NO. 72423-1-I

**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.,

Defendants.

BRIEF OF RESPONDENT STATE OF WASHINGTON

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I. INTRODUCTION

The superior court found that Appellants/Defendants Janet Sparks and William Dailey violated the Consumer Protection Act (CPA), RCW 19.86, and awarded the State its attorneys' fees and costs. The superior court enjoined Dailey and Sparks from continuing their unfair and deceptive business practices—which victimized numerous senior citizens—and ordered them to pay restitution.

Sparks and Dailey did not challenge the merits of the State's CPA claims, and do not do so now. Rather, the crux of their appeal is their contention that the superior court should have declined to rule on the State's summary judgment motion until they obtained counsel, suggesting that to require *pro se* litigants to oppose a summary judgment motion without the benefit of counsel is reversible error. The superior court rejected that argument, as should this Court. Sparks and Dailey had years to obtain counsel, and failed to do so until *after* the superior court granted the State's summary judgment motion. Even with the benefit of counsel, who filed a motion for reconsideration on their behalf, they still could not show that a continuance of the summary judgment motion would have made any difference to their ability to successfully oppose it.

For the reasons detailed below, the Court should affirm the superior court's well-reasoned and detailed orders granting summary judgment for the State, denying Sparks' and Dailey's motion for reconsideration, and awarding the State its fees and costs.

II. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Court should affirm the superior court's order denying Sparks' and Dailey's motion for reconsideration of the order granting summary judgment for the State because Sparks and Dailey did not meet their burden under CR 59 to show reconsideration was warranted.

2. Whether the Court should affirm the superior court's order granting the State's motion for summary judgment because Sparks and Dailey did not show that there was a genuine issue of material fact precluding summary judgment and did not satisfy the CR 56(f) requirements for granting a continuance of a summary judgment motion.

3. Whether the Court should affirm the superior court's order awarding the State its reasonable attorneys' fees and costs pursuant to RCW 19.86.080(1) because the State was the prevailing party in this action and because the superior court did not abuse its discretion when it concluded that the presence of two attorneys at Sparks' and Dailey's

depositions did not constitute wasted or duplicative efforts and thus, that a fee award that includes fees for both attorneys' time is reasonable.

4. Whether the State should be awarded its reasonable attorneys' fees and costs for this appeal pursuant to RAP 18.1 because the CPA, RCW 19.86.080(1), provides the Court with discretion to award attorneys' fees and costs to a prevailing party.

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background of the State's Investigation and Lawsuit.

The underlying facts are not in dispute. Beginning in 2007, Sparks and Dailey, and their associates,[1] were in the business of selling reverse mortgages, annuities, and living trusts to senior citizens. CP 5. Their business scheme involved making unannounced visits to seniors' homes, offering to provide financial and estate planning services, including reverse mortgage and annuity products that would allegedly improve the seniors' financial status. *Id.* In reality, the financial products and transactions Sparks and Dailey promoted and executed maximized the commissions they received, to the detriment of their senior citizen victims. CP 5-6. As detailed in the superior court's order granting the State's summary judgment motion, Sparks' and Dailey's sales were conducted in an unfair and deceptive manner: they misrepresented their qualifications to

[1] The other defendants are not parties to this appeal.

provide financial advice; they illegally acted as investment advisors, sold insurance, and prepared estate distribution documents without possessing the proper licenses to do so; and they engaged in a myriad of other unfair and deceptive practices. CP 451-53.

The State conducted an extensive, two-year investigation of Sparks' and Dailey's business practices pursuant to the CPA. CP 7701 ¶ 6. The State interviewed approximately 32 witnesses face-to-face and 41 witnesses over the telephone. The State also obtained and analyzed over 55,000 pages of documents. CP 7701 ¶¶ 6-7. Senior Counsel Elizabeth Erwin, an attorney with over 25 years of experience, handled the majority of the investigation. CP 7702 ¶ 10. Once it became clear that Sparks and Dailey (and the other defendants) were not interested in negotiating a settlement, the State filed suit. CP 7701 ¶¶ 3-4; CP 1-20. Assistant Attorney General (AAG) Jason Bernstein joined the litigation team. CP 7702 ¶ 10.

B. Procedural History of the Litigation.

The State filed t in King County Superior Court on July 29, 2013, against multiple defendants, including Sparks and Dailey, and two limited liability companies with which they were associated. CP 1-20. The State alleged that the defendants violated the CPA and the Washington Estate Distribution Documents Act, RCW 19.295.030, violations of which are

per se violations of the CPA. CP 11-19. A default judgment was entered against two of the other individual defendants. CP 38-39. Sparks, Dailey, and the LLCs (acting through Dailey as their managing member) filed *pro se* answers to the complaint, but did not allege any affirmative defenses. CP 58-64, CP 65-71, CP 72-78.

The State served Dailey with a deposition notice on February 27, 2014, CP 122, and his deposition was set for March 21, 2014. CP 148 ¶ 4. Sparks was served with a deposition notice on March 1, 2014, CP 123, and her deposition was set for March 28, 2014. CP 158 ¶ 4. Despite receiving three weeks' notice of their depositions, Sparks and Dailey waited until March 19, 2014, two days before the date Dailey's deposition was noted, to move for an order continuing their depositions for 60 days to permit them to obtain counsel. CP 144-53; CP 15-63. They represented they were "actively seeking representation" and filed declarations detailing their attempts to obtain pro-bono or reduced-fee assistance. CP 147-49, CP 157-59. The superior court denied the motions to continue the depositions, noting that Sparks and Dailey had no constitutional right to counsel in this case and that while their declarations stated they had been seeking *pro bono* counsel since the case was filed, there was nothing in their declarations "that suggests any change in circumstances, such as promising leads or improving finances, will occur to enable them to retain

an attorney in the next sixty days." CP 164-66. The State deposed Sparks and Dailey. CP 224 ¶¶ 5-6.

After their depositions, the State provided Sparks and Dailey with three months' advance notice of the hearing on the State's motion for summary judgment. CP 168. The notice was filed on April 17, 2014, setting a July 25 hearing date for the summary judgment motion. A month and a half later, on June 3, 2014, AAG Bernstein received a call from attorney Kenneth Kato, who said he was considering representing Sparks and Dailey and asked Bernstein about the date for the summary judgment hearing.[2] CP 435 ¶ 2. Mr. Kato explained that he had not yet agreed to represent Sparks and Dailey, but that if he did agree, he would call back and make an official appearance. *Id.*

The State timely filed its summary judgment motion on June 27, 2014. CP 197-222. On July 14, the day their response to the summary judgment motion was due, Sparks and Dailey filed motions to continue the summary judgment motion, explaining that they were "now retaining counsel" and that a continuance would allow them to "complete retaining counsel" and permit their attorney "to file with the court confirming representation as well as prepare for the hearing." CP 409-11; 414-16. They argued that attending the summary judgment hearing "without

[2] Kato is Appellants' counsel of record.

benefit of counsel would irreparably compromise [their] defense(s) in this action." CP 411; 416. *Id.* But, their motions for a continuance did not identify any genuine issues of material fact that necessitated a continuance, and did not cite CR 56(f). CP 409-11; 414-16.

Sparks and Dailey appeared at the summary judgment hearing *pro se*, and told the superior court Judge Ken Schubert, that "[w]e are represented, he just has not made a notice of appearance yet" and stating that Mr. Kato "spoke to Mr. Bernstein this morning to assure him that he was representing us and that he would be filing a notice of appearance next week." RP 4:22-5:2. As AAG Bernstein explained to the court, however, Mr. Kato had called him that morning and said that he was "[w]orking on representation and he would call [Bernstein] if he was going to appear." RP 5:4-15. Bernstein clarified that Mr. Kato had told him that he could represent to the superior court that Sparks and Dailey were talking with Mr. Kato about representing them, but that no fee agreement had been signed and that Mr. Kato would not file a notice of appearance until a fee agreement was signed. RP 5:4-6:5.

The judge told Dailey and Sparks that there was "nothing in front of [the] court that indicates that you are represented, or that [Mr. Kato] has agreed to represent you" and noted that "there is a significant difference to me between talking to an attorney, trying to retain an attorney, and

actually retaining an attorney." RP 6:13-15, RP 7:10-12. The judge explained that there is no constitutional right to counsel in this type of civil case, and that the court would proceed to hear argument on the summary judgment motion. RP 8:14-9:1. Noting that Sparks and Dailey had not submitted any sworn statements in opposition to the summary judgment motion, the court provided Sparks and Dailey the opportunity to present argument at the hearing. RP 23:10, RP 25:2. In response, Dailey stated, "I am not allowed to talk" and Sparks declined to argue in response to the summary judgment motion either, stating "[w]e'll just have to let this be granted and deal with it after the citation [sic]." RP 25:1-26:11.

After denying the motion for a continuance, RP 8:14-24, and hearing the State's arguments, the court granted summary judgment for the State, finding that Sparks and Dailey had violated the CPA on multiple grounds, including a *per se* violation based on violation of the Estate Distribution Documents Act, held an injunction was proper, and also held that the State had demonstrated that it was appropriate to order Sparks and Dailey to pay $29,125 in consumer restitution. RP 27:15-22. Finally, the court held that the State was entitled to its reasonable attorney fees under the CPA, and invited the State to submit a fee declaration and request for fees, including a record of the time spent on specific tasks and hourly rates. RP 27:15-29:13. The court explained that Sparks and Dailey could

oppose the request for fees, and the procedure for doing so. RP 28:19-29:24. The Court entered a written order detailing the CPA violations and the practices enjoined. CP 449-58.

Noting that he "ha[d] been in discussions the past several months with William Dailey and Janet Sparks as to the possibility of my being retained as their counsel in this action[,]" Mr. Kato filed a notice of appearance as counsel for Sparks and Dailey and a motion for reconsideration a week after the Court granted the State's summary judgment motion. CP 461-62; 466-70; 472 ¶ 2. He stated that at the time of the summary judgment hearing he "had not yet been formally retained by Dailey and Sparks, but did fully expect to be hired by them in the week following the hearing" and was not actually hired until after the summary judgment order had been entered. CP 472 ¶¶ 3-4. In the motion for reconsideration, Sparks and Dailey argued that the court abused its discretion by denying the motion for continuance and "by granting summary judgment against pro se litigants." CP 469.

The superior court denied the motion for reconsideration, finding that Sparks and Dailey failed to satisfy the requirements for seeking a CR 56(f) continuance. CP 4000-01. The court also explained that "[c]ontinuing a hearing based on nothing more than the non-moving party's expectation of being able to retain counsel sometime after that

hearing would provide no recourse in the event that party failed to retain counsel and would not result in the just, speedy, and inexpensive determination of the action." CP 4002. Sparks and Dailey appealed the court's summary judgment order and the order denying the motion for reconsideration. CP 4004-23.

The State moved for an award of attorneys' fees and costs, submitting voluminous records of the time spent investigating and litigating this case. CP 7647-703. After reducing the fee award request for clerical work performed by professional staff, the superior court held that the State's fees were appropriate. CP 7721-30. The Court also reduced the amount the State requested in costs, finding that an award of all deposition costs was inappropriate as only certain pages of the transcripts were submitted to the Court. CP 7725. In response to an argument by Sparks and Dailey that awarding fees for two attorneys' presence at their depositions was unreasonable, the court held that "[g]iven the complexity of legal matters in a Consumer Protection action, the collaboration and work of two attorneys for [the State] was reasonable." CP 7726. Because Senior Counsel Erwin was the lead attorney in the case, her presence at Sparks and Dailey's depositions "does not constitute wasted or duplicative efforts." CP 7726-27. The court awarded the State $407,471.09 in fees and costs. CP 7729.

IV. ARGUMENT

This Court can affirm the superior court's orders based on any theory established by the pleadings and supported by the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989). As argued below, the record in this case demonstrates that the State is entitled to summary judgment as a matter of law, and the superior court did not abuse its discretion in denying Sparks and Dailey's motion for reconsideration and in awarding the State its attorneys' fees.

A. The Superior Court Properly Granted Summary Judgment to the State.

At no point in the litigation, whether proceeding *pro se*, or later, when they retained counsel and filed a motion for reconsideration, did Sparks and Dailey comply with the requirements of the Civil Rules or meet their burdens thereunder. They did not meet their burden under CR 59 to show reconsideration of the summary judgment order was warranted. They did not attempt to meet CR 56's requirement that a party opposing a motion for summary judgment show that there is a genuine issue of material fact or even reference CR 56(f)'s requirements for obtaining a continuance of a summary judgment motion. Their only response to the State's summary judgment motion, and their only argument in their motion for reconsideration, was that they should not be

required to respond to a summary judgment motion before they retained counsel. And even when they retained an attorney, they repeated the same arguments.

1. The Court Should Affirm the Superior Court's Order Denying Reconsideration of the Summary Judgment Order Because Sparks and Dailey Did Not Meet Their Burden Under CR 59 to Show Reconsideration Was Warranted.

A trial court's denial of a CR 59 motion for reconsideration is reviewed for abuse of discretion. *West v. Department of Licensing*, 182 Wn. App. 500, 516, 331 P.3d 72 (2014). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons." *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). A decision is "manifestly unreasonable" if, given the facts and applicable legal standard, "it is outside the range of acceptable choices." *Id.*

CR 59 provides several grounds for reconsideration of a trial court's order. Here, Sparks and Dailey based their motion for reconsideration on CR 59(a)(1) and CR 59(a)(9). CP 468. As shown below, they failed to satisfy either standard.

CR 59(a)(1) provides a trial court with discretion to reconsider a prior order when there is "[i]rregularity 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." CR 59(a)(1); *Edwards v. Le Duc*, 157 Wn. App 455, 459-60, 238 P.3d 1187 (2010). In their motion for reconsideration, Sparks and Dailey contended that they were not afforded "a meaningful opportunity to be heard" on the State's motion for summary judgment because the court denied their request to continue a hearing until they had retained counsel.[3] CP 469. They further argued that the summary judgment order was essentially a "default judgment" even though they had answered the complaint and denied the allegations.[4] CP 469. As a result, they argued they were "prevented from having a fair hearing," and that reconsideration under CR 59(a)(1) was appropriate. CP 469-70.

While "irregularity" for purposes of CR 59(a)(1) can include a trial court's failure to treat the parties fairly, the court must be mindful of its obligation to "hold pro se parties to the same standards to which it holds attorneys." *Edwards*, 157 Wn. App. at 460; *see also Westberg v. All-Purpose Structures, Inc.*, 86 Wn. App. 405, 411, 936 P.2d 1175 (1997)

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[3] In their motion for reconsideration, Sparks and Dailey made much of the fact that the superior court did not enter a written order on their motions for a continuance and claimed that the motions were "not decided and the [Superior] Court's reasons are not apparent in the record." CP 469. The court acknowledged that a written order on the motions for a continuance was not filed, but noted that at the summary judgment hearing, the court "inform[ed] Defendants that it was denying their motion for a continuance, and explained that it provided an oral ruling so they would understand its reasons for doing so." CP 3999. This is reflected in the hearing transcript. *See* RP at 6:6 - 8:24.

[4] Sparks and Dailey filed answers to the State's complaint, denying the allegations, but they did not plead any affirmative defenses. CP 58-64, CP 72-78.

(explaining that "pro se litigants are bound by the same rules of procedure and substantive law as attorneys"). Pro se parties are not entitled to "special favors" from the court. *In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993). As the *Edwards* court explained,

> We acknowledge that trial courts have a difficult job of overseeing and conducting a trial fairly and efficiently, especially with those representing themselves, but the trial court must, above all, remain impartial....[T]he trial court must treat pro se parties in the same manner it treats lawyers.

Id. at 464 (citing *Westberg*, 86 Wn. App. at 411).

Here, the superior court allowed Sparks and Dailey multiple opportunities to be heard and to make their record, including the opportunity to present argument at the summary judgment hearing, but Sparks and Dailey did not do so. RP 23:10-25:2. But Dailey stated on the record that he was "not allowed to talk," and Sparks told the court that "[w]e'll just have to let this [summary judgment motion] be granted and deal with it after the citation [sic]." RP 25:1-26:11. Indeed, had the superior court treated Sparks and Dailey differently because they were proceeding pro se, that preferential treatment *could* constitute grounds for reconsideration under CR 59(a)(1). *See Edwards*, 157 Wn. App. at 460-63 (holding trial court abused its discretion in denying CR 59(a)(1) motion because the court "overstep[ped] the bounds of impartiality" by assisting

pro se plaintiff in laying foundation for testimony, questioning witnesses, and responding to objections).

Nor did Sparks and Dailey provide the superior court with a valid basis for granting reconsideration under CR 59(a)(9). Under that rule, a motion for reconsideration may be granted if "substantial justice has not been done." CR 59(a)(9). Granting a motion for reconsideration under CR 59(a)(9) "should be rare, given the other broad grounds available under CR 59." *Lian v. Stalick*, 106 Wn. App. 811, 825, 25 P.3d 467 (2001). In their motion for reconsideration, Sparks and Dailey essentially repeated the same arguments with respect to CR 59(a)(9) as they did with respect to CR 59(a)(1). They claimed that "substantial justice has not been done as the court abused its discretion by refusing to continue the hearing and by granting summary judgment against pro se litigants, who were unable to secure counsel until now." CP 469 (citing CR 59(a)(9)). Their arguments fail for the same reason set forth above: the mere fact that they were *pro se* litigants does not mean they are entitled to different treatment at the summary judgment stage. Further, as argued below, the superior court correctly determined that Sparks and Dailey had not satisfied the CR 56(f) requirements for a continuance of the summary judgment motion.

On appeal, Sparks and Dailey now argue that the superior court abused its discretion when it denied the motion for reconsideration because the court "indicat[ed] counsel should have engaged in unethical conduct to obtain a continuance of the summary judgment motion." Br. of Appellants at 1-2. Specifically, Sparks and Dailey claim that the trial court judge stated on the record that to secure a continuance, an attorney – in this case, Mr. Kato – should have filed a notice of appearance before the attorney agreed to represent them, in violation of RPC 1.2(f). *Id.* at 6.

As a threshold matter, this argument was not preserved for appeal because Sparks and Dailey did not raise it in the trial court. *See Silverhawk, LLC v. KeyBank Nat'l Ass'n*, 165 Wn. App. 258, 265, 268 P.3d 958 (2011) (explaining arguments not raised in the trial court "cannot be raised for the first time on appeal"). Because Sparks and Dailey did not argue below that the superior court "suggested" that their counsel engage in an "unauthorized and unethical" act "to secure a continuance," this Court should not consider this argument.

Second, even if the Court chooses to consider Sparks and Dailey's claim that the superior court's actions were "unethical," the Court should reject this argument because it mischaracterizes the record. Sparks and Dailey claim that at the hearing, the superior court stated that their 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." Br. of Appellants at 3-4 (citing RP 6). The superior court made no such statement. Rather, the court noted that there was nothing in the record "that indicates that [Sparks and Dailey] are represented, or that [Mr. Kato] has agreed to represent [them]." RP 6:13-15. The court further stated that "the standard way" counsel makes an appearance "at this stage in the game is a Notice of Appearance," and explained that "nothing has been filed in this case that indicates that he - - that someone has agreed to represent [Sparks and Dailey] in this matter." RP 6:18-21. As the court correctly noted, "there is a significant difference...between talking to an attorney, trying to retain an attorney, and actually retaining an attorney." RP 7:10-12. At no point did the superior court indicate or require that Mr. Kato, or any other attorney, should file a notice of appearance *before* the attorney was actually retained. *See* RP 6:7-7:25.

Sparks and Dailey further challenge the superior court's order on the motion for reconsideration as "patently offensive," claiming that: "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." Br. of Appellants at 7. But the written order contains no such statement. *See generally* CP 3996-4003. Rather,

the superior court explained that if Sparks and Dailey had indeed retained counsel, as Sparks claimed, *see* RP 4:22-5:2, "[t]hat attorney could have easily provided notice of his appearance *before* the hearing but failed to do so." CP 3996. In the absence of a notice of appearance of counsel, the superior court could not, and did not, assume that Sparks and Dailey were represented. And based on Sparks and Dailey's representations months before when they requested a continuance of their depositions that they were in the process of obtaining counsel, and their subsequent failure to do so, it would be reasonable for the superior court to deny a request to continue the summary judgment hearing. As the superior court explained:

> Continuing a hearing based on nothing more than the non-moving party's expectation of being able to retain counsel sometime after that hearing would provide no recourse in the event that party failed to retain counsel and would not result in the just, speedy, and inexpensive determination of the action.

CP 4002.

Finally, Sparks and Dailey erroneously contend that the superior court's decision to deny the motion for reconsideration was based solely on their counsel's failure to file a notice of appearance before he was retained. Br. of Appellants at 8. However, the record is very clear: the superior court denied their request for a continuance because Sparks and Dailey failed to comply with CR 56(f), as argued below, when they sought

a continuance of the summary judgment hearing, *and* because their counsel similarly failed to comply with CR 56(f) when he appeared on their behalf after the hearing and filed the motion for reconsideration and a supporting declaration. CP 4000-01.

2. Summary Judgment Was Proper Because There Are No Genuine Issues of Material Fact and Sparks and Dailey Did Not Satisfy the CR 56(f) Requirements for Granting a Continuance.

An order granting summary judgment is reviewed de novo. *Weden v. San Juan Cnty.*, 135 Wn.2d 678, 689, 958 P.2d 273 (1998). The order may be affirmed "on any grounds supported by the record." *Lewark v. Davis Door Servs., Inc.*, 180 Wn. App. 239, 242, 321 P.3d 274 (2014).

Summary judgment is appropriate when no issue of material fact exists and only questions of law remain to be determined. *State Farm Ins. Co. v. Emerson*, 102 Wn.2d 477, 480, 687 P.2d 1139 (1984). "[A]n adverse party may not rest upon the mere allegations or denials of a pleading[.]" CR 56(e). Rather, a response to a summary judgment motion "must set forth *specific facts* showing that there is a genuine issue for trial." *Id.* (emphasis added); *Young v. Key Pharm.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

If the non-moving party cannot meet its burden to "present by affidavit facts essential to justify the party's opposition," CR 56(f)

provides the trial court with discretion to continue a motion for summary judgment to permit the party opposing summary judgment to obtain declarations, take depositions, or conduct other discovery as necessary. CR 56(f); *Ernst Home Ctr., Inc. v. United Food & Commercial Workers Int'l Union, AFL-CIO, Local 1001*, 77 Wn. App. 33, 48-49, 888 P.2d 1196 (1995). However, "[v]ague, wishful thinking is not enough to justify a continuance." *Molsness v. City of Walla Walla*, 84 Wn. App. 393, 401, 928 P.2d 1108 (1996) (affirming order denying motion for a continuance because plaintiff "was unable to explain specifically what evidence would be obtained by additional discovery, or even to speculate as to the identity of persons whose depositions would establish a genuine factual issue"). Accordingly, a trial court may deny a CR 56(f) motion for a continuance if the moving party (1) "does not offer a good reason for the delay in obtaining the desired evidence"; (2) "does not specify the evidence that would be obtained through additional discovery"; or (3) "the desired evidence will not raise a genuine issue of material fact." *Tellevik v. Real Prop. Known as 31641 West Rutherford St.*, 120 Wn.2d 68, 90, 838 P.2d 111 (1992) (internal citations and marks omitted).

On appeal, Sparks and Dailey contend the superior court erred in granting the State's summary judgment motion on two grounds. First, they argue that the Court must reverse the order granting summary

judgment for the State "[b]ecause the [trial court] judge abused his discretion by denying the motion for reconsideration of the summary judgment order." Br. of Appellants at 9. Second, Sparks and Dailey claim that the order granting the State's summary judgment motion should be reversed because they "denied the allegations in the complaint and must be allowed to respond to them with the assistance of counsel." *Id.* The only authority Sparks and Dailey cite in support of this argument is CR 56. This Court should reject these arguments.

First, as argued above, denial of the motion for reconsideration was a proper exercise of the superior court's discretion. Second, merely filing an answer denying allegations in a complaint—whether a party is proceeding *pro se* or is represented by counsel—is not sufficient grounds to successfully oppose a motion for summary judgment. *See* CR 56(e).

Furthermore, Sparks and Dailey provide no authority to support their argument that as *pro se* litigants they could successfully oppose a summary judgment motion by stating that they were not represented by counsel and could not properly respond to the motion until counsel was retained. When a party cites to no authority, courts will presume it has found none. *King Cnty. v. Seawest Inv. Assoc., LLC*, 141 Wn. App. 304, 317, 170 P.3d 53 (2007). Indeed, issues cannot even be considered "absent argument and citation to legal authority." *Id.*; *see also Lilly v.*

Lynch, 88 Wn. App. 306, 320-21, 945 P.2d 727 (1997) ("Assignments of error that are not supported by citations to authority will not be considered on appeal").

It is well established that *pro se* litigants *must* comply with the same procedural rules and substantive law as attorneys. *See Westberg*, 86 Wn. App. at 411; *Edwards*, 157 Wn. App. at 460. And it is undisputed that Sparks and Dailey failed to rebut any of the State's legal arguments. They did not file briefs responding to the State's summary judgment motion and, when provided the opportunity at the hearing to present argument, they declined to do so. RP 23:10-26:11. As a result, Sparks and Dailey did not meet their burden to show there was a genuine issue of material fact precluding summary judgment.

Sparks' and Dailey's only response to the motion for summary judgment was the motions for a continuance they filed before the summary judgment hearing, which asked the superior court to continue the summary judgment motion to allow them to "complete retaining counsel" and allow an attorney, once retained, "to file with the court confirming representation as well as prepare for the hearing." CP 409-13; 414-21; 443-45; 446-48.

But, as the superior court explained at length in the order denying the motion for reconsideration, neither Sparks' and Dailey's declarations

submitted with their motions for a continuance nor their attorney's declaration filed with the motion for reconsideration even referred to CR 56(f), much less attempted to satisfy the rule's requirements. CP 4000-01. Indeed, Sparks and Dailey do not even refer to CR 56(f) in their opening appellate brief, a surprising omission given the superior court's order on the motion for reconsideration discussed CR 56(f) at length. The issues they raise pertaining to their assignments of error do not challenge the superior court's findings as to CR 56(f). Br. of Appellants at 1-2. Addressing CR 56(f) in their reply brief "is too late to warrant consideration" by the Court. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration").

In any case, the superior court properly found that Sparks and Dailey did not satisfy any of the three grounds supporting a CR 56(f) continuance. CP 3996-4003. They did not specify the evidence they needed to oppose the summary judgment motion and why that evidence was relevant. CP 409-13; 414-21; 443-45; 446-48. Nor does the declaration filed by their attorney after he appeared and filed the motion for reconsideration refer to the need for discovery to obtain declarations and documents relevant to any genuine issue of material fact. CP 471-73.

Indeed, Sparks and Dailey conducted no discovery in the case and never explained why they failed to do so. CP 430.

Sparks and Dailey argued that the "thousands of pages" the State submitted with its summary judgment motion supported their request for a continuance, because they needed time to review the documents. CP 410; 418. However, as Sparks and Dailey admitted, 90-95 percent of the documents submitted were from their own business records. CP 444; 447.

In addition, Sparks and Dailey had three months' advance notice of the State's summary judgment hearing date. CP 168. Sparks and Dailey had answered the complaint. CP 58-64; 72-78. They had been put on notice when the court ruled on their motions to continue their depositions that they did not have a right to counsel and that as *pro se* litigants, they could not use their unrepresented status to put the litigation on hold until they obtained counsel. CP 164-66.

Sparks and Dailey did not meet their burden under CR 56(f) to demonstrate why they needed a continuance to obtain the discovery and declarations necessary to oppose the State's summary judgment motion. Based on the record below, the superior court did not abuse its discretion when it denied their motion for a CR 56(f) continuance, nor did it err as a matter of law when it granted the State's summary judgment motion.

B. The Court Should Affirm the Superior Court's Order Awarding the State Its Reasonable Attorneys' Fees and Costs.

In a CPA enforcement action brought by the State, the court has discretion to award the prevailing party the costs of the action, including a reasonable attorneys' fee. RCW 19.86.080(1); *State v. Ralph Williams' Nw. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 314–15, 553 P.2d 423 (1976). The purpose of such awards is to encourage an active role in the enforcement of the Consumer Protection Act, which "shall be liberally construed that its beneficial purposes may be served." *Ralph Williams'*, 87 Wn.2d at 315 (citing RCW 19.86.920). Awarding attorneys' fees to the State places the substantial costs of enforcement proceedings on the violators of the act and lessens the burden on public funds. *Id.*

To determine a "reasonable" attorneys' fee, the court must determine the number of hours reasonably expended and the claimant's customary billing rate, which are then multiplied to determine the "lodestar." *See Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597-98, 675 P.2d 193 (1983).

In support of its motion for attorneys' fees and costs, the State submitted detailed time records for the attorneys, investigators, and paralegals involved in the State's investigation and enforcement action. CP 7700-03 (fee declaration); 7653-99 (time records). The State's counsel

also submitted a declaration explaining the chronology of the case, the background and qualifications of each attorney and staff person who worked on the case, and the role each played in the investigation and litigation. CP 7700-03. Senior Counsel Erwin handled the majority of the investigation and drafted the complaint, and AAG Bernstein handled discovery and motion practice in the litigation. CP 7702 ¶ 10.

The superior court's order on the State's request for attorneys' fees and costs reflects that the court carefully reviewed the time records and other information the State submitted in support of its fee request. CP 7721-30. For example, in the Findings of Fact, the court found certain costs and fees were *not* recoverable, such as time entries for tasks the court determined were clerical in nature. CP 7725-26. Of the $424,197.25 the State sought in fees and costs, *see* CP 7703, the superior court awarded $407,471.09. CP 7729.

On appeal, Sparks and Dailey challenge the superior court's Finding of Fact 15,[5] where the court found that 393.7 hours were reasonable for Senior Counsel Erwin, "the State's lead attorney," and Conclusion of Law 5, where the court concluded that Senior Counsel Erwin's attendance at Sparks and Dailey's depositions, which were

[5] The State assumes Sparks and Dailey meant to assign error to Finding of Fact 15, which concerns Senior Counsel Erwin's hours, rather than Finding of Fact 14, which finds Assistant Attorney General Bernstein's hours reasonable. CP 7724.

conducted by AAG Bernstein, "does not constitute wasted or duplicative efforts." Br. of Appellants at 1. Citing *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745, *review denied*, 179 Wn.2d 1026 (2014), Sparks and Dailey argue the superior court abused its discretion when it awarded fees for the 13.9 hours Senior Counsel Erwin spent attending their depositions "as the State made no showing her presence was needed at the depositions." *Id.* at 10.

Berryman is distinguishable on two grounds. First, it was a "minor soft tissue injury case" arising from a car accident. *Berryman*, 177 Wn. App. at 650. The Court found that the trial court abused its discretion when it awarded "nearly $292,000" in an "unexceptional case"—a case where the Court concluded that the plaintiff's attorneys "demonstrated a lack of billing judgment when they fashioned a claim for almost $292,000 in attorney fees out of a run-of-the-mill minor injury case." *Id.* at 650, 661. Indeed, "[t]he case had previously been prepared for and taken through an arbitration, the fault of the uninsured drivers was conceded before trial, [and] the witnesses gave ordinary testimony typical of such cases." *Id.* at 661.

In contrast to *Berryman*, the State's complex CPA enforcement action was not a "run-of-the-mill case." It involved an investigation that lasted over two years and included approximately 41 telephone and 32

face-to-face interviews of consumers, as well as review of over 55,000 pages of documents. CP 7701 ¶ 6. The complexity of the case is further illustrated by the detailed opinion of the State's expert, Neil Granger, which sets forth the detailed and multifaceted financial fraud perpetrated by Sparks and Dailey. CP 1108-1252. Under these circumstances, the superior court did not abuse its discretion when it concluded that "[g]iven the complexity of legal matters in a Consumer Protection action, the collaboration and work of two attorneys for [the State] was reasonable." CP 7726-27. As the court further explained, "[a]s the attorney who handled the majority of the investigation, Senior Counsel Erwin's presence at depositions does not constitute wasted or duplicative efforts." *Id.* Indeed, in complex cases involving thousands of documents and dozens of transactions, it is not unusual for two attorneys to collaborate and strategize together, including off the record during a deposition.

Berryman is also distinguishable because, as that court explained, the trial court's findings and conclusions regarding fees in that case were "conclusory" and "[t]here is no indication that the trial judge actively and independently confronted the question of what was a reasonable fee." *Berryman*, 177 Wn. App. at 658. Indeed, the *Berryman* court could not determine from the record whether "the trial court considered any of [the defendant's] objections to the hourly rate, the number of hours billed, or

the multiplier." *Id.* Rather, the trial court "simply accepted, unquestionably, the fee affidavits from counsel." *Id.* Here, unlike the trial court in *Berryman*, the superior court made detailed Findings of Fact and Conclusions of Law in the order awarding the State attorneys' fees and costs. CP 7721-30. The Court should affirm the superior court's order awarding the State its reasonable attorneys' fees and costs.

With respect to the superior court's fee award, the record makes clear that the superior court carefully considered the detailed time records the State submitted with its fee motion, the applicable law, and the specific facts of this case before entering its findings of fact and conclusions of law, including the finding and conclusion supporting the decision to award fees for all time incurred by Senior Counsel Erwin. Sparks and Dailey provide no reasoned argument to counter that finding and conclusion.

C. The Court Should Award the State Attorney Fees and Costs Incurred in this Appeal.

A prevailing party is entitled to attorneys' fees and costs on appeal if requested in the party's opening brief and if "applicable law grants to a party the right to recovery." RAP 18.1(a)-(b). The CPA provides the Court with discretion to award the State reasonable fees and costs as the prevailing party. RCW 19.86.080(1). This includes fees and costs incurred in connection with an appeal of a CPA action. *See State v. Kaiser*, 161

Wn. App. 705, 726, 254 P.3d 850 (2011) (awarding fees on appeal to the State in a CPA action). As argued above, awarding attorneys' fees and costs to the State in a CPA case minimizes the burden on public funds by shifting the considerable costs of an enforcement action to the persons who violated the CPA. *Ralph Williams'*, 87 Wn.2d at 314-15.

Pursuant to RAP 18.1(b), the State respectfully requests the Court exercise its discretion and award the State its reasonable attorneys' fees and costs on appeal. Should the Court grant the State's fee and cost request, the State will file an affidavit detailing the fees and costs incurred, as required by RAP 18.1(d).

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V. CONCLUSION

The Attorney General respectfully requests that the Court affirm the superior court's orders granting summary judgment for the State and denying Sparks and Dailey's motion for reconsideration, and award the State its reasonable attorneys' fees and costs pursuant to RAP 18.1.

RESPECTFULLY SUBMITTED this 7th day of August, 2015.

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CERTIFICATE OF SERVICE

I certify that on the 7th day of August, 2015, I caused a true and correct copy of respondent's brief to be filed with the Court, via electronic filing, and caused to be served, via email, as agreed by parties, on Kenneth H. Kato at khkato@comcast.net.

Natalia Corduneanu
Paralegal