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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JZK, INC., a Washington corporation, Respondent, v. VIRGINIA COVERDALE; JOHN DOES 1-20 and JANE DOES 1-20, also known as ENLIGHTEN ME FREE, Appellant.	No. 46465-9-II UNPUBLISHED OPINION

WORSWICK, J. — JZK, Inc. obtained an injunction, a judgment for attorney fees, a writ of execution, and an order of contempt against Virginia Coverdale after Coverdale posted a video on the Internet in violation of a nondissemination agreement. Coverdale appeals several superior court orders arguing that the court erred by (1) granting JZK summary judgment and denying Coverdale summary judgment on the issue of the contract's breach, (2) dismissing Coverdale's affirmative defenses and counterclaims, (3) denying Coverdale's motion to amend her answer to the complaint, (4) failing to strike JZK's summary judgment rebuttal brief, and (5) finding Coverdale in contempt of two court orders. We affirm all the superior court's orders except for the order finding Coverdale in contempt. Accordingly, we reverse the contempt order in part and remand for the court to reconsider its contempt decision consistent with this opinion.

FACTS

JZK, Inc. is a for-profit Washington corporation that operates Ramtha's School of Enlightenment (RSE). At RSE, students learn about the teachings of "Ramtha," a 35,000-year-

old spiritual entity purportedly channeled by RSE's founder, JZ Knight. Clerk's Papers (CP) at 122. At one point, Knight purported to channel Jesus as well as Ramtha, but she later retracted this claim.

Before students participate in RSE events, they are required to sign "Conditions of Participation" (CoPs). CP at 13. At issue in this case are two CoPs from 2006 and 2007 which Coverdale signed. The 2007 CoP states that the conditions "apply to all future events or activities in which you participate at the School." CP at 37. The CoPs inform the signer that "[t]he information and techniques taught here are for your knowledge only," and that the signer is "licensed to use this information and techniques for your personal use only." CP at 239, 37. The 2006 CoP prohibits the distribution of information "that you teach or learn at the School," and the 2007 CoP prohibits the distribution of "any information or techniques that you learn or are taught at the School." CP at 239, 37. They further prohibit "assist[ing] or facilitat[ing] other persons" in distributing such information. CP at 239, 37. The 2007 CoP also contains a reasonable attorney fees provision for enforcement of the conditions. The CoPs are enforceable "for the life of JZ Knight, plus 21 years." CP at 240, 38.

Beginning in about 2008, RSE began offering "live stream" instruction events over the internet. CP at 1079. These live stream events were available to existing students, who had presumably signed a CoP at an in-person event, and to new students, who signed an online version of a CoP.

Virginia Coverdale was a student at RSE beginning in 2006. She signed the 2006 and 2007 CoPs. In 2008, Coverdale and Knight had a personal dispute when Coverdale began dating Knight's former boyfriend. Knight sent Coverdale an email in 2008 barring Coverdale from all

future RSE events, but in 2009, Knight allowed Coverdale to return to RSE. Coverdale attended several RSE events during 2009 and 2010, but never signed another CoP.

By 2012, Coverdale became increasingly critical of RSE and Knight, and she had many concerns about the organization. For example, Coverdale was especially concerned about potential fire hazards at RSE, and she was frustrated by how local authorities responded when she raised these concerns. Coverdale was also concerned with the relationship she perceived between local elected officials and RSE.

Coverdale received a flash drive in the mail one day from an anonymous source. The flash drive contained an approximately 11-hour video recording of a live stream event at RSE. It is undisputed that Coverdale did not attend the live stream event from which this video came. Coverdale posted approximately two and a half minutes of this video on the internet. Neither the 11-hour video nor the shorter video Coverdale posted is part of our record on appeal, nor were they filed in the superior court. Coverdale avers that the video portrayed Knight "making derogatory, bigoted, and hate-filled statements about homosexuality, Catholicism, and Jewish people at a February 2012 JZK, Inc. event." Br. of Appellant at 6 (citing CP at 69, 90-91). She also avers that it showed an elected county commissioner attending an RSE event. JZK said only that the video was "taken from a video recordings [sic] depicting JZ Knight channeling Ramtha during the course of a 2012 RSE event."[1] CP at 14.

[1] Neither party argues that the contents of the video were not RSE's "information and techniques." *See* CP at 239, 37.

JZK filed for a temporary restraining order (TRO) against Coverdale, and the superior court granted its motion. Later, the superior court granted JZK a preliminary injunction restricting Coverdale from releasing further videos. JZK also filed a complaint alleging breach of contract, and sought injunctive relief to prevent Coverdale from distributing JZK's proprietary material. In response, Coverdale pleaded several affirmative defenses and counterclaims.[2] JZK moved for partial summary judgment dismissing Coverdale's counterclaim of misrepresentation and fraud on the grounds that it violated JZK's religious freedom rights. The superior court granted this motion.

The parties agreed to a case schedule, setting the discovery cutoff for June 14, 2013. On April 15, eight weeks before the discovery cutoff, Coverdale moved to amend her answer to JZK's complaint. She sought to add eight affirmative defenses and five counterclaims.[3] JZK objected to this proposed amendment, arguing that the necessary discovery would likely delay

[2] Coverdale pleaded the following affirmative defenses: (1) lack of capacity to sue, (2) failure to join JZ Knight as a party under CR 19, (3) piercing the corporate veil and alter ego, (4) federal preemption, (5) failure to state a claim upon which relief can be granted, (6) unconscionability, (7) violation of public policy, (8) indefiniteness, (9) misrepresentation or fraud, (10) fraudulent inducement, and (11) that an injunction against Coverdale would violate the first amendment to the federal constitution and article I, section 5 of the Washington Constitution.

Coverdale pleaded the following counterclaims: (1) that the lawsuit was a Strategic Lawsuit Against Public Participation (SLAPP), (2) defamation per se, (3) misrepresentation as to copyright, and (4) misrepresentation and fraud.

[3] The affirmative defenses were "Illegality, Estoppel, Waiver, Failure of consideration, Fault of a non-party," . . . "voidness, vagueness, and indefiniteness." CP at 812-13.

The counterclaims were (1) defamation, (2) false light, (3) outrage, (4) intentional infliction of emotional distress, and (5) violation of the Washington Consumer Protection Act (CPA).

trial for over a year. The superior court denied this motion, noting the undesirability of further complicating what began as a simple breach of contract case. It also noted that the proposed new affirmative defenses were sufficiently similar to the original defenses that Coverdale would be able to argue her theories even without the amendment.

On May 17, 2013 JZK filed a motion for partial summary judgment to dismiss Coverdale's affirmative defenses and remaining counterclaims. The superior court granted this motion in part, dismissing all but three affirmative defenses (unconscionability, misrepresentation and fraud, and fraudulent inducement).[4] On May 31, both JZK and Coverdale moved for summary judgment. The hearing on this final summary judgment motion was scheduled for Friday, June 28. JZK filed its rebuttal to Coverdale's response to JZK's summary judgment motion on Monday, June 24. Coverdale moved to strike this rebuttal, arguing that it was late and included new argument that addressed Coverdale's defenses, which defenses she raised in her response. The superior court considered this motion, but granted summary judgment in favor of JZK.[5] The superior court denied Coverdale's summary judgment motion. The superior court entered judgment for JZK: it granted a permanent injunction and awarded JZK attorney fees and costs in the amount of $600,021.

[4] The superior court orally granted JZK's motion for summary judgment on June 14, 2013. The superior court's written order on this motion is dated July 26, 2013.

[5] The superior court orally granted JZK's motion for summary judgment and denied Coverdale's motion for summary judgment on June 28, 2013. The court's written order on the motions for summary judgment is dated July 19, 2013.

JZK then requested a writ of execution to partially satisfy its judgment out of Coverdale's personal property—namely, her motor vehicle. The superior court issued this writ, directing the sheriff to deliver possession of Coverdale's vehicle to JZK. The superior court did not issue an order prohibiting Coverdale from transferring or otherwise disposing of her vehicle.

Regarding Coverdale's vehicle, the parties contested whether its value exceeded the $3,250 personal property exemption in RCW 6.15.010(1)(c)(iii). Coverdale moved to quash the writ, claiming the vehicle exempt. The superior court denied Coverdale's motion to quash the writ, instead ordering the parties to follow a procedure to appraise the vehicle.[6] The superior court set a deadline for the appraisal.

Coverdale did not follow the superior court's ordered procedure to have the vehicle appraised: instead, she provided JZK a website-generated "Trade Bookout Sheet" which she had obtained through a car dealership. CP at 1999. This sheet estimated her vehicle's value. Subsequently, JZK learned that Coverdale had sold her vehicle to a friend, Kevin O'Sullivan, and distributed the proceeds. JZK sought an order of contempt against both Coverdale and her attorney for violating the writ of execution and the appraisal order. The superior court found only Coverdale in contempt, and found that she intentionally violated both orders. The superior court assessed a $3,000 penalty as sanction for the contempt, but it provided Coverdale three weeks to purge the contempt by repurchasing the vehicle from O'Sullivan or otherwise bringing the vehicle back into the jurisdiction of the court. Coverdale did not do so. Coverdale appeals.

[6] The superior court ordered JZK and Coverdale to each appoint a "disinterested person to appraise" the vehicle. CP at 2020. In the event the appraisers did not agree on the vehicle's value, the superior court directed the appraisers to choose a third appraiser to break the tie.

ANALYSIS

I. FAILURE TO STRIKE REBUTTAL BRIEF

Coverdale argues that the superior court erred by failing to strike JZK's rebuttal brief in support of its summary judgment motion because the rebuttal (1) was untimely and (2) included new argument and evidence. We disagree.

A. *Standard of Review*

We review a superior court's ruling on a motion to strike for an abuse of discretion. *King County Fire Prot. Districts No. 16 v. Hous. Auth. of King County*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994). A superior court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

B. *Timeliness*

Coverdale argues that JZK's rebuttal on its summary judgment motion was untimely because it was due on Friday, June 21, but was not filed until Monday, June 24. We hold that the rebuttal was timely filed.

CR 6(a) is a general rule governing how time should be computed under the civil and local rules. It provides that when a deadline is less than seven days away, weekends are not included in the computation. CR 6(a). Therefore, if a deadline falls on a Saturday or Sunday, the proper time for filing is the previous Friday. CR 6(a). But CR 56(c), specifically governing timeliness in summary judgments, provides that "[i]f the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday."

Coverdale argues that CR 56(c), governing summary judgment specifically, is "subject to" CR 6(a), such that weekends should be excluded and the deadline is the previous Friday. Br. of Appellant at 53. But Coverdale provides no authority for this proposition. *See* Br. of Appellant at 53, 53 n.76 (citing *In re Det. of Capello*, 114 Wn. App. 739, 749, 60 P.3d 620 (2002) (holding that CR 6(a)'s mandate to exclude weekends applied to chapter 71.09 RCW, which included a 72-hour period but was silent about weekends)). Coverdale misinterprets the court rules.

We use the principles of statutory construction to interpret court rules. *Lane v. Skamania County*, 164 Wn. App. 490, 496, 265 P.3d 156 (2011). We endeavor to apply the plain meaning of the statute, without making any portion meaningless or superfluous. *State v. Derenoff*, 182 Wn. App. 458, 463, 332 P.3d 1001 (2014). If CR 6 applied even to summary judgment motions, then CR 56(c) would be meaningless because it would never apply. Moreover, when both a general and a specific provision address the same subject, we resolve the conflict in favor of the more specific provision. *See Knowles v. Holly*, 82 Wn.2d 694, 702, 513 P.2d 18 (1973). Because CR 56(c), which applies only to summary judgment, is more specific than CR 6, and because we interpret court rules to avoid making any rule superfluous, we apply CR 56(c).

Under CR 56(c), the rebuttal was timely filed. The summary judgment hearing was set for Friday, June 28. Rebuttal documents are due five calendar days before a hearing. CR 56(c). JZK's rebuttal was therefore due five calendar days before Friday, which fell on Sunday. Under CR 56(c), the rebuttal falling on Sunday was due the next working day *nearer* the hearing—namely, Monday. JZK filed on Monday, and the rebuttal was therefore timely. Thus, the superior court did not abuse its discretion by declining to strike the timely rebuttal.

C. *New Argument in Rebuttal*

Regarding JZK's May 31 motion for summary judgment, Coverdale argues that the superior court erred by failing to strike JZK's rebuttal brief because it included new argument not contained in its initial motion—specifically, that it rebutted Coverdale's defenses that she raised in her response to JZK's summary judgment motion. We disagree.

In general, a party moving for summary judgment must raise in its initial motion "all of the issues on which it believes it is entitled to summary judgment." *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991). Raising new issues in a rebuttal is inappropriate because it does not permit a nonmoving party to respond. *White*, 61 Wn. App. at 168.

JZK complied with the requirement that it raise in its initial motion the issues on which it believed it was entitled to summary judgment—namely, that Coverdale breached the CoPs. Its summary judgment motion dealt only with the question of breach, and JZK had moved *separately*, on May 17, for partial summary judgment dismissing Coverdale's affirmative defenses. Thus, JZK did not seek in its May 31 summary judgment motion to disprove Coverdale's affirmative defenses. We hold that JZK complied with the requirement to raise all of the issues on which it was entitled to summary judgment, because it moved for summary judgment on breach of contract.

Here, after JZK filed its May 31 motion for summary judgment on breach of contract, Coverdale filed a response that discussed her affirmative defenses in detail as a basis to deny summary judgment. She now argues that JZK was not entitled to rebut these arguments because it did not discuss them in its initial brief. But JZK was entitled to rebut arguments contained in

Coverdale's response to JZK's summary judgement motion. CR 56(c). We hold that the superior court did not abuse its discretion by declining to strike JZK's rebuttal brief.[7]

II. MOTION TO AMEND

Coverdale argues that the superior court erred by denying her motion to amend her answer to JZK's complaint and add counterclaims.[8] We disagree.[9]

Under CR 15(a), a party may amend a pleading by leave of court, and the superior court shall grant leave freely when justice so requires. The superior court has discretion to determine whether to allow amendments, and we reverse that decision only for an abuse of discretion. *Hines v. Todd Pac. Shipyards Corp.*, 127 Wn. App. 356, 373-74, 112 P.3d 522 (2005). A superior court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *Hines*, 127 Wn. App. at 374.

[7] Coverdale also argues in a heading that the superior court erred by granting summary judgment to JZK while JZK's motion for protective order was pending. But her brief contains no argument or citations to authority in support of this contention, and we do not consider it. RAP 10.3(a).

[8] The superior court denied Coverdale's motion to add several counterclaims to her answer. The court also denied her motion to add several affirmative defenses, but her brief on appeal appears to abandon any argument about these affirmative defenses. Thus, we discuss only Coverdale's arguments related to her attempt to add counterclaims.

[9] JZK argues that this issue is moot because Coverdale has since initiated a lawsuit alleging the same claims. "An appeal is moot where it presents purely academic issues and where it is not possible for the court to provide effective relief." *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 631, 860 P.2d 390, 866 P.2d 1256 (1993). But Coverdale's separate lawsuit has no bearing on whether we can provide effective relief to Coverdale. We could reverse the superior court's denial of Coverdale's motion to amend; thus, we can provide Coverdale effective relief, and this issue is not moot.

The superior court did not abuse its discretion by denying Coverdale's motion to amend. In denying the motion, the court noted that JZK's suit on the narrow issue of breach of contract had already become highly complex, involving several counterclaims and affirmative defenses. The court thus denied Coverdale's motion to add even more counterclaims. In addition, Coverdale sought to add five counterclaims to this case just two months before the agreed close of discovery. There are tenable reasons for denying a party's motion to amend when the amendment would require discovery on multiple factual issues in counterclaims and affirmative defenses, and where the discovery cutoff is approaching. Coverdale cannot show that the decision not to allow the addition of more counterclaims was an abuse of discretion. *Hines*, 127 Wn. App. at 373-74. Instead, the superior court had reasons to attempt to keep the breach of contract case limited and to proceed with the existing discovery, given the risk of significant delay. Moreover, the court noted that Coverdale's existing affirmative defenses were sufficiently related to her proposed affirmative defenses that she would be able to argue her theories even without the amendment. The court's decision was not based on untenable grounds or reasons. We therefore affirm the superior court's order denying the motion to amend.

Alternatively, even if the superior court erred in denying the motion to amend, this error was harmless. After the superior court granted summary judgment to JZK in this case, Coverdale filed suit in Thurston County Superior Court against JZK and JZ Knight personally, pleading the five counterclaims that the superior court refused to allow her to add to her complaint in this case, as well as other claims. JZK argues that because Coverdale has a viable suit in superior court, her argument is moot. Thus, JZK appears to concede that Coverdale's suit is not collaterally estopped or foreclosed by res judicata. Thus, even if the superior court erred

by preventing Coverdale from amending her answer in the instant case, this error appears harmless because Coverdale may proceed with those claims in her other case in superior court.

III. SUMMARY JUDGMENTS

Coverdale next argues that the superior court erred by granting JZK's summary judgment motion and by denying Coverdale's summary judgment motion. Coverdale also argues that the superior court erred by granting summary judgment dismissal to JZK on Coverdale's affirmative defenses and counterclaims. We disagree.

A. *Standard of Review*

We review summary judgment orders de novo. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). Summary judgment is appropriate if, when viewing the facts in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Ranger Ins. Co.*, 164 Wn.2d at 552. A genuine issue of material fact exists when reasonable minds could reach different conclusions. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009).

B. *Breach of Contract*

Coverdale argues that the superior court erred by entering summary judgment for JZK.[10] She also argues that the superior court erred by denying her summary judgment motion, because she is entitled to judgment as a matter of law. These arguments both turn on Coverdale's

[10] JZK argues in a footnote that Coverdale waived this issue by failing to assign error to the order granting JZK a TRO. JZK cites no authority for the proposition that findings in a TRO, which by its plain terms do not adjudicate the merits of the underlying dispute, binds the parties. Moreover, we review summary judgments de novo. *Ranger Ins. Co.*, 164 Wn.2d at 552. Thus we consider the merits of Coverdale's argument.

contention that she did not breach the CoPs. We disagree because there is no question of material fact that Coverdale breached the CoPs, which applied to her and to the materials she disseminated.

1. *Substitute Agreement*

First, we determine whether both CoPs were in force, or whether merely the 2007 CoP was in force. Coverdale argues that the 2007 CoP was a substitute agreement, and thus it effectively rescinded the 2006 CoP. Thus, she argues that the superior court erred by considering both CoPs as "'the agreement.'" Br. of Appellant at 36 (quoting Verbatim Report of Proceedings (VRP) (June 28, 2013) at 60-61). JZK argues in a footnote that Coverdale waived this argument by failing to raise it until her motion for reconsideration. We consider Coverdale's argument on its merits, but we reject her contention that the 2007 CoP was a substitute agreement.

Parties generally may not raise new issues in a motion for reconsideration after an adverse ruling. *Int'l Raceway, Inc. v. JDFJ Corp.*, 97 Wn. App. 1, 7, 970 P.2d 343 (1999). But a party may raise new issues at that time where, as here, the new issues are "not dependent upon new facts and are closely related to and part of the original theory." *Nail v. Consol. Res. Health Care Fund I*, 155 Wn. App. 227, 232, 229 P.3d 885 (2010). Here, the two CoPs were before the superior court, and the legal issue of whether the 2007 CoP was a substituted agreement is closely related to the legal issues of contract interpretation already before the court. Therefore, we consider the merits of this argument.

When parties enter into a second contract dealing with the same subject matter as the first, but do not say whether the second contract is intended to discharge or replace the first, we interpret both contracts together. *Durand v. HIMC Corp.*, 151 Wn. App. 818, 830, 214 P.3d 189 (2009). If there are inconsistencies between the two contracts, the second prevails. *Durand*, 151 Wn. App. at 830. In that case, the second becomes a substitute agreement for the first. *See* RESTATEMENT (SECOND) OF CONTRACTS § 279 (1981). But if the contracts are not inconsistent, neither contract supersedes the other, and both apply. *Durand*, 151 Wn. App. at 830.

Where, as here, the second agreement does not expressly discharge the first agreement, we endeavor to interpret both contracts. *Durand*, 151 Wn. App. at 830. And Coverdale does not point to any inconsistent terms between the two CoPs. Thus, the 2007 CoP was not a substituted agreement discharging the 2006 CoP, and the superior court did not err in interpreting both contracts together. *Durand*, 151 Wn. App. at 830.

2. *Nondissemination Clauses Not Ambiguous*

Coverdale argues that the CoPs' nondissemination clauses are ambiguous and therefore the clauses must be construed against JZK.[11] Coverdale argues that the clauses are ambiguous because they include language suggesting that they protect only the information and techniques

[11] Coverdale argues that she did not breach the 2007 CoP. She does not address the 2006 CoP based on her argument that the 2007 CoP was a substitute agreement. But because we hold that both contracts are in force, we consider Coverdale's argument as addressing both the 2006 and 2007 CoPs.

that the signer learns while personally attending in-person (not live stream) events at RSE.[12] We disagree.

When interpreting a contract, we give the utmost importance to the parties' intent. *Durand*, 151 Wn. App. at 829. We look to the objective manifestations in the contract and not to the "unexpressed subjective intent of the parties" in determining intent. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005).

In determining intent, we consider the contract as a whole and the parties' conduct. *King v. Rice*, 146 Wn. App. 662, 670, 191 P.3d 946 (2008). We generally interpret the language of the contract as written, giving each term its "ordinary, usual, and popular meaning" unless the entire contract demonstrates that the parties had a contrary intent. *Hearst*, 154 Wn.2d at 504. We interpret contracts to give effect to each provision and to harmonize contract terms that seem to conflict. *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007). In harmonizing contract terms, we give greater weight to specific terms than general terms. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 354-55, 103 P.3d 773 (2004).

We review whether a contract is ambiguous de novo as a question of law. *GMAC v. Everett Chevrolet, Inc.*, 179 Wn. App. 126, 135, 317 P.3d 1074, *review denied*, 181 Wn.2d 1008 (2014). "'[C]ontractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts.'" *Queen Anne Park Homeowners Ass'n v.*

[12] She points to the following language: "These conditions apply . . . to all future events or activities in which you participate at the School;" "[y]ou agree not to teach or otherwise disseminate . . . any information or techniques that you learn or are taught at the School;" and "The materials provided to you at the School are subject to the copyright laws." CP at 37.

State Farm Fire & Cas. Co., 183 Wn.2d 485, 489, 352 P.3d 790 (2015) (alteration in original) (internal quotation marks omitted) (quoting *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 181, 110 P.3d 733 (2005)). Summary judgment is appropriate where a contract has only one reasonable meaning in view of the written contract and the parties' objective manifestations. *GMAC*, 179 Wn. App. at 135.

First, Coverdale argues that the CoPs are ambiguous because they do not state whether they are limited to information the signer obtained directly from RSE. We disagree.

The CoPs prohibit the signer from disseminating JZK's information and techniques, without limitation on how the signer receives them. The CoPs read: "The information and techniques taught here are for your knowledge only." CP at 239, 37. The CoPs also provide that the signer is "licensed to use this information and techniques for your personal use only."[13] CP at 239, 37. The signer then agrees not to "teach or otherwise disseminate through speeches, books, articles, media interviews, or other forms of mass or group distribution . . . any information" or techniques the signer learns or teaches at RSE. CP at 37. The CoPs also prohibit "assisting or facilitating other persons" in disseminating RSE's materials without RSE's consent. Then, the CoPs inform the signer that the materials RSE provides are subject to copyright protections, and that the signer is not authorized to "copy, reproduce, prepare adaptations, publicly distribute, publicly perform, or publicly display" RSE's materials without RSE's consent. CP at 239, 37. Thus, taken as a whole, the CoPs unambiguously protect RSE's

[13] Coverdale does not argue that the phrase "information or techniques" is ambiguous regarding what material it applies to. Thus, we do not discuss any potential ambiguity in that phrase.

information and techniques from distribution without JZK's consent regardless of whether the signer obtains them directly from RSE or through a third party.

Second, Coverdale argues that the CoPs are ambiguous regarding whether they protect RSE information from events the signer did not attend. Again, we disagree.

The CoPs are not limited to information and techniques the signer obtains by attending an RSE event. The CoPs inform the signer that "[t]he information and techniques *taught here* are for your knowledge only," and that the signer is licensed to use "*this* information"—i.e., the information *taught here* (without apparent limitation) "for your personal use only." CP at 37, 239 (emphasis added). The 2007 CoP provides that the signer agrees "not to teach or otherwise disseminate . . . any information or techniques that you learn or are taught at the School." CP at 37. This clause broadly prevents dissemination of information or techniques that "are taught at the School," and it does not exempt information or techniques from events the signer did not attend. Moreover, the CoPs prohibit assisting or facilitating other persons in disclosing RSE's information and techniques, evincing a clear intent to apply to information or techniques that the signer did not learn from an event she attended. Thus, the CoPs as a whole are not ambiguous: they are not limited to events which the signer personally attends.

Third, Coverdale argues that the phrase "'at the School'" is ambiguous because it is unclear whether this language applies to live stream events, and the CoPs do not specifically mention live stream events. Br. of Appellant at 41 (quoting CP at 37). We disagree.

It is undisputed that the video Coverdale distributed came from a live stream event. But as stated above, the CoPs as a whole are unambiguous: they broadly protect RSE's information and techniques—everything taught at the School. The live stream events, so long as they

consisted of RSE's information or techniques, would therefore fall under the CoP. There is no language in the CoPs showing an intent to limit their application merely to in-person events. Thus, we hold that the CoPs unambiguously protect JZK's "information and techniques," regardless of whether the signer obtains the information directly from RSE, attends the event at which the protected information is taught, or whether the information was provided in person or through a live stream event.

3. *Anticipatory Breach*

Coverdale argues that JZK anticipatorily breached the CoPs in the 2008 email when JZK appeared to expel her from RSE, thus excusing any future breach by Coverdale. We disagree.[14]

Anticipatory breach occurs when "when one of the parties to a bilateral contract either expressly or impliedly repudiates the contract prior to the time of performance." *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994). Repudiation of a contract by one party may be treated by the other as a breach that will excuse the other's performance. *CKP, Inc. v. GRS Constr. Co.*, 63 Wn. App. 601, 620, 821 P.2d 63 (1991). Whether a party anticipatorily repudiated a contract is generally a question of fact. *VersusLaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 321, 111 P.3d 866 (2005).

Here, even taking all inferences in favor of Coverdale, there are no questions of fact about whether JZK anticipatorily repudiated its ongoing obligations when Knight sent the 2008

[14] JZK argues that Coverdale waived this argument by raising it for the first time in her motion for summary judgment, because it was an affirmative defense that should have been pleaded. Assuming without deciding that this issue was not waived, we consider the merits of Coverdale's argument.

email purporting to bar Coverdale from attending RSE. Anticipatory breach can occur only prior to the time of performance, but under the plain terms of the CoPs, JZK had already fully performed and did not owe any ongoing obligations to Coverdale. Instead, JZK had performed its obligations by allowing Coverdale to "participate in the teachings of Ramtha" when she signed the CoPs. CP at 239, 37. The CoPs contain no language to suggest that a signer is excused if he or she stops attending RSE for any reason. Thus, Coverdale's argument that JZ Knight's 2008 email purporting to expel Coverdale from school somehow excused Coverdale's ongoing performance is unavailing. There are no genuine issues of material fact precluding summary judgment on the issue of anticipatory breach.

C. *Dismissal of Affirmative Defenses*

Coverdale argues that the superior court erred by granting summary judgment dismissal on her affirmative defenses.[15,16] We disagree.

[15] Coverdale offers argument regarding why the superior court erred by dismissing her affirmative defenses of fraudulent inducement and undue influence. But Coverdale provides no argument for why the superior court erred by dismissing her other affirmative defenses. To the extent Coverdale discusses any other affirmative defenses in her brief, she appears to argue only that they remain effective in contesting her breach of contract. Because Coverdale assigns error to the dismissal of all of her affirmative defenses, we analyze whether each affirmative defense was properly dismissed under a summary judgment standard.

[16] The procedure of these summary judgment dismissals is complicated. On February 8, 2013, the superior court dismissed Coverdale's counterclaim for misrepresentation and fraud. On May 17, JZK moved for partial summary judgment dismissing Coverdale's affirmative defenses and remaining counterclaims. On May 31, JZK moved for summary judgment on breach of contract. Also on May 31, Coverdale moved for summary judgment on breach of contract. On June 14, the superior court *orally* dismissed most of Coverdale's affirmative defenses. The superior court did not dismiss the defenses of unconscionability, misrepresentation and fraud, and fraudulent inducement. The superior court then formalized this oral ruling in writing on July 26. In the meantime on July 19, the superior court granted JZK's motion for summary judgment and denied Coverdale's motion for summary judgment.

Below, Coverdale pleaded eleven affirmative defenses. She moved unsuccessfully to add two additional affirmative defenses. On appeal, Coverdale abandons several of her affirmative defenses.[17] We discuss only those affirmative defenses which Coverdale properly pleaded below[18] and did not abandon on appeal.[19]

1. *Substantive Unconscionability*

Coverdale argues that the CoPs are substantively unconscionable. We disagree.

Thus, the superior court never explicitly dismissed the affirmative defenses of unconscionability, misrepresentation and fraud, and fraudulent inducement. But by granting summary judgment to JZK on the issue of breach, the superior court necessarily dismissed these affirmative defenses; the superior court could not have granted JZK's motion for summary judgment, and denied Coverdale's motion, had it not rejected them. Thus, all affirmative defenses were dismissed on summary judgment.

[17] Coverdale's brief contains no argument about the following affirmative defenses: lack of capacity, failure to join JZ Knight under CR 19, federal preemption, failure to state a claim upon which relief can be granted, misrepresentation and fraud, indefiniteness, and free speech issues. Accordingly, we deem that she has abandoned these affirmative defenses. RAP 10.3(a)(6).

[18] Coverdale did not properly plead undue influence; she raised this defense for the first time in opposition to JZK's motion for summary judgment. Undue influence is an affirmative defense to breach of contract. *See Gerimonte v. Case*, 42 Wn. App. 611, 613, 712 P.2d 876 (1986). Thus, Coverdale waived this defense by failing to plead it under CR 8(c). *See In re Estate of Palmer*, 145 Wn. App. 249, 258, 187 P.3d 758 (2008). And because Coverdale did not plead undue influence, the superior court did not dismiss it. Thus, it was not dismissed, and we have no ruling to review about undue influence. Alternatively, because this defense was not properly pleaded, the superior court did not err in refusing to consider it.

[19] Coverdale pleaded piercing the corporate veil as an affirmative defense below, and she continues to argue on appeal that we should pierce JZK's corporate veil to entitle Coverdale to recover damages from JZ Knight personally. Piercing the corporate veil is a doctrine that allows a court to disregard a corporate entity and assess liability against individual shareholders. *Morgan v. Burks*, 93 Wn.2d 580, 585, 611 P.2d 751 (1980). Piercing the corporate veil is not a defense to breach of contract.

We review unconscionability as a question of law. *McKee v. AT&T Corp.*, 164 Wn.2d 372, 396, 191 P.3d 845 (2008). Agreements may be unconscionable in two ways: substantively and procedurally. *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wn.2d 598, 603, 293 P.3d 1197 (2013). Either type of unconscionability alone is sufficient to void a contract. *Gandee*, 176 Wn.2d at 603. Here, Coverdale alleges only substantive unconscionability. An agreement may be substantively unconscionable where it is one-sided or overly harsh. *Romney v. Franciscan Med. Grp.*, 186 Wn. App. 728, 740, 349 P.3d 32, *review denied*, 184 Wn.2d 1004 (2015). In making this determination, we look at whether the provisions in question shock the conscience, are monstrously harsh, or are exceedingly callous. *Romney*, 186 Wn. App. at 740.

Coverdale relies almost exclusively on *McKee* in support of her substantive unconscionability argument. JZK argues that *McKee* addresses only confidentiality clauses in dispute resolution provisions of contracts. 164 Wn.2d at 404 (finding the subject agreement substantively unconscionable "to the extent that it purports to waive the right to class actions, require confidentiality, shorten [a] statute of limitations, and limit availability of attorney fees"). In *McKee*, our Supreme Court held that a confidential arbitration clause in a consumer contract was substantively unconscionable because it hindered the open and public administration of justice. 164 Wn.2d at 398-99. Even though the facts in *McKee* addressed dispute resolution provisions, the law of substantive unconscionability is not so limited. Any provision that is one-sided or overly harsh may rise to the level of unconscionability.

Coverdale argues that the CoPs are substantively unconscionable because the CoPs are adhesion contracts. We disagree. A contract may be an adhesion contract if it is (1) a standard form printed contract, (2) "'prepared by one party and submitted to the other on a take it or leave

it basis,'" and the parties did not have a true equality of bargaining power. *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 304, 103 P.3d 753 (2004) (internal quotation marks omitted) (quoting *Yakima County (W.Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 393, 858 P.2d 245 (1993)). But the determination whether a contract is an adhesion contract goes to whether it is procedurally, not substantively, unconscionable. *Adler*, 153 Wn.2d at 347 n.7. Thus, even assuming without deciding that the CoPs are an adhesion contract, this consideration would not make the CoPs substantively unconscionable.

Coverdale also argues that the CoPs are substantively unconscionable because they are one-sided and overly harsh. We disagree. The nondissemination clause prevents dissemination of JZK's proprietary information and techniques in exchange for the signer participating in voluntary RSE activities. We hold that, as a matter of law, this clause is not substantively unconscionable. It does not shock the conscience, nor is it monstrously harsh or exceedingly callous.

2. *Violation of Public Policy*

Coverdale also argues that the CoPs violate public policy and are therefore unenforceable. We disagree.[20]

[20] JZK argues in a footnote that much of Coverdale's argument supporting this affirmative defense is raised for the first time on appeal, and that we should not consider it. While Coverdale advances more detailed arguments on appeal than she did below, she adequately raised this affirmative defense below. Thus, we consider this argument on the merits.

In general, a contract may violate public policy if it is "'prohibited by statute, condemned by judicial decision, or contrary to the public morals.'" *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 85, 331 P.3d 1147 (2014) (internal quotation marks omitted) (quoting *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 481, 687 P.2d 1139 (1984)). Courts consider whether a contract "'has a tendency to be against the public good, or to be injurious to the public.'" *LK Operating*, 181 Wn.2d at 86 (internal quotation marks omitted) (quoting *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007)). Courts disfavor rewriting or avoiding contracts under the guise of generalized public policy concerns. *See Hearst Commc'ns*, 154 Wn.2d at 511 (declining to construe a clear contract to give effect to a public policy concern). But if a contract violates public policy, it may be void and unenforceable. *Scott*, 160 Wn.2d at 851.

Coverdale first argues that the CoPs violate public policy by requiring confidentiality. We disagree. Again, Coverdale relies on *McKee*. 164 Wn.2d at 398. But *McKee* holds that a contract requiring secrecy violates the public policy of the open administration of justice in the context of an arbitration clause. 164 Wn.2d at 396, 398. In other words, *McKee* holds that a consumer contract of adhesion may violate public policy by requiring secrecy in a dispute resolution provision. Thus, contrary to Coverdale's arguments, *McKee* does not broadly hold that any secrecy in a consumer contract is a violation of public policy. Thus, we disagree with Coverdale's broad argument about secrecy clauses.

Coverdale also argues that the CoPs violate the public policies of government accountability,[21] the freedom to petition government, and avoiding "mischief in the electoral process."[22] Br. of Appellant at 27-30. We disagree.

If the information and techniques covered by the CoPs consisted of illegal activity, we might be persuaded that the CoPs violated public policy by preventing the dissemination of this information. But Coverdale has not shown that the information and techniques are illegal. Thus to establish that the CoPs violate public policy, Coverdale must show that the CoPs themselves violate public policy. *See LK Operating*, 181 Wn.2d at 85-86. She has failed to make this showing. We decline to avoid the CoPs in the guise of Coverdale's generalized and attenuated public policy concerns. *Hearst Commc'ns*, 154 Wn.2d at 511. We hold that the clause preventing dissemination of JZK's proprietary materials does not violate the public policies Coverdale mentions.

3. *Fraudulent Inducement*

Coverdale argues that the superior court erred by dismissing her affirmative defense of fraudulent inducement. We disagree.

Coverdale argues that fraudulent inducement has only four elements, but she cites no legal authority in support of this argument. Instead, she cites a secondary source about negligent

[21] Br. of Appellant at 27 (citing RCW 42.17A.001(5)) ("[P]ublic confidence in government at all levels is essential and must be promoted by all possible means.").

[22] Br. of Appellant at 29 (citing RCW 4.24.500) ("Information provided by citizens concerning potential wrongdoing is vital to effective law enforcement and the efficient operation of government.").

misrepresentation. *See* Br. of Appellant at 47, 47 n.58 (citing 16A DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 19:12, at 136 (4th ed)). Coverdale is mistaken. A claim of fraudulent inducement requires proof of all nine elements of fraud.[23] *Petersen v. Turnbull*, 68 Wn.2d 231, 235, 412 P.2d 349 (1966); *Webster v. L. Romano Eng'g Corp.*, 178 Wash. 118, 120-21, 34 P.2d 428 (1934).

One of the elements of fraudulent inducement is that the representation is false. *Webster*, 178 Wash. at 120-21. A party claiming the elements of fraud must prove each of the nine elements (including falsity) by clear, cogent, and convincing evidence. *Kirkham v. Smith*, 106 Wn. App. 177, 183, 23 P.3d 10 (2001). Coverdale cannot do so because, as a matter of law, we avoid inquiring into the truth or falsity of religious beliefs. *See United States v. Ballard*, 322 U.S. 78, 86, 64 S. Ct. 882, 88 L. Ed. 1148 (1944) (noting that under the First Amendment, people "may not be put to the proof of their religious doctrines or beliefs"); *see also Backlund v. Bd. of Comm'rs of King County Hosp. Dist. 2*, 106 Wn.2d 632, 640, 724 P.2d 981 (1986) (quoting *State ex rel. Bolling v. Superior Court*, 16 Wn.2d 373, 384, 133 P.2d 803 (1943)) ("Courts 'have nothing to do with determining the reasonableness of the belief.'"). Because Coverdale cannot prove all nine elements of fraud, this claim fails.

[23] These are: "(1) representation of an existing fact, (2) the materiality of the representation, (3) the falsity of the representation, (4) the speaker's knowledge of the falsity of the representation or ignorance of its truth, (5) the speaker's intent that the listener rely on the false representation, (6) the listener's ignorance of its falsity, (7) the listener's reliance on the false representation, (8) the listener's right to rely on the representation, and (9) damage from reliance on the false representation." *Landstar Inway Inc. v. Samrow*, 181 Wn. App. 109, 124, 325 P.3d 327 (2014).

D. *Dismissal of Counterclaims*

Coverdale argues that the superior court erred by dismissing her counterclaim of misrepresentation and fraud. We disagree.

Below, Coverdale pleaded four counterclaims. Early in this case, the superior court dismissed the counterclaim of misrepresentation and fraud. Coverdale then moved unsuccessfully to add five additional counterclaims and to reinstate her misrepresentation and fraud claim. On appeal, Coverdale abandons several of her counterclaims.[24] We analyze whether the superior court erred by denying the only counterclaim which Coverdale properly pleaded below and did not abandon on appeal: misrepresentation and fraud.[25]

As stated above, a claim of fraud requires proof of nine elements by clear, cogent, and convincing evidence. *Landstar Inway Inc. v. Samrow*, 181 Wn. App. 109, 124, 325 P.3d 327 (2014). And like fraud, a claim of negligent misrepresentation requires proof of a false statement by clear, cogent, and convincing evidence. *Shepard v. Holmes*, 185 Wn. App. 730, 742 n.2, 345 P.3d 786, 791 (2014); *West Coast, Inc. v. Snohomish County*, 112 Wn. App. 200, 206, 48 P.3d 997 (2002). But as a First Amendment matter, we do not inquire into the truth or falsity of

[24] Coverdale's brief contains no argument about the following counterclaims: SLAPP, defamation per se, and misrepresentation as to copyright. Accordingly, we deem them abandoned. RAP 10.3(a)(6).

We take judicial notice of Coverdale's complaint against JZK and JZ Knight personally in Thurston County Superior Court. In the complaint, Coverdale alleges defamation, defamation per se, false light, outrage, intentional infliction of emotional distress, violation of the CPA, misrepresentation and fraud, negligence, and civil conspiracy.

[25] Coverdale treats "misrepresentation and fraud" as a single counterclaim; we address them together here.

religious beliefs. *Ballard*, 322 U.S. at 86; *Backlund*, 106 Wn.2d at 640. Instead, so long as a religious belief is sincerely held, it merits First Amendment protection. *Backlund*, 106 Wn.2d at 639.

Without arguing that JZK's religious beliefs are insincere, Coverdale argues that JZK does not merit the protection of religious freedoms in the federal and state constitutions because JZK is a for-profit entity and holds itself out as a school, rather than a religion. But the United States Supreme Court has recently clarified that a for-profit corporation may further religious beliefs and obtain religious freedom protections. *Burwell v. Hobby Lobby Stores, Inc.*, ___ U.S. ___, 134 S. Ct. 2751, 2771, 189 L. Ed. 2d 675 (2014). And "where an individual's beliefs are 'arguably religious,' the court will recognize and consider them for purposes of constitutional analysis." *State v. Balzer*, 91 Wn. App. 44, 54, 954 P.2d 931 (1998) (quoting *Int'l Soc'y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 439 (2d Cir. 1981)). Thus, Coverdale fails to show that JZK does not merit the protections of the First Amendment.

Coverdale also argues that JZK made a misrepresentation when it advertised an audiotape purporting to consist of JZ Knight channeling Jesus, but later retracted the claim that JZ Knight ever channeled Jesus. Although this argument does not depend on adjudicating the truth or falsity of JZK's religious beliefs, it fails nonetheless. To prove fraud, Coverdale must prove that the false misrepresentation was material, that JZK intended for Coverdale to rely on it, that Coverdale did rely on it, and that this reliance damaged her. *Landstar Inway*, 181 Wn. App. at 124. Coverdale fails to argue or provide facts supporting the assertion that she relied on JZK's misrepresentation about Jesus or that she was thereby harmed. This claim fails. The superior court did not err by dismissing Coverdale's counterclaim for misrepresentation and fraud.

IV. CONTEMPT

Coverdale argues that the superior court erred by finding her in contempt because she did not intend to violate any order, and because the contempt order provided no mechanism to purge the contempt. Specifically, she argues that the writ of execution was not directed to her and did not prohibit her from selling her vehicle. We agree that the superior court erred in holding Coverdale in contempt for violation of the writ of execution, but we affirm the finding of contempt for violation of the appraisal order.

We review a superior court's exercise of its contempt powers for an abuse of discretion. *In re Marriage of Eklund*, 143 Wn. App. 207, 212, 177 P.3d 189 (2008). A superior court abuses its discretion if it exercises its contempt powers in a manifestly unreasonable way or exercises its power on untenable grounds or for untenable reasons. *First-Citizens Bank & Trust Co. v. Reikow*, 177 Wn. App. 787, 797, 313 P.3d 1208 (2013).

RCW 7.21.010(1)(b) defines "contempt of court" as intentional "[d]isobedience of any lawful judgment, decree, order, or process of the court." Washington statutes distinguish between criminal contempt sanctions that are punitive and civil contempt sanctions that are remedial. RCW 7.21.010(2)-(3); *State v. T.A.W.*, 144 Wn. App. 22, 24, 186 P.3d 1076 (2008); *see also In re Marriage of Didier*, 134 Wn. App. 490, 500-02, 140 P.3d 607 (2006). The party seeking to impose civil contempt bears the burden of proving contempt by a preponderance of the evidence. *State v. Boren*, 44 Wn.2d 69, 73, 265 P.2d 254 (1954). A remedial sanction is "imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform." RCW 7.21.010(3).

Moreover, an "'order of remedial civil contempt must contain a purge clause under which a contemnor has the ability to avoid a finding of contempt and/or incarceration for noncompliance.'" *Didier*, 134 Wn. App. at 501 (internal quotation marks omitted) (quoting *In re Interest of Rebecca K.*, 101 Wn. App. 309, 314, 2 P.3d 501 (2000)). "A contemnor challenging the purge condition carries the burden of 'offer[ing] evidence as to his inability to comply and the evidence must be of a kind the court finds credible.'" *Didier*, 134 Wn. App. at 502 (alteration in original) (quoting *In re Pers. Restraint of King*, 110 Wn.2d 793, 804, 756 P.2d 1303 (1988)).

A. *Intent To Violate Writ of Execution*

Coverdale argues that the superior court erred by finding her in contempt because there was no evidence that she intentionally violated the writ of execution. We agree.

To find contempt, a superior court must find that a party's violation of a previous court order was intentional. *Holiday v. City of Moses Lake*, 157 Wn. App. 347, 355, 236 P.3d 981 (2010). "Implicit in [the definition of contempt] is the requirement that the contemnor have knowledge of the existence and substantive effect of the court's order or judgment." *In re Estates of Smaldino*, 151 Wn. App. 356, 365, 212 P.3d 579 (2009).

A person need not be personally served with an order to intentionally violate it. *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 327, 332, 553 P.2d 442 (1976); *State v. Wallace*, 114 Wash. 692, 693, 195 P. 1049 (1921); *Stella Sales, Inc. v. Johnson*, 97 Wn. App. 11, 20, 985 P.2d 391 (1999). Instead, the alleged contemnor need only have actual knowledge of the order and its legal effect. *N.W. Chrysler Plymouth*, 87 Wn.2d at 332; *see also State v. Mecca Twin Theater & Film Exch., Inc.*, 82 Wn.2d 87, 93, 507 P.2d 1165 (1973). Where a finding of

contempt is based on a violation of an order, the superior court must strictly construe the order in favor of the contemnor, here Coverdale. *In re Marriage of Humphreys*, 79 Wn. App. 596, 599, 903 P.2d 1012 (1995). "In contempt proceedings, an order will not be expanded by implication beyond the meaning of its terms when read in light of the issues and the purposes for which the suit was brought." *Johnston v. Beneficial Mgmt. Corp. of Am.*, 96 Wn.2d 708, 712-13, 638 P.2d 1201 (1982).

Here, although Coverdale knew the existence of the writ of execution, the superior court abused its discretion by finding that she violated it intentionally. The writ commanded the *sheriff* to "levy upon, seize, and take into possession and execution the non-exempt personal property of Virginia Coverdale . . . which is identified in this Writ." CP at 1905. The writ was not directed to Coverdale, nor did it direct her to take or refrain from taking any action. The superior court did not issue any other order addressing Coverdale's behavior. Coverdale could violate the writ, although it was not directed to her, only if she knew of its legal effect—and if that legal effect were that Coverdale was not permitted to sell her vehicle. *N.W. Chrysler Plymouth*, 87 Wn.2d at 332. Here, the writ's apparent legal effect was that the sheriff would seize Coverdale's vehicle, not that Coverdale's possessory interest in her own vehicle was reduced. Strictly construing the writ in favor of Coverdale, we hold that the superior court abused its discretion by finding that Coverdale knew that the writ prohibited her from selling her vehicle, and that she intended to violate the writ. *Johnston*, 96 Wn.2d at 712-13.

B. *Intent To Violate Appraisal Order*

Coverdale also argues that she did not intend to violate the appraisal order, because she in fact had her vehicle appraised. We disagree.

The appraisal order directed both parties to "appoint a disinterested person to appraise" Coverdale's vehicle. CP at 2020. It further directed both appointed appraisers to provide their appraisals to the parties' attorneys. The order provided that "in the event the appointed appraisers disagree on whether the vehicle exceeds the exemptible value ($3,250), they shall appoint a third appraiser." CP at 2020.

Here, the superior court did not abuse its discretion by finding that Coverdale intentionally violated the appraisal order. Coverdale provides no evidence that she appointed a disinterested person to appraise the car, as the order required. Instead, she provided a website-generated "Trade Bookout Sheet" which she obtained through a car dealership. Even construing the order strictly in favor of Coverdale, it required her to appoint a *person* to appraise the car, not to find an estimate of the car's value on a website with the assistance of a car dealership. Based on these facts, the superior court did not abuse its discretion by finding that Coverdale intentionally failed to have the vehicle appraised as ordered.

C. *Compliance with Purge Condition*

Coverdale argues that the superior court erred by entering the contempt order because Coverdale was unable to comply with the purge condition. We disagree.

A finding of remedial contempt requires the contemnor to be presently able to comply with the order she is charged with violating. RCW 7.21.030(2). Thus, inability to comply with an order is an affirmative defense to the imposition of remedial contempt, and a contemnor bears the burden of production and persuasion in presenting such a defense. *King*, 110 Wn.2d at 804. "The contemnor must offer evidence as to [her] inability to comply and the evidence must be of a kind the court finds credible." 110 Wn.2d at 804. Moreover, "'[a]n order of remedial civil

contempt must contain a purge clause under which a contemnor has the ability to avoid a finding of contempt and/or incarceration for noncompliance.'" *Rebecca K.*, 101 Wn. App. at 314 (quoting *State ex rel. Shafer v. Bloomer*, 94 Wn. App. 246, 253, 973 P.2d 1062 (1999)). Thus, at the outset, remedial contempt is appropriate only if the contemnor has the ability to comply with the order, but does not do so. Separately, a remedial contempt order must contain a purge clause.

Here, the superior court assessed a $3,000 penalty as sanction for the contempt, but provided Coverdale three weeks to purge the contempt by "bringing the vehicle back into this Court's jurisdiction." VRP (Nov. 22, 2013) at 7. Specifically, the superior court reminded Coverdale that she could purge the contempt by buying the vehicle back from O'Sullivan.

Coverdale argues that the contempt order "contain[s] no legal mechanism capable of performance to purge" the contempt because Coverdale did not have the ability to comply with the purge clause. Br. of Appellant at 58. She also argues that she could not comply with the alternative method of purging contempt because she already spent the $3,000 on "basic essential human needs, such as heat." Br. of Appellant at 56. When arguing the affirmative defense of inability to comply with the order, Coverdale bore the burden of production and persuasion. *King*, 110 Wn.2d at 804. Coverdale provided no evidence to the superior court that she attempted to repurchase the car from O'Sullivan. Coverdale failed to convince the superior court of her inability to comply with the orders. Coverdale did not carry her burden of proving with credible evidence the affirmative defense that compliance was impossible.

In conclusion, we reverse the superior court's finding that Coverdale intentionally violated the writ of execution. We affirm the superior court's finding that Coverdale intentionally violated the appraisal order. Because the contempt amount of $3,000 reflected the

superior court's finding that Coverdale violated both of these orders, we remand to the superior court to reconsider the contempt order and purge condition.[26]

ATTORNEY FEES

Coverdale requests reasonable attorney fees and costs under the CoPs and RAP 18.1. The 2007 CoP entitles JZK to "reasonable attorneys' fees and costs incurred by JZK, Inc. in connection with the enforcement of these Conditions of Participation, including those incurred on appeal." CP at 38. RCW 4.84.330 entitles the prevailing party in a "final judgment" to attorney fees, even if the contract providing for attorney fees specifies that only one party is entitled to them. Coverdale is not entitled to attorney fees and costs because she is not the prevailing party in a final judgment.

JZK requests attorney fees and costs both under the 2007 CoP and because Coverdale's appeal is frivolous. RAPs 18.1 and 18.9. JZK is entitled to attorney fees under the 2007 CoP in an amount to be set by the commissioner. RAP 18.1. But we hold that Coverdale's appeal is not

[26] Coverdale makes several arguments for the first time on appeal. She argues that the CoPs violate the CPA, chapter 19.86 RCW. She also argues that we should certify a class under CR 23(a)(1) and (2) of customers injured by JZK's violation of the CPA. Coverdale attempted to add a CPA claim as a counterclaim below, but the superior court denied her motion to amend. Coverdale may not now argue the substantive merits of her CPA claim, beyond arguing that the superior court erred by denying her motion to amend. There is no ruling about Coverdale's CPA claim for us to review.

Similarly, Coverdale never requested the superior court to certify a class under CR 23, thus there is no ruling about a class certification for us to review. Thus, we do not consider these arguments.

so devoid of merit as to be frivolous. Thus, JZK is not entitled to attorney fees for defending a frivolous appeal under RAP 18.9.[27]

We affirm the superior court orders denying Coverdale's motion to strike JZK's rebuttal brief, denying Coverdale's motion to amend, granting summary judgment to JZK, denying summary judgment to Coverdale, and dismissing Coverdale's affirmative defenses and counterclaims. We reverse the contempt order in part and remand for reconsideration consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

Johanson, C.J.

Melnick, J.

[27] We note that JZK's 50 page brief includes many large footnotes that contain core facts and substantive argument. Parties must make their argument in the body of their brief, not in footnotes. *See Tamosaitis v. Bechtel Nat., Inc.*, 182 Wn. App. 241, 248 n.2, 327 P.3d 1309, *review denied*, 181 Wn. 2d 1029 (2014). Parties needing more than the 50 pages allotted by RAP 10.4(b) should seek to file an over-length brief, not include excessive footnotes. *Tamosaitis*, 182 Wn. App. at 248 n.2.