

No. 68153-2-I

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

McKAY CHADWELL, PLLC

Plaintiff-Respondent,

v.

MEAGHAN McKAIGE AND JOHN DOE McKAIGE, husband and wife,
and the marital community comprised thereof,

Defendants-Appellants.

**OPENING BRIEF OF APPELLANTS
MEAGHAN McKAIGE and JOHN DOE McKAIGE**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff McKay Chadwell PLLC brought a Motion for Summary Judgment against Meaghan McKaige and Andrew McKaige, husband and wife, based solely on a personal guarantee signed by Meaghan McKaige on March 21, 2007. Such guarantee related to an attorney fee agreement signed by her brother, Jeremy Stamper, for his company, Federal Savings, LLC. The fee agreement was restricted in scope and emphasized in its terms that it was for investigation only, and that a new agreement would be required if criminal charges were brought. Plaintiff was subsequently paid \$157,276.27 in fees and costs pursuant to such agreement, a large portion of which was for services that were clearly beyond the investigative stage. Nevertheless, Plaintiff filed suit for an additional \$190,444.84 in fees under the guarantee, plus interest and attorney's fees, and on September 30, 2011 obtained a summary judgment against Meaghan McKaige and Andrew McKaige for \$290,847.50.

Defendant Meaghan McKaige defended herself pro se from her residence in California. A single mother, she planned to take the first flight up in the morning for the September 30, 2011 hearing, which had been noted for 10:00 a.m. Inexplicably, Plaintiff noted the motion with Judge Yu, who had recused herself from the case more than a year earlier, it subsequently being transferred to Judge Catherine Shaffer on August 23,

2010. When Meaghan McKaige learned at the last minute that the hearing had been switched to a different judge and was now an hour earlier, she was no longer able to obtain a flight that would get her to the courthouse on time.

Douglas S. Dunham (Counsel on appeal) was hired in the early morning hours of September 30, 2011 to attend the hearing and represent Meaghan McKaige. Plaintiff's counsel agreed to give Mr. Dunham a short continuance as a professional courtesy and advised Judge Shaffer's staff of that fact by e-mail prior to the hearing. The Court requested a hearing anyway and at such hearing declined to grant the short continuance requested by both parties. Mr. Dunham then requested a continuance orally, which was also denied. The Court then granted Plaintiff's Order of Summary Judgment without argument, stating it was unopposed.

It is axiomatic under Washington law that the moving party is not entitled to summary judgment unless it can demonstrate there is no genuine issue as to any material fact, with all reasonable inferences construed in a light most favorable to the non-moving party. If the moving party fails its burden, the non-moving party is not required to respond. Here the Plaintiff's own declaration and billing statements raise

genuine issues of material fact, but the trial court denied the Defendant the opportunity to argue from such documents that genuine issues of material fact exist. (Defendant had provided Plaintiff's counsel with a Response to the Motion for Summary Judgment which raised material factual issues, but the court refused to recognize such pleading because it had not been e-filed.)

Finally, there was no factual evidence before the Court on September 30, 2011 that Defendant Meaghan McKaige was married, or that she was married to Andrew McKaige, who in fact lives apart and has never been served or noticed in this case, and whose name is nowhere factually in the record.

For these and other reasons, the Court's Order on Summary Judgment should be reversed and the case remanded for a hearing on the merits.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting Plaintiff's motion for judgment as a matter of law. CP 327-329.
2. The trial court erred in denying Defendant's motion for continuance. CP 330; CP 452-456.

3. The trial court erred in dismissing Defendants' Motion for Reconsideration. CR 59; CP 529-530.

4. The trial court erred in denying Defendants' motion for continuance pursuant to CR 56(f).

5. The trial court erred in granting Plaintiff's Motion to Strike the Declarations of Meaghan McKaige and Andrew McKaige. CR 56(f); CP 462-464.

6. The trial court erred in granting Plaintiff's Motion for Summary Judgment as it was not timely served 28 days before the hearing pursuant to CR 56(c).

III. ISSUES PRESENTED

1. Whether the denial of the request of Defendants' attorney for a continuance to prepare a defense properly to the Plaintiff's Motion For Summary Judgment, especially when there were no prior requests for continuances, and this was the first appearance of an attorney for the Defendants, was an abuse of discretion. (Assignments of Error Nos. 1, 3.)

2. Whether this court should reverse the trial court's Order On Summary Judgment and remand this matter for trial because the trial court erroneously treated the lack of opposition papers the same as if the matter

was uncontested, and erroneously granted plaintiff's motion for summary judgment.

3. Whether Plaintiff's own declaration with attached Fee Agreement, Guarantee and billing invoices raises genuine issues of material facts regarding the scope of a fee agreement that is limited to investigation, especially after criminal charges were brought, thereby causing Plaintiff to fail to meet its initial burden of proof that it is entitled to an Order on Summary Judgment as a matter of law. (Assignments of Error Nos. 1, 3, 5.)

4. Whether the trial court should be reversed for granting Plaintiff's Motion For Summary Judgment against Andrew McKaige and his marital community when Plaintiff failed to produce any facts that Meaghan McKaige was married at all or married to Andrew McKaige or that Andrew McKaige was contractually bound by the guarantee.

5. Whether this court should reverse the trial court's granting the plaintiff's motion for summary judgment which was served less than 28 days prior to the hearing as required by CR 56(c).

IV. STATEMENT OF THE CASE

A. Factual Background

On March 21, 2007, attorneys Robert G. Chadwell (“RGC”), Krista K. Bush (“KKB”) and Patrick J. Preston (“PJP”) of the firm McKay Chadwell PLLC (“Plaintiff”) met with Jeremy Stamper and Meaghan McKaige about legal representation. <http://www.mckay-chadwell.com/>; CP 120-123. On such date, Jeremy Stamper was presented with a “Fee Agreement” for Jeremy Stamper to sign and Meaghan McKaige was presented with a “Guarantee” agreement to sign. CP 115-118. (Fee Agreement and Guarantee, signed by Meaghan McKaige are attached to this brief as Appendix I and II.) The Plaintiff requested an advance fee deposit \$50,000, which was received in trust. CP 115; CP 121.

The Fee Agreement was limited in scope, in that it was titled as follows:

FEE AGREEMENT (Investigation)

CP 115; Appendix I. The scope of the agreement was limited as follows:

This agreement and the fees for services are based upon the work to be performed in the course of the investigation only. Should criminal charges be brought against the Client, a new agreement based upon those charges and the scope of services necessitated will be required.

(Bold added.) CP 115; Appendix I.

But criminal charges were brought in Nevada. According to the many time slip entries in the Firm billing invoices attached to the McKay declaration (CP 111-305), which was the only substantive declaration filed in support of Plaintiff's Motion for Summary Judgment, Plaintiff spent considerable time on the Nevada criminal charges. On May 29, 2007, PJP reviewed an e-mail from KKB "regarding status of Nevada criminal charges". CP 179. From May 29, 2007 until June 6, 2007, Plaintiff spent time researching Nevada criminal statutes, having conference calls, reviewing charging documents and reviewing "service of criminal Complaint." CP 179-188. Nevada charging documents were reviewed on May 31, 2007, by RGC and PJP. CP 182. KKB and PJP discussed strategy regarding Nevada charges. CP 182. On June 14, 2007 RGC (Robert G. Chadwell) flew to Las Vegas, Nevada to "[a]ttend client processing." He billed 12 hours at \$375 per hour or \$4,500.00. CP 198. His travel expenses were \$1,414.87, presumably for flying first class as the Fee Agreement expressly permits flying first class if the flight exceeds 2 ½ hours. On June 21, 2007, KKB had a discussion with Nevada counsel "regarding initial appearance hearing". CP 203 On September 14, 2007, members of Plaintiff reviewed "the Nevada plea bargain offer" and did

“Westlaw legal research regarding charging statutes”. CP 262-263. All these billing invoices and time entries were attached to Exhibit B of the McKay declaration, which the trial court had before it to determine whether the Plaintiff had met its initial burden of proof on its motion for summary judgment. Despite the filing of criminal charges which “required” a new fee agreement according to its own terms, Plaintiff continued to operate under the same “investigation” fee agreement without any notice to guarantor Meaghan McKaige.

When Plaintiff received criminal charging documents from the State of Nevada on May 31, 2007, CP 181, Plaintiff had billed or incurred \$107,542.28 for fees and costs (including \$3,255.12 in third-party costs that are beyond the scope of the Fee Agreement and Guarantee.)

SUMMARY OF PLAINTIFF'S BILLING STATEMENTS THROUGH MAY 31, 2007				
Date	Fees	Costs	3 rd Party Costs	CP Nos.
Mar. 15 - Mar. 20	1,737.50	0.00	0.00	121
Mar. 21 - Apr. 20	68,727.00	215.42	3,099.51	148-149
Apr. 21 - May 20	22,263.50	247.83	155.61	170-171
May 21 - May 31	11,089.00	6.91	0.00	173-181 (fees); 201-202 (costs)
Subtotals:	103,817.00	470.16	3,255.12	
TOTAL BILLED:	107,542.28			

During the period up to May 31, 2007, Plaintiff received payments against its billing invoices of \$125,000. CP 121, CP 171. Plaintiff subsequently received an additional \$32,276.27, to bring the total paid to \$157,276.27. CP 225, CP CP 250, CP 294. After the Nevada criminal charges were brought, Plaintiff billed an additional \$240,000 in fees and cost. CP 113, CP 225, CP 250, CP 294. In other words, at a time when criminal charges were “brought”, Jeremy Stamper was current on his fees and costs according to Plaintiff’s own billing invoices as attached to the McKay Declaration. There is nothing in Plaintiff’s Fee Agreement that binds Meaghan McKaige to a new agreement.

Under the Fee Agreement, Plaintiff could advance the “expenses of independent professions such as court reporters, architects, investigators, engineers and other experts, which are reasonably incurred in conjunction with work performed”. CP 116. But the Fee Agreement also states that the “Client will be obligated to pay any third party expenses directly unless the Firm, in its sole discretion, advances payment to streamline administrative efforts.” CP 116. Guarantor Meaghan McKaige could reasonably believe that substantial third party costs were being paid directly and only those “to streamline administrative efforts” were part of the guarantee. On Plaintiff’s billing invoices, third-party charges in the

amount of \$40,850.17 were included that should have been billed directly to the “Client” according to the fee agreement and the Guarantee, including \$21,372.12 to Draughon & Draughon (charged as “investigator”) for accounting services related to refunding amounts collected by Federal Savings (CP 149, 224, 249, 282, 283, 289); and \$15,104.21 to the law firm of Cairncross & Hempelmann, P.S. for handling the collection and disbursement of investor funds CP 201, CP 240, CP 250, CP 282, CP 289.

In addition, Plaintiff apparently agreed to a fee agreement with attorney Scott Bell of the law firm of Cairncross & Hempelman, P.S. <http://www.cairncross.com/> CP 182. Plaintiff sought approval from the Department of Financial Institutions to appoint Mr. Bell as an attorney escrow agent. (PJP May 17, 2007 time entry.) CP 169, (TMB May 21, 2007 time entry.) CP 174. From June 4, 2007 throughout the summer, there were substantial fees incurred with check on the status of the escrow with Mr. Bell. (“Review of Cairncross fee agreement”, PJP, June 4, 2007) CP 185, (“Telephone Conference with S. Bell”, KKB, June 7, 2007) CP 190, (“Review e-mail from S. Bell” PJP time entry, June 13, 2007) CP 196, (“Telephone conversation with S. Bell and RGC”, KKB time entry, June 13, 2007) CP 197, (“Discussion with KKB regarding status of

investor contacts and escrow account; Telephone call with KKB to S. Bell regarding same;” PJP, June 27, 2007) CP 209, and so on. In essence, Meghan McKaige was guaranteeing another attorney fee agreement through Plaintiff’s billing statements indirectly and guaranteeing third party attorney’s fees that were supposed to be paid by Jeremy Stamper directly.

As of the summary judgment hearing on September 30, 2011, there was no evidence in the McKay Declaration and its attachments in support of Plaintiff’s Motion for Summary Judgment that Meaghan McKaige was anything other than a single woman. In the initial summons and complaint, the defendants are “alleged and believe to be” Meaghan McKaige and John Doe McKaige husband and wife. (Paragraph 2.3, page 2 of the Complaint.) CP 2. Plaintiff’s counsel obtained an order authorizing service by mail and the court ordered service by mail at two addresses to Meaghan McKaige and John Doe McKaige. (See order authorizing service) CP 31-32. Meaghan Stamper McKaige stated in an e-mail to Plaintiff’s counsel on September 30, 2011, while asking for a continuance, stated: “As a single parent living out of town and representing myself, I would appreciate the allowance.” (Declaration of Tyler J. Moore In Opposition of Defendant McKaige’s Motion to

Reconsider, Exhibit E.) CP 491-492. Andrew McKaige's name, as husband of Meaghan McKaige, appears for the first time in the admissible record¹ on the Plaintiff's Motion for Summary Judgment CP 88 and the Order on Summary Judgment signed and filed on September 30, 2011. CP 327-329. Plaintiff's Motion is based only upon the Declaration of Michael D. McKay and its attachments. There is nothing in this declaration or attachments that establish the existence of a marital community or that Andrew McKaige is related to it.

B. Procedural Background

Plaintiff originally filed its Motion for Summary Judgment against Meaghan McKaige on September 2, 2011 and noted it on September 30, 2011 by service on Meaghan McKaige by e-mail. There is no proof of service in the court file and no proof of consent to service by electronic means pursuant CR5(b)(7). Plaintiff's counsel served Meaghan McKaige by e-mail on Friday, September 2, 2011 and advised hard copies by mail.

¹ In their declarations in support of their Motion for Reconsideration of the Order on Summary Judgment, Meaghan and Andrew admitted that they were married, but Andrew was not aware that she had guaranteed her brother's attorney's fees until months later, that he did not consent to the guarantee and that such guarantee did not benefit his marital community. CP 408-409; CP 428-451. But Plaintiff moved to strike both Andrew's and Meaghan's declarations, which Motion to strike was granted by the trial court on November 14, 2011. CP 462-464. Certainly, there was no evidence of their marital status before the court and was not before the trial court at the time of the entry of the Order on Summary Judgment on September 30, 2011.

CP 486. Assuming he mailed the Motion on September 2nd, the motion was noted less than 28 days in violation of CR 56(c). Plaintiff's Motion For Summary Judgment was not properly noted contrary to the trial court's order granting its motion to strike, set out below in the court's observations.

The Motion for Summary Judgment was erroneously noted before The Honorable Mary Yu on September 30, 2011 at 10:00 as shown on the top right corner of Plaintiff's Motion (and on the Note). CP 88, CP 93-94. The error continued when Plaintiff's counsel filed a Declaration of No Response on September 23, 2011 again indicating that it was before Judge Yu for hearing at 10:00 a.m. CP 318-321. Judge Yu had recused herself a year earlier by Order of Recusal filed August 23, 2010, and the case was reassigned to Judge Catherine Shaffer by Order filed August 23, 2010. In other words, the case had already been transferred to Judge Shaffer a year before Plaintiff noted its motion for 10:00 a.m. on Judge Yu's court. The only activity in the case for a year was the filing of the Confirmation of Joinder filed January 5, 2011 until Plaintiff filed its Motion for Summary Judgment on September 2, 2011. (See Superior Court Case Summary attached to Tyler J. Moore's Declaration as Exhibit A.) CP 480-481. Meaghan McKaige served a late Response on Plaintiff's Counsel called

Defendant's Response to Plaintiff's Motion for Summary Judgment. (Attachment to Declaration of Meaghan McKaige.) CP 404-406. Although served on counsel, Meaghan McKaige was not aware that she was supposed to e-file the Response. Counsel for Plaintiff served and filed a Reply to Defendant's unfiled response. CP 322-324. When she received the Reply served late September 28, 2011, Defendant Meaghan McKaige was notified that the hearing was now at 9:00 a.m. on September 30, 2011 before The Honorable James [sic] Schafer [sic] (really The Honorable Catherine Shaffer). CP 322. According to the e-mail service from Plaintiff's counsel's office, Meaghan McKaige did not receive Plaintiff's Reply until Wednesday evening September 28, 2011 at 23:15 (11:15 p.m.) CP 407. Meaghan McKaige asked counsel for Plaintiff for a week continuance because she could not get an earlier flight for the earlier hearing. (E-mail from Meaghan McKaige dated September 30, 2011 8:13 a.m.) CP 492. Counsel refused to agree to her request for a week's continuance and advised Meaghan McKaige that her response was 7 days late. (E-mail from Tyler Moore dated September 30, 2011 8:19 a.m.) CP 492.

Douglas S. Dunham (counsel for appellant McKaige on appeal) was retained by Meaghan McKaige's father to appear for her at the

hearing before Judge Shaffer that morning. (See Declaration of Attorney Douglas S. Dunham In Opposition To Plaintiff's Motion To Strike) CP 452-456. Before the 9:00 a.m. hearing before Judge Shaffer on September 30, 2011, Douglas S. Dunham called Plaintiff's counsel Tyler J. Moore and requested short continuance as a professional courtesy. A Notice of Appearance was e-filed. CP 325-326. Mr. Moore notified Judge Shaffer's court by e-mail at 8:46 a.m. that he agreed to a two week continuance and requesting the Court to give him dates. (E-mail to Judge Shaffer's court, September 30, 2011, 8:46 a.m.) CP 455. Judge Shaffer requested a hearing of the parties anyway. At the hearing, Judge Shaffer advised that she considered Plaintiff's Motion for Summary Judgment unopposed as was going to enter judgment for Plaintiff. (See Clerk's Minutes of Hearing) CP 456. When informed that the parties had agreed to a two week continuance, she informed the parties that she could not hear the motion for several months. Plaintiff's counsel would not agree to two months. Counsel for Meaghan McKaige orally moved that the Motion for Summary Judgment be continued. The trial court opined that a pro se litigant had to follow the rules like other litigants and denied Defendants' Motion for continuance. (Declaration of Douglas S. Dunham) CP 456. Since she considered Plaintiff's motion to be unopposed, she signed

Plaintiff's proposed Order On Summary Judgment. CP 327-329. In granting Plaintiff's Motion to Strike the Declarations of Meaghan McKaige and Andrew McKaige, the Court handwrote as follows:

The Court adds the following observations:

1. Defendant McKaige, who was on notice of the summary judgment motion, never filed with the Court or provided to the assigned judge or [?] judge any response to the motion. It was in fact unopposed under the Court rules.

2. CR 56(f) requires a continuance of a Summary Judgment to be requested by way of an affidavit which explains how the continuance will permit facts relevant to the motion to be provided. No such affidavit was provided, and defendant McKaige's just-retained counsel could not tell the Court what such an affidavit would say if there had been time to prepare it.

3. The failure to follow Court rules cannot be excused by defendant McKaige's pro se status, which was voluntary. Nor does her pro se status warrant an exemption from clear Court rules which are applied to every other litigant. The Court adheres to its denial of what was in fact a last-minute request to continue a properly noted, unopposed motion by way of a verbal request from just retained counsel without any supporting declarations or affidavits as CR 56(f) requires.

CP 462-464. Defendants McKaige again requested a continuance by filing a Motion To Reconsider The Court's Order On Summary Judgment And Motion To Continue Pursuant To CR 56(f). CP 333-344. Attached to the Motion were Declarations from Meaghan McKaige and Andrew

McKaige. Plaintiff moved to strike the McKaige declarations. CP 412-414. The court granted plaintiff's Motion To Strike. CP 462-464. The Court then denied Plaintiff's motion to reconsider and for continuance pursuant to CR 56(f). CP 529-530. Defendants Meaghan McKaige and Andrew McKaige, husband and wife timely appealed.

V. ARGUMENT

A. Standards Of Review

This Court reviews errors of law – such as the trial court's granting a Plaintiff's Motion for Summary Judgment against the Defendants – de novo. *See Meadow Valley Owners Ass'n v. Meadow Valley, LLC*, 137 Wn. App. 810, 816, 156 P.3d 240 (2007) (“Where the relevant facts are undisputed and the parties dispute only the legal effect of those facts, the standard of review is also de novo.”); *see also Coulter v. Asten Grp., Inc.*, 155 Wn. App. 1, 7 n.2, 230 P.3d 169 (2010) (statutory interpretation reviewed de novo).

This Court reviews the trial court's denial of a motion for a continuance or for reconsideration for abuse of discretion. *McCluskey v. Handorff-Sherman*, 68 Wn. App. 96, 103, 841 P.2d 1300 (1992). A trial court abuses its discretion when its decision is manifestly unreasonable or its discretion is exercised on untenable grounds or for untenable reasons.

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). “A court acts on untenable grounds when its factual findings are not supported by the record; it acts for untenable reasons if it uses an incorrect standard of law or the facts do not meet the requirements of the standard of law.” *Sherron Assocs. Loan Fund V (Mars Hotel) LLC v. Saucier*, 157 Wn. App. 357, 361, 237 P.3d 338 (2010).

B. The Denial Of The Request of Defendant’s Attorney For A Continuance To Prepare A Defense Properly To The Plaintiffs’ Motion For Summary Judgment, Especially When There Were No Prior Requests For Continuances, And This Was The First Appearance Of An Attorney For The Defendants, Was An Abuse Of Discretion.

Counsel on appeal herein first requested and obtained an agreement to a short continuance from Plaintiff’s counsel, who did so out of professional courtesy. When Plaintiff’s counsel notified the trial court and requested some new dates, he was advised that the trial court expected a hearing. There had essentially been no activity in the court file for over a year. (See Tyler J. Moore Declaration In Opposition to Defendants’ Motion For Reconsideration – Exhibit A Superior Court Case Summary) CP 480-483. Counsel on appeal was the first appearance on behalf of Defendants Meaghan McKaige and Andrew McKaige on the day of the hearing on September 30, 2011. Rather than accept counsel’s agreement to a continuance, the trial court demanded a hearing of the parties and

advised that she could not give a short continuance. (See Declaration of Douglas S. Dunham In Opposition Of Motion To Strike) CP 452-456). Counsel for Defendants moved the trial court for a continuance, which was denied. (See Clerk's Minutes) CP 456. In her observations, in the Order Granting Plaintiff's Motion to Strike, the trial court emphasized how Defendant McKaige had notice and that her pro se status did not warrant an exemption, and that in face of the "unopposed" motion, the court adhered to her denial of "just retained counsel's" motion for continuance. CP 462-464. Meaghan had served a Response to Plaintiff's Motion wherein she raised issues about the scope of the fee agreement in light of criminal prosecution prior to the hearing as shown by the fact that Plaintiff's counsel filed a Reply Brief. CP 322-324.

There is no question that Defendant Meaghan McKaige was unfamiliar with the civil rules, in particular CR 56, although some of her difficulties were compounded by Plaintiff's own errors. Twice before the hearing on September 30, 2011, Plaintiff's pleadings advise Defendant McKaige that her hearing is before Judge Yu and at 10:00 a.m. (Note and Motion for Summary Judgment, filed September 2, 2011, and Declaration of No Response, filed September 23, 2011, one week prior to the hearing.) It is totally understandable that Meaghan McKaige was misled to believe

the hearing was at 10:00 a.m. on September 30, 2011 before Judge Yu. The first notice to her that the hearing is at 9:00 a.m. before a different judge until late September 28, 2011, when Plaintiff's counsel e-mail his Reply to her unfiled response.

When Counsel on appeal appeared on September 30, 2011, he advised the court that the parties had agreed to a short continuance, which the trial court would not grant. He then moved for a continuance to prepare, which was denied.

Clearly the rule in Washington is that it is in the discretion of the trial court to grant a motion for continuance. An exercise in discretion will not be overturned unless there is abuse. *Coggle v. Snow*, 56 Wn. App. 499; 784 P.2d 554 (1990). But as the court stated in *Coggle*, at 508:

The primary consideration in the trial court's decision on a motion for a continuance should have been justice. The client, *Coggle*, after obtaining new counsel, should not be penalized for the apparently dilatory conduct of his first attorney.

Here Defendant Meaghan McKaige tried to defend herself personally but when she saw that she could not do so she hired an attorney. Again in *Coggle*, this Court stated:

The court should have viewed the motions in the context of the new legal representation. We fail to see how justice is served by a draconian application of time limitations here. The case had been filed 2 years earlier. Little discovery had

been pursued. The process could have been speeded by the court after a short continuance and the consideration of Coggle's materials in response to the motion for summary judgment. Snow has not argued that he would have suffered prejudice if the court had granted a continuance, nor do we perceive any prejudice.

Id. This Court reversed the trial court's decision not to grant the continuance.

In a case not too dissimilar from the present case, the attorney in *Butler v. Joy* 116 Wn. App. 291; 299, 65 P.3d 671 (2003) was retained one day before the motion for summary judgment hearing. Ms. Butler's attorney "appeared without written affidavits in support of a continuance and presented the motion orally." The Butler court points out that there was no prejudice; that this was Ms. Butler's first request for a continuance; and that her attorney "deserved an opportunity to prepare a response to the issues." The Butler court relied on *Coggle* and found that the trial court abused her discretion.

The trial court also refused to consider the declarations of Meaghan McKaige and Andrew McKaige by granting plaintiff's motion to strike them. CP 462-464. It also denied Defendant's Motion for Continuance pursuant to CR 56(f). In *Coggle*, this Court found that "after failing to grant the continuance" the failure to consider declarations filed

pursuant to a Motion for Reconsideration “was an abuse of discretion flowing from the court’s initial denial of the motion for continuance.” *Coggle*, at 508-509.

After a year of no activity in the court file, Plaintiff here could not be prejudiced by a continuance and the trial court abused her discretion by not granting it under these circumstances.

C. This Court Should Reverse The Trial Court’s Order On Summary Judgment And Remand This Matter For Trial Because The Trial Court Erroneously Treated The Lack of Opposition Papers The Same As If The Matter Was Uncontested, And Erroneously Granted Plaintiff’s Motion For Summary Judgment.

By holding that Plaintiff’s motion was unopposed, and Plaintiff was therefore entitled to a \$290,000 judgment against Meaghan McKaige and Andrew McKaige, the trial court did so because there was no timely defense response in the court file to the motion. Even without a response, Defendants were entitled to argue whether Plaintiff’s declaration and attachments met its initial burden of proof as a matter of law. A lack of opposing affidavits or declarations does not substitute for plaintiff’s burden of proof or mean that the motion is uncontested. Obviously Defendants were contesting the motion, counsel was hired and requested a continuance, Defendant Meaghan McKaige had served a response on counsel for Plaintiff as recognized in the Reply.

The trial court simply ignored the boiler plate language that it receives in every motion for summary judgment. The trial court did not consider if the summary judgment was appropriate based on the documents before her. In determining whether Plaintiff met its burden of proof, she did not hold Plaintiff to a “strict standard” and construe any doubts against it nor construe the facts most favorably to Defendants. See *Atherton Condominium Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990), which is oft cited in the preambles for motions for summary judgment.

In *Graves v. P. J. Taggares Co.*, 94 Wn.2d 298, 302, 616 P.2d 1223 (1980), the court stated:

But “[i]f the moving party does not sustain that burden, summary judgment should not be entered, irrespective of whether the nonmoving party has submitted affidavits or other materials.” *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977); P. Trautman, *Motions for Summary Judgment: Their Use and Effect in Washington*, 45 Wash. L. Rev. 1, 15 (1970).

In *Graves v. P.J. Taggares*, even though the non-moving party did not dispute the issue as to whether the driver was a self-employed independent contractor, the court de novo review held that the moving party did not meet its initial burden of proof. In other words, until the moving party meets its initial burden of proof, the moving party does not have to submit

anything. Defendants should not have been penalized for failing to produce declarations.

The only explanation for the trial court's decision is that she erroneously substituted a finding of "unopposed" for plaintiff's burden of proof.

D. Plaintiff's Own Declaration With Attached Fee Agreement, Guarantee And Billing Invoices Raises Genuine Issues Of Material Facts Regarding The Scope Of A Fee Agreement That Is Limited To Investigation, Especially After Criminal Charges Were Brought, Thereby Causing Plaintiff To Fail To Meet Its Initial Burden Of Proof That It Is Entitled To An Order on Summary Judgment As A Matter Of Law.

Despite a Fee Agreement that was limited in scope to "investigation" and contemplated a new fee agreement when criminal charges were "brought", Plaintiff's own time records show that it went far beyond the scope of the Fee Agreement upon which Meaghan McKaige's Guarantee was based. In the only Declaration supporting its Motion for Summary Judgment, Michael D. McKay states that Plaintiff represented Jeremy Stamper and that all bills were sent to him and he did not dispute any of the bills. (See McKay Declaration, paragraph 7.) CP 112. Whether Defendants McKaige challenge whether Plaintiff did the work for which it charged is not the issue. The current issue is whether the work done was within the scope of the limited Fee Agreement. Beyond

helping out her brother, there is no showing nor can there be that Meaghan McKaige received any consideration for guaranteeing her brother's company's fee agreement.

Generally, the Appellate Court matters of contract interpretation are a question of law and are viewed de novo. *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990).

It is the fundamental law of Washington that a guaranty contract promising to answer for the debt of another "must be explicit and is strictly construed". In *Seattle-First Nat'l Bank v. Hawk*, 17 Wn. App. 251, 256, 562 P.2d 260 (1977), in holding for the guarantor against bank, the court stated:

It is a fundamental rule that guarantors can be held only upon the strict terms of their contract, as a contract to answer for the debt of another must be explicit and is strictly construed. [Citations omitted.] If a contract is equally susceptible of two or more constructions, it should be construed against the party using the language. [Citations omitted.] In other words, where language is ambiguous, the party selecting, drafting, and presenting the contract of guaranty containing such misleading language should suffer any consequences.

"That the contract of a guarantor without compensation will be strictly construed, needs no sustaining citation of authority." *Hansen Serv. V. Lunn*, 155 Wash. 182, 189, 283 P. 695 (1930) (Court held for guarantor

that a consignment sale was not a sale within terms of guarantee.) “The liability of the guarantor cannot be enlarged beyond the strict intent of his contract.” Id. at 191. See also, *Wilson Court Ltd. P'ship v. Tony Maroni'S*, 134 Wn.2d 692, 703 952 P.2d 590 (1998).

This Fee Agreement and Guarantee were obviously prepared by Plaintiff law firm on its own behalf. Defendant Meaghan McKaige is not an attorney and was not represented at the time the Guarantee was signed. The term “investigation” as used in context of the Fee Agreement and Guarantee is susceptible several meanings. The common meaning is “1. The act or process of investigating or the condition of being investigated, 2. A search inquiry for ascertaining facts; detailed or careful examination.” <http://dictionary.reference.com/browse/investigation> The Courts “generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.” *Hearst Commc'ns, Inc. v. Seattle Times*, 154 Wn.2d 493, 503-504, 115 P.3d 262 (2005). It is clear that if a contract is “is equally susceptible of two or more constructions, it should be construed against the party using the language.” *Seattle-First Nat'l Bank v. Hawk*, supra at 256.

The Fee Agreement states that is for “investigation only” and goes on to say that “[s]hould criminal charges be brought against the Client, a new agreement based on those charges and the scope of services necessitated will be required.” As pointed out, criminal charges were brought in Nevada around May 31, 2007 and Plaintiff law firm spent substantial hours researching, reviewing and conferencing about those charges. On June 14, 2007, Mr. Chadwell traveled to Las Vegas, Nevada to “process” his client and charged \$4,500 in fees. At this point in the representation, Jeremy Stamper had incurred approximately \$107,000 in fees and costs and had made payments \$125,000 for those fees and costs either as paid invoices or in trust. Construing the Fee Agreement and Guarantee strictly against the Law Firm, a new fee agreement was “required” and yet none was produced. Plaintiff billed over \$240,000 after the criminal charges were filed.

In light of the fact that criminal charges were in fact brought as shown by Plaintiff’s own billing invoices supporting its Motion for Summary Judgment, there was certainly a material question of fact whether Meaghan McKaige’s Guarantee was no longer effective by the terms of plaintiff’s own agreement because her guarantee was for “investigation only”. The point here is regardless of whether there is an

ambiguity regarding the meaning of “investigation only”, the service of criminal complaint is no longer investigatory and the guarantee no longer was enforceable without a new agreement.

After the Nevada charges were “brought” went far beyond a reasonable interpretation of investigation. It signed a fee agreement with another law firm, Cairncross & Hempelmann, P.S. and had attorney Scott Bell appointed as an escrow agent to collect client funds from various sources. Most of its fees according to Plaintiff’s billing invoices, were related to putting together stipulations to pay back investor funds. Certainly there is a question of fact entering into stipulations and paying back investor funds fits within the scope of the word “investigation” or “investigation only” when viewed strictly against the law firm and more favorably for the Guarantor.

Finally, in the Fee Agreement it states that third party costs shall be billed to the Client directly but Plaintiff can advance payments to third parties to streamline administrative efforts. In is fair to believe that substantial third party costs would not be part of the Guarantee, but instead Plaintiff over \$40,000 in accounting fees with Daughon and Draughon and legal fees with Cairncross & Hempelmann by running them through their billing invoices. Probably more importantly is that most of

these bills relate to arriving at a settlement wherein investors were to be paid back.

In summary, there certainly is a number of questions of material fact as to whether any of these invoices are within the scope of Meaghan McKaige's Guarantee. Based on Plaintiff's Declaration, Fee Agreement, Guarantee and billing invoices, there are clear issues of material fact and Plaintiff did not meet its initial burden.

E. The Trial Court Should Be Reversed For Granting Plaintiff's Motion For Summary Judgment Against Andrew McKaige And His Marital Community When Plaintiff Failed To Produce Any Facts That Meaghan McKaige Was Married At All Or Married To Andrew McKaige Or That Andrew McKaige Was Contractually Bound By The Guarantee

At the time of the summary judgment hearing on September 30, 2011, there was no proof before the trial court showing that Meaghan McKaige was married, to whom she was married, or the name of the person to whom she was married beyond the alleged "John Doe". Plaintiff alleged in paragraph 2.3 of the Complaint that Meaghan McKaige is "believed and alleged to be a married woman residing outside the state of Washington." The Complaint goes on to allege: "Defendant Meaghan McKaige and John Doe McKaige are believed and alleged to be husband and wife ..." (Complaint, page 2) CP 2. Later Plaintiff obtained service by Order Authorizing Plaintiff To Serve By Mail. Service was on

Meaghan McKaige and John Doe McKaige. CP 30-31. The name “Andrew McKaige” appears for the first time in Plaintiff’s Motion For Summary Judgment in the introduction. CP 88. The only evidence presented to support plaintiff’s Motion For Summary Judgment was the Declaration of Michael D. McKay CP 111-113 and its attachments CP 114-306. There is no mention of Andrew McKaige’s name or the alleged marriage to Meaghan McKaige in McKay’s Declaration or the attached documents thereto. Meaghan McKaige was the only signer of the Guarantee, she did so to assist her brother, and there is no reference to the marital community in such agreement. Plaintiff failed its initial burden to prove that Andrew and Meaghan McKaige’s marital community existed, or had any obligation on the Guarantee. This is not a question as to “genuine issue of any material fact,” there are zero facts to support Plaintiff’s Motion for Summary Judgment against the marital community and Andrew McKaige as of September 30, 2011, and no response is required. The marital community and Andrew McKaige are entitled to a dismissal as a matter of law.

F. This Court Should Reverse The Trial Court’s Granting The Plaintiff’s Motion For Summary Judgment Which Was Served In Less Than 28 Days Prior To The Hearing As Required By CR56(c).

Judge Shaffer stated in her “observations” in her Order granting Plaintiff’s Motion to Strike that Plaintiff’s Motion for Summary Judgment was properly noted. CP 463-464. Not only was the Motion improperly noted for a 10:00 a.m. hearing before Judge Yu, who had a year previously recused herself, but there is no proof of service on the defendants of Plaintiff’s Motion for Summary Judgment in the record.

There is no proof in the record that electronic service was agreed to pursuant to CR5(b)(7). Plaintiff’s Motion for Summary Judgment was filed on September 2, 2011, and according to an e-mail from Plaintiff’s counsel sent to Meaghan McKaige on September 2, 2011, hard copies of the motion were in the mail. (See Exhibit B of Declaration Of Tyler J. Moore In Opposition To Defendant McKaige’s Motion To Reconsider.) CP 486. Service by mail is not effective until the 3rd day after posting. CR5(b)(2)(A). CR 56(c) requires that a Motion for Summary Judgment “shall be filed and served” “not later than 28 calendar days”, CR 56(c), which means “the filing and service dates are calculated as 28 calendar days before ‘the hearing.’” *Cole v. Red Lion*, 92 Wn. App. 743, 749, 969 P.2d 481 (1998). Defendant was obviously prejudiced when her counsel’s request for continuance was denied and the Order On Summary Judgment

was granted at a hearing that was held earlier than permitted by Court Rules.

VI. DEFENDANTS McKAIGE ARE ENTITLED TO RECOVER THEIR ATTORNEYS' FEES AND COSTS ON APPEAL.

Consistent with RAP 18.1, Defendants McKaige also ask that the Court award them reasonable attorneys' fees and costs incurred in this matter from September 30, 2011 (the day defense counsel appeared for the Summary Judgment hearing) to the present, including attorneys' fees and costs incurred on appeal.

The prevailing party is entitled to an award of reasonable attorney's fees based on contract. *Gold Creek N. Ltd. P'ship v. Gold Creek Umbrella Ass'n*, 143 Wn. App. 191; 177 P.3d 201 (2008) Plaintiff's Fee Agreement provides:

The Firm shall also be entitled to recover from the Client all fees, including interest and costs of collection, including reasonable attorneys' fees and costs of appeal.

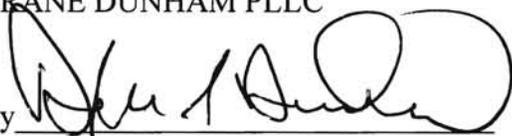
Although this fee agreement provision is unilateral, RCW 4.84.330 makes such provision reciprocal so that should Defendants be considered the prevailing party, they are "entitled to reasonable attorneys' fees in addition to costs and necessary disbursements."

VII. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's Order On Summary Judgment and remand this matter for trial and award Defendants McKaige their reasonable attorneys' fees and costs as requested above.

Respectfully Submitted this 18th day of April, 2012.

CRANE DUNHAM PLLC

By 

Douglas S. Dunham, WSBA No. 2676

800 5th Avenue, Suite 4000

Seattle, WA 98104-3179

(206) 292-9090

Attorneys for Defendants-Appellants

Meaghan McKaige and Andrew

McKaige

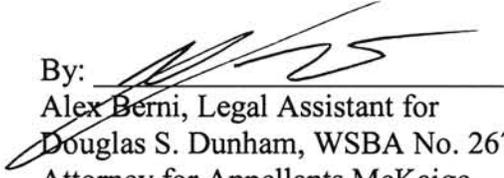
CERTIFICATE OF SERVICE

I certify that I served the foregoing OPENING BRIEF OF APPELLANTS MEAGHAN McKAIGE and JOHN DOE McKAIGE on April 18, 2012 by hand delivery to the law offices of :

Tyler Moore
Lasher Holzapfel Sperry & Ebberson, PLLC
601 Union St, Ste 2600
Seattle, WA 98101

Fax: (206) 340-2563

DATED this 18th day of April, 2012.

By: 
Alex Berni, Legal Assistant for
Douglas S. Dunham, WSBA No. 2676
Attorney for Appellants McKaige

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 APR 18 PM 4:21

APPENDIX I

McKAY CHADWELL, PLLC
1601 One Union Square, 600 University Street, Seattle, Washington 98101
(206) 233-2800

FEE AGREEMENT (Investigation)

This Fee Agreement, dated 3-21, 2007, is between, Federal Savings LLC (collectively the "Client") and McKAY CHADWELL, PLLC (the "Firm") for services performed and sets forth the parties' understandings concerning the Firm's billing procedures and the Client's obligations.

Nature of Representation. The Firm is being retained to represent the Client in the context of an ongoing investigation into allegations of securities fraud by Federal Savings, LLC, associated entities, and Jeremy Stamper. The scope of the investigation is generally contained in a Cease And Desist Order. At this point, this is a civil matter with implications of possible criminal wrongdoing. No criminal charges have been filed to date and it is unknown whether any charges will ultimately be brought. This agreement and the fees for services are based upon the work to be performed in the course of the investigation only. Should criminal charges be brought against the Client, a new agreement based upon those charges and the scope of services necessitated will be required. It is anticipated an additional advance fee deposit sufficient to cover the costs and services for pre-trial preparation and trial will be required prior to the Firm's entering an appearance on behalf of the Client. On occasion, the prosecutor may seek to amend or supersede the formal charging papers to add additional charges. If this occurs and materially changes the scope of the representation, it is likely additional fees will be required.

Fees Structure. The Firm's fees for legal services in this matter are based upon hourly rates for actual time devoted to the Client's representation and are not contingent upon any particular event or outcome. The Firm charges for all time expended on the Client's behalf, including but not limited to time spent with the Client, telephone conversations, personal conferences, witness interviews, time spent with experts, strategy development and planning, document preparation and review, research, drafting, negotiating, court appearances, and travel. The Firm's fees might be increased beyond the hourly rates if there is an increase in the difficulty of the issues presented, if there are time limitations imposed either by the Client or the case, or if by unforeseen circumstances should occur.

Each of the Firm's attorneys and legal assistants is assigned an hourly billing rate, which may be adjusted to reflect changing economic conditions or the increasing expertise of the individual. The lead attorney on this matter presently bills at an hourly rate of \$375.00. For cost savings, efficiency or other purposes, another of the firm's attorneys or paralegals that bills at a lower rate may be perform work on the Client's behalf.

Advance Fee Deposit. The Client agrees to deposit \$50,000.00 into the Firm's trust account. Work on the client's behalf will commence once the Advance Fee Deposit, an executed copy of this agreement, and the Guarantee have been received. The client shall also provide a guarantee of payment acceptable to the Firm to ensure payment of all legal fees. The deposit will be applied to the final billing statement or to any delinquent statement. Should it become necessary to apply funds from the trust account to payment of a delinquent statement, the client agrees to replenish the trust deposit in full. The Client understands that should the Client's balance in the trust account fall below the required deposit amount it may become necessary for the Client to deposit additional funds into the Firm's trust account in order for the Firm to continue representation of the Client. In such event, the Client agrees to make such deposit within 10 days of the Firm's request.

Fees Not Contingent. The charges are not contingent upon the outcome of the matter for which it is representing the Client, or upon any other outcome. Although it is possible that the charges may be reimbursed to the Client or paid to the Firm directly by a third party, the Firm nevertheless looks directly to the party or parties comprising the Client, jointly and severally, for payment, and the Client's obligation to pay the Firm's charges in a timely manner will not be dependent or contingent upon the obligation of any other party.

Costs and Expenses. In addition to legal fees, the Client will be charged for in-house expenses incurred on the Client's behalf, including photocopying, document binding, document preparation, terminal time for computerized legal research, long distance telephone calls, facsimile, postage, special mailing or courier service and staff overtime.

There may be other expenses such as travel expenses^o, filing fees, and fees and expenses of independent professionals such as court reporters, architects, investigators, engineers, and other experts, which are reasonably incurred in connection with work performed on the Client's behalf and which are the Client's responsibility. The Client will be obligated to pay any third party expenses directly to the third party unless the Firm, in its sole discretion, advances payment to streamline administrative efforts. (*For airline travel over two and one-half hours, travel will be by First Class.)

Billing and Payment. The Firm bills on a monthly basis, with all invoices rendered and payable in U.S. dollars. The invoices identify the date on which services were performed, the individual performing those services, the billing rates for each individual providing services, and will briefly describe the services performed. Expenses and other costs, including payments to third parties on behalf of the client are listed on a section of the invoice separate from the fees for legal services. The invoices also identify any credits by reason of overpayment or prepayment, and any unapplied retainer amount. The period covered by each invoice will be from the 21st of the month to the 20th of the month. Some expense charges, such as long distance telephone calls, may not be billed until a few months after the date on which the expense was incurred because of delays in receiving the amounts of charges from the service providers and the time required for the Firm to allocate the charges to the appropriate clients.

All invoices are due and payable within 30 days of the invoice date. A late payment charge (currently 1% per month) may be added to account balances not paid within 30 days of the invoice date.

Delinquent Accounts. Legal fees and expenses that are more than 30 days past due are considered delinquent. Interest on the unpaid, delinquent balance will be charged at the rate of ONE (1%) PERCENT per month. In the event of a delinquency or breach of this Agreement by the Client, the Firm shall be entitled immediately to institute collection procedures against the Client, including, at its sole option, the acceptance of promissory notes, security interests, and/or payment schedules on terms acceptable to the Firm. The Firm shall also be entitled to recover from the Client all fees, including interest and costs of collection, including reasonable attorneys' fees and costs of appeal. The Client agrees that, in the event a lawsuit between the parties to this Agreement, venue shall lie, at the Firm's option, in either Seattle District Court or King County Superior Court.

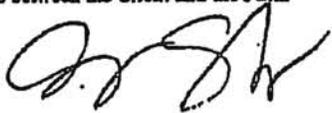
Termination of Services. The Firm retains the right to cease performing legal services on the Client's behalf and to terminate its legal representation of the Client for any reason consistent with the applicable ethical rules, including unanticipated conflicts of interest or delinquent legal fees and expenses. The Client acknowledges that if the Firm withdraws, or if the Client terminates the Firm's representation, the Client will promptly pay all charges, including subsequent charges relating to dealing with successor counsel or otherwise relating to this engagement.

Questions. Please review each billing statement upon receipt. The Client agrees to direct any questions or concerns about billings, payments or legal services to the attorney responsible for the account within 30 days of the date of each statement.

Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Washington.

By signing below, the Client acknowledges that the Client has received and read a copy of this Agreement, and that the Client understands its terms and conditions and agrees to abide by them. There are no other oral or written fee arrangements or agreements between the Client and the Firm.

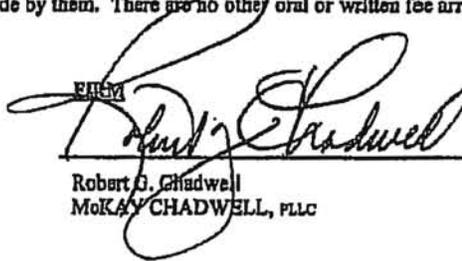
CLIENT



for Federal Savings LLC

3-21-2007

FIRM



Robert G. Chadwell
McKAY CHADWELL, PLLC

APPENDIX II

GUARANTEE

MERGHAN MCKAY, hereby guarantees payments required to be made under the terms of this agreement between McKAY CHADWELL, PLLC (the "Firm") and (the "Client").

This Guarantee will take effect when received by the Firm without the necessity of any acceptance by the Firm, or any notice to the Guarantor or to the Client, and will continue in full force and effect until all indebtedness incurred or contracted under the terms of the Fee Agreement have been fully paid. No payments made under the indebtedness will discharge or diminish the continuing liability of the Guarantor in connection with any remaining portion of the indebtedness of the Client or any of the indebtedness which subsequently arises or is thereafter incurred or contracted.

Except as prohibited by applicable law, the Guarantor waives any right to require the Firm (a) to continue to perform legal work on behalf of the Client or incur additional fees or costs thereby; (b) to resort for payment or proceed directly or at once against any person, including the Client; (c) to proceed directly against or exhaust any remedy against the Client or any other person; or (d) to commit any act or omission of any kind, or at any time, with respect to any matter whatsoever. The Guarantor warrants and agrees that each of these waivers set forth therein is made with the Guarantor's full knowledge of its significance and that, under the circumstances, the waivers are reasonable.

The Guarantor acknowledges that the Firm represents the Client and not the interests of the Guarantor. The Firm will always exercise their skill and judgment on behalf of the Client and no one else. Any communication between the Firm and the Client is subject to the attorney-client privilege and are therefore confidential. Accordingly, the Firm will not disclose such communications to you or others without the express consent of the Client.

DATED THIS 21st day of MARCH, 2007.

GUARANTOR