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Court of Appeals
Division I
State of Washington

74511-5

NO. 74511-5-I

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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

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ALLYIS, INC.,

and

Matthew F. Davis,

Appellants

v.

SIMPLICITY INCORPORATED,

Respondent,

and

Jeremy Schroder,

Defendant.

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# BRIEF OF APPELLANT

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Matthew F. Davis
Bracepoint Law
2775 Harbor Ave SW, Ste D
Seattle, WA 98126
(206)347-8877
mdavis@bracepointlaw.com

## Table of Authorities

### *Washington Cases*

***Federal Cases***

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## I. INTRODUCTION

This is an action to enforce a noncompete and nonsolicitation agreement. Plaintiff/Appellant Allyis, Inc. sued its former employer, defendant Jeremy Schroder, and his new employer, Simplicity, Inc. During the case, the parties had discovery disputes, and King County Judge Hollis Hill entered orders to compel and awarded discovery sanctions against Allyis.

Allyis ultimately brought a motion for voluntary dismissal while a summary judgment motion was pending. Simplicity objected and asked the court to dismiss the case with prejudice, which Judge Hill did.

After the case was dismissed, Simplicity brought a motion for an award of fees for defending a frivolous action. The motion was six pages long and provided no basis to award sanctions. It sought fees under RCW 4.84.185, but did not acknowledge that all claims pled must be frivolous to award fees under that statute, and it only addressed one of five claims in the action. Simplicity's motion contained a single sentence about its request for CR 11 sanctions.

The only substantive argument made in the motion concerned Allyis' unjust enrichment claim. Simplicity argued that the claim was frivolous because Allyis did not directly confer a benefit on Simplicity. According to Simplicity, the Supreme Court adopted that requirement for unjust enrichment claims in *Young v. Young*, 164 Wn.2d 477, 484-85, 191 P.3d 1258 (2007). As set forth in Allyis' response that the motion and in this Brief, that simply is not true.

Judge Hill signed Simplicity's proposed order without making a single change to it other than striking the word "Proposed." She awarded

$58,758.95 against Allyis and its attorney, appellant Matthew Davis., which order included and superseded her prior discovery orders.

Allyis moved for reconsideration, and Judge Hill called for a response. She apparently recognized that her order was flawed because she complete rewrote it. Judge Hill's Amended Order purports to make findings about the other claims even though no evidence or argument was ever presented to her about them. She likewise made conclusory findings under CR 11 for which no evidence was ever presented. She also went well beyond the scope of the motion, talking about "Mr. Davis' conduct throughout this lawsuit" and "substantial justice."

Judge Hill knows nothing about Davis' conduct throughout this case. Before awarding fees, she decided a Motion to Compel and a follow-on Motion for Fees and Contempt and Allyis' Motion for Voluntary Dismissal. Simplicity filed a Motion for Summary Judgment, but Allyis filed its Motion to Dismiss before that motion could be heard. Judge Hill denied every request for oral argument in the case, and she has never seen Davis. The only direct contact was a short telephone conference concerning the Motion to Dismiss. When Davis demanded a hearing in Allyis' Motion for Reconsideration, Judge Hill denied it in a written order.

Washington law does not allow judges to impose $60,000 of sanctions without a real factual basis and a deliberate process. When Judge Hill recognized on reconsideration that her order was deficient, she should have withdrew it, but she instead made whatever additional findings she thought necessary to justify her decision. This Court should reverse the award of fees and sanctions, not remand for further proceedings.

## II. ASSIGNMENTS OF ERROR

1. Judge Hill erred in awarding Simplicity fees under RCW 4.84.185.

2. Judge Hill erred in awarding Simplicity sanctions under CR 11.

3. Judge Hill erred in making Findings of Fact 4, 7, 8, 9, 10, 22, 23, 24, 25, 26, 27, 28, 29, 31, and 33 in her Order Denying Plaintiff's Motion For Reconsideration And Amending Order Granting Defendant Simplicity's Petition For Fees And Costs For Opposing Frivolous Action.

## III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Does unjust enrichment require proof that the plaintiff directly conferred a benefit on the defendant? (First and Second Assignments of Error)

2. Were Allyis' claims for violation of the Trade Secrets Act, injurious falsehood, and violation of the Consumer Protection Act frivolous and advanced without reasonable cause? (First Assignment of Error)

3. Did the Complaint violate RCW 4.84.185 or CR 11? (First and Second Assignments of Error)

4. Did the Amended Complaint violate RCW 4.84.185 or CR 11? (First and Second Assignment of Error)

5. Did the trial court make the findings of fact required for an award of fees under RCW 4.84.185 or sanctions under CR 11? (First and Second Assignments of Error)

6. Was the request for CR 11 sanctions properly supported in the motion for fees? (Second Assignment of Error)

7. Did the trial court abuse its discretion in awarding attorney fees under RCW 4.84.185 and/or CR 11? (First and Second Assignments of Error)

8. Was the trial court authorized to award sanctions under CR 11? (Second Assignment of Error)

9. Were Judge Hill's findings of fact supported by substantial evidence? (Third Assignment of Error)

## IV. STATEMENT OF THE CASE

Because this appeal concerns sanctions for what transpired during the case, the factual and procedural facts are combined in a single statement.

Plaintiff Allyis, Inc. is in the business of providing contract workers to technology companies like Microsoft.[1] CP 450 at ¶ 2. On May 10, 2002, Allyis (then known as Essential Web Design & Consulting, Inc.) hired defendant Jeremy Schroder ("Schroder") as a Web Publisher for its OEM Publishing Team. CP 2 at ¶ 3.3. Schroder was continuously employed by Allyis for a dozen years. Verified Complaint at ¶ 3.17.

Shortly after he was hired, Schroder executed a Noncompetition Agreement dated July 23, 2002, in favor of Allyis (the "Noncompetition Agreement"). Id. at ¶ 3.4; CR 213-17. In the Noncompetition Agreement, Schroder agreed not to work for a competing company for five years after leaving Allyis, or to solicit Allyis employees for another company. CP 213. Schroder also executed a Confidentiality Agreement. CP 3 at ¶ 3.5.

Over the years, the work of Essential Web Design & Consulting evolved into providing contract workers to technology companies, including

[1] Allyis was originally formed as Essential Web Design & Consulting, Inc. and later changed its name to Allyis. Allyis and Essential are the same legal entity. CP 1 at ¶ 1.1.

Microsoft. CP 450 at ¶ 2. Along the way, Schroder was promoted to a management position. CP 4 at ¶ 3.9.

On May 7, 2014, Schroder abruptly left Allyis and began working for defendant Simplicity Consulting, Inc. CP 5 at ¶ 3.17. Simplicity is also in the business of providing contract workers to technology companies including Microsoft. CP 452 at ¶ 9. At least six Allyis employees left and also joined Simplicity immediately after Schroder did. *Id.*. When those employees joined Simplicity, their actual work did not change at all. *Id.* They continued to work on the same projects for the same client as they had for Allyis. *Id.* The only thing that changed was that Simplicity rather than Allyis was receiving the profit on the contracts. *Id.* Allyis also was told by its employees the Schroder solicited them to work for Simplicity as well. CP 453 at ¶ 11.

Allyis became very concerned about the potential for Schroder to systematically raid its employees. Schroder knew the terms of employment for Allyis employees, and it would be a simple matter to offer them slightly more since they were already working on projects. CP 451 at ¶ 7. On June 18, 2014, Allyis contacted Simplicity through its business attorney and simply demanded that "make no further efforts to induce Allyis employees to leave their employment." CP 218. It did not ask that Schroder stop working for Simplicity. *Id.*

Simplicity's response was a letter from an attorney representing both Simplicity and Schroder stating that "Mr. Schroder is not and does not intend to violate any enforceable terms of any prior employment agreement with your client." CP 219. The letter argued that the five-year duration and geographic reach of the agreement was unreasonable and questioned

whether Allyis' information was confidential. *Id.*. It concluded that "My clients do not anticipate any of their activities will constitute a violation of any enforceable provision of Mr. Schroder's prior employment agreement." CP 220.

It would have been a simple matter for Simplicity to acknowledge the agreements and agree not to allow Schroder to breach the agreement for its benefit. After seeing Simplicity's response, Allyis decided that it was necessary to file a lawsuit. It knew that it had already lost six employees to Simplicity when Schroder left, and it was being told by its employees that they were being solicited as well. CP 542-53 at ¶ 9.

The original complaint asserted one claim against Schroder for breach of contract and four claims against Simplicity. The claims against Simplicity were tortious interference with contract, violation of the Trade Secrets Act, injurious falsehood, and violation of the Consumer Protection Act against Simplicity. CP 1-11.

Before filing the Complaint, Allyis verified the basis of its claims. Washington courts enforce compete agreements that are valid and reasonable. *Labriola v. Pollard Grp., Inc.*, 152 Wn.2d 828, 833, 100 P.3d 791, 793 (2004). The claim for tortious interference was approved *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 935 P.2d 628 (1997). The confidential employment terms were actively protect as a trade secret. The reported statements of Schroder, if proven, met the requirements for an injurious falsehood claim. The year before, the Supreme Court had clarified that a Consumer Protection Act claim could be based on conduct that was unfair but not deceptive. *Klem v. Washington Mut. Bank*, 176 Wn. 2d 771, 787, 295 P.3d 1179, 1187 (2013).

Attorney Jeff James ultimately appeared in the case for Simplicity. One of his earliest communications in the case was a December 18, 2014 email that begins: "It was nice meeting you on the phone yesterday; thanks for your message as well. From what I can tell, your client's lawsuit with respect to Simplicity is frivolous." CP 340. That email set the tone for everything that would follow.

Allyis served discovery requests on Simplicity, and it refused to produce documents on the grounds of confidentiality, but it did not seek a protective order. CP 45-46. On April 9, 2015, Davis sent a lengthy email to James seeking an agreed way forward on the confidentiality issues. CP 361-62. James responded by saying that "confidentiality of business information that is not the sole basis for our objections."

Allyis attempted to work with Simplicity to exchange the documents that were needed for the case without requiring either side to disclose confidential information. *E.g.*, CP 352-54. For example, in a May 11, 2015 email to James, Davis wrote:

> I have already told you that I will limit my discovery to those employees and that I will agree to any reasonable protective order that you might want. Doesn't it make the most sense to focus our efforts on this small group of documents to answer the relevant questions? If you really have the proof that you say you do, then that would be the most efficient way to resolve this case.

CP 359. James responded to that in part by saying that "you continue to look for a global resolution instead of looking to dismiss my client and continue pursuing your client's claims against Mr. Schroeder." CP 358.

Davis then sent James a list of every Allyis employee who had left during the relevant time and asking if Simplicity would identify those who had become its employees to focus discovery and the case. CP 352-54.

James responded to that request by saying, "Regarding your request below to "exchange some information," I fail to see the relevance of your request." CP 352.

After Allyis was informed that Schroder was fired by Simplicity, the case lost a lot of urgency. It appeared that the harm would be limited to the six employees who followed Schroder to Simplicity. On June 22, 2015, Davis took the CR 30(b)(6) deposition of Simplicity. Because of the reduced scope of the case, Davis kept the deposition very short, and the entire transcript is twenty-six pages. CP 192-93.

Although the deposition was short, Simplicity made the admissions that were sought. First Simplicity admitted that Schroder showed Simplicity the noncompete agreement before he was hired, but it could not make up its mind whether it was signed or not.

> Q. Did the subject of whether Mr. Schroder had a non-compete agreement ever come up in the interviews before he was offered employment?
> A. Yes.
> Q. To your knowledge, how did that happen?
> A. The first time I heard about his non-compete was at the end of our in-person interview on April 10, 2014.
> I found the date. He told me that he didn't think he had a non-compete and then he changed his mind and showed me a document that was part of an employee manual for a company under a different name.
> Q. But he told you that he did not have a separate non-compete agreement that he had signed?
> A. Originally he said he didn't and then he said well, actually, I have this document, but it's part of this employee manual. He showed it to me. It wasn't signed and that was the first I heard about any kind of non-compete.
> Q. What did you do after that with respect to the potential that he had a non-compete agreement?
> A. Well, I looked at the non-compete and it was under a different company name. **It was signed by him when he was a contractor, not an account manager. It wasn't signed.**

CP 465-66. The noncompete agreement may have been taken from the handbook, but it was a standalone agreement. CP 457-61.

Second, Simplicity admitted that Schroder solicited Allyis employees while working for Simplicity with Simplicity's approval.

> Q. To your knowledge, did Mr. Schroder while he was employed by Simplicity contact the people that he worked with at Allyis for the purpose of recruiting them to Simplicity?
> A. Yes.
> Q. And were you aware of that when it happened?
> A. In one instance, yes.
> Q. Was that considered a good thing, a bad thing or a neutral thing that he did that?
> A. It was neutral because that person's contract was ending and she was looking for new work.
> Q. Did Mr. Schroder receive any additional compensation or bonus because he brought someone new in?
> A. No.
> Q. Was his compensation a salary or was it dependent upon his book of business?
> A. He had salary plus bonus potential.
> Q. So how was it that you knew that Mr. Schroder was making contact with someone that he knew because of his relationship at Allyis?
> A. He told me about one instance where this woman – We had had a client meeting and the client needed a specific skill set. It was a current Simplicity client and he told me about someone he knew that had that skill set and she was looking for a new role because her's was ending on June 30th of 2014.
> Q. So did you have Mr. Schroder contact that person about the possibility of --
> A. I didn't have him do anything. He did it on his own.
> Q. Well, if he told you he knew somebody who was perfect for the position -- He hadn't contacted them about this position yet obviously?
> A. Right.
> Q. So did he have any direction from you one way or the other as to what to do or did you just say oh, that's interesting?
> A. I basically said oh, okay. Great.

CP 469-70.

Simplicity filed a Motion to Compel on July 9, 2015, complaining that Allyis had not produced documents even though Simplicity had refused to produce its own documents. CP 45-46. By this time, Allyis' focus had

changed from trying to stop what appeared to be a significant threat into looking for a reasonable means to resolve a business dispute. Allyis did not oppose the motion in an effort to keep the cost of the lawsuit as low as possible for both sides. However, Simplicity refused to discuss any compromise. It steadfastly maintained that the lawsuit was frivolous.

Making matters worse, because of a scheduling error, two representatives of Allyis failed to appear for their depositions on July 23, 2015. Instead of rescheduling the depositions, Simplicity brought a Motion for Sanctions and Contempt. CP 110-15. The motion did not even attempt to compel the depositions to take place. *Id.* Judge Hill granted the motion and awarded $5,900 of terms over two depositions. CP 236-37. Her order does not require the witnesses to be produced for their depositions. *Id.*

On August 7, 2015, Simplicity filed a Motion for Summary Judgment, noted for September 7, 2015. CP 146-55. Judge Hill's order on the Motion for Fees and Contempt was entered on August 14, 2016, and Simplicity concluded that there was no reason to proceed with its claims before Judge Hill. CP 236-37.

On September 3, 2016, Allyis filed a motion to dismiss its claims without prejudice under CR 41(a)(1)(B). Simplicity objected to the motion with its own request that the dismissal be made with prejudice. CP 262-70. In its motion, Simplicity asserted that the Court should dismiss the claims with prejudice because of the discovery issues in the case. CP 268. The parties briefed that issue, and Judge Hill granted Simplicity's request. CP 316-18. Allyis has not appealed the order.

On October 1, 2015, Simplicity filed the Motion for Fees that is the subject of this appeal. CP 319-26. The motion is six pages long and

supported by the Declaration of James. *Id.* The James Declaration is cited in the motion only to support the assertion that he told Allyis that the claims in the case were frivolous, and its claim that Allyis dismissed its original claims in response, as well as to support the amount requested. CP 320, 322, 323.

The Statement of Facts in the motion consists of three paragraphs. CP 319-20. The first simply states that the trial court was familiar with the facts and refers to Simplicity's motion for Fees and Contempt. CP 319. The second states that James told Allyis that its claims were frivolous and is offered as proof that they were. CP 320. The third alleges the amount of fees that Simplicity incurred in the action. *Id.*

The motion for fees and contempt to which Simplicity refers in the first paragraph is discussed above. CP 110-15. That motion concerned the trial court's July 15, 2015 Order Compelling Discovery and the depositions. CP 111. The only authorities cited in that motion were CR 26(i) and 37(d). CP 113.

Simplicity sought an award of fees under RCW 4.84.185. Simplicity quoted the statute and cited *Escude v. King County Pub. Hosp. Dist.*, 117 Wn. App. 183, 192, 69 P.3d 895 (2003) for the proposition that an award of fees after a voluntary dismissal is "within the discretion of the trial court." However, Simplicity did not discuss the standards for awarding fees under RCW 4.84.185. Simplicity also requested CR 11 sanctions in the alternative, but it did not discuss the standards for those decisions either.

The motion contained two substantive arguments; First, Simplicity argued that Allyis admitted that its original claims were frivolous by amending the Complaint to replace them with a claim for unjust enrichment;

and second, Simplicity argued that the unjust enrichment claim itself was frivolous.

Simplicity's primary focus was the unjust enrichment claim. According to Simplicity, in *Young v. Young*, 164 Wn.2d 477, 191 P.3d 1258, 1262 (2008), the Supreme Court held that unjust enrichment requires the plaintiff to directly confer a benefit on the defendant.

> To establish a claim for unjust enrichment, Allyis would have to prove three elements: (1) a benefit conferred upon the defendant *by the plaintiff;* (2) knowledge by the defendant of the benefit; and (3) the acceptance or retention of the benefit under such circumstances that it would be inequitable for the defendant to retain the benefit without the payment of its value. *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2007) (emphasis added). Since *Young*, courts have consistently required *the plaintiff* to confer the alleged benefit on the defendant.

CP 322-23 (emphasis in original). Simplicity apparently believed that italicizing the word "plaintiff" would demonstrate the court's intention to impose that requirement.

Simplicity also included a request for sanctions under CR 11 at the end of its motion. That section of the motion consists of a single sentence and is so short that it can be quoted in full here:

> **c. Alternatively,** the **Court Should Award Sanctions Under CR 11.**
>
> In the event Allyis responds by attempting to blame its counsel for pursuing a frivolous claim, or Allyis' counsel, on his own, accepts responsibility for pursuing a frivolous claim, the Court should exercise its discretion and award Simplicity its fees and costs against Allyis and its counsel, jointly and severally, as sanctions under CR 11. *See, e.g.*, *Escude*, 117 Wn. App. at 193-94.

CP 324. That is literally Simplicity's entire submission to the Court in support of its request for CR 11 sanctions.

In its response, Allyis presented a detailed explanation of the facts including Simplicity's deposition admission that Schroder had solicited its

employees while working for Simplicity with Simplicity's knowledge and consent. CP 425-28. It disputed the assertion about Allyis admitting that its claims were frivolous with a declaration and the email announcing the amended complaint. CP 431-32.

With regard to the unjust enrichment claim, Allyis argued that Simplicity was wrong the holding in *Young*, and pointed out that the *Young* court itself described that element as "the received benefit is at the plaintiff's expense" in the same opinion. CP 432-33. Allyis also identified many Washington unjust enrichment cases since *Young* that did not require the plaintiff to confer a benefit directly on the defendant. CP 432-33.

In its reply, Simplicity argued that "Allyis Has Failed to Show Reasonable Cause for Advancing This Lawsuit" and "Mr. Davis Has Failed to Show That the Claims Asserted Against Simplicity Were Well Grounded in Fact/Were Not Interposed for an Improper Purpose/" CP 471-72. Simplicity argued that Allyis and Davis had the burden to prove that the claims were not frivolous. Simplicity also argued that the declarations submitted by Allyis were inadmissible hearsay and opinion, but did not explain that assertion, nor did it file a motion to strike.

With regard to unjust enrichment, Simplicity took issue with the other post-*Young* cases cited in the response, but completely ignored the fact that Young itself stated the element as a "benefit received at the plaintiff's expense." Simplicity just disregarded the fact that *Young* itself does not say what Simplicity claims it does.

Simplicity provided no reply at all to Allyis' argument that RCW 4.84.185 requires a finding that all of the claims asserted were frivolous. Not once in any of its briefing in this action did Simplicity address the

claims for tortious interference with contract, violation of the Trade Secrets Act, injurious falsehood, and violation of the Consumer Protection Act. The only thing that it ever said about those claims was that they were frivolous because James said they were.

It likewise provided no reply on CR 11 except to state that the basis was three discovery matters and the primary witness list. No actual conduct was identified except for the statement that "The attempt to blame staff for failing to timely serve Plaintiff's Possible Primary Witnesses, and the attempt to avoid dismissal with prejudice claiming the nonexistence of staff created a hardship."

Judge Hill granted Simplicity's motion and awarded $58,758.95 of sanctions. CP 478-82. She simply signed the proposed order without making any changes, and it tracks the motion. CP 480 at ¶ 10. It finds that this action was frivolous because James said it was. CP 479 at ¶ 4. It finds that "Allyis' unjust enrichment claim was advanced without reasonable cause because Allyis was well aware that it never conferred any benefit on Simplicity." CP 479-80 at ¶ 7. None of the evidence and authorities submitted by Allyis are mentioned.

Allyis brought a Motion for Reconsideration. CP 483-94. It again argued that Simplicity was wrong on the law of unjust enrichment. CP 485-90. It pointed out that the court had not made, nor could it make, a finding that all of the claims asserted were frivolous under RCW 4.84.185, nor could it make any of the required findings under CR 11. CP 491-93. The motion also again requested oral argument, stating that the court "should grant oral argument before making a decision of this magnitude." CP 494.

Judge Hill issued an Order denying the request for oral argument but calling for a response. CP 497. In its response, Simplicity disputed the facts set forth in the motion, citing its Answer as evidence. CP 499 at line 17. It cited no specific evidence. It then claimed that Judge Hill had awarded sanction "based on the entire record." CP 500. It argued that the motion did not satisfy CR 59 because "Simplicity is unaware of any evidence that the Court abused its discretion." CP 501. It went on to claim that Allyis "did not argue in its response to Simplicity's Petition for Fees that it was not required to show that it conferred a benefit on Simplicity." CP 502. However, it then goes on to dispute the argument that Allyis did make in its response. CP 502.

In response to the facts that the language cited by Simplicity is a quote from *Black's Law Dictionary*, and that the *Young* court itself states the element as a "benefit received at the plaintiff's expense," Simplicity replied: "When the Court restated the elements differently just a few lines later in its decision, it did not disavow the standard, common-law elements it had just set forth. Rather, the Court's use of the phrase 'in other words' shows that it intended only to further clarify the actual elements, not replace them." CP 502. Simplicity did not explain how stating an element differently could "clarify" it.

With respect to RCW 4.84.185, Simplicity argued that "The Court properly awarded fees and costs under RCW 4.84.185 because it found that Allyis' unjust enrichment claim against Simplicity was frivolous." CP 506. However, Simplicity once again said absolutely nothing about the substance of the other claims pled in the case. It just kept repeating the same assertion over and over again.

> The evidence before the Court shows that Allyis' original four claims were meritless and advanced without reasonable cause.
>
> Here, Allyis filed four frivolous claims against Simplicity for the sole improper purpose of bringing Simplicity's presumably deep pockets into the litigation.
>
> With respect to Allyis' original four claims, Allyis must show that "there is no evidence or reasonable inference from the evidence to justify . . . the decision" that its original four claims were frivolous and advanced without reasonable cause.
>
> The record makes clear that Allyis never produced any evidence to support any of its claims and that it abused the legal process at every opportunity throughout this litigation.
>
> Because Allyis' original claims were also frivolous, the Court properly awarded Simplicity its expenses related to those claims.

CP 499, 506, 508 and 510. Simplicity just kept saying that claims were frivolous because it said so.

With respect to CR 11, Simplicity said that "Simplicity sought CR 11 sanctions, and understands that the Court awarded them, based on the totality of Allyis' counsel's extreme conduct in filing and prosecuting this frivolous action." CP 507. It said that "Allyis and its counsel *never produced* ***any*** *evidence* to support its claims against Simplicity against Simplicity. CP 508 (emphasis in original).

Simplicity also made the curious allegation that Davis threatened to embarrass Simplicity in an attempt to extort a settlement. Lest the Court think this an exaggeration, the Response stated:

> Similarly, Allyis' counsel's conduct throughout this case shows that the action was filed for an improper purpose. An attorney will rarely make a record of his or her improper purpose, but Allyis' counsel explicitly threatened to seek dismissal without prejudice so that Allyis could continue holding the threat of its frivolous claim over Simplicity. James Decl. Re Prejudice, Ex. 3. Allyis' counsel also admitted that he still had no "concrete proof" after almost a full year of litigation against Simplicity. Id. Moreover,

> Allyis' counsel threatened to use Allyis' frivolous action as a means to embarrass Simplicity by re-filing the action and deposing Simplicity's clients. *Id.* Indeed, before Simplicity's motion for summary judgment could be heard, Allyis did exactly what it threatened to do and filed a motion to voluntarily dismiss its claims rather than respond to Simplicity's meritorious motion. See Motion for Nonsuit, Dkt. No. 42 (Sep. 3, 2015). It then fought to avoid dismissal with prejudice. See Response to Motion[] for Dismissal with Prejudice, Dkt. No. 59 (Oct. 7, 2015). This conduct, threatening to further abuse the legal process to embarrass and bully Simplicity, shows that Allyis and its counsel filed this action for the improper purpose of extorting a settlement from Simplicity without a valid claim.

CP 508. This email from Davis apparently is the smoking gun that will lay bare the malice towards Simplicity.

For that reason, the Court should be permitted to review the offending communication. It states in full:

> As you know, I have had difficulty reaching my client recently. As you also know, I have been attempt to persuade my client to dismiss this action. I have finally been able to have that conversation.
>
> At this point, I am prepared to do one of two things. First, I am authorized to dismiss the claims with prejudice and without costs or fees. That would put an end to this once and for all. It would mean that Simplicity would waive some fee awards. In the alternative, I will dismiss the claims without prejudice and in all probability refile them when my client has more time to focus on them. We have a three-year statute of limitations, and my client tells me that the gross profit per employee is somewhere between $20,000 and $30,000 per year. It is not an insubstantial claim. I also have some information that I have not been able to verify with concrete proof that Schroder played more of a role in having those contracts transferred from Allyis to Simplicity than I have been led to believe. However, that will require a subpoenas and depositions given the restrictions that Microsoft imposes on its employees.
>
> Please let me know if your clients will agree to a clean dismissal with prejudice of all claims or whether I should simply file a motion for a nonsuit.

CP 388. The Court might notice that the matter for which Davis lacked "concrete proof" was not the case as a whole, but that "that Schroder played

more of a role in having those contracts transferred from Allyis to Simplicity than I have been led to believe." CP 388. As for filing a CR 41(a)(1)(B) motion while a summary judgment is pending, this Court has repeatedly held that plaintiffs have exactly that right. *Paulson v. Wahl*, 10 Wn. App. 53, 57, 516 P.2d 514, 516 (1973).

Judge Hill denied the motion for reconsideration and adopted Simplicity's suggestion to infer that the claims were frivolous. CP 518-24. She also greatly expanded her findings from 10 to 33. However, she still made no meaningful findings about any of the other claims pled by Allyis.

> Based on Allyis' and Mr. Davis' conduct throughout this lawsuit the Court **infers** that Allyis filed its claims against Simplicity only because it believed Simplicity would pay it a settlement, not because it reasonably believed that its claims against Simplicity had merit. Allyis has never presented competent evidence to support its filing of these claims.

CP 521 at ¶ 9 (emphasis added). Judge Hill never said one word about the evidence submitted by Allyis or its explanation of the legal basis for its claims.

The Amended Order mentions RCW 4.84.185 one time. CP 522 at ¶ 22. Judge Hill did finally address the other claims asserted in the action, after a fashion. She made findings that the claims were not well grounded in fact, not well grounded in law, and were advanced without reasonable cause.

> 9. The Court also finds that Allyis' original claims against Simplicity for (1) tortious interference with a contractual relationship; (2) violation of the Washington CPA; (3) injurious falsehood; and (4) violation of the UTSA were frivolous and advanced without reasonable cause. Based on Allyis' and Mr. Davis' conduct throughout this lawsuit the Court infers that Allyis filed its claims against Simplicity only because it believed Simplicity would pay it a settlement, not because it reasonably believed that its claims

> against Simplicity had merit. Allyis has never presented competent evidence to support its filing of these claims.
>
> * * * *
>
> 22. In light of the facts and circumstances of the entire case, the claims asserted by Allyis were frivolous and not advanced with reasonable cause in violation of RCW 4.84.185.
>
> 23. The four claims against Simplicity in the Verified Complaint were not well grounded in fact. Dkt. No. 1.
>
> 24. The four claims against Simplicity in the Verified Complaint were not warranted by existing law, nor did Allyis present evidence or argument suggesting it was attempting in good faith to modify existing law.

CP 521 at ¶ 9, 522 at ¶ 22. Those are remarkable findings for a judge who knows nothing of any kind about any of those claims. The only evidence about the claims that was ever submitted came from Allyis, and it supports them. CP 424-28.

Judge Hill made identical findings for the unjust enrichment claim under RCW 4.84.185:

> 22. In light of the facts and circumstances of the entire case, the claims asserted by Allyis were frivolous and not advanced with reasonable cause in violation of RCW 4.84.185.
>
> 25. Allyis' unjust enrichment claim against Simplicity pled in its First Amended Complaint was not well grounded in fact.
>
> 26. Allyis' unjust enrichment claim against Simplicity was not warranted by existing law, nor did Allyis present evidence or argument suggesting it was attempting in good faith to modify existing law.
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> * * * *
>
> 28. Allyis and Mr. Davis filed the four claims in the Verified Complaint and the unjust enrichment claim in the First Amended Complaint against Simplicity for the improper purpose of bringing, and keeping, Simplicity's presumably deep pockets into the litigation.

CP 522-23. Based on this, Judge Hill found that the unjust enrichment claim was frivolous because "At no point did Allyis present evidence showing that it conferred a benefit on Simplicity nor did plaintiff present compelling or persuasive argument suggesting that the law as articulated in *Young* and its progeny did not apply here." CP 520 at ¶ 7.

Judge Hill's amended order also refers to CR 11 only one time. CP 523 at ¶ 29. That, too, was a bare assertion devoid of any detail: "Allyis and Mr. Davis violated CR 11 by pursuing the claims against Simplicity." *Id.* The other findings on CR 11 mimic her findings for RCW 4.84.185.

> 23. The four claims against Simplicity in the Verified Complaint were not well grounded in fact. Dkt. No. 1.
>
> 24. The four claims against Simplicity in the Verified Complaint were not warranted by existing law, nor did Allyis present evidence or argument suggesting it was attempting in good faith to modify existing law.
>
> 25. Allyis' unjust enrichment claim against Simplicity pled in its First Amended Complaint was not well grounded in fact.
>
> 26. Allyis' unjust enrichment claim against Simplicity was not warranted by existing law, nor did Allyis present evidence or argument suggesting it was attempting in good faith to modify existing law.
>
> 27. Allyis and Mr. Davis failed to perform a reasonable inquiry before filing the Verified Complaint against Simplicity. They also failed to perform a reasonable inquiry before filing the First Amended Complaint against Simplicity. Dkt. No. 13.
>
> 28. Allyis and Mr. Davis filed the four claims in the Verified Complaint and the unjust enrichment claim in the First Amended Complaint against Simplicity for the improper purpose of bringing, and keeping, Simplicity's presumably deep pockets into the litigation.

CP 522-23.

In light of the changes to the order, Allyis brought another Motion for Reconsideration. CP 525-40. Although that motion argued the issues

again, it was more focused on requesting that Judge Hill hold an actual hearing on this issue to hear from the parties. CP 534-35. Authorities were cited to the effect that due process requires a hearing. CP 534. Aside from a short telephone hearing, Davis has never appeared before Judge Hill.

## VI. ARGUMENT

### A Standard of Review.

An award of sanctions generally is reviewed for abuse of discretion. *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 903, 969 P.2d 64, 72 (1998). "A trial court abuses its discretion when it bases its ruling on an erroneous view of the law or applies the wrong legal standard." *State v. Hampton*, 184 Wn.2d 656, 678, 361 P.3d 734, 744 (2015). However, the legal conclusions underlying that decision are reviewed *de novo*. *Kelley v. Centennial Contractors Enterprises, Inc.*, 169 Wn.2d 381, 386, 236 P.3d 197, 199 (2010); *Gildon v. Simon Prop. Grp., Inc.*, 158 Wn.2d 483, 493, 145 P.3d 1196, 1201 (2006).

Ordinarily, when a trial court abuses its discretion in an award of sanctions, this Court will remand for further proceedings. However, that is not always necessary or prudent. "Where, as here, the trial judge has applied the wrong legal standard to evidence consisting entirely of written documents and argument of counsel, an appellate court may independently review the evidence to determine whether a violation of the certification rule occurred." *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 345-46, 858 P.2d 1054, 1079 (1993).

Given the arguments that Simplicity has advanced and the rulings that the trial court has made, it would be neither fair nor logical to remand this matter for further proceedings. The basis of the motion was the elements of

unjust enrichment, and that is a question of law. Likewise, Judge Hill had no evidence before her to make additional findings, and it would be wholly improper for a trial court to make new findings on remand to justify a decision that was erroneous when made. *Blair v. Ta-Seattle E. No. 176*, 171 Wn.2d 342, 352, 254 P.3d 797, 802 (2011) ("Our resolution does not allow the trial court to make after-the-fact findings supporting its August 14 and October 15 orders, as this would be inappropriate.").

> Dr. Deck argues that even if Judge Washington's order contained technical errors, the correct remedy is a remand to Judge Washington to make the *Burnet* findings. We rejected a similar argument in *Blair*, 171 Wash.2d at 352 n. 6, 254 P.3d 797 (allowing the trial court to make after-the-fact findings to support its exclusion orders "would be inappropriate").

*Teter v. Deck*, 174 Wn.2d 207, 220-21, 274 P.3d 336, 343 (2012).

**B. <u>The Unjust Enrichment Claim Was Not Frivolous</u>.**

Simplicity brought its motion for fees on the ground that the unjust enrichment claim was frivolous "because Allyis was well aware that it never conferred any benefit on Simplicity." CP 323. The basis of this statement was Simplicity's position that in *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258, 1262 (2008), the Supreme Court held that an element of a claim for unjust enrichment is "a benefit conferred upon the defendant *by the plaintiff*." CP 322 (emphasis in original). Simplicity's motion did not mention or contest any of the other elements of unjust enrichment. Simplicity was Simplicity was even more forceful in its response ot reconsideration: "The Supreme Court was exceedingly clear in *Young* that the first element that must be established in order to sustain a claim based on unjust enrichment is 'a benefit conferred upon the defendant by the plaintiff.'" CP 502.

If any argument made to Judge Hill in this case was frivolous, it would be this one. *Young* does contain the language quoted by Simplicity, but it is in a quote from *Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn. App. 151, 159, 810 P.2d 12, 17 (1991), which in turn was quoting *Black's Law Dictionary*. *Id.* at 484. *Young* did not approve or adopt the definition in Black's Law Dictionary as a statement of Washington law.[2]

*Young* does not contain any discussion precluding a claims based on benefit indirectly conferred on the defendant. The quote from Black's Law Dictionary is the only part of the opinion that discussed the "plaintiff" conferring a benefit on the defendant. Any claim that the Court was "exceedingly clear" about a requirement for the plaintiff to confer a benefit on the defendant can only charitably be called dishonest. It was not an issue considered or discussed by the court.

It also is contrary to the *Young* court's own statement of the element. In the sentence immediately following the quote from Black's Law Dictionary, the Court went on to state:

> In other words the elements of a contract implied in law are: (1) the defendant receives a benefit, (2) **the received benefit is at the plaintiff's expense**, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment.

*Young*, 164 Wn.2d 477 at 484-85 (emphasis added). A benefit that is "received at the plaintiff's expense" is a very different thing from a benefit conferred on the defendant "by the plaintiff." At least, it is to most people.

[2] Washington courts cite secondary sources all the time without making them law. In fact, they even have a procedure that they use when they do make them the law: they adopt them. And Washington courts have adopted definitions from Black's Law Dictionary on many occasions. *See* e.g., *Washington Ass'n of Neighborhood Stores v. State*, 149 Wn.2d 359, 379, 70 P.3d 920, 930 (2003); *State v. Johnson*, 124 Wn.2d 57, 66, 873 P.2d 514, 521 (1994). The *Young* court said nothing about adopting that definition.

There is, of course, a good way to determine which version of the elements the Young court considered to be accurate: the rule that it actually used in deciding the case. When it applied the law to the facts of the case, the *Young* court made no mention of the plaintiff.

> Clearly Judith received **a benefit at the plaintiff's expense** and the circumstances make it unjust for her to retain that benefit without payment. Equally clear, however, is Judith's request for the work, Jim's reasonable expectation of payment for the work, and Judith's knowledge that Jim expected compensation.

*Young v. Young*, 164 Wn.2d 477, 486, 191 P.3d 1258, 1263 (2008) (emphasis added). Simplicity claims that *Young* created a new rule and then did not even use it in the same case.

If the Supreme Court intended to announce the rule asserted by Simplicity, it made an equally odd decision to quote *Bailie* in announcing it. The plaintiff in *Bailie* did not confer a benefit on the defendant, but the Court nonetheless ruled that he had an unjust enrichment claim.

*Bailie Communications, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wash.App. 151, 159, 810 P.2d 12 (1991) (*Bailie II*) was the second appeal in that case, and the first, *Bailie Communications, Ltd. v. Trend v. Trend Business Systems, Inc.*, 53 Wn. App. 77, 78, 765 P.2d 339, 344 (1988) ("Bailie I"), also needs to be considered to fully understand it.

In *Bailie I*, the one-third owner of a Hawaii condominium (Bailie) cosigned a promissory note for a loan to the other owner ("Suburban") based on a promise to pay him $175,000 of the $300,000 loan. *Id.* at 78-79. The funds were instead diverted to another company, Trend Business Systems, Inc. (Trend). *Id.* at 79. Bailie had no relationship with Trend itself.

After Suburban obtained the loan, the deed of trust was foreclosed. *Id.* at 79. Bailie sued Suburban, Trend, and its president Wosepka for

breach of contract, fraud and unjust enrichment. At trial, Bailie prevailed against Suburban, but the trial court applied Simplicity's logic and ruled that Trend was not liable because "Wosepka was not acting on behalf of Trend when he and Suburban perpetrated the fraud." *Id* at 79. Bailie appealed.

The Court of Appeals held that Bailie did not have to have a relationship with Trend to assert a claim for unjust enrichment.

> Trend's liability for unjust enrichment does not depend on the capacity in which Wosepka uttered his misrepresentation. Even third parties who innocently acquire property must sometimes surrender it if the property was fraudulently obtained. See Restatement of Restitution § 123 (1937); *see also id.* at §§ 3, 13, 17, 28, 63, 64, 107.
>
> Trend's enrichment is unjust for two alternative reasons. First, Trend received and retained the proceeds of fraud knowing of the Bailies' rights. Trend knew of the fraud through Wosepka because Wosepka was Trend's president and sole shareholder. *See* 3 W. Fletcher, *Private Corporations* §§ 796, 799 (rev. ed. 1986). Second, Trend did not pay value for any of the mortgage proceeds. Either of these reasons makes Trend's otherwise lawful acquisition and retention of the proceeds unjust. *See* Restatement of Restitution § 123.

*Id.* at 85. Consistent with *Young*, it was enough that the benefit was received at the plaintiff's expense." *Young*, 164 Wn.2d at 484.

The court remanded for entry of judgment for unjust enrichment in favor of Bailie and against Trend for $175,000. *Bailie II* was an appeal after remand when the trial court denied prejudgment interest. In revisiting the law of unjust enrichment, the court again cited *Black's Law Dictionary* for the proposition that unjust enrichment claims include "benefits received, retained or appropriated."

> *Black's Law Dictionary* 1535-36 (6th ed. 1990) defines the doctrine of unjust enrichment as the:

> General principle that one person should not be permitted unjustly to enrich himself at expense of another, but should be required to make restitution of or for property or benefits received, retained or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly. *Tulalip Shores, Inc. v. Mortland,* 9 Wash.App. 271, 511 P.2d 1402, 1404. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another. *L & A Drywall, Inc. v. Whitmore Const. Co., Inc.,* Utah, 608 P.2d 626, 630.

*Bailie* II, 61 Wn. App. at 159, 160. Bailie approved the claim for unjust enrichment even though the benefit was not conferred by the plaintiff, but instead at its expense.

> In the present case, Trend received a benefit in the form of money received. Trend had knowledge, through its sole stockholder Wosepka, that $175,000 of this money was to be paid to the Bailies. The Court of Appeals in *Bailie I* determined that Trend's retention of this money was wrongful.

*Id.* at 160.

As it turns out, Simplicity is not the first to make this exact argument. The class action case of *Keithly v. Intelius Inc.*, 764 F. Supp.2d 1257 (W.D. Wash. 2011) was assigned to former King County Superior Court Judge and now United States District Court Judge Robert S. Lasnick. The lawsuit alleged that an on-line information service was unjustly enriched by amounts it received from third parties in connection with their use of the service.

> Plaintiffs allege that Intellius has obtained significant revenues, either directly from plaintiffs or through third party defendant Adaptive Marketing, that in all fairness should be returned to plaintiffs. Plaintiffs allege that Intelius knew that some of the "purchases" made by its customers were unknowing and that retention of the money it was collecting directly or indirectly would be unjust.

*Id/* at 1271. The case came before Judge Lasnick on a Rule 12(c) Motion on the Pleadings by the defendants.

One of the arguments in the motion was that the unjust enrichment claim failed to the extent that the benefit was not conferred by the plaintiffs. *Id.* at 1271. The defendants claims that *Young* required *the plaintiff* to confer the benefit on the defendant to state a claim for unjust enrichment. *Id.* The argument in the case was not similar to Simplicity's position in this case; it was identical.

Judge Lasnick not only rejected that argument, but he also called it "misleading."

> Defendants' citation to *Young* for the proposition that the benefit must be conferred upon defendant directly "by the plaintiff" is misleading. The passage quoted by defendants is actually taken from an earlier Court of Appeals case. The Supreme Court's own statement of the elements of an unjust enrichment claim does not include the reference to "by the plaintiff." *Young,* 164 Wash.2d at 484–85, 191 P.3d 1258. While the Court has no doubt that some benefits are simply too remote to form the basis of an unjust enrichment claim, that is not the case here.

*Id.* at 1271 n. 14. Judge Lasnick went on to say that the plaintiffs "have adequately alleged facts supporting all of the elements of an unjust enrichment claim under Washington law." Id. at 1271.

Allyis did not locate this decision until its second Motion for Reconsideration, but it was presented to Judge Hill. CP 531. Judge Hill imposed $60,000 of sanctions because Allyis' claims were inconsistent with a theory that has no support in the law and that Judge Lasnick called misleading. This alone should be more than sufficient to reverse Judge Hill's decision. She was wrong on the law, and sanctions are not authorized for asserting a claim that is amply supported by the law.

## C. Allyis' Remaining Claims Were Not Frivolous.

In its Motion for Fees, Simplicity asserted that the original claims were frivolous because James said they were, and Judge Hill seems to have found that sufficient. In its response to the motion, Allyis presented a factual basis in the Verified Complaint and the Declaration of Chanbir Mann. CP 426-28. "A verified complaint is equivalent to an affidavit." *Gordon v. Seattle-First Nat. Bank*, 49 Wn.2d 728, 731, 306 P.2d 739, 741 (1957). Simplicity's motion did not discuss the specific allegations or the facts of the case. CP 319-20. In its Rely Brief, Simplicity argued that "the declaration and the Verified Complaint are incompetent from an evidentiary standpoint, being based primarily on hearsay and opinion," but provided no argument or explanation beyond that and did not file a Motion to Strike. CP 471-72.

Judge Hill's order on the Motion for Fees made no specific findings about the other claims. CP 478-82. She signed the proposed order in the form provided by Simplicity, and it did not seek any such findings. *Id.*

In her Amended Order, Judge Hill found that that the original claims pled by Allyis "were not well grounded in fact" and "were not warranted by existing law." CP 522 at ¶¶ 23, 24. She made those finding without ever hearing any argument from Simplicity on the facts or law regarding those claims or discuss them herself. The claims are not frivolous.

### 1. Tortious Interference.

The claim for tortious interference with contractual expectancy was legally based on *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 935 P.2d 628, 636 (1997). In *Goodyear*, the Court of Appeals expressly held that a claim for tortious interference may be asserted

against a competitor who knowingly permits an employee to engage in conduct contrary to a noncompete agreement.

> However, Whiteman presented a dispute of material fact as to whether Goodyear permitted Mr. Anthony to sell to Whiteman customers, in violation of his covenant not to compete. Mr. Anthony's employment agreement provided that if he resigned, he would not engage in the tire business in Grant County or within a 30-mile radius of Othello, for a period of one year. Mr. Anthony left Whiteman's employment on September 30, 1986. Mr. Anthony went to work for Goodyear's Pasco store immediately after he resigned his position at Whiteman's. Mr. Whiteman stated he notified Goodyear of the existence of the noncompete agreement. He further stated he reviewed Goodyear's invoices for the one-year period following Mr. Anthony's resignation and found many of them bore the initials "j.a.," and were for sales made within the area protected by the noncompete agreement. He attached to his declaration copies of these Goodyear Pasco store invoices. Mr. Whiteman said he complained to Goodyear about Mr. Anthony's activities while they were occurring, and Goodyear assured him those actions would
>
> facts would support a trial court's conclusion or a jury's cease. Mr. Whiteman named several Whiteman customers Mr. Anthony solicited.
>
> If accepted, the foregoing verdict that Goodyear tortiously interfered in the performance of Whiteman's noncompete agreement with Mr. Anthony. We, therefore, hold the court erred when it dismissed Whiteman's cause of action for tortious interference, but only with respect to the allegations concerning Mr. Anthony.

*Id.* at 746-47.

Factually, Simplicity admitted that it knew about the noncompete agreement in April 2014 before it hired Schroder. CP 465-66. Simplicity claims that it believed the noncompete agreement was unenforceable (CP 463-64, 466-67), but its belief cannot render the noncompete agreement invalid.

An issue did exist because the agreement signed after Schroder's employment began, but the Supreme Court stated in *Labriola v. Pollard Grp., Inc.*, 152 Wn.2d 828, 834, 100 P.3d 791, 794 (2004) that continued employment with training and promotions can provide independent consideration. Schroder was employed for a dozen years and promoted from an entry position to management. CP 450-54.

In its CR 30(b)(6) deposition, Simplicity admitted to at least one instance in which Schroder solicited an Allyis employee on its behalf while he was its employee. It admitted that it knew in advance about that conduct, and "basically said oh, okay. Great." CP 470.

These facts satisfy the requirement of *Goodyear* and state a claim for tortious interference against Simplicity.

**2. Consumer Protection Act.**

The Consumer Protection Act prohibits acts and practices that are unfair or deceptive. RCW 19.86.020. A claim may be based on conduct that is unfair even if it is not deceptive. *Klem v. Washington Mut. Bank*, 176 Wn. 2d 771, 787, 295 P.3d 1179, 1187 (2013).

A number of cases have addressed claims for violation of the Consumer Protection Act in the context of tortious interference without any question about the viability of the claims. *E.g.*, *Sanders v. Woods*, 121 Wn. App. 593, 89 P.3d 312 (2004); *Ethridge v. Hwang*, 105 Wn. App. 447, 20 P.3d 958 (2001)

**3. Injurious Falsehood.**

As set forth in paragraph 3.21 of the Verified Complaint an paragraph 11 of the Mann Declaration, Allyis was told by its employees that Schroder had said false and derogatory things about Allyis. While those statement are hearsay, nothing precludes a lawsuit from being based on hearsay evidence. Washington recognizes the tort of "injurious falsehood." *Rorvig v. Douglas*, 123 Wn. 2d 854, 862-63, 873 P.2d 492, 497 (1994). Simplicity offers no authority or discussion of this claim.

Although it has not been adopted in Washington, Section 623A of the Restatement (Second) of Torts states the elements of injurious falsehood as follows:

> One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if
>
> > (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and
> >
> > (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.

The statements of Schroder that were being reported by Allyis would satisfy these elements. CP 450-54.

**4. <u>Trade Secrets Act</u>.**

Washington's Trade Secrets Act provides broad protection for trade secrets, defined as information that derives independent economic value from not being generally known and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. RCW 19.108.010(4).

Here, the trade secret that was alleged was the terms of compensation of Allyis' employees. CP 8 at ¶ 8.2. In the hands of a competitor, that information could be used to offer slightly better terms to lure away employees. In *Nat'l City Bank, N.A. v. Prime Lending, Inc.*, 737 F. Supp. 2d 1257, 1267 (E.D. Wash. 2010), the court stated that pipeline reports qualified as trade secrets because they "contained confidential information that qualified as a trade secret, such as the employee's compensation and whether the employee had loans scheduled to be completed." Authority exists to support this claim.

Allyis addressed these claim in its response to the Motion for Fees even though the motion itself did not. Simplicity likewise ignored them in its Reply Brief and in its response to reconsideration. Judge Hill had no basis of any kind to find them frivolous

**D. Judge Hill's Findings And Order Do Not Support an Award Under RCW 4.84.185.**

RCW 4.84.185 provides for an award of attorney fees for defending an action that is frivolous "upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause." For the statute to apply, every claim asserted against the moving party must be frivolous.

> In this case, the trial judge found three of the plaintiff's four claims to be frivolous. This determination is left to the trial court's discretion, and the record supports the trial court's determination in that regard. However, the trial judge did not find the contract claim to be a frivolous claim, and indeed it was not. Thus the action *as a whole* cannot be deemed frivolous and attorneys' fees were therefore improperly granted.
>
> * * * *
>
> But the language and the history of the frivolous lawsuit statute (RCW 4.84.185) are clear. The lawsuit, as a whole, that is in its entirety, must be determined to be frivolous and to have been advanced without reasonable cause before an award of attorneys' fees may be made under the statute. The trial court erred in awarding fees under the statute after having found only three of the four claims for relief in the complaint to be frivolous; the Court of Appeals erred in affirming on that issue.

*Biggs v. Vail*, 119 Wn.2d 129, 137, 830 P.2d 350, 354 (1992).

This Court has held that the findings required by the statute are something more than conclusory statements that parrot the words of the statute.

> However, before awarding attorney fees under RCW 4.84.185, the court must make written findings that the

> lawsuit in its entirety is frivolous and advanced without reasonable cause. Again, the court summarily found that Selig's counterclaims were frivolous and advanced without reasonable cause. It did not specify why the counterclaims were baseless. Without some explanation, we are unable to determine whether the trial court abused its discretion in granting attorney fees under this statute. Therefore, we remand with directions to reconsider the RCW 4.84.185 basis for the award, and to enter appropriate findings if the award is confirmed on that basis.

*North Coast Electric Co. v. Selig*, 136 Wn. App. 636, 650, 151 P.3d 211, 218-19 (2007). Here, Judge Hill made no findings at all in her original order. Her amended order "summarily found" the claims to be frivolous. Because Simplicity is the moving party, it had the burden "to justify the request for sanctions." *Biggs v. Vail*, 124 Wn.2d 193, 202, 876 P.2d 448, 454 (1994).

In *North Coast Electric*, this Court remanded the RCW 4.84.185 question to the trial court to reconsider the basis for the award and make appropriate findings. 136 Wn. App. at 650. However, that court had evidence and argument on those claims and the benefit of a hearing. Here, there is no evidence or argument for Judge Hill to reconsider on remand, and it would be a waste of time. Judge Hill never inquired into the factual or legal basis of the claims, and she could not make any valid findings on the record as it exists.

**E. <u>The CR 11 Sanctions Were Improperly Awarded</u>.**

Leaving aside the fact that the claims asserted were not frivolous, Judge Hill's award of CR 11 sanctions was not supported by the required findings and cannot be fixed. It has been the law for over twenty years that a judge imposing CR 11 sanctions must make detailed finding that specify the improper conduct.

> Finally, in imposing CR 11 sanctions, it is incumbent upon the court to specify the sanctionable conduct in its order. The

> court must make a finding that either the claim is *not* grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, *or* the paper was filed for an improper purpose. CR 11. *See also Bryant*, at 219-20, 829 P.2d 1099. In this case, there were no such findings.
>
> Accordingly, we must remand this case once again to the trial court to: (1) make explicit findings as to which filings violated CR 11, if any, as well as how such pleadings constituted a violation and (2) impose an appropriate sanction for any such violation, which *may* include the amount of Vail's attorney fees incurred in responding specifically to the sanctionable conduct. The burden is on the movant to justify the request for sanctions.

*Biggs v. Vail*, 124 Wn.2d 193, 202, 876 P.2d 448, 453-54 (1994)

When the trial court fails to make the required findings, and the records filed with the court "provide the only evidence regarding whether the complaints had a factual and legal basis," the appellate court makes it own findings. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 222, 829 P.2d 1099, 1106 (1992); *see also Matter of Firestorm 1991*, 129 Wn.2d 130, 135, 916 P.2d 411, 414 (1996); *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 808, 225 P.3d 213, 229 (2009).

It should be pointed out that this Court in *Madden v. Foley*, 83 Wn. App. 385, 389, 922 P.2d 1364, 1367 (1996) inexplicably ruled that: "While no specific findings were entered by the trial court regarding CR 11 violations, provisions of the January 4, 1995, order dismissing the complaint indicate the basis upon which the court imposed sanctions under the rule (baseless filing). There was no error." The extent of the findings in the trial court's order is not clear, and without that information, the case provides no guidance here.

This is not one of those cases where the trial court explained its reasons in an oral decision or wrote some considered explanation of its reasoning. Judge Hill has refused every single request for oral argument in

this case, and she has never even seen anyone from Allyis or Davis. Her first decision was simply the proposed order without a single change, and her second is mostly derived from Simplicity's revised proposed order on reconsideration. Now Washington court has ever upheld sanctions on such a thin record.

## F. The Court Should Limit Simplicity to the Argument in its Motion.

In its response to the Motion for Reconsideration, Simplicity apparently realized how wrong it was about the law of unjust enrichment, and it tried to raise some new arguments such as its assertion that "The Court Granted Simplicity's Motion Based on the Entire Record." CP 500. The Motion was based on the unjust enrichment claim, not on the entire record.

When Judge Hill wrote her Amended Order, she took that argument and ran with it. She made a number of findings that have no bearing on Simplicity's motion.

> In addition, Mr. Davis' conduct throughout this lawsuit has not been consistent with a claim filed in good faith. The Court therefore infers that Allyis' counsel did not perform a reasonable inquiry before filing Allyis' First Amended Complaint, Dkt. No. 13.

CP 520 at ¶ 8.

> Based on Allyis' and Mr. Davis' conduct throughout this lawsuit the Court infers that Allyis filed its claims against Simplicity only because it believed Simplicity would pay it a settlement, not because it reasonably believed that its claims against Simplicity had merit

CP 521 at ¶ 9.

> In light of the facts and circumstances of the entire case, the claims asserted by Allyis were frivolous and not advanced with reasonable cause in violation of RCW 4.84.185.

CP 522* at ¶ 22.

> Based on Allyis' and its counsel's conduct throughout this litigation, including its filing of frivolous claims and its abuse of the legal process, the Court's October 16, 2015 Order did substantial justice in compensating Simplicity for having to defend a frivolous action and in discouraging future frivolous actions.

CP 523 at ¶ 33.

As set forth throughout this Brief, Judge Hill's statements are utterly uninformed and patently false, but this Court should not even consider them because they were not set forth in the motion. This issue was raised in the Motion for Reconsideration filed after Judge Hill modified her findings.

> Any order on fees and sanctions must be based on Simplicity's motion. The Amended Order goes far beyond the scope of that motion. The Court has made findings for which no evidence was presented and on issues that were never raised in the motion.
>
> * * * *
>
> Simplicity's motion addressed only the unjust enrichment claim. It contained no factual discussion or argument concerning the other claims pled in the case. Had counsel done any legal inquiry at all, he would have discovered that virtually every single reported case mentioning RCW 4.85.185 since at least 1992 has pointed out that every claim asserted in the case must be frivolous. The motion did not seek a finding that those claims were frivolous. For that reason, this court has no grounds to make the finding. It is axiomatic that the decision on a motion is limited to the issues raised in the motion itself. *Admasu v. Port of Seattle*, 185 Wn. App. 23, 40, 340 P.3d 873, 881 (2014). Simplicity never raised any issue regarding whether the other claims pled by Allyis were frivolous and did not even address them in its reply brief when Allyis pointed that out in it its response.

CP 526, 532-33. Judge Hill's willingness to completely change her findings to defend her decision on reconsideration is another reason not to remand this case for further consideration. *See State v. Head*, 136 Wn.2d 619, 624-25, 964 P.2d 1187, 1190 (1998).

## G. The Trial Court's Factual Findings Lack Substantial Evidence.

Challenging a trial court's findings of fact is always a difficult endeavor. Arguing that a finding lacks substantial evidence is easy to say and very difficult to prove. And appellate decisions often provide little detail or explanation for their determination of substantial evidence challenges.

Here, the challenge to Judge Hill's findings is all the same: they are supported by no evidence at all. A finding that is supported by no evidence necessarily lacks substantial evidence. When findings are not supported by any evidence, they must be reversed. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 345, 858 P.2d 1054, 1079 (1993) ("There is no evidence in the record to support this finding and while findings of fact which are supported by substantial evidence will not be disturbed on appeal, unsupported findings cannot stand.").

> There must be "substantial evidence" as distinguished from a "mere scintilla" of evidence, to support the verdict-i.e., evidence of a character "which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." *Id.* A verdict cannot be founded on mere theory or speculation. *Id. Accord Campbell v. ITE Imperial Corp.*, 107 Wash.2d 807, 817-18, 733 P.2d 969 (1987).

*Sommer v. Dep't of Soc. & Health Servs.*, 104 Wn. App. 160, 172, 15 P.3d 664, 670 (2001).

This makes Simplicity's task simple and straightforward. It merely has to identify the evidence that was before the trial court and that supports her findings. In that regard, she listed the evidence that she considered in her Amended Order, and it includes the "papers and files on record in this case." CP 518. Simplicity therefore can look anywhere in the docket for this evidence.

For the sake of clarity, the specific findings that are being challenged are set forth with brief comments. They are located at CP 518-24, and are identified by the paragraph in which they are found.

"**4. On December 17, 2014, Mr. James advised Allyis' counsel Matt Davis that the lawsuit with respect to Simplicity was frivolous. Thereafter, Simplicity expressed to Allyis that its action against Simplicity was frivolous and advanced without reasonable cause on multiple occasions.**" Judge Hill seems to have treated James' assertions as evidence that the claims were frivolous. They aren't.

"**7. Allyis' unjust enrichment claim was advanced without reasonable cause because Allyis has had no interaction with Simplicity at all, other than this lawsuit.**" Although not terribly important, the fact of the matter is that Simplicity interacted with Allyis through its employee when he solicited an Allyis employee on its behalf and with its permission. CP 469-70.

"**8. If Mr. Davis had performed a reasonable inquiry, he would have known that Allyis' claim was not well grounded in fact or warranted by existing law.**" This concerns the unjust enrichment claim. As shown in argument above, Davis did perform and inquiry and his theory is consistent with Washington law and *Young* itself.

"**8. In addition, Mr. Davis' conduct throughout this lawsuit has not been consistent with a claim filed in good faith.**" Judge Hill did not identify the specific conduct to which she referred, but she also seems to be creating a new standard for CR 11 sanctions: conduct "not consistent" with good faith.

"**8. The Court therefore infers that Allyis' counsel did not perform a reasonable inquiry before filing Allyis' First Amended Complaint, Dkt. No. 13.**" Judge Hill had to "infer" a failure to make reasonable inquiry because she never made any effort to inform herself and rejected Davis' efforts to inform her.

"**9. The Court also finds that Allyis' original claims against Simplicity for (1) tortious interference with a contractual relationship; (2) violation of the Washington CPA; (3) injurious falsehood; and (4) violation of the UTSA were frivolous and advanced without reasonable cause.**" The Court could search the record for a thousand years, but it still would find no evidence at all in the record to support this finding. Judge Hill made this finding on reconsideration because it was necessary to maintain her decision, not because it was right.

"**9. Based on Allyis' and Mr. Davis' conduct throughout this lawsuit the Court infers that Allyis filed its claims against Simplicity only because it believed Simplicity would pay it a settlement, not because it reasonably believed that its claims against Simplicity had merit.**" Of all the inferences that a person could draw from the conduct of Allyis and Davis, this is about the strangest. Allyis announced that it was replacing its CPA and tortious interference claims with one for unjust enrichment in an email that said in part:

> The crazy thing here is that I just don't see some monumental damage case. When Allyis first came to us, there was a concern that it was the tip of the iceberg and that it was about to be systematically raided. Fortunately that did not happen. And that leaves us stuck where we are. I am not sure that the case makes a ton of economic sense, but it can still make business sense. Allyis has to police its agreements or they become worthless. Simplicity would do the same. That does not mean that Simplicity has to fall on its sword or admit wrongdoing. There ought to be plenty of room in the middle

> for compromise. I am not sure what it looks like, but an agreement not to use any information that came from Schroder's time at Allyis would be a nice start. Some kind of revenue sharing for those people would seem to make sense, but I would imagine that we would be talking about sharing profits, not revenue.

CP 431-32 (authenticated at CP 456 ¶ 6). There is no evidence in the record supporting an inference that Davis or Allyis ever wanted to extort a settlement from Simplicity.

"**9. Allyis has never presented competent evidence to support its filing of these claims.**" To a degree, this statement is accurate, but only because Allyis has never had a reason to present that evidence. Simplicity never filed a motion requiring that evidence to be presented. The fact that "The burden is on the movant to justify the request for sanctions" seems to have been forgotten. *Biggs v. Vail*, 124 Wn.2d 193, 202, 876 P.2d 448, 453-54 (1994).

"**10. Allyis and Mr. Davis should have known, and would have discovered through reasonably inquiry, that these four claims were not well grounded in fact or warranted by existing law.**" Again, Judge Hill never explained why those claims were frivolous, and her conclusory statement has no basis.

"**22. In light of the facts and circumstances of the entire case, the claims asserted by Allyis were frivolous and not advanced with reasonable cause in violation of RCW 4.84.185.**" In this finding Judge Hill went well beyond the motion, and even beyond CR 11. No motion was ever made against Allyis or Davis about "the facts and circumstances" of the case, and Judge Hill did not even say what they were. No evidence supports this finding, but the finding itself has no place in this case.

"**23. The four claims against Simplicity in the Verified Complaint were not well grounded in fact. Dkt. No. 1.**" Again, Judge Hill does not even know what facts these claims are based on.

"**24. The four claims against Simplicity in the Verified Complaint were not warranted by existing law, nor did Allyis present evidence or argument suggesting it was attempting in good faith to modify existing law.**" The legal basis for the claims is set forth in this motion in a somewhat summary fashion except for the unjust enrichment claim since that was the basis of the motion.

"**25. Allyis' unjust enrichment claim against Simplicity pled in its First Amended Complaint was not well grounded in fact.**" This claim is discussed at length above, but the factual basis of the claim was never an issue in the motion. Judge Hill threw this in on reconsideration without any argument or evidence being presented.

"**26. Allyis' unjust enrichment claim against Simplicity was not warranted by existing law, nor did Allyis present evidence or argument suggesting it was attempting in good faith to modify existing law.**" The law supporting this claim is set forth above.

"**27. Allyis and Mr. Davis failed to perform a reasonable inquiry before filing the Verified Complaint against Simplicity.**" Judge Hill refused to listen to Davis when he sought a hearing to explain his inquiry.

"**27. They also failed to perform a reasonable inquiry before filing the First Amended Complaint against Simplicity. Dkt. No. 13.**" Judge Hill refused to learn what that inquiry was, and she had no evidence to basis this on.

"**28. Allyis and Mr. Davis filed the four claims in the Verified Complaint and the unjust enrichment claim in the First Amended Complaint against Simplicity for the improper purpose of bringing, and keeping, Simplicity's presumably deep pockets into the litigation.**" There is no evidence that Simplicity has "deep pockets," nor is there any evidence that this lawsuit was filed for any reason other than Schroder's admitted solicitation of Allyis employees.

"**29. Allyis and Mr. Davis violated CR 11 by pursuing the claims against Simplicity.**" An attorney can violated CR by filing a pleading, not by "pursuing a claim." A client cannot violate CR 11 at all.

"**31. There is evidence and reasonable inferences from the evidence to justify the Court's October 16, 2015 Order awarding fees and costs to Simplicity. Dkt. No. 67.**" If there is, Judge Hill never identified it.

"**33. Based on Allyis' and its counsel's conduct throughout this litigation, including its filing of frivolous claims and its abuse of the legal process, the Court's October 16, 2015 Order did substantial justice in compensating Simplicity for having to defend a frivolous action and in discouraging future frivolous actions.**" This is in many respects the most troubling finding that Judge Hill made. It suggests that believes that she can impose $60,000 of sanctions whenever it feels like "substantial justice" to her, and it suggests that she was motivated by something other than what is identified in her order. It is not a finding made in accordance with the law governing awards of sanctions.

## H. The Court Should Reverse the Amended Order in Full.

Simplicity no doubt will assert that Allyis is in violation of an Order to Compel and in contempt of the trial court, but that is not true. Judge Hill entered two discovery orders against Allyis, in her Amended Order, Judge Hill expressly stated that "The Court's award of sanctions by Orders dated July 17 and August 14 are subsumed in and superseded by this Order." CP 523. It is settled law that "A judge may reverse or modify a pretrial ruling at any time prior to the entry of final judgment." *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 37, 864 P.2d 921, 934 (1993). Because those orders are superseded, they are no longer in effect.

In a typical case, when this Court reverses an award of sanctions, it remands to the trial court. But that is not always the case. Pursuant to the authorities discussed throughout this Brief, and for reasons that should be clear, this Court should not remand to Judge Hill for more findings. Simplicity has not cross appealed that order, and this Court should reverse the entire award of sanctions. *Teter v. Deck*, 174 Wn.2d 207, 220-21, 274 P.3d 336, 343 (2012).

# VI. CONCLUSION

This has been a nightmare for both Allyis and Davis. This was never some wild or unsubstantiated case. Every claim pled is supported by ample authority and well within mainstream litigation. The known facts more than supported those claims because it was a fact that Schroder went directly to Simplicity from Allyis and that six Allyis employees immediately followed him there. An issue existed about consideration, but the facts were within the arguments outlined in *Labriola.*

Commencing with her decision on the Motion to Compel, Judge Hill was inexplicably hostile to the claims, and appeared to be displeased or angry with Davis as well. However, she has never met or even seen Davis, and no reason for that reaction was apparent.

In its handling of the case, Allyis consistently sought ways for the parties to cooperate so that they would limit the scope and size of the case and protect their confidential information. Those efforts were rejected at every corner with never-ending assertions that the claims were frivolous.

Allyis accepted that the legal system is imperfect, and it even decided to accept Judge Hill's decision to make its voluntary dismissal with prejudice. But her casual award of $60,000 of sanctions is an inexplicable as it is improper. Judges are not supposed to accept arguments like Simplicity's argument under *Young*. That argument was shown to be so wrong for so many reasons that no qualified legal mind could accept it.

The changes that she made to her order on reconsideration only make sense if Judge Hill realized that here original order was defective. However, once she determined that, her duty was to withdraw the order, but she instead made finding without a basis to keep her order in place. Without any justification, she labeled Davis as unethical and dishonest, without an apparent thought about the consequences.

Judge Hill's order imposing sanctions was improper. This Court should reverse.

DATED this 2nd day of May, 2016

**BRACEPOINT LAW, P.S.**

By /Matthew F. Davis/
Matthew F. Davis, WSBA No. 20939
Attorneys for Appellants

## DECLARATION OF SERVICE

I, Matthew Davis hereby declare as follows:

1. I have personal knowledge of the fast set forth herein and am competent to testify thereto.

2. On May 2, 2016, I caused the foregoing document to be served on the persons identified in paragraph 3 in the manner indicated.

3. The documents identified in paragraph 2 were served on the following persons at the email addresses stated pursuant to agreement of counsel.

**Counsel for Simplicity**

Jeff James at jaj@sebrisbusto.com

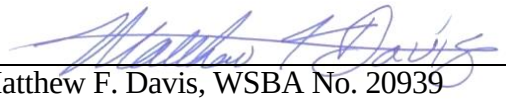
Jennifer Parda-Aldrich parda@sebrisbusto.com

**Counsel for Schroder**

Joseph Shaeffer at josephs@mhb.com

4. I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 2nd day of May, 2016 at Seattle, Washington.



Matthew F. Davis, WSBA No. 20939