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WA State Court of Appeals Division III

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

REVOLUTIONAR, INC., a Washington Corporation; JOSHUA W. ROE, a married individual,)	No. 36499-2-III
)	
Appellants,)	
)	
v.)	UNPUBLISHED OPINION
)	
GRAVITY JACK, INC., a Washington Corporation; and AARON L. RICHEY a/k/a LUKE RICHEY, individually, and his marital community,)	
)	
Respondents.)	

FEARING, J. — Plaintiff RevolutionAR, Inc. hired defendant Gravity Jack, Inc. to design a demonstration application and software code for an augmented reality platform that would train users in the performance of various tasks. After the relationship soured, RevolutionAR sued Gravity Jack and its president, Luke Richey, under numerous contract and tort theories. RevolutionAR’s Chief Executive Officer (CEO) Joshua Roe also sued for invasion of privacy. The superior court dismissed the claims on summary judgment because of limitations on liability in the parties’ contracts and the failure to present an issue of fact with regard to damages. The trial court also awarded Gravity Jack and Luke

Richey an award of reasonable attorney fees and costs on the theory that RevolutionAR and Joshua Roe filed a frivolous lawsuit. We affirm in part and reverse in part.

FACTS

This appeal involves a business dispute between RevolutionAR and its CEO, Joshua Roe, on the one hand, and Gravity Jack and its President, Luke Richey, on the other hand. Because the trial court dismissed RevolutionAR's and Joshua Roe's claims on summary judgment, we review the facts in a light favorable to Roe and RevolutionAR.

Joshua Roe holds a master's degree in organizational leadership from Gonzaga University. Roe specializes in training workers. According to Roe and other experts, students and workers learn by four formats: (1) reading and writing, (2) visual, (3) auditory and aural, and (4) kinesthetic. While consulting for a Spokane-headquartered oil and gas management company, Roe observed ineffective and inconsistent training methods of industry workers, which compelled his active mind to contemplate new processes and methods for worker instruction.

In February 2014, Joshua Roe contacted Luke Richey, founder and president of Gravity Jack, a software development company in Liberty Lake. Roe understood Richey to possess experience and expertise with computer technology and in forming and operating start-up businesses. Roe and Richey discussed forming a start-up company that

engaged in software development and management consulting. The company would develop and market interactive training and maintenance software using augmented reality technology. Augmented reality technology allows “computer-generated virtual imagery information to be overlaid onto a live direct or indirect real-world environment in real time.” Clerk’s Papers (CP) at 400. For example, a mechanic could place an iPhone, smartphone, tablet, or iPad next to a car’s fuel injection system. The device screen’s imagery would show the injection system’s components and display directions for repairing or replacing the components. Because augmented reality employs all four iconic methods of learning, the software platform excels in teaching workers new skills.

Joshua Roe and Luke Richey discussed the augmented reality platform start-up firm contracting with Gravity Jack for software development needed to produce the interactive learning computer applications. The start-up company would later perform additional product development on its own. During the discussions, Richey never informed Roe that Gravity Jack had developed applications for learning, training, or maintenance or of any plan to develop such products. Roe did not know of any experience of Richey or Gravity Jack in this form of technology.

Luke Richey expressed approval of the concept of developing augmented reality teaching software applications. Richey advised and encouraged Joshua Roe to pursue the

project. Richey also gave Roe advice regarding agreements Roe entered with the oil and gas management company. Joshua Roe spoke with Brendan Weatherly, a coworker at the oil and gas management firm, about forming the start-up company, RevolutionAR. RevolutionAR would develop and market custom interacting learning, process training, and maintenance applications using augmented reality technology. Roe and Weatherly incorporated RevolutionAR on May 5, 2014, after RevolutionAR entered contracts with Gravity Jack. Neither party contends that any of the contracts are void because RevolutionAR did not legally exist at the time of signing.

Because of Luke Richey's business experience and acumen, Joshua Roe and Brendan Weatherly invited Richey to serve on RevolutionAR's board of directors. Richey agreed to the position and also requested an ownership interest in the company. Richey requested the shares be held in the name of his wife due to difficulties with his former wife over income and child support. Roe granted the request.

According to Brendan Weatherly, Luke Richey assured him and Joshua Roe that Richey, along with his company, Gravity Jack, would assist as a trusted advisor and consultant for RevolutionAR. Roe and Weatherly relied on Richey, with his business contacts, to approach investors in and potential customers of RevolutionAR.

On April 8, 2014, Gravity Jack and RevolutionAR executed three contracts: (1) a design and developing resourcing contract, (2) a master services agreement between RevolutionAR and Gravity Jack, and (3) a memorandum of understanding. The business agreements covered Gravity Jack’s development of software for RevolutionAR’s interactive augmented reality applications for learning and training. We do not know why the three agreements could not be synthesized into one contract.

Under the unique, always clever, sometimes humorous, and lawyer bashing design and developing resourcing contract, Gravity Jack would deliver design and development services to RevolutionAR’s project, including branding, logo preparation, website planning and development, and prototype product design and development. Project development and use of resources would be “dictated by ongoing collaboration between RevolutionAR and Gravity Jack—on an agile development structure.” CP at 174. Gravity Jack estimated monthly charges of \$13,000 for one “man month” of work. CP at 175. The agreement further read:

OH, MAN. THIS IS GOING TO BE SO COOL.

....

Additional details.

These are things about our development process that are good to be savvy of.

Agile Development: Gravity Jack contracts with all of our clients on an “agile” structure. This means that you are purchasing time and a service, and NOT a fixed-bid delivery of a project or other product. Gravity Jack’s

services are truly a complete solution—offering your project everything from creative design, expert development, professional in-house project management, comprehensive quality assurance and, of course, assistance with a public release, through our in-house marketing and PR specialists if need be. Agile allows our clients to dictate the direction and creative vision of a project, with the flexibility to pivot and adjust scope whenever they would like.

CP at 173-76 (boldface omitted).

The design and developing resourcing agreement additionally provided:

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

....

We know that's a lot of info.

CP at 178 (emphasis added) (boldface omitted). In a corporate deposition of Gravity

Jack, Luke Richey testified concerning the meaning of the contract term “portfolio:”

Q. Explain to me what the “portfolio” is.

A. It's a list of projects we've done - what those projects use cases are; links to the apps, if they are still live at the app store; potentially videos; sometimes use cases, where we describe how we built it - because we do unique things.

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

A. No. Only finished products are in the portfolio.

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

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A. Our demo—our R&D demo utilized Josh Roe’s voice and the carburetor JD model.

Sealed CP at 1212.

In addition, the design and developing resourcing contract included a “release of liability” clause:

A note from legal.

We don't like ‘em either. So to keep them quiet, we have to tell you this stuff.

....

Release of Liability: Except as otherwise contained in this Work Order, or in the case of willful misconduct or gross negligence, Gravity Jack shall not under any circumstances or for any reason be liable to [RevolutionAR] for breach of warranty, lost profits, or any other claim or demand. The express limit of any liability of Gravity Jack resulting from any claim of [RevolutionAR] shall be no more than the total compensation paid to Gravity Jack pursuant to the terms of this Work Order. In no event shall Gravity Jack be liable for any damages, incidental, consequential, or otherwise, incurred by [RevolutionAR] where [RevolutionAR] has been provided written advisement of the possibility that such damages may occur, and instructed Gravity Jack to continue performance.

CP at 179 (boldface omitted). A section on intellectual property read:

Intellectual Property Rights: All software code that exists or will exist as a result of this project that will be, or might be used in b.Kit (browsAR SDK) for Augmented Reality or the Gravity Jack Factory Libraries, or Pre-Existing; after payment in full. Gravity Jack grants Client a nonexclusive, fully paid, worldwide, royalty-free license to install, use and copy the software Gravity Jack created for Client, and all related documentation, in accordance with the terms and conditions of this Agreement. Gravity Jack will retain all copyright, patent, trade secrets and other intellectual property rights in the browsAR SDK or Gravity Jack

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Factory library work that was created for Client. *Client agrees to the terms of b.KIT (browsAR SDK) License Terms.*

After payment in full, all work created by Gravity Jack, that is NOT related to Augmented Reality, Pre-Existing, b.KIT (browsAR SDK), or the Gravity Jack Factory Libraries for this project belongs to Client at the time it is created as work for hire. Client will have access to their source code via the subversion repository during the development process. Source will not be provided for third party, Pre-Existing, Gravity Jack Factory Libraries or browsAR components.

CP at 180 (emphasis added) (boldface omitted). The agreement ended:

Love always,
The super nice, weirdly not lawyerish legal team

Make it happen.

Hi! We're big fans. Can we have your autograph?

CP at 181-82 (emphasis added) (boldface omitted). Joshua Roe signed as chief executive officer of RevolutionAR, and Luke Richey signed as president and chief executive officer of Gravity Jack.

The following exchange occurred between Joshua Roe and Gravity Jack's counsel during Roe's deposition:

Q. Okay. And you signed that on behalf of yourself and on behalf of your company?

A. Uh-huh.

MR. MCDONNELL [Joshua Roe and RevolutionAR counsel]:
Object to the form.

Q. (By Mr. Church [Gravity Jack's counsel]) Is that true?

A. Yes.

MR. MCDONNELL: Object to the form.

Q. (By Mr. Church) So both you and RevolutionAR, Inc. are subject to the terms of this agreement, right?

MR. MCDONNELL: Objection to the form, calls for a legal conclusion.

A. I would say that we were subject to the terms up until the signing of an MSA and an MOU that trumped this agreement. And this was –

Q. (By Mr. Church) And I'm talking about—I know you want to keep making your case, but I just want you to focus on the questions.

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

A. Yes.

Q. Okay. And as far as the terms,

A. Actually, I would say that RevolutionAR was subject to the terms of the agreement, and I signed as an officer, right? I just want to clarify. Because we're bouncing back and forth between me, RevAR, Brendan. So

—

Q. Okay. So Revolution—

A. —just making that clarification.

Q. RevolutionAR, Inc. was subject to the terms of it, but you signed it?

A. That's correct.

Q. Right?

A. (Nods head).

Q. Okay. And did you make that distinction anywhere?

MR. MCDONNELL: Object to the form.

A. I just signed it as the CEO of the company at that time.

Q. (By Mr. Church) Oh. Where does it say that?

A. Page 12 of 12.

Q. Okay.

A "Title: CEO."

Q. Were you CEO?

A. At that time, yeah.

Q. Because I thought RevolutionAR didn't come into existence until May 4th?

A. I would have to really review the documentation to give you—

Q. Okay. It's right here.

A. —a time line.

Q. This is it. This is the contract.

A. No, like, the whole time line.

Q. Okay. But you signed this, Josh Roe, as of April 8th, 2014, right?

A. That's what it says.

Q. No dispute on that?

A. That's what it says.

Q. Okay. Let's look at page six.

A. (Complied).

Q. Talks about Agile Development?

A. Oh, page six of the contract?

Q. Of the contract, yes.

A. (Complied).

Q. And you understood that the terms that you were agreeing to, particularly with regard to development, "that Gravity Jack contracts with our clients on an agile structure," which you understood to mean that you are purchasing time and service and not a fixed bid delivery of a project or other product, right?

MR. MCDONNELL: Object to the form of the question. "You" is again vague, ambiguous. It's—it might move things along to clarify that.

Q. (By Mr. Church) This is what you—

MR. MCDONNELL: You may answer the question.

Q. (By Mr. Church) That is what you agreed to?

A. Well, again, I'm going to clarify that as RevolutionAR, and I signed this as RevolutionAR, as the CEO.

CP at 110-11.

Luke Richey testified, during his deposition,

Q. This [design and developing resourcing contract] is not RevolutionAR's template, correct?

A. I don't know.

Q. Well, it's Gravity Jack's template, right?

A. They also used our template; so I don't know.

Q. And it's signed by you, Mr. Richey; is that correct?

A. Let me see. Yes.

Q. As president and CEO of Gravity Jack?

A. Correct.

Q. And it's dated April 8, 2014, correct?

A. Correct.

Q. Who else's name is on this page?

A. Joshua Roe.

Q. And who is be signing on behalf of?

A. RevolutionAR.

Q. As the what?

A. CEO.

Q. On what date?

A. 4-8-14.

Q. So Gravity Jack entered this contract, correct?

A. Correct.

Q. And RevolutionAR entered into this contract, correct?

Q. Not Josh Roe individually, correct?

A. I'm not a lawyer. I can't answer that.

Sealed CP at 1199-1200.

The undated two-page master service agreement between RevolutionAR and Gravity Jack, provided that Gravity Jack retained all copyright, patent, trade secrets and other intellectual property rights to any software Gravity Jack created for RevolutionAR.

The agreement also read:

2. Business Development and Marketing

Both revAR [RevolutionAR] and GJ [Gravity Jack] desire to build a strong business relationship. To accomplish that, both companies will make efforts to market each other's products to potential customers. Both companies understand the strengths of each others services and will make efforts to not compete with each other on their products and services.

.....

7. Mutual Indemnification

....

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

CP at 187 (boldface omitted). Joshua Roe signed as president and chief executive officer of RevolutionAR. Luke Richey executed the agreement as agent for Gravity Jack.

The third contract, a two-page undated memorandum of understanding between RevolutionAR and Gravity Jack, addressed intellectual property rights for the upcoming “invention.” CP at 184. The memorandum included the following language:

The purpose of this MOU [memorandum of understanding] is to give revAR full ownership of the invention, including all software code, excluding any b.Kit (browsAR SDK) for Augmented Reality and Gravity Jack Factory Libraries that may or may not have been used in the development process, from the date the current agreement was signed.

CP at 185. The memorandum also reaffirmed that “the terms of the original signed Agreement are still valid and enforceable[.]” CP at 185. Joshua Roe signed the memorandum of understanding as president and chief executive officer of RevolutionAR. Luke Richey signed the memorandum as agent for Gravity Jack.

We already quoted language from the design and developing resourcing contract that referenced a fourth document and redundantly read: “Client agrees to the terms of b.KIT (browsAR SDK) License Terms.” CP at 180. The Gravity Jack Software License

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Terms for “(SDK) | b.Kit” preserved Gravity Jack’s rights to all software code resulting from the project and granted RevolutionAR a non-exclusive license to use the code.

“SDK” is an acronym for software development kit. Presumably “b.KIT” is short for browsAR software development kit. Gravity Jack developed browsAR SDK as a user-friendly augmented reality platform. Gravity Jack’s software license agreement read:

19. LIMITATION ON AND EXCLUSION OF REMEDIES AND DAMAGES. You can recover from Gravity Jack and its suppliers only direct damages up to U.S. \$5.00. You cannot recover any other damages, including consequential, lost profits, special, indirect or incidental damages.

This limitation applies to

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

It applies even if Gravity Jack knew or should have known about the possibility of the damages. The above limitation or exclusion may not apply to You because Your country may not allow the exclusion or limitation of incidental, consequential or other damages.

CP at 307-08.

During his deposition, Joshua Roe conceded that he agreed, presumably on behalf of RevolutionAR, to the b.KIT (browsAR SDK) License Terms, or software license terms. Later in his deposition when asked about the exclusion of remedies found in the license agreement, Roe proclaimed that he had never before seen the software license terms. Gravity Jack never mentioned the existence of such a document. He did not know

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if the license terms even existed when he signed the design and developing resourcing contract.

The b.Kit license terms contained a limitation on and exclusion of remedies and damages clause:

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

This limitation applies to

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

CP at 307-08.

Joshua Roe insisted that Gravity Jack never used the b.KIT platform on RevolutionAR's project prepared by Gravity Jack. Gravity Jack instead employed a Vuforia platform. An employee of Gravity Jack, Shawn Poindexter, also declared that Gravity Jack never used the b.KIT platform on RevolutionAR's project. According to both Joshua Roe and Brendan Weatherly, Steven Halverson, Gravity Jack's project manager for RevAR's prototype application, also asserted that Gravity Jack never utilized browsAR in any work for RevolutionAR.

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Joshua Roe, Brendan Weatherly, Neil Ziegler, and Luke Richey served on RevolutionAR's initial board of directors beginning July 31, 2014. The corporation's articles of incorporation partially shielded its directors from liability to the company:

A director of the corporation shall not be personally liable to the corporation or its shareholders for monetary damages for conduct as a director, except for liability of the director for (i) acts or omissions that involve intentional misconduct or a knowing violation of law by the director, . . . or (iii) any transaction from which the director will personally receive a benefit in money, property or services to which the director is not legally entitled.

CP at 1077. RevolutionAR's articles of incorporation indemnified its directors from liability, damage, or expense:

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

CP at 1078. The articles also protected directors of RevolutionAR from personal liability with a few exceptions such as director intentional misconduct.

Pursuant to Gravity Jack's agreements with RevolutionAR, Gravity Jack created RevolutionAR's prototype or demonstration application in July 2014 utilizing a Volkswagen Bug Bus 30/31 carburetor, owned and purchased by RevolutionAR. This opinion will alternatively refer to the product as the prototype application or

demonstration application. The prototype application demonstrated steps for a mechanic to repair and maintain the carburetor using the four learning styles. The demonstration application employed the RevolutionAR logo and branding and featured recordings of Joshua Roe's voice. RevolutionAR paid Gravity Jack \$30,000 for the prototype application.

In the summer of 2014, RevolutionAR consulted with attorneys regarding patenting the RevolutionAR augmented reality technology reflected in the prototype application. After conversations between Luke Richey and other members of RevolutionAR board of directors, the company delayed seeking patent protection. In April 2015, RevolutionAR submitted a provisional patent application.

In September of 2015, Jack Knudsen, a contact of RevolutionAR, introduced Brendan Weatherly, of RevolutionAR, to Antoine Sample from T-Mobile. Weatherly participated in an initial meeting with T-Mobile in Factoria. The meeting resulted in a series of later sales meetings and momentum toward a contract between RevolutionAR and T-Mobile. Weatherly anticipated that the project would not only engender income from T-Mobile for \$70,000, and a \$15,000 profit, but lead to other significant projects. The momentum floundered because Gravity Jack refused to cooperate on pricing and assisting in gaining the T-Mobile project.

Through its own contacts, RevolutionAR met with leadership at Itron, a Liberty Lake supplier of smart networks, software, meters, and sensors that aid utilities and cities to better manage energy and water delivery. Joshua Roe participated in meetings with Itron, during which Itron expressed interest in RevolutionAR presenting a “proof of concept” for a training augmented reality platform. A proof of concept consists of a demonstration that the feasibility of some concept or theory holds practical potential. Because Roe and Brendan Weatherly had no experience in marketing a product or presenting a proof of concept, the two relied on Luke Richey for advice on preparing a contract and important contract provisions. After reviewing Itron’s proposed contract, Richey advised RevolutionAR not to sign the agreement. RevolutionAR accepted the advice. Itron grew frustrated that RevolutionAR balked at the contract terms, and Itron expressed reluctance to hire the services of RevolutionAR. RevolutionAR prepared a modest proof of concept. Itron, however, never entered any agreement with RevolutionAR. Itron had lost interest. RevolutionAR blames Luke Richey’s advice on the lost contract. In his deposition, Luke Richey agreed that Gravity Jack garnered income from projects later completed for Itron.

In June of 2015, Terry Hoy, Vice President of Gravity Jack, met with Joshua Roe and Brendan Weatherly at RevolutionAR’s office. Hoy asked that RevolutionAR provide

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a reference for Gravity Jack on an upcoming project. After Brendan Weatherly and Joshua Roe researched the customer and project, the two realized that the project may involve learning development, an area of business of RevolutionAR. Roe and Weatherly met with Luke Richey the next morning. Mr. Richey again assured the two that Gravity would not compete with RevolutionAR. Richey promised that Gravity Jack would not pursue training and learning projects. As a result, RevolutionAR provided the reference.

In addition to rendering contracted services, Luke Richey and Gravity Jack provided financial, sales and investor leads, contracts, time, and reputation assistance to RevolutionAR. Nevertheless, by November 2015, RevolutionAR had completed only two sales for a total of \$15,000 in gross revenue, had no prospective investors, had no additional customers, and had incurred debt of \$22,000.

On the night of November 10, 2015, RevolutionAR's four board of directors members, investor Tim Holt, and the five's wives convened a meeting. After diligent prayer, the group decided not to dissolve RevolutionAR. The group reduced the board to Brendan Weatherly and Joshua Roe. In the meantime, Weatherly and Roe would conduct steps to find financing and customers for the dormant company. Roe confirmed the decisions in an e-mail the following day. Thereafter, Brendan Weatherly continued to perform tasks for RevolutionAR centered around gaining a contract with T-Mobile.

Shawn Poindexter served Gravity Jack as director of development from 2011 to 2015 and chief technical officer from 2015 to May 2017. Poindexter holds a doctorate in astrophysics and specializes in software development, algorithms, computer vision, mobile applications, and machine learning. As an employee of Gravity Jack, Poindexter became familiar with the company's development of RevolutionAR's demonstration application.

Shawn Poindexter also assisted Gravity Jack in the development of PoindextAR, a computer vision algorithm for estimating the pose of objects seen in a video frame. A pose is the object's orientation, distance, and position. PoindextAR enables an augmented reality experience for the user with ordinary objects. An inquisitive person might wonder if Gravity Jack named the PoindextAR after Shawn Poindexter. Gravity Jack later renamed PoindextAR "Adroit." CP at 1125.

According to Shawn Poindexter, to promote and market the PoindextAR, Gravity Jack created promotional material including a video. The video, posted to the internet, utilized Joshua Roe's voice originally recorded for use in the RevolutionAR's demonstration application. This PoindextAR video also incorporated other content originally created or used in the development of the RevAR prototype demonstration application including the same carburetor. RevolutionAR paid for the content. Similar to

the RevolutionAR demonstration application, the PoindexAR promotional video demonstrated how augmented reality technology allows a user to perform tasks, such as setting the idle speed on a carburetor, in a way that incorporates the four learning styles of auditory, reading and writing, visual, and kinesthetic.

According to Joshua Roe, in December 2015, Luke Richey contacted him about employment as government contract manager with Gravity Jack. Richey contends Roe contacted him instead. By late 2015, Roe desperately needed paid employment. In January 2016, Roe and Gravity Jack executed an independent contractor agreement, under which Roe would provide services for Gravity Jack.

Joshua Roe began employment at Gravity Jack on January 4, 2016. On January 7 and 8, Roe attended a meeting with a government client, 4LNS, whose project Roe would manage. Alyce Fernebok, the CEO of 4LNS represented 4LNS at the meeting. Luke Richey also attended the meeting.

According to Luke Richey, Alyce Fernebok wanted to review future projects with Gravity Jack. One potential project entailed RevolutionAR preparing a training augmentative reality platform for United States Special Operations Command (SOCOM), the unified operation command overseeing the special operations of all branches of the military. Even though RevolutionAR was on the brink of death, Richey and Roe hoped

for a “Hail Mary,” for the company. Joshua Roe was present because of a hope that RevolutionAR could gain business from 4LNS.

During the January 4, 2016, meeting, Joshua Roe learned that 4LNS used various technologies to train field operatives in the United States Marine Corps. Roe had never before heard of 4LNS.

On the second day of the meetings, Gravity Jack showed the PoindexAR multi-media presentation to 4LNS that incorporated RevolutionAR’s concept, name, logo, and content and included photographs of the RevolutionAR prototype application. The PoindexAR video included the voice of Joshua Roe from the RevolutionAR demonstration application. The video also incorporated the four learning styles and demonstrated steps to adjust the idle speed on a carburetor. Alyce Fernebok, on behalf of 4LNS, expressed interest in using the RevolutionAR concept to secure funding and government contracts.

Joshua Roe had never given Gravity Jack permission to use RevolutionAR assets to share with or present to 4LNS. Gravity Jack had never sought permission from RevolutionAR. On January 8, Joshua Roe confronted Luke Richey in Gravity Jack’s hallway. Roe expressed dismay at Gravity Jack utilizing assets of RevolutionAR for

purposes of government contracts and excluding RevolutionAR from the business.

Richey responded:

Well I don't really care. That ship has sailed. I know this is going to be hard for you for awhile, but you will get over it.

Sealed CP at 1455.

In his deposition, Luke Richey conceded that Gravity Jack appropriated Joshua

Roe's voice:

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

A. Our demo—our R&D demo utilized Josh Roe's voice and the carburetor 3D model.

....

Q. Why did you use Josh Roe's voice?

A. Just to show that - you know, a simple procedure. Just to add some content so it wasn't just such a dorky R&D video.

Q. So Josh Roe's voice livened the app up and made it interesting?

A. I wouldn't say it made it interesting. I'd say it didn't - it was less boring.

....

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

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

....

Q. Any other community that has seen this, other than the scientific community?

A. Well, it was online, and I have no way to know who saw it. But it didn't get a lot of views. I mean, the last time I checked it had 241.

Q. Is it online right now?

....

Q. Was it posted to any other third-party site?

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A Well, it was posted through YouTube. So it was a YouTube video that we put onto our site.

Q. So Gravity Jack uses YouTube on its site to show videos, correct? A Yes.

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

A. Correct.

Sealed CP at 1207-08, 1212-13. In answers to requests for admission, Gravity Jack also conceded use of Joshua Roe's voice.

Joshua Roe, as CEO of RevolutionAR, deemed himself obligated to inform other company board members and investors of Gravity Jack's use of RevolutionAR assets. On January 9, 2016, Roe informed Brendan Weatherly that Gravity Jack used RevolutionAR sales materials for its own promotion. Roe continued to work for Gravity Jack.

On January 13, 2016, Brendan Weatherly, Joshua Roe, Luke Richey, Jennifer Richey, Neil Ziegler, and others convened a meeting. During the meeting, Roe confronted Richey about Gravity Jack's use of the RevolutionAR assets. Richey denied any wrongdoing. Following the meeting, a RevolutionAR investor present at the meeting informed Weatherly and Roe that he would not contribute any additional funding for RevolutionAR to continue.

In March 2016, Joshua Roe participated in another meeting with 4LNS at Gravity Jack headquarters. Luke Richey also attended. Gravity Jack showed a PowerPoint

presentation containing pictures of RevolutionAR's assets and screenshots of the RevolutionAR prototype application which included the carburetor.

Gravity Jack performed work for and with 4LNS including work referred as DVLM. This project trained U.S. Marine field officers the process of moving a piece of forensic material through a field lab and demonstrated the maintenance of a mass spectrometer. Gravity Jack received payment for this project. In a response to a request for admission, Gravity Jack admitted to receiving payment from 4LNS. Gravity Jack also admitted to contracting with third parties for services involving PoindexAR, by then known as AdroitAR. According to Roe, Gravity Jack reaped \$1.2 million from the project. Gravity Jack did not include RevolutionAR in the work for 4LNS.

In November of 2016, Josh Abel of Gravity Jack asked Brendan Weatherly if he could buy RevolutionAR's carburetor used by Gravity Jack to create the RevolutionAR prototype application. Weatherly refused to sell. Thereafter, Richey met with Weatherly, and Richey informed him that Gravity Jack wished to use the carburetor. Without understanding Gravity Jack's intended use, Weatherly loaned the carburetor to Gravity Jack. Gravity Jack thereafter used the carburetor to develop a new video of its PoindexAR prototype application. In December 2016, Gravity Jack released the video

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on YouTube. Weatherly had not given permission to Gravity Jack to use the carburetor in a presentation.

According to Shawn Poindexter, Gravity Jack, in December 2016, participated in three projects, Port of Virginia, Peers Foundation, and World of Tanks, that included content created by Gravity Jack for RevolutionAR. Also according to Shawn Poindexter, Gravity Jack performed work in 2016 and 2017 for Itron.

RevolutionAR administratively dissolved in October 2017. Even though Luke Richey had been ousted from his board seat in the fall of 2015 and Joshua Roe allegedly had not been involved with RevolutionAR since March 2016, Brendan Weatherly reinstated RevolutionAR in October 2017, listing Roe and Richey as governors and listing Roe's home address for Richey's address.

As part of discovery responses, Gravity Jack produced a fourteen-page profit and loss detail on an accrual basis for January through December 2014. We do not know why the detail is for the calendar year 2014. The first two pages of the statement show income from Department of Defense projects, but does not disclose the amount of the income. The last seven pages list income generated from various clients, including RevolutionAR and 4LNS. 4LNS paid Gravity Jack \$53,000 during this time frame. The pages identify

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most clients only by a number. According to two separate calculations, Gravity Jack accrued income in the aggregate of \$4.7 million during 2014.

PROCEDURE

RevolutionAR and Joshua Roe sued Gravity Jack and Luke Richey. The two plaintiffs allege that Gravity Jack used the content the company developed for RevolutionAR's prototype application when Gravity Jack marketed and sold augmented reality software content to its other clients. RevolutionAR and Roe also allege that Richey, through Gravity Jack, breached representations, uttered false and misleading statements about RevolutionAR, dissuaded investors from backing RevolutionAR, and discouraged customers from conducting business with RevolutionAR. Finally, RevolutionAR and Roe contend that Gravity Jack, contrary to representatives from Luke Richey, stole business from RevolutionAR.

RevolutionAR asserts the following eleven causes of action against Gravity Jack: (1) breach of contract, (2) breach of implied duty of good faith and fair dealing, (3) promissory estoppel, (4) implied contract / unjust enrichment, (5) negligent misrepresentation, (6) intentional misrepresentation, (7) tortious interference with business expectancies, (8) conversion, (9) misappropriation of trade secrets, (10) trademark and tradename infringement, and (11) civil conspiracy. RevolutionAR

asserts the following claims against Luke Richey: (1) promissory estoppel, (2) implied contract and unjust enrichment, (3) negligent misrepresentation, (4) intentional misrepresentation, (5) tortious interference of business expectancy, (6) breach of fiduciary duties, (7) misappropriation of corporate opportunity, (8) conversion, (9) misappropriation of trade secrets, (10) trademark and tradename infringement, and (11) civil conspiracy. Joshua Roe asserts a claim against Gravity Jack for infringement of personality rights and claims against both Gravity Jack and Luke Richey for invasion of privacy and conspiracy. In the briefing, RevolutionAR and Joshua Roe do not mention any claim for civil conspiracy. We deem such cause of action abandoned.

Gravity Jack and Luke Richey moved for summary judgment on all claims. Gravity Jack and Richey argued that contract language released it from any liability to RevolutionAR. The two defendants also argued that RevolutionAR and Joshua Roe had no legally protected interest in the augmented reality prototype prepared by Gravity Jack. In their summary judgment brief, Gravity Jack and Richey further contended that RevolutionAR and Joshua Roe lacked facts to support their legal claims, but the two defendants never analyzed the discrete causes of action asserted by the plaintiffs. The only argument addressing the legal claims of the plaintiffs centered on RevolutionAR and Joshua Roe lacking any protected intellectual property. Even then, the defense cited no

law and only argued that the agreements between the parties reserved proprietary rights for the work performed to Gravity Jack. Finally, Gravity Jack and Luke Richey, in support of their summary judgment motions, maintained that no facts supported any damages incurred by RevolutionAR or Joshua Roe.

In response to Gravity Jack's and Luke Richey's summary judgment motion, plaintiffs RevolutionAR and Joshua Roe presented legal argument supporting the viability of their various causes of action. In reply, Gravity Jack and Luke Richey again relied on language of the contracts that purportedly precluded RevolutionAR from gaining intellectual property rights. The two defendants omitted any discussion of the viability of the many causes of action other than a lack of intellectual property rights, an absence of damages, and the waiver of liability.

After the filing of the summary judgment motions, RevolutionAR and Joshua Roe moved to compel discovery. RevolutionAR and Roe argued that, at the outset of the case, Gravity Jack and Richey wrongly withheld Gravity Jack's corporate and financial records. In response, Gravity Jack and Richey moved for a protective order. The trial court denied RevolutionAR's motion to compel and granted a protective order protecting Gravity Jack's financial records, business plans, marketing strategy, and client lists.

The trial court granted summary judgment to Gravity Jack and Luke Richey and dismissed all causes of action. The trial court concluded that the alleged conduct by Gravity Jack was controlled by contract, that Joshua Roe had no intellectual property rights to anything created for RevolutionAR, that RevolutionAR showed no evidence to support its alleged damages, and that the lawsuit filed against Gravity Jack was frivolous. In addition, the trial court concluded that Luke Richey bore no personal liability because he acted on behalf of Gravity Jack and had been removed from RevolutionAR's board before any alleged wrongful conduct.

The trial court directed counsel for Gravity Jack to prepare an attorney fees summary. The court then set presentment of the order on fees, without oral argument, for December 7, 2018. The trial court eventually entered judgment against RevolutionAR and Joshua Roe and in favor of Gravity Jack and Luke Richey for reasonable attorney fees and costs of \$76,972.45.

LAW AND ANALYSIS

On appeal, RevolutionAR and Roe contend that the trial court erred when (1) granting Gravity Jack's protective order, (2) dismissing Roe's individual claims of infringement of personality rights and invasion of privacy, (3) dismissing all of RevolutionAR's claims because of genuine issues of material fact as to whether the

limitation of liability clauses in contracts apply, whether Luke Richey's status as a former director of RevolutionAR shields him from liability, and whether RevolutionAR suffered damages, and (4) awarding attorney fees and costs against Roe and RevolutionAR.

Protective Order

RevolutionAR contends that the trial court abused its discretion when it precluded the discovery of Gravity Jack's sales and corresponding profit when RevolutionAR's claims involve misappropriation of trade secrets and corporate opportunity. Thus, RevolutionAR assigns error to the trial court's denial of its motion to compel and Gravity Jack's motion for a protective order. In its opening brief, RevolutionAR cites to the trial court pleadings and the trial court order, but to no underlying facts. RevolutionAR offers no legal authority for its argument that the trial court abused its discretion.

RAP 10.3(a)(6) directs each party to supply, in its brief, "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." This court does not consider conclusory arguments unsupported by citation to authority. *Joy v. Department of Labor & Industries*, 170 Wn. App. 614, 629, 285 P.3d 187 (2012). Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *West v. Thurston County*, 168

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Wn. App. 162, 187, 275 P.3d 1200 (2012); *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998).

In a reply brief, RevolutionAR supplies for the first time relevant case authority and an analysis of facts behind the motion to compel discovery and the motion for a protective order. Nevertheless, we decline to address its assignment of error regarding the discovery orders. An appellate court will not consider a claim of error that a party fails to support with legal argument in her opening brief. *Jackson v. Quality Loan Service Corp.*, 186 Wn. App. 838, 845, 347 P.3d 487 (2015). Gravity Jack had no opportunity to reply to an argument placed for the first time in RevolutionAR's reply brief.

Joshua Roe's Claim of Infringement of Personality

This court reviews de novo an order granting summary judgment. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 270, 208 P.3d 1092 (2009). When reviewing a summary judgment order, this court engages in the same inquiry as the trial court, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d at 270. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of

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law.” CR 56(c). A material fact is one on which the outcome of the litigation depends in whole or in part. *Atherton Condominium Apartment-Owners Association Board of Directors v. Blume Development Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

Joshua Roe asserted two causes of action personal to him: infringement of personality rights and invasion of privacy. On appeal, he conflates the two causes of action. Roe predicates the claims on the fact that Gravity Jack used Roe’s voice, from the RevolutionAR prototype application, in Gravity Jack’s PoindexAR prototype application videos. Roe argues that the design and developing resources contract was between RevolutionAR and Gravity Jack, not Gravity Jack and him. Therefore, any limitation of liability in the agreement does not bar his claim. Roe adds that he never gave express or implied consent for Gravity Jack to use the recording of his voice.

In 1998, the Washington legislature adopted the Washington personality rights act, chapter 63.60 RCW. LAWS OF 1998, ch. 274, § 1. The act codified and modified common law principles regarding a person’s right to his or her name, voice, or likeness.

Under the opening sentence of the Act

Every individual or personality has a property right in the use of his or her name, *voice*, signature, photograph or likeness.

RCW 63.60.010 (emphasis added). In turn, RCW 63.60.050 declares:

Any person who uses or authorizes the use of a living or deceased individual's or personality's name, *voice*, signature, photograph, or likeness, on or in goods, merchandise, or products entered into commerce in this state, or for purposes of advertising products, merchandise, goods, or services, or for purposes of fund-raising or solicitation of donations, or if any person disseminates or publishes such advertisements in this state, without written or oral, express or implied consent of the owner of the right, has infringed such right. An infringement may occur under this section without regard to whether the use or activity is for profit or not for profit.

(Emphasis added.) RCW 63.60.060(2) permits statutory damages if the claimant cannot show actual damages:

Any person who infringes the rights under this chapter shall be liable for the greater of one thousand five hundred dollars or the actual damages sustained as a result of the infringement, and any profits that are attributable to the infringement and not taken into account when calculating actual damages.

Gravity Jack concedes it used recordings of Joshua Roe's voice in a YouTube video advertising new technology known as PoindexAR. This court must decide whether Roe presented a question of fact as to whether he gave Gravity Jack consent to use his voice in Gravity Jack's own prototype applications.

The parties' design and development resourcing contract portfolio submission provision reads, in pertinent part:

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

CP at 37. Gravity Jack and Luke Richey argue that by signing the provision of the contract, Joshua Roe expressly consented to any use of his voice in Gravity Jack's materials developed for its clients, including in its demonstrations to other potential clients.

We conclude that a question of fact exists as to whether Joshua Roe gave Gravity Jack consent to use his voice in the software company's prototype applications. Roe did not sign in his personal capacity. Roe signed on behalf of RevolutionAR as acting CEO of the company. In his deposition, Roe stated, "[a]ctually, I would say RevolutionAR was subject to the terms of the agreement, and I signed as an officer, right?" CP at 110-11. Roe declared that Gravity Jack never informed him that it would use his voice in connection with the PoindextAR video. Roe also declared he did not give Gravity Jack or Richey permission to use his voice. Importantly, Luke Richey's own deposition testimony confirms that Roe signed the design and development resourcing contract on behalf of RevolutionAR.

When an agent makes a contract on behalf of a disclosed principal whom he has power to bind, he does not thereby become liable for his principal's nonperformance. *Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc.*, 71 Wn.2d 679, 686, 430 P.2d 600 (1967). This rule addresses the nonperformance of the principal and does

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not directly answer whether the agent may be bound to the provisions of the contract.

But the agent generally has no liability under the contract. *Davis v. Lee*, 52 Wash. 330,

341, 100 P. 752 (1909). One signing a contract as agent and performing no act

inconsistent with the relation of agency is not liable as principal and can neither be sued

for a breach nor for specific performance. 3 AM. JUR. 2D *Agency* § 279 (2020). When

the corporation appears as the primary signer, the signature is that of the corporation, and

when the name or names of one or more of its officers in their official capacity are

appended as subscribing agents, the corporation will be regarded as the signer and

obligor, and the individuals will not be obligated. *Yellow Book Sales & Distribution Co.*

v. Valle, 311 Conn. 112, 84 A.3d 1196, 1202 (2014).

An agent may pledge his or her individual responsibility and become bound by

expressly agreeing to be bound by the obligations in the contract. *Yellow Book Sales &*

Distribution Co. v. Valle, 84 A.3d at 1203. No language in the design and development

resourcing contract suggests that Joshua Roe bound himself to its terms.

Gravity Jack next argues that Joshua Roe, under the design and developing

resourcing contract and other agreements, expressly released Gravity Jack from all

liability for any claim or demand, except for willful misconduct or gross negligence. In

response, we repeat what we just wrote. Roe did not bind himself to the terms of the various contracts.

Gravity Jack writes that Joshua Roe consented to his voice being recorded by voluntarily allowing Gravity Jack to record his voice. We agree, but he consented in the context of his voice being used to promote RevolutionAR projects, not Gravity Jack business. Roe does not complain about his voice being recorded, he complains about the recording of his voice being used to promote Gravity Jack products. Gravity Jack supplies the court no facts suggesting that Roe voluntarily and personally agreed to the use of his voice by Gravity Jack in its own business pursuits.

RevolutionAR's Release of Gravity Jack

RevolutionAR assigns error to the trial court's dismissing its claims based on the company's purported written waiver of liability of Gravity Jack. RevolutionAR maintains that the release of liability terms of the design and development contract only applies to breach of contract and related warranty claims. RevolutionAR also contends that genuine issues of material fact exist as to whether Gravity Jack's conduct rose to the level of willful misconduct or gross negligence.

Gravity Jack relies on provisions in three agreements that it claims released it from liability. First, the design and developing resourcing contract released Gravity Jack,

except “in the case of willful misconduct or gross negligence, . . . for breach of warranty, lost profits, or any other claim or demand.” CP at 179. Second, the Gravity Jack software license terms, which the parties incorporated by reference in the design and developing resourcing contract, also broadly released Gravity Jack from “any other damages, including consequential, lost profits, special, indirect or incidental damages.” The software license limitation of liability extended to anything related to Gravity Jack’s services and “claims for breach of contract, breach of warranty, guarantee or condition, strict liability, negligence, or other tort to the extent permitted by applicable law.” CP at 308. The license waiver applied “even if Gravity Jack knew or should have known about the possibility of damages.” CP at 308. Third, the memorandum of understanding read that each party will “mutually indemnify, defend and hold harmless either company for any claims made against revAR and/or GJ arising out of the work, not arising out of the gross negligence or sole malfeasance of GJ.” CP at 46.

We question whether the mutual indemnification clause in the memorandum of understanding shields Gravity Jack from liability to RevolutionAR. An indemnification clause generally functions to require one party to the contract to defend the other party to the contract from a claim asserted by a third party and to pay the claim. *Johnson v. Little*, 426 S.C. 423, 827 S.E.2d 207, 211 (Ct. App. 2019); *Amoco Oil Co. v. Liberty Auto and*

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Electric Co., 262 Conn. 142, 810 A.2d 259, 263 (2002). This dispute involves claims between the two contracting parties.

RevolutionAR briefly contends that the exclusion of remedies language in the software licensing agreement cannot apply to its claims against Gravity Jack because none of RevolutionAR agents, including Joshua Roe, ever saw the agreement. Also, according to RevolutionAR, Gravity Jack utilized a Vuforia platform, not the b.KIT platform. Nevertheless, RevolutionAR signed the design and developing resourcing contract which stated that the software licensing agreement binds the party.

RevolutionAR cites no law and provides no analysis as to whether it remains bound by a document referenced in an agreement it signs when it could have insisted on seeing a copy of the document before signing the agreement. RevolutionAR also omits any analysis as to the implications of whether the software licensing agreement applies if Gravity Jack employs a different platform. We need not decide, however, if the software licensing agreement bars any of RevolutionAR's claims pending in this suit.

We disagree with RevolutionAR and conclude that the language in the design and developing resourcing contract blankets the various causes of action asserted by RevolutionAR against Gravity Jack. The document specifically refers only to breach of warranty and breach of contract claims, but the language does not limit the release from

liability to those two forms of action. Instead, the language blankets “any other claim or demand.” Therefore, we rule, as a matter of law, that RevolutionAR released Gravity Jack from all claims except those based on willful misconduct or gross negligence.

RevolutionAR provides no analysis as to why the phrase “any other claim or demand” does not stretch to all of its claims asserted against Gravity Jack. CP at 179. In reading a release, a court must render an interpretation that gives a reasonable and effective meaning to all the terms rather than an interpretation that leaves a part unreasonable or of no effect. *Aggregate Construction, Inc. v. Aaron Swan & Associates*, 871 N.W.2d 508, 512 (S.D. 2015). RevolutionAR’s construction of the release terms would only give effect to the language regarding breach of contract and breach of warranty, while rendering nugatory the language of “any other claim.”

RevolutionAR next contends that any waiver of liability does not extend to intentional tort claims asserted against Gravity Jack. RevolutionAR pleads the torts of conversion, intentional misrepresentation, tortious interference with business expectancies, and misappropriation of trade secrets. According to RevolutionAR, Gravity Jack and Luke Richey converted RevolutionAR’s carburetor, while deliberately failing to fully disclose its intended use for the object. RevolutionAR alleges that Gravity Jack misappropriated trade secrets when Gravity Jack marketed its own product to 4LNS,

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while using RevolutionAR's content, assets, trademark, name and rights, and by excluding RevolutionAR from the opportunity to contract with 4LNS. In addition, according to RevolutionAR, Richey uttered intentional and grossly negligent misrepresentations and omissions including, for example: (a) the intended use of the carburetor, (b) that Gravity Jack and Richey would not interfere or compete with RevolutionAR's marketing and selling of products or services related to augmented reality learning development, (c) that Gravity Jack would not pursue for its own benefit such work, (d) that Gravity Jack would direct potential customers to RevolutionAR for such projects, and (e) that Richey would exert efforts to raise funds from investors.

Releases of liability cannot extend to intentional torts. *Philip Morris USA Inc. v. Skolnick*, 171 So. 3d 747, 751 (Fla. Dist. Ct. App. 2015); *Hillerson v. Bismarck Public Schools*, 2013 N.D. 193, 840 N.W.2d 65, 73; W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 68, at 484 (5th ed. 1984). Therefore, we hold that the waiver of liability did not bar RevolutionAR's claims for conversion, intentional misrepresentation, tortious interference with contractual relations, and misappropriation of trade secrets.

Conversion is an intentional tort. *State v. Roache*, 920 N.W.2d 93, 103 (Iowa 2018); *Yuan v. Johns Hopkins University*, 452 Md. 436, 157 A.3d 254, 269 (2017); *Salima Multani v. Knight*, 23 Cal. App. 5th 837, 853, 233 Cal. Rptr. 3d 537, 551 (2018);

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Harris Group, Inc. v. Robinson, 209 P.3d 1188, 1199 (Colo. App. 2009). Conversion is the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it. *Consulting Overseas*

Management, Ltd. v. Shtikel, 105 Wn. App. 80, 83, 18 P.3d 1144 (2001). As its name implies, intentional misrepresentation is also an intentional tort. *Young v. Savidge*, 155 Wn. App. 806, 820-21, 230 P.3d 222 (2010). Interference with contractual relations is an intentional tort. *Quadra Enterprises, Inc. v. R.A. Hanson Co.*, 35 Wn. App. 523, 526, 667 P.2d 1120 (1983). Finally, misappropriation of trade secrets is an intentional tort. *PMC, Inc. v. Kadisha*, 78 Cal. App. 4th 1368, 1382, 93 Cal. Rptr. 2d 663, 673 (2000).

Gravity Jack contends that, even if RevolutionAR's conversion, intentional misrepresentation, tortious interference of business expectancy, and misappropriation of trade secrets claims survive application of the limitation of liability clause, RevolutionAR fails to present evidence that raises a question of fact as to liability under the causes of action. We agree, but only with regard to the conversion and misappropriation of trade secrets causes of action.

RevolutionAR asserts that Gravity Jack converted RevolutionAR's carburetor by failing to fully inform RevolutionAR as to Gravity Jack's intended use of the piece of equipment. Under modern jurisprudence, conversion is the unjustified, willful

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interference with a chattel that deprives a person entitled to the property of possession.

Potter v. Washington State Patrol, 165 Wn.2d 67, 78, 196 P.3d 691 (2008). Conversion

is the act of willfully interfering with any chattel, without lawful justification, whereby

any person entitled thereto is deprived of the possession of it. *Repin v. State*, 198 Wn.

App. 243, 270, 392 P.3d 1174 (2017). The undisputed facts establish that Brendan

Weatherly, an agent of RevolutionAR, loaned the carburetor to Gravity Jack.

RevolutionAR does not contend that Weatherly lacked authority to loan the device.

Nor does RevolutionAR contend that it ever demanded that Gravity Jack return the

carburetor. When the defendant initially acquires the property lawfully, such as by

borrowing a car with the owner's permission, the defendant does not convert the personal

property until the plaintiff demands its return, and the defendant refuses to deliver it. 18

AM. JUR. 2D *Conversion* § 2 (2020). RevolutionAR cites no law that the user of personal

property must inform the lender of the user's intended use.

RevolutionAR relies on *Westview Investments, Ltd. v. U.S. Bank National Association*, 133 Wn. App. 835, 138 P.3d 638 (2006), for the proposition that conversion

turns on how the property is acquired. In *Westview Investments*, the property owner paid

a contractor funds intended to be distributed to the contractor's subcontractors. The

owner wired the funds to the contractor's bank account. The bank, instead of applying

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the payment to debts owed by the contractor to subcontractors, applied the funds to a line of credit owed by the contractor to the bank. This court held that the property owner presented a question of fact as to whether the bank violated a breach of trust when applying the payment to debt owed the bank. Some facts suggested that the bank should have known that the wire deposit was a special deposit for the sole purpose of the benefit of subcontractors.

RevolutionAR presents no facts analogous to the facts in *Westview Investments, Ltd. v. U.S. Bank National Association*. RevolutionAR presents no facts suggesting that Gravity Jack should have known of any limits on its use of the carburetor. To the contrary, RevolutionAR does not enlighten the court as to what purpose Gravity Jack's use of the carburetor should have been limited. RevolutionAR does not answer the begged question of: to what other use would RevolutionAR have applied the carburetor.

We also agree that, based on undisputed facts, RevolutionAR cannot recover on its claim of misappropriation of trade secrets. In its briefing, RevolutionAR does not identify trade secrets allegedly stolen and used. Under the design and developing resourcing contract, Gravity Jack retained the right to add RevolutionAR's project and product for use in its portfolio, demonstrations to other possible clients, and other uses as Gravity Jack seeks fit. RevolutionAR cites no law to supports its claim.

Gravity Jack cites no law and provides no analysis in support of its request for dismissal of the intentional misrepresentation and tortious interference claims other than to perfunctorily argue that it never took any business from RevolutionAR. For this reason, and because Gravity Jack presented no argument to the trial court in support of its summary judgment motion as to the merits of these claims, we reverse dismissal of the two torts. This court does not consider conclusory arguments unsupported by citation to authority. *Joy v. Department of Labor & Industries*, 170 Wn. App. at 629 (2012). Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *West v. Thurston County*, 168 Wn. App. at 187 (2012); *Holland v. City of Tacoma*, 90 Wn. App. at 538 (1998). The reversal will not prevent Gravity Jack from filing a later summary judgment motion before the superior court based on further development of the facts and adequate briefing.

Luke Richey Release from Liability

RevolutionAR sues Luke Richey for: (1) promissory estoppel, (2) implied contract and unjust enrichment, (3) negligent misrepresentation, (4) intentional misrepresentation, (5) tortious interference of business expectancy, (6) breach of fiduciary duties, (7) misappropriation of corporate opportunity, (8) conversion, (9) misappropriation of trade secrets, (10) trademark and tradename infringement, and (11) civil conspiracy.

RevolutionAR assigns error to the dismissal of these claims asserted against Luke Richey.

As we affirmed the dismissal of the misappropriation of trade secrets and trademark infringement claims against RevolutionAR, we affirm the dismissal of those claims against Richey. We also confirm the abandonment of any claim for civil conspiracy.

Luke Richey tersely responds:

1. RevolutionAR's corporate documents indemnify Richey;
2. RevolutionAR fails to show Richey was grossly negligent;
3. RevolutionAR fails to show that Richey misappropriated a corporate opportunity;
4. The business judgment rule protects Richey;
5. Richey incurred no personal benefit from any breaches of duty to RevolutionAR;
6. The corporate format protects Richey from individual liability; and
7. Richey was not a director of RevolutionAR at the time of the alleged misconduct in 2016.

Luke Richey's discussion of his prospective liability ignores the presence of claims brought by Joshua Roe against Richey. Roe sues Richey for invasion of privacy and civil conspiracy. We have already held that any waivers of liability do not bar claims asserted

by Roe. Richey also does not contend that any waiver of liability in the contracts between RevolutionAR and Gravity Jack extend to shield him from liability. Nor does Richey seek escape from liability with refuge from the proviso in RevolutionAR's articles of incorporation that shelter a director from liability to the corporation except for acts of intentional misconduct or that personally benefit the director.

Luke Richey contends an indemnification clause in RevolutionAR's articles of incorporation benefiting members of the corporation's board of directors, one of whom was him, shields him from liability. RevolutionAR argues that the indemnification provision applies only to claims brought by third parties against a board of directors' member. RevolutionAR also maintains that the indemnity clause does not shield Richey because of his intentional misconduct.

RCW 23B.08.510 authorizes a corporation to indemnify members of its board of directors under limited circumstances. The statute declares, in pertinent part:

- (1) Except as provided in subsection (4) of this section, a corporation may indemnify an individual made a party to a proceeding because the individual is or was a director against liability incurred in the proceeding if:
 - (a) The individual acted in good faith; and
 - (b) The individual reasonably believed:
 - (i) In the case of conduct in the individual's official capacity with the corporation, that the individual's conduct was in its best interests; and
 - (ii) In all other cases, that the individual's conduct was at least not opposed to its best interests; and

....

- (4) A corporation may not indemnify a director under this section:
- (a) In connection with a proceeding by or in the right of the corporation in which the director was adjudged liable to the corporation; or
 - (b) In connection with any other proceeding charging improper personal benefit to the director, whether or not involving action in the director's official capacity, in which the director was adjudged liable on the basis that personal benefit was improperly received by the director.

Pursuant to the statute, RevolutionAR's articles of incorporation indemnified its directors from "all liability, damage, or expense resulting from the fact that such person . . . was a director, to the maximum extent and under all circumstances permitted by law," except when grossly negligent. CP at 1078.

We reject RevolutionAR's position that the articles of incorporation indemnification provision applies only to claims brought by third parties against a board of directors' member. It cites no law to support this contention. The broad language of the indemnification provision does not limit its import to third party claims, but instead extends to the maximum protection allowed by law. Indemnification may be sought in many types of proceedings, whether third-party actions or actions by or in the right of the corporation. 18B AM. JUR. 2D *Corporations* § 1628 (2020). Accordingly, a corporation may be required to indemnify an officer for expenses incurred in successfully defending against an action by the company. *Truck Components Inc. v. Beatrice Co.*, 143 F.3d 1057, 1061 (7th Cir. 1998).

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RevolutionAR also contends the indemnification duty does not extend to claims brought by the corporation against the director for breaches of his or her duties to the corporation. The company argues that Richey, as director and advisor to RevolutionAR, possessed a duty of good faith and to act in the best interest of the company and to not misappropriate corporate opportunities. We agree.

Good faith is a prerequisite to corporate indemnification. 18B AM. JUR. 2D *Corporations* § 1625 (2020). Accordingly, indemnification is prohibited in cases of bad faith or intentional wrongdoing or if there is a breach of fiduciary duty. *In re Walt Disney Co. Derivative Litigation*, 906 A.2d 27, 65 (Del. 2006). Whether a director acted with good faith toward the corporation may be a question of fact so that an indemnification dispute generally cannot be resolved until after the merits of the underlying controversy are decided. 18B AM. JUR. 2D *Corporations* § 1625 (2020).

Luke Richey next contends that RevolutionAR failed to show Richey was grossly negligent. We have already dismissed RevolutionAR's claims against Gravity Jack for conversion and misappropriation of trade secrets as a matter of law. We also dismiss the same claims against Luke Richey for the same reason. Richey does not develop his argument that RevolutionAR fails to show gross negligence, so we do not address this

argument. We observe that many of the remaining claims against Richey are intentional torts.

Luke Richey contends that he was not a director of RevolutionAR at the time of his alleged misconduct in 2016. RevolutionAR contends Richey remained a board member indefinitely, but the undisputed facts show that, after prayer, RevolutionAR removed Richey from the board of directors on November 10, 2015. Still, RevolutionAR does not concede that Richey did not engage in taking clients from RevolutionAR before November 2015. Instead some facts show that that RevolutionAR never discovered the conduct of Richey until 2016.

Luke Richey next contends that RevolutionAR has failed to show that Richey misappropriated a corporate opportunity. Because of the lack of legal argument and development of relevant facts, we decline to address this contention. Anyway, facts show that Richey, along with Gravity Jack, took business with Itron and 4LNS away from RevolutionAR.

Luke Richey argues that the business judgment rule protects him. He cites RCW 24.03.127 for this contention. Nevertheless, the statute applies to nonprofit corporations. Richey also fails to develop his argument, and he fails to recognize that RevolutionAR presents some facts showing violation of a fiduciary duty.

Luke Richey contends that RevolutionAR presented no facts that show he reaped a personal benefit from any breaches of duty to RevolutionAR. He fails to recognize some facts that show his conduct benefited Gravity Jack, in which he held an interest.

Although a corporate officer may breach a fiduciary duty by benefiting himself, Richey cites no law that requires that he necessarily reap a personal benefit to be held responsible for breach of duty.

Luke Richey notes that the corporate form protects officers and shareholders from personal liability. *Grayson v. Nordic Construction Co.*, 92 Wn.2d 548, 552-53, 599 P.2d 1271 (1979). Nevertheless, the corporate format does not shield a director from its torts or from liability for breach of duty to the corporation.

We question whether RevolutionAR can sustain an action against Luke Richey for claims of promissory estoppel, implied contract, and unjust enrichment when RevolutionAR and Richey never sought to enter an agreement with one another and when Richey only acted on behalf of Gravity Jack, the contracting party. Nevertheless, neither party has briefed this question. Richey may seek summary judgment dismissal of these claims below.

Damages

The trial court dismissed all of RevolutionAR and Joshua Roe's causes of action

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because of the waiver of liability and because of a failure to present a genuine question of fact as to damages. We have affirmed the trial court's dismissal of all claims brought by RevolutionAR against Gravity Jack except causes of action for intentional misrepresentation and tortious interference with a business expectancy. We have affirmed dismissal of claims brought by RevolutionAR against Luke Richey, except for causes of action in promissory estoppel, implied contract, unjust enrichment, negligent misrepresentation, intentional misrepresentation, tortious interference of business expectancy, breach of fiduciary duties, and misappropriation of corporate opportunity. We have also held that Joshua Roe presents an issue of fact as to the viability of his claims for invasion of privacy and misappropriation of his voice against RevolutionAR and Luke Richey. We now address whether the dismissal of the remaining claims should be affirmed because of the absence of damages.

The Washington personality rights act addresses damages to which the claimant is entitled. RCW 63.60.060(2) permits statutory damages if the claimant cannot show actual damages:

Any person who infringes the rights under this chapter shall be liable for the greater of one thousand five hundred dollars or the actual damages sustained as a result of the infringement, and any profits that are attributable to the infringement and not taken into account when calculating actual damages.

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Thus, even if Joshua Roe can prove no damages resulting from Gravity Jack's use of his voice, the law affords him statutory damages.

RevolutionAR contends that the trial court erred in conflating the fact of damages with the measure of damages. It asserts that, to create a genuine issue of fact on the issue of damages in response to a summary judgment motion, it need only show the fact of damages, not the amount. RevolutionAR alleges that Gravity Jack has been unjustly enriched by income and payment to Gravity Jack from 4NLS and Itron. RevolutionAR also claims that, due to Gravity Jack's misconduct, it lost an opportunity to contract with T-Mobile on a project with an anticipated income of \$70,000 and an anticipated profit of \$15,000. We agree that RevolutionAR presented a question of fact as to its sustaining compensable damages.

RevolutionAR's claims require proof of actual damages. Washington law requires that damages be proved with reasonable certainty. *Mutual of Enumclaw Insurance Co. v. Gregg Roofing, Inc.*, 178 Wn. App. 702, 715, 315 P.3d 1143 (2013). Reasonable certainty is "concerned more with the fact of damage than with the extent of damage or amount of damage." *Gaasland Co. v. Hyak Lumber & Millwork, Inc.*, 42 Wn.2d 705, 712, 257 P.2d 784 (1953) (emphasis omitted). Nevertheless, the fact that the amount of damages need not be proved with precision does not allow a claimant to present no

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evidence regarding the amount. *Mutual of Enumclaw Insurance Co. v. Gregg Roofing, Inc.*, 178 Wn. App. at 715. Therefore, claimed damages must be supported by competent evidence in the record. *Mutual of Enumclaw Insurance Co. v. Gregg Roofing, Inc.*, 178 Wn. App. at 715. To be competent, the evidence of damages must be established by a reasonable basis, and it must not subject the trier of fact to mere speculation or conjecture. *Clayton v. Wilson*, 168 Wn.2d 57, 72, 227 P.3d 278 (2010).

We emphasize RevolutionAR's claims arising primarily from tortious interference of business expectancy and misappropriation of trade secrets. Gravity Jack allegedly took business opportunities from RevolutionAR and gained contracts with third parties by the use of RevolutionAR's secrets. Gravity Jack, not RevolutionAR, possesses the information that proves the income received from the business purportedly wrested from RevolutionAR. For example, Gravity Jack agrees it conducted business with Itron and 4LNS, possible clients of RevolutionAR. Gravity Jack holds the data to the profits received from these clients. RevolutionAR has sought to gain this information. The record shows that Gravity Jack produced a terse sheet showing its income for 2014, but shielding the identity of most clients. The sheet evidences income from contracts with 4LNS.

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When reviewing a summary judgment order, this court views the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d at 270 (2009). More importantly for the issue of RevolutionAR's damages, we are reluctant to grant summary judgment when material facts are particularly within the knowledge of the moving party. *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963); *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn. App. 649, 661-62, 240 P.3d 162 (2010); *Riley v. Andres*, 107 Wn. App. 391, 395, 27 P.3d 618 (2001).

Gravity Jack emphasizes that Joshua Roe, during his deposition, failed to testify to a precise figure of damages sustained by RevolutionAR. But, RevolutionAR need not present an exact amount, and any amounts lie peculiarly within the possession of Gravity Jack.

Attorney Fees under RCW 4.84.185

On appeal, RevolutionAR and Joshua Roe contend that the trial court abused its discretion in awarding fees under RCW 4.84.185. Because we reverse some of the trial court's orders on summary judgment, we do not address the merits of this assignment of error, but instead vacate the award. Gravity Jack and Luke Richey may apply for an award again after completion of the litigation on remand. For the same reason, we deny

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the two defendants' request for an award of reasonable attorney fees and costs on appeal because of a purported frivolous appeal.

CONCLUSION

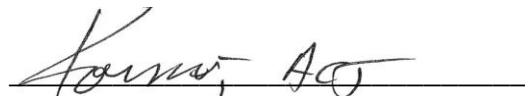
We affirm in part and reverse in part the superior court's summary judgment order favoring Gravity Jack and Luke Richey. We vacate the judgment in favor of Gravity Jack and Richey for reasonable attorney fees and costs. We remand for further proceedings consistent with this opinion.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

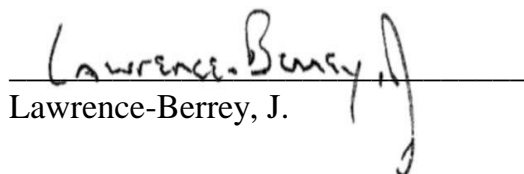


Fearing, J.

WE CONCUR:



Korsmo, A.C.J.



Lawrence-Berrey, J.