

**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

REPLY BRIEF OF
APPELLANTS

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Plaintiff/Respondent,

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WEATHERSPOON and JANE DOE WEATHERSPOON, husband
and wife and their marital community,

Defendants/Appellants.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	TABLE OF AUTHORITIES.....	3
I.	ARGUMENT.....	4
II.	CONCLUSION.....	8
III.	APPENDIX.....	9

TABLE OF AUTHORITIES

Table of Cases

1.	<i>Butler v. Joy</i> ,.....	6
	116 Wn.App. 291, 299 (2003)	
2.	<i>Jones v. Allstate Ins. Co.</i> ,.....	4
	146 Wn.2d 291, 300 (2002)	
3.	<i>MRC Receivables Corp. v. Zion</i> ,.....	6,7
	152 Wn.App. 625, 629 (2009)	
4.	<i>Marshall v. Bally’s Pacwest, Inc.</i> ,.....	4
	94 Wn. App. 372, 377 (1999)	

Statutes

A.	<u>CR</u>	
	CR 56,34.....	7
	CR 56(e).....	4
	CR 56(f).....	5,6,7,8

I. ARGUMENT

The Appellants (“Weatherspoon”) wish to respond briefly to Respondent’s (“Wells Fargo”) brief by addressing two points.

An Issue of Fact Exists. First, there was unquestionably an issue of fact raised in the pleadings that precluded summary judgment. It is important to reiterate that the court construes “all facts and their reasonable inferences in the light most favorable to the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300 (2002). Further, “[t]he 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).

Weatherspoon set forth facts in his declaration that revealed a genuine issue of fact for trial and these facts must be interpreted in a light most favorable to the nonmoving party. The issue of fact brought by Weatherspoon was whether or not a settlement agreement was entered into. Weatherspoon stated in his declaration that he reached a settlement agreement with Amanda Layton on April 27, 2016. (CP 16). Weatherspoon substantiated this statement by providing a settlement letter he sent to Ms. Layton before the settlement conversation. Weatherspoon also provided a letter to Wells Fargo concerning funds garnished from Weatherspoon’s

account in breach of the settlement agreement as well as a response letter from Wells Fargo. Weatherspoon's specific statements regarding the details of how and when a settlement agreement was entered into along with supporting documentation demonstrate an issue of fact concerning whether a settlement agreement was entered between the parties.

Wells Fargo argues that since it provided a declaration stating that no settlement agreement was reached containing the terms described by Weatherspoon that there is no issue of fact. First, the mere, the mere fact that the parties disagree that a settlement agreement was reached is an issue of fact in and of itself. Second, Wells Fargo provided a declaration from Kristina Hohn not Amanda Layton. (CP 10). Ms. Hohn's declaration does not even mention Amanda Layton. If Wells Fargo wanted to prove there was no issue of fact, they could have easily provided a declaration from Amanda Layton or the actual telephone transcripts indicating that no settlement agreement had been reached. The fact that Wells Fargo did not use the best evidence available to them further indicates that an agreement was in fact reached with Amanda Layton on April 27, 2016.

The trial court should have granted a CR 56(f) continuance. 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). In *MRC Receivables v. Zion*, the court upheld the denial of a continuance because the appellant never specifically asked for a CR 56(f) continuance in its written motion or at the summary judgment hearing. *Id.* Here, Weatherspoon specifically asked for a CR 56(f) continuance at the summary judgment hearing. (RP 4-5).

The test for whether a trial court abuses its discretion in granting a CR 56(f) continuance is 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).

Reason for Delay. Weatherspoon has a valid reason for delay. Wells Fargo filed the complaint in this matter on November 11, 2015 and Weatherspoon answered the complaint on November 17, 2015. (CP 3 & 5) Wells Fargo then took no action for five months. Then, on April 8, 2016, Wells Fargo cited in a Motion for Summary Judgment for May 20, 2016 without first consulting Weatherspoon. (CP 9-12). Weatherspoon did not get notice of this motion until he received it in the mail several days later. At that

point, since his response was due 11 days before the hearing, issuing a request for production was pointless as the time period for responding was 30 days. CR 56 & 34. The hearing on this matter was then set over as the parties negotiated a settlement. When settlement discussions failed, Wells Fargo then recited the motion on June 17, 2016 to July 22, 2016, again not leaving Weatherspoon with sufficient time to draft, mail and receive responses to discovery requests. (CP 27 & 22). Wells Fargo was not amendable to continuing the hearing date to allow sufficient time for discovery.

Weatherspoon stated what evidence would be established through additional discovery. At the summary judgment hearing, counsel for Weatherspoon specifically asked for a CR 56(f) continuance to request the recorded telephone calls between Weatherspoon and Amanda Layton discussing settlement and also take the deposition of Amanda Layton. (RP 4-5) This is very specific, detailed request. Unlike the appellants in *MRC Recievables*, Weatherspoon specifically requested a CR 56(f) continuance and mentioned the statute by name. (RP 4-5).

The desired evidence will raise a genuine issue of material fact. The recorded telephone calls between Weatherspoon and Ms. Layton will indicate that the parties reached a settlement on April 27, 2016. The fact that Wells Fargo did not produce the telephone calls

or a declaration from Ms. Layton indicate as much. This will create an issue of material fact that will preclude summary judgment.

II. CONCLUSION

An issue of fact exists that precludes summary judgment.

Weatherspoon timely requested and met the three factor test for a CR 56(f) continuance. The trial court erred in granting summary judgment. Weatherspoon respectfully asks that this court overturn the trial court's ruling.

RESPECTFULLY SUBMITTED this 16th day of March, 2017.

By /s/ Jesse D. Conway
Jesse D. Conway, WSBA #41677
Attorney for Appellants

III. APPENDIX

CR

CR 56,34.....7
CR 56(e).....4
CR 56(f).....5,6,7,8

**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 REPLY BRIEF OF APPELLANTS to be served on the following:

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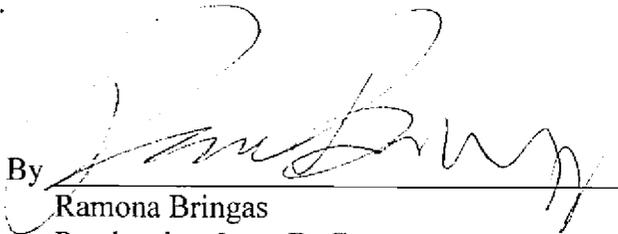
by the following indicated method or methods:

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 16th day of March, 2017.

By 

Ramona Bringas
Paralegal to Jesse D. Conway

THE LAW OFFICE OF JESSE D. CONWAY
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