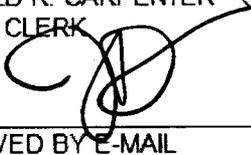


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Supreme Court No. 92844-4

Court of Appeals No. 72423-1-I

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent,

v.

WILLIAM DAILEY et ux., and JANET SPARKS et ux.,

Petitioners,

DEBORAH A. HIGGINS, et al.,

Defendants.

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**ANSWER OF RESPONDENT STATE OF WASHINGTON TO  
PETITION FOR REVIEW**

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 ORIGINAL

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## I. INTRODUCTION

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

At no point in these proceedings have Dailey and Sparks challenged the merits of the State's CPA claims. Rather, Dailey and Sparks appealed only the superior court's denial of their request to continue the summary judgment hearing, and the court's award of attorneys' fees to the State.<sup>1</sup> The Court of Appeals' unpublished decision affirmed the superior court on all grounds. *State of Wash. v. Dailey*, No. 72423-1-I, slip op. at 1 (Wash. Ct. App., Div. I, Jan. 11, 2016).

Dailey and Sparks now seek discretionary review. However, they fail to specify any appellate decisions that conflict with the Court of Appeals' detailed and well-reasoned opinion and do not even attempt to create the appearance of a conflict. Indeed, no such conflict exists. The

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<sup>1</sup> Dailey and Sparks include their challenges to the superior court's order on attorneys' fees and costs in the Petition's "Issues Presented for Review," *see* Pet. for Review at 1-2, but provide no argument as to why the Court should accept review of the fee issues. Accordingly, the State's Answer to the Petition will address only whether discretionary review of the Court of Appeals' decision on the motion for a continuance is warranted under RAP 13.4(b).

Court of Appeals applied established Washington law to the facts and circumstances of the case, and properly concluded that the superior court had not abused its discretion. Nor does Dailey and Sparks' Petition involve an issue of substantial public interest. Their insistence that the superior court acted unethically is based on a characterization of the superior court's conduct that the Court of Appeals correctly rejected, based on its review of the record. Review should be denied.

## **II. COUNTERSTATEMENT OF THE ISSUES**

As explained in Section IV below, Dailey and Sparks have not met the RAP 13.4 criteria for review and this Court should deny review. However, if the Court were to grant review, the issues would be:

1. Whether the Court should affirm the superior court's order denying Dailey and Sparks' motion for reconsideration of the order granting the State's summary judgment motion because they 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 Dailey and Sparks 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.

### III. COUNTERSTATEMENT OF THE CASE

#### A. The State's Consumer Protection Investigation and Lawsuit.

Dailey and Sparks and their non-party associates 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 the superior court held, Dailey and Sparks' sales were conducted in an unfair and deceptive manner: they misrepresented their qualifications to 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 Dailey and Sparks' business practices pursuant to the CPA. CP 7701 ¶ 6. The State interviewed over 70 witnesses and analyzed over 55,000 pages of documents. CP 7701 ¶¶ 6-7. On July 29, 2013, the State sued Dailey and

Sparks for violating the CPA and the Washington Estate Distribution Documents Act, RCW 19.295.030, violations of which are *per se* violations of the CPA. CP 7701 ¶¶ 3-4; CP 1-20. The State's attorneys were Senior Counsel Elizabeth J. Erwin, who handled the majority of the investigation and Assistant Attorney General (AAG) Jason Bernstein. CP 7702 ¶ 10.

**B. Procedural History**

Appearing *pro se*, Sparks and Dailey answered the complaint and denied the allegations. CP 58-64, CP 72-78. On February 27, 2014, the State served Dailey with a deposition notice, noting his deposition for March 21, 2014. CP 148 ¶ 4. Sparks was served with a deposition notice on March 1, 2014, noting her deposition for March 28, 2014. CP 158 ¶ 4.

On March 19, 2014, Dailey and Sparks moved for a 60 day continuance of their depositions so they could find counsel. CP 144-53; CP 154-63. They submitted declarations stating that they were appearing *pro se* due to "insufficient funds" and detailing their ongoing attempts to find an attorney. CP 147-49; CP 157-59. The superior court denied Dailey and Sparks' motions, noting that "because more than six months have passed without [D]ailey or Sparks being able to find an attorney – despite actively looking – and because there is no indication that their situation will improve, continuing their depositions for sixty days will not

change anything.” CP 166. Thereafter, the State took the depositions. CP 224 ¶¶ 5-6.

On April 22, 2014, the State filed a notice for a summary judgment hearing scheduled for July 25, 2014. CP 168. Six weeks later, on June 3, 2014, attorney Kenneth Kato contacted AAG Bernstein and stated that he was “considering” representing Dailey and Sparks but “had not yet agreed” to do so. CP 435 ¶ 2.

The State filed its summary judgment motion on June 27, 2014. CP 197-222. On July 14, the day their response brief was due, Dailey and Sparks moved to continue the summary judgment hearing for two months, stating 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, CP 414-16. Their motions for a continuance did not identify any genuine issues of material fact they believed necessitated a continuance and did not cite CR 56(f). *Id.*

Dailey and Sparks appeared at the summary judgment hearing *pro se* and Sparks told the superior court that “[w]e are represented, he just has not made a notice of appearance yet” and that Kato had called AAG Bernstein that morning “to assure [Bernstein] that [Kato] was representing us and that [Kato] would be filing a notice of appearance next week.” RP

4:22-5:2. However, Bernstein responded that Kato had told him that morning that he was “[w]orking on representation and he would call [Bernstein] if he was going to appear.” RP 5:4-15. Bernstein explained that Kato had told him he could represent to the court that Dailey and Sparks were talking to Kato about representing them but that he did not yet do so. RP 5:4-6:5.

The superior court denied the continuance, noting 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 explaining that “there is a significant difference to [the court] between talking to an attorney, trying to retain an attorney, and actually retaining an attorney.” RP 6:13-15, RP 7:10-12, RP 8:14-24. Noting that Dailey and Sparks had not filed a response to the summary judgment motion, the court permitted them to present argument at the hearing. RP 23:10, RP 25:2. Dailey, however, responded, “I am not allowed to talk” and Sparks stated, “[w]e’ll just have to let this be granted and deal with it after the citation [sic].” RP 25:1-26:11. The superior court granted summary judgment for the State, finding that Dailey and Sparks had violated the CPA, that an injunction was proper, ordering them to pay \$29,125 in consumer restitution and held that the State was entitled to its fees and costs under the CPA. RP 27:15-29:13; CP 449-58.

On August 1, 2014, Kato filed a notice of appearance on behalf of Dailey and Sparks as well as a motion for reconsideration of the summary judgment order. CP 461-62; 466-70. He admitted he “was not formally retained until after the hearing and entry of the summary judgment order” but argued that the superior court abused its discretion in denying a continuance because Dailey and Sparks had “made a good faith effort to retain an attorney before a response was due” and ultimately did so, “albeit after summary judgment was entered.” CP 467. The superior court denied the motion for reconsideration, finding that neither Dailey nor Sparks “nor their new attorney” failed to satisfy the requirements for 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.<sup>2</sup>

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<sup>2</sup> After the superior court denied Dailey and Sparks’ motion for reconsideration, it granted the State’s motion for attorneys’ fees and costs, over Dailey and Sparks’ objections to the amount of fees awarded for, among other things, two attorneys’ presence at their depositions. CP 7721-7730. On appeal, Dailey and Sparks unsuccessfully challenged the order granting attorneys’ fees and costs. Slip op. at 8-9.

The Court of Appeals held that the superior court did not abuse its discretion, affirmed the court's orders on all grounds and awarded the State its fees and costs incurred on appeal. Slip. op. at 9.

#### IV. REVIEW SHOULD BE DENIED

**A. Dailey and Sparks Fail To Identify Any Conflict Between the Court of Appeals' Decision and Any Other Appellate Decision and There Is No Such Conflict.**

Dailey and Sparks have not met their burden under RAP 13.4(b)(1) and (2) to show that the Court of Appeals' decision conflicts with any decision of this Court or the Court of Appeals. They refer to the RAP 13.4 criteria in the final paragraph of their brief but do not specify any appellate decisions that conflict with the Court of Appeals' decision, much less the basis for any alleged conflict. *See* Pet. for Review at 8. This alone is fatal to Dailey and Sparks' petition for discretionary review.

Moreover, the only appellate cases Dailey and Sparks even mention in the Petition, *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 41 P.3d 1172 (2002) and *Spreen v. Spreen*, 107 Wn. App. 341, 28 P.3d 769 (2001), are cited only as support for the well-established abuse of discretion standard. *See* Pet. for Review at 6-7 (citing *Rivers*, 145 Wn.2d at 685, and *Spreen*, 107 Wn. App. at 349-50).

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As noted above, while Dailey and Sparks include the fee and cost order in the Petition's "Issues Presented for Review," *see* Pet. for Review at 1-2, they provide no argument as to why the Court should accept review of those issues.

Neither *Rivers* nor *Spreen* address the Court of Appeals' ruling Dailey and Sparks challenge here: whether, under the circumstances, the superior court abused its discretion in denying Dailey and Sparks' request for a continuance of the summary judgment hearing. *Rivers*, an employment discrimination case, considered whether the trial court properly exercised its discretion in dismissing the plaintiff's case with prejudice as a sanction because she failed to comply with the court's discovery and case scheduling orders and in denying her motion for reconsideration of that decision. *Rivers*, 145 Wn.2d at 677. The *Rivers* court reversed the trial court's dismissal order because the trial court "did not make a sufficient record" before imposing that sanction. *Id.* at 698-99. *Spreen*, an appeal in a family law case, concerned whether the trial court abused its discretion in finding that the former wife was only entitled to a one-year extension of spousal maintenance. *Spreen*, 107 Wn. App. at 344. The Court of Appeals found the trial court abused its discretion because it relied on the wrong factors when it ruled on how long to extend spousal maintenance. *Id.* at 346-50. The trial court considered the statutory factors courts must consider in determining spousal maintenance awards, but abused its discretion because "it apparently relied on other factors when determining the modified maintenance." *Id.* at 347-50.

As with all cases applying an abuse of discretion standard, *Rivers* and *Spreen* turn on the specific facts at issue in those cases, and the legal issues in *Rivers* and *Spreen* are distinguishable from the issues Dailey and Sparks raise here. Unlike the trial court in *Rivers*, which failed to make a “sufficient record,” and as is made clear by the Court of Appeals’ detailed discussion of the procedural history of the case, the superior court here made careful and detailed findings both at the hearing on the State’s motion for summary judgment and in its written orders on the motion for summary judgment and motion for reconsideration. RP 6:6-8:20; CP 449-58, 3996-4003. Further, unlike the trial court in *Spreen*, the superior court applied the correct factors when denying the motion for a continuance.

In sum, assuming *Rivers* and *Spreen* are the appellate decisions Dailey and Sparks believe conflict with the Court of Appeals’ decision (and that is not clear from the Petition), there is no conflict with appellate law meriting discretionary review under RAP 13.4(b)(1) and (2).

Moreover, the Court of Appeals’ conclusion that the superior court did not abuse its discretion when it denied Dailey and Sparks’ motion for a continuance is consistent with well-established general principles Washington appellate courts use when determining if a trial court has abused its discretion. Citing Washington precedent, the Court of Appeals explaining that a trial court exercising its discretion to rule on a motion for

a continuance “should consider the need for a reasonably prompt disposition of the litigation; the possible prejudice to the adverse party; and the prior history of the litigation, including continuances already granted to the moving party.” Slip op. at 6 (citing *Willapa Trading Co. v. Muscanto, Inc.*, 45 Wn. App. 779, 727 P.2d 687 (1986)).

Applying these factors to its review of the superior court’s order, the Court of Appeals considered the prior history of the case, including the fact that “Dailey and Sparks had attempted to get an attorney since the filing of the complaint on July 29, 2013, but could not due to their financial circumstances,” that they were still unable to do so when their depositions were noted, and had not retained counsel at the summary judgment hearing a year after the case was filed. Slip op. at 6-7. The Court of Appeals also noted, based on its review of the superior court record, that “the State needed a prompt resolution of the litigation because of the serious allegations against Dailey and Sparks and the advanced age of its relevant witnesses/victims.” Slip op. at 7. Finally, the Court of Appeals observed that “Dailey and Sparks have not shown how a continuance would have changed the outcome.” *Id.* In sum, the Court of Appeals considered “all the circumstances” of the case, applied well-established Washington law, and properly concluded that the superior court had not abused its discretion.

**B. The Petition Does Not Involve an Issue of Substantial Public Interest Warranting Review By this Court.**

Dailey and Sparks also argue that the Petition involves an “issue of substantial public interest” meriting discretionary review under RAP 13.4(b)(4). The so-called issue of substantial public interest is that the Court of Appeals allegedly “condoned” the superior court’s improper indication that “counsel should have acted unethically to buy time for his clients[.]” Pet. for Review at 8.

However, this argument rests solely on a characterization of the superior court’s conduct that the Court of Appeals correctly rejected, based on its detailed review of the record. Slip op. at 7-8. As the Court of Appeals explained, “Dailey and Sparks misread the trial court’s order.” *Id.* at 7. The report of proceedings shows that the superior court did not direct Dailey and Sparks’ attorney to file a notice of appearance before he was actually retained. RP 6:18-7:20. Rather, the trial court stated that it might have considered granting a continuance if Dailey and Sparks had retained an attorney before the hearing and the attorney had requested a continuance so he or she could prepare a response to the State’s summary judgment motion. *Id.* There is no evidence in the record, despite Dailey and Sparks’ wishful thinking, that the superior court indicated, or required,

that Kato, or any other attorney, should file a notice of appearance before he or she was actually retained. *See* RP 6:7-7:25.

Thus, there is no basis to conclude that Court of Appeals “looked the other way” and endorsed allegedly improper and unethical actions by the superior court, and no reason to conclude that the Court of Appeals’ unpublished decision, which correctly affirmed the superior court’s discretionary rulings, involves issues of substantial public interest that warrant this Court’s review.

**C. The State Should Be Awarded Its Reasonable Fees and Costs for Answering the Petition for Review.**

“If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals,” and the Court denies a subsequent petition for review, the Court may award the respondent its reasonable attorneys’ fees and costs incurred in connection with the preparation and filing of the answer to the petition for review. RAP 18.1(j). RCW 19.86.080(1) also provides the Court with discretion to award the State its reasonable fees and costs as the prevailing party in a CPA action. This includes fees and costs incurred in connection with an appeal. *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). 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. *State v. Ralph Williams' Nw. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 314–15, 553 P.2d 423 (1976).

Here, the Court of Appeals awarded the State its reasonable fees and costs as the prevailing party, as permitted by RCW 19.86.080(1). Slip op. at 9. Accordingly, pursuant to RAP 18.1(j), the State respectfully requests the Court exercise its discretion and award the State its reasonable attorneys' fees and costs incurred in responding to and filing Dailey and Sparks' Petition for Review. 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(j) and (d).

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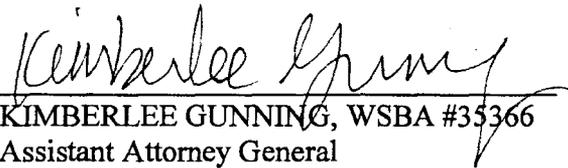
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**V. CONCLUSION**

Petitioners Dailey and Sparks have failed to show any conflict with any precedent. Nor have they shown that this case involves an issue of substantial public interest. As such, they have failed to meet their burden for obtaining discretionary review under RAP 13.4(b). The Petition should be denied.

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of March, 2016.

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Attorney General

  
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CERTIFICATE OF SERVICE

I certify that on the 24th day of March, 2016, I caused a true and correct copy of Answer of Respondent State of Washington to Petition for Review 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.



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Natalia Corduneanu  
Paralegal

## OFFICE RECEPTIONIST, CLERK

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Attached is State's Answer to Petition for Review and Certificate of Service.

Thank you for your consideration of this matter.

*Natalia Corduneanu*

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