

Cross-App. Brief

FILED
COURT OF APPEALS
DIVISION II

09 JUN -9 PM 1:55

STATE OF WASHINGTON
BY *KS* DEPUTY

No. 38354-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Boris Nadein, Appellant/Cross-Respondent

v.

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

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

Daniel P. Harris, WSBA #16778
Charles Moure, WSBA #23701
John F.S. Rapp, WSBA #17286
Attorneys for Turner and UMG
Harris & Moure
600 Stewart Street, Suite 1200
Seattle, WA 98101
(206) 224-5657

1/18/10 1117

ORIGINAL

TABLE OF CONTENTS

	Page(s)
TABLE OF CASES AND OTHER AUTHORITIES.....	i
I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR (CROSS-APPEAL).....	4
Assignments of Error	
No. 1.....	4
No. 2.....	4
Issues Pertaining to Assignments of Error (both Appeal and Cross Appeal)	
No. 1.....	4
No. 2.....	4
No. 3.....	5
No. 4.....	5
III. STATEMENT OF THE CASE.....	5
IV. ARGUMENT.....	7
A. The Court Properly Refused to Pierce the Corporate Veil of UMG.....	8
B. The Court Exercised Proper Discretion to Keep Discovery Focused.....	13
C. The Court Properly Declined to Accept Nadein’s Goodwill Amount.....	16
V. CONCLUSION.....	21

TABLE OF CASES AND OTHER AUTHORITIES

Cases	Page(s)
<u>Bishop of Victoria Corp. Sole v. Finley</u> , 138 Wn.App. 443, 158 P.3d 1183 (2007).....	12,13
<u>Carlson v. Leonardo Truck Lines</u> , 13 Wn.App. 795, 802, 538 P.2d 130 (1975).....	18
<u>Conkle v. Jeong</u> , 73 F.3d 909, 914 (9 th Cir. 1994).....	15
<u>Eagle Pac. Ins. Co. v. Christensen</u> , 85 Wn.App. 695, 934 P.2d 715 (1997).....	9
<u>ESCA v. KPMG Peat Marwick</u> , 86 Wn.App. 628, 939 P.2d 1228 (1997), <u>aff'd</u> , 135 Wn.2d 820, 959 P.2d 651 (1998).....	18, 19
<u>Gail Landau Young v. Hedreen</u> , 63 Wn.App. 91, 816 P.2d 762 (1991).....	9
<u>Hadley v. Cowan</u> , 60 Wn.App. 433, 444, 804 P.2d 1271 (1991).....	7
<u>Hansen v. Washington Natural Gas</u> , 95 Wn.2d 773, 779, 632 P.2d 504 (1981).....	19
<u>Kenworthy v. Kleinberg</u> , 182 Wn. 425, 47 P.2d 825 (1935).....	17
<u>Lang v. Hougan</u> , 136 Wn.App. 708, 150 P.3d 622 (2007), <u>rev. denied</u> , 163 Wn.2d 1018, 180 P.3d 1292 (2008).....	4, 8, 10, 11, 12, 13, 18, 22
<u>Lewis River Golf v. Scott</u> , 120 Wn.2d 712, 845 P.2d 987 (1993).....	17
<u>Lindblad v. Boeing</u> , 108 Wn.App. 198, 207, 31 P.3d 1 (2001).....	8, 15
<u>Maxwell v. Gallagher</u> , 709 A.2d 100 (D.C. App. 1998).....	17

<u>Meyer v. University</u> , 105 Wn.2d 947, 853, 719 P.2d 98 (1986).....	19
<u>Miksis v. Howard</u> , 106 F.3d 754, 758 (7 th Cir. 1997).....	14
<u>Moise v. Hodges</u> , 156 Wn. 591, 287 P. 878 (1930).....	18
<u>Nakata v. Blue Bird</u> , 2008-WA-0905.316, 191 P.3d 900, 905.....	14
<u>Noble v. Lubrin</u> , 114 Wn.App. 812, 60 P.3d 1224 (2003).....	10, 11, 12, 13
<u>Norhawk Investments, Inc. v. Subway Sandwich Shops, Inc.</u> , 61 Wn.App. 395, 811 P.2d 221 (1991).....	9
<u>Pappas v. Zerwoodis</u> , 21 Wn.2d 725, 735-36,153 P.2d 170 (1944).....	16
<u>Pelletier v. Main Street Textiles</u> , 470 F.3d 48, 55-56 (1 st Cir. 2006).....	18
<u>Thongchoom v. Graco Children’s Products</u> , 117 Wn.App. 299, 308-09, 71 P.3d 214 (2003).....	15
<u>Truckweld Equipment Co. v. Olson</u> , 26 Wn.App, 638, 643-44, 618 P.2d 1017 (1980).....	9, 10
<u>Trust Fund v. Harold Jordan Co.</u> , 52 Wn.App. 387, 760 P.2d 382 (1988).....	9
<u>West Coast, Inc. v. Snohomish County</u> , 112 Wn.App. 200, 206, 48 P.3d 997 (2002).....	18
<u>Winston v. State Dep’t of Corrections</u> , 130 Wn.App. 61, 65, 121 P.3d 1201, 1203 (2005).....	15

I. INTRODUCTION.

The brief of Appellant/Cross-Respondent Nadein (“Nadein”) is meritless. Maybe it would be more powerful for those who had not seen the trial or studied this transcript. For those who know the facts, this appeal is abjectly aspirational.

Nadein tries to portray this trial as some kind of rigged game – i.e., Nadein was unable to prove damage, because his expert valuation was rejected, because he could not get critical data. Nothing is further from the facts of this case. Nor does Nadein build credibility by attacking the trial court for dismissing Unimak Maritime Group (“UMG”) – when he has never attempted to make any showing, at trial or on appeal, that an additional “pocket” was or is needed to secure his rights – or that UMG’s corporate forms were ever abused in ways that could conceivably impose upon UMG separate or additional liability, independent of its owner, Respondent/Cross-Appellant Turner (“Turner”). Nadein might as well have appealed the dismissal of Ms. Dorsey, Unimak America’s (“UA”) office bookkeeper, whom Nadein sued personally (for *in terrorem* effect). In fact, no facts support Nadein’s appeal.

This trial and appeal were, and are, just two parts of Nadein’s multi-year litigation battle – which continues – which has been ably-handled by a careful and longsuffering judge. Far from bestowing upon

Turner whatever he wants (as Nadein implies), Judge Haberly repeatedly adjudicated each issue and dispute by engaging in a precise weighing of law and evidence.

For example, in the very Final Judgment which Nadein appeals, Judge Haberly listed 7 Findings of Fact and 3 Conclusions of Law. Judge Haberly held adversely to Turner in fully 6 of these 10 holdings. She held against Turner on liability, and she forced him to bear all of his own costs. She ordered him to repay the parties' old entity, Unimak America ("UA), over \$60,000. She found that Turner had not paid for UA's goodwill.

Most of this appeal thus resolves to one practical issue: Could this judge, in this bench trial, reasonably decline to accept the conclusion of Kell Rabern, Nadein's expert witness, that UA had significant goodwill? She reasonably rejected it. For his testimony was unhelpful, incredible, and uninformed by critical evidence. For example, Rabern did not listen to Nadein's own trial testimony, where Nadein testified about UA's value. Nor did he read Nadein's deposition. Nor did he review the many documents available to him that he admitted could alter his estimate of goodwill – which he admitted could be wrong by up to 50 percent! RP 377.

Among the documents available to Rabern were 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 ("UMG"). Nadein's claims to lack these documents – now, at trial, and before trial – are flatly false. Instead, he and Rabern simply declined to look at the documents Turner offered them – repeatedly. For example, testimony at trial established that although Turner produced 25 boxes of financial documents, Rabern saw only 12 of the boxes. Nadein plainly chose to be selective in giving Rabern information. Nadein also chose to wait until now to clarify the relevance of much discovery he sought.

Finally, Nadein's appeal from the trial court's dismissal of UMG also fails because that dismissal has no substantive impact. How are Nadein's substantial rights affected by this dismissal? Nadein has never even tried to show that assets of UA or Turner are insufficient to pay Nadein's half of UA. Nor did he demonstrate at trial why UMG's new, and unrelated, businesses could conceivably be his. And if the value of UA's goodwill was nothing, then UMG could gain nothing from UA.

In sum, Nadein's appeal is just another instance of his love of vexatious litigation. When Nadein first started losing this case, he sent some of his false claims from this case (along with UA internal documents and accounting records) to the Russian FSB, the successor to the KGB. CP 420-23 & 772 *et seq.* He falsely denounced UA's biggest debtor, Rassvet, to the FSB, as part of an "international fishing mafia." RP 240-

41. He made these false charges despite a Confidentiality Order issued by Judge Haberly, and his doing so caused grave harm to Rassvet, UA's biggest debtor, thus hugely reducing UA's dissolution value. RP 479. After trial, Nadein arbitrated to try to avoid paying his financier of this case, Oleg Nikitenko (a Unimak competitor: RP 604).

Now Nadein wants this trial repeated over and over again until he wins, or Turner gives in. This Court should not allow its services to be so diverted.

II. ASSIGNMENTS OF ERROR (CROSS-APPEAL).

No. 1: The trial court erred in entering its March 2, 2007, Order Denying Turner's Motion for Summary Judgment.

No. 2: The trial court erred in entering its April 18, 2008, Order on Summary Judgment.

Issues Pertaining to Assignments of Error (both Appeal, and Cross-Appeal).

No. 1: Should dissolution of a closely-held entity justify piercing the corporate veil of the ex-partners' new companies, pursuant to Lang v. Hougan, 136 Wn.App. 708, 150 P.3d 622 (2007), *rev. denied*, 163 Wn.2d 1018, 180 P.3d 1292 (2008)?

No. 2: Was Lang v. Hougan wrongly decided?

No. 3: Does a court abuse its discretion by ordering discovery only of information relating to “clients in common” between a dissolving LLC and a party’s nonparty LLC?

No. 4: Must a trial judge, sitting without a jury, overlook an accountant’s guesses, contradictions and lack of foundation just because the judge is not an accountant herself?

III. STATEMENT OF THE CASE.

Beyond some snide “spin,” Nadein’s Statement of the Case is mainly factual. So Turner will not burden the Court with a counter-statement here, except to note some key points. First, the court-appointed Receiver, Jan Kallshian, confirmed without hesitation about UA: “Books and records are maintained on a current basis. Bank statements are reconciled. All the details that I would normally expect to see are there. They are complete.” RP 576.

By contrast, here is a partial list of the inadequacies of Nadein’s purported expert, and his goodwill “opinion.”

- a. He had never dealt before with Russian fishing companies, or other international business. RP 294, 354, 371-72.
- b. He never spoke on or chaired a seminar or course on valuation. RP 295.
- c. He never wrote on valuation. RP 296.

- d. Business valuation certificates are available. He has none.
RP 296 & 301.
- e. He never reviewed Nadein's deposition. RP 297.
- f. He did not listen to Nadein's testimony, and he was not asked to. RP 297.
- g. He never reviewed UA's full ledger, though he would like to have done so. RP 297-98.
- h. He reviewed 12 of 25 boxes of documents produced to Nadein. RP 298.
- i. He knew nothing about international fish prices for 2003-2006. RP 300.
- j. He knew nothing about vessel fuel prices for 2003-2004.
RP 300.
- k. He never did any valuation work for an international company. RP 300.
- l. He knew nothing about the value of the Russian ruble. RP 300.
- m. He did no work for entities that deal in fluctuating currency. RP 300-01.
- n. He has read nothing on fishing, or vessel management/valuation. RP 301-02.

- o. He never talked with the court-appointed Receiver, Jan Kallshian. RP 305.
- p. He knew nothing about collecting debts from Russian entities. RP 305.
- q. He did not know Pusan (home of Unimak Korea) is in Korea. RP 305-06.
- r. He did no research on the health of the Russian fishing industry. RP 307.
- s. He knew nothing about the services performed by UA's two biggest vendors. RP 307.
- t. He did not discount the goodwill value of UA at all due to the letter from UA's biggest customer, Rassvet, declaring it would do no future business with any company with which Nadein had an association. RP 343.

Finally, this whole trial was unnecessary, as these fatal flaws were evident in Nadein's case before trial. *See* CP 332 *et seq.*

IV. ARGUMENT.

Nadein bears a heavy burden on appeal: "on appeal, an order may be sustained on any basis supported by the record." Hadley v. Cowan, 60 Wn.App. 433, 444, 804 P.2d 1271 (1991). This record is rife with examples of the good job Judge Haberly did.

And Nadein's burden is heavier yet, given his sketchy objections in the trial court. Particularly as to Nadein's current contentions about how fine his expert's goodwill opinion was – and how material UMG's documents were – he did not give Judge Haberly sufficient notice of the flaws Nadein now sees in her rulings. This matters. For this Court “will not review an issue, theory, argument, or claim of error not presented at the trial court level.” Lindblad v. Boeing, 108 Wn.App. 198, 207, 31 P.3d 1 (2001).

A. The Court Properly Refused to Pierce the Corporate Veil of UMG.

1. Lang v. Hougan Does Not Mandate Liability for UMG.

Nadein relies on Lang v. Hougan, 136 Wn.App. 708, 150 P.3d 622 (2007), *rev. denied*, 163 Wn.2d 1018, 180 P.3d 1292 (2008). Judge Haberly also adopted some of the Lang analysis (wrongly, we contend); but only regarding goodwill. Nadein presses Lang further – to mandate that UMG bear separate liability. That is not what Lang held.

Indeed, in Lang, the trial court held, and was affirmed, in refusing to find wrongful the defendant's having (as plaintiff put it) “killed the corporation” by depriving him of an allegedly essential part of the failed business. *Id.* at 625. This is precisely Nadein's core claim. The key holding of Lang is that partners's fiduciary duties “continue while the

business [is] breaking apart.” *Id.* at 626. Even if this holding is correct, Turner has always denied violating his duties to Nadein by forming and operating UMG. And he denies that even had he acted badly, his acts could necessarily inculcate UMG.

Nadein fails to show why UMG’s corporate veil should be pierced sufficiently to transfer all Turner’s winding-up of UA into UMG’s liabilities. Nadein offers neither law nor facts – only this *ipse dixit*, without citation: “that Turner actually transferred the good will is irrelevant. UMG, through its principal Turner, was aware of the circumstances of this transfer.” *Appellant’s Opening Brief* (“AOB”), p. 11. This “awareness doctrine” claims too much. Nadein would change the corporate code of Washington were his expansive “awareness” rule adopted. Awareness is not an act justifying liability.

For every sole proprietor company is “aware” of whatever is in its owner’s mind. Awareness is not enough. Nadein’s interpretation is not the law. Instead, the general rule of Washington law has long been to maintain corporate identity. *See Eagle Pac. Ins. Co. v. Christensen*, 85 Wn.App. 695, 934 P.2d 715 (1997); *Gail Landau Young v. Hedreen*, 63 Wn.App. 91, 816 P.2d 762 (1991); *Norhawk Investments, Inc. v. Subway Sandwich Shops, Inc.*, 61 Wn.App. 395, 811 P.2d 221 (1991); *Trust Fund v. Harold Jordan Co.*, 52 Wn.App. 387, 760 P.2d 382 (1988); *Truckweld*

Equipment Co. v. Olson, 26 Wn.App, 638, 643-44, 618 P.2d 1017 (1980).

Nadein has not and cannot show an exception here.

Moreover, this Court should decline now to reverse UMG's dismissal as Nadein's rationale advanced here is materially different from his claims below. And if Nadein felt losing UMG from this case was consequential, why did he not seek interlocutory review? He likely did not seek review because this issue is academic. Turner is solvent.

2. Lang v. Hougan Is Wrongly Decided, Given Better Decisions.

Were Lang to be interpreted as broadly as Nadein urges, this Court would be awash in appeals from ex-partners. So interpreted, Lang would become a virtual entitlement for all ex-partners to sue their other partner's new venture, claiming the new venture must have gained some "goodwill," even if the ex-partner can prove no amount.

Decisions made both before and after Lang are better-reasoned in key respects. In particular, Noble v. Lubrin, 114 Wn.App. 812, 60 P.3d 1224 (2003), addresses a situation that is, in several material aspects, significantly more similar to these parties' dispute than Lang is. In Noble, the trial "court concluded" – and was affirmed – "there was no corporate 'interest' because there was no existing contractual right after the original one-year leases." *Id.* at 820. Similarly, in this case all of UA's contracts – including the big ones with Rassvet that Nadein coveted (and ruined, due

to his false denunciations of Rassvet to the Russian secret police) – had expired well over a year before UA dissolved.

The Noble Courts (trial and appellate) further found “no reasonable ‘expectancy’ that [appellant] would acquire the license agreements in subsequent years,” *id.*, “because [appellant] had no financial resources with which it could pursue the leases.” *Id.* at 821. The appellant in Noble tried to defeat his financial incapacity by contending that his ex-partner’s bad “actions defeated his ‘reasonable expectation’ that theirs was a long-term venture and thus breached his fiduciary duty to him.” *Id.* at 822. The Noble Court of Appeals thus concluded: “We cannot agree. If we were to accept [appellant’s] argument, courts would have to find oppressive conduct whenever an officer/shareholder of a closely-held, insolvent corporation chose to end the corporation rather than contribute additional money to a failed venture.” *Id.* at 823. Lang is overbroad in just this way. This Court should not support a *per se* rule.

In Noble, the Court “concluded there was no good will.” *Id.* at 817. Given that the Noble respondent had just “returned the renewal of corporate registration with the word ‘dissolved’ written on it,” *id.* at 816, the Noble Court of Appeals affirmed the “finding that the corporation was not properly dissolved,” which had caused the trial court rightly to award only “\$175.00 in statutory fees and costs.” *Id.* at 817. Similarly in this

case, Judge Haberly held that even though Turner's dissolution method had been improper, it had not harmed Nadein. Indeed, Lang found "technical noncompliance." 150 P.3d at 626. Even the breach of a fiduciary duty cannot alone proximately cause damage. Nor should it justify finding goodwill, absent evidence. If read too broadly, Lang is bad law.

More recently, a Noble-type proximate cause rationale was followed in Bishop of Victoria Corp. Sole v. Finley, 138 Wn.App. 443, 158 P.3d 1183 (2007), *rev. denied*, 180 P.3d 1290 (2008). The Bishop decision arguably flees even further from Lang, in finding immaterial the Bishop respondent's secretly soliciting funds to buy property the Bishop appellant wanted. *Id.* at 1191. Despite this secret and adverse activity – much more adverse than anything adjudged against Turner – the Court found no liability, as the ex-partner's actions "did not prejudice" the appellant – because appellant "had lost any ability to profit from the situation." *Id.* at 1192. Some undesirable acts cause no damage.

Similarly in this case, Nadein could never have profited from UA's biggest asset – its business with Rassvet – due to his criminal denunciation of Rassvet to Russia's secret police. Lang should not impose a finding of goodwill in this extraordinary circumstance.

If Lang is to be harmonized, Turner urges that proximate cause be engrafted on it. This is the wiser, more businesslike view represented by Noble and Bishop. Lang defines a potential liability – not *per se* proof.

B. The Court Exercised Proper Discretion to Keep Discovery Focused.

Nadein admits (perhaps unwittingly) one of the most consequential facts on this Appeal: “Plaintiff brought a motion to compel production of documents and information from UMG. The trial court granted plaintiff’s motion only in part.” *AOB*, p. 12.

The “part” Judge Haberly granted was full discovery of all information about, and full production of each, all and every document concerning “any agreements, volume of business, all communications between UMG and those clients related to the changeover from UA and UMG” – for any, all and every of UMG’s “clients in common with Unimak America.” CP 94; *AOB*, p. 13. UMG complied. Even Nadein does not claim otherwise.

How, then, was Nadein “denied access to UMG’s financial information” – to any extent materially relevant? *AOB*, p. 14. The crux of Nadein’s complaints against UMG is that he was deprived of the means “to determine the profits UMG obtained from using Unimak America’s assets.” *AOB*, p. 12 (emphasis added). Yet this is precisely the data

Turner was forced to produce: all “agreements, volume of business ... communications” about all “clients in common with Unimak America.” Read together with that language from the trial court’s Order, Nadein apparently complains of lacking only financial data about UMG business not “common” to UA. What renders this unrelated data relevant?

In a similar situation, a trial court that “limited the scope of her discovery to those records that postdated Blue Bird’s merger with Skookum” was affirmed. Nakata v. Blue Bird, 2008-WA-0905.316, 191 P.3d 900, 905. Many courts require “a clear showing that a discovery limitation resulted in actual and substantial prejudice for it to warrant reversal.” Miksis v. Howard, 106 F.3d 754, 758 (7th Cir. 1997) (citation omitted). As Nadein did not make such a showing below (nor can he), this rule alone warrants affirmance.

Nadein tries now to proffer new – and purely hypothetical – proof of relevance: “The information could also be relevant to Nadein’s claims that Turner was improperly paying third parties for services that were never performed. If UMG made no payments to those entities and showed significantly higher profits as a result, it would raise an inference that the payments were not legitimate.” *AOB*, p. 14. Nadein did not assert even this weak (and, frankly, bizarre) offer of proof below, which should

foreclose this Court's reviewing this new argument now. See Lindblad v. Boeing, 108 Wn.App. 198, 207, 31 P.3d 1 (2001).

In any event, the neutral, court-appointed Receiver, Jan Kallshian, testified he never saw any evidence indicating Turner or UA ever improperly paid even a single third party. RP 577. And the trial court so found. Yet Nadein keeps repeating this false claim. This repetitive false claim is just another example of Nadein's trying to keep on fighting. "Nadein was unable to establish the value of the converted Unimak America assets," *AOB*, p. 15, because no UA asset was converted. No such evidence ever existed.

Discovery was properly denied because Nadein merely "relied on what he hoped to reveal through additional discovery rather than identify evidence that would give rise to a genuine issue of fact." Winston v. State Dep't of Corrections, 130 Wn.App. 61, 65, 121 P.3d 1201, 1203 (2005); Thongchoom v. Graco Children's Products, 117 Wn.App. 299, 308-09, 71 P.3d 214 (2003) (discovery properly limited as party "had no knowledge that any of the information would be favorable to their case"); accord Conkle v. Jeong, 73 F.3d 909, 914 (9th Cir. 1994) (discovery "regarding alleged conversations" not required as the movant "fails to put forth any facts to show that such conversations took place.").

C. The Court Properly Declined to Accept Nadein's Goodwill

Amount.

Nadein's attack on the trial judge becomes most unjustified on the goodwill issue. Nadein condemns Judge Haberly's "decision to exclude accounting expert Kell Rabern's opinion as to the value of the goodwill taken by Turner." *AOB*, p. 15. But she did not do this. Nadein's counsel tried to mislabel her ruling in this same way, upon presentment of the Findings and Conclusions, after trial. *Compare* CP 828, *with* CP 846. In fact, Judge Haberly plainly considered all Rabern's testimony. Her care and attention were obvious – while Rabern's shaky testimony was plain for all to witness at trial: "Again, I can't conclude as a conclusion as an accountant is the money due back to Unimak America? I can't say that. I can say it needs to be considered by the court." RP 331.

She declined only to accept as proven his opinion fixing a goodwill amount. And she rejected (as should this Court) the strange claim that "Nadein was obviously damaged by Turner's wrongful dissolution of Unimak America ... Prior to this action, Nadein was receiving income, afterwards he was not." *AOB*, p. 16. If a breach alone were sufficient to prove damage, no case of mere "technical" misfeasance, or "nominal damage," would exist. In fact, breaches without loss have a long history. *See Pappas v. Zerwoodis*, 21 Wn.2d 725, 735-36, 153 P.2d 170 (1944);

Maxwell v. Gallagher, 709 A.2d 100 (D.C. App. 1998) (no “compensable damage resulting from the breach of fiduciary duty”). In Kenworthy v. Kleinberg, 182 Wn. 425, 47 P.2d 825 (1935), our Supreme Court might have been speaking directly to Nadein:

There is enough in the record to show a *technical violation* of the contract by Daniel Kleinberg, and it may be assumed that *his activities have been distasteful to the appellants* and possibly, in some vague way, may have tended to lessen the profits of some of them, but, as we read the record, if the question were now before us, we should be obliged to hold that *there is no basis in the evidence for anything more than nominal damages*. That being so, we cannot see how the dismissal of the action as to the plaintiffs J. Fred Kenworthy and the Kenworthy Grain & Milling Company can, even if erroneous, be prejudicial. Whether they remain in the action as plaintiffs can only be important if that tends to increase the amount of the recovery. We can find no basis of fact for so holding, and therefore need not pursue this question further. If it was error to dismiss them from the action, which we do not decide, it was *error without prejudice*.

182 Wn. at 429-30 (emphasis added).

In other words, Nadein had to prove his damages, not just assert them. He needed to prove how – and how much – and by whom he was damaged. His trial brief promised Rabern would establish “that the Balance Sheet substantially undervalued Unimak American tangible and intangible assets.” CP 236. But he did not establish this.

Nadein relies unduly heavily on Lewis River Golf v. Scott, 120 Wn.2d 712, 845 P.2d 987 (1993). That case bases its decision explicitly on an admission: “It is important to note that defendant concedes the fact

of damage.” *Id.* at 718. Turner does not concede damage in this case and the Court did not find Nadein to be entitled to recover damage. Moreover, at most, this decision stands for the rule that a court’s decision to accept or reject testimony is rarely disturbed. *See, e.g., Carlson v. Leonardo Truck Lines*, 13 Wn.App. 795, 802, 538 P.2d 130 (1975) (“the trial court properly rejected proffered evidence by the employer showing the net profit made by the former employee from business obtained from former customers of the employer.”); *accord Pelletier v. Main Street Textiles*, 470 F.3d 48, 55-56 (1st Cir. 2006) (the Federal Rules “do not afford automatic entitlements to proponents of expert testimony”; courts have “wide discretion” to accept or reject evidence) (citation omitted). An expert may be qualified generally, while not being expert in the precise area of expertise material to the case. *See Moise v. Hodges*, 156 Wn. 591, 287 P. 878 (1930) (real property expert unqualified to give expert opinion on valuation of timber).

Nadein’s creative interpretation of Lang does not somehow remedy his lack of competent evidence. This lack of proof is fatal to his case: “a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” West Coast, Inc. v. Snohomish County, 112 Wn.App. 200, 206, 48 P.3d 997 (2002); *see also ESCA v. KPMG Peat Marwick*, 86 Wn.App. 628,

939 P.2d 1228 (1997), *aff'd*, 135 Wn.2d 820, 959 P.2d 651 (1998) (“The goal of awarding money damages is to compensate for losses that are actually suffered.”); Hansen v. Washington Natural Gas, 95 Wn.2d 773, 779, 632 P.2d 504 (1981) (the acts complained of must have proximately caused plaintiff provable damage to be actionable). Proof has been required specifically on the issue of goodwill: “Although plaintiff claims potential severe damage to” his goodwill, “he sets forth no evidence of actual damage. This is not sufficient to” avoid dismissal. Meyer v. University, 105 Wn.2d 947, 853, 719 P.2d 98 (1986).

Judge Haberly carefully considered Nadein’s case, plainly trying to discover truth in it. Yet Nadein attacks her “independent analysis.” *AOB*, p. 17. In fact, independence is a signature strength of this judge. Indeed – in precisely (and ironically) the part of the Record to which Nadein cites to support this complaint (RP 594-599) – her independent analysis, at its most precise, shines through. Far from inappropriately injecting her “own knowledge of accounting,” as Nadein contends (*AOB*, p. 17), the Judge focused precisely on what Rabern said, finding many of his opinions inadequate in light of the full record –

1. DOUBLE-COUNTING. “Going to the goodwill, Mr. Rabern calculated a number of \$836,277 were intangible assets, but in his testimony and on his Exhibit 101 he included the value of outfitting vessels, and parts and supplies for the vessels, and he admitted these included dollars that were laid out by or advanced

by Unimak for which there would be an associated accounts receivable, or revenue, or entitlement was a word that Mr. Rabern used, and I have asked questions of Mr. Rabern and [the court-appointed Receiver] Mr. Kallshian about this accounts receivable, or revenue, and entitlement, and it's a number out there, and I don't know [that] it's correctly characterized." RP 594-95.

2. LACK OF BASIS. "When Mr. Rabern was asked what portion of the \$836,277 included tangible assets, he was unable to give a number or an estimate of what this entitlement as he called it was. ... but when I looked at the tax returns that came in yesterday, and look at 2005, on the tax return on line 1A it says, 'Gross sales or receipts,' and we still have this issue about what's old revenue, what's new revenue, what's gross sales Mr. Rabern testified that he looked at the tax returns for years 1999 through 2002, but he did not use them in his calculations, and did not explain on direct or cross why you would not use those in looking at income over a period of time that the company operated." RP 595-97, 358-64. In fact, Rabern admitted his valuation might be mistaken by as much as 50 percent. RP 377.
3. CONTRADICTORY METHODS. "The company ceased operation as a going concern on April 12, 2005. Mr. Rabern was attempting to figure out the going concern value as of April 12, 2005, but he used income figures through December, '05, and if you are using a capitalization of income as your method of calculating goodwill, then you must necessarily use income made while the company was a going concern, while it was in operation as Unimak America. ... and when I look at Mr. Rabern's calculations, he's using numbers in 2005 that include recovery of tangible assets, that includes recovery of old revenue, or accounts receivable, whatever you want to call it, but Mr. Rabern was not able to segregate those assets out, and he lumped them in what he calls goodwill, and value of going concern, and other items that I read, so what you have is a number that is not goodwill, but a mix of tangible and intangible assets, and there's no testimony, looking again in the light most favorable to the nonmoving party, to segregate these different types of assets out." RP 597-98.
4. SPECULATION. "And then to complicate things, again, we know this business stopped on April 12, 2005, and they made no more

sales for Unimak America after that date. He [Rabern] took this \$500,000 in operating revenues and applied that against the \$19 million times 5 percent, minus \$500,000, and we know from the evidence that there was no \$500,000 in operating expense for 2005. ... in terms of goodwill, that was a fictitious number. The \$500,000, it had no bearing to any real numbers or real facts” RP 598-99, 358-64.

5. CONCLUSION. “the court’s conclusion is that the methods used and the sources and number used do not give a credible value of goodwill, and the number is based on speculation and numbers for which there was no basis in fact.” The trial court “grant[ed] the motion for directed verdict as to the goodwill number because the plaintiffs have failed to prove that, prove goodwill.” RP 599-600.

None of these analyses evinces a trial court resorting to “its own knowledge of accounting.” Indeed, most of the trial court’s questions and concerns were of the kind most experienced businesspeople would share – *e.g.*, Rabern’s critical and unjustified assumption of a willing and able buyer for UA. RP 387. Nor did Nadein’s silence at the time indicate that the trial court was acting inappropriately: “Any questions from counsel for plaintiff or defendant?” RP 602. Nadein stayed silent; it did not object.

V. CONCLUSION.

The Appeal should be denied, and the Cross-Appeal granted, for the above-referenced reasons – including (but not limited to):

1. Nadein’s substantial rights are unaffected by this appeal; he simply prefers to keep on litigating, in every forum possible.

2. Judge Haberly carefully weighed the parties' rights and evidence to produce a decision that appropriately wound-up UA.
3. Judge Haberly's acted properly in limiting Nadein's discovery to all clients UMG had "in common" with UA; Nadein's new theories – about what additional discovery might conceivably have helped "prove" – are new and fantastical.
4. Nadein could not have gained substantially – even if UMG had possessed "goodwill" – given his denunciations of Rassvet.
5. Nadein never proved at trial – nor has he made any showing on appeal – how Turner's technically improper dissolution of UA harmed him.
6. Judge Haberly acted properly in rejecting Rabern's unhelpful opinion on a goodwill amount.
7. Nadein's objections before and during trial did not make sufficiently clear a basis for the issues and errors he assigns now.
8. If Lang v. Hougan truly relieves plaintiff of having to prove Turner or UMG proximately caused his damages, then it is bad law and it should be modified.
9. This Court should affirm the work of Judge Haberly, Receiver Kallshian, and Turner to accomplish the final winding-up of UA.

RESPECTFULLY SUBMITTED this 8th day of June, 2009.

Harris & Moure

By  
Daniel P. Harris, WSBA #16777
Charles Moure, WSBA #23701
John F.S. Rapp, WSBA #17286
Attorneys for Turner and UMG

FILED
COURT OF APPEALS
DIVISION II

09 JUN -9 PM 1:55

STATE OF WASHINGTON

BY _____
DEPUTY

Case No. 38354-3-II

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

BORIS A. NADEIN,)
)
)
Appellant/)
Cross-Respondent)
v.)
)
WILLIAM TURNER and JANE)
DOE TURNER and UNIMAK)
MARITIME GROUP,)
)
)
Respondents/)
Cross-Appellant)

DECLARATION OF SERVICE
OF BRIEF OF RESPONDENT/CROSS
APPELLANT

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

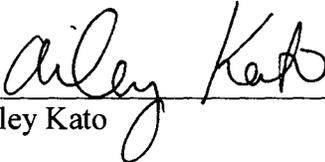
That on June 8, 2009, I arranged for service via US mail of the foregoing Brief of Respondent/Cross Appellant to the Court and the parties of this action as follows:

Bruce M. Hull
Law Office of Bruce M. Hull, pllc
4100 S.E. 36th Street, Suite 100
Bellevue, WA 98006-1675

Marc Barreca
K&L Gates
925 4th Ave., Suite 2900
Seattle, WA 98104

ORIGINAL

DATED this 8th day of June 2008.


Ailey Kato