

*Cross-Res. Reply*

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON  
BY *[Signature]*

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

No. 38354-3-II

Boris Nadein, Appellant/Cross-respondent

v.

William Turner and Unimak Maritime Group, LLC,  
Respondents/Cross-appellants

REPLY OF APPELLANT

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Appellant Boris Nadein assigned error to the trial court's decision to dismiss Unimak Maritime Group (UMG) on summary judgment before trial, restricting Nadein's discovery against UMG, and striking the testimony of Nadein's economic expert, Kell Rabern. Appellee William Turner argues that Appellant Nadein's appeal should be denied because Nadein cannot show how he was adversely affected by UMG's dismissal; Nadein cannot demonstrate that he was prejudiced by the discovery restrictions ordered by the trial court; and that the trial court was within its discretion to strike the testimony of Rabern. These arguments are not well founded, as discussed below.

**I. Turner's Brief Includes Factual Mistatements.**

Turner's brief attempts to distract from what actually occurred in this case - Turner's conduct that preceded the lawsuit. To summarize, Turner and Nadein were co-owners and members of Unimak America, LLC. The company managed fishing vessels and sold seafood. It had two main customers, Russian fishing companies that hired UA to manage their fishing vessels and sell the products. Mr. Nadein made a good living from this company.

In 2005, Turner decided he did not want Nadein to be involved in the business anymore. He offered Nadein \$129,815.50, far less than half

the company was worth. (RP 92) When Nadein refused, Turner unilaterally closed UA on April 15, 2005. (RP 465) The next business day, Monday, April 18, 2005, Turner opened UMG, in the same offices, with the same phone number, and same personnel, except Nadein. (RP 504) That same day, Turner also signed new contracts with the two Russian fishing companies that UA had been doing business with right up to the day UA closed. (RP 480, lines 11-15) The contracts were very nearly the same as the UA contracts, and Turner even admitted the person drafting them had used an earlier UA contract to work from. (RP 490-91) UMG paid nothing for UA's goodwill. (RP 555)

The trial court held that Turner had wrongfully dissolved the company, and had taken UA goodwill without any compensation. (RP 593) But the trial court also struck the testimony of Nadein's economic expert and then directed verdict against Nadein because he had no evidence concerning the value of the goodwill converted by Turner. (RP 599)

Turner introduces several alleged facts that are not supported by the record. He alleges that "Nadein could never have profited from UA's biggest asset – its business with Rassvet" because of a letter sent by Nadein to the Russian police. (Brief of Respondent at 12.) But the letter was not sent until August, 2006 (CP 423), while Turner dissolved UA in

April 2005, more than a year earlier. Even Turner admits the letter was sent as a result of the litigation caused by the dissolution. (Brief of Respondent's at p. 3.) Therefore, the letter and any alleged results thereof, are irrelevant to whether UA's goodwill had value in April 2005, when Turner converted it.

Turner also claims inaccurately that Nadein had access to "each and every document that pertained in any way to the only two customers UA had in common with Turner's new entity, Unimak Maritime Group." (Brief of Respondent at p. 3.) This is both untrue and contradicted by the record. In fact, Nadein moved for production of financial information concerning Unimak Maritime Group. (CP 17) The Court granted Nadein access only to agreements between UMG and UA's, former clients, communications with those clients "related to the changeover from UA and UMG," and the "volume of business" with those UA clients. (CP 94) There is no evidence in the record that Nadein received "each and every document that pertained in any way" to the common clients as Turner now alleges.

The production of the approximately 25 boxes of documents cited by Turner occurred in January, 2006. (RP 266, lines 4-19) Turner objected to producing any UMG financial documents in his February 1, 2006. (CP 81-82) In his opposition to Nadein's April 13, 2006 motion to

compel, Turner stated “Unimak Maritime has provided the names of the clients it has in common with Unimak America ... but it should not be required to turn over anything more.” (CP 90, lines 18-20) As of April 2006, Turner had not produced any financial documents concerning UMG, and he did not produce any such documents later. Turner’s claim now that Nadein received all of the documents pertaining to the common clients is simply false.

**II. Unimak Maritime Group Was Potentially Liable Because It Received Unimak America’s Goodwill, Without Paying Compensation.**

Nadein assigned error to the dismissal of UMG on summary judgment. Turner raises two main arguments in opposing reversal. First, Turner contends that UMG could not be liable as a matter of law, and criticizes the decision in Lang v. Hougan, 136 Wash.App. 708, 150 P.3d 622 (2007), *rev. denied* 163 Wash.2d 1018, 180 P.3d 1292 (2008). Second, Turner contends the dismissal of UMG was irrelevant, because Turner was still available to cover any judgment. Turner is incorrect in his first argument, and only partially correct in his second.

**A. Unimak Maritime Group Was Potentially Liable Because It Received Unimak America’s Goodwill, Without Paying Compensation.**

Turner repeatedly discusses UMG’s liability in the context of piercing the corporate veil. In fact, UMG’s liability arises directly from its

own act of conversion. UMG accepted UA's goodwill without paying any compensation, and it was aware, because its principal Turner was aware, that no compensation had been paid. Under these circumstances, UMG can be liable to Nadein and UA for conversion. The corporate veil doctrine is simply irrelevant.

Turner urges the Court to rethink, or at least distinguish, Lang v. Hougan, *supra*. However, the cases Turner relies on are in no way inconsistent with Lang. And Turner's spectre that the Lang case will cause a huge number of appeals by ex-partners is unsupported beyond the rhetoric of respondent.

Turner relies primarily on Noble v. Lubrin, 114 Wn. App. 812, 60 P.3d 1224 (2003). In Noble, a partnership contracted with the Evergreen Fairgrounds to conduct swap meets and a Christmas show. The contracts were one year contracts. One partner sued after the other formed a new company that entered into contracts for the flea market and Christmas show in following years. The trial court found that the partners had no reasonable expectancy of obtaining future contracts. 114 Wn. App. at 820. The Court of Appeals adopted the "line of business" test, and affirmed on other grounds. It held that the subsequent contracts were within the partnership's line of business, but that the defendant had met

his burden to show that the partnership was financially unable to take advantage of the new opportunity.

In contrast, in this case, UA's business with the Russian fishing companies was ongoing, and had been continuous for several years. Similarly, in Lang, the partnership had ongoing existing clients. Unlike Noble, this case and Lang involved existing and ongoing business that was appropriated by a partner or member. The trial court held UA had an existing customer base, and that Turner converted the customer base to his new company without paying compensation. (RP 593)

Turner also relies on Bishop of Victoria Corp. Sole v. Corporate Business Park, LLC, 138 Wash.App. 443, 158 P.3d 1183 (2007) to urge the Court to reconsider Lang. However, Turner's summary of Bishop of Victoria leaves out the relevant facts, which are far different than in Lang and the present case. The partnership in Bishop of Victoria owned property that was in foreclosure because the partnership did not have sufficient funds to pay the mortgage. The defendant bought the creditor's claim as a means of protecting itself from further liability. The appellate court reviewed all of the defendant's actions and determined that none of them prejudiced the partnership, which was no longer financially viable. In this case and Lang, the entities had ongoing business that was taken by

one of the partners. Other than general principles concerning partners' fiduciary duties, Bishop of Victoria has no relevance to this case.

**B. UMG's Dismissal on Summary Judgment Affected the Course of Discovery and Prejudiced Nadein**

Turner contends that the dismissal of UMG is a case of no harm no foul. This is only partially true. Turner is correct that there is no evidence that UMG was a necessary defendant in order for Nadein to obtain a complete recovery. However, it is apparent that the trial court allowed the dismissal of UMG to affect its decision on how much discovery would be permitted. The trial court improperly restricted the discovery Nadein could obtain from UMG, preventing him from obtaining critical evidence on the value of the goodwill Turner converted, as discussed below. It is likely the trial court would have allowed a broader scope of discovery if UMG had remained a defendant.

In any event, as discussed below, this matter must be remanded for a partial retrial on the issue of goodwill, at least. Because UMG should not have been dismissed on summary judgment, Nadein's claims against it should be reinstated, and UMG should be a defendant in the retrial.

**III. The Trial Court Improperly Restricted Nadein's Discovery Against UMG, and Prevented Him From Obtaining Information Relevant To Damages.**

Nadein contends that the trial court's refusal to permit him to obtain financial information from UMG prejudiced him by preventing him

from obtaining the best evidence concerning the value of the goodwill Turner converted from UA – the profit UMG realized from that goodwill. Nadein made exactly this point in his original motion to compel. (CP 17, lines 10-26.)

In response, Turner contends Nadein got everything he asked for. Turner does this through sleight of hand. He correctly cites the language of the trial court's order: "any agreements, volume of business, all communications between those clients related to the changeover from UA to UMG." From this language, Turner contends that Nadein had the means to determine the profits UMG made from using UA's assets. BR 13-14.) But the trial court's order is more restrictive than Turner now interprets it. And as discussed above, Nadein never received any UMG financial records.

In order to determine the profit UMG made from its business with the Russian fishing companies, Nadein needed to have access to UMG's financial records, which is what Nadein requested and Turner objected to providing. (CP 81.) The trial court compelled production of only the agreements and communications between UMG and UA's former clients, and "the volume of business". Plainly, with only the discovery authorized by the court, Nadein could do more than guess what profit UMG had made from the former UA customers.

**IV. The Trial Court Should Not Have Excluded Rabern's Testimony on Grounds Not Raised by Turner.**

Turner claims Nadein did not exclude Rabern's opinion concerning the value of the goodwill converted by Turner. It is difficult to understand the basis for this statement. The trial court's ruling on the testimony of Kell Rabern was "I am going to I guess at the same time strike the testimony regarding goodwill, and the conclusion that this company had an intangible value for goodwill." (RP 599) Apparently, Turner believes there is some distinction between striking Rabern's testimony versus excluding it. If so, his brief does not explain what the difference is. In any event, after the trial court struck Rabern's testimony concerning goodwill, it granted a directed verdict against Nadein on that issue, holding Nadein had failed to prove damages - that the goodwill taken by Turner without compensation had value.

Turner's brief highlights the unusual nature of the trial court's decision to exclude Rabern, and the difficulty it created for Nadein. Turner cites a number of documents or evidence that he claims Rabern failed to consider in formulating his opinion. (Brief of Respondent at p. 5-7.) These same issues were raised by Turner at trial. Nadein contended that Turner's criticisms were more theoretical than real, and that Turner failed to show any of issues he raised were accurate, or if accurate, would

have been relevant Rabern's opinion. The trial court's decision to strike Rabern's testimony includes none of the criticisms raised by Turner. Turner had no accounting expert. Instead, the trial court raised new issues, such as Rabern's decision to use \$500,000 for 2005 expenses even though the company closed in April, 2005 (RP 598-99).<sup>1</sup> Because the trial court based its decision to strike Rabern's testimony on grounds not raised by Turner, Nadein was prevented from responding to those criticisms.

It is difficult to understand how Turner can contend that Nadein did not prove he was damaged. Nadein established that he was receiving income from UA, and that that income stopped once Turner improperly dissolved the LLC, and converted its two biggest customers to Turner's new company. The trial court held this caused damage to Nadein. (RP 593.) The only question is the amount of Nadein's damages. "[W]here the fact of damage is firmly established, the wrongdoer is not free of liability because of difficulty in establishing the dollar amount of damages. Reefer Queen Co. v. Marine Const. & Design Co., 73 Wash.2d 774, 781, 440 P.2d 448 (1968). Once damage is shown, absolute certainty is not required. Alpine Industries, Inc. v. Gohl, 30 Wash.App. 750, 755, 637 P.2d 998 (1981).

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<sup>1</sup> Ironically, if Rabern had pro-rated expenses only through April 15 when the business closed, the expenses would have been lower and the profit

Mr. Rabern was attempting to show the value of the goodwill based on the “capitalization of income” method. (RP 595.) A large part of the trial court’s criticism of Rabern’s opinion was based on the difficulty he had splitting out income from various sources from the records available. The trial court’s decision to strike his testimony on goodwill arose from its concern that his methods were too “speculative.” Of course, if the trial court had permitted Nadein to obtain documents showing the profits UMG made from UA’s former clients, Nadein would have had not only an alternate means of proving his damages, but his expert would have had a yardstick by which he could have refined and verified his analysis.

Nadein was damaged by Turner’s fiduciary breach when he improperly closed UA and took its biggest customers. Turner should not profit from his bad acts simply because it is difficult to calculate the amount of damages. The Court should remand the issue of the value of the converted goodwill to the trial court.

**V. Nadein Preserved His Objections At The Trial Court Level.**

Turner claims that Nadein has changed his basis for seeking discovery from the rationale provided to the trial court. That is not true. Nadein’s motion to compel stated the UMG financial information was \_\_\_\_\_ and value of goodwill higher.

necessary to show UMG's profit from the UA customers. (CP 17) Nadein also stated that UMG's financial arrangements with its vendors might be relevant to liability. (CP 17-18)

Turner fails to identify any instance when Nadein failed to raise an argument or objection at the trial court level that would justify the Court's refusal to consider his arguments on appeal.

**VI. Turner Failed to Preserve His Assignments of Error.**

Turner assigned error to two trial court rulings: the March 2, 2007 order denying Turner's motion for summary judgment, and its April 18, 2008 order dismissing certain claims asserted by Turner in the receivership. After listing these assignments of error, Turner's brief does not discuss either of these orders or why the trial court should be reversed. Therefore, Turner has waived his cross-appeal.

**A. Turner Failed To Even Mention The April 18, 2008 Order, And His Appeal Is Therefore Waived.**

The trial court's April 18, 2008 order granted summary judgment against Turner on certain claims he had filed in the UA receivership, after the receiver filed a claims bar notice. Nadein moved to have the claims dismissed, and the receiver joined the motion. Although the issue is designated an error by Turner, he fails to even mention what the order was, much less the context or why the court's order was incorrect.

The appellate rules require appellants to assign error and to develop the basis for the assignment of error. “[W]ithout argument or authority to support it, an appellant waives an assignment of error.” Bercier v. Kiga, 127 Wash.App. 809, 824, 103 P.3d 232 (2004). The court “need not consider arguments that are not developed in the briefs and for which a party has not cited authority.” Id. Because Turner did not even identify the alleged error in the court’s April 18, 2008 order, he has waived the assignment and the court should not consider it.

**B. Turner Did Not Preserve His Assignment of Error Regarding The Court’s March 2, 2007 Order Denying Summary Judgment.**

Turner also assigned error to the trial court’s denial of Turner’s motion for summary judgment dismissal just before trial. However, Turner once again does not advise what the specific order was nor does he address what error the trial court made in denying his motion. Therefore, as discussed above, Turner waived this assignment of error.

Turner does suggest the Court should reconsider Lang, 136 Wash.App. 708. However, Turner fails to discuss how such reconsideration would interact with the March 2, 2007 order, or what part of the order it objects to, much less why the Court should therefore reverse the trial court’s ruling. And it would be inappropriate to allow Turner a reply in which to raise new arguments for the first time. An issue argued

for the first time in a reply brief is too late to warrant consideration.

Cowiche Canyon Conservancy v. Bosley, 118 Wash.2d 801, 809, 828 P.2d 549 (1992). Turner has waived his assignments of error, and any reply supporting those assignments should be disregarded.

**VII. CONCLUSION**

Each of Turner's arguments as summarized in his conclusion are unsupported by the record, as discussed above. This matter should be remanded to the trial court for a new trial on the issue of damages, with UMG reinstated as a defendant, and with direction to the trial court to permit discovery of UMG's financial records.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of July, 2009.

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By  \_\_\_\_\_  
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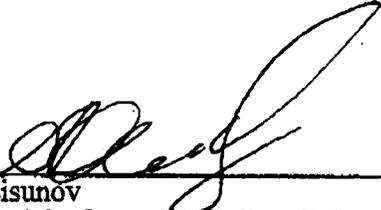
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