No. 99380-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

TODD PIERCE,

Respondent and Cross-Petitioner,

v.

BILL & MELINDA GATES FOUNDATION,

Petitioner and Cross-Respondent.

REPLY TO PIERCE'S CROSS-PETITION

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I. INTRODUCTION

The Bill & Melinda Gates Foundation (the "Foundation") asks the Court to deny the cross-petition filed by its former Chief Digital Officer, Todd Pierce ("Pierce"). Pierce does not demonstrate any error in Division One's striking of his promissory estoppel claim or in its reversal of the trial court's damage award. Still less does Pierce show a basis for discretionary review of either ruling under RAP 13.4(b).

II. ISSUES PRESENTED ON CROSS-REVIEW

A. The trial court determined that Pierce and the Foundation were parties to a contract. Was the court of appeals correct in holding that Pierce's promissory estoppel claim must therefore be dismissed?

B. Was the court of appeals correct in rejecting Pierce's theory of tort reliance damages, which could not survive the dismissal of his misrepresentation claim and is contrary to basic principles of contract law?

C. Do alternative and independent grounds support the court of appeals' rejection of Pierce's promissory estoppel claim and his purported reliance damages?

III. ARGUMENT

A. Promissory estoppel does not apply where a contract governs.

The court of appeals held that "a party may not recover for both breach of contract and promissory estoppel." *Bill & Melinda Gates Found.*

v. Pierce, ___ Wn. App. 2d. ___, 475 P.3d 1011, 1019 (2020). This Court has said the same thing: Promissory estoppel implies a contract from a "unilateral, otherwise unenforceable promise and is wholly inapplicable where [an] actual contract exists." *Klinke v. Famous Recipe Fried Chicken*, 94 Wn.2d 255, 261 n.4, 616 P.2d 644 (1980). Division One's own precedent could not be clearer: "the doctrine of promissory estoppel does not apply where a contract governs." *Spectrum Glass Co., Inc. v. PUD No. 1 of Snohomish Cty.*, 129 Wn. App. 303, 317, 119 P.3d 854 (2005).[1]

Pierce identifies no decision by this Court or by the Washington Court of Appeals that conflicts with the *Klinke* principle. The key out-of-state case Pierce cites stands for the same proposition. In *Air Atlanta Aero Eng'g Ltd. v. SP Aircraft Owner*, 637 F. Supp. 2d 185 (S.D.N.Y. 2009), the court stated: "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter. A 'quasi contract' only applies in the absence of an express agreement . . . ." *Id*. at 195 (quoting *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 388, 521 N.Y.S.2d 653, 516 N.E.2d 190 (1987)).

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[1] *Accord Bybee Farms, LLC v. Snake River Sugar Co.*, 563 F. Supp. 2d 1184, 1193 (E.D. Wash. 2008) ("The existence of consideration is fatal to the plaintiffs' promissory estoppel claim."); 3 ERIC MILLS HOLMES, CORBIN ON CONTRACTS § 8.12 (Joseph M. Perillo, ed., rev. ed. 2020) (promissory estoppel is "inapplicable as a matter of law when all the promises made are bargained for and supported by consideration.").

To be sure, a party may plead in the alternative if there is a dispute as to an agreement's validity or enforceability. Once a valid contract is found, however, there is no basis to claim promissory estoppel: "promissory estoppel . . . cannot be maintained alongside a properly asserted breach of contract claim as a matter of law. 'The existence of a valid contract will generally preclude quasi-contract claims.' As such, these claims may only proceed should the Court find that no valid contract exists." *Air Atlanta,* 637 F. Supp. 2d at 196 (citations and internal quotations omitted).

Pierce argues that he was entitled to allege alternative claims for breach of contract and promissory estoppel and that the trial court could consider both claims before entering judgment. True enough.[2] But once the trial court concluded that there was a valid contract supported by adequate consideration,[3] Pierce's promissory estoppel claim became moot. The cases Pierce cites do not suggest otherwise.[4] *See Flower v. T.R.A. Indus., Inc.*,

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[2] Pierce cites several cases to this effect, none of which advance his argument that a party may be held liable after trial on two mutually exclusive theories. *See Cweklinsky v. Mobil Chem. Co.*, 364 F.3d 68, 78 (2d Cir. 2004) (under Connecticut law, both breach of contract and promissory estoppel issues should be ***presented to the jury***); *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 548, 442 P.3d 608 (2019) (inconsistent liability theories can be ***pled*** in the alternative).

[3] "The Court concludes that the Foundation's job offer and Pierce's acceptance of it constitutes an enforceable contract." CP 18 (¶ 95). "The Court concludes that the parties' contract is supported by consideration." CP 18 (¶ 96).

[4] Pierce cites a number of cases focusing on double recovery, but they have nothing to do with the issue raised here. The problem with Pierce's promissory estoppel claim is not the risk of double recovery but the fact that promissory estoppel applies only in the absence of an enforceable contract. Liability for one excludes liability for the other.

127 Wn. App. 13, 31, 111 P.3d 1192 (2005) (describing promissory estoppel as an "alternate theory" that may apply "if there was no valid contract between the parties"); *Corbit v. J.I. Case Co.*, 70 Wn.2d 522, 540, 424 P.2d 290 (1967) ("There should be a new trial as to the contractual ***or*** promissory estoppel liability . . . .") (emphasis added).[5]

B. Promissory estoppel doctrine underlines the fatal flaws in Pierce's case. It does not give him a way to avoid proving an enforceable promise or actual contract damages.

The court of appeals followed the law when it dismissed Pierce's promissory estoppel claim as inconsistent with the trial court's conclusion that the parties had a contract. In addition, independent grounds exist for dismissal of that claim based on (1) the absence of a clear and definite promise and (2) the absence of any recoverable damages.

Arguing that Division One should have considered promissory estoppel as an alternative theory to support the trial court's judgment, Pierce cites cases that have nothing to do with promissory estoppel. These cases do not address, much less endorse, a judgment based on contradictory theories of liability. *See, e.g.*, *Sprague v. Sumitomo Forestry Co., Ltd.*, 104

[5] The court in *Hellbaum v. Burwell & Morford*, 1 Wn. App. 694, 463 P.2d 225 (1969), held that there was substantial evidence to support a jury verdict in a case where there was no indication as to which theory of liability (breach of contract, negligence, or promissory estoppel) the jury accepted. To the extent *Hellbaum* suggests that a plaintiff may recover both for promissory estoppel and for breach of contract, the case is no longer good law. *See Klinke*, 94 Wn.2d at 261 n.4 ("If the promisee's performance was requested at the time the promisor made his promise and that performance was bargained for, [promissory estoppel] is inapplicable."); *Spectrum*, 129 Wn. App. at 317.

Wn.2d 751, 756–60, 709 P.2d 1200 (1985) (plaintiff failed to give notice as required to recover damages for resale under UCC Article 2 but was entitled to damages based on the difference between market and contract price); *Palin v. Gen. Constr. Co.*, 47 Wn.2d 246, 251, 287 P.2d 235 (1955) (court declined to consider trespass claim where liability was already established under negligence).

Imagine, however, that the trial court had found no valid contract but had held that Pierce could recover for promissory estoppel. His claim would fare no better. First, the promise that the trial court found had been breached—that of a far-reaching and transformational job[6]—is too vague to be enforced under the law of promissory estoppel, just as it is too vague to be enforceable as a contract term. *See, e.g.*, *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 173, 876 P.2d 435 (1994) (to be enforceable as a matter of promissory estoppel, a promise must be "clear and definite"); *Wash. Educ. Ass'n v. Wash. Dep't of Ret. Sys.*, 181 Wn.2d 212, 225, 332 P.3d 428 (2014) (same). Moreover, a "statement of future intent is not sufficient to constitute a promise for the purpose of promissory estoppel. An intention to do a thing is not a promise to do it." *Elliot Bay Seafoods v. Port of Seattle*, 124 Wn.

[6] The trial court concluded that "the Foundation promised Pierce a job that would transform the non-profit world." CP 21 (¶ 118).

App. 5, 13, 98 P.3d 491 (2004) (rejecting plaintiff's claim that defendant's expression of its vision for a project was a legally binding promise).

Second, promissory estoppel can offer an alternative way to secure contractual relief when a contract claim is unavailable, but it does ***not*** provide an avenue to circumvent limitations on contract damages. No Washington case supports Pierce's assertion that a party who claims breach of contract can recover more than the value of that contract by making a claim in the alternative for promissory estoppel. *Crafts v. Pitts*, 161 Wn.2d 16, 162 P.3d 382 (2007), which Pierce cites for the supposed breadth of equitable relief, is not relevant here. *Crafts* considers whether an order for specific performance of a lessee's duty to deliver a quit-claim deed for an adjacent parcel should be treated as having been discharged in bankruptcy.[7]

For these reasons, too, Pierce's cross-petition seeking review of Division One's promissory estoppel ruling should be denied.

C. Division One's reversal of Pierce's $4.64 million judgment was proper. Pierce may not recover damages for fraud in the inducement when he failed to prove that theory at trial.

Pierce also seeks review of the court of appeals' decision to set aside the judgment he received from the trial court. He argues that the court of

[7] Pierce asserts that "[n]one of the Foundation's assignments of error below challenged such discretion [to award equitable damages for promissory estoppel]." Ans. to Pet. for Rev. at 13. To the contrary, Assignment of Error B states that the "trial court erred in holding the Foundation liable for promissory estoppel," and Assignment of Error C states that the "trial court erred in awarding damages to Pierce."

appeals should have considered, as "reliance damages" for a breach of contract that occurred long after he began his new job at the Foundation, the compensation that he may or may not have earned at his prior job had he chosen ***not*** to work for the Foundation. The court of appeals properly rejected Pierce's damage theory.[8]

Had Pierce established that he was induced to leave his job at Salesforce by negligent misrepresentation, he would have had a basis to seek damages measured by the compensation and stock options he left behind.[9] But Pierce's misrepresentation claim was dismissed after trial, and he did not appeal that dismissal. Pierce is not entitled to recover damages as if he had proven fraud in the inducement for an alleged breach of contract that occurred many months after he countersigned his offer letter and started working at the Foundation. As Division One explained:

> Pierce would have lost the higher wage and stock options from Salesforce even if the CDO role at the Foundation became exactly what he had envisioned. Any entitlement to that compensation had long since dissipated by the time the Foundation breached the contract with Pierce, roughly seven months into his employment there. As such, there is no causation to tie such damages to the breach found by the trial court.

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[8] Pierce offers no defense of Division One's remand order. He simply asserts that it was "unnecessary." Ans. to Pet. for Rev. at 20. In failing to address the Foundation's arguments on pp. 18–20 of its petition for review, Pierce implicitly admits their merit.

[9] Pierce cites *Specialty Asphalt & Constr., LLC v. Lincoln Cty.*, 191 Wn.2d 182, 197, 421 P.3d 925 (2018), to support his argument for reliance damages, ignoring that *Specialty* addressed reliance damages as an award ***for negligent misrepresentation***.

Pierce, 475 P.3d at 1020–21.

Reliance damages for breach of contract are meant to place the plaintiff "in the same position as if the contract had never been entered into." WPI 303.05. An example would be the expenditures that a party reasonably incurs in preparing to perform a contract. Such damages are, by definition, not appropriate where a contract has been entered into and performed for an extended period before any breach can be said to have occurred. Trying to turn back the calendar seven months, or pretending that Pierce and the Foundation never entered into an employment contract, is not just fanciful; it also defies every principle of contract law, including that damages must be reasonably foreseeable by the party in breach.[10]

Under Washington law, a plaintiff who prevails on a breach of contract claim is entitled "to be put into as good a position pecuniarily as he would have been had the contract been performed." *Knox v. Microsoft Corp.*, 92 Wn. App. 204, 208–09, 962 P.2d 839 (1998). "[A] party to a contract has a contractual right only to that which it bargained for—its reasonable expectation." *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146,

[10] *See* RESTATEMENT (SECOND) OF CONTRACTS § 351 (AM. LAW INST. 1981). As Comment a to Section 351 notes, "the requirement of foreseeability is a more severe limitation of liability than is the requirement of substantial or 'proximate' cause in the case of an action in tort or for breach of warranty. . . . Although the recovery that is precluded by the limitation of foreseeability is usually based on the expectation interest . . ., the limitation may also preclude recovery based on the reliance interest . . . ."

156, 43 P.3d 1223 (2002). Pierce's expectation damages in this case were nil: He received every penny that the Foundation was contractually bound to give him. This included a salary of $425,000 per year, a signing bonus of $100,000, and retirement contributions equal to 15 percent of his salary, as well as payment of all relocation expenses. Ex. 256.

Pierce attacks Division One for relying on *Ford* and on *Bakotich v. Swanson*, 91 Wn. App. 311, 957 P.2d 275 (1998). Pierce claims that *Ford* is inapplicable because it does not refer to reliance damages. But that is precisely the point *Ford* makes: a breach of an at-will employment contract is compensable ***only*** by expectation damages, which are nominal. *See* 146 Wn.2d at 156–57 ("[A] contract confers no greater rights on a party than it bargains for. . . . —its reasonable expectation. . . . We hold lost earnings cannot measure damages for the breach of an employment at-will contract because ***the parties to such a contract do not bargain for future earnings***.") (emphasis added). If the parties to an at-will employment agreement do not bargain for future earnings from the actual employer, they certainly do not bargain for future earnings that might have been paid by a past employer.

Pierce also attempts to distinguish *Ford* and *Bakotich* on their facts, claiming that the plaintiffs there did not seek compensation they would have earned at their prior jobs but only "future lost earnings." Ans. to Pet. for

Rev. at 16 n.19. Pierce is wrong. The damages that Mr. Bakotich sought included "loss of earnings, future loss of earnings, and loss of pension and benefits." 91 Wn. App. at 314. Only the second of these was expectation damages; the first and third reflect claims for reliance damages.

Pierce points out that *Ford* and *Bakotich* did not involve an alleged breach of contract "***during*** the parties' relationship." Ans. to Pet. for Rev. at 16 n.19 (emphasis his). That distinction makes Pierce's damage claim even weaker than those that were rejected as a matter of law in *Ford* and *Bakotich*. If a loss of past earnings, pension, and benefits is "highly speculative" before a new job begins, how much more speculative must such a claim be if it does not arise until seven months into the new job? During that long period, the Foundation had the right to terminate Pierce's employment at any time without consequence. And if Pierce had stayed at Salesforce, he might have been terminated at any point during the same seven-month period. Pierce was, after all, an at-will employee of both his old and his new employer, and he was not performing well when he quit his job at Salesforce to join the Foundation. *See* RP 952–54, 957; ASRP 29–30.

A contract-reliance damage award is necessarily limited to the plaintiff's expectation interest and "may not exceed the full contract price." RESTATEMENT (SECOND) OF CONTRACTS § 349 cmt. a (AM. LAW INST. 1981). A plaintiff is "not entitled to be placed in a better position than he

would have been in if the contract had not been broken." *Rathke v. Roberts*, 33 Wn.2d 858, 865, 207 P.2d 716 (1949); *accord Platts v. Arney*, 50 Wn.2d 42, 46, 309 P.2d 372 (1957) ("The plaintiff is not . . . entitled to more than he would have received had the contract been performed."); *Diedrick v. Sch. Dist. 81*, 87 Wn.2d 598, 609–10, 555 P.2d 825 (1976) (same).

Lacking support in Washington law, Pierce cites two cases decided under Colorado and Kansas law. These out-of-state cases cannot meet his obligation to show a conflict between the court of appeals' ruling and Washington precedent. *See* RAP 13.4(b). They also involve very different facts and legal principles. In *Hunter v. Hayes*, 533 P.2d 952 (Colo. App. 1975), a promissory estoppel plaintiff received a $700 judgment based upon the defendant's unfulfilled promise to employ her as a flagger on a construction job. The plaintiff had quit her prior job because the defendant told her to do so. *See id.* at 953. She then suffered two months of unemployment, the direct cost of which ($350 per month) she recovered. Unlike this young woman, Pierce was not told to quit his old job; he started his new job immediately; and his new employer paid him everything he had been promised over the 18-month period that he was employed.

In *Glasscock v. Wilson Constructors, Inc.*, 627 F.2d 1065 (10th Cir. 1980), the plaintiff was induced to leave his prior employer by a five-year oral employment contract under which he was promised, in addition to an

agreed salary, 10% of net profits from the construction division that he would lead. Shortly after starting work at Wilson, Mr. Glasscock received a written version of this contract that did not reflect the same method of figuring the 10% net profit that he had been promised orally. Mr. Glasscock quit and returned to his prior employer. He was able to keep his previous salary but lost the longevity points he had accumulated. He sued for their value and recovered $30,000 in damages.

The Tenth Circuit decided three things in *Glasscock*: first, that Kansas law would permit recovery under a theory of promissory estoppel despite application of the Kansas statute of frauds to an oral employment contract; second, that the trial court could apply estoppel as a matter of law; and third, that Kansas law permitted Glasscock to recover his lost benefits where they were reasonably within the contemplation of the parties at the time the contract was made. *Id*. at 1066–68. The court added: "Wilson's assertion that a distinction must be made between an out-of-pocket expenditure and the loss of benefits under a profit sharing plan is not supported by Kansas law." *Id.* at 1068.

Pierce's dependence upon these out-of-state cases helps to explain his continuing invocation of promissory estoppel, despite the trial court's determination that the parties here had a contract. But the law of promissory estoppel in Kansas (or Colorado) has nothing to say about how Washington

law measures damages for breach of contract. Indeed, the law of promissory estoppel in Kansas differs in key respects from Washington law concerning promissory estoppel. *See Bakotich*, 91 Wn. App. at 319.[11]

Pierce argues that his desired measure of damages merits deference, but the cases he cites do not support his argument. In *Rathke*, this Court held that a party's recovery "is limited to the loss he has actually suffered by reason of the breach; he is not entitled to be placed in a better position than he would have been in if the contract had not been broken." 33 Wn.2d at 865. And in *Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wn. App. 66, 82–83, 248 P.3d 1067 (2011), the court stated:

> Generally, a party injured by breach of contract is entitled (1) to recovery of all damages that accrue naturally from the breach and (2) to be put into as good a pecuniary position as he would have had if the contract had been performed. . . . To recover, the plaintiff has the burden of proving that the defendant breached the contract, that the plaintiff incurred actual economic damages as a result of the breach, and the amount of the damages. . . . Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty. [Citations omitted.][12]

[11] The Washington cases Pierce cites, *Kloss v. Honeywell*, 77 Wn. App. 294, 298, 890 P.2d 480 (1995), and *Flower*, 127 Wn. App. at 27, do not discuss contract reliance damages and do not suggest that a party may recover speculative damages in addition to promised compensation.

[12] The court in *Columbia* held that, where possible, damages should be measured by the plaintiff's expectation interest, with reliance damages used as a fallback if the expectation interest cannot be known because no contract was struck. *Id*. at 83–87. This holding supports the Foundation's position, not Pierce's.

Pierce's damage award violated all of these principles. The court of appeals was right to reverse it.[13]

D. Pierce's damage claim was entirely speculative. This provides an independent basis for Division One's reversal of the trial court judgment.

A plaintiff must establish the damages resulting from an alleged breach of contract with a reasonable degree of certainty. *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 15, 390 P.2d 677 (1964). More precisely, there must be "certain[ty] as to the ***fact*** that damage resulted from defendant's breach." *Id*. at 16 (emphasis added). The requirement of reasonable certainty as to the ***amount*** of damage means that "remote and speculative" damages cannot be recovered. *Id*. Damages "must be supported by competent evidence in the record," which "affords a reasonable basis for estimating the loss and does not subject the trier of fact to mere speculation or conjecture." *Shinn v. Thrust IV, Inc*., 56 Wn. App. 827, 840, 786 P.2d 285 (1990). Because the trial court's damage award violated all of these

[13] Pierce's other authorities do not help him. The "new business rule" considered in *No Ka Oi Corp. v. Nat'l 60 Minute Tune, Inc.*, 71 Wn. App. 844, 849–54, 863 P.2d 279 (1993), can preclude an unestablished business from obtaining lost profits as damages. *Dunseath v. Hallauer*, 41 Wn.2d 895, 253 P.2d 408 (1953), was a real estate dispute involving an orchard that was severely damaged by cold weather. Neither case bears any resemblance to this one. Pierce's contention that he "should be permitted to select" a measure of damages also conflicts with his own understanding that the proper measure of damages is a question of law. Ans. to Pet. for Rev. at 18 n.21 (citing *Platts*, 50 Wn.2d at 43).

principles, alternative grounds exist for Division One's reversal of Pierce's $4.64 million judgment.

Far from establishing with certainty the ***fact*** of actionable damage, Pierce failed this basic threshold test in three ways:

First, he received exactly the same compensation and benefits from the Foundation as he would have gotten if he had been authorized to pursue his dream of transforming the world without being troubled with questions about whether the IT department, for which he was admittedly responsible, was operating effectively. He therefore suffered no pecuniary harm.

Second, there is no certainty at all that, by the time his contract with the Foundation was allegedly breached in November 2015, he would still have had a job with Salesforce had he decided to stay there. Far from performing well as a Salesforce executive, he had been demoted and had received a "needs improvement" rating. *See* RP 952–54, 957; ASRP 29–30.

Third, it is completely unforeseeable that an alleged breach of contract occurring seven months into Pierce's time at the Foundation would be treated as if it had invalidated his employment there and put Pierce back on the payroll at Salesforce.

For all of these reasons, any one of which would suffice, Pierce's damage claim failed. Even if these fundamental problems could be ignored, Pierce's claim ran afoul of the prohibition upon speculation and conjecture

in calculating the ***amount*** of his alleged damages.[14] He did not call an expert to address how to value stock options; he gave minimal testimony on damages; and he relied solely on an illustrative exhibit.[15]

The problems of speculation and conjecture only worsened when the trial court tried to predict when Pierce might have exercised fictitious options or sold shares of phantom stock. (Pierce at one time owned some of those options and shares, but they disappeared when he left Salesforce.) Pierce cites no case that upholds a damage award in similar circumstances.[16] The general rule instead is that damages measured by stock options and

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[14] In *Reefer Queen Co. v. Marine Constr. & Design Co.*, 73 Wn.2d 774, 440 P.2d 448 (1968), the court stated that a plaintiff must "afford a reasonable basis for estimating his loss." *Id.* at 781 (quoting *Larsen*, 65 Wn.2d at 16). The court affirmed a damages award in a products liability case where evidence of damages due to a faulty part provided for a fishing vessel included "logs of other tuna fishing boats which had been in the same general area at the same time," expert testimony as to the amount of tuna lost by reason of the mechanical failure, and testimony establishing the average price per ton of tuna. *Id.* at 778.

[15] Illustrative exhibits are not evidence. The factfinder can rely on illustrative exhibits to summarize "factually complex" evidence, but it cannot treat these exhibits as additional evidence or as a substitute for evidence properly admitted. *State v. Lord*, 117 Wn.2d 829, 855–56, 822 P.2d 177 (1991), *abrogated on other grounds by State v. Schierman*, 192 Wn.2d 577, 710, 438 P.3d 1063 (2018).

[16] In *Scully v. US WATS, Inc.*, 238 F.3d 497 (3d Cir. 2001), the stock options at issue were issued by the defendant, not a third party, and the defendant barred their exercise after wrongfully terminating the plaintiff. There was no dispute about the date of exercise; option values were supported by expert testimony; and the trial court avoided a windfall award that would have been based on hindsight. Pierce's award shares none of these characteristics. In *Aecon Bldgs. Inc. v. Vandermolen Constr. Co., Inc.*, 155 Wn. App. 733, 742, 230 P.3d 594 (2009), the trial court's damage award was "based on expert reports and depositions." In *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 160 Wn. App. 728, 738, 253 P.3d 101 (2011), the trial court relied for its damage calculations upon expert testimony it found to be "credible, persuasive and unrebutted." Pierce offered no expert testimony to support his damage calculations.

grants require expert testimony. *See Farmer v. Farmer*, 172 Wn.2d 616, 627–30, 259 P.3d 256 (2011) (valuing employee stock options is "a formidable task given the numerous possible contingencies and restrictions involving stock options").

IV. CONCLUSION

Pierce's cross-petition meets none of the criteria for review under RAP 13.4(b). It should, therefore, be denied. This Court should accept the Foundation's petition, reverse on liability, and remand with instructions to dismiss. If any basis for liability survives review, the Court should remand for an award of nominal damages.

Respectfully submitted this 15th day of February 2021.

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