34446-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

DAVID T. RAMSDEN and MICHELLE L. RAMSDEN, and the marital community composed thereof,

Appellants

v.

JEROME C. IVES as Personal Representative of the Estate of G. JEROME IVES,

Respondent and Cross-Appellant

RESPONDENT/CROSS-APPELLANT'S REPLY BRIEF

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I. REBUTTAL IN SUPPORT OF RESPONDENT'S CROSS APPEAL

A. Introduction. Respondent cross appeals on two grounds: Conclusion of Law No. 3, ruling that the first four limited partnerships Ramsden sold to Ives "were not unsuitable, because Mr. Ives had sufficient liquidity for his circumstances following each of the purchases",

- is an error of law, not supported by the findings of fact, because the court failed to correctly apply the law governing a securities salesperson's standard of care and duties to his customers; and
- constitutes a finding of fact that Mr. Ives had sufficient liquidity for his needs which is not supported by substantial evidence.

Ramsden does not deny that substantial evidence supports each of the findings of fact on which the Estate relies (except to the extent he may have so argued in his opening brief, in support of his own appeal). Neither does he offer argument of his own that Conclusion of Law No. 3 *is* supported by the findings of fact, or does correctly apply the law. Indeed, Ramsden never, in any of his briefing, sets forth or discusses the law at issue here—the legal duties a securities salesperson owes to his customer, and the securities industry's standard of care for a stockbroker when recommending that a client buy a security.

Instead he relies entirely on his assertions, repeated mantra-like, that bits and pieces of the Estate's facts and arguments "are not supported by authority" and should not be considered. Ramsden has an odd understanding of what it means in an appeal brief to support argument with legal authority in order to be considered, and he is wrong is those assertions.

But first, Ramsden asserts that two affirmative defenses bar the Estate's cross appeal:

B. The Arbitration Clause Did Not Prevent the Court from Hearing the Ives Estate's Claims

Ramsden first argues that the trial court did not have jurisdiction because Mr. Ives in an arbitration clause had waived his right to trial. The language on which Ramsden relies states:

> "The Following General Provisions Apply to All Arbitrations Under this Agreement:
>
> 1. Arbitration is final and binding on the parties in arbitration.
> 2. The parties are waiving their right to seek remedies in court.
> 3. [additional disclosures about reduced discovery, lack of appeals, other.]"

Ramsden does not dispute that a party may, by conduct inconsistent with arbitration, waive the right to enforce an arbitration clause. *Lake Washington School District v. Mobile Modules Northwest,* 28 Wn.App. 59, 61-62, 621 P.2d 791 (1980) ("Parties to an arbitration contract may waive that provision, however, and a party does so by failing to invoke the clause when an action is commenced and arbitration has been ignored"); *Steele v. Lundgren*, 85 Wn.App. 845, 855, 935 P.2d 671 (1997) ("there can be no doubt that, by failing to assert arbitration at the outset and by passing up several obvious opportunities to move for arbitration, Lundgren effectively chose to litigate in superior court, which is inconsistent with arbitration in an NASD forum").

Ramsden insists that when an arbitration clause explains that by signing, one waives his right to a trial, the waiver of one's ability to sue in court is absolute, and is the end of the inquiry. But *every* arbitration clause waives the signer's right to a trial. See *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 360-361, 103 P.3d 773 (2004).[1] The language Ramsden relies on adds nothing substantive to the contract. If Ramsden's position were correct, the *Steele-Lundgren* line of cases would never apply.

In any event, Ramsden relies on the wrong arbitration clause. He was employed by Titan Capital between 1989-1992, during which time he sold the first four limited partnerships to Ives. FF 3, CP 52, FF 29, CP 55.

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[1] "[B]y knowingly and voluntarily agreeing to arbitration, a party implicitly waives his right to a jury trial by agreeing to an alternate forum, arbitration. . . . In *Malted Mousse, Inc. v. Steinmetz*, we affirmed this conclusion noting that by agreeing to arbitration, parties "generally waive their right to a jury." 150 Wash.2d 518, 526, 79 P.3d 1154 (2003). *Accord Cooper v. MRM Inv. Co.*, 367 F.3d 493, 506 (6th Cir.2004) (holding that by agreeing to an arbitral forum, an employee necessarily waives his right to a jury trial); *Burden v. Check Into Cash of Ky., LLC*, 267 F.3d 483, 492 (6th Cir.2001) ("As to the failure of the arbitration clause to include a jury waiver provision, 'the "loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate." ' ". . .).

Those are the investments at issue in the cross-appeal. Titan Capital's arbitration clause says nothing about waiving one's right to trial. Ex. 102. Ramsden in 1992 became employed by United Pacific Securities. Mr. Ives signed United Pacific's Client Data Form, with its arbitration clause, on December 29, 1993, when he bought the Texas Keystone investment. *Ibid.* It is that arbitration clause to which Ramsden erroneously refers in opposing the cross appeal.

C. The Statute of Limitations Had Not Run on the Estate's Claims.

Preliminarily, it should be noted that Ramsden has never claimed that the decedent, Mr. Ives, discovered or should have discovered before his death that he had any cause of action due to his investments. Ramsden urges only that Ives' son, Jerry, should be deemed to have discovered the cause of action before he was appointed Personal Representative (hereafter "PR").

Mr. Ives died June 19, 1996. His will was admitted to probate and Jerry appointed PR three weeks later, on July 9, 1996. The trial court entered a finding that there was no evidence

> that prior to his appointment as personal representative Jerry Ives knew, or reasonably should have known, that Mr. Ives had incurred monetary damages as the result of his purchase of investments from Mr. Ramsden before the personal representative was appointed on July 9, 1996. FF 110, CP 67.

If FF 110 is supported by substantial evidence, that finding is sufficient to support the trial court's conclusion that the 3-year statute of limitations did not begin to run before July 9, 1996.[2] Ramsden relies on a single piece of evidence he thinks is contrary to FF 110, to sweepingly conclude "therefore" Finding 110 is not supported by substantial evidence[3]:

> In June 1996 . . . Jerome Ives met with his family, including his daughter-in-law, a securities attorney [sic], and his son, an MBA, and discussed Jerry Ives' investments. . . . Jerome Ives' daughter-in-law and son were aghast that Jerry Ives had invested in limited partnerships, and advised Jerome Ives to get rid of those investments. . . . Jerome Ives' claim for fraud, if any, accrued at that meeting. The fact that Jerome Ives did not discover the full extent of his claimed damages until later did not toll the statute of limitations. . . . Findings 105, 106, 107, 108, 109, 110 are therefore not supported by substantial evidence. . . .

As always, Ramsden makes no effort to present a realistic recitation of the evidence at trial. He just points to one bit of testimony he thinks is contrary to the trial court's Finding, then declares "therefore" no substantial evidence supports the trial court's Finding of Fact. This fails

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[2] Ramsden declares that the trial court "misapplied the discovery rule", followed by a string cite of multiple discovery rule cases without further explanation. But he does not raise any issue of law regarding the discovery rule. If the court's findings are supported by substantial evidence, the conclusion that the statute of limitations did not begin to run until some time after Jerry was appointed PR is obviously correct.

[3] Although it takes a lot of cross referencing to figure out that that is his argument on the cross appeal. See Appellant's Reply Brief, at 37, 10 (citing p. 46 of Amended Brief of Appellants).

to meet his burden on appeal; it is just disagreeing with how the trial court weighed the totality of the evidence:

Jerry Ives was for 25 years a surveying engineer manager for the Bureau of Land Management. He retired in 1986. Since that time he has spent time volunteering as an officer of the International Federation of Surveyors. RP II, 93/2-15. He testified he was "not a financial person" and did "not really understand limited partnerships" (in explaining why he ultimately decided to liquidate them). RP II, 153/4-12.

Within days of his father's death, Jerry met with Ramsden. RP II, 155/4 – 156/24. He asked Ramsden about his father's investment portfolio, and they discussed his investments. RP II, 15/5 – 156/24. Ramsden was the only financial person Jerry talked to about the limited partnerships around this time, other than his son (an MBA) and daughter-in-law (a "principal attorney" for "Oppenheimer Funds"; Ramsden says she was a "securities attorney" but there was no testimony of this, nor about the nature of her legal position at Oppenheimer).

Ramsden in his first meeting with Jerry urged him to hold onto the limited partnerships because the big payoff came at the end when the partnerships liquidated. RP II, 155/4 – 157/15. Right after that meeting (RP II, 165/14 – 166/23) Jerry met up with his wife, sister, stepbrother, son and daughter-in-law. He testified he told them about the investments, and said that his son and daughter-in-law "were really aghast that dad was in limited partnerships and they helped to advise to get rid of them." RP II, 153/17 –155/9. There was no testimony what it was about limited partnerships that concerned them. Only that the family "was not happy with the limited partnerships" so they "eventually were going to liquidate [them]. As to when was an open question." RP III, 14/4 – 15.

Some months later (RP II, 155/4 – 157/15), apparently responding to a "follow up question" from Jerry's sister (RP II, 156/4-20), Ramsden met with Jerry and other family members. He again urged that they keep the limited partnerships, telling them the big payoff would be coming in time. *Ibid.*

The trial court, supporting its finding that prior to Jerry's appointment as PR he did not know and should not reasonably have known "that Mr. Ives had incurred monetary damages" from the limited partnerships, entered FF 111 (CP 67) finding that

> the personal representative undertook to investigate the nature of his father's investments, and the values of the limited partnerships, *after* he had been appointed PR. (Emphasis added.)

Again Ramsden does not discuss any of the evidence about what Jerry did after being appointed PR. He just disagrees with how the court weighed one piece of evidence, arguing (this is the totality of the argument):

> Finding 3 is contradicted by Jerome Ives' testimony regarding the June 1996 meeting with Dave and the meeting with his family. . . . Finding 3 is therefore not supported by substantial evidence. . . .[4]

The testimony about his first meeting with Ramsden, and discussion with his family, says nothing of Jerry "investigating the nature" of his father's investments, or "the values of the limited partnerships". That was just when he first learned of them. His father had died days earlier. His family had gathered in Sequim. Promptly within a couple weeks he was appointed PR. The court's finding that he then began inquiring into the nature and values of the limited partnerships, after being appointed PR, is consistent with all of the evidence, and supports the court's finding that he did not learn, and should not reasonably have learned, of the Estate's claims before being appointed PR.

Entirely missing the import of the trial court's factual determinations regarding discovery of the Estate's claims, Ramsden argues as a matter of law that the running of statutes of limitations on an Estate's claim is unaffected by when a PR is appointed. That was not the legal ground for the trial court's ruling. The court found as a fact that Jerry did not discover, and should not reasonably have discovered, the estate's cause of action until after his appointment as PR.

[4] Appellant's Reply Brief, at 37, 10.

Still, Ramsden is wrong on the law. On the facts of this case, regardless of whether Jerry personally had discovered the wrong prior to his appointment as the Estate's PR, the statute on the Estate's claims would not have begun to run until he was appointed PR two weeks later.

Ramsden cites the 1930 case of *Dodson v. Continental Can Co.*, 159 Wash. 589, 294 P. 265 (1930) for the proposition that "a rule measuring accrual of a cause of action based upon the date of appointment of a personal representative was inherently unreliable". *Dodson* explicitly applies only to statutory wrongful death claims. The *Dodson* court found wording in the wrongful death statute to be indistinguishable from language in the Federal Employers' Liability Act, and relied solely on a FELA case, *Reading Co. v. Koons,* 271 U. S. 58, 46 S. Ct. 405, 70 L. Ed. 835 (1926), to hold that, as with FELA claims, the statute of limitations on a statutory wrongful death claim begins to run when the decedent dies.

After another half-century of jurisprudence, the State Supreme Court in *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 693 P.2d 687 (1985) distinguished *Dodson* to reach the opposite result. *White* held that with the advent of the discovery rule the statute of limitations on a wrongful death claim begins running when the decedent's *personal representative* discovers the cause of action:

> *Dodson*, however, is a prediscovery rule case and is significantly distinguishable from the present case. . . .
>
> We reject defendants' assertion that, as a matter of law, the date of the decedent's death marks the time at which a wrongful death action "accrues". Instead, we hold a wrongful death action "accrues" at the time *the decedent's personal representative* discovered, or should have discovered, the cause of action. . . . (Emphasis added; *ibid,* at 352-353).

Later in *White v. Johns-Manville* the court addressed the issue of when the statute of limitations on a survivorship action, such as the Estate's claim here, begins to run. The case had been certified by the federal court to the Washington Supreme Court to answer the question,

> Does the "discovery" rule . . . toll the applicable statutes of limitation until such time as plaintiff, as the surviving spouse and personal representative of the decedent, discovers or should reasonably have discovered the essential elements of her possible causes of action?

Following the same analysis it used for the wrongful death issue, the Court likewise held:

> The statute of limitation pertinent to a survival action commences at the earliest time at which the decedent *or his personal representatives* knew, or should have known, the causal relationship between the decedent's exposure to asbestos and his ensuing disease.

These holdings are consistent with the long-time general rule that when a cause of action has not accrued prior to a decedent's death, the statute of limitations does not begin to run until a representative of a deceased person is appointed who can sue, or be sued. *McAuliff v. Parker*, 10 Wash. 141, 38 P. 744 (1894):

> The general holding of the courts is that the statute of limitations does not begin to run until there is some one to sue, or liable to be sued, but that, when the statute once begins to run, the death of another party does not impede its operation. For instance, in case the action arises after the death of a party to a contract, then the statute would not begin to run until an administrator or representative was appointed. But, if it arose before, the death or disability would not interfere with the running of the statute, as the rule is laid down by *Hogan v. Kurtz*, 94 U. S. 773, that when the statute begins to run it is not arrested by any subsequent disability, unless expressly so provided in the statute. . . .

Here there was no contention that the decedent had discovered his claims against Mr. Ramsden. Under age-old law, as well as under modern law applying the discovery rule, the statute of limitations on the Estate's claims did not begin to run until the decedent's legal *personal representative* discovered them, which could not happen before a personal representative existed.

D. The Trial Court Concluded Ramsden Breached His Fiduciary Duties and Duty of Due Care—not "the Suitability Rule" *per se.*

Ramsden argues Respondent "provides no authority that a violation of the NASD Suitability Rule gives rise to a civil claim for damages".

Ramsden's premise is wrong. Neither the trial court nor the Estate treated violating the NASD's suitability rule as a *per se* cause of action. It just sets the industry's standard of care for a securities salesperson in making recommendations to customers.

On the other hand, RCW 21.20.702, statutorily adopting the suitability rule, probably does create a private cause of action. But that doesn't make any difference, because it is not the basis for the trial court's legal conclusions or judgment. While the trial court concluded that the Texas Keystone investment was "unsuitable" (CL 1, CP 58), its Conclusions of Law are based on Ramsden's negligence and failure to employ the skill, prudence and judgment of a reasonably prudent securities salesperson. The Court never cites "the Suitability Rule" per se:

> CL 2. Mr. Ramsden breached his duty of due care, duty of fair dealing, and duty to have reasonable grounds to believe his recommendations were suitable for Mr. Ives. . . .
>
> CL 5. As any professional, a securities salesperson must employ such care, skill, prudence, diligence and judgment as might reasonably be expected of persons skilled in his calling.
>
> CL 6. Securities salespersons owe their client a duty, at common law and pursuant to the rules and regulations of the securities industry, of fair dealing.
>
> CL 7. A securities salesperson has a duty to (1) determine a customer's financial circumstances, and (2) recommend only investments and investment strategies that the salesperson has reasonable grounds to believe are suitable for that client, in light of the client's individual circumstances. "Suitable" means

> appropriate, in light of the client's age, wealth (or lack of wealth), investment needs and objectives, risk tolerance, and investment sophistication.
>
> CL 8. A securities salesperson has a duty to refrain from making recommendations that are incompatible with a client's financial and other circumstances. . . .

To be sure, the Estate in its briefing commonly refers to the "suitability rule" standing alone. But given the trial court's Conclusions of Law it simply used those references as shorthand for, and fairly representing, the industry's standard of care as the trial court found it to be in unchallenged FF 5-10.

Ramsden obviously owed his customers a common law duty of reasonable care. *De Kwiotkowski v. Bear, Stearns & Co., Inc.* 306 F.3d 1293, 1305 (2002) ("No doubt, a duty of reasonable care applies to the broker's performance of its obligations to customers. . . ."); *Skeie v. Mercer Trucking Co., Inc.*, 115 Wn.App. 144, 61 P.3d 1207 (2003). And the NASD's suitability rule is properly considered in determining the security industry's standard of due care and proper conduct, as the trial court did here. *Mihara v. Dean Witter & Co., Inc.* 619 F.2d 814, 823-24 (9th Cir. 1980):

> New York Stock Exchange Rule 405 ("know your customer"). . . has been recognized as a standard to which all brokers using the Exchange must be held. . . . Appellants contend that the admission of testimony regarding New York Stock Exchange and NASD rules served to "dignify those rules and regulations to some sort of standard." The admission of testimony relating to those rules was proper precisely because the rules reflect the standard to which all brokers are held.

Accord, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cheng, 697 F. Supp. 1224, 1227 (D.D.C.1986) (violation of NASD rule was evidence of broker's negligence; negligence claim based on violation of NASD rules is proper even where a court has held that the rule itself does not create a private right of action); *Miley v. Oppenheimer & Co.*, 637 F.2d 318, 333 (5th Cir.1981) (NYSE and NASD rules are excellent tools to assess reasonableness of broker's handling of investor's account); *Lange v. H. Hentz & Co.*, 418 F. Supp. 1376, 1383-84 (N.D. Tex.1976) (violation of NASD rules should be a factor in determining brokerage industry standard of care and is evidence of the standard of care).

E. *In re Jack Stein* Is Not the Estate's "Sole Authority," and It Is Properly Discussed in Argument.

Because since 1983 nearly all claims against registered securities salespersons have been arbitrated, very few modern appellate cases discuss the facts or the law that are at issue in such cases. Neither do NASD arbitration panels issue written explanations for their decisions. NASD Code of Arbitration Procedure, § 10330(e). The NASD's National Adjudicatory Council, however, issues lengthy and detailed discussions of the law and the facts in cases involving alleged breaches by stockbrokers of their duties.

To "illustrate the application of the rules" (Resp. Brief, at 57) when it is alleged a broker violated his duties in recommending that a customer purchase an investment, the Estate discussed a detailed analysis and written decision by the National Adjudicatory Council in the case of *In re Jack H. Stein*. The Estate did not contend that *Jack H. Stein* is precedent binding this court. It used that case to frame the Estate's own analysis and argument, and by way of comparison to our facts. Ramsden objects, citing RAP 10.4(g), (h) (prohibiting "citing as an authority an unpublished opinion of the Court of Appeals"). That RAP is inapplicable on its face.

But the Estate does believe that using the discussion in that case, and comparing facts in that case by analogy, are proper argument. NAC decisions are appealable to the S.E.C. [15 U.S.C. § 78s(d)-(e)]. S.E.C. decisions *are* reported and are frequently cited in federal Court of Appeals, and are themselves appealable to the Court of Appeals. *See S.E.C. v. Mohn*, 465 F.3d 647, 649 (6th Cir.2006). So while the discussion in *Jack H. Stein* is not precedent, it is part of a legal process overseen by the federal judiciary and is a serious legal analysis.

Ramsden also declares *Jack H.Stein* to be "the sole authority" cited by the Estate on its cross appeal. He is wrong again. The controlling authority on whether an investment is suitable is RCW 21.20.702 and

NASD Conduct Rule 2310. The Estate cited and quoted at length that legal authority. Resp. Brief, at 7. And in any event, there has never been any argument over the law that applies here; Ramsden has never contested whether the suitability rule establishes an industry standard for a stockbroker duty of due care, or whether violating the elements included in that rule leads to liability.

The cross appeal focuses on whether the trial court's Findings of Fact support its Conclusion of Law that the first four limited partnership investments were suitable ("not unsuitable"). If they were not suitable, the Estate contends the trial court erred in failing to conclude that Mr. Ramsden breached his duties of due care, etc., in recommending them to Mr. Ives, just as he had in recommending the unsuitable Texas Keystone investment.

The Estate's argument consists mostly of an analysis of how the court's Findings of Fact, and sometime the trial record, apply to the law set forth in RCW 21.20.702 and NASD Rule 2310. It is fact-specific, and no citations to judicial opinions are necessary for that analysis.

F. The Court Erred in Finding as a Fact that Ives Had "Sufficient Liquidity", and Concluding that Liquidity Alone Made the Recommendations Suitable.

Ramsden does not address the Estate's challenge to the sufficiency of the evidence supporting the court's finding that Ives "had sufficient liquidity for his circumstances following each of the [first four limited partnership] purchases". His only response is that

- Ives "overlooks" that he suffered no monetary damages specifically from a lack of liquidity (Reply Br., at 39); and

- Ives "fails to provide authority that the trial court could not consider just liquidity, or that the court was required to make a determination based upon all factors" *Ibid*[5].

The first point is irrelevant, and was discussed in the opening Brief of Respondent.

The second point does not address the sufficiency of the evidence. As an argument on the law, it verges on the absurd: customers virtually always have enough liquidity for their circumstances after buying a security. If that the sole fact, standing alone, made a broker's recommendation suitable, then rarely would any recommendation—no matter how speculative, or how contrary to an investor's investment objectives—ever be unsuitable.

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[5] While not mentioning this in responding to cross appeal, earlier in his brief Ramsden had wrongly stated that the court's Finding No. 51 and Conclusion of Law No. 1 (the Texas Keystone investment was unsuitable for Ives) "are premised *exclusively* upon the fact that it [sic] exhausted Jerry Ives' liquid assets when he was 80 years old." But Finding No. 51 only addressed liquidity. In other Findings the court also found that Texas Keystone was illiquid (FF 31, CP 55), and was "the most highly speculative of the limited partnership investments" (FF 40; CP 57). And Conclusion of Law No. 1 was explicitly based on the investment being speculative, as well as illiquid.

G. Ramsden Does Not Argue the Findings of Fact Support Conclusion of Law No. 3.

Ramsden never even discusses whether the Findings support Conclusion of Law No. 3. Instead, he just makes shotgun assertions that the Estate "provides no authority" for the law on which *it* relies. Ramsden seems to think that for each fact the Estate discusses, it must cite an appellate case involving a similar fact and applying it to the same law in the way the Estate argues it should apply here.

But Ramsden is consistently wrong in asserting the Estate provides no authority for its arguments. For example, the law is that a securities salesperson "Must have reasonable grounds for believing that the recommendation is suitable for the customer" in light of the customer's individual circumstances. NASD Conduct Rule 2310; RCW 21.20.702. The Estate argued that applying the facts about Mr. Ives' age, financial circumstances, etc. to the law, the limited partnerships were not suitable for him because of the facts that they were speculative (FF 39; CP 57), illiquid (FF 31; CP 55), had "considerably higher" commissions "than the commission rate which brokers generally receive for the sale of stocks, bonds and mutual funds" (FF 13, CP 53), and so on. Resp. Brief, 55-64. Ramsden responds:

> "Jerry Ives argues that high commissions securities were not suitable for Jerry Ives. BR at 62. Jerome Ives fails to support his argument

with authority. [It] should therefore not be considered."

He is wrong. The Estate cited evidence that Ives had very limited means (Resp. Brief, at 3-4, 5, 8, 55-56), that a vast array of lower-commission investments were available to Ives (FF 13, CP 55), *and* that the court had found

> Mr. Ives's purchases of the limited partnership investments . . . constituted excessive trading due to their commission costs, in light of Mr. Ives's investment objectives and financial and other circumstances. (FF 37, CP 56).

The Estate argued that applying those facts to the law, high-commission securities were not consistent with Ives' circumstances. One need not cite an appellate court case addressing the same facts, in order to make that argument.

Ramsden asserts

> "Jerry Ives alludes to a world of alternative investments that did not take 8% off the top. BR at 62. Jerome Ives fails to provide any reference to the record. Jerome Ives' argument therefore should not be considered."

Again he is wrong. The court in unchallenged FF 13 (CP 55) found that "stocks, bonds and mutual funds"— the world of traditional investments— had lower commissions than the limited partnerships. This is the support in the record, and the authority for the Estate's "allusion" to a vast array of lower-cost investment alternatives.

Ramsden asserts

> "Jerry Ives argues that the limited partnerships failed to provide regular income. BR at 63-64. Jerome Ives fails to support his argument with authority. Jerome Ives' argument therefore should not be considered."

One begins to wonder if Mr. Ramsden read the Estate's entire Brief. The Estate explicitly cited the records of income generated by the partnerships, which were admitted as trial Exs 81-85 (Brief, at 63). These exhibits show erratic and greatly variable amounts of income being distributed by the partnerships, eventually dwindling to very little or stopping entirely. This Court can decide whether that evidence supports the Estate's argument that the partnerships were not consistent with Ives' circumstances and investment needs; citation to another appellate case is not required.

The Findings of Fact, and the evidence in the record, conclusively establish that Mr. Ives was quite old; had very limited assets; had limited, fixed, income; was relatively unsophisticated about investments; and sought conservative investments generating steady income.

The Findings of Fact, and the evidence in the record, conclusively establish that the first four limited partnership interests Ramsden sold Ives

- were speculative, not conservative;
- did not provide the stable income Ives sought, but instead highly variable income that could—and did—run out over time;

- were illiquid, and that Ives might not a have access to the cash for many years—while one in his circumstances might be expected to need that money for extraordinary expenses such nursing care or medical care; and

- had considerably higher commission costs than other traditional income-producing investments, while Mr. Ives had limited means.

The amount of liquid assets which an investor has, standing alone, certainly could cause an illiquid investment to *not* be suitable for his needs. But the converse is not true. The fact that an investor has sufficient liquid assets means only that the liquidity factor is not a problem. It does not mean that anything else about the investment meets the customer's needs or circumstances.

Finally, the Estate concluded its argument on the cross appeal with the accusation:

> The only reason [the limited partnerships] were recommended is because Ramsden pocketed a rich 8% commission every time he foisted one of them off on the trusting elderly Mr. Ives.

Ramsden responds that the Estate "fails to provide either citation to the record or authority to support his argument". Appellant's Reply Br., 41. Ramsden is wrong. The trial court found as a fact, cited in the Estate's opening brief (at 8-9), that

> Mr. Ramsden generally received a commission of about 8% of the sale amount when he sold limited partnership interests. This is considerably higher than the commission rate which brokers generally receive for the sale of stocks, bonds and mutual funds. FF 13; CP 53.

Ramsden did not challenge the sufficiency of the evidence to support this Finding, and it is a verity on appeal (although he declares that he himself testified, with respect to just one of the partnerships, that his employer got 8% and gave him only a portion).

II. ATTORNEYS FEES AND COSTS

Respondent requests an award of attorney's fees and costs on appeal. Pursuant to RAP 18.1, and RCW 21.20.430, and RCW 19.86.090.

Respondents' claims are based on conduct which the trial court found, with respect to Ramsden's recommendation that Mr. Ives buy the Texas Keystone investment, to violate RCW Ch. 19.86, under which an award of attorneys' fees and costs is authorized. If the Court grants Respondent's cross appeal, it would necessarily follow that Ramsden's conduct in recommending the first four limited partnerships likewise violated RCW Ch. 19.86, warranting an award of attorneys' fees and costs for the cross appeal.

DATED: February 16, 2007

Carlson & Dennett, P.S.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 16th day of February, 2007, I caused a true and correct copy of the foregoing document to be mailed, postage prepaid, in the U.S. Mail to the following:

Clerk, Court or Appeals, Division II 950 Broadway, Suite 300 MS TB-06 Tacoma, WA 98402	Christopher M. Constantine Attorney at Law P.O. Box 7125 Tacoma, WA 98407-0125

DATED this 16th day of February, 2007.

____