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NO. 36499-2-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

REVOLUTIONAR, INC., a Washington corporation; JOSHUA
W. ROE, a married individual

Appellants,

v.

GRAVITY JACK, INC., a Washington corporation; AARON L.
RICHEY a/k/a LUKE RICHEY, individually, and his marital
community

Respondents.

REPLY BRIEF OF APPELLANTS

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I. ARGUMENT

A. **The Trial Court Abused its Discretion in Granting Defendants' Motion for Protective Order and in Denying RevAR and Mr. Roe's Motion to Compel.**

Defendants would have the Court “*decline to consider*” whether the trial court erred in entering a protective order and in denying Mr. Roe and RevolutionAR, Inc.’s (“RevAR”) motion to compel because, they believe, argument was somehow inadequate. (Br. Resp’t. at 11). However, Mr. Roe and RevAR provided detailed argument and analysis including, for example, that precluding discovery about sales and corresponding profit unreasonably and unfairly impeded their right to discovery on the very issue on which summary judgment was pending. (Br. App’t. at 22-23). The document requests were limited in scope, to 2014. (CP 546).

Defendants conclude the trial court “*properly exercised its discretion*” because it had authority to limit discovery under CR 26. (Br. Resp’t. at 12). Authority to limit discovery is not without limitation; it is tempered by the very same rule, providing for a broad right to discovery. CR 26(b)(1). This right “*is subject to . . . relatively narrow restrictions.*” Flower v. T.R.A. Indus., Inc., 127 Wn. App. 13, 38, 111 P.3d 1192 (2005) (it “*is necessary to ensure*

access to the party seeking the discovery” and “to *effectively pursue . . . a plaintiff’s claim*” (internal quotations omitted)); Cedell v. Farmers Ins. Co. of Wash., 176 Wn.2d 686, 695, 295 P.3d 239 (2013) (“*The right to discovery is an integral part of the right to access the courts embedded in our constitution.*”). Defendants’ contrary contentions notwithstanding, the court lacked “*good cause*” to enter the order. Flower, 127 Wn. App. at 38, 111 P.3d 1192 (good cause lacking). A prior protective order adequately protected against risk of disclosure of sensitive information. (CP 65-75).

Defendants disingenuously accuse Mr. Roe and RevAR of abusing the discovery process by requesting documents concerning profit, mischaracterizing such necessary discovery as a “*shoot first, ask questions later’ litigation style.*”(Resp’t. Br. at 12). Their sleight of hand is apparent; they attempt to deflect their own “*blindman’s bluff*” litigation tactic that has been rejected by Washington courts. Cedell, 176 Wn.2d at 695, 295 P.3d 239 (rejecting the “*blindman’s bluff approach to litigation*” in favor of discovery where “*each side knows what the other side knows*” (internal quotations omitted)).

Defendants rely on Webb v. Neuroeducation Inc., P.C., Winbun v. Moore, and In re Estate of Fitzgerald, 121 Wn. App. 336, 88 P.3d 417 (2004); 143 Wn.2d 206, 18 P.3d 576 (2001); 172 Wn.

App. 437, 294 P.3d 720 (2012). This reliance is misplaced. In Winbun, the court explained the discovery rule in medical negligence cases should not be applied in a manner that “*could lead to suing any health care providers identified with the treatment which injured the plaintiff—whether or not specific acts or omissions could be attributed to such providers at the time the suit was commenced.*” Winbun, 143 at 221, 18 P.3d 576. The court in Webb echoed the foregoing: a medical provider should not be named to an action “*until specific acts or omissions can be attributed to*” such person. Id. at 345, 88 P.3d 417. The court in In re Fitzgerald addressed whether a creditor was “*reasonably ascertainable*” to determine if a claim against an estate was barred. Id. Unlike those cases, this one does not involve limitations or discovery rule issues. Unlike in Webb and Winbun, this case does not involve questions about identity of the actors to whom or to which acts are attributable; rather, Mr. Roe and RevAR had actual knowledge that the conduct giving rise to the claims was attributable to Defendants. (CP 105, 1055-1079, 1443-1464).

Mr. Richey and Gravity Jack rely on federal law to support their argument that discovery cannot be used to “*find evidence*” supporting claims. (Resp’t. Br. at 13). Their reliance is, again,

misplaced because Washington courts apply the notice pleading standard. CR 8; Watson v. Emard, 165 Wn. App. 691, 267 P.3d 1048 (2011) (“*The purpose of a notice pleading is to ‘facilitate a proper decision on the merits’*” (internal quotation omitted)). “*Under notice pleading, plaintiffs use the discovery process to uncover the evidence necessary to pursue their claims.*” Putman v. Wenatchee Valley Med. Ctr., P.S., 166 Wn.2d 974, 983, 216 P.3d 374 (2009).

B. The Trial Court Abused its Discretion in Awarding Fees under RCW 4.84.185 and in Failing to Create an Adequate Record to Support the Award.

Defendants argue that the issue of whether the trial court erred in failing to reference in its findings the separate claims was not preserved, contending this argument was raised “*for the first time on appeal.*” (Br. Resp’t. at 28-29). It was raised below. (CP 1747-1750 at ¶¶ 1-3, 6); see, e.g., CP 1747 (objecting that the trial court failed to address individual claims); CP 1012-1052 (arguing the merit of individual claims). Their argument should be rejected.

Defendants rely on State ex rel Quick-Ruben v. Verharen to argue the trial court’s findings are adequate. 136 Wn.2d 888, 969 P.2d 64 (1998); (Br. Resp’t. at 29). There, the court affirmed dismissal of a private quo warranto action based on the narrow and dispositive issue of standing, and premature filing. Id. The Court

noted the trial court's order was clear when it addressed the precise claim, finding a lack of standing and that the entire action was frivolous and lacked reasonable cause. Id. at 904, 969 P.2d 64.

Unlike in that case, this action involves two plaintiffs, disputed factual issues, and multiple claims. The trial court's lack of adequate findings as to each claim make the findings inadequate to support that the action—as a whole—was frivolous and advanced without reasonable cause, the latter of which finding (without reasonable cause) was not made. (CP 1780-1781, 1699-1670). The trial court only found the action frivolous “*against Gravity Jack*,” not expressly against Mr. Richey. Id. It also failed to adequately consider Mr. Roe's individual claims and, thus, the entire action. Id. While it dismissed the claims on the issue of damages, statutory damages are available under RCW 63.60.060(2).

Defendants incorrectly argue the court's order was correct because “*no claim survived to trial.*” (Resp. Br. at p. 29-30). That a party does not prevail on the merits is, alone, insufficient to support an award. Bill of Rights Legal Found. v. Evergreen State College, 44 Wn. App. 690, 697, 723 P.2d 483 (1986). Contrary to the standard the trial court applied, the “*kitchen sink*” standard, the inquiry does not turn on the number of claims. RCW 4.84.185.

Defendants point to, but fail to address, the trial court's erroneous finding that "*Roe was aware at the outset that he had no claim but rather hoped for a financial settlement because he was aware Richey didn't like lawsuits.*" (Br. Resp't. at 30). In making this erroneous finding, the court ignored the evidence:

Q: *Did you tell Luke Richey that you didn't think there was a case there, but they wanted to pursue it because you and the board knew that he hates lawsuits?*

A: *No*

(CP 103). The trial court also ignored evidence supporting the claims, including damages, further compelling the conclusion the action was not advanced without reasonable cause:

Q: *. . . . Is it true you don't have any evidence that supports damages for any of the 15 claims alleged against my clients? Is that true?*

. . . .

A: *I know for a fact that the amount of revenue that Gravity Jack received from 4LNS from the time that I was there was 1.3 million dollars. I know for a fact, sitting in a meeting, that RevolutionAR content and assets were, in fact, used. I sat in a meeting where a client demanded RevolutionAR. I know from sitting in that meeting. I also know that PoindexAR was released in April of 2017 using my voice and RevolutionAR assets and content. . . . So, yes, I do have proof. . . .*

(CP 105). The court found Mr. Roe hoped for a "*financial settlement,*" which is not the standard. (CP 1699-1700). Attempting

to compromise claims in good faith is not a proper basis for a fee award and should not be deterred. RCW 4.84.185.

Recognizing the merit to the objection to the fee award based on lack of due process, Defendants attack the argument on procedural grounds, complaining the trial court's clear error was invited because, they argue, the issue was not raised below. (Br. Resp't. at 33). This is incorrect. See CP 1747-1750 including ¶ 6 (arguing lack of "*due process regarding . . . entitlement to or amount of attorney's fees*"); CP 1757 (Defendants responding due process satisfied). Instead of allowing briefing after all evidence was in, entertaining oral argument on presentment, or conducting an evidentiary hearing, the court summarily entered its order without addressing the objections. (CP 1747-1750, 1780-1785).

Defendants contend the court was not required to apply the lodestar method in determining a fee. (Br. Resp't. at 32). That the trial court need not utilize the lodestar method does not obviate the requirement to create an adequate record supporting a fee award. Berryman v. Metcalf, 177 Wn. App. 644, 312 P.3d 745 (2013). Here, the trial court's findings do not "*show how the court resolved disputed issues of fact*" or state "*conclusions . . . [that] explain the court's analysis.*" Id. at 658; (CP 1780-1783). The findings are too

conclusory and, thus, inadequate as “[t]here is no indication that the trial judge actively and independently confronted the question of what was a reasonable fee.” *Id.*; (CP 1780-1783). The court’s failure to address the issues raised in the objections is also reversible error. *Id.* at 659, 312 P.3d 745; (CP 1780-1783).

Without citation to any legal authority, Defendants conclude “it is . . . reasonable to infer from the trial court’s . . . order, the trial court agreed with the Defendants’ position on the issues raised by Plaintiffs’ objections,” due to a hand notation increasing the amount of the fee. (Br. Resp’t. at p. 31-32). An inference derived from the judgment that the court unquestioningly accepted the fee affidavit of counsel is inadequate because the trial court did not explain why it overruled the objections. (CP 1780-1783).

C. The Trial Court Erred in Failing to Segregate Fees.

Defendants contend the issue of fee segregation should not be considered. Mr. Roe and RevAR, however, raised issues and developed argument that the trial court erred in failing to segregate the fee award on RevAR’s claims from that of Mr. Roe’s claims and failed to address this issue raised in the objection. (Br. App. 28-30).

Defendants argue the trial court correctly found “*Roe and RevolutionAR . . . jointly and severally liable . . . under [RCW*

4.22.070(1)(a)].” (Br. Resp’t. at 35). That statute applies to tort, products liability, and warranty claims, not RCW 4.84.185. See RCW 4.22.015 (defining “*fault*”). The court’s findings do not indicate if it relied on this statute (CP 1780-1783); if it did, it erred.

Defendants argue Mr. Roe’s individual claims “*arise from the same fact pattern*” as RevAR’s claims, “*a soured business relationship.*” (Br. Resp’t. at 34). His individual claims do not arise from “*a soured business relationship,*” but from Gravity Jack’s unauthorized use of his voice in a video it posted to YouTube announcing a new technology: PoindextAR. (CP 1458). Gravity Jack posted this video to the internet long after the relationship “*soured.*” (CP 1457-1458). He was not involved with the PoindextAR project while at Gravity Jack; the launch of this video occurred after his employment ended. (CP 1459). His claims are not duplicative of RevAR’s claims, but trace back to separate duties. (CP 3-28).

Defendants argue the trial court was authorized to assess fees against Mr. Roe for claims he did not assert by virtue of Etheridge v. Hwang, 105 Wn. App. 447, 461, 20 P.3d 958 (2001); (Br. Resp’t. at p. 34-35). That case pertained to whether the court should have segregated fees against a party based on the claims that party asserted, not, as here, whether the court was unauthorized to

award fees against a party on claims the party did not assert. *Id.* Courts must segregate fees based on the party unless the claims are related to such a degree that segregating the fee is not reasonably possible. *Ewing v. Glogowski*, 198 Wn. App. 515, 523, 394 P.3d 418 (2017). Here, the trial court did not make any determination that Mr. Roe’s individual claims were so related that segregation was not possible, nor did it give any indication that it engaged in this inquiry. (CP 1780-1783). It did not explain its reasons for awarding fees against Mr. Roe for the claims asserted by RevAR and fees against RevAR for the claims asserted by Mr. Roe. *Id.*

D. The Trial Court Erred in Dismissing Mr. Roe’s Individual Claims.

Defendants claim the “*privacy right claim*” was not supported by argument and requested the court not consider it. (Br. Resp’t. at 16). They ignore argument going to overlapping claims of infringement of personality rights and invasion of privacy. (Br. App’t. at 30-36). Their request should be rejected. Gravity Jack incorrectly argues it proved Mr. Roe consented to Gravity Jack’s infringement of personality and privacy rights. (Br. Resp’t. at p. 17). Mr. Weatherly did not give consent. (CP 1068). Mr. Roe declared:

I was never informed by anyone at Gravity Jack, . . . that they were going to use my voice, . . . in connection with the launch of PoindexAR. I never

gave Luke Richey or anyone else at Gravity Jack permission . . . , nor did anyone ask me.

(CP 1459).

Nevertheless, Gravity Jack contends: “*Roe consented to his voice being recorded by voluntarily allowing Gravity Jack to record his voice.*” (Br. Resp’t. at 17). In doing so, it relies on the testimony of Gravity Jack, that “*we allowed him to record,*” and relies on Mr. Roe’s declaration in which he stated the recording was done for use in the RevAR demo application. (Br. Resp’t. at 17); see CP 1202 (“*for free, we allowed him to record*”); CP 1448. Gravity Jack conflates its authorization to allow recording of Mr. Roe’s voice for RevAR to incorporate into the demo application with consent for Gravity Jack to use his voice in the PoindextAR video; he did not consent to the latter. (CP 1459). They argue that nothing shows “*consent was limited*” (Resp. Br. at p. 17). Their argument presupposes consent was given in the first instance; it was not.

Gravity Jack relies on the Initial Service Agreement between RevAR and Gravity Jack to argue Mr. Roe consented to infringement and invasion of personality and privacy rights or released Gravity Jack for the same. (Br. Resp’t. at p. 17); (CP 17). Their argument that Mr. Roe was a party to that contract ignores testimony that Mr. Roe signed it on behalf of RevAR as CEO; they

do not contend he is bound by the Memorandum of Understanding or Master Services Agreement. (CP 41, 111, 1190-1200).

Furthermore, the portfolio provision provides:

Portfolio Submission: *Gravity Jack retains the right to add this project and/or product for use in its portfolio, demonstrations to other possible clients, and other uses Gravity Jack sees fit (including use on its website)."*

(CP 37). Mr. Richey described the "portfolio" in pertinent part as "a list of projects we've done" and "links to the apps." (CP 1212). Gravity Jack testified the purpose of the portfolio is to show clients or potential clients work and that only finished products are part of the portfolio, not component parts used in new projects. (CP 1212, 1215). The PoindexAR video was not part of the portfolio. (CP 1215). The testimony of Gravity Jack confirms lack of consent:

Q: Do you recall having any conversation with Mr. Roe prior to posting of that video, notifying him that the video would be posted or that RevAR assets would be used in connection with it?

A: No.

(CP 1247).

The trial court dismissed Mr. Roe's individual claims based on what it erroneously viewed as a lack of evidence on the issue of damages. (CP 1696). However, minimum statutory damages and injunctive relief are available. RCW 63.60.060. Mr. Roe submitted

proof of actual damages including damages based on unjust enrichment: by failing to pay for the use of Mr. Roe's voice, an unearned windfall was realized equal to one eight-hour day of work at about \$120 an hour, or about \$960. (CP 1208, 1212).

E. The Trial Court Erred in Dismissing All Claims Based on the Limitation of Liability Clauses.

Defendants argue this provision applies to any and all claims so long as the claims do not involve willful misconduct or gross negligence. (Resp. Br. at 18). Their argument, however, is unsupported by the text, and context, of the agreement:

***Except as otherwise contained in this Work Order, or in the case of willful misconduct or gross negligence,** Gravity Jack shall not under any circumstances or for any reason be liable to Client for breach of warranty, lost profits, or any other claim or demand. The express **limit** of any liability of Gravity Jack resulting from any claim of client shall be no more than the total compensation paid to Gravity Jack pursuant to the terms of this Work Order*

(CP 38); Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990) (context). By its plain terms, this provision does not waive the claims against Mr. Richey; rather, it applies to claims by RevAR against Gravity Jack for breach of contract and related warranty claims. (CP 38). Nothing in this provision expressly releases claims arising independently of the contract, such as tort and statutory

claims, or releases Mr. Roe's individual claims. Id. Gravity Jack's reading of this clause as a blanket release of every claim against it is also unsupported by the second sentence that limits damages to the amount paid. Id. The limitation provision cannot be read in isolation of the entire contract. The scope of the contract governed services by Gravity Jack to RevAR including, for example, design and development of the demo application and product development. (CP 33). The provision is, thus, limited to claims by RevAR against Gravity Jack arising from the contract scope of work.

Defendants ignored and failed to address the evidence that their actions and omissions rise to the level of gross negligence and willful misconduct as alleged. (Br. Resp't.). Gross negligence and willful misconduct, while more than simple negligence, need not rise to the level of intention tort, such that evidence supporting intentional torts satisfies such lower standards of misconduct. Contradt v. Four Star Promotions, Inc., 45 Wn. App. 847, 852, 728 P.2d 617 (1986). The remaining claims also involve actions rising to these levels of misconduct. (CP 1055-1069, 1442-1464). Such argument was, and is, supported by the record and law; thus, the Court should decline Defendants' request to not consider it.

Gravity Jack argues no conversion occurred, such that its

conduct was not tantamount to gross negligence or willful misconduct. (Br. Resp't. at 20). It concedes it willfully obtained and kept the "*RevolutionAR's carburetor.*" (Br. Resp't. at 20-21). But, it argues that its deception in omitting the reason for receiving the carburetor is immaterial because "*intended use is not an element of conversion.*" (Br. Resp't at 20). However, conversion turns on how the property is acquired. See Westview Invest's., Ltd. v. U.S. Bank Nat'l. Ass'n., 133 Wn. App. 835, 136 P.3d 638 (2006) (conversion may occur where contractor's bank applies progress payment funds to decrease indebtedness to bank where funds were received by contractor for the purpose of paying subcontractors). Defendants did not consent. (CP 1068, 1458). Property was converted, not abandoned. Id. Rather than requesting the court return the property, RevAR sought damages. (CP 23). Defendants waived the defense by omitting it from their answer. (CP 62-63).

Gravity Jack further contends it did not "*solicit[] 4LNS's AR maintenance/training and learning development work.*" (Resp't. Br. at 22). They do not dispute the legal duty to not compete with RevAR on training or learning development/maintenance work. Indeed: (a) under the Master Service Agreement, Gravity Jack agreed: "*Both companies understand the strengths of each others*

services and will make efforts to not compete with each other on their products and services”; and (b) Mr. Richey represented and assured RevAR that he and Gravity Jack would never do a “pivot” and pursue training, learning and/or development/maintenance projects without involving RevAR. (CP 46, 1065, 1452-1453). The Declaration of Mr. Poindexter also controverts their contention:

Gravity Jack has pursued projects involving training and learning development, and maintenance . . . Content created for RevAR was used by Gravity Jack to pursue projects. . . . Gravity Jack did work for and with 4LNS including work referred as DVLM. This project involved education and instruction and, specifically, teaching Marine field officers the process of moving a piece of forensic material through a field lab and demonstrating maintenance on a mass spectrometer. Upon information and belief, Gravity Jack billed and was paid for its work on this project.

(CP 1125-1126). When asked about DVLM, Mr. Richey answered:

Q: *Would anybody at Gravity Jack know anything about ART, DVLM, CMS, or TVLM?*
A: *It’s been a long time, but the only person would be Joshua Abel.*

(CP 1239). After Mr. Roe began working at Gravity Jack, he learned of Defendants’ work for or with 4LNS including the following:

ART – An interactive marketing brochure using augmented reality to demonstrate the applicability of augmented reality and to open the door for use cases and projects beyond marketing areas and into areas such as learning development and training/maintenance; DVLM – An interactive

training application designed to train field operatives in the steps for processing forensic material in the field; CMS – a content management system designed to organize and manage images, 3D content and other digital assets critical to the forensic material processing, which was to support the learning development aspects of the DVLM project.

(CP 1456). He learned Gravity Jack pitched to 4LNS new projects and work, and a presentation on the “*two eye*” concept. *Id.* Mr. Roe learned work for 4LNS amounted to about 1.2 million of projected \$3 million in income for Gravity Jack. (CP 1457). Instead of including RevAR on any of the work, Gravity Jack concealed it. (CP 1456-1457). Gravity Jack argues it did not “*get a contract with 4LNS*” (Br. Resp’t. at 22), but in discovery, it admitted it “*has entered into agreements with 4LNS,*” and any lack of a formalized written contract does not mean a contract was not formed, given work performed and payment received. (CP 1159, 1240, 1456-1457).

Defendants claim the “*Portfolio Submission*” provision permitted them to use portions of the demo application and related content. (Br. Resp’t. at 21). It did not. *See Supra* at ¶ D (discussing this provision). This paragraph is a narrow limitation to the general ownership rights of the customer, RevAR, to the content Gravity Jack created for it. (CP 1206; *see also* 517, 519-520). It, thus, did not give Gravity Jack unlimited right to use content and assets.

Gravity Jack also argues an unsigned and an inadmissible document known as b.Kit/BrowsAR license “*indemnified Gravity Jack*.” (Br. Resp’t. at 18). This document does not apply to release Defendants. It is not signed by any of the parties. (CP 304-308). By its terms, it does not apply to claims against Mr. Richey individually or preclude Mr. Roe’s individual claims. *Id.* It was not provided to RevAR or Mr. Roe, was not discussed, and was not previously seen, if it previously existed. (CP 118, 1447-48, 1059-60). The parties did not assent to its terms. *Id.* The subject software was not used. (CP 1060, 1447-1448, 1124). Direct damages are recoverable, by the documents’ terms. (CP 307-308). It cannot rely on this document when it lacked knowledge of when the document was created, who created it, and from where it was obtained. (CP 1221-1222).

Gravity Jack relies on the indemnification provision in the Master Service Agreement. (CP 46). This provision does not insulate Defendants from liability because: by its terms, it does not apply to claims against Mr. Richey individually or to claims asserted by Mr. Roe individually; it applies to claims “*arising out of the work*” and not to claims based on breach of duties independent of any contract or the work; and no judgment was entered that might give rise to the duty to indemnify. Gravity Jack acted with gross

negligence and “*malfeasance*.” (CP 46, 1055-1069, 1443-1464)

F. The Trial Court Erred in Dismissing All Claims as Factual Issues Exist as to the Fact of Damages.

Defendants argue that all of the claims asserted in the action “*require proof of damages*.” (Resp. Br. at 23). Mr. Roe’s individual claim of infringement of personality rights permits, but does not require, proof of damages, and injunctive relief is available. RevAR and Mr. Roe submitted evidence establishing the fact of damages, resulting from Defendants’ actionable conduct, beyond speculation and creating factual disputes for trial. (CP 105, 107, 1126, 981-994, 1456-1457, 1156-1166, 1207-1208, 1071-1072, 1066, 1452).

Gravity Jack claims Mr. Roe does “*not know what work Gravity Jack did for 4LNS*” and that RevAR has “*failed to show . . . that Gravity Jack’s work for or income from 4LNS*” related to marketing and sales to customers using advanced technology for training and/or learning development/maintenance. (Br. Resp’t. at 24). However, it was Mr. Richey who lacked knowledge, and was unprepared, to testify about work on and profit from 4LNS projects including work described as DVLM. (CP 1237). When asked about DVLM, Mr. Richey did not know about it. (CP 1239). But Mr. Richey testified that Mr. Roe might know about 4LNS projects:

Q: What projects was Mr. Roe involved in while

- an employee at Gravity Jack for 4LNS?*
- A: *He was supposed to come in and take over all Alyce's contracts and potential contracts.*
- Q: *So he would know a lot about those contracts, right?*
- A: *Yeah, potentially.*

(CP 1241). RevAR submitted evidence of profit stemming from work of Gravity Jack for 4LNS. (CP 105, 1123-1126, 1456-1457, 1160). It also submitted evidence that Gravity Jack did work falling within the category of RevAR's market. (CP 1163-1164, 1456-1457).

Attempting to disregard this evidence, Gravity Jack now argues that "*Adroit [PoindextAR] technology is a completely different technology*" than RevAR's model of using advanced technology to market and sell interactive applications for training and learning/maintenance purposes. (Br. Resp't. at 24). This argument conflates the technology utilized with the purpose for which it is used; the type of advanced technology is not material to this issue. It is, however, material that Gravity Jack, without permission, used Mr. Roe's voice and select portions of content that RevAR owned to promote and sell technology known as PoindextAR, known as Adroit. (CP 1456, 1458-1459, 1123-1126).

Gravity Jack argues that Mr. Roe and RevAR cannot "*identify any actual loss.*" (Br. Resp.'t at 24-25). In doing so, Defendants mischaracterize the testimony and evidence in this case.

Mr. Roe testified that the precise extent of damages was undetermined but that the fact of damages was established including damages corresponding to 4LNS work. (CP 105). Unjust enrichment damages are recoverable, including profit. Young v. Young, 164 Wn.2d 477, 191 P.3d 1258 (2008). Defendants argue the carburetor's price is not proof. (Br. Resp't. at 25). It is proof of conversion damages. Potter v. Wash. St. Patrol, 165 Wn.2d 67, 79, 196 P.3d 691 (2008).

Defendants disagree that RevAR was unable to land the T-Mobile project due to their refusal to reduce pricing, reach out to investors, and support the potential project in contravention of prior representations. (CP 1066, 1453); (Br. Resp't. at 25). While they have alternative theories about causation about the loss of T-Mobile and Itron work, their dispute creates an issue for trial, and while they claim there was no duty, there was a duty to not make misrepresentations, to comply with fiduciary duties, and act in good faith. (Br. Resp't. at 25). This damages calculation in Mr. Weatherly's declaration is not "*speculative*," (Resp. Br. at 25-26) but the declaration provides a reasonable basis of projected income and profit had Defendants complied with their duties. (CP 1066).

G. The Trial Court Erred in Dismissing Claims because Genuine Issues of Material Fact Exist Regarding Mr. Richey's Status as a Director, His Fiduciary Duties, and Application of the Indemnification Provision.

Defendants' request that the Court not consider the merits regarding Mr. Richey's misappropriation of corporate opportunity and other breaches, and lack of application of the indemnification provision, should be declined; this issue was raised and supported by legal argument and the record. (Br. App't. at 48-50). Mr. Richey relies on the indemnification provision of RevAR's Articles to argue that it excuses his breach of duties as board member. (Br. Resp't. at p. 26). He would have the Court read this provision in isolation; doing so ignores Article IV, which provides that directors are liable to the corporation for acts and omissions involving intentional misconduct or knowing violation of the law, conduct violating RCW 23B.08.310, and transactions from which the director will receive a benefit to which he or she is not entitled. (CP 1077). It lacks logic to read the indemnification provision as a waiver or release of claims that RevAR has against Mr. Richey, as director, for claims that the Articles specifically authorizes against directors. (CP 1077-1078).

As Mr. Richey points out, "*Richey has not been found liable to RevolutionAR*" such that any argument for indemnity is

premature. (Br. Resp't at p. 27). Even were it not premature, indemnification of a director is not available where the director is adjudged liable to the corporation, or in connection with an action finding some improper personal benefit. RCW 23B.08.510. RevAR offered evidence of improper benefit to Mr. Richey, including work his company secured with 4LNS. (CP 1456-1457). The statute underscores indemnification by a company of a director for the director's misconduct may be unauthorized under the circumstances. Mr. Richey cites to Grayson v. Nordic Const. Co., Inc. for the proposition that "*the corporate form protects*" him, arguing that no exception such as alter-ego applies. 92 Wn.2d 548, 599 P.2d 1271 (1978); (Br. Resp't. at p. 27). That case does not stand for the proposition for which it is used: that his status as constituent of both Gravity Jack and RevAR somehow insulates him from the duties owed to RevAR as a director and that the corporate form somehow precludes personal liability for all misconduct. Id.

Mr. Richey concludes without citation to evidence or analysis that the business judgment rule insulates him from liability. (Br. Resp't. at 26-27). He ignores that directors must perform their duties "*in good faith.*" RCW 24.03.127. The rule does not exonerate Mr. Richey from liability. See Shinn v. Thrust IV, Inc., 56 Wn. App.

827, 834, 786 P.2d 285 (1990) (exercise of “*proper care, skill, and diligence*” required and does not extend to fraud, dishonesty, or incompetence). This defense was not asserted in his answer and, thus, waived. (CP 62-63). Mr. Richey does not cite evidence supporting his argument that the rule protects him. (Br. Resp’t.). He concedes he was a director, but a factual dispute exists as to the timeframe within which he acted in this role, given his lack of knowledge as to when he purportedly quit and lack of written resignation. (CP 1220). He now does not dispute his fiduciary duties lasted through at least November 11, 2015, the date of an email about possibly resetting the board. (CP 327); (Br. Resp’t. at 5).

H. The Request for Fees on Appeal Should be Denied.

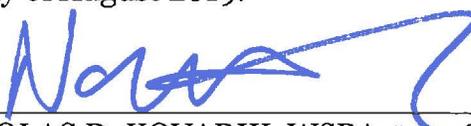
An appeal is not frivolous unless, “*considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal.*” Advocates for Resp. Dev. v. W. Growth Mgmt. Hearings Bd., 170 Wn.2d 577, 580, 245 P.3d 764 (2010). “*All doubts . . . should be resolved in favor of appellant.*” Id. “*Raising at least one debatable issue precludes finding that the appeal as a whole is frivolous.*” Id. Debatable issues were raised. Defendants argue they

are entitled to fees under “RCW 64.60.”(Resp. Br. at 37). That act has no application here and does not provide a basis for the request; and fees should be declined under RCW 63.60 et seq. as this claim was advanced with merit. Defendants request an award of fees on appeal under RCW 19.108.040. The claim was advanced in good faith. Defendants do not cite to evidence of bad faith.

II. CONCLUSION

The trial court erred in granting the Motion for Protective Order, denying the Motion to Compel, granting summary judgment dismissal, and entering the Final Order and Judgment. Gravity Jack and Mr. Richey are not entitled to fees on appeal. Mr. Roe and RevAR respectfully request that the Court reverse the trial court’s orders and judgment and remand for further proceedings and that it deny the request for fees on appeal.

DATED this 9th day of August 2019.



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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of August 2019, I caused a true and correct copy of this Reply Brief of Appellants to be served on the following in the manner indicated below:

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