

No. 68153-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

McKAY CHADWELL, P.L.L.C.,

Respondent,

v.

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

Appellant.

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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I. INTRODUCTION

Meaghan and Andrew McKaige (the “defendants”) chose to represent themselves in this case. They failed to follow the Civil Rules, and on the day of the Summary Judgment could not appear. It was only then that the defendants elected to have an attorney represent them. However, the defendants had not filed a response to the summary judgment motion, and there was no basis for the Court to continue the hearing. Plaintiffs burden having been met and no response filed, the Court entered summary judgment.

The defendants’ arguments on appeal are based upon speculation, and strained readings of the materials presented on summary judgment. The facts and law presented met Plaintiff’s burden on summary judgment, and established there was no genuine issue of material fact regarding the debt guaranteed by Mrs. McKaige. Plaintiff put forth evidence of the principal obligation, the unconditional guaranty of that obligation, and default by the principal obligor. It was incumbent upon the defendant to provide specific factual evidence that there was an issue of fact regarding the amount owing under the Fee Agreement. The defendant failed to present any evidence, much less specific factual evidence. Defendants’ failure to show that a genuine issue of material fact existed was due to their own dilatory conduct. Because Meaghan McKaige failed to follow

Court Rules and file a responsive pleading, plaintiff's motion was in fact unopposed and the facts presented undisputed.

The Court has the discretion to control the proceedings before it. The denial of Meaghan McKaiges' attorneys' last minute attempts to avoid the civil rules by appearing in person and requesting a continuance was properly within the Court's discretion of the Court. Neither Meaghan McKaige nor her counsel filed an affidavit pursuant to CR 56(f) stating a basis for continuance, and counsel was unable to provide a basis to continue the hearing to the Court. By holding Meaghan McKaige to the same standards as is expected from litigants every day, the Court simply upheld the civil rules. The Court did not abuse its discretion by denying the oral motion to continue.

Now, defendants argue that plaintiff failed to meet its burden based upon conjecture unsupported by the factual evidence before the court on summary judgment. Defendant asks this Court to speculate based on equivocal time entries that the amount due exceeded the scope of the Fee Agreement, and the unconditional guaranty. However, the evidence in front of the Court is that the Client was billed regularly, the bills were undisputed by the principal, and the fees were due under the terms of the Fee Agreement. Further, the defendants' argument regarding a possible criminal complaint in Nevada does not show that a criminal action was

filed against Federal Savings, LLC, the “Client” under the Fee Agreement of that McKay Chadwell served as counsel in that matter. Defendants’ arguments are pure speculation, and do not support the reversal of the trial court’s order on summary judgment.

II. ISSUES PRESENTED ON APPEAL

1. Whether the Plaintiff met its initial burden of proof on summary judgment by presenting the Fee Agreement, the unconditional guaranty of the Fee Agreement, all billing statements, and a declaration explaining the services provided and their relationship to the Fee Agreement?

2. Whether denial of an oral motion for continuance under CR 56(f) is an abuse of discretion when there has not been an affidavit filed stating the basis for a continuance, and the defendants’ attorney cannot orally provide a basis for continuance under CR 56(f) at the summary judgment hearing?

3. Whether the Court abused its discretion by striking the new evidence presented in the Declarations of Andrew and Meaghan McKaige filed with the Motion for Reconsideration when neither the declarations nor the motion provided a basis to have the evidence considered as newly discovered evidence, as required by the court rules?

4. Whether the Court abused its discretion by denying the Motion for Reconsideration when no specific ground for reconsideration was stated, and defendants' only argument was that the burden of proof on summary judgment had not been met?

III. STATEMENT OF THE CASE

A. The Representation Of Federal Savings, LLC, By McKay Chadwell, And Personal Guaranty By Meaghan McKaige.

On or about March 21, 2007, Federal Savings, L.L.C. ("Federal Savings") was being investigated for securities fraud by state and federal authorities. CP 111-12. Federal Savings was being investigated in multiple states, and there were criminal investigations into Jeremy Stamper, Meaghan McKaige, and Federal Savings. CP 112. Additionally, individual investors in Federal Savings were also threatening to file individual, or class action lawsuits against Federal Savings. CP 112.

McKay Chadwell, PLLC, ("McKay") was retained to defend Federal Savings in these matters, and work with state and federal authorities to find a resolution. CP 111-12. Federal Savings signed a written Fee Agreement with McKay. CP 111, 115-18. The "Nature of Representation" according to the Fee Agreement was stated as:

Nature of Representation. The Firm [McKay] is being retained to represent Client [Federal Savings LLC] in the context of an *ongoing investigation* into the 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. [emphasis added]

CP 115. Meaghan McKaige personally and unconditionally guaranteed in writing “all payments required to be made” by Federal Savings under the Fee Agreement. CP 118. The personal guaranty stated in the relevant part:

Meaghan McKaige, 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 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. [emphasis added]

CP 118. The unconditional guaranty does not include “investigation” in its plain language. CP 118.

McKay was responsible for devising a legal strategy that would best represent Federal Savings and its officers. CP 112. Federal Savings, Jeremy Stamper, and McKay determined that the best strategy would be to rescind the investment offering, and return the investments to the investors. CP 112. The rescission plan would return the principle investments to keep investors from filing suit against Federal Savings. CP 112. Also, the plan to return the principal investments was a sign of good faith to the state and federal authorities to prevent criminal prosecutions. CP 112.

The plan was implemented and executed by McKay. CP 112. The rescission was completed, and none of Federal Savings investors ever filed a lawsuit against Federal Savings or its officers. CP 112.

This plan of action was approved by Jeremy Stamper as President of Federal Savings. CP 112. The legal fees incurred were necessary to the successful completion of the rescission and performed with Mr. Stamper's approval. CP 112. Mr. Stamper received regular monthly billings regarding the fees incurred, and never disputed the fees charged under the Fee Agreement. CP 112.

Despite the quality legal work completed by McKay and the fact Mr. Stamper never disputed any of the bills, Federal Savings failed to pay McKay for the fees that were incurred. CP 113.

B. Filing Of Lawsuit And The Summary Judgment Motion.

This case was filed on July 21, 2010. CP 4. On September 2, 2010, a default judgment was entered against Jeremy Stamper, Meaghan McKaige's brother. CP 83-84. On July 7, 2011, plaintiff's counsel requested summary judgment dates in the matter, the first available date was September 30, 2011. CP 475. On September 2, 2011, McKay filed Plaintiff's Motion For Summary Judgment ("Motion") seeking judgment against the remaining defendants, Meaghan and Andrew McKaige. CP 476. The defendants received a copy of the Motion via e-mail the same day, and did not object to e-mail service at the time.¹ CP 476,486.

The defendants' deadline to file and serve a response to the Motion was September 19, 2011. CP 476. After not receiving a response 4 days after September 19th deadline, plaintiff's counsel filed a Declaration of No Response on Friday, September 23rd. CP 476. On Monday, September 26, 2011, Meaghan McKaige served Defendant's Response To Plaintiff's Motion For Summary Judgment via e-mail, no hard copy was mailed. CP 486.

Plaintiff's counsel was unable to verify whether the Response had been filed with the Court at that time, but felt he could not file the Response on behalf of the defendants, because filing would subject

¹ Defendants did not raise service of the motion for summary judgment as an issue on the Motion for Reconsideration. See CP 333-34, 486.

Meaghan McKaige to liability for sanctions under CR 11. CP 476. However, plaintiff's counsel drafted and filed a Reply despite the Response being served well past the deadline. CP 322-24, 477. Plaintiff's counsel filed its Reply knowing that it would alert the Court to the fact that a Response had been served even if it had not been properly filed. CP 477.

On the day of the hearing, at 8:19 am, plaintiff's counsel received an e-mail from Meaghan McKaige. CP 477, 489. In the e-mail, Meaghan McKaige asked for a continuance of the hearing, because she was unable to make an earlier flight due to a sick child.² CP 489. Plaintiff's counsel informed Meaghan McKaige that a continuance would not be agreed to. CP 492. Almost immediately thereafter, plaintiff's counsel's office received a phone call from Mr. Dunham. CP 477. During the telephone conference, plaintiff's counsel agreed to request that the Court continue the hearing for 2 weeks. CP 477. At 8:46 am, plaintiff's counsel e-mailed the Court requesting a two week continuance. CP 477, 495.

At 9:01 am, the Court called plaintiff's counsel and requested that the parties appear at the hearing. CP 477. Plaintiff's counsel immediately called opposing counsel, and made arrangements to appear before the

² This excuse was the only one stated in the initial email to counsel. *See* CP 492. However, defendants now seek to blame the hearing time being changed to one hour earlier.

Court. CP 477. At the hearing, the Court denied the request for a two week continuance, because the matter could not be heard until November 23rd, and ruled that the summary judgment motion was unopposed. CP 454, 497. At plaintiff's counsel's request, the Court entered the Order Granting Summary Judgment without continuing the hearing. CP 454. The minute entry from the Summary Judgment hearing states:

Plaintiff's Motion for Summary Judgment.

The Court Informs respective counsel that it would treat the motion as an unopposed motion, there being no response from the Defendant.

The Court denies Defendant's motion for continuance and grants Plaintiff's motion.

Order on Summary Judgment is signed and filed,

CP 497. Additionally, the summary judgment order states, "Defendant's having failed to respond" on its face. CP 327.

C. Post-Judgment Motions, Striking Of Improper Declarations, And Denial Of Reconsideration.

On October 10, 2011, defendants filed the Motion for Reconsideration, and the Declarations of Meaghan McKaige and Andrew McKaige. CP 419-58. The Declarations of Meaghan and Andrew McKaige included significant new material not previously presented to the Court. CP 333-409, 457-58. The Motion for Reconsideration did not provide a basis for the declarations as newly discovered evidence. See CP 413.

On November 1, 2011, Plaintiff filed a Motion to Strike all evidence in the declarations that was available prior to the response date on the summary judgment motion. CP 412-14. Plaintiff's requested relief included striking all of the Declaration of Andrew McKaige and all but two substantive paragraphs of the Declaration of Meaghan McKaige. CP 412. The Court granted the Motion to Strike, and added the following to the order:

"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 this 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. These failures 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 affidavit as CR 56 (f) requires.³

CP 463.

³ These additional comments were the handwritten work of Judge Shaffer. This is an attempt at a faithful reproduction of the handwritten comments. Any disagreement between the handwritten comments and what appears here is unintentional or a good faith mistake. The comments in Judge Shaffer's handwriting are part of the record on appeal.

Plaintiff's counsel was asked to respond to the Motion for Reconsideration by the Court pursuant to KCLCR 59. CP 465-74. The Motion for Reconsideration was denied on December 2, 2012. CP 529-530. The Notice of Appeal was filed on December 29, 2011.

IV. ARGUMENT

A. On The Record Before The Court, The Summary Judgment Motion Was Properly Granted.

The defendants were self-represented by choice, and failed to follow Civil and Local Rules in responding to the summary judgment motion. The defendants' failure to file and serve the response left the motion unopposed and the trial court properly entered the judgment. The Appellate Court may only consider that evidence before the Trial Court on the Motion for Summary Judgment. *See Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 755, 162 P.3d 1153 (2007).

The standard of review of an order granting summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). "Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." *Sheehan v. Central Puget Sound Regional*

Transit Authority, 155 Wn.2d 790, 797, 123 P.3d 88 (2005) *see also* CR 56(c). A party is entitled to summary judgment “when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.” *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997).

The appellate court may consider all materials that were brought to the attention of the trial court, whether or not the trial court relied on those materials. *Riojas v. Grant County PUD*, 117 Wn. App. 694, 696 n.1, 72 P.3d 1093 (2003). In addition, the appellate court is entitled to consult the law in its review of the case, whether or not a party has cited that law. *Ellis v. City of Seattle*, 142 Wn.2d 450, 460 n.3, 13 P.3d 1065 (2000).

The defendants’ procedural failures require that they argue the facts before the trial court were insufficient to grant summary judgment. However, to prove that there was an issue of fact on the unopposed summary judgment motion, the defendants must show that a reasonable juror would look at the information in front of Court, and find that Plaintiff was not entitled to judgment.

Here, the summary judgment order clearly states that no evidence had been presented by the defendants. CP 327-29. Without any evidence

contrary to plaintiff's assertions, the Summary Judgment motion was properly granted.

1. *Plaintiff Met Its Burden On Summary Judgment By Presenting Sufficient Evidence Of The Debt And The Unconditional Guaranty Of The Debt.*

On Summary Judgment, "if the moving party does not sustain its burden, summary judgment should not be granted, regardless of whether the nonmoving party has submitted affidavits or other evidence in opposition to the motion. *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 302, 616 P.2d 1223 (1980). Only after the moving party has met its burden of producing factual evidence showing that it is entitled to judgment as a matter of law does the burden shift to the nonmoving party to set forth specific facts showing that there is a genuine issue of material fact. *Graves*, 94 Wn.2d at 302. *Hash by Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn. 2d 912, 915, 757 P.2d 507 (1988).

Here, plaintiff's uncontroverted declarations stated sufficient facts and provided the necessary documentation for the trial court to grant summary judgment. Plaintiff provided the trial court with the unconditional guaranty, the Fee Agreement creating the principal obligation, testimony regarding the scope of work performed for the principal obligor, and the amount due and owing on the principal obligation. Additionally, plaintiff provided every billing entry for the life

of the representation. These facts show an unconditional guaranty of payments owed under the contract, payments owing under the contract, and failure to pay by the principal obligor.

Defendants failed to provide any specific facts showing an issue remaining for trial. Because the defendants did not provide the trial court with any legal or factual issues sufficient to deny the summary judgment the order must be upheld. Defendants' late arguments are insufficient to meet their burden on summary judgment that there remains a genuine issue of material fact.

A reasonable juror reviewing the Declaration of McKay, the Guaranty, and the payments owing could only conclude that the defendants were liable for the fees incurred. That is sufficient to grant the plaintiff's summary judgment motion, and shift the burden to the defendants. The defendants did not meet their burden, and the order granting summary judgment must be upheld.

2. *The Unconditional Guaranty Of All Payments Due Under The Fee Agreement Is Strictly Construed, Not The Fee Agreement.*

Defendant asks the Court to strictly construe the Fee Agreement entered into by Federal Savings based upon defendants' personal guaranty. However, the defendants cite no law for the proposition that all contracts that are personally guaranteed must be strictly construed. In fact,

defendant seeks to rewrite the law of contracts in its opening brief seeking to strictly construe a contract only because it is personally guaranteed.

A personal guaranty is strictly construed. *Seattle First National Bank v. Hawk*, 17 Wn. App. 251, 256, 562 P.2d 260 (1977). However, the contract of guaranty and the principal obligation are two separate contracts. *Robey v. Walton Lumber Co.*, 17 Wn.2d 242, 256, 135 P.2d 95 (1943). “The debtor is not a party to the guaranty, and the guarantor is not a party to the principal obligation.” *Id. citing* 24 Am.Jur.875, 876, § 4. The responsibilities of the two obligations are separate and apart from one another. *Id.*

“A guarantee of a payment of an obligation, without words of limitation or condition, is construed as an absolute or unconditional guaranty.” *Id.* at 256, *quoting* 24 Am.Jur. 885 § 16. If default of the principal is the only condition on collection against the guarantor, the agreement is considered unconditional. *Bellevue Square Managers v. Granberg*, 2 Wn. App. 760, 766, 469 P.2d 969 (1970).

With an unconditional guaranty, the scope of liability of the principal debtor “measures and limits” the liability of the guarantor. *Robey*, 17 Wn.2d at 258. “Having guaranteed performance by the principal debtor of a promise that the debtor made and for which the debtor has received consideration, and having made its intention in that

respect clear and plain, the guarantor is now bound by its agreement.”
A. M. Castle & Co. v. Pub. Serv. Underwriters, 198 Wash. 576, 592-93,
89 P.2d 506 (1939), *citing Backus v. Feeks*, 71 Wash. 508, 513, 129 P.
86 (1913).

The scope of the guaranty is set by the language contained in the
guaranty. *Id.* The guaranty states:

Meaghan McKaige, 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 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.

CP 118. There are no conditions on the enforcement of the guaranty, and
there is no restriction on the scope of the guaranty. CP 118. This
guaranty is unconditional. The language of the guaranty contained above
is unambiguous, and even under strict interpretation would be considered
an unconditional guaranty.

As an unconditional guaranty, liability would be measured and
limited by the liability of the principal. Here, the evidence before the trial
court was that Federal Savings, the principal obligor, did not contest

liability for the amounts owed under the Fee Agreement. Further, the other guarantor of the Fee Agreement already had a judgment entered against him by default. CP 83-85. The record is clear that the principal agreed to the amount and types of fees and costs incurred, and that the principal was liable for those fees and costs.

Defendants attempt to challenge the principal obligation without facts or law to support their argument. Defendants obligated themselves to guaranty all payments due under the Fee Agreement. The plaintiff's burden on summary judgment was to provide evidence of a guaranty of the principal's obligation, the amount of principal's obligation under the debt, and the default by the principal. Plaintiff provided that evidence and summary judgment was properly granted.

- i. The Court Did Not Find That The Lack Of An Opposition Substituted For Plaintiff's Burden Of Proof And Found That There Was No Genuine Issue Of Material Fact.

Defendant argues that the Court substituted the motion being unopposed for plaintiff establishing its burden of proof. Opening Brief of Appellants ("AB") 22-24. The Court found that the motion was unopposed, because the defendants had failed to file a response pursuant to CR 56(c). Importantly, the Court then ruled that there was no genuine

issue of material fact, and that plaintiff was entitled to judgment as a matter of law. *See* CP 327-29.

Defendants speculate that the Court did not review the moving papers to determine whether the plaintiff had met its burden, because the motion was unopposed. However, the defendants have no facts or holdings that support this argument.

Defendants are trying to stretch the duties of the Court presiding on a motion for summary judgment. Defendant is arguing that when reviewing an unopposed summary judgment motion the Court should act as an advocate for the non-moving party as well as the ruling on the motion. Defendants want the Court to dissect the 185 pages of billing statements produced by the plaintiff, and determined if there is any argument that a single dollar was not covered by the unconditional guaranty.

Essentially, because the defendants failed to file a response, they want the Court to act as an advocate and make the defendants' arguments for them. This is not the proper role of the Court on summary judgment. The Court should review the evidence presented to determine if the moving party met its burden, as was done in this case, and shift that burden to the non-moving party to present specific factual evidence to create a genuine issue of fact, which was not done in this case.

Defendants are seeking a ruling that the Court failed a duty by not taking an advocates role in the proceeding and speculating on the meaning of the evidence presented. Even when the non-moving did not file a response. The Court cannot fail this duty because it does not exist. The defendants' arguments do not establish that plaintiff's evidence was insufficient to support its burden on summary judgment. As such, the Court properly entered summary judgment in this matter, and the order granting summary judgment must be upheld.

3. *There Was No Clear And Convincing Evidence To Rebut The Presumption The Debt Was A Community Obligation And Summary Judgment Against The Marital Community Was Proper.*

The defendants argue there was insufficient evidence to find the marital community of Andrew and Meaghan McKaige liable for the debt incurred. However, there was no evidence presented on the motion for summary judgment to defeat the presumption of community liability for the obligation. Further, the defendants never filed an answer denying the community liability alleged in the complaint, and the issue was not before the trial court on summary judgment.

“A debt incurred by either spouse during marriage is presumed to be a community debt.” *Oil Heat Co. of Port Angeles, Inc. v. Sweeney*, 26 Wn. App. 351, 354, 613 P.2d 169 (1980). “A suretyship

debt or obligation of one of the spouses creates a presumption of a community obligation.” *Bank of Washington v. Hilltop Shakemill, Inc.*, 26 Wn. App. 943, 946, 614 P.2d 1319 (1980).

The presumption gives the defendants the burden of producing evidence that the community was not liable for the debt. *See Bank of Washington*, 26 Wn. App. at 948. The presumption that the debt is a community debt can only be overcome by clear and convincing evidence. *Id.* The presumption may be overcome by a showing that the marital community was no longer in existence or was defunct. *Oil Heat*, 26 Wn. App. at 351.

Here, the unconditional guaranty was presumed to be a community debt. There is no evidence that the marital community did not exist, or was defunct at the time the guaranty was entered into. In fact, the defendants admit they were married at the time the guaranty was signed. CP 347, 408-09, 457.

Further, there is no “clear and convincing evidence” that the marital community was not benefited by the guaranty. In fact on summary judgment, the facts before the trial court show that Mrs. McKaige was not a passive guarantor, but that she was under criminal investigation and faced the possibility of criminal charges. CP 112. Evidence that a debt was incurred to keep a member of the marital

community from facing criminal charges establishes a “benefit” to the marital community.

There was no evidence presented that the marital obligation did not exist or that the community was not benefited by the debt. As such, the presumption that the debt was a community debt was never rebutted, and plaintiff was entitled to judgment against the marital community as a matter of law.

4. *Defendants Arguments Regarding A Criminal Complaint Being Filed And Excessive Third-Party Costs Must Be Considered Under The Abuse Of Discretion Standard For A Motion For Reconsideration, Because They Were Not Before The Court On Summary Judgment.*

For the first time in its motion for reconsideration, Defendants argued that a criminal complaint was filed and that a new Fee Agreement was required. The standard of review for a motion for reconsideration is abuse of discretion; however, defendants are attempting to argue these new facts under the summary judgment standard of de novo.

On review of an order granting summary judgment, the appellate court reviews the facts presented to the trial court de novo. *See Jones*, 146 Wn.2d at 300. On appeal, the court makes the same inquiry the trial court would. *Id.* However, the court may only review that evidence that was presented to the trial court. *See Jacob's Meadow*, 139 Wn. App. at 755.

“Issues not raised in the hearing for summary judgment cannot be considered for the first time on appeal.” *Save-Way Drug, Inc. v. Standard Inv. Co.*, 5 Wn. App. 726, 727, 490 P.2d 1342 (1971). “By bringing a motion for reconsideration under CR 59, a party may preserve an issue for appeal that is closely related to a position previously asserted and does not depend upon new facts.” *River House Dev. Inc. v. Integrus Architecture, P.S.*, No. 29889-2-III, 272 P.3d 289, 294-95 (May 15, 2012). However, that issue will be reviewed under the less favorable abuse of discretion standard. *Id.*

Here, the defendants’ arguments are an attempt to seek a de novo review of issues raised for the first time on the motion for reconsideration. This Court must engage in the same inquiry as the trial court, and there was no allegation that criminal charges had been filed presented to the trial court on summary judgment. Further, defendants did not raise the issue of excessive third-party costs not being included in the guaranty. The Court could not consider these issues because they were not raised, and they should be reviewed by this Court only under the abuse of discretion standard on review of the motion for reconsideration.

summary judgment motion was not perfected. Because the trial court found that plaintiff had met its burden, there was no basis to deny the summary judgment motion.

B. The Court Properly Denied Defendants' Motion To Continue Because Defendants Could Not Articulate What Evidence Would Be Produced If A Continuance Was Granted.

Defendants' attorney argued that a continuance should be granted at the hearing on the summary judgment motion. However, no "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." CP 463. Without any cause to continue the summary judgment motion, the Court was left with no choice other than to deny the opposed CR 56(f) motion. The denial of a motion to continue is reviewed for abuse of discretion. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 369, 166 P.3d 667 (2007); *Durand v. HIMC Corp.*, 151 Wn. App. 818, 828-29, 214 P.3d 189 (2009).

CR 56(f) permits a trial court to continue a summary judgment motion when the party seeking a continuance offers a good reason for the delay in obtaining discovery. *Butler v. Joy*, 116 Wn. App. 291, 299, 65 P.3d 671 (2003). A Motion for Continuance cannot be justified unless the party requesting the continuance can provide an explanation of what

evidence would be obtained through discovery. *Thongchoom v. Graco Children's Products, Inc.*, 117 Wn. App. 299, 308, 71 P.3d 214 (2003).

Failure to move for continuance is sufficient to support upholding the denial. *Bldg. Indus. Ass'n of Washington v. McCarthy*, 152 Wn. App. 720, 743, 218 P.3d 196 (2009). “The trial court may deny a motion for a continuance when (1) the requesting party does not have a good reason for the delay in obtaining evidence; (2) the requesting party does not indicate what evidence would be established by further discovery; or (3) the new evidence would not raise a genuine issue of fact.” *Butler*, 116 Wn. App. at 299.

Here, the denial of the motion to continue is supported by the record before the trial court. An affidavit is required pursuant to the plain language of CR 56(f) to put the issue before the Court. However, the record shows that an affidavit was never filed. Further, defendants’ counsel could not orally provide the Court a basis for continuing the hearing. CP 463.

Defendant could not provide cause for the continuance to be granted. CP 463. The Court could not expeditiously hear the continued hearing because the Court’s calendar was full for nearly two months. CP 454. However, the summary judgment hearing had already been delayed by the Court’s schedule because September 29th hearing was set on July

7th. CP 454, 475. The denial of the CR 56(f) motion was within the Court's discretion, and that discretion was clearly not abused.

1. *The Case Law Cited By Defendants Is Distinguishable, Because Defendants In This Case Could Not Provide A Basis For Continuance.*

Defendants rely on two cases to establish that the Court abused its discretion in denying a continuance. AB 20-22. The first is *Coggle v. Snow*, 56 Wn. App. 499, 784 P.2d 554 (1990), and the second is the previously cited *Butler* decision, 166 Wn. App. at 299-300. Both cases are distinguishable from the case at bar.

In *Coggle*, the Court noted that just retained counsel had been prejudiced by the "dilatatory conduct" of the previous attorney. 56 Wn. App. at 508. The Court held the newly retained attorney had filed an affidavit that "fulfilled the other criteria for a continuance by identifying the evidence he sought and explaining that the declarations would rebut the defense expert testimony." *Id.* Finally, the Court held that a prejudice was not argued, and that there was no tenable ground for the decision. *Id.*

As opposed to *Coggle*, there are at least three grounds for the denial of the continuance in the case at bar. First, there was no affidavit filed with the Court setting forth why a continuance was necessary. CP 463. Second, the trial court held "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.” CP 463. Finally, the dilatory conduct in this matter was perpetrated by the defendants, not previously retained counsel. Defendant Meaghan McKaige chose to not hire an attorney until an hour prior to the hearing, and failed to timely or properly file her responsive papers. These were all actions taken by the defendant, and unlike *Coggle*, the defendants in this case are responsible for their own derelictions.

The Court in *Butler* relied on *Coggle* in finding that the trial court had abused its discretion in denying a continuance. 116 Wn. App. at 299-300. In *Butler*, there was no recording of the hearing, and there was “no indication whether [newly retained counsel] argued that he needed more time to obtain further discovery or what further evidence he expected to produce.” *Id.* at 299. Here, there is a record of what defendants counsel argued at the motion hearing, and the failure to provide any legitimate basis for the continuance. CP 463. Further, the plaintiff was prejudiced because the Court could not grant a short continuance. The hearing was scheduled on July 7, 2011, and would not have to been heard until late November 2011, a total of nearly 5 months. CP 454, 475. This prejudiced the plaintiff who had properly noted the hearing, and had a right to a judgment based on all the evidence before the Court within a reasonable period of time.

Finally, the motion for reconsideration and accompanying declarations show that a continuance was unwarranted. The evidence in the declarations was the testimony of Meaghan and Andrew McKaige based upon the documents provided by the plaintiff, and their personal knowledge. This is not newly discovered evidence, which is required by the rules, and there is no testimony as to why the declarations could not be presented to the Court on summary judgment.

At the hearing on the summary judgment motion, the Defendant had not filed an affidavit pursuant to CR 56(f), and could not provide the Court with any basis for a continuance under CR 56(f). CP 463. This is demonstrably different than *Coggle* and *Butler* where the defendants either presented a legitimate need, or the record was devoid of a reason to deny the continuance. The Court in this case did not abuse its discretion, because the defendants offered no basis, other than their dilatory conduct, for a continuance of the summary judgment hearing.

C. The Court Was Within Its Discretion To Strike The Declarations Of Meaghan And Andrew McKaige Because No Basis Was Given For The Declarations To Be Considered As Newly Discovered Evidence.

Trial courts have discretion to strike pleadings or documents that do not meet the standards set in the Court Rules, such as not being timely filed. *See Colorado Structures, Inc. v. Blue Mountain Plaza, LLC*, 159

Wn. App. 654, 660, 246 P.3d 835 (2011). The Court abuses its discretion when it strikes documents for “untenable grounds or for untenable reasons.” *Id.*

To have the testimony admitted as newly discovered evidence, the moving party must show that the evidence was not known, or under the circumstances could not have been known, or could not have been found through the exercise of reasonable diligence prior to the hearing. *Davenport v. Taylor*, 50 Wn. 2d 370, 374, 311 P.2d 990 (1957).

In the Motion for Reconsideration, defendants made no attempt to create a basis for the admission of the testimony as newly discovered evidence required by CR 59(a)(4). On their face, the declarations presented evidence of the defendants’ personal knowledge. That personal knowledge did not come from an outside source, and could easily have been presented at the summary judgment hearing.

The Court did not abuse its discretion by striking the declaration testimony of the defendants. The record shows the testimony was presented for the first time with the motion for reconsideration, and that these declarations did not even attempt to explain why could not had not be presented to the court on summary judgment. Additionally, the evidence is based on defendants’ personal knowledge of past events that was known to the defendants prior to the hearing. *See* CP 345-52, 408-09.

There was no basis for the Court to admit the declaration testimony as newly discovered evidence, and the Court did not abuse its discretion in striking the testimony.

D. The Court Was Within Its Discretion To Deny The Motion For Reconsideration, Because Defendants' Did Not Articulate A Basis For Reconsideration Under CR 59 And Only Attempted To Reargue Summary Judgment Instead.

The motion for reconsideration was an attempt by the defendants to file a response to the summary judgment motion, and argue issues that should have been raised in response to the original motion for summary judgment. However, a motion for reconsideration is not a second opportunity to argue summary judgment. Importantly, the denial of a motion for reconsideration is reviewed for an abuse of discretion. *See Wagner Dev., Inc. v. Fidelity & Deposit Co.*, 95 Wn. App. 896, 906, 977 P.2d 639 (1999).

“Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion.” *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005); *Kleyer v. Harborview Medical Ctr.*, 76 Wn. App. 542, 545, 887 P.2d 468 (1995); *In re Marriage of Littlefield*, 133 Wn.2d 39, 46–47, 940 P.2d 1362 (1997). “An abuse of discretion exists only if no reasonable person would have

taken the view adopted by the trial court.” *Holaday v. Merceri*, 49 Wn. App. 321, 324, 742 P.2d 127 (1987). The trial court abuses its discretion when it applies the wrong legal standard, relies on unsupported facts, or when no reasonable person would support the view adopted by the Court. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668–69, 230 P.3d 583 (2010).

If the motion for reconsideration is based on CR 59(a)(5)–(9), the court must restrict its review to the evidence presented on summary judgment. *Jet Boats, Inc. v. Puget Sound Nat'l Bank*, 44 Wn.App. 32, 42, 721 P.2d 18 (1986); *Holaday*, 49 Wn. App. at 330. A party seeking to admit new evidence must show good cause why the evidence could not be presented prior to the summary judgment motion. *West v. Thurston County*, 144 Wn. App. 573, 580, 183 P.3d 346 (2008).

The Court did not abuse its discretion by denying defendants’ motion for reconsideration. The Court should not have considered the newly presented evidence because that evidence was not part of the record on summary judgment. The facts in the summary judgment establish the agreement, the unconditional guaranty, work performed, and the amount due and owing. Those facts were undisputed, and remain undisputed. The arguments offered by defendants on reconsideration involved solely the interpretation of the Fee Agreement, and speculation regarding the work

performed. The Court did not abuse its discretion by denying reconsideration.

1. *Defendants Offered No Specific Basis Under CR 59 For The Court To Reconsider The Summary Judgment Motion.*

The trial court's decision on a motion for reconsideration is discretionary. *Lilly v. Lynch*, 88 Wn. App. 306, 945 P.2d 727 (1997); *accord Kleyer*, 76 Wn. App. 542. CR 59(a) states the exclusive grounds for granting reconsideration.

A motion for reconsideration “shall identify specific reasons in fact and law as to each ground on which the motion is based.” CR 59(b). Defendants’ motion states “Defendant McKaige brings this motion to reconsider pursuant to CR 59.” CP 336. There is never any other cite to the CR 59 or any subparagraph of CR 59 in the motion. *See* CP 333-44. The motion essentially asks the Court to guess what the basis for reconsideration should be, and then apply that basis to the case.

There was no stated basis for the motion for reconsideration, because defendants were attempting to reargue summary judgment. Without a specific basis for reconsideration provided by the defendants, the Court is forced to speculate regarding the possible grounds for reconsideration. However, the defendants must show that the Court abused its discretion by upholding the uncontested summary judgment

motion when the plaintiff had presented evidence of the principal obligation, the unconditional guaranty, and the all documents forming the basis of the amount due and owing. The trial court properly denied reconsideration of the summary judgment order, and that denial was not an abuse of the court's discretion.

2. *There Was No Basis For Considering The Declarations Of Andrew And Meaghan McKaige As Newly Discovered Evidence Under CR 59(a)(4).*

Reconsideration under CR 59(a)(4) is only warranted when new and material evidence is presented by the moving party that could not have discovered and produced prior to the motion. *Wagner*, 95 Wn. App. at 906. Evidence that was available on summary judgment, but not offered cannot support a motion for reconsideration, and the moving party is not entitled to submit that evidence. *Wagner*, 95 Wn. App. at 907; *accord Fishburn v. Pierce County Planning & Land Services Dept.*, 161 Wn. App. 452, 472-73, 250 P.3d 146 (2011).

Defendants did not offer any basis for the use of newly discovered evidence to support the motion for reconsideration. Without a basis to admit the evidence as newly discovered evidence, the Court could not consider the declaration testimony. Defendants have tried to argue that criminal charges were filed, and that the charges discharged the guaranty obligation. However, there is no evidence of charges being filed against

Federal Savings or that McKay served as counsel in that proceeding, and even if charges were filed, this would not be newly discovered evidence supporting a motion for reconsideration without a basis under CR 59(a)(4). The declaration testimony was properly stricken, and not considered on the motion for reconsideration.

3. *Defendants' Arguments That A Criminal Complaint Was Filed Against Federal Savings Are Speculative, Because Nothing Ties The Time Entries Cited To Federal Savings.*

The Fee Agreement states that a new fee agreement will be required for criminal representation. Defendants assert without any supporting facts that criminal charges were filed against the "Client", but defendants have presented only speculation that criminal charges may have been filed against Federal Savings, and no evidence that McKay represented Federal Savings in a criminal action. The defendants seem to confuse the "Client," for purposes of the agreement, with Jeremy Stamper, co-defendant in this lawsuit. CP 403-04

Conclusory statements and statements of ultimate fact alone cannot defeat a summary judgment motion. *Strong v. Terrell*, 147 Wn. App. 376, 384, 195 P.3d 977 (2008). The party opposing "may not rely on speculation, argumentative assertions that unresolved factual issues remain." *Id.* The opposing party "must set forth specific facts rebutting the moving parties' contentions and disclose that a genuine issue as to a

material fact exists.” *Id.* A declaration that contains only conclusory statements without adequate factual support does not create an issue of material fact that defeats a motion for summary judgment. *Lane v. Harborview Medical Ctr.*, 154 Wn. App. 279, 288, 227 P.3d 297 (2010).

Defendants rely on the equivocal time entries in the billing statements provided and conclusory statements to attempt to create an issue of fact. However, defendants’ arguments based upon the billing entries are strictly speculative.

The Fee Agreement defines client as “Federal Savings LLC”, and states:

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 client, a new agreement based on those charges and the scope of services necessitated will be required.

CP 115. There is no evidence that criminal charges were filed against Federal Savings.⁴

The evidence before the Court was that there were multiple criminal investigations, including investigations into Jeremy Stamper and Meaghan McKaige. CP 112. These investigations were pertinent to the

⁴ In fact, the defendants’ own response says that criminal charges were filed against Jeremy Stamper, not Federal Savings. CP 403-04. This is not a criminal charge against the Client, Federal Savings, for purposes of the Fee Agreement. Ms. McKaige did not declare that criminal charges were filed against Federal Savings.

Federal Savings matter, because McKay was in negotiations with federal and state authorities during the rescission. CP 112. Defendants complain of reviewing criminal statutes, an e-mail “regarding status of Nevada criminal charges”, and discussions with Nevada counsel. AB 7. These tasks do not indicate representation in a criminal case, but rather representation in a “civil matter with implications of possible criminal wrongdoing,” as contemplated in the Fee Agreement. CP 115.

Further, there is a very limited scope to the time entries that defendants speculate are related to criminal charges. *See* AB 7-8. Of the 185 pages of billing statements provided by the plaintiff, defendant speculates that 15 may include time entries related to criminal representation. *See* AB 7-8; CP 179-88, 198, 203, 262-63. The fact of criminal charges being filed against Federal Savings must be demonstrated with competent evidence, not speculation based upon equivocal time entries. There is not one single piece of evidence suggesting that criminal charges of any kind were ever filed against Federal Savings.

Finally, the Fee Agreement states that “a new agreement based upon those charges and the scope of services necessitated will be required.” CP 115. The plain language of the agreement is that if McKay is to represent Federal Savings in a criminal matter, a new Fee Agreement for criminal representation will be required. Whether criminal charges

were filed is not dispositive, as defendants argue. Additionally, the time entries indicate that counsel was retained in Nevada regarding possible criminal charges, CP 181, 203, consistent with the Fee Agreement, and a “civil matter with implications of possible criminal wrongdoing.” CP 115. There is no language in the Fee Agreement stating that if criminal charges are filed, a new fee agreement will be required for continued representation in the civil matter.

Defendants’ speculative argument that filing of criminal charges discharged the unconditional guaranty is insufficient to create a genuine issue of material fact. The Fee Agreement in question does not completely disappear upon the filing of criminal charges against Federal Savings, and the evidence before the Court is that criminal issues, but not criminal representation, were a part of the representation. The Court did not abuse its discretion by rejected defendants’ argument that criminal charges were filed that discharged the personal guaranty and denying reconsideration.

4. *The Plain Language Of The Fee Agreement Gives McKay The Discretion To Pay Third-Party Costs And Charge Them To Federal Savings, And Any Third-Party Costs Paid By McKay Were Guaranteed By Defendants.*

Defendants argue that “it is fair to believe substantial third-party costs would not be part of the Guarantee,” and argues that summary

E. Service Of The Motion For Summary Judgment Motion Was Not Raised Before The Trial Court, And Cannot Be Raised For The First Time On Appeal.

For the first time on appeal, defendants argue that service of the motion for summary judgment was three days late, because e-mail service was not agreed to. The Defendants did not dispute service of the summary judgment motion at the trial court level, nor did they argue that service was insufficient on reconsideration. In fact, defendants' service of their late response was done only by e-mail. CP 486.

Defendant claims that there is nothing in the record that service by e-mail was agreed to pursuant to CR 5(b)(7), and that without an agreement in writing, service by mail was three days late. "Issues not raised in the hearing for summary judgment cannot be considered for the first time on appeal." *Save-Way Drug*, 5 Wn. App. at 727. In *Save-Way Drug*, on appeal the defendant challenged the sufficiency of the affidavits supporting the summary judgment motion under CR 56(e) for the first time on appeal. *Id.* The Court declined to consider the challenge, because the issue had not been before the trial court. *Id.*

There is no difference between the *Save-Way Drug*, and the matter at bar. The defendants never took issue with e-mail service in response to the motion for summary judgment, the motion to strike, or the motion for reconsideration. In fact, the defendants served their response to the

motion for summary judgment by e-mail as well. CP 486. Defendants' challenges to the e-mail service of the motion for summary judgment for the first time on appeal should not be considered by this court.

F. McKay Is Entitled To An Award Of Attorney Fees And Costs On Appeal.

Pursuant to RAP 14 and RAP 18.1, the appellate court is authorized to award attorney fees and certain costs (i.e. reasonable expenses actually incurred and reasonably necessary for review) to the substantially prevailing party on review. RAP 14.3.

In addition, attorney fees are awarded on appeal, if allowed by applicable law, e.g., by statute, contract, or a recognized ground of equity. RAP 18.1 (a); *Leingang v. Pierce County Medical Bureau*, 131 Wn.2d 133, 143, 930 P.2d 288 (1997); *Eugster v. City of Spokane*, 121 Wn. App. 799, 91 P.3d 117 (2004).

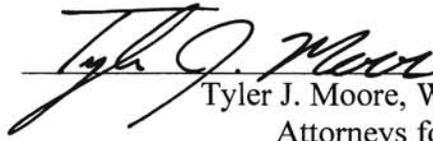
The Fee Agreement provides that the prevailing party "shall be awarded its reasonable attorney and expert witness fees and costs." CP 116. McKay was awarded attorneys' fees on the Motion for Summary Judgment, and is entitled to an award of attorneys' fees under the Fee Agreement. CP 116, 327-29.

McKay requests that this Court award the attorney fees and costs incurred on appeal.

V. CONCLUSION

Plaintiff met its burden on summary judgment by presenting the trial court the unconditional guarantee, the principal obligation, default by the principal, and evidence of the amount due and owing. Defendants failed to properly file a response to the motion for summary judgment, and failed to file an affidavit for continuance required by CR 56(f). Whatever excuse there is for those failures, the defendants left the Court no choice but to enter the summary judgment and deny the opposed motion for continuance. We respectfully request the order granting summary judgment be upheld.

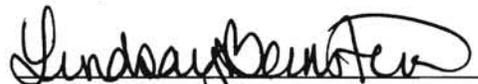
Respectfully submitted this 15th day of May, 2012.


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CERTIFICATE OF SERVICE

I certify that on May 16, 2012, I caused a copy of the foregoing document to be served via legal messenger to the following counsel of record:

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