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WASHINGTON STATE COURT OF APPEALS
DIVISION TWO AT TACOMA

NO. 35765-8 II

Joe and Teri Mount, Husband and Wife, Plaintiff/Respondent

v.

Tom and Kimley Nauman, Husband and Wife, Defendant/Appellant

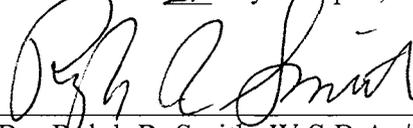
ORIGINAL

APPELLANT'S
BRIEF
FILED
APR 27 2007
COURT OF APPEALS
DIVISION TWO
TACOMA, WA

RESPONDENT'S RESPONSIVE BRIEF TO
APPELLANT'S OPENING BRIEF

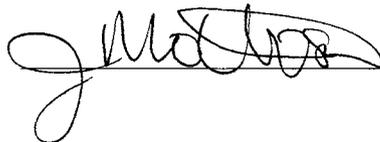
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By: Ralph R. Smith, W.S.B.A. # 5358

Certification: I certify that on this 27 day of April, 2007, I caused a true copy of this responsive brief of Respondent to be served upon Michael Jacobson, Attorney for Appellant by ABC Legal Messenger to his address of record.



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ISSUE ON APPEAL

1. The Defendants Kimley and Tom Nauman complaint of the trial court's refusal to grant a continuance on the date of trial October 25, 2006
2. The Defendants further complain of the trial courts refusal to reopen judgment under Rule CR 59 on December 12. 2006
3. The Defendants also complain of the trial court's second refusal to reopen judgment under Rule CR 59 on January 25, 2007.

I. STATEMENT OF CASE

The Plaintiffs, Joe and Teri Mount are respectively the brother-in-law and sister of Defendant, Tom Nauman. (Clerks Papers, page 273 paragraph 3.1) (Hereafter “CP” ¶ 3.1)

Defendant Tom Nauman has been a securities salesperson since 1994. (CP 273 ¶ 3.2) Joe Mount’s first investment with Tom Nauman was when he was a securities salesperson for Dean Securities. (Report of Proceedings 10/25/2006, p. 10, hereafter “RP”) In 1993 the Mounts transferred their IRA's to Tom Nauman's new broker, Thomas White. (RP p. 10)

In 1997 Joe Mount's grandfather died leaving him his small house. Joe Mount also sold a store that he owned and placed all those funds with Tom Nauman at the Thomas White Company. (RP p.11) In 1999, Joe Mount's father passed away and Joe received over \$400,000.00 from that estate. (RP p. 11) Those funds were also placed in Plaintiff's account at Thomas White Company. (RP p. 11-12)

In 1999, Tom Nauman suggested that Joe Mount "short" stocks. (RP p. 13) Defendant Tom Nauman told Plaintiff Mount that he could not manage the account unless it was in his (Tom Nauman's) name. (RP p. 13) Plaintiff Mount agreed to have the accounts placed in Defendant Nauman's name and they discussed the stocks to be shorted. (RP p. 13-15)

Defendant Tom Nauman advised Plaintiff Mount of the shares he had shorted for him and provided a handwritten note reflecting this. (RP p. 14) In December of 1999 Tom Nauman advised Joe Mount that he had invested for him the following purchase of 3,000 shares of Amazon, shorted 33,000 shares of Amazon at 95 and a quarter, a thousand shares of Ebay at 151, a thousand shares of Priceline at 63 and a thousand shares of Etoys at \$39. (RP p. 14)

After that meeting, at Tom Nauman's suggestion, Joe Mount provided additional funds to purchase more Amazon. (RP p. 14)

Joe Mount had agreed to place his funds in Tom Nauman's name; however, he wanted some documentation to show that Joe and Teri Mount was the owner. On January 20, 2000, Joe Mount had Tom Nauman and

his wife, Kimley Nauman, sign a note that reflected the securities that Mount's owned which were carried in their name. (RP p. 17, CP p. 282)

In May 2000, Joe Mount met with Tom Nauman to discuss Joe's account and decided to get out of all the shorts except Amazon.com. Tom Nauman advised that they got out and covered all the shorts and Ebay, Priceline and PDLI and purchased some internet stocks. (RP p. 18)

Joe Mount prepared a spread sheet on Excel to keep track of his investments with Mr. Nauman. (RP p. 19) (EX. 4)

All of the information regarding Joe Mount's investments comes from oral statements and handwritten notes from Defendant Tom Nauman. (RP p. 19)

Defendant Nauman kept Plaintiff Joe Mount regularly informed about his investments. (RP p. 20)

Based on oral representations from January through at least November 2000 to Joe Mount, the accounts were doing fine and Tom Nauman never indicated that there were any problems. (RP p. 20)

On December 18, 2000 Tom Nauman's father called Joe Mount and requested that he meet him in Oakville. (RP p. 20) Joe Mount met his father in law in Oakville and was informed by him that Tom Nauman had lost all of his money and other people's money too. (RP p. 20)

Joe Mount did not believe it because based upon what Tom Nauman had told him, he knew where his money was invested and it was doing fine. He thought there was a mistake. His father in law did not know anymore other than the funds were gone. (RP p. 20)

A couple of days later Defendant Tom Nauman met with Plaintiff's Joe Mount and his wife Teri and said "it's all gone". Defendant Nauman never explained how it was gone. Both Tom Nauman and his wife Kimley stated that they would pay them back. (RP p. 21)

Starting in January 2001, some payments were made from the Nauman's to the Mounts. (RP p. 21) (EX. 6)

Tom Nauman never provided any records of what happened to the funds and advised Joe Mount that "because of something else he was

doing his company, Thomas White, took everything in this account. (RP p. 22)

The Thomas White Company is out of business. (RP p. 23)

In October 2003, Plaintiff's Joe and Teri Mount brought a Complaint against Tom and Kimley Nauman alleging securities fraud and conversion. (CP 272 – 286)

The Nauman's, pro se, filed a "Response to Complaint and a Countersuit for Defamation and Gross Harassment". (CP 252-271)

In the Nauman's response he states:

"Thomas White & Company allows customers to sell short. This is a hedging strategy for an overpriced market. However, because of the unlimited risk potential . . .I do not allow any of my customers to do it in their accounts." (CP 253 ¶ 2.1.b)

Tom Nauman had advised Plaintiff's that he couldn't do these trades in their name that it had to be in his name. He made the same representation to Dr. Kilgore. (CP 297-299)

In his reply to the Complaint Nauman states that his broker-dealer did allow the trades in the customer's name but he insisted the accounts be in his name. (CP 253)

The Response admits the receipt of the funds but continuously berates the Mounts for his lack of knowledge of securities.

“This shows Joe's lack of securities investing knowledge . . .” (CP 254 ¶ 2.1.e) This shows Joe's lack of securities and derivative investing knowledge . . .” (CP 255)

Tom Nauman admits that he kept Joe Mount orally informed about his investments. Tom Nauman stated:

“Although some of the strategies we were doing were somewhat complicated, I kept Joe informed about them all.” (CP 256) “I summarized changes for Joe often, conscientiously and in great detail.” (CP 261)

No answer as to what occurred to cause the loss is provided in the answer. The response contains the following:

“When the December 2000 loss first occurred, my sister was more amiable than she is now.” (CP 257)

Defendant Nauman states that the funds were combined, and stated as follows:

“Joe's money was invested exactly as Kimley’s and my money. I simply kept tract of the amount each party invested. .” (CP 258)

To respond to the allegations of conversion, Mr. Nauman shows his pay stubs as an answer:

"Joe insinuates in his Complaint and constantly tells all those around him that I stole his money and used it to cover my losses. I thought I put this false theory to rest within a week or so after the loss occurred. My father, wife, and I went to Joe and Teri's house. I showed him my monthly pay stubs for 1999 and 2000. These were crazy times in the markets. Many, many people thought they could open an account, buy just about any internet stock, and make money indefinitely. They were eventually wrong. However, because of this huge surge in activity, my monthly paychecks were usually \$40,000 to \$60,000. I showed these to Joe to try to get him off of his "Tom stole my money" theory. I did not need his money. I accepted the checks he voluntarily and willingly gave me ." (CP 258-259)

Mr. Nauman also offers the defense that the funds were a gift. (CP 266-267)

In summary, the defense to the Mount's claim was the money was added to other money and the Mount's had been kept well informed and knew of the risks. Further, the money was a gift and it was "lost" in December 2000.

Attempts were made to obtain records and information about what had happened to Plaintiffs funds. Interrogatories were mailed on two occasions to Tom Nauman in early 2004 and finally on August 17, 2004 a

letter was sent to Defendants advising that a Motion to Compel was in the offing. (CP 249)

On October 6, 2004, the Nauman's sent a letter to the judge of the Superior Court attaching the letter above and a letter from Dr. Kunz dated October 6, 2004. The Defendants request the Court to preclude bringing the Motion to Compel based upon their contentions that the Defendant is medically unable to answers questions or provide information.

On October 29, 2004 an Order to Compel was entered by Judge Brosey. (CP 246)

The Nauman's regularly wrote directly to the Judge. On June 6, 2005, the Nauman's wrote concerned about a second Motion to Compel scheduled for June 10, 2005. (CP 242) In this letter the Nauman's complained of the request seeking records. The Nauman's offered:

" . . .one example, he wanted copies of all stock, bond, mutual fund, and options trades which I did for myself and my clients during the period from the beginning of 1994 to the end of 2000 . . . This was only one request . . . Even if I had those documents, I think the requests should be considered cumbersome and not relevant. . " (CP 242 p. 1)

On January 6, 2006 a reply to the counterclaim was filed. (CP 240-241)

The Nauman's responded to the reply and also requested that a trial date, which had been requested, be set sometime after July 1, 2007, conditioned upon the approval of Hawaii's chief psychiatrist and Tom Nauman's doctor. (CP 235-237)

The original trial date was set for June 5, 2006 but the Mount's agreed to a continuance based upon the representations of Defendant Tom Nauman's doctor. (CP 224-226) (CP 227-229)

On June 28, 2006, a hearing was held at the Nauman's request to dismiss Plaintiff's attorney. (CP 242). The motion was denied and a new trial was set for the week of October 25-27, 2006. (CP 230)

A few days before the scheduled trial on October 18, 2006 the Nauman's sent a letter to the Judge requesting once again that the trial be delayed for three or four months. The Defendant's mother even adds a note that there had been an earthquake and due to this, the Defendant's and their children were sleeping in sleeping bags. (CP 212)

On the date the trial was scheduled, the Defendants did not appear. Attorney Walker appeared for the sole purpose of requesting a continuance. The court denied the requests. (RP 91-96)

Mr. Walker presented a declaration signed on October 24, 2006 by Dr. Kunz that stated Mr. Nauman was too ill to participate at any level for at least six months. (CP 210-211)

At the trial, Joe Mount testified that he had requested records of what happened to his funds and had never received any records and that Tom Nauman had contented his mother threw them out by mistake. (RP 112)

The principal Defense that Tom Nauman put forth was that the money was a gift. The Court enquired as to the intentions of Joe Mount, and Mr. Mount advised that these funds were never intended as a gift. (RP 115) The court inquired of Joe Mount as to any explanation he had received regarding what occurred with Plaintiff's funds:

"THE COURT: The long and the short of it, Mr. Mount, is you've never had any kind of reasonable explanation for what happened to the \$604,000.00?

THE WITNESS: That's correct. (RP 116)

THE COURT: I recognize that in Mr. and Mrs. Mount's case, it's a situation where they're suing someone who's a family member, but why wasn't complaint ever made to law enforcement?

MR. SMITH; Well, because when you want your money back, the guy in jail doesn't often give you any money. . .(RP 118)

THE COURT: And again, I want to emphasize, even though Mr. Nauman's not here to hear it, that it would be one thing to have this case tried on a simple, you're negligent, you're reckless, whatever, theory. It's another thing entirely to totally refuse to participate in any kind of discovery and provide any kind of an explanation for what happened to the money and that's what's so glaringly apparent, is there's absolutely been no explanation provided to the Plaintiffs for what happened to their money, other than the fact that it's supposedly gone, and for all Mr. and Mrs. Mount know, it's not gone. (RP 119-120)

On November 3, 2006, the Nauman's employed their current attorney, Mr. Jacobson, who requested a CR59 Motion to Reconsider. (CR 79-89)

In his declaration, Mr. Jacobson states:

" . . .counsel for Defendants, makes this declaration based upon personal knowledge:"

He then goes on to provide hearsay about what evidence that now may or may not be available. In part of his hearsay statements the attorney for the Defendant offers for the first time an "explanation" of

what happened to the funds. It was all a "trader's" error. "Tom's communications to the trader got confused." (CP 125 ¶ 8)

During the entire time the case was pending, Defendant Nauman was a licensed and active securities salesperson with some 100 clients. He ceased being an active securities salesperson on October 1, 2006. (CP 152)

A declaration filed by the Defendant's father, another explanation is offered as to what happened to the money. It states in part:

" . . . In December of 2000, the whole family investment pool came to a halt. I recall Tom coming to my house . . .and telling me our whole account got wiped out while he was in the hospital. I asked him what happened to Teri's money. He said it was all gone. . .Tom said the market started taking a slide and with the kind of investments he'd made for us, once it gets started that way its very hard to stop your losses and it can be gone before you get the chance. Tom said he tried to stay on top of it but even in the best of times it's hard to stop a skid like that and he couldn't do it. He said the brokerage company sold out all our holdings to cover the loss. That's as much as I could grasp of it." (CP 76 ¶ 6)

In response to Defendant's Motion for Reconsideration Plaintiff's filed a response which set out Interrogatories submitted to Tom Nauman and Tom Nauman's answers thereto. Mr. Nauman provided no records at all. In response to an Interrogatory that asked:

“ . . With regard to your losses of 2000 in which you claim to have lost every cent of the monies entrusted to you by Joe and Teri Mount, Robert and Gloria Oaks and Alfred and Evelyn Nauman, in addition to all of your own money, list the type of transactions (hedging or otherwise), the dates of those transactions, to the best of your knowledge, the stocks and the amounts of each trade that created these significant losses.”

The Defendants response was:

“ . . .The funds which were legally gifted to Kimley and me from the parties you mentioned plus our own savings were lost via buying stocks, shorting stocks, and option hedging transactions on the stocks that Kimley and I were long and short in our account. I have no record of exact dates. However the major losses occurred in December 2000. Kimley and I have done the type of aforementioned transactions in our accounts with our funds since about 1987. Joe knew this. One does not make the amount of money that Kimley and I did in our account or lose the amount of money which we did without taking risks. Joe knew Kimley and I were shorting stocks in our account. Shorting stocks is more dangerous than buying puts or calls. With long puts or calls, one has a limited loss potential. When one is shorting a stock, the loss potential is unlimited.”
(CP 71)

The new evidence consisted of additional hearsay and the promise that maybe Tom Nauman would now be able to provide records that he had denied having. The Court denied the Defendants request for a new trial under CR59. (CP 63-64)

The Defendant then requested a second CR59 hearing and submitted additional information about the Defendant's medical condition that allegedly made it impossible to appear and defend at the earlier trial date.

At the time of the original trial date in June 2006 Tom Nauman owned two parcels of real property in Washington. After the first continuation he sold one lot and the day of the oral judgment on October 25, 2006, he transferred the remaining home to his father, Alfred Nauman without consideration who then transferred it for value. (CP 42) His property in Hawaii had loans against it for approximately \$1,000,000.00. (CP 82) Those loans at the time of the trial were three years old.

II. DEFENDANT NAUMAN'S MEDICAL INFORMATION PROVIDED TO THE COURT PRE-TRIAL

Tom Nauman, throughout the three year period this case was pending, relied on Dr. Kunz to excuse his participation in the proceedings.

On October 6, 2004 Dr. Kunz's letter of that date was submitted to the court. It stated in part

"Thomas Nauman has been under my medical care since February 14, 2002. I have advised him to minimize or eliminate all travel and all unnecessary activities for a one year period ending twelve months from the date of this letter. . .Because of this illness and the treatments currently under way, and his depression, he is not a candidate to be involved in any legal matters related to litigation at this time. . .The prognosis for Mr. Nauman is good and I believe that one year from the date of this letter he should be able to participate fully in all matters regarding his legal affairs. . ." (CP 250)

Defendant Kimley Nauman wrote to the court on October 6, 2004 and enclosed the above letter he also advised the court:

“ . . . Also enclosed is a letter from Tom's primary care physician Dr. Kevin Kuntz, which states the reasons why it would not be reasonable, fair, or safe for us to provide his extremely lengthy discovery requests at this time. . . ” (CP 248)

On June 6, 2005 Defendant Tom Nauman sent a letter to the court which states in part

“ . . . In a letter from Plaintiff's attorney . . . he stated that there would be a Motion to Compel hearing on June 10, 2005 . . . Due to ongoing medical reasons, our responses to Ralph Smith's interrogatories were sent to him just over a week and a half late . . . ” (CP 242)

On a note for trial in this case set for January 27, 2006 the Nauman's made the following requests and statements regarding a trial date:

“Trial dates available: Anything after July 1, 2007, pending approval of State of Hawaii, County of Hawaii, Chief Psychiatrist, with possible advisement of Defendant Tom Nauman's psychiatrist and/or State of Hawaii psychiatrist. . . .

1. Tom is suffering from a severe and deep depression as a direct result of this litigation.

* * *

4. Tom can no longer safely drive a vehicle himself. Due to the deep depression resulting from this lawsuit which his brother-in-law and sister filed against us, it is necessary for me to be the designated driver." (CP 236-237)

In a declaration for an agreed continuation the plaintiff's attorney advises the court the following:

"Dr. Kunz advised me that Mr. Nauman entered the hospital May 26, 2006 for chemotherapy and is expected to be in the hospital until Friday June 2, 2006. Dr. Kunz also advised me that Mr. Nauman would not be able to travel for two weeks after coming home from the hospital . . . (CP 234)

Dr. Kunz submitted a letter dated June 12, 2006 directly to the court in which he observed the following:

". . . I should mention that Mr. Nauman, is, in my view, a man of exceptional character and attitude, who despite these serious medical problems has never lost faith, and has never stopped doing the very best he could each day. To his family, children and his friends, he must be a living example of bearing the unbearable with dignity and fortitude. . . . The next few months are critical to Mr. Nauman's continued care. I have advised him as follows:
A. Minimal work . . .

Mr. Nauman has been advised to avoid all unnecessary stress for the next six months. This certainly includes the medical postponement of any legal issues . . ." (CP 228-229)

Letter of May 22, 2006 from defendant Kimley Nauman to the court which states in part:

"Tom has had ongoing health problems including cancer, chemotherapy related neuropathy causing severe pain in the feet, a new metal ball joint in his shoulder, which did not heal correctly and continues to dislocate almost daily, and severe depression caused by chronic pain and this ongoing case for which he now must receive electro shocks to his brain. Tom's main doctor is now hospitalizing Tom in order to comprehensively treat many of these health problems. . ." (CP 223)

Letter of September 26, 2006 from Dr. Kunz to the court which states in part:

“Unfortunately, Mr. Nauman's condition has worsened since my last letter to you.
...He will need to travel to Oahu or the mainland for evaluation for a spinal cord stimulator, or other device . . .
. . .Postponement of any and all legal matters- Mr. Nauman is too ill to participate at any level in the near future, for at least six months. . .”
(CP 215)

On October 13, 2006 Defendant and family wrote to the court stating in part:

“The extreme pain that has grown constantly worse has caused me to slip into a very deep chronic pain depression. This depression has been significantly worsened by the actions of my sister and her husband toward me and my family. My psychiatrist, Dr. Michael McGrath, is scheduling a new and experimental combination of treatments in an effort to finally rid me of the very deep depression. This procedure conflicts directly with the proposed hearing dates of the end of October. After the procedures, there is approximately a two month recovery time with smaller follow-up shock therapy to my brain over a three month period . . .I would appreciate your consideration in following Dr. Kunz's recommendations at least half-way and rescheduling the hearing for sometime in January/February of next year. This is just three months away. If, per chance, I am not better by then, I imagine I will be forced to default the case.” (CP 212)

Dr. Kunz's declaration dated October 24, 2006 states in part:

“ . . Mr. Nauman's condition has worsened since my last communication with the Court . . .He is unable to ambulate without assistance for greater than 50 feet. . .
Postponement of Trial and Other legal matters. Mr. Nauman is too ill to participate at any level in for at least six months.”
(CP 210-211)

III. MEDICAL INFORMATION PROVIDED BY DEFENDANT AFTER COURT PROCEEDED WITH TRIAL.

The following is contained in an October 30, 2006 declaration filed by Matt Teagle a securities salesperson:

" . . . I spent several weeks in September 2006 at Mr. Nauman's home to begin the process of transitioning all of Tom's current securities clients over to me. Tom was visibly debilitated and visibly unable to sustain the pace, stamina, and focus needed to complete a full work week as a securities broker. " (CP 152)

On November 3, 2006 Defendant Kimley Nauman filed a declaration that contained the following:

" . . . Since the Court extended time in June for Tom to prepare for trial, he's experienced reversals outside our control which have combined to prevent adequate preparations or attendance at the October 25th trial. . . Tom's customers include family, friends, and business relationships dating back 20 years. Turning over the operation to Matt was Tom's whole focus in September. He has millions of dollars under management. Tom's cleared October calendar did not free him to make headway on Joe Mount's issues during the first 2 weeks of October . . . The Richter 6.7 earthquake which struck the big island centered 14 miles from our home on October 15th put an effective end to Tom's efforts to organize a response to the Mounts' case. . . This lawsuit is both a curse and a blessing. We cannot restore normal relations while it is going. But it represent to Tom his chance to show his sister that, measured by objective standards, he didn't do any of the bad things her husband has invented to explain to himself how he could lose their inheritance. On balance, Tom feels the needs most this chance to explain.

Tom was in no shape to travel to Washington this month, and will not be for the foreseeable future . . ." (CP 127-130)

On December 20, 2006 Dr. Kunz provided another declaration and attached to it his progress notes, Dr. Kunz notes:

“ . . .he remains unable to appear in a courtroom in Washington State for the foreseeable future . . .(CP 55)

Progress note on Tom Nauman dated November 13, 2006:

“He is here by himself. He states he wrecked his car one week ago. He was racing down from his house and he turned to turn the heater off and he ran into 3 fence posts. He was okay, did not need to go to the ER His wife now got a job at Aloha Airlines . . .I discussed with him my concern and the need for mainland evaluation. Patient declines this. I told him I will talk with his wife and he is in agreement with this.” (CP 57)

Progress note on Tom Nauman dated October 17, 2006:

“ . . .I've talked with his wife about moving back to Utah as I am unable to get him into some movement toward a direction for control. She is in agreement with this . . .” (CP 58)

Progress note on Tom Nauman dated October 23, 2006:

“ . . . I am recommending a return to the mainland and complete disability. I have told them I have discussed this with his attorney with whom I have signed an affidavit saying he is completely disabled. . .I am concerned that we have not been able to get this patient off a dime, so to speak, in terms of an action step. The wife is making plans to return to the mainland. Patient is resistant to that. I am on her side . . . (CP 58)

Progress note on Tom Nauman Dated September 6, 2006:

“ . . .He says his legal issues have increased and there is stress with his work. He is trying to get someone to take over his business . . .” (CP 59)

Progress Note on Tom Nauman dated September 21, 2006:

“ . . . Patient says that he has been taking Xanax that he didn't tell me about . . . (CP 59)

Progress note on Tom Nauman dated August 17, 2006:

“ . . . Because of his illness he has been nonfunctional at work and he is looking to give away his business. His wife is looking to fix up the house and possibly sell and relocate. They have recently sold a property . . .” (CP 60)

Note from Dr. Kunz dated January 24, 2007:

“ . . . the patient has received substantial pain relief from acupuncture to the point where he is now managing without any Morphine or Nardil since January 8th . . . By March 2007, Tom is expected to be able to give his testimony in this proceeding on the basis of 2 1/2 hours a day from his residence without requiring the support of an inpatient pain clinic admission . . .” (CP 29)

IV. ARGUMENT

DENIAL OF A CONTINUANCE ON OCTOBER 25, 2006 THE DAY OF TRIAL BY COURT

The motion was made on the morning of trial without any written motion under any rule of the court. An attorney appeared for the sole purpose of requesting a continuance and presented a declaration from Tom Nauman's doctor. Did the trial court act within its discretion in so ruling. Presumptively the request was base upon CR40(d). Appellate review is manifest abuse of discretion.

“Whether a motion for continuance should be granted or denied is a matter discretionary with the trial court, reviewable on appeal for manifest abuse of discretion. *Jankelson v. Cisel*, 3 Wn. App. 139, 473 P.2d 202 (1970). In exercising its discretion, the court may properly consider the necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior continuances granted the moving party; any conditions imposed in the continuances previously granted; and any other matters that have a material bearing upon the exercise of the discretion vested in the court.” *Balandzich v. Demeroto*, 10 Wn. App. 718, 720, 519 P.2d 994 (1974)

On the date of trial, October 25, 2006 the case had been pending for three years and the plaintiff's “loss” had occurred six years earlier. At the time the continuance was requested the court had received a variety of reports from Dr. Kunz over a three year period in which Dr. Kunz always had the opinion that Tom Nauman would be able to participate at some point in the future. That point always kept receding. The doctors unsolicited statement that Tom has “exceptional character and attitude ... (CP 228) brings up the question of the doctors objectivity.

When Interrogatories were submitted to Tom Nauman he contended he was too sick to respond and he was supported in that contention by Dr. Kunz. Yet when the court ordered him to comply he was able to respond. The notes of Dr. Kunz are also at odds with the

statements that Tom Nauman was unable to go to the mainland. Dr. Kunz wanted him to go but Tom Nauman refused. He could not walk yet he could drive in a reckless manner having a wreck and getting himself to the doctor. (CP 57)

Tom Nauman had produced no documents as to the "loss" of the funds and the defendant's "answer" failed to provide for any explanation of loss other than it occurred in December 2000. (CP 257) The defendant's answer contended that the funds were a "gift" (CP 266-267) but also advised that plaintiff was kept well informed as to what was occurring with this "gift". (CP 256)

A continuance of the June 5, 2006 trial date was agreed to by Joe and Teri Mount after receiving assurances from Tom Nauman's doctor that Tom would be able to travel in a few weeks. (CP 234)

The attorney who appeared advised the court that he would not be representing the Nauman's after he had made the request for a continuance. (RP 91) The same doctor who had advised the court in 2004 that the defendant would be able to proceed with his defense in 2005. (CP 227) now advised the court that Tom Nauman could do nothing until at

least six months (CP 142). The request for a continuance was for some unknown time in the future with no assurance that Tom Nauman would be any better able to appear. In his past statements, Tom Nauman's doctor had expressed his deep admiration for Mr. Nauman which may reflect upon his judgment. (CP 225)

During the first two and half years that the case was pending the defendant had been an active securities salesperson. (CP 152)

"In the Puget Sound case, supra, this court said:

"It is always well for trial courts to be liberal in the matter of granting continuances where a party or a material witness, on account of sickness or other unavoidable reason, is unable to be present at the time of trial of the cause. . . .But there must of necessity be some limitation on the extension of this courtesy and consideration." Chamberlin v. Chamberlin 44 Wn. 2d 689, 700, (1954).

The trial judge in this case may the following remarks regarding the trial date request for a continuance:

". . . I would be more kindly disposed to a request for a continuance even at this late date if I knew that there was going to be an attorney involved representing Mr. Nauman, because quite frankly, I get the distinct impression that what's happening here is again an effort to delay the proceedings . . . The case. . . will be three years old . . . So plaintiff's entitled to their day in court, and this case was set for trial . . . back on June the 29th. The long and the short of it is that Mr. and Mrs. Nauman have had ample opportunity to travel over here from Hawaii, and if necessary, if there's really a serious medical problem I think deal with the medical problem here on the mainland to be prepared to go to trial. . . I think that

the plaintiffs are entitled to their day in court , and if I grant this continuance, they're not going to get it and I have no idea when they're going to get back here . . ."

It is interesting to note that the court believes that Mr. Nauman should go to the mainland for medical treatment which is exactly Mr. Nauman's doctor's advise which Mr. Nauman ignores.

". . .defendant's belated "morning of the trial" motion for continuance and his deliberate absence from the proceedings bespeaks neither due diligence nor good faith . . . The trial judge before passing upon the motion, with an eye to the physician's concern about a "long or suspenseful" trial, ascertained from counsel that the trial would not be a protracted or difficult one. He also ascertained that defendant's counsel could make no firm prediction when his client would be available for a trial in the future." Odom v. Williams 74 Wn. 2d 714 ,718 (1968)

Under the history of this case and with no real expectation that a time could ever be set with the expectation that Tom Nauman would appear coupled with his total lack of explanation as to what if any thing happened to the Mount's funds in December 2000, the court did not abuse its discretion in proceeding with the scheduled trial.

After the trial was held without the Nauman's being present, the Nauman's employed their current attorney Mr. Jacobson. On November 3, 2006, Tom Nauman's attorney requested a CR59 Motion to Reconsider. This motion was based on CR59(a) (3) accident and CR59(a)(4) newly discovered evidence.

It appears that the accident that was the basis for Tom Nauman CR59(a)(3) motion was the earthquake that occurred 10 days prior to trial. (CP 128 ¶ 8) No records were present showing that Tom Nauman had purchased tickets or had any intention of appearing at trial prior to the earthquake. (CP 42) Tom Nauman had previously denied under oath having any records regarding the funds he managed and "lost" for the plaintiffs and had denied having any records of his own transactions during the relative period. (CP 242) (CP 202 ¶ 11) There was no evidence that the earthquake was an accident as contemplated under CR59(a)(3). The newly discovered evidence offered under CR59(a)(4) was a statement by attorney Jacobson that the "loss" was due to a trader's error. (CP 125 ¶ 8) The attorney also advises that he would try to find some copies of the documents that reflected the accounts and the losses therein. Additional "evidence" consisted of photos showing damage to Mr. Nauman's Hawaii home and copies of drug bills and other documents (CP 134-140) that failed to show any meaningful evidence new or otherwise.

In summary other than the defendant's lawyers hope to obtain some records (CP 123) and his hearsay statement as to his client new

reason for having "lost" the money nothing was offered to support any new trial.

On December 20, 2006 a second request for a CR59 motion to reconsider was filed by Tom and Kimley Nauman's attorney. (CP 52)

In the second CR59 Motion to Reconsider, Dr. Kunz offers yet another opinion where he now states that Tom Nauman can give videotape testimony with the following conditions. "He must first be enrolled in an accredited pain medicine program, which is currently in process". (CP 55) On the date of the trial Dr. Kunz had advised the court that Tom Nauman "is too ill to participate at any level in for at least six months." (CP 67)

Attached to Dr. Kunz's declaration is Tom Nauman's progress notes that reflect his ability to drive by himself (CP 57) and his rejection of his doctor's advise to return to the mainland (CP 57). He rejects his doctor's advice about returning to Utah (CP 57) and he refuses to do anything about his drug addition contrary to what his doctor recommends. (CP 57) Even when his wife makes plans to return to the mainland and the doctor urges him to go, Tom Nauman ignores his doctor. (CP 58) He fails to inform his doctor and wife about all of the drugs he is taking. (CP 59)

The court was advised that after the first agreed continuance in June 2006 the Nauman's had sold a lot in Mason county for \$155,000.00 (CP 42) and that on October 25, 2006, the date that the court entered its oral judgment against Tom and Kimley Nauman they transferred their remaining Washington home and attached lot to Tom's father for no consideration. (CP 42) Tom's father then transferred the property for value to a third party. (CP 42)

In *Zulauf v. Carton* 30 Wn. 2d. 425 (1948) the defendant sought a continuance on the date of trial which was granted conditioned upon the defendant paying costs. The costs were not paid and the trial went forward without any defendant or defendant's witness. Defendant presented a sworn statement regarding his absence and had not been contracted about the need to pay the costs. The trial court refused to reopen the case. The court held

" An affidavit for reopening of a cause because of the absence of a party, where it alleges facts showing the absence was unavoidable, that the presence of the party was necessary, and that he has a meritorious defense, is a sufficient showing upon which to grant the motion to reopen the cause." *Zulauf* at 428

In this case the neither defendant ever planned to appear and they have yet to present a meritorious defense.

The Nauman's have presented two defenses. One being that the funds were gifts. That is belied by the Nauman's own answer to the Complaint where Tom Nauman states that he kept Joe Mount fully informed as to the investments.

Tom Nauman offered a document which purported to reflect that Joe and Teri Mount had made a gift of their funds to him. (CP 146) While it was the plaintiff's expert opinion that the document was a forgery (CP 307-310) it does not matter in determining whether or not the funds were a gift.

"A gift will not be presumed, but he who asserts title by this means must prove by evidence which is clear, convincing, strong and satisfactory a clear and unmistakable intention on the part of the donor to make a gift of his property, and the delivery of the property must be as perfect as the nature of the property and the circumstances and surroundings of the parties will reasonably permit". In Re the Estate of Robert Otto Gallinger 31 Wn. 2d 823 (1948) Also See McCarton v. Estate of Watson 39 Wn. App. 358

To make the transfer of funds a gift there needs to be a donative intent. In this case both the recipient and the donor knew the funds were not a gift, but an investment.

The second defense was "was no violation of securities law. The funds were owned by Kimley and me in our account. Did I fraud Kimley and

myself? Any thought of that is nonsense,” Nauman’s answer to the complaint. (CP 17 ¶ II. 4) Mr. Nauman's answer is predication upon his first defense that the funds were a gift.

Attorney for Mr. Nauman asserts that RCW21.20.010 prohibits dishonesty of an investment adviser. That is not a correct statement of the statute it provides.

"It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:

(1) To employ any device, scheme or artifice to defraud;

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading; or . . ."RCW 21.20.010

In *Brin v. Stutzman* 89 Wn. App. 809 (1998) Respondent Brin invested with her securities broker upon the advise of Appellant Stutzman who was not involved in the securities business. Brin bought and action against Stutzman contending securities law violation under RCW 21.20.010 and 21.20.020. . The trial court had dismissed Brin claim under RCW 21.20.010. The court on appeal stated:

"The trial court dismissed Brin's cause of action under RCW 21.20.430 (1) for Stutzman's alleged violation of RCW 21.20.010, because Stutzman: did not 'offer to sell a security" to Brin" page 828 In *Haberman*, the Supreme Court held that “a defendant is liable as a seller under RCW 21.20.430 (1) if his acts were a substantial contributive factor in the sales transaction" *Haberman*, 109 Wn.2d at 131-32” *Brin v. Stutzman* 89 Wn. App. 809, 829 (1998)

In this case we do not have a girlfriend boyfriend relationship where the boyfriend who is not in the securities business makes a recommendation to his girlfriend to buy securities which she does through her licensed securities broker dealer paying him a commission. Mr. Nauman is a license securities salesperson and has been for many years. There is no basis for a claim that this transaction did not violate the securities act of Washington.

In This case Tom Nauman was not only a trusted relative, he owed a fiduciary duty to Tom and Teri Mount.

“A fiduciary position . . . includes not only the position of one who is a trustee, executor, administrator, or the like, but that of agent, attorney, trusted business advisor, and indeed any person whose relation with another is such that the latter justifiably expects his welfare to be cared for by the former.”

Liebergesell v. Evans 93 Wn. 2d 881, 890-91, 613 P.2d 1170 (1980) (quoting from Restatement (Second) Contracts S 472, Comment C. In this case plaintiffs relied upon Tom Nauman as a long time securities advisor and friend.

In this case a long time securities salesman persuaded his trusting client to place his retirement funds in his name for the purpose of buying certain securities. By offering or even agreeing to place securities in his name concealing the rightful owner is a violation of RCW 21.20.110 (g). "dishonest or unethical practices in the securities . . .business". Which have been further defined under WAC-460-22B-090

"Dishonest and unethical business practices-salespersons. The Phase "dishonest or unethical practices" as used in RCW 21.20.110 as applied to salesperson, is hereby defined to include any of the following:

- (1)Engaging in the practice of lending or borrowing money or securities from a customer, or acting as a custodian for money, securities or an executed power of a customer.
- (2)Effecting securities transactions not recorded on the regular books or records of the broker-dealer . . .
- (3) Establishing or maintaining an account containing fictitious information in order to execute transactions which would otherwise be prohibited
- (4) Sharing directly or indirectly in profits or losses in the account of any customer without the written authorization of the customer and the broker-dealer which the agent represents
- (5) Dividing or otherwise splitting the agent's commissions, profits or other compensation from the purchase or sale of securities with any person not also registered for the same broker-dealer . . .
- (7) Recommending to a customer the purchase, sale or exchange of any security without reasonable grounds to believe that such transaction or recommendation is suitable for the customer based upon reasonable inquiry concerning the customer's investment objectives, financial situation and needs, and any other relevant information known by the broker-dealer. " WAC460-22B-090

Part of the time, Tom Nauman has contended that the plaintiff's securities were placed in his name at the behest of his broker dealer. (RP p. 13) (CP 298-300)

WAC 460-21B-008 defines "Fraudulent practices of broker- dealers to include:

“(7) Effecting any transaction in, or inducing the purchase or sale of any security by means of any manipulative, deceptive or other fraudulent device or contrivance including . . .use of fictitious or nominee accounts.”

Any person offering or selling or buying a securities must fully disclosed the risks of such transactions. Certainly a long term securities salesperson understands the requirements and is fully aware that the broker-dealer could not let him place securities not belonging to him under his name and control.

Assuming all of Tom Nauman's "answers" to the Complaint are true, he clearly violated the fraud provision of the Washington State Securities Act 21.20.010.

V. CONCLUSION AND RELIEF REQUESTED

In summary, based upon the conflicting testimony of the Defendant's doctor and the lack of a meritorious defense, the trial court was within its sound discretion in denying a continuance and refusing to reopen the matter.

Pursuant to RAP 18.1, Plaintiff respectfully requests that all attorney's fees and expenses incurred in responding to this appeal be awarded. Plaintiff is entitled to attorney's fees and costs pursuant to RCW 21.20.430.