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No. 61638-2-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

TERESA FARMER,

Respondent,

v.

DANIEL J. FARMER,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
NOV 11 2008

APPEAL FROM THE SUPERIOR COURT
FOR ISLAND COUNTY
THE HONORABLE VICKIE CHURCHILL

BRIEF OF APPELLANT

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I. INTRODUCTION

The husband appeals an order awarding the wife a \$487,325 judgment based on his conversion of stock valued at \$173,298 when he unilaterally exercised stock options that were awarded to the wife. On appeal, the husband challenges only the trial court's calculation of damages.

II. ASSIGNMENTS OF ERROR

The husband disputes the characterization below of the evidence of his exercise of the options at issue. Nevertheless, he recognizes the deference this court gives to the trial court's findings of fact, and only challenges those findings relevant to the calculation of damages:

1. The trial court erred in finding that "had the petitioner been in a position to exercise the stock options on the day before each group of stock options expired, petitioner would have been able to realize approximately \$617,553.00 on future exercises dating from April 26, 2009, to January 13, 2013, using an estimated Federal tax rate of 35% plus Medicare of 1.56%. The present value of the \$617,553 is \$487,325." (Finding of Fact (FF) XX, CP 11)

2. The trial court erred in finding that "the respondent did not challenge the findings of Roland T. Nelson by submission of a

sworn declaration from any CPA or similarly qualified professional challenging the assumptions, findings and conclusions of Mr. Nelson.” (FF XXII, CP 12)

3. The trial court erred in adopting “the findings of Roland T. Nelson CPA identified in the document entitled ‘Declaration of Roland T. Nelson, CPA, CFP,’ dated March 21, 2007 and the ‘Supplemental Declaration of Roland T. Nelson, CPA, CFP’ dated June 5, 2007 and the declaration of Ronald Nelson dated 4/10/2008, which findings are incorporated by reference herein as if fully set forth herein.” (FF XXIII, CP 12)

4. The trial court erred in finding “that the petitioner should be awarded judgment against the respondent as result of the respondent’s fraudulent conduct described above. Said judgment should be in the amount of \$487,325.” (FF XXIV, CP 12)

5. The trial court erred in finding that it would be “just, fair and equitable to award to the petitioner judgment against the respondent in the sum of \$487,325.00, said sum representing the amounts which the petitioner would have realized on future exercises of stock options awarded to her pursuant to the terms and conditions of the decree of dissolution of marriage from April

26, 2009 to January 13, 2013 using an estimated federal tax rate of 35% plus Medicare of 1.56%.” (Conclusion of Law (CL) IV, CP 14)

6. The trial court erred in finding that “it is just, fair and equitable to award judgment to the petitioner in the amount of \$487,325. Said judgment will accrue interest at the rate of 12% per annum from the date of this judgment until paid in full.” (CL VI, CP 14)

7. The trial court erred in entering its Findings of Fact and Conclusions of Law. (CP 7-14)

8. The trial court erred in entering its Order on Petitioner’s Motion for Relief from Judgment. (CP 4-6)

9. The trial court erred in entering its Order on Petitioner’s Motion to Strike Portions of Report of Steven J. Kessler (CP 27-29) and in denying the husband’s request for an evidentiary hearing on damages. (4/16/07 RP 32-33)

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did the trial court err in assessing conversion damages against the husband based on speculation as to the value of stock years after judgment was entered, instead of based on evidence of the value of the stock as of the date of conversion or some reasonable time thereafter?

2. Did the trial court err in its assessment of damages against the husband based solely on speculative assumptions that 1) the stock would continue to rise at a specific rate; 2) the husband would continue his employment with the company granting the stock options for seven years; and 3) the wife would have exercised the options the day before each grant expired?

3. Did the trial court err in using a discount rate to reduce the damage award to present value that was lower than the rate of return it found the stock would maintain in calculating damages?

4. Did the trial court err in refusing the husband an evidentiary hearing to challenge the wife's expert witness and the assumptions on which he based the damage calculation adopted by the trial court?

IV. STATEMENT OF FACTS

A. The Parties Agreed That Each Would Be Awarded One-Half Of Community Stock Options Earned Through The Husband's Employment.

Appellant Daniel Farmer and respondent Teresa Farmer were married on August 22, 1987, and separated on March 19, 2004. (See CP 358, 435) On July 18, 2006, the parties entered into a "Stipulated CR2A Agreement" resolving property, parenting,

and child support. (CP 455-59) Among other provisions, the parties agreed to equally divide community stock options earned through Daniel's employer, PACCAR, with each party retaining the right to choose when to exercise the options:

The stock options the husband has shall be awarded such that each party receives one-half of the community options. Each party shall choose whether or not to exercise the options. Any party exercising the options shall pay taxes on his or her options.

(CP 456)

Daniel's options expired between April 27, 2009 and January 15, 2014. (CP 181) According to the terms of his employment agreement, if Daniel were terminated from PACCAR for cause, unexercised stock options would be immediately terminated and forfeited. (See CP 294, 313) If Daniel resigned or was terminated without cause, he would have between one and three months to exercise any vested stock options otherwise they would be forfeited. (See CP 294, 312)

The parties' CR 2A agreement was filed with the court on July 21, 2006. (CP 455) With the exception of the stock options, the wife received 55% of the net community estate, valued at nearly \$500,000, including two parcels of real property and cash accounts. (CP 180-82, 455-58)

B. Before Final Papers Were Entered, The Husband Unilaterally Exercised All Of The Community Stock Options.

In August 2006, prior to entry of the final documents dissolving the parties' marriage, Daniel exercised all of the vested stock options, based upon what he believed was his attorney's advice, without obtaining Teresa's consent.¹ (CP 157) Daniel explained that he believed he had to exercise the options to preserve community assets because the price of the PACCAR stock had been falling. (CP 129, 157, 160) Daniel believed that his attorney directed him to "not allow the value of the stock option[s] to reduce to less than the value of the options as of the date of valuation of our assets," which the parties agreed would be July 1, 2006. (CP 157)

Daniel exercised the options when the stock was trading at \$54.984 per share.² (CP 141, 160) From the exercise of the stock options, Daniel received net proceeds of \$444,664.63. (CP 129,

¹ Neither current trial or appellate counsel represented appellant at the time of the exercise or entry of the parties' decree of dissolution.

² The pre-adjustment sale price was \$84.984 per share. There was a three for two stock split just prior to the husband's exercise. (CP 141, 160)

532) Daniel used approximately \$170,000 to purchase real property, leaving a balance of \$274,664.63. (CP 129)

While Daniel was concerned that the price of the stock would continue to fall, in fact the stock began to rise shortly after he exercised the options and sold the shares. Exercising the stock options was a "terrible mistake." (CP 129) Worse, Daniel failed to disclose the fact that he exercised the stock options before final papers were entered. (CP 129) Instead, he attempted to obtain Teresa's "consent" to exercise her share of the stock options. (See CP 148-49; FF XVI, FF XVII, CP 9-10)

C. The Husband Obtained New Counsel And Admitted Exercising The Options Shortly After The Final Papers Were Entered.

On October 12, 2006, the day before entry of the final orders, Teresa's counsel subpoenaed Daniel's bank records and discovered that he had made a deposit of approximately \$491,000 into his account. (CP 145; FF V, CP 8) At the hearing for entry of final documents, Daniel, through his then-counsel, falsely advised the court that the deposit discovered by Teresa's counsel was from

the sale of his share of the PACCAR stock options³. (CP 145-46, FF VI, CP 8) On October 13, 2006, a decree of dissolution was entered, dissolving the parties' marriage and distributing the parties' property, including an award of stock options to the wife that unknown to her no longer existed. (See CP 176-89)

On October 24, 2006, less than two weeks after the final papers were entered, Daniel obtained new counsel and filed an affidavit admitting that he had cashed in all of the parties' PACCAR stock options, not just the stocks options that were awarded to him. (CP 157, 165-67) Daniel conceded his error in unilaterally exercising the stock options. (CP 129) He proposed immediately distributing approximately \$170,000 to the wife as her share of the proceeds from the exercised stock options. (CP 161) Alternatively, Daniel proposed depositing nearly \$190,000 into his attorney's trust account, to secure the wife's option rights. (CP 161-62) Daniel

³ In fact neither party was particularly candid with the court prior to entry of the final papers. After final papers were entered, the court found that the wife had concealed a joint bank account that contained over \$14,000, and that she had consumed over \$12,000 from another joint account without the husband's consent or knowledge. (CP 157-59) As a result, the court entered a judgment against the wife for \$18,923, representing one-half of the concealed joint account and all of the funds consumed by the wife from the other joint account. (CP 16-17)

suggested that the court set up a procedure that would allow Teresa to direct him to “exercise” her stock options on a date of her choice prior to the expiration of the options. The proceeds the wife would have received on that day had the options still existed would then be distributed to her. (CP 161-62)

Daniel’s motion was rescheduled several times. Although it was originally filed in October 2006, the court did not hear the matter until April 2007 – six months later. (CP 129-30; FF XVIII, CP 11) While Daniel’s motion was pending, Teresa filed a CR 60 motion seeking relief from the decree and asking the court to “make adjustments” to the decree to make up for the loss suffered from the sale of the stock options. (CP 144)

D. The Trial Court Assessed Damages Based On A Presumption That The Stock Would Increase In Value By More Than 20% Every Year Through 2013.

In a consolidated hearing on both motions⁴, the trial court found that Daniel had no authority to exercise the wife’s share of stock options (FF XIV, CP 10), and that as “a direct and proximate result of [Daniel]’s unauthorized sale of the wife’s share of PACCAR stock options, and [Daniel]’s fraudulent conduct, [Teresa]

⁴ The matter was heard on April 16, 2007. The trial court’s findings were entered nearly a year later, on April 14, 2008.

has been substantially and irrevocably damaged insofar as she is now unable to exercise the stock options, which were awarded to her.” (FF XIX, CP 11)

In assessing damages, the trial court found that had the wife been in a position to exercise the stock options on the day before each grant expired, she would have been able to realize \$617,553.00 on future exercises occurring April 26, 2009 through January 13, 2013. (FF XX, CP 11) The trial court relied on a declaration by wife’s expert, CPA Ronald Nelson, who asserted that “[w]e have computed that over the last 10 years (March 6, 1997 to March 6, 2007) PACCAR had a rate of return of 20.235% per annum. (CP 137; FF XXIII, CP 12) Based on speculation that this rate of return would continue, Mr. Nelson calculated the price of the stock on the day before each grant expired, through January 2013, and predicted the net proceeds to the wife for each exercise. (CP 137, 142)

At the hearing on consolidated motions, the husband asked the court to set an evidentiary hearing if it intended to award a judgment to the wife instead of the alternative proposed by the husband, “so that we can get Mr. Nelson’s testimony in person and subject to cross-examination as to exactly what assumptions he

made or did not make as to the calculation of – of the damages as – as articulated by him in his declaration.” (4/16/07 RP 30) The trial court rejected the husband’s request, stating that “if Mr. Farmer had thought that the 20 percent rate of return was way too high, then he had a remedy. And that remedy was to never have exercised stocks that didn’t belong to him.” (4/16/07 RP 32)

Even though under Mr. Nelson’s theory the wife would not have realized some of the proceeds from sale of the stock until 2013, his calculations applied no discount rate to the proceeds calculated from future exercise of the options. Daniel moved for reconsideration, pointing out that the discount rate should equal the rate of return, since future damage could be avoided by giving the wife the ability to purchase PACCAR shares and realize the claimed rate of return from the judgment proceeds. (CP 71, 126) On reconsideration, the trial court reduced the damage award to \$487,325 (FF XX, CP 11), adopting Mr. Nelson’s belatedly proposed discount rate of six percent (CP 79-80), but struck large portions of the report of Daniel’s expert witness, Steven Kessler, challenging the assumptions made in Mr. Nelson’s calculation of damages and his determination of the proper discount rate. (CP 27-29)

The court entered a judgment in favor of the wife in the amount of \$487,325, plus attorney fees and costs of \$9,794.57, on April 14, 2008. (CP 4) The husband now appeals. (CP 1)

V. ARGUMENT

A. The Trial Court Erred As A Matter Of Law By Calculating Damages Based On Speculation What The Price Of Stock Would Be In The Future Instead Of The Date When The Options Were Converted Or A Reasonable Time Thereafter.

1. This Court Reviews The Trial Court's Assessment Of Damages De Novo.

"The appropriate measure of damages for a given cause of action is a question of law, reviewed de novo." *Womack v. Von Rardon*, 133 Wn. App. 254, 263, ¶ 21, 135 P.3d 542 (2006) (citing *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 843, 726 P.2d 8 (1986)). Daniel Farmer concedes that he is guilty of conversion, as he "exercised the options, which did not belong to him." *Marriage of Langham and Kolde*, 153 Wn.2d 553, 560, ¶ 16, 106 P.3d 212 (2005). But our Supreme Court in *Langham* held that the measure of damages for a conversion of stock options is the value of the options at the time of its exercise. 153 Wn.2d at 567-68, ¶ 31. The trial court in this case erred in instead calculating damages based on speculation what the price of the stock would

be in the future instead of the date when the options were converted.

2. The Trial Court Should Have Assessed Damages At The Time Of Conversion Under *Langham*.

In *Langham*, as in this case, an employee husband wrongfully exercised and sold options that had been awarded to the wife in their divorce. The Supreme Court held that the wife was entitled to damages calculated by the market value of the property at the time the husband converted the options by exercising them and receiving the stock:

“[t]he conversion being established, the respondent was entitled to recover the value of the stock at the time of the conversion, regardless of what the property of the company may have been subsequently transferred for by the appellant.”

Langham, 153 Wn.2d at 567-68, ¶ 31 (quoting *Hetrick v. Smith*, 67 Wash. 664, 669, 122 P.363 (1912)).

Here, the trial court calculated damages not based on the value of the stock on the date that the husband exercised the options, but on speculative values up to six years in the future at the time of the court’s oral ruling. This was error under *Langham*. Had the trial court properly used the date of conversion to assess damages to the wife, it would have determined that the total

damages were \$173,298 - the net amount realized from exercise of the wife's share of stock options on the date of conversion. (CP 141)

3. If The Trial Court Was Not Bound By *Langham* Because The Property Increased In Value After Conversion, The Trial Court Should Have Assessed Damages Within A "Reasonable Time" After Conversion.

In *Langham*, the Court declined to directly address the issue presented here of the measure of damages when property increases in value after the conversion, noting that a "person whose property is converted may recover *at least* its value at the time of conversion." 153 Wn.2d at 569, ¶ 33 (emphasis in original, *citing In re Salmon Weed & Co.*, 53 F.2d 335, 341 (2nd Cir. 1931)). However, other cases addressing property with fluctuating values have held that the measure of damages for conversion is at most "the highest value of the property wrongfully converted between the time of conversion and a reasonable time after victim learns of such conversion." *Brougham v. Swarva*, 34 Wn. App. 68, 77, 661 P.2d 138 (1983); *see also Hetrick v. Smith*, 67 Wash. 664, 122 P.363 (1912) ("true measure of damages is the value of the stock at the time of conversion, or a reasonable time after"). There is no authority for the measure of damages assessed by the trial court

here, based on speculation on the value of the assets at post-judgment dates up to six years after its ruling. (See CP 142)

In ***Brougham***, the trial court found the defendant guilty of converting silver coins owned by the plaintiff. The plaintiff, a widow, was persuaded by the defendants to place silver coins with a face value of \$50,000 in a safety deposit box in the name of the defendants. Five years later, the plaintiff sued the defendants for the return of these silver coins. At trial, two years after the plaintiff filed suit, the defendants finally admitted that they had converted the coins.

The plaintiff in ***Brougham*** presented evidence at trial that the value of the silver coins at various times between the date of conversion and defendant's admission was between \$225,000 and \$950,000. The trial court assessed damages at \$800,000. ***Brougham***, 34 Wn. App. at 78-79. This court affirmed, holding that where "personal property which has a sharply fluctuating value is willfully converted and such conversion is fraudulently concealed by the converter, the measure of damages is the highest value of the property wrongfully and knowingly converted between the time of conversion and a *reasonable* time after the victim learns of such conversion." ***Brougham***, 34 Wn. App. at 77. This court held that

while a victim of conversion should be protected, she is not entitled to a “windfall of complete umbrella protection by being awarded the highest possible valuation of the property from the time of its taking to the entry of judgment or its return.” *Brougham*, 34 Wn. App. at 78.

Here, the husband converted the stock options on August 14, 2006. (CP 157; FF XV, CP 10) The wife was made aware of the conversion on October 24, 2006, when the husband admitted to exercising the options. (CP 157) Damages should have been calculated as of the date of conversion, or a reasonable time thereafter. The trial court erred in instead calculating damages based on speculative values three to seven years after the wife learned of the conversion.

4. Under No Circumstances Could The Trial Court Assess Damages Calculated At A Time After Entry Of Judgment.

Despite the court’s long delay in entering judgment, the valuation dates chosen by the trial court in assessing damages went beyond even the date of judgment. Under no circumstances could the trial court assess damages calculated at times after entry of judgment. See *Roxas v. Marcos*, 89 Hawai’i 91, 969 P.2d 1209, 1270 (1998).

In *Roxas*, the Hawaii Supreme Court adopted the measure of damages for wrongfully converted assets of fluctuating value established by this court in *Brougham*. 89 P.2d at 1269 (“On balance, we agree with the resolution at which the *Brougham* court arrived.”) In determining the “reasonable time” after the victim learns of the conversion for assessing damages, the Hawaii Supreme Court held that “the date of close of the evidence at trial would, as a matter of law, be the absolute end-point beyond which the ‘reasonable time’ cannot extend, inasmuch as the market values of the converted Buddha statue and gold bars beyond that date would be unknowable to the trier of fact.” *Roxas*, 89 P.2d at 1270; see also 18 Am. Jur. 2d Conversion § 120 (“In determining what constitutes a ‘reasonable time,’ the outside boundary is the latest date upon which a reasonable investor with adequate funds would have reentered the market by purchasing a replacement, and the date of the close of evidence at trial is an absolute endpoint beyond which a ‘reasonable time’ cannot extend”).

Under the reasoning of *Brougham*, as characterized in *Roxas*, the trial court erred in calculating damages based on speculation about the price of the stock far into the future instead of

the date when the options were wrongfully converted or some reasonable time thereafter before judgment was entered.

B. The Trial Court's Erred In Calculating Damages Based Only Speculative Assumptions.

1. The Trial Court's Assessment Of Damages Was Based Solely On A Speculative Assumption About The Rate Of Return On The Stock.

Even if this court is not bound by *Langham* and *Brougham* to a method of calculating damages at or near the time of conversion, the trial court erred by assessing damages based solely on a declaration by the wife's expert witness presenting his opinion what the stock price might be over the next six years. While expert testimony may be a sufficient basis for an award of damages, "their opinions must be based upon tangible evidence rather than upon speculation and hypothetical situations." *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 19, 390 P.2d 677 (1964).

In *Larsen*, our Supreme Court reduced an award of lost profits where the plaintiff's expert based his profit estimates on the assumption that the company would have achieved a large and disproportionate share of the market. 65 Wn.2d at 19. The court found that because there was no substantial and sufficient evidence in the record to justify this assumption, the expert's

testimony was speculative and could not be relied on as a basis for damages. *Larsen*, 65 Wn.2d at 20.

Similarly here, there was no evidence in the record to justify the assumption that PACCAR stock would increase at a rate of 20.235% per annum over the next six years. The only “evidence” of this rate of return was a two-page declaration by the wife’s CPA asserting that “we had computed that over the last 10 years (March 6, 1997 to March 6, 2007) PACCAR had a rate of return of 20.235% per annum.” (CP 137) This is not evidence from which the court could conclude that the stock would appreciate at that rate through 2013.

The wife’s expert witness did not and could not provide an opinion that it was likely that rate of return would continue – Mr. Nelson is not a financial consultant, a stock broker or analyst, nor has he any stated expertise in predicting how a stock, or PACCAR stock will perform. (See CP 139-40: Nelson Curriculum Vitae) Mr. Nelson’s entire “analysis” consists of simple math that could have been accomplished by anyone with a calculator. (See CP 137-42) Further, notwithstanding that the declaration does not explain who “we” are, Mr. Nelson provided no evidence of the data on which he relied for his bald statement that the rate of return of the stock for

the past ten years was 20.235%. Nor did Mr. Nelson provide any market analysis to prove that this claimed annual rate of return would continue for the following six years.

An opinion of an expert is of no weight unless founded upon facts in the case. "The law demands that verdicts rest upon testimony, and not conjecture." *Anton v. Chicago, M. & St. P. Ry. Co.*, 92 Wash. 305, 308, 159 P. 115 (1916); see also *ESCA Corp. v. KPMG Peat Marwick*, 86 Wn. App. 628, 639, 939 P.2d 1228 (1997) (rejecting the claimed proof of damages as "speculative and self-serving at best." Proof of damages must be established by a reasonable basis and must not subject trier of fact to mere speculation or conjecture). The trial court's assessment of damages was based solely on a speculative assumption about the rate of return on the stock.

2. If Speculation On The Rate Of Return Was Proper, The Trial Court Should Have Used The Same Rate Of Return As The Discount Rate To Calculate The Present Value Of The Wife's Future Damages.

Present cash value is the "sum of money needed now which, if invested at a reasonable rate of return, would equal the amount of loss at the time in the future when the benefits would have been received." 6 Washington Practice: Washington Pattern

Jury Instructions, WPI 34.02 at 366 (2005). In this case, the trial court found that the benefit the wife would have received in the future would be \$617,553, calculating this amount by assuming that had the wife retained her stock options, the value of the stock would have increased at a rate of return of 20.235%. To determine the “present cash value” of the lost future benefit, the trial court should have discounted the lost benefit by the same rate of return, as under the court’s theory the wife could have purchased PACCAR stock with the judgment and enjoyed that rate of return. By discounting the future lost benefit by only 6%, the trial court improperly overcompensated the wife.

3. No Evidence Supported The Trial Court Assumption That The Wife Would Have Exercised The Options On The Day Before They Were To Expire.

There was no evidence in the record to justify the assumption that the wife would have, given the opportunity, exercised her options on the day before each grant expired. See Restatement of Restitution: Quasi Contracts and Constructive Trusts § 151, comment c (1937) (person entitled to highest value reached by subject matter within reasonable time after tortious conduct “if he can prove that he probably would have made a sale

while the subject matter was at its highest point in value”); see also **Gerstle v. Gamble-Skogmo, Inc.**, 478 F.2d 1281, 1305 (2nd Cir. 1973) (whether plaintiffs would have sold their stocks at its highest value is “too untenable and speculative to support an award of damages”). Here, there was no evidence that the parties historically exercised their stock options on the day before each grant expired, nor was there any evidence that Daniel would remain employed at PACCAR through 2013 so the wife could do so. Instead, the only evidence of this intention was a statement in the wife’s declaration that: “had affiant been in a position to exercise the stock options, for instance, on the day before each group of stock options expired, affiant would have been able to realize approximately \$617,553 [based on the declaration of the certified public accountant].” (CP 146)

In **Scully v. U.S. WATS, Inc.**, 238 F.3d 497, 512-13 (3rd Cir. 2001), the court expressed concern with an approach that allows a plaintiff to choose, in hindsight, the date that she would have exercised stock options for purposes of calculating damages. The plaintiff in **Scully** argued that the court should have calculated damages at the end of the restricted holding period, when he claimed he would have sold his stock. The **Scully** court rejected

that approach as “unduly speculative,” holding that it could not “accept a plaintiff’s after-the-fact assertion that he would have sold stock at a time that, in hindsight, would have been particularly advantageous.” 238 F.3d at 512-13. The court reasoned that accepting this approach would provide a plaintiff with “more than the benefit of his bargain” from the stock options:

Were [plaintiff’s] approach accepted, he would receive more than the benefit of his bargain because the stock option merely (1) reduced his risk of incurring a loss, and (2) increased the likelihood that he would reap a profit. However, the stock option neither extinguished all risk, nor guaranteed a profit.

Scully, 238 F.3d at 513.

The **Scully** court recognized that there were some cases where courts have accepted a plaintiff’s position concerning the date he would have sold shares, but in those instances there was “adequate evidence confirm[ing] a plaintiff’s professed intent concerning the exercise of security interests.” 238 F.3d at 513, fn. 3 (citing **Greene v. Safeway Stores, Inc.**, 210 F.3d 1237, 1243 (2000); **Kers & Co. v. ATC Communications Group, Inc.**, 9 F.Supp.2d 1267, 1271 (D.Kan. 1998); **Commonwealth Associates v. Palomar Medical Technologies, Inc.**, 982 F.Supp. 205, 207 (S.D.N.Y. 1997). In each of those cases, not only was there

additional evidence to support the plaintiffs' claims that they would have exercised their options on a certain date, there was also evidence of the price of the stock on those dates.

Here, there was no evidence that the wife would have exercised the stock options on the day before each grant expired as she claims. Further, there was no evidence of the price of the stock on those dates save a declaration by an accountant speculating on what those prices might be in the future. Finally, the assessment of damages could only be supportable if the husband continued his employment with PACCAR through 2013. The trial court erred in assessing damages based solely on speculative assumptions that were not supported by any evidence.

4. The Trial Court Erred In Imposing Statutory Interest On The Future Damages Award To The Wife.

If the court's damage calculations can otherwise be justified, the trial court erred in imposing statutory interest on the award to the wife. The purpose of interest on a judgment is to allow a party to be compensated for the other party's "use" of his or her money when he or she has been denied use of that money. ***Aguirre v. AT&T Wireless Services***, 118 Wn. App. 236, 241, 75 P.3d 603 (2003), *rev. denied*, 151 Wn.2d 1028, 94 P.3d 959 (2004). Where

a party's right to recover on a judgment does not arise until a future contingency occurs, post - judgment interest should only accrue from the date the party has a right to collect the funds. **Aguirre**, 118 Wn. App. at 241 (citing **Young v. Young**, 44 Wn. App. 533, 534, 723 P.2d 12 (1986)).

Here, the underlying assumption of the damage award is that wife would not have exercised her share of the stock options until the day before each grant expired - April 26, 2009, January 24, 2010, January 23, 2011, January 22, 2012, and January 14, 2013, respectively. (CP 142, 181) The wife would not be entitled to the “use” of any of these funds until at least 2009, when the first grant was set to expire and when she allegedly would have exercised her share of the stock options.

An award of statutory interest on the judgment was also inappropriate because already built into the judgment were the alleged increases in value of the stock options had the wife retained them. In other words, the wife was already compensated for the “use” of her money by the amount of the judgment awarded by the court. The trial court erred in imposing statutory interest on the judgment awarded to the wife.

5. The Trial Court's Assessment Of Damages Was Punitive, Not Compensatory.

Each of the errors discussed above demonstrate that the trial court's assessment of damages was punitive, rather than compensatory. Our courts have consistently disapproved of punitive damages as contrary to public policy. *Dailey v. North Coast Life Ins. Co.*, 129 Wn.2d 572, 574-75, 919 P.2d 589 (1996). Not only do punitive damages impose on the defendant a penalty generally reserved for criminal sanctions, they also "award the plaintiff with a windfall beyond full compensation." *Dailey*, 129 Wn.2d at 574. Here, the trial court erred in wholly adopting the wife's proposed method of calculating damages, and it is evident it did so as a means to "punish" the husband for what it perceived was his misconduct in unilaterally exercising the stock options.

For example, after the husband objected to the wife's claim that the stock would continue to increase at a rate of 20.235%, the court stated that it would adopt the wife's analysis as "appropriate" in light of the fact that the husband "chose to lie," and that its damage calculations was "based upon his actions:"

If Mr. Farmer had thought that the 20 percent rate of return was way too high, then he had a remedy. And that remedy was to never have exercised stocks that didn't belong to him. And yet he lied -- I won't even

cloak it in any other way – he lied to this Court that those options existed ... By doing so, he took the risk. He took the risk of the Court’s decision here. And the Court believes, that because he chose to lie, that it is appropriate to go ahead and award her the value of that ... over \$600,000. This is based upon his actions. No one else’s actions but his.

(4/16/07 RP 32-33; *see also* 6/04/2007 RP 27-28) Later, in rejecting the husband’s proposed discount rate, the trial court reminded the husband that the only reason that it was even necessary to address these issues was because the husband “repeatedly lied” to the court. (4/14/08 RP 31)

This was error. There is no legislative authority allowing the trial court to impose punitive sanctions in a dissolution action. In fact, the domestic relations act specifically prohibits the consideration of marital misconduct in making both property and spousal maintenance awards. RCW 26.09.080; RCW 26.09.090. The trial court erred in awarding damages to “punish” the husband as opposed to compensating the wife for her loss.

C. The Trial Court Erred By Accepting The Wife’s Expert’s Speculative Opinion Without Granting An Evidentiary Hearing Or Allowing The Husband To Present His Own Expert Testimony Challenging The Expert’s Assumptions.

The trial court’s blind acceptance of the wife’s expert’s speculative opinion as a basis to assess damages was especially

egregious because the court refused to allow an evidentiary hearing for the husband to challenge the expert's opinion. (See 4/16/07 RP 31) Civil Rule 43(e)(1) provides that "when a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions." This court has held that this rule "must be applied in a manner that will not offend due process hearing requirements." *Rogoski v. Hammond*, 9 Wn. App. 500, 508, 513 P.2d 285 (1973). A party "has a right to produce evidence and arguments thereon, including the right to confront and examine witness when those are used. If, therefore, a [party] demands the right to offer evidence rather than to be confined to affidavits, he must be afforded that opportunity." *Rogoski*, 9 Wn. App. at 508; see also 2 Washington Court Rules Annotated, CR 43 editorial commentary at 494 (2007-2008) ("Due process requires that a party whose substantive rights may be affected by a pending motion have the right to be heard in open court").

Here, there were disputed facts regarding the loss to the wife from the unilateral exercise of stock options, and the credibility and bases of the wife's expert witness in calculating that loss. (See

4/16/07 RP 30; CP 131) The husband should have had an opportunity to challenge the expert's assumptions and to cross-examine him. See ***Marriage of Rideout***, 150 Wn.2d 337, 351-52, 77 P.3d 1174 (2003) ("issues of credibility are ordinarily better resolved in the 'crucible of the courtroom, where a party or witness' fact contentions are tested by cross-examination, and weighed by a court in light of its observations of demeanor and related factors"). The trial court erred in denying the husband's request for an evidentiary hearing.

At a minimum, the trial court should have allowed the husband an opportunity to present rebuttal affidavit evidence on the issue of damages. Instead, the trial court further erred by striking substantial portions of the husband's expert's report, which challenged the wife's expert's assessment of damages. (CP 27-29)

The husband explained that his expert's report "was offered in part, to assist the court in its assessment of the credibility of Mr. Nelson, the credibility and the persuasiveness of his report, and the factors upon which he relied in determining the appropriate discount rate," which was the subject of a pending hearing. (CP 53) The trial court apparently believed that it could not consider any additional evidence on the issue of damages because it had

made an oral ruling on the subject. (See 9/10/07 RP 12-13) But “until a formal judgment is entered, a trial court is free to change its mind, and the defendant here was free to utilize whatever procedural tactics [he] deemed appropriate to obtain entry of findings of fact, conclusions of law, and judgment in her favor.” **Seidler v. Hansen**, 14 Wn. App. 915, 917, 547 P.2d 917 (1976). The trial court should have accepted the report so that it could properly weigh the evidence relating to the assessment of damages. In refusing to do so, the trial court erred.

VI. CONCLUSION

This court should reverse and remand to a different judge with directions to properly assess the damages to the wife. In light of the punitive, rather than compensatory, manner in which the trial court assessed damages - remand should be to a different judge to promote the appearance of fairness. **Marriage of Muhammad**, 153 Wn.2d 795, 807, 108 P.3d 779 (2005); *see also* **McCausland v. McCausland**, 129 Wn. App. 390, 118 P.3d 944 (2005), *reversed on other grounds*, 159 Wn.2d 607, 152 P.3d 1013 (2007).

Dated this 26th day of September, 2008.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 26th, 2008, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

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Carrie O'Brien