IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOE and TERI MOUNT, husband and wife, Respondents, v. TOM and KIMLEY NAUMAN, husband and wife, Appellants.	No. 35765-8-II UNPUBLISHED OPINION

Bridgewater, J. — Tom and Kimley Nauman appeal from the entry of a judgment against them for securities fraud and conversion. We hold that the trial court did not abuse its discretion when it denied their continuance on the morning of trial, their motion for reconsideration or new trial, or their motion to reconsider the order denying the motion for reconsideration. We affirm

and award attorney fees and costs to Joe and Teri Mount.

FACTS

Background History

Tom Nauman was a securities salesperson for Thomas F. White & Co., Inc., a securities broker-dealer. In 1993, Joe and Teri Mount opened modest accounts with Thomas F. White, Inc., and Nauman, Teri's brother, managed their investments.

Around 1999, Nauman advised the Mounts to invest in "short" stocks. RP (Oct. 25, 2006) at 12. Nauman assured the Mounts that there was little to no risk of losing the entire principal, however, he also stated that his broker-dealer, Thomas F. White, would not allow him to trade "short" stocks unless the account was in his name. RP (Oct. 25, 2006) at 12. Accordingly, the Mounts orally agreed to transfer $540,000 to Nauman personally to invest the "short" stocks. RP (Oct. 25, 2006) at 12. The Mounts also agreed, in writing, to transfer an additional $52,500 to Nauman personally.

In January 2000, the Mounts asked Nauman to acknowledge the funds he had received from the Mounts and to identify the securities in which their funds were invested. On January 20, 2000, Nauman signed a "PROMISARY [sic] NOTE" identifying the securities and appraised their value at $604,000. CP at 282. Thereafter, Nauman continued to orally advise the Mounts as to the location of their funds.

Based on this oral information, the Mounts tracked the investments. The only evidence of their securities was Nauman's oral assurance of the funds and his handwritten notes that identified what the account was doing.

On December 18, 2000, Nauman's father (also Teri's father) advised the Mounts that the funds were gone. Nauman's father could not offer an explanation as to what happened to the funds; he merely stated that the funds were "lost." RP (Oct. 25, 2006) at 20. Nauman eventually confirmed that the funds had disappeared, and he promised to repay the Mounts for their loss, even making some payments to them between January 2001 and September 2002. Thereafter, Nauman denied any responsibility or liability for the loss and acted hostile towards the Mounts.

Procedural History

On November 5, 2003, the Mounts filed this lawsuit against Nauman,[1] claiming securities fraud under RCW 21.20.110 and conversion. On January 23, 2004, Nauman filed a pro se response denying the allegations, requesting summary judgment, and alleging a countersuit for liable, defamation, and gross harassment. Nauman admitted receipt of the Mounts' funds, but he maintained those funds were a gift.

The Mounts sent interrogatories to Nauman on May 20 and June 23, 2004. Nauman did not respond. On August 17, 2004, the Mounts advised Nauman that they would be forced to file a motion to compel if he did not respond to the interrogatories.

Rather than supplying answers to the interrogatories, Nauman sent an ex parte letter to the trial court, requesting that it "stay the Plaintiff's attorney's request" for a motion to compel discovery. CP at 248. Nauman included a letter from his physician, stating that due to illness, depression, and medical treatments, he was "not a candidate to be involved in any legal matters related to litigation at this time." CP at 250. The letter, dated October 6, 2004, also stated that

[1] Tom Nauman's wife, Kimley Nauman, was also named in the lawsuit; however, we refer to Nauman singularly to avoid confusion.

"[t]he prognosis for . . . Nauman is good and I believe that one year from the date of this letter [Nauman] should be able to participate fully in all matters regarding his legal affairs." CP at 250.

The trial court granted the Mounts' motion to compel on October 29, 2004. Nauman responded to the interrogatories over a week late.

The Mounts used the interrogatories to request copies of tax returns; copies of monthly statements from Thomas F. White, Inc.; buy and sell confirmations; copies of Nauman's stock holdings, trades, and transactions between August 1999 and 2003; and purchase terms of the home Nauman bought in Hawaii in 2001. Nauman claimed that he did not retain any such documents. In response to an interrogatory inquiring what happened to the Mounts' funds, Nauman stated:

> The funds which were legally gifted to [my wife] 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. . . .[2]

CP at 71. Nauman complained that the Mounts' requests for documents "should be considered cumbersome and not relevant." CP at 242.

On November 29, 2005, the Mounts conducted depositions in Aberdeen, Washington. Nauman received notice but failed to appear or have an attorney appear on his behalf.[3]

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[2] Nauman produced a "Legal Gifting Document," apparently signed by the Mounts stating that the funds were a gift. CP at 310. The Mounts maintain that they never signed such document and went so far as to have the signatures analyzed by a forensic expert, who found the signatures were forgeries.

[3] In an ex parte letter addressed to the trial court dated May 22, 2006, Nauman admitted that he received notification of the deposition, but also stated that the Mounts' attorney had "employed underhanded tactics" when he conducted the deposition without the defendants present. CP at 222-23.

On January 4, 2006, the Mounts filed a reply to Nauman's counterclaim. On January 26, 2006, Nauman responded and requested that a trial date be set for sometime after July 1, 2007, contingent on approval by the State of Hawaii's chief psychiatrist. In the same document, Nauman claimed that he was "suffering from a severe and deep depression as a direct result of this litigation." CP at 236.

The original trial date was set for June 5, 2006; however, the Mounts agreed to a continuance based on information from a doctor that Nauman would be in the hospital from May 26 to June 2, 2006 and that he could not travel for two weeks thereafter.

Nauman later requested that the trial court dismiss the Mounts' attorney for an alleged conflict of interest.[4] Nauman was supposed to appear by telephone at the hearing, but there is no record of his appearance. The trial court denied Nauman's request and set trial for the week of October 25-27, 2006.

On October 13, 2006, Nauman sent an ex parte letter to the court requesting it continue the trial for three to four months. He explained that he was to begin new and experimental treatments for depression that would conflict with his ability to participate in legal proceedings. The letter also included a handwritten note from Nauman's mother, indicating that Nauman was recovering from a 6.6 magnitude earthquake near his Hawaii home.

Nauman failed to appear at trial on October 25, 2006, but a local attorney appeared on his behalf for the sole purpose of requesting a continuance. The attorney supported the oral motion for continuance with a declaration from Nauman's physician stating that "Nauman is fully

[4] Nauman claimed that the Mounts' attorney made derogatory statements about him.

disabled. . . . [and] medically unable to testify or assist in his defense." CP at 210. The physician's declaration further stated that Nauman could not participate in legal matters at any level for at least six months. After hearing a brief response from the Mounts' attorney, the trial court denied the motion for continuance and proceeded to trial with Nauman *in absentia*.

At trial, Joe Mount was the only witness. He testified that the funds were not a gift to Nauman. He further testified that in May 2000, he received and subsequently discussed Nauman's handwritten notes regarding investments that Nauman made with their funds. In addition, Joe Mount stated that he had never received any documents from Thomas F. White Inc. or from Nauman confirming that the brokerage firm required Nauman to purchase shorts in his name rather than the name of his customers. Nor did he receive any documentation from either Thomas F. White Inc. or Nauman showing what happened to their funds.

Following direct examination, the trial court questioned Mount further as to how and why he invested his funds in Nauman's name, whether the Mounts ever saw anything in writing from the brokerage firm regarding the investments, why they did not file a formal complaint with the Securities and Exchange Commission, whether Nauman discussed the risks of selling short, and whether the Mounts gifted the funds to Nauman.

At the end of its questioning, the trial court asked, "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?" RP (Oct. 25, 2006) at 27. He answered affirmatively.

The trial court held that Nauman had violated the securities fraud statute and had converted the Mounts' funds. It awarded the Mounts $604,000 with eight percent interest from

January 2000 through October 25, 2006. The trial court also awarded the Mounts costs and reasonable attorney fees, as provided under RCW 21.20.430. In rendering its decision, the court stated:

> 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 (Oct. 25, 2006) at 31.

On November 3, 2006, Nauman filed a motion to reconsider and for a new trial under CR 59.[5] He argued that the trial court erred when it denied the continuance on the morning of trial and that since trial he had newly discovered evidence. After a hearing on December 12, 2006, the trial court denied the motion.

Nauman timely appealed. Meanwhile, he filed a second CR 59 motion to reconsider the order denying reconsideration and new trial on December 22, 2006. After a hearing, the trial court denied the second CR 59 motion.

Before oral arguments in this court, Nauman filed chapter 13 bankruptcy in Hawaii. Accordingly, we stayed the appeal, pending resolution of Nauman's bankruptcy. At both parties' request, we lifted the stay on May 5, 2009. The record is unclear as to whether the bankruptcy is complete. Nevertheless, the parties assured this court that the Hawaii bankruptcy proceedings would not affect the case before us.

[5] Nauman hired an attorney to represent him post judgment and on appeal.

ANALYSIS

Nauman appeals from two orders denying his motions for reconsideration or new trial. His motions for reconsideration stem from the trial court's order denying his motion for continuance on the day of trial. We examine the trial court's denial of the continuance and the subsequent denials of reconsideration in turn.

I. Motion for Continuance

Nauman contends that "good cause" for granting the continuance existed under CR 40(e)[6] because his absence at trial was unavoidable. Br. of Appellant at 20. He further contends that "good cause" for granting the continuance existed under CR 40(d)[7] because he could not prepare or attend trial due to involuntary circumstances, namely the earthquake and his medical problems. Br. of Appellant at 41. These arguments are unpersuasive.

We review a trial court's decision granting or denying a motion for continuance for a manifest abuse of discretion. *Martonik v. Durkan*, 23 Wn. App. 47, 50, 596 P.2d 1054 (1979), *review denied*, 93 Wn.2d 1008 (1980). A manifest abuse of discretion occurs where the trial court's ruling is manifestly unreasonable or is based on untenable grounds or done for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In exercising its discretion, a trial court may properly consider the necessity of reasonably

[6] CR 40(e) provides in part: "A motion to continue a trial on the ground of the absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it, and also the name and address of the witness or witnesses."

[7] CR 40(d) provides, "When a cause is set for trial, it shall be tried or dismissed, unless good cause is shown for a continuance."

prompt disposition of litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior continuances granted to the moving party; any conditions imposed in the continuances previously granted; and any other matters that have a material bearing on the exercise of the discretion vested in the trial court. *Balandzich v. Demeroto*, 10 Wn. App. 718, 720, 519 P.2d 994, *review denied*, 84 Wn.2d 1001 (1974); *see also Willapa Trading Co. v. Muscanto, Inc.*, 45 Wn. App. 779, 785-86, 727 P.2d 687 (1986) (considering *Balandzich* factors and other circumstances, court allowed counsel to withdraw and denied motion for continuance); *Martonik*, 23 Wn. App. at 51 (finding a long delay in prosecution of cause, prior continuances, and the interests of the defendant support denial of continuance).

In addition, the Washington Supreme Court has held that "[i]t 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 set for the trial of the cause . . . *[b]ut there must of necessity be some limitation on the extension of this courtesy and consideration*." *Puget Sound Mach. Depot v. Brown Alaska Co.*, 42 Wash. 681, 683, 85 P. 671 (1906) (emphasis added); *Traynor v. White*, 44 Wash. 560, 87 P. 823 (1906) (finding no abuse of discretion in denying a third continuance to an ill party defendant).

In *Strom v. Toklas*, the defendants gave notice three days before trial that they planned to move for a continuance at trial. *Strom v. Toklas*, 78 Wash. 223, 226, 138 P. 880 (1914). At trial, they supported the motion with affidavits from the family physician stating facts showing her serious physical condition and that she had left Washington on his advice. *Strom*, 78 Wash. at

226. They also submitted an affidavit from defendant's counsel corroborating the physician's statements. *Strom*, 78 Wash. at 226. The Washington Supreme Court held that the trial court erred when it denied the continuance, noting that the "object of all litigation is to do justice between the parties." *Strom*, 78 Wash. at 228. The court concluded that it was unjust for the trial court to deny the first continuance to a party who could not attend trial due to bona fide illness. *Strom*, 78 Wash. at 229.

Likewise, in *Chamberlin v. Chamberlin*, the Supreme Court found an abuse of discretion when the trial court denied the defendant's motion for continuance when her absence from trial was "caused by a *bona fide* illness and where no prior continuance has been sought or granted." *Chamberlin v. Chamberlin*, 44 Wn.2d 689, 703, 270 P.2d 464 (1954). The *Chamberlin* court reasoned that because the defendant had a bona fide illness making it impossible for her to travel to Washington and because she did not voluntarily "absent" herself from the place of the trial and because the plaintiffs suffered no hardship by delaying the trial for 30 additional days, the trial court abused discretion in denying her motion for continuance. *Chamberlin*, 44 Wn.2d at 706.

The *Chamberlin* court, however, recognized that a party who moves for a continuance must have exercised good faith and diligence to prevent the need for delay. *See Chamberlin*, 44 Wn.2d at 704. "In view of the appellant's refusal to comply with the terms imposed by the trial court, this court found that the trial court did not abuse its discretion in denying the continuance or in refusing to reopen the cause or to grant a new trial." *Chamberlin*, 44 Wn.2d at 700 (discussing *Thornthwaite v. Greater Seattle Realty & Improvement Co.*, 160 Wash. 651, 295 P. 933 (1931)); *see also City of Tacoma v. Bishop*, 82 Wn. App. 850, 862, 920 P.2d 214 (1996)

(stating when a criminal defendant "engages in dilatory conduct which hinders the 'efficient administration of justice,' a court may constitutionally deny a continuance even when the defendant is unrepresented at trial as a result.") (citation omitted).

In *Odom v. Williams*, the Washington Supreme Court again emphasized that a party moving for continuance must exercise due diligence and good faith. *Odom v. Williams*, 74 Wn.2d 714, 717-18, 446 P.2d 335 (1968). There, the lower court acted within its proper discretion when it denied the defendant's motion for continuance because the action had been pending for over two years; much of the difficulty in scheduling a prompt trial was due to the defendant's motions; the unverified letter from the physician on which the continuance was argued stated the defendant's illness arose shortly after the first vacated trial date and was premised on the assumption that the trial would be a "'long or suspenseful' one"; and finally, the physician's letter was not served or communicated to opposing counsel until the morning of trial. *Odom*, 74 Wn.2d at 717. The *Odom* court concluded that the defendant's absence was deliberate and bespoke neither due diligence nor good faith. *Odom*, 74 Wn.2d at 718.

Similarly, against the background of this case, Nauman failed to exercise good faith and diligence to prevent the need for delay. First, he did not file or serve a timely written motion[8] or affidavit showing the materiality of the evidence expected to be obtained and the due diligence used to procure such evidence. *See* CR 40(e); *Odom*, 74 Wn.2d at 717 (finding that the defendant did not comply with procedural requirements because he failed to file or serve any

[8] Nauman asserts that he filed a timely written affidavit six days before trial; however, the record reveals only that Nauman sent an ex parte letter to the trial court stating that he was unable to participate in legal proceedings for at least six months, per his doctor's diagnosis. The record is unclear as to whether the court sent a copy of the letter to the Mounts' counsel.

timely written motion or affidavit supporting his motion for continuance); *Makoviney v. Svinth*, 21 Wn. App. 16, 29, 584 P.2d 948 (1978), *review denied*, 91 Wn.2d 1010 (1979) (stating the plaintiff failed to comply with procedural requirements of CR 40(e) when he made an oral offer of proof but did not supply the required affidavit). Second, the physician's declaration that Nauman submitted at trial to support the motion for continuance failed to establish the materiality of the evidence he expected to obtain and the due diligence to procure such evidence. *See* CR 40(e); *Odom*, 74 Wn.2d at 717. The declaration only stated that Nauman was not competent to participate in legal proceedings due to his illness.

But assuming his procedural deficiencies were excusable, the trial court nevertheless acted within the proper limits of its discretion. The trial court denied Nauman's continuance because the case had been pending for nearly three years, during which time Nauman consistently sent improper ex parte letters to the trial court. Further, the case had previously been continued due to Nauman's circumstances. Although Nauman argues that the earthquake hindered his opportunity to diligently prepare for trial, the record reveals that Nauman failed to participate in discovery until compelled to do so, failed to provide information as to what happened to the funds in question, and maintained that he did not retain any records to account for the funds. Finally, starting in 2004, the trial court received several subsequent letters from the same doctor all of which generally stated that Nauman would be medically capable to participate in legal proceedings in six months.

Based on Nauman's behavior, it was reasonable for the trial court to legitimately question whether the Mounts would have the opportunity to litigate their claims in court. In the interest of

justice to all parties, the trial court acted within the proper bounds of its discretion when it denied Nauman's motion for continuance on the morning of trial. *See Odom*, 74 Wn.2d 714; *Balandzich*, 10 Wn. App. 718.

This case is further complicated because up to and at the time of trial, Nauman chose to represent himself pro se. And although a local attorney represented him for the purpose of the continuance, that attorney did not represent him at the subsequent trial. In other words, Nauman was *in absentia*, and counsel did not represent his interests at trial. But it is well established that pro se litigants are bound by the same rules of procedure and substantive law as attorneys. *Westberg v. All-Purpose Structures Inc.*, 86 Wn. App. 405, 411, 936 P.2d 1175 (1997) (citing *Patterson v. Superintendent of Pub. Instruction*, 76 Wn. App. 666, 671, 887 P.2d 411 (1994), *review denied*, 126 Wn.2d 1018 (1995)). Moreover, CR 40 provides that after notice of trial has been given, either party may "proceed with his case" and receive a judgment despite the absence of the adverse party. CR 40(a)(5).[9]

Here, Nauman had notice of the trial and nonetheless failed to appear. Because the trial court acted within its proper discretion when it denied the motion for continuance, the court also properly proceeded to trial under the civil rules. *See In re Marriage of Daley*, 77 Wn. App. 29, 32, 888 P.2d 1194 (1994).

II. Motions for Reconsideration or Reopen for New Trial

Where it is not an abuse of discretion to refuse a continuance on account of the absence of

[9] CR 40(a)(5) provides in part: "Either party, after the notice of trial . . . and in the absence of the adverse party, unless the court for good cause otherwise directs, may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require."

a party, it is not an abuse of discretion to refuse a new trial on the same grounds. *Nye v. Manley*, 69 Wash. 631, 637, 125 P. 1009 (1912); *Thornthwaite*, 160 Wash. at 654. Here, because the trial court did not abuse its discretion in denying the continuance, it likewise did not abuse its discretion in denying Nauman's CR 59 motions. Nevertheless, the trial court's denials of the CR 59 motions were proper on the merits.

Nauman argues that the trial court abused its discretion when it failed to grant his motions for reconsideration or to reopen for new trial under CR 59(a)(4), newly discovered evidence; CR 59(a)(7), insufficient evidence supporting decision; and CR 59(a)(1), irregularity of the court proceeding. These arguments are misguided.

A. No Newly Discovered Evidence

Under CR 59(a)(4), reconsideration is warranted if the moving party presents new and material evidence that it could not have discovered or produced at trial. *Wagner Dev. v. Fid. & Deposit*, 95 Wn. App. 896, 906, 977 P.2d 639, *review denied*, 139 Wn.2d 1005 (1999). If the evidence was available but not offered until after that opportunity passed, the parties are generally not entitled to another opportunity to submit the evidence. *Meridian Minerals Co. v. King County*, 61 Wn. App. 195, 203, 810 P.2d 31, *review denied*, 117 Wn.2d 1017 (1991).

Implicit in the civil rules are ample opportunities for discovery and inspection of evidence before trial. When a party fails to take advantage of these opportunities, it may show a lack of diligence. 4 Karl B. Tegland, Washington Practice: Rules Practice author's cmt. 16 (2), at 482 (5th ed. 2006). And again, the same rules of procedure and substantive law that bind attorneys apply to pro se litigants. *Westberg*, 86 Wn. App. at 411.

On appeal, Nauman contends that both the first motion for reconsideration or new trial and the second motion to reconsider the order denying reconsideration and new trial were erroneously denied under CR 59(a)(4).

1. First CR 59 Motion for Reconsideration or New Trial

To support the first CR 59(a) motion, Nauman submitted declarations from his new attorney, his wife, and his father. Attached to his wife's declaration was documentation of Nauman's prescriptions, photographs of the damage the earthquake caused, letters from Nauman's physician, and a declaration from one of Nauman's colleagues. The declarations enumerated Nauman's "struggle to locate records, witnesses, and a trial counsel while plagued by earthquake related communications [sic] blackouts and survival issues." Br. of Appellant at 47. In addition, Nauman argued that his medical condition justified his failure to prepare for or appear at trial.

But as the trial court noted at the first CR 59 hearing, there was a "continual claim . . . a recurrent theme throughout this file that, 'I'm too sick to come to court. I'm too sick to participate. I'm not able to lucidly answer questions,' et cetera." RP (Dec. 12, 2006) at 44.

Notably, Nauman's colleague's declaration states that he began familiarizing himself with Nauman's 100 security clients in June 2006 and that in September he began "the process of transitioning all of [Nauman's] current securities clients over to [him]." CP at 152. Impliedly, then, at least until June 2006, Nauman was well enough to continue working as a securities trader and continued in that capacity at least part time through September 2006. Yet the trial court began receiving letters from Nauman's physician in October 2004 stating that he was not capable

of participating in legal proceedings. Moreover, in one of the letters, Nauman's physician expressed his view that Nauman is "a man of exceptional character and attitude." CP at 225. A reasonable person may interpret to reflect on the physician's impartiality.

In short, the trial court's reluctance to grant the continuance was reasonable, given Nauman's lack of participation in the proceedings over the three years the case was pending. Accordingly, we find that the trial court did not abuse its discretion in denying the first motion for reconsideration under CR 59(a)(4).

2. Second CR 59 Motion to Reconsider Order Denying Reconsideration and New Trial[10]

Nauman supported his second CR 59 motion with a statement from his physician that Nauman would be medically capable of participating in the legal process by mid-January 2007. Likewise, the trial court properly denied Nauman's second CR 59 motion to reconsider the order denying reconsideration and new trial.

At the second CR 59 hearing, the trial court again stated there was no evidence on the record that Nauman put forth any effort over the three years the case was pending to participate in the litigation. In particular, the trial court noted there was no evidence that Nauman made plans to travel to Washington for the trial. The trial court further noted that although Nauman's wife was a named defendant in the case, she had not participated or appeared for trial. Finally, the trial court noted that Nauman offered no new evidence on the merits of the security fraud and conversion judgments. Thus, we hold that the trial court did not abuse its discretion in denying

[10] CR 59 permits more than one motion for reconsideration when the motions do not come under any of the classifications enumerated in CR 59(j). *See Barry v. USAA*, 98 Wn. App. 199, 203, 989 P.2d 1172 (1999).

the second motion for reconsideration under CR 59(a)(4).

B. Sufficient Evidence Supporting the Decision

To prevail on a motion for reconsideration under CR 59(a)(7), a party must show that the outcome of the court's decision was contrary to the evidence. On appeal, Nauman contends that the trial court did not rely on objective evidence in the record in denying the motion for continuance or motions for reconsideration. He asserts that the declarations they submitted for the CR 59 hearing "furnish material data undermining the conclusion that conversion and RCW 21.20 violations occurred." Br. of Appellant at 34.

According to Nauman, the missing material evidence at trial to refute the judgment of securities fraud under RCW 21.20.010 consists of statements set forth in Nauman's father's declaration and testimony from Nauman that he *was not acting in his capacity as an investment advisor in his dealings with the Mounts because he was not compensated for his services*. Therefore, Nauman maintains that he is not liable for securities fraud under RCW 21.20.010.

But as the Mounts correctly observe, this is a misstatement of the law. We can only assume that Nauman mistakenly believed the trial court found him liable under RCW 21.20.020, which prohibits dishonesty by an investment advisor. But whether Nauman was an investment advisor for the Mounts is irrelevant because the trial court found him liable for securities fraud under RCW 21.20.010. The standards under RCW 21.20.010 and 21.20.020 differ. *See Brin v. Stutzman*, 89 Wn. App. 809, 951 P.2d 291, *review denied*, 136 Wn.2d 1004 (1998).

RCW 21.20.010 sets forth two essential elements of a securities fraud claim: (1) a fraudulent or deceitful act committed (2) in connection with the offer, sale, or purchase of any

security. *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007) (citing RCW 21.20.010). Because the primary purpose of the Washington State Securities Act (WSSA) is to protect investors, courts construe it liberally. *Kinney*, 159 Wn.2d at 844.

It is undisputed that Nauman affected the offer, sale, and/or purchase of the securities in question. Further, Nauman's declarations provided no evidence that placing the funds in his account and concealing the name of the rightful owner was not deceitful. *See* RCW 21.20.110(1)(g); WAC 460-22B-090 (defining dishonest or unethical: practices as used in RCW 21.20.110); WAC 460-21B-008(7) (defining fraudulent practices by a broker-dealer to include "[e]ffecting 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 but not limited to the use of boiler room tactics or use of fictitious or nominee accounts.") Therefore, the trial court did not err when it denied their motion for reconsideration or to reopen the case.

C. No Irregularity

A new trial is available under CR 59(a)(1) if an "[i]rregularity in the proceedings of the court . . . prevented [the moving party] from having a fair trial." CR 59(a)(1). Nauman asserts irregularity in the proceedings because, at the CR 59 hearings, the trial court denied his motion to reopen for new trial because there was no formal request for continuance, rather than asking whether there was a serious medical problem that properly warranted the continuance. He claims the trial court erred as a matter of law when it denied the continuance and as such a de novo standard of review is appropriate. We find no irregularity under either standard.

Nauman relies on *Zulauf v. Carton* where the court stated, "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 had a *meritorious defense, is a sufficient showing upon which to grant the motion to reopen the cause*." *Zulauf v. Carton*, 30 Wn.2d 425, 428, 192 P.2d 328 (1948) (emphasis added).

But *Zulauf* is distinguishable. There, the trial court initially recognized the necessity for the continuance because it directed a short continuance, subject to the payment of certain costs. *Zulauf*, 30 Wn.2d at 429. In *Zulauf*, the plaintiffs' absence was unavoidable, their presence was necessary and they had established a meritorious defense sufficient enough to grant a continuance subject to payment of costs. Zulauf, 30 Wn.2d at 422. The Washington Supreme Court held that the trial court erred as a matter of law when it declined to reopen the cause for additional testimony simply because the plaintiffs could not pay the costs the court imposed. *Zulauf*, 30 Wn.2d at 429.

Here, the trial court declined to recognize the need for a continuance in the first place. It denied the initial request for continuance because it was not properly before the trial court under CR 40 and given the evidence on the record, Nauman failed to establish good cause to continue trial to a later date. Therefore, we hold that the trial court did not err when it denied Nauman's motion for reconsideration or new trial under CR 59(a)(1).

III. ATTORNEY FEES

The Mounts ask us to award them attorney fees under RAP 18.1. RAP 18.1(a) allows recovery of attorney fees and costs on appeal "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses." Under RCW 21.20.430, a person found guilty of

security fraud under RCW 21.20.010 is liable for "the consideration paid for the security, together with interest at eight percent per annum from the date of payment, costs, and reasonable attorneys' fees." We award the Mounts attorney fees and costs upon their compliance with RAP 18.1.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Houghton, J.

Van Deren, C.J.