No. 93601-3

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondents,

v.

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

Petitioners.

and

ROBERT KORNFELD,

Additional Respondent.

JOINT ANSWER TO PETITION FOR REVIEW

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A. Introduction.

The Court of Appeals correctly held that respondent Rolfe Godfrey's affidavit of prejudice was timely under RCW 4.12.050 because the trial court had not made any discretionary rulings before he filed it. The Court of Appeals decision comports with the plain language of RCW 4.12.050 and is consistent with this Court's decisions. Godfrey and his co-respondent and trial counsel Robert Kornfeld ask this Court to deny review. RAP 13.4(b).

B. Restatement of Issue.

Is an affidavit of prejudice in a civil lawsuit timely under RCW 4.12.050 when the trial court presiding over the case has taken no action other than signing the parties' stipulation that extends only the deadline for their disclosure of witnesses?

C. Restatement of the Case.

Appellant Rolfe Godfrey suffered a devastating injury to his hand when a wine bottle manufactured by respondent Saint Gobain and bottled by respondent Chateau Ste. Michelle (collectively "St. Michelle") shattered while he was opening it. (Op. 1)[1] After Mr. Godfrey sued Ste. Michelle, Pierce County Superior Court Judge

[1] This Restatement of the Case is supported by citation to the Court of Appeals Opinion (Appendix A) and the record before the trial court.

Katherine Stoltz ("the trial court") denied Mr. Godfrey's affidavit of prejudice under RCW 4.12.050, ruling that it was untimely under the statute because she had already twice exercised discretion, once by signing a stipulated order extending the deadline for Ste. Michelle to disclose its primary witnesses and for disclosure of all rebuttal witnesses, and again by signing a stipulated order for a CR 35 exam of Mr. Godfrey. (Op. 1; CP 158-64, 205-06) In fact, as Ste. Michelle now concedes (Pet. 2), the trial court did not sign the CR 35 stipulation – a superior court commissioner did. (Op. 1; CP 163) After denying Mr. Godfrey's affidavit of prejudice, the trial court presided over a bench trial at which it excluded nearly all of Mr. Godfrey's liability evidence (as well as his expert testimony based on that evidence), while admitting every exhibit offered by Ste. Michelle, as a sanction for failing to file a "separate" Joint Statement of Evidence. (*See generally* App. Br. 7-15) The trial court entered judgment in favor of Ste. Michelle. (CP 765-66)

The Court of Appeals reversed in an unpublished decision, holding Mr. Godfrey's affidavit of prejudice was timely because the trial court had not exercised discretion before he filed it. (Op. 1-3) The Court of Appeals reasoned that approving stipulations on such matters as "discovery, identity of witnesses, and deadlines for

submission of documents" does not invoke trial court discretion "because they do not alert an individual party to the trial court's disposition." (Op. 2) Because the trial court erroneously denied the affidavit of prejudice, all of its subsequent actions were void and a new trial was required. (Op. 3)

D. Argument Why Review Should Be Denied.

1. The Court of Appeals correctly held the trial court did not exercise discretion by signing a stipulated order extending witness disclosure deadlines.

The Court of Appeals correctly held that a trial court does not exercise discretion under RCW 4.12.050 when it signs a stipulated order extending the deadline for witness disclosures in a civil case, an order that affects only the parties and in no way alerts the parties to any potential disposition of the court towards the case. Ste. Michelle identifies no decision that conflicts with the Court of Appeals decision, nor any public concern that would justify review. This Court should deny review. RAP 13.4(b)(1), (2), (4).

RCW 4.12.050(1) grants any party or the party's attorney the absolute right to establish the prejudice of a judge by filing an affidavit stating his or her belief that the judge cannot be fair and impartial:

> 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.

RCW 4.12.050(1) places no limits on the right to file such an affidavit of prejudice, except that the affidavit must be filed before the judge has made a ruling involving discretion:

> 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 . . . .

The statute makes clear that "the arrangement of the calendar . . . shall not be construed as a ruling or order involving discretion within the meaning of this proviso." RCW 4.12.050(1). Ste. Michelle's argument that a stipulation affecting only the dates for disclosure of witnesses is "an order or ruling involving discretion" ignores the plain language of this proviso. (Arg. § D.3, *infra*)

Ste. Michelle also ignores this court's established precedent, which recognizes that a court does not exercise discretion within the meaning of RCW 4.12.050 in accepting stipulated orders on

preliminary matters. For example, in *State ex rel. Floe v. Studebaker*, 17 Wn.2d 8, 134 P.2d 718 (1943), the judge signed stipulated orders consolidating two civil cases and continuing one of them. This Court held the order did not involve discretion, reasoning 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." *Floe*, 17 Wn.2d at 17.[2]

Ste. Michelle's allegation the stipulation affected the "timely disposition" of the case and the "court's own calendar" mischaracterizes and is completely at odds with the parties' actual stipulation in this case. (Pet. 11) The stipulation did not continue a hearing or the trial date, or require any action whatsoever from the court. It changed only the deadline by which the parties would exchange information concerning their witnesses. The continuance of witness disclosure deadlines is unequivocally a matter "affecting only the rights or convenience of the parties, not involving any interference with the duties and functions of the court" and thus did

[2] RCW 4.12.050 has remained substantively unchanged since 1941, two years before *Floe*. It was amended once in 2009 for gender neutrality and to except water right adjudications. *See* Laws of 2009 ch. 332 § 20.

not involve discretion. *State v. Parra*, 122 Wn.2d 590, 603, 859 P.2d 1231 (1993). The Court of Appeals correctly held that the trial court did not exercise discretion by signing a stipulated order extending the deadline for witness disclosures, a deadline that in no way affects the functioning of the court.

Where a court exercises discretion, it is typically because – unlike here – it ruled on a *motion*. *Parra*, 122 Wn.2d at 600-01 ("To either grant or deny a motion involves discretion"; ruling on unopposed omnibus motions involved discretion because "[r]ather than presenting a stipulation, the parties each submitted motions to the court for its ruling"). While Ste. Michelle might be correct that a formal motion is not always a "necessary" predicate for the court to exercise discretion (Pet. 9), the statute emphasizes that ruling on a motion is the traditional hallmark of discretion. RCW 4.12.050(1) (affidavit must be filed "before [the court] 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") (emphasis added); *see also State v. Torres*, 85 Wn. App. 231, 234, 932 P.2d 186 (order allowing material witness to leave jurisdiction did not involve discretion because it "was not a motion by any party to the action, as contemplated by RCW 4.12.050"), *rev. denied*, 132 Wn.2d 1012

(1997). Here, had the trial court refused the parties' stipulation, the parties would have simply been "in their original positions . . . free to seek resolution of the issue through a motion" inviting the court to exercise discretion. *Parra*, 122 Wn.2d at 601.

The right to file an affidavit of prejudice is a "substantial and valuable right." *Harbor Enterprises, Inc. v. Gunnar Gudjonsson*, 116 Wn.2d 283, 291, 803 P.2d 798 (1991). "[T]here is no discretion in granting a timely motion" and once exercised, "the statutory right deprives that particular judge of jurisdiction." *Harbor Enterprises*, 116 Wn.2d at 291; *see also Marine Power & Equip. Co., Inc. v. Indus. Indem. Co.*, 102 Wn.2d 457, 461-62, 687 P.2d 202 (1984) ("The statute permits of no ulterior inquiry; it is enough to make timely the affidavit and motion, and however much the judge moved against may feel and know that the charge is unwarranted, he may not avoid the effect of the proceeding by holding it to be frivolous or capricious.") (quotation omitted). Requiring that the affidavit be filed before the judge has exercised discretion prevents parties from "waiting to see the disposition of the judge before asserting the right." *Parra*, 122 Wn.2d at 599 (citing *State v. Clifford*, 65 Wash. 313, 316, 118 P. 40 (1911)).

Ste. Michelle's interpretation of "discretion" in RCW 4.12.050 is completely detached from this statutory purpose – to prevent parties from "gaming the system" by filing an affidavit after a judge has ruled against them. As this Court explained in *Parra*, "[t]he distinction drawn in *Floe* relating to stipulations makes sense" because where "the parties have resolved ... 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." 122 Wn.2d at 599-600.[3]

The Court of Appeals did not, as Ste. Michelle alleges, hold that "stipulated orders are always non-discretionary." (Pet. 7) Rather, consistent with *Floe,* it gave as examples specific types of stipulated preliminary orders in civil cases that would be non-discretionary, including orders "regarding discovery, identity of witnesses, and deadlines for submission of documents." (Op. 2 (emphasis added)) *See also Tye v. Tye*, 121 Wn. App. 817, 821, 90

[3] Ste. Michelle erroneously asserts that it was the only party that received relief under the stipulation and thus had the trial court denied it, Ste. Michelle would have been alerted to a bias against it. (Pet. 11-12) But the stipulation extended the due date for disclosure of Mr. Godfrey's rebuttal witnesses. (CP 158) Regardless, when a court rejects the parties' stipulation, there is no reason to infer a disposition towards either party.

P.3d 1145 (2004) ("ministerial acts of entering uncontested case scheduling orders" did not involve discretion).

Ste. Michelle – not the Court of Appeals – puts forth an absurdly categorical interpretation of RCW 4.12.050 by which approval of stipulations, including those involving nothing more than the parties' calendaring, "always" involves discretion. (Pet. 9) Ste. Michelle not only disregards the statutory language and legislative purpose, but eviscerates both the "substantial and valuable right" to file an affidavit of prejudice and the policy favoring the resolution of calendaring matters by stipulation. *Parra*, 122 Wn.2d at 601 ("Stipulations are favored by courts").

Ministerial pretrial matters can, and should, be resolved by agreement of the parties without fear of forfeiting the valuable right to file an affidavit of prejudice. The Court of Appeals decision is consistent with this Court's precedent and Washington public policy; it presents no basis for review under RAP 13.4(b).

2. While the Constitution and criminal rules require a court to scrutinize a stipulated continuance of a criminal trial, no authority requires judicial oversight of stipulated extensions of civil discovery deadlines.

The Court of Appeals followed established law in holding that a trial court does not exercise discretion in approving the parties'

stipulation to extend civil discovery deadlines that in no way affect the court or its docket. Ste. Michelle cites no published case in conflict with that decision. Instead, Ste. Michelle relies on a series of cases addressing whether the criminal rules and the constitutional right of criminal defendants to a speedy trial require a court to exercise discretion when approving a stipulation continuing a criminal trial. Because the Court of Appeals decision does not conflict with these decisions, there is no basis for review under RAP 13.4(b)(1) or (2).

Ste. Michelle's petition is premised on an alleged conflict between *Floe*, and two criminal cases, *State v. Dennison*, 115 Wn.2d 609, 801 P.2d 193 (1990) and *State v. Espinoza*, 112 Wn.2d 819, 774 P.2d 1177 (1989). In *Espinoza*, this Court expressly *refused* to consider whether an affidavit of prejudice was timely because "the State did not challenge the timeliness of the affidavit in the Court of Appeals," stating in dicta that a ruling on a joint motion for a continuance of a criminal trial was discretionary. 112 Wn.2d at 821-23. In *Dennison*, this Court affirmed the denial of an affidavit of prejudice as untimely because the trial court had made multiple discretionary rulings before the affidavit was filed, stating in a footnote that approving a stipulated continuance of the criminal trial

was a discretionary act. 115 Wn.2d at 620 & n.10. There is no conflict for three reasons, two of which have already been identified.

First, the *Dennison* Court held that the trial court in that case exercised discretion by ruling on a *motion*, not a *stipulation*, as the trial court did here. Second, this was not trial continuance, which affects the orderly administration of justice by the superior court itself. In this civil case, the stipulation for extending witness disclosure deadlines had no effect on the trial court – it affected only the parties' calendars. (Arg., § D.1, *supra*)

The third distinction, also ignored by St. Michelle, is that unique considerations govern the decision whether to continue a criminal trial – foremost the constitutional right to a speedy trial (U.S. Const. amend. VI; Wash. Const. art. 1, § 22) – as well as "various factors, such as diligence, materiality, due process, a need for an orderly procedure, and the possible impact of the result on the trial." *State v. Guajardo*, 50 Wn. App. 16, 19, 746 P.2d 1231 (1987), *rev. denied*, 110 Wn.2d 1018 (1988); *State v. Iniguez*, 167 Wn.2d 273, 282, ¶ 15, 217 P.3d 768 (2009) ("The right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment.") (internal quotation omitted). It is because of these unique considerations that Criminal Rule 3.3(h), relied on in *Dennison*,

expressly provided that "[c]ontinuances or other delays *may* be granted . . . [u]pon written agreement of the parties." *See State v. Jones*, 111 Wn.2d 239, 244, 759 P.2d 1183 (1988) (emphasis added).[4] Use of the term "may" in a court rule "is an indication that a referenced course of action is discretionary rather than mandatory." *Dependency of M.P.*, 185 Wn. App. 108, 116 n.3, ¶ 14, 340 P.3d 908 (2014).

For example, a trial court may exercise discretion to deny an agreed continuance of a criminal trial because a criminal defendant did not fully understand he was waiving his right to a speedy trial by agreeing to a continuance. *State v. Lopez*, 74 Wn. App. 264, 268-69, 872 P.2d 1131 (reviewing for abuse of discretion whether defendant's "signature on the agreed continuance order . . . [was] a knowing and voluntary waiver of his right to a speedy trial because [of] his language difficulty"), *rev. denied*, 125 Wn.2d 1004 (1994). Or a trial court may reject an agreed continuance because the prosecution delayed filing an amended information, unfairly forcing a criminal defendant to choose between "agreeing" to a continuance and waiving the right to a speedy trial, or proceeding with unprepared

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[4] The current rule similarly provides that "[c]ontinuances or other delays *may* be granted" "[u]pon written agreement of the parties." CrR 3.3(f)(1) (emphasis added).

counsel. *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980) ("the State cannot force a defendant to choose between these rights"). Or the court may decide that the rights of a victim are grounds to reject an agreed continuance of a criminal trial. *See, e.g.*, RCW 10.46.085 (court may continue child sex abuse cases only for substantial and compelling reasons and only if benefit of postponement outweighs detriment to victim). As this Court has stressed, "[a] speedy trial in criminal cases is not only a personal right protected by the federal and state constitutions, it is also an objective in which the public has an important interest." *State v. Striker*, 87 Wn.2d 870, 876, 557 P.2d 847 (1976) (citations omitted).

No similar reasons exist for denying a stipulated continuance of a civil trial, let alone denying a stipulated continuance of civil discovery deadlines that do not result in the continuance of a civil trial. Such stipulations in no way affect anyone's constitutional rights. That is why the Civil Rules encourage the parties to resolve preliminary matters such as witness disclosure deadlines without independent oversight from the court. *See, e.g.*, CR 2A (providing for enforcement of stipulations); CR 26(f)(5) (providing that party must state that it "has made a reasonable effort to reach agreement"

before moving for a discovery conference); CR 35(c) (parties may arrange physical and mental examinations by agreement).

Setting aside Ste. Michelle's attempt to characterize the witness disclosure deadline here as tantamount to an order continuing a trial, Ste. Michelle cites no published[5] decision extending *Dennison's* holding regarding continuances of criminal trials (or *Espinoza's* dicta) to a civil case, or overruling *Floe's* holding that approving a stipulated continuance of a *civil* trial does not involve discretion. There thus can be no conflict between the Court of Appeals decision here and *State v. Lile,* 193 Wn. App. 179, 373 P.3d 247 (2016), *rev. granted in part*, 186 Wn.2d 1004 (Sept. 29, 2016), another case involving a stipulated continuance of a criminal trial. Whether *Lile* conflicts with *Dennison* or *Espinoza* has no bearing on the Court of Appeals decision this case; Ste. Michelle cannot meet the standards of RAP 13.4(b) by showing a *different* Court of Appeals

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[5] This Court should reject Ste. Michelle's reliance on *Marriage of Welton*, 180 Wn. App. 1027 (2014), an unpublished decision, which involved a continuance of a *trial* date, not preliminary discovery deadlines. Moreover, relaxation of the prohibition against citing unpublished decisions does not relax the criteria for review in this Court under RAP 13.4(b)(2), which provides that a conflict with "a *published* decision of the Court of Appeals" may provide grounds for accepting review. While Ste. Michelle pays lip service to this restriction, it spends four pages of its petition discussing *Welton* (including a half page quotation) citing it to establish "inconsisten[cy]" and "lack of uniformity" in decisions. (Pet. 5, 12-14) *Welton* is both unpublished and inapposite.

decision involving distinct considerations of criminal law conflicts with decisions of this Court in a civil case.

Ste. Michelle's attempt to conflate the unique considerations governing continuances of criminal trials and those governing witness disclosure deadlines in civil cases is without merit. Ste. Michelle is comparing apples to oranges. This Court should deny review.

3. Addressing ministerial matters such as discovery deadlines are matters involving "arrangement of the calendar" that are expressly excluded from discretionary rulings under RCW 4.12.050.

The Court of Appeals decision was correct for another reason – regardless of any stipulation, RCW 4.12.050(1) recognizes that a judge does not exercise discretion when addressing "the arrangement of the calendar, [or] the setting of an action, motion or proceeding down for hearing or trial." Courts have repeatedly held that orders addressing ministerial matters, especially those setting pretrial deadlines, fit within the plain language of this proviso.

For example, in *Tye v. Tye*, 121 Wn. App. 817, 821, 90 P.3d 1145 (2004), the court held that there was no discretion involved in "the ministerial acts of entering uncontested case scheduling orders." *See also Marriage of Hennemann*, 69 Wn. App. 345, 347, 848 P.2d

760 (1993) (no discretion in signing form order setting trial date, deadlines for submission of various documents, and dates for settlement and pretrial conferences); *Hanno v. Neptune Orient Lines, Ltd.*, 67 Wn. App. 681, 682-83, 838 P.2d 1144 (1992) (no discretion in signing standard order that set dates for mediation, the plaintiff's settlement demand, and the pretrial conference); *Dependency of Hiebert*, 28 Wn. App. 905, 911, 627 P.2d 551 (1981) ("routine appointments and setting the case for trial d[o] not involve discretion"). Ste. Michelle ignores this authority.

The stipulated extension of witness disclosure deadlines is a ministerial pretrial matter that involves "arrangement of the calendar" akin to the case scheduling and pretrial orders in the above cases that did not involve the exercise of discretion under RCW 4.12.050(1). Thus, regardless of the parties' stipulation, the Court of Appeals correctly held that the extension of witness disclosure deadlines did not involve the exercise of discretion.

E. Conclusion.

This Court should deny review.[6]

Dated this 14th day of November, 2016.

SMITH GOODFRIEND, P.S.

By: _____
Howard M. Goodfriend
WSBA No. 14355
Ian C. Cairns
WSBA No. 43210

KORNFELD TRUDELL BOWEN & LINGENBRINK, PLLC

By: _____, for
Robert Kornfeld
WSBA No. 10669

Attorneys for Respondents

[6] In the unlikely event this Court accepts review and reverses the Court of Appeals, this Court, or the Court of Appeals on remand, should nonetheless reverse the judgments below on the alternative ground that the trial court erred in excluding nearly all of Mr. Godfrey's liability evidence (as well as his expert testimony based on that evidence) as a sanction for failing to file a "separate" Joint Statement of Evidence. RAP 13.7(b). Respondents raised these issues in the Court of Appeals but that court did not address them because the trial court erred in failing to recuse under RCW 4.12.050. (*See* Godfrey App. Br. 25-38; Kornfeld Br. 2)

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 14, 2016, I arranged for service of the foregoing Joint Answer to Petition for Review, to the court and to the parties to this action as follows:

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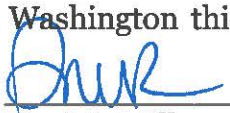
DATED at Seattle, Washington this 14th day of November, 2016.



Patricia Miller

195 Wash.App. 1007

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 2.

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
|
July 19, 2016

Appeal from Pierce County Superior Court; Docket No: 12-2-12968-7; Honorable Katherine M. Stolz, Judge.

Attorneys and Law Firms

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UNPUBLISHED OPINION

Lee, J.

*1 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 filed 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 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.

***2** 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.

***3** 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.

We concur:

Worswick, J.

Bjorgen, C.J.

All Citations

Not Reported in P.3d, 195 Wash.App. 1007, 2016 WL 3944869

Footnotes

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.

SMITH GOODFRIEND, PS

November 14, 2016 - 4:09 PM

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