

No. 73757-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

SIMCHA SHOVAL, a married woman,

Appellant,

vs.

VALET PARKING SYSTEMS, INC., a Washington Corporation,

Respondent.

RESPONDENT VALET PARKING SYSTEMS' RESPONSE BRIEF

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I. INTRODUCTION

In this personal injury action, Appellant Simcha Shoval fell while exiting a shuttle van in the evening. No one knows how or why she fell because there were no witnesses, and she left the courtroom before testifying. The shuttle van driver explained to the jury that after she parked the van, Ms. Shoval asked her how to open the van door. The driver told Ms. Shoval, "I'm going to come around and help you." RP 240. The driver testified that "as I was going around the van, I saw through the side windows that she had gotten the door open. And instead of waiting for me to help her out of the van, she just went out of the van on her own." After a five-day trial, the jury delivered a defense verdict. Ms. Shoval had a fair trial and justice was served.

The jury's verdict should be affirmed. The trial court correctly interpreted the law by declining to grant an untimely affidavit of prejudice after it made a discretionary ruling concerning the particular circumstances of the parties' request for a trial continuance. Likewise, the trial court did not abuse its discretion when it granted, denied, or deferred ruling on motions *in limine*. The trial court did not impermissibly comment on the evidence; instead, it maintained the appearance of neutrality and impartiality—even when Ms. Shoval was argumentative

and combative with the court. Finally, the cumulative error doctrine does not apply. She did not request a new trial, lodge timely objections, make an offer of proof, or otherwise establish a record warranting a new trial.

II. NO ASSIGNMENTS OF ERROR

Valet Parking respectfully submits that the Honorable Samuel Chung and the Chief Civil Judge did not abuse their discretion or err as a matter of law.

III. RESTATEMENT OF THE ISSUES

1. Should the court affirm the Chief Civil Judge's and trial court's ruling, under *de novo* review, that granting a stipulation and order for a trial continuance under the facts presented in this case involves discretion when there are numerous alternative provisions requiring a court to exercise judgment and choice in accordance with what is fair and equitable under the circumstances, and after exercising such discretion cannot grant an untimely motion for a change of judge based on an affidavit of prejudice?

2. Whether the trial court properly exercised its discretion to defer rulings on certain pretrial motions *in limine* until the context of the anticipated evidence and development of facts was revealed during trial?

3. Whether the trial court properly exercised its discretion in ruling, under ER 401, that evidence of Valet Parking's absence of prior incidents was relevant when the conditions were sufficiently similar and the actions sufficiently similar to the night of the incident?

4. Whether the trial court properly exercised its discretion by imposing a monetary sanction of \$1,000 for Ms. Shoval's numerous discovery violations, rather than excluding Ms. Shoval's expert witness?

5. Whether the trial court properly exercised its discretion in sustaining Valet Parking's objection that Ms. Shoval's medical bills should not be mentioned during her opening statement, as she, herself, requested in her own motions *in limine*?

6. Whether the trial court properly exercised its discretion in making its rulings and providing procedural support and guidance during the jury trial, but did not improperly comment on the evidence?

IV. RESTATEMENT OF THE CASE

A. A local substitute school teacher started a successful valet parking business in 1986.

Tina Campbell, previously a Tacoma substitute school teacher, started her own business, Valet Parking Systems ("Valet Parking") in 1986. Verbatim Report of Proceeding ("RP") 833. Now, thirty years later, Valet Parking has been hired for events as prestigious as Bill Gates'

wedding reception. RP 154.

Valet Parking has two full-time and several part-time employees providing valet parking services from Olympia to Bellingham for events of any kind; town car transportation 24 hours a day, every day of the year; airport service; shuttle van services; and parking lot attendant services. RP 833-34. It has provided shuttle van services to over 500 events. RP 154.

Ms. Campbell, the president, is a hands-on owner. She meets with clients, answers the phone, performs site inspections before providing services, drives the vehicles, and trains her employees. RP 834-35. Her office is in her home.

One year *before* the 2012 incident that is the subject of this appeal, Valet Parking provided shuttle van service for Temple B'nai Torah, specifically during the High Holy Days. RP 326, 835, 838. *Since* the 2012 incident, Valet Parking continues to provide shuttle van service for this Temple. RP 325, 838. Over the years, Ms. Campbell has driven the shuttle van for the Temple's nighttime services for over 2,000 customers. RP 839.

Valet Parking's services for the Temple are straightforward. Attendees of the Temple services may park in a large nearby offsite parking lot owned by Cross of Christ Lutheran Church. RP 839. After

parking their vehicle in the Church lot, attendees may either take Valet Parking's shuttle van to the nearby Temple, or walk. RP 835-36.

After the Temple services are over, a Valet Parking employee stands outside of the Temple with the van door open, welcoming anyone for the short ride back to the parking lot. RP 836. Valet Parking helps people into the van "if they need it." RP 836. "[O]nce they're seated, the door person shuts the doors 'cause they're difficult to shut[.]" *Id.* On the way to the nearby Church lot, the shuttle driver introduces herself and states that she will "come around to help with the doors and assist anybody that needs help from the van." RP 836.

Upon arrival at the Church parking lot, the shuttle driver puts the van into the parking gear, and turns off the ignition. RP 836. The driver removes the key, gets out, and walks around the van "to open the doors and help if anybody needs help." RP 837. After the passengers leave, the Valet Parking driver closes the doors in a sequence and may return to the Temple to pick up more passengers. RP 837.

Ms. Campbell testified that over the course of her valet career, "we've had probably tens of thousands of passengers. And if a passenger needs assistance they will wait, and we will give them assistance." RP 840.

B. Simcha Shoval fell while exiting Valet Parking's shuttle van.

On the evening of September 25, 2012, after the Temple service was over, the last group of six people entered the van to return to the parking lot and retrieve their vehicles. Ms. Campbell, Valet Parking's owner, was the driver. Upon arrival at the parking lot, appellant Simcha Shoval was the fourth or fifth person to exit the van; she fell while exiting on her own. The mechanics of how or why Ms. Shoval fell or what caused her to fall are unknown because she did not testify at trial; in fact she left after the third day of trial and never returned. RP 513.

C. Valet Parking's driver completed an incident report.

That same evening, after the incident, Ms. Campbell completed an incident report explaining the details of the incident. The incident report was admitted as Trial Exhibit 5. RP 114; 243. Her trial testimony was consistent with the report that she completed contemporaneous with the incident.

D. Valet Parking's driver testified that she assists people exiting the van who want assistance.

At trial, Ms. Campbell affirmed that Valet Parking owes the public the highest degree of care, and per its safety rules, offers assistance to anyone exiting the van. RP 265. She explained that "we offer assistance,

but they have to take it or not.” RP 272. “We just put our hand, and then try to let them take our hand and steady themselves. We say where the step is, to step there, and then step down. And, probably six out of 10 people don’t take our help.” RP 273. Certain people are more likely to accept help than others. For example, “older people that are having trouble with their knees or hips, ladies, especially in heels or tight skirts” will take help. RP 275. However, men usually don’t take any help, and children jump out. *Id.*

The drivers “don’t force them [passengers] to take assistance from us. They have to accept it[.]” RP 277. Ms. Campbell explained that “[w]e stop the van, and we get out, and we go around and help the passengers. It’s not a difficult thing. The passengers have to let us help them.” RP 234.

E. Ms. Campbell offered to help Ms. Shoval exit the van, then walked around the van to assist her.

Ms. Campbell—who was driving Ms. Shoval and her friends in the van back to their cars in the parking lot on the evening on September 25, 2012—testified that she took the keys out of the ignition, and as she proceeded to get out the van, Ms. Shoval “curtly” said “Driver.” RP 240. Ms. Shoval asked “How do you open this door?” *Id.* Ms. Campbell stated that even though she was exiting the van to walk around and open that

same door, “I didn’t want to be disrespectful, so I turned back and I’m talking to her over my shoulder. And I said, it opens—you have to put your hand in and pull towards you.” RP 240.

Ms. Campbell told the jury that the door is hard to open because it is not a “normal push-the-handle down kind of door; it’s different. You have to reach in, pinch the handle towards you and then the doors open[.]” RP 249. It is not a sliding door. RP 249.

Ms. Campbell told Ms. Shoval, “I’m going to come around and help you.” RP 240. Ms. Campbell testified that “as I was going around the van, I saw through the side windows that she had gotten the door open. And instead of waiting for me to help her out of the van, she just went out of the van on her own.”¹ RP 240. Ms. Shovel fell and broke her shoulder.

Inexplicably, Ms. Shoval’s counsel accused Ms. Campbell—four times in front of the jury—of “fabricating this story” and “fabricating her recollection.” RP 262-63. Ms. Campbell responded that she remembered it “like it was yesterday. And it happened just as I wrote it and as I said.” RP 263.

F. Three witnesses did know how or why Ms. Shoval fell and

¹ Plaintiff’s counsel accused Ms. Campbell of “creating a story” both on incident report and to the jury, but Ms. Campbell stated that the truth was in the investigation/incident report. RP 240-41. Plaintiff’s counsel snapped, “I think the jury will make that determination, ma’am.” RP 241.

provided inconsistent testimony to the jury.

No one actually saw how or why Ms. Shoval fell as she exited the van on her own after opening the side door. Ms. Shoval moved *in limine* to exclude any comment about the “hypothetical mechanics of injury” because “there is no evidence therefor.” CP 177.

Ms. Campbell testified that three other people had already exited the van through the front passenger door because it was the only door that was open. RP 251-52; RP 261. The driver stated that the van had two captain seats and that it was easy for passengers in the front row to walk through the middle and exit through the front passenger door. RP 238.

In contrast, Ms. Shoval and another woman were sitting in the second row, which was directly next to the side door handle that Ms. Shoval was trying to open while Ms. Campbell walked around the van. RP 252. “I was coming around when she decided not to wait for my help.” RP 278.

1. Richard Knutson testified that the driver was walking around the van

Judge Knutson, an administrative law judge who has known Mr. and Mrs. Shoval for 35 years, testified at trial that someone from Valet Parking was at the Temple assisting people into van (to be driven to the parking lot). RP 216, 223. He was sitting in the front passenger seat,

which he preferred because it was easier to get in and out. RP 223-24. He stated that members of the group were talking to each other during the short ride to the parking lot. RP 223.

Judge Knutson was not sure if the driver exited the van before Ms. Shoval fell. RP 219. He and his wife had already exited the van and were talking with Eli Soval (Simcha's husband) while other people exited the van that evening. RP 218, 220. He heard a "yelp" and remembered "seeing her [Mrs. Shoval] standing in the doorway, and then seeing her fall." RP 226. *Judge Knutson testified that he saw the Valet Parking driver coming around the back of the van when Ms. Shoval was on the ground.* RP 219.

2. Patricia Gorman testified that "our backs were to the van"

Ms. Gorman is a social worker who has been married to Judge Knutson for 45 years and is very close friends with Ms. Shoval. RP 287-88. She has been assisted by Valet Parking at the Temple for many years before and after this incident. RP 291-92. Ms. Gorman could not recall exactly where she was sitting when the shuttle van took her and her friends to the parking lot on September 25. RP 293.

She testified that she did not see Ms. Shoval fall. "I wasn't looking her direction 'cause we were talking over there *with our backs to the van.*"

RP 308. “It wasn’t my responsibility to be concerned about anybody’s safety in the van.” RP 308.

3. Eli Shoval testified that the driver was walking around the van

In contrast to Judge Knutson’s testimony, Mr. Shoval testified first that everyone was silent in the van.² RP 377. He did not recall if he or Ms. Gorman exited the van first after Judge Knutson exited. RP 411. Mr. Shoval had no trouble getting out of the van. RP 414. He recalled that the van had a light. RP 414. Unlike Ms. Gorman, who testified that she, her husband and Mr. Shoval had *their back to the van* while they were talking, Mr. Shoval stated that *he could see the driver sitting in the van*. RP 380. Later, he changed his testimony, stating that after he exited the van, “I didn’t look back,” it was dark, and thereafter, his “back was to van.” RP 381.

He described his wife as “very healthy and strong.” RP 381. Ms. Shoval had backpacked with her son in Vietnam, Cambodia, and Thailand, and was taking Pilates twice a week at the time. RP 397, 412. Mr. Shoval did not see his wife exit the van. RP 380. Mr. Shoval told the jury that when he looked back and saw his wife on the ground, “you are in shock and you are embarrassed.” RP 381. *Like Judge Knutson, he testified that*

² Mr. Shoval also testified that the passengers were “chatting.” RP 377.

he saw the driver coming around the van while his wife fell. RP 382.

G. The jury rendered a defense verdict.

After five days of testimony, Ms. Shoval's closing argument accused Valet Parking's driver of "betrayal and lies," and deceit; of "staging" evidence; and relying on an expert who "if ever there was a paid shill who comes into court, he's the guy." RP 999, 1003-04. Ms. Shoval quoted Thomas Jefferson and Bruce Springsteen before asking the jury to award damages of between \$2.9 to \$5.8 million. RP 1002, 1004, 1006.

The jury deliberated for one hour and nineteen minutes before reaching a defense verdict. RP 1022-23. Ms. Shoval did not assign error to the jury instructions.

H. Pertinent Procedural History

1. Ms. Shovel moved to continue the trial date twice, then moved for a different judge.

Ms. Shoval sued Valet Parking for negligence on June 6, 2013. Clerk's Papers ("CP") 1-3. On March 27, 2014, she requested an order from assigned Judge Mary Yu, pursuant to a stipulation between the parties, to continue the trial date from September 2014 to February 2015. CP 17-18. This particular stipulation was very short and simply requested a trial continuance to a date certain: February 23, 2015. *Id.* Judge Yu granted the continuance and signed a computer-generated Order

Amending Case Schedule. CP 18-20. Judge Yu was appointed to the Washington Supreme Court, effective May 16, 2014.

On January 20, 2015, Ms. Shovel again requested a trial continuance. It states as follows:

COME NOW the parties in the above-referenced action and hereby agree and stipulate that good cause exists for a brief continuance because Plaintiff is still treating in Israel and attempting to resolve her injuries. Further, Plaintiff resides in Israel and is having difficulties making travel arrangements at this time.

As a separate but related issue, counsel for Plaintiff has another matter for trial on the same day presently set herein, February 23, 2015, before Judge Laura Gene Middaugh in HYUN SOOK NAM v. FRED GREEN AND JANE DOE GREEN, Case No. 13-2-35694-5 SEA. Defendant's counsel also has a trial set in another matter for the same day.

The parties have conferred with their respective clients who approve of this continuance.

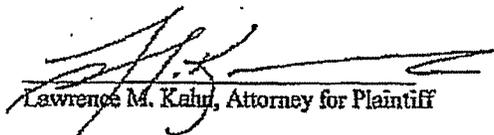
The continuance will allow the parties adequate time to conduct discovery and attempt to resolve this matter through mediation, if appropriate.

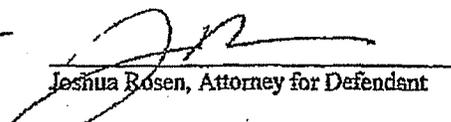
The parties agree that the current jury trial should be rescheduled to one of the following dates: May 18, 2015, May 26, 2015, June 1, 2015, June 8, 2015, June 22, 2015, or June 29, 2015.

DATED this 24th day of December, 2014.

Lawrence Kahn Law Group, PS

Law Offices of Sweeney, Heit & Dietzler


Lawrence M. Kahn, Attorney for Plaintiff


Joshua Rosen, Attorney for Defendant

Based on the stipulation of counsel;

IT IS ORDERED that the current jury trial date of February 23, 2015 is continued to

May 18, 2015

DATED this 20th day of January, 2015


The Honorable Samuel Chung

CP 21-23. This stipulation and order:

- Informs the trial court that that plaintiff's counsel has another trial on the same day in a different case;
- Asks the court to bump Ms. Shovel's case so that the case of Nam v. Fred Green can go forward to trial in Judge Middaugh's court;
- Informs the trial court that defense counsel also has a trial set in another matter;
- Asks the court to bump Ms. Shoval's case so that his other case can go to trial instead;
- Informs the trial court of six different trial dates;
- Asks the court to consider, then chose, one of those dates;
- The court considers resolves these requests by agreeing to (1) bump Ms. Shoval's trial; (2) chose a trial date most appropriate for the court; and (3) sets the date for May 18; and
- The trial court then signs an automated Case Scheduling Order *assigning a completely different trial date*. CP 24-25.

Two months later, Ms. Shoval moved the court for a change of judge "per affidavit of prejudice" and asserted that "[n]o discretionary

rulings have been made by Judge Chung.” CP 26. Judge Chung denied Ms. Shoval’s motion, explaining that it was “denied because this court has already made a discretionary ruling per RCW 4.12.050.” CP 30.

Ms. Shoval moved for reconsideration, arguing that the trial court did not exercise discretion when it signed the order for a trial continuance. CP 31-37. King County Superior Court Chief Judge Mariane Spearman—relying on two Supreme Court cases: State v. Parra and State v. Dennison—issued a detailed two-page ruling denying Ms. Shoval’s request for reconsideration. CP 38-40. Ms. Shoval assigns legal error to both rulings.

2. The trial court reserved ruling on nine out of forty-two motions *in limine*.

Ms. Shoval presented 24 motions *in limine*. CP 389-91. The trial court granted 17, denied two, and reserved ruling on five. *Id.* Valet Parking presented 22 motions *in limine*. CP 397-404. The court granted 16, denied two, and reserved ruling on four. *Id.*

During oral argument, the trial court explained that it was reserving its ruling with respect to Ms. Shoval’s motion *in limine* regarding evidence of Valet Parking absence of prior incidents to “see what the evidence is and what the relevance would be.” RP 39-40. Ms. Shoval also moved to exclude evidence of her failing to hire or call a

liability expert; the trial court heard extensive oral argument, then stated that it was “going to reserve ruling on this issue.” RP 49.

Ms. Shoval moved to exclude evidence of “hypothetical” medical issues (CP 175); the trial court heard oral argument, including Valet Parking’s remark that it did not understand what Ms. Shovel was trying to exclude, then stated, “Well, let’s reserve this one. And, as we get closer to the evidence, I’ll rule.” RP 51-52.

Ms. Shoval asked the court to exclude unsubstantiated injuries and/or medical treatment. CP 390; RP 55-56. Valet Parking was concerned that its experts could not discuss prior conditions that they thought may have contributed to Ms. Shoval’s current condition. RP 56. The trial court stated, “All right. I’m going to hear the evidence. So, No. 19 is reserved.” RP 56.

With respect to whether the jury verdict form should indicate that Ms. Shoval’s medical specials were \$80,000, the trial court stated that it would review the proposed jury verdict form. “And I’m going to reserve this for right now.” RP 71-72.

Before trial, Ms. Shoval advised the court that she “probably will not be calling” a rebuttal treating psychiatrist, but nevertheless asked the trial court to rule in advance that the expert could appear via Skype to the

jury. RP 72-73. The trial court stated that since Ms. Shoval didn't know before trial whether she would call the rebuttal witness, the court was "not going to make a decision on that right now." RP 75. Ms. Shoval never called the rebuttal witness.

Valet Parking asked the court to exclude evidence of arguments and inferences *outside of the evidence* that could inflame the jury enough to deliver a punitive verdict, including the "send a message" argument. CP 229. The trial court heard extensive oral argument from Ms. Shoval, who discussed deterrence, punitive damages, compensation and the scope of her "send a message" argument. RP 92-94. The trial court stated that "it's very difficult for me at this point to figure out what words either side will use. I mean, there is a broad framework that you can't argue about punitive damages in this case. It's just not allowed. So, I'll reserve [this motion *in limine*]." RP 94. Despite the ruling, Ms. Shoval continued arguing. The trial court explained why it was reserving ruling and also opined that it needed more context. RP 95. Ms. Shoval contends that the court abused its discretion by deferring its rulings on these motions *in limine*.

- 3. The trial court denied Ms. Shoval's request to exclude evidence that Valet Parking had no prior incidents of passengers falling while exiting the van.**

In her one-sentence motion *in limine*, Ms. Shoval asked the trial court to exclude any evidence that Valet Parking had no prior record of similar incidents. CP 172. She relied on ER 401 (relevance). *Id.* Valet Parking argued that it had worked at similar events wherein it transported hundreds of passengers without incident. Relying on specific cases, Valet Parking argued that a lack of prior incidents was relevant to the issue of whether dropping customers off at the same spot in the church parking lot where Ms. Shoval was dropped off was “dangerous” (as Ms. Shovel argued it was). RP 126. The trial court denied Ms. Shoval’s motion. CP 390; RP 126. Ms. Shoval asked the court to reconsider, so the trial court heard additional legal arguments from both parties, then denied reconsideration. RP 127. Ms. Shoval asserts that the court abused its discretion.

4. The trial court declined to exclude Ms. Shoval’s expert witness, and instead imposed a monetary sanction of \$1,000 for discovery violations.

Valet Parking moved *in limine* to exclude Ms. Shoval’s psychiatric forensic expert witness, Henry Levine, M.D., from testifying at trial. CP 227. Valet Parking argued that Dr. Levin was disclosed on November 4, 2014; the discovery cutoff was May 11, 2015; and as of June 22—*one week before trial*—Ms. Shoval still had not disclosed Dr. Levine’s

opinions. *Id.* Valet Parking had repeatedly requested and reminded Ms. Shoval—as late as June 9, 2015—to disclose Dr. Levine’s opinions. CP 247-48.

Valet Parking argued that Ms. Shoval’s failure to comply with KCLCR 26(k)(3)(C) (requiring parties to disclose a summary of the expert’s opinions, the basis therefore, and a brief description of the experts qualifications) was unduly prejudicial as it prepared for trial to begin the following week. CP 228. Valet Parking needed Dr. Levine’s opinions for the purpose of preparing its rebuttal witness. CP 229. KCLCR 26(k)(4) allows a court to impose sanctions, including the exclusion of witnesses if a party fails to comply with the disclosure requirements. CP 228.

On June 23, 2015, two business days before trial, Ms. Shoval provided Valet Parking with a lengthy summary of Dr. Levine’s opinions, even though he had completed his sessions with Ms. Shoval in April. CP 364; RP 91. Ms. Shoval apologized for the lengthy delay, explaining that “Dr. Levine has an active and busy practice.” RP 88.

In opposing Valet Parking’s motion to exclude Dr. Levine, Ms. Shoval argued that her expert’s “general” opinions were disclosed earlier. RP 87. Valet Parking disagreed. Ms. Shoval simply disclosed: “Dr. Levine may testify as the approximate cause of Plaintiff’s injuries, that the

treatment she received wasn't [sic] as reasonable and necessary to reasonable medical probability. Additionally, Dr. Levine may also opine about Simcha Shoval's ongoing emotional distress regarding the incident."

RP 88. Valet Parking argued that this rudimentary disclosure was neither an opinion nor the bases for an opinion, as required by the civil rules. RP 88.

The trial court, troubled by Ms. Shoval's late disclosure of Dr. Levine's opinions, and asked when he was scheduled to testify and whether the defense expert had received a copy of his written opinions. RP 89. The court denied Valet Parking's motion to exclude Dr. Levine, so Valet Parking requested a lesser sanction, such as a monetary sanction for the time it would take for the defense expert to quickly review and respond to the report. RP 90. The trial court considered all of the foregoing circumstances and imposed \$1,000 in sanctions against Ms. Shoval for discovery violations and for her untimely disclosure of an expert opinion. RP 91. She asserts that the court abused its discretion.

5. Ms. Shoval's counsel insisted on interrupting his opening statement with a sidebar; the court admonished him to take a 15-minute break to "cool down" his temper.

Several weeks before trial, the court granted Ms. Shoval's motion for partial summary judgment with respect to the reasonableness and

necessity of her medical bills. CP 43. The order states that her motion “on the reasonableness and necessity of the treatment and medical charges only in the sum of \$80,169.74 is GRANTED, there being no genuine issues of material fact.” CP 43.

Ms. Shoval moved *in limine* to preclude Valet Parking “from in any way mentioning or addressing medical specials or the amount awarded to plaintiff in front of the jury because it is irrelevant and prejudicial.” CP 178. During oral argument in support of excluding this evidence, Ms. Shoval stated, “[t]here is no reason for that jury to even know that number[.]” RP 68. “It is not for the jury to determine.” RP 70. Ms. Shoval argued that to put the amount of medical specials “in front of the jury absolutely confuses them.” RP 70. The parties also disputed whether the amount of \$80,169.74 should be on the jury verdict form. RP 71.

Despite arguing that the issue of medical specials and the total amount should not be mentioned or addressed in front of the jury (CP 178), Ms. Shoval told the jury in her opening statement that “[t]here are no medical bills to consider as that was handled in another proceeding.” RP 138. Valet Parking objected, which the court sustained. Even though the court sustained the objection, Ms. Shoval again stated to the jury: “Your

determination will not include in any way, shape, or form the amount of medical bills that were incurred by Simcha Shoval.” RP 138.

Valet Parking requested a sidebar. RP 138. Instead, the court reminded Ms. Shoval that the objection was sustained and to move on. RP 138. Ms. Shoval insisted on a sidebar, stating in front of the jury that “it may be best to interrupt my opening once more and we have a conversation with the Court because this jury is not determining specialists [sic].” RP 138. The court excused the jury. RP 138.

The Court stated its understanding that neither party was going to discuss medical specials in front of the jury because the reasonableness of the bills had been accepted. RP 139. Valet Parking concurred with this understanding and stated it was the basis for the objection. RP 139. Ms. Shoval’s counsel explained that he was telling the jury what it had to do: “decide the harm and losses, the pain and suffering, that’s it.” RP 140. Ms. Shoval reprimanded the trial court:

And for you to allow Counsel to interrupt my opening like this on-on that issue and then sustain the objection is incomprehensible, and I’m moving for a mistrial right now. I don’t want this jury. They’ve been tainted by this. I think that the Court has really overstepped

its bounds in this regard. This is completely irrelevant and injects prejudice into my case. I don't want those medical bills in, which is why we brought the motion for summary judgment, which is why they accepted it, because it was clear this was not for the jury to determine.

RP 140-41. Valet Parking recommended that the court instruct Ms. Shoval to "just leave this alone" and "go on" with the trial. RP 141. The court denied the motion for a mistrial, ruling "there'll be no mentioning of the medical specials in this case given my reserve ruling." *Id.* The court stated that there were many other "issues you can cover without specifically going into that issue right now." *Id.* Instead, Ms. Shoval accused the court of "missing the point" and that the court "interrupted me in front of this jury." RP 141. Ms. Shoval demanded that "right now you need to rule, they are not going to determine medical specials in this case; otherwise, you've just made me a liar." *Id.* Ms. Shoval declared, "I will not proceed until I have a ruling on this motion now." *Id.* The court stated "why don't you go walk outside for a while, come back in 15 minutes, okay? Your motion for mistrial is denied. Cool off and come back, and we'll pick up where we left off." *Id.* Ms. Shoval then accused the court of "hamstringing my case." *Id.* The Court ordered a 15-minute recess. *Id.*

After the recess, Ms. Shoval apologized “for losing my temper.” RP 143. Ms. Shoval explained that the purpose of her motion *in limine* was to prohibit Valet Parking from talking about the medical specials— “for putting it in front of the jury at all.” RP 144. The court opined that Ms. Shoval wanted to use it on the other side “as a sword.” RP 144. Ms. Shoval agreed. “Just to say it’s been done, you [the jury] don’t have to worry about it.” RP 144. The court and parties continued to engage in extensive colloquy on this issue. RP 144-46.

Toward the end of this discussion, Ms. Shoval instructed the court to be aware that it was prejudicing her case. “You’re going to learn that,” Ms. Shoval warned the court, with a pointed finger. RP 147. The Court advised Ms. Shovel to not point at the court again. *Id.*

When the jury returned from a long recess—due to Ms. Shoval needing to take time to cool down and then reargue the issue—the court apologized for the delay and inconvenience, explaining that sometimes it was necessary to discuss legal issues outside the presence of the jury. RP 148. Ms. Shovel contends that the court abused its discretion.

V. LEGAL ARGUMENTS

A. The *de novo* standard of review applies to statutory interpretation of untimely filed affidavits of prejudice.

A trial court's interpretation of a statute is a question of law subject to de novo review. Ellensburg Cement Prods., Inc. v. Kittitas County, 179 Wn.2d 737, 743, 317 P.3d 1037 (2014). When a statute gives a trial court discretion to take a particular action, the standard of review is discretion. Yousoufian v. Office of Ron Sims, 152 Wn.2d 421, 430-31, 98 P.3d 463 (2004).

B. The trial court correctly interpreted the statute by ruling that Ms. Shoval's affidavit of prejudice was untimely.

Ms. Shoval first challenges the trial court's refusal to honor her motion for change of judge and affidavit of prejudice. (See Appellant's Opening Br. at 12-18) RCW 4.12.050 extends to parties a right to one change of judge upon the *timely* filing of a motion supported by an affidavit of prejudice. A motion and affidavit of prejudice are timely filed if called to the court's attention "before the judge presiding has made any order or ruling involving discretion." RCW 4.12.050.

RCW 4.12.050(1) states:

Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial before such judge: PROVIDED, 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, but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso; and in any event, in counties where there is but one resident judge, such motion and affidavit shall be filed not later than the day on which the case is called to be set for trial: AND PROVIDED FURTHER, That notwithstanding the filing of such motion and affidavit, if the parties shall, by stipulation in writing agree, such judge may hear argument and rule upon any preliminary motions, demurrers, or other matter thereafter presented: AND PROVIDED FURTHER, That no party or attorney shall be permitted to make more than one such application in any action or proceeding under this section and RCW 4.12.040.

RCW 4.12.050(1) (emphasis added).

Here, the parties submitted a stipulation and order to continue the trial date—providing the court with six proposed dates. CP 21-22. The trial court chose a date, granted a continuance, and signed the order amending the case schedule on January 21, 2015. CP 23-25. Two months later, Ms. Shovel moved for a change of judge based on an affidavit of prejudice, CP 26-27, which the trial court denied as untimely “because this court has already made a discretionary ruling per RCW 4.12.050.” CP 30.

The Chief Civil Judge denied Ms. Shoval’s motion for

reconsideration, relying on two criminal cases and explaining that when the parties stipulate to a continuance, the trial court has discretion whether to grant or deny the continuance. CP 39, citing State v. Parra, 122 Wn.2d 590, 601, 859 P.2d 1231 (1993) and State v. Dennison, 115 Wn.2d 609, 620 n.10, 801 P.2d 193 (1990). The Chief Civil Judge highlighted the Supreme Court's holding in Parra, stating that a "stipulation is an agreement by the attorneys to the action regulating any matter incidental to the proceedings *which falls within their discretion.*" CP 39 (emphasis in the Chief Civil Judge's order). As the Chief Civil Judge explained, "[m]otions do not transform into stipulations just because counsel agree or have not objection. A motion is made to the court for the purpose of obtaining a ruling or order." *Id.*

Here, Ms. Shoval argues that the Chief Civil Judge erred by relying on criminal cases wherein the trial court inherently exercises discretion "hedged about with constitutional concerns like a speedy trial." (*See* Appellant's Opening Br. at 18). But Ms. Shovel presents a difference without a real distinction. While it is true that when considering continuances, criminal courts "must consider various factors, such as diligence, materiality, due process, a need for an orderly procedure, and

the possible impact of the result on the trial,”³ it is also true that most of those identical factors must be considered in the civil context. In civil cases, the trial courts are concerned with the timely disposition of cases and the trial court’s own calendar (even if civil cases do not present the same issues of due process).

Here, this particular stipulation and order, under the circumstances, involved the following exercise of court’s discretion:

- Informed the trial court that that plaintiff’s counsel has another trial on the same day in a different case;
- Asked the court to bump Ms. Shovel’s case so that the case of Nam v. Fred Green can go forward to trial in Judge Middaugh’s court;
- Informed the trial court that defense counsel also has a trial set in another matter;
- Asked the court to bump Ms. Shoval’s case so that his other case can go to trial instead;
- Informed the trial court of six different trial dates;
- Asked the court to consider, then chose, one of those dates;
- The court considered and resolved these requests by agreeing to (1) bump Ms. Shoval’s trial; (2) chose a trial date most appropriate for the court; and (3) sets the date for May 18; and
- The trial court then signs an automated Case Scheduling Order *assigning a completely different trial date*. CP 24-25.

³ State v. Guajardo, 50 Wn. App. 16, 19, 746 P.2d 1231 (1987), *review denied* 110 Wn.2d 1018 (1988).

Ms. Shoval's and Valet Parking's stipulated continuance provided *six trial dates for the trial court's consideration*. CP 22. The trial court properly exercised its discretion in choosing a trial date—likely one most fitting to the trial court's calendar, since the Order Amending the Case Schedule actually set a different date than the signed order. The convenience of the parties is rarely divorced from the trial court's consideration of its own calendar, duties, and function. Much like the trial court in State v. Parra, 122 Wn.2d 590, 603, 859 P.2d 1231 (1993), the parties here were submitting a stipulation with proposed trial dates that required a trial court's resolution, and by the nature of the request involved “interference with the duties and functions of the court.”

Conversely, when a trial court *denies* a continuance, it also exercises discretion. In Donaldson v. Greenwood, 40 Wn.2d 238, 242 P.2d 1038 (1952), defense counsel moved for a trial continuance because his client temporarily left the jurisdiction of Seattle to attend his daughter's marriage in Paris. The trial court “exercised a high degree of fairness and judicial restraint” in denying a trial continuance. *Id.* at 243. The Supreme Court was not interpreting RCW 4.12.050(1), but opined that the “denial of a continuance rests in the sound discretion of the trial court and will not be reversed except for manifest abuse.”

The trial court is not a rubber stamp for stipulations; it must exercise discretion when considering certain agreed orders. Black's Law Dictionary at 467 (6th ed. 1990) defines "discretionary acts" as:

Those acts wherein there is no hard and fast rule as to the course of conduct that one must or must not take and, if there is clearly defined rule, such would eliminate discretion. Option open to judges and administrators to act or not as they deem proper or necessary and such acts or refusal to act may be not overturned without a showing of abuse of discretion, which means an act or failure to act that not conscientious person acting reasonably could perform or refuse to perform. One which requires exercise in judgment and choice and involves what is just and proper under the circumstances.

Additionally, the terms of the stipulation and order were not certain or definite—the court exercised its discretion in determining which trial date was the best for the court and for the parties, given all of the competing circumstances. This term was not definite. Legal commentators explain that indefiniteness problems arise “where the parties have purported to agree upon a material term but left it indefinite not reasonably certain.” DeWolf, Allen and Caruso, 25 Washington Practice: Contract Law and Practice § 2.27, at 92 (3rd ed. 2014); *see also* Calamari & Perillo, Contracts § 2.9, at 44-45 (6th ed. 2009).

As the Chief Civil Judge noted, the “parties cannot simply agree among themselves to continue a trial date.” CP 39.

C. Evidentiary rulings are reviewed for abuse of discretion.

The admissibility of evidence is largely within the discretion of the trial court, and should not be disturbed on appeal absent a showing of abuse. Harris v. Groth, 31 Wn. App. 876, 879, 645 P.2d 1104 (1982), *aff'd*, 99 Wn.2d 438, 633 P.2d 113 (1983). Abuse occurs only where discretion is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971). The trial court's decision is given particular deference where there are fair arguments to be made both for and against admission. In re Bennett, 24 Wn. App. 398, 404, 606 P.2d 1308 (1979). Division One opines that “[i]f the reasons for admitting or excluding the opinion evidence are both fairly debatable, the trial court's exercise of discretion will *not* be reversed on appeal.” (Italics in original). Levea v. G.A. Gray Corp., 17 Wn. App. 214, 220-21, 562 P.2d 1276 (1977), *review denied*, 89 Wn.2d 1010 (1977).

D. A trial court has discretion to grant, deny, modify, or defer evidentiary pre-trial motions.

Ms. Shovel complains that the trial court “erred” by taking some of her motions *in limine* to exclude evidence under advisement without a ruling. (See Appellant's Opening Br. at 18-19) But she submits no legal authority to support this proposition.

A trial court may grant a motion *in limine* “if it describes the evidence which is sought to be excluded with sufficient specificity to enable the trial court to determine that it is clearly inadmissible under the issues as drawn or which may develop during the trial.” Fenimore v. Donald M. Drake Constr. Co., 87 Wn.2d 85 91, 549 P.2d 483 (1976). To assist the court in making appropriate pretrial rulings “prior to trial and ‘out of context’ the moving party should provide a memorandum of authorities showing that the evidence is inadmissible.” *Id.* Here, Ms. Shoval contends that the trial court’s *deferral* of its ruling on whether to exclude evidence that she “chose not to call a liability expert” was prejudicial. (*See* Appellant’s Opening Br. at 19-20) But her written motion *in limine* (MIL No.11 at CP 174) did not provide the court with any written authority, context or specific facts, other than a cryptic citation to ER 401 and 403. If the motion is too vague, too broad, or inadequately briefed, then “it can hardly be said to have abused its discretion if it denies a motion asking it to rule on the admissibility of evidence before it knows what the issues and circumstances are.” *Id.*

Ms. Shoval told the court that she “probably will not be calling” a rebuttal treating psychiatrist, but nevertheless asked the trial court to rule in advance if the expert could appear via Skype to the jury. RP 72-73. The

trial court stated that since Ms. Shoval didn't know before trial whether she would call the rebuttal witness, the court was "not going to make a decision on that right now." RP 75. Ms. Shoval never called the rebuttal witness. She could have easily renewed her request outside of the jury's presence and obtained a ruling about using Skype. She did not. There was no abuse of discretion.

Inexplicably, Ms. Shoval argues that the court erred by reserving a ruling *on Valet Parking's motion in limine*. (See Appellant's Opening Br. at 22) Valet Parking asked the court to exclude evidence of arguments and inferences *outside of the evidence* that could inflame the jury enough to deliver a punitive verdict, including the "send a message" argument. CP 229. The trial court stated that "it's very difficult for me at this point to figure out what words either side will use. I mean, there is a broad framework that you can't argue about punitive damages in this case." RP 94. Valet Parking accepted the court's deferral,⁴ but Ms. Shoval did not.

The trial court may take specific motions under advisement and wait for the factual background to be developed at trial, so that it has a

⁴ Neither party was "reprimanded" in front of the jury, as the court correctly noted should not be done. (See Appellant's Opening Br. at 22). Ms. Shoval could have presented offers of proof outside of the jury's presence; requested a modified ruling on pretrial motions; or requested an evidentiary ruling after the facts were sufficiently developed.

better understanding of the consequences of excluding or admitting that evidence. To do otherwise would force the court to improperly engage in conjecture. See Fenimore, 87 Wn.2d at 90 (holding that the trial court properly denied a motion to exclude evidence because it “asked the court to engage in conjecture regarding the relevancy of evidence which might later be offered”).

Trial courts routinely defer evidentiary rulings until the factual basis is better developed. As the Court explained in State v. Blum, 17 Wn. App. 37, 44-45, 561 P.2d 226 (1977), *review denied*, 89 Wn.2d 1004 (1977), when ruling on motions *in limine*, “[a] major consideration is that the trial judge is being called upon to rule ‘out of context’ and without the benefit of the additional evidence which may develop during trial.” Similarly, the court may modify its pretrial ruling. See Jordan v. Berkey, 26 Wn. App. 242, 244, 611 P.2d 1382 (1980) (the pretrial order “is interlocutory in character and will be modified or abandoned according to the demands of justice”). In Jordan, the trial court initially excluded evidence of plaintiff’s alcoholism, but then ruled that his alcohol use became relevant and admissible after he testified about his physical condition. Here, the trial court did not abuse its discretion in deferring its ruling on certain motions *in limine*.

E. The court did not abuse its discretion in admitting evidence of the absence of prior incidents.

First, Ms. Shoval contends that Valet Parking “sprung this evidence on Shoval at the end of the trial,” as if Valet Parking violated the court’s evidentiary rulings. (See Appellant’s Opening Br. at 25) It did not. The court ruled that under the facts and circumstances in this case, evidence of the absence of prior incidents was admissible, so Valet Parking presented the evidence. Second, even though Ms. Shovel briefed neither the facts nor the law in her three-sentence motion *in limine* on this issue, she now, for the first time directs this Court to specific cases. (Compare MIL No. 2 at CP 172 with Appellant’s Opening Br. at 23-25). These cases are easily distinguishable.

The trial court did not abuse its discretion, based on the facts and law presented to it. Valet Parking had worked at events similar to that on the evening of September 25, 2012, and had transported hundreds of passengers. In fact, an employee from the Temple testified that Valet Parking *had transported passengers to and from the same parking lot to the same Temple in the previous year, 2011.* RP 326. Similarly, Ms. Shoval alleged these facts in her complaint. (The Temple “has used a van service for years to shuttle people between an off-site parking lot and the temple for holidays were excess off-site parking is required.” CP 2)

A lack of prior incidents was relevant to the location where the driver parked the van at the Church lot and the location where Ms. Shoval fell. She alleged that the location was “dangerous.” Her complaint alleges the “danger” of the dark color of van’s running board; there “was no light on the van to light up the running board or the ground near thereto”; “the parking lot was also very dark” and “there were no car lights in the area to light up the running board or the ground around the van’s doors.” CP 2-3.

Here, Valet Parking’s absence of incidents were relevant and admissible because the conditions were sufficiently similar and the actions were sufficiently numerous. *See Martini ex rel. Dussalt v. State*, 121 Wn. App. 150, 89 P.3d 250 (2004), *review denied*, 153 Wn.2d 1023 (2005) (allowing the absence of other accidents was not an abuse of discretion “by ruling that conditions were sufficiently similar” and noting that “the national trend is also in accord”).

The Martini Court noted that Washington and at least 24 other states “now take the position that ‘that evidence of the absence of previous similar accidents at the same place where the plaintiff was injured in person or property is relevant and competent as tending to show that the conditions complained of were not so unreasonably dangerous as to render the defendant liable for failing to correct them, often noting that evidence

of previous injuries at a particular spot was relevant and admissible, and that the two situations were similar.” *Id.* at 171; *see also* Panitz v. Orege, 10 Wn. App. 317, 518 P.2d 726 (1973) (the “decision to exclude events occurring on previous occasions is a determination falling within the discretion of the trial court. Such a ruling will not be disturbed on review except upon a clear showing of abuse of such discretion[.]”) Ms. Shovel’s reliance on Gabel v. Koba, 1 Wn. App. 684, 463 P.2d 237 (1969) is misplaced and is factually inapposite because the conditions were not sufficiently similar.

F. The trial court properly exercised its discretion in imposing a monetary sanction instead of excluding her untimely disclosed expert.

Ms. Shovel contends that the trial court “erred as a matter of law” and violated due process by imposing a monetary discovery sanction. (*See* Appellant’s Opening Br. at 25). A trial court’s imposition of sanctions for noncompliance with court orders or rules is reviewed for abuse of discretion. Jones v. City of Seattle, 179 Wn.2d 322, 387-88, 314 P.3d 380 (2013). On June 23, 2015, two business days before trial, Ms. Shovel finally provided Valet Parking with a lengthy summary of her forensic psychiatrist’s expert opinions, even though the expert had completed his

sessions with Ms. Shoval in April, and the discovery cutoff was May 11. CP 364; RP 91.

If the trial court had excluded Ms. Shoval's expert due to his untimely disclosed opinions, then the trial would have been required to conduct an on-the-record analysis of the factors explained in Burnet v. Spokane Ambulance, 131 Wn.2d 484, 506, 933 P.2d 1036 (1997), subject to the harmless error review. However, the imposition of monetary compensatory sanctions does not trigger an on-the-record analysis of the Burnet factors. Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 688, 132 P.3d 115 (2006) (noting that "nothing in Burnet suggests that trial courts must go through the Burnet factors every time they impose sanctions for discovery abuses. Nor does Burnet indicate that a monetary compensatory award should be treated as 'one of the harsher remedies allowable under CR 37(b).'"") Based on the foregoing, the court was well within its discretion to impose a monetary compensation sanction. *See also supra* section IV.H.4.

G. The trial court did not abuse its discretion in sustaining Valet Parking's objection when Ms. Shoval violated her own motion in limine and invited any alleged error.

Ms. Shoval moved *in limine* to preclude Valet Parking "from *in any way mentioning or addressing medical specials* or the amount

awarded to plaintiff in front of the jury because it is *irrelevant and prejudicial*.” CP 178 (emphasis added); *see also supra* IV.H.5. During oral argument in support of excluding this evidence, Ms. Shoval stated, “[t]here is no reason for that jury to even know that number[.]” RP 68. “It is not for the jury to determine.” RP 70. Ms. Shoval argued that to put the amount of medical specials “in front of the jury absolutely confuses them.” RP 70.

Despite her unequivocal position, Ms. Shoval nevertheless explained to the jury in her opening statement that “[t]here are no medical bills to consider as that was handled in another proceeding.” RP 138. Valet Parking objected, which the court sustained. After the court sustained the objection, Ms. Shoval *again* stated to the jury: “Your determination will not include in any way, shape, or form the amount of medical bills that were incurred by Simcha Shoval.” RP 138.

Valet Parking requested a sidebar. RP 138. Instead—and apparently in an effort to not draw more attention to this subject—the court reminded Ms. Shoval that the objection was sustained and to move on. RP 138. However, Ms. Shoval *insisted* on a sidebar, *stating in front of the jury* that “it may be best to interrupt my opening once more and we

have a conversation with the Court because this jury is not determining specialists [sic].” RP 138.

The court excused the jury and stated its understanding that neither party was going to discuss medical specials in front of the jury because the reasonableness of the bills had been accepted. RP 138-39. Valet Parking concurred with this understanding and stated it was the basis for the objection. RP 139.

Ms. Shovel then lectured, scolded and chastised the court. (*See supra* IV.H.4; Appellant’s Opening Br. at 30-32) She argued that sustaining Valet Parking’s objection was “incomprehensible”; the court had overstepped its bounds; the court was “missing the point”; and demanding that “right now you need to rule.” RP 141-42. Due to Ms. Shovel’s lack of decorum and apparent loss of temper, the court advised Ms. Shoval to “walk outside for a while, come back in 15 minutes.” RP 142. “Cool off and come back, and we’ll pick up where we left off.” *Id.* When Ms. Shoval returned, she pointed her finger at the judge and warned him. RP 147.

Contrary to Ms. Shovel’s version of these events, the court did not interrupt her “opening argument for over 20 minutes” or cause her any prejudice. The jury was in recess for 20 minutes because Ms. Shovel was

ranting, lost her temper, and then was advised to take a walk and cool down. She returned, apologized for losing her temper, then began pointing at the court and re-arguing the issue of mentioning medical specials to the jury. The jury never reached the issue of medical bills or general damages because it first determined that Valet Parking was not negligent. CP 452-55.

Here, any potential abuse of discretion was invited by Ms. Shoval's conduct. In determining whether the doctrine of invited error bars review, courts consider whether the party asserting error affirmatively assented to it, *materially contributed to it*, or benefited from it. State v. Momah, 167 Wn.2d 140, 154, 217 P.3d 321, 328 (2009); State v. Barnett, 104 Wn. App. 191, 200, 16 P.3d 74 (2001) (a potential error is waived if the party asserting such error materially contributed thereto); In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) ("This court will deem an error waived if the party asserting such error materially contributed thereto.").

Here, Ms. Shoval contributed to any alleged error by: (1) failing to adhere to her own motion *in limine* to exclude any reference or mention of medical specials; (2) refusing to abide by the court's ruling sustaining Valet Parking's objection; (3) insisting on a sidebar during her opening

statement, even though the trial court sustained the objection and advised her to move on; and (4) telling the court *in front of the jury* “that it may be best to interrupt my opening once more.” The 20-minute recess was purely caused by her own rudeness and loss of temper—which she could have prevented. Her own actions materially contributed to any potential abuse of discretion with respect to the 20-minute recess and the denial of a mistrial.

H. The trial court did not violate Ms. Shoval’s constitutional rights or improperly comment on the evidence.

Ms. Shoval contends that the trial court “made manifest errors affecting Shoval’s constitutional rights by repeatedly commenting on the evidence.” (*See* Appellant’s Opening Br. at 35) But the examples she provides do not violate the appearance of neutrality, nor did she lodge an objection “at the next available opportunity when jury is not present” once she perceived an improper comment on evidence. *See* ER 614(c). Her failure to object and make a record warrants a waiver of any purported “comment” on the evidence.

Her first example: “All right. Sustained. I think the –the witness has answered the question” is not a judicial comment on the evidence. (*See* Appellant’s Opening Br. at 38; RP 187). Valet Parking “admitted that as a common carrier that you have this heightened duty of—of care.”

RP 186. When asked how it fulfills this duty, the witness explained that “We drive safely and carefully. We transport customers safely from Point A to Point B. If they, uhm—once we parked the van, we’ll go around to assist the customers out that want assistance.” RP 187. Despite this clear and unequivocal answer, Ms. Shovel again asked “And so in order to fulfill these recognized duties you make sure that the drivers get out and offer to physical assist your customers.” RP 187. The court sustained the “asked and answered” objection, stating that “I think the—the witness has answered the question.” RP 187. This comment was not a question to the witness, nor did it improperly indicate the court’s attitude toward the witness or her credibility. Nor is there any indication that the court was endorsing a witness “successfully” evading the question, as Ms. Shovel speculates. (*See Appellant’s Opening Br.* at 38).

The second purported example (*See Appellant’s Opening Br.* at 38-41) demonstrates that the court and both parties were repeatedly talking over each other after Valet Parking lodged an objection. Ms. Shovel stated—in front of the jury—that Valet Parking’s objections were “absurd.” *Id.* at 41. Likewise, when the time for a lunch recess was near, there was nothing wrong with the court evaluating when to interrupt an witness examination for a lunch break. Nor did the court comment on the

evidence. In fact, when the jury left the room, the trial court explained the ground rules for making objections, and directed Ms. Shovel to stop talking until a ruling has been made. *See* RP 205-06. Ms. Shovel did not lodge any ER 614(c) objections.

The third and fourth purported judicial comments (*see* Appellant's Opening Br. at 43-45) were not comments "on the evidence" but Ms. Shoval's ongoing and combative arguments with the court about Valet Parking's objections. Ms. Shoval moved to strike as nonresponsive a witness's *third answer to the same question*. RP 261-62. The court denied the request, but Ms. Shovel continued to argue about it. After the witness's third answer, the jury could determine whether the witness was evading the question. Ms. Shovel did not lodge any ER 614(c) objections.

Ms. Shovel repeatedly violated the court's "ground rules" to stop talking after an objection was made or sustained. RP at 205-06. She argued with and interrupted the court, then tutored the court on the rules of cross examination (*see* Appellant's Opening Br. at 44; RP 358). The court's response was not a comment "on the evidence" but an attempt to "require order and decorum in proceedings before the court." CJC 2.8. Likewise, "[a] judge shall require lawyers in proceedings before the court

to refrain from manifesting bias or prejudice, or engaging in harassment, against parties, witnesses, lawyers, or others.” CJC 2.3.

Ms. Shovel contends that the court commented “on the evidence” when it asked the parties: “Are you going to have any motions?” (*See* Appellant’s Opening Br. at 45; RP 643). This is not a question that belies the court’s appearance of impartiality or violates Ms. Shovel’s constitutional rights. She also asserts that the court commented on the evidence when it sustained Valet Parking’s objection. (*See* Appellant’s Opening Br. at 46; RP 694). But in sustaining the objection, the court simply repeated the basis for its ruling.

Ms. Shovel argues that the court “entered the fray and assumed an advocacy role” when she tried to use the *deposition* of witness A (who had already testified on the stand) in her cross examination of witness B (Anna Lynn). (*See* Appellant’s Opening Br. at 47; RP 694-95). The colloquy demonstrates Ms. Shovel’s own confusion when she admitted that she misspoke—she wanted to use the transcript of Ms. Campbell, not Ms. Noon. *Id.* Nor did Ms. Shovel request a sidebar or make an offer of proof outside the jury’s presence. Instead, she continued to argue with the court after it had made its ruling. This court made no comment about the evidence.

The court did not abuse its discretion in ruling that Ms. Shovel could not use a third-party deposition to impeach or cross examine another witness. CR 32(a)(1), which governs use of depositions in court proceedings, has limitations and exceptions. CR 32(a)(3)(i)-(v) allows the deposition to be “used by any party for any purpose *if the court finds*” that the witness is dead, resides out of county, cannot attend trial, is unavailable via subpoena, or other exceptional circumstances. Similarly, CR 32(a)(1) allows the use of a deposition “for the purpose of contradicting or impeaching *the testimony of the deponent* as a witness or for any other purpose permitted by the Rules of Evidence.”

Here, Ms. Shoval wanted to use the deposition transcript of Tina Campbell—a witness who had already testified on the stand—to presumably impeach by contradiction another witness, Anna M. Lynn. The Washington Rules of Practice casts doubt on this approach. Karl Tegland opines that “CR 32(a)(1) would seem to allow the introduction of X’s deposition testimony to rebut Y’s in-court testimony—a situation sometimes termed ‘impeachment by contradiction.’” Tegland, 3A Washington Practice: Rules Practice § 7 at 754 (6th ed. 2013). He contends that it is “doubtful” that the drafters intended this result, but instead “intended to refer only to impeachment by prior inconsistent

statement, *leaving the admissibility of rebuttal evidence to be governed by provisions other than 32(a)(2).*” *Id.* The court did not abuse its discretion, and did not comment on any evidence.

Ms. Shoval contends that the court’s expression of appreciation to the jury for their patience is a purportedly improper “comment on the evidence.” (*See* Appellant’s Opening Br. at 48; RP 716-18). First, no evidence was before the jury upon which to comment. Second, Ms. Shoval presents no legal support for her contention that thanking the jury for its time and patience during a five-day trial *is anything but* a judicial courtesy. A jury takes its civic duties seriously, and thanking them is simply good manners.

I. The trial court properly exercised its discretion; Ms. Shoval had a fair trial.

Ms. Shovel invokes the doctrine of cumulative error, claiming that she did not receive a fair trial. (*See* Appellant’s Opening Br. at 49) First, at the close of evidence or 10 days after judgment was entered, she did not ask for a new trial pursuant to CR 59—and has waived claiming that the court erred—since she never asked for a new trial.

Additionally, the foregoing concerns raised by Ms. Shovel in her opening brief were all rulings made within the court’s discretion. She relies on Storey v. Storey, 21 Wn. App. 370, 585 P.2d 185 (1978), *review*

denied, 91 Wn.2d 1017 (1979) for the proposition that the cumulative error doctrine applies. But Storey affirmed granting a new trial after considering the factors set forth in CR 59(a), which Ms. Shoval did not ask this court to do.

Finally, the court's first instruction to the jury explained that one of its "duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my ruling on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked to you to disregard the evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict." CP 430.

With respect to "comments on the evidence," the same instruction explains that the "law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely." *Id.*

This instruction also explains that each party has a right or duty to object to questions. "These objections should not influence you. Do not

make assumptions or draw any conclusions based on the lawyer's objections." CP 431. "The jury is presumed to have heeded the instructions of the court." State v. Lord, 117 Wn.2d 829, 861, 822 P.2d 177 (1991).

VI. CONCLUSION

Respondent Valet Parking respectfully requests that the Court affirm the jury's verdict. The trial court did not abuse its discretion in making or deferring its evidentiary rulings, nor did it impermissibly comment on the evidence. Further, the court did not err as a matter of law in denying Ms. Shovel's untimely affidavit of prejudice because it had already made a discretionary ruling.

Respectfully submitted this 4th day of April, 2016.

FLOYD, PFLUEGER & RINGER, P.S.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the date noted below, a true and correct copy of the foregoing was delivered and/or transmitted in the manner(s) noted below:

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