants, thereby implicating the "invited error doctrine."[18] *See* ***Studd***, 137 Wn.2d at 545-46. In upholding convictions where the instructions were invited by the defendants, the majority noted that the dissenting opinion sought to avoid the invited error doctrine by "assigning significance" to a previously decided opinion by this Court in which the doctrine was implicated but the court gave no consideration to whether the defendant had proposed the incorrect jury instruction. *Id.*, 137 Wn. 2d at 547. In dismissing the dissenting opinion as factually inaccurate, the majority additionally noted that the dissent had "invent[ed]" a new argument not previously raised by the parties. *Id.*

In contrast here, Simplicity has clearly asserted that Allyis' entire action was not grounded in fact or law and asserted for an improper purpose. That the appellate court found merit in Simplicity's position does not support a finding the appellate court impermissibly served as an "advocate" for Simplicity. Furthermore, the language in ***Studd*** upon which Allyis and Simplicity rely is commentary by the majority addressing the merits (or lack thereof) of the dissenting opinion. It is not the case holding and cannot serve as a basis upon which to render the Opinion "inconsistent" with ***Studd***. *See* RAP 13.4(b)(1). ***Studd*** is simply inapposite.

2. The Opinion is Consistent with *Young*.

[18] The "invited error doctrine" precludes a party from obtaining relief from error caused by the party's own act or omission. ***Studd***, 137 Wn.2d at 546.

Allyis and Davis erroneously assert that the Opinion is inconsistent with this Court's decision in ***Young v. Young.***[19] In so doing, Allyis and Davis continue to misinterpret the correct legal standard for an unjust enrichment claim by erroneously asserting that, under ***Young***, unjust enrichment requires only that the defendant received a benefit at the plaintiff's expense—not that the benefit was conferred on the defendant by the plaintiff. *See* Petition, at 12-15.

The appellate court properly rejected Petitioners' assertion, concluding that the trial court did not erroneously interpret ***Young*** as requiring the plaintiff to directly confer a benefit on the defendant for an unjust enrichment claim to succeed. Opinion, at 9-10. As the appellate court recognized: (1) this Court in ***Young*** set forth the elements of an unjust enrichment claim "in its own words" by recognizing, *inter alia,* that a defendant must receive a benefit "at the plaintiff's expense"; and (2) Washington courts have since clarified the elements established by ***Young*** as requiring that the benefit be conferred by the plaintiff.[20] None of this Court's opinions relied upon by Petitioners hold otherwise.[21]

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[19] 164 Wn.2d 477, 191 P.3d 1258 (2008).

[20] *See* Opinion, at 9-10 (citing ***Young,*** 164 Wn.2d at 484-85; ***Austin v. Ettl,*** 171 Wn. App. 82, 92, 286 P.3d 85 (2012) ("[A] plaintiff conferred a benefit upon the defendant"); ***Nat'l Sur. Corp. v. Immunex Corp.***, 162 Wn. App. 762, 778 n.11, 256 P.3d 439 (2011) ("[A] party must show a benefit conferred upon the defendant by the plaintiff."), *aff'd,* 176 Wn.2d 872, 297 P.2d 688 (2013); ***Cox v. O'Brien***, 150 Wn. App. 24, 37, 206 P.3d 682 (2009) ("[O]ne party must have conferred a benefit to the other"). As addressed in detail below, Allyis and Davis' additionally assert that the Opinion is inconsistent with decisions of the appellate court regarding the correct legal standard of an unjust enrichment claim. *See* Petition, at 19-20.

[21] In their Petition, Allyis and Davis cite to, but provide little analysis of, five opinions by this Court that purportedly contradict the appellate court's interpretation of ***Young.*** *See* Petition, at 13-14. Notably, four of the decisions were issued *before* ***Young*** *and* were not cited in or

Moreover, in submitting that this Court "should rule" that the elements of an unjust enrichment claim require that the defendant's received benefit is "at the plaintiff's expense"—not conferred at the plaintiff's expense—Petitioners seek a *modification* of existing law. *See* Petition, at 14-15. Such an argument is untimely and underscores the frivolity of Allyis' asserted claim.[22]

3. **The Opinion is Consistent with *Biggs I & II.***

Oddly, in asserting that the Opinion is inconsistent with the elements required for CR 11 sanctions under ***Biggs v. Vail,***[23] Allyis and Davis claim that whether Allyis was able to prove its asserted claims "was never the question in this case." *See* Petition, at 15. To the contrary, whether the asserted claims were well grounded in fact or law—and thus *capable* of being proven—was precisely at issue with regard to Simplicity's sanction request. *See* ***Biggs II,*** 124 Wn.2d at 201 (for CR 11 sanctions to be imposed, the court must find, *inter alia,* that "the claim was not grounded in fact or law"). Consistent with the requirements of ***Biggs II,*** the appellate court properly held that the trial court did not abuse its

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otherwise relied upon by this Court in ***Young.*** *See* **Olwell v. Nye** *& **Nissen Co.,*** 26 Wn.2d 282, 283, 173 P.2d 652, 652 (1946); ***Bill v. Gattavara,*** 34 Wn.2d 645, 651, 209 P.2d 457, 460 (1949);***Mill & Logging Supply Co. v. W. Tenino Lumber Co.,*** 44 Wn.2d 102, 113, 265 P.2d 807, 813 (1954),***Irwin Concrete, Inc. v. Sun Coast Properties, Inc.,*** 33 Wn. App. 190, 653 P.2d 1331, 1334 (1982). Thus, even if viewed as contradictory—which Simplicity does not concede—***Young*** would supersede them. As Allyis and Davis concede, the remaining case--***Nat'l Surety. Corp. v. Immunex Corp.,*** 176 Wn.2d 872, 899, 297, 13 P.3d 688, 701 (2013)—did not reach an issue related to unjust enrichment, which was addressed only in the dissenting opinion.

[22] The appellate court expressly recognized the same. *See* Opinion, at 10 note 4 ("Allyis never argued that the rule announced in ***Young*** should be extended, modified, or reversed—instead, it argued for an interpretation of the case that is not supported by the law.").

[23] 119 Wn.2d 129, 830 P.2d 350 (1992) ("***Biggs I***")124 Wn.2d 193, 201, 876 P.2d 448 (1994) ("***Biggs II***").

discretion in imposing CR 11 sanctions after finding that none of the asserted claims were well grounded in fact or warranted by existing law, nor did Davis' conduct throughout the litigation reflect that they had been brought in good faith.

Petitioners' assertion that the Opinion is inconsistent with the requirements under ***Biggs I*** that an order awarding sanctions under CR 11 must "specify the sanctionable conduct in its order" is equally without merit. Remarkably, Petitioners allege that the trial court's findings were "perfunctory . . . because [the court] had no idea what Davis did or did not do." *See* Petition, at 15. To the contrary—and as set forth in detail in the trial court's order—the court based its sanction award on Allyis' and Davis' failure to allege sufficient facts or produce any evidence in support of the asserted claims (including in opposition to summary judgment); their refusal to engage in discovery; their recurring contempt of court; and their threat to exploit voluntary dismissal as a weapon. (CP 520-21, 523) The trial court's specific factual findings in this regard are consistent with ***Biggs I***, as the appellate court properly concluded.

4. The Opinion is Consistent with *Labriola*.

Allyis and Simplicity contend that the appellate court's finding that Schroder's continued employment did not serve as valid independent consideration for the noncompete agreement is inconsistent with ***Labriola v. Pollard Group, Inc.***[24] Once again, their contention has no merit.

[24] 152 Wn.2d 828, 100 P.3d 791 (2004).

This Court in ***Labriola*** held that a noncompete agreement entered into during an existing employment relationship is unenforceable unless supported by "independent additional consideration," such as "increased wages, a promotion, a bonus, a fixed term of employment, or perhaps access to protected information." ***Labriola***, 152 Wn.2d at 834. Consistent with this holding, the appellate court properly concluded that no valid independent consideration existed where "nothing in the noncompete agreement or Schroder's circumstances of employment suggests that he continued to be employed or that he was promoted as a result of his promise not to compete." Opinion, at 14.

Petitioners claim that the appellate court incorrectly interpreted ***Labriola*** as standing holding that continued employment may never form a basis for independent consideration and did not consider facts specific to Schroder's employment. *See* Petition, at 17. In fact, the appellate court considered the record evidence and concluded that "[n]othing in the record would support an inference, let alone a conclusion, that Schroder's later promotion was given as consideration for a noncompete agreement."[25] *See* Opinion, at 14.

B. The Opinion Affirming the Trial Court's Order Imposing Sanctions is Consistent with its Decisions in *Selig, Norcon, Bailie, and Bates.*

[25] Allyis and Davis additionally attempt to rely on Justice Madsen's concurring opinion in which they allege she "objected" to the majority's ruling that whether continued employment is sufficient consideration should be determined on a case-by-case basis. *See* Petition, at 17. In fact, Justice Madsen's concurring opinion was made in order "to *clarify* that continued at-will employment is never sufficient consideration for a noncompete agreement formed after the outset of employment." *See id.,* at 843 (emphasis added).

Petitioners also seek review under RAP 13.4(b)(3), identifying multiple appellate court opinions with which they claim the Opinion is inconsistent. As addressed in detail below, their claim has no merit.

1. **The Opinion is Consistent with *Selig*.**

Allyis and Davis claim that the Opinion is inconsistent with the requirements under ***North Coast Electric Co. v. Selig***[26] that an award of attorney fees under RCW 4.84.185 and CR 11 contain specific findings regarding the frivolous nature of the asserted claims and identifying the pleadings that constitute a CR 11 violation.[27] *See* Petition, at 18. They erroneously claim that the Opinion "makes no attempt" to satisfy this requirement. *Id.*

As described above, the trial court's Amended Order explicitly found that Allyis presented no evidence in support of any of the asserted claims, both in the Verified Complaint and through its refusal to engage in discovery—including by refusing to comply with the court's orders compelling discovery and holding Allyis in contempt of court. (CP 518-524) The trial court specifically identified the Verified Complaint and Amended Complaint as the pleadings forming the basis for the CR 11 violation, finding that no reasonable inquiry was made before filing each and that each was brought for the improper purpose of

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[26] 136 Wn.App. 636, 650, 151 P.3d 211 (2007).

[27] Their assertion here is similar to their claim that the Opinion is inconsistent with this Court's opinion in ***Biggs I***, which requires that an order awarding sanctions under CR 11 must "specify the sanctionable conduct in its order." *See supra.*

"bringing, and keeping, Simplicity's presumably deep pockets in the litigation." (CP 520-21, 523) For each of these reasons, the appellate court correctly upheld the trial court's sanction award, and the Opinion is not inconsistent with ***Selig.***

2. **The Opinion is Consistent with *Norcon Builders, Bailie and Bates.***

In its Opinion, the appellate court properly rejected Petitioners' interpretation of ***Norcon Builders, LLC v. GMP Homes VG, LLC,***[28] and ***Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.***[29] regarding the legal standard for an unjust enrichment claim. The Opinion is not inconsistent with either decision, nor is it inconsistent with ***Puget Sound Security Patrol, Inc. v. Bates.***[30]

The appellate court accurately concluded that both ***Norcon*** and ***Bailie*** "are consistent with a requirement that that plaintiff confers a benefit to the defendant." *See* Opinion, at 10. Indeed, as the appellate court aptly recognized, ***Bailie*** explicitly identifies one element of an unjust enrichment as "a benefit *conferred upon the defendant by the plaintiff.*" Opinion, at 9 (citing ***Bailie***, 61 Wn. App. 151 at 159) (emphasis added). In ***Norcon***, Division One of the Court of Appeals similarly identifies a plaintiff-conferred benefit as a requirement:

> The mere fact that a *defendant has received a benefit from the plaintiff* is insufficient alone to justify recovery. The doctrine of unjust enrichment applies only if the circumstances of the benefits received or retained make it unjust for the defendant to keep the benefit without paying.

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[28] 161 Wn.App. 474, 254 P.3d 835 (2011).
[29] 61 Wn.App. 151, 810 P.2d 12 (1991).
[30] 197 Wn.App. 461, 389 P.3d 709 (2017).

Norcon, 161 Wn. App. at 490 (emphasis added). Petitioners' reliance on ***Bates*** is equally misplaced where Division One specifies that "enrichment alone will not suffice" for an unjust enrichment claim. ***Bates***, 197 Wn.App., at 475. Instead, "it is critical that the enrichment be unjust both under the circumstances *and as between the two parties to the transaction." Id.* (emphasis added). Thus, the language in ***Bailie, Norcon*** and ***Bates*** each identifies one element of an unjust enrichment claim as a plaintiff-conferred benefit on the defendant. As the appellate court correctly concluded, "[t]hat courts have phrased this requirement in different ways does not create two competing tests, but a single test explained in several ways." Opinion, at 10.

C. This Court Should Award Fees and Costs Per RAP 18.1(j).

In their Petition, Allyis and Davis have again submitted the same frivolous arguments, requiring Simplicity to incur further expense in responding. Simplicity respectfully requests an award of fees and costs per RAP 18.1(j).

IV. CONCLUSION

For each of the above reasons, this Court should deny review.

RESPECTFULLY SUBMITTED this 26th day of May, 2017.

SEBRIS BUSTO JAMES

Jeffrey A. James, WSBA No. 18277
Jennifer A. Parda-Aldrich, WSBA No. 35308
Attorneys for Respondent

Appendix A

Matthew Davis

Principal of Bracepoint Law, P.S.
Greater Seattle Area | Real Estate

Current	Bracepoint Law P.S.
Previous	Davis Leary LLC, Demco Law Firm, P.S.
Education	University of Kansas School of Law
Websites	Company Website

232 connections

Summary

I am an attorney. In 2013, I left my firm of 20 years to try something new and discovered that I am an attorney, not a businessman. Part of the explanation appeared when I learned at age 50 that I have ADHD. That explained a whole lifetime and surprised no one but me. ADHD meds are a wonderful thing and have drastically improved my life.

That led to my April 2016 merger into Bracepoint Law, P.S,, the firm of my friend and excellent business attorney Mark Jordan. We have collaborated on many cases over the last two years, and that has been a wonderful thing for both of us. He knows who and what I am, so I do not have to worry that he will be surprised at my disorganization. He provides organization and a structure for my practice that have been missing.

I am sharing these details because anyone considering me as their attorney has a right and need to know them. Your choice of lawyer will make more difference in terms of the outcome than with any other profession. I am not the right attorney for every client or case.

I have often been described as a different kind of lawyer. If you have a routine problem and need a routine solution, then I am not your guy. However, when things get complicated or take a strange turn, you might find that I am just what you need. My mind tends to see the whole picture and to see the connections. That can help to make sense out of chaos, but it also can make chaos out of sense. I do very well with complicated or complex questions, but am not efficient with routine matters.

mdavis@bracepointlaw.com

Experience

Principal

Bracepoint Law P.S.
April 2016 – Present (1 year 2 months)

Professional Services

Principal

Davis Leary LLC
September 2013 – March 2016 (2 years 7 months)

Principal with boutique law firm

Partner

I was one of four partners and spent more than 20 years with the Demco Law Firm. Its practice is focused almost exclusively on residential real estate matters, and my own practice evolved into commercial real estate, securities and business disputes. So I left to form my own firm.

Pat Brewer
Full Time Professional Realtor

Projects

Fathom Systems
Starting 2005

Startup developing LED lighting systems that reproduce spectrum of sunlight
Team members: Matthew Davis

Skills

Real Estate | Real Estate Transactions | Sellers | Commercial Litigation | Litigation | Arbitration | Dispute Resolution | Mediation | Legal Research | Foreclosures | Negotiation | Investment Properties

Languages

French

Education

University of Kansas School of Law
Doctor of Law (JD)
1989 – 1991

Study Abroad

Universite de Grenoble, France
French
1984 – 1985

Study Abroad

CERTIFICATE OF SERVICE

I Holly Holman, certify under the penalty of perjury under the laws of the United States that, on May 26, 2017, I served the attached Answer to Petition for Discretionary Review to the party listed below in the manner shown.

Matthew Davis	[ ] By United States Mail
Bracepoint Law	[ ] By Legal Messenger
2775 Harbor Ave SW	[ ] By Facsimile
Seattle, WA 98126-2138	[ ] By Overnight Fed Ex Delivery
mdavis@bracepointlaw.com	[X] Via E-Mail
matt@davisleary.com	[ ] Via LINX

Joe Shaeffer	[ ] By United States Mail
MacDonald Hoague &	[ ] By Legal Messenger
Bayless 705 Second Ave,	[ ] By Facsimile
Suite 1500 Seattle, WA	[X] By E-Service
98104	[ ] By Email

/s/ Holly Holman

Holly Holman

SEBRIS BUSTO JAMES

May 26, 2017 - 4:44 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	94435-1
Appellate Court Case Title:	Allyis, Inc. v. Simplicity Consulting, Inc., et al.
Superior Court Case Number:	14-2-25900-0

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Comments:

Attached please find Respondent's Answer to Petition for Discretionary Review and Appendix 1. Also attached is a Certificate of Service. Thank you.

Sender Name: Holly Holman - Email: hholman@sebrisbusto.com
Filing on Behalf of: Jeffrey Allen James - Email: jaj@sebrisbusto.com (Alternate Email:)

Address:
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Suite 325
Bellevue, WA, 98006
Phone: (425) 454-4233

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