

FILED

STATE OF WASHINGTON  
OFFICE OF THE INSURANCE COMMISSIONER

2014 SEP 19 P 12

<i>In the Matter of</i>	)	Order No. 14-0114
	)	
HENRY WILLIAM DAILEY,	)	LICENSEE'S RESPONSE
	)	TO OFFICE OF THE
Licensee.	)	INSURANCE
	)	COMMISSIONER'S
	)	MOTION FOR SUMMARY
	)	JUDGMENT

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HENRY WILLIAM DAILEY, Licensee, pro se, responds to the Motion for Summary Judgment in this matter, as follows:

1. RELIEF REQUESTED

Licensee asks this Court to deny Office of the Insurance Commissioner's Motion for Summary Judgment pending the outcome of his appeal of the King County Superior Court Summary Judgment Order.

2. STATEMENT OF FACTS:

The appeal was timely filed by his attorney of record in the King County matter: KENNETH H. KATO, WSBA #6400, 1020 North Washington Street, Spokane, WA 99201.

The appeal is based, first, on his motion before the King County Superior Court for a continuance of the Summary Judgment hearing to allow him to retain counsel. This motion was never addressed by the Court, but summary judgment was entered against him on July 25, 2014. An order denying the motion for continuance has not been entered. Counsel was retained shortly after the Summary Judgment hearing.





EXHIBIT 1

SEE ATTACHED:

Honorable Kenneth Schubert  
Defendants Dailey and Sparks'  
Motion for Reconsideration  
Date: 8/4/14 w/o oral argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

WILLIAM DAILEY, individually and his marital community; CATHERINE A. DAILEY, individually and her marital community; JANET SPARKS, individually and her marital community; JOHN DOE SPARKS, individually and his marital community; DEBORAH A. HIGGINS, individually and her marital community; MICHAEL P. HIGGINS, individually and his marital community; and T.E.A.M. SERVICES LLC,

Defendants.

**NO. 13-2-27535-0 SEA**

**DEFENDANTS DAILEY AND SPARKS' MOTION FOR RECONSIDERATION**

1. RELIEF REQUESTED

Defendants Dailey and Sparks ask this Court to grant their motion for reconsideration of the Order Granting Plaintiff's Motion for Summary Judgment, entered

On July 25, 2014.

## 2. STATEMENT OF FACTS

On July 14, 2014, defendants Dailey and Sparks, pro se, moved the Court for an order of continuance so they could retain an attorney to represent them. No order denying the motion for continuance was entered. The Court granted summary judgment to the plaintiff State on July 25, 2014. The defendants Dailey and Sparks spoke to attorney Kenneth H. Kato about representing them, but he was not formally retained until after the hearing and entry of the summary judgment order. (Decl. of Kenneth H. Kato). His notice of appearance has been filed along with this motion.

## 3. STATEMENT OF ISSUES

A. Did the court err by implicitly denying the motion for continuance when defendants Dailey and Sparks made a good faith effort to retain an attorney before a response was due and were successful in doing so, albeit after summary judgment was entered?

B. Did the court err by granting plaintiff's motion for summary judgment when genuine issues of material fact exist?

## 4. EVIDENCE RELIED UPON

Defendants Dailey and Sparks were unable to respond timely to the summary judgment motion as they were overwhelmed by the sheer volume of documents and the task of trying to obtain counsel. (Motions for Continuance of Summary Judgment Motion and Affidavits/Declarations in Support by Defendants Dailey and Sparks, sub nos. 64, 67, 68, 74, 75). A written order denying the motion for continuance has not been entered. On July 25, 2014, the Court granted the State's motion for summary judgment. Kenneth H. Kato has since been retained as counsel for defendants Dailey and Sparks.

## 5. AUTHORITY

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.

Defendants Dailey and Sparks, acting pro se, were served with the State's motion for summary judgment on June 27, 2014. (Decl. of Sparks, sub no. 67; Decl. of Dailey, sub no. 68). They moved for a continuance on July 14, 2014. (Defendants' motions for continuance, sub nos. 64, 67). 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 able to retain Kenneth H. Kato as their counsel. (Decl. of Kenneth H. Kato).

By not being granted a continuance so counsel could come on and respond to the summary judgment motion, defendants Dailey and Sparks were not allowed a meaningful opportunity to be heard. Although denying the State's allegations in their respective answers and having viable defenses, they in essence had a default judgment entered against them. Defendants Dailey and Sparks represented to the Court that they were retaining Kenneth H. Kato as counsel and a notice of appearance would be filed the week after the summary judgment hearing. (Supplemental Declarations of Dailey and Sparks, sub nos. 74, 75). The decision on a motion for continuance is left to the court's discretion, but discretion unexercised is discretion abused. *Bowcutt v. Delta N. Star Corp.*, 95 Wn. App. 311, 320, 976 P.2d 643 (1999). Indeed, the defendants' motion was not decided and the Court's reasons are not apparent in the record. Defendants Dailey and Sparks suffered prejudice, whether the Court's action be viewed as no decision or an implicit one denying the continuance, because the sure result was entry of summary judgment by default.

In these circumstances, 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. CR 59(a)(9). The State also cannot show any prejudice had the defendants been granted a short continuance to respond to the motion with assistance of retained counsel. As a result, defendants Dailey and Sparks were prevented from having a fair hearing as well. CR 59(a)(1).

## 6. CONCLUSION

Based on the foregoing facts and authorities, defendants Dailey and Sparks respectfully urge this Court to grant their motion for reconsideration.

DATED this 1<sup>st</sup> day of August, 2014.

Kenneth H. Kato, WSBA #6400  
Attorney for Defendants  
1020 N. Washington St.  
Spokane, WA 99201

CERTIFICATE OF SERVICE

I certify that on August 1, 2014, I mailed a true and correct copy of the Notice of Appearance to Jason E. Bernstein, AAG, 800 Fifth Ave., Ste 2000, Seattle, WA 98104-3188.

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

WILLIAM DAILEY, individually and his marital community; CATHERINE A. DAILEY, individually and her marital community; JANET SPARKS, individually and her marital community; JOHN DOE SPARKS, individually and his marital community; DEBORAH A. HIGGINS, individually and her marital community; MICHAEL P. HIGGINS, individually and his marital community; and T.E.A.M. SERVICES LLC,

Defendants.

**NO. 13-2-27535-0 SEA**

**DECLARATION OF KENNETH H. KATO**

I, KENNETH H. KATO, certify under penalty of perjury under the laws of the state of Washington that the following is true and correct:

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1. I am over the age of 18 years, am competent to be a witness, and have personal knowledge of the matters stated.

2. I have 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.

3. Although I was interested in representing them, they were unable to retain me due to their circumstances. Just prior to the summary judgment hearing on July 25, 2014, I spoke with Jason E. Bernstein, plaintiff's counsel, and advised him I had not yet been formally retained by Mr. Dailey and Ms. Sparks, but did fully expect to be hired by them in the week following the hearing. I also told him he could represent that to the Court. Since Mr. Dailey and Ms. Sparks had indeed been successful in retaining counsel, I was under the impression that the State's reasons for objecting to their continuance request

had been minimized. They would be afforded the opportunity to respond meaningfully; the State would be put to its proof.

4. Mr. Dailey and Ms. Sparks have now hired me, but that did not happen until after the hearing and the entry of the order granting plaintiff's motion for summary judgment.

5. In order for substantial justice to be done, I respectfully ask the Court to consider that I have been retained by Mr. Dailey and Ms. Sparks, who should be given the opportunity to respond to the State's motion for summary judgment with the assistance of counsel, and to grant their motion for reconsideration of the order granting summary judgment that was, for all practical purposes, entered by default.

DATED this 1<sup>st</sup> day of August, 2014, at Spokane, WA.

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Kenneth H. Kato

#### CERTIFICATE OF SERVICE

I certify that on August 1, 2014, I mailed a true and correct copy of the Declaration of Kenneth H. Kato to Jason E. Bernstein, AAG, 800 Fifth Ave., Ste 2000, Seattle, WA 98104-3188.