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I. INTRODUCTION

This case involved a disputed valuation of Respondent/Cross-Appellant Steven B. Dixon's ("Respondent") interest in a law partnership under Washington's Uniform Partnership Act (Chap. 25.10 RCW). The Cross-Appeal in this case concerns the following assignment of error:

The reported opinions of the four experts who expressed opinions on the value of the Firm as a whole (Joseph Lawrence for Respondent; and Roland Nelson, Steven Kessler and James Weber for Appellants [Cross Respondents (collectively "Appellants")]) were that the value of Respondent's interest in the Firm would be based on two potential components of value: (1) the value of "goodwill" of the firm; and (2) the value of the tangible assets of the Firm. (*RP 94:22-96:21*).¹ Three out of four of these experts analyzed the value of the goodwill of the Firm utilizing a capitalization of excess earnings methodology. The methodology is described at *RP 96:25-116:8*. All of Appellants' experts concluded that there was no goodwill value for the Firm, but also concluded that there was a tangible asset value. (*Trial Ex. 32 at C000003 (Nelson); Trial Ex. 33 at C000030 and C000035 (Kessler); and Trial Ex. 34 at C000008 (Weber)*). The value of the tangible assets, as determined by Appellants' experts ranged from \$36,000 to \$47,000.

Judge Orlando made his own calculation of the value of the goodwill. (*CP 341-343*). Judge Orlando used the capitalization of excess earnings methodology using assumptions for discount rate and replacement compensation he believed were supported by the evidence. Judge Orlando concluded that the value of the goodwill was \$232,143, the principal amount awarded to Respondent in the Judgment. (*CP 370-373*). Judge Orlando made no

¹ A fifth expert, Alan VanderHamm, working in conjunction with Mr. Lawrence, opined on the present value of the income realized from the Kitsap County public defense contracts ("Contracts") between Respondent's disassociation and the termination dates in the Contracts.

separate award for the tangible assets. Respondent contends this is error.

In sum, the Trial Court used a valuation methodology which all the experts on both sides agreed would only value the intangible asset of good will of the partnership to calculate the total value of all of the assets of the partnership both tangible and intangible. In doing so, the Trial Court ignored undisputed testimony by experts on both sides that Respondent's share of the tangible assets had a value of \$36,000 to \$43,000.

As Respondent understands the Response to the Cross Appeal, Appellants assert:

1. Respondent's failure to specify the specific finding by finding number which is the subject of the Cross Appeal precludes this Court's consideration of the Cross Appeal.
2. The failure to make an award for the value of the tangible assets was not an abuse of discretion.

Respondent will address the issues in the above order.

II. APPLICABLE AUTHORITY AND DISCUSSION

A. The Failure of Respondent to Assign Error to a Specific Finding by Number Does Not Preclude Consideration of this Cross Appeal.

Appellants assert that this cross appeal is barred under RAP 10.3(g) because Respondent has failed to identify the specific finding at issue by number. In Finding No. 20, the Trial Court sets forth its calculation of the "value of the goodwill of the Crawford Firm" determining the value of Respondent's interest in the value of the goodwill to be \$243,750. The Trial Court utilized a "capitalization of excess earnings" method which the experts uniformly testified was a methodology for valuing goodwill only.

The Trial Court then reduced the amount by the amount of income taxes payable by the partnership to realize a net value of Respondent's interest of \$232,143. The Finding at issue is Finding No. 24: "The value of Dixon's interest in the Crawford Firm as of the date of disassociation is \$232,143.00, including both tangible and intangible assets." The value of both tangible and intangible assets as determined by the Trial Court was equal the value of the intangible assets by themselves.

However, the net asset value, after consideration of partnership debt, of Respondent's share of the tangible assets determined by the experts was between \$36,000 and \$43,000. (*Trial Ex. 33 at C000030 and C000035 (Kessler)*; and *Trial Ex. 34 at C000008 (Weber)*). The undisputed testimony was then that the total value of Respondent/Cross Appellant's interest in the total assets of the partnership would exceed the value of the intangible goodwill asset by at least \$36,000.

RAP 10.3(g) does not provide the kind of absolute bar to consideration of the Cross Appeal which Appellants/Cross Respondents assert:

In a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief ... so that the court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue.

State v. Olson, 126 Wn.2d 315, 323, 893 P.2d 629 (1995). In this same regard, RAP 1.2 provides: "[c]ases and issues will not be determined on the basis of compliance or noncompliance with these rules except in

compelling circumstances where justice demands”. There is no compelling basis to preclude review here.

Both Finding Nos. 20 and 24 were assigned error by Appellants. (*Appellants’ Opening Brief at ¶¶ 5 and 7*). The specific relief sought by Appellants is that: “this Court should reverse and remand with directions to establish the buyout price based solely on the partnership’s ethically divisible tangible assets.” (*Appellants’ Opening Brief at ¶ 36*). Thus, the Trial Court’s determination of the value of Respondent’s interest, and the Findings related thereto were already at issue. The issue raised by the Respondent/Cross Appellant is directly related to the issue raised by Appellants/Cross Respondents

The Assignment of Error is both explicit and detailed as to the basis for the Cross Appeal. The value of the tangible assets is not in dispute and Appellants themselves assigned error to the methodology whereby the Trial Court determined the value of Respondent’s interest in the partnership. In this situation, the potential for the Court to be inconvenienced or the Appellants to be prejudiced is non-existent. There is no compelling reason for this Court not to consider the issues raised by the Cross Appeal.

B. The Failure to Make an Award for the Value of the Tangible Assets Based on the Undisputed Evidence was an Abuse of Discretion.

Respondent does not dispute that damage awards fall within the discretion of the Trial Court. However, Respondent disputes that the award here falls within the range of evidence. Where the decision or order of Trial Court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion

manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12 at 26, 482 P.2d 775 (1971).

The Trial Court, on its own, calculated the value of the intangible assets – goodwill – using a methodology advocated by experts on both sides as appropriate for calculating the value of goodwill. The trial Court specifically found that value, net of taxes, to be \$232,143. None of the experts testified that the value determined by this methodology would include any value for tangible assets and, each of the experts using this method separately valued the tangible assets. The Trial Court found at Finding No. 24: “The value of Dixon’s interest in the Crawford Firm as of the date of disassociation is \$232,143.00, including both tangible and intangible assets.” The value of both tangible and intangible assets as determined by the Trial Court was, therefore, equal to the value of the intangible assets by themselves.

However, the net asset value, after consideration of partnership debt, of Respondent’s share of the tangible assets determined by the experts was between \$36,000 and \$43,000. (*Trial Ex. 33 at C000030 and C000035 (Kessler)*; *Trial Ex. 34 at C000008 (Weber)*; and *Trial Ex. 30 (Lawrence)*). The undisputed testimony was then that the total value of Respondent/Cross Appellant’s interest in the total assets of the partnership would exceed the value of the intangible goodwill asset by at least \$36,000.

With all due respect to the Trial Court, and irrespective of whether the final value determined by the Trial Court is “within the range of the evidence,” the Findings of the Trial Court are nevertheless internally

inconsistent and cannot be reconciled with the Trial Court's own determination of the value of goodwill by itself. In light of uncontested evidence that Respondent's share of the tangible assets was a positive number, there is simply no reasonable basis on which to conclude that the value of the intangible assets by themselves is equal to the total value of all of the assets. The only way that the Trial Court could conclude that the value of the intangible assets by themselves is equal to the total value of all of the assets is if the Trial Court concluded the tangible assets had no value.

That conclusion simply cannot be squared with the undisputed conclusions of every expert who valued all the assets that (1) the value of Respondent's interest would be the sum of Respondent's interest in the goodwill plus the value of Respondent's interest in the tangible assets and (2) that the tangible assets had a minimum value of \$36,000 over and above the value of the goodwill. The failure to award an amount for the value of the tangible assets in addition to the value of goodwill is manifestly unreasonable.

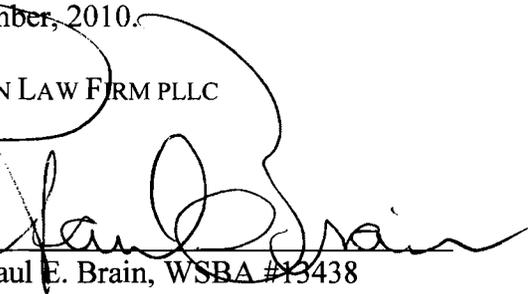
III. CONCLUSION

Respondent respectfully submits that this matter should be remanded to the Trial Court for a determination of the value of the tangible assets with direction to the Trial Court that the amount so determined be added to the amounts previously awarded for goodwill, plus interest thereon.

DATED this 29th day of November, 2010.

BRAIN LAW FIRM PLLC

By:


Paul E. Brain, WSBA #13438

Counsel for Respondent/Cross-Appellant
Steve B. Dixon

CERTIFICATE OF SERVICE

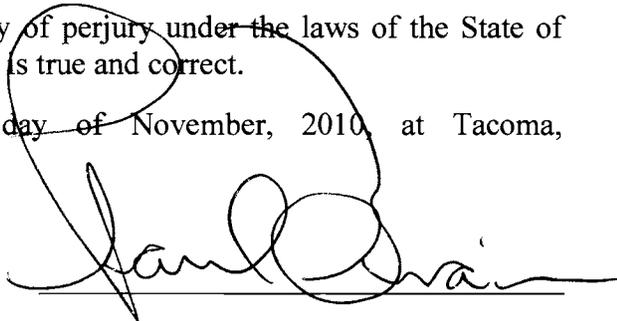
I hereby certify that I have this 29th day of November, 2010, served a true and correct copy of the foregoing document upon counsel of record, via the methods noted below, properly addressed as follows:

Attorneys for Appellants:

| | | |
|---|-------------------------------------|--|
| Catherine W. Smith | <input type="checkbox"/> | Hand Delivery |
| Edwards, Sieh, Smith & Goodfriend, P.S. | <input type="checkbox"/> | U.S. Mail (first-class, postage prepaid) |
| 1109 First Avenue, Suite 500 | <input type="checkbox"/> | Facsimile |
| Seattle, WA 98101-2988 | <input checked="" type="checkbox"/> | Email |

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

DATED this 29th day of November, 2010, at Tacoma, Washington.



A handwritten signature in black ink, appearing to read "Paul Davis", is written over a horizontal line. The signature is stylized and somewhat cursive.

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