No. 99380-7

[Court of Appeals No. 79354-3-I]

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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TODD PIERCE,

Respondent,

v.

BILL & MELINDA GATES FOUNDATION,

Petitioner.

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# PETITION FOR REVIEW

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## I. IDENTITY OF PETITIONER

The Bill & Melinda Gates Foundation (the "Foundation"), appellant below, asks this Court to accept review of the decision designated in Part II.

## II. COURT OF APPEALS DECISION

On November 16, 2020, Division One issued a decision affirming in part and reversing in part a $4.64 million judgment in favor of the Foundation's former Chief Digital Officer, Todd Pierce ("Pierce"). *Bill & Melinda Gates Found. v. Pierce*, ___ Wn. App. 2d ___, 475 P.3d 1011 (2020). *See* Appendix A. On December 4, 2020, the Foundation moved for reconsideration, seeking reassignment of the trial judge. *See* Appendix B. Division One denied this motion on December 28, 2020. *See* Appendix C.

## III. ISSUES PRESENTED FOR REVIEW

A. Although the Foundation fulfilled every obligation in Pierce's written employment agreement, the court of appeals held that it breached an oral promise of a "far-reaching and transformational" job. An action for breach of contract requires the plaintiff to establish a promise that is sufficiently definite to be legally enforceable. Even if Pierce's contract included oral statements about a "transformational" job, such statements are too vague to be enforceable. Did the court err in concluding otherwise?

B. Because Pierce was an at-will employee, the Foundation was entitled to modify his job duties at any time, in its discretion. Did the court

of appeals err in holding the Foundation liable for breach of contract because it prioritized some of Pierce's job duties over others?

C. An implied duty of good faith and fair dealing is inconsistent with an at-will employment agreement but might be recognized if there is egregious employer abuse. Did the court of appeals err in holding that the Foundation breached the implied duty of good faith and fair dealing, even while implicitly acknowledging the absence of egregious employer abuse?

D. A party that establishes a breach of contract is entitled to recover expectation damages. Pierce had no such damages, and he was paid in full. Did the court of appeals err in holding that Pierce could recover anything other than nominal damages for his "rather ephemeral loss"?

## IV. STATEMENT OF THE CASE

The court of appeals has fairly summarized the facts underlying the parties' dispute. *See* 475 P.3d at 1014–16. We highlight key points below.

In 2014, Dr. Sue Desmond-Hellman became the Foundation's CEO. RP 491. Although the trustees govern all Foundation strategies, the CEO and the Executive Leadership Team ("ELT") direct day-to-day operations. RP 514, 504. Shortly after Desmond-Hellmann joined the Foundation, she hired Leigh Morgan to assess the Foundation's operations. RP 1459–60. Morgan was then named Chief Operating Officer. RP 523. In that role, she oversaw IT, HR, security, and facilities. RP 1461–63.

Morgan had no prior experience working in or supervising an IT operation, RP 1465, and reached out to Pierce for support. Ex. 1; RP 1469–70. Morgan knew Pierce from working together at Genentech, a Bay Area biotechnology company. RP 523–24, 257. When she contacted Pierce, he was a senior vice president at Salesforce.com. Ex. 1; RP 284.

Morgan told Pierce that there was "heavy lifting" to be done in the Foundation's IT operation. Ex. 1. After Morgan sought Pierce's advice, their discussions moved to the possibility of his working at the Foundation. Exs. 3, 4. Pierce understood that managing IT operations would be part of his job but said he was interested only if his Foundation job was broader than that of a traditional Chief Information Officer. RP 998, 538–39.

Morgan and Pierce discussed the possibility of Pierce joining the Foundation as its Chief Digital Officer ("CDO"). RP 998. The Foundation had never employed a CDO, and Pierce had never worked as one. RP 996. Morgan and Pierce discussed getting the Foundation's IT programs in order, managing its systems upgrades, and building a cross-Foundation digital strategy that would amplify and expand upon the work that the Foundation was already doing. RP 998–99.

In October 2014, Morgan arranged for Pierce to travel to Seattle and meet with the Foundation's senior leadership. In Pierce's meeting with Desmond-Hellmann, she told him to be sure to ask for what he wanted from

the Foundation. RP 1004. Pierce made three specific requests: (1) to be a CDO, (2) to be a member of the ELT, and (3) to report directly to the CEO. RP 533. The Foundation agreed to his first two requests but rejected the third, instead informing Pierce that he would report to Morgan. RP 540. Morgan and Desmond-Hellmann both told Pierce that fixing the Foundation's IT systems would be a priority. RP 539; *see also* RP 1006.

Morgan then set up a meeting between Pierce and Bill Gates and arranged for him to meet with the Presidents of the Foundation's U.S. Program and Global Health divisions. Ex. 217. Before the meeting with Gates, Morgan told Pierce that the "CDO role description is still forming." Ex. 13. She sent him a draft list of CDO "accountabilities" and asked for his input. *Id*. Pierce responded that he was not able to find "quality time to build out a brief for the CDO role," but that what Morgan had written was "broad enough to give a significant opportunity." Ex. 218. Aside from one minor change, Pierce did not offer any revisions. *See id*. Pierce also stated that he had "done some research on the CDO role," the results of which he was forwarding. *Id*. The articles Pierce sent to Morgan noted that the CDO role is "new, untested and . . . in a state of evolution." *Id*. Based on their discussions, Morgan sent Pierce a list of "high level job accountabilities" that were crafted with room for Pierce to develop a role "with significant breadth" and one "that meets [the Foundation's] current need." Ex. 221.

The Foundation sent Pierce an offer letter in January 2015, Ex. 231, which he signed and returned. Ex. 256. He did not seek any revisions to the letter or ask for any additional commitments. *Id*. The offer letter, which the parties agree was an enforceable contract, set forth the terms of Pierce's employment. RP 1053–56. In exchange for Pierce's services as CDO, the Foundation agreed to pay him a $425,000 annual salary, a $100,000 signing bonus, retirement contributions equal to 15% of his salary, and relocation benefits. Ex. 256. The letter stated that Pierce's employment would be "'at will' and may be terminated by [Pierce] or the [F]oundation at any time for any reason with or without cause or advance notice." *Id*. Pierce understood that at-will employment meant (1) he could be terminated at any time, and (2) his job duties could be shifted. RP 1056–57, 951–52.

Pierce began working at the Foundation as its CDO in April 2015, RP 1060, and started developing a digital strategy. Ex. 279. In November 2015, Pierce sent Desmond-Hellmann an email outlining his initial thoughts on a digital strategy. Ex. 40. Desmond-Hellmann questioned his focus on "white spaces," i.e., new program strategies, rather than collaboration with the Foundation's existing programs. *Id.* She stressed the importance of pacing, given the breadth of his proposal. *Id.* Pierce agreed these concerns were legitimate. RP 1338–39. In January 2016, Pierce gave a presentation on his digital strategy to the ELT, entitled "Digital Foundation." Ex. 391.

Foundation executives supported Pierce's pursuit of his digital vision despite having serious concerns about his performance.[1] Pierce also had conflicts with his boss. Before he was hired, Pierce understood that he would report to Morgan. Ex. 256. Despite this, he insisted on reporting directly to CEO Desmond-Hellmann. Exs. 367, 40, 553, 554. Concerned that Pierce was attempting to bypass or work around her, Morgan told the Foundation's Chief HR Officer that she was considering terminating Pierce over this and other issues. Ex. 562; RP 1582–83.

In September 2016, Morgan met with Pierce to address additional concerns with his conduct. RP 1643. Morgan discussed issues regarding Pierce's fit at the Foundation as well as an investigation into Pierce's expense reimbursement practices and a related, violent outburst involving his executive assistant. RP 908–09, 2032–34, 2043–45, 1673–76. Pierce was terminated shortly thereafter. RP 910–11.

On April 17, 2017, Pierce filed a complaint asserting claims for breach of contract, promissory estoppel, and negligent misrepresentation. CP 3–4. Pierce alleged that the Foundation breached the contract not by terminating him but rather by failing to give him the duties of a CDO. *Id.*

[1] *E.g.*, RP 620 (CEO received negative feedback regarding Pierce from several members of the ELT), 617–18 (Pierce was not a "visible leader" within his IT department), 2169 (Pierce "wasn't present" at the Foundation), 1799 (Pierce failed to articulate his digital strategy with a "level of specificity that would have allowed [the Foundation] to operationalize [it]"), 1800 (Pierce's discussion of his "digital foundation" was too abstract).

Following a ten-day bench trial, King County Superior Court Judge Catherine Shaffer rejected Pierce's negligent misrepresentation claim but ruled for him on his breach of contract and promissory estoppel claims. CP 8, 19–22. The trial court found that the Foundation breached its contract by failing to give Pierce a "far-reaching and transformational" role. CP 19. The trial court found that this breach occurred in November 2015, seven months after he began working at the Foundation. CP 20. Using a reliance measure of damages, the trial court awarded Pierce $88,104 in wages and $4,547,140 in stock that he gave up by leaving Salesforce. CP 206.

The court of appeals, while acknowledging that "[t]he specific promise at the heart of the negotiations for Pierce's employment may well have been vague and unenforceable in other circumstances involving different parties," affirmed the trial court's finding of breach of contract with respect to the Foundation's alleged failure to provide Pierce a "far-reaching and transformational" CDO position. 475 P.3d at 1013–14.

The court of appeals struck the trial court's conclusion of law regarding promissory estoppel and reversed its rulings on damages. *Id*. at 1019–23. Although it acknowledged that "the proper measure of damages is nominal" under Washington law, Division One said that "the facts of the case at hand are such that we are not so constrained. The context and parties are unique and the stakes high, therefore we find it proper to look beyond

nominal damages." *Id.* at 1022. The court remanded the case so that the trial judge, whose conduct it described as "[h]eavy handed," *id.* at 1024,[2] could determine the value of Pierce's "rather ephemeral loss." 475 P.3d at 1022.

## V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review under RAP 13.4(b)(1), (2), (3), and (4). The court of appeals' decision conflicts with settled precedent regarding the requirements for a binding promise, the nature of at-will employment, and the measure of damages for breach of an at-will agreement. Division One's rationale for refusing to apply settled precedent also violates constitutional guarantees of equal justice under law. These issues are of substantial public interest, and they should be determined by this Court.

### A. A pre-hire discussion of a "far-reaching and transformational" role is too vague to be an enforceable promise.

Pierce's contract claim turns on an alleged offer of a "far-reaching and transformational" role, which he asserts is an enforceable oral promise. It is not. Division One's decision conflicts with decisions of this Court, as well as published decisions by the court of appeals, holding that contract terms must be ***definite***. "[I]f a term is so 'indefinite that a court cannot decide just what it means, and fix exactly the legal liability of the parties,' there cannot be an enforceable agreement." *Keystone Land & Dev. Co. v.*

[2] *See* Appendix B (trial judge testified, interrupted counsel, intervened in favor of Pierce during cross-examination, attacked Morgan, and prohibited objections to its questions).

*Xerox Corp.*, 152 Wn.2d 171, 178, 94 P.3d 945 (2004) (quoting *Sandeman v. Sayres*, 50 Wn.2d 539, 541, 314 P.2d 428 (1957)). If a supposed promise "is so indefinite it cannot be enforced," it is illusory. *Stewart v. Chevron Chem. Co.*, 111 Wn.2d 609, 613, 762 P.2d 1143 (1988).

The burden of proving a contract, whether express or implied, is on the party asserting it. *Bogle & Gates, PLLC v. Zapel*, 121 Wn. App. 444, 448, 90 P.3d 703 (2004). To be enforceable, a promise must be "clear and definite." *See Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 173–74, 876 P.2d 435 (1994) (noting in analyzing a promissory estoppel claim that "[t]he requirement of a clear and definite promise is consistent with this state's terminable at will doctrine" and that statements typical of those made in the interviewing process do not demonstrate a clear and definite promise).

"An enforceable contract requires, among other things, an offer with ***reasonably certain*** terms." *Andrus v. State Dep't of Transp.*, 128 Wn. App. 895, 898–99, 117 P.3d 1152 (2005) (emphasis in original) (holding that an oral offer of employment revoked the following day was not an enforceable employment contract because it lacked definition of key terms, including start date, salary, and benefits information). Here, the parties agree that the Foundation's offer letter to Pierce was an enforceable contract establishing the terms of Pierce's employment. RP 1053–56. These terms included Pierce's title, compensation, and benefits; they also included notice that

Pierce's employment was at-will and terminable by the Foundation at any time for any reason without cause or advance notice. Ex. 256.

Pierce's contract did not spell out what it would mean to be the Foundation's CDO. *See id.* Nor did Pierce, during his negotiations with the Foundation, participate meaningfully in defining the role he sought to fill. *See* 475 P.3d at 1017 ("Morgan attempted to engage Pierce in defining what a CDO would be at the Foundation, but by his own admission, [Pierce] did not participate in that critical stage of the process . . . ."). Pierce agreed that Morgan's idea of the CDO role was broad enough to give a significant opportunity; Morgan said her description had "significant breadth" to meet the Foundation's needs. *See* Exs. 218, 221. The definition was left open.

The court of appeals acknowledged that "[t]he specific promise at the heart of the negotiations for Pierce's employment ***may well have been vague and unenforceable in other circumstances involving different parties***," but nevertheless affirmed the trial court's finding of breach of contract because "***the Foundation was uniquely situated*** to provide precisely the opportunity it jointly envisioned and bargained for with Pierce." 475 P.3d at 1014 (emphasis added). The court thus focused on the nature of the parties rather than the nature of the promise. *Id.* at 1017 ("[T]he agreement between Pierce and the Foundation is exceedingly unique in that both ***parties*** are high-level innovators in their respective fields and the

resources available . . . ***at the Foundation*** likely do not exist within most other organizations."), 1018 (the "Foundation is ***the largest charitable foundation in the world***, with . . . access to resources to securely anchor such an offer well within the realm of possibility"), 1019 ("As expansive as the language was that conveyed the promise, the Foundation was ***uniquely situated*** to provide exactly that . . . .") (emphasis added throughout).

Division One's focus on the parties rather than on the absence of a sufficiently definite promise conflicts with established principles of contract law. At least as troubling, the court of appeals has created rules that apply only to the Foundation and special benefits for Pierce that do not apply to other litigants. Washington law does not permit this kind of partiality.

Article I, section 12 of the Washington Constitution forbids any law "granting to any citizen, class of citizens, or corporation . . . privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." The purpose of the privileges and immunities clause "is to secure equality of treatment of all persons." *State ex rel. Bacich v. Huse*, 187 Wash. 75, 80, 59 P.2d 1101 (1936), *overruled on other grounds, Puget Sound Gillnetters Ass'n v. Moos*, 92 Wn.2d 939, 603 P.2d 819 (1979). "[A]rticle I, section 12 was intended to prevent favoritism and special treatment for a few to the disadvantage of others." *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, ___ Wn.2d ___, 475 P.3d 164, 171 (2020).

The court of appeals has approved "special treatment for a few," executive-level employees of the Foundation, in enforcing promises that would not be sufficiently definite for enforcement in any other context. This is a blatant departure from principles of equal justice and the rule of law.[3]

**B. The Foundation was entitled to modify Pierce's job duties.**

Even if it were possible to measure what is and is not a "far-reaching and transformational" job and to determine whether the promise of such a job has been breached, the court of appeals' ruling that the Foundation could not modify Pierce's duties contradicts the law of at-will employment. For this reason, too, its breach-of-contract holding is erroneous.

An employer may modify the terms of an at-will contract as it chooses so long as the modification applies prospectively. *Duncan v. Alaska USA Fed. Credit Union, Inc.*, 148 Wn. App. 52, 76, 78 n.100, 199 P.3d 991 (2008). "[O]f necessity, the greater right in either party to terminate without cause include[s] the lesser right to unilaterally and prospectively modify contract terms unilaterally." *Id.* at 77. Practically, the "new contract is formed when the employer communicates the new terms (offer), the

[3] It is no answer to say that the Foundation has resources that can be deployed to realize bold ambitions. The Foundation's assets are devoted to addressing global challenges of public health and equitable development. They are not meant to provide financial rewards to high-level employees beyond those agreed upon by the parties. In any case, the problem with a promise too vague to be enforceable is not that it cannot be achieved but that its achievement cannot be measured or determined by any court. *Cf. Havens*, 124 Wn.2d at 174 (plaintiff was told that setup and operation would be "his show").

employee works after receiving notice (acceptance), and the employee continues in employment although free to terminate (consideration)." *Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wn. App. 760, 769, 145 P.3d 1253 (2006).

This Court has refused to impose liability for an employer's decision to modify the terms of employment for an at-will employee. *White v. State*, 131 Wn.2d 1, 19–20, 929 P.2d 396 (1997) (holding that there is no tort for "wrongful transfer" and that an employee cannot recover for disciplinary action short of actual discharge, particularly where there is no loss in pay, rank, job classification, or other benefits). Because courts are "ill-equipped to act as super personnel agencies," they should refrain from "interfering with an employer's discretion to make personnel decisions." *Id.*[4]

If an employer does not breach an at-will agreement by transferring an employee to an entirely new job, it certainly cannot be said to breach an at-will contract by asking an employee to focus on a specific, acknowledged job responsibility and to devote less time to the allegedly "transformational" aspects of his job, with no change in salary and benefits. Yet this is the breach that the trial court found and the court of appeals upheld.

[4] Like Pierce, the plaintiff in *White* did not assert and the Court did not address any claim under the Washington Law Against Discrimination (ch. 49.60 RCW), which may permit a plaintiff to seek relief for a demotion or "adverse transfer." *Harrell v. State ex rel. Dep't of Soc. Health Servs.*, 170 Wn. App. 386, 398, 285 P.3d 159 (2012).

The court of appeals dismissed the Foundation's argument:

> While the Foundation is correct that it retained the ability to modify Pierce's job duties because of his status as an at-will employee, what they could not do, based on the duty of good faith and fair dealing, was fundamentally change what it meant to be the CDO of the Bill & Melinda Gates Foundation. To do so would render that fundamental promise illusory.

475 P.3d at 1018. Aside from the court's error in implying a duty of good faith and fair dealing, addressed below, its holding does not withstand scrutiny. First, the court assumes that telling Pierce to focus on his IT responsibilities was a "fundamental[] change" in his job even though those responsibilities were always part of his job. Second, the court assumes that "what it meant to be the CDO of the . . . Foundation" is sufficiently definite to be legally enforceable despite the absence of any definition in the parties' contract. And third, the court turns the principle it purports to recognize—that the Foundation was entitled to modify Pierce's job duties—on its head.

The trial court found that the Foundation employed Pierce for seven months before it purportedly breached its contract by failing to allow him to pursue the duties he wanted. Under Washington law, the Foundation could have terminated his at-will employment at that time without liability. Pierce understood that the Foundation could change his job duties at any time, and he agreed to the alleged change that occurred in November 2015 by continuing to work. The court of appeals erred in concluding otherwise.

### C. The implied duty of good faith and fair dealing does not apply here.

The court of appeals' holding that the Foundation owed Pierce an implied duty of good faith and fair dealing hinges on its characterization of their agreement as a bilateral contract. Regardless of how the agreement is described, the "promise" to which the implied duty allegedly attached was not sufficiently definite to be enforceable. The only enforceable agreement between the Foundation and Pierce was an at-will employment agreement, and this Court has held that such contracts do not contain an implied duty of good faith and fair dealing.

1. The terms of a bilateral contract must be clear and definite.

The circumstances surrounding the formation of the Foundation's agreement with Pierce do not change the requirement that any promises contained therein must be clear and definite to be enforceable. *See Keystone*, 152 Wn.2d at 178; *Cook v. Johnson*, 37 Wn.2d 19, 23, 221 P.2d 525 (1950) (both unilateral and bilateral contracts require promises); *Flower v. T.R.A. Indus., Inc.*, 127 Wn. App. 13, 27, 111 P.3d 1192 (2005) ("The fundamental difference between a unilateral contract and a bilateral contract is the method of acceptance."). "[T]here is no 'free-floating' duty of good faith and fair dealing that is unattached to an existing contract. The duty exists only 'in relation to performance of a ***specific contract term.***'" *Keystone*,

152 Wn.2d at 177 (emphasis added) (citation omitted) (quoting *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569–70, 807 P.2d 356 (1991)).

To the extent that there was any bilateral agreement regarding the duties of a CDO (a role that Pierce admittedly made no effort to define and one that his employment contract also does not define), such an agreement was not sufficiently definite to be enforceable. Pierce's written at-will contract for employment allowed the Foundation to modify Pierce's duties as it saw fit, and the Foundation did not breach that contract.

2. At-will employment agreements do not include an implied duty of good faith and fair dealing.

An implied duty of good faith and fair dealing is "internally inconsistent" with an at-will agreement that, by its terms, has no restrictions. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 227–28, 685 P.2d 1081 (1984). Imposing such a duty would subject each employment action to "judicial incursions into the amorphous concept of bad faith." *Id.* "If there is no contractual duty, there is nothing that must be performed in good faith." *Johnson v. Yousoofian*, 84 Wn. App. 755, 762, 930 P.2d 921 (1996).

In *Willis v. Champlain Cable Corp.*, 109 Wn.2d 747, 754, 748 P.2d 621 (1988), this Court indicated that there ***might*** be an implied duty of good faith and fair dealing in the case of egregious employer abuse. Since 1988, however, no such claim has been successful. *See, e.g., Trimble v. Wash.*

*State Univ.*, 140 Wn.2d 88, 96–97, 993 P.2d 259 (2000) (affirming summary judgment for employer and noting that the plaintiff's allegations were not egregious circumstances). In *Trimble*, the Court considered a claim for breach of good faith and fair dealing arising not from the plaintiff's termination but from denial of tenure. *Id.* While declining to reach the merits of the plaintiff's claim, the Court noted that "Washington courts have declined to broadly adopt [an implied covenant of good faith and fair dealing] in an at will contract." *Id.* at 97. Here, Division One did not address egregious employer abuse, implicitly acknowledging that there was none.[5]

The court of appeals admitted that "[s]ome Washington cases appear to indicate that at-will employment provides no implied duty of good faith and fair dealing." 475 P.3d at 1018 n.3. The court asserted that the absence of the implied duty is limited to the narrow context of termination of at-will employment. *Id.* at 1018–19. The cases it cited, however, do not support that distinction. *See Comfort & Fleming Ins. Brokers, Inc. v. Hoxsey*, 26

[5] The trial court concluded that Morgan engaged in egregious conduct when she advanced her own interests, punished Pierce for going around her to the CEO, and told him to focus on IT. CP 14–15, 19–20. The trial court also criticized Morgan for doing little to advance Pierce's CDO role, failing to be in his corner, and being upset when he disregarded her instructions to present strategy proposals to her before taking them to the CEO. CP 14–15. These examples trivialize the concept of "egregious employer abuse." *Cf. Youe-Kong Shue v. Optimer Pharm., Inc.*, No. 3:16-cv-02566-BEN-JLB, 2017 WL 3316259, at *2, *7 (S.D. Cal. Aug. 1, 2017) (at-will plaintiff could not state a claim for breach of the implied covenant of good faith and fair dealing despite "campaign of retaliation and intimidation against" him).

Wn. App. 172, 1763–80, 613 P.2d 138 (1980) (did not involve an at-will employment relationship but, rather, a contract for employment that "placed a limit on the power of the employer to terminate the services of the employee," and did not discuss the implied duty of good faith and fair dealing); *Rekhter v. State Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 108, 323 P.3d 1036 (2014) (did not involve an at-will employment relationship); *Badgett*, 116 Wn.2d at 569 (same).

### D. Only nominal damages are available for the alleged breach of contract.

The court of appeals also erred in holding that Pierce was entitled to anything other than nominal damages. "[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, 156, 43 P.3d 1223 (2002). As this Court has held, "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." *Id.* at 157. "Because an employer can alter or terminate at-will employment without consequence, '[t]here [is] no tangible basis upon which [to assess] damages where plaintiff's expectation was for an at-will position which could have been changed or from which he could have been terminated without consequence.'" *Id*. (first and third alteration in original).

The court of appeals acknowledged that "*Ford* would suggest a result of only nominal damages." 475 P.3d at 1021. Nevertheless, even though "Washington law generally directs that the proper measure of damages is nominal, . . . the facts . . . are such that we are not so constrained. The context and parties are unique and the stakes high, therefore we find it proper to look beyond nominal damages." *Id.* at 1022; *see also id*. at 1014 ("[T]he court is not constrained to nominal damages typically associated with a finding of breach of an at-will employment contract.").[6]

The court deemed itself "not constrained" by the law because of the parties' identity. Just as a court may not hold the Foundation to a different standard with respect to the requirements for an enforceable promise, or create special privileges for those who contract with the Foundation, so it may not hold that greater damages arise from an alleged breach of an at-will employment contract by the Foundation than by any other employer.

Division One describes Pierce's damages as "rather ephemeral" and "seemingly intangible." 475 P.3d at 1022–23. To put things more plainly,

[6] "The assessment of damages here rests on a determination of the value of this 'far-reaching and transformational' job; what is the inherent value of having this highly specialized role at this precise charitable foundation guided by these particular leaders of industry?" 475 P.3d at 1022. The court held that "[t]he damages to Pierce stem from the impact on his marketability," but Pierce did not bargain for "marketability." His complaint does not allege reduced marketability, *see* CP 2–5, and the record does not support such a claim. On the contrary, the Foundation gave Pierce several opportunities to strengthen his marketability as a CDO, including presenting on behalf of the Foundation at Salesforce's Dreamforce conference and a DocuSign conference. RP 908–09, 1383–84.

Pierce had ***no*** damages. He negotiated the salary and benefits he believed represented the value of the job he was promised—CDO of the Foundation—and received no less. As the court acknowledged, "Pierce was provided everything he was owed in compensation." *Id*. at 1022. The court's conclusion that he was entitled to something more is error.[7]

Division One's decision not only defies *Ford* but also improperly invites a speculative damage award. Damages "must be proven with reasonable certainty"; "damages which are remote and speculative cannot be recovered." *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 16, 390 P.2d 677 (1964). 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). Anything other than an award of nominal damages here would violate this rule.

## VI. CONCLUSION

This Court should accept review of the court of appeals' decision, reverse on liability, and remand with instructions to dismiss. If liability is affirmed, this Court should remand for entry of $1 in nominal damages.

[7] The court held that "[t]he proper measure of damages owed to Pierce . . . is that of the difference in value between the job he was promised and the job he was provided after his late November 2015 meeting with Desmond-Hellman . . . ." 475 P.3d at 1022. By the court's logic, Pierce was overpaid from that point forward because he did not perform "the job of a CDO."

Respectfully submitted this 31st day of December 2020.

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# APPENDIX A

475 P.3d 1011
Court of Appeals of Washington, Division 1.

BILL & MELINDA GATES FOUNDATION, a Washington nonprofit corporation, Appellant/Cross-Respondent,
v.
Todd PIERCE, Respondent/Cross-Appellant.

No. 79354-3-I
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FILED 11/16/2020

**Synopsis**

**Background:** Former employee brought action against employer alleging breach of contract, promissory estoppel, and negligent misrepresentation. After bench trial, the Superior Court, King County, Catherine Shaffer, J., entered judgment in employee's favor, 2018 WL 6605451, and denied employee's motion for attorney fees and costs, 2018 WL 6605454. Employer appeals, and employee filed cross-appeal.

**Holdings:** The Court of Appeals, Hazelrigg-Hernandez, J., held that:

implied duty of good faith and fair dealing precluded employer from fundamentally changing employee's job responsibilities;

there was sufficient evidence to support trial court's finding that employer breached employment agreement by not providing employee with job he was promised;

employee could not recover lost wages and stock options he would have earned with his prior employer as damages;

proper measure of damages was difference in value between job employee was promised and job he was provided;

trial judge did not violate employer's due process right to fair trial as result of her extensive interrogation of witnesses;

trial judge did not violate employer's due process right to fair trial as result of her actions to prevent it from objecting; and

employee was not entitled to recover his attorney fees.

Affirmed in part, reversed in part, and remanded.

**Procedural Posture(s):** On Appeal; Judgment; Motion for Attorney's Fees.

***1013** Honorable Catherine D. Shaffer, Judge

**Attorneys and Law Firms**

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PUBLISHED OPINION

Hazelrigg, J.

¶1 Todd Pierce was recruited away from a high-paying executive position with a technology company in San Francisco to become the first Chief Digital Officer for the Bill & Melinda Gates Foundation (the Foundation). After negotiating what the role would and, more importantly, would not be, Pierce accepted the at-will position and moved to Seattle to begin his "far-reaching and transformational" ***1014** work. However, the job for which he bargained never materialized and Pierce was ultimately terminated after approximately 18 months with the charitable organization. He filed suit against the Foundation for breach of contract, promissory estoppel, and negligent misrepresentation. After a bench trial, the judge found for Pierce as to the breach claim and, in the alternative, on the theory of promissory estoppel. The judge found that Pierce did not meet his burden to prove negligent misrepresentation. Pierce was awarded damages based largely on lost wages and stock options from his prior employer, but his request for attorney fees was denied.

  

¶2 The Foundation asserts that the court erred in finding for Pierce on both breach of contract and promissory estoppel, grounding its various arguments in the fact that Pierce was an at-will employee, and that the award for damages was improper. It further raises due process challenges to the proceedings as a whole, based on the manner by which the judge conducted the bench trial. Pierce cross-appeals the court's denial of his request for attorney fees.

¶3 The highly distinctive factual context of this case presents issues not heretofore considered in the body of law on employment contracts in Washington. The specific promise at the heart of the negotiations for Pierce's employment may well have been vague and unenforceable in other circumstances involving different parties. However, the Foundation was uniquely situated to provide precisely the opportunity it jointly envisioned and bargained for with Pierce, yet failed to do so. We affirm the trial court's ruling as to breach of contract and, as such, do not reach the alternative basis of promissory estoppel. At-will employees may not recover reliance damages as the trial court awarded here, but the facts of this case are such that the court is not constrained to nominal damages typically associated with a finding of breach of an at-will employment contract. Accordingly, we agree with the Foundation that the trial court erred in its assessment of damages and remand for further proceedings. While the Foundation raises serious questions as to the manner of the judge's questioning of the witnesses and interference with counsel's ability to object at trial, it fails to demonstrate prejudice and we find error was harmless. As Pierce did not bring a suit for wages, we affirm the court's ruling denying his request for attorney fees. Affirmed in part, reversed in part, and remanded for further proceedings.

## FACTS

¶4 The Bill & Melinda Gates Foundation (the Foundation) is the world's largest philanthropic organization. The Foundation has three trustees: Warren E. Buffett, Melinda A. French Gates, and William Henry (Bill) Gates, III. Buffett and the Gateses are some of the wealthiest individuals in the world; Bill Gates is the founder of technological pioneer Microsoft, Melinda French Gates had a distinguished career in technology and has been an advocate for diversity in that field since her youth, with a particular focus on gender equity, and Warren Buffett is considered one of the world's top investors as the Chairman and Chief Executive Officer (CEO) of Berkshire Hathaway.

¶5 The Foundation invests five billion dollars each year in charitable support, driven by the notion that every life has equal value. The trustees of the Foundation oversee its operations by working directly with the CEO and the Executive Leadership Team (ELT), who direct the daily operations of each program's divisions: Global Health, Global Development, Global Growth & Opportunity, U.S. Program, and Global Policy & Advocacy. Some of the projects undertaken by the Foundation include helping improve high school graduation rates and creating opportunity for higher education, water sanitation, vaccine development, women's economic empowerment, and financial services for the poor.

¶6 Dr. Susan Desmond-Hellmann joined the Foundation as CEO in 2014. Shortly after her arrival, she hired Leigh Morgan to assess the Foundation's operations. Morgan was later hired on as Chief Operating Officer (COO). Morgan reached out to Todd Pierce for support and insight regarding Information Technology (IT) operations at the Foundation. Desmond-Hellmann, Morgan, and ***1015** Pierce had all worked together previously at Genentech, a San Francisco biotechnology company. When Morgan first contacted Pierce in 2014, he was a Senior Vice President at Salesforce.com (Salesforce). Morgan explained her tasks, priorities and the general landscape at the Foundation to Pierce and emphasized the need to rework IT operations.

¶7 Initially, Morgan was only seeking advice and insight from Pierce, however their discussion grew into exploring the possibility of Pierce coming to work for the Foundation. They discussed Pierce joining as Chief Digital Officer (CDO); Pierce made it clear that he only wanted to work for the Foundation if his job was broader than that of a traditional Chief Information Officer (CIO). The two considered the need to overhaul the Foundation's IT program, implement systems upgrades, and build a cross-Foundation digital strategy that would help with its philanthropic work.

¶8 In October 2014, Pierce visited Seattle to meet with senior leadership who were aware of Pierce's interest in a CDO position. At the meeting, Desmond-Hellmann told Pierce to be sure to ask for what he wanted from the Foundation. Pierce made three specific requests: to be the CDO, to be on the Foundation's ELT, and to report directly to the CEO. The Foundation agreed to the first two requests and expressly rejected the third. Desmond-Hellmann reinforced that, should he join the

  

Foundation, Pierce's first priority would be to fix the IT systems. The next month, Morgan emailed Pierce to indicate that Bill Gates was open to meeting with him. Prior to meeting with Gates, Morgan emailed Pierce that the "CDO role description is still forming" and included a draft list of accountabilities. She also expressly requested Pierce's input.

¶9 There had never previously been a CDO position at the Foundation. Pierce was unable to find time to provide meaningful input on the draft of CDO accountabilities from Morgan, but he later testified that he felt the draft was broad enough to encompass the opportunities he had in mind. Pierce did, however, forward some articles to Morgan about CDO positions that were beginning to emerge in other companies and organizations. In December 2014, Morgan sent Pierce a list of "high level job accountabilities for [the] CDO role." Pierce knew he would need to persuade Gates in order for the opportunity to come to fruition. The meeting between Pierce and Gates went well, but Pierce did not make any specific requests of commitment from Gates. The Foundation sent Pierce an offer letter in January 2015 which he signed and returned a month later. The parties agree that the offer letter was an enforceable contract setting forth the terms of Pierce's employment.

¶10 In exchange for Pierce's employment as CDO, the Foundation agreed to pay him a salary of $425,000 annually, a $100,000 signing bonus, retirement contributions equal to 15% of his salary, and relocation benefits. The letter also stated Pierce's employment would be " 'at will' and may be terminated by you or the [F]oundation at any time for any reason with or without cause or advance notice." Pierce accepted the position and was aware that, in doing so, he was leaving behind unvested incentive compensation at Salesforce.

¶11 Pierce was employed at the Foundation from April 2015 to October 2016. Pierce immediately began working on a digital strategy, in addition to the numerous other projects the Foundation identified as priorities. In November 2015, Pierce sent Desmond-Hellmann an email outlining his digital strategy. In response, Desmond-Hellmann questioned his focus on new programs rather than working with existing ones. She stressed the need for Pierce to pace himself given the breadth of the proposal. Pierce agreed with the feedback.

¶12 In January 2016, Pierce presented his digital strategy to the ELT, which was comprised of the presidents of the Foundation's various program divisions. Pierce followed up by presenting an updated digital strategy to Desmond-Hellmann in May 2016 and identified the need for additional budget amounts for 2016 and 2017. Pierce continued to expand and work on his project, eventually hiring a Director of Digital Platforms & Ecosystems. With Desmond-Hellmann's approval, Pierce worked on options for building out ***1016** the Foundation's investment management system. In September 2016, Pierce and his IT group created a "36-[Month] Digital Roadmap."

¶13 During Pierce's time at the Foundation, numerous concerns surfaced about his leadership, team morale, and questioning the degree of Pierce's commitment to the Foundation. Pierce and Morgan repeatedly had communication issues due to Pierce's insistence on reporting directly to CEO Desmond-Hellmann, despite the Foundation's explicit rejection of his request on that matter during negotiations for the position. Prior to his acceptance of the job offer, it was made clear that Pierce was to report to Morgan. In May 2016, Pierce again provided a presentation directly to Desmond-Hellmann. Morgan emailed the Foundation's Chief Human Resources Officer and explained that she was contemplating firing Pierce based on this conduct, which she deemed insubordinate. Morgan and Pierce met to discuss the concerns and appeared to reach an agreement on how to move forward. In September 2016, Pierce and Morgan met again and addressed further concerns Morgan had regarding Pierce's conduct. They also discussed an investigation that was underway based on Pierce's expense reimbursement practices and a violent outburst with his executive assistant. Less than two weeks later, Pierce was terminated.

¶14 Pierce filed suit in April 17, 2017, asserting claims against the Foundation for breach of contract, promissory estoppel, and negligent misrepresentation. The case proceeded to a bench trial where the court found for Pierce on the breach of contract claim and, in the alternative, promissory estoppel. The court concluded that Pierce failed to meet his burden of proof as to negligent misrepresentation. The trial court awarded Pierce $88,104 in lost Salesforce wages and $4,547,140 in "other compensation," the majority of which was based on stock options Pierce received from employment at Salesforce. The Foundation now appeals. Pierce cross-appeals the court's denial of his attorney fee request.

## ANALYSIS

  

I. Breach of Contract

¶15 The Foundation first asserts that the court erred in determining that it breached the contract with Pierce. We review questions of law de novo. Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wash.2d 873, 880, 73 P.3d 369 (2003). "This Court will review only findings of fact to which error has been assigned." In re Contested Election of Schoessler, 140 Wash.2d 368, 385, 998 P.2d 818 (2000). "It is well-established law that an unchallenged finding of fact will be accepted as a veri[t]y upon appeal." State v. Hill, 123 Wash.2d 641, 644, 870 P.2d 313 (1994). When we review mixed questions of law and fact, this court defers to the unchallenged findings and reviews the legal conclusions de novo. In re Marriage of Pennington, 142 Wash.2d 592, 602-03, 14 P.3d 764 (2000). In its briefing to this court, the Foundation does not assign error to any of the 91 findings of fact. As such, we accept all of them as verities and focus our review on the assignments of error the Foundation did allege.

¶16 "Employment contracts are governed by the same rules as other contracts." Kloss v. Honeywell, Inc., 77 Wash. App. 294, 298, 890 P.2d 480 (1995). The law recognizes two types of contracts: bilateral and unilateral. Cook v. Johnson, 37 Wash.2d 19, 23, 221 P.2d 525 (1950). A bilateral contract is one where the parties exchange promises. Govier v. N. Sound Bank, 91 Wash. App 493, 499, 957 P.2d 811 (1998). Here, neither party disputes that they entered into a written bilateral contract on February 15, 2015 when Pierce signed the offer letter from the Foundation.

¶17 Pierce argues, as he did in the trial court, that the Foundation did not uphold its end of the contract and breached by not providing him with the CDO position as promised. This is not a case where the focus of our analysis rests on an employee's termination, but is instead one that hinges on whether Pierce was provided the position for which he bargained. As such, one of the key facts before us is Pierce's express rejection of a CIO role that would center on IT work.

***1017** ¶18 Pierce left his lucrative job as an executive at Salesforce and relocated in order to accept the newly-created CDO position at the Foundation. Further, the findings by the trial court establish that although "Bill Gates understood the CDO role, others at the Foundation did not" and "Morgan did not lay the groundwork for a CDO to succeed." The court concluded that the Foundation offered "that the CDO position would be far-reaching and transformational and, importantly, not the role of a glorified IT operations manager[,]" but the Foundation advances the position that any such offer is not enforceable. We disagree. The findings and conclusions from the trial court, testimony, and hundreds of exhibits made clear that this promise was well established and that Pierce relied on it in his acceptance of the CDO role at the Foundation.

¶19 A CDO is a new position that companies and organizations around the world are beginning to utilize. The role of a CDO has been viewed within the technology and business world as the executive position to bridge technology and market, while driving digital strategy and initiatives to fundamentally shift a business or organization.[1] In particular, discussion surrounding the emerging CDO position signals that it is much broader than a CIO and likely could subsume the need for a CIO entirely.[2]

¶20 Morgan attempted to engage Pierce in defining what a CDO would be at the Foundation, but by his own admission, he did not participate in that critical stage of the process beyond sharing articles about CDO positions with other organizations. Ultimately, Morgan drafted the following accountabilities for the new role:

- Build and implement an enterprise-wide digital strategy that harmonizes across divisional and program-team boundaries to solve shared, large-scale problems relevant to our mission
- Partner with ELT members to ensure that we have a dashboard approach to utilizing key metrics across multiple foundation teams
- Set a vision for more innovative use of big data, predictive analytics, novel IT and social networking platforms, cloud-related data sharing, GIS modelling, and other digital modalities
- Be a thought-leader with the co-chairs, foundation and program leaders, anchor partners, other key stakeholders
- Facilitate experimentation, cross-program collaboration and knowledge sharing on digital/technology-related strategies
- Transform the foundation IT organization into a high-performing, nimble, innovative, and lean organization
- Partner with Co-chairs, ELT, and programs to drive for tangible, measureable results in foundation-wide digital strategies

¶21 In Washington, we follow the objective manifestation theory of contracts in which "we attempt to determine the

  

parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties." Hearst Cmmnc'ns, Inc. v. Seattle Times Co., 154 Wash.2d 493, 503, 115 P.3d 262 (2005). However, in determining the parties' intent, context matters and informs the objective manifestations of the agreement. See Id. at 502-503, 115 P.3d 262. The present context of the agreement between Pierce and the Foundation is exceedingly unique in that both parties are high-level innovators in their respective fields and the resources available for the implementation of this newly-created role at the Foundation likely do not exist within most other organizations. These realities necessarily establish the framework upon which our review is conducted.

***1018** ¶22 The trial court found the Foundation breached the contract by not providing Pierce the CDO position that he was promised. There was conflicting testimony as to how Pierce's time at the Foundation unfolded. The trial court found that there was no question Gates understood what a CDO would do at the Foundation. However, it also found that Morgan failed to lay the groundwork or facilitate the necessary transition to truly allow Pierce to fit within the Foundation's existing organizational structure as CDO. When Pierce arrived at the Foundation, he was immediately met with resistance from the present staff and internal organizational structures. This was demonstrated by Finding of Fact 50, wherein the court found that "Pierce had concerns that the Foundation was not committed to or prepared for the expanded, outward-facing CDO role he had been promised." Nonetheless, Pierce appears to have tried to make the new position work.

¶23 The Foundation takes issue with the court's description of the promised job in the conclusions of law; that "the CDO position would be far-reaching and transformational." It argues, among other things, that such terms would be too vague to be enforceable. However, the Bill & Melinda Gates Foundation is the largest charitable foundation in the world, with trustees and a platform that provide access to resources to securely anchor such an offer well within the realm of possibility. Beyond providing the expansive financial assets to implement the visions and strategies described in the CDO accountabilities, the Foundation is uniquely situated to provide a CDO with opportunities to collaborate with decision-makers and leaders of industry across the globe.

¶24 Two of the Foundation's key arguments are that Pierce's job responsibilities could be modified by his supervisor at any time due to his status as an at-will employee and that there is no duty of good faith and fair dealing in the context of at-will employment. However, when considering that assertion within the framework of a bilateral contract such as this one, this latter argument in particular is incorrect. "There is in every contract an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." Badgett v. Sec. State Bank, 116 Wash.2d 563, 569, 807 P.2d 356 (1991). This duty does not require a party to accept a material change to the contract terms; "it requires only that the parties perform in good faith the obligations imposed by their agreement." Id. While the Foundation is correct that it retained the ability to modify Pierce's job duties because of his status as an at-will employee, what they could not do, based on the duty of good faith and fair dealing, was fundamentally change what it meant to be the CDO of the Bill & Melinda Gates Foundation. To do so would render that fundamental promise illusory.

¶25 We acknowledge what, on cursory review, could appear to be a conflict in Washington law as to the duty of good faith and fair dealing in contracts that provide for employment at-will.[3] We understand the body of case law to reflect a rather simple principle: there is no duty of good faith and fair dealing as to termination of at-will employment. By accepting at-will employment, the parties have expressly bargained away any right to good faith and fair dealing with regard to a decision to terminate the employment. However, as to the other terms and ***1019** conditions of employment, our case law is clear that a duty of good faith and fair dealing does apply. See also Badgett, 116 Wash.2d at 569, 807 P.2d 356.

¶26 The unchallenged facts found by the trial court indicate the breach occurred in November 2015 when Morgan would no longer allow Pierce to perform his end of the bargain. "In late November 2015, Pierce took his vision for the Foundation's digital transformation to CEO Desmond-Hellmann during a semi-regular 'one-on-one' meeting."[4] This meeting offended Morgan to the point that she chastised Pierce for insubordination. In Finding of Fact 60, trial court determined that from that point forward "Morgan began a sustained campaign to frustrate Pierce's efforts to fulfill the broader CDO role."

¶27 At oral argument before this court, the Foundation reinforced that they do not dispute any of the findings of fact from the trial court and agreed that we are to accept them as verities on appeal. Instead, the Foundation only challenges the conclusions of law which flow from those findings. The trial court's findings establish that after the November 2015 meeting, Pierce was not able to perform his promised role as CDO and was actively prevented from doing so by the Foundation, through Morgan. Pierce

was consistently told to scale back and focus on IT. Further, the trial court found those that hired Pierce should have helped him push his digital vision forward and work to break down internal resistance, but "Morgan did nothing of substance to advance the CDO role across the organization or look for ways to push or advocate for genuine cross-programmatic collaboration or, better yet, accountabilities for such work." The trial court's determination that the Foundation breached its contract with Pierce on November 30, 2015 by not providing him with the job he was promised was a proper conclusion based on the facts adduced at trial.

¶28 Evidence supports the trial court's ruling that the parties had a meeting of the minds and did objectively manifest their intent regarding the agreement as to what Pierce's CDO position would be. The facts of this case support the court's conclusion that the Foundation kept Pierce employed in the CDO position following the November 30, 2015 meeting, but frustrated his ability to perform the job for which he had contracted. The Foundation's failure to cooperate establishes a breach of its duty of good faith and fair dealing. As expansive as the language was that conveyed the promise, the Foundation was uniquely situated to provide exactly that which it offered, but failed to do so.

II. Promissory Estoppel

¶29 The Foundation next argues the trial court improperly found for Pierce on an alternative theory of promissory estoppel. We agree that a party may not recover for both breach of contract and promissory estoppel.

¶30 "[T]he doctrine of promissory estoppel does not apply where a contract governs." Spectrum Glass Co., Inc. v. Public Util. Dist. No. 1 of Snohomish County, 129 Wash. App. 303, 317, 119 P.3d 854 (2005). Here, "[t]he Court concludes that the Foundation's job offer and Pierce's acceptance of it constitutes and enforceable contract." However, the court went on to conclude "[e]ven if the Foundation's offer is unenforceable as a matter of contract law, Pierce establishes all elements of a claim for promissory estoppel." These contradictory conclusions of law are mutually exclusive. See Id. The trial court found facts that established that a contract existed, which appropriately support its conclusions of law on that issue. It is improper for a party to recover on the basis of two mutually exclusive theories. We therefore strike the conclusion of law finding promissory estoppel and decline to substantively reach the assignment of error on this issue as the contract between Pierce and the Foundation governs.

III. Damages

¶31 The Foundation avers that even if it is found to have breached the contract with Pierce, the court erred in its award of damages.

***1020** ¶32 This court reviews de novo the question of whether damages were proper for Pierce's cause of action. Ford v. Trendwest Resorts, Inc., 146 Wash.2d 146, 152, 43 P.3d 1223 (2002). We review a trial court's evidentiary rulings on damages for abuse of discretion. Bakotich, 91 Wash. App. at 314, 957 P.2d 275. "The burden of proof is on the party seeking damages." 224 Westlake, LLC v. Engstrom Prop., LLC, 169 Wash. App. 700, 729, 281 P.3d 693 (2012).

A. Expectation and Reliance Damages

¶33 "Washington law is clear on the parties' rights under an at-will employment contract after employment begins: Generally, an employee cannot recover damages when terminated from at-will employment." Bakotich, 91 Wash. App. at 315, 957 P.2d 275. "[L]ost 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. By its very nature, at-will employment precludes an expectation of future earnings." Ford, 146 Wash.2d at 157, 43 P.3d 1223. "[A]n at-will employment contract anticipates that the employer may repudiate at any time without ramification." Bakotich, 91 Wash. App. at 316, 957 P.2d 275. In Bakotich v. Swanson, the court made clear that, for these same reasons, damages would also be improper under a theory of promissory estoppel in the context of at-will employment. Id. at 319-20, 957 P.2d 275.

¶34 Ford v. Trendwest Resorts, Inc. involved an employee who was terminated for suspicion of drinking on the job. 146 Wash.2d at 150, 43 P.3d 1223. The employer then agreed that if the employee completed a counseling program, he would be rehired as an at-will employee in a position equal to the one which he previously held. Id. After the employee signed up for a counseling program, he called to determine his new work schedule. The employer informed him that he could not return to the same position, but could work in a much less lucrative position. Id. After a trial, the jury determined

that the employer had breached its contract to rehire the employee and awarded both "past economic damages" and "future economic damages." Id. at 151, 43 P.3d 1223. Our Supreme Court took up the case to "determine whether lost earnings are an appropriate measure of damages when an employer breaches a contract to hire an at-will employee." Id. at 152, 43 P.3d 1223. The Court concluded that the employee had no reasonable expectation of future earnings due to his at-will status and reversed and remanded for entry of an award for only nominal damages. Id. at 158, 43 P.3d 1223. It is noteworthy that the Supreme Court in Ford stated that Bakotich reached the right conclusion for the wrong reason; specifically that anticipated earnings are highly speculative, but also that, fundamentally, the parties do not bargain for future earnings in the context of at-will employment. Id. at 157, 43 P.3d 1223.

¶35 Bakotich is more analogous to the present case as it involved an employer luring a prospective employee away from his current position to begin employment as the manager of an outlet the employer hoped to open. However, the outlet never manifested so there was no new position for the employee after he left his prior employment. 91 Wash. App. at 313, 957 P.2d 275. The trial court prevented the employee from presenting any evidence of damages, which included evidence of loss of earnings, future earnings, and loss of pension and benefits. Id. at 314, 957 P.2d 275. Division Two of this court found the exclusion of that evidence was proper due to the speculative nature of such calculations and the fact that the prospective employment was at-will. Id. at 314, 316, 957 P.2d 275.

¶36 Here, the damages awarded to Pierce are all predicated on exactly the sort of calculations rejected in both Ford and Bakotich. The court based the award on loss of the higher wage from Pierce's employment at Salesforce, along with stock options that were part of his compensation there. This was fundamentally an improper measure as 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 ***1021** into his employment there. As such, there is no causation to tie such damages to the breach found by the trial court. Because the trial court concluded that Pierce's employment was at-will, there was no bargain for future earnings or job stability under Washington case law. Ford would suggest a result of only nominal damages. 146 Wash.2d at 152, 43 P.3d 1223.

¶37 Another noteworthy consideration in our review of the damages awarded is that Pierce had full knowledge of what he was foregoing in terms of future salary or stock options by accepting this at-will position with the Foundation as the job he left at Salesforce was also at-will. During the negotiations, Pierce had the opportunity to request a term for reimbursement for the stock options he was foregoing, generally or specifically in the event of termination during a set period, if he had so desired. In Bakotich, the potential employee was never even given the opportunity to attempt the job he was offered and the court still rejected damages. Here, Pierce was employed for nearly 18 months with the Foundation and provided all the compensation he bargained for during that time. Washington courts have rejected the assertion that reliance damages would be proper in the context of at-will employment. See Ford, 146 Wash.2d at 155-58, 43 P.3d 1223; See also Bakotich, 91 Wash. App. at 316-17, 957 P.2d 275. Following that precedent, we agree with the Foundation that the damages awarded to Pierce were erroneously calculated.

B. Measure of Damages and Valuation

¶38 The Foundation further argues that even if damages were proper in the context of at-will employment, the evidence does not support the amount of damages awarded here. The amount of damages awarded under a specific measure is a discretionary determination for the trier of fact, provided it falls within the range of relevant evidence. Womack v. Von Rardon, 133 Wash. App. 254, 262, 135 P.3d 542 (2006). The case at hand calls for both a temporal analysis of damages and careful assessment as to value.

¶39 An essential first step for a trial court when considering damages in this sort of employment litigation, particularly where the position is new or unsettled, is to make a factual determination as to a reasonable period of time for transition and attempted performance before finding that a breach has occurred. See Barrett v. Weyerhaeuser Co. Severance Pay Plan, 40 Wash. App. 630, 638, 700 P.2d 338 (1985) (affirming trial court's factual determination that three days in a new position was too limited to justify a finding that new duties were unreasonable). It is reasonable that there would be an initial period of time where the position is fleshed out in more detail or significant time is spent on training and orientation rather than the defined job duties, particularly when the position itself has never existed within the organization. Here, the court reasonably determined that there was a period of time where the CDO role was

  

understandably in flux and, later, a finite point when the Foundation breached. This is critical because Pierce is not entitled to damages for the period of time he was employed with the Foundation before the breach. See Bakotich, 91 Wash. App. at 316-17, 957 P.2d 275. Neither is he entitled to damages after termination because he was an at-will employee. Id. at 315, 957 P.2d 275. Pierce may only recover for the period of time between the breach and termination, therefore this factual determination is not only proper, but fundamental to establishing the necessary framework for the inquiry into damages.

¶40 Finding of Fact 81 states that, "starting by at least November 30, 2015, Morgan failed to cooperate with Pierce in good faith to realize the CDO opportunity during his employment or seek modification of the parties' deal when there was still an opportunity to mitigate harm." The court further explained its assessment of the time period leading up to breach in Conclusion of Law 105: "Morgan's earlier failure to take any action on the Clarity recommendations or otherwise set up the CDO role for success are troubling, but the Court cannot say with certainty that Morgan actively frustrated Pierce's purpose prior to his November 2015 meeting with the CEO." The court may award Pierce damages only for the period from November 30, 2015 when the breach ***1022** occurred up to October 10, 2016, when he was terminated.

¶41 Only after determining the temporal aspect of the claim for damages does the court turn to valuation. Here, the evidence to support the award of damages was primarily Pierce's testimony after the judge specifically asked him to evaluate the amount and establish a value as to his stock options from Salesforce. Some documentary exhibits were also submitted on this issue, including some basic spreadsheets created by Pierce. During his testimony, Pierce used language like "hypothetically" when he explained how he had loosely calculated the stock value. In addition to lacking a proper basis in the law, the evidence underlying the court's calculation of damages was insufficient to support the amount awarded.

¶42 The Foundation is correct that these valuations are complex and of the sort that commonly involve expert testimony. See Aubin v. Barton, 123 Wash. App. 592, 98 P.3d 126 (2004). However, these more specific questions as to the value of the Salesforce stock are beyond the proper inquiry as to the scope of damages owed to Pierce because the court erred in awarding reliance damages. "[T]he general measure of damages for breach of contract—which is applicable to employment contract cases—is that the injured party is entitled (1) to recovery of all damages that accrue naturally from the breach, and (2) to be put into as good a position pecuniarily as he would have been had the contract been performed." Knox v. Microsoft, 92 Wash. App. 204, 208-09, 962 P.2d 839 (1998). "The measure of damage in any particular case will depend upon the facts in that case." Dunseath v. Hallauer, 41 Wash.2d 895, 904, 253 P.2d 408 (1953). Washington law generally directs that the proper measure of damages is nominal, however the facts of the case at hand are such that we are not so constrained. The context and parties are unique and the stakes high, therefore we find it proper to look beyond nominal damages.

¶43 It is not just that the Foundation is the preeminent entity of its sort in the world, but also that it achieves its results from successful innovation and mastery of a digital landscape. The Foundation functions at this unusually high level, in part, because it is able to recruit exceptional talent, not only due to the expanse of its resources, but also because of the professional network to which it is privy. Such access is substantially attributable to the prestige of the Trustees and of other front runners of various industries who they have brought into the Foundation. As set out above, the breach here occurred by not providing Pierce the position for which he bargained and the opportunities that flow from such a cutting-edge position within a leading organization in the field of global philanthropy. The assessment of damages here rests on a determination of the value of this "far-reaching and transformational" job; what is the inherent value of having this highly specialized role at this precise charitable foundation guided by these particular leaders of industry? The damages to Pierce stem from the impact on his marketability. He cannot necessarily expect another high level CDO position because he wasn't doing that work at the Foundation, so the trial court must determine the value of that rather ephemeral loss.

¶44 At oral argument, the Foundation claimed Pierce was provided everything he was owed in compensation, however our inquiry as to proper damages does not end there. In this case, we do not simply look to the paychecks earned for time spent at work, for the Foundation is correct as to that point. The breach here is more complex and conceptually expansive. The proper measure of damages owed to Pierce, given the nature of the Foundation's breach, is that of the difference in value between the job he was promised and the job he was provided after his late November 2015 meeting with Desmond-Hellman when the court determined Morgan began to actively frustrate Pierce's purpose. Unfortunately, there is no evidence of the value of either of those roles in the record before us, nor the difference between them. While Pierce attempted to demonstrate the

  

value of Salesforce compensation he abandoned when he took the role at the Foundation, that was not the proper inquiry.

¶45 We recognize this calculation will be complex, however countless attorneys have ***1023** ably proved monetary value to juries and trial judges for seemingly intangible damages. See, E.g., Kirk v. Wash. State Uni., 109 Wash.2d 448, 746 P.2d 285 (1987) (affirming $353,791 damages award for pain and suffering to twenty-year-old cheerleader who sustained permanent elbow injury during unsupervised cheerleading practice); Jones v. Rumford, 64 Wash.2d 559, 392 P.2d 808 (1964) (affirming $500 damages award for nuisance due to odor and flies from chicken breeding plant next door to plaintiff); Bunch v. King County Dept. of Youth Servs., 155 Wash.2d 165, 116 P.3d 381 (2005) (affirming award of $260,000 for non-economic damages in employment discrimination suit). We are confident that the same can be done here. Evidence for this sort of inquiry will likely include experts in the field and comparisons of employment opportunities; while it is certainly a difficult task, it is not an insurmountable one. The current record of the evidence presented to the trial court is insufficient to establish the proper damages award in line with this opinion. Having established the correct inquiry as to loss, an exceedingly unique opportunity to hold a specialized and innovative role within one of the world's foremost philanthropic foundations, the parties now must assess its monetary value. We remand for recalculation of damages consistent with this opinion.

IV. Fair Trial

¶46 The Foundation argues it was deprived of a fair trial before a neutral arbitrator when the judge interjected during the bench trial and took control of the court room at numerous times. It further avers the court prevented it from making objections, in violation of ER 614(c).

¶47 A fundamental liberty interest protected by the due process clause of both the Fourteenth Amendment and article I, section 3 of the Washington Constitution is the right to a fair trial. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); State v. Davis, 141 Wash.2d 798, 824, 10 P.3d 977 (2000). "A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955); State v. Moreno, 147 Wash.2d 500, 507, 58 P.3d 265 (2002). Normally, a trial court may ask questions of the witnesses without violating the due process right to a fair trial. ER 614(b); Moreno, 147 Wash.2d at 509-11, 58 P.3d 265.

A. Judicial Participation in Witness Testimony

¶48 Here, the court did ask numerous questions of both parties' witnesses throughout the trial. A bench trial puts "unique demands" on the judge presiding, "requiring them to sit as both arbiters of law and finders of fact." State v. Read, 147 Wash.2d 238, 245, 53 P.3d 26 (2002). ER 614 expressly allows for the court to call witnesses and to question them, though such questioning is expressly limited by the state constitution's prohibition on judicial comment on the evidence. WASH. CONST. art. IV, § 16. Judicial comment on the evidence is naturally less of a concern in the context of a bench trial, however, as where the facts in a case are "passed upon by the trial judge alone, [the judge] may be presumed to have disregarded all improper and incompetent evidence." Whiting v. City of Seattle, 144 Wash. 668, 675, 258 P. 824 (1927). This presumption in favor of the trial judge is a guiding principle for our analysis of this issue.

¶49 The Foundation argues that the judge usurped the role of counsel by actively examining witnesses and otherwise directing testimony, but in the context of a bench trial, the judge was also the finder of fact and such inquiry is proper under ER 614(b). "In a case without a jury, the judge has much broader discretion to question a witness." 5A Wash. Prac., Evidence Law and Practice § 614.5 (6th ed.). While the court's participation in testimony here was extensive, much of the direction by the judge was to avoid repetition or move past topics she, as the trier of fact, felt needed no further exploration. "Trial judges have wide discretion to manage their courtrooms and conduct trials fairly, expeditiously and impartially .... We, therefore, review a trial judge's courtroom management decisions for abuse of discretion." In re Marriage of Zigler and Sidwell, 154 Wash. App. 803, 815, 226 P.3d 202 (2010) (internal citations omitted). Particularly in a bench trial, ***1024** this may manifest as a more active role in directing witness testimony for the sake of efficiency.

¶50 The Foundation further avers that, at times, the judge testified either by answering questions from counsel before the witness could respond, or framing her questions in a way that ventured into testimony. ER 605 states, "[t]he judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point." Again, while the court's involvement was pervasive, such that the experienced practitioners here may well have perceived it as invading their respective roles in the proceedings, many of the

  

excerpts from the trial transcripts cited demonstrate that the judge was summarizing prior testimony. Heavy handed as it may have been, the court may operate its courtroom with justice and efficiency in mind.

¶51 An assignment of error claiming that the judge's conduct at trial prevented a litigant from the basic right to a fair trial is serious one. While the Foundation went to great lengths to count the number of interjections by the judge and set them out in a grid attached to their briefing on appeal, they failed to put forth similar effort to demonstrate the prejudice that may have resulted from this conduct or otherwise explain how this constitutes an abuse of discretion under the highly deferential standard. As such, we find no error on this matter.

B. Counsel's Ability to Object

¶52 The Foundation's claim that it was denied a fair trial also rests on the assertion that the court prevented it from objecting during proceedings. ER 614(c) states "[o]bjections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present." As explained above, in the context of "a bench trial, there is even a more 'liberal practice in the admission of evidence' on the theory that the court will disregard inadmissible matters." State v. Jenkins, 53 Wash. App. 228, 231, 766 P.2d 499 (1989) (quoting State v. Miles, 77 Wash.2d 593, 601, 464 P.2d 723 (1970)). Though we are skeptical of the court's approach to addressing the Foundation's attempts to object, the Foundation utterly failed to identify any harm stemming from this directive.

¶53 There is nothing in the record to demonstrate later attempts by the Foundation's trial counsel to preserve their intended objections; for example, by filing written objections the next day or seeking to make an offer of proof. Part of its argument rests on claims of hostility from the trial court judge. However, once removed from the heat of battle as it were, the Foundation does not identify in its briefing to this court objections it would have made, but for the trial judge, or evidence that was improperly admitted in the absence of those intended objections. This court, for obvious reasons, takes seriously claims that a trial court judge would prevent a litigant from making objections on the record, but we cannot engage in any meaningful inquiry if the party alleging such error fails to identify how their strategy was impacted or otherwise demonstrate resulting harm.

¶54 The Foundation moved for a new trial or, in the alternative, reconsideration soon after the conclusion of proceedings. Pierce argues in briefing that this motion arrived shortly after the publication of a case from this court addressing similar interjections in a bench trial by the same judge. However, the record before us does not include a response from Pierce, transcripts, or indications that argument was taken. We have only the motion, its appendices and the court's ruling denying the motion. The Foundation's motion largely mirrors its argument on this matter in its briefing on appeal; while it points out the conduct to which it assigns error, the Foundation fails to establish prejudice. When a claim as serious as this is raised on appeal, the party bringing the challenge bears the responsibility to demonstrate, or at least allege, the specific harm that ensued from the judge's conduct. In light of the presumptions in favor of the trial judge in the context of a bench trial, the deferential abuse of discretion standard of review on appeal and the absence of a showing of prejudice, we find no error.

***1025** V. Cross-Appeal of Denial of Attorney Fees

¶55 Pierce cross-appeals the court's denial of his request for attorney fees at the conclusion of trial. Our court applies a two-part review of attorney fee awards. Gander v. Yeager, 167 Wash. App. 638, 647, 282 P.3d 1100 (2012). First, we review de novo whether a legal basis exists for awarding attorney fees by statute, under contract, or in equity. Id.; Niccum v. Enquist, 175 Wash.2d 441, 446, 286 P.3d 966 (2012). We then apply an abuse of discretion standard to a decision to award or deny attorney fees and the reasonableness of any such attorney fee award. Gander, 167 Wash. App. at 647, 282 P.3d 1100; Freeman v. Freeman, 169 Wash.2d 664, 676, 239 P.3d 557 (2010); Rettkowski v. Dep't of Ecology, 128 Wash.2d 508, 519, 910 P.2d 462 (1996).

¶56 Here we must first determine whether RCW 49.48.030 provides a basis for attorney fees. The relevant portion of RCW 49.48.030 states: "[i]n any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer." The trial court properly determined that this was not a suit for wages, but instead for breach of contract and promissory estoppel.

¶57 There is no question that Pierce was paid the salary owed to him during his time with the Foundation. "RCW 49.48.030 authorizes an award of attorney fees for employees who must sue in order to collect wages owed

from their employers." Int'l Union of Police Ass'n, Local 748 v. Kitsap County, 183 Wash. App. 794, 798, 333 P.3d 524 (2014). "[T]he statute has been construed to include awards that were not for wages for work actually performed, but rather, money due by reason of employment." Gaglidari v. Denny's Rest., Inc., 117 Wash.2d 426, 449, 815 P.2d 1362 (1991). Here, as the court's order denying fees explains, the only reason "wages" are even at issue is because the award for damages was predicated on what Salesforce would have paid Pierce as opposed to what the Foundation did pay him during the same time. As explained in Section III, this was not the proper measure of damages, but even if the correct analytical framework had been used, this is not an instance where Pierce was owed wages for work completed or work he was further contracted to do. The court properly denied Pierce's request for attorney fees.

¶58 Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

WE CONCUR:

Mann, C.J.

Dwyer, J.

**All Citations**

475 P.3d 1011

## Footnotes

1 Nicholas D. Evans, The evolving role of the Chief Digital Officer, CIO (Sep. 14, 2017), https://www.cio.com/article/3224478/the-evolving-role-of-the-chief-digital-officer.html

2 Robert Berkman, The Emergence of Chief Digital Officers, MIT Sloan Management Review (April 29, 2013), https://sloanreview.mit.edu/article/social-business-helps-usher-in-new-executive-the-cdo/
Irving Wladawsky-Berger, Why CIOs May Morph Into the Chief Digital Officer, Wall Street Journal (November 18, 2012 8:11 AM ET), https://blogs.wsj.com/cio/2012/11/18/why-cios-may-morph-into-the-chief-digital-officer/

3 Some Washington cases appear to indicate that at-will employment provides no implied duty of good faith and fair dealing. See Thompson v. St. Regis Paper Co., 102 Wash.2d 219, 685 P.2d 1081 (1984) (finding no duty of good faith and fair dealing as to termination for at-will employment); See also Bakotich v. Swanson, 91 Wash. App. 311, 957 P.2d 275 (1998) (declining to extend a duty of good faith and fair dealing as to at-will employee's termination).
Other cases plainly declare employment contracts are to be treated like all other bilateral contracts, which implicitly includes a duty of good faith and fair dealing. See Comfort & Fleming Ins. Brokers, Inc v. Hoxsey, 26 Wash. App. 172, 176, 613 P.2d 138 (1980) ("A contract for employment is subject to the same rules that govern the construction of other contracts."); See also Rekhter v. State Dept. of Soc. and Health Servs., 180 Wash.2d 102, 323 P.3d 1036 (2014) (finding DSHS violated its duty of good faith and fair dealing in the performance of a specific term of its contracts with providers).

4 Finding of Fact 57.

# APPENDIX B

No. 79354-3-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

---

TODD PIERCE,

Respondent,

v.

BILL & MELINDA GATES FOUNDATION,

Appellant.

---

# APPELLANT'S MOTION FOR RECONSIDERATION

---

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## 1. IDENTITY OF MOVING PARTY

The Bill & Melinda Gates Foundation (the "Foundation") asks for the relief designated in Part 2.

## 2. STATEMENT OF RELIEF SOUGHT

In the interest of justice, the Foundation asks the Court to require reassignment of this case after remand. Doing so would require adding a single sentence at the end of Part IV of this Court's opinion: "Nevertheless, to promote the interest of justice, this case must be assigned to a different trial judge on remand."

## 3. FACTS RELEVANT TO MOTION

The Foundation appealed to this Court after a ten-day bench trial in which the trial court awarded Todd Pierce $4.64 million in damages for breach of an at-will contract and promissory estoppel. *See* Br. of Appellant at 20–23. Erroneously applying a reliance theory of damages, the trial court based this calculation on lost wages, unvested restricted stock units, and unvested incentive stock options related to the job at Salesforce.com that Pierce left to assume the role of Chief Digital Officer with the Foundation. *Id.* at 4–5, 9–10, 20–23; *Bill & Melinda Gates Found. v. Pierce*, No. 79354-3-I, at 21 (Wash. Ct. App. Nov. 16, 2020) ("Slip op.").

This Court struck the trial court's rulings on promissory estoppel and remanded for recalculation of Pierce's damages stemming from "the impact on his marketability." Slip op. at 22. The Court noted that this "ephemeral loss" will require evidence of the value of the role that Pierce was promised versus the role that he was provided and that it will entail a "complex" calculation. *Id.* at 22–23.

While declining to hold that the Foundation had been deprived of a fair trial, this Court acknowledged the trial court's "extensive," "pervasive," and "heavy handed" participation in testimony. Slip op. at 25–26. The Court also noted its skepticism at the trial court's approach to responding to the Foundation's attempts to object at trial. Slip op. at 27.[1]

## 4. GROUNDS FOR RELIEF AND ARGUMENT

In disposing of a case on review, this Court is empowered to take any action "as the merits of the case and the interest of justice may require." RAP 12.2. An appellate court should reassign a case to a new judge on remand where "facts in the record show[] the judge's impartiality might reasonably be questioned." *State v. Solis-Diaz*, 187 Wn.2d 535, 540, 387

[1] This Court observed that "the record before us does not include a response from Pierce [to the Foundation's motion for a new trial], transcripts, or indications that argument was taken." Slip op. at 27. The record does not include such materials because Pierce offered no response. *See* Appellant's Reply Br. at 40. Nevertheless, the trial court denied the motion after refusing to recuse itself. CP 4324–32.

P.3d 703 (2017).[2] The law "goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial." *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972) (reassigning a case on remand to a new judge where there was "no proof of bias or prejudice [but] the investigations and activity of the trial judge created the appearance of bias or prejudice").

Reassignment is particularly appropriate where a trial court "will exercise discretion on remand regarding the very issue that triggered the appeal . . . ." *Solis-Diaz*, 187 Wn.2d at 540 (quoting *State v. McEnroe*, 181 Wn.2d 375, 386, 333 P.3d 402 (2014)); *see also* Toby J. Heytens, *Reassignment*, 66 STAN. L. REV. 1, 41 (2014) ("a great many of the cases in which courts of appeals have ordered reassignment seem to be those in which future appeals would be governed by [a deferential standard of review]"). In this case, the trial court will enjoy substantial discretion after remand. It will need to evaluate "complex" damage calculations in order to determine the value of a "rather ephemeral loss" that is "seemingly intangible." *See* slip op. at 21–23. Any damages award will likely be reviewed on a future appeal for abuse of discretion. *Harmony at Madrona*

[2] *See also State v. Lopez*, 107 Wn. App. 270, 279–80, 27 P.3d 237 (2001) (remanding case for sentencing before a different judge where the court did "not question the fairness of the trial judge" but reassigned "in the interest of preserving the integrity of the sentencing process"); *In re Custody of R.*, 88 Wn. App. 746, 762–63, 947 P.2d 745 (1997) (remanding for proceedings before a different judge where trial judge expressed personal disapproval of party), *superseded by statute as stated in Tostado v. Tostado*, 137 Wn. App. 136, 144–49, 151 P.3d 1060 (2007).

*Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 143 Wn. App. 345, 357–58, 177 P.3d 755 (2008) ("Whether the amount of a damages award is reasonable is a question of fact, which we review for abuse of discretion.").

An appellate court's authority to reassign a case to a different judge is distinct from judicial disqualification; it rests on the court's "inherent power to require such further proceedings as may be just." RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 33.5, at 999 (2nd ed. 2007); *United States v. Jacobs*, 855 F.2d 652, 656 & n.2, 657 (9th Cir. 1988) (per curiam) (reassigning case to a different trial judge while expressly acknowledging that the standard for recusal had not been met).

The record here reveals ample reason to question the trial judge's impartiality. *See* Br. of Appellant at 47–50 (noting that the trial court testified on behalf of witnesses, interrupted the Foundation's counsel, intervened in favor of Pierce during cross-examination, and prohibited the Foundation from objecting to the court's questions); Appellant's Reply Br. at 31–41 (same, noting trial court's unrelenting attacks on a key Foundation witness and its unabashed admiration for Pierce). Although this Court held that this conduct did not warrant a new trial on liability and that "error was harmless," slip op. at 2–3, the trial court's actions plainly call into question its impartiality. The size of the legally insupportable judgment reversed by

this Court raises additional questions about the trial court's impartiality specifically with respect to damages.

The trial court engaged in conduct that was tantamount to "acting as a lawyer in the proceeding." *See* CJC 2.11 ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including [where] . . . the judge . . . is . . . acting as a lawyer in the proceeding").[3] Courts have held that reassignment is appropriate where the judge "conducts a trial in a manner that creates the appearance that he [or she] is or may be unable to perform his [or her] role in an unbiased manner." *United States v. Torkington*, 874 F.2d 1441, 1446–47 (11th Cir. 1989) (reassigning a case to a new judge on remand in part to "preserve the appearance of impartiality"); *see also In re Ellis*, 356 F.3d 1198, 1211 (9th Cir. 2004) (courts consider "whether reassignment is advisable to preserve the appearance of justice," among other factors); *Jacobs*, 855 F.2d at 656 (a finding that reassignment is advisable to preserve the appearance of justice supports remand to a different judge); *United States v. White*, 846 F.2d 678, 695 (11th Cir. 1988) ("[W]here a reasonable

[3] One example is the trial court's conducting extensive direct and cross-examination and its refusal to permit objections by the Foundation to the court's questions. Even if the court's admitted violations of ER 614(c) do not require reversal, they demonstrate the kind of partiality that merits reassignment.

person would question the trial judge's impartiality, reassignment is appropriate.").

Reassignment will not undermine judicial efficiency. This Court has acknowledged that the record does not contain sufficient evidence to support an award of actual damages. Slip op. at 22–24. Thus, any damages determination on remand will require assessing the need for further evidence, managing discovery regarding that evidence, and conducting a new trial. The trial judge will need to consider issues and evidence that were not raised in the previous trial. *See id.*; *see also State v. M.L.*, 134 Wn.2d 657, 660–61, 952 P.2d 187 (1998) (remanding for resentencing before different judge where trial judge imposed excessive sentence without evidence that such sentence was warranted and noting that trial court could "hear additional relevant evidence at the rehearing").

Given the evidence of partiality in this record, the trial court's discretion with respect to awarding damages in a new bench trial, and the novel issues and evidence the trial court will have to consider on remand, the Foundation respectfully requests that this Court amend its ruling to include an instruction that the case be reassigned to a new trial judge.

DATED this 4th day of December 2020.

Respectfully submitted,

K&L GATES LLP

By */s/ Robert B. Mitchell*
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Attorneys for Appellant Bill & Melinda Gates Foundation

# APPENDIX C

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | | |
|---|---|---|
| TODD PIERCE,<br><br>Respondent/Cross-Appellant,<br><br>v.<br><br>BILL & MELINDA GATES FOUNDATION, a Washington nonprofit corporation,<br><br>Appellant/Cross-Respondent. | ) | No. 79354-3-I<br><br>DIVISION ONE<br><br>ORDER DENYING MOTION FOR RECONSIDERATION |

The appellant/cross-respondent, Bill & Melinda Gates Foundation, filed a motion for reconsideration of the opinion filed on November 16, 2020. A majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

Judge

## K&L GATES LLP

## December 31, 2020 - 9:09 AM

## Transmittal Information

| | |
|---|---|
| **Filed with Court:** | Court of Appeals Division I |
| **Appellate Court Case Number:** | 79354-3 |
| **Appellate Court Case Title:** | Todd Pierce, Respondent / Cross- App. v. Bill and Melinda Gates Foundation, Appellants / Cross-Res. |

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