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WASHINGTON STATE COURT OF APPEALS  
DIVISION TWO AT TACOMA

NO. 35765-8 II

Joe and Teri Mount, H/W, plaintiff/respondent

v.

Tom and Kimley Nauman, H/W, defendant/appellant

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DIVISION II  
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STATE OF WASHINGTON  
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APPELLANT'S OPENING BRIEF

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*CERTIFICATION: I certify that on this 21<sup>st</sup> day of March 2007, I caused a true copy of this opening brief of appellant to be served upon Ralph Smith Esquire, atty. for plaintiffs by ABC Legal Messenger to his record address .*

[Signature]

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#### **4a ASSIGNMENTS OF ERROR**

1. The 10/25/06 Order denying Naumans' continuance request was error.
2. The ex parte 10/27/06 Judgment, Findings and Conclusions were error.
3. The 12/12/06 Order denying CR 59 Motion to Reopen Judgment and Findings and Conclusion and For New Trial was error.
4. The 1-25-07 Minute Order and 2/28/07 order denying defendant's motion to reconsider was error

#### **4b ISSUES RELATING TO ASSIGNMENTS OF ERROR 1-4**

1. What are the standards for reviewing the trial court's discretionary abuses and errors of law?
2. Is CR 40(e) good cause shown or CR 59(a)(1,7) irregularity in proceedings shown where trial court denies a trial continuance to a party seeking to perpetuate his trial testimony and secure the attendance of absent witnesses, unable to be present at trial because of defendants' battle with metastatic cancer, surgery, neuropathy, potent chemotherapies, morphine, and depression medicines?
3. Failing to address, discuss, assess, or exhibit awareness of Mr. Nauman's medical issues, branding Nauman a calculating liar and obstructionist for claiming to be sick, unable to fly, and a poor record keeper, did the trial court abuse its discretion?
4. Reinterpreting the history reported in its prior orders, did the trial court abuse its discretion?
5. If not singly, did the aggregate of these discretionary abuses prejudice the defendant?
6. Was the absent evidence material and procured with diligence with reasonable guarantees for a rescheduled trial?
7. Is CR 40(d) good cause for trial continuance shown where a party is

unable to be physically present at trial to react to the developing case or meaningfully prepare due to unavoidable illness?

8. Is newly discovered evidence of an earthquake disaster 10 days before trial and medical fitness to perpetuate trial testimony and locate and organize witnesses and trial counsel eligible for CR 59(a)(1) consideration?

9. Is it prejudicial error to refuse to consider reopening materials which do not relate to or prove or disprove the issues framed in the plaintiff's Complaint?

10. Was the evidence of the earthquake disaster, impeded travel and stamina for trial, and fitness for limited activity to perpetuate testimony, submitted in the reopening applications newly discovered, material to the reopening, and procured with reasonable diligence?

## **5. STATEMENT OF THE CASE.**

*PARTIES.* The plaintiff Terri Nauman Mount, and her marital community ("Mount") sued the marital community of her brother, defendant Tom Nauman et ux. , ("Nauman") who reside in Kamuela on the Island of Hawaii. (Clerks Papers, page 272 paragraph 1.2; page 273 paragraph 3.1) (hereafter "CP 272 ¶ 1.2; 273 ¶3.1)(See also CP 172-75) The 2003 Complaint alleges conversion and securities fraud. (CP 273; 275-76 ¶ 4.1, 4.2) The Complaint describes a joint tenancy, where Mount gave his funds to a pool of money traded on the stock market by Tom Nauman. (CP 274 ¶3.4) and received from the pooled funds his right to recover his original contribution, which grew to \$604,000, "plus profits and minus losses and taxes..." (CP 282; 274¶3.5) The case arose because the pooled funds suffered in 2000 a total loss, with the bursting of

the “tech” bubble. (CP 275 ¶ 3.7)

The complaint identifies 100% of the profit on sales [net of 28% income tax] credited to Mount (e.g. Ebay and Priceline) (CP 279), without any sales charge or commission. (CP 279, 280, 274 ¶ 3.4) Mount also paid 100% of the investment losses. (e.g. PDLI) (CP 279)

The Nauman’s Answer identifies the essential terms of joint tenancy: to “invest his (Mount) funds exactly as I was investing mine;” (CP 267 ¶ II. 2; 262 ) the gift deed which effected the Mount’s transfer of funds to the pool; (CP 262 ¶ II.1) the other participants in the pooled account (CP 266) and Nauman’s due diligence in securing and executing the advice of his trading company compliance officer in setting up the pooled account. (CP 266-67) Nauman also counterclaimed, alleging defamation. (CP 268-69)

*PRE TRIAL* The discovery period was uneventful. Plaintiff sought and received an October 2004 Order to Compel Answers to Interrogatories, (CP 246-7) which acknowledged some degree of justification for delay in fixing 40 days for defendant to comply. (CP 246-7) Plaintiff was seeking through CR 34 all stock trading records under defendants custody or

control. (Clerks Sub No. 7, hereafter "CSN #7" )<sup>1</sup> There was no further record<sup>2</sup> made in the trial court about discovery, apart from hearsay assertions by plaintiff's counsel that, having received answers as compelled by the Court, he posed a better set of questions (CSN # 12 ) which continued to seek records under defendants custody or control. (CSN #12) There is no assertion made or record made that plaintiff ever asked the identity of or compelled records from or attendance of any third party, such as Nauman's tax preparer, escrow, or broker, its successor or IRS records custodian. Otherwise, the plaintiff's pre trial activity was limited to three requests:

1. In December 2005 to set the matter for trial; (CSN 17,19)
2. In May 2006 to continue the trial; (CP 233-34)
3. In June, 2006 to reset the matter for trial. (CSN 28)

The Court issued orders to set the matter on the June 5<sup>th</sup> trial calendar, (CSN 21) strike the matter from the June 5<sup>th</sup> trial calendar, (CP 231-32) and to set the matter on the October 25<sup>th</sup> trial calendar. (CP 217) Additionally, two judges recused themselves, noting their personal relationship with plaintiff Joe Mount. (CP 244,245)

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<sup>1</sup> The clerk of the trial court will designate and forward to the court the contents of all citations to the record marked "CSN" with its supplemental designation of clerks papers, previously filed, at which point appellant will notify the case manager of the correct citation to the clerks papers.

<sup>2</sup> Plaintiff at one point requested assistance securing the second round of records requests, but elected to abandon that request before putting the matter to the court (CSN #13) .

*MEDICAL INCAPACITY*

Five months prior to trial, plaintiff, through counsel, secured Nauman's written authorization for the release of medical information through attending medical provider Kevin Kunz, MD. (CP 234) Plaintiff, through counsel, interviewed the attending provider, which satisfied him that Nauman was confined in a hospital with a medical condition preventing his attendance at the trial set for June 5, 2006.<sup>3</sup> (CP 234) Plaintiff asserted his understanding to be that Nauman's inability to attend trial extended for a further two weeks beyond the June 5<sup>th</sup> trial date. (CP 234) The court reviewed direct medical evidence from doctor Kunz delivered at its June 28<sup>th</sup> trial setting hearing (CP 230) including this problems list:

- \*recurring cancer;
- \*metastatic cancer complications,
- \*chemotherapy induced peripheral neuropathy and impaired walking;
- \* cognitive disturbances and micro circuitry perturbations secondary to methadone and methadone tolerance;
- \* depression with suicidal ideation; sleep impaired; bed confinement; abandoning interactions;
- \* adverse effects secondary to nardil depression medicine, including incapacitating headaches when withdrawing from the medicine;
- \* hospitalization for pain control with 300 mg intravenous morphine yielding to high dose oral morphine and

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<sup>3</sup> Nauman was billed inpatient hospital charges for June 5, 2006 by Kona Hospital. (CP 170)

- gabapentin;
  - \*disability under social security guidelines.
- (CP 224-6) The treatment plan required serious interventions and serious changes in routine:
- \*a rehabilitation program to address de-conditioning secondary to intractable pain;
  - \* explore surgical ablation, implanted analgesic pump or more;
  - \* stress reduction, including medical postponement of legal proceedings;
  - \*scale back work activities to 2 hours per day.

(CP 225-26) This record was a component of the trial setting hearing. (CP 230) These scientific judgments are completely uncontradicted by evidence. (CP 234)

*DEFENDANTS' 1<sup>st</sup> MOTION TO CONTINUE OCTOBER 25<sup>th</sup> TRIAL.*

On 10/18/06, the 6<sup>th</sup> court day prior to trial on 10/25/06, Nauman filed with the clerk his first written, signed continuance request for “rescheduling the hearing for sometime in January/February next year.”

(CP 212) The Court served plaintiff’s counsel, Mr. Smith. (CP 94, 97) The request identified an enclosure from attending physician Kunz. (CP 212) (RP I, @ 5-6) The supporting material from Kunz, (CP 213) including Kunz’ sworn testimony, (CP 210-11) showed these changes to Nauman’s problem list:

- \* worsened chemotherapy induced peripheral neuropathy;
- \* morphine tolerance;
- \* edema, skin breakdown, bacterial infection in his feet make him unable to walk unaided for 50 feet;

\* new psycho tropic depression medicines cause memory problems and problematic sedation;  
(CP 210-11) The treatment plan for fall 2006 included planned entry into a residential pain clinic or implanted spinal cord stimulator to achieve independence from the problematic medications. (CP 211) Participation in legal matters and trial were both beyond Nauman's capabilities, due to illness, and required postponement. (CP 211) The patient was informed that he was "in no condition to go anywhere," and is "not capable of traveling to Washington State" for trial (CP 136) <sup>4</sup> These further scientific judgments are also completely uncontradicted in the record. (CP 234)

The Court heard argument about Nauman's continuance request from counsel for plaintiff Smith, who had been served with it earlier. (CP 94, 97) Mr. Smith declined to make a record of any admissible facts (CP 92-93) or to challenge the record made by Kunz on this occasion. (CP 234)(RP 10/25/06 at 3) Smith instead made hearsay assertions that Nauman engaged in prior bad acts "using his illness as an excuse for years;" (CP 92) settled contested customer trading claims 9 years before trial; (CP 92) bankrupted medical bills 7 or 14 years before trial; (CP 92-

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<sup>4</sup> The clerk's docket prior to trial does not index nor appear to include this 10/13/06 letter from the attending physician addressed "Dear Judge Brosey" at the trial court's mailing address, although Dr. Kunz' 6/12/06 and 9/22/06 and 10/24/06 writings to the court are logged by the clerk. The reconsideration application, which submitted the 10/13/06 writing as exhibit 6 to the Kimley Nauman declaration (CP 185 ¶6) asserted its impression that the rial court had previously logged this letter under CSN #45.

93) and sold a retirement asset during the pre trial period. (CP 93)<sup>5</sup>

A Washington lawyer, Mr. Walker, made a special appearance at trial to deliver to the court the sworn testimony of Doctor Kunz establishing the patient Tom Nauman to be incapacitated and incapable of participating in legal proceedings. (CP 90-91). Nauman had no direct contact with lawyer Walker, who was “contacted by” and “asked to appear” through an intermediary, Nauman’s father. (CP 91) The lawyer felt compelled that “he should not in any case” appear. (CP 91)

Under the signature of Evelyn Nauman, the first continuance request also identified a Richter 6.6 earthquake centered 14 miles from Nauman’s home 10 days before the trial, which damaged the house structure, hot water system, water, and power, forcing the Naumans and their children to sleep under a trampoline. (CP 212)

#### *EXERCISING DISCRETION AT TRIAL TO DENY CONTINUANCE*

The continuance motion was denied. (CP 208, 096) The court did not decide “...if there’s really a serious medical problem...” (CP 95)

Initially, the trial court reframed the issue of Nauman’s incapacity

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<sup>5</sup> Trial exhibit 10, a certified record of Mr. Nauman’s prior history of his customers’ unproved accusations compiled by the Department of Securities, was admitted at trial. (CP 206). But RCW 5.44.040 certified public records “...**when relevant and material**, are admissible in evidence if ...it is the record of a fact as **distinguished from an opinion**...” Steel v. Johnson, 9 Wn.2d 347 351 (1941) (emp. added)

into “ample opportunity” (CP 095) to prepare, to travel, or to make alternative arrangements with medical facilities in Washington. (CP 095) The trial court balanced this against plaintiff’s right to a “day in court ...and if I grant this continuance...they’re not going to get it.” (CP 95-96)

*EXERCISING DISCRETION TO DENY REOPENING BASED UPON THE TRIAL RECORD.*

A timely motion for new trial was filed and argued. (CP 64, 79)

The Court denied reconsideration. (CP 64, 63)

Without any basis in fact, the court deduced from the trial record there was “no...written motion” for continuance (Report of Proceedings 12/12/06, p. 30, hereafter “RP 12/12 at 30”) “there was no request for continuance...I don’t recall that there was even a request for continuance...” (Report of Proceedings 1-25-07, p. 24; “RP 1-25 at 24”) and “its not too much to ask....that you give Mr. Smith’s position an opportunity to respond as set forth by the rules.” (CP 12/12 at 46)

The Court’s baseless findings influenced its application of the CR 59(a)(1) statutory phrase “irregularity in proceeding.” The Court held: “the court is not going to grant a request that was not formally and properly before the court.....the long and the short of it is that there was no formal request for continuance.” (RP 12/12 at 43; 41; 40 )

On reconsideration, the trial court did not address the question it

originally deferred at trial “...if there’s really a serious medical problem...” (CP 95) The record contains no discussion, assessment, awareness or conclusion whether or not metastatic cancer and chemotherapy or the doctors’ inability to get the upper hand against Nauman’s intractable peripheral neuropathy and (CP 225, 210) and resultant methadone disturbances, (CP 224) nardil headaches (CP 225) and morphine sedation (CP 210) were a fit scientific basis to negate travel to and preparation for the October 25<sup>th</sup> trial. The court instead expressed with exasperation its conclusion that it “can’t believe” Mr. Nauman and “would not accept” and “would not believe” and felt “troubled” (RP 12/12/06 at 41) that Nauman “merely claimed to be ill” and “claims I am too sick to go to court”( RP 12/12/06 at 41,43.) Reframing the scientific issues as Nauman’s lay claims, the trial court concluded “I don’t have satisfactory evidence that Mr. Nauman is disabled by catastrophic illness.” (RP 12/12 @ 45)

The trial court’s reconsideration did not address, discuss, or assess the impact upon the patient of a treatment plan or the propriety of the medical treatment plan requiring medical postponement of any legal issues (CP 225) for six months beyond October 2006. (CP 211) The court ignored instructions to the patient he was in no condition to go and not capable of travel to Washington State (CP 136) or to walk 50 feet without

assistance (CP 210-11) The court ignored instructions to the patient that he must avoid stressful preparations for court and reduce his productive gainful hours from two hours per day (CP 225) to zero (CP 210, 134) over the course of a 4 month widening and worsening health crisis. (CP 235)

The trial court also concluded that Mr. Nauman was a regular air traveler between the islands of Maui and Hawaii who had “ample opportunity to participate and for whatever reasons voluntarily chose not to participate” at the trial. (RP 12/12/at 45) The court deduced Nauman’s claims to be incapable of air travel to be a vexatious “story....he’s too sick to travel.” (RP 12/12/06 at 29) The Court found “what I would have expected is I had the tickets purchased, I had the hotel reservations made, I was ready to come over there and go to trial and then we had the earthquake and I couldn’t get off of Maui (sic) to come over there to the mainland. I don’t see any of that in the file.” (RP 1-25 p. 10) The court deduced from this record:

“You say he can’t travel, but he apparently has no difficulty going **from Maui** over to the Big Island for his doctor, huh?....The doctor’s affidavit says his office is in Kailua Kona and **that’s not on Maui that’s on the Big Island.** Been there, done that....I’ve had eight trips over there, seven of which have included Maui

(RP 12/12 p. 12)(emp. added) The trial court had no basis in fact for its vexation, characterization of Mr. Nauman’s “story,” or conclusion about

Mr. Nauman's capacity for air travel. Mr. Nauman's residence is not Maui, but Kamuela, **Hawaii**, (CP 272, 265, 172-175) at zip code 96743 (CP 272, 251),<sup>6</sup> an approximate 40 minute drive down the road to Dr. Kunz' medical office in Kailua Kona, Hawaii. (CP 56, ¶7; CP 215)

The trial court's focus upon its mistrust of Nauman's air travel "story" and its disbelief of his "mere assertions" of illness instead of the medical record appeared to lead the trial court to stray further outside the admissible trial record to support its conclusions. The trial court further concluded that Nauman "chose voluntarily not to participate" (RP 12/12/06 at 46) (RP 1-25-07 at 26) (emp. added) The trial court deduced Nauman's voluntary choice to be "Nauman's intent from day one...to delay, obfuscate, avoid the trial." (RP 12/12/ at 37) To deduce bad intent, the court relied upon "Mr. Smith in a colloquy with the court...acting as an advocate...set forth a number of reasons why....the nonappearance of Mr. Nauman was not unplanned, not due to emergency, but part and parcel of a strategy to delay and obfuscate proceedings." (RP 12/12 p. 41-42). A search of the record of such colloquy unearths a record of third

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<sup>6</sup> Pursuant to ER 201(b,d) the court shall take judicial notice of adjudicative facts when furnished data of unquestioned accuracy, such as the White Pages. Com telephone directory for zip code 96743:

**96740 Kailua Kona Hawaii** 96741 Kalaheo Kauai 96742 Kalaupapa Maui  
**96743 Kamuela Hawaii** 96744 Kaneohe Honolulu 96745 Kailua Kona Hawaii

party hearsay, opinions about Mr. Nauman or his bad character or unproven accusations against him or other bad acts, but not material admissible evidence.<sup>7</sup>

The court cited more hearsay as further evidence of a wilful bad attitude, where “Mr. Smith set forth some of the answers to interrogatories apparently that were made by Mr. Nauman...” (CP 12/12 at 37) about “...the stuff **he was supposed to provide pretrial as** explanation for where the money went.” (RP 12/12 at 21)(emp. added) Attorney Smith’s hearsay report of Nauman’s apparent answers asserts Nauman’s bad conduct was in keeping on file at his residence **no personal copy** of records made by his escrow agent and broker or submitted to IRS. (CP 69-70) Finally, the Court derived Nauman’s bad intent from its one “ruling” (RP 12/12 at 36)(CP 246) which at the time recognized no emergency, but instead granted Nauman 40 days to comply.(CP 246)<sup>8</sup>

*DENY DAY IN COURT* The trial court also reiterated on

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<sup>7</sup> Smith asserted his own immaterial opinion that Nauman was “using his illness as an excuse for years” (CP 92) the unproven immaterial accusations of third parties that Nauman settled contested customer trading claims 9 years before trial (CP 92) and immaterial bankruptcy of medical bills 7 or 14 years before trial. (CP 92-93)

<sup>8</sup> Though counsel for plaintiffs urged the court to infer bad conduct from the Nauman’s pre trial sale of a retirement asset, the trial court avoided that error, finding “I put no weight whatever into the fact that Mr. Nauman has chosen to do whatever he has with his property....(as) counsel has presented a rational explanation for that.” (RP 12/12 at 43)

reconsideration its initial basis for denying continuance: denying plaintiff his day in court if the defendant could not return on a date certain to participate at the trial. The court concluded that “to undo all this and grant a motion for a new trial based upon the assertions made by Mr. Nauman ...would deny, first of all, the plaintiffs their opportunity in court, secondly, there’s no guarantee that I can foresee that...six months from now....that Mr. Nauman would be any more cooperative or any more able....whatever that may mean with respect to his medical condition, to participate in the proceedings.” ” (CP 12/12 p. 44-45; CP 095-96; RP 12/12/06 at 37-38; RP 12/12/06 at 4) (emp. added)

*NEW EVIDENCE IN THE REOPENING APPLICATION OF INVOLUNTARY INCAPACITY*

The trial court did not address or discuss or evaluate the reopening application of attending physician Kunz, (See, CP 61, 62) asserting Nauman’s medical fitness to perpetuate his testimony in a residential setting for 2.5 hours per day with the support of pain clinic specialists to manage his medicine (CP 55-56 ¶4,5) or the support of an acupuncturist to rid him of reliance upon nardil and morphine (CP 27 ¶ 2,4) Nauman retained a trial counsel to address the decision maker, cross examine, and present witnesses. (CP 78; RP 1-25-07 at 8)

The reopening application also identified the historical record of

Nauman's previously identified problems list: two 1996 testicular cancer surgeries; cancer surgeries 1999 and 2000; heart excision teratoma cancer surgery; and 2004 right shoulder replacement. (CP 180; CP 181¶2; CP 185 tab 20)

Also, the Richter 6.7 earthquake centered 14 miles from the Nauman's home on October 15, 2006 (CP 182 ¶7; 212) overturned and spilled to the floor and soaked in water all the stored paper case records in Nauman's office. (CP 182 ¶ 9; 141-44) The quake smashed his computer, printer, and fax, so as to sever his email and web connections with the mainland and the witnesses, and sever his own connection to electronic stored records. (CP 182 ¶ 9; 141-44)

The earthquake and continuing aftershocks knocked loose from the Nauman family home 12 cubic feet of stones which once composed its masonry chimney (CP 168, 185 tab 16; 183 ¶12) unseated structural footings (CP 183 ¶ 12; CP 166) and twisted loose and broke sheets of glass everywhere. CP 183 ¶ 12; CP 185 tab 15) For the 10 days running up to trial, the Naumans had neither hot nor running water, dishware, nor cooked food.(CP 182 ¶ 10; 183 ¶11,12))

Aftershocks intermittently disconnected them from the power grid and phone service. (CP 182 ¶ 10; 183 ¶11,12) Nauman couldn't reach

an attorney. (CP 183 ¶ 11) Nauman sought legal representation, but had to rely upon his Dad to find a mainland attorney. (CP 183 ¶ 11) Church connections produced only Mr. Walker, a lawyer whose ethics did not permit him to appear in a dispute between Church members. (CP 183 ¶ 11) Kimley Nauman was incapacitated from attending trial by her need to feed, protect, care for, and shelter two minor children and an incapacitated spouse<sup>9</sup> and to manage her family's earthquake cleanup. (CP 183 ¶ 11) The same dislocations which scrambled and severed Naumans' connections with mainland witnesses or potential trial counsel also prevented Nauman from making a record in the trial court of these dislocations. (CP 181-82 ¶ 1-7; CP 182-184 ¶8-15)

Without a basis in fact, the trial court found Nauman "chose not to hire counsel until after the judgment was actually entered (RP 12/12 at 41) and "chose to represent himself for whatever reason." (RP 10/25 p. 3)

#### *TRIAL FINDINGS AND DEFENSE ON THE MERITS*

The court conducted an ex parte trial on October 25<sup>th</sup>. (CP 097-98) The Court heard evidence only from plaintiff Joe Mount, without objection, cross examination, or rebuttal. (CP 98-121) Only plaintiff

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<sup>9</sup> "Nauman ....receives care from his wife, who attends to all matters regarding the normal activities of daily living." (CP 250)

through his counsel addressed the questions posed by the trial judge. (CP 113-17) Only plaintiff through his counsel furnished a summation (CP 117-120) The findings of fact rely completely upon plaintiff's assertions. (CP 200 ¶4, 4a; CP 201 ¶9; 202 ¶10,11; CP 200 ¶5; CP 200 ¶5; CP 202 ¶12; CP 115; 124 ¶ 5; CP 279- 280, CP 274; Tr. Ex. 1,2).

Nauman's defense to the instant securities fraud judgment (CP 202¶2) is that Mount paid no compensation to participate as a joint tenant in the family investment pool; that Nauman's services as family investment pool manager were "incidental" to his broker business and unpaid, that Nauman merely shared his investment expertise among a group of friends; and that Nauman was not an investment adviser subject to regulation under the Securities Act. The reopening application set forth that Mount didn't pay Nauman to participate in the pool. (CP 124 ¶5 279-80; 274) Mount admitted the pool was to "...keep trading Joe's money just as Tom was trading his own" (Cp 76 ¶5) in an effort to share in Nauman's experience. When asked to confirm Mount's share of the joint tenancy as an asset, Nauman's promise was for the pro-rata share "plus profits minus taxes and losses on sale..." (CP 282, Tr. Ex. 3, CP 115,16) without any financial consideration inuring to Nauman's benefit.

The reopening application controvert's Mount's claim to

ownership. Mount gift deeded to Nauman all funds transferred to the investment pool (CP 124¶ 6; 128) just as pool participants Bob and Gloria Oaks did. (CP 130) The pooled funds were Nauman's legal property. (CP 128) The reopening application establishes Nauman's justification for not returning to Mount the gifted funds. Mount had a tenant-in-common interest in his pro rata share "plus profits minus taxes **minus losses**. (emp. added) (CP 282, Tr. Ex. 3, CP 115,16) There was nothing left of the pool to remit. (CP 275 ¶3.7)

The explanations of joint tenants Bud Nauman and Bob Oaks about the genesis and operation of the pooled investment fund supported this defense. (CP 124-5 ¶ 7-8; CP 128,130) The testimony of defendant Tom Nauman would have supported the defense had his medical unfitness and earthquake effects not interfered with making a record of it. (CP 210, 225, 181-82 ¶4; 123 ¶ 2,3) Nonetheless, judgment was entered against Nauman (CP 204-5) without Nauman's trial participation (CP 202 ¶9) and without Nauman's access to witnesses and to his normal acuity to make a fuller record. (CP 123 ¶3)

## **6 ARGUMENT**

**A. Appellate review of denial of CR 40 continuance and 59(a)(1,7) reopening application to perpetuate testimony of absent party and witnesses or permit meaningful preparations must assure that the fact**

**finder selected its view of historical facts inclusively enough to explain the material and meritorious issues presented using admissible evidence which does not irreconcilably conflict with the entire evidentiary composition.**

A court “may” grant a continuance for good cause shown; CR 40(d) or, if pointed out by affidavit showing materiality and diligence in procurement, to correct an “absence of evidence.” CR 40(e). Also, a Court “may” reopen an order affected by “irregularity” in proceedings CR 59(a)(1); see also CR 60(b)(1)(“irregularity”); see also CR 59(a)(7) (decision....lacking evidence) The statutory term “irregularity” is defined to be a “want of adherence to some prescribed rule or mode of proceeding...” Mosbrucker v. Greenfield Implement, 54 Wn. App. 647 652 (1986) (violation of CR 10c is CR 60b irregularity) Chamberlin v Chamberlin, 44 Wn 2d 689, 706 (1954). ( trial of seriously ill party “without permitting appellant to testify... abused...(trial court’s) discretion in refusing to grant appellant's motion for a new trial”) Whether an atypically submitted continuance motion precludes CR 59(a)(1) irregularity in proceedings “....constitutes a correct statement of the ... doctrine in this jurisdiction is an issue of law (which).... we review for error only, as no discretion inures in the trial court's decision” Schneider v. Seattle, 24 Wn. App. 251, 256 (1979)

Whether reopening trial or granting continuance for absent evidence or for other good causes “may” be granted is an exercise of discretion, reviewed for its abuse. Zulauf v Carton, 30 Wn 2d 425 (1948)( denial of reopening application is reviewed for abuse of discretion); In re Schuoler, 106 Wn.2d 500, 512 1986 (“... refus(ing) to grant her attorney's request for a continuance... the court abused its discretion.”) A trial court abuses its discretion if “exercised on untenable grounds or for untenable reasons” Weyerhauser v Comm'l Union Ins., 142 Wn 2d 654, 683 (2000) which includes the question: “are conclusions drawn from objective criteria.” State ex rel. Carroll v. Junker, 79 Wn.2d 12, 25-26 (1971) See, Bach v Sarich, 74 Wn 2d 575, 583 (CR 59(a)(7) lacking evidence to justify the decision means “irreconcilable with the total evidentiary composition viewed in a favorable light”)

**B.1 It is an abuse of discretion to deny a CR 40e continuance or CR 59a(1,7) reopening application for the purpose of perpetuating the material testimony of a party and witnesses absent from trial due to involuntary circumstances.**

**a CR 40e Standards to Continue Trial for Perpetuation of Trial Testimony**

The classic “good cause” for reopening or granting continuance is for perpetuation of the testimony of an unavoidably absent party or witness. CR 40(e) explicitly provides:

**Continuances.** A motion to continue a trial on the ground of the [i]absence of evidence shall only be made upon [ii]affidavit showing the materiality of the evidence expected to be obtained, and that [iii]due diligence has been used to procure it... The court upon its allowance of the motion, [iv]may impose terms or conditions upon the moving party. (CR 40e)(emp. added); In Zulauf, defendant Carton left town a week prior to trial to supervise a youth group he managed, and, unable to book return air tickets for the trial, he drove through the night, making him unable to meet the court's terms for continuance. The court held "In not reopening the cause for the purpose of taking additional testimony of appellants, the trial court erred." Zulauf, 30 Wn 2d at 429 (unavoidable commitment to shepard youth group) In Strom v Toklas, 78 Wash 223, (1914) the court held that the motion to reopen and for new trial should be granted "to enable the deposition of Toklas who was then in San Francisco" on the advice of her physician. The Court reasoned that ""without (Toklas') presence and without deposition...the trial amounted to little more than a judgment by default." Strom, 78 Wash. at 228-29. (unavoidable absence due to health); accord Chamberlin, 44 Wn 2d at 705 (reopening for deposition of wife due to unavoidable trial absence with flu); See, Estate of Stevens 57 Cal..App 160, 161 (1922) (reopening for depositions of will contestants due to unavoidable illness in New York at time of trial) Hill v Hill, 42 Wash. 250, 251 (1906) (reopening for

deposition of appellant and a witness unavailable in Manila). Nauman was unable to attend or endure the October 25<sup>th</sup> trial because his doctor told him he must not do so. (CP 225, 210-11, 136, 225-26) What is more Dr. Kunz was protecting Nauman from a very real, perilous, medical crisis brought on by metastatic cancer, peripheral neuropathy, potent anti-cancer chemicals, morphine sedation, nardil headaches, and methadone cognition impacts. (CP 224-5; 210-11) Nauman was, however, medically fit to perpetuate his testimony on a limited schedule from a residential setting. (CP 55-56 ¶4,5; CP 27 ¶2,4) Also, Nauman was able to locate a trial counsel and the other investment pool participants after normalcy resumed in the aftermath of a Richter 6.7 earthquake (CP 123-5). A CR 40(e) excusable absence of evidence is established. Failure to reopen was error.

**b. Deducing No Significant Evidence of Medical Incapacity is Arbitrary**

CR 59(a)(7) prohibits decisions which are “irreconcilable with the total evidentiary composition viewed in a favorable light” Bach, 74 Wn 2d at 583. Also, evidentiary conclusions are arbitrary if not “drawn from objective criteria. Junker, 79 Wn 2d at 25-26. In Virginian Mason Hosp Ass’n v Larson, 9 Wn 2d 284 (1941) the court further described the interaction of the evidentiary record, the fact finder’s discretionary choices, and the appellate review function:

This rule does not bind the court to the (fact finders) findings in the sense that the court cannot look to the (hearing) record to determine whether the findings of fact are arbitrary....or wholly without evidential support...or incomplete....

Virginia Mason, 9 Wn 2d at 305-6 (appellate review of administrative

findings on a “record devoid of evidence” in support ) Accord

Weyerhauser, 152 Wn 2d at 683; (findings on “untenable grounds”) See,

Hillis v State, DOE, 131 Wn 2d 373 (1997) (fact finder’s choices among the evidence are “arbitrary....if taken without regard to the attending facts or circumstances”) (judicial review of agency fact finding)

Concluding that the evidence of Nauman’s medical incapacity was “not satisfactory,” and deferring without **ever** answering “...”if there’s really a serious medical problem...” (CP 95) “...whatever that may mean...” (RP 12/12 at 44-45) the trial court made partial findings of fact irreconcilable with the material and unchallenged scientific evidence and abused its discretion. Medical specialist Kunz’s evidence at trial, trial setting, and on reconsideration made the uncontradicted scientific link that metastatic cancer, chemotherapy, (CP 210, 225) the surgically removed portions of Nauman’s thorax from heart teratoma and testicular cancer surgeries (CP 180) the unstable prosthetic shoulder ball joint, (CP 136) and the active properties of chemical cancer therapy, nardil, morphine, and methadone disturbed Nauman’s cognition, memory, focus, and planning,

and ambulation, (CP 210) and diminished his resilience to travel (CP 136) and to stressful events. (CP 225). Yet the trial court did not discuss, explain, attend, or exhibit any awareness that the central, material issue in dispute—Nauman’s “incapacity” showing good cause for continuance—was placed on the record by treating medical specialist Kunz. (CP 210, 225, 136, 180) The trial court missed the point entirely. Deducing “not satisfactory” evidence without discussion or explanation of the central CR 40(e) issue in dispute is an abuse of discretion, not “drawn from objective evidence” Junker, 79 Wn 2d at 25-26. and in disregard of the material surrounding facts and circumstances of the case, Hillis 131 Wn 2d at 373, see, Bach, 74 Wn 2d at 583 (“irreconcilable with the total evidentiary composition viewed in a favorable light”) The order denying continuance and orders refusing to reopen the judgment for a new trial abused the trial court’s discretion on an issue so fundamental that these orders should be reversed on this basis standing alone.

Furthermore, all but the most hidebound or arrogant human beings, when told by a trusted medical advisor to change their ways or risk catastrophic health impacts, feel compelled to change their diet, their exercise, their medicines, their residence, their work routine, or whatever it takes to preserve their health. The court disregarded that Nauman was

under the care of a physician who set forth a treatment plan which **required of Nauman** medical postponement of any legal issues, (CP 225) continuing six months beyond October, 2006 (CP 211) including specific instructions to the patient he was “in no condition to go anywhere,” and is “not capable of traveling to Washington State” for trial (CP 136) or walking 50 feet without assistance (CP 210-11) over the course of a 4 month widening and worsening health crisis. (CP 235) Yet the trial court did not discuss, explain, attend, or exhibit any awareness that this central aspect of good cause for continuance and to order a new trial was either sworn to or addressed to the trial judge and discussed by a trained medical care giver. The court in this regard too ignored the defendants central claim to good cause. Bach, 74 Wn 2d at 583 (“irreconcilable with the total evidentiary composition viewed in a favorable light”) The trial court abused its discretion. Its outcome-determining orders must be reversed.

**c. Credibility Challenge on Untenable Grounds Which are Not Objective are Abuse of Discretion**

Evidentiary conclusions of the trial court are abuse of discretion where those are not drawn “upon objective evidence.” Junker, 79 Wn 2d at 25-26; Bach, 74 Wn 2d at 583 (“irreconcilable with the total evidentiary composition viewed in a favorable light.”) The court deduced it “can’t believe him (Nauman)” and would “not accept” and would “not believe”

and felt “troubled” (RP 12/12 at 41) that Nauman “merely claimed to be ill” and “claim(s) I am too sick to go to court...” (RP 12/12 at 41, 43)

The objective evidence is that Nauman said so because his trusted medical adviser told him so and set forth a treatment plan barring all participation in legal proceedings. The objective evidence is that the active properties of chemical cancer therapy cause nerve injury; nardil and morphine and methadone cause cognitive impacts. Both effects prevent a typical patient and prevented this patient from focusing, concentrating, remembering, and sustaining the pace and intensity required to function at or endure a trial. Because Nauman’s health claims were scientifically supported, the trial court’s abused its discretion to select from this record a reason to doubt Nauman’s veracity when he reported accurately what his doctor told him. Drawing this conclusion in conflict with the objective evidence, the trial court again abused its discretion. Junker, 79 Wn 2d at 25-26.

The court should reverse the orders denying a new trial.

**d. Abuse of Discretion to Find Nauman a Frequent Air Traveler Whose “Story is he’s too Sick to Travel”**

The trial court concluded that Nauman was a regular air traveler between Maui and Hawaii who had “ample opportunity to participate” (RP 12/12 at 45) and “ample opportunity to prepare, to travel, or to make alternative arrangements.” (CP 95) The court found Nauman chose not to

do so “for whatever reasons;” (RP 12/12 at 45) that Nauman claimed falsely to be incapable of air travel. This apparently, vexed the court:

You say he [Nauman] can’t travel, but he apparently has no difficulty going from Maui over to the big Island for his doctor, huh?...The doctor’s office (is) not on Maui, that’s on the Big Island. Been there, done that...I’ve had eight trips over there....

(RP 12/12 at 12) Searching the trial record for objective evidence to support this deduction, “the record is devoid of evidence.” Virginia Mason, 9 Wn 2d at 306; Bach, 74 Wn 2d at 583 (“irreconcilable with the total evidentiary composition viewed in a favorable light”) The uncontradicted evidence is that Nauman lived in Kamuela, Hawaii, (CP 272, 265, 172-75; 251) 40 miles down the road from the doctor’s Kona office on the Big Island, and traveled by car down the road to his doctor visits. (CP 56 ¶7). The provocative conclusion that Nauman routinely traveled by air and that “**the story** is he’s too sick to travel” (RP 12/12 at 29)(emp. added) making he and his doctor calculating story tellers, are not “drawn from objective criteria.” Junker, 79 Wn 2d at 25-26. The trial court abused its discretion in finding Nauman a calculating “story” teller about air travel and a liar about being too sick. The order denying 40(e) good cause for continuance and denying a new trial is grounded upon these abuses of discretion and should be reversed.

**e. Error of Law to Define Irregularity in Proceedings to Exclude an Order Denying Continuance**

An order denying continuance is subject to review for “irregularity” in proceedings under CR 59(a)(1). Zulauf, 30 Wn 2d at 429; Chamberlin, 44 Wn 2d at 706. See, Mosbrucker, 54 Wn App at 652 (“want of adherence to some prescribed rule”) (interpreting CR 60b “irregularity”) The Court received 6 days in advance of trial a written request, signed by defendant, requesting a trial continuance (CP 212) and served it upon plaintiffs. (CP 94, 97) The court heard arguments at trial for and against granting a continuance. (CP 90-91, 92-94) The Court issued an order denying continuance. (CP 208, 96 )

The court deduced from the trial record there was “no...written motion” for continuance (RP 12/12 at 30) “there was no request for continuance...I don’t recall that there was even a request for continuance...” (RP 1-25 at 24) and “its not too much to ask....that you give Mr. Smith’s position an opportunity to respond as set forth by the rules.” (CP 12/12 at 46) The trial court abused its discretion to ignore the significant facts and circumstances in the record that it received a written request, served it upon opposing counsel, invited and heard arguments, and issued a ruling at trial. Hillis, 131 Wn 2d at 373.

Whether a CR 59(a)(1) irregularity in proceeding encompasses an

order denying continuance is a legal determination, to which no discretion is accorded. The trial court misinterpreted CR 59(a)(1) “irregularity in proceedings.” The court held that CR 59(a)(1) excluded continuance requests submitted in writing in advance of trial upon which an order is issued. Instead, the court held “the court is not going to grant a request that was not formally and properly before the court.....the long and the short of it is that there was no formal request for continuance.” (RP 12/12 at 43; 41; 40 ) As a matter of law, the requested continuance, upon which the court issued its order denying continuance, qualified for consideration under a CR 59(a)(1) reopening application, See, Zulauf, 30 Wn 2d at 429. The trial court’s apparent refusal to consider applying CR 59(a)(1) standards to the reopening application was an error of law, premised upon arbitrary deductions about what materials were submitted to the court. To whatever degree this legal error and abuse of discretion resulted in outcome-determining trial court orders, this court should reverse those orders.

**f. Bad Attitude is Unsupported by the Record**

Conclusions drawn arbitrarily from the evidence are those not “drawn from objective criteria.” Junker 97 Wn 2d 225-26. Accord, Hillis, 131 Wn 2d 373; Bach, 74 Wn 2d at 583 (“irreconcilable with the total

evidentiary composition viewed in a favorable light”) Hearsay is inadmissible in evidence. ER 802. “...(H)earsay narrations of occurrences antedating the making of the (business) record...” are inadmissible records of hearsay. State v. White, 72 Wn.2d 524, 531 (1967). Opinion is inadmissible without a foundation in direct perception. ER 701. A certified public record of an opinion is inadmissible. Steel v. Johnson, 9 Wn.2d 347, 351 (1941) Furthermore, unproven accusations of antecedent criminal intent are too tenuous to be admissible evidence of intent at trial. Advantage Tel Dir. Consultants v GTE Directories Corp, 37 F.3d 1460, 1464 (11<sup>th</sup> Cir. 1994) (“erroneously admitted ...1990 accusation of forgery...” Bad intentions from 10 or more years in the past are too remote for admission US v Cox, 536 F.2d 65 (“immigration law violations...constituted specific acts of misconduct that should not have been admitted as impeachment...(Also) events in 1959 and 1960 were so remote they should not have been admitted”)

The court admitted at trial exhibit 10, (CP 206) a certified public record of the hearsay opinions and unproved accusations against Nauman made by non-government personnel, and other asserted bad acts by Nauman. The trial court relied upon Mr. Smith’s ex parte “colloquy” and “advocacy” characterizing these records of opinion and hearsay to

constitute a “strategy to delay and obfuscate proceedings...” (RP 12/12 at 41-42, 37) The colloquy cites the opinions of Smith and unnamed non-government accusers reported in the government record of opinion (CP 92-93)

A bad trait of character is the weakest form of evidence.  
The jury may infer that he...is a bad person...Having made such inferences about a party...the jury might ignore the real issues, including those relating to credibility and improperly base its verdict on this evaluation of character.

Wright, Miller, and Kane, Federal Practice, s. 6118 at 98; accord Wigmore, Evidence, Chadbourn 1970 ¶922. (“To the psychologist, the common law’s reliance on character as an index of falsehood is crude and childish”) Mueller, Federal Evidence, ¶ 306, 1979 (“Prejudice...attends the evidence of bad acts since juries are likely to misuse such evidence...”)  
The trial court drew from this record of hearsay and opinion the prohibited inference that “Nauman’s intent from day one...(was) to delay, obfuscate, avoid the trial.” (RP 12/12/ at 37) and thus Nauman “chose voluntarily not to participate.” (RP 12/12/06 at 46) The trial court committed a reversible error.

Furthermore, a presumed bad attitude is not an objective criteria  
Junker, 97 Wn 2d at 225-26. There is no scientific evidence from a trained health care provider that Nauman’s absence sprang from “attitude”

apart from the chemically active effects of neuropathic chemotherapy (CP 224) methadone disturbances, (CP 224) nardil headaches (CP 225) and morphine sedation. (CP 210) The orders denying a new trial and order denying continuance were an abuse of discretion and should be reversed.

The court cited more hearsay as further evidence of a wilful bad attitude, where “Mr. Smith set forth some of the answers to interrogatories apparently that were made by Mr. Nauman...” (CP 12/12 at 37) about “...the stuff **he was supposed to provide pretrial** as explanation for where the money went.” (RP 12/12 at 21)(em. added) The asserted bad act was neglecting to retain a personal copy of records filed with IRS or made by his broker or escrow agent. (CP 69-70) The trial court adopted the premise that plaintiff’s own failure to seek evidence from third party records custodians (or unnamed accusers or a remote bankruptcy filing) impeached the scientific evidence of Nauman’s precarious health and medical incapacity. The orders denying continuance and denying the reopening applications should be reversed.

**g. Prejudicial Cumulative Impact of Discretionary Abuses**

“The cumulative effect of many errors may sustain a motion for a new trial even if, individually, any one of them might not.” Storey v Storey, 21 Wn App 370, 374 (1978) rev. den. 91 Wn.2d 1017 (“a difficult

witness who was constantly unresponsive even after thoroughly admonished... about the impropriety of her actions”) The instant trial court exhibited multiple discretionary abuses. The trial court deferred at trial any discussion, analysis, attention, or awareness of Nauman’s thoracic cancer surgeries and the potent actions of chemotherapy drugs, nardil, and morphine and never returned to it in its CR 59 proceedings. The trial court arbitrarily branded Nauman a calculated fabricator for claiming to be sick because of it. And the court branded Nauman a liar for feigning inability to fly, citing air trips to Maui that never occurred. The Court impermissibly relied upon counsel’s opinions, arguments founded upon a government record of the hearsay assertions and opinions of non-governmental third parties, without a basis in evidence, to find that Nauman exhibited a wilful bad intent to subvert the trial process. The trial court also adopted the idea that a wilful bad attitude can be inferred where the plaintiff neglected to ask third parties for records and plaintiff did not retain those himself.

The trial court also asserted inexplicable non sequiturs: that its own order denying continuance was not an order under the civil rules; that the signed, written request for continuance, filed and served six court days before trial was not a motion; and that attorney Smith’s arguments in

court did not furnish him an opportunity to respond. Also the court reinterpreted history, recharacterizing its one pre trial ruling to bespeak foot dragging so severe as to require a swift judicial response, when at the time, 40 days were granted for compliance.

If not singly, these discretionary abuses in the aggregate prejudiced defendant from his right to trial. The orders denying reopening and denying a new trial should be reversed for this added reason.

## **2. Materiality of Missing Evidence**

A requested trial extension to procure unavailable evidence must “only be made upon affidavit showing the materiality of the evidence expected to be obtained” CR 40e. The reopening declarations of Bud Nauman, Kimley Nauman, and Jacobson furnish material data undermining the conclusion that conversion and RCW 21.20 violations occurred.

RCW 21.20.010 prohibits dishonesty of an **investment adviser**, defined as one who “receives any consideration from another party primarily for advising the other person as to the value of securities or their purchase of sale....” RCW 21.20.010. See, 15 USC 80b-6 ( “It shall be unlawful for any investment adviser, by... interstate commerce, directly or indirectly--(1) to employ any device, scheme, or artifice to defraud any client or prospective client..”)(emp. added) But the Washington Securities

Act is “not aimed at persons who do not engage in the business of providing investment advice for compensation, but who nevertheless may share their real or supposed investment expertise with a friend or even among a small group of friends.” Brin v Stutzman, 89 Wn App 809, 836-37 (1998) Stutzman

did not charge any fees....(A)lthough Stutzman advised Brin to make the same investments that he was making, there is no evidence in the record that Stutzman was otherwise financially interested in the securities the parties were purchasing.

Brin, 89 Wn App at 836. Accord 15 USC 80b-1(11) (“Investment adviser’ **does not include** ...[C]**any broker** ...whose performance of such **services is solely incidental to the conduct of his business as a broker** or dealer and who receives no special compensation therefor”) (emp. add.)

Nauman’s defense to the instant securities fraud judgment (CP 202¶2) is that Mount paid no compensation to participate as a joint tenant in the family investment pool; that Nauman’s services as family investment pool manager were “incidental” to his broker business and unpaid, that Nauman merely shared his investment expertise among friends and family and did not serve as an investment adviser subject to

regulation under the Securities Act. The reopening application set forth that Mount didn't pay Nauman to participate in the pool (CP 124 ¶5 279-80; 274) Mount admitted the pool was to "Keep trading Joe's money just as Tom was trading his own" (Cp 76 ¶5) in an effort to share in Nauman's experience. When asked to confirm Mount's share of the joint tenancy as an asset, Nauman's promise was for the pro-rata share "plus profits minus taxes and losses on sale..." (CP 282, Tr. Ex. 3, CP 115,16) without any financial consideration inuring to Nauman's benefit. The explanations of joint tenants Bud Nauman and Bob Oaks about the genesis and operation of the pooled investment fund, while absent from trial, would furnish a clear and comprehensive defense to the complaint and thoroughly impeach the trial testimony of plaintiff. The testimony of defendant Tom Nauman would have supported the reopening application, had his medical unfitness and earthquake effects not interfered with making a record of it. (CP 210, 225, 181-82 ¶4; 123 ¶ 2,3)

Liability for conversion requires a willful deprivation of property that is both (a) unjustified and (b) another's belonging. Marriage of Langham and Kolde, 153 Wn 2d 553 (2005). The reopening application controvert's Mount's claim to ownership. Mount gift deeded to Nauman all funds transferred to the investment pool. (CP 124¶ 6; 128) The pooled

funds were Nauman's legal property. (CP 128) The reopening application establishes Nauman's justification for not returning to Mount the gifted funds. Mount had a tenant-in-common interest in his pro rata share "plus profits minus taxes **minus losses**. (emp. added) (CP 282, Tr. Ex. 3, CP 115,16) After loss, there was nothing left of the pool to remit.

For this reason, the materiality of absent evidence should have been a focus of attention, discussion, and ruling by the trial court. Ignoring this central issue of the reopening application, the court further abused its discretion. Bach, 74 Wn 2d at 583 ("irreconcilable with the total evidentiary composition viewed in a favorable light")

### **3. Reasonable Diligence in Proportion to One's Capacity to Prepare**

A proponent of continuance to include unavailable evidence must establish that "due diligence has been used to procure it." CR 40e. Where incapacity is lengthy or serious, the reasonable diligence required of an absent party seeking a day-of-trial extension to permit live or deposition testimony is small. In Jaffe v Lilienthal, 101 Cal. 175 (1894) quoted in Zulauf, 30 Wn 2d at 429, the defendant had been housebound with rheumatoid arthritis for a full year before trial. The Court held

So far as the want of preparation on the part of the attorney is concerned, the most laborious and painstaking preparation ... would not have prevented the sickness and absence of his client...

Jaffe, 101 Cal. at 177. See, Strom, 78 Wash. at 229 (“ upon the whole record, it cannot be said that counsel for the appellants failed to exercise reasonable diligence” in making a week-of-trial continuance request for an elderly and infirm party whose doctor advised her to leave the jurisdiction 16 days before trial)<sup>10</sup> The opposing party’s unclean hands also lowers the moving party’s threshold of required diligence. See, Betts Spring Co v Jardine Mach. Co, 23 Cal. App. 705-06 (1914) ( the matter having “...been on the court’s calendar for two years...[for want of] any reasonable effort of plaintiff...made to force progress....It must be held that the court abused its discretion in denying the appellant’s motion for continuance”) Plaintiff Mount waited over two years to note the instant case for trial. (CSN 17,19)

No amount of preparation by Nauman could have headed off the perilous course of his metastatic cancer, neuropathy, nardil headaches, morphine lethargy, and its widening and worsening impacts during 2006

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<sup>10</sup> cf Odom v Williams, 74 Wn 2d 714, 718 (medical continuance to avoid a “long and suspenseful” trial denied, when the court ascertained the issues were simple and short, the party sat in the vicinity of but not in court on the day of trial, and his attorney could make no firm prediction when his client would be available for a trial in the future); cf . Conner v. Zanuzoski, 36 Wn.2d 458, 462 (1950) (denying continuance to party who left the jurisdiction two weeks before trial “ voluntarily for reasons having nothing to do with his state of health...[making] no attempt to make his deposition” then) cf Bramall v. Wales, 29 Wn. App. 390, 393 (1981) ( “Bramall voluntarily left the state and traveled to New York” after the court had already denied continuance)

which reduced his productive hours from two per day in July to full disability by September. Nauman exhibited the full degree of diligence at his disposal, in proportion to his capacities. Jaffe, 101 Cal. at 178; Strom, 78 Wash. at 229. Ignoring and exhibiting no awareness of Nauman's scientific evidence of incapacity, mistaking hearsay "advocacy" for evidence, and otherwise abusing discretion as set forth in sections B.1(b-g) infra, the trial court erred. The order denying continuance or denying reopening for a new trial should be reversed.

While a search of the Washington reports does not reveal the level of diligence required of a party digging out from an earthquake disaster, the diligence required under such circumstance should also be measured in proportion to one's capacity. Nauman's entire electronic record of case materials, stored paper historical records, and electronic communications to witnesses, potential counsel, and the court were turned upside down, smashed, and strewn about the floor in the Hawaii earthquake disaster 10 days prior to trial. He exhibited the diligence possible, in proportion to his capacity to cope with this disaster.

Similarly, the two Nauman school-age boys had no roof secure from falling objects, no walls secure from animals and pests, no cooked food, no bathing facilities, and no secure communications to the outside

world prior to and on the day of trial. Abandoning young boys to such an environment, or diverting attention from repairing such an environment was a moral and practical impossibility. Both Mr. and Mrs. Nauman exhibited the full degree of earthquake disaster diligence at their disposal in organizing a week-of-trial continuance. For the reasons set forth in B.1 (b-g) infra, the trial court abused its discretion to deduce that Nauman's effort was unreasonably modest.

#### **4. Reasonable Terms for Continuance**

The court, upon allowance of a CR 40e continuance, may impose upon the moving party terms. (CR 40e) See, Odom v Williams, 74 Wn 2d 714, 718 (denying continuance when "attorney could make no firm prediction when his client would be available for a trial in the future")

Nauman sought (CP 61,62) and received medical approval to perpetuate his testimony beginning in March, 2007 for 2.5 hours per day—either with supportive pain clinic therapies to manage his medicines (CP 55-56 ¶ 4-5) or from his home with supportive acupuncture therapy once the **discontinued** morphine and nardil left his system. (CP 27 ¶ 2,4) To address the decision maker, cross examine, and present witness testimony, Nauman retained trial counsel. (CP 78; RP 1-25-07 at 8)

Yet on this reopening record, the trial court repeatedly found "...no

guarantee that I can foresee that...six months from now...that Mr. Nauman would be any more cooperative or any more able...whatever that may mean with respect to his medical condition to participate in the proceedings” (CP 12/12/06 at 44-45) and ....if I grant this continuance...they’re not going to get (plaintiff’s day in court) ...” (CP 95-96) Conclusions drawn arbitrarily from the evidence are those “irreconcilable with the total evidentiary composition viewed in a favorable light” Bach, 74 Wn 2d at 583; accord, Hillis, 131 Wn 2d at 373; Junker 97 Wn 2d at 225-6. The trial court abused its discretion to whatever extent its findings assert Nauman’s non-compliance with reasonable terms to make himself available for future appearances.

On this record of diligence in proportion to circumstances and material evidence absent from trial because of a medical crisis, the trial court abused its discretion to deny a continuance or new trial. The court should reverse the orders denying a new trial.

**C. . Other Good Cause to Continue Trial Arises Under CR 40(d) From Involuntary Circumstances which Prevent a Party’s Meaningful Preparation for and Attendance at Trial**

CR 40(d) provides:

**Trials.** When a cause is set and called for trial, it shall be tried or dismissed, unless **good cause** is shown for a continuance. The court may in a proper case, and upon terms, reset the same.

(Emphasis added)

Unlike CR 40(e) which concerns absent evidence, a CR 40(d) proper case of good cause to continue trial arises where meaningful pre-trial preparations are obstructed. See, In re Schuoler, 106 Wn.2d 500, 512 1986 (affording “**no access** to... records, **no opportunity to contact [witnesses]**’... .the court abused its discretion”)(emp. added) Also, the opportunity for hearing “must be granted at a **meaningful time** and in a meaningful manner.”)(emp. added) See, In re Disciplinary Proceeding Against Deming, 108 Wn.2d 83, 94 (1987) (judicial conduct hearing)

Washington Courts have not delineated in the context of civil trials the dimensions of access to records and witnesses or meaningful timing which make a proper case of CR 40(d) good cause to continue. But other jurisdictions have interpreted the statutory phrase “good cause” to continue the trial.

It cannot be doubted that it is the right of the parties to the action to be present at the trial of their case....(unless) the absence of the party is voluntary and ...(lacking) due regard for the rights and interests of others.

Jaffe 101 Cal. at 177; quoted in Zulauf, 30 Wn 2d at 429 (emp. added) .

Jaffe was decided under California Procedure Code section 594, which “authorizes the court ‘**for good cause**’ to postpone the trial in the absence

of a party.” Id. 101 Cal. at 179. See, CR 40(d) (if “...**good cause is shown** for continuance. The court may in a proper case reset...” (emp. added)

Accordingly, CR 40(d) good cause is intended to assure parties a meaningful time for hearing, where the party’s physical presence can be assured.

...(W)here any reasonable excuse is shown for his absence... dismissal is the absolute destruction of the plaintiff’s right....  
....(P)laintiff was confined to his room by an attack of acute rheumatism....(and) his presence at the trial was indispensably necessary;...he was the only person who knew the whereabouts of the witnesses necessary to be called....

Jaffe, 101 Cal. at 178. The necessity of one’s presence at trial to react to the developing issues at trial motivated the Nebraska court to reopen judgment in Juckniess v. Howard, 231 N.W. 843 (Neb. 1930)

(W)hen the absent person is a party to the litigation, as in this case....the litigant has been deprived, not only of his right to testify in person, ... but also of the **important right to be present** and advise with his counsel during the course of the trial.

"Her counsel were **entitled to her presence, counsel and advice during the entire trial**. The evidence discloses that she knew more about the real issues than any one else, and, while she may have been incompetent as a witness to testify to many of these matters, there was the more need for her advice and counsel during the trial."

Juckniess, 231 NW at 845; (emp. added) accord, Pacific Gas & Electric

Co. v. Taylor, 52 Cal. App. 307, 310-11 (1921). (“where a party’s

**presence at the trial is indispensable** and the character of his illness

...renders his presence at the time impossible a continuance should be

granted, if he has been guilty of no negligence...”) (emp. added)

The instant trial court’s findings 4, 4a, 5, 8,9, 10, 11, (CP 200-202) quote in Nauman’s absence admissions he was said to make and characterizations of his conduct, proving the rule that his “presence at the trial was indispensably necessary...” Jaffe, 101 Cal. at 178; to react to the developing case. See, Juckniess, 231 NW at 845 (“important right to be present”)

The instant trial court record of uncontradicted scientific evidence from a medical specialist is that Nauman’s metastatic cancer and chemotherapy gave rise to a June 2006 treatment plan limiting his productive, gainful activities from 2 hours per day in June (CP 225) to full disability in September. (CP 210, 134) Nauman’s “meaningful time” for a civil trial, See, Deming, 108 Wn 2d at 94, was not immediately following such an interval during which meaningful preparations for trial were an impossibility. Nauman’s lack of capacity to prepare for a meaningful trial and his indispensable presence at trial to identify records or witnesses in rebuttal make CR 40(d) “good cause... shown” and a “proper case” for continuance. Each enumerated abuse of discretion in denying continuance and the aggregate of them (section B.1 (b-g)) prejudiced Nauman from a fair trial. The orders denying reopening should

be reversed for this added reason.

**D. CR 59(a)(4) Newly Discovered Evidence Material to the Issue.**

**1. Overview of CR 59a4 standards**

CR 59(a) states, in pertinent part

A... new trial granted and .. an order may be vacated, ...for any of the following causes affecting the substantial rights of the parties...

(4) [I] newly discovered evidence, {ii]material for the party making the application, which he could not with [iii]reasonable diligence have discovered and produced at the trial

CR 59a (emphasis added) (see also CR 60b3; FRCP 60b2 “newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59b”)

Newly discovered evidence “falls within the rule as long as it pertains to facts in existence at the time of trial and not to facts that have occurred subsequently.” National Anti-Hunger Coalition v Exec. Comm. 229 US App. DC., 143 (D.C. Cir. 1983) citing 6A, J. Moore, Federal Practice ¶ 59.08(3)(1982) (interpreting CR 60(b)(2))

“Materiality” is determined by the CR 59(a) “irregularity” or “misconduct” submitted for review, not the Complaint. Zulauf, 30 Wn 2d at 426 (Carton affidavit asserted his compulsion to mind the youth group and drive through the night, not the merits of the lawsuit) State v. Briggs,

55 Wn. App. 44, 55 1989 ( post trial affidavits established prejudice from “juror White's use of the undisclosed information during jury deliberations”) Adkins v. Aluminum Co. of Am., 110 Wn.2d 128, 137-38 1988) (new trial granted, upon reopening applications asserting “one of the jurors requested a dictionary, the bailiff supplied one, and the jurors considered the definitions of "negligence" and "proximate cause" therein”)

Due diligence “requires a justifiable excuse” for not discovering the material in a timely manner.” Alpern, 84 F.3d at 1536; DeBoer v Village of Oak Park, 86 F. Supp. 2d 804, 808 (ND. Ill 1999), rev'd oth grds 267 F.3d 558 (“Litigants are deemed to have exercised due diligence if they present a justifiable excuse for not submitting the evidence prior to the ....ruling”)

## **2. Erroneous Interpretation of CR 59(a)(4) “Material for the Party Making Application”**

Whether or not the statutory term CR 59(a)(4) “newly discovered evidence” means only evidence probative of the issues set forth in the Complaint and Answer “constitutes a correct statement of the ...doctrine in this jurisdiction is an error of law (which)...we review for error only, as no discretion inures in the trial court’s decision.” Schneider, 24 Wn App at 256. The trial court’s holding herein exhibits this error of law:

The problem I have is that I think the newly discovered evidence referred to under Rule 59 is evidence that pertains to the merits or lack of merits of the underlying claim and not to the situation that's asserted here which is that he was, for lack of a better way to put it, too sick to come to ...Washington to participate in the trial.

(RP 1-25-07 at 23)

In this second CR 59 request, there does not appear to be any evidence related to the underlying case, that of which (sic) is Securities Fraud.....(A)ccordingly I deny the Defendant's second CR 59 Motion for the reasons that the new evidence required by CR 59(4) must bear on the underlying issue.

(CSN 86) Confining the reopening application to issues raised in the Complaint and Answer, the court declared immaterial all of Nauman's reopening evidence of his capacity to perpetuate his testimony to "guarantee" participation at trial in six months (RP 12/12 at 44-45; 37-38, 4, CP 95-96) Also, the court precluded consideration of the reopening materials supporting what Nauman "merely claimed" about his health. (RP 12/12 at 41,43) And the trial court disregarded all of the reopening materials which concerned Nauman's struggle to locate records, witnesses, and a trial counsel while plagued by earthquake related communications blackouts and survival issues. The orders denying reconsideration were conclusively premised upon the wrong legal doctrine. Schneider, 24 Wn App at 256. A new trial should be ordered because of this additional prejudicial error.

**3. Newly Discovered Evidence of Incapacity for Trial and Capacity to Commit to a Future Court Date**

Kimley Nauman's reopening application explained three justifications existing at or before trial for late submissions:

(1) that at the time of trial, an October 16<sup>th</sup> earthquake had destroyed electronic records, emptied the defendants' shelves of their paper case records, and cut off communications to witnesses and potential legal counsel; (CP 181-84)

(2) that Tom Nauman was unable to attend to questions posed by counsel or attend to business or case affairs secondary to his medicines and visible anguish and pain; (CP 181-82 ¶1-7) and

(3) that transcribed medical records of Tom's condition dating at least 57 days back in time remained backlogged and unavailable (CP 187)

Involuntary circumstances justified post trial submission of reopening exhibits 2, 5,6, 20, and the reopening declarations asserting Tom Nauman's medical incapacity to prepare for trial or secure a trial counsel to assist him, good cause to continue trial, and irregularity in trial court proceedings. (CP 185, 187, 190-91. 134, 136-7, 180, 181-82 ¶1-7) Reopening exhibits 8-16 (CP 185, 141-175) bearing upon the Naumans' inability to travel or meaningfully prepare for trial since the earthquake were likewise excused. The trial court abused its discretion to disregard such newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered

and produced at the trial. CR 59(a)(4).

The 2d reopening application and declaration of Kunz identified earthquake impacts to his medical practice as justification for his tardy responses (CP 56¶6) regarding the question previously put to him. (CP 61,62) With this justification, the doctor asserted Nauman was medically fit at trial to perpetuate his trial testimony on a limited schedule and guarantee a future trial date for the parties with the support of pain clinic specialists to manage his medicines (CP 55-56 ¶4-5) or an acupuncturist to rid him of his reliance upon nardil and morphine. (CP 27, ¶2, 4) The trial court abused its discretion to disregard such newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial. CR 59(a)(4).

## **7. CONCLUSION AND RELIEF REQUESTED**

The orders denying continuance, (CP 208,96) denying reconsideration, (CP 63,64, RP 12/12 at 46; CSN 86, RP 1-25 at 23) and refusing a new trial should be reversed. The trial court should be instructed to vacate the judgment and order a new trial on all issues pled in the Complaint and Answer.