Supreme Court No. 89193-1
Court of Appeals No. 46465-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

VIRGINIA COVERDALE

Appellant,

vs.

JZK, INC.,

Respondent.

AMENDED BRIEF OF RESPONDENT

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I. INTRODUCTION

This case is, and always has been, a straightforward breach of contract action. Appellant Virginia Coverdale gave something—her promise not to disseminate JZK, Inc.'s materials and information—and she got something—attendance at JZK, Inc.'s school. JZK, Inc.'s complaint sought an injunction preventing continued breach of that agreement. Clerk's Papers ("CP") at 15–16. The trial court's oral ruling at the preliminary injunction hearing is illuminating:

> [T]he evidence before me includes the allegations, if not the fact, that the defendant, Coverdale, signed a contract with JZK, Inc. And as part of that contract, she acknowledged, on at least two separate occasions, that she would not disseminate or distribute any of the materials, essentially, at issue in this particular case.
>
> . . . .
>
> She signed that contract. She acknowledged every paragraph of that contract, and she signed it on two separate occasions. It is, at the risk of overstating it, disingenuous for her to come to court and argue, through the very passionate argument of her lawyer, that this is an adhesion contract or an unconscionable contract, when clearly the evidence shows that she had ample opportunity to ask questions, which she didn't, or to challenge any provision in that contract, which evidently she didn't. . . .
>
> This is simply a contract issue. . . . Like any contract, you get something; you give something up. And that is what both of these parties did.

Verbatim Report of Proceedings ("VRP") 11/14/12 at 29:18–31:7. After months of contentious litigation drawn out by a slew of meritless defenses

and counterclaims, the trial court, headed by a different judge, reached the identical conclusion that Coverdale had breached her agreement. *See* CP 1820–26.

Coverdale's appeal is a frivolous and thinly veiled attempt to attack JZK, Inc.'s reputation on a grander stage in furtherance of her mission to "take JZ Knight down." CP 306–07; *see also* CP 262 (Coverdale writing that "[e]verything was a means to an end to expose JZ"); CP 415 (Coverdale writing "I'm not done with her [Knight] yet"). The trial court's orders should be affirmed in their entirety.

II. STATEMENT OF THE CASE

A. Overview of the nature of the case and relief granted to JZK, Inc.

JZK, Inc. operates Ramtha's School of Enlightenment ("RSE" or "School"), which promotes the teachings of Ramtha, a 35,000-year-old warrior spirit channeled by RSE's founder, JZ Knight. CP 122. Knight and Ramtha have addressed audiences worldwide since 1979. *Id.* Ramtha is considered by students to be a master teacher, and his teachings encompass beliefs about life, death, and the human condition. *Id.*

Before attending teaching events at RSE, students are required to sign a nondisclosure agreement known as the "Conditions of Participation" ("Conditions" or "CoP"). CP 123–24. By signing the CoP, students agree that they will not, without prior written consent, adapt or

disseminate JZK, Inc.'s teachings or materials, nor will they assist others in doing so. CP 239–40, 242–43.

Coverdale signed the CoP twice, once in 2006, CP 240, and again in 2007. CP 243. But in 2012, Coverdale posted on YouTube an edited and spliced version of JZK, Inc.'s video of a teaching event, without JZK, Inc.'s permission. CP 33, 62, 936–37. She did so under her own name, "coverdalev." CP 62. JZK, Inc. filed suit only after Coverdale ignored a letter demanding that the video be taken down. CP 973–76.

JZK, Inc.'s only causes of action were for breach of the CoP and for injunctive relief prohibiting future breaches. CP 15–16. Finding that JZK, Inc. had a substantial likelihood of success on the merits, the trial court first granted a temporary restraining order,[1] then a preliminary injunction, preventing Coverdale from continuing to disseminate JZK, Inc.'s materials. CP 100–04, 464–67. Thereafter, the trial court dismissed Coverdale's various affirmative defenses and counterclaims, CP 553–54, 1898–99, and, on cross motions for summary judgment, properly determined that Coverdale breached the CoP. CP 1891–97.[2]

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[1] Coverdale violated this order by continuing to send out JZK, Inc. video privately, telling her supporters, "it doesn't have to be brought down yet." CP 388–90, 415.

[2] The trial court also denied a late motion by Coverdale to amend her complaint. CP 862–63. However, Coverdale has subsequently filed most, if not all, of the claims she

B. Coverdale signed the nondisclosure agreement known as the Conditions of Participation ("CoP") in 2006 and again in 2007.

Coverdale provided her written promise—twice—that she would not disseminate JZK, Inc.'s information or materials. CP 239–43. She did so as an intelligent and vocal consumer who was admittedly skeptical of RSE before she attended. CP 1132–33. The relevant portion of the CoP provides as follows:

> The information and techniques taught here are for your knowledge only. You are licensed to use this information and techniques for your personal use only. By signing these Conditions of Participation, you agree not to teach or otherwise disseminate through speeches, books, articles, media interviews, or other forms of mass or group distribution (collectively, to "Teach or Disseminate") any information that you learn or are taught at the School . . . nor will you assist or facilitate other persons in doing so without the prior written consent of the School.
>
> . . . .
>
> The materials provided to you at the School are subject to the copyright laws. You are not authorized to copy, reproduce, prepare adaptations, publicly distribute, publicly perform, or publicly display any of those materials without the prior written consent of the School. All School events are routinely recorded on audiotapes and archived under the registered trademark RAMTHA DIALOGUES®.

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sought to include via amendment in a separate lawsuit in Thurston County. *See* Request for Judicial Notice.

CP 943, 946. Coverdale testified that she did in fact sign the CoP twice and that she fully understood these terms. CP 1137, 1328.

CoPs similar to the ones at issue in this case have been used at RSE since 1993. CP 123. The standard procedure that was followed for many years was to provide the CoP to the student upon registration on the first day of the event. CP 124. However, since 2006, students have also been able to review the CoP online at any time before they register. CP 32, 221, 1067–69. In either case, the student is given an opportunity to review the statement and ask any questions; occasionally, they have. CP 221. These questions are usually addressed by Mike Wright, JZK, Inc.'s Legal Affairs Manager. *Id.* From time to time, students have chosen not to sign or have negotiated some of the terms. *Id.*

The vast majority of students read the CoP, initial each paragraph, and comply with its terms. *Id.* Such agreements are not unique to RSE, CP 145, and are customary when conducting private seminars to protect the sponsor from unauthorized commercial use of its material and techniques. CP 221. This is only the second time that JZK, Inc. has been required to file a lawsuit to enforce the terms of the CoP. CP 125. The first time was in 2006, and the Thurston County Superior Court enforced the CoP. *Id.*

On September 21, 2006, Coverdale read the seven-paragraph CoP, initialing each numbered paragraph, before attending a Beginning Event at

RSE. CP 913–15, 239–40. Below the printed phrase "I hereby agree to be bound by the foregoing Conditions of Participation, as witnessed by my signature below," Coverdale signed the document. CP 913–15, 240. Just above Coverdale's signature, the Conditions state: "If you are unable to agree with these Conditions and you have already paid your admission fee, JZK, Inc. will refund your payment." CP 240. Coverdale also gave permission for her daughter to attend, again signing the CoP. *Id.*

Coverdale did not raise any objection to any of the language in the CoP, nor did she request her money back. CP 918–19. Instead, to the best of her recollection, she filled out the Conditions with her name and address, initialed it, signed it, handed it to the RSE employee working at the registration window, and proceeded into the event. CP 913–15.

Over a year later, on November 6, 2007, Coverdale again signed a similar CoP. CP 947. She did so after attending 11 RSE events in the interim, CP 229–30, at which she could have—but did not—raise any concerns about the Conditions. CP 919–20, 985–86. Coverdale again initialed each of the six numbered paragraphs. CP 919–20, 946–47. Again, she raised no concerns when she signed the document, or at the 16 events she attended, CP 227–30, between November 2007 and 2010. CP 985–86.

C. Coverdale posts RSE materials on YouTube in breach of the CoP.

Despite agreeing not to disseminate information or materials taught at RSE, on October 18, 2012, Coverdale posted footage from a February 17, 2012 RSE live internet streaming event on YouTube. CP 33, 62, 936–37. She then publicly threatened to post 11 hours more. CP 71. Coverdale did not have permission from JZK, Inc. to use, adapt, or edit the video, or to display or disseminate it in any way. CP 986.

Coverdale claims she received JZK, Inc.'s proprietary video material from an anonymous source, CP 1158–59, 1167–69, but one who necessarily had to have signed the CoP to obtain the materials. CP 32.[3] She testified that she posted an edited version of JZK, Inc. video for her own purposes on You Tube, without obtaining JZK, Inc.'s permission. CP 1170–71, 1173.

Coverdale has styled herself in the underlying lawsuit, and now this appeal, as a "whistleblower," initially claiming that her posting of JZK,

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[3] Coverdale claims that JZK, Inc. did not require its students to sign a CoP as a condition of accessing live streams. This is false and contradicts the very statement of Mike Wright, JZK Inc.'s legal affairs manager, upon which Coverdale relies. Specifically, Coverdale cites to CP 1079 wherein Wright testified that to register for a streaming event, "a current student . . . either . . . signed [a CoP] in person at a live beginning event or an updated version at a subsequent event." This is consistent with an earlier declaration wherein Wright testified that "[t]he only way that an individual would have lawful access to these materials is by agreeing not to disseminate them." CP 32.

Inc.'s video was somehow part of an attempt to call attention to fire and safety code violations at the School, CP 62–63, and later claiming it was to "expose" RSE and its president, Ms. Knight, as "dangerous." *See* Br. of App., generally. Yet Coverdale had already reported her purported concerns to the county officials charged with enforcement. Those officials specifically addressed Coverdale's allegations, publicly stating—on three separate occasions—that any claimed code violations at RSE have been resolved. CP 224–25, 276 ("The county has investigated those complaints and the minor violations have been corrected."); 285 ("fire code violation have been resolved"), 294 (same).[4]

The sensational picture of RSE that Coverdale portrays is far from reality. Students do not live at RSE. They attend periodic events on campus throughout the year, at their own choice, then return to their own homes and careers. CP 123. Nothing in the CoP prevents students from talking about RSE or making complaints to public officials or authorities if they choose to do so.

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[4] JZK, Inc. does not attempt to engage each of Coverdale's salacious allegations as they have no bearing on this appeal. Closer inspection of one of Coverdale's grievances, fire code violations, is emblematic. As explained by Mike Wright, Coverdale's allegations of corruption reflect a fundamental misunderstanding of both the facts and the roles of government officials. *See* CP 2307 *et seq.*; *see also* CP 436 (Coverdale discussing conspiracy theory about trial judge being corrupted).

It is notable that for some time there has been a small but vocal group of disgruntled former RSE students who have operated websites dedicated to criticizing RSE. CP 262–64, 765–66. JZK, Inc. supports their right to criticize and air their opinions. *Id.* at 765–66. This lawsuit is only intended to prevent the misuse of JZK, Inc.'s materials. CP 12–18, 766.

D. JZK, Inc. sends Coverdale written notice that she has unlawfully posted its materials; Coverdale refuses to take the video down.

On October 28, 2012, JZK, Inc., through Mike Wright, sent Coverdale a letter via her Facebook account advising her of her breach of the Conditions and directing her to take down the RSE material she had posted without authorization. CP 971, 973–76. Coverdale refused to do so, instead telling Wright that she had also posted an additional 20-minute segment of RSE video. CP 971. Only then did JZK, Inc. file suit. CP 17.

E. Harm to JZK, Inc.

RSE students pay for the opportunity to hear the School's message as distinctly presented by JZ Knight and Ramtha. CP 220–21. RSE's value as a business comes from the information and material it presents to its students and the way in which information is presented. *Id.* To preserve that value, JZK, Inc. asks its students to sign the CoP as a condition of attending the School. *Id.* The CoP is in place to allow JZK, Inc. to keep its competitive edge by maintaining the prestige and uniqueness of its message. That edge would be quickly lost if others were able to co-opt,

distort, or repackage presentations for their own pecuniary or other interests, as did Coverdale. *Id.*

III. AUTHORITY & ARGUMENT

Coverdale agreed not to disclose JZK, Inc.'s materials. CP 943–44, 946–47. She also agreed that she would not assist anyone else in disclosing JZK, Inc. materials. *Id.* Subsequently, Coverdale publicly posted JZK, Inc. video material on YouTube. CP 924, 933–34. Coverdale testified that she knew the video was JZK, Inc.'s and that she did in fact post it. CP 924–27, 933–39, 956–57. This Court should affirm the trial court[5] and award attorneys' fees pursuant to RAP 18.1 and RAP 18.9.

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[5] Appellate courts generally decline to review matters to which no error has been assigned. *Painting & Decorating Contractors of Am. Inc. v. Ellensburg Sch. Dist.*, 96 Wn.2d 806, 814–15, 638 P.2d 1220 (1982). Coverdale has failed to assign error to the trial court's order granting JZK, Inc.'s motion for temporary restraining order. This is the order on which the subsequent orders on preliminary injunction and summary judgment are largely predicated, *i.e.*, the merits of JZK, Inc.'s claim for breach of contract and request for equitable relief. Without assignment of error, fundamental common sense compels the conclusion that the basis on which the trial court issued its orders is valid and must be upheld. In *Painting & Decorating Contractors*, the appellant failed to assign error to a finding of fact. *Id.* at 814. The court stated as follows: "Consequently, we must assume the facts stated therein are established facts in the case. . . . The unchallenged finding strongly militates against granting the extraordinary relief suggested by PDCA. Second, RAP 10.3(g) requires that an appellant's brief contain a separate concise statement of each error claimed. PDCA did not assign error to the trial court's denial of its requested injunctive relief or the refusal to oversee the District's bidding procedure. Thus, we will not consider the matter further, and are obligated to affirm the decision of the trial court." *Id.* at 814–15 (internal citations omitted).

A. *McKee* merely holds that contracts of adhesion for basic consumer services violate public policy where they require *dispute resolution* to occur in secret.

Coverdale's assertion that the Conditions are unconscionable relies solely on the inapplicable decision *McKee v. AT&T*, 164 Wn.2d 372, 191 P.3d 845 (2008). But her insistence that *McKee* renders the CoP void is premised on two incorrect assumptions: (1) that *McKee's* holding extends beyond contract clauses requiring confidential *dispute resolution*; and, even if it does, (2) that the CoP is a consumer contract of adhesion for a basic consumer service, as opposed to an entirely elective activity. Both assumptions are fatal to her argument.

1. Public policy does not prohibit attendees at presentations from agreeing not to disseminate proprietary materials.

McKee involved a challenge to a dispute resolution provision in AT&T's Consumer Services Agreement, which the Washington Supreme Court found to be unconscionable. Among other provisions, the Court took issue with a clause that required ***arbitration*** to take place in secret. 164 Wn.2d at 398–99. But *McKee* does not, as Coverdale suggests, broadly hold that nondisclosure agreements like the CoP are universally unconscionable or that they violate public policy. Indeed, each of the pertinent cases cited in *McKee* were also limited to secret arbitration provisions. *Id.* at 398 (citing *Ting v. AT&T*, 319 F.3d 1126, 1151–52 (9th Cir. 2003) (provision requiring "any **arbitration** to remain confidential"

was unconscionable); *Luna v. Household Fin. Corp. III*, 236 F. Supp. 2d 1166, 1181 (W.D. Wash. 2002) ("repeat **arbitration participants** enjoy advantages over one-time participants"); *Zuver v. Air Touch Commc'ns, Inc.*, 153 Wn.2d 293, 315, 103 P.3d 753 (2004) ("keeping past findings secret undermines an employee's confidence in the fairness and honesty of the **arbitration** process").

In marked contrast to the nondisclosure provision in JZK, Inc.'s CoP, the agreement at issue in *McKee* required: "Any arbitration shall remain confidential. Neither you nor AT&T may disclose the existence, content or results of any arbitration or award except as may be required by law, or to confirm and enforce an award." CP 1481. The nondisclosure provisions in JZK, Inc.'s CoP, which merely limit teaching or dissemination of RSE's material, share none of these odious limitations.[6] JZK, Inc.'s nondisclosure provision extended only to the School's own teachings and materials. Its enforcement occurred in Superior Court, and

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[6] By Coverdale's logic, almost *any* nondisclosure agreement would violate public policy. For instance, employers often require employees to sign nondisclosure agreements to protect their own business information. Such agreements are likely standard form contracts, prepared by the employer (often the party with greater bargaining power)—making the employer what Coverdale misunderstands to be the kind of "repeat player" at issue in *McKee*. But such agreements are, of course, not unconscionable as a matter of law based on the mere hypothetical that the employer could use the agreement to conceal misconduct.

now, the State's appellate courts—open and transparent proceedings. The briefing, accompanying evidence, and hearings are openly available to those who wish to review them and have been widely reported in the news media.

Coverdale seizes upon a sentence in *McKee*, that unconscionable provisions in AT&T's agreement "have nothing to do with arbitration," *id.* at 404, to conclude that no contract with any consumer can ever prohibit the dissemination of proprietary information. Not so. *McKee* begins its unconscionability analysis by acknowledging that "states may not refuse to enforce arbitration agreements based upon state laws that apply only to [arbitration]." *Id.* at 396.[7] But "generally applicable contract defenses, such as fraud, duress, or unconscionability may be applied." *Id.* (internal quotation marks omitted). The *McKee* Court simply acknowledged that any provision in a consumer contract of adhesion that requires *dispute resolution*, whether through arbitration or some other format, to occur in secret would violate public policy.

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[7] The continuing viability of *McKee* is uncertain. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 321, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) (Federal Arbitration Act preempts state court rules hostile to arbitration).

For instance, a company could not use a consumer contract of adhesion to preemptively require that all mediated settlements of disputes with consumers remain confidential. Similarly, a company could not require a consumer to preemptively waive objections to the sealing of records or the closing of the courtroom in *judicial* proceedings.

It is in this way that *McKee* is not limited to arbitration (though arbitration may be the most common application). In finding AT&T's secret arbitration clause unconscionable, the Court recognized that "Washington has a strong policy that *justice* should be administered openly and publicly." *Id.* at 398 (emphasis added). The Court cited *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004), a case "discussing sealed court records," *McKee* at 398, and quoted the constitutional requirement that "'*justice* in all cases shall be administered openly.'" *Id.* (quoting Wash. Const. art. I, § 10) (emphasis added). "[C]ontracts that require secrecy violate *this* important policy." *Id.* at 399 (emphasis added).

But *McKee* does not support Coverdale's expansive proposition and she cites no authority, from anywhere in the country, to support her interpretation. Instead, basic contract law governs. *Cf. King v. Riveland*, 125 Wn.2d 500, 505, 886 P.2d 160 (1994) (confidentiality agreement not

valid contract due to lack of consideration). Contract law is decidedly well settled: offer, acceptance, and consideration. *Id.* All were present.

Coverdale also relies solely on *McKee* to support her affirmative defense that "[t]he [CoP] violate[s] public policy." CP 325. The trial court correctly dismissed the defense because the public policy identified in *McKee*, prohibiting provisions requiring secret **arbitrations**, is not present and does not apply to *this* case.[8] "There is ample case law making it clear that generalized public policy concerns cannot be used to rewrite a clear and lawful contract." *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 511, 115 P.3d 262, 267 (2005) (citing *Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 380, 917 P.2d 116 (1996) (courts "will not, under the guise of public policy, rewrite a clear contract"); *Fluke Corp. v. Hartford Acc. & Indemn. Co.*, 102 Wn. App. 237, 246, 7 P.3d 825 (2000) ("Washington courts are reluctant to invoke public policy as a reason to

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[8] Coverdale's new "public policy" argument, based on RCW 42.17A.001(5) (campaign finance disclosure laws) is raised for the first time on appeal and unsupported by fact or legal authority. Not only does Coverdale fail to point to anything in the record even remotely resembling a campaign finance violation by JZK, Inc., which is not a candidate for office, she also fails to cite a single case invalidating an agreement based on campaign finance law. Coverdale's remaining argument, that Washington's Consumer Protection Act ("CPA") provides a public policy defense to a contract, is also raised for the first time on appeal and is unsupported by any authority.

limit or avoid express contract terms.")). Coverdale finds a reading of *McKee* that just is not there.[9]

2. Coverdale's untenable reading of *McKee* would not apply because attendance at a spiritual school is purely elective.

Even if Coverdale's understanding of *McKee* was correct (it is not), its application would be limited to "consumer contract[s] of *adhesion* for a basic consumer service . . . ." 164 Wn.2d at 399 (emphasis added). Attendance at an entirely elective school of spiritual enlightenment is hardly a basic consumer service offered on a take-it-or-leave-it basis.

In *Crewe v. Rich Dad Education, LLC*, the court found an argument similar to Coverdale's "quite unpersuasive." 884 F. Supp. 2d 60, 73 (S.D.N.Y. 2012). The court rejected Crewe's arguments that he was rushed and didn't have the opportunity to even read the contract, noting that "the nature of the service that he was contracting to receive (the right to attend a class to enhance his stock-trading skills and 'wealth building opportunities,' . . .) was quintessentially elective." *Id.* at 81.

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[9] Vague references to federal copyright law, or some undefined public policy stemming therefrom, are unavailing. Coverdale appears to argue, without any authority, that public policy prevents JZK, Inc. from pursuing a claim for breach of its contract. Br. of App. at 30–31. This is not the law. Regardless, if Coverdale believed that this case implicates federal copyright law, her remedy was to remove to federal court. *See* 28 U.S.C. § 1338(a) ("No state court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to . . . copyrights").

> Simply put, nothing compelled Crewe to sign the Agreement or initial the documents put in front of him, read or unread, other than his own internal impulsion to enroll in the stock-trading course at the lowest available price. ***At the risk of stating the obvious, the setting in which Crewe enrolled for the Rich Dad training course is a far cry from the paradigmatically coercive one in which harsh terms are foisted on a consumer***, in connection with the purchase of a necessity, with little practical ability to resist.

Id. at 82 (emphasis added) (string citing cases where customers had to agree to terms in order to (1) continue to use cell phone plans they had purchased; (2) remain at a mobile home property; and (3) remain at a nursing home); *also citing* WILLISTON ON CONTRACTS § 19:25 (4th ed. 1993) ("courts tend to be less sympathetic to parties who enter into releases so they may engage in voluntary recreational activities")).[10]

The CoP is not the type of "take-it-or-leave-it" adhesion contract for a basic consumer service that was at issue in *McKee*. Moreover, Coverdale ignores the fact that the CoP was subject to negotiation and had been modified by students in the past. CP 221 at ¶ 9. While Coverdale's

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[10] Coverdale similarly cites cases contemplating contracts relating to basic necessities. *See* Br. of App. at 22 (citing *Zuver*, 153 Wn.2d at 304 (agreement making arbitration a condition of employment was adhesive, but *not* procedurally unconscionable); *Yakima Cnty. (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 393, 858 P.2d 245 (1993) (agreement required as a condition of receiving sewer service was *not* procedurally unconscionable)).

reading of *McKee* is incorrect, even her flawed interpretation is of no effect here. Either way, *McKee* does not apply.

B. Coverdale cannot establish that the CoP is unconscionable on any other grounds—similar agreements are regularly enforced.

The trial court properly found that Coverdale did not meet her burden of establishing unconscionability on any other ground. *E.g.*, *August v. U.S. Bancorp*, 146 Wn. App. 328, 343, 190 P.3d 86 (2008) (defendant's burden to establish affirmative defense). Student nondisclosure agreements are entirely enforceable and have been endorsed by courts as a reasonable means for organizations such as RSE to protect the integrity of their teachings. Coverdale cites no authority to the contrary.

In *Art of Living Foundation v. Does 1-10*, 5:10-CV-05022-LHK, 2012 WL 1565281 (N.D. Cal. May 1, 2012), the court found that use of a student nondisclosure agreement was compelling evidence that an organization "dedicated to teaching the wellness and spiritual lessons of ['His Holiness Sri Sri Ravi] Shankar,'" *id.* at *1, had taken reasonable efforts to maintain the secrecy of those lessons. *Id.* at *22. Notably, the "[d]efendants are former adherents of the Art of Living Foundation, but are now critical of both the Foundation and Shankar." *Id.* at *2. They created "two blogs . . . critical of AOLF and its founder, Shankar . . . to provide former AOLF members and currently doubting ones 'a space for

healing.'" *Id.* In addition to criticizing AOLF and its founders, one blogger-defendant "began posting various AOLF materials . . . ." *Id.* at *3.

Among the claims in the action that followed was misappropriation of AOLF's trade secrets—specifically, AOLF's "teaching methods and processes[.]" *Id.* at 21. Relying in part on the student nondisclosure agreement, the court rejected the defendants' argument that "many aspects of the designated materials cannot be trade secrets because they are observed by students enrolled in the course." *Id.* at *20. The court explained that the fact that the school "require[s] students to sign a nondisclosure agreement upon enrollment in one of Plaintiff's courses, and that this policy has been in place since before the [protected materials] were published" constituted a reasonable effort to protect that information. *Id.* at *21–22 ("if anything, Plaintiff's case ha[d] strengthened" based on evidence that student nondisclosure agreement was required). The court entertained no suggestion that these prudent nondisclosure agreements violated public policy or were otherwise unenforceable.[11]

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[11] The court noted that the case was "analogous to *Religious Technology Center* [*v. Netcom On–Line Community Services.*, 923 F. Supp. 1231, 1252 (N.D. Cal. 1995)] in which the district court determined that the Church's religious texts could qualify as trade secrets, in part because the Church's adherents were under a duty of confidentiality as to the relevant materials." *Art of Living Found.*, 2012 WL 1565281 at *20.

Similarly, in *Shell v. American Family Rights Ass'n*, 899 F. Supp. 2d 1035 (D. Col. 2012), the plaintiff required attendees of her child protection services seminars to sign nondisclosure forms. *Id.* at 1046. Again, without any suggestion that the nondisclosure agreement was unconscionable or somehow violated public policy, the court found that the plaintiff had stated causes of action for both a trade secrets violation, *id.* at 1056, and breach of contract. *Id.* at 1059 ("The Complaint alleges that Ms. Swallow signed a nondisclosure agreement but nonetheless disseminated confidential materials from the training seminar . . . . This is sufficient to state a claim for breach of contract").[12]

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[12] Agreements with similar nondisclosure provisions are commonly used and enforced. *See, e.g., Moore v. Commercial Aircraft Interiors, LLC*, 168 Wn. App. 502, 512, 278 P.3d 197, 201 (2012) (recognizing the validity of Commercial Aircraft Interiors' nondisclosure agreement); *BBA Nonwovens Simpsonville, Inc. v. Superior Nonwovens, LLC*, 303 F.3d 1332, 1342 (Fed. Cir. 2002) (substantial evidence supported existence of enforceable nondisclosure agreement); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 521 (9th Cir. 1991) (noting that a confidentiality agreement is a reasonable step to ensure secrecy); *Technical Indus., Inc. v. Banks*, 419 F. Supp. 2d 903, 915 (W.D. La. 2006) (plaintiff established substantial likelihood of success on the merits of enforcing nondisclosure agreement); *Newport-Mesa Unified Sch. Dist. v. State of Cal. Dept. of Educ.*, 371 F. Supp. 2d 1170, 1179 (C.D. Cal., 2005) (nondisclosure agreement a valid way to reduce risk of disclosure of copyrighted materials); *APAC Teleservices, Inc. v. McRae*, 985 F. Supp. 852, 868 (N.D. Iowa, 1997) (public interest served by protecting disclosure of trade secrets by enforcing nondisclosure agreement); *Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 762 (Iowa 1999) (nondisclosure agreement reasonably necessary to protect plaintiff's business interests).

As discussed, a nondisclosure clause arising in a consumer contract for a non-essential activity is *less* likely to be unconscionable than one arising in the context of a commercial or employment contract. *E.g.*, WILLISTON ON CONTRACTS § 19:25 (4th ed. 1993). Nonetheless, in either case, a party is receiving something (*e.g.*, access to

An agreement, such as the CoP, that simply requires students not to disclose an organization's materials is not substantively unconscionable—that is, it is not one-sided or overly harsh. *Nelson v. McGoldrick*, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995).

C. The plain language of both the 2006 and 2007 CoP protect JZK, Inc. from precisely the conduct engaged in by Coverdale.

At least three specific terms in both the 2006 and 2007 Conditions[13] directly prohibit the precise conduct Coverdale admits she engaged in:

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presentation; employment) and is agreeing not to disclose certain information in exchange. The cases cited above merely stand for the unremarkable proposition that courts enforce nondisclosure agreements like any other contract.

[13] Coverdale's argument that the trial court erred in finding she had breached *both* the 2006 and 2007 CoP is procedurally precluded. Coverdale raised the issue for the first time in a motion for reconsideration, arguing "[i]t was an error of law to give any consideration to the 2006 CoP." CP 1731. This was in contravention of her own prior position, and any proclaimed error was invited by Coverdale herself.

Though she analyzed none of the factors authorizing reconsideration, Coverdale sought relief under Civil Rule 59. CP 1724. That rule does not permit a party, "finding a judgment unsatisfactory, to suddenly propose a new theory of the case." *JDF Corp. v. Int'l Raceway, Inc.*, 97 Wn. App. 1, 7, 970 P.2d 343 (1999). This would violate, among other things, the invited error doctrine. *Id.*; *see also In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606, *cert. denied,* 540 U.S. 875, 124 S. Ct. 223, 157 L. Ed. 2d 137 (2003) ("The invited error doctrine prohibits a party from setting up an error in the trial court then complaining of it on appeal.") Washington courts "refuse to permit such a perversion of the rules." *Id.* While an issue closely related to an issue previously raised may be raised in a motion for reconsideration, *Anderson v. Farmers Ins. Co. of Wash.*, 83 Wn. App. 725, 734, 923 P.2d 713 (1996), a movant must first provide an "explanation for why [new] arguments were not timely presented." *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005).

Here, Coverdale never raised any argument about a "substitute contract" in any of her *five* briefs relating to summary judgment. In fact, she argued favorable inferences that could be reached from her signing of the 2006 CoP. *E.g.* CP 1028 ln.15; 1220 ln. 18. Coverdale certainly never objected to the trial court's consideration of the 2006 CoP prior to the adverse ruling against her, as evidenced by her own proposed order. CP 1039.

copying, adapting, distributing, and disseminating RSE information and materials taught at the School. When she signed and separately initialed the CoP, Coverdale promised as follows:

- You agree not to teach or otherwise disseminate . . . any information or techniques that you learn or are taught at the School[;]
- Nor will you assist or facilitate others in doing so without the prior written consent of the School[;]
- You are not authorized to copy, reproduce, prepare adaptations publicly distribute publicly perform, or publicly display any of those materials without the prior written consent of the School

CP 943–44; 946–47 (2006 CoP and 2007 CoP at ¶¶ 1, 2). Moreover, the sentence of the first numbered paragraph of the Conditions put Coverdale on notice that she would be expected to keep JZK, Inc. information private: "The information and techniques taught here are for your knowledge only." *Id.* (CoPs at ¶ 1). The meaning is unequivocal:

Having now realized that her "undue influence" argument could not apply to the 2006 CoP, Coverdale changes position. But a party may not remain silent on an issue during summary judgment proceedings only to take a contrary position on a motion for reconsideration, and then complain about an error on appeal.

Even so, the very authorities cited by Coverdale make clear that substitution only applies "when two contracts are in conflict," that is, "containing inconsistent terms[.]" *Higgins v. Stafford*, 123 Wn.2d 160, 165–66, 866 P.2d 31 (1994). Where terms are not inconsistent, neither document supersedes the other. *Stranberg v. Lasz*, 115 Wn. App. 396, 403, 63 P.3d 809 (2003). Here, Coverdale repeatedly stated that "[t]he 2006 CoP contains an almost identical provision" to the 2007 CoP. CP 1210 n.3; CP 1017 n.3. The trial court properly ruled that Coverdale breached *both* CoPs.

information and material taught at RSE are not to be disseminated. The Conditions further make clear that this promise is for the lifetime of JZ Knight, plus 21 years. CP 944 (2006 CoP at ¶ 7); 947 (2007 CoP at ¶ 6).

Coverdale argues that she should not be bound by her promise because she did not receive the RSE video she disseminated from JZK, Inc. while she was a student at RSE. Her argument is squarely contradicted by the very contract language on which she relies and contrary to well-established principals of contract interpretation:

> We impute an intention corresponding to the reasonable meaning of the words used. Thus, when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used. We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.

Hearst, 154 Wn.2d at 503–04 (internal citations omitted).

Here, in the actual words *and* in the entirety of the agreement, Coverdale promised not to disseminate that which is "taught at the School." Her argument asks this Court to judicially read a different and contradictory meaning into the CoP—one that would allow Coverdale to

circumvent her promise to keep RSE's property confidential as long as she received it from someone else.[14] The Court should decline that request.

1. Coverdale is in breach of her agreement under either the 2006 or the 2007 CoP.

Introductory language in the 2007 CoP plainly states: "These conditions apply to students, teachers, and other participants in the School, *and* apply to all future events or activities in which you participate at the School." CP 242 (emphasis added). Coverdale signed the Conditions as a student at the School and the CoP therefore applies to her. The second independent clause adds that a student will not need to sign a new CoP each time she attends an event. It does not, as Coverdale insists, eliminate or modify the first half of the sentence. Coverdale's interpretation omits the conjunction "and," essentially engrafting the words "but only" in its place.[15]

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[14] It is well known that Washington courts give effect to all of a contract's provisions over any interpretation that renders some language meaningless or ineffective. *Newsom v. Miller*, 42 Wn.2d 727, 731, 258 P.2d 812 (1953). Similarly, our courts do not give effect to interpretations that render contract obligations illusory. *Taylor v. Shigaki*, 84 Wn. App. 723, 730, 930 P.2d 340 (1997).

[15] Furthermore, Coverdale ignores the fact that the 2007 CoP contains several conditions beyond non-dissemination of JZK, Inc. materials. For instance, there is a notice and waiver of risks associated with activities that "may require physical agility, stamina, and coordination." CP 242 at ¶ 3. That the first paragraph clarifies that conditions like the risk waiver apply to future events at the School does not somehow limit the non-dissemination provisions, which the CoP provides will "remain in effect and enforceable for the life of JZ Knight, plus 21 years." CP 243 at ¶ 6.

In any event, Coverdale's argument is moot because the text that she claims supports her untenable rewriting of the 2007 CoP is not present in the 2006 CoP, which Coverdale also signed. CP 239–40. The trial court properly found that the 2006 CoP was also breached. CP 1895.

Finally, to the extent Coverdale argues in her brief that she did not know that the videos she posted depicted information "taught at the School," she is belied by her own testimony. Coverdale acquired the video, understood what it was, hired a technician to edit it, and disseminated it. CP 924–27, 933–39, 956–57. Moreover, before filing suit, JZK, Inc. sent a letter informing Coverdale that the materials she was disseminating were from private RSE events. CP 971, 973–76. She knew what she was doing, was given an opportunity to stop, chose not to do so, and now asks that she not be held accountable.

2. Coverdale ignores her contractual promise not to "assist or facilitate" others to disseminate JZK, Inc. materials.

Coverdale's argument ignores, as it must, any substantive analysis of her agreement not to "assist or facilitate other persons" in disseminating JZK, Inc.'s materials. CP 239, 242. Instead, she sidesteps the issue, getting caught up in whether the original source of the video had also signed the CoP. But in signing the CoP, Coverdale did not merely agree not to assist others in *breaching* their own contracts with JZK, Inc. The relevant

provision provides that a student will not disseminate information taught at the School, "nor will you assist or facilitate other persons in doing so without the prior written consent of the School." CP 242.

Thus, all that the CoP requires is that Coverdale not aid or abet *anyone*—signatory or non-signatory, "anonymous" source or known ally—to disseminate JZK, Inc.'s materials. To be sure, the individual who originally accessed, copied, and disseminated the video to Coverdale necessarily signed the CoP. CP 32 ("The only way that an individual would have lawful access to these [video streams] is by agreeing not to disseminate them"); 924–27, 933–39, 956–57. Regardless, the fact remains the Coverdale facilitated and assisted "other persons" in disseminating JZK, Inc.'s materials.

D. Anticipatory breach, an unpled affirmative defense, does not apply because Coverdale received the services for which she bargained.

Coverdale asserted the affirmative defense of anticipatory breach for the first time in her motion for summary judgment. *Compare* CP 530–31 *with* CP 1032–33. The defense was waived. Even so, there was no anticipatory breach because Coverdale received precisely the services she had bargained for—namely, information and techniques taught by RSE, where she attended nearly 30 events. CP 227–32.

1. Anticipatory breach was not pleaded and was thus waived.

A party "shall set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense." CR 8(c). An affirmative defense is "[a]ny matter that does not tend to controvert the opposing party's prima facie case as determined by applicable substantive law[.]" *Shinn Irrigation Equip., Inc. v. Marchand*, 1 Wn. App. 428, 430–31, 462 P.2d 571 (1969). "The purpose of Rule 8 as it relates to denials is apparent: 'Denials must be definite enough to inform the adverse party of the issues he must be prepared to meet.'" *Id.* at 430. "Affirmative defenses are thus waived unless they are (1) affirmatively pleaded, (2) asserted in a motion under CR 12(b), or (3) tried by the parties' express or implied consent." *In re Estate of Palmer*, 145 Wn. App. 249, 187 P.3d 758 (2008).[16]

Here, Coverdale waived the affirmative defense of anticipatory breach by failing to assert it until her motion for summary judgment, which she filed May 31, 2013, CP 886, after JZK, Inc. had conducted the majority of its discovery, *see* CP 797, and weeks after JZK, Inc. had

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[16] *See also Harting v. Barton*, 101 Wn. App. 954, 962, 6 P.3d 91 (2000) (lessee waived lack of notice of default); *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 896, 1 P.3d 587 (2000) (in contract action, failure to plead satisfaction or payment waived defenses); *Henderson v. Tyrell*, 80 Wn. App. 592, 625, 910 P.2d 522 (1996) (waiving fault of third party); *Rainier Nat'l Bank v. Lewis*, 30 Wn. App. 419, 422, 635 P.2d 153 (1981) (waiving failure of consideration).

moved for summary judgment on *all* affirmative defenses. CP 886. It was not properly before the trial court and is not properly before this Court.

2. Coverdale received the services for which she bargained.

Even if anticipatory breach had not been waived, the defense would not apply because JZK, Inc. performed its obligation under the CoP when it allowed Coverdale to attend an event at RSE. "An anticipatory breach occurs when one of the parties . . . repudiates the contract *prior to the time for performance*." *Lovric v. Dunatov*, 18 Wn. App. 274, 282, 567 P.2d 678 (1977) (emphasis added); *see also* WPI 302.04.

The plain language of the CoP provides that its terms do not merely apply while the student is attending the school, but for the life of JZ Knight, plus 21 years. CP 243 at ¶ 6. Moreover, the CoP expressly provides: "The School/JZK, Inc. has the right to refuse any person admission or enrollment[.]" CP 243 at ¶ 5. Thus, a plain reading of the CoP shows: (1) a student agrees not to disseminate RSE materials; (2) even if the student has signed the CoP, she may be denied enrollment in the future; and (3) even if a student is denied enrollment, she remains bound by her promise for the defined period of time. JZK, Inc. performed its obligation the moment it allowed Coverdale to attend its presentation and witness its teachings. That Coverdale may now regret the return promise she made is of no consequence. *Emberson v. Hartley*, 52 Wn.

App. 597, 601, 762 P.2d 364 (1988) (courts "will not relieve a party of a bad bargain as long as . . . she is competent to contract").[17]

E. The trial court properly dismissed the fraud and misrepresentation counterclaim and affirmative defense.

Coverdale raises two issues regarding fraud or misrepresentation. One concerns a counterclaim, the other a defense. Neither has merit.

1. One does not have a cause of action merely because she disagrees with an institution's teachings or message.

The entirety of Coverdale's fraud/misrepresentation counterclaim is premised on Coverdale's disbelief that "JZ Knight channels for various spiritual figures[.]" CP 327. This does not give rise to a cause of action.

A claim of fraud is established by clear, cogent and convincing evidence of all nine elements of fraud, including falsity. *Stiley v. Block*, 130 Wn.2d 486, 504, 925 P.2d 194 (1996). By the same standard, an individual asserting misrepresentation must prove, among other things, that the statement at issue is false. *E.g. Elliot Bay Seafoods, Inc. v. Port of Seattle*, 124 Wn. App. 5, 14, 98 P.3d 491 (2004).

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[17] To the extent Coverdale believes that attendance at an event is not adequate consideration for a promise not to disseminate RSE's materials for the life of JZ Knight plus 21 years, this is no defense. While inadequate consideration was also not asserted as an affirmative defense, and is thus waived, "courts are loath to inquire into [adequacy of consideration], that is, into the comparative value of the promises and acts exchanged." *Browning v. Johnson*, 70 Wn.2d 145, 147, 422 P.2d 314 (1967).

Here, the trial court properly held that Coverdale could not establish that Plaintiff's spiritual beliefs[18] and statements about those beliefs are false. To do so would amount to a "heresy trial" in which the court would impermissibly sit in judgment of the validity of the beliefs of others.

The United States has long been guided by the principle that its civil courts have neither subject matter jurisdiction nor the competence to adjudicate ecclesiastical matters. *See, e.g., Watson v. Jones*, 80 U.S. 679, 728–29, 13 Wall. 679, 20 L. Ed. 666 (1871); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n*, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012) ("a matter 'strictly ecclesiastical' . . . is the church's alone"). State intrusion into religious affairs "violates [the] rule of separation between church and state." *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 110, 73 S. Ct. 143, 97 L. Ed. 120 (1952). Courts therefore cannot "engage in the forbidden process of interpreting and weighing church doctrine." *Presbyterian Church v. Mary Elizabeth Blue*

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[18] Though Ramtha's School of Enlightenment is a for-profit school that does not hold itself out as a church or organized religion, the foundation of its teachings is spiritual and centers around belief in the teachings of Ramtha, a 35,000 year old warrior spirit channeled by Knight. "Where an individual's beliefs are 'arguably religious,' the court will recognize and consider them for purposes of constitutional analysis." *State v. Balzer*, 91 Wn. App. 44, 54, 954 P.2d 931 (1998) (citing *Int'l Soc'y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 439 (2d Cir. 1981)).

Hull Mem'l Presbyterian Church, 393 U.S. 440, 451, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969).

In *United States v. Ballard*, a mail fraud case, the Supreme Court held that courts are prohibited from judging the truth or falsity of religious beliefs. 322 U.S. 78, 64 S. Ct. 882, 886, 88 L. Ed. 1148 (1944). There, "[t]he charge was that certain designated corporations were formed, literature distributed and sold, funds solicited, and memberships in the I Am movement sought 'by means of false and fraudulent representations, pretenses and promises.'" *Id.* Notably, the allegedly false representations centered on the defendants' claims that they were "divine messengers" who could channel the voices of their deities. *Id.*

The Court explained that it would be constitutionally impermissible for a finder of fact to sit in judgment of the religious beliefs of another:

> [W]e do not agree that the truth or verity of respondents' religious doctrines or beliefs should have been submitted to the jury. Whatever this particular indictment might require, the First Amendment precludes such a course, as the United States seems to concede. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.

Id. at 86 (internal quotation marks omitted). The defendants' beliefs were entitled to the same constitutional respect as more common faiths.

> The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury

> charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.

Id. at 87. Washington's Supreme Court has echoed *Ballard*, noting that "[c]ourts 'have nothing to do with determining the reasonableness of [a] belief.'" *Backlund v. Bd. of Comm'rs of King Cnty. Hosp. Dist. 2*, 106 Wn.2d, 632, 640, 724 P.2d 981 (1986) (quoting *State ex rel. Bolling v. Superior Court*, 16 Wn.2d 373, 384, 133 P.2d 803 (1943)). "The court will not inquire further into the truth or reasonableness of the individual's convictions." *Id.*

Ballard controls. The facts are analogous. It is central to Respondent's beliefs that Ramtha is a master teacher and that his message is delivered through a human channel, JZ Knight. CP 122. The questions upon which Ramtha teaches encompass the ultimate nature of the human spirit. *Id.* Those beliefs are not subject to judicial challenge.

Coverdale's constitutional arguments were not raised in her two-page opposition below, CP 523–24, and are inadequately developed on appeal. Though she contends there is an "open question" about religious protections, Br. of App. at 50, Coverdale provides little more. Appellate courts do not consider constitutional issues "unsupported by sufficient argument." *In re Pers. Restraint of Erickson*, 146 Wn. App. 576, 588, 191

P.3d 917 (2008) (citing RAP 10.3(a)(5)); *see also State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (declining review of constitutional issues unsupported by reasoned argument); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (declining to consider argument where not supported by reference to the record or citation to authority); *In re Request of Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) ("[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion").[19] Applying *Ballard*, the trial court properly dismissed Coverdale's defense/counterclaim of fraud and misrepresentation.

2. Coverdale cannot prove that she was induced to sign the CoP; she witnessed no "misrepresentations" before attending RSE.

To the extent Coverdale contends that she was fraudulently induced to sign the CoP based on representations of RSE's beliefs, the argument

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[19] Without analysis, Coverdale cites *Ockletree v. Franciscan Health System*, 179 Wn.2d 769, 317 P.3d 1009 (2014) and *Burwell v. Hobby Lobby*, ___ U.S. ___, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (June 30, 2014). Br. of App. at 50. Neither case is applicable. In *Ockletree*, Washington's Supreme Court decided that the religious exemption to the Washington Law Against Discrimination did not apply to job positions unrelated to religious functions. The Court was not presented with a nondisclosure agreement designed to protect the value of materials and information of any kind. At issue in *Hobby Lobby* was whether, under the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq.* ("RFRA"), private for profit corporations could refuse to provide birth control to employees otherwise entitled to receive it by federal law. 131 S. Ct. at 2759. Though RFRA was neither raised nor argued in the instant case, it is notable that the U.S. Supreme Court held that for-profit corporations are "persons" that may perpetuate religious values. *Id.* at 2769–70.

fails for the same reason as her counterclaim. While Coverdale quibbles over the elements of a fraud claim versus an affirmative defense, the test she asserts still requires a fact finder to determine the truth or falsity of one's beliefs, as prohibited by *Ballard.*

Coverdale also failed to establish any conduct she relied upon in signing either the 2006 or 2007 CoP. She acknowledged that before she attended in 2006, she had never spoken with anyone at RSE, including JZ Knight. CP 1580. Any assertion that Coverdale relied on representations of scientific studies also fails. As noted below, Coverdale referenced unauthenticated and undated RSE publications. *See* CP 1653. Even so, these materials tracked the words of the scientists themselves. *Id.*; CP 1590. Most importantly, Coverdale *never* declared that she either saw or relied on any of these materials in deciding to attend RSE. *See* CP 1653. Coverdale could not have been induced to sign the CoP by conversations she never had and materials she never saw prior to attending RSE.

F. Coverdale was not unduly influenced to sign the CoP.

Coverdale was not unduly influenced to sign the CoP. Again, this affirmative defense was not pleaded, CP 325–26, asserted in a CR 12(b)(6) motion, or tried by express or implied consent. It was first raised in opposition to summary judgment, CP 1550–51. The defense was waived and was not properly before the trial court. *See* discussion, *supra.*

Even if not waived, Coverdale's arguments fail. At the outset, she could not have been unduly influenced to sign the 2006 CoP because she did not have *any* relationship with *anyone* at JZK, Inc. before doing so. CP 1550. Even so, the very authority upon which she relies provides:

> It is not enough that a person is susceptible to undue influence as a result of a confidential relationship. It is also not enough that influence is exerted upon that person. Persuasion is unfair (or influence is undue) only when it overcomes the will of another such that her own free agency is destroyed. Undue influence must be proved by evidence that is clear, cogent, and convincing.

Ferguson v. Jeanes, 27 Wn. App. 558, 563, 619 P.2d 369 (1980) (internal citations omitted). A confidential relationship may exist if the nature of the relationship between the parties has historically been considered fiduciary in character—*e.g.*, trustee and beneficiary, principle and agent, partner and partner, husband and wife, physician and patient ,or attorney and client. *McCutcheon v. Brownfield*, 2 Wn. App. 348, 356-57, 467 P.2d 868 (1970).

In *Ferguson*, the court found undue influence existed when the plaintiff fell in love with a Christian Science healer who treated her several times a week during their relationship. 27 Wn. App. at 560. Ferguson testified that she trusted Jeanes because of their romantic relationship and his role as a healer. *Id.* Moreover, Jeanes took an active role in Ferguson's decision to include him in the contract at issue. When she declined, he became angry and told her that she was ungrateful for all

that he had done for her. He stated that her refusal violated the tenets of Christian Science and told her that she was financially, intellectually and emotionally incapable of purchasing and operating the venture alone. *Id.*

In stark contrast here, Coverdale presented no evidence of any such confidential relationship with anyone at JZK, Inc., including JZ Knight, because none existed. When Coverdale signed the 2006 CoP, she was skeptical of RSE and of Ramtha, CP 1132–33, but did not consult with anyone at RSE. She stood in line, registered, and attended. CP 913–15, 918–20.

Even if there was a confidential relationship, an undue influence claim "must include more than merely the presumption that can arise from a confidential relationship." *In re Estates of Jones*, 170 Wn. App. 594, 609, 287 P.3d 610 (2012). Yet that is all that Coverdale offers. *See* Br. of App. at 48 (conclusory statement that "there is at least an issue of fact").

The trial court properly rejected Coverdale's unpled and unsubstantiated affirmative defense of undue influence.

G. JZK, Inc.'s reply brief and supporting materials rebutting Coverdale's opposition to summary judgment were timely.

The Civil Rule governing summary judgment expressly provides that reply materials be submitted "5 calendar days prior to the hearing." CR 56(c). It goes on to state: "If the date for [the reply] falls on a Saturday,

Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday." *Id.* Here, JZK, Inc. noted its summary judgment motion for a Friday. CP 1706. Sunday is five calendar days before Friday. *See* CP 1718. JZK, Inc. therefore timely filed its reply materials (before noon) on Monday, CP 1711, "the next day nearer the hearing." CR 56(c).

"In the event of a conflict between CR 6 (Time) and CR 56, the drafters intended that the specialized provisions in CR 56 should control." 4 Karl B. Tegland, *Washington Practice: Rules of Practice* CR 56, at 403 (6th ed. 2013). The reason for the deadlines in Rule 56 was to avoid the implications of Rule 6. *Id.* at 427–28 (citing Drafters' Comment).[20]

Coverdale also takes issue with JZK, Inc.'s inability to *anticipate* the arguments that Coverdale *might* have raised in opposing summary judgment. But as Coverdale acknowledged, Rule 56 requires a movant to present evidence supporting "its claim." CP 1696 at ln. 10 (underlining in

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[20] It is a fundamental maxim of interpretation that a conflict between a general and a specific provision addressing the same subject is resolved in favor of the specific provision. *See, e.g., Knowles v. Holly*, 82 Wn.2d 694, 702, 513 P.2d 18 (1973). Moreover, "[a] court rule must be construed so that no word, clause or sentence is superfluous, void or insignificant." *State v. Raper*, 47 Wn. App. 530, 536, 736 P.2d 680 (1987). Coverdale's reading would render language in CR 56(c) superfluous as a reply could *never* fall due on a Saturday, Sunday, or legal holiday. The provision expressly contemplating a reply deadline falling on a Sunday (and thus being due "not later than the next day ***nearer*** the hearing"), would be meaningless.

original). A reply "is limited to . . . explaining, disproving, or contradicting the adverse party's evidence." CP 1695 at lns. 17–18.

That is precisely what occurred here. JZK, Inc.'s summary judgment motion addressed each necessary element of its contract claim. CP 1000–11. JZK, Inc. had no obligation to guess how Coverdale would oppose the motion. Its 10-page reply, CP 1648–57, was accompanied by evidence "explaining, disproving, or contradicting" Coverdale's defenses—in particular, the unpled defense that Coverdale was unduly influenced or "brainwashed" to sign the CoP. *See* CP 1195 at ¶ 10. This is ordinary motion practice, not an issue for the State Supreme Court.[21]

H. Coverdale was properly found in contempt for blatantly disregarding the trial court's orders.

"Whether contempt is warranted in a particular case is a matter within the sound discretion of the trial court; unless that discretion is abused, it should not be disturbed on appeal." *King v. Dept. of Soc. &*

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[21] Coverdale makes several allegations about discovery production. She fails to inform the Court that on May 15, 2013, the last day to serve discovery, she served JZK, Inc. with 80 interrogatories, 55 requests for production, and 91 requests for admission. *See* CP 2229–2305. The vast majority of these requests were woefully unrelated to the issues in this case as they largely concerned the CPA claim that the trial court had already excluded from the case. *See id.* This discovery had no bearing on the court's summary judgment ruling. Indeed, Coverdale never sought a continuance of the summary judgment hearing pending the trial court's resolution of the JZK, Inc.'s motion for protective order.

Health Servs., 110 Wn.2d 793, 798, 756 P.2d 1303 (1988). That discretion was properly exercised here and the contempt finding should be affirmed.

A brief factual summary of the events leading to the contempt finding is helpful.[22] After entry of judgment, JZK, Inc. obtained a Writ of Execution on September 13, 2013 for Coverdale's vehicle. CP 1905–06. Coverdale moved to quash the writ, arguing that the vehicle's value was below the $3,250 exemption from execution. CP 1912. JZK, Inc. had substantial evidence that the value of Coverdale's vehicle easily exceeded the exemption, anywhere from $3,720 to $8,694. CP 1964–79.

In reply on her motion to quash, Coverdale argued that disagreement as to the value of the vehicle should be resolved through independent appraisals under RCW 6.15.060(4)(b). CP 2015 at ln. 18. She further presented "additional relevant circumstances" surrounding her purchase of the vehicle, CP 2014 at ln. 7, namely, that Coverdale's "personal friend[,]" Chuck Champion, CP 1992, had a security interest in the vehicle. But even though the loan was purportedly made in April of 2010, the proclaimed

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[22] Coverdale's reference to her "Motion to Stay Enforcement of Judgment" for a "complete history" of the contempt action, Br. of App. at 21 n.22, is inconsistent with the appellate rules. *See* RAP 9.1; 10.4(f). That 20-page motion is supported by five affidavits, none of which is included in the record on review.

security agreement and promissory note were not reduced to writing until October 17, 2013, *after* Coverdale learned about the Writ. CP 1994–95.

Though the trial court could have simply had the vehicle seized for appraisal, CP 2176 lns. 21–23, it instead tried to protect Coverdale by suspending the September 13 Writ of Execution so the parties could obtain independent appraisals. CP 2020. Specifically, the court ordered that, "pursuant to RCW 6.15.060(4)(b), the Parties shall each appoint a disinterested" appraiser. *Id.* Any further disagreement as to whether the vehicle's value exceeds $3,250 was to be decided by a third appraiser. *Id.*

JZK, Inc. retained an appraiser who determined the vehicle's fair market value to be $7,391. CP 2037–53. That appraisal was provided to Coverdale's counsel on October 29, 2013. CP 2056 at ln.5. Coverdale did not obtain an independent appraisal as ordered by the court.[23] CP 2118.

On November 6, 2013, without notice to the trial court or JZK, Inc., Coverdale sold the vehicle to a personal friend, Kevin O'Sullivan, for $3,500. CP 2123, 2093–94, 2113. She did so despite knowing that the vehicle had been appraised for more than twice that amount. The

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[23] Coverdale relied on a "Trade Bookout Sheet" from vinsolutions.com, which she had relied on before the court ever ordered appraisals. CP 1999, 2118. As explained by JZK, Inc.'s appraiser, and not rebutted by Coverdale, this is not an "appraisal" of market value but a software-generated, "low ball" wholesale price estimate. CP 2038.

fabricated security agreement with her other friend, Chuck Champion, apparently had no implications on the sale. *See* CP 2123.

The trial court was well within its discretion to find that Coverdale had flouted its orders. "In the 'context of civil contempt, the law presumes that one is capable of performing those actions required by the court . . . [and the] inability to comply is an affirmative defense.'" *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995) (quoting *King*, 110 Wn.2d at 804) (modifications in *Moreman*). A contemnor has "both the burden of production and the burden of persuasion regarding [her] claimed inability to comply with the court's order." *Id.* Such evidence "must be of a kind the court finds credible." *Id.* at 41.

Coverdale's claim—that she could not get a supportive friend, to unwind an improper sale, within a matter of days, to keep her out of contempt—strains credibility and adds nothing to her argument that the trial court abused its discretion. *See* CP 2179 (COURT: "If he [O'Sullivan] chooses to [rescind the transaction] to keep you out of trouble to reduce this, then the vehicle would be sold at auction"). In fact, Coverdale *never* presented *any* evidence of any effort she made to rescind the transaction with O'Sullivan. *See* CP 2207 at lns. 12–16. Similarly, Coverdale's claim that she could not purge the contempt finding because

she had spent all $3,500 is both unsubstantiated in the record, *see* Br. of App. at 56 (uncited assertion), and lacks credibility.[24]

Coverdale's reading of the orders and case law is self-serving. For instance, as the trial court noted, "page 2, line 9 [of the Writ] says, 'The judgment will be partially satisfied out of the following person property of the debtor described as follows.' And that's a court order." CP 2176 at lns. 13–15; *see also* RCW 9A.020 (Obstructing Law Enforcement).

Coverdale's arguments about the order directing the appraisal are equally flawed. First, she did *not* comply with the order to get an appraisal (something she herself had requested). CP 2118, 2038. Second, the argument that the order "said nothing on its face about transfer of the vehicle" is nonsense. The next two paragraphs of the order address what was to occur "in the event the appointed appraisers disagree on whether the vehicle value exceeds the exemptible value ($3,250)[.]" CP 2020. The parties were to appoint a third appraiser. *Id.* Quite obviously, a third appraisal cannot occur (and did not occur) where one party unilaterally gets rid of the vehicle—the equivalent of throwing the ball into the woods.

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[24] Coverdale has a network, including Mr. Champion, that supports her financially. *E.g.* CP 1994–95. JZK, Inc. initially moved for relief just six days after Coverdale's unlawful sale. CP 2055. Below, Coverdale also claimed that she could not return the $3,000 without impeding her proclaimed constitutional right to exempt funds. CP 2154.

Coverdale offers no meritorious argument that the trial judge abused his considerable discretion. The contempt finding should be affirmed.

I. Coverdale makes astonishing requests for relief that an appellate court cannot possibly grant.

Coverdale makes numerous requests for relief that this Court cannot possibly grant. Each should be rejected.

1. This is not a CPA case, Coverdale's subsequent lawsuit has mooted any CPA arguments, and the trial court properly exercised its discretion in rejecting a slew of new counterclaims six weeks before the discovery cutoff.

The vast majority of Coverdale's 14-page "factual" history is consumed by irrelevant smears which she apparently believes support her CPA-based allegations. Not one of these allegations had anything to do with Coverdale's decision to *twice* sign the CoP, nor do they justify her subsequent breach of the CoPs. Rather, the ostensible basis for this distasteful presentation of inaccurate information seems to be Coverdale's argument that the trial court should have allowed her to amend her complaint. Coverdale's arguments are both moot and unsubstantiated.

First, by commencing a new lawsuit against JZK, Inc. during the pendency of this appeal, Br. of App. at 48 n. 60, Coverdale has mooted this Court's consideration of whether her request to amend should have been denied. An appeal is moot if it presents purely academic issues and it is not possible for the court to provide effective relief. *Klickitat Cnty.*

Citizens Against Imp. Waste v. Klickitat Cnty., 122 Wn.2d 619, 631, 860 P.2d 390 (1993). A moot appeal should be dismissed. *Id.*

Here, Coverdale's recently filed lawsuit alleges the following causes of action: defamation, defamation per se, false light, outrage, intentional infliction of emotional distress, "Violation of the Consumer Protection Act"; "misrepresentation and fraud," negligence, and civil conspiracy.[25] Said differently, Coverdale is asking this Court to find that the trial court should have allowed the very same claims that she has recently filed in Thurston County Superior Court to go forward in Thurston County Superior Court. *See* CP 840–44 (proposed amended answer alleging same claims). This is the definition of mootness.[26] Any decision as to whether amendment was properly denied would be purely academic.

Second, even if the question of amendment was not moot, "[t]he disposition of motions to amend the pleadings is discretionary with the trial court, and its refusal to permit such an amendment will not be

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[25] This Court has granted JZK, Inc.'s Request for Judicial Notice (filed Apr. 14, 2014) of the Complaint filed by Coverdale in her subsequent lawsuit, *Coverdale v. Knight*, No. 14-2-00328-2 (Thurston Cnty. Super. Ct.). Ruling (dated Aug. 5, 2014).

[26] Curiously, Coverdale appears to acknowledge that claims asserted in her new lawsuit have no place in the instant appeal. Br. of App. at 48 n. 60 ("claims related to . . . defamation claims . . . are not included herein, as Coverdale has filed separate litigation on the defamation and related claims").

overturned except for manifest abuse of discretion." *Ensley v. Mollman*, 155 Wn. App. 744, 759, 230 P.3d 599 (2010).

Here, Coverdale does not actually argue that that the trial court abused its discretion, nor could she. The trial court denied her motion to amend six weeks before the discovery cutoff (agreed to by the parties), and ten weeks before the trial date. *See* CP 826. The trial court, aware of complexity and contentiousness of this case, was well within its discretion not to expand the case's scope any further.

2. Appellate courts cannot make class certification determinations, in a case without class allegations, for a hypothetical lawsuit, with no identified plaintiffs.

Coverdale's request for this Court to make class action certification determinations must fail. Br. of App. at 33–35. Again, this is not a CPA case. Even Coverdale's *proposed* amended counterclaims make no mention of a Rule 23 class action. CP 837–45. Coverdale acknowledges that she would not be a class representative in this hypothetical class action. Br. of App. at 35. Advisory opinions are exceedingly rare, only pertinent to questions of "great public interest," and even then must be "adequately briefed and argued." *Matter of Deming*, 108 Wn.2d 82, 123, 736 P.2d 639 (1987). Coverdale offers nothing to explain why this appellate court should find just two of the many class certification factors satisfied for a hypothetical lawsuit involving unknown plaintiffs.

3. Appellate courts cannot preemptively pierce a corporate veil based on speculation.

Without basis, Coverdale appears determined to pursue Ms. Knight personally. Once again, the law does not support her effort.

"For a court to pierce the corporate veil, 'two separate, essential factors must be established.'" *Columbia Asset Recovery Grp., LLC v. Kelly*, 177 Wn. App. 475, 486, 312 P.3d 687 (2013) (quoting *Dickens v. Alliance Analytical Labs., LLC,* 127 Wn. App. 433, 440, 111 P.3d 889 (2005)). "First, the corporate form must be intentionally used to violate or evade a duty. Second, the fact finder must establish that disregarding the corporate veil is necessary and required to prevent an unjustified loss to the injured party." *Id.* (internal quotation marks omitted). "Before the *trial court* may pierce the corporate veil, it must find that piercing is necessary to prevent an unjustified loss . . . ." *Id.* at 487 (emphasis added).

Here, Coverdale identifies no violation of the corporate form or duty breached by Knight—a non-party to this action.[27] Nor does she identify an unjustified loss. She merely speculates, based on her unsupported opinion, that such loss may be suffered in the future. This is not sufficient.

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[27] To the extent Coverdale maintains that JZ Knight was an indispensable party, JZK, Inc. incorporates by reference the analysis of Commissioner Eric Schmidt in this Court's February 28, 2013 Ruling Denying Discretionary Review. CP 555–62.

J. JZK, Inc. should be awarded its attorneys' fees under the contract and because the appeal is frivolous.

Attorneys' fees are available when authorized by contract. *Niccum v. Enquist*, 175 Wn.2d 441, 446, 286 P.3d 966 (2012). "If fees are allowable at trial, the prevailing party may recover fees on appeal as well." *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001). The Conditions contain an attorney fee provision. CP 947. Coverdale does not assign error to the trial court's award of fees. *See* CP 1891–97. JZK, Inc. is entitled to an award of fees and costs on appeal. RAP 18.1.

In addition, RAP 18.9 authorizes compensatory damages against a party or counsel who files a frivolous appeal. "An appeal is frivolous if the appellate court is convinced that the appeal presents no debatable issues upon which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal." *In re Marriage of Foley*, 84 Wn. App. 839, 847, 930 P.2d 929 (1997). Examples of frivolous appeals include:

- "Failing to cite applicable authority in support of arguments in the brief;"
- "Appeal of purely discretionary rulings simply because the appellant disagrees with them, without making a debatable showing of abuse of discretion[;]"
- "Appeals based solely on issues which have not been raised below or properly preserved for appeal[.]"

WSBA, *Appellate Practice Deskbook* § 26.3(1) (3d ed. 2005).

Here, Coverdale's reliance on *McKee*, which is limited on its face to secret *arbitration* clauses, is frivolous. So too is her tactical disregard of the plain CoP language that she not assist others in disseminating JZK, Inc.'s materials. The same is true of her challenge of entirely discretionary rulings such as the trial court's refusal to allow new counterclaims weeks before the discovery cutoff and its decision finding Coverdale in contempt. And Coverdale's requests for things like preemptive veil piercing, review of issues mooted by her own subsequent lawsuit, review of clear procedural filing deadlines, even hypothetical Rule 23 class certification are all frivolous as well. This is to say nothing of Coverdale's *repeated* violations of appellate procedural rules, including violation of a direct order from the Commissioner of the Supreme Court *not* to include the very materials that Coverdale included in an "Appendix" to an earlier version of her opening brief.[28]

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[28] JZK, Inc. filed multiple motions with the Supreme Court to address Coverdale's improper attempts to draw attention to extraneous matters that are not part of the record on review. Despite repeated orders from the appellate courts, Coverdale continues make assertions unsupported by the record.

JZK, Inc. first moved the Supreme Court to exclude a videotape of a summary judgment hearing below, filmed by a third-party videographer. Mot. to Exclude (filed Sept. 26, 2013). As argued in that motion, Coverdale was attempting to circumvent the trial court's ruling—that a PowerPoint presentation was not considered at summary judgment—by submitting a video depicting the PowerPoint to the appellate court. Coverdale responded with a countermotion under RAP 9.13 for inclusion of the PowerPoint slides and the video in the record, arguing that the video was (somehow)

Coverdale has presented no debatable issues or legitimate arguments for the extension of the law and her appeal is frivolous. The appeal is both unfounded and an abuse of the legal system. This Court should award attorneys' fees pursuant to RAP 18.9 as well.

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relevant to show anti-gay bias on the part of the trial judge. Resp. to Mot. to Exclude at 5:12–16; 6:16–20. A Supreme Court Commissioner, finding that "JZK's motion clearly has merit[,]" granted JZK, Inc.'s motion and denied Coverdale's countermotion. Ruling (filed Oct. 23, 2013). As a result, this Court must disregard CP 1746–1816.

Despite the clarity of that ruling, Coverdale included an "appendix" to an earlier iteration of her opening brief that included the very same PowerPoint slides that the Commissioner had excluded. 2nd Br. of App. (filed Mar. 14, 2014). JZK, Inc. moved to strike these materials. Mot. to Strike Appendix (filed Apr. 14, 2014). Coverdale responded by *again* moving under RAP 9.13 for inclusion of the excluded materials into the record, this time mischaracterizing the trial court's rulings. Resp. to Mot. to Strike Appendices (filed Apr. 30, 2014). Following transfer from the Supreme Court, Commissioner Schmidt directed Coverdale to file an amended brief "omitting the appendices, [and] any reference to the appendices." Ruling (filed Aug. 5, 2014).

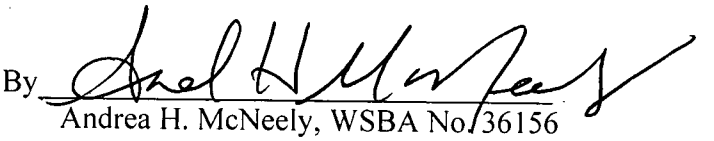
Though the materials at issue have *thrice* been excluded from the record—once by the Supreme Court, once by the Court of Appeals, and once by the Superior Court—Coverdale remains defiant in her effort to put irrelevant materials before the Court. In its briefing on the motion to strike the appendix, JZK, Inc. noted: "Coverdale's suggestion that she may merely cite to other portions of the record in support her arguments is difficult to square with the fact that she forced the appendix materials before the Court in the first place. Any new citations to the record would undoubtedly be quite imaginative." Reply Re Mot. to Strike Appendix (filed May 9, 2014) at 9.

This prediction has proved accurate. While Coverdale has removed citation to the appendix from her amended brief, she has done so by citing portions of the record that do not actually support her factual allegations, which remain largely unchanged. For instance, Coverdale avoids citing the appendix by citing to her oral *argument* below regarding the PowerPoint presentation. *See* Br. of App. at 6 (citing June 28, 2013 VRP); 8 (same); 19 (same); 28 (same); 46 (same). The argument of counsel is not evidence and this is just another attempt to circumvent the Court's orders.

IV. CONCLUSION

Virginia Coverdale was free to go on criticizing JZK, Inc., RSE, and JZ Knight to whomever would listen, just as she had been doing for some time. But she agreed in writing not to disseminate JZK, Inc.'s materials or help others to do so—twice. Despite that promise, Coverdale posted JZK, Inc.'s materials, which she had edited, online. She was informed that she had done so in violation of her agreements and was asked to take those materials down. She refused. The trial court properly held her accountable for her own knowing decision to violate her contractual agreements and its decision should be affirmed.

Respectfully submitted this 13th day of November, 2014.

By 

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CERTIFICATE OF SERVICE

I certify that I emailed, or caused to be emailed, a copy of the foregoing Amended Brief of Respondent via email on the 13th day of November, 2014 to counsel of record for Defendant at the following address and email address:

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