No. 72423-1-III

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM DAILEY *et ux*; and JANET SPARKS *et ux*,

Appellants,

And

DEBORAH A. HIGGINS, *et al.*,

Defendant.

BRIEF OF APPELLANTS

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> This Court finds 393.7 hours reasonable for Elizabeth J. Erwin for a total of $160,629.60 ($408/hr x 393.7 hours = $160,629.60).

4. In its order regarding plaintiff's request for an award of attorney's fees and costs, the court erred by entering conclusion of law 5:

> Given the complexity of legal matters in a Consumer Protection action, the collaboration and work of two attorneys for Plaintiff was reasonable. As the lead attorney in the case, Ms. Erwin's presence at deposition does not constitute wasted or duplicative efforts……1

Issues Pertaining to Assignments of Error

A. Did the court err by denying the motion for reconsideration of Dailey & Sparks when it abused its discretion by

indicating counsel should have engaged in unethical conduct to obtain a continuance of the summary judgment motion? (Assignment of Error 1).

B. Did the court err by entering its order granting plaintiff's motion for summary judgment when the motion by Dailey & Sparks for a continuance should have been granted? (Assignment of Error 2).

C. In its order regarding plaintiff's request for an award of attorney's fees and costs, did the court err by making finding of fact 14 that 393.7 hours for the State's lead attorney was reasonable? (Assignment of Error 3).

D. In its order regarding plaintiff's request for an award of attorney's fees and costs, did the court err by entering conclusion of law 5 that the lead attorney's attendance at deposition was neither wasted nor duplicative effort when only the junior attorney conducted the deposition? (Assignment of Error 4).

II. STATEMENT OF THE CASE

The State filed a Consumer Protection Act complaint involving reverse mortgages against William Dailey and Janet

Sparks, among others. (CP 1). They entered pro se notices of appearance. (CP 459, 460). Denying the State's claims, Dailey and Sparks answered the complaint. (CP 72, 58).

The State filed a motion for summary judgment. (CP 197). Dailey and Sparks requested a continuance of the summary judgment hearing to allow them time to retain counsel. (CP 409, 414, 422, 443). The court did not decide the motion for continuance before the summary judgment hearing, but rather considered both at the same time. (7/25/14 RP 4). The assistant attorney general represented to the court that the morning of the summary judgment hearing, he had spoken with this counsel, who had not been formally retained by Dailey and Sparks:

> Working on representation and he would call me if he was going to appear. He has not done so. When I called him after receiving Mr. Dailey's supplemental declaration, I talked to him this morning and he said that still he had – there has been no fee agreement signed. He is not representing them yet, though he believes them, that they are trying to get all the information and that money together. But that he is not going to be entering an appearance unless they get all that information together. (*Id*. at 5).

In response, the court stated this counsel should have filed a notice of appearance to ask for a continuance, as an attorney,

without actually having been retained by Dailey and Sparks or having an agreement to represent them. (7/25/14 RP 6).

The court heard from the State's counsel regarding the gravamen of the complaint. (7/25/14 RP 9-23). Stating Dailey and Sparks had not filed any opposition to the summary judgment, the court, for all intents and purposes, granted summary judgment to the State by default. (*Id*. at 23-25; CP 449).

Dailey and Sparks filed a timely motion for reconsideration, which was denied. (CP 3996). The court later entered an order regarding plaintiff's request for an award of attorney's fees and costs. (CP 7721). This appeal follows. (CP 4004).

III. ARGUMENT

A. The court erred by denying the motion for reconsideration of Dailey and Sparks.

Within a week after summary judgment was granted to the State, Dailey and Sparks did formally retain this counsel and filed a CR 59 motion for reconsideration. (CP 466).

Dailey and Sparks were unable to respond timely to the summary judgment motion because they were absolutely overwhelmed by the sheer volume of documents and the thus far

futile task of trying to obtain counsel. (CP 409, 414, 422, 443, 446). As noted by the court, they filed a timely motion for continuance. (7/25/14 RP 4; CP 422). No written order denying the continuance was entered.

CR 59 provides in pertinent part:

> (a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:
>
> (1) Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial,
>
> . . .
>
> (9) That substantial justice has not been done.

Dailey and Sparks, acting pro se, were served with the State's motion for summary judgment on June 27, 2014. (CP 414, 422). They moved for a continuance on July 14, 2014. (*Id*.). Despite earnest efforts to do so, they were unable to secure

counsel before the July 25, 2014 summary judgment hearing. After summary judgment was entered that day, defendants Dailey and Sparks were finally able to retain this counsel. (CP 471-73). Up to that time, they were only prospective clients and counsel could not legally or ethically file a notice of appearance as reasoned by the trial court to secure a continuance when they were prospective clients only. RPC 1.18(a). Indeed, RPC 1.2(f) provides:

> A lawyer shall not purport to act as a lawyer for any person or organization if the lawyer knows or reasonably should know that the lawyer is acting without the authority of that person or organization, unless the lawyer is authorized or required to so act by law or a court order.

Yet, the trial judge indicated counsel should have done just that – represent to the court that he had been retained and enter a notice of appearance to secure a continuance for Dailey and Sparks when they were only prospective clients and he had no authority to do the unauthorized and unethical act the judge suggested. (7/25/14 RP 6-7).

In its order denying the motion for reconsideration, the judge wrote in part:

> Defendants argue that substantial justice has not been done because this Court abused its discretion

> by refusing to continue the summary judgment hearing and by granting summary judgment against *pro se* litigants. Defendants had a year to retain an attorney, but had failed to do so. That attorney could have easily provided notice of his appearance *before* the hearing. (CP 3996).

This judge actually put in a written order that counsel should have unethically filed a notice of appearance before being retained so a continuance could be secured. This is patently offensive to this counsel, who was a judge for over 19 years, and is a totally unacceptable reason for denying the continuance, much less the motion for reconsideration.

Exacerbating the impropriety of fault counsel for not acting unethically, the court further wrote:

> On July 23, 2014, Defendant Dailey filed a supplemental declaration. In that declaration, Defendant Dailey contended that he was retaining attorney Kenneth H. Kato to represent him and that Mr. Kato would make an appearance the following week. Defendant Dailey's supplemental declaration did not address or explain why Mr. Kato had not already filed a notice of appearance or why he planned on waiting until *after* the summary judgment to appear. (CP 3997).

Dailey's declaration clearly indicated he had not yet retained this counsel and was hoping to do so. Counsel could not file a notice of appearance because he had no authority to act on the client's

behalf until he had been formally retained and a fee agreement reached. RPC 1.2(f). That was the legal and ethical reason for not filing a notice of appearance. Counsel fully expected representation arrangements to be completed by the following week and for the assistant attorney general to convey that information to the court so the summary judgment motion could be continued for a short time to accommodate this. (CP 471-73). Instead, the judge reasoned a notice of appearance should have been filed without counsel having the authority to do so.

The court's decision on a motion for reconsideration is reviewed for an abuse of discretion. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 485, 41 P.3d 1175 (2002). Discretion is abused when the court makes an error of law. *Spreen v. Spreen*, 107 Wn. App. 341, 349-50, 28 P.3d 769 (2001). Here, the judge made his decision based on a misguided and offensive charge to this counsel to engage in unethical conduct by filing a notice of appearance when he had no authority to file one just so it could be used as a pretense for seeking a continuance on behalf of his then pro se clients. RPC 1.2(f). Since this is a legally improper basis for denying the motion for reconsideration, the court

necessarily abused its discretion. *Spreen*, *supra*. The denial of the motion for reconsideration must be reversed and the case remanded for further proceedings.

B. The court erred by entering the order granting plaintiff's motion for summary judgment.

Because the judge abused his discretion by denying the motion for reconsideration of the summary judgment order, the summary judgment itself must be reversed. Dailey and Sparks denied the allegations in the complaint and must be allowed to respond to them with the assistance of counsel. CR 56.

C. In its order regarding plaintiff's request for an award of attorney's fees and costs, the court erred by making finding of fact 14 that 393.7 hours for the State's lead attorney was reasonable.

Finding of fact 14 stated:

> This Court finds 393.7 hours reasonable for Elizabeth J. Erwin for a total of $160,629.60 ($408/hr x 393.7 hours = $160,629.60).

Of those 393.7 hours, Dailey and Sparks objected only to the time Ms. Erwin spent sitting in, and doing nothing else, in their depositions taken by the junior assistant attorney general. (CP 7705). That time amounted to 13.9 hours at $408/hour, or

$5,671.20. (CP 7706). This amount should have been disallowed as the State made no showing her presence was needed at the depositions. *See Berryman v. Metcalf*, 177 Wn. App. 644, 656-66, 312 P.3d 745 (2013), *review denied*, 179 Wn.2d 1026 (2014). In these circumstances, the court abused its discretion. *State v. Ralph Williams N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 314, 553 P.2d 423 (1976).

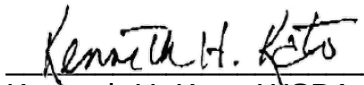
D. In its order regarding plaintiff's request for an award of attorney's fees and costs, the court erred by entering conclusion of law 5 that the lead attorney's attendance at deposition was neither wasted nor duplicative effort when only the junior attorney conducted the deposition.

Again, the State made no showing that Ms. Erwin's attendance was necessary at the depositions of Dailey and Sparks. The junior assistant attorney general ably handled the depositions by himself. Ms. Erwin asked no questions and contributed nothing to the process. There is no indication otherwise. Accordingly, the court abused its discretion by allowing $5,671.20 for attorney fees that were plainly wasted and duplicative effort. *Berryman*, *supra*. The amount should be disallowed from the award.

IV. CONCLUSION

Based on the foregoing facts and authorities, Dailey and Sparks respectfully urge this court to reverse the denial of their motion for reconsideration, the order granting summary judgment, and the award of $5,671.20 attorney fees to the State for Ms. Erwin's attendance at depositions.

DATED this 22nd day of June, 2015.



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CERTIFICATE OF SERVICE

I certify that on June 22, 2015, I served the brief of appellants by email, as agreed, on Kimberlee Gunning at kimberleeg@atg.wa.gov and Natalia Corduneanu at nataliac@atg.wa.gov.