Supreme Court No. 93601-3

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 46963-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROLFE GODFREY and KRISTINE GODFREY, husband and wife and their marital community composed thereof,

Appellants,

v.

STE. MICHELLE WINE ESTATES, LTD. dba CHATEAY STE. MICHELLE, a Washington Corporation; and SAINT-GOBAIN CONTAINERS, INC.,

Respondents,

AND

ROBERT KORNFELD,

Additional Appellant.

RESPONDENTS' PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Ste. Michelle Wine Estates Ltd., and Saint-Gobain Containers, Inc., Defendants and Respondents, petition for review of the Court of Appeals' decision identified in Section II.

II. COURT OF APPEALS DECISION

Petitioners seek review of the unpublished decision terminating review in *Godfrey v. Ste. Michelle Wine Estates Ltd, et al.*, issued by Division Two of the Court of Appeals on July 19, 2016 (the "Decision") (copy attached as Appendix A). Division Two denied a timely motion for reconsideration by a summary order entered on August 30, 2016 (copy attached as Appendix B).

III. ISSUE PRESENTED FOR REVIEW

Petitioners seek review of the following issue:

Is a Superior Court judge's ruling granting an order stipulated to by the parties a discretionary ruling for purposes of the affidavit of prejudice statute, RCW 4.12.050? If granting a stipulated order is a discretionary ruling for purposes of the statute, then a party is foreclosed from using an affidavit of prejudice to force a judge from a case who has already granted such an order.

Review of this issue is warranted for two reasons. First, the Decision of Division Two falls on one side of a growing divide in the case law concerning what constitutes a discretionary ruling under RCW 4.12.050. As Division One recently observed, this divide is rooted in a conflict amongst the decisions of ***this Court***. *See State v. Lile,* 193 Wn.

App. 179, 193, n.5, 373 P.3d 247 (2016), *petition for review filed*, No. 93035-0. The Decision of Division Two therefore warrants review under RAP 13.4(b)(1). Second, the affidavit of prejudice is an important and commonly used procedural device whose correct and predictable application is a matter of public interest in both civil and criminal litigation, such that whether a stipulated order constitutes a discretionary decision under RCW 4.12.050 warrants review under RAP 13.4(b)(4).

IV. STATEMENT OF THE CASE

On February 13, 2010, Plaintiff and Appellant Rolfe Godfrey suffered a laceration of his left thumb when a wine bottle he was opening broke in his hand. CP 690. At the time of his injury, Godfrey was working as a bartender at an Olive Garden restaurant in Tacoma. RP 1109. Since the injury, he has been working as a host at the Olive Garden, and as a seasonal tax preparer for H&R Block. RP 661.

On September 20, 2012, Godfrey filed a complaint for personal injuries against Petitioners in Pierce County. CP 1-8. On December 19, 2013, the case was reassigned to Superior Court Judge Katherine Stolz. CP 157. On January 6, 2014, Judge Stolz signed a stipulated order to extend the deadlines for defendants' disclosure of possible primary witnesses (including any opinions of those witnesses), and for the disclosure of all rebuttal witnesses. CP 158-59 (copy attached as Appendix C). On January 7, 2014, a commissioner of the Superior Court signed a stipulated order for a medical examination under CR 35. CP 160-

64. On February 27, 2014, Godfrey filed a motion for a continuance, and noted it for a hearing before Judge Stoltz. CP 165-179.

On March 3, 2014, Godfrey filed an affidavit of prejudice and related motion for reassignment under RCW 4.12.050. CP 791-94. On March 7, 2014, after hearing argument, the trial court denied Godfrey's motion, finding that the orders entered on January 6 and January 7 were discretionary within the meaning of the statute. CP 205-06. On March 21, 2014, after hearing further argument, the trial court denied Godfrey's motion for reconsideration of that ruling. CP244-45. The case then proceeded through additional discovery, dispositive motions and other motion practice. A bench trial commenced on September 29, 2014. After hearing testimony from 16 witnesses over 12 trial days, Judge Stolz entered findings and conclusions in favor of Petitioners. CP 688-702.

The Court of Appeals reversed, holding that the trial court erroneously denied Godfrey's motion for reassignment under RCW 4.12.050. Decision at 2. The Court of Appeals found that neither the January 6, 2014 order extending witness disclosure deadlines, nor the January 7, 2014 order for examination under CR 35, was discretionary within the meaning of the statute. *Id.* at 5-6.[1]

[1] The Court of Appeals did not reach an alternative ground for relief raised by Godfrey, involving the assertion that the trial court prejudiced Godfrey by a supposed error involving the on-the-record balancing requirement of *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Division Two based its decision on one of two lines of conflicting decisions of this Court, regarding whether granting a stipulated order is a discretionary ruling for purposes of the affidavit of prejudice statute, RCW 4.12.050. This Court should grant review under RAP 13.4(b)(1) to resolve this conflict.

The Decision by Division Two held that rulings on pretrial stipulated orders relating to scheduling and deadlines in all cases are not discretionary for purposes of RCW 4.12.050, in all cases. Decision at 5. Relying on *dicta* from this Court's decision in *State v. Parra,* 122 Wn.2d 590, 859 P.2d 1231 (1993), Division Two held that stipulated orders do not involve the exercise of discretion because such orders supposedly do not "alert an individual party to the trial court's disposition." *Id.*

Parra involved rulings granting motions to which neither party objected. In holding that such rulings involved discretion for purposes of RCW 4.12.050, this Court distinguished its decision in *State ex rel. Floe v. Studebaker*, 17 Wn.2d 8, 134 P.2d 718 (1943), which involved stipulated orders, reasoning that "[i]f the parties have resolved [pretrial] ... issues among themselves and have not invoked the discretion of the court for such resolution, then the parties will not have been alerted to any possible disposition that a judge may have toward their case." *Parra*, 122 Wn.2d at 600. In *Floe*, this Court stated that "[w]e do not believe it can be said that the court is required to exercise discretion when asked to make an order involving preliminary matters such as continuing a case, or for

consolidation, where all the parties have stipulated that such order be made." 17 Wn.2d at 17.

Division Two's interpretation and application of *Parra* conflicts with the holdings of this Court in *State v. Espinoza,* 112 Wn.2d 819, 774 P.2d 1177, 1180 (1989), and *State v. Dennison,* 115 Wn.2d 609, 801 P.2d 193 (1990). The Decision is also inconsistent with Division Three's recent unpublished decision of *Marriage of Welton,* 180 Wn. App. 1027, 2014 WL 1514595 (2014). While the recent amendment to RAP 13.4 means this conflict no longer constitutes a basis for review under RAP 13.4(b)(2), the *Welton* decision shows how Division Three actually addressed this specific issue in a civil case and therefore should be important to this Court's analysis, as discussed in Section V. B.[2]

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[2] *See State v. Arreola*, 176 Wn.2d 284, 296-97 & fn. 1, 290 P.3d 983 (2012) (citing three unpublished decisions "to show that, ***in practice***, the *Ladsen* test [for pretextual police stops] has been applied by our courts to weed out pretextual stops" (emphasis added)); *State v. Evans*, 177 Wn.2d 186, 195-96 & fn. 1, 197 & fn. 2, 298 P.3d 724 (2013) (citing two unpublished decisions "not as precedent but only to show that, ***in actual practice***, identity theft has been known to cause harm to corporations" and a third unpublished decision to show that, "***in actual fact***, the terms 'living' and 'dead' have been used regularly and reasonably to describe corporations" in affirming conviction for identity theft from a small corporation (emphasis added)). *Accord, Gamboa v. Clark*, 180 Wn. App. 256, 275 & fn. 6, 321 P.3d 1236 (2014), *aff'd,* 183 Wn.2d 38, 348 P.3d 1214 (2015) (citing two unpublished decisions "to show that, ***in practice***, Division One has applied [the case under discussion] to prevent a shift to a presumption of adverse use if evidence supports an inference of neighborly accommodation). This concern with unpublished decisions accords with two of Justice Oliver Wendell Holmes's observations about the nature of the law and the judicial process. First, that "The life of the law has not been logic: it has been experience." O.W. Holmes, Jr., *The Common Law Tradition,* p. 1 (1880). The second, which follows from his first, that it is what courts ***actually do*** that really matters because the law is what courts in fact do:

> Take the fundamental question, What constitutes the law? . . . **The prophecies of what the courts do, in fact**, and nothing more pretentious, **are what I mean by the law.**

(Footnote continued next page)

In *Espinoza*, this Court held that the grant or denial of a continuance was a discretionary decision under RCW 4.12.050, notwithstanding that the continuance was sought under a joint agreed motion. 112 Wn.2d at 821-22. In *Dennison*, this Court likewise held that the trial court's grant of a stipulated motion for a continuance was a discretionary decision under RCW 4.12.050, reasoning that "although the parties stipulated to the continuance, the trial court in its discretion decided whether to grant or deny the continuance." 115 Wn.2d at 620, n. 10. *Dennison* cited to former CrR 3.3(h)(1), now CrR 3.3(f)(1), which provides that "[u]pon written agreement of the parties, which must be signed by the defendant or all defendants, the court may continue the trial date to a specified date."

In *State v. Lile,* 193 Wn. App. 179, 373 P.3d 247 (2016), Division One expressly recognized the conflict amongst the decisions of this Court:

> The State also relies on *Dennison,* 115 Wn.2d at 620, 801 P.2d 193, to support its assertion that Judge Uhrig's decision on the continuance was discretionary. In *Dennison,* the court specifically noted, in a footnote, that although the parties stipulated to a continuance, the trial court decided whether to grant or deny a continuance in its discretion. *Id.* at n. 10. Similarly, in *State v. Espinoza,* 112 Wn.2d 819, 821–22, 823, 774 P.2d 1177 (1989), *reversed in part on other grounds*, 112 Wn.2d 819, 774 P.2d 1177 (1989), the court applied the general rule when considering whether two different continuance rulings were discretionary. One ruling was on a motion to continue brought by only the defendant,

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O.W. Holmes, Jr., *The Path of the Law*, 10 HARV.L.REV. 457, 460-61 (1897) (emphasis added). The recent amendment of GR 14.1 recognizes this practical application of unpublished decisions. Hence, while not precedential, Petitioners may cite and discuss Division Three's unpublished analysis in *Welton* as "persuasive authority," which they do in Section V.B. of this petition.

> but the other was on a motion to continue brought by defendant and joined by the State. *Id.* at 821–22, 774 P.2d 1177. The *Espinoza* court cited to the general rule and did not distinguish between the two continuances. *Id.* at 823, 774 P.2d 1177. Both the *Dennison* footnote and *Espinoza* were in conflict with *Floe* when they were decided. And, neither the *Dennison* court nor the *Espinoza* court cited to *Floe* or provided any indication that they were aware stipulations are treated differently in this context. Because the Washington Supreme Court subsequently reaffirmed *Floe* in *Parra,* we adopt the reasoning in *Parra* on this issue.

193 Wn. App. at 193, n.5.

Division One's decision in *Lile* illustrates the Court of Appeals' continuing struggle to resolve the conflict between *Floe* and *Parra* on one side, and *Espinoza* and *Dennison* on the other. The issue in *Lile* was whether an order on a stipulated motion for continuance was a discretionary ruling under RCW 4.12.050. Recognizing the conflict amongst this Court's decisions, Division One forthrightly came down on the side of the *Floe-Parra* divide, and on that basis held that the trial court's order was not discretionary and the affidavit timely.[3]

Petitioners do not believe that Division Two was justified in this case in similarly relying on *Parra* for the general proposition that stipulated orders are always non-discretionary for purposes of RCW 4.12.050. The commentary on that issue in *Parra* was *dicta*, set forth by this Court in order to distinguish the issue before it -- whether rulings on motions that were not objected to were discretionary -- from stipulated motions. *See* 122 Wn.2d at 600-03. This Court's holding in *Dennison*,

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[3] *Lile* is presently pending on this Court's *en banc* calendar, set to be heard on September 29, 2016. The State's answer seeks review of the same issue that Petitioners are asking the Court to review.

however, was neither *dicta* nor secondary. Squarely presented with the issue, the Court held that a stipulated motion for continuance called for the exercise of discretion by the trial judge, *i.e.*, that, notwithstanding the stipulation, "the trial court in its discretion decided whether to grant or deny the continuance." 115 Wn.2d at 620, n. 10. Just so in this case, the trial court's grant of the parties' proposed stipulated order to extend the deadlines for Petitioners' primary witness disclosures involved the exercise of that court's discretion.

Indeed, case management rulings are *always* reviewed solely for an abuse of discretion. *See, e.g., Willapa Trading Co. v. Muscanto, Inc.*, 45 Wn. App. 779, 785, 727 P.2d 687 (1986) ("a party does not have an absolute right to a continuance, and the granting or denial of a motion for a continuance is reversible error only if the ruling was a manifest abuse of discretion" (citing *Martonik v. Durkan,* 23 Wn. App. 47, 596 P.2d 1054 (1979)); *Northern State Constr. Co. v. Banchero,* 63 Wn.2d 245, 386 P.2d 625 (1963) (motion for continuance addressed to the sound discretion of the court that may be disturbed only for a manifest abuse of that discretion). Just because the case management decision at issue here came before the trial judge as something to which the parties had agreed does not make that decision any less discretionary.

A court is called upon to exercise discretion when it "may either grant or deny a party's request." *Rhinehart v. Seattle Times Co.,* 51 Wn. App. 561, 578, 754 P.2d 1243 (1988) (citing *State ex rel. Mead v. Superior Ct.*, 108 Wash. 636, 640, 185 P. 628 (1919)). As any attorney

who has had a stipulated order denied by a judge knows, stipulated orders always present at least a certain minimum degree of discretion -- the trial court's inherent authority to say "no" to what the parties have agreed *they* want to do. Here, Judge Stoltz certainly had the right to say "no" to the parties' stipulated order extending the defendants' witness disclosure deadlines; her decision instead to say "yes" involved the exercise of that certain minimum degree of discretion.

Nor is the filing of a motion necessary for a court to issue an order involving the exercise of discretion, as recognized by the plain language of the affidavit of prejudice statute:

> That such motion and affidavit is filed and called to the attention of the judge ***before he or she shall have made any ruling whatsoever in the case***, either ***on the motion*** of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, ***and before the judge presiding has made any order or ruling involving discretion***[.]

RCW 4.12.050 (emphasis added). This language shows that the Legislature expressly contemplated that a judge may enter a discretionary order without a contested motion before the court. What matters is the exercise of discretion, not the form by which the issue came before the court. *Estate of Williams,* 48 Wn.2d 313, 315, 293 P.2d 392 (1956) (holding that merely because an application for an out of state attorney to appear is usually granted, it does not "change the fundamental character of the judicial action itself, as one involving the exercise of discretion."). A trial court has just as much right to refuse an agreed-to case management order as it does to refuse an agreed-to case management motion. The

difference between the two forms should not matter in determining whether the grant of an agreed-to case management request is discretionary for purposes of the affidavit of prejudice statute.

Here the Court of Appeals did not consider whether the trial court's grant of the stipulated order for the extension of the defendants' witness disclosure deadlines involved the exercise of discretion.[4] Instead, relying on *Parra*, Division Two held that, merely because the relief embodied in the order had been stipulated to by the parties, the grant of that order was not discretionary for purposes of RCW 4.12.050. This Court should grant review to resolve the conflict between the *Floe-Parra* and *Espinoza-Dennison* lines of decisions on the question of whether the grant of stipulated case management relief, whether by an agreed motion or an agreed order, constitute a discretionary ruling for purposes of RCW 4.12.050.

B. Whether stipulated orders involve the exercise of discretion under the affidavit of prejudice statute, RCW 4.12.050, is an issue of substantial public interest under RAP 13.4(b)(4) and should be resolved by this Court.

In *Parra* this Court observed that trial courts generally do not exercise discretion for purposes of an affidavit of prejudice when entering stipulations on "matters relating merely to the conduct of a pending proceeding, or to the designation of the issues involved, *affecting only the*

[4] Petitioners are withdrawing any reliance upon the order of the trial court commissioner regarding the CR 35 examination. Upon further reflection, Petitioners agree that this order could not involve any exercise of discretion by the trial judge, as it never came before the trial judge.

rights or convenience of the parties, not involving any interference with the duties and functions of the court." 122 Wn.2d at 603 (emphasis added). But seeking to amend a case scheduling order ***does*** invoke those duties and functions. All trial courts are concerned with the timely disposition of cases and the court's own calendar.[5] The parties' stipulation to continue the defendants' witness disclosure deadlines in this case, accordingly, was not merely a matter of the parties' rights or convenience, but did affect the duties and functions of the trial court. Indeed, if it did not, then why would the parties have needed -- as they surely *did* -- to seek and obtain the trial court's approval of those changes?

Nor is the specific reasoning in *Parra* relied upon by Division Two properly applicable to this issue in this case. Division Two quoted *Parra* as follows: "If the parties have resolved such issues among themselves and have not invoked the discretion of the court for such resolution, then the parties will not have been alerted to any possible disposition that a judge may have toward their case." Decision at 5 (quoting *Parra*, 122 Wn.2d at 600). Following that reasoning, however, the stipulated order for extending the witness disclosure and expert opinion deadlines should be deemed "discretionary" under RCW 4.12.050 because it benefited only Petitioners, by extending the deadline for their disclosure of primary witnesses and of expert opinions. Had the trial court denied the stipulated order, Petitioners would have been "alert[ed] ... to the trial court's

[5] Moreover, these concerns have increased substantially since the far simpler procedural era of *Floe*.

disposition" not to grant them additional time to fulfill their obligations under the court's case scheduling order. The grant of the stipulated order, on the other hand, did alert Godfrey "to the trial court's disposition" to grant Petitioners additional time to fulfill those obligations.

As is often the case in modern practice, a stipulation is not always the result of an agreement, but instead the practical recognition that a motion is likely to be granted on a particular issue combined with the understandable desire to forego the cost of litigating a contested motion. It is fundamental; however, that a trial court is not *required* to accept a stipulated order and neither side has the *right* to the order just because the opposing party has stipulated to the requested relief. And for these reasons, it follows that stipulated orders constitute a request to a trial court to make a discretionary decision. Accordingly, it should be the obligation of a party, when presented with the choice of either submitting a stipulated relief request or exercising their right to "affidavit a judge," to recognize that this is indeed the choice. And if that party chooses not to "play the affidavit card," that choice has been taken off the table for that judge. Express recognition of these important, practical realities is a matter of substantial public interest warranting review of the Decision of the Court of Appeals under RAP 13.4(b)(4).

Division Three used just such an analysis when it treated a stipulated order as a discretionary ruling under RCW 4.12.050 in its recent unpublished decision in *Marriage of Welton*. Writing for the court, Judge Siddoway affirmed the trial judge's refusal to recuse on the basis that

signing the stipulated order of continuance of the trial date in that dissolution was a discretionary decision which made the later affidavit of prejudice untimely. *Welton*, 2014 WL 1514595 at *3-4. Division Three followed the analysis of *Dennison* in the criminal context by analogy, concluding that similar concerns in civil cases with timely disposition of cases and calendar management meant presentation of a stipulated order of continuance necessarily asked for and required the court to exercise its discretion:

> Although there is no equivalent civil rule, most of the same factors must be considered in the civil context, in which trial courts are concerned with the timely disposition of cases and the court's own calendar, even if civil cases do not present the same issues of due process. Mr. Welton's and Ms. Martin's stipulated continuance made clear that they had agreed to a later trial date but the scheduling of trial is not, to quote *Parra*, an issue "affecting only the rights or convenience of the parties, not involving any interference with the duties and functions of the court."
>
> Because Judge Small exercised his discretion in determining whether to sign the continuance order **or hold the parties to the existing schedule**, the trial court did not err in finding that Mr. Welton's affidavit was untimely.

Marriage of Welton, 2014 WL 1514595 at *4 (emphasis added).

Had the instant case been heard in Division Three instead of Division Two, the Petitioners presumably would have prevailed on the affidavit of prejudice issue. This shows that, under the current state of Washington law, there is no predictable answer for the lawyer or client who is faced with the decision of whether to exercise their affidavit of prejudice option before submitting the stipulated order of continuance or lose it for all time. And yet one fundamental purpose of the law is to allow

all persons -- individuals, companies, governments -- to order their lives and legal affairs based on predictable rules to the extent reasonably possible.[6]

Petitioners submit that the analysis in *Welton* accords with the statute's terms and this Court's recent decisions, and that it should be considered as part of resolving the unsettled state of the law in this fundamental part of trial practice. As Division One correctly recognized in *Lile*, there is a lack of uniformity in the application of the statute in criminal cases. The underlying Decision in this case and the *Welton* decision show the same is true in civil cases. The *Welton* decision also raises the question of whether there should be a different analysis for civil and criminal cases based either on the governing rules or due process concerns. The manifestly unsettled state of the law governing when parties must decide whether to exercise their affidavit of prejudice right needs to be brought to an end by this Court.

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[6] *See, e.g., Christensen v. Ellsworth*, 162 Wn.2d 365, 372, 173 P.3d 228 (2007) (unanimously holding that "As a general matter, time calculation rules should be applied in a clear, predictable manner. It is a well-accepted premise that '***[l]itigants and potential litigants are entitled to know*** that a matter as basic as time computation will be carried out in an easy, clear, and consistent manner, thereby eliminating traps for the unwary who seek to assert or defend their rights.' " (emphasis added)); Holmes, *The Path of the Law*, 10 HARV.L.REV. at 458 ("I wish, if I can, to lay down some first principles for the study of ***this body of dogma or systematized prediction which we call the law***, for ***men who want to use it as the instrument of their business to enable them to prophesy in their turn***, and, as bearing upon the study, I wish to point out an ideal which as yet our law has not attained" (emphasis added)).

VI. CONCLUSION

This Court should grant review to determine whether stipulated orders are discretionary rulings under the affidavit of prejudice statute, RCW 4.12.050. Godfrey chose not to affidavit Judge Stoltz until *after* stipulating to an extension of the deadline for defendants' witness disclosures. Under the *Espinoza-Dennison* decisions of this Court, thereby Godfrey forfeited his right to affidavit Judge Stoltz. This Court should grant review and rule that the Court's decisions in *Espinoza* and *Dennison* control. This Court should then reinstate the trial court's judgment in favor of Petitioners.

Respectfully submitted this 14th day of September, 2016.

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APPENDIX

A

Filed
Washington State
Court of Appeals
Division Two

July 19, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ROLFE GODFREY and KIRSTINE GODFREY, husband and wife and their marital community composed thereof, Appellants, v. STE. MICHELLE WINE ESTATES LTD, dba CHATEAU STE. MICHELE, a Washington corporation; and SAINT-GOBAIN CONTAINERS, INC. Respondents, and ROBERT KORNFELD, Additional Appellant.	No. 46963-4-II UNPUBLISHED OPINION

LEE, J. — Following a bench trial, the trial court found in favor of Ste. Michelle Wine Estates in Rolfe Godfrey's product liability suit against it. Godfrey appeals, arguing that the trial court erred by rejecting his timely filed affidavit of prejudice and motion for change of judge. Godfrey's trial and appellate counsel, Robert Kornfeld, separately appeals the trial court's imposition of monetary sanctions against him. Kornfeld argues that the sanctions were improperly imposed and that the trial court erred by not making the required findings before imposing attorney

fees. Ste. Michelle concedes that the trial court did not make the required findings. Because the trial court erroneously rejected the affidavit of prejudice, we reverse and remand for a new trial.[1] We also vacate the monetary sanctions imposed against Kornfeld.

FACTS

In 2010, Godfrey, while working as a server, was injured after a bottle of Ste. Michelle wine shattered in his hand. In 2012, Godfrey file a product liability suit against Ste. Michelle,[2] asserting manufacturing and design defects.

On January 6, 2014, the trial court entered a stipulation and order for extension of witness disclosure deadlines. On January 7, the superior court commissioner entered a stipulation and order for examination under CR 35.

On March 3, Godfrey signed an affidavit of prejudice. On March 7, the trial court heard Godfrey's motion for change of judge and ruled that Godfrey's affidavit and motion were not timely because two discretionary orders had already been signed. Godfrey moved for reconsideration of the trial court's ruling, which was denied.

On March 21, the trial court entered an amended case scheduling order setting deadlines for discovery cutoff and the filing of a joint statement of evidence. On September 26, Ste. Michelle moved for an award of sanctions against Godfrey for failing to comply with the trial court's scheduling order when Godfrey failed to timely file a joint statement of evidence. The trial court entered an order granting Ste. Michelle's motion for award of fees and costs, ordering "Plaintiff's

[1] Godfrey also argues that the trial court erred by imposing sanctions for failure to file a joint statement of evidence and excluding portions of his expert's testimony. Because we reverse based on the affidavit of prejudice challenge, we do not address the remainder of Godfrey's issues.

[2] Godfrey's initial complaint included his wife, Kirstine Godfrey, but she stipulated to a dismissal with prejudice and is not a party to this appeal.

counsel of record [to] pay Defendants the sum of $10,000 within fourteen (14) days of the entry of this Order." Clerk's Papers at 761.

Trial began on September 29. After the bench trial, the trial court dismissed Godfrey's product liability claim and entered judgment in favor of Ste. Michelle. Godfrey and his trial counsel appeal.

ANALYSIS

A. AFFIDAVIT OF PREJUDICE

Godfrey argues that the trial court erroneously rejected of his affidavit of prejudice based on the entry of the January 6 and January 7 stipulation and orders. Specifically, Godfrey contends that the trial court did not exercise discretion in entering the January 6 order because the parties stipulated to the order and the order was purely ministerial. Therefore, his affidavit of prejudice was timely. Godfrey also contends that the trial court erred by deeming the superior court commissioner's January 7 entry of the parties' stipulated order a discretionary ruling. We agree that the trial court erred by rejecting Godfrey's affidavit of prejudice.

RCW 4.12.040 allows "a party in a superior court proceeding the right to one change of judge upon the timely filing of an affidavit of prejudice." *State v. Dennison*, 115 Wn.2d 609, 619, 801 P.2d 193 (1990). When a party properly files such an affidavit, the judge must step aside. RCW 4.12.040; *Harbor Enters., Inc. v. Gudjonsson*, 116 Wn.2d 283, 285, 803 P.2d 798 (1991) (once a party timely complies with the statute, prejudice is deemed established and the judge who is the subject of the affidavit is divested of authority to proceed in the action). Whether RCW 4.12.050 imposed a duty on the judge to step aside under the circumstances is a question of law that we review de novo. *In re Parenting Plan of Hall*, 184 Wn. App. 676, 681, 339 P.3d 178 (2014).

An affidavit of prejudice is timely filed if called to the court's attention before the judge has "made any ruling whatsoever in the case" on a motion by either party, and "before the judge presiding has made any order or ruling involving discretion." RCW 4.12.050(1). In other words, an affidavit of prejudice is "timely so long as it was filed before the court made any ruling apprising the parties of the court's predisposition in the case." *State v. Parra*, 122 Wn.2d 590, 600, 859 P.2d 1231 (1993).

Discretionary rulings, for purposes of RCW 4.12.050, do not include "the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial." RCW 4.12.050(1). Setting, renoting, or resetting a show cause or motion for hearing is a calendaring action that is not discretionary for purposes of RCW 4.12.050. *State v. Dixon*, 74 Wn.2d 700, 703, 446 P.2d 329 (1968); *see also In re Marriage of Tye*, 121 Wn. App. 817, 821, 90 P.3d 1145 (2004) (holding "the ministerial acts of entering uncontested case scheduling orders" do not involve the court's discretion for purposes of RCW 4.12.050). Many issues, often involving pretrial disputes regarding "discovery, identity of witnesses, and anticipated defenses," may be resolved between the parties and presented to the court in the form of an agreed order. *Parra*, 122 Wn.2d at 600. "If the parties have resolved such issues among themselves and have not invoked the discretion of the court for such resolution, then the parties will not have been alerted to any possible disposition that a judge may have toward their case." *Parra*, 122 Wn.2d at 600.

On January 6, 2014, the trial court signed and entered a stipulated order for extension of witness disclosure deadlines. On January 7, the superior court commissioner signed a stipulation and proposed order for examination under CR 35. On March 3, Godfrey signed a motion and

affidavit of prejudice. On March 7, the trial court heard arguments regarding Godfrey's affidavit of prejudice and motion for change of judge. The trial court rejected Godfrey's affidavit of prejudice, ruling that the affidavit was untimely because the court had entered two discretionary orders: the January 6, 2014 order and the January 7, 2014 order.

1. January 6 Stipulation and Order

A stipulation is an agreement between parties. *Parra*, 122 Wn.2d at 601. The parties may, as they have here, resolve various issues and present stipulated orders regarding discovery, identity of witnesses, and deadlines for submission of documents. *Id.* at 600; *see Tye*, 121 Wn. App. at 821. Rulings on pretrial stipulated orders relating to scheduling and deadlines are not discretionary for the purposes of RCW 4.12.050 because they do not alert an individual party to the trial court's disposition. *Parra*, 122 Wn.2d at 600 ("If the parties have resolved such issues among themselves and have not invoked the discretion of the court for such resolution, then the parties will not have been alerted to any possible disposition that a judge may have toward their case."); *see Tye*, 121 Wn. App. at 821.

Here, the trial court signed the January 6 stipulation and order extending the deadline for witness disclosures. The trial court's entry of the stipulated order relating to a deadline for witness disclosures is not a discretionary decision. Thus, the trial court erred by rejecting the affidavit of prejudice based on the January 6 stipulation and order.

2. January 7 Stipulation and Order

Godfrey argues that the trial court erred by determining that the commissioner's entry of the parties' stipulated order was a discretionary ruling. We agree.

A superior court commissioner and a superior court judge are separate and distinct judicial officers. A ruling by a commissioner, even if discretionary, does not apprise anyone of any predisposition on the part of the judge. Thus, it follows that a superior court commissioner's ruling cannot be a discretionary ruling under RCW 4.12.050 that would preclude an affidavit of prejudice against the superior court judge. The trial court erred by deeming the superior court commissioner's January 7, 2014 order to be a discretionary ruling that precluded the trial court from accepting Godfrey's affidavit of prejudice.

We reverse the trial court's order denying Godfrey's motion for change of judge and remand for a new trial. *See Hanno v. Neptune Orient Lines, Ltd.*, 67 Wn. App. 681, 683, 838 P.2d 1144 (1992); *In re Marriage of Hennemann*, 69 Wn. App. 345, 348, 848 P.2d 760 (1993).

B. IMPOSITION OF SANCTIONS AGAINST GODFREY'S COUNSEL

Kornfeld, who represented Godfrey at trial and on appeal, challenges the trial court's imposition of $10,000 in attorney fees against him. He argues that the sanctions were improperly imposed and that the trial court failed to make the required findings. We agree that the sanctions were improperly imposed.

Here, the trial court imposed sanctions against Kornfeld after rejecting Godfrey's affidavit of prejudice. Because the trial court erred in rejecting Godfrey's affidavit of prejudice, the trial court's imposition of monetary sanctions was improper. Therefore, we vacate the sanctions imposed on Kornfeld in favor of Ste. Michelle.

CONCLUSION

We hold that the trial court erroneously rejected the affidavit of prejudice. We also hold that the imposition of monetary sanctions against Kornfeld was improper. Therefore, we reverse,

vacate the monetary sanction against Kornfeld, and remand for a new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Worswick, J.

Bjorgen, C.J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ROLFE & KIRSTINE GODFREY & ROBERT KORNFELD, Appellants, v. STE. MICHELLE WINE ESTATES, Respondent.	No. 46963-4-II ORDER DENYING MOTION FOR RECONSIDERATION

RESPONDENT moves for reconsideration of the Court's **July 19, 2016** opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Bjorgen, Worswick, Lee

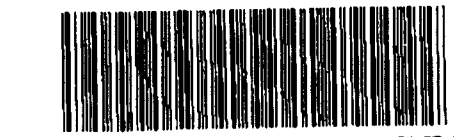
DATED this 30th day of August, 2016.

FOR THE COURT:

Bjorgen, C.J.
CHIEF JUDGE

cc: Emily J Harris
Kenneth Wendell Masters
Howard Mark Goodfriend
Seann C Colgan
Robert B. Kornfeld
Ian Christopher Cairns

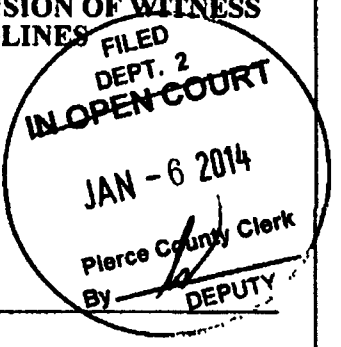
APPENDIX C



THE HONORABLE KATHERINE M. STOLZ

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

ROLFE GODFREY and KIRSTINE GODFREY, husband and wife and their marital community composed thereof, Plaintiffs, v. STE. MICHELLE WINE ESTATES LTD. dba CHATEAU STE. MICHELLE, a Washington Corporation; and SAINT-GOBAIN CONTAINERS, INC., Defendants.	No. 12-2-12968-7 **STIPULATION AND ~~[PROPOSED]~~ ORDER FOR EXTENSION OF WITNESS DISCLOSURE DEADLINES**



STIPULATION

The parties above named by and through their attorneys do hereby stipulate and agree to the following order for extension of the deadline for defendants' witness disclosure and rebuttal witness disclosure, as follows:

Defendants' Disclosure of names, addresses & CVs of Possible Primary Witnesses ..... January 16, 2014

Defendants' Disclosure of Opinions of Primary Possible Witnesses ..... January 31, 2014

Disclosure of All Rebuttal Witnesses ..... February 27, 2014

The parties agree that defendants reserve the right to disclose additional lay and expert witnesses in response to any new or supplemental expert opinions that were not disclosed in

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Plaintiffs' Disclosure of Possible Primary Witnesses dated December 2, 2013 with a corresponding right for Plaintiffs to name a rebuttal witness thereto. The parties further agree that the disclosure of the report of Defendants' Examining Physician shall be pursuant to a separate stipulation between the parties.

IT IS SO STIPULATED

DATED this 2nd day of January, 2014.

KORNFELD, TRUDELL, BOWEN & LINGENBRINK, PLLC
Robert B. Kornfeld, Inc., P.S.

Robert Kornfeld, WSBA No. 10669
Attorneys for Plaintiff

CORR CRONIN MICHELSON BAUMGARDNER & PREECE, LLP

/s/Emily Harris
Emily Harris, WSBA No. 35763
Attorneys for Defendants

ORDER

Pursuant to the foregoing Stipulation of the parties, NOW THEREFORE, IT IS SO ORDERED.

DATED this 6th day of January, 2014.

THE HONORABLE KATHERINE M. STOLZ
Pierce County Superior Court Judge

Presented by:

FILED
DEPT. 2
IN OPEN COURT
JAN - 6 2014
Pierce County Clerk
By DEPUTY

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Supreme Court No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 46963-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROLFE GODFREY and KRISTINE GODFREY, husband and wife and their marital community composed thereof,

Appellants,

v.

STE. MICHELLE WINE ESTATES, LTD. dba CHATEAY STE. MICHELLE, a Washington Corporation; and SAINT-GOBAIN CONTAINERS, INC.,

Respondents,

And,

ROBERT KORNFELD,

Additional Appellant.

NO. 46963-4-II

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of *Correspondence of Michael B. King, Petitioners' Motion to Link Cases and Respondents' Petition for Review* on the below-listed attorney(s) of record by the method(s) noted:

☒ Email and first-class United States mail, postage prepaid, to the following:

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DATED this 14th day of September, 2016.

Patti Saiden, Legal Assistant