

83960-3

FILED
DEC 12 2009
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 61638-2-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

TERESA FARMER,

Respondent,

v.

DANIEL J. FARMER,

Petitioner.

PETITION FOR REVIEW

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2009 DEC 7 8 PM 14:42

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

LAW OFFICE OF SKINNER
& SAAR, P.S.

By: Catherine W. Smith
WSBA No. 9542
Valerie A. Villacin
WSBA No. 34515

By: Douglas A. Saar
WSBA No. 28221

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

740 SE Pioneer Way
Oak Harbor, WA 98277
(360) 679-1240

Attorneys for Petitioner

TABLE OF CONTENTS

A.	Identity of Petitioner.....	1
B.	Court of Appeals Decision.....	1
C.	Issue Presented For Review.	1
D.	Statement of Facts.	2
E.	Argument Why This Court Should Grant Review.	6
	1. The Court Of Appeals' Decision Conflicts With Other Cases Holding That The Measure Of Damages Is The Value Of The Property At The Time Of Conversion Or A Reasonable Time Thereafter. (RAP 13.4(b)(1), (2))	6
	2. Division One's Approval Of A Speculative Method Of Calculating Damages As Of A Date After Entry Of Judgment Raises A Matter Of Substantial Public Interest. RAP 13.4(b)(4).	10
F.	Conclusion.....	14

TABLE OF AUTHORITIES

FEDERAL CASES

Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281 (2nd Cir. 1973) 13

Scully v. US WATS, Inc., 238 F.3d 497 (3rd Cir. 2001)..... 9, 14

STATE CASES

Brougham v. Swarva, 34 Wn. App. 68, 661 P.2d 138 (1983) 2, 6, 8, 9, 10

Gilmartin v. Stevens Inv. Co., 43 Wn.2d 289, 261 P.2d 73 (1953) 12

Hetrick v. Smith, 67 Wash. 664, 669,122 P. 363 (1912) 7

Jemo v. Tourist Hotel Co., 55 Wash. 595, 104 P. 820 (1909) 12

Larsen v. Walton Plywood Co., 65 Wn.2d 1, 390 P.2d 677 (1964) 13

Marriage of Langham and Kolde, 153 Wn.2d 553, 106 P.3d 212 (2005) 1, 6, 7, 8, 9, 10

Rorvig v. Douglas, 123 Wn.2d 854, 873 P.2d 492 (1994) 12

Roxas v. Marcos, 89 Hawai'i 91, 969 P.2d 1209 (1998) 10, 11

RULES AND REGULATIONS

CR 2A 5

RAP 13.4(b)(1) 6, 7, 9, 10, 14

OTHER AUTHORITIES

18 Am. Jur. 2d Conversion § 120..... 11

Restatement of Restitution: *Quasi Contracts and
Constructive Trusts* § 151, comment c (1937) 13

A. Identity of Petitioner.

Daniel J. Farmer asks this Court to accept review of the Court of Appeals decision designated in Part B of this Petition.

B. Court of Appeals Decision.

Division One filed its decision on November 2, 2009. A copy of the decision is attached as Appendix A.

C. Issue Presented For Review.

In *Marriage of Langham and Kolde*, 153 Wn.2d 553, 106 P.3d 212 (2005), this Court took review of an unpublished decision of Division One to hold that when stock declines in value after stock options are unilaterally converted by one party to a divorce, the measure of damages that the other party may recover is “*at least* its value at the time of conversion.” 153 Wn.2d at 569, ¶ 33 (emphasis in original). This Court did not directly address the measure of damages when the stock *increases* in value after conversion, leaving that “question for another day” because it was not necessary to resolve it under the facts in *Langham*. 153 Wn.2d at 569, ¶ 33.

This is that other day. This case presents the question that *Langham* left unanswered: what is the measure of damages for the unilateral exercise of stock options when the price of a stock

temporarily increases after conversion – should damages be based on the stock value at the time of conversion, as in *Langham*; the “highest value of the property wrongfully and knowingly converted between the time of conversion and a reasonable time after the victim learns of such conversion,” as in *Brougham v. Swarva*, 34 Wn. App. 68, 77, 661 P.2d 138 (1983); or, as in this case, on speculation: (1) that the stock will continue to steadily rise in value at a rate of 20.235% per annum for six years, (2) while the husband continues his employment with the company granting the stock options, and (3) that the wife would have exercised the stock options the day before each grant expired?

D. Statement of Facts.

Petitioner Daniel Farmer and respondent Teresa Farmer entered into a “Stipulated CR2A Agreement” resolving the property issues in their marriage dissolution. (CP 455-59) Among other provisions, the parties agreed to equally divide community stock options earned through Daniel’s employer, PACCAR, with each party retaining the right to choose when to exercise the options. (CP 456) Daniel’s options expired between April 27, 2009 and January 15, 2014. (CP 181) If Daniel were terminated from PACCAR for cause, unexercised stock options would be

immediately terminated and forfeited. If Daniel resigned or was terminated without cause, he would have between one and three months to exercise any vested stock options. (See CP 294, 312-13)

In August 2006, prior to entry of the final documents dissolving the parties' marriage, Daniel wrongfully exercised all of the vested stock options without obtaining Teresa's consent. (CP 157) Daniel exercised the options when the stock was trading at \$54.984 per share. (CP 141, 160) From the exercise of both parties' stock options, Daniel received net proceeds of \$444,664.63. (CP 129, 532)

PACCAR stock began to rise shortly after Daniel exercised the options and sold the shares. Daniel conceded that exercising the stock options was a "terrible mistake." (CP 129) Worse, Daniel failed to disclose the fact that he had exercised the stock options to Teresa, instead attempting to obtain her "consent" to exercise her share of the stock options. (See CP 129, 148-49; FF XVI, FF XVII, CP 9-10) Two months later, on October 13, 2006, a decree of dissolution was entered distributing the parties' property, including an award of stock options to Teresa that, unknown to her, no longer existed. (See CP 176-89)

On October 24, 2006, less than two weeks after the final papers were entered, Daniel through new counsel filed an affidavit admitting that he had cashed in all of the parties' PACCAR stock options, not just the stock options that were awarded to him. (CP 157, 165-67) Daniel conceded that he was wrong in unilaterally exercising the stock options. (CP 129) He proposed immediately distributing approximately \$170,000 to Teresa as her share of the proceeds from the exercised stock options. (CP 161) Alternatively, Daniel proposed depositing nearly \$190,000 into his attorney's trust account, to secure Teresa's option rights. (CP 161-62) With these funds Teresa could "exercise" her stock options, on a date of her choice, prior to the expiration of the options. The proceeds Teresa would have received on that day had the options still existed would then be distributed to her. (CP 161-62)

The court did not hear the matter until April 2007 – six months later. (CP 129-30; FF XVIII, CP 11) The trial court found that as "a direct and proximate result of [Daniel]'s unauthorized sale of the wife's share of PACCAR stock options, and [Daniel]'s fraudulent conduct, [Teresa] has been substantially and irrevocably damaged insofar as she is now unable to exercise the stock options, which were awarded to her." (FF XIX, CP 11) In

assessing damages, the trial court relied on a declaration of Teresa's expert accountant, Ronald Nelson, who asserted that "[w]e have computed that over the last 10 years (March 6, 1997 to March 6, 2007) PACCAR had a rate of return of 20.235% per annum." (CP 137; FF XXIII, CP 12) Assuming that rate of return would continue through 2013, the trial court found that had Teresa been in a position to exercise the stock options on the day before each grant expired, she would have been able to realize \$617,553.00 on future exercises occurring April 26, 2009 through January 13, 2013. (FF XX, CP 11) On reconsideration, the trial court reduced the damage award to \$487,325 (FF XX, CP 11), adopting Mr. Nelson's belatedly proposed discount rate of six percent. (CP 79-80) The court entered a judgment in favor of Teresa in the amount of \$487,325, plus attorney fees and costs of \$9,794.57, on April 14, 2008. (CP 4)

Daniel appealed. Division One affirmed, holding that "the trial court exercised its equitable authority to enforce the specific terms of the final decree and the CR 2A Agreement in order to put Teresa in as good a position as she would have been if Daniel did not act in bad faith and complied with the terms of the decree and the CR 2A Agreement." (Opinion 15)

E. Argument Why This Court Should Grant Review.

- 1. The Court Of Appeals' Decision Conflicts With Other Cases Holding That The Measure Of Damages Is The Value Of The Property At The Time Of Conversion Or A Reasonable Time Thereafter. (RAP 13.4(b)(1), (2))**

This Court should grant review of Division One's decision, which holds that the trial court could measure damages for the husband's conversion of stock options based on speculation as to the value of stock years after entry of the judgment. Division One's decision is inconsistent with this Court's decision that the measure of damages for a conversion of stock options is the value of the options at the time of its exercise in *Marriage of Langham and Kolde*, 153 Wn.2d 553, 569, ¶ 33, 106 P.3d 212 (2005). RAP 13.4(b)(1). The Court of Appeals decision is also inconsistent with a prior decision of Division One holding that the measure of damages for conversion is at most "the highest value of the property wrongfully and knowingly converted between the time of conversion and a reasonable time after the victim learns of such conversion." *Brougham v. Swarva*, 34 Wn. App. 68, 77, 661 P.2d 138 (1983). RAP 13.4(b)(2).

Under this Court's decision in **Langham**, the proper measure of damages should be the value of property at the time of conversion. In **Langham**, as in this case, an employee husband wrongfully exercised and sold options that had been awarded to the wife in their divorce. This Court held that the wife was entitled to damages calculated by the market value of the property at the time the husband converted the options by exercising them and receiving the stock. **Langham**, 153 Wn.2d at 567-68, ¶ 31 (citing **Hetrick v. Smith**, 67 Wash. 664, 669, 122 P. 363 (1912)).

This Court declined to directly address the issue presented here of the measure of damages when property temporarily increases in value after the conversion. **Langham**, 153 Wn.2d at 569, ¶ 33. But this Court did not state that the rule for measuring damages would be any different. This Court should accept review under RAP 13.4(b)(1) and hold that, consistent with **Langham**, damages should be measured at the date of conversion. Had the date of conversion been used in this case, the total damages would have been \$173,298 – the net amount Daniel realized from exercise of Teresa's share of stock options on the date of conversion. (CP 141) Instead, speculating that the stock would

increase in value at a rate of over 20% per year for six years, the trial court assessed damages of \$487,325.

If this Court's holding in *Langham* is not applicable when property temporarily increases in value after conversion, the proper measure still requires that damages be assessed within a "reasonable time" after the injured party learns of the conversion. The Court of Appeals decision to the contrary conflicts with its prior decision in *Brougham v. Swarva*, 34 Wn. App. 68, 77, 661 P.2d 138 (1983). In *Brougham*, Division One held that where "personal property which has a sharply fluctuating value is willfully converted and such conversion is fraudulently concealed by the converter, the measure of damages is the highest value of the property wrongfully and knowingly converted between the time of conversion and a *reasonable* time after the victim learns of such conversion." *Brougham*, 34 Wn. App. at 77 (emphasis added).

Division One noted in *Brougham* that while a victim of conversion should be protected, she is not entitled to a "windfall of complete umbrella protection by being awarded the highest possible valuation of the property from the time of its taking to the entry of judgment or its return." 34 Wn. App. at 78. While accurately describing the holding in *Brougham*, Division One

declined to apply it in this case, instead holding that it was within the trial court's discretion to "put Teresa in as good a position as she would have been if Daniel did not act in bad faith." (Opinion 15) But the trial court's decision did not place Teresa in as "good a position" as if she had retained the stock options Daniel had converted. Instead, it gave her the "windfall of complete umbrella protection" disapproved by Division One in *Brougham*, 34 Wn. App. at 78. Even though stock options "neither extinguish all risk, nor guarantee a profit," *Scully v. US WATS, Inc.*, 238 F.3d 497, 513 (3rd Cir. 2001), the trial court's decision significantly improved Teresa's position by immediately guaranteeing her a risk-free 20% annual rate of return on options she now claims she would have held for six unpredictable years.

Division One's decision holding that damages for conversion of property can be assessed based on speculative values calculated at a time after entry of judgment is inconsistent with this Court's decision in *Langham* and with Division One's prior decision in *Brougham*. This Court should grant review under RAP 13.4(b)(1) and (2).

2. **Division One’s Approval Of A Speculative Method Of Calculating Damages As Of A Date After Entry Of Judgment Raises A Matter Of Substantial Public Interest. RAP 13.4(b)(4).**

Whether the measure of damages is at the date of conversion, as in *Langham*, or some reasonable time thereafter, as in *Brougham*, it cannot as a matter of law be based on a date after entry of judgment, as here. As the current state of the economy reflects, whether the value of property, and especially of stock, will continue to rise at a steady rate after entry of judgment is entirely unpredictable, and not a proper basis for calculating damages. This Court should take this opportunity under RAP 13.4(b)(4) to adopt a clear rule that damages for conversion must be calculated at a time before entry of judgment. See *Roxas v. Marcos*, 89 Hawai’i 91, 969 P.2d 1209, 1270 (1998).

In *Roxas*, the Hawaii Supreme Court adopted the measure of damages for wrongfully converted assets of fluctuating value established by Division One in *Brougham*. 969 P.2d at 1269 (“On balance, we agree with the resolution at which the *Brougham* court arrived”). In determining the “reasonable time” after the victim learns of the conversion for assessing damages, the Hawaii Supreme Court held that “the date of close of the evidence at trial

would, as a matter of law, be the absolute end-point beyond which the 'reasonable time' cannot extend, inasmuch as the market values ... beyond that date would be unknowable to the trier of fact." **Roxas**, 969 P.2d at 1270. See also 18 Am. Jur. 2d Conversion § 120 ("In determining what constitutes a 'reasonable time,' the outside boundary is the latest date upon which a reasonable investor with adequate funds would have reentered the market by purchasing a replacement, and the date of the close of evidence at trial is an absolute endpoint beyond which a 'reasonable time' cannot extend").

This Court should take this opportunity to affirmatively adopt this rule of law in measuring damages for conversion, consistent with the rule in other jurisdictions. Among the nearly three hundred collected cases in *Comment Note – Measure of Damages for Conversion of Corporate Stock or Certificates* 31 A.L.R.3d 1286, not one measures the time of fixing damages after the date of entry of judgment. Instead, the Note analyses five categories for fixing damages: (1) time of conversion (§ 5[a]); (2) highest price between the time of conversion and time of trial or suit (§ 5[b], [h]); (3) highest price between the time of conversion and reasonable time after learning of conversion (§ 5[c], [d]); (4) value within reasonable

time after conversion (§ 5[f]); and (5) highest price between date of conversion to date of judgment (§ 5[g]).

The reason the “absolute endpoint” for assessing damages must be the date of judgment is that otherwise the trial court is required to rely wholly on speculation as to the value of the property. Reliance on speculation to determine damages is contrary to this state’s well-settled law that an award of “damages must not rest upon speculation or conjecture.” **Jemo v. Tourist Hotel Co.**, 55 Wash. 595, 604, 104 P. 820 (1909); see also **Rorvig v. Douglas**, 123 Wn.2d 854, 861, 873 P.2d 492 (1994)(evidence of damages should “not subject the trier of fact to mere speculation or conjecture”); **Gilmartin v. Stevens Inv. Co.**, 43 Wn.2d 289, 302, 261 P.2d 73 (1953) (“Damages must be proved with all the certainty the case permits and cannot be left to conjecture, guess, or speculation.”) (*quoting* 25 C.J.S., *Damages*, § 162(2), page 816).

Here, the trial court’s award of damages was based solely on a declaration by the wife’s “expert” witness, an accountant, and Division One apparently relied on this declaration to hold that “substantial evidence” supported the trial court’s determination. (Opinion 17) But while expert testimony may be a sufficient basis for an award of damages, “their opinions must be based upon

tangible evidence rather than upon speculation and hypothetical situations.” *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 19, 390 P.2d 677 (1964). The accountant did not and could not provide the necessary “tangible evidence” to support the trial court’s damages award by declaring only that “we had computed that over the last 10 years (March 6, 1997 to March 6, 2007) PACCAR had a rate of return of 20.235% per annum.” (CP 137) His entire “analysis” consisted of simple math that a fourth grader with a calculator could replicate. The accountant was not a financial consultant, a stock broker, or an analyst; he had no stated expertise in predicting how a stock, or PACCAR stock, would perform.

Further, there was no evidence to justify the assumption that the wife would have, given the opportunity, exercised her options on the day before each grant expired, or that Daniel continued his employment with PACCAR through 2013, which he did not. See Restatement of Restitution: *Quasi Contracts and Constructive Trusts* § 151, comment c (1937) (person entitled to highest value reached by subject matter within reasonable time after tortious conduct only “if he can prove that he probably would have made a sale while the subject matter was at its highest point in value”); see also *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1305 (2nd

Cir. 1973) (whether plaintiffs would have sold their stocks at its highest value is “too untenable and speculative to support an award of damages”); ***Scully v. US WATS, Inc.***, 238 F.3d 497, 512-13 (3rd Cir. 2001) (“we cannot accept a plaintiff’s after-the-fact assertion that he would have sold stock at a time that, in hindsight, would have been particularly advantageous.”)

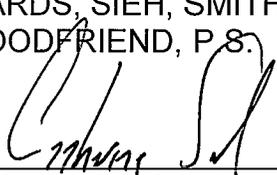
Damages for conversion must be calculated as of a date before entry of judgment. This Court should grant review of Division One’s decision under RAP 13.4(b)(4) and reject as a matter of law any measure of damages that relies on speculation of the value of converted property after entry of judgment.

F. Conclusion.

This Court should grant review under RAP 13.4(b)(1), (2) and (4), and hold that the measure of damages for the wrongful conversion of property is the value on the date of conversion or some reasonable time thereafter, but can not be as of a date after the entry of judgment.

Dated this 2nd day of December, 2009.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: 

Catherine W. Smith

WSBA No. 9542

Valerie A. Villacin

WSBA No. 34515

Attorneys for Petitioner

DECLARATION OF SERVICE

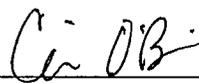
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 2nd, 2009, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

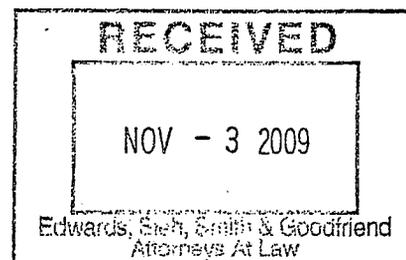
Office of Clerk Court of Appeals - Division I 600 University Street Seattle, WA 98101	<input checked="" type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Douglas Saar Law Office of Skinner & Saar PS 740 SE Pioneer Way Oak Harbor, WA 98277	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Gregory M. Miller Carney Badley Spellman, P.S. 701 Fifth Avenue. Suite 3600 Seattle, WA 98104-7010	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Ken Manni Cohen, Manni & Theune P.O. Box 889 Oak Harbor, WA 98277	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

2009 DEC 2
3 55 PM
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
FILED

DATED at Seattle, Washington this 2nd day of December, 2009.



Carrie O'Brien



**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

IN RE THE MARRIAGE OF:)	
TERESA W. FARMER,)	No. 61638-2-1
)	
Respondent,)	
)	UNPUBLISHED OPINION
v.)	
)	
DANIEL J. FARMER,)	
)	
Appellant.)	FILED: <u>November 2, 2009</u>

SCHINDLER, C.J. — Daniel J. Farmer and Teresa W. Farmer entered into a Civil Rule 2A Agreement (CR 2A Agreement) that resolved most of the disputes in their pending dissolution action. As part of the CR 2A Agreement, Daniel agreed that Teresa should receive one-half of the community PACCAR stock options and that she would have the discretion to decide when to exercise the stock options before the designated expiration dates.¹ The final decree of dissolution was entered on October 13, 2006. The decree awards Teresa one-half of the community stock options and specifically sets forth each of the stock option dates, the number of options granted on that date, the option price, the expiration date, and the number of shares awarded to Teresa. There is no dispute that shortly after the parties entered into the CR 2A Agreement and before entry of the final decree, Daniel sold all of the stock options and fraudulently concealed the fact that he had done so until after entry of the decree. The

¹ For clarity, we refer to Daniel J. Farmer and Teresa W. Farmer by their first names.

trial court granted Teresa's CR 60(b) motion to vacate the stock option provisions of the decree. The court awarded Teresa damages based on the specific terms of the decree and the CR 2A Agreement and on the expert's calculation of damages based on the value of the stock options the day before the expiration date. On appeal, Daniel contends the trial court erred in determining the measure of damages. Daniel asserts that as a matter of law, the measure of damages is the stock price at the time of the conversion or within a reasonable time thereafter. In the alternative, Daniel contends the expert's calculation of damages is based on speculative assumptions and an erroneous present value discount rate. Daniel also asserts that the court abused its discretion in denying his request for an evidentiary hearing and striking a portion of his expert's declaration as untimely. The trial court did not err in enforcing the specific terms of the degree and CR 2A Agreement and relying on unrebutted expert testimony in awarding damages. We also conclude the court did not abuse its discretion in calculating the amount of damages and using a discount rate for present value within the range of the evidence presented. In addition, the court did not abuse its discretion in denying Daniel's untimely request for an evidentiary hearing and striking a portion of his expert's declaration as untimely. We affirm the trial court in all respects.

FACTS

Daniel J. Farmer and Teresa W. Farmer married in August 1987 and have three children. The couple separated in March 2004.

Daniel worked as an engineering manager at PACCAR. In March 2004, Daniel was the Director of Applied Technology and Simulation. Beginning in April 1999, Daniel began receiving PACCAR stock options on an annual basis. The stock options

No. 61638-2-1/3

have a set price with a ten year expiration date. The stock options are not transferable. From April 1999 until the parties separated in March 2004, Daniel had received approximately 15,000 stock options. After the parties separated, Daniel continued to work at PACCAR and received additional stock options.

After filing the dissolution action, the parties engaged in extensive discovery for approximately two and a half years. On July 21, 2006, Daniel and Teresa entered into a "Stipulated CR 2A Agreement" (CR 2A Agreement) resolving the majority of the issues concerning the parenting plan, the order of child support, maintenance, and the division of assets and liabilities. Except for the community PACCAR stock options, the parties agreed that Teresa would receive 55 per cent and David would receive 45 per cent "of the community net equity in all of the parties' community real and personal property." The parties agreed that the valuation date they would use for their property was July 1, 2006. In the event the parties could not agree, the CR 2A Agreement provides that "the court shall resolve disputed matters on the regular motions calendar."

As to the PACCAR stock options, Daniel and Teresa agreed that they would each receive one-half of the community PACCAR stock options.

The stock options the husband has shall be awarded such that each party receives one-half of the community options. Each party shall choose whether or not to exercise the options. Any party exercising the options shall pay taxes on his or her options. . . . These assets are not to be included in the overall 45/55 division of assets.

The CR 2A Agreement specifically provides that the court will retain jurisdiction to enforce the terms of the Agreement and has the discretion to award attorney fees if either party acts in bad faith contrary to the Agreement.

The court will retain continuing jurisdiction to enforce the terms and conditions of this agreement. Disputes as to the terms of this agreement shall be resolved on the motion calendar. The court may award attorney's fees in the event the court concludes in its discretion that either party has by his or her actions frustrated the terms of this agreement and or has acted in bad faith.

On August 14, 2006, less than a month after entering into the CR 2A Agreement, Daniel sold all of the PACCAR stock options. There is no dispute that Daniel sold the stock options for \$1,070,301 without Teresa's knowledge or authorization. After withholding for federal income tax, Medicare, and payment of the cost of exercising the options, Daniel received \$444,664.63.²

After selling the stock options, Daniel sent an e-mail to Teresa on August 25, asking her whether she was going to cash out the stock options and offered to provide her with information "[j]ust so you can see the history to help you decide. Are you going to cash out the stock or stock options? You might want to read the documents that were sent to Ken by PACCAR."

On September 7, Daniel sent another e-mail to Teresa suggesting that she sell the stock options and telling her it was risky to not do so.

As you said early in the separation, we were heavily leveraged with PACCAR stock. It went as high as \$88.35 a share and now is back down to about \$55. As it was downgraded again today, you might want to consider what to do with your 'shares.' Read the paperwork about options. One [sic] the divorce is final, option shares are not 'inheritable' for anyone other than my spouse so if anything happened to me, your options would be gone or if I was laid off, you would need to sell within 30 days.

It is public information that the 2007 emission regulations will be very tough on the truck manufacturers. I think I am going to hold on to the other side of 2008, but the choice is yours. Hold on with the risk, or sell on the way down. Let me know[.]

² Daniel used \$170,000 to purchase real property.

On September 27, Daniel filed a motion to enforce the CR 2A Agreement and enter the final decree of dissolution, parenting plan, and child support order. In his declaration, Daniel states the parties had resolved most of the issues in the CR 2A Agreement and that the only outstanding disputes were over the valuation of the family home, the 2005 tax return, and payment of the guardian ad litem fees.

On October 12, Teresa filed a motion to continue the hearing to enter the final decree. According to Teresa, in response to a subpoena for bank records, she discovered that in August Daniel had deposited approximately \$492,000 in his account. Teresa questioned the source of the funds. Teresa also notes that the parties disagreed about the date to use in determining whether the stock options were community or separate property, certain provisions in the parenting plan, and the valuation of the home. Teresa asked the court to defer entry of the final decree until she had the opportunity to engage in further discovery concerning the funds in Daniel's bank account and the impact on the division of property.

The Bank of America records were subpoenaed because the respondent refused to provide any records concerning the Farmer Trust which is maintained by the respondent's parents for himself and his other siblings. Although the respondent's mother has recently filed a declaration with the court indicating that the trust has been established for the purpose of distributing funds to Mr. Farmer and his siblings in the future, it clearly appears based on the bank accounts attached hereto that some other arrangements have been made and that distributions have in fact been made to Mr. Farmer. Regardless of whether these distributions came from the Trust or from some other source, it is imperative to determine the source of these funds, whether or not these funds should properly be characterized as community assets and what impact the distribution of these funds to Mr. Farmer has on his child support obligation and other financial matters which are pertinent to the entry of the final orders in this case

The court held a hearing on October 12. Daniel was present at the hearing. Daniel opposed a continuance. His attorney told the court that the majority of the money in Daniel's account was from the sale of the stock options that were awarded to him in the CR 2A Agreement as his separate property.

This is not something new. When we settled the agreement in July, we had a settlement agreement and Mr. Manni and I had discussion about exercising stock options and gave the parties the opportunity to exercise the stock options because there was going to be a split in stock and Mr. Manni was well aware that my client was looking into exercising some of his options that he would be awarded and that is where the money came from³

The court denied Teresa's motion to continue. However, the court ordered Daniel to "disclose under penalty of perjury the money that was deposited in the Premier account and also provide supporting documentation within seven days."

On October 13, the court held a hearing on the disputed issues that were not resolved in the CR 2A Agreement and entered the final decree of dissolution, the parenting plan, and order of child support. The final decree awards Teresa one-half of the community PACCAR stock options. The decree sets forth the specific terms of the award to Teresa of one-half of the PACCAR community stock options. The decree states each option date, the number of options granted on that date, the price, the expiration date, and the number of shares Teresa is entitled to receive for each option date. Exhibit A, "Property Awarded to Petitioner Wife" and Exhibit B "Property Awarded to Respondent Husband" provide in pertinent part:

³ (Emphasis omitted).

The wife shall receive one-half of the following community stock options:

Option Date	Type	Granted	Price	Expiration Date	Wife's Share
4/27/1999	NQ	1,710.0	\$23.9028	4/27/2009	855
1/25/2000	NQ	2,029.0	\$18.5555	1/25/2010	1014
1/14/2001	NQ	1,707.0	\$22.9445	1/14/2011	854
1/23/2002	NQ	4027.0	\$28.2045	1/23/2012	1510
1/15/2003	NQ	3513.0	\$31.4000	1/15/2013	723
1/15/2004	NQ	1992.0	\$56.9533	1/15/2014	83

The wife will direct the husband when she wishes to exercise her options. The wife shall be solely responsible for all costs and taxes associated with exercising her options. The husband must declare the transfer on his tax return and pay taxes on the transfer, the wife shall be responsible for the taxes. The husband shall provide the wife with the information on the taxes on the transfer. If the options are cashed, the husband shall hold back an amount equivalent to the taxes he expects to pay on the transfer. At the time the husband's taxes are filed, he shall provide proof of the actual tax consequences and the wife shall either pay any additional amount owed or receive a refund from the husband if she overpaid. All remaining stock options are the husband's separate property.

Daniel did not comply with the court's order to provide documentation concerning the source of the funds deposited in his account. However, on October 24, Daniel filed a Declaration in Support of a Motion to: "(1) Finalize PACCAR Stock; (2) For Entry of Judgment; (3) To Amend Decree; and (4) For Attorney Fees." First, Daniel notes that the CR 2A Agreement provides for resolution of disputes "on the regular motion calendar through declarations." Daniel then states that the court needs to resolve the number of community PACCAR stock shares Teresa was entitled to and determine how much Teresa should reimburse him for funds expended from their joint bank account. Daniel also states that he had "become aware of an additional bank account" in North Carolina that Teresa did not previously disclose and requests an award of 45 per

No. 61638-2-1/8

cent of the funds in the account. Last, Daniel admits for the first time that in August, he exercised all of the PACCAR stock options. Daniel said that he mistakenly did so on advice of his previous attorney to avoid a reduction in value based on the parties agreed valuation date of July 1, 2006. Daniel asked the court to amend the decree to allow him to deposit funds in his attorney's trust account in order to "award the petitioner the equivalent of proceeds from this deposit that the petitioner would have been entitled to, had petitioner exercised the options at an uncertain date that the petitioner will choose [sic] in the future."

Teresa filed a motion to compel Daniel to produce documentation about the stock options. On December 18, the court ordered Daniel to disclose all documents concerning his exercise of the stock options within seven days. On January 29, 2007, the court held Daniel in contempt, and ordered him to pay sanctions for failure to comply with the order. On February 5, Daniel disclosed the requested information.

On March 22, Teresa filed a motion under CR 60(b)(1), (3), and (4) for relief from the provisions of the decree awarding her the community PACCAR stock options.⁴ Teresa asserted that Daniel fraudulently exercised the stock options and misrepresented that he had not done so to her and to the court prior to entry of the final decree. In support of her request for an award of damages, Teresa submitted the declaration of certified public accountant Roland T. Nelson.

We have computed that over the last 10 years (March 6, 1997 to March 6, 2007) PACCAR had a rate of return of 20.235% per annum. If Ms. Farmer had held her options until the day before expiration, and the rate of return remained consistent, Ms. Farmer would have realized \$617,553

⁴ CR 60(b)(1), (3), and (4) allows the court to grant relief based on mistakes, newly discovered evidence, and fraud.

No. 61638-2-1/9

on future exercises (dating from April 26, 2009 to January 14, 2013) using an estimated federal tax rate of 35% plus Medicare tax of 1.45%.

Daniel did not submit expert testimony to contradict Nelson's calculation of damages. Instead, Daniel argued that the amount was "inappropriate and unreasonable" and was based on "future speculation" of the value of PACCAR stock. Daniel also argued that the damage calculation of \$617,553 was unfair because it was not discounted to present value.

Daniel urged the court to adopt his previous proposal, "[m]y proposal was for a deposit to remain with my attorney in his trust account until the petitioner advised me of her desire to exercise the options at which point we could account for the proceeds properly payable to the petitioner." In the alternative, Daniel agreed to "place stock, cash and possibly future stock options subsequently awarded to me into a trust or other investment vehicle with language crafted such that the petitioner have the opportunity to direct the sale of the stock at any time, and when so directed, the trustee when calculating and distributing the funds generated from the sale reimburse to me the basis amount of the stock option and distribute to the petitioner the profit from the stock option." During the hearing on the CR 60(b) motion, Daniel's attorney argued that if the court did not accept Daniel's proposals, the court should schedule an evidentiary hearing to allow him to challenge Nelson's calculations.

The court denied Daniel's request for an evidentiary hearing as untimely. The court granted Teresa's CR 60(b) motion and awarded damages based on the express terms of the decree and the CR 2A Agreement and the unrebutted expert testimony.

On April 24, Daniel filed an objection to the proposed order granting the CR 60(b) motion for relief from the decree. For the first time, Daniel cited In re Marriage of

No. 61638-2-I/10

Langham and Kolde, 153 Wn.2d 553, 567, 106 P.3d 212 (2005), to argue that Teresa was only entitled to damages of approximately \$173,000 based on the value of the stock options on the date he exercised the options. In the alternative, Daniel argued that the damages should be discounted to present value. The court agreed that the damages award should be discounted to present value, but ruled Teresa was entitled to damages based on the express terms of the final decree and the 2A Agreement.⁵

Teresa submitted a supplemental declaration from Nelson addressing present value discount. Nelson used a six per cent discount rate resulting in a judgment of \$487,325. Daniel submitted the declaration and report of certified public accountant Steven J. Kessler. Kessler's report included a "Critique of Roland Nelson Damage Analysis" and "Critique of Roland Nelson Present Value Analysis." The court granted Teresa's motion to strike Kessler's critique of Nelson's damages analysis as untimely but considered Kessler's present value analysis. In Kessler's opinion, a discount rate between 15 per cent and 25 per cent was more appropriate than Nelson's use of a six per cent rate. Kessler applied the higher discount rates to Nelson's calculation of damages.

On April 14, 2008, the court entered an order on Teresa's motion for relief from the decree. The judgment and order vacates the provisions in the decree awarding her the PACCAR stock options and awards her a judgment of \$487,325 and attorney

⁵ The trial court noted that Langham, was not inconsistent because the Court in Langham held that the measure of damages was "at least" the value of the date on the date of conversion. Langham, 152 Wn.2d at 569.

And there is language in the Langham case that leads the Court to believe that - that Mr. Farmer should pay for the tort that he committed. And that - that at least Mrs. Farmer should get the value at the time of the conversion. That 'at least' says it could be 'more than.'

No. 61638-2-I/11

fees and costs. The court ordered that the judgment "shall accrue interest at the rate of 12% per annum until said amount is fully paid by respondent." The order and judgment provides in pertinent part:

The petitioner is awarded total judgment in the amount of \$487,325.00 against the respondent in lieu of receipt of the PACCAR stock options referred to in the decree of dissolution of marriage awarded to her as her sole and separate property.

The court entered detailed findings of fact and conclusions of law setting forth the specific terms of the decree and CR 2A Agreement related to the community PACCAR stock options awarded to Teresa, findings concerning Daniel's fraudulent conduct, and the basis for the court's award of damages. The court expressly finds that Daniel did not timely challenge Nelson's calculation of damages and adopts Nelson's calculation of damages. The trial court's findings state in pertinent part:

XIX.

As a direct and proximate result of the respondent's unauthorized sale of the petitioner's share of the PACCAR stock options, and the respondent's fraudulent conduct, the petitioner has been substantially and irrevocably damaged insofar as she is now unable to exercise the stock options which were awarded to her pursuant to the terms and conditions of the parties' CR 2A Agreement and the Decree of Dissolution of Marriage. All of the stock options have been exercised and their exercise is final and irrevocable.

XX.

Had the petitioner been in a position to exercise the stock options on the day before each group of stock options expired, petitioner would have been able to realize approximately \$617,553.00 on future exercises dating from April 26, 2009, to January 13, 2013, using an estimated Federal tax rate of 35% plus Medicare of 1.56%. The present value of the \$617,553 is \$487,325.

XXI.

In support of petitioner's motion, petitioner submitted the declarations of Roland T. Nelson, CPA, CEP, said declarations are dated March 21, 2007 and June 5, 2007. Respondent submitted declaration of Steven J. Kessler (6/29/07). Stricken in part by order

dated 9/10/2007. Petitioner submitted declaration of Roland Nelson dated 4/10/2008.

XXII.

The respondent did not challenge the findings of Roland T. Nelson by submission of a sworn declaration from any CPA or any similarly qualified professional challenging the assumptions, findings and conclusions of Mr. Nelson.

XXIII.

The court adopts the findings of Roland T. Nelson CPA identified in the document entitled "Declaration of Roland T. Nelson, CPA, CFP", dated March 21, 2007 and the "Supplemental Declaration of Roland T. Nelson, CPA, CEP" dated June 5, 2007, and the declaration of Roland Nelson dated 4/10/2008 which findings are incorporated by reference herein as if fully set forth herein.

XXIV.

The court finds that the petitioner should be awarded judgment against the respondent as result of the respondent's fraudulent conduct described above. Said judgment should be in the amount of \$487,325.

XXV.

The court finds that the respondent's conduct referred to above was fraud, visited not only upon the court but also upon the petitioner insofar as after the respondent sold all of the parties[] stock options, the respondent made no less than two attempts to persuade the petitioner to authorize the respondent to sell her shares of the stock options in spite of the fact that all of the stock options had already been exercised by the respondent.

XXVI.

Further, the court finds the respondent's conduct fraudulent because when the deposit of approximately \$444,000 was identified to the court by petitioner's attorney, the respondent lied to the court in advising the court that those sums represented the sale of only the respondent's share of the stock options when in fact those sums represented the net proceeds available from all of the stock options, both the respondent's and the petitioner's.

No. 61638-2-1/13

Daniel only appeals the award of damages. Daniel does not challenge any of the court's other findings.⁶

ANALYSIS

Measure of Damages

Daniel asserts the trial court erred in determining the measure of damages. Daniel contends that as a matter of law, the measure of damages for conversion of the community PACCAR stock options must be based on the stock price on the date he exercised the stock options or the price within a reasonable time after Teresa learned of the conversion.

The measure of damages is a question of law that we review de novo. Womack v. Von Rardon, 133 Wn. App. 254, 263, 135 P.3d 542 (2006). The court has the authority to enforce the terms of a property settlement and the decree. "The superior court unquestionably has authority to enforce property settlements. RCW 26.12.010." Langham, 153 Wn.2d at 560. The Court in Langham also held that "[h]aving before it at the outset a cause cognizable in equity, the court retain[s] jurisdiction over the subject matter and the parties to be affected by its decree for all purposes—to administer justice among the parties according to law or equity." Langham, 153 Wn.2d at 560, (quoting, Yount v. Indianola Beach Estates, Inc., 63 Wn.2d 519, 524-25, 387 P.2d 975 (1964)). When the equitable jurisdiction of the court is invoked the court is entitled to grant whatever relief the facts warrant. Ronken v. Bd. of County Comm'rs, 89 Wn.2d 304, 313, 572 P.2d 1 (1977) (quoting Kreger v. Hall, 70 Wn.2d 1002, 1008, 425 P.2d 638 (1967)). We review the trial court's exercise of its

⁶ Unchallenged findings are verities on appeal. In re Marriage of Knight, 75 Wn. App. 721, 732, 880 P.2d 71 (1994).

No. 61638-2-1/14

equitable authority for abuse of discretion. In re Foreclosure of Liens, SAC Downtown Ltd. P'ship v. Kahn, 123 Wn.2d 197, 204, 867 P.2d 605 (1994).

Daniel relies on Langham to assert that as a matter of law, the measure of damages for the conversion of the stock options is the price of the stock at the time of the conversion. In the alternative, Daniel cites Brougham v. Swarva, 34 Wn. App. 68, 77, 661 P.2d 138 (1983) to argue that the measure of damages is the highest value between the time of the conversion and a reasonable time after Teresa learned that Daniel converted the stock options.

In Langham, the court in the dissolution action, evenly divided some of the husband's nontransferable stock options. The husband relied on a later stipulation of the parties to exercise the stock options and receive stock. Several months later, the husband sold the stock at a significant loss. The wife argued that she was entitled to damages based on the value of the stock on the date the stock options were exercised and not the date the husband sold the stock. The superior court ruled in favor of the wife. Langham, 153 Wn.2d at 558. On direct appeal, this court reversed. In an unpublished decision, we held that the measure of damages should be based on the value of the stock on the date the husband sold the stock. Our Supreme Court reversed:

Here the Court of Appeals applied the older approach ruling stock options are converted when the resulting stock is sold. In re Marriage of Langham & Kolde, slip op. at 9. Only then, the court reasoned, is the plaintiff deprived of the right of possession. This reasoning confuses stock options with the stock itself. Stock may be converted when it is sold, but stock options, as a right to purchase stock, disappear when the owner exercises the options and purchases the stock. Once the owner exercises the options, he has irrevocably exchanged one kind of property (stock options) for another kind of property (stock), and has lost the ability to enter the stock markets at

the time of his choosing. His "range of elective action" is now limited to retaining the stock or selling it. Am. Gen. Corp. v. Cont'l Airlines Corp., 622 A.2d 1, 10 (Del.Ch.), aff'd, 620 A.2d 856, 1992 WL 426435 (Del.1992). . . The modern view of conversion more readily fits the reality that stock options are valuable property and are converted when exercised by limiting the owner's available choices.

Langham, 153 Wn.2d at 565-66. Because the stock price "declined rapidly in value" after the conversion, the Court held that the measure of damages was "at least" the value of the stock on the date of conversion. Langham, 153 Wn.2d at 569.

In Brougham, the court addressed the measure of damages for the conversion of silver Canadian coins with a sharply fluctuating market value. The court held that that where the conversion is fraudulent and the property has a fluctuating value, the measure of damages is the highest value of the property between the time of conversion and a reasonable time after learning of the conversion. Brougham, 34 Wn. App. at 77.

Here, unlike in Langham and Brougham, the trial court exercised its equitable authority to enforce the specific terms of the final decree and the CR 2A Agreement in order to put Teresa in as good a position as she would have been if Daniel did not act in bad faith and complied with the terms of the decree and the CR 2A Agreement.

It is just, fair and equitable to award to the petitioner judgment against the respondent in the sum of \$487,325.00, said sum representing the amounts which he petitioner would have realized on future exercises of stock options awarded to her pursuant to the terms and conditions of the decree of dissolution of marriage from April 26, 2009 to January 13, 2013 using an estimated federal tax rate of 35% plus Medicare of 1.56%.

On this record, we conclude the court did not abuse its discretion in enforcing the specific terms of the final decree and the CR 2A Agreement and awarding Teresa

No. 61638-2-1/16

damages to compensate her for the loss of her right to exercise the stock options before the future expiration dates set forth in the decree.⁷

Calculation of Damages

Daniel argues that if the court did not err in determining the measure of damages, the court erred in calculating the amount of damages.

The calculation of damages is a question of fact. Womack, 133 Wn. App. at 263. We determine whether the court's findings of fact are supported by substantial evidence. In re Marriage of Rockwell, 141 Wn. App. 235, 242, 170 P.3d 572 (2007). "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." Bering v. SHARE, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

The trial court relied on Nelson's expert testimony in calculating damages. While Daniel asserts that Nelson's calculations are based on speculation and challenges Nelson's assumptions, Daniel did not timely present any expert testimony to rebut Nelson's testimony. Unrebutted expert testimony is sufficient to support the trial court's calculation of damages, including future loss. Mayer v. Sto Industries, Inc., 156 Wn.2d 677, 695, 132 P.3d 115 (2006); Larsen v. Walton Plywood Co., 65 Wn.2d 1, 17, 390 P.2d 677 (1964) (expert testimony alone can support an award for loss of profits). Moreover, the record supports Nelson's expertise in business valuation,

⁷ For the first time on appeal, Daniel cites Roxas v. Marcos, 89 Haw. 91, 151, 969 P.2d 1209 (Haw. 1998), to argue that the court erred in calculating damages based on stock option values after entry of the decree. In Roxas, gold bars and a solid gold Buddha statue were allegedly sold many years before trial. The court held that the jury could determine what was a reasonable time in determining damages for replacement of the commodities between the conversion and the close of evidence at trial. Roxas, 89 Haw. at 151-52. The reasoning in Roxas does not apply in this case where the stock options were not a replaceable commodity and the court enforced the terms of the decree and the CR 2A Agreement to award damages.

No. 61638-2-1/17

including stock options and tax rates and his assumptions based on the historical stock prices.⁸ See Larsen, 65 Wn.2d at 20 (lost profit calculation based on historical data is not speculative). The court's calculation of damages is supported by substantial evidence.

Relying on Scully v. US WATS, Inc., 238 F.3d 497, 512-13 (3d Cir. 2001), and Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1305 (2d Cir. 1973), Daniel argues the evidence does not support the assumption that Teresa would have waited to exercise the stock options until the day before the expiration date. Daniel also argues that if he had been terminated from PACCAR, the options could have expired earlier.

In Scully, when the executive's employment contract was wrongly terminated, he was deprived of the opportunity to exercise options to buy stock. Scully, 238 F.3d at 503-04. In awarding damages, the court declined to accept the executive's "after-the-fact assertion that he would have sold stock at a time that, in hindsight, would have been particularly advantageous," and awarded damages based on breach of contract. Scully, 238 F.3d at 512-13.

In Gerstle, stockholders lost the opportunity to object to a merger based on the company's misrepresentation of the value of the assets in a proxy statement. The court held that allowing the stockholders to benefit from the highest value of the post-merger stock during the nine years before entry of judgment would be "grossly unfair." Gerstle, 478 F.2d at 1306.

⁸ After oral argument, Daniel filed a motion to take judicial notice of new evidence related to PACCAR stock prices. Teresa filed a motion to strike, arguing that Daniel's motion did not comply with the requirements of RAP 9.11. We deny Daniel's request to take judicial notice of PACCAR stock prices and grant Teresa's motion to strike.

No. 61638-2-1/18

Here, unlike in Scully and Gerstle, Nelson's unrebutted damage calculations do not rely on hindsight or unfair assumptions. Nelson's calculations are based on the expiration dates expressly agreed to in the 2A Agreement and set forth in the decree and historical market data.

In the alternative, Daniel contends that the court's use of a six per cent present value discount rate overcompensated Teresa. Below, Daniel relied on Kessler's report criticizing Nelson's use of a six per cent rate. Kessler asserted that "to determine the discount rate you must make assumptions about the risk of the underlying asset," and that a six per cent present value discount rate was too low for a stock investment. In response, Nelson asserted that the court's calculation of Teresa's loss is not a stock investment, but a "sum certain" that should be discounted at the standard rate of six per cent. The trial court's use of the six per cent rate was within the range of credible evidence and not an abuse of discretion. In the Matter of the Marriage of Sedlock, 69 Wn. App. 484, 491-92, 849 P.2d 1243 (1993).

Daniel also argues that the damage award is punitive. See Dailey v. North Coast Life Ins. Co., 129 Wn.2d 572, 574-75, 919 P.2d 589 (1996) (punitive damages generally contrary to public policy). At the hearing on Daniel's motion to reconsider, the court expressly addressed and rejected his argument that the award of damages was punitive.

And in this particular case - I mean, the Court is a court of equity. And Mr. Farmer exercised the stock options in August fraudulently. He knew he didn't have the authority to do so. And he continued to hide his actions and lie to this Court and try to finesse Mrs. Farmer into agreeing that they should be sold so that he wouldn't have to disclose what he had done.

Now, is that punitive to take that into account? I don't think so. Because what he was doing was just out-and-out fraud

not only to Mrs. Farmer, but also to this Court. He disclosed in October when he really had no other option but to do so.

So I - I thought about this. Is this punitive? Is this making him pay more than he's required to do so?

No. It's making him pay for what he did.

The judgment represents her loss. They -- she had the ability to exercise these stock options at some point in the future -- Not just today -- but at some point in the future. And the only information that I have is what the value of those would be in the future is the expert opinion that was provided to me.

Now, I thought very long and hard because of the cases that you provided to this Court. And just -- I keep coming up against the block of why if - if we provide that the damages will be on the date the stock - stock options were exercised, then we are rewarding Mr. Farmer's wrongdoing. We are letting him have his way for something he knew was wrong, but he didn't have the authority to do.

Is that punitive? No. That's saying you - you chose to make this decision. Now, here's the results of that decision.

The record supports the conclusion that the trial court's award of damages was not punitive.

Next, Daniel asserts the trial court erred in denying his motion for an evidentiary hearing to challenge Nelson's calculation of damages. Daniel also contends that the court erred by striking Kessler's critique of Nelson's calculation of damages. Daniel relies on Rogoski v. Hammond, 9 Wn. App. 500, 508, 513 P.2d 285 (1973), to argue that he had a due process right to challenge the expert testimony in an evidentiary hearing.

In Rogoski, a landlord sued a tenant for unpaid rent and obtained a writ of attachment on the tenant's property. On appeal, the court reversed on the grounds that the record was inadequate to determine whether a hearing below complied with due process. Rogoski, 9 Wn. App. at 511. The court stated that on remand the tenant

No. 61638-2-1/20

“has a right to produce evidence and arguments thereon, including the right to confront and cross-examine witnesses when those are used.” Rogoski, 9 Wn. App. at 508.

Here, unlike in Rogoski, Daniel did not timely request an evidentiary hearing or timely submit expert testimony. On March 22, 2007, Teresa submitted Nelson’s expert testimony on damages. In opposition, Daniel did not submit expert testimony and did not request an evidentiary hearing.⁹ On April 16, the court ruled that Teresa was entitled to damages based on Nelson’s testimony. On reconsideration, the court agreed that the judgment amount should be discounted to present value. The court requested additional testimony on the discount rate. In response, for the first time, Daniel submitted expert testimony criticizing Nelson’s calculation of damages. The court did not abuse its discretion in denying Daniel’s untimely request for an evidentiary hearing to challenge Nelson’s calculation of damages. In re Marriage of Rideout, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003). We also conclude that the court did not abuse its discretion in striking the portions of Kessler’s declaration addressing Nelson’s damages calculation as untimely. Thornton Creek Legal Def. Fund v. City of Seattle, 113 Wn. App. 34, 58, 52 P.3d 522 (2002).

Last, Daniel argues that the court erred by imposing 12 per cent statutory interest on the judgment. However below, Daniel asserted that Teresa was “entitled to statutory interest” at the rate of 12 per cent. We decline to review an argument raised for the first time on appeal. RAP 2.5(a); Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

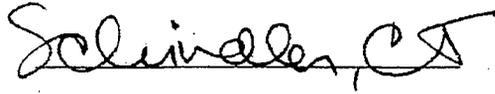
⁹ In addition, Daniel also insisted throughout the proceedings that all issues should be resolved by declaration on the court’s motion calendar as agreed to in the CR 2A Agreement.

No. 61638-2-1/21

Attorney Fees

Teresa requests attorney fees on appeal under the terms of the CR 2A Agreement. The CR 2A Agreement provides that “[t]he court may award attorney’s fees in the event the court concludes in its discretion that either party has by his or her actions frustrated the terms of this agreement and or has acted in bad faith.” Because Teresa is the prevailing party and Daniel does not challenge the trial court’s findings that he acted in bad faith in violating the terms of the CR 2A Agreement, upon compliance with RAP 18.1, Teresa is entitled to attorney fees on appeal.

We affirm.



WE CONCUR:

