74511-5

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NO. 74511-5-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

ALLYIS, INC.

Appellant,

v.

SIMPLICITY CONSULTING INCORPORATED,

Respondent,

and

JEREMY AND NICOLE SCHRODER,

Defendants

Reply **BRIEF OF APPELLANT**

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I. INTRODUCTION

An award of $60,000 of sanctions is a momentous decision. Parties seeking such an award should identify in detail the conduct being sanctioned and the basis for imposing it. Simplicity filed a seven page motion arguing only that the unjust enrichment claim was legally flawed, and that argument has been thoroughly disproven.

Courts considering such requests should be skeptical of them and mindful of the findings that are required. They should give counsel a full and fair opportunity to explain himself. Judge Hill signed the proposed order despite the fact that it lacked the required findings and was based on an erroneous legal argument about unjust enrichment.

When this was pointed out, Judge Hill tried to fill the holes in her order, but she had nothing to fill them with. She could not make the required findings because evidence to support them was nowhere to be found in the record. The record contained no evidence not because of omission, but because the required findings simply were not true.

All of this was laid out in the Brief of Appellants. Simplicity never responds to the arguments in Allyis' brief, but instead makes a series of new arguments and cites its own attorney as its primary authority. The original basis for the motion is all but abandoned in favor of amorphous claims about the conduct of counsel "throughout this litigation."

All of this took place in the context of Simplicity's outright admission of the core fact in the case.

> Q. To your knowledge, did Mr. Schroder while he was employed by Simplicity contact the people that he worked with at Allyis for the purpose of recruiting them to Simplicity?
> A. Yes.
> Q. And were you aware of that when it happened?
> A. In one instance, yes.

CP 469. One might expect that a judge would address this admission in the context of considering whether a claim was frivolous, but Judge Hill never even acknowledged it.

The award of sanctions was erroneous as a matter of law. There is no need to remand for further findings or consideration because there is no evidence to consider or from which to make findings. The Court should end this now.

II. FACTS

The core facts presented by Simplicity are all either completely untrue or misleading to the point where they can fairly be called misrepresentations. To the extent that the factual allegations have any validity at all, they do not pertain the motion for fees or the trial court's decision on that motion.

A. The Handbook Disclaimer Does Not Affect the Noncompete Agreement.

At page 6 of its brief, Simplicity asserts that the "Employee Handbook in which the purported agreements were contained also contained an express disclaimer that the contents of the handbook 'do[] not establish any . . . contract with, employees.'" The disclaimer states:

> I also understand that the information contained in the employee handbook is intended to be an overview as to the practices and procedures of Essential Design, and does not establish any employment rights of, or contract with, employees.

CP 459. Simplicity apparently is arguing that an employee handbook may not contain a copy of the employment agreement that the employer uses. It likewise argues that if the parties remove from the handbook a page that contains an express agreement, and then sign that agreement, the disclaimer set forth on an entirely different page of the handbook invalidates the agreement.

Allyis has never claimed that "the information contained in the employee contract" was its agreement with Schroder. It instead claims that the signed agreement that was on a form contained in the handbook is a contract. This has never been an action to enforce the handbook.

B. Allyis Provided Evidence to Support Consideration for the Noncompete Agreement.

Simplicity claims that "at no time during the underlying litigation did Allyis produce any evidence that EWD provided Schroder any consideration at the time he signed the handbook documents." Brief at 6. Schroder was hired in 2002 and resigned in 2014. CP 451-52. Over his twelve years of employment, he was promoted from an entry level position to management. CP 4 at ¶ 3.9. Continued employment coupled with promotions can provide consideration for a noncompete agreement signed after employment commences. *Knight, Vale & Gregory v. McDaniel*, 37 Wn. App. 366, 368, 680 P.2d 448, 451 (1984). Similarly, training while employed can provide consideration. *Wood v. May*, 73 Wn.2d 307, 310, 438 P.2d 587, 589 (1968). "Examples of independent consideration for a noncompete restriction include increased wages, a promotion, a bonus, or access to protected information." *McKasson v. Johnson*, 178 Wn. App. 422, 428, 315 P.3d 1138, 1142 (2013). Simplicity may dispute the adequacy of Schroder's promotions and training, but that it cannot dispute that Allyis has relevant evidence.

C. Allyis Produced Evidence to Simplicity.

Allyis repeatedly asserts that Allyis never produced any documents or information, and that "The only "evidence" Allyis ever produced in over 10 months of litigation was the Verified Complaint it filed on September 22, 2014." Brief at 7. On March 20, 2015, Allyis provided Simplicity with a

list of its employees who had left during the relevant time. CP 352-54. Simplicity ignores the fact that it refused to produce its own documents in response to Allyis's discovery requests. CP 45-46. Allyis responded by contacting counsel for Simplicity to propose ways to address the concerns of both parties about sharing sensitive information with a competitor. CP 361-62. In an effort to resolve the dispute, Davis offered to limit discovery to the employees it had identified on May 11, 2015 (CP 359) and again on July 24, 2015 (CP 372).

D. Schroder Recruited Allyis Employees for Simplicity.

Simplicity claims that Schroder "was not responsible for developing new business or recruiting persons to join Simplicity." Brief at 8. It adamantly claims that Schroder would never under any circumstances solicit or recruit Allyis employees. The problem is that Simplicity testified in its CR 30(b)(6) deposition that he did just that.

> Q. To your knowledge, did Mr. Schroder while he was employed by Simplicity contact the people that he worked with at Allyis for the purpose of recruiting them to Simplicity?
> A. Yes.
> Q. And were you aware of that when it happened?
> A. In one instance, yes.

CP 469. Although the witness later tried to backtrack and explain away her answer, both the question and the answer are clear and unequivocal. Simplicity can try to explain away its answer however it wants, but it cannot argue that a claim based on its own testimony is frivolous.

E. Simplicity and Allyis Are Competitors.

Simplicity claims that "Simplicity and Allyis are not competitors" because "Simplicity is a consulting firm that provides marketing talent to a wide range of successful companies in the technology, retail, insurance, and financial industries, among others. (CP 147) In contrast, Allyis is an

Information Technology ("IT") consulting firm that primarily provides software-engineering, content-management, and business-intelligence services to its clients. *Id.*" Brief at 9. According to Simplicity, it provides marketing talent to technology companies, while Allyis provides business-intelligence services. How that makes the two not competitors is never explained. If the companies were not involved in the same business, then Schroder would not have recruited an Allyis employee to join Simplicity. CP 469.

F. <u>Simplicity's Assertions Are Neither Evidence nor Authority</u>.

Simplicity seems to think that the statements of its attorney calling Allyis' claims frivolous have some significance.

> On numerous occasions, Simplicity attempted to explain to Allyis in detail why Allyis' claims against it had no basis in fact or law and suggested that it focus on pursuing its claims against Simplicity's then-former employer Schroder.

Brief at 9. In its original motion, Simplicity cited its own statements as the authority for its position. CP 322. It does the same in its Brief. Brief at 34 ("This finding is supported by multiple email communications between James and Davis in which James explains that Allyis' asserted claims had no merit under well-established Washington law."). What Simplicity fails to acknowledge is that James' assertions were met with lengthy and considered discussion and authorities to support the claims, most of which went unanswered. CP 340-41 Counsel for Allyis has always responded to criticisms of the case with detailed responses that expressed a willingness to consider contrary arguments. CP 340-41 (December 17, 2014 email concerning consideration); CP 338-39 (January 29, 2015 email regarding frivolous assertion); CP 336-338) (February 2015 back and forth discussing merits of claims).

G. Allyis Did Not Concede That the Original Claims Lacked Merit.

Once again Simplicity simply ignores the evidence and makes up facts when it asserts that Allyis "implicitly" conceded that Judge Hill acted properly in dismissing Allyis's claims with prejudice by not appealing it and "implicitly" conceded that its original claims lacked merit when it replaced them with the unjust enrichment claim. Brief at 4, 24. Every time that Simplicity lacks evidence, it just says that

On March 2, 2015, Davis sent an email to counsel for Simplicity and Schroder with the draft Amended Complaint and an explanation.

> Attached is a proposed Amended Complaint. Please let me know if you will stipulate to my filing it. As you can see, it would eliminate many of the claims alleged in the action and reduce this case to a matter of the enforceability of the noncompete and an unjust enrichment claim. If nothing else, it would focus our discussions.
>
> I remain convinced that this case could be resolved on relatively painless terms if we could just have that discussion. In that regard, I would welcome any substantive discussion of the allegations, but so far I have not seen any dispute with the underlying notion that Shroder left Allyis with the intention of soliciting its people to do the same work under Simplicity.
>
> This case is not going to just go away, but it can be resolved quickly and economically

CP 346-47. Simplicity does not have to accept the explanation given for the amendment, but its complete disregard of the communications between counsel paints an inaccurate picture.

H. The Discovery Motions and Orders Are Not Relevant.

Simplicity spends a great part of its Brief rehashing its perspective of the discovery disputes even though it acknowledges that "the trial court included its July 17, 2015 and August 14, 2015 sanction awards in the October 16, 2015 order, ruling that the new order superseded the prior sanction orders". Brief at 17. Because those orders have been superseded,

they no longer exist, and they cannot be used as the basis for action in this appeal. Simplicity and the Court can only rely on the Order Denying Reconsideration and Amending Order. CP 518-24.

In that regard, Simplicity also is trying to raise an entirely new issue that was never briefed or argued. The discovery disputes were not a basis for the motion for fees (CP 319-26), nor were they mentioned in either the original order on fees (CP 478-82) or the Amended Order (CP 518-24). Moreover, Simplicity now requests sanctions for discovery under RCW 4.84.185 and CR 11 instead of the discovery rules, which is wholly improper. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339–40, 858 P.2d 1054, 1076 (1993).

I. Allyis' Settlement Offer Was Not "Blackmail."

Allyis offered to dismiss its case with prejudice if Simplicity would waive the discovery sanctions awarded by the trial court. Simplicity calls that "blackmail," but it never responds to the simple fact that parties generally are entitled to a dismissal without prejudice before they rest their case at trial under CR 41(a)(1)(B). *Paulson v. Wahl*, 10 Wn. App. 53, 57, 516 P.2d 514, 516 (1973). Simplicity's characterization of a simple settlement offer as blackmail is nothing more than posturing. Parties are free to make settlement offers on any terms that they choose.

J. "Conduct Throughout This Litigation" Is Not an Issue.

Simplicity claims that the trial court based its decision on "Allyis' and Davis' conduct throughout the lawsuit—including their refusal to engage in discovery, their contempt of court and their threat to exploit voluntary dismissal as a weapon to continue harassing Simplicity." Brief at 19. The Amended Order does make a number of references to "conduct throughout

this litigation" (CP 520, 521, 523), but it contains no findings about specific conduct. The order simply makes sweeping statements with no explanation or details.

VI. ARGUMENT

Simplicity's argument is as dishonest as its factual statements. Instead of presenting authorities to supports its assertions, Simplicity just says what it pleases.

A. Questions of Law Are Reviewed *de novo*.

On page 21 of its brief, Simplicity makes the remarkable assertion that in an appeal of sanctions, this Court applies an abuse of discretion standard to "the trial court's legal conclusions upon which it bases such awards." Simplicity chastises Allyis for arguing that the court reviews legal conclusions *de novo* in any context.

Contrary to Simplicity's assertion, a trial court's legal determinations are questions of law and always reviewed *de novo*.

> "All questions of law are reviewed de novo." *Berger v. Sonneland,* 144 Wash.2d 91, 103, 26 P.3d 257 (2001). It is our duty to correctly apply the law and we are not confined by the legal issues and theories that the parties argued. *King County v. Boundary Review Bd.,* 122 Wash.2d 648, 670, 860 P.2d 1024 (1993) (applying *Maynard Inv. Co. v. McCann,* 77 Wash.2d 616, 623, 465 P.2d 657 (1970)).

Bainbridge Citizens United v. Washington State Dep't of Nat. Res., 147 Wn. App. 365, 371, 198 P.3d 1033, 1036 (2008); *Auto. United Trades Org. v. State*, 175 Wn.2d 214, 222, 285 P.3d 52, 55 (2012) ("We review a trial court's decision under CR 19 for an abuse of discretion and review any legal determinations necessary to that decision de novo.").

Moreover, Simplicity ignores the fact that a trial court necessarily abuses its discretion when it applies the wrong legal standard to a discretionary decision, and that question is reviewed *de novo*.

> A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Mayer v. Sto Indus., Inc.,* 156 Wash.2d 677, 684, 132 P.3d 115 (2006). An abuse of discretion is found if the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Id.* The underlying questions of law we review de novo. *Id.*

State v. Lord, 161 Wn.2d 276, 283–84, 165 P.3d 1251, 1256 (2007). The abuse of discretion standard of review includes a *de novo* component.

B. The Trial Court Had No Grounds to Impose Sanctions.

Simplicity asserts that "Allyis fails to show that the trial court's decision to award attorney's fees to Simplicity under either RCW 4.84.185 or CR 11 was 'manifestly unreasonable or based on untenable grounds or reasons.'" Brief at 22. To the contrary, Allyis has demonstrated that the trial court had no basis whatsoever to make its findings.

Allyis never actually identifies any evidence that was before the trial court. Instead, it cites the trial court's findings and its own assertions as the evidence to support the trial court's findings in an endless loop of empty statements.

1. The Original Claims.

The "evidence" that Simplicity cites as proof that the original claims were frivolous has a few common features. First, none of it was mentioned in the motion for fees. Second, none of it concerns the unjust enrichment claim, which was the only argument in that motion. Third, most of it is demonstrably untrue. And fourth, none of it is evidence that the claims were frivolous.

Allyis asserts that the four original claims were frivolous because the noncompete agreement was taken from an employee handbook that was not part of the contract. Brief at 23. Whether a writing is a contract depends not on where it came from, but instead on whether it evidences the parties'

intention to be bound by its terms. His Court addressed almost the same question in *Alaska Indep. Fishermen's Mktg. Ass'n v. New England Fish Co.*, 15 Wn. App. 154, 159, 548 P.2d 348, 352 (1976) and held that when parties signed an agreement on a single page removed from a form contract, the other terms of the form contract were not incorporated by reference.

> We reject AIFMA's contention that the signed, single-page agreement between AIFMA and NEFCO, consisting of one page removed from a WACMA form agreement, incorporates by reference the terms of that document. The fact that the parties removed only one page from the form agreement, instead of adopting the entire agreement, supports an inference contrary to AIFMA's position.

The noncompete agreement stands on its own.

Allyis next asserts that there is "no evidence that Simplicity, through Schroder, solicited Allyis' clients." Brief at 23. That would be a true statement if one pretended that Simplicity's CR 30(b)(6) representative did not testify as she did in her deposition.

> Q. To your knowledge, did Mr. Schroder while he was employed by Simplicity contact the people that he worked with at Allyis for the purpose of recruiting them to Simplicity?
> A. Yes.
> Q. And were you aware of that when it happened?
> A. In one instance, yes.

CP 469. It is a fact that Schroder contacted at least one person at Allyis to recruit them to Simplicity. It also is a fact that Simplicity made no mention of this argument in its motion for fees. CP 319-25.

Simplicity claims that it is not a competitor with Allyis. Brief at 23. As proof of that assertion, Simplicity cites the CR 30(b)(6) deposition of Simplicity, at which its representative testified, "I also didn't view Allyis as a competitor so I took a look at it and didn't believe that it was valid." CP 466. Elsewhere in its brief, Simplicity explains this argument by saying, "Simplicity has never done business with Allyis or had any contact with

Allyis, other than as a result of this lawsuit." Brief at 9. Competitors are simply people or companies in the same line of business, not people who interact with each other.

Lastly, Simplicity argues that Allyis' dismissal of the original claims and its assertion of an unjust enrichment claim implicitly conceded that its original claims lacked merit. Brief at 24. Taking that at face value, the number of parties and attorneys subject to sanctions is staggering beyond belief. Every voluntary nonsuit would be an implicit admission that the claim being dismissed was frivolous.

These arguments comprise the sum total of Simplicity's arguments that the original claims were frivolous. It cannot escape the Court's attention that Simplicity never discusses the elements of the claims, never responds to the authorities set forth in the Brief of Appellant about each of the claims, and never actually provides a single reason why any of the claims were frivolous.

2. The Unjust Enrichment Claim Was Not Frivolous.

Simplicity's continued insistence that the plaintiff must confer a benefit directly on the defendant to state a claim for unjust enrichment feels like the legal equivalent of a Monty Python skit. No matter how many times Allyis disproves this assertion, Simplicity just keeps returning the same wrong arguments.

In its Brief, Simplicity cites *Young v. Young*, 164 Wn.2d 477, 191 P.3d 1258 (2007) for the proposition that

> To state a claim for unjust enrichment, a party must prove three elements: (1) a benefit conferred upon the defendant by the plaintiff; (2) knowledge by the defendant of the benefit; and (3) acceptance or retention of the benefit under such circumstances that it would be inequitable for the defendant to retain the benefit without payment of its value.

Brief at 24. Simplicity's citation is misleading because it is not citing the words of the *Young* court. Instead is citing the *Young* court quoting a court of appeals decision, which in turn was quoting Black's Law Dictionary.

Simplicity citation is also misleading because in the very next sentence of its opinion, the *Young* court did state the elements of unjust enrichment in its own words.

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

Young v. Young, 164 Wn.2d 477, 484–85, 191 P.3d 1258, 1262 (2008). Moreover, when the *Young* court actually applied the law the case at hand, it used its own formulation and not Black's Law Dictionary.

> After reviewing the trial court's findings of fact and conclusions of law, we find it is unclear whether there was a contract implied in fact or a contract implied in law. Clearly Judith received a benefit at the plaintiff's expense and the circumstances make it unjust for her to retain that benefit without payment. Equally clear, however, is Judith's request for the work, Jim's reasonable expectation of payment for the work, and Judith's knowledge that Jim expected compensation.

Young v. Young, 164 Wn.2d 477, 486, 191 P.3d 1258, 1263 (2008).

Before the trial court, Simplicity's response to this point was that the Supreme Court was just clarifying the law.

> When the Court restated the elements differently just a few lines later in its decision, it did not disavow the standard, common-law elements it had just set forth. Rather, the Court's use of the phrase "in other words" shows that it intended only to further clarify the actual elements, not replace them. CP 502. Simplicity did not explain how stating an element differently could "clarify" it.

CP 502. In other words, Simplicity argued that the Supreme Court clarified the elements of unjust enrichment by mis-stating them. In its Brief, Simplicity just ignores the issue altogether. Simplicity never even acknowledges the *Young* court's statement of the elements.

Simplicity instead now claims that "opinions by the Court of Appeals of the State of Washington have clarified this element in the time since *Young* was decided," which is a new and completely different argument than it has ever made before. Brief at 25. It also is completely wrong. Simplicity presumably reviewed the cases that have cited *Young* since it was decided. It cites two of those opinions as proof that the courts of appeal have settled on the requirement that the plaintiff confer the benefit on the defendant.

Simplicity inexplicably omits one of the opinions citing *Young*, which is all the more inexplicable because it was a decision by this very court. In

> Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it." *Young v. Young,* 164 Wash.2d 477, 484, 191 P.3d 1258 (2008). A claim of unjust enrichment requires proof of three elements—"(1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment." *Young,* 164 Wash.2d at 484–85, 191 P.3d 1258. All three elements must be established for unjust enrichment. *See Young,* 164 Wash.2d at 484, 191 P.3d 1258.

Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 490, 254 P.3d 835, 844 (2011). The claim that courts have consistently required the plaintiff to confer the benefit is just wrong.

It also is notable that the other decision by this court that Simplicity cites was reviewed by the Supreme Court. *Nat'l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 297 P.3d 688 (2013). The Supreme Court's decision was made on a 5-4 vote. The majority opinion did not identify the elements of unjust enrichment, but the dissenting opinion did.

> Turning to the mechanics of the claim itself, in order to establish an unjust enrichment claim, the plaintiff must demonstrate that "(1) the defendant receive[d] a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment." *Young,* 164 Wash.2d at 484–85, 191 P.3d 1258. As a result of the

> majority's opinion, Immunex will receive the benefit of payment for its defense costs at National Surety's expense. Thus, the first two elements of National Surety's unjust enrichment claim would be easily met. The only remaining issue—whether circumstances would make it unjust for Immunex to receive payment of its litigation costs instead of paying for them itself—depends on a careful balancing of the equities in this case.

Nat'l Sur. Corp. v. Immunex Corp., 176 Wn.2d 872, 899, 297 P.3d 688, 701 (2013) (Wiggins dissenting, joined by J.Johnson, Brintnall and Madsen).

As Allyis' brief also pointed out, in the very case quoted by *Young*, the plaintiff did not confer a benefit on the defendant. Simplicity disagrees in its own Brief, but once again is wrong.

Simplicity claims that "the plaintiffs in *Bailie* conferred the benefit upon both Wosepka and the defendant by cosigning the loan." Simplicity's Brief at 26. In truth, Bailie assigned its interest in a condominium to one party (Suburban), which agreed to pay the plaintiff $175,000 over six years. *Bailie Commc'ns., Ltd. v. Trend Bus. Sys., Inc.*, 53 Wn. App. 77, 78, 765 P.2d 339 (1988). Suburban's obligation to pay the $175,000 was personally guaranteed by Wosepka. *Id.* When Suburban and Wosepka could not make payment, they induced Bailie to cosign a $300,000 note secured by the property with the promise to pay him $175,000 of it. *Id.* at 78-79.

Instead of paying Bailie, Suburban and Wosepka diverted the money to Trend Business Systems, which was affiliated with Wospeka. *Id.* at 79. The question in the appeal was whether Bailie could assert a claim for unjust enrichment against Trend despite his lack of a relationship with it. *Id.* at 84. The Court held that "the Bailies were damaged when they co-signed Suburban's mortgage," and that Trend "received the proceeds of the Bailies' lost right in the form of the mortgage proceeds." *Id.* It held that Bailie had a claim for unjust enrichment because "Trend knew of the fraud through Wosepka because Wosepka was Trend's president and sole shareholder."

Id. at 85. Bailie never conferred a benefit on Trend; he was a victim of a fraud.

As was pointed out in the Brief of Appellant, when Simplicity's argument was made to Judge Lasnick, he called it misleading. Simplicity's response to that argument is even more misleading. In *Keithly v. Intelius Inc.*, 764 F. Supp.2d 1257 (W.D. Wash. 2011), visitors to a website owned by one company were tricked into signing up for services from another company. *Id.* at 1263. A class action was brought against the owner of the website, including a claim for unjust enrichment.

On a motion to dismiss, the defendants argued that the unjust enrichment claim failed because the plaintiffs did not confer a benefit on the owner of the website, but instead on the companies that sold the services. *Id.* at 1271 n. 14. The defendants cited exactly the same part of *Young* for the same proposition that Simplicity does here. Simplicity's suggestion that Judge Lasnick's decision was "dictum" and "confusing at best" is not well taken.

Lastly, Simplicity asserts that "Allyis presented no evidence in more than 10 months of litigation to show that it conferred any benefit upon Simplicity, directly or indirectly," and that "Allyis also failed to produce any evidence that Simplicity had any knowledge of or retained any benefit under such circumstances that it would be inequitable for the defendant to retain the benefit without payment of its value." Simplicity's Brief at 28-29. These arguments were never made or briefed to the trial court. Moreover, those arguments would be appropriate on summary judgment, but are not the standard for awarding sanctions. Their only significance is to demonstrate how far Simplicity has strayed from its motion for fees.

C. The Award of Fees Under RCW 4.84.185 Was Erroneous.

The section of Simplicity's brief discussing RCW 4.84.185 fails to cite a single authority other than the statute itself. Simplicity just refuses to actually address the arguments made in this appeal.

1. Simplicity Has Never Discussed the Other Claims.

To award fees under RCW 4.84.185, the claim must be frivolous in its entirety, meaning that every claim pled must be frivolous. *Biggs v. Vail*, 119 Wn.2d 129, 137, 830 P.2d 350, 354 (1992). Allyis pointed out that Simplicity has never addressed the merits or substance of any of its claims, and its response is that Allyis conceded that they were frivolous by replacing them with an unjust enrichment claim. Brief at 30. Simplicity's failure even to argue that the original claims were frivolous is fatal to the RCW 4.84.185 award.

2. Judge Hill Did Not and Could Not Make the Required Findings.

Judge Hill signed the proposed order from Simplicity without making any changes to it. CP 478-82. That order contains no findings about the tortious interference with contract, violation of the Consumer Protection Act, violation of the Trade Secrets Act, and Injurious Falsehoods claims. The closest thing to a finding about those claims was the statement: "In light of the facts and circumstances of the entire case, I find that the claims asserted by Allyis were frivolous and not advanced with reasonable cause in violation of RCW4.84.185." CP 480.

Simplicity's proposed order did not contain any findings about those claims because its motion did not address them. For the same reason, the record contains no evidence from which any findings about those claims could be made. In her Amended Order, Judge Hill found that that the original claims pled by

Allyis "were not well grounded in fact" and "were not warranted by existing law." CP 522 at ¶¶ 23, 24. However, she again failed to make any actual findings about any of the claims because she could not do so. The record does not contain any basis to find those claim frivolous, and this Court should simply reverse the decision.

3. The Claims Were Not Frivolous.

In its response to the Motion for Fees, Allyis explained why each of its claims was well founded in fact and in law. CP 429-30. Simplicity did not respond to any of those arguments in its reply brief. CP 471-75. Neither the original order nor the amended order awarding fees discussed any of those claims. CP 478-82, 518-24. In its Brief, Allyis again explained the basis for each of those claims. Brief of Appellant at 30-31. In its own Brief, Simplicity again refused to actually discuss the substance of the claims.

The only claim that has been discussed is unjust enrichment. To affirm the trial court, this Court would have to rule that unjust enrichment requires the plaintiff to confer a benefit directly on the defendant. That ruling would be contrary to the actual holding in *Young* as well as the cases applying unjust enrichment in other contexts.

The claims asserted in this action were not just within the law, but well within the law. This Court should find that the claims were not frivolous in any respect and reverse the trial court's award of sanctions.

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

Simplicity's Motion for Fees sought CR 11 sanctions only if "Allyis responds by attempting to blame its counsel for pursuing a frivolous claim, or Allyis' counsel," which did not happen. CP 324. The entire discussion of CR 11 consisted of 63 words. The only basis of the motion was the unjust enrichment claim.

In its Brief, Simplicity now claims that the trial court reasonably found the claims to be frivolous because of "a lack of any enforceable contractual agreement or competent evidence reflecting that Simplicity had done anything unlawful." Brief at 32-33. It likewise asserts that "the trial court reasonably concluded from the facts and circumstances of the entire case—including Davis' and Allyis' "blackmail" litigation tactics— that Davis and Allyis filed the pleadings in this lawsuit for the improper purpose of harassing Simplicity to obtain a settlement." Simplicity's Brief at 33.

None of those assertions were in the Motion for Fees. Judge Hill had no basis to find that the noncompete agreement was invalid because that argument was never made to her. Nor did the parties brief the question whether Simplicity did anything unlawful. The "blackmail" claim is incorrect as set forth above, but also is a claim first concocted long after the motion was filed.

E. <u>The Trial Court's Findings Lack Substantial Evidence</u>.

Simplicity devotes over nine pages of its brief to the substantial evidence question, but it never actually identifies any evidence.

Simplicity claims that the court's finding that the claims were frivolous were "supported by multiple email communications between James and Davis in which James explains that Allyis' asserted claims had no merit under well-established Washington law." Brief at 34. Those emails were not mentioned in the motion or any of the court's orders, and Simplicity never points to the emails that constitute this evidence. This argument is just one more way that Simplicity is citing its own attorney's allegations as some kind of authority.

Simplicity repeatedly asserted that Allyis never presented any evidence to support its claims, but it conveniently ignores Simplicity's admission that

the allegations were true. Once Simplicity testified that Schroder had recruited at least one Allyis employee with its knowledge and approval, Allyis had all the evidence that it needed. CP 469. Aside from claiming that Simplicity did not say what it said in the deposition, Simplicity's only argument about the deposition testimony is that "Allyis did not have that testimony at the time it asserted the original four claims and, thus, either relied on different evidence or no evidence at all." Brief at 24 n.17.

VI. CONCLUSION

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

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

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

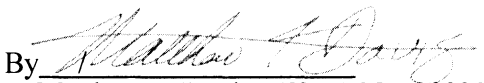
Allyis accepted that the legal system is imperfect, and it even decided to accept Judge Hill's decision to make its voluntary dismissal with prejudice. But her casual award of $60,000 of sanctions is as inexplicable

as it is improper. Judges are not supposed to accept arguments like Simplicity's argument under *Young*. That argument was shown to be so wrong for so many reasons that no attorney or judge should accept it.

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

DATED this1st of September, 2016

BRACEPOINT LAW, P.S.

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

DECLARATION OF SERVICE

I, Matthew Davis hereby declare as follows:

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

2. On September 1, 2016, I caused the foregoing document to be served on the persons identified in paragraph 3 in the manner indicated.

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

   Counsel for Simplicity

   Jeff James at jaj@sebrisbusto.com

   Jennifer Parda-Aldrich parda@sebrisbusto.com

   Counsel for Schroder

   Joseph Shaeffer at josephs@mhb.com

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

Dated this 1st day of September, 2016 at Seattle, Washington.

Matthew F. Davis, WSBA No. 20939