

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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 BRIEF OF CROSS-APPELLANTS/RESPONDENTS

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ANALYSIS

The Reply/Opposition Brief of Appellant/Cross-Respondent Boris Nadein (“Nadein”) evinces the fatally fundamental flaw in his approach to this entire lawsuit: His excuses change but his lack of proof abides. He had – and has, again on appeal – the obligation and the opportunity to make a solid record. He failed to do so. And this failure is doubly inexcusable given that Judge Haberly, sitting without a jury, was unusually flexible. Nadein proffered insufficient proof of damages at trial. He could hardly have offered less proof.

Indeed, even now on appeal, Nadein cites to no damages proof. Instead, he keeps on contending simply that he “made a good living from this company,” and “that income stopped once Turner” closed Unimak America (“UA”). *Appellant Reply Brief*, pp. 3 & 12. Nadein similarly contends he “was obviously damaged ... Prior to this action, Nadein was receiving income, afterward he was not.” *Appellant Opening Brief*, p. 16. This is fatuous. If simply losing income can alone prove damages, why

did Nadein proffer expert testimony on damages at all? Rabern (Nadein's expert) had to prove something more than loss of a job. Indeed, Nadein essentially admits the crux of this Cross-Appeal: That Lang v. Hougan, 136 Wn.App. 708, 150 P.3d 622 (2007), rev. denied, 163 Wn.2d 1018, 180 P.3d 1292 (2008) should not be read to obviate the need for proof. Even Nadein admits that Noble v. Lubrin, 114 Wn.App. 812, 60 P.3d 1224 (2003), for example, requires additional proof (not made here) that the plaintiff had the financial ability "to take advantage of the new opportunity." *Appellant Reply Brief*, p. 8. Nadein did not prove he had such ability. His denunciation of UA's largest customer is exactly the kind of act that would preclude such ability. And the inherently future-oriented nature of "goodwill" belies his contention now that "goodwill" should have been determined only as of the date of dissolution. If that date is/were the relevant one, then why does Nadein complain that he needed – and needs – documents from long after the dissolution?

Furthermore, in Noble, the trial “court concluded,” and was affirmed, in holding “there was no corporate ‘interest’ because there was no existing contractual right after the original one-year leases.” *Id.* at 820. In this case, all of UA’s contracts, including the big ones with Rassvet that Nadein coveted (and ruined), had expired well over a year before UA dissolved. Nadein does not even try to deny this. Nor did he prove at trial how he could have actually obtained such “goodwill.” He just keeps asserting *ipse dixit* as if they were proof.

Nadein does not even try to retain even a rough consistency among his contentions. Instead, he asserts that various doctrines excuse his lack of proof, and of preservation, in the multi-year litigation below. First among these excuses is Nadein’s reading of Lang.

This Cross-Appeal contends that Lang should be overruled, limited or otherwise clarified or modified to make clearer the need for proof of damages against all defendants. Nadein’s misplaced reliance on Lang – allegedly to excuse his

having no proof of damages – illustrates a practical problem Nadein’s odd views could well create for our courts. Armed with this expansive interpretation of Lang, ex-partners will now believe they have a *per se* entitlement to goodwill and to a separate cause of action against the other partner’s new entity. Widely prevailing and well-settled doctrine contradicts Nadein’s view; the law requires actual and persuasive proof of damages caused by each defendant, specifically including any alleged “goodwill.” See Meyer v. University, 105 Wn.2d 947, 953, 719 P.2d 98 (1986); (“no evidence of actual damage” fatal to claim of “potential severe damage to” business goodwill); accord, e.g., Reiling v. Reiling, 66 Or. App. 284, 288-89, 673 P.2d 1360 (1983), rev. denied, 296 Or. 536 (1984) (expert testimony did “not adequately consider the factors of health, professional reputation, skill, knowledge, work habits and the nature and duration of” the business; therefore no “basis on which to assign a value to good will”); see also Maxwell v. Gallagher, 709 A.2d 100 (D.C. App. 1998) (no “compensable

damage resulting from the breach of fiduciary duty”). Nadein simply did not offer the necessary evidence.

Nadein had many opportunities and the obligation to make a full record against Unimak Maritime Group (“UMG”). Yet even Nadein admits he did not make a full record: “Turner is correct that there is no evidence that UMG was a necessary defendant in order for Nadein to obtain a complete recovery.” *Appellant Reply Brief*, p. 9. Quite a concession! In essence, Nadein asks this court to announce a presumptive new rule of automatic joint and several liability for an ex-partner’s new entity without any evidence of a new and independent wrongful act by the entity. Nor does Nadein indicate any need for proof of an increased risk of noncollectibility of his (nonexistent) judgment -- nor any reason to burden a brand-new, lawfully-constituted corporate entity with a potential judgment absent any proof of its wrongdoing. He just wants a new *per se* rule.

Nadein then proceeds to conflate his Discovery and goodwill contentions with those regarding UMG’s potential

liability, all based, in major part (at least), on his misinterpretation of Lang. Nadein hopes Lang will excuse huge holes in his record below. Indeed, in the very same Discovery Order from which Nadein appeals, Judge Haberly expressly left wide open to Nadein the opportunity to reconsider her Order(s), if new evidence arose: “Plaintiff’s discovery requests are otherwise overbroad and plaintiff’s motion on those is denied, *pending plaintiff’s CR 56(f) motion.*” (CP 94.)

Nadein consistently failed (on the very issues he now appeals) to support the patient trial court below with additional offers of proofs, or supplemental briefs, or supplemental expert or other testimony. Instead, he chose to maintain a grumpy silence and to wait for an appeal to explain. Nadein was dead silent right after the court rejected his expert’s testimony: “Any questions from counsel for plaintiff or defendant?” (RP 602.) By remaining silent then, Nadein waived his appeal rights. Lindblad v. Boeing, 108 Wn.App. 198, 207, 31 P.3d 1 (2001) (“an issue, theory, argument, or claim of error not presented at

the trial court level” is unreviewable). Without this rule requiring clear and contemporaneous explanation, every initial decision would constitute an abuse of discretion. This is not, cannot and must not be the law.

Nadein failed to take many opportunities to meet his obligations below. Instead, he now advises this court to excuse such failures, as “this matter must be remanded for a partial retrial” anyway. *Appellant Reply Brief*, p. 9. Nadein just wants to retry his case. And with the expert and other witnesses he presented before, all the additional data he seeks would make no difference. Additional data will not somehow transform an unreliable, unbelievable and incredible expert like Rabern into a persuasive one.

Nadein even tries to impose on the court, and/or Turner, his own duty to preserve the record: “The trial court’s decision to strike Rabern’s testimony includes none of the criticisms raised by Turner...Because the trial court based its decision to strike Rabern’s testimony on grounds not raised by Turner,

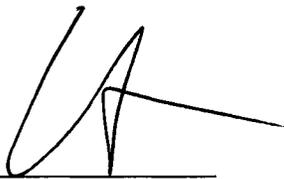
Nadein was prevented from responding to those criticisms.” *Nadein’s Reply Brief*, pp. 11-12 (original emphasis). Of course, Nadein and counsel were in the courtroom when the court announced her ruling and detailed her reasons; they had the perfect opportunity to respond, but they chose silence.

They also had the obligation to object. Then. Otherwise (absent full, timely and sufficient objection) “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). Instead of taking each opportunity to fulfill his obligations at trial, Nadein opted to “sandbag.” He chose to wait until now to assert whatever new arguments might give him the best chance at another trial, with the attendant costs and leverage on Turner that Nadein can impose. Nadein could not even be bothered to appeal the correct order (Assignment No. 3): Instead, he tries (again in this court, as he did below) to mislabel Judge Haberly’s rulings. *Compare* CP 828, *with* CP 846. But Judge Haberly’s care was obvious and the trial was surely fair.

For these reasons, Turner urges Nadein's appeal be denied; or, alternatively, the Cross-Appeal granted.

RESPECTFULLY SUBMITTED this 7th day of August, 2009.

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DECLARATION OF SERVICE

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The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on the date indicated, she did cause service of the Reply Brief of Cross-Appellants/Respondents by sending a copy via email and U.S. Mail to:

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