

2009

# Michael C. Posner v. Equity Title Insurance Agency, Inc., NRT, Inc., Coldwell Banker Residential Brokerage : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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**MICHAEL C. POSNER,**

**Plaintiff/Appellant,**

**v.**

**EQUITY TITLE INSURANCE  
AGENCY, INC., a Utah Corporation,  
and NRT, INC., a New Jersey  
Corporation dba COLDWELL  
BANKER RESIDENTIAL  
BROKERAGE,**

**Defendants/Appellees.**

**Appellate Court No. 20090058-CA**

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**BRIEF OF APPELLEE NRT, INC. D/B/A COLDWELL BANKER  
RESIDENTIAL BROKERAGE**

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**Appeal from the Ruling of the Third Judicial District Court,  
The Honorable Tyrone E. Medley, Presiding  
Granting Two Motions for Summary Judgment Against Plaintiff/Appellant**

---

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ORAL ARGUMENT NOT REQUESTED

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ORAL ARGUMENT NOT REQUESTED

### **PARTIES TO THE PROCEEDINGS BELOW**

1. The Plaintiff/Appellant is Michael C. Posner (referred to herein as “Posner”).

2. Defendant/Appellee Equity Title Insurance Agency, Inc. (referred to herein as “Equity Title”) was a defendant below. The trial court granted summary judgment to Equity Title on May 23, 2005, which Posner appealed.

3. Defendant Independence Title Insurance Agency (referred to herein as “Independence Title”) was a defendant below. The trial court granted summary judgment to Independence Title on May 23, 2005. Posner did not appeal said judgment. Independence Title is not a party to this appeal.

4. Defendant/Appellee NRT, Inc., d/b/a Coldwell Banker Residential Brokerage (referred to herein as “Coldwell Banker”) was a defendant below. The trial court granted summary judgment to Coldwell Banker on December 8, 2008, which Posner appealed.<sup>1</sup>

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<sup>1</sup> The Brief of Appellant incorrectly states that Coldwell Banker is not a party to this appeal. (App. Br., p. I).

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### **STATEMENT OF JURISDICTION**

The Utah Supreme Court has original jurisdiction of this matter under Utah Code Ann. § 78A-3-102(3)(j). The Supreme Court transferred this matter to the Utah Court of Appeals pursuant to Utah Code Ann. § 78A-3-102(4).

### **CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS**

The statutes, rules and regulations which pertain to this appeal are identified in the Table of Authorities and are fully set forth in the body of this brief.

### **ISSUES PRESENTED FOR REVIEW**

Coldwell Banker is satisfied with Posner's statement of the issues presented for review (as they relate to Coldwell Banker), and Posner's statement of the standard of review for those issues.

### **STATEMENT OF THE CASE/STATEMENT OF FACTS**

1. Posner commenced this lawsuit on or about January 30, 2004. R. 1.
2. The trial court entered the original Scheduling Order governing formal discovery in this case on or about July 30, 2004. R. 91.
3. On or about March 28, 2005, Posner filed a First Amended Complaint which introduced a single claim of breach of fiduciary duty against Coldwell Banker. R. 323.
4. On or about May 2, 2006, the trial court entered a second Scheduling Order to govern formal discovery between Posner and Coldwell Banker. R. 91.

5. At Posner's request, the Trial Court later entered an Amended Scheduling Order on or about October 2, 2006. R. 872.

6. The Amended Scheduling Order established the deadline for fact discovery as October 13, 2006. The deadline for expert witness designation was sixty days thereafter, or December 12, 2006. R. 872.

7. Through interrogatories dated July 26, 2006, Coldwell Banker formally requested Posner to identify any and all expert witnesses he intended to call to testify during the course of this lawsuit. R. 719 and 728.

8. Posner responded to the aforementioned interrogatories, but never identified or designated Gage Froerer in his response. Posner never supplemented his response to Coldwell Banker's interrogatories with either the designation or identification of Gage Froerer. R. 728.

9. Posner filed an unsigned Rule 26(a)(3) Designation of Expert Witness Gage Froerer with the trial court on December 26, 2006. R. 1066.

10. Following the expiration of all deadlines set forth in the Amended Scheduling Order and after an extended period of inactivity, the trial court ordered Posner to appear before it on January 10, 2008, and show cause as to why this case should not be dismissed for Posner's failure to prosecute. R. 1515.

11. Despite months of inactivity, Posner appeared at the Order to Show Cause hearing and certified to the trial court that the case was immediately ready for trial. R. 1525.

12. Based upon Posner's certification of readiness for trial, the trial court did not dismiss the case. Instead, the trial court conducted a scheduling conference to determine the final pre-trial and trial schedule. R. 1519 and 1522.

13. The case was scheduled for a three-day jury trial on June 17, 18 and 19 of 2008. R. 1634.

14. On or about March 13, 2008, Coldwell Banker filed a Motion in Limine to Exclude the Testimony and Report of Gage Froerer. R. 1527.

15. On or about March 13, 2008, Coldwell Banker also filed a Motion in Limine to Exclude Documents Produced by Plaintiff After the Expiration of the Fact Discovery Deadline. R. 1559.

16. On or about May 28, 2008, the trial court entered its Order wherein it granted both of Coldwell Banker's Motions in Limine. R. 1695.

17. On or about June 6, 2008, Coldwell Banker filed a Motion for Summary Judgment. R. 1755.

18. On or about December 8, 2008, the trial court entered the Order granting Coldwell Banker's Motion for Summary Judgment. In its Order, the trial court awarded

Coldwell Banker its attorney's fees and cost pursuant to Posner's contract with Coldwell Banker. R. 1842.

19. In 2002, and at the outset of the transaction at issue, Posner and Coldwell Banker had entered into a Listing Agreement & Agency Disclosure (hereinafter "Listing Agreement"). Paragraph 8 of the Listing Agreement states:

Except as provided in section 7 [mediation provision], in case of the employment of an attorney in any matter arising out of this Listing Agreement (including the sale of the Property) the prevailing party shall be entitled to receive from the other party all costs and reasonable attorney fees, whether the matter is resolved through court action or otherwise.

(App. Br., Add. C).

### **SUMMARY OF ARGUMENT**

The trial court properly granted summary judgment in favor of Coldwell Banker as Posner could not have prevailed on his claim of breach of fiduciary duty as a matter of law. Posner had no expert to testify as to the appropriate standard of care to be applied to Coldwell Banker or to opine as to whether Coldwell Banker's conduct fell below the appropriate standard of care. Expert testimony was absolutely necessary in this case as it involved a complex and unusual closing which was not within the common knowledge or experience of a lay juror.

Posner's expert testimony and report was properly excluded by the trial court as Posner willfully ignored the Amended Scheduling Order and frustrated the trial court's ability to manage this case. Allowing Posner's tardy designation of

Mr. Froerer would have resulted in significant waste and prejudiced both the trial court and Coldwell Banker.

Early in the case, Coldwell Banker served Posner with interrogatories wherein Posner was requested to identify any and all experts he intended to call in this case. Posner made no mention of any experts in his responses to Coldwell Banker's interrogatories. Posner never supplemented those responses. In fact, over the course of two years of formal discovery and two separate, court-ordered mediations, Posner never designated or identified any additional expert. Indeed, it was not until after the expiration of both fact and expert discovery, after the failed mediations, and after Coldwell Banker had filed a cumulative motion for summary judgment that Posner finally, and belatedly, designated Mr. Froerer as an expert in this case. The trial court properly granted Coldwell Banker's motion to strike the expert report and testimony of Mr. Froerer. The trial court was justified in striking the expert testimony.

The trial court struck Mr. Froerer's report and testimony because Posner never properly identified Mr. Froerer in his responses to Coldwell Banker's interrogatories and because Posner's expert designation of Mr. Froerer was admittedly two weeks tardy. However and more importantly, the trial struck Posner's expert report and testimony to sanction Posner's repeated and persistent dilatory conduct in this case. The trial court struck Posner's expert because

allowing Posner's late designation would have endorsed and legitimized Posner's persistent refusal to comply with the Amended Scheduling Order and other basic tenets of formal discovery, which Posner had so often ignored. Finally, the trial court struck Posner's expert in order to avoid the unfair prejudice that would have resulted had Posner been allowed to bend the rules yet again.

The trial court's Order included the evidentiary findings upon which it granted Coldwell Banker's motion to exclude Mr. Froerer's report and testimony. The Order made reference to the underlying briefing and dismissed Posner's questionable contention regarding an earlier, albeit late, expert designation. In addition to reviewing the Order and the briefing referenced therein, this Court may look to the lower court record. The record clearly demonstrates that Posner's failure to comply with the Amended Scheduling Order and the Utah Rules of Civil Procedure was willful and that Posner's actions and inactions warranted the sanction meted out by the trial court.

Finally, the trial court properly awarded Coldwell Banker its attorney's fees pursuant to the Listing Agreement. Although Posner's claim for breach of fiduciary duty sounded in tort, the parties' dealings and Posner's claim arose solely from the contract between the parties. But for the Listing Agreement, Posner would have no cause of action for breach of fiduciary duty. Accordingly, this

Court should affirm the trial court's award of attorney's fees and costs to Coldwell Banker.

### **ARGUMENT**

#### **I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN STRIKING THE REPORT AND TESTIMONY OF POSNER'S EXPERT.**

Sanctions are warranted when “(1) the party's behavior was willful; (2) the party has acted in bad faith; (3) the court can attribute some fault to the party; or (4) the party has engaged in persistent dilatory tactics tending to frustrate the judicial process. (App. Br., p. 30, citing Kilpatrick v. Bullough Abatement, Inc., 199 P.3d 957, 965 (Utah 2008). Posner's failure to comply with the scheduling order in regard to the expert witness designation was willful and fault was properly attributed to Posner.

##### **A. The Sanction Was Warranted As Posner's Failure to Timely Designate His Expert Was Willful.**

The trial court entered an Amended Scheduling Order on or about October 2, 2006. R. 872. Pursuant to the Amended Scheduling Order, Posner was required to designate his expert witnesses and submit all related expert reports no later than December 12, 2006. Despite this clear and unambiguous deadline, Posner failed to timely identify or designate Mr. Froerer.

This matter involved more than a two week late expert designation and must be reviewed in context with the history of the case. By December of 2006, the case

had been pending for nearly two years. Fact discovery was completed by October 13, 2006. Following the expiration of fact discovery, both the trial court and Coldwell Banker reasonably believed that all material facts were discovered and exchanged, and that all potential witnesses had been designated. Believing that all triable issues and facts had been explored and set forth during the course of formal discovery, the trial court ordered the parties to renew their efforts to mediate. Mediation was ordered for a second time. R. 878. The parties mediated this matter for a second time on December 8, 2006. R. 1619. At no time prior to, or during the mediation did Posner reference, allege or represent that he had retained an expert in support of his claims against Coldwell Banker. Thus, Posner's failure to timely designate Mr. Froerer again frustrated the progress of the case and the purpose of the second mediation.

Posner filed an unsigned Rule 26(a)(3) Designation of Gage Froerer and the related Expert Report on December 26, 2006. R. 1066. Posner filed the designation only after the failed mediation and after Coldwell Banker incurred significant costs to prepare and file its comprehensive motion for summary judgment. Posner's designation of Mr. Froerer undisputedly occurred two weeks after the expiration of the expert designation deadline. Prior to his tardy designation, Posner had roughly two years within which to appropriately identify and designate his witnesses. Moreover, through interrogatories as early as July,



2006, Coldwell Banker requested Posner to identify any expert he intended to call as an expert witness. R. 719 and 728. Posner made no mention of any expert in his discovery responses. R. 728.

Before the trial court, Posner argued that the mediation order “effectively interrupted the 2006 [Amended Scheduling] Order.” R. 1612. If Posner believed that the ordered mediation “interrupted” the Amended Scheduling Order, Posner should have addressed the same with the Court and opposing counsel. Prior to the mediation, the trial court judge held a telephone conference with the parties. R. 878. Posner had every opportunity to address the dates contained in the Amended Scheduling Order and how the mediation may have impacted the deadlines set forth therein. However Posner never sought, nor obtained, leave of court to modify the Amended Scheduling Order or the expert designation deadline. Indeed, Posner maintained his silence. Posner made no mention whatsoever of any expert until well after the scheduling conference, the mediation, Coldwell Banker’s summary judgment motion and the expiration of the expert designation deadline.

This Court has made clear that “to support a finding of willfulness, there need only be any intentional failure as distinguished from involuntary compliance. No wrongful intent need be shown.” Aurora Credit Services, Inc. v. Liberty West Development, Inc., 129 P.3d 287, 291 (Utah App. 2006). See also Tuck v. Godfrey, 981 P.2d 407, 411 (Utah App. 1999). As discussed above, Posner’s

failure to file his expert designation was willful as he was fully aware of the Amended Scheduling Order and its expert discovery deadline. Posner wilfully chose not to comply with the Amended Scheduling Order.

Moreover, in referring to the second mediation, Posner indicated in his brief that it did not “make sense to [Posner to] spend money on any steps towards litigation until we see the outcome of this mediation.” (App. Br., p. 31). This statement shows that Posner made the wilful decision to ignore the Amended Scheduling Order and its expert designation deadline. This telling statement in Posner’s brief further supports the trial court’s finding of willfulness.

**B. The Sanction Was Warranted As The Trial Court Properly Attributed Fault To Posner For His Failure to Timely Designate His Expert.**

After Coldwell Banker filed its Motion to Strike the Expert Report, counsel for Posner claimed that she mailed the expert designation to Coldwell Banker on December 14, 2006. (R. 1610). Coldwell Banker received no such letter or expert designation on or near that date. R. 1618. Posner’s counsel offered only an unsigned, one page letter to support her assertion. R. 1617. Posner’s counsel made no reference or production of any certificate of mailing or certificate of service to evidence the designation as there was none. The trial court and Coldwell Banker first received Posner’s expert designation on December 26, 2006, two weeks after the expiration of the expert designation and well after Posner’s counsel claimed to

have mailed the mysterious one-page, unsigned letter. R. 1066. These dubious circumstances beg the question that if Posner had, in fact, timely designated Mr. Froerer on December 14, 2006, why would he wait an additional two weeks to actually file the same properly with the court.

Posner's contention was further suspect as Posner previously designated a different expert in the case, which designation was in compliance with the Utah Rules of Civil Procedure. (R. 178). Posner previously designated Joseph A. Beykirch as an expert. Posner's designation of Mr. Beykirch appropriately included a certificate of mailing. It was certainly odd that counsel for Posner would present an unsigned letter as evidence of an expert witness designation in the same case in which she had appropriately made an earlier expert witness designation in compliance with the Utah Rules of Civil Procedure.

The trial court properly found that there was insufficient evidence to support Posner's contention of a timely or appropriate designation of Mr. Froerer. R. 1695. The judge noted that there was no certificate of service or certificate of mailing which accompanied the expert designation and report. Posner continues the suspect claim today by including a complete misrepresentation of the facts in his brief on appeal. The Brief of Appellant indicates that "Posner's counsel thought she was timely filing the expert witness designation when she served Coldwell Banker on December 14, 2006." (App. Br., p. 31 (emphasis added)). The trial

court's ruling and the Record in this case is absolutely clear that Coldwell Banker was never served with an expert witness designation on December 14, 2006.

The trial court properly attributed fault to Posner for the improper and late designation of Mr. Froerer. Posner was at fault in not designating the expert prior to the ordered cut off date of December 12, 2006. If Posner indeed mailed the letter on December 14, 2006, Posner was at fault for not properly designating the expert in accordance with the Utah Rules of Civil Procedure. If Posner indeed mailed the letter on December 14, 2006, Posner was at fault for not filing an expert designation with the trial court until December 26, 2006. More significantly, Posner was at fault for failing to identify and designate his expert prior to the second mediation ordered by the trial court.

Posner was also at fault for failing to supplement his discovery responses to Coldwell Banker and identify Mr. Froerer as a potential expert witness. In July, 2006, Coldwell Banker requested Posner to identify any expert he intended to call as an expert witness. R. 719 and 728. Posner made no mention of any expert in his discovery responses. R. 728. Rule 26(e)(2) of the Utah Rules of Civil Procedure makes clear that "A party is under a duty seasonably to amend a prior response to an interrogatory . . . if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the

discovery process or in writing.” URCP 26(e)(2) (2008). According to the Affidavit of Mr. Froerer, Mr. Froerer consulted with Posner in early November, 2006. R. 1685. Thus, Posner had adequate time to appropriately amend his discovery responses and advise Coldwell Banker of the potential expert witness. Posner was clearly at fault in failing to amend his discovery responses and failing to comply with the Utah Rules of Civil Procedure, in addition to his failure to comply with the Amended Scheduling Order. Again, we see the practical impact and frustration of the case from Posner’s failure to timely designate his expert.

**C. The Trial Court’s Order Includes the Proper Factual Findings to Merit the Sanction.**

Rather than include the many facts underlying the sanction, the Order incorporates by reference Coldwell Banker’s Memorandum in Support of Motion in Limine to Exclude the Expert Testimony of Gage Froerer (hereinafter “Coldwell Banker’s Memorandum in Support to Exclude Expert”) and the arguments in support set forth therein. R. 1695. The Order indicates “For the reasons set forth in Coldwell Banker’s Memorandum in Support of Motion in Limine to Exclude the Expert Testimony of Gage Froerer, Coldwell Banker has adequately satisfied its burden to demonstrate the prejudice it would suffer were this Court to allow Mr. Froerer’s untimely testimony and report to be introduced at trial.” It is common practice for the trial courts in Utah to incorporate findings into Orders by reference. Smith v. Four Corners Mental Health Center, Inc., 70 P.3d 904, 910 (Utah 2003);

State v. L.A.W., 12 P.3d 80, 84 (Utah 2000); Wilson v. Wilson, 2008 WL 5097703, ¶ 2 (Utah App. 2008), Jackson v. State, 2008 WL 152588, ¶ 1 (Utah App. 2008).

Coldwell Banker's Memorandum in Support to Exclude Expert includes the evidentiary basis warranting the sanction. R. 1530. Posner's willfulness and fault in failing to comply is described therein. Coldwell Banker's Memorandum in Support to Exclude Expert notes that Posner failed to identify any potential expert, through discovery or timely designation, during the two years during which the case was pending. R. 1530.

This Court may also include the trial court's oral ruling on the motion (R. 1914) in its review. Free Motion Fitness, Inc. v. Wells Fargo Bank West, NA, 629 Utah Adv. Rep. 3 (2009). The oral ruling outlines the untimeliness of the designation and notes that the dates for the jury trial had already been scheduled. R. 1914. The oral ruling also incorporates Coldwell Banker's Reply Memorandum in Support of Motion in Limine to Exclude the Expert Testimony of Gage Froerer (hereinafter "Coldwell Banker's Reply Memorandum"). R. 1914. Coldwell Banker's Reply Memorandum addresses the real impact of Posner's late designation which was to frustrate the entire case. R. 1618.

The Order also details the facts surrounding Posner's contention that the expert report was provided on December 14, 2006. R. 1695. The Court notes that

there was insufficient evidence to support the contention which further demonstrates fault on the part of Posner thereby warranting the sanction.

**D. If This Court Finds The Trial Court's Order Lacking, the Record Reveals Sufficient Factual Grounds to Uphold the Sanction.**

This Court recognizes that a lower court's failure to make a specific finding of willfulness, bad faith or fault "is not grounds for reversal if a full understanding of the issues on appeal can nevertheless be determined by the appellate court." Amica Mutual Insurance Co. v. Schettler, 768 P.2d 950, 962 (Utah App. 1989). *See also* Preston & Chambers, P.C. v. Koller, 943 P.2d 260, (Utah App. 1997). As discussed above, the evidence contained in the record in this case demonstrates Posner's willfulness and fault in regard to the expert designation.

The striking of Posner's expert report was not due simply to his two week late designation but rather because of Posner's actions which greatly frustrated the case. Posner had two years to identify and disclose any potential witness. Not only did Posner fail to timely designate an expert, Posner failed to identify any expert in his discovery responses and failed to supplement the same. R. 719 and 728. Believing that the discovery process was complete, the trial judge ordered the parties to mediate the case for a second time before proceeding to trial. R. 878. Posner had numerous opportunities to advise Coldwell Banker and/or the trial judge that he intended to designate an expert witness. Instead, Posner presented

the expert designation after the mediation and after the designation cutoff. R. 1066. Moreover, Posner tried to present an unsigned letter as evidence of an earlier, albeit late, expert designation at the hearing on the matter. R.1913 and 1610. Thus, this Court can fully determine the issue from a review of the record should it find that the trial court failed to include the adequate findings in the Order. Any such failure by the trial court to not make a specific finding of willfulness or fault is not reversible error.

**E. The Sanction Was Just.**

Posner's omission and concealment of any potential expert witness prejudiced Coldwell Banker and frustrated the effective management and litigation of the case. Coldwell Banker reasonably formulated its defense based upon the facts, witnesses and information disclosed during the previous two years of formal discovery. Coldwell Banker relied upon Posner to comply with the Utah Rules of Civil Procedure, to seasonably supplement his discovery responses and to provide all material information during fact discovery and during mediation. Instead, Posner ambushed both Coldwell Banker and the trial court with his tardy and surprise expert witness designation filed together with his Memorandum in Opposition to Coldwell Banker's Motion for Summary Judgment.

Posner took absolutely no action in the case for nine months following the denial of Coldwell Banker's first Motion for Summary Judgment. Had Posner



actually taken any action to move his case forward during the year following his untimely expert designation, Coldwell Banker would have then moved to strike the improper expert testimony at that time. However, Posner allowed this case to stagnate for nearly a year, thereby giving e both Coldwell Banker and the trial court the impression that he had abandoned his case. The appearance of Posner's abandonment was so compelling that after nine months of inactivity, the trial court *sua sponte* ordered the parties to show cause as to why the case should not be dismissed for failure to prosecute. R. 1515.

In order to avoid dismissal, counsel for Posner appeared at the order to show cause hearing and hastily represented that the case was ready for trial. Coldwell Banker's Motions in Limine naturally followed. The record clearly establishes that Posner was responsible for the significant delays in prosecution of this suit. Posner, not Coldwell Banker, should bear the consequences for his failure to dutifully pursue his claims, including the consequences for his failure to timely designate Mr. Froerer.

Trial courts are given broad discretion regarding the imposition of discovery sanctions because trial court judges "must deal first hand with the parties and the discovery process." Coxey v. Fraternal Order of the Eagles, Aerie, 112 P.3d 1244, 1246 (Utah App. 2005). This Court recognizes that a trial court "has great latitude in determining the most efficient and fair manner to conduct the court's business

[including] discretion in determining whether a violation of a scheduling order warrants sanction.” Normandeau v. Hanson Equipment, Inc., 174 P.3d 1, 7-8 (Utah App. 2007).

Once the threshold determination is made (willfulness, bad faith, fault or persistent dilatory tactics), “sanctions are warranted, and the choice of sanctions is the responsibility of the trial judge.” Aurora Credit Services, Inc., 129 P.3d at 291. *See also* Tuck, 981 P.2d at 412. The trial court has “broad discretion to select among the full range of options in deciding which sanction to apply to the violator.” SFR, Inc. v. Control, Inc., 177 P.3d 629, 633 (Utah App. 2008).

Utah law is clear that, once the factual finding has been made, an appellate court may not interfere with the trial court’s discretion and disturb the sanction “unless abuse of discretion is clearly shown.” Kilpatrick v. Bullough Abatement, Inc., 199 P.3d at 965. “A trial court’s abuse of discretion in selecting which sanction to impose may be shown only if there is either an erroneous conclusion of law or no evidentiary basis for the trial court’s ruling.” Tuck, 981 P.2d at 411 (internal quotations and citations omitted). There was no erroneous conclusion of law and there is much evidence, as described herein, to support the trial court’s ruling. The sanction was just considering Posner’s wilful mishandling of this case and the prejudice both Coldwell Banker and the trial court would have suffered if the tardy designation was allowed.

**F. Posner Failed to Marshal the Evidence Supporting the Trial Court's Striking of Posner's Expert Designation and Report.**

To successfully challenge the trial court's findings, Posner must demonstrate that the findings were clearly erroneous. To make such a showing, Posner "must marshal all of the evidence supporting the finding and then demonstrate how this evidence, when viewed in the light most favorable to the finding, is insufficient to support it." Fisher v. Fisher, 907 P.2d 1172, 1178 (Utah App. 1995). *See also* Wilde v. Wilde, 969 P.2d 438, 444 (Utah App. 1998).

Posner failed to marshal all of the evidence presented to the trial court that supports the factual findings. Among other evidence identified herein, Posner failed to advise this Court that the case had been pending for two years and that the scheduling order had been amended two times. R. 91 and 872. Posner does not address his discovery responses which made no mention of Mr. Froerer. Posner further neglected to address his failure to supplement his discovery responses and identify Mr. Froerer. R. 728. Because Posner failed to meet his burden to marshal all of the evidence, this Court must affirm the trial court's factual findings. *Id.*

**II. THE TRIAL COURT PROPERLY GRANTED COLDWELL BANKER SUMMARY JUDGMENT AS POSNER COULD NOT PREVAIL AT TRIAL WITHOUT EXPERT TESTIMONY.**

Posner brought a claim against Coldwell Banker for breach of fiduciary duty. R. 323. To prevail on such a claim, Posner would have to establish both: 1) the appropriate standard of care which should have been fulfilled by a reasonable

agent/broker at all times material to the subject closing; and 2) that the conduct of Coldwell Banker's agent, Ms. Kristoffersen, fell below the applicable standard of care. Posner could not satisfy these required elements of his claim without the testimony of an expert witness. Without expert testimony Posner's claims failed as a matter of law. Accordingly, the trial court properly granted Coldwell Banker's Motion for Summary Judgment and dismissed the case. R. 1842.

“Utah courts have held that expert testimony may be helpful, and in some cases necessary, in establishing the standard of care required in cases dealing with the duties owed by a particular profession.” Preston & Chambers, P.C., 943 P.2d at 263 (citing to Wycalis v. Guardian Title, 780 P.2d 821, 826 n. 8 (Utah App. 1989)). “Expert testimony is required ‘[w]here the average person has little understanding of the duties owed by particular trades or professions,’ ” Id. “[E]xpert testimony has been required to establish the standard of care for medical doctors, engineers, insurance brokers, and professional estate executors.” Wycalis, supra at n. 8 (internal citations omitted). Expert testimony is only unnecessary where the propriety of the defendant's conduct “is within the common knowledge and experience of the layman[,]” and “where misconduct ‘is so obvious that no reasonable juror could not comprehend the [ ] breach of duty.’ ” Preston, 943 P.2d at 263-64 (internal citations omitted).

In this case, expert testimony was absolutely necessary as the subject matter of Posner's claim against Coldwell Banker is not within the common knowledge or experience of the layman and there is no obvious misconduct. This is not a case where the agent's conduct so obviously departed from a widely recognized standard of care that it rendered expert testimony unnecessary. Coldwell Banker recognizes that there are times when an expert's opinion may not be necessary to establish the standard of reasonable care or a licensee's departure from that standard such as an agent's concealment of a latent defect in real property, an agent's failure to attend a closing or an agent's acceptance of a double commission. These are all examples of acts so obvious that any reasonable layman would know that the licensee fell short of a commonly known standard of care and breached fiduciary duties owed to his or her client.

**A. The Trial Court Properly Held that Posner's Claims Required Expert Testimony to Determine the Appropriate Standard of Care to be Applied to Coldwell Banker.**

Here, the propriety of Coldwell Banker's conduct in the transaction at issue is not within the common knowledge or experience of a layman. Posner's allegation of misconduct against Coldwell Banker deals with a narrow and isolated point in time in the subject real estate transaction, to wit, the closing. Furthermore, the closing in the subject transaction radically departed from the "standard" or "typical" land deal in several material respects; a) Posner was taking a

subordinated carry-back interest in the ground; b) Posner's attorney required a "surety bond" to secure Posner's position, but neither Posner nor his attorney provided any instruction whatsoever as to what the surety bond should entail or whether anyone should review it prior to closing; c) Posner signed all of the closing documents in advance of the buyer's closing and left them in escrow with Equity Title with instructions to Equity to close the transaction upon receipt of the Surety Bond; d) Posner received notice that the Surety Bond was completed, prior to the buyer's closing, but never requested to review it or have it reviewed by his attorney; and e) both Equity Title and Coldwell Banker received the surety bond which was simply captioned as a "financial guarantee" instead of as a "surety bond."

The trial court record contained absolutely no evidence whatsoever to establish the appropriate standard of care or course of action for a real estate agent faced with the unique and highly unusual transaction. Indeed, Posner cannot argue in good faith, that this transaction with its several abnormalities and exigencies fell "within the common knowledge and experience of the layman." Further, an expert was also needed to provide context and application to the juror for otherwise abstract fiduciary duties of loyalty, confidentiality, obedience, etc. An expert is necessary to explain what, in terms of practical application, context and actual behavior, is reasonably expected of an agent/broker who owes fiduciary duties to

his principal. Utah law is clear that Posner cannot simply pass the responsibility of determining the appropriate standard of care in a situation as unique as this case to the lay juror.

**B. The Trial Court Properly Held that Posner's Claims Required Expert Testimony to Determine Whether Coldwell Banker's Conduct Fell Short of the Applicable Standard of Care and Whether Coldwell Banker Breached any Fiduciary Duty Owed to Posner.**

Even if Posner was able to establish the appropriate standard of care to be applied to Coldwell Banker during the subject closing, expert testimony would still be necessary to determine whether Coldwell Banker's purported actions or inactions fell short of that standard. To reiterate, expert testimony is only unnecessary where misconduct 'is so obvious that no reasonable juror could not comprehend the [ ] breach of duty.' Preston, 943 P.2d at 263-64. In the case at bar, and even taking Posner's allegations at face value, there is no Coldwell Banker action which is so egregious and so obvious that no reasonable juror could not comprehend that a duty was breached. Reasonable minds could clearly differ on whether there was any breach of duty based upon the allegations and evidence surrounding this unique closing.

Even Posner admitted that "reasonable minds could differ as to whether Posner's real estate agent's conduct amounted to fiduciary breach. . . ." R. 1786. By this admission, Posner essentially concedes that the purported misconduct was

not so obvious as to clearly constitute a breach of duty. Expert testimony is necessary to guide the trier of fact in adjudicating the propriety of Coldwell Banker's conduct in this case. Again, an expert is necessary both to establish the appropriate standard of care and to opine as to whether there was any breach thereof.

Posner was obviously aware of the need of an expert in this case, which is why he designated Mr. Froerer. R. 1066. Indeed, Posner selected Mr. Froerer specifically because Mr. Froerer had enough transactional and practical real estate experience to address the several unique characteristics of this particular transaction. Mr. Froerer was likely selected because Posner believed he had sufficient experience to address the numerous and complicated issues of surety ship, laws regulating surety ship, contract interpretation, escrow procedures and the standard of care for real estate agents as it relates to agents' roles as necessary just to establish the standard of care alone.

There is simply no possible way a lay juror can be expected to have the necessary knowledge and experience of an expert in this case. There is similarly no possible way that a lay juror without that requisite knowledge and experience can determine what the appropriate standard of care was, and to then further determine whether Coldwell Banker's conduct satisfied that standard.



The cases cited in Posner's brief are neither legally nor factually analogous to this matter. (App. Br., pp. 34-35, citing Reese v. Harper, 329 P.2d 410 (Utah 1958) and Phillips v. JCM Development Corp., 666 P.2d 876 (Utah 1983)). The facts of this case are nothing like the straightforward fact patterns presented in the cases cited by Posner. Here, it is undisputed that the circumstances surrounding the closing at issue were extremely unusual for a residential closing. The surety bond, split closing, seller carryback financing, buyer's out of state location and premature signature and escrow of all closing documents all materially contributed to the complexity of the transaction. In no way could this closing be ascribed to being "within the common knowledge and experience of the layman." Again, an expert is necessary to evaluate and analyze the unique characteristics of the subject closing and impart to the trier of fact what a reasonable agent/broker should have done in such a situation so that the trier of fact could determine whether Coldwell Banker's conduct satisfied that standard. Without an expert to establish the appropriate standard of care, Posner could not prove that Coldwell Banker's conduct fell below it.

Referring to this particular situation, the trial court judge properly noted the "complexity and the unusual nature of the transaction and closing at issue." R. 1844. Accordingly, the trial court properly granted Coldwell Banker's Second Motion for Summary Judgment and dismissed Posner's case finding that Posner

needed an expert to establish the standard of care to be applied to Coldwell Banker and to assist the trier of fact in determining whether Coldwell Banker's conduct satisfied or fell below the applicable standard. R. 1842.

### **III. THE TRIAL COURT PROPERLY AWARDED COLDWELL BANKER ITS ATTORNEYS' FEES AND COSTS PURSUANT TO POSNER'S CONTRACT WITH COLDWELL BANKER.**

Under Utah law, attorney fees are generally not recoverable unless provided under statute or by contract. *See Canyon Country Store v. Bracey*, 781 P.2d 414, 419 (Utah 1989). Posner's First Amended Complaint states a claim against Coldwell Banker for breach of fiduciary duty. R. 323. It is clear that the fiduciary duties owed to Posner by Coldwell Banker arose from that certain Listing Agreement executed by and among them. (App. Br., Add. C). The Listing Agreement is clearly a contract between Posner and Coldwell Banker. Paragraph 8 of the Listing Agreement states:

Except as provided in section 7 [mediation provision], in case of the employment of an attorney in any matter arising out of this Listing Agreement (including the sale of the Property) the prevailing party shall be entitled to receive from the other party all costs and reasonable attorney fees, whether the matter is resolved through court action or otherwise.

(App. Br., Add. C).

While Posner claims that he chose a tort action, there is no denying that the lawsuit and the claims articulated therein arose out of the Listing Agreement. The Listing Agreement clearly maintains that the prevailing party shall be entitled to receive costs and

fees “in case of the employment of an attorney in any matter arising out of this Listing Agreement.” ((Emphasis added) App. Br., Add. C). Accordingly, the trial court properly found that Coldwell Banker was entitled to an award of its attorneys fees and costs pursuant to the Listing Agreement.

While a Utah real estate licensee owes a statutory duty to the public to be honest, ethical and competent, fiduciary duties inure solely pursuant to contractual agency relationships. See Hermansen v. Tasulis, 48 P.3d 235 (Utah 2002). Posner undisputedly entered into the Listing Agreement with Coldwell Banker, pursuant to which a fiduciary relationship was created and fiduciary duties owed by Coldwell Banker to Posner inured. It is the Listing Agreement which spells out these fiduciary duties. (App. Br., Add. C). The Listing Agreement is the proverbial “but for” cause. But for the Listing Agreement, there would have been no fiduciary relationship and no fiduciary duties owed by Coldwell Banker to Posner.

Indeed, paragraph twelve of Posner’s First Amended Complaint expressly acknowledged that the agency relationship and resulting fiduciary duties owed by Coldwell Banker to Posner arose directly from the Listing Agreement. Paragraph twelve reads in relevant part that “Coldwell Banker listed the property and Ms. Christofferson became Posner’s real estate agent.” R. 323. Absent the Listing Agreement, Coldwell Banker would owe no fiduciary duties to Posner.

While the contractual origin of Coldwell Banker's fiduciary duties did not foreclose Posner from making a claim in tort, it does not allow Posner to ignore the contract's existence or escape the applicability of its terms. Contrary to Posner's assertion, Posner may not simply choose to sue in tort and not be governed by the terms of the Listing Agreement. The Listing Agreement is clearly an enforceable contract between Posner and Coldwell Banker and is binding upon both of them.

This lawsuit clearly arose out of the Listing Agreement and Posner's retention of Coldwell Banker as his agent/broker. Accordingly, Coldwell Banker was entitled to an award of its attorneys fees and costs pursuant to the Listing Agreement. The trial court did not error in awarding Coldwell Banker its attorneys fees and costs.

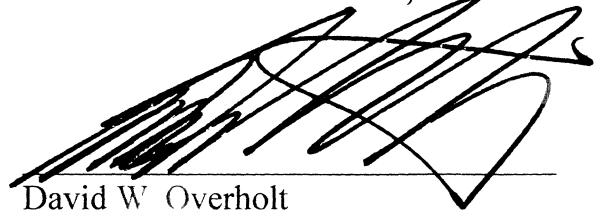
### **CONCLUSION**

The necessary evidentiary basis existed to warrant the sanction as evidenced by the record below. The trial court did not abuse its discretion in striking the expert report as Posner was at fault and his failure to comply with the Amended Scheduling Order was willful. Posner could not have prevailed, as a matter of law, without the testimony of an expert witness given the complexities of the case. In addition, the trial court properly awarded Coldwell Banker its attorney's fees as the parties interaction arose only from the contract between the parties.

Accordingly, Coldwell Banker respectfully requests this Court to affirm the trial court's order granting summary judgment in favor of Coldwell Banker.

DATED this **30** day of June, 2009.

**RICHNER & OVERHOLT, P.C.**

A handwritten signature in black ink, appearing to read 'David W. Overholt', written over a horizontal line.

David W. Overholt  
Attorneys for NRT, Inc., d/b/a Coldwell  
Banker Residential Brokerage

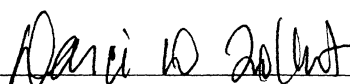
**CERTIFICATE OF SERVICE**

I hereby certify that on the 1st day of July, 2009, I caused a true and correct copy of the foregoing **BRIEF OF APPELLEE, NRT, INC., d/b/a COLDWELL BANKER RESIDENTIAL BROKERAGE** to be served upon the following by placing the same in the United States mail, postage prepaid and addressed as follows:

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