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NO. 73066-5-I

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Court of Appeals
Division I
State of Washington

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

MCCLINCY BROTHERS FLOOR COVERING, INC.,

and TIM McCLINCY,

Appellants,

v.

COLLIN CARPENTER and TRISH CARPENTER, husband and wife, and
RANDALL V. BROOKS,

Respondents.

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

Appellants attempted to redirect this case away from its history of personal attacks and acrimony and towards a considered discussion about the controlling legal issues. That is true for both the factual and legal questions raised in this appeal. Respondents, refuse to address either in a reasoned matter.

Among the factual questions, none matter more than Judge Linde's finding that "Encompass stopped payment and never reissued its check because Tim McClincy secretly convinced Encompass that it should not reissue its check." CP 2255 at ¶ 1.39. Judge Linde found that at the very moment he was demanding that payment, McClincy told Encompass not to stop payment on the check, and that Encompass followed his instructions.

She made that finding despite the absence of any witness or exhibit saying anything of the kind, despite Carpenter's testimony that he personally asked Encompass to stop payment on the check, despite Encompass' testimony that it had already made its own decision to refuse the payment because his own investigation had revealed misrepresentations by the Carpenters, and despite the Carpenters' settlement agreement with Encompass in which the Carpenters gave up their claim to the supplement in exchange for Encompass dropping its misrepresentation claim. Judge Linde not only ignored the settlement agreement, but also found that "Encompass has no claims against the Carpenters for insurance fraud or anything else." CP 2260 at ¶ 1.99.

The Carpenters' response to these undisputed facts is the same as it always has been: to completely ignore them. In a 65-Brief, they could not find the time to even acknowledge Encompass' investigation, its decision to terminate payments, their lawsuit against Encompass, or the settlement agreement itself. They even one-up Judge Linde by asserting that "Encompass never made any claim against the Carpenters." Carpenter Brief at 25.

The Carpenters are just as evasive with respect to the legal issues. They do not cite a single authority supporting: (a) Judge Linde's refusal to offset the balance owing on the contract from the contract damages; (b) her conclusion as a matter of law that an accord and satisfaction was created by McClincy's demand for payment; (c) her award of damages against McClincy's for its compliance with her preliminary injunction; or (d) her Consumer Protection Act award for McClincy's business philosophy.

Brooks' response is no better, He cites no authority for his arguments that (a) that a lack of consideration for a noncompete provision that has no bearing on a case will render an entire employment contract void as to the employer's claim but still permit the employee to assert a claim under it; (b) that a court can consider new issues raised in a reply brief on summary judgment; or (c) that overtime under an agreement to work 40 to 70 hours per week can be calculated based on a 40-hour work week.

The Carpenters and Brooks are far too busy maligning McClincy to be bothered with such mundane matters as legal authorities or reasoning. That is not a complete surprise because it is a strategy that has worked well for them in this case, but such tactics have no place here.

RAP 10.3 requires both sides in an appeal to present authorities and reasoned arguments in support of their respective positions. When either party fails to do so, this Court assumes that after diligent search, the party was unable to find any such authorities. Here, that assumption is correct, and this Court should reverse the trial court as set forth in the Brief of Appellants.

II. FACTS

The Carpenters devote over thirty pages of their 65-page brief to their version of the facts, but the vast majority of it has no bearing on the legal issues presented by this appeal. For his part, Brooks commenced his brief with a nine-

page monolog that doubles as an introduction and his version of the facts, which for the most part is as irrelevant and unsupported as the Carpenters' factual statement. Those assertions are mostly irrelevant and immaterial to this appeal, but a few merit discussion.

A. The Carpenters Asked the Court to Require McClincy's to Retain the Furniture.

When this case was commenced, the parties were immersed in a dispute over some of the Carpenters belongings that had been placed in storage during the work. On September 6, 2012, McClincy's sent the Carpenters a supplement that included additional storage fees. Exhibit 106. When the parties were unable to resolve that issue, McClincy's moved the furniture from Crown Moving to its own facility. Carpenter Brief at 12.

The Carpenters learned of the transfer of the furniture in January 2013 and demanded its return. Carpenter Brief at 13. McClincy's refused until the storage fees were paid. CP 109 at ¶ 9. Mr. Carpenter admitted at trial that he never paid for the storage, but instead claimed that he signed over to McClincy's any payments from Encompass for the storage. RP 7/28/14 at 78-79. However, he could not identify that amount. *Id.*

The Carpenters sought a Preliminary Injunction prohibiting any transfer of the furniture during the lawsuit or in the alternative for its return. CP 59-67. Judge Linde granted the Motion for an injunction prohibiting any transfer of the property, but did not order its return. CP 128-32. However, her Order does state that "McClincy's has presented no lawful justification for possessing the Carpenters' household belongings without the Carpenters' permission or consent." CP 130 at ¶ 10.

At that point, the Carpenters had a number of options available to them. They could bring a motion for partial summary judgment or even a motion on

the pleadings for a final order to return the furniture. They could seek a modification of the injunction. But they were quite content with an order requiring McClincy's to provide free storage of the furniture at a time when their insurance carrier was paying for their living expenses and when they could not have used the furniture anyway. So they left the injunction in place and did nothing at all.

The Carpenters then asserted a conversion claim against McClincy's for possessing the furniture that it was required to hold under the Order that the Carpenters themselves had requested. Whatever merits such a claim might have in the abstract, the fact remains that the Carpenters caused McClincy's to retain the furniture, benefited from the resulting free storage, and did nothing to alter the situation for almost a year.

B. McClincy's Was The Contractor for the Outside Remodeling.

Judge Linde found that the Carpenters acted "as their own 'general contractor' and hir[ed] their own subcontractors for the covered patio work," but she also admitted the City of Medina permitting file as trial Exhibit 63. CP 2253 at ¶ 1.26. That file copiously documents the fact that McClincy's was named as the contractor in the permit (Exhibit 63 at page MC-CARP-PL 00125) and acted as the contractor in every respect until Mr. Carpenter became his own contractor after most of the work was finished (Exhibit 63 at page MC-CARP-PL00125; Exhibit 63).

These facts were brought to Judge Linde's attention (CP 2283-84), but she refused to consider them. CP 2364-70. They again were discussed extensively in the Brief of Appellants, and the Carpenters have completely ignored this whole issue as well. Brief of Appellants at 9-11. As far as Judge Linde and the Carpenters are concerned, Exhibit 63 does not even exist. But it does exist, and it says what it says.

The Court should not bury its head in the sand and ignore the undisputed evidence. It should rule as a matter of law that McClincy's was the contractor on the patio remodel until Carpenter changed that on July 31, 2012.

C. Brooks Did Extensive Work on the Patio Remodel as an Agent of McClincy's.

In similar fashion, Judge Linde found that Brooks merely "stayed connected to the Carpenters during the permit project" in the hope of securing some finishing work. CP 2253 at ¶ 1.28. Once again, the undisputed facts are completely different and were presented to Judge Linde, but she refused to even acknowledge them. CP 2282-83; CP 2364-70. And once again, the undisputed evidence was discussed at length in Appellant's Brief, but does not merit a single word in the Carpenters' Brief. Brief of Appellants at 9-11.

This is not some minor detail or tangent, but goes to the heart of the case. Brooks's emails with Carpenter at the time at the time portray his involvement as essentially his full-time employment on behalf of McClincy's. He applied for the permit in February 2013 in the name of McClincy's. Exhibit 63 at page MC-CARP-PL 00125. He signed the Medina Construction Code of Conduct as the General Contractor. Exhibit 63 at MC-CARP-PL 00160. He submitted plan revisions on March 9, April 25, and May 8, 2012. Exhibit 63 at MC-CARP-PL 00115-00117. The permit itself was issued on May 16, 2012, and confirms McClincy's role as contractor. Exhibit 63 at page MC-CARP-PL 00104.

Brooks then oversaw and managed the work. On June 13, 2012, Brooks sent Carpenter an email listing ten separate items that he personally was doing at the time.

I'm putting together a project plan for work at the house to provide to you. I'd like to get most of the dust removed from the house before installing appliances..... Will install wood under stairs beginning Monday next week and will put the third coat on- then we'll spray the

millwork following and get appliances in. We'll leave the paint for the great room and master to be done in another phase. Inside work will be in concert with the exterior. Lights for the laundry room will go in before we paint.

Exhibit 52 at page Carpenter 563. He also worked with and oversaw the consultants and subcontractors on the job. On June 25, 2012, he emailed the designer and said:

Attached is the patio layout that we will need your help with. The city would like to see a drawing with the perimeter shown. The perimeter wall will extend 18 inches above finished slab with the exception of the south wall which will be sided. There will be 3 steps coming down from the family/sun room. The stair will have a raked edge on either side that will extend 18 inches above steps. We will only use steel to support the north side of the roof structure.

Exhibit 52 at Carpenter 570. Five days before Carpenter became his own contractor, Brooks was doing concrete work.

This week we have installed the ledger that is necessary to later install the stone veneer. I'm awaiting a response from the first water feature professional, but in the interim I've met with another to get additional thoughts.

Exhibit 55 at Carpenter 610.

Brooks testified that all of his involvement with the Carpenters was done in his capacity as "an authorized agent of McClincy's." RP 7/16/14 at 179. McClincy's suspected that Brooks did this work on the side for personal payment, but Judge Linde found that the Carpenters never paid him anything. CP 2271 at 7. It necessarily follows that Brooks simply gave the Carpenters the benefit of McClincy's services for free.

D. McClincy Did Not Cause Encompass to Withhold the \$40,736.07 Check.

In the end, no other issue in the case matters more than whether Judge Linde erred in finding that "Encompass stopped payment and never reissued its check because Tim McClincy secretly convinced Encompass that it should not reissue its check." CP 2255 at 1.39. Her entire decision rests on this determination.

The idea that a large national insurance company would let a contractor tell it whether to pay a claim conjures images of moon-landing doubters and silent black helicopters. That is doubly true when the contractor himself would have been the recipient of the check. At a minimum it calls for some kind of evidence. Plenty of undisputed evidence about the decision not to make the payment does exist, but all of it demonstrates that Encompass made its own decision for entirely different reasons than anything that McClincy ever said.

In addition to the sheer absurdity of that statement, the undisputed evidence at trial was completely the opposite.

Encompass representative Michael Chesterman testified at trial by deposition and was the only witness with direct testimonial knowledge on the subject. He repeatedly refused to say that McClincy caused the decision and just as repeatedly said that Encompass made its own decision based on its own investigation. The following excerpts from his trial testimony are lengthy but necessary to accurately present this evidence to the Court.

Q: And what was your role?

A: I investigated the file.

Q: You investigated the file?

A: The claim. I'm -- I'm sorry.

RP 7/23 at 150

Q: And what did Encompass do with respect to the payment of further benefits to the Carpenters as a result of your investigation?

A: As a result of our investigation we discontinued payments of additional living expenses and we denied payment of a supplement.

RP 7/23 at 158.

Q: And is this referring to the supplement that was not paid by Encompass as a result of what Mr. McClincy told Encompass? Do you understand my question?

A: Yeah. This is the estimate for the supplement. But -- but I can't say it was not paid simply for the fact of what Mr. McClincy said. This is the estimate for the supplement that we denied.

RP 7/23 at 160.

Q: Did you make recommendations for payment or non-payment of this supplement?

A: Did I make recommendation? I would say that I brought the facts of the loss to management. And it was decided on together to move forward with the denial.

RP 7/23 at 161.

Q: And as a result of your investigation –

A: As a result of my investigation, the claim was, the supplement was denied. And further ALE payments were stopped.

Q: That's ALE?

A: Yes.

Q: What is ALE?

A: Additional Living Expenses, sir.

RP 7/23 at 161-162.

Q: Does the fact that Mr. McClincy stated that much of the work being billed to Encompass was unrelated to the initial water loss have a bearing on the claim?

A: Yes.

Q: But that statement was never confirmed by Encompass.

A: To my knowledge, and again, I briefly went over the file in coming here, but to my knowledge we did not, we didn't find that in any bills we did pay. But again, our investigation was focused on the outstanding bill and the current ALE payments.

RP 7/23 at 166-67.

Q: Did you do any further investigation -- strike that. Did you do anything to confirm the statements that Mr. McClincy gave you, confirm the accuracy of them?

A: Steve Potter was sent back out to the home to review the damages of the home.

RP 7/23 at 174.

Q: Okay. There was a conclusion in this case that fraud had been committed?

A: We had a conclusion of material misrepresentation.

Q: And material misrepresentation by whom?

A: The Carpenters.

Q: Okay. Did you ever make any investigation of the material representations of Tim McClincy?

MR. ZUBEL: Objection the form, lack of foundation. Withdraw the objection.

BY MR. CORNING:

A: No. We did not. And for it to be material it would have to affect the outcome for this person. So his – he wouldn't really have a material misrepresentation for something that he stated.

RP 7/23 at 187-88. The actual pertinent testimony at pages 150-191 is far more extensive, and the Court may wish to review it for additional context.

It is actually much worse than that for the Carpenters. Judge Linde adopted their proposed finding that “Encompass has no claims against the Carpenters for insurance fraud or anything else” (CP 2260 at ¶1.99), but they go even further, brazenly boasting that “Encompass never made any claim against the Carpenters.” (Carpenter Brief at 25). That assertion is an outright misrepresentation.

At trial, Chesterman read a March 22, 2013 letter from Encompass to the Carpenters' attorney stating:

Encompass has determined that your clients fraudulently obtained no less than \$57,233.52 in insurance proceeds from Encompass, to which they're not entitled. At this time **Encompass is taking steps to determine what action it will take** in order to recoup these fraudulently obtained insurance proceeds.

RP 7/17/14 at 218 (emphasis added); *see* RP 7/17/14 at 158, 161-62, 215-16. Encompass directly accused the Carpenters of misrepresentation and refused to pay the claim as a result.

The step that Encompass chose to take was to deny all additional payment of any kind to the Carpenters. Encompass refused to pay not only the \$40,736.07 supplement for the water claim, but also “later claims made by the Carpenters for theft of their furniture (Encompass Claim Z1147634) and for liability claims made against the Carpenters by McClincy Brothers Floor Coverings, Inc. in King County Superior Court Cause No. 13-2-03051-9 (Encompass Claim Z1146713).” Exhibit 163 at Page 1.

The Carpenters do not mention the accusation of misrepresentation or the denial of all additional payments. When Encompass refused to make any

further payments, the Carpenters filed a lawsuit. All of those claims were resolved in a settlement agreement that was admitted as trial Exhibit 163. In the settlement agreement, the Carpenters expressly acknowledged that:

Encompass conducted further investigation of the Carpenters' claim and as a result of its August 2012 investigation, Encompass decided to discontinue the payment of benefits under Encompass Claim Z1116175 [water damage claim] and threatened to seek reimbursement of certain benefits paid under Claim Z1116175."

Exhibit 163 at p. 1 (emphasis added).

In a Mutual Release agreement, the Carpenters waived any right to any payments by Encompass for three claims in exchange for Encompass waiving its misrepresentation claims against the Carpenters. Exhibit 163 at page 2. The reason why Encompass did not pay the \$40,736.06 supplement was that the Carpenters surrendered them in exchange for Encompass dropping its misrepresentation claims. Despite all this undisputed evidence, the Carpenters still insist that substantial evidence supports Judge Linde's finding that Encompass really refused to the supplement because Tim McClincy told it not to. McClincy cannot respond to the Carpenters' explanation for the settlement agreement because the Carpenters have never once even mentioned the during this entire case.

III. ARGUMENT

A. Carpenter Issues.

1. Breach of Contract

The appeal of Judge Linde's \$40,800 contract award in favor of the Carpenters presents a purely legal question concerning the measure of damages for breach of a construction contract; there are no factual issues. This is an area where the law provides a very detailed and specific method of computing the damages, and the Carpenters never even try to deny it.

The damages award is calculated with the three-part test set forth in *Eastlake Const. Co., Inc. v. Hess*, 102 Wn.2d 30, 686 P.2d 465 (1984).

Subject to the limitations stated in §§ 350–53, the injured party has a right to damages based on his expectation interest as measured by

- (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
- (b) any other loss, including incidental or consequential loss, caused by the breach, less
- (c) any cost or other loss that he has avoided by not having to perform.

Id. at 46. No one has ever disputed this rule, but Judge Linde refused to follow it.

Judge Linde found that the Carpenters contracted to pay \$260,021.17 for full performance of the contract (CP 2260 at ¶ 1.88), of which \$215,305.45 was paid (CP 2260 at ¶ 1.92). That mathematically leaves an unpaid balance of \$44,715.72. However, Judge Linde ruled that McClincy's was not entitled to an offset "because McClincy's materially breached the McClincy's Contract." CCP 2261 at ¶ 1.6. If that were the law, then *Eastlake* would have to be reversed in its entirety.

Judge Linde further found that the Carpenters incurred \$40,800 of expenses to complete the contract, which includes \$5,000 paid to their testifying expert Mike Showalter. CP 2260 at ¶ 1.92. Under *Eastlake*, the Carpenters' damages are calculated as their \$40,800 cost to complete the work less the avoided expense of the unpaid balance of \$44,715.72. That results in a net award to McClincy's of \$3,915.72.

In their response to this legal analysis, the Carpenters fail to cite a single legal authority or to make a single legal argument. The only thing that they do say is that "if McClincy Brothers had performed its remaining contract obligations, the Carpenters would not have had to pay McClincy Brothers for

that work” because “Encompass would have paid.” Carpenter Brief at 45. That argument is nonsense because it ignores Encompass’ decision not to pay the claim as a result of the Carpenters’ misrepresentation. It also would constitute incidental or consequential loss under the *Eastlake* test, and Judge Linde did not award such damages. The Carpenters were awarded the cost to complete, and they, not Encompass, were the parties to the contract. Judge Linde denied the offset not on the grounds stated by the Carpenters, but because of McClincy’s breach. The Carpenters are making an entirely new and different argument on appeal.

This Court, of course, cannot reverse the Supreme Court’s decision in *Eastlake* even if wanted to. *Eastlake* is the law, and the Carpenters never deny that it compels reversal and remand for entry of judgment for McClincy’s in the amount of \$3,915.72. This Court should enforce the law and do precisely that.

2. Unjust Enrichment Claim for Indoor Addition

Judge Linde dismissed the unjust enrichment claim for the indoor remodeling as a matter of law under CR 41(b)(3) when McClincy’s rested its case at trial. She based this decision on accord and satisfaction. CP 2261 at ¶ 1.2; RP 7/24/14 at 61 (“The Court finds that the Affirmative Defense of Accord and Satisfaction is made out by these facts, and simply on their face as a matter of law, the plaintiff’s lose their claims.”). Review therefore is *de novo* with all evidence and inferences viewed in a light most favorable to McClincy’s. *In re Dependency of Schermer*, 161 Wn.2d 927, 940, 169 P.3d 452, 459 (2007).

Although she said that she was deciding the motion as a matter of law, Judge Linde did not view the evidence in a light favorable to McClincy’s. In her oral decision that she incorporated into the Findings of Fact and

Conclusions of Law (CP 2250), Judge Linde actually said that she was deciding the issue as a matter of law but still weighing the evidence. RP 7/24/14 at 17-18, 61-63; RP 7/24/14 at 61-63. She did the same thing with the contract claim, repeatedly saying that she was deciding the motion to dismiss as a matter of law, but also making credibility determinations, apparently in the belief that she could weigh the evidence and still rule as a matter of law. RP 7/24/14 at 64-66.

In the end, it really does not matter because as a matter of law, no accord and satisfaction existed.

The elements of an accord and satisfaction are: (1) a debtor tenders payment, (2) on a disputed claim, (3) communicates that the payment is intended as full satisfaction of the disputed claim, and (4) the creditor accepts the payment. *Douglas Northwest, Inc. v. Bill O'Brien & Sons Const., Inc.*, 64 Wn.App. 661, 685-86, 828 P.2d 565 (1992).

Carpenter Brief at 43. The Carpenters made no offer to pay a disputed debt; instead, McClincy's demanded payment of an amount claimed to be owed. No authority exists that McClincy's agreement to accept payment without a contingency created an accord and satisfaction. Nor did Judge Linde find that the Carpenters communicated an intention for the check to be payment in full of a disputed debt. The first element of accord and satisfaction was not proven, and the defense fails as a result. The Court should reverse the order dismissing the unjust enrichment claim for the indoor remodeling and remand for a new trial on that issue.

3. Unjust Enrichment Claim for Patio Remodel

When asked about the contracts between the Carpenters and McClincy's during a May 9, 2014 deposition, McClincy testified that he had been advised that Brooks may have formed a contract for the patio addition. CP 1299. No

claim was ever pled for such a contract, and McClincy did not attempt to assert one in his deposition.

The Carpenters nonetheless brought a motion for summary judgment seeking the dismissal of a purported claim for breach of an “alleged unsigned, unwritten contract.” CP 1297-1300. Because no such claim was ever asserted, the motion was four pages long and entirely hypothetical.

Instead of bringing a claim for breach of an agreement, McClincy’s brought a motion for leave to assert a claim for unjust enrichment for the benefit it conferred on the Carpenters in connection with the patio addition. CP 1712-1723. The Carpenters filed a seven-page Opposition (CP 1751-63) supported by a Declaration from attorney Jennifer Karol (CP 1764-67) and a Declaration of Colin Carpenter (CP 1768-70).

On June 23, 2014, the Carpenters filed their Reply Brief on their motion to dismiss the phantom contract claim. CP 1838-42. In their Reply Brief, they abandoned their original motion and repeated their arguments against the proposed amended complaint. For example, both pleadings assert that the unjust enrichment claim just repeated earlier fraud claims “disguised as” unjust enrichment. CP 1756, 1840. The same day, Judge Linde granted the Motion for Leave to file the Second Amended Complaint.

When the motion to dismiss the phantom contract claim was heard three days later, the Carpenters ignored their contract arguments and reargued the Motion for Leave to Amend the Complaint. During that hearing, counsel for the Carpenters admitted: “When I filed the motion, there wasn't a Third Claim for Relief.” RP 6/27/14 at 18. Although she had just granted the Motion for Leave to Amend three days earlier, Judge Linde dismissed the unjust enrichment claim under the contract summary judgment motion.

Based on the argument of counsel and the evidence presented the Court finds that (1) no genuine issue of material fact exists on these claims, and (2) the Carpenters are entitled to summary judgment as a matter of law on plaintiff's claims for damages arising out of an unsigned, unwritten contract with the Carpenters as they are now set forth in plaintiff's Second Amended Complaint under plaintiff's "Third Claim for Relief."

CP 2200-01.

The proposition that a judge cannot grant a motion for leave to assert a new claim and then three days later dismiss that claim based on a new argument raised in a reply brief in an unrelated summary judgment motion that addressed an entirely different legal theory, should go without saying. *See Norco Const., Inc. v. King County*, 97 Wn.2d 680, 685, 649 P.2d 103, 106 (1982) ("Although zoning is, in general, a proper exercise of police power which can permissibly limit an individual's property rights, it goes without saying that the use of police power cannot be unreasonable."). To the extent it does not go without saying, *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn.App. 163, 168, 810 P.2d 4, 8 (1991), along with many other cases, does say so.

4. Conversion of Furniture and Personal Property

a. The Court Should Reverse or Limit the Award.

As set forth above, McClincy's retained the Carpenters' furniture during this case pursuant to an order requested by the Carpenters themselves. They took no action to modify that order or to secure the property for almost a year.

Washington follows the universal principle that a party may not seek an order and then complain that it was injured because the order was granted.

Accordingly, we will not now hear Nuzum's complaint that the court resolved the factual dispute when he specifically requested the court to do so. When a party submits an issue and argues it before the court below, that party cannot complain on appeal that the trial court erred in considering and resolving that issue.

Western National Assurance Co. v. Hecker, 43 Wn.App. 816, 821, 719 P.2d 954, 958 (1986). Under this rule, a party may not propose a jury instruction

and then complain that it was given. *City of Seattle v. Patu*, 147 Wn.2d 717, 721, 58 P.3d 273, 274 (2002). A party who requests consolidation cannot complain if it is granted. *State v. Hood*, 24 Wn.App. 155, 160, 600 P.2d 636, 640 (1979).

The Carpenters' only defense of their inaction is to claim that a preliminary injunction "simply preserves 'the status quo until the trial court can conduct a full hearing on the merits of the complaint'" as if they were powerless to do anything. Carpenter Brief at 46. But that simply is not true. They could have sought partial summary judgment for the return of the furniture. The Carpenters could have asked Judge Linde to issue a permanent injunction based on her determination as a matter of law that "McClincy's has presented no lawful justification for possessing the Carpenters' household belongings without the Carpenters' permission or consent." CP 130. That procedure was approved by the Supreme Court in *City of Seattle v. Davis*, 174 Wn.App. 240, 245, 306 P.3d 961, 964 (2012).

The Carpenters instead chose to do nothing because they were fully protected by the preliminary injunction and at the same time benefitted from it by having their furniture stored for free. They never claim that they experienced any actual loss of use of the furniture. In their proposed order on the Motion for Preliminary Injunction, the Carpenters did not ask for the return of the furniture to use it, but instead to "allow the Carpenters to transfer their household belongings to an independent location chosen by the Carpenters." CP 130 at ¶ 3.

b. The Damage Award Is Not Supported By Evidence.

To the extent that the Court does not reverse the conversion award on the merits, it should reverse the damage award for lack of evidence. The only damages awarded were for loss of use, which Judge Linde based on a flawed

formula. She found that 50% to 75% of the Carpenters' furniture was placed in storage, and then calculated damages by reference to a comparison of the size of their home and the apartment paid for by Encompass, together with the rental cost of the furniture in the apartment. CP 2258-2259 at ¶ 1.78. There are almost too many flaws in that reasoning to count.

First, there was no evidence that 50% of the Carpenters' furniture was in storage. Trish Carpenter testified that half of the house was affected by the leak, not about how much furniture was stored. RP at 7/28/14 at 131. Second, value of the use of the furniture cannot be measured by the rental cost of totally different and unidentified furniture. Aside from both groups apparently including "furniture," no evidence was offered that the furniture in the two groups was equivalent or interchangeable. Neither part of the equation was even defined by the evidence.

Judge Linde made a damage award based on nothing but speculation about how much furniture was in storage, what it consisted of, and whether or how it could have been used. The law does not require precision with respect to the amount of damages, but it does require some proof. This kind of "hypothetical loss" is not recoverable. *DePhelps v. Safeco Ins. Co. of Am.*, 116 Wn.App. 441, 451, 65 P.3d 1234, 1239 (2003).

5. Consumer Protection Act

As the Carpenters note in their Brief, Judge Linde awarded Consumer Protection Act damages against McClincy based on "the driving philosophy of his interaction with the customer and the public." Carpenter Brief at 51 (citing RP 8/8/14 at 15 (trial court's oral rulings)). Judge Linde seemed particularly displeased that McClincy failed to deny or put some different light on those allegations. *Id.*

The Consumer Protection Act is not a vehicle to punish businesspeople for what are perceived to be bad attitudes or character. To sustain a claim under the CPA, the plaintiff must prove the elements of the claim. *Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn.App. 777, 796, 6 P.3d 583, 593 (2000).

Judge Linde did not make findings to support the elements of the CPA claim for any of the unfair and deceptive acts and practices that she identified. For example nothing in her findings links having a “negative ethos of business” (CP 2264 at ¶ 1.34), bringing this action (*Id.* at ¶ 1.31), “disingenuous negotiations” (*Id.* at ¶ 1.33), or refusing to comply with court orders (*Id.* at ¶ 1.33) with any other elements of the CPA. She simply lists a litany of accusations as if that were enough to award a judgment.

In their Brief, the Carpenters likewise make sweeping statements about things like McClincy’s alleged “abusive business model,” but they never articulate a single coherent Consumer Protection Act claim. Because neither the findings nor the evidence support all of the elements of a CPA claim for any of the acts or practices, this Court should reverse.

6. Prejudgment Interest

Judge Linde’s award of prejudgment interest was a gratuitous enhancement to an already-inflated award, and the Carpenters’ defense of it is equally vacuous. The Carpenters acknowledge that prejudgment interest can only be awarded when the amount is liquidated, meaning calculated “without reliance upon opinion or discretion” and then turn a blind eye to Judge Linde’s discretionary decisions. Judge Linde did not even find that the damages were liquidated. Judge Linde said in her findings that she had two alternate ways to calculate the contract damages, and chose one of them. CP 2263 at ¶ 1.22. That alone precludes prejudgment interest. *King Aircraft Sales, Inc. v. Lane*, 68 Wn.App. 706, 721, 846 P.2d 550, 559 (1993)

(prejudgment interest award was error because “the trial court findings indicated alternative grounds for ‘damages’”). She called her award of conversion damages an “estimate.” CP 2259 at ¶ 1.80. An “estimate” is the antithesis of a liquidated claim. *See Rekhter v. State, Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 125, 323 P.3d 1036, 1047 (2014). To the extent that the Court affirms the trial court, it should reverse the award of prejudgment interest.

B. Reply to Brooks Brief.

It is hard to find a single sentence in Brook’s Brief that is not a distortion or an outright falsehood. He takes equal liberties with the facts and the law. Brooks starts his brief with a lengthy monologue that is part introduction and part factual statement, but completely inaccurate or irrelevant. Appellants are not going to respond to those assertions except to the extent relevant to the narrow issues raised here and will trust that the Court is entirely capable of distinguishing pertinent argument from pointless statements.

1. Dismissal of McClincy’s Claim Against Brooks on Summary Judgment

McClincy’s asserted a contract claim against Brooks in the First Amended Complaint. CP 509-524. The Agreement contains a non-compete provision, but claim was ever made under it. On June 2, 2014, however, Brooks filed a Motion for Partial Summary Judgment claiming that the entire agreement was void for lack of consideration because the noncompete provision was not supported by independent consideration because it was signed after he started. CP 1448-1456. Whether the noncompete provision was supported by consideration was the only argument in his Motion.

In its response to the Motion, McClincy’s attached an earlier version of the agreement that was signed on Brooks’ first day of employment and pointed

out that its claim was “based upon Brooks’ agreement not to ‘solicit, divert [or] damage’ Plaintiffs existing customer relationships while he was employed, not attempting to enforce the noncompete provision” and that the two were contained in separate paragraphs. CP 1730. McClincy’s presented authority that even if the later version were invalid for lack of consideration, the former version would be reinstated by operation of law. CP 1731-32 (citing *Bakke v. Buck*, 21 Wn.App. 762, 764, 587 P.2d 575 (1978)) and further pointed out that the agreement contained a severability section. CP 1730.

In his Reply, Brooks raised a completely new argument that both versions of the Confidentiality Agreement were in the name of alleged non-entity “McClincy’s Home Decorating, Inc.” (CP 1850-52). No evidence regarding the status of McClincy’s Home Decorating, Inc. was presented..

Judge Linde granted the motion only on the grounds of the name on the contract. .” CP 2197. The proposed order does state that the agreement was void for lack of consideration, but a handwritten interlineation limits that part of the order to the later agreement. *Id.* It is black letter law that a trial court may not grant summary judgment based on a new argument made in a reply brief. *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn.App. 163, 168, 810 P.2d 4, 8 (1991).

Brooks falsely states that “the appellate record does not reveal any opposition to Randy’s rebuttal, constituting a waiver of that issue on appeal.” Brooks Brief at 15. That is not true. At the June 27, 2014 hearing on the motion, counsel for McClincy’s said, among other things, “This business about coming into court at the eleventh hour and all of a sudden claiming Lack of Capacity; claiming that McClincy's Home Decorating Inc. never existed, therefore, the contract's no good. Well, that's an ambush.” RP 6/27/14 at 40. That discussion continued for two pages. RP 6/27/14 at 40-42.

Brooks also incorrectly argues that a party waives an objection to a new argument in a reply brief by failing to make record in the trial court. Brooks cites *Turner v. Kohler*, 54 Wn.App. 688, 775 P.2d 474 (1989) as authority for that argument, but *Turner* and the cases that it cites refer to defects in the form of affidavits, not new arguments on reply. Objections to the admissibility of the evidence timely presented are waived if not made for the simple reason that those defects “can be corrected by an appropriate motion in an action by the trial court.” *Crabtree v. Lewis*, 86 Wn.2d 282, 290, 544 P.2d 10, 15 (1975).

This Court has made it clear that include all grounds for a summary judgment motion in the motion itself is the duty of the moving party.

“It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment.” Further, “[a]llowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond.” Thus, “it is incumbent upon the moving party to determine what issues are susceptible to resolution by summary judgment, and to clearly state in its opening papers those issues upon which summary judgment is sought.” If the moving party fails to do so, it may either strike and refile its motion for summary judgment or raise the new issues in a new filing at a later date, but the moving party cannot prevail on the original motion based on issues not raised therein.

Admasu v. Port of Seattle, 185 Wn.App. 23, 40, 340 P.3d 873 (2014)

Id. at 40 (footnotes omitted). Parties who willfully violate basic rules of civil procedure cannot justify their behavior by blaming the other for not complaining loudly enough. This Court should reverse.

2. Judge Linde’s Overtime Calculations Are Erroneous.

Brooks likewise falsely asserts that Judge Linde’s overtime calculations were not challenged at the trial court level. McClincy’s Motion for Reconsideration and/or Modification of Findings of Fact states:

McClincy's may not have established the required hours of work, but the Court did when it found that Brooks's compensation was based on Exhibits 206, 207 and 208. All three of those exhibits state that the employee "must work a minimum of 40 hours per week and a

maximum of 70 hours per week." The Agreements referenced by the Court establish a flexible work schedule that was not limited to 70 hours per week

CP 2293.

Aside from his false claim that this issue was not raised below, Brooks has nothing at all to say about it. Brooks testified that Exhibits 206 and 208 were the form of his contract with McClincy's. RP 8/5/14 at 22-23. Judge Linde found that to be the case. CP 2274 at ¶ 10. That Agreement expressly states that Brooks "must work a minimum of 40 hours per week and a maximum of 70 hours per week." Exhibits 206 and 208 at page 2.

In *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 532, 7 P.3d 807, 815 (2000), the Washington Supreme Court approved the Department of Labor and Industry's adoption of the variable workweek rule. Under that rule, when the parties agree to a 40-hour work week, the hourly rate is the week wage divided by 40, and overtime is paid at one and half times that fixed regular rate. However, when the parties agree to a variable work week, the regular rate is calculated as the weekly pay divided by the total number of hours actually worked in the week and can vary. Because the regular rate is already included in overtime hours, overtime pay is just an extra fifty percent of the variable for hours over 40 in any given week. *Innis*, 141 Wn.2d at 530-35.

Judge Linde ignored the undisputed fact that the parties agreed to a variable work week. The Court should reverse and remand for calculations in accordance with the rule.

C. Attorney Fees.

One would hope that every King County attorney and Superior Court judge has read *Berryman v. Metcalf*, 177 Wn.App. 644, 312 P.3d 745 (2013) and taken its message to heart, but that seems not to be the case here. The Carpenters and Brooks submitted lavish requests for awards of attorney fees

supported by opaque and conclusory documentation, and Judge Linde simply awarded them every penny they requested. The motions and the award are equally indefensible. Neither the Carpenters nor Brooks have shown any comprehension of the fundamental policy considerations set forth in *Berryman*, but instead chose to see what the court might simply hand out. Judge Linde completely abdicated her responsibility to perform a serious and independent review of the fee requests and to explain the reasons for her decisions. The fee award should be reversed.

D. The Receivership Issues Are Moot.

The Receivership issues have been resolved by the bankruptcy court and need not be addressed by this Court.

E. Motion for Joinder.

The Carpenters defer to Brooks' arguments on the joinder issue, and he makes nonsensical arguments about different questions being presented for McClincy and McClincy's. Judge Linde made no such distinctions, but instead imposed joint and several liability. CP 2262 at ¶¶ 1.13, 2263 at ¶1.27, 2263-64 at ¶ 1.28; 226 at ¶¶ 3, 5 and 7; 2660 at ¶¶ 10, 11, 15 and 16; 2663 at ¶ 1(a)((ii) and 1(b)(i); 2664 at ¶ 2; 4 and 8; 2665 at ¶ 9.

Brooks likewise speculates that perhaps Talmadge withdrew over a conflict of interest between McClincy and McClincy's, a proposition for which there is no evidence or inference at all, and which, if true, would make present counsel's joint representation unethical. The Court should grant the Motion for Joinder for the reasons articulated therein.

F. Response to Motions for Fees.

Just as they systematically failed to cite any authorities for the substantive arguments in their Briefs, the Carpenters cite no authorities in support of their Motion for fees on appeal. The Carpenters instead cited to Conclusions of Law

2.1 and 2.2 in the order granting them attorney fees below. Carpenter Brief at 65 (citing CP 2250 at ¶¶ 2.1 and 2.2). Even if that were a citation to the authorities contained therein, paragraph 2.1 refers only to RCW Chapter 4.84, which addresses costs, not attorney fees. Paragraph 2.2 refers to RCW 19.86.090, but says nothing about joint and several liability or other matters set forth there.

Brooks at least makes passing reference to “CP 2650-2658, awarding attorney fees pursuant to contract and in accordance with RCW 49.48.030 and RCW 49.52.070,” but he offers no specificity or explanation. RCW 49.48.030 and RCW 49.52.070 have specific exclusions and limitations that are not addressed at all.

This Court and the Supreme Court have held that “RAP 18.1(b) requires ‘[a]rgument and citation to authority’ as necessary to inform the court of grounds for an award, not merely ‘a bald request for attorney fees.’ *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wash.2d 692, 710 n. 4, 952 P.2d 590 (1998).” *State v. Richardson*, 177 Wn.2d 351, 366, 302 P.3d 156, 163 (2013). Even if this Court were somehow to affirm, it should deny fees for failure to comply with RAP 18.1.

IV. CONCLUSION

This Court should focus on the questions presented and simply enforce the law. With regard to the Carpenters’ contract claim, it should: (a) enforce the rule of *Eastlake* and offset the Carpenters damages by the balance on the construction contract, resulting in a \$3,915.72 judgment for McClincy’s; (b) reverse the CR 41(b)(3) dismissal of McClincy’s unjust enrichment claim for the indoor remodeling and remand that issue for trial; (c) reverse the summary judgment order dismissing McClincy’s unjust enrichment claim for the patio addition and remand for trial; (d) reverse the conversion award and dismiss the

conversion claim; (e) reverse the Consumer Protection Act award and dismiss the claim; and (f) reverse and dismiss the award of prejudgment interest.

With respect to Brooks, the Court should: (a) reverse the dismissal on summary judgment of McClincy's contract claim; (b) reverse the award of overtime pay and remand for recalculation under the variable workweek rule.

The Court should further reverse the awards of attorney fees to the Carpenters and Brooks and award fees to McClincy and McClincy's under the mutuality of remedies doctrine for claims that are reversed outright and reserve fees for claims remanded for trial. Lastly, the Court should dismiss the receivership appeal as moot and grant the motion for joinder.

DATED this 18th of July, 2016.

BRACEPOINT LAW, P.S.

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DECLARATION OF SERVICE

I, Matthew Davis, hereby declare as follows:

1. I have personal knowledge of the facts set forth herein and am competent to testify thereto.
2. On July 18, 2016, I served the foregoing document on the parties identified in paragraph 3.
3. The documents identified in paragraph 2 were served on the following persons at the email addresses stated pursuant to agreement of counsel.

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DATED this 18th day of July, 2015 at Seattle, Washington.


Matthew F. Davis