

**COURT OF APPEALS  
THE STATE OF WASHINGTON  
DIVISION II**

WELLS FARGO BANK,  
N.A.,  
  
Plaintiff/Respondent,

v.

DUMA VIDEO, INC., a  
Washington corporation;  
SULTAN WEATHERSPOON  
and JANE DOE  
WEATHERSPOON, husband  
and wife and their martial  
community,  
  
Defendant/Appellant.

NO. 49531-7-II

AMENDED BRIEF OF  
APPELLANTS

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WELLS FARGO BANK, N.A.,  
Plaintiff/Respondent,

v.

DUMA VIDEO, INC., a Washington corporation; SULTAN  
WEATHERSPOON and JANE DOE WEATHERSPOON, husband  
and wife and their marital community,

Defendants/Appellants.

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**BRIEF OF APPELLANT**

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## I. INTRODUCTION

Appellants move the Court to overturn the trial court's order for summary judgment.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering an order for summary judgment against Appellants.

## III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court abuse its discretion when it granted an order summary judgment against Appellants as there was a genuine issue of material fact and Appellants were entitled to a CR 56(f) continuance to gather additional affidavits and discovery? (Assignment of Error 1).

## IV. STATEMENT OF THE CASE

On February 5, 2012, Appellant Duma Video, Inc. entered into a Business Line Agreement ("the Agreement") with Respondent Wells Fargo Bank N.A. ("Wells Fargo"). (CP 11). Appellant Sultan Weatherspoon personally guaranteed the obligations of said agreement (hereinafter, Appellants will be collectively referred to as "Weatherspoon"). (CP 11)

On April 27, 2015, Wells Fargo agreed to a settlement agreement concerning the amounts owed by Weatherspoon pursuant to the Agreement. Wells Fargo admits that a payment plan was entered into on May 5, 2015. (CP 16).

On November 2, 2015, Wells Fargo filed suit against Weatherspoon alleging that Weatherspoon failed to make payments pursuant to the Agreement. (CP 3). On November 17, 2015, Weatherspoon answered the complaint and denied all allegations. (CP 5).

Nearly five months later on April 8, 2016, Wells Fargo filed an unannounced Motion for Summary Judgment. (CP 12). Weatherspoon retained counsel for this Matter on May 10, 2016. On May 13, 2016, Weatherspoon filed a Response to Wells Fargo's Motion for Summary Judgment and a Declaration in support thereof with exhibits. (CP 17).

In these documents, Weatherspoon described in detail the settlement agreement he reached with Wells Fargo. Specifically, Weatherspoon stated that, on April 27, 2016, he spoke with Amanda Layton, an account representative for Wells Fargo, and the parties agreed to settle all disputes for \$23,000.00. (CP 16). Weatherspoon attached the letters confirming the agreement. Weatherspoon made the first two payments as agreed. On July 2, 2015, Wells Fargo then

garnished Weatherspoon's account in the amount of \$3,492.84 in violation of the settlement agreement. (CP 17). Wells Fargo filed suit for the full amount and omitted to inform the court of the settlement agreement. (CP 3). Wells Fargo also failed to subtract the \$3,492.84 that they garnished from the amount they claim is owed. (CP 3).

Weatherspoon's response indicated that an issue of material fact existed. (CP 17). At the hearing, counsel argued that Weatherspoon should be afforded a CR 56(f) continuance to gather additional affidavits and records. (RP 4-5). Specifically, counsel asked for a continuance to subpoena the recorded telephone calls with Amanda Layton and to schedule a deposition of Ms. Layton. (RP 4-5).

The Court granted summary judgment in favor of Wells Fargo despite the fact that there was a genuine issue of material fact as to which party breached the settlement agreement. (CP 27).

## V. ARGUMENT

**Standard for Summary Judgment.** The Court of Appeals reviews "an order for summary judgment de novo, engaging in the same inquiry as the trial court." *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300 (2002). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admission on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). The court construes “all facts and their reasonable inferences in the light most favorable to the nonmoving party. *Jones*, 146 Wn.2d at 300. “A party moving for summary judgment bears the burden of demonstrating that there is no genuine issue of material fact.” *Atherton Condo. Apartment-Owners Ass’n Bd. Of Dirs. V. Blume Dev. Co.*, 115 Wn.2d 506, 516 (1990). “A material fact is one upon which the outcome of the litigation depends in whole or in part.” *Id.* at 516. “If the moving party satisfies its burden, the nonmoving party must present evidence demonstrating that a material fact remains in dispute.” *Id.* “The nonmoving party may not rest on allegations or denials from the pleadings.” *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 259 (1988). “The response, by affidavits or as otherwise provided under CR 56(e), must set forth specific facts that reveal a genuine issue for trial.” *Marshall v. Bally’s Pacwest, Inc.*, 94 Wn. App. 372, 377 (1999). “Conclusory statements of fact will not suffice.” *Grimwood*, 110 Wn.2d at 360. The Court will “affirm a summary judgment if reasonable minds could reach only one conclusion from the admissible facts in evidence. *Suquamish Indian Tribe v. Kitsap County*, 92 Wash. App. 816, 827 (1998).

Here, a genuine issue of material fact exists. Weatherspoon's response and affidavits set forth specific facts indicating the genuine issue of material fact. Weatherspoon has provided testimony and letters confirming that a settlement agreement was entered into and that he made the first two payments. Weatherspoon provide a letter from Wells Fargo confirming that they garnished his account in violation of the settlement agreement. The court must construe these facts in a light most favorable to Weatherspoon. Reasonable minds could not reach one conclusion based on these facts. Therefore, summary judgment is not appropriate.

**Standard for CR 56(f) continuance.** CR 56(f) states that "Should it appear from the affidavits of a party opposing the motion that for reasons stated, the party cannot present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." CR 56(f) "allows the trial court to continue a summary judgment hearing 'if the nonmoving party shows a need for additional time to obtain additional affidavits, take depositions, or conduct discovery.'"

*Building Indus. Ass'n of Wash.; v. McCarthy*, 152 Wn.App. 720, 742 (2009). "The purpose of CR 56(f) is to 'allow a party to move for a

continuance so that it may gather evidence relevant to a summary judgment proceeding.” *Old City Hall, LLC v. Pierce County AIDS Found.*, 181 Wn.App. 1, 15 (2014). “CR 56(f) provides a remedy for parties who know of the existence of a material witness and show good reason why they cannot obtain the witness’ affidavits in time for the summary judgment proceeding. In such a case, the trial court has a duty to give the party a reasonable opportunity to complete the record before ruling on the motion.” *Lewis v. Bell*, 45 Wash. App. 192, 196 (1986). The court reviews “a trial court’s denial of a CR 56(f) motion for a continuance for manifest abuse of discretion. *MRC Receivables Corp. v. Zion*, 152 Wn.App. 625, 629 (2009). “The trial court does not abuse its discretion if: (1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact. *Butler v. Joy*, 116 Wn.App. 291, 299 (2003).

Here, a CR 56(f) continuance should have been granted. Weatherspoon’s counsel argued for such a continuance at the summary judgment proceeding. RP, 4:22-5:5. Weatherspoon requested additional time to subpoena the call records from Wells Fargo and then depose Ms. Layton. Following the *MRC Receivables*

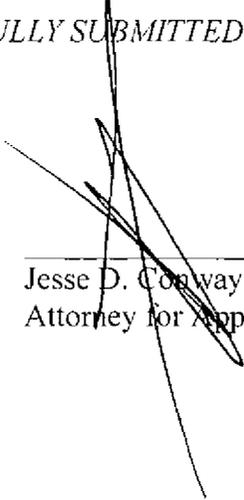
test, this additional discovery would have established that a settlement agreement was reached, that Weatherspoon made the first two payments, and that Wells Fargo garnished Weatherspoon's account in violation of said agreement. This evidence would have raised a genuine issue of material fact, that is, whether Wells Fargo breached the settlement agreement by garnishing Weatherspoon's account or whether Weatherspoon breached the settlement agreement by not making the payments. The delay in requesting this information is apparent because Weatherspoon was only initially given 28 days to respond to Wells Fargo's unannounced Motion for Summary Judgment. Wells Fargo would have had 30 days to respond to a request for production to produce call records. After that the parties would have had to schedule Ms. Layton's deposition. That is, Weatherspoon would have only been able to obtain the desired information until well after the summary judgment hearing. As such, the trial court should have granted a CR 56(f) continuance.

## VI. CONCLUSION

Summary judgment should not have been entered because a genuine issue of material fact existed and a CR 56(f) continuance should have been granted. Weatherspoon respectfully requests that

this court overturn the trial court's order granting summary judgment  
in this matter.

*RESPECTFULLY SUBMITTED* this 17<sup>th</sup> day of January,  
2017.



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Jesse D. Conway, WSBA #41677  
Attorney for Appellants

VII. APPENDIX

**CR 56**

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CR 56  
SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross claim, or to obtain a declaratory judgment may, after the expiration of the period within which the defendant is required to appear, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in such party's favor as to all or any part thereof.

(c) Motion and Proceedings. The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise. Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that for reasons stated, the party cannot present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Form of Order. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

[Originally effective July 1, 1967; amended effective September 1, 1978; September 1, 1985; September 1, 1988; September 1, 1990; September 1, 1993; April 28, 2015.]

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## CERTIFICATE OF SERVICE

I certify that I caused true and correct copies of the AMENDED BRIEF OF APPELLANTS to be served on the following:

Douglas W. Harris  
Attorney at Law  
11120 NE 2nd St. Suite 220  
Bellevue, WA 98004-6549  
*Attorney for Plaintiffs/Respondents*

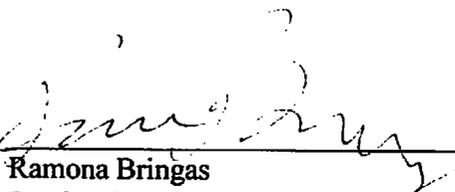
by the following indicated method or methods:

by mailing a full, true and correct copy thereof in a sealed, first-class postage-prepaid envelope, addressed to the attorney as shown above, the last-known office address of the attorney, and deposited with the United States Postal Service at Vancouver, WA on the date set forth below.

by causing a full, true and correct copy thereof to be hand-delivered to the attorney at the attorney's last known office address listed above on the date set forth below.

by faxing a full, true and correct copy thereof to the attorney at the fax number shown above, which is the last-known fax number for the attorney's office, on the date set forth below. The receiving fax machine was operating at the time of service and the transmission was properly completed, according to the attached confirmation report.

DATED this 18<sup>th</sup> day of January, 2017.

By   
\_\_\_\_\_  
Ramona Bringas  
Paralegal to Jesse D. Conway

**JESSE D. CONWAY LAW OFFICE PLLC**

**January 18, 2017 - 11:21 AM**

**Transmittal Letter**

Document Uploaded: 2-495317-Appellant's Brief.pdf

Case Name:

Court of Appeals Case Number: 49531-7

**Is this a Personal Restraint Petition?** Yes  No

**The document being Filed is:**

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

**Comments:**

No Comments were entered.

Sender Name: Ramona Bringas - Email: [jesse@conwaylaw.net](mailto:jesse@conwaylaw.net)

A copy of this document has been emailed to the following addresses:

[doug@dwharrislaw.com](mailto:doug@dwharrislaw.com)

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