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No. 36499-2-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

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.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SPOKANE COUNTY

The Honorable Maryann C. Moreno, Judge

BRIEF OF RESPONDENTS

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A. RESTATEMENT OF FACTS

Joshua Roe and Brendan Weatherly formed RevolutionAR for the purpose of selling customized Augmented Reality applications. Clerk's Papers (CP) 85 (p. 18:17-22). Augmented Reality (AR) is a technology application that "overlay[s] computer-generated graphics on top of the physical, real-world environment." CP at 413; *see also* CP 400. AR applications have been used for a variety of purposes from entertainment to education. CP 414. Through RevolutionAR, Roe and Weatherly wanted to "take training manuals and sales catalogs[,] turn them into interactive experiences using augmented reality" and sell the customized AR applications to companies that use training manuals or sell products with training manuals. CP at 1074-075; *see also* CP 437.

But Appellants lacked software development skills or abilities. CP 89. So Roe (prior to RevolutionAR's incorporation in May 2014¹) contracted with Gravity Jack, an software development firm with experience developing AR software, to develop RevolutionAR's branding, website, and AR software, among other things. CP 33, 89, 133, 182, 450, 471. Roe had been friends with Gravity Jack's co-founder, Luke Richey. CP 86, 470.

The parties' business arrangement was memorialized by three written contracts:

1. Design and Developing Resourcing Contract;
2. Memorandum of Understanding; and
3. Master Services Agreement between revolution AR, Inc and Gravity Jack.

CP 171-88.

The Design and Developing Resourcing Contract was the original services contract between the parties. This contract provided that, in exchange for RevolutionAR's payment, Gravity Jack would develop RevolutionAR's brand, website, and software, including a demonstration application ("demo app") that RevolutionAR could use in sales pitches to potential customers. CP 508-09. Gravity Jack retained the right to use anything it created for RevolutionAR in its portfolio, in its demonstrations to potential clients, and for any other use Gravity Jack saw fit, including for use on its website:

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 as Gravity Jack seeks fit (including use on its website).

CP at 512. The contract limited Gravity Jack's liability to only acts of willful misconduct or gross negligence:

¹ CP 90 (pp. 39:24-40:1), 471.

Release of Liability: 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.

CP at 513. Roe admitted to being individually bound by the terms of the contract. CP 110 (pp. 119:21-120:23).

At the time you signed it, it was your understanding that you and RevolutionAR, Inc. were subject to the terms of this agreement; is that correct?

A. Yes.

CP at 110 (p. 120:20-23).

The **Master Services Agreement between revolutionAR, Inc. and Gravity Jack, Inc.**, created by Appellants, provides that Gravity Jack retains its ownership of and rights to any software Gravity Jack created for RevolutionAR. CP 517. It also includes an indemnification provision that protected Gravity Jack from claims arising from its work:

Rev AR and GJ agree to mutually indemnify, defend and hold harmless either company for any claims made against revAR and/or GJ arising out of the work, not arising out of the gross negligence or sole malfeasance of GJ.

CP at 517.

Finally, the **Memorandum of Understanding Between revolutionAR, Inc. and Gravity Jack Inc.**, also created by Appellants, purported to establish an intellectual property (“IP”) ownership agreement

but expressly reaffirmed that “the terms of the original signed [Design and Developing Resourcing Contract] Agreement are still valid and enforceable[.]” CP at 520. Appellants ultimately pursued nothing more than a provisional patent for what Roe admitted “may very well not be definable as ‘IP’ in the literal sense.” CP at 353; *see* also CP 99 (pp. 76:7-115, 77:8-11). RevolutionAR’s concept was not eligible for patent protection because the use of augmented reality as an educational tool is not a new or novel idea. CP 357, 471.

All three contracts incorporated “b.Kit” license terms into them, which further preserved Gravity Jack’s rights to all software code and granted RevolutionAR a non-exclusive license to use it. CP 514, 517, 520. Roe acknowledged that Appellants had agreed to the “b.Kit” license terms:

A "Client agrees to the terms of b.KIT
BrowsAR SDK license terms."

Q There we go. You agreed to that,
right?

A Yes.

CP at 118 (p. 150:14-17). The b.KIT license terms also contained an indemnification clause:

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.

It applies even if Gravity Jack knew or should have known about the possibility of the damages.

CP at 307-08; *see also* CP 118-19 (pp. 150:20- 153:4).

In addition to Gravity Jack's contracts with Appellants, RevolutionAR's Articles of Incorporation indemnified its directors from liability, damage or expense:

ARTICLE V

Indemnification

The corporation shall indemnify its directors against all liability, damage, 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 at 1078. The Articles also protected directors from personal liability.

CP 1077. Richey served on RevolutionAR's initial board of directors until he stepped down and the board was "reset" to only Roe and Weatherly in November 2015. CP 327, 1078, 1446.

Gravity Jack created RevolutionAR's demo app as contemplated by the parties' original services agreement. CP 1448 (¶10). The demo featured Roe's voice and a carburetor. CP 1448 (¶10). Roe allowed his

voice to be recorded in the creation of the demo app. CP 1202-03 (pp. 53:3-15, 54:3-4), 1448 (¶10).

In addition to rendering their contracted services to RevolutionAR, Richey and Gravity Jack tried to help RevolutionAR succeed, including but not limited to providing it with sales leads and names of potential investors, allowing it to use Gravity Jack's marketing materials, assisting it in the preparation of client proposals, allowing it to use Gravity Jack's training and maintenance apps to help with fundraising, and dedicating their own time and resources. CP 458 (pp. 26:5, 29:14, 34:6), 471-73.

Despite the help, Roe and Weatherly made several poor business decisions. CP 450. After four years, RevolutionAR had only \$15,000.00 in gross revenue, no prospective investors, and somewhere between \$22,000.00 and \$203,000.00 in company debt. CP 96, 450. In a November 11, 2015, email, Roe told RevolutionAR's investors and board members that the decision had been made to "reset the board back to Brendan [Weatherly] and me" instead of dissolving the business. CP at 327. Around that time, Roe asked Gravity Jack for a job. CP 473. Roe worked for Gravity Jack from January to April 2016. CP 473-74.

By March 2016, Roe freely admitted he no longer worked for RevolutionAR:

Unfortunately, in January, I personally came to the end of my ability to continue . . . I had resigned as CEO of RevolutionAR . . .

CP at 366;

I will not lie and I would never represent myself as working for RevAR at this point . . . If you plan to expand the board of directors I will consider a seat.

CP at 360. RevolutionAR's business records blame the company's failure on mismanagement, lack of experience, and underfunding (not Richey or Gravity Jack):

Ran out of money in lat(sp) December. Company is out of money and Josh and Brendan are funding out of pocket.
We spent quite a bit of money with no results that consumed considerable time.
The few companies we reached out to fell flat.
We were left with nothing else in the pipeline.
Very little response rate from potential clients.
We are at our 1 year anniversary without revenue.

CP at 340-41;

Told you guys from the beginning we thought it would take \$350k, to date we are roughly \$150k shy and that would take us a long way.
We are underfunded
J&B [Josh and Brendan] did not manage early money as well as we should
Josh, Brendan, Tim and Neil – lack experience in tech start ups
Too much time and money spent setting up a capitalization plan that was a total bust
Lack of money to support sales cycle
Ultimately, the past has shown us we are not in alignment about how to move forward. We feel it is the best interest

of the company to reset the board, have Brendan and I do our very best to keep the company alive, and rebuild the board, over time, if we are successful.

CP at 343-44;

If revAR to continue operating and complete the pending T-Mobile contract, the focus will be on using the profits to secure additional contracts. . . These plans begin when T-Mobile signs, and should buy us 4 months to land another contract. A lot of the decisions will hinge on the level of profitability.

CP 348 (emphasis original). Roe and Weatherly also acknowledged and at least one of the businesses solicited by RevolutionAR's app cost too much. CP 341, 1140.

Around January 2016, Gravity Jack used the RevolutionAR demo app video it had created and portions of what it created for RevolutionAR in a demonstration to a prospective customer, 4LNS, for Department of Defense contracts. CP 473. Roe was present for the demonstration and admitted Gravity Jack's sales pitch to 4LNS was "very different from the RevAR demo." CP at 355. Gravity Jack did not get a contract; Roe, nevertheless, told Weatherly and RevolutionAR investors that Gravity Jack had stolen RevolutionAR's intellectual property. CP 353-56, 473.

In January 2016, Roe telephoned Richey and said RevolutionAR and its governing members and managers planned to sue Gravity Jack with the hope of obtaining settlement funds from Gravity Jack to repay

RevolutionAR's debts. CP 331-32. Roe acknowledged that they had no meritorious claim against Gravity Jack or Richey and further stated that he and other members and managers of RevolutionAR intended to sue Richey and Gravity Jack because they believed Richey did not like lawsuits and would likely pay to settle Appellants' meritless claims. *Id.*

On May 2, 2016, Weatherly accused Roe of "screwing the company" by telling Richey about the plan to sue Gravity Jack:

You completely screwed the company over, violated fiduciary responsibility when you told [L]uke about the lawsuit...do you even realize how bad that was??? You went behind the board's back and told Luke something completely confidential that caused harm to RevAR. Trout told me over coffee that was the single biggest reason why they were done with us, the lawsuit.
You threatened to torch the TMO deal.
You threatened to torch all of the other deals.

CP at 331.

RevolutionAR administratively dissolved in October 2017. CP 142. Even though Richey had had nothing to do with RevolutionAR since fall 2015, and Roe allegedly was no longer involved in RevolutionAR, Weatherly reinstated RevolutionAR in October 2017, listing Roe and Richey as governors and listing Roe's home address for Richey's address. CP 143.

Prior to filing suit, Appellants reached out to Defendants claiming they wanted to mediate the claims Plaintiffs were alleging. CP 101. In

response, Defendants requested evidence of wrongdoing and damages in order to properly approach the subject of mediation. CP 102. Rather than provide this evidence, Appellants sued Richey and Gravity Jack, asserting 15 causes of action. CP 1-47, 102. RevolutionAR contended Gravity Jack used the content it developed for RevolutionAR in Gravity Jack's marketing to its own clients and that Richey, through Gravity Jack, failed to follow through on alleged oral promises, and made false and misleading statements about and dissuaded others from investing in or doing business with RevolutionAR. CP 1-47.

Seeking evidence to support their baseless claims, Appellants issued extensive discovery, and Defendants responded. CP 694-95. When Richey and Gravity Jack filed summary judgment for Appellants' lack of proof of causation and damages, Appellants sought to compel more discovery. CP 632-34. To stop Appellants' abuse of the discovery process, the trial court denied Appellants' motion to compel discovery and issued a protective order protecting Gravity Jack's confidential and proprietary business records, including financial records and client lists. CP 679-81, 1010-11, 1801-05. Appellants were unable to show a genuine issue of material fact for trial, and the trial court granted Defendants' Motion for Summary Judgment, dismissing all 15 of Appellants' claims.

The trial court then found that Appellants' entire action was frivolous and awarded Richey and Gravity Jack attorney fees and costs against Roe and RevolutionAR. CP 1790-1800.

B. ARGUMENT

1. The Trial Court Properly Granted Richey and Gravity Jack's Motion for Protective Order and Properly Denied Appellants' Motion to Compel Discovery.

“[T]he standard of review for the trial court's grant of a protective order and for controlling discovery is abuse of discretion.” *Shields v. Morgan Fin., Inc.*, 130 Wn. App. 750, 759, 125 P.3d 164 (2005).

Appellants offer no facts, argument or legal authority for its conclusory statement that entry of a protective order and order denying Appellants' motion to compel discovery of Gravity Jack's proprietary records, including financial records, while a summary judgment motion on the issue of damages is pending is somehow erroneous. The Court should decline to consider this issue as a result of Appellants' failure to present a developed argument for the Court's consideration. RAP 10.3(a)(6). “Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.” *West v. Thurston Cty.*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (quoting *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998)) (alteration omitted).

The trial court properly exercised its discretion in any event. CR 26(b)(1) authorizes the trial court to limit requested discovery when appropriate to suit the case. Further, under CR 26(c), a trial court may issue a protective order to regulate discovery for good cause, taking into account the needs of the case. After the parties had already produced 46,000 pages of documents in response to discovery requests, the trial court here denied Appellants' motion to compel additional discovery and granted Respondents' motion for protective order in light of Appellants' abuse of the discovery process with its "shoot first, ask questions later" litigation style. The trial court's orders were proper exercises of its discretion in response to Appellants' discovery abuses.

Washington courts prohibit litigants from suing first and conducting discovery later to substantiate their claims:

Because of the possibility that such acts or omissions might later be determined in discovery, the temptation would be to sue first and conduct discovery later. Such a practice would run counter to CR 11, which requires 'that to the best of the party's or attorney's knowledge, information, and belief, formed after reasonable inquiry [every pleading, motion, and legal memorandum] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

Winbun v. Moore, 143 Wn.2d 206, 221–22, 18 P.3d 576, 583 (2001).

In fact, Washington courts have expressly rejected the “shoot first, ask questions later” strategy employed by Appellants in this case. *Webb v. Neuroeducation Inc., P.C.*, 121 Wn. App. 336, 345, 88 P.3d 417 (2004). The *Webb* court determined that the plaintiff there had insufficient facts to initiate a lawsuit and rejected plaintiff’s argument that a mere belief was sufficient to initiate a lawsuit then conduct additional discovery to confirm facts to support his claims:

Dr. Chupurdia contends a party who lacks conclusive evidence of negligence must file suit and invoke the civil discovery rules to force disclosure of information not otherwise available. *Beard v. King County*, 76 Wash.App. 863, 868, 889 P.2d 501 (1995). **This is the so-called “shoot first, ask questions later” litigation style, rejected by Washington courts. The rule now is that no action should be filed until specific acts or omissions can be attributed to a particular defendant. Filing on questionable grounds in the hope of using the discovery rules to supply the missing facts is contrary to CR 11.** *Winbun*, 143 Wash.2d at 221–22, 18 P.3d 576.

Id. at 345 (emphasis added).

Appellants sued Richey and Gravity Jack, asserting 15 causes of action. All claims were missing critical facts, such as the fact of damages. Without showing evidence of a prima facie case for each of their 15 claims but hoping to find evidence to support them, Appellants abused the discovery process by serving massive amounts of discovery requests to supply their missing facts, including a request for 10 years of Gravity

Jack's confidential and proprietary client lists, communications, business and marketing plans, and financial documents.

“When a plaintiff first pleads its allegations in entirely indefinite terms, without in fact knowing of any specific wrongdoing by the defendant, and then bases massive discovery requests upon those nebulous allegations, in the hope of finding particular evidence of wrongdoing, that plaintiff abuses the judicial process.” *Koch v. Koch Industries, Inc.*, 203 F.3d 1202, 1238 (10th Cir.), *cert. denied*, 121 S.Ct. 302 (2000); *see also Fidelity and Deposit Co. v. McCulloch*, 168 F.R.D. 516, 526 (E.D. Pa. 1996); *In re Estate of Fitzgerald*, 172 Wn. App. 437, 449, 294 P.3d 720 (2012).

Counsel for Richey and Gravity Jack requested Roe and RevolutionAR's prima facie proof of damages multiple times throughout the litigation. CP 598-600, 698-712. But Appellants could point to no specific evidence and admitted they would need to rely upon Defendants' responses to discovery requests in hopes of finding some evidence. *Id.* Based on these facts and the *Winbun*, *Webb*, and *Fitzgerald* cases cited above, the trial court acted well within its discretion when it limited discovery and protected Richey and Gravity Jack from Appellants' further abusive use of the discovery rules.

2. The Trial Court Properly Granted Summary Judgment Dismissing Roe’s and RevAR’s Claims for Failing to Produce Prima Facie Proof of Each Essential Element of Each Claim.

This Court reviews de novo an order granting summary judgment. *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 515–16, 799 P.2d 250 (1990). Summary judgment is proper if the pleadings, discovery, and declarations on file show no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. *Id.* at 516. “A material fact is one upon which the outcome of the litigation depends in whole or in part.” *Id.* “The nonmoving party may not rely on speculation, argumentative assertions, ‘or having its affidavits considered at face value; for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party’s contentions and disclose that a genuine issue as to a material fact exists.’” *Becker v. Washington State Univ.*, 165 Wn. App. 235, 245, 266 P.3d 893 (2011) (quoting *Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wn.2d 1, 13, 721 P.3d 1 (1986)). “If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to his case, then the trial court should grant the motion.” *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors*, 115 Wn. App. at 516.

Here, the trial court correctly determined that, given the facts of this case, Roe and RevolutionAR failed to establish legally cognizable causes of action against Richey and Gravity Jack. Appellants asserted the following 15 claims against the Respondents:

1. Breach of contract;
 2. Breach of implied duty of good faith and fair dealing;
 3. Promissory estoppel;
 4. Unjust enrichment;
 5. Negligent misrepresentation;
 6. Intentional misrepresentation;
 7. Tortious interference with business expectancies;
 8. Breach of fiduciary duties;
 9. Misappropriation of corporate opportunities;
 10. Conversion
 11. Misappropriation of trade secrets;
 12. Infringement of personality rights (RCW 63.60);
 13. Invasion of privacy;
 14. Trademark/name infringement; and
 15. Civil conspiracy.
- a. Roe's personality rights and privacy claims were properly dismissed on summary judgment because Roe allowed Gravity Jack to record his voice without limitation.

Appellants argue that Roe's personality rights and invasion of privacy claims regarding Gravity Jack's use of Roe's voice should not have been dismissed. Appellants' Brief offers no argument to support the conclusory statement that Roe's privacy rights claim was erroneously dismissed on summary judgment. This Court should not consider the issue. RAP 10.3(a)(6); *West*, 168 Wn. App. at 187.

For Roe's personality rights claim to survive summary judgment, Roe had to prove that Gravity Jack used his voice without his express or implied consent. *See* RCW 63.60.050. The undisputed evidence shows (1) Roe consented to his voice being recorded by voluntarily allowing Gravity Jack to record his voice²; (2) Roe produced no evidence showing that his consent was limited; (3) Roe and RevolutionAR gave Gravity Jack a broad license to use the project and products it created for RevolutionAR (which included Roe's voice recording) in its demonstrations to potential clients and as Gravity Jack otherwise saw fit³; and (4) Roe and RevolutionAR expressly released Gravity Jack from all liability for any claim or demand, except for willful misconduct or gross negligence⁴. Based on these undisputed facts, dismissal of Roe's personality rights and privacy claims was proper.

b. Appellants' claims were properly dismissed on summary judgment because Appellants released Gravity Jack from liability for any claim and could not establish or identify proof of damages, willful misconduct, or gross negligence.

The parties' contracts and Appellants' lack of proof of damages, willful misconduct, and gross negligence bar each of Appellants claims. Contrary to Appellants' assertion that the release of liability terms of the

² CP 1202-03 (p. 53:3-15, 54:3-4), 1448 (¶10).

³ CP 37.

⁴ CP 37.

April 8, 2014, Design and Development Resourcing contract between Roe/RevolutionAR and Gravity Jack “only applies to breach of contract and related warranty claims”⁵, the contract’s plain language expressly releases Gravity Jack from liability for breach of warranty, **lost profits, and any other claim or demand** except for willful misconduct or gross negligence:

Release of Liability: 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.

CP at 513.

The Gravity Jack Software License Terms, which was incorporated into each of the parties’ contracts, also broadly indemnified Gravity Jack:

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.**

It applies even if Gravity Jack knew or should have known about the possibility of damages.

⁵ Appellants’ Br. at 36-7.

CP at 308 (emphasis added).

An undated Memorandum of Understanding Between revolutionAR, Inc. and Gravity Jack Inc. purports to revise the intellectual property rights terms of the Design and Development Resourcing contract but leaves the remainder of the service contract's terms "valid and enforceable". CP at 44.

An undated Master Services Agreement between revolutionAR, Inc. and Gravity Jack, Inc. (drafted by Roe) states each party owns its property upon completion of future projects for third party clients, will make efforts to market RevolutionAR's products to potential customers, desires to help the other develop new products to serve their clients, and mutually indemnifies and holds harmless either company for "**any claims**":

revAR and GJ agree to mutually indemnify, defend and hold harmless either company for any claims made against revAR and/or GJ arising out of the work, not arising out of the gross negligence or sole malfeasance of GJ.

CP at 46.

Appellants neither specifically alleged nor produced evidence of willful misconduct or gross negligence to the trial court, yet they claim genuine issues of material fact exist as to both. To establish a prima facie case of gross negligence or willful misconduct on summary judgment, the

plaintiff must offer more than mere argument that the defendant's breach rises to the level of gross negligence or willful misconduct. *Johnson v. Spokane to Sandpoint, LLC*, 176 Wn. App. 453, 460, 309 P.3d 528 (2013); CR 56(e).

Failing to cite the record, Appellants claim Richey was "grossly negligent" when (1) Gravity Jack used RevolutionAR's carburetor; and (2) Richey purportedly promised Gravity Jack and Richey would not interfere or compete with RevolutionAR, would direct all training/maintenance and learning development projects to RevolutionAR, and would make effort to raise investor funds for RevolutionAR. Appellants' Br. at 38. Appellants claim Gravity Jack broke these promises by marketing to 4LNS using RevolutionAR's content, trademark, name, and rights, and by excluding RevolutionAR from the opportunity to contract with 4LNS.

Appellants' argument fails. Appellants reason, nonsensically, that Gravity Jack engaged in conversion by using RevolutionAR's carburetor without explaining how it would be used. Appellants' Br. at 38. Intended use is not an element of conversion: "Conversion is the willful interference with another's property without lawful justification, resulting in the deprivation of the owner's right to possession." *Lowe v. Rowe*, 173 Wn. App. 253, 263, 294 P.3d 6 (2012). It is undisputed that Weatherly

permitted Gravity Jack to use RevolutionAR's carburetor. CP 1068, 1204, 1206. It is also undisputed that neither Roe nor Weatherly have attempted to retrieve it. "Abandonment of property is a complete defense to the tort of conversion." *Lowe*, 173 Wn. App. at 263 (citing *Jones v. Jacobson*, 45 Wn.2d 265, 267, 273 P.2d 979 (1954)).

As for using "RevolutionAR's content and assets to market 4LNS," the parties' Design and Development Resourcing contract gave Gravity Jack the express right to use what it created for RevolutionAR in demonstrations to Gravity Jack's other possible clients and for other uses as Gravity Jack saw fit:

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 as Gravity Jack seeks fit (including use on its website).

CP at 37. This right exists whether or not "browsAR" or "b.Kit" was used to create RevolutionAR's demo app⁶. Appellants point to no contractual limitation on Gravity Jack's right to use part or all of the demo app Gravity Jack created for RevolutionAR. There is no limit. And they do

⁶ Accordingly, summary judgment was proper because the outcome of this litigation does not depend in whole or in part on whether or not browsAR/b.Kit was used. *See Atherton Condo. Apartment-Owners Ass'n Bd. of Directors*, 115 Wn.2d at 516 (defining genuine issue of material fact); *accord* Appellants' Br. at 41-2 ("This dispute between the parties, however, does not turn on any limited license to use browsAR/b.KIT from Gravity Jack to Rev /AR").

not dispute that RevolutionAR's "provisional patent" provides no protection.

Appellants further fail to point to any evidence in the record that Gravity Jack solicited 4LNS's AR maintenance/training and learning development work for itself. It did not. CP 1234-35 (pp. 179:6-180:5, 182:18-183:1). And it is undisputed that Gravity Jack did not get a contract with 4LNS for AR maintenance/training and learning development work or for Gravity Jack's PoindexAR/Adroit technology. CP 1213-14, 1235 (pp. 184:24-185:3). Therefore, no evidence of interference or competition, misappropriation or gross negligence exists.

Citing no legal authority, Appellants offer only conclusory assertions that the release terms in the parties' contracts do not apply to Appellants' intentional tort claims. These issues should not be considered by the Court. RAP 10.3(a)(6); *West*, 168 Wn. App. at 187. Appellants' position fails in any event. The release terms of the parties' contracts apply to **any claim**, which necessarily includes all claims asserted by Appellants, including but not limited to their intentional tort claims. CP 38, 43, 46.

c. Appellants' claims were properly dismissed on summary judgment for lack of proof of damages.

Appellants' claims require proof of damages. Because Appellants failed to produce proof of damages, they failed to show the existence of an essential element of their case.

Appellants assert they "need only show the fact of damages, not the amount." Appellant's Br. at 44. "[D]amages must be proved with reasonable certainty or supported by competent evidence in the record." *Iverson v. Marine Bancorporation*, 86 Wn.2d 562, 565, 546 P.2d 454 (1976). Reasonable certainty is concerned more with the fact of damage. *Gilmartin v. Stevens Inv. Co.*, 43 Wn.2d 289, 295, 261 P.2d 73 (1953). A plaintiff has the burden to prove its loss as a result of the defendant's conduct, which must be based on more than mere speculation or conjecture:

Although the precise amount of damages need not be shown, damages must be supported by competent evidence in the record. To be competent, the evidence or proof of damages must be established by a reasonable basis and it must not subject the trier of fact to mere speculation or conjecture.

ESCA Corp. v. KPMG Peat Marwick, 86 Wn. App. 628, 639, 939 P.2d 1228, 1233 (1997), *aff'd*, 135 Wn.2d 820, 959 P.2d 651 (1998). Roe and RevolutionAR have failed identify any connection between the loss they claim to have suffered and Richey or Gravity Jack's conduct.

Appellants point to Roe's deposition testimony as proof of damages. Roe testified that Gravity Jack received \$1.3 million from 4LNS. However, Roe did not know what work Gravity Jack did for 4LNS and Richey explained that it did no AR training/learning/maintenance work for 4LNS. CP 1156, 1237. Appellants failed to show beyond speculation and conjecture that Gravity Jack's work for or income from 4LNS related to the specific product RevolutionAR tried unsuccessfully to market or that RevolutionAR was somehow entitled to the income Gravity Jack received from 4LNS. *Becker*, 165 Wn. App. at 245; *ESCA Corp.*, 86 Wn. App. at 639; CR 56(e). Even if Gravity Jack entered contracts for its Adroit technology, Adroit is a completely different technology than RevolutionAR's training/learning app concept. RevolutionAR's concept used AR to make training manuals interactive, whereas Gravity Jack's Adroit uses a model of a real world object to give any device with a camera the power to detect and track the real world object with augmented reality overlays. CP 1244.

Appellants next argue that Roe's testimony that "RevolutionAR content and assets were, in fact, used" by Gravity Jack is proof of Appellants' damages. It is undisputed, however, that Roe could not identify any actual loss associated with the use of all or part of

RevolutionAR's demo app and admitted that he relied on Appellant's (improper) use of discovery to determine Appellants' damages. CP 115 (pp. 139:23-140:23). Moreover, the purchase price for the carburetor is not proof of damage.

Appellants further claim that, but for "Gravity Jack's conduct", RevolutionAR would have realized income of about \$70,000 and "anticipated approximately \$15,000 in profit" if it had successfully contracted with T-Mobile and more than \$2,500 if it had successfully contracted with Itron. Appellants' Br. at 47-8. Weatherly's declaratory statement as to RevolutionAR's estimated income and profit is speculative, conclusory, and cannot be taken at face value; it is insufficient to overcome a motion for summary judgment. *Becker*, 165 Wn. App. at 245; *ESCA Corp.*, 86 Wn. App. at 639; CR 56(e).

The undisputed evidence shows RevolutionAR did not contract with Itron because the parties could not agree on contract terms. CP 1595. RevolutionAR did not contract with T-Mobile because it had "no money or infrastructure to pull it off." CP 1690. Neither Richey nor Gravity Jack guaranteed these contracts for RevolutionAR and neither had a duty to provide RevolutionAR with the money or infrastructure to secure them.

No evidence shows RevolutionAR was damaged by Gravity Jack as a result of RevolutionAR's failure to contract with Itron or T-Mobile.

- d. Summary dismissal of Appellants' claims was proper where the business judgment rule protects Richey and RevolutionAR's corporate documents indemnify him.

Appellants contend the indemnification clause in RevolutionAR's Amended Articles of Incorporation protects Richey (as a board of director for RevolutionAR) from only third-party claims, not from RevolutionAR's claim. They support this argument with a partial quotation of RCW 23B.08.510(4). Appellants have failed to present a developed argument with citation to facts in the record to the contrary. Appellants have further failed to show Richey was grossly negligent or attempt to offer a developed argument, citing the record, to show he misappropriated a corporate opportunity. This Court should decline to address Appellants' undeveloped arguments. RAP 10.3(a)(6); *West*, 168 Wn. App. at 187.

In any event, the plain language of the indemnification clause expressly states, "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.**" CP at 1078 (emphasis added). This broad language is not limited to only third-party actions; it expressly

applies to all liability and applies to the maximum extent permitted by law. RCW 23B.08.510(4) does not limit the clause's application because Richey has not been found liable to RevolutionAR, and he had not received an improper personal benefit. Moreover, the corporate form protects officers and shareholders from personal liability. *Grayson v. Nordic Const. Co., Inc.*, 92 Wn.2d 548, 552-53, 599 P.2d 1271 (1979). Appellants did not attempt to prove than any exception to this protection. *See Wash. Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 503, 90 P.3d 42 (2004). Appellants also did not attempt to prove that the Business Judgment Rule should not apply to Richey. *See* RCW 24.03.127.

Richey was not a director of RevolutionAR at the time of his alleged misconduct in 2016, and no evidence shows he damaged RevolutionAR. Roe and Weatherly's inexperience, mismanagement, and overpriced product were the death knells for their company.

3. The Trial Court Properly Awarded Fees and Costs to Richey and Gravity Jack under RCW 4.85.185.

- a. The trial court's award is supported by sufficient findings, reasonable inferences therefrom, and the record.

The Court should affirm the trial court's award of attorney fees and costs to Richey and Gravity Jack under RCW 4.84.185. This statute allows the trial court to impose sanctions, including reasonable attorney

fees and costs incurred to defend a frivolous lawsuit. RCW 4.84.185. The trial court's award of fees under RCW 4.84.185 to Richey and Gravity Jack is reviewed for clear abuse of discretion. *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 903, 969 P.2d 64 (1998).

RCW 4.84.185 is intended to apply to an action, which, in its entirety is a spite, nuisance, or harassment suit. *Id.* In enacting the statute, the legislature expressed concern about baseless claims and defenses in Washington's courts. *See Biggs v. Vail*, 119 Wn.2d 129, 134-37, 830 P.2d 350 (1992) (reviewing and interpreting the legislative history of Former RCW 4.84.185 (1991)). It designed the statute to discourage frivolous lawsuits and to compensate victims forced to litigate meritless cases. *Id.* at 137.

To affirm an award of attorney fees under RCW 4.84.185, “[t]he lawsuit, as a whole, that is[,] in its entirety, must be determined to be frivolous and to have been advanced without reasonable cause[.]” *Id.* Appellants have offered no authority to support their argument that the trial court's findings supporting its award under RCW 4.84.185 must directly address each of Appellants' 15 claims or that applied the wrong legal standard. *See Appellants' Br.* At 25. Appellants failed to preserve

these errors, which they claim for the first time on appeal. RAP 2.5(a)(3); CP 1747-50.

In *State ex rel. Quick-Ruben*, the Washington Supreme Court affirmed a fee award under RCW 4.84.185 where the trial court dismissed the plaintiff's case in its entirety for lack of standing and premature filing. 136 Wn.2d at 904. The trial court there found the plaintiff's legal theory was unfounded and described how the evidence showed the plaintiff's untenable position on standing resulted in a frivolous action advanced without reasonable cause. *Id.*

Similarly, here, the trial court issued a *Memorandum Opinion and Order Granting Summary Judgment of Dismissal* on November 8, 2018, dismissing all 15 of Roe's and RevolutionAR's claims against Richey and Gravity Jack. CP 1696-1700. No claim survived to trial. In its memorandum opinion and order, the trial court, analyzing specific evidence before the court, found that all of Appellants' claims were frivolous and without merit or evidence, yet Appellants pursued their action in hopes of obtaining a financial settlement:

Here, **plaintiff's lawsuit contained a "kitchen sink" of claims, all brought without merit.** Indeed, as I indicated above, **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. All of the conduct alleged by Gravity Jack was controlled by contract; those

contracts included indemnity and release of liability provisions. **No evidence was offered of gross negligence or willful misconduct. Roe admits that he had no IP rights** to anything created for RevAR. As Gravity Jack points out, **RevAR created nothing subject to copyright or patent; nor did Gravity Jack have a copyright or patent. Again, RevAR was unable to produce any evidence to support damages other than speculation. The complaint against Gravity Jack was frivolous.** RevAR and Roe are responsible for attorney fees and costs to Gravity Jack.

CP 1699-1700 (emphasis added). These findings and conclusions were incorporated into the trial court's Final Order awarding Richey and Gravity Jack attorney fees and costs entered on December 10, 2018. CP 1790-91.

The trial court's findings show the trial court expressly found Roe knew he had no claim but personally and on behalf of RevolutionAR pursued an entirely frivolous action producing no supporting proof of liability. In other words, Appellants' action was advanced without reasonable cause. Because the trial court met the requirements for awarding attorney fees and costs under RCW 4.84.185, it did not abuse its discretion in granting the award. *See State ex rel. Quick-Ruben*, 136 Wn.2d at 903–05. The trial court's award under RCW 4.84.185 should be affirmed.

- b. Adequate and supported findings support the amount of fees and costs awarded.

Appellants further argue that the trial court failed to enter adequate findings and conclusions to support the **amount** of the award. *Appellant's Br.* At 28 (quoting *Berryman v. Metcalf*, 177 Wn. App. 644, 657, 312 P.3d 745 (2013) (alteration added)).

In *Berryman*, the trial court found only that the hourly rate and hours billed were reasonable. *Id.* at 657. Here, after expressly reviewing the objections filed by Roe and RevolutionAR, the trial court found the fees, costs, and hours expended on the defense of Richey and Gravity Jack to be reasonable and supported:

The court also reviewed the objections filed by Plaintiff Defendants charged a reasonable hourly rate, expended a reasonable number of hours on this case, and provided the Court with reasonable documentation substantiating the fees and costs in this case.

The Court finds that the fees in the amount of \$74,527.00 and the costs in the amount of \$2,445.45. are reasonable.

CP at 1781.

Significantly, the trial court wrote a line through the original attorney fees request of \$71,922.00 and wrote in an award of \$74,527.00. This increase in the attorney fees award corresponds with the additional fees requested in Richey and Gravity Jack's response and supplemental affidavit of fees filed in opposition to Appellants' objections to the fee

award. CP 1751-65. It is, therefore, reasonable to infer from the trial court's findings, conclusions, and order, the trial court agreed with the Defendants' position on the issues raised by Plaintiffs' objections, resolving the disputed issues in Defendants' favor.

The amount of the fee award here was limited to the fees incurred. It is supported by an objective basis set forth in the trial court's findings, and the affidavits of attorney fees filed by counsel for the Defendants support those findings. The trial court was not required to apply the lodestar method to determine the fee award under RCW 4.84.185. *Highland School Dist. No. 203 v. Racy*, 149 Wn. App. 307, 316, 202 P.3d 1024 (2009). The amount of the fee award should be affirmed.

- c. Roe and RevolutionAR were afforded notice and adequate opportunity to respond to Richey and Gravity Jack's fee request.

Appellants claim they were deprived of an opportunity to respond to Richey's and Gravity Jack's request for fees and costs under RCW 4.84.185. They responded in writing. Richey and Gravity Jack formally requested fees and costs under RCW 4.84.185 in their *Motion for Summary Judgment and Memorandum in Support of Defendants' Motion for Summary Judgment*, with adequate notice to Appellants. CP 468, 477, 479, 483, 669. Roe and RevolutionAR filed a memorandum opposing

Defendants' summary judgment filings **and** request for fees. CP 1051. However, Roe and RevolutionAR had the opportunity but failed to offer any oral argument in response to Defendants' oral argument on their fee request at the summary judgment hearing. RP 53-71.

Thus, Appellants responded to Defendants' request for fees and invited any error they claim occurred. The invited error doctrine prohibits Appellants from setting up an error in the trial court in order to complain about it on appeal. *Humbert/Birch Creek Const. v. Walla Walla County*, 145 Wn. App. 185, 192, 185 P.3d 660 (2008). Roe and RevolutionAR were not denied due process by the trial court; the denial of any process they claim they are due results from their own omissions. *Id.*

Appellants argue for the first time on appeal that they were entitled to a separate, formal motion on fees and an evidentiary hearing. The Court should not consider this claim of error because it was not raised in the trial court. RAP 2.5(a)(3). Plaintiffs only generally claimed at the trial court level that they had "not had due process." CP 1749. Regardless, an attorney fee award for a frivolous action "is wholly unaffected by the date the motion [for fees] is filed." *Reid v. Dalton*, 124 Wn. App. 113, 124, 100 P.3d 349 (2004) (alteration added). And Plaintiffs did not take their opportunity to argue the fee issue at the summary judgment hearing. The

trial court did not rule on the fee request until after it granted Defendants' summary judgment motion. Plaintiffs were afforded due process.

- d. The trial court properly held Roe and RevolutionAR jointly and severally liable for all of Richey and Gravity Jack's attorney fees and costs.

In a single conclusory paragraph lacking argument, Appellants contend the trial court erred when it ordered Appellants to be jointly and severally liable for Defendants' attorney fees and costs. For support, they cite a single case for the proposition that fees should be segregated based on the time spent on issues for which fees are authorized.

Appellants' assignment of error should not be considered by this Court because they fail to argue why the trial court allegedly erred in violation of RAP 10.3(a)(6). Moreover, Appellants statement of error and legal citation ignores that the trial court awarded fees to Defendants on **all** of Appellants' 15 causes of action under RCW 4.84.185. All 15 claims arise from the same fact pattern – a soured business relationship between RevolutionAR and Gravity Jack as well as the owners of the two companies. A “court is not required to artificially segregate time . . . where the claims all related to the same fact pattern, but allege different bases for recovery.” *Etheridge v. Hwang*, 105 Wn. App. 447, 461, 20 P.3d

958 (2001). Appellants offered no legal authority to show that segregation is required under such circumstances.

Roe and RevolutionAR are jointly and severally liable for Defendants' attorney fees and costs. RCW 4.22.070(1)(a) requires joint and several liability where parties act in concert or when a person acts as an agent of a party. Roe and RevolutionAR acted in concert and Roe acted as an agent of Revolution AR by filing and pursuing a frivolous lawsuit against Defendants, causing the Defendants to incur a single, indivisible injury – attorney fees and costs. Joint and several liability, is, therefore, proper.

4. The Court Should Award Richey and Gravity Jack Attorney Fees and Costs on Appeal.

Richey and Gravity Jack request an award of attorney fees on appeal pursuant to RAP 18.9(a) which provides an appellate court may order a party who “files a frivolous appeal” to “pay terms or compensatory damages” to any party harmed by its actions. Washington Courts have repeatedly noted:

An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there [is] no reasonable possibility of reversal.

Presidential Estates Apartment Assocs. v. Barrett, 129 Wn.2d 320, 330, 917 P.2d 100 (1996) (quoting *Fay v. Northwest Airlines, Inc.*, 115 Wn.2d 194, 200–01, 796 P.2d 412 (1990)); *State v. Rolax*, 104 Wn.2d 129, 136, 702 P.2d 1185 (1985).

Roe and RevolutionAR had no evidence establishing a prima facie case against Richey and Gravity Jack for any of their 15 causes of action when the Complaint was initially filed or at any time thereafter. They “[f]il[ed] on questionable grounds in hope of using the discovery rules to supply the missing facts . . . contrary to CR 11.” *Winbun*, 143 Wn.2d at 221-22. Appellants’ use of these “shoot first, ask questions later” litigation tactics is prohibited and failed to supply Appellants with proof of their undeveloped claims. Appellants were afforded multiple opportunities by defense counsel to dismiss their frivolous claims, and the trial court wanted them at the discovery hearing preceding the summary judgment hearing that they had nothing to support their claims. Appellants ignored the opportunities and warnings and have continued with their meritless claims through appeal, offering no more than undeveloped, conclusory arguments that fail to raise a debatable issue or present a reasonable possibility of reversal. Richey and RevolutionAR are, therefore, entitled to attorney fees on appeal. RAP 18.9(a).

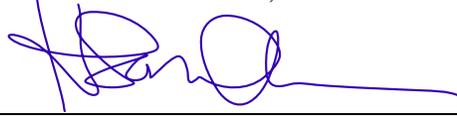
Richey and RevolutionAR should also be awarded fees and costs as the prevailing party on appeal under RCW 64.60.060(5), which allows the prevailing party to recover reasonable attorneys' fees, expenses, and court costs incurred in defending any claim brought under the section. Similarly, RCW 19.108.040 entitles a prevailing party to fees when a claim for trade secret misappropriation is made in bad faith. Appellants sued Richey and RevolutionAR under RCW 64.60 and RCW 19.108. The claims were meritless, lacking prima facie evidence to sustain the claim from the beginning. Appellants, nevertheless, pursued the claim in a bad faith attempt to pressure Defendants into paying money to resolve the case. The Appellants' claims were properly dismissed on summary judgment. Richey and RevolutionAR are the prevailing parties and entitled to fees on appeal as a result.

C. CONCLUSION

Based on the foregoing, Respondents respectfully request that the Court affirm the appealed orders and award Respondents their attorney fees and costs on appeal.

Respectfully submitted on July 12, 2019.

STAMPER RUBENS, P.S.

A handwritten signature in blue ink, appearing to read "Michael H. Church", written over a horizontal line.

Michael H. Church, WSBA #24957

Hailey L. Landrus, WSBA #39432

Attorneys for Respondent

**COURT OF APPEALS, DIVISION III OF THE STATE OF
WASHINGTON**

REVOLUNTAR, INC., et al.)	COA NO. 36499-2-III
)	
v.)	PROOF OF SERVICE
)	
GRAVITY JACK, INC., et al.)	
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I, HAILEY L. LANDRUS of STAMPER RUBENS, P.S., I assigned counsel for the Appellant herein, do hereby certify as follows: On July 12, 2019, I served the attached document on the Appellants via Washington State Appellate Courts' Secure Portal Electronic Filing system.

Dated and served this 12th day of July, 2019.

STAMPER RUBENS, P.S.



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