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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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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.

BRIEF OF APPELLANTS

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I. INTRODUCTION

This case involves the violation of contract, tort, and statutory duties that Gravity Jack, Inc. (“Gravity Jack”) and Luke Richey (“Mr. Richey”) owed RevolutionAR, Inc. (“RevAR”) and Joshua Roe (“Mr. Roe”) in connection with a startup company to develop and sell interactive custom computer applications for learning development, training, and maintenance. After Gravity Jack and Mr. Richey filed a motion for summary judgment on the issue of damages, among other disputed issues, the trial court granted their motion for protective order, precluding certain discovery as to the issue of damages and, thereafter, dismissed all claims on summary judgment, reasoning, in part, that RevAR and Mr. Roe lacked proof of damages. The court also summarily entered an order and judgment assessing fees against Mr. Roe and RevAR, jointly and severally, without addressing their specific objections or permitting further notice and opportunity to be heard. The trial court abused its discretion in precluding discovery on the issue of damages and in awarding fees and costs. Genuine issues of material fact preclude summary judgment dismissal. The trial court erred. Therefore, reversing and remanding these orders and judgment is necessary.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error.

1. The trial court erred in granting Mr. Richey and Gravity Jack's Motion for Protective Order and in denying RevAR and Mr. Roe's Motion to Compel;
2. The trial court erred in entering an order and judgment awarding attorney's fees and costs against Mr. Roe and RevAR under RCW 4.84.185;
3. The trial court erred in failing to create an adequate record to support an award of attorney's fees and costs under RCW 4.84.185;
4. The trial court erred in entering judgment against Mr. Roe and RevAR jointly and severally and in failing to segregate and apportion the fees;
5. The trial court erred by incorporating by reference the court's Memorandum Opinion and Order Granting Summary Judgment of Dismissal into its findings of fact and by omitting any conclusions of law to support the fee award, and the court erred in entering each of its findings incorporated by reference into the Memorandum Opinion;
6. The trial court erred by dismissing on summary judgment Mr. Roe's claims of infringement of personality rights and invasion of privacy; and
7. The trial court erred in dismissing on summary judgment each claim that RevAR and Mr. Roe advanced.

B. Issues Presented.

1. Whether the trial court abused its discretion in granting Mr. Richey and Gravity Jack's Motion for Protective Order and denying RevAR and Mr. Roe's Motion to Compel;
2. Whether the trial abused its discretion in awarding fees and costs and entering judgment against Mr. Roe and RevAR

under RCW 4.84.185;

3. Whether the trial court failed to make an adequate record for review of its order and judgment awarding attorney's fees and costs against Mr. Roe and RevAR under RCW 4.84.185;
4. Whether the trial court abused its discretion in refusing to segregate the fee award on Mr. Roe's individual claims from the fee award on RevAR's claims;
5. Whether genuine issues of material fact preclude summary judgment dismissal RevAR and Mr. Roe's claims;
6. Whether genuine issues of material fact exist precluding summary judgment on Mr. Roe's claims of infringement of personality rights under RCW 63.60 et seq. and invasion of privacy;
7. Whether genuine issues of material fact exist as to the applicability and scope of limitation of liability provisions;
8. Whether genuine issues of material fact exist as to damages;
9. Whether genuine issues of material fact exist as to the duties of Mr. Richey, individually, and the applicability and scope of the indemnification clause in the First Amended Articles of Incorporation.

III. STATEMENT OF THE CASE

A. Factual Background.

Mr. Roe and Mr. Weatherly had worked for a management consulting company on a large project in the oil and gas industry. (CP 1444, 1056). Mr. Roe was a consultant focusing on developing and implementing processes. (CP 1444). He observed ineffective and inconsistent training methods, which inspired him to consider

processes and methods to implement to train and instruct. (Id.). To that end, he reached out to Mr. Richey. (Id.). Mr. Richey is the founder and Chief Visionary Officer of Gravity Jack, a software development company, who sits on the board and runs the company. (CP 1190, 1444). He is a self-proclaimed expert in software distribution methods and augmented reality with extensive experience with startup companies and business operations. (CP 1193-1194). They discussed creating and selling interactive platforms for training and maintenance, and mechanical process and human process improvement. (CP 1444). They discussed forming a company to operate as part software development and part management consulting company that would develop and sell interactive learning development, training and maintenance applications using advanced technology such as, for example, augmented reality and 3D technology, in a way that would incorporate the four learning styles. (CP 1445).

Mr. Roe reached out to Mr. Weatherly about forming a company, RevAR, to develop and sell custom interactive learning and process training and maintenance applications using advanced technology. (CP 1056, 1445). In discussing this opportunity, Mr. Richey committed to dedicate his effort and expertise to the startup,

as a board member, trusted advisor, and consultant, provided that, in addition to being on the board, he would also have some direct or indirect ownership interest in the company. (CP 1057, 1446). Additionally, as Mr. Richey represented, Gravity Jack would develop the software applications for RevAR, at a discounted rate, to sell to RevAR's customers. (CP 1057). Encouraged by and relying on Mr. Richey's representations, and active involvement, RevAR was formed. (CP 1057). Mr. Richey requested that his shares be held not in his name but in that of his wife. (CP 1446, 1057). Mr. Roe and Mr. Weatherly were shareholders, with Mr. Roe as the President and Mr. Weatherly as the Vice President. (CP 1446).

RevAR uses advanced technologies, including 3D and augmented reality, to customize interactive learning experiences for maintenance, training and learning development. (CP 1057). This process allows customers to interact, for example, with mechanized process in a simulated way, based on the four learning styles, to maximize knowledge retention. (CP 1057). As an example, RevAR may sell custom applications that transform technical operations manuals into interactive instructive experiences. (CP 1057).

At first, Mr. Roe and Mr. Weatherly were involved in the day-to-day operations and focused their knowledge and experience

on creating internal processes and implementing RevAR's training and learning/maintenance concept. (CP 1058). As a result, and based on assurances and representations Mr. Richey made from the outset, they relied heavily on him, as director and trusted advisor, and on his other company, Gravity Jack. (CP 1058, 1446). Based on their representations and assurances, RevAR relied on them to introduce RevAR to their network of investors to invest in the startup company and to make warm introductions to potential customers. (CP 1445-1446). They relied on Mr. Richey to advise about legal documents, project contracting processes, and protecting their legal rights. (CP 1445-1446, 1450-1452, 1593).

Initial Service Agreement and Demo Application.

RevAR and Gravity Jack entered into the Design & Development Resourcing Agreement ("Initial Service Agreement"). (CP 30-41, CP 1447). The purpose was to engage Gravity Jack to develop a sales prototype, known as the demo application, as well as marketing materials, website, and branding. (1448). RevAR ultimately trademarked its branding. (CP 1431, 1448). Mr. Richey/Gravity Jack presented their form Initial Service Agreement, although it did not reflect the broader arrangement or set forth all of Mr. Richey's representations. (CP 1447). The Initial

Service Agreement references “*b.Kit (BrowsAR SDK License Terms.*” (CP 39). But no one at Gravity Jack made any such license terms available, if any even existed at that time, to RevAR, and any terms were not discussed. (CP 1059-1600, 1447-1448). Rather, Gravity Jack explained that b.Kit, BrowsAR SDK was defunct and would not be used in developing software for RevAR. (Id.).

Gravity Jack developed the prototype/demo application for RevAR. (CP 1059). The application was developed to demonstrate the RevAR concept and capability to potential customers. (Id.). The application demonstrated steps of a mechanized process on a carburetor in a way that utilized the four learning styles. (Id.). It utilized the RevAR logo and branding, and incorporated recordings of Mr. Roe’s voice including step-by-step instructions about work on a carburetor, all using interactive and advanced technology. (CP 1448). Mr. Weatherly utilized eBay to purchase the carburetor for this very purpose, at a cost of \$127.50. (CP 1059, 1071-1072). Neither Mr. Richey nor Gravity Jack purchased or paid for the carburetor; RevAR owned it. (CP 1059). RevAR paid Gravity Jack thousands of dollars for its work, including, specifically, developing the RevAR demo application. (CP 1059).

RevAR Pipeline and Board Meetings.

For over a year, Mr. Roe and Mr. Weatherly spent hours developing a sales “*pipeline*” comprised of potential customers and referral sources. (CP 1448-1449). The pipeline focuses on particular industries and leaders including energy, manufacturing, aerospace, medical, and government, such as the Department of Defense. (CP 1448-1449). RevAR protected this pipeline by maintaining it through Customer Relationship Management (CRM) software. (CP 1449). It safely stored information in this program. (Id.). It used this pipeline to focus marketing efforts. (Id.). The pipeline was valuable including by virtue of the time and effort RevAR dedicated to creating and protecting it and in the information contained within. (CP 1449). Mr. Richey attended board meetings where updated pipeline documents were provided. (CP 1451).

Reaching Out to Investors.

As a startup, obtaining investor funds was paramount. To that end, RevAR relied on Mr. Richey and Gravity Jack to reach out to potential investors for RevAR including, specifically, to Mr. Richey’s broad network of investor contacts. (CP 1445). While he provided some feedback on an investor pitch, he did not make any warm introductions to anyone in his investor network. (Id.).

Rather, he refused to do so until RevAR landed projects. (CP 1062-1063). Of course, he knew that RevAR could not secure and complete projects without funding. (Id.). Some investor funds were obtained, but not through Mr. Richey. (CP 1058, 1060).

The Relationship of RevAR and Richey/Gravity Jack.

During the development of the demo application, Mr. Roe became concerned about the relationship between RevAR, on the one hand, and Mr. Richey and Gravity Jack, on the other hand. (CP 1449). RevAR wanted to set forth in writing terms that comprehensively and accurately set forth the roles and responsibilities between the parties. (Id.). To that end, RevAR had documents drafted, but Mr. Richey refused to sign. (Id.). Instead, RevAR and Gravity Jack executed a document narrower in scope, described as the Memorandum of Understanding. (CP 43-44, 1449, 1061). The Memorandum of Understanding was to establish that RevAR owned the concept and invention, as implemented in the demo application, and provided that Gravity Jack “*agrees it will not use any software code that inhibits revAR from obtaining complete ownership of the software code.*” (CP 43-44, 1449-1450, 1061). RevAR intended to obtain patent protection and wanted documentation that it owned everything Gravity Jack developed for

RevAR. (CP 1450). Again, no license terms were signed, discussed, or presented including any terms concerning b.Kit, BrowsAR SDK, and any such terms did not apply. (CP 1450, 1062).

RevAR and Gravity Jack then executed the Master Service Agreement. (CP 46-47, 1061, 1449-1450). It provided, without limitation: (a) “*GJ agrees it will not use any software code that inhibits revAR from obtaining complete ownership of the software code.*”; (b) “*Both companies understand the strengths of each others services and will make efforts to not compete with each other on their products and services*”; (c) *GJ . . . agrees that it may not use the trademarks of revAR . . .*” (CP 46-47).

Provisional Patent.

About summer of 2014, RevAR consulted with attorneys regarding patenting the RevAR concept reflected in the demo application. (CP 1450). This option was discussed by the Board of Directors, including Mr. Richey who insisted patents were a waste of money because, he explained, information can and will be stolen. (CP 1062). Relying on his opinion and expertise, patent protection was not pursued at that time. (CP 1062, 1450). Nevertheless, the following calendar year, RevAR ultimately submitted a provisional patent application. (CP 1450-1451, 1467-1524). While RevAR had

not claimed to have patent protection, the provisional patent sets forth the information that is subject to protection as a trade secret.

Proofs of Concept and Assessment.

RevAR had its first paid assessment for a potential contract with Spokane Turbine Center. (CP 1063). Mr. Roe had met with the CEO at a community event in the fall of 2014 and built a relationship from there. (Id.). RevAR was paid \$750 to analyze potential projects to determine which projects would have the highest chance of success. (Id.). RevAR asked Mr. Richey to assist. (Id.). He agreed, demanding \$250 on this \$750 transaction. (Id.).

One proof of concept was the result of a suggestion from a radio show host that RevAR contact the Journal of Business. (Id.). This journal published an article and Telemedia contacted RevAR. (CP 1063-1064). Telemedia engaged RevAR for a proof of concept. (CP 1064). Then, Gravity Jack refused to do certain work it knew Telemedia required, forcing RevAR to seek an outside company to do 3D modeling. (Id.). The project was, thus, delayed, and the proof of concept did not result in a project. (Id.). RevAR netted about \$3,000, after paying Gravity Jack's demands. (Id.).

The next proof of concept came from Itron. RevAR had been introduced to Itron through its own contact, not through Mr.

Richey. (CP 1064, 1451). Itron paid about \$2,500 for this proof of concept, and it cost about the same in payment to Gravity Jack. (CP 1064-1065). The aim of the proof of concept was to land a project. (Id.). To that end, RevAR began a dialogue with Itron's legal department to agree on contract terms. (CP 1064). Lacking knowledge and experience in this area, RevAR relied on the advice of Mr. Richey who, after reviewing the proposed terms, recommended RevAR not sign and rather push back on the legal department to remove certain language. (CP 1064-1065, 1451-1452). RevAR followed this direction, which delayed the process and destroyed the momentum. (Id.). Itron, frustrated with the delay, did not move forward with a project. (Id.).

Richey and Gravity Jack Promise to Never “Pivot.”

In about the summer of 2015, the then Vice President of Sales at Gravity Jack approached RevAR and requested RevAR give Gravity Jack a reference for a project that they had not heard about, Dakota EHS. (CP 1065, 1452-1453). After some investigation, RevAR began to believe that the project may have involved the learning development space including compliance based risk management. (Id.). They immediately scheduled an appointment with Mr. Richey for the next morning and met with him. (Id.).

During this meeting, Mr. Richey represented and assured RevAR that it would never do a “*pivot*” and pursue training, learning development/maintenance projects. (Id.). He also assured RevAR that Gravity Jack would involve RevAR in any resulting work. (CP 1453). RevAR provided the recommendation, but did not hear anything further about the project. (CP 1065, 1453).

T-Mobile Falls Through.

In about the fall of 2015, RevAR was introduced to someone at T-Mobile, but Mr. Richey did not make this introduction. (CP 1066, 1453). An initial meeting between RevAR and T-Mobile occurred in Factoria, Washington. (Id.). That meeting resulted in additional meetings, generating positive momentum toward a project. (Id.). Mr. Richey and Gravity Jack, however, refused to assist in landing this sizable contract. (Id.). Instead, RevAR again faced Gravity Jack’s substantial development cost demands that Mr. Richey and Gravity Jack refused to decrease. (Id.). Instead, Gravity Jack insisted that RevAR allow Gravity Jack to contract with T-Mobile directly, while proposing to give RevAR a 3% referral fee. (Id.). Without Mr. Richey and Gravity Jack, and without further investment funds or sales income, however, the sales process became drawn out and RevAR did not secure the project. (Id.).

Gravity Jack Recruits Roe.

Near the end of 2015, Mr. Richey reached out to Mr. Roe to recruit him to join Gravity Jack. (CP 1453). Mr. Roe was desperate for a steady paycheck. (Id.). He discussed the opportunity with his family and with Mr. Weatherly, and then contacted Mr. Richey to discuss moving forward. (Id.). After a series of meetings, and formal application process, Gravity Jack hired Mr. Roe. (Id.).

A Pivot: Roe Learns Gravity Jack and Richey Competing.

Mr. Roe started work at Gravity Jack in January of 2016. (CP 1454). On or about the next day on the job, he was expected to attend a meeting with a government client whose projects he was hired to manage. (Id.). Mr. Richey attended the meeting. (Id.). At the meeting, for the first time, Mr. Roe learned the facts giving rise to this action: that the customer's name was 4LNS and that the company, a government contractor, was leveraging different technologies, including implementing technology for a learning development project for laboratory field operatives in the U.S. Marines. (Id.). RevAR had never before heard of 4LNS and had never been informed by Mr. Richey and Gravity Jack that they were concealing from RevAR their profitable work with 4LNS. (Id.).

On the second day of these meetings between Gravity Jack

and 4LNS, Shawn Poindexter and another individual from Gravity Jack presented a multi-media presentation to 4LNS to showcase a new project idea that was initially referred to as “*Remote Hands*,” and the project would later be known as “*two eye*” or “*IIP*.” (Id.). The multi-media presentation incorporated the RevAR concept, RevAR’s name, logo, and assets/content including pictures of the RevAR prototype/demo application. (Id.). Mr. Richey was at this meeting. (Id.). As discussions continued that day, a 4LNS representative expressed interest in using the RevAR concept to secure funding and further government work. (CP 1454-1455). Mr. Roe also learned at that meeting that there was as a plan to pitch the remote hands project to the government. (Id.). RevAR did not give Gravity Jack permission to use RevAR assets/content with 4LNS, nor was permission requested. (CP 1455). RevAR had been kept in the dark concerning such prior and projected work and opportunities. (Id.). Mr. Roe was astounded by what he learned.

In response, on the second day of meetings, Mr. Roe confronted Mr. Richey in the hallway about what Mr. Roe had observed. (Id.). He expressed to Mr. Richey surprise and frustration that Mr. Richey and Gravity Jack were utilizing RevAR assets and content to enter into government contracts, including work in

involving training development, while excluding RevAR from these opportunities. (Id.). Mr. Richey responded cavalierly: “*Well I don’t really care. That ship has sailed. I know this is going to be hard for you for a while, but you will get over it.*” (Id.).

This knowledge prompted a meeting, held on or about January 13, 2016, between Mr. Weatherly, Mr. Roe, Mr. Richey, Jennifer Richey, and others. (CP 1067, 1455). Mr. Richey was confronted about Gravity Jack’s use of the RevAR assets/content but became defensive and, after the meeting, one of RevAR’s investors refused to provide any further funds to RevAR. (Id.). Mr. Weatherly continued his work with RevAR to try landing the T-Mobile project. (CP 1067). Without Mr. Richey following through with his commitment and assurances the opportunity became unattainable. (CP 1067). RevAR had no choice but to seek a separate tech company to secure the project. (CP 1067).

Mr. Roe continued working for Gravity Jack. He needed steady pay and, during the first part of 2016, he learned that his wife was pregnant; they needed health care benefits then more than ever. (CP 1455). As he continued working at Gravity Jack, he learned that it had been actively developing at least three projects for or with 4LNS including the following: ART – an interactive

marketing brochure using augmented reality to demonstrate the capability 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 and development aspects of the DVLM project. (CP 1456). Mr. Roe learned this work amounted to about \$1.2 million of a projected \$3.0 million in work for Gravity Jack. Instead of including RevAR on the work, Gravity Jack concealed it. (CP 1456-1457).

In or about March of 2016, Mr. Roe participated in a meeting with 4LNS where the Two Eye project was discussed. (CP 1456). Representatives of 4LNS and Gravity Jack were present, including Mr. Richey, Jennifer Richey, Josh Abel, and Shawn Poindexter. (Id.). At this meeting, a powerpoint presentation was given, which included information about the “*Gravity Jack Partnership.*” (Id.). The presentation contained a detailed description of the Two Eye/IIP technology, and incorporated pictures of RevAR’s assets

and content including, specifically, screenshots of the RevAR demo application and, more specifically, the carburetor. (Id.). Mr. Roe also learned that Gravity Jack was servicing a contract for Itron, which was in the RevAR pipeline. (CP 1457).

In or about March of 2016, a representative of 4LNS informed Mr. Roe that 4LNS was losing trust in Gravity Jack, wanted Gravity Jack to play a smaller role, but that 4LNS wanted Mr. Roe to continue as project manager. (CP 1457). In about April of 2016, Mr. Roe, again, approached Mr. Richey about what he learned about 4LNS. (Id.). Mr. Roe's job performance was not discussed. (Id.). Mr. Richey proposed potential future roles that Mr. Roe may have had, but, given the foregoing, Mr. Roe was not interested. (Id.). Richey lost his temper, and exploded at Mr. Roe to "get the fuck out" of his office. (Id.). Mr. Richey later apologized in person to Mr. Roe and to Mr. Roe's wife. (CP 1053-1054, 1458).

The Carburetor.

Mr. Richey and Josh Abel of Gravity Jack reached out to Mr. Roe and Mr. Weatherly, requesting the carburetor that had been used in developing the RevAR demo application. (CP 1068, 1458). Mr. Richey and Gravity Jack, however, omitted the real reason for the request: to use the carburetor in a video to launch new

PoindexAR technology, now known as Adroit, that would incorporate Mr. Roe's voice and RevAR assets. (CP 1068, 1458). Not knowing this reason, the carburetor was made available. (CP 1068).

PoindexAR Video.

On or about December 19, 2016, Gravity Jack released a YouTube video, announcing a new technology and product offering: PoindexAR. (CP 1458). The first portion of the video features the RevAR carburetor, and also utilizes recordings of Mr. Roe's voice that were created for incorporation into the RevAR prototype/demo application. (CP 1068, 1458). The PoindexAR video contained the same distinctive features of RevAR's assets and content that had been included in the RevAR demo application¹. (Id.). The PoindexAR video shows an application and includes a recording of Mr. Roe's voice outlining certain steps to adjust the idle speed on a carburetor. (CP 1068, 1458). Mr. Roe was never involved with the PoindexAR project while working at Gravity Jack, and the launch of this video did not occur until about a year after his employment concluded. (CP 1459). Gravity Jack did not ask or obtain any permission and none was given. (CP 1068, 1458-1459).

¹ At the time of the summary judgment briefing, the PoindexAR video could be found on YouTube at the following URL: <https://www.youtube.com/watch?v=QUoKolE5zMc>. (CP 1458).

B. Procedural History.

After learning that Mr. Richey and Gravity Jack launched an advertising campaign for PoindexAR that included a video using the voice of Mr. Roe and incorporating the carburetor in a manner that was used for the demo application, RevAR and Mr. Roe commenced the action and served written discovery. (CP 1-47, 897-994). On May 18, 2018, Gravity Jack and Mr. Richey moved for summary judgment on all claims. (CP 448-469). When they refused to produce documents, including information pertaining to projects, profits, and damages, Mr. Roe and RevAR moved to compel. (CP 632-665). Defendants moved for a protective order. (CP 679-692). The court granted the protective order and denied the motion to compel. (CP 1007-1010). Plaintiffs took the deposition of Gravity Jack, which designated Mr. Richey as its representative. (CP 1189). He refused to answer regarding topics he deemed confidential, citing the protective order. (CP 1207-1208).

On November 8, 2018, the court entered its Memorandum Opinion and Order Granting Summary Judgment of Dismissal, in which it dismissed all claims and, without further opportunity for briefing or hearing, awarded fees and costs under RCW 4.84.185, directing Gravity Jack and Mr. Richey to present the final order

“without oral argument.” (CP 1696-1700). On November 14, 2018, Gravity Jack and Mr. Richey filed a Notice of Presentment – “Without Oral Argument” – on Judgment and Final Order. (CP 1739-1746). Mr. Roe and RevAR filed a detailed objection. (CP 1747-1750). Without further hearing and opportunity to be heard, the Court considered the presentment without oral argument and without an evidentiary hearing, accepted unquestioningly the fee affidavit from counsel, and entered the Judgment and Final Order, effectively overruling, without addressing, RevAR and Mr. Roe’s objections or setting forth necessary conclusions. (CP 1780-1784). RevAR and Mr. Roe filed a timely Notice of Appeal. (CP 1786-1805).

IV. ARGUMENT

A. Standard of Review.

“The standard of review on appeal of a summary judgment order is *de novo*.” Herron Tribune Publ’g. Co., Inc., 108 Wn.2d 162, 255, 736 P.2d 249 (1987). The appellate court engages in the same inquiry as the trial court. (Id.). Summary judgment is proper only if there are no genuine issues of material fact. CR 56. “The facts and reasonable inferences . . . are construed most favorably to the nonmoving party.” Korslund v. DynCorp Tri-Cities Serv’s., Inc., 156 Wn.2d 168, 177, 125 P.3d 119 (2005). An appellate court reviews a

fee award under RCW 4.84.185 and orders on discovery motions for abuse of discretion. Curhan v. Chelan County, 156 Wn. App. 30, 37, 230 P.3d 1083 (2010); Dempsey ex rel Smith v. Spokane Wash. Hospital Co., LLC, 1 Wn. App. 2d 628, 633, 406 P.3d 1162 (2017). “Discretion is abused when . . . exercised on untenable grounds or for untenable reasons.” Curhan, 156 Wn. App. at 37, 230 P.3d 1083. (internal quotations omitted). A trial court necessarily abuses its discretion if its decision is “based on an erroneous view of the law or involves application of an incorrect legal analysis.” Dix v. ICT Grp., Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

B. The Trial Court Abused its Discretion in Granting Mr. Richey and Gravity Jack’s Motion for Protective Order and in Denying RevAR and Mr. Roe’s Motion to Compel Information about Damages.

On May 25, 2018, RevAR and Mr. Roe filed a Motion to Compel Discovery to obtain information concerning certain categories of work Gravity Jack performed and related financial information as to the issue of damages, including profits (CP 635-652). In response, Gravity Jack and Mr. Richey filed a Motion for Protective Order requesting, without limitation, preclusion of written discovery of financial information. (CP 679-681). The court denied the Motion to Compel and granted the Motion for Protective

Order. (CP 1007-1009, 1010-1011). In its Order Granting Defendant's Motion for Protective Order, the court precluded discovery on Gravity Jack's sales pertaining to training and learning development and related financial records. (CP 1007-1009).

Precluding discovery of sales and corresponding profit in an action involving trade secrets and misappropriation of corporate opportunity, among other claims, is manifestly unreasonable and unfairly prejudicial, particularly, where as here, it was entered when a motion for summary judgment on the issue of damages is pending. Based on these orders, at its 30(b)(6) deposition, Gravity Jack refused to answer questions it unilaterally deemed subject to the protective order. The court abused its discretion in precluding discovery on the issue of damages and, thereafter, in dismissing the action based on a purported lack of evidence as to damages.

C. The Trial Court Abused its Discretion in Awarding Fees and Costs under RCW 4.84.185 Because the Action, in its Entirety, is Not Frivolous and was Not Advanced without Reasonable Cause and its Findings are Not Supported by the Evidence.

RCW 4.84.185 provides that:

the court . . . may, upon written findings . . . that the action . . . was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred This

determination shall be made upon motion by the prevailing party after a . . . final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. . . .

RCW 4.84.185. “A frivolous action is one that cannot be supported by any rational argument on the law or facts.” Goldmark v. McKenna, 172 Wn.2d 568, 582, 259 P.3d 1095 (2011). “Thus, if any one of the claims asserted was not frivolous, then the action is not frivolous.” Tiger Oil Corp. v. Dept. of Licensing, State of Wash., 88 Wn. App. 925, 938, 946 P.2d 1235 (1997). Importantly, “allegations that . . . prove legally insufficient to require a trial are not, for that reason alone, frivolous.” Bill of Rights Legal Foundation v. Evergreen State College, 44 Wn. App. 690, 697, 723 P.2d 483 (1986); see, e.g., Holland v. City of Tacoma, 90 Wn. App. 533, 546, 954 P.2d 290 (1998) (reversing fee award where “a finding that the lawsuit was frivolous was in error” notwithstanding summary judgment was “appropriate”); Dave Johnson Ins., Inc. v. Wright, 167 Wn. App. 758, 785-787, 275 P.3d 339 (2012) (reversing fee award where counterclaim not entirely frivolous, although the claimant did not prevail); Eserhut v. Heister, 52 Wn. App. 515, 522-523, 762 P.2d 6 (1988) (same).

Here, the trial court abused its discretion in awarding fees and costs under RCW 4.84.185 because it did not directly address each of Mr. Roe’s—or RevAR’s—claims, only mentioning obliquely in its memorandum that “*use of the . . . recordings of Mr. Roe’s voice . . . was expressly permitted according to the parties’ agreement.*” (CP 1968). The record, however, is replete with facts and law sufficient to support these claims, irrespective of whether Mr. Roe ultimately prevailed on the merits. For example, and as set forth in further detail below, Mr. Roe did not authorize Gravity Jack to use recordings of his voice beyond incorporating the recordings into RevAR’s demo application; likewise, Mr. Roe did not authorize Gravity Jack to use recordings of his voice—a component of the demo application—outside of the context of the demo application itself. Furthermore, the Court dismissed the action based on what it perceived to be a lack of damages, but Mr. Roe’s individual claim for infringement of personality rights under RCW 63.60 et seq. allows for statutory damages in the amount of \$1,500 in the absence of proof of actual damages. RCW 63.60.060(2). Accordingly, Mr. Roe’s claims, in their entirety, are not frivolous.

The trial court abused its discretion by applying the incorrect legal standard, predicating its decision to award fees on the number

of claims the parties asserted and that they were determined to be “*without merit.*” (CP 1699). But the standard does not turn on the number of claims a party may assert, it turns on whether the action, as a whole, was frivolous and advanced without reasonable cause; and, that a party does not ultimately prevail on the merits is, alone, insufficient to support an award under RCW 4.84.185.

Furthermore, the trial court ignored evidence that Mr. Roe and RevAR believed that they had legitimate claims and nothing is improper about attempting to reach a good faith “*financial settlement*” early in litigation. (CP 1700). Good faith settlement attempts should not be discouraged. In its Memorandum and Order, the Court relied on and adopted Mr. Richey’s version of the story that he set forth in his Declaration: “*On January 28, 2016 . . . Mr. Roe called me and stated that the board had decided to sue Gravity Jack, even though they don’t think they have a case (because they know I hate lawsuits) that I will just pay ‘some’ amount to not have to deal with it which will allow them to pay off the local debts.*” (CP 473-474). In choosing Defendants’ version of the facts over RevAR and Mr. Roe’s evidence, the trial improperly ignored the evidence before it and acted as fact-finder, because Gravity Jack and Mr. Roe presented controverting evidence,

including the following testimony from Mr. Roe:

Q: Did you tell Luke Richey that you didn't think that 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 (emphasis added)). The Court's findings are not supported by the record, including Mr. Roe's deposition testimony:

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 PoindextAR was released in April of 2017 using my voice and RevolutionAR assets and content. . . . So, yes, I do have proof from sitting in meetings, and that's how we're establishing our damages. And we've requested discovery multiple times.

(CP 105). The trial court also summarily entered its order granting fees without a separate formal motion that would have allowed Mr. Roe and RevAR to address the complete record within the context of RCW 4.84.185 after all the evidence was in, nor did the court conduct any evidentiary hearing. Hamilton v. Huggins, 70 Wn. App. 842, 855 P.2d 1216 (1993); but see Reid v. Dalton, 124 Wn. App. 113, 100 P.3d 349 (2004).

D. The Trial Court Did Not Create an Adequate Record to Support the Fee Award under RCW 4.84.185.

“Courts must take an active role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought.” Berryman v. Metcalf, 177 Wn. App. 644, 657, 312 P.3d 745 (2013) (internal quotations omitted). Indeed, *“[c]ourts should not simply accept unquestioningly fee affidavits from counsel.”* Id. (internal quotations omitted). Trial courts must support a fee award by adequate findings of fact and conclusions of law. Id. at 657-59, 312 P.3d 745. *“The findings must show how the court resolved disputed issues of fact and the conclusions must explain the court’s analysis.”* Id. at 658, 312 P.3d 745. A trial court’s findings of fact and conclusions of law are too conclusory and, thus, inadequate when *“[t]here is no indication that the trial judge actively and independently confronted the question of what was a reasonable fee.”* Id. at 658, 312 P.3d 745. Absent adequate findings and conclusions, the appropriate remedy is to remand. Id. at 659-60, 312 P.3d 745.

Here, the trial court failed to create an adequate record—and, specifically, did not enter adequate findings of fact or conclusions of law—to support the award of attorney’s fees and cost against Mr. Roe and RevAR. On November 30, 2018, Mr. Roe and

RevAR filed an Objection to Award of Attorney's Fees and Costs, Findings of Fact and Conclusions of Law, Proposed Judgment for Award of Attorney's Fees and Costs, Judgment Summary and Final Order. (CP 1747-1750). In it, they set forth specific objections including the following: (1) the trial court did not adequately address each of the claims; (2) attorney's fees and costs should not be joint and several; (3) inadequacy of the findings of fact and conclusion of law including the incorporation by reference of the Memorandum Opinion as findings; (4) duplicative fee entries, improper block billing, and lack of adequate documentation supporting fees and costs; (5) excessive time; and (6) lack of due process in the trial court's order and judgment determining entitlement to and amount of fees and costs. (CP 1747-1750).

Without any presentment or evidentiary hearing, the trial court entered its Final Order, Judgment, and Judgment Summary. In doing so, the trial court noted that it considered the objections, but, ultimately, failed to enter any findings showing how the court resolved disputed issues and the court's conclusions did not explain the court's analysis. The trial court did not create any record showing how it actively and independently confronted the question of what was a reasonable fee, nor did it articulate any basis for

overruling the specific objections. (CP 1780-1784). Instead, the trial court accepted unquestioningly the fee affidavit of counsel and summarily entered the order and judgment, increasing the fee award from the amount originally requested, and set forth the conclusory finding that “*Defendant’s fees and costs are reasonable.*” (CP 1780-1784). Therefore, the trial court erred.

E. The Trial Court Erred in Entering Judgment Jointly and Severally against Mr. Roe and RevAR and by Refusing to Segregate the Fee Award on Mr. Roe’s Individual Claims from the Fee Award on RevAR’s Claims.

The court abused discretion in awarding fees against Mr. Roe for the fees incurred in defending RevAR’s separate claims. RCW 4.84.185. Likewise, the court abused its discretion in awarding fees against RevAR for fees incurred in defending Mr. Roe’s individual claims. *See, e.g., Ewing v. Glogowski*, 198 Wn. App. 515, 523, 394 P.3d 418 (2017) (segregating fee award based on “*the time spent on issues for which fees are authorized*” is appropriate).

F. The Trial Court Erred in Dismissing Mr. Roe’s Individual Claims of Infringement of Personality Rights and Invasion of Privacy.

“*Every individual . . . has a property right in the use of his or her . . . voice.*” RCW 63.60.010. “*Any person who uses or*

authorizes the use of a living . . . individual's . . . voice . . . for purposes of advertising products, merchandise, goods, or services . . . or if any person disseminates or publishes such advertisements in this state, without written or oral, express or implied consent of the owner of the right, has infringed such right.” RCW 63.60.050. Importantly, evidence of damages caused by infringement is not necessary to recover on this claim. RCW 63.60.060. Rather, the claimant may recover “*the greater of one thousand five hundred dollars or the actual damages sustained as a result of the infringement, and any profits that are attributable to the infringement and not taken into account when calculating actual damages.*” (*Id.*). Additionally, or alternatively, a claimant may also be awarded injunctive relief. (*Id.*). Individuals, thus, have a protectable interest in privacy, to be free from the appropriation of one’s likeness, including voice. Mark v. King Broadcasting Co., 27 Wn. App. 344, 354, 618 P.2d 512, 518 (1980); Restatement (Second) of Torts § 652C.b (“*The common form of invasion of privacy under the rule . . . is the appropriation and use of the plaintiff’s name or likeness to advertise . . .*”).

Gravity Jack conceded that it used recordings of Mr. Roe’s voice in a video advertising new technology known as PoindextAR,

later known as Adroit, and that it posted this video, containing recordings of Mr. Roe's voice, to the internet through YouTube:

Q: So you used Josh Roe's voice in the video, correct, for Adroit?

A: Correct – no, for PoindexAR. PoindexAR was the code name of Adroit before we broadcast it.

. . . .

Q: So Gravity Jack used YouTube on its site to show videos, correct?

A: Yes.

Q: Including the video using Josh Roe's voice for the R&D?

A: Correct

(CP 1213). Indeed, in requests for admission, Gravity Jack admitted: (a) *“that, on or about December 19, 2016, Gravity Jack published on YouTube a video captioned as follows: (PoindexAR – Augment Anything | Augmented Reality & Objection Detection for the Real World,”* and (b) that this video *“incorporated or used the voice, or a recording of the voice, of Mr. Roe.”* (CP 1161).

The court dismissed the infringement of personality rights based on what it erroneously viewed as a lack of evidence on the issue of damages. As a matter of law, however, evidence of damages resulting from infringement is not necessary because the claimant showing infringement is entitled to minimum statutory damages of \$1,500 and injunctive relief is available. RCW 63.60.060.

Mr. Roe also offered proof of actual damages resulting from

the infringement. Gravity Jack testified it saved money by using Mr. Roe's voice without his authorization and without paying him for using it in a video unrelated to the demo application:

Q: *Did it save money to use Josh Roe's voice?*

A: *A small amount. We could have jumped in the recording studio and done it.*

Q: *How much time would that have taken?*

A: *A day*

(CP 1212). Gravity Jack charges by the hour, including in the approximate amount of about \$120 an hour, based on a "*chart*." (CP 1208). Based on an eight-hour work day, the resulting unearned windfall to Gravity Jack is in the range of about \$960. Therefore, genuine issues of material fact exist as to the fact of actual damages Mr. Roe incurred as a result of infringement.

Furthermore, the trial court erroneously reasoned—in dismissing all claims—that Gravity Jack's use of Mr. Roe's voice "*was expressly permitted*" (CP 1698) based on the following provision of the Design and Developing Resources Contract: "*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.*" (CP 37).

First, a genuine issue of material fact exists regarding whether this agreement was between RevAR and Gravity Jack, not

Mr. Roe and Gravity Jack, which Mr. Richey necessarily understood given his position as a board member of RevAR. As Mr. Richey testified at the 30(b)(6) deposition of Gravity Jack:

Q: *Who else's name is on this page?*

A: *Joshua Roe*

Q: *And who is he signing on behalf of?*

A: *RevolutionAR.*

Q: *As the what?*

A: *CEO*

(CP 1199). Secondly, by its terms, and as confirmed by Gravity Jack's 30(b)(6) testimony, this provision does not authorize Gravity Jack to use component parts of the end "*project and/or product*" to use in its marketing of new technology that is unrelated to the final product. Indeed, during its deposition, Gravity Jack described its portfolio as "*a list of projects we've done*" and explained that "*only finished products are in the portfolio,*" thus giving attribution to Gravity Jack's current customer while displaying work to third parties. (CP 1212). Gravity Jack testified, however, that it went beyond the scope of what might plausibly be permitted by the "*portfolio submission*" paragraph of the Initial Services Agreement by utilizing Mr. Roe's voice in a video it published on YouTube:

Q: *Did the RevAR app or any portion of the assets created for RevAR – did that appear in the portfolio in a manner that was not attributable to RevAR?*

A: *No. Only finished products are in the*

portfolio.

Q: *Was any portion of the RevAR assets incorporated into projects unrelated to RevAR?*

A: *Our demo – our R&D demo utilized Josh Roe’s voice and the carburetor 3D model.*

(CP 1212). Thus, the use of RevAR content and assets, and trademark, falls outside of this portfolio provision.

Moreover, Gravity Jack testified at its 30(b)(6) deposition that it relied on some oral, rather than written, consent to use Mr. Roe’s voice, that such consent did not come from Mr. Roe directly, that Gravity Jack lacked any idea about the point in time when any purported third-party consent was given, and, if given, was oral:

Q: *Please turn to page 16. In your first answer, you say, “Any use of Plaintiff Joshua Roe’s voice or likeness was authorized by acting CEO of Plaintiff RevolutionAR, Brendan Weatherly.” Tell me when this occurred.*

A: *... I don’t know when.*

Q: *On one occasion or multiple occasions?*

A: *I don’t know.*

Q: *Was it authorized in writing or orally?*

A: ***Orally.***

(CP 1400). Notably, however, Mr. Roe denies that he ever gave express or implied consent for Gravity Jack to use recordings of his voice and that he lacked any knowledge that Gravity Jack had used his voice recording until having seen the video online.

Importantly, this contract term is subject to the implied duty

of good faith and fair dealing. One may breach the duty of good faith and fair dealing, notwithstanding compliance with a written term, where, as here, the party has evaded the spirit of the bargain, willfully rendered imperfect performance, or interfered with or failed to cooperate with the other parties' performance. Restatement (Second) of Contracts § 205 cmt. d (1981).

G. The Trial Court Erred in Dismissing All Claims because Genuine Issues of Material Fact Exist Regarding the Applicability and Scope of Limitation of Liability Paragraph.

The court erred in dismissing RevAR's claims based on the limitation of liability paragraph in the Initial Services Agreement and in an unsigned document titled Gravity Jack Software License Terms browsAR | Software Development Kit (SDK) | b.KIT. (CP 38, 304-308). The trial court relied on the Initial Service 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) (emphasis added).

Here, by its terms, this provision only applies to breach of

contract and related warranty claims between RevAR and Gravity Jack. (CP 30-41). Likewise, by its terms, this limitation of liability provision does not apply to any direct claims against Mr. Richey including, but not limited to, those claims asserted against Mr. Richey predicated on his status as advisor to and director of RevAR.

Furthermore, genuine issues of fact exist as to whether Gravity Jack's conduct rose to the level of willful misconduct or gross negligence. "*Gross negligence is negligence substantially and appreciably greater than ordinary negligence.*" Johnson v. Spokane to Sandpoint, LLC, 176 Wn. App. 453, 460, 309 P.3d 528 (2013) (internal quotations omitted). "*Willful or wanton misconduct falls between simple negligence and an intentional tort.*" Contradt v. Four Star Promotions, Inc., 45 Wn. App. 847, 852, 728 P.2d 617 (1986). Genuine issues of material fact exist as to all intentional tort claims including, without limitation, those asserted against Gravity Jack such that these claims are neither barred nor limited by this provision: conversion, intentional misrepresentation, tortious interference with business expectancies, as well as misappropriation of trade secrets. Genuine issues of material fact exist as to whether the conduct supporting the remaining claims falls in the scope of this limitation clause. The

conduct supporting all claims, and particularly the intentional ones, fall squarely within both standards of misconduct.

For example, Gravity Jack and Mr. Richey converted RevAR assets and content including, specifically, the carburetor, deliberately failing to fully inform RevAR as to the intended use. (CP 1068). See Westview Investments, Inc. v. U.S. Bank Nat. Ass'n, 133 Wn. App. 835, 852, 138 P.3d 638 (2006) (conversion is “*the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived the possession of it.*” (internal quotations omitted). Gravity Jack and Mr. Richey made intentional and grossly negligent misrepresentations and omissions including, for example: (a) its use of the carburetor as referenced above; (b) that Gravity Jack and Mr. Richey would not interfere or compete with RevAR in marketing and selling products or services as to training/maintenance and learning development, (c) that they would not pursue for their own benefit such work, (d) that they would direct to RevAR leads pertaining to such projects, (e) that Mr. Richey make efforts to raise funds from investors.

Its breach of contract, including breach of the implied duty of good faith and fair dealing, falls squarely within these standards

of misconduct. See Restatement (Second) of Contracts § 205 cmt. d (enumerating examples of bad faith including: “*evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of power to specify terms, and interference with or failure to cooperate in the other party’s performance*”); see also Master Service Agreement, CP 46 (wherein Gravity Jack agreed it would “*not compete . . . on . . . [RevAR’s] products and services*”). By using RevAR content and assets to market to 4LNS while contemporaneously excluding RevAR from that opportunity to contract with 4LNS, among other actions, Gravity Jack and Mr. Richey evaded the spirit of the bargain, concealed material information, and interfered and failed to cooperate with RevAR in the parties’ business arrangement.

In using RevAR content and assets to market to 4LNS, Gravity Jack misappropriated RevAR trade secrets by using components of those trade secret in presenting to 4LNS. These trade secrets are detailed with specificity in RevAR’s provisional patent². (CP 1468-1521). This misappropriation contravenes RCW 19.108 et seq. In one meeting with 4LNS, Gravity Jack presented material utilizing the name of RevAR, causing confusion to 4LNS,

² The lack patent protection does not preclude protection as a trade secret, as was suggested by Gravity Jack at the trial court.

thereby infringing on the trademark, name, and rights of RevAR to t same. The conduct falls squarely in the standards of misconduct subject to the exception to the limitation of liability clause.

Importantly, this clause purports to cap damages. (CP 38). To the extent this provision may limit recovery on certain claims, it does not operate to preclude any recovery. (Id.).

The trial court also relied on the following provision in the Initial Services Agreement: “*Client agrees to the terms of b.KIT (browsAR SDK) License Terms.*” (CP 39). The license terms that Gravity Jack and Mr. Richey filed with their motion, provides:

*You **can** recover from Gravity jack and its suppliers only direct damages up to U.S. \$5.00. You cannot recover any other **damages**, including consequential, lost profits, special, indirect or incidental damages.*

This limitation applies to

- 1. anything related to the SDK, services, content (including code) on third party Internet sites, or third party programs; and*
- 2. claims for breach of contract, breach of warranty, guarantee or condition, strict liability, negligence, or other tort to the extent permitted by applicable law.*

(CP 307). However, this document was not provided to RevAR or Mr. Roe and was not discussed. (CP 1447-48); (CP 1059-60). Rather, based on Gravity Jack’s own representations and

assurances, RevAR understood at the time of contracting, and to date, that this purported incorporation of unknown terms was not applicable because b.Kit/browsAR was not used in the demo application. (Id.). Indeed, the project manager at Gravity Jack informed RevAR that b.Kit and browsAR were not used. (CP 1060, 1447-1448). RevAR has filed the Declaration of Shawn Poindexter, formerly with Gravity Jack, confirming the same:

To the best of my knowledge, and upon information and belief, browsAR and b.Kit were not used in the development of the Demo App. BrowsAR is a mobile application and accompanying backend services designed show (sic) augmented reality (AR) content from multiple content producers; b.Kit is a software development kit (SDK) to enable AR mobile application development which is capable of utilizing content served by BrowsAR backend services. At the time Gravity Jack created the Demo App for RevAR, browsAR and b.Kit were effectively defunct.

(CP 1124). Thus, genuine issues of material fact exist as to whether browsAR/b.Kit was used so as to trigger the application, if at all, of these license terms, and if any even existed at that point in time.

The so-called browsAR/b.Kit document, if it pertains to anything, pertains only to any license regarding browsAR/b.Kit and, consequently, the limitation of liability provision only applies, if at all, to any claim predicated on the purported license. (CP 304-308). This dispute between the parties, however, does not turn on

any limited license to use browsAR/b.KIT from Gravity Jack to RevAR. Nor does the document purport to cover Mr. Roe's individual claims or claims against Mr. Richey individually.

This document was not signed by any of the parties. (CP 1222). The parties did not assent to the terms of this document and, in that regard, the deposition testimony of Gravity Jack's designated representative is particularly pertinent in this regard:

Q: *Who drafted it?*

A: *I don't remember. It was a long time ago.*

Q: *How long ago?*

A: *I don't remember.*

...

Q: *Could it have been from the internet?*

A: *Possibly.*

...

Q: *... So you don't know, is that correct?*

A: *That's what I keep saying.*

(CP 1221-1222). Gravity Jack, thus, lacks knowledge about when the document was created, who created it, and from where it was obtained. (*Id.*). Accordingly, when Mr. Richey filed a declaration in support of the summary judgment, he necessarily did not attach the license terms to it as he lacked any foundation for it³.

As Gravity Jack and Mr. Richey conceded in their moving papers, certain "*claims do not relate to an existing contract*" but, rather, relate to "*duties not found in the contracts.*" (CP 457).

³ This document is, thus, in its entirety, inadmissible as evidence.

Indeed, RevAR and Mr. Richey advanced tort and statutory claims predicated on duties arising independent of the contract and the contract terms do not specifically disclaim liability for breach of all these duties arising from sources independent of the contracts. Thus, the limitations of liability provisions do not bar these claims.

H. The Trial Court Erred in Dismissing all Claims because Genuine Issues of Material Fact Exist as to the Fact of Damages.

RevAR and Mr. Roe asserted claims allowing for different measures of monetary damages. See, e.g., DC Farms, LLC v. Conagra Foods Lamb Weston, Inc., 179 Wn. App. 205, 230, 317 P.3d 543 (2014) (benefit of the bargain damages for breach of contract); Young v. Young, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008) (value of the benefit for unjust enrichment); Puget Sound Power & Light Co. v. Strong, 117 Wn.2d 400, 403, 816 P.2d 716 (1991) (“Generally, the measure of damages in tort actions is the amount that will adequately compensate for the loss suffered as the direct and proximate result of the wrongful act.”); Potter v. Wash. State Patrol, 165 Wn.2d 67, 79, 196 P.3d 691 (2008) (“[T]he measure of damages for conversion is the fair market value of the property at the time and place of conversion.” (internal quotations omitted)); Petters v. Williamson & Assoc., Inc., 151 Wn. App. 154,

210 P.3d 1048 (2009) (“*The traditional form of restitutionary relief in an action for the appropriation of a trade secret is an accounting of the defendant’s profits on sales attributable to the use of the trade secret . . .*” (quoting Restatement (Third) of Unfair Competition § 45 cmt. f., at 516-17 (1995))).

The trial court erred in conflating the fact of damages with the measure of damages, reflecting the trial court’s erroneous view of longstanding Washington law. See Jacqueline’s Washington, Inc. v. Mercantile Stores Co., 80 Wn.2d 784, 789-90, 498 P.2d 870 (1972) (explaining that recovery is not precluded even though “*the precise amount of damages is incapable of exact ascertainment*” as “[d]ifficulty of ascertainment is no longer confused with the right of recovery” (internal quotations omitted)). Indeed, at such an early stage in litigation, and in the procedure posture of summary judgment, to create a genuine issue of fact on the issue of damages, Mr. Roe and RevAR need only show the fact of damages, not the amount, particularly where, as here, the trial court broadly precluded discovery—and Gravity Jack refused to provide deposition testimony—concerning the extent of damages.

Here, genuine issues of material fact exist as to the fact of damages, and injunctive relief is available. As Mr. Roe testified:

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 PoindextAR was released in April of 2017 using my voice and revolutionAR assets and content.

(CP 105). As set forth in the Declaration of Shawn Poindexter, former Chief Technical Officer at Gravity Jack:

To promote and demonstrate . . . [PoindextAR], Gravity Jack created promotional material including video that is referenced in the Complaint This video, posted to the internet, utilizes recordings of Joshua Roe's voice that had originally been created for use in the RevAR Demo App. This PoindextAR video utilizes and incorporates other content originally created or used in the development of the RevAR Demo App Gravity Jack pursued projects involving training and learning development, and maintenance . . . Content created for RevAR was used by Gravity Jack to pursue projects. . . . During that meeting with 4LNS, a multi-media presentation was displayed, which depicted and utilized RevAR's logo and other content that Gravity Jack had developed for RevAR. . . . 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 1126). The profit earned by Gravity Jack is reflected, in part, in a heavily redacted profit and loss statement, reflecting significant income. (CP 981-994). Defendants have been unjustly enriched by income and payment to Gravity Jack from 4LNS. (1456-1457).

In its own answers to requests for admission, Gravity Jack admitted to profiting from its unlawful conduct, including: (a) “*that Gravity Jack requested payment from 4LNS*”; (b) “*that Gravity Jack received payment or income from 4LNS*”; (c) after posting the video, “*Gravity Jack contracted with one or more individuals or entities for services or projects involving Adroit,*” originally known by the code name PoindexAR⁴; (d) that “*Gravity Jack received payment or income on or after*” posting the video “*in connection with agreements or services involving Adroit*”; and (e) “*that, in or after April of 2014, Gravity Jack received payment or income from individuals or entitles other than RevAR in connection with any service or project involving . . . maintenance . . .*” (CP 1156-1166).

Restitutionary damages, and direct damages, are also available based on use of RevAR assets, including the carburetor:

Q: *So then why the carburetor?*

A: *Because for our - . . . we use a 3D model, a synthetic model of the real item. So we created that as an asset or RevAR, and we*

⁴ (CP 1207)

take this 3D model, and then ultimately our artificial intelligence then can recognize the real object in the real world. . . .

Q: *How much time would that take to do that?*

A: *it's significant*

. . . .

A: *two or three days.*

. . . .

Q: *For eight hours a day? Or how many hours?*

A: *Yes, eight hours a day.*

Q: *And then what's the hourly rate for something – for somebody doing that work at Gravity Jack?*

. . . .

A: *. . . . It would be about 120 an hour.*

(CP 1207). The carburetor is the property of RevAR, not Gravity Jack, and was purchased for \$125.50 (CP 1059, 1071-72).

As a result of Defendants' conduct, RevAR lost an opportunity to contract with T-Mobile on a project with anticipated income of about \$70,000 and, based on a historical margin, anticipated approximately \$15,000 in profit. (CP 1066). It was unable to land this project due to the Defendants' refusal to reduce its pricing, reach out to investors, and support the potential project, contravening prior representations. (CP 1066, 1453)⁵.

As a result of Gravity Jack's and Mr. Richey's conduct, RevAR missed opportunities to contract for profitable work with

⁵ Indeed, on the one hand, Mr. Richey refused to reach out to investors until RevAR landed a project and, on the other hand, RevAR could not land projects without Mr. Richey and Gravity Jack working with the company on development costs. (CP 1063).

Itron for amounts in excess of the simple proof of concept RevAR first completed for it in the amount of \$2,500. (CP 1451-1452). Notably, it turns out, Gravity Jack worked with Itron, notwithstanding Itron was within RevAR's pipeline and customer list, a trade secret. (CP 1064-1065, 1228, 1395, 1451-1452).

I. The Trial Court Erred in Dismissing RevAR's Claims against Mr. Richey and Gravity Jack where Genuine Issues of Material Fact Exist Regarding His Status as a Director, His Fiduciary Duties, and Application of the Indemnification Clause in the First Amended Articles of Incorporation.

The court also referenced an indemnification provision in the RevAR "governing documents." (CP 1698). The indemnification provision in the First Amended Articles of Incorporation provides:

The corporation shall indemnify its directors against all liability, damages, or expense resulting from the fact that such person is or was a director, to the maximum extent and under all circumstances permitted by law; except that the corporation shall not indemnify a director against liability, damage, or expense resulting from the director's gross negligence.

(CP 1078). This provision applies, however, to third-party claims, not to claims advanced directly against a director by RevAR and not in connection with unlawful conduct of the director vis-à-vis the company. RCW 23B.08.510(4) ("A corporation may not indemnify a director . . . [i]n connection with a proceeding" where the

director is liable to the corporation or received improper personal benefit). Mr. Richey acted with gross negligence, as described above. By its terms, this provision does not apply to Mr. Roe's individual claims or to claims advanced directly against Gravity Jack. (CP 1078). Mr. Richey claims to have quit the board, but, when asked when this occurred, he did not know. (CP 1229). He did not submit a written resignation. RCW 23B.08.070 ("A *director may resign . . . by delivering . . . an executed resignation*" that "is *effective when . . . delivered.*"). He held himself out as an advisor and attended board meetings after he claims to have left. (CP 1229).

Mr. Richey, as director and advisor to RevAR, had a duty of good faith and to act in the best interest of the company and to not misappropriate corporate opportunities. RCW 23B.08.300 (general standards for directors); Noble v. Lubrin, 114 Wn. App. 812, 60 P.3d 1224 (2003) (corporate opportunity); Colonial Imports, Inc. v. Carlton Northwest, Inc., 121 Wn.2d 726, 853 P.2d 913 (1993) (fiduciary and quasi-fiduciary duties and duty to disclose). Like any other person, Mr. Richey and Gravity Jack also have legal tort duties to not make negligent and intentional misrepresentations. Donatelli v. D.R. Strong Consulting Engineers, Inc., 179 Wn.2d 84, 95 n.3, 312 P.3d 620 (2013); Adams v. King County., 164 Wn.2d

640, 662, 192 P.3d 891 (2008). Genuine issues of material fact, thus, exist including as to whether Mr. Richey had fiduciary or quasi-fiduciary duties and whether he and Gravity Jack violated the same.

V. CONCLUSION

Genuine issues of material fact exist with respect to all elements of all the claims of RevAR and Mr. Roe. The trial court abused its discretion in entering a Protective Order, denying the Motion to Compel, and awarding fees and costs under RCW 4.84.185. Mr. Roe and RevAR respectfully request this Court reverse and remand to the trial court for further proceedings.

DATED this 22nd day of April 2019

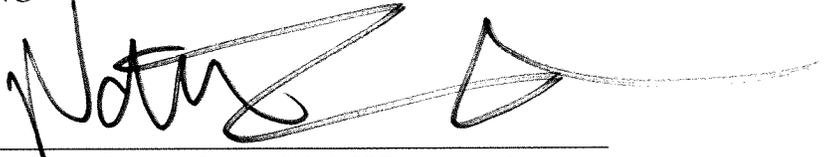


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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of April 2019, I caused a true and correct copy of this Brief of Appellants to be served on the following in the manner indicated below:

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