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67939-2

NO. 67939-2-1

COURT OF APPEALS, DIVISION 1
IN AND FOR THE STATE OF WASHINGTON

SCOTT BANCHERO, an individual,

Appellant,

v.

MICHAEL YERKOVICH, in a derivative capacity and individually,

Respondent.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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ORIGINAL

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I. INTRODUCTION

This case arose as a result of a dispute in the interpretation of a shareholder contract between two sole shareholders. Appellant Scott Banchero ("Banchero"), one of the two defendants in the trial court case, owns 51% of Pinnacle Processing Group, Inc. ("Pinnacle") which is the subject of the shareholder contract.

Respondent Michael Yerkovich ("Yerkovich"), the plaintiff in the case, owns 49% of Pinnacle. Yerkovich became suspicious of Banchero when Banchero caused the corporation to issue to him a W2 reflecting no federal withholding. His subsequent investigation resulted in uncovering a breach of the shareholder contract between the two shareholders.

On August 13, 2009, Yerkovich filed a Verified Complaint in King County Superior Court against Scott Banchero, individually, and against Pinnacle in a derivative capacity. Yerkovich had a private cause of action against Scott Banchero for breach of the shareholder contract and a corporate cause of action on behalf of Pinnacle against Banchero for breach of his fiduciary duties as a director. A trial was held and a judgment was entered against Banchero for breach of contract in favor of Yerkovich. No award was made for the corporation against Banchero because the court held that Banchero was never a director.

This appeal is by Scott Banchero, an individual, as the Appellant. Pinnacle did not participate in the trial court proceedings and is not a party to this appeal.

II. ALLEGED ASSIGNMENTS OF ERROR

A. The Trial Judge Did Not Err As A Matter Of Law In Awarding Judgment In Favor Of Yerkovich.

As the first assignment of error, Banchero asserts for the first time on appeal that the trial judge abused his discretion in awarding a judgment in favor of Yerkovich against Banchero for breach of the shareholder contract. Banchero claims that any award to Yerkovich belongs to the corporation.

B. The Trial Judge Did Not Err As A Matter Of Law In Awarding A Judgment In The Amount of $254,746.89 In Favor Of Yerkovich.

As the second assignment of error, Banchero asserts for the first time on appeal that the trial judge abused his discretion in awarding a judgment in the amount of $254,746.89 in favor of Yerkovich in his individual capacity.

III. STATEMENT OF THE CASE

A. Findings of Fact and Conclusions of Law. CP 126-143.

1. PPG is a closely held corporation that was founded and incorporated on May 16, 2002 by Yerkovich, who also was then appointed the Initial Director. Yerkovich initially held 100% of PPG's stock and

bore the financial burden and risk to start PPG. Specifically, Yerkovich provided PPG's financial backing as guarantor on company contracts, secured a letter of credit in the amount of $150,000, and secured a loan for PPG in the amount of $82,000 based upon equity in his own property. Yerkovich's start-up efforts are memorialized in the *Pinnacle Processing Group Shares Allocation Contract* ("2003 Contract").

2. Banchero worked as an employee for PPG and as Corporate Secretary in 2002 and considered himself to be a principal. He did not become a shareholder until September 15, 2003.

3. The company PPG processes credit card transactions between merchants and financial institutions. In the 2003 Contract, Yerkovich allocated 50% ownership in PPG to Banchero with the following conditions: (1) Banchero was to assume joint liability with Yerkovich for a $50,000 line of credit; (2) Banchero was to receive a salary of $1,000 per week as a full time employee; (3) Yerkovich was going to work part time, and would receive a salary of $1,000 per month; (4) future increases in salary for Yerkovich and Banchero had to be by mutual agreement or an automatic increase of 5% would take effect as of the first of May each calendar year. Banchero did not pay any other consideration for becoming an equal shareholder.

4. At the time the parties executed the 2003 Contract, Yerkovich was still PPG's president and sole director, and Banchero was PPG's chief operations officer and treasurer.

5. Shortly after the parties executed the 2003 Contract, Yerkovich was placed in police custody in Mexico on September 17, 2003 and was detained for 15 months including his transfer to the U.S. While in custody, on January 24, 2004, at the request of Banchero, Yerkovich signed a general Power of Attorney ("POA") that authorized Banchero to take action on his behalf generally and specifically regarding PPG's operations, negotiations, and governance until it expired on December 31, 2004. Yerkovich's signature on the Power of Attorney in Mexico was never notarized. Instead Banchero crossed out Yerkovich's name and inserted his own, then had that signature notarized in Pierce County, Washington. The purpose of the POA was to enable Banchero to conduct the affairs of PPG in Yerkovich's absence. It was not intended to be used by Banchero in a struggle against Yerkovich to obtain control of PPG for his own benefit.

6. On or about May 18, 2004, Banchero unilaterally held a "corporate meeting" by himself and purported to transfer 100 of Yerkovich's 2,500 shares to himself in order to become majority shareholder of PPG. No written notice of shareholder meetings as required

under Article 2 of PPG's Bylaws, or notice of a special meeting of the Board of Directors as required by Article 3 of the Bylaws, were given. There was confusion caused by Banchero regarding what type of "corporate meeting" he held, but whatever it was, no notice was given, no purpose stated, and Yerkovich was unaware that Banchero had taken these actions. Banchero testified that he tried to use the POA in this manner because he wanted other entities PPG dealt with to recognize that he had the authority to speak for PPG, but such testimony lacked any specificity, was not corroborated by any documents, and it was vague and unconvincing. On November 15, 2004 Banchero, again without notice to Yerkovich or specifying the purpose, held a special meeting of the shareholders by himself. Banchero used his new purported majority interest to elect himself as a new Director of PPG, and appointed himself as Chair of the Board of PPG. Banchero stated the "he is the only director of PPG," implicitly removing Yerkovich who was unaware that Banchero had taken these actions. While Banchero contends that his actions in granting himself the stock and making himself the sole director was for the benefit of PPG, his later actions demonstrated that his real reasons were to assume control of PPG for his own benefit. The POA itself was to expire on December 31, 2004, but Banchero sought to use his co-shareholder's

temporary accommodation in the POA to effect permanent changes in ownership and control of PPG.

7. Yerkovich was released from Mexico in late 2004, then remanded to custody in the U.S. and released shortly thereafter and returned to work for PPG in February 2005. On March 15, 2006, Yerkovich and Banchero executed a Master Operational Agreement and Pinnacle Processing Group – Shares Allocation Contract First Amendment (the "2006 Contract"), that recognized they were still "equal" owners of PPG and transferred an additional 1% to Banchero to make the stock split 51/49. This "2006 Contract" eliminated the 2003 contract's salaries provision and provided that PPG's net profits would be split fifty-fifty and distributed in the most advantageous manner under the advisement of the tax preparer. The tax preparer was Robert Christopfel, CPA. Yerkovich and Banchero never discussed salaries in advance for 2007 or 2008. The subject only arose in 2009 after Banchero set their salaries for the previous two years. For 2006, profits were split roughly equally and there was no dispute. While Yerkovich was detained in Mexico, Banchero hired his brother Todd Banchero, with conditional approval of Yerkovich. Subsequently, after his return when Yerkovich called for the termination or veto of Todd's employment, he was ignored.

8. On or about December 21, 2007, at a special Board Meeting of the Directors of PPG, of which no notice was given to Yerkovich, Banchero eliminated Yerkovich's access to PPG's banking, financial, and tax records.

9. In response to a request for corporate tax returns and other financial records from Yerkovich on May 13, 2008, Banchero contacted the corporate attorney, Larry Davidson, who appeared to be advising Banchero on both corporate governance issues and on how he could obtain sole control of PPG from Yerkovich. Davidson opined that while Yerkovich had no right to such financial documents as a minority shareholder, he was likely entitled to such records as corporate President. In response, Banchero, without giving notice to Yerkovich, held what purported to be another special Board Meeting on May 15, 2008, with only himself and the Corporate Secretary, Sandra Farah, present, and removed Yerkovich as president, and appointed himself to the position of "Interim President."

10. Yerkovich began working remotely from home and stopped going to the office on about August 5, 2008, and while he did some work for PPG out of the office, he effectively did not discharge his duties as president since then. In April of 2009, PPG stopped providing Yerkovich with any net profit distributions and discontinued his employee benefits.

Yerkovich was then required to seek other employment in order to support his family.

11. On or about January 14, 2009, Yerkovich attended PPG's annual shareholders meeting. Prior to this meeting, Yerkovich had received his W2 from PPG, which showed a salary of $275,000 with no federal income tax withholding. During that meeting, Yerkovich requested to review PPG's financial reports for 2008. Two months later, Banchero partly complied by producing some of the reports. Banchero refused to allow Yerkovich to conduct a comprehensive inspection of PPG's records. At trial, Banchero contended that Yerkovich could gain access to PPG financial records through the CPA, but Banchero never said that at the time and clearly acted to preclude Yerkovich from such access.

12. Yerkovich obtained counsel to compel Banchero to produce the records. On April 3, 2009, counsel for Yerkovich served PPG and Banchero with a request to review accounting records pursuant to RCW 23B.16.020. Banchero partly complied with the request by providing some of the records to Yerkovich and his counsel on April 20, 2009, including PPG's corporate tax returns for the years 2006, 2007, and 2008.

13. Upon review of these returns, Yerkovich discovered that Banchero had unilaterally acted to increase his own compensation in a

manner inconsistent with the 2006 Contract. Yerkovich ascertained that Banchero had increased his own salary from $79,800 in 2006 to $300,000 in 2007, and again to $450,000 in 2008. These financial maneuverings were hidden from Yerkovich and not discoverable due to his removal as president, and removal from access to PPG's bank accounts. At trial, both Christopfel and Banchero pointed to the other as making salary decisions, but 2007 and 2008 salary amounts were set by Banchero, with the advice of the CPA Christophel. The amount of Banchero's salary, based upon a market survey for comparable positions, would be approximately $122,000 considering all of the relevant factors.

14. On or about May 8, 2009, Yerkovich made a second request to Banchero to produce corporate records. Banchero acknowledged receiving the request but refused to honor it. As a result, Yerkovich initiated an action for a court order to compel Banchero to produce the records under King County Superior Court Cause No. 09-2-20629-5 SEA. On June 30, 2009 the parties entered into an agreed order for the production of records.

15. There were no Director or Shareholders meetings that approved Banchero's salaries for the years 2007 and 2008, nor did Banchero ever discuss the amount of his salaries with Yerkovich. The salaries paid resulted in a direct violation of the 2006 Contract to "split

Net Profits equally." The Shareholders, pursuant to the 2006 Contract, had eliminated salaries and instead agreed to "split Net Profits equally," whereas pursuant to the provisions of the 2003 Contract, the Shareholders were paid salaries. Banchero apparently believed that since he exercised a broader set of responsibilities than Yerkovich, and had helped him out personally while he was detained in Mexico, that he was free to reward himself by setting a much higher salary than Yerkovich. However, in doing so, Banchero acted inconsistently with and in defiance of the 2006 Contract which clearly manifested the intention to split profits equally. While the 2006 Contract did not mention salaries, as did the 2003 contract it replaced, the 2006 Contract was effectively eviscerated by Banchero's actions in using salary distributions to get himself the lion's share of what would otherwise be distributed as net profits. Banchero knew this, and this explains why he took a series of ultimately unsuccessful actions to prevent Yerkovich from reviewing the PPG books and financial records. As discussed further below, Banchero lacked the authority to set the salaries for himself and Yerkovich as that authority was reserved under the PPG ByLaws, Article 4, to the board of directors; and despite his attempts to appoint himself, Banchero was never on the board of directors.

16. The Division of Profits is defined by Section 8.0 of the 2003 Contract as follows:

8.1 Division of Profits is defined (sic) as (sic) the revenues left over after all expenses and reserves have been met.

8.2 The Division of Net Profits is to be paid on a quarterly basis.

8.3 The Net Profit will be divided by the amount of shares outstanding and then payable by the amount of shares a shareholder owns.

17. The 2006 Contract eliminated the salary for both Banchero and Yerkovich, and deleted the above Sections 8.2 and 8.3 in their entirety, and replaced them with the following new sections 8.2 and 8.3:

New 8.2 Distributions of Net Profits shall be made in the most advantageous manner under the advisement of the Tax Preparer retained by PPG.

New 8.3 the Division of Net Profits shall be an equal division, with both "SB" and "MY" receiving a 50% share.

18. In 2007, 2008, and previously, Banchero distributed PPG's cash, transferred funds directly to himself and Yerkovich, and in some cases directly to his creditors, based upon cash flow. As is the practice in many closely held firms, these amounts were initially classified as "loans" on PPG's corporate records. There were no loan documents for these loans, and there was no interest paid on these loans. At the end of the year,

Banchero alone would decide how much of the loans would be classified as salary, or loans, or remain as profit distributions for both himself and Yerkovich. PPG was converted into an S Corporation on the same day the 2006 Contract was signed, which eliminated the risk of double taxation since the income of the corporation is passed through to shareholders.

19. Banchero set his own salary at $300,000 for 2007 and $450,000 for 2008, while setting Yerkovich's at $100,000 for 2007 and $275,000 for 2008. Further, since Yerkovich's 2007 salary was set so low relative to the cash that had been disbursed to him the effect was to push his tax liability forward into 2008. While Yerkovich did sign his personal IRS Form for 2007, which showed his $100,000 salary, that did not put Yerkovich on notice that Banchero had paid himself $300,000. Nor did he know that the next year, all of the 2007 loans would be included in his 2008 income such that he got about $128,000 in distributions but would have to pay tax on about $275,000. But in 2008, Banchero did not extend the PPG "loans" to Yerkovich any longer, and Yerkovich having no notice or knowledge of Banchero's decisions, failed to request adequate withholding to prepare for his tax liability from income attributable to 2007 and 2008. However, while Banchero had in theory the same tax problem, he used his control over PPG's funds to ensure that he had no tax problems and instead had PPG pay about $104,000 of his tax liability

directly to the IRS. Worse still, he did not even carry this "loan" on PPG's books; it just doesn't appear on the "loan to Scott" spreadsheet for 2008. Obviously aware of how this looked, on the last day of trial he acknowledged this was an "error of judgment" and stated he intended to pay it back to PPG. But Banchero's unequal treatment of himself and Yerkovich was more than a mere error of judgment; it was a series of deliberate acts of corporate self-dealing and misuse of the use of corporate resources.

Original Findings of Fact did not contain numbers 20-24 and reflects two numbers 25.

. . .

25. Yerkovich presented two alternative summaries of damages. Summary One was based upon profits being split 49% Yerkovich and 51% Banchero, with a 12% simple interest calculation, with no reduction for salaries resulting in damages of $241,526. Summary Two was similar, except it included an equal salary for both parties of $100,000, with a 12% simple interest calculation, which is reasonably close to the value that would likely be imputed. Damages under summary Two as of January 31, 2011 were determined to be $246,986. Defendant criticizes Yerkovich's calculations for not taking into account all monies advanced to Yerkovich later recharacterized as part salary and part loans.

25. Even if the trial court accepted Banchero's interpretation that salaries were to be taken out before calculation of net profits, the evidence established that a reasonable salary for Banchero as President/CEO of PPG would be in the range of $122,000, and Yerkovich never received less than $100,000 as a salary, so adding in realistic salaries would not lead to a huge change in distributable net profits. The balance of the compensation is what was due the shareholders for return on their equity. Banchero offered no credible explanation as to why he set Yerkovich's salary at $100,000 in 2007 after he distributed to him cash of $292,633, or why his salary was "raised" to $275,000 in 2008, a year in which he was distributed $128,432 and owed taxes for his 2007 "loans." Banchero's decisions about how much to set salaries, how to avoid a fair split of the profit, how and when to characterize PPG loans, and when to have PPG cover his tax liabilities were grossly self-serving and not based on any reasonable formula, and that is why he resisted giving his business partner access to the books.

26. Taking into account the funds received by both parties, as Yerkovich has pointed out should be considered, results in the following damages calculations: In 2007, Yerkovich got distributions of $292,633.94 and Banchero received $347,657.24, for total profits of $640,291.18. Under the 2006 Contract, Yerkovich was owed 50% of that amount,

equaling $320,145.59, which means that Banchero owes him $27,511.65 over the distributions already received, plus prejudgment interest at 12% per annum (1% per month) since December 31, 2007, for 37.5 months, which equals $10,316.87. In 2008, Yerkovich received distributions of $128,432.40 and Banchero received $450,000 (including the $104,000 he acknowledges he would otherwise owe PPG for his 2008 IRS taxes; and allowing him to carry forward his loan balance of $53,973.01 (which Yerkovich did not contest), total PPG net profits were $578,432.40 on which Yerkovich was owed 50%, or, $289,216.20; this means he is owed an additional $160,783.80, plus interest, since December 31, 2008, for 25.5 months, equaling $40,999.87. The total of damages awarded was therefore $239,612.19. This compares relatively closely with Yerkovich's expert's opinion that damages were between about $241,000 and $246,000.

IV. STANDARD OF REVIEW

A. RAP 2.5 – Circumstances Which May Affect Scope of Review.

RAP 2.5 provides

> (a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A

party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

V. ARGUMENT

A. Banchero Raised The Error Of The Trial Court For the First Time On Review.

Appellant never argued that the trial court lacked authority to issue a judgment in favor of Yerkovich in his individual capacity against Banchero for breach of contract. Appellant is barred from raising that issue on appeal. Questions not raised in any manner before trial court will not be considered on appeal. *Fisch v. Marler* (1930) 1 Wash.2d 698, 97 P.2d 147; *Gill v. Strouf* (1940) 5 Wash.2d 426, 105 P.2d 829.

The court never considered the question of whether Yerkovich could receive a judgment in his individual capacity. Question which was not presented to or considered by trial court will not be considered on appeal. *Lawson v. Helmich* (1944) 20 Wash.2d 167, 146 P.2d 537, 151 A.L.R. 930; *State ex rel. York v. County Comrs.* (1947) 28 Wash.2d 891, 184 P.2d 577, 172 A.L.R. 1001.

Question not raised in trial court will not be considered on appeal. *State v. Long* (1961) 58 Wash.2d 830, 365 P.2d 31, cert den 374 U.S. 850,

852, 10 L.Ed.2d 1070, 1073, 83 S.Ct. 1914, 1919; *Seattle v. Shields* (1962) 60 Wash.2d 859, 376 P.2d 535; *Wetherbee v. Gary* (1963) 62 Wash.2d 123, 381 P.2d 237; *Richards v. Tyee Lumber & Mfg. Co.* (1963) 62 Wash.2d 168, 381 P.2d 740; *State v. Bogner* (1963) 62 Wash.2d 247, 382 P.2d 254; *Arnett v. Seattle General Hospital* (1964) 65 Wash.2d 22, 395 P.2d 503; *Tyler v. Tyler* (1964) 65 Wash.2d 102, 395 P.2d 1021, 6 A.L.R.3d 764; *Thorsteinson v. Waters* (1965) 65 Wash.2d 739, 399 P.2d 510; *State v. Bullock* (1967) 71 Wash.2d 886, 431 P.2d 195; *State v. Ashby* (1969) 77 Wash.2d 33, 459 P.2d 403; *Parker v. Theubet* (1969) 1 Wash.App. 285, 461 P.2d 9; *Snyder v. Cox* (1969) 1 Wash.App. 457, 462 P.2d 573; *Daniels v. Pacific Northwest Bell Tel. Co.* (1970) 1 Wash.App. 805, 463 P.2d 795; *Webley v. Adams Tractor Co.* (1970) 1 Wash.App. 948, 465 P.2d 429; *Felsman v. Kessler* (1970) 2 Wash.App. 493, 468 P.2d 691.

Objection based on theory not presented to trial court cannot be raised for first time on appeal. *Miller v. Staton* (1961) 58 Wash.2d 879, 365 P.2d 333; *Titus v. Tacoma Smeltermen's Union* (1963) 62 Wash.2d 461, 383 P.2d 504.

Banchero fails to cite any portion of the record to support that he raised the question of whether or not Yerkovich could be awarded a judgment in his individual capacity in the trial court. He makes no attempt

in this appeal to explain why he did not raise this issue in the lower court. Banchero admits in his brief that Yerkovich sued in his individual capacity and in a derivative capacity, but fails to explain to the Court why someone who sues in their individual capacity for breach of contract and in a derivative capacity cannot be awarded a judgment in their individual capacity. Instead, what Banchero argues is that in a derivative case a judgment, if awarded to a plaintiff in a derivative capacity, belongs to the corporation.

His argument completely ignores the fact that in this case, unlike all the cases he cites, Yerkovich had a personal claim against Banchero for breach of contract and the judge awarded judgment to Yerkovich on his personal claim but did not award judgment to Yerkovich in a derivative capacity.

Banchero's claim of error is that the judge abused his discretion in making the award to Yerkovich in his individual capacity. In the trial court complaint under the first cause of action for breach of contract, Yerkovich's individual claim against Banchero is clearly set forth. CP 6.

Pinnacle is not appealing this case and is not a party. Banchero does not have standing to appeal a cause of action that belongs to Pinnacle. The record is clear that Pinnacle did not participate in the trial proceedings in the lower court and is not a party to this appeal. However,

what is in the record is that Yerkovich sued in his individual capacity, as admitted in Appellant's Brief and as set forth in the record.

Assuming *arguendo*, that Yerkovich did not have an individual cause of action against Banchero, the award to Yerkovich would be harmless error. In *Joyce v. Congdon,* 11 Wash. 239, 195 P. 29 (1921), the court stated that the rule that the recovery in a shareholder derivative action will go to the corporation is not universal. If, in awarding the recovery to the corporation it would result in a stockholder's receiving a portion thereof of which he was not entitled, then a court of equity will look beyond the corporation and decree the recovery to the individual stockholders entitled thereto. In the present case, Banchero would receive 51% of the money that he had wrongfully taken from the corporation and was not entitled if the award went to the corporation. The trial court sitting in equity had the authority to make the award to Yerkovich.

In *LaHue v. Keystone Inv. Co.*, 6 Wash.App. 765, 496 P.2d 343 (1972), the court stated the following rule:

> A direct recovery to the stockholders may be permitted under exceptional circumstances, notwithstanding that such recovery amounts to a *781 forced distribution of corporate assets to the stockholders. See 13 W. Fletcher, Private Corporations s 6028 (perm. ed. rev. vol. 1970); Note, Shareholders' Right to Direct Recovery in Derivative Suits, 17 Wyo.L.J. 208 (1963).

The Findings of Facts and Conclusions of Law demonstrate exceptional circumstances that permit recovery by Yerkovich of corporate assets. As stated in 19 above, "Banchero's unequal treatment of himself and Yerkovich was more than a mere error of judgment; it was a series of deliberate acts of corporate self-dealing and misuse of the use of corporate resources." The judge had authority to award a judgment to Yerkovich based upon Banchero's actions and deny a corporate recovery that would benefit Banchero.

B. The Trial Court Had The Authority To Award The Judgment.

The Findings of Facts by the trial judge were based upon expert testimony of Doug McDaniel, a forensic CPA, who determined that the correct damage calculation should be based on a 49/51% ownership. The Findings of Facts issued by the trial court stated the following:

> "Plaintiff presented two alternative summaries of damages. Summary One was based upon profits being split 49% Yerkovich and 51% Banchero, with a 12% simple interest calculation with no reduction for salaries which resulted in damages of $241,526. Summary Two was similar except it included an equal salary for both parties of $100,000, 'which' a 12% simple interest calculation, which is 'reasonable' close to the value that would likely be imputed. Damages under summary Two as of January 31, 2011 were determined to be $246,986. Defendant criticizes plaintiff's calculations for not taking into account all monies advanced to Plaintiff later recharacterized as part salary and part loans."

The rule in Washington on the question of the sufficiency of the evidence to prove damages is: "[T]he fact of loss must be *850 established with sufficient certainty to provide a reasonable basis for estimating that loss." *Wilson v. Brand S Corp.*, 27 Wash.App. 743, 747, 621 P.2d 748 (1980). Mathematical exactness is not required. *Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.*, 66 Wash.2d 469, 476, 403 P.2d 351 (1965).

Haner v. Quincy Farm Chems., Inc., 97 Wash.2d 753, 757, 649 P.2d 828 (1982). The amount of damages is a matter to be fixed within the judgment of the fact finder. *Rasor v. Retail Credit Co.,* 87 Wash.2d 516, 531, 554 P.2d 1041 (1976); *Sherwood v. Bellevue Dodge, Inc.,* 35 Wash.App. 741, 749, 669 P.2d 1258, 676 P.2d 557 (1983). A trier of fact has discretion to award damages which are within the range of relevant evidence. *Cultum v. Heritage House Realtors, Inc.,* 103 Wash.2d 623, 633, 694 P.2d 630 (1985); *Kwik-Lok Corp. v. Pulse,* 41 Wash.App. 142, 149-50, 702 P.2d 1226 (1985). An appellate court will not disturb an award of damages made by the fact finder unless it is outside the range of substantial evidence in the record, or shocks the conscience, or appears to have been arrived at as the result of passion or prejudice. *Sherwood,* 35 Wash.App. at 749, 669 Wash.2d 1258; *Rasor,* 87 Wash.2d at 531, 554 P.2d 1041.

In the case at bar, Banchero fails to cite any portion of the record to support his position that the damage award was outside the range of substantial evidence, shocks the conscience, or appears to have been arrived at as the result of passion or prejudice. *Id.* Instead, Banchero argues that Yerkovich should not be allowed the full damage award because he did not work the full year in 2008. The judge heard the evidence and interpreted the contract. The judge had discretionary power to award the damages to Yerkovich because the damages were within the scope of the relevant evidence. The award should not be overturned on appeal.

VI. CONCLUSION

Banchero's claims of error by the trial court in (1) awarding a judgment to the individual plaintiff instead of to the corporation in a derivative capacity, and (2) the amount of damages awarded, are without merit.

DATED: May 11, 2012.

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By: _____

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CERTIFICATE OF SERVICE

I, Kate McBride, declare as follows: On May 11th, 2012 I caused to be served upon Eric Zubel, at the address stated below, by the method of service indicated, a true and correct copy of the foregoing **Brief of Respondent:**

Eric Zubel
800 Fifth Avenue, Suite 4100
Seattle, WA 98104
Telephone: 206.447.1445
Attorney for Appellant

By Hand Delivery

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 11th day of May, 2012.

Kate McBride

Kate McBride

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