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COURT OF APPEALS DIV I  
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No. 68153-2-I

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

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McKAY CHADWELL, PLLC

Plaintiff-Respondent,

v.

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

Defendants-Appellants.

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

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ORIGINAL

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

In their opening brief, defendants Meaghan McKaige and Andrew McKaige argued that plaintiff McKay Chadwell, PLLC failed to meet its burden of proof in its Motion for Summary Judgment, and the Summary Judgment against both defendants in the total amount of \$290,847.50, based solely on the declaration and attached billing statements, should never have been entered. Defendants McKaige argued that the fees alleged to be owed were outside the scope of the Fee Agreement, which itself was ambiguous and should have been construed against plaintiff law firm. In its Respondent's Brief, plaintiff argued that the obligations set out in Guarantee, which was signed only by Meaghan McKaige, was unconditional and stood alone and separate from the Fee Agreement, which position is not supported by case law, which requires such documents to be construed together, nor is it supported by the language of the Guarantee itself, which state that the guarantee will continue until "all indebtedness *incurred or contracted under the terms of the Fee Agreement* have been fully paid." (Emphasis added.) The "under the terms of the Fee Agreement" language conditions the Guarantee by the terms of the Fee Agreement.

Plaintiff McKay Chadwell, PLLC spends a substantial portion of its arguments trying to show that Defendants McKaige did not preserve

their issues on appeal. Almost all of the issues challenged could have been preserved had the trial court granted the parties' agreed request for a short continuance or granted defendants' newly retained counsel's oral motion for continuance so that defendant's counsel could have prepared to argue the legal issues before the trial court using plaintiff's own motion materials.

In Respondent's Brief, plaintiff characterized defendant's arguments based on the information obtained from the billing statements as "strained" and "speculative", to which defendants' simple response is that to meet its burden, the facts must be most favorably construed in favor of the non-moving parties – Meaghan McKaige and Andrew McKaige. Facts construed in favor of Defendants as is required to meet the burden of proof should not be considered strained or speculative. Additionally, plaintiff apparently argues that it could charge unlimited fees and costs (even beyond the approximate \$340,000 charged) on an "Investigation" or "investigation only" Fee Agreement so long as criminal charges were not brought against Federal Savings, which raises additional ambiguities in the Fee Agreement regarding the inclusiveness of the word "Client" as well as the meaning and effect of the words "investigation only", the bringing of "criminal charges", and third party costs to be directly billed to Client, all

of which should be construed against plaintiff the law firm drafter of the agreement and in favor of Meaghan McKaige, who was unrepresented at the time the agreement was presented to her and signed.

Further, in Defendants' Opening Brief, they pointed out there was zero evidence before the court at the time of the hearing that Meaghan McKaige was married or that she was married to Andrew McKaige. Plaintiff states in its brief that there is no evidence that they were not married ignoring its burden of proof. Plaintiff jumps to case law setting out a presumption of community liability, but each case cited involved trials where the complaining spouse actually testified. None of these cases involved facts where there was no proof of marriage. This is an example of an issue that simple oral argument after a short continuance could have apprised the trial judge. In short, at the time of the hearing on September 30, 2011, there was still no evidence of marriage or mention of a person called Andrew McKaige.

The Summary Judgment should be reversed and the case be remanded for these reasons and others set forth in the Opening Brief and below.

## II. RESPONSE TO McKAY CHADWELL'S RESTATEMENT OF THE CASE

Plaintiff McKay Chadwell PLLC opens its Statement of the Case with the statement that Meaghan McKaige and Andrew McKaige “chose to represent themselves in this case.” Resp. Br. at 1. “The defendants were self-represented by choice and failed to follow Civil and Local Rules ....” Resp. Br. at 11. These statements are certainly misleading as Meaghan McKaige was hardly in this lawsuit by choice and was not *pro se* out of principle. Further, Andrew McKaige did not even know about plaintiff’s Motion for Summary Judgment until October 9, 2011, which was after Judgment was already entered. CP 458.

Plaintiff states that the reason Meaghan McKaige could not make the hearing was “due to a sick child.” Resp. Br. at 8. But Meaghan’s actual e-mail stated: “I was informed 36 hours ago that the hearing was moved up to its new time and due to a sick child this morning, I was unable to take an earlier flight to make it to the new hearing time.” CP 489. The information about the new time (9:00 a.m.) could only have come from the top right corner of plaintiff’s Reply Brief to its Motion for Summary Judgment. She does not say that her sick child prevented her from coming at the originally scheduled time of 10:00 a.m. The confusion regarding the time for hearing is directly related to plaintiff’s erroneous

and misleading service on September 2, 2011 of the Note for its Motion for Summary Judgment in front of Judge Mary Yu, who had recused herself a year prior, the Order of Recusal having been filed August 23, 2010. CP 44. Plaintiff's error was compounded by its Declaration Of No Response filed September 23, 2011, which still erroneously advised Meaghan McKaige seven (7) days before the hearing that it was still being held at 10:00 a.m. CP 318. Had she appeared and been permitted to argue the issues as set out in her unfiled but served "Defendant's Response To Plaintiff's Motion For Summary Judgment"<sup>1</sup>, CP 404-406, she would have been able to point out to the trial court most of the material issues raised in this appeal, including the Fee Agreement's limitation to investigation, the Nevada criminal charges being out of the scope of the agreement, as well as issues of double billing, and other matters.

Additional misleading statements of Plaintiff are addressed below, along with Defendants' McKaige's corresponding arguments.

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<sup>1</sup> Plaintiff's counsel makes the curious argument that the reason he did not file Meaghan McKaige's Response himself was because he feared that he would be subjecting her to CR 11 sanctions for the untimely filing. Resp. Br. at 7-8. Of course, without a motion from counsel, the likelihood of CR 11 sanctions would be very remote. It is far more probable that he did not file it because he did not want the trial court to be advised of the issues contained therein.

### III. ARGUMENT

#### A. **By Denying Defendants' Motion For Continuance To Give Newly Retained Counsel Time To Prepare, The Trial Court Abused Its Discretion.**

In *Coggle v. Snow*, 56 Wn. App. 499; 784 P.2d 554 (1990) and in *Butler v. Joy* 116 Wn. App. 291; 299, 65 P.3d 671 (2003), *review denied* 150 Wn.2d 1017, 79 P.3d 446 (2003), this Court and Division III found that justice was not done, and the trial court abused its discretion by not granting newly retained counsel a continuance to be able respond to a Motion for Summary Judgment. Plaintiff attempts to distinguish *Coggle* factually by pointing out that the prior counsel for plaintiff *Coggle* was dilatory. Plaintiff argues here the “defendants” “perpetrated” “the dilatory conduct”. Resp. Br. at 27. If plaintiff is serious about literally attributing “dilatory conduct” to a pro se defendant, then plaintiff should not use defendants in the plural, because Andrew McKaige certainly was not “dilatory” as he did not even know about the hearing until after the summary judgment was entered. In this case, present counsel is the first attorney hired to defend Meaghan McKaige and Andrew McKaige, and this was defendants’ first request for a continuance. Even if Meaghan McKaige’s failure to respond timely according to CR 56 could be considered “dilatory”, following plaintiff’s argument, her dilatory conduct should not have prejudiced Andrew McKaige. *Coggle* is directly on point

with regard to Andrew and defendants would argue that Coggle should still apply for both defendants.<sup>2</sup>

Plaintiff argues that no affidavit was filed in support of the continuance, that newly retained counsel could not explain why the continuance was needed, and that plaintiff was prejudiced as it scheduled the motion on July 7, 2011. Resp. Br. at 7. In *Briggs v. Nova Servs.*, 135 Wn. App. 955, 147 P.3<sup>rd</sup> 616 (2006), the court explained the holdings in *Joy* and *Coggle* that it was an abuse of discretion not to give newly retained counsel adequate time to respond to a summary judgment motion.

In both *Joy* and *Coggle*, the plaintiffs obtained new counsel shortly before the summary judgment hearing. *Joy*, 116 Wn. App. at 299; *Coggle*, 56 Wn. App. at 508. Neither counsel had adequate time to respond to the summary judgment motion. *Joy*, 116 Wn. App. at 299-300; *Coggle*, 56 Wn. App. at 508.P13 *Joy* and *Coggle* are distinguishable. Here, the issue is not whether the Workers had adequate time to respond to the motion.

*Briggs v. Nova Servs.*, supra at 962.

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<sup>2</sup> There is further opportunity for confusion for out of state pro se defendants under King County LGR 30 which requires Mandatory Electronic Filing. Attorneys are required to e-file, which Plaintiff's counsel did here, but "[n]on-attorneys are not required to e-file documents." This rule, as written, could mislead out of state pro se defendants, who might reasonably believe that their documents served on counsel would be e-filed. Although Meaghan McKaige served Interrogatories and Requests for Production, CP 430-435, (Plaintiff chose not to answer) and Requests for Admission, CP 436-451, (Plaintiff answered the first 25 pursuant to King County LCR 26(d)(5)(B), the King County Clerk's file does not reflect that Meaghan McKaige ever filed a single pleading including an answer, despite plaintiff's representation to the court that all mandatory pleadings have been filed in its Confirmation of Joinder. CP 86.

In *Butler v. Joy*, at 299-300, counsel was retained one day before the summary judgment hearing and moved orally for a continuance without written affidavits in support of the continuance. The hearing was not recorded. The Court stated that plaintiff's attorney "deserved an opportunity to prepare a response on the issues of law." The denial of the continuance was held to be an abuse of discretion.

Without any cite to the record, Plaintiff attempts to distinguish *Joy* by stating: "Here, there is a record of what defendants counsel argued at the motion hearing, and the failure to provide a legitimate basis for a continuance." Resp. Br. at 27. The only references in the record are the boiler plate recitation in the Order on Summary Judgment that the court "having heard the argument of counsel" CP 328 and the trial court's order striking the declarations of Meaghan McKaige and Andrew McKaige, stating "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 affidavit as CR 56(f) requires." CP 463. As plaintiff points out in its brief, at 8:45 a.m. on September 30, 2011, 15 minutes prior to a 9:00 a.m. plaintiff's counsel had agreed to a short continuance with defendants' newly retained counsel and sought a new date for hearing

from the trial court. At that point, new counsel for defendants could reasonably have thought that he had an agreement for a short continuance, only to be informed that the court expected the parties to appear at the hearing. Resp. Br. at 8. In that kind of time frame, how could plaintiff or the trial court expect newly retained counsel to have time to prepare a written affidavit or have a clue what an affidavit would say other than the obvious, counsel needed a reasonable opportunity to prepare? The time needed by counsel to prepare was implicitly recognized in *Butler*.

Regarding plaintiff's claim of prejudicial delay, plaintiff waited over a month and a half before noting its motion at the very last minute on September 2, 2011 for a hearing on September 30, 2011. CP 93. When it did note it, it failed to "file and serve" it within 28 days as required by CR 56(c). Plaintiff does not deny this failure but argues that this failure was not before the trial court and therefore waived on review. Regardless it is hard to see the prejudicial delay. It appears that plaintiff law firm expects pro se Meaghan McKaige to meet a higher standard of civil rule following than it follows.

In analogous cases, involving motions to amend according to CR 15, courts have held that "delay alone is not sufficient to justify denial" of an amendment *Orwick v. Fox*, 65 Wn. App. 71, 89, 828 P.2d 12 (1992).

In this case, by granting the summary judgment on the grounds that it was unopposed, the trial court essentially treated the motion as a motion for default judgment. Certainly delay is not necessarily considered prejudicial in motions to vacate default judgments. See, for example, *Johnson v. Cash Store*, 116 Wn. App. 833, 842, 68 P.3d 1099, (2003):

While delay in the proceedings is one of the evils addressed by the motion for default judgment, *Griggs*, 92 Wn.2d at 582 (quoting *Widucus v. S.W. Elec. Coop., Inc.*, 26 Ill. App. 2d 102, 109, 167 N.E.2d 799 (1960)), vacation of a default judgment inequitably obtained **cannot be said to substantially prejudice the nonmoving party merely because the resulting trial delays resolution on the merits**. Ms. Johnson fails to establish that she will suffer substantial hardship if the default judgment is vacated.

(Emphasis added.)

Counsel for defendants suggests to this Court that pro se defendants should be treated differently in some instances than pro se plaintiffs. Pro se plaintiffs bring their claims to court voluntarily where pro se defendants most often are before the court involuntarily and are forced to represent themselves by their financial circumstances. With the increasing costs of litigation, it is too simplistic to say pro se defendants “choose” to be unrepresented. Some courts in other jurisdictions point out

that considerations should be given to pro se defendants when they make errors that would not typically be made by counsel.<sup>3</sup>

Clearly Meaghan McKaige was misled by plaintiff as to the time and judge holding the hearing. The filing requirements for mandatory e-filing rules in King County are not helpful to out-of-state pro se defendants. It is easy to see how an out-of-state pro se defendant could be confused by the filing requirements in King County.

At this point, we do not know what the trial court would have done if Meaghan McKaige had been able to fly up from California ready to argue the case. At that moment in time, she was much more familiar with

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<sup>3</sup> For example, the Montana District Court pointed out some examples as follows:

In recent years, the Montana Supreme Court set aside a default for the reasons that "laymen are often misled and get entirely different meanings from conversations than one trained in the legal field." *In re Marriage of Broere* (1994), 263 Mont. 207, 210, 867 P.2d 1092, 1094, citing *Waggoner v. Glacier Colony of Hutterites* (1953), 127 Mont. 140, 148, 258 P.2d 1162, 1166. The court has set aside default judgments on grounds of excusable neglect in cases where pro se defendants have either misunderstood communications from the opposing attorney, where opposing counsel took advantage of pro se defendants, or where pro se defendants made errors that would not typically have been made by counsel. *Sun Mountain Sports, Inc. v. Gore*, 2004 MT 56, P 19, 320 Mont. 196, P 19, 85 P.3d 1286, P 19 (overruled on other grounds by *Essex Insurance Co. v. Jaycie, Inc.*, 2004 MT 278, 323 Mont. 231, 99 P.3d 651).

(Emphasis added.) *Gregston v. Beckett*, 2005 ML 285, 16, 2005 Mont. Dist. LEXIS 840 (Mont. Dist. Ct. 2005) (This District Court case is reported in Lexis. Montana Courts allow the citing of District Court decisions for persuasive purposes but not as controlling precedence.

her case than was newly retained counsel. Had she been told that the trial court was considering the plaintiff's motion to be unopposed and the court would not hear her arguments, we submit that would have been highly unfair and reversible error. It is hard to state defendants' case better than the court in *Butler v. Joy* at 299-300:

As noted in *Coggle*, it is hard to see "how justice is served by a draconian application of time limitations" when a party is hobbled by legal representation that has had no time to prepare a response to a motion that cuts off any decision on the true merits of a case.

**B. Plaintiff's Guaranty Is Conditional And The Guarantee And Fee Agreement Must Be Strictly Construed Together And Strictly Construed Against Plaintiff's Fee Agreement**

Throughout the Respondent's Brief, commencing at page 13, Plaintiff argues that the Guarantee signed by Meaghan McKaige was unconditional and separate from the Fee Agreement, and therefore there is no need to refer to the Fee Agreement. According to this position, all plaintiff has to do is show an amount owed, apparently regardless of the amount, and defendants are not allowed to contest or challenge the amount or whether it is proper. Certainly guarantees may be conditional or unconditional.<sup>4</sup> Plaintiff argues that defendant's guarantee is one of

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<sup>4</sup> Actually, guarantees can be classified as either continuing or restricted. A continuing guarantee is one where the debt remains undefined like a line of credit. In a continuing guarantee notice of default is required, which gives the guarantor time to

(continued . . .)

payment only “without words of limitation or condition” and is “absolute or unconditional guaranty.” *Robey v. Walton Lumber Co.*, 17 Wn.2d 242, 258, 135 P.2d 95 (1943), citing 24 Am. Jur. 885 § 15. On the other hand, “[a] conditional guaranty contemplates, as a condition to liability on the part of the guarantor, the happening of some contingent event other than the default of the principal debtor or the performance of some act on the part of the obligee.” *Grayson v. Platis*, 95 Wn. App. 824, 830-831, 978 P.2d 1105 (1999), citing *National Bank V. Equity Investors*, 81 Wn2d 886, 917, 506 P.2d 20 (1973)

The guarantee signed by Meaghan McKaige states it will stay in effect “until all indebtedness incurred or contracted under the terms of the Fee Agreement” has been paid. CP 118. Under Plaintiff’s position, Meaghan McKaige could be responsible for any amount, say \$5,000,000, and she could not question the reasonableness of the amount, the basis for the charges, or the accuracy. Such a position is untenable. The guarantee has to be conditioned about the fees being reasonable and related to the work for which it was contracted.

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(. . . continued)

intervene to stem potential limitless liability by terminating the guaranty as to future debts. See *WXI/Z Southwest Malls Real Estate Liab. Co. v. Mueller*, 137 N.M. 343, 348, 110 P.3d 1080 (2005). Defendants were never given time to intervene to stem significant liability. Should this case be sent back to trial court, one question that needs to be answered is why defendants were not notified once the “Client” was in default.

The cases cited by plaintiff are cases involved specific fixed maximum amounts. For example, in *Bellevue Square Managers v. Granberg*, 2 Wn. App. 760, 766, 469 P.2d 969 (1970), the Court held that the guarantor guaranteed a \$4,853 per month lease payment, but the court did state: “The determination of this issue must be based upon a reading of the guaranty in connection with the surrounding documents.” In *Robey v. Walton* above, the court found the guarantee absolute when it was attached to individual \$1,000 bonds. Plaintiff cited no case where the maximum guarantee obligation was unknown or unspecified as it was here.

Both Fee Agreement and Guarantee were signed at the same time for the same subject matter to “accomplish the agreed purpose,” and therefore are “part of the same transaction”, “even though the contracts are not executed between the same parties.” *Am. Pipe & Constr. Co. v. Harbor Constr. Co.*, 51 Wn.2d 258, 265, 317 P.2d 521 (1957).

There are at least three rules of construction that come into play with this Fee Agreement and Guarantee. First, “a fundamental rule is that a guarantee “must be explicit and is strictly construed.” *Wilson Court Ltd. P'ship v. Tony Maroni'S*, 134 Wn.2d 692, 705, 952 P.2d 590 (1998), citing *Seattle-First Nat'l Bank v. Hawk*, 17 Wn. App. 251, 256, 562 P.2d 260 (1977). Second, any ambiguities in the contract are construed against the

drafter. *Wilson Court Ltd. P'ship*, supra. And the third is that summary judgment is not proper if there are two reasonable but competing meanings of a written contract when viewed in light of the parties other objective manifestations. *Hall v. Custom Craft Fixtures Inc.*, 87 Wn. App. 1, 9-10, 937 P.2d 1143 (1997).

**C. Defendants Were Entitled To Believe The Scope Of The Guarantee Was Limited In Scope Because It Was For Investigation Only And Because Criminal Charges Were Filed Against The Client.**

**1. Nevada Criminal Charges.** Without question criminal charges were filed in Nevada. Mr. Chadwell traveled to Las Vegas to “[a]ttend client processing.” He charged \$4,500 in fees for that day. CP 198. All billing invoices attached to plaintiff’s Motion for Summary Judgment were sent to “Jeremy Stamper, Progressive Homesellers”. “Federal Savings LLC” is handwritten into the agreement box of the Fee Agreement followed by “(collectively the “Client”)” certainly suggesting that the term “client” refers to more than one person or entity. The Agreement further states: “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. CP 115. A fair reading would be that Jeremy Stamper would be included “collectively” in the term “Client”. Plaintiff argues that there is

no proof that the Nevada charges were filed against the Client, which could only be Federal Savings, LLC, Resp. Br. at 34-37, which raises the question as to who was Mr. Chadwell representing when he travelled to Las Vegas to process “client”. CP 198.

Whether Jeremy Stamper considered himself a client turns on his subjective belief. *In re McGlothlen*, 99 Wn.2d 515, 522, 663 P.2d 1330, (1983), citing E. Cleary, *McCormick on Evidence* § 88, at 179 (2d ed. 1972). As stated in *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992): “The essence of the attorney/client relationship is whether the attorney's advice or assistance is sought and received on legal matters. [Citations omitted.] The relationship need not be formalized in a written contract, but rather may be implied from the parties' conduct.” The simple fact is that Jeremy Stamper could be included “collectively” in the term “Client” and his criminal prosecution in Nevada required “a new agreement based upon those charges and the scope of services necessitated” to which Meaghan McKaige would have had the option to sign another guarantee or not.

By limiting the term “client” to Federal Savings, plaintiff has painted itself into a box that is difficult to get out of. If the client is only Federal Savings, then so much of the billing factually is related to non

Federal Savings matters. If the term client includes more than Federal Savings, then without question criminal charges were filed against the client in Nevada and a new fee agreement was required under the terms of the existing fee agreement. This conflict is factual in nature making the case not susceptible for summary judgment.

**D. Whether Co-Guarantor Disputed Plaintiff's Bills Is Irrelevant And Does Not Bar Any Defenses By Defendants.**

Plaintiff argued that the principal debtor received regular bills and never disputed them. Resp. Br. at 6; Resp. Br. at 16-17. Plaintiff argues that Jeremy Stamper had a default judgment entered against him on his guarantee. Resp. Br. at 17; CP 83-85. Defendants' position whether Jeremy Stamper disputed the bills or had a default judgment entered against him is irrelevant. Plaintiff's intended inference is that the principal debtors' acceptance of the bills and the default judgment is somehow binding on defendants McKaige. Respondent cites no cases law and in fact case law is to the contrary. This is explained in *Lilenquist Motors v. Monk*, 64 Wn.2d 187, 190, 390 P.2d 1007 (1964):

The following is the rule, as set forth in Restatement, Security § 139, p. 372:

"(3) Where, in an action by a creditor against a principal, judgment is obtained by default or confession against the principal, and the creditor subsequently brings an action

against the surety, proof of the judgment against the principal is evidence only of the fact of its rendition."

In the comment to this subsection, p. 375, it is said:

". . . Such a judgment against the principal does not create a rebuttable presumption of the principal's liability, in an action between creditor and surety."

**Thus, the defendant in this action may present whatever defenses she may have and is in no way foreclosed by the release and the default judgment taken pursuant to it.**

(Emphasis added.)

Nothing in the case law prevents Meaghan McKaige as Guarantor from raising all defenses under the Fee Agreement and Guarantee.

**E. There Is No Need To Rebut The Presumption Of Community Debt If There Is No Proof Of Marital Community Upon Which It Is Based.**

In its opening argument plaintiff cites this Court's decision in *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 754-755, 162 P.3d 1153 (2007) for the proposition that a review on a motion for summary judgment is "based on the precise record conserved by the trial court." Resp. Br. at 11. Ignoring that it has the initial burden of proof on a Motion for Summary Judgment, plaintiff states: "There is no evidence that the marital community did not exist, or was defunct at the time the guaranty was entered into." Resp. Br. at 20. To prove the community relationship existed, plaintiff argues that "defendants never

filed an answer denying the community liability alleged in the complaint, and the issue was not before the court.” Resp. Br. at 19. Yet, plaintiff still advised the trial court that all mandatory pleadings had been filed in its Confirmation of Joinder. CP 86. Defendants agree to that effect that the record is silent as to any community relationship prior to and at the hearing. Certainly plaintiff never moved for default against either Meaghan McKaige or Andrew McKaige. Plaintiff cites the declarations of Meaghan McKaige and Andrew McKaige to “prove” the marriage, Resp. Br. at 20, but they were not part of “the precise record” on September 30, 2011 and were successfully stricken by plaintiff’s motion. CP 462-464 (Order to Strike). Without citing any cases, plaintiff then argues that a community “benefit” was established, because Meaghan McKaige was alleged to be facing criminal charges. Resp. Br. at 20-21. But language of the guarantee, which states that plaintiff represents the client only and “no one else” and “not the interests of the guarantor”, defeats the argument that any work done by plaintiff pursuant to the Fee Agreement was for Meaghan McKaige’s “benefit”. The failure to prove the existence of defendant Andrew McKaige and prove his marital community is clear and summary judgment should not have been granted.

**F. Defendants McKaige Preserved Its Issues For Appeal By Bringing Its Motion For Reconsideration**

This Court would not have to reach the issue of whether the trial court abused its discretion in failing to grant defendants' Motion for Reconsideration or by striking the Declarations of defendants had the trial court granted newly retained counsel's initial motion for continuance. This point was recognized by this Court in *Coggle v. Snow*, 56 Wn. App. 499, 784 P.2d 554 (1990). Judge Ringold stated that the refusal to consider the declarations in a Motion for Reconsideration and their impact on the summary judgment "was an abuse of discretion flowing from the court's initial denial of the motion for a continuance." *Id.* at 508-509. The denial of the initial request for continuance distinguished this case from cases where the appellate courts had found no abuse of discretion when the trial court refused to consider later filed declarations, setting forth facts, that could have been discovered prior to the trial court's ruling. *Id.* at 509, FN 3.

Additionally, Defendant's further point is that whether plaintiff met its burden of proof on its Motion for Summary Judgment should be reviewed de novo. But plaintiff points out that issues may be preserved on appeal under the less favorable standard of "abuse of discretion" for review, Resp. Br. at 22, as opposed to "de novo" standard, if the issues are