Supreme Court No. 96952-3

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 46963-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Plaintiffs/Appellants,

v.

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

Defendants/Respondents,

and

ROBERT KORNFELD,

Additional Appellant.

RESPONDENTS' PETITION FOR REVIEW FROM DECISION ON REMAND

Emily J. Harris, WSBA No. 35763
Kelly H. Sheridan, WSBA No. 44746
CORR CRONIN LLP
1001 Fourth Avenue, Suite 3900
Seattle WA 98154-1051
Telephone: (206) 625-8600
Facsimile (206) 625-0900

Michael B. King, WSBA No. 14405
Gregory M. Miller, WSBA No. 14459
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215

Attorneys for Respondents Ste. Michelle Wine Estates Ltd. and Saint-Gobain Containers, Inc.

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I. IDENTITY OF PETITIONER

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

II. COURT OF APPEALS DECISION

Petitioners seek review of the unpublished decision terminating review after remand in *Godfrey v. Ste. Michelle Wine Estates Ltd, et al.*, issued by Division II of the Court of Appeals on December 27, 2018 (the "Decision") (copy attached as Appendix A). The Decision was issued by Division Two following this Court's remand of this case, in conjunction with its grant of Petitioners' prior Petition for Review, requiring Division Two to reconsider its prior decision in light of this Court's decision in *State v. Lile*, 188 Wn.2d 766, 398 P.3d 1052 (2017) ("*Lile*"). A copy of this Court's Order granting Petitioners' prior Petition is attached as Appendix B and a copy of Division Two's prior decision is attached as Appendix C.

III. ISSUE PRESENTED FOR REVIEW

Petitioners seek review of the following issue:

Is a Superior Court judge's ruling granting a request to extend case management deadlines a "discretionary ruling" for purposes of Washington's notice of disqualification statute, RCW 4.12.050? If entering such an order is a discretionary ruling for purposes of the statute, then a party is foreclosed from using an affidavit of prejudice to unilaterally remove a judge from a case who has already granted such a request.

Review of this issue is warranted for two reasons.

First, Division Two has misapplied this Court's recent direction in *Lile* regarding what constitutes a discretionary ruling under RCW 4.12.050, the affidavit of prejudice statute. Instead of taking this Court's direction to apply the bright-line standard it had just set out in *Lile*, Division Two created its own approach to deciding whether a trial court decision is discretionary—an unworkable approach, flatly contrary to the text and spirit of *Lile*. Under Division Two's re-formulation of what constitutes a discretionary ruling under RCW 4.12.050, the focus changes from looking at the *nature* of the trial court decision—whether it involves a *choice* to grant or deny a request, which is the quintessence of discretion itself—to looking only at the *result* of the decision. Moreover, according to Division Two, only if the decision results in a change in a *court date* will it be deemed a discretionary ruling that forecloses the exercise of the right to recuse a judge provided for by RCW 4.12.050. This approach conflicts with the text and spirit of this Court's decision in *Lile*, as well as this Court's decision in *State v. Parra*, 122 Wn.2d 590, 859 P.2d 1231 (1993), which this Court reaffirmed and applied in *Lile*. The Decision on remand therefore warrants review under RAP 13.4(b)(1).

Second, the affidavit of prejudice is an historically important procedural device, the correct application of which is a matter of substantial public interest in both civil and criminal litigation. Division Two's decision confuses rather than clarifies the standard set out in *Lile*, and risks undermining the importance of case management generally in civil actions. As such, whether a case management order extending pretrial deadlines

constitutes a discretionary decision under RCW 4.12.050 also warrants review under RAP 13.4(b)(4).

IV. STATEMENT OF THE CASE

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

On September 20, 2012, Mr. Godfrey filed a complaint for personal injuries against Petitioners in Pierce County. CP 1-8. On December 19, 2013, the case was reassigned to Superior Court Judge Katherine Stolz. CP 157. On January 6, 2014, in response to a stipulated request by the parties, Judge Stolz entered an order extending the disclosure deadline for defendants' witnesses, establishing a separate deadline to disclose defendants' expert opinions, extending the rebuttal witness disclosure deadline, and excepting the disclosure of defendants' examining physician report from the disclosure deadlines. CP 158-59. In so ruling, Judge Stolz necessarily found that good cause existed, as the Pierce County Local Rules provide that trial court judges may only extend pretrial deadlines in an existing case scheduling order upon a showing of good cause. PCLR 3(e).

On March 3, 2014, Mr. Godfrey filed an affidavit of prejudice[1] and related motion for reassignment under RCW 4.12.050. CP 791-94. On March 7, 2014, after hearing argument[2], the trial court denied Mr. Godfrey's motion, finding that the order entered on January 6 (as well as a January 7 order that is not the subject of this petition) was discretionary within the meaning of the statute. CP 205-06. On March 21, 2014, after hearing further argument, the trial court denied Mr. Godfrey's motion for reconsideration of that ruling. CP 244-45. A bench trial commenced on September 29, 2014. After hearing testimony from 16 witnesses over 12 trial days, Judge Stolz entered findings of fact and conclusions of law in favor of Petitioners. CP 688-702.

Division Two of the Court of Appeals reversed, holding in an unpublished opinion that the trial court erroneously denied Mr. Godfrey's motion for reassignment under RCW 4.12.050. 195 Wn. App. 1007, 2016

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[1] RCW 4.12.050 was amended in 2017 to change the terminology from "affidavit of prejudice" to a "notice of disqualification," and to no longer require the party seeking disqualification to file an affidavit stating that the assigned judge is prejudiced against such party. Laws of 2017, ch. 42, § 2. The prior version of the statute governed the trial court's decision on Mr. Godfrey's "affidavit of prejudice" and for the sake of consistent terminology Petitioners will continue to refer generally to the "affidavit of prejudice." *See Lile*, 188 Wn.2d at 775 n.5, 398 P.3d 1052 (in amending the statute, the Legislature "did not depart from its basic discretionary/nondiscretionary framework" and "gave no indication that its change . . . is to have retroactive effect").

[2] During the argument, counsel for Godfrey agreed that if the order had not been based on a stipulation of the parties, "I would agree with Your Honor that there would have been a discretionary ruling." CP 219 (Hearing Transcript March 7, 2014 at 4:23-5:2).

WL 3944869, at *2-3 (July 19, 2016) (the "Prior Decision").[3] Division Two held that the trial court's January 6, 2014 order extending witness disclosure deadlines was not discretionary within the meaning of the statute because it was stipulated between the parties. *Id.*

Petitioners moved for reconsideration. The Court of Appeals denied Petitioners' motion by a summary order, issued on August 30, 2016. Petitioners filed a Petition for Review by this Court, on September 14, 2016.

While Petitioners' Petition for Review was pending, this Court issued its decision in *Lile*.[4] *Lile* involved the question of whether a trial court order granting an agreed request for a trial continuance was discretionary under RCW 4.12.050. 188 Wn.2d at 772. Division One, recognizing a split in the decisions of this Court, had previously ruled that the continuance order was not discretionary because it was an agreed order, and the defendant's attempt to disqualify the assigned judge via an affidavit of prejudice was therefore timely. *State v. Lile*, 193 Wn. App. 179, 186-193, 373 P.3d 247 (2016) (trial court's "acceptance of joint motion and signing of agreed order were not discretionary acts" and the trial court therefore "erred in treating his ruling as a discretionary act" and rejecting the affidavit of prejudice as untimely). This Court granted review and

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[3] Petitioners have attached the Westlaw version of both the Prior Decision and the Decision on remand, and are citing to those versions.

[4] On September 14, 2016, Petitioners filed a Motion to Link Cases, asking this Court to link their first petition for review with the Court's consideration of the then-pending petition for review and answer to petition for review in *Lile*. On January 4, 2017, this Court denied that motion but deferred consideration of Petitioner's petition for review pending the final decision in *Lile*.

rejected Division One's holding that trial court rulings on stipulated motions are categorically non-discretionary. 188 Wn.2d at 776.

This Court began its analysis in *Lile* by noting that it has "consistently held that a ruling on an *opposed* continuance motion is discretionary," and then determined that agreed or unopposed motions should not be treated differently than opposed motions for purposes of RCW 4.12.050. 188 Wn.2d at 775-76 (emphasis in original). In reaching that deterrmination, this Court reaffirmed its prior holding in *State v. Parra*, 122 Wn.2d 590, 859 P.2d 1231 (1993) ("*Parra*"), in which the Court set forth the simple and easily-applied rule that any motion that requires action by a trial court is discretionary: "To either grant or deny a motion involves discretion." 188 Wn.2d at 778.

This Court noted that rulings on opposed continuance motions are discretionary "because the court must consider various factors, such as diligence, materiality, due process, a need for orderly procedure, and the possible impact of the result on the trial." *Id.* at 776 (omitting citation to case quoted by *In re: Recall of Lindquist*, 172 Wn.2d 120, 258 P.3d 9 (2011)). This Court further noted that these same considerations "similarly apply to rulings on agreed continuances," and held that the Court of Appeals erred in "focusing on the form of a continuance, rather than its substance or impact." *Id.* Finally, noting that "[c]ontinuances, even when unopposed, have a significant impact on the efficient operation of our courts and the

rights of the parties,"[5] this Court rejected Lile's claim that the continuance ruling was "no more than a 'calendaring matter'" and held that the trial court's ruling granting the continuance was discretionary for purposes of the statute. *Id.* at 778-79. In sum, *Lile* stands for the proposition that trial courts have inherent discretion to manage their dockets and that the *substance* of a trial court's case management orders, not their *form*, controls whether such orders are discretionary under RCW 4.12.050.

On November 8, 2017, this Court issued an order granting Petitioners' petition for review and remanding the case "for reconsideration in light of" this Court's decision in *Lile*.[6] 189 Wn.2d 1016, 404 P.3d 498 (Table). On November 22, 2017, Petitioners filed a Motion for Submission of Supplemental Briefing to address this Court's decision in *Lile*. Two months later, on January 23, 2018, Division Two granted that motion, and

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[5] In making this observation, the Court noted that such concerns were "particularly acute in criminal proceedings." *Id.* at 778. As discussed in greater detail below, however, this concern is also strongly implicated in civil matters like the instant case, and there is no principled distinction between civil and criminal matters in regard to how they implicate the Court's case management prerogative.

[6] While Godfrey initially raised an alternative ground for relief in his appeal to Division Two – involving the assertion that the trial court prejudiced Godfrey by a an error involving the on-the-record balancing requirement of *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), which Godfrey argued warranted granting him a new trial—that issue has been waived. The Court of Appeals did not address the *Burnet* argument in its prior decision, the matter was not raised in Petitioner's Petition for Review granted by this Court, Godfrey only referenced the issue in a footnote attached to the "Conclusion" section of Godfrey's Answer and Petitioners pointed out in reply that this footnote was insufficient to constitute the raising of an issue for review, the matter was not raised by Godfrey on remand before Division Two, and the matter was not addressed by Division Two in its Decision on remand. In sum, Godfrey has waived any claimed error involving *Burnet*.

the parties filed their supplemental briefing on February 12, 2018, and February 13, 2018, respectively.

Some ten months later, without oral argument, Division Two issued its unpublished Decision on remand. No. 46963-4-II, ___ Wn. App. 2d ___, 2018 WL 6813964 (Dec. 27, 2018). Division Two began by noting that *Lile* instructs courts that the "most relevant consideration" in determining whether a trial court's action is discretionary is "the substance and impact of a request—not the form of the request." *Id.* at *2. But then the court went on to state that, under *Lile*, "a ruling on a stipulated agreement is nondiscretionary where the agreement affects only the rights or convenience of the parties, and does not impact or interfere with the duties and functions of the trial court." *Id.* Reasoning that Judge Stolz's order extending the defendants' witness disclosure deadline "impacted only the parties' convenience," Division Two held that the trial court's ruling "did not impact the court's calendar, the operation of the court, the parties' rights, orderly procedure, or due process because it did not change any of the court dates set in the case schedule." *Id.* Accordingly, the court reinstated its prior decision that Mr. Godfrey's attempt to disqualify Judge Stolz through an affidavit of prejudice was timely:

> Under the framework presented in *Lile* for determining whether a ruling on a stipulated agreement is discretionary for purposes of RCW 4.12.050, Judge Stolz's ruling was not discretionary because the substance and impact of the stipulated order extending witness disclosure deadlines did not impact the court's functions or duties. Therefore, we again determine that the trial court erred by finding that Godfrey's affidavit of prejudice was untimely. Because the

affidavit of prejudice was timely, we reverse and remand for further proceedings.

Id.

Petitioners filed a Motion for Reconsideration in the Court of Appeals on January 16, 2019, which was summarily denied on February 14, 2019. Petitioners now respectfully request that this Court review the Court of Appeals' latest decision in this case.

V. ARGUMENT

A. The Decision on remand disregards this Court's clear direction in *Lile*, is also contrary to this Court's prior precedents, and review therefore is warranted under RAP 13.4(b)(1).

The Court should grant review pursuant to RAP 13.4(b)(1) because the Decision on remand misapprehends the clear direction of this Court in *Lile* and has instead adopted an unmanageable and unpredictable test for determining whether an order is discretionary, based on out-of-context statements taken from *Lile*. As previously stated, this Court expressly directed the Court of Appeals to reconsider its prior decision "in light of" the Court's decision in *Lile* and its straightforward direction that any decision by a trial court to "either grant or deny a motion involves discretion." Division Two, however, embarked on an analytical path of its own creation that is nowhere to be found in *Lile* and which conflicts with this Court's prior decision in *Parra*.

Division Two begins its remand analysis by correctly noting that *Lile* instructs courts to look at the "substance and impact" of a request as opposed to the "form" that the request takes – thus acknowledging that its

prior decision, holding that stipulated orders as such are nondiscretionary, was incorrect. 2018 WL 6813964, at *2. Division Two then goes on to note that *Lile* found the stipulated continuance at issue to be discretionary because it required the trial court to "consider the request's impact on various factors, such as diligence, materiality, due process, a need for an orderly procedure, and the possible impact of the result on the trial." *Id.*

From these two straightforward premises, however, Division Two veers astray, holding that Judge Stolz's ruling was not discretionary because it "impacted only the parties' convenience" and "did not impact the court's calendar, the operation of the court, the parties' rights, orderly procedure, or due process *because it did not change any of the* ***court dates*** *set in the case schedule*." 2018 WL 6813964, at *2 (emphasis added). To reach this conclusion, Division Two cites *Lile* for the proposition that "because the motion for continuance [in *Lile*] impacted the duties and functions of the trial court, the trial court's ruling on the motion to continue the trial date involved discretion." 2018 WL 6813964, at *2 (citing *Lile*). But *Lile* actually sets forth the principle that a ruling is only nondiscretionary where it does not *implicate* the "duties and functions of the court" such as diligence, materiality, due process, orderly procedure, and trial impact:

> We [have] noted that certain stipulated agreements ... would not "invoke the discretion of the court for resolution" and, therefore, would not be discretionary. But we [have] also cautioned that for such a ruling to be nondiscretionary, a stipulated agreement must "affect only the rights or convenience of the parties, and not involve any interference with the duties and functions of the court." We further noted that for these purposes, "a party's decision not to

> object to a motion does not constitute a stipulation by that party." "To either grant or deny a motion involves discretion."

Lile, 188 Wn.2d at 778 (citation omitted, emphasis in italics in the original, emphasis in bold added).

Division Two thus has misapprehended and misapplied the test set forth by this Court in *Lile*. First, while it is true that Judge Stolz's ruling did affect the convenience of the parties, that fact alone is not dispositive of whether it was discretionary, under the rule set forth in *Parra* and affirmed in *Lile*. Rather, the question is whether Judge Stolz had discretion, in the plain-language sense of the word, to "either grant or deny" the motion. Judge Stolz unquestionably had such discretion to deny the requested extension, and her ruling was accordingly discretionary—period.

Second, Judge Stoltz's ruling also implicated the "duties and functions" of a trial court by implicating the "various factors" courts consider in ruling upon motions related to case management deadlines: "diligence, materiality, due process, a need for orderly procedure, and the possible impact of the result on the trial." *Lile*, 188 Wn.2d at 776 (citation omitted). Those factors are plainly implicated by Judge Stolz's ruling on the parties' stipulated request to extend the witness disclosure deadline: Judge Stolz had the authority to deny the motion by finding a lack of diligence, by finding that a departure from the case schedule would disrupt the orderly management of the case, as well as by finding that an extension of a pretrial disclosure deadline would jeopardize the trial date. Indeed, the very fact that this Court in *Lile* instructed trial courts to consider the "possible" impact on a trial date in determining whether rulings are

discretionary makes clear that case management orders short of outright continuances qualify as discretionary under the rule.

The discretion inherent in Judge Stolz's decision to grant the parties' requested extension is perhaps best made clear by the fact that under the Pierce County Local Rules, trial courts *may modify* dates set forth in case scheduling orders *based upon a finding of good cause*. *See* PCLR 3(e);[7] *see also Campbell v. State Emp. Sec. Dep't*, 180 Wn.2d 566, 573, 326 P.3d 713 (2014) (whether "good cause" exists is a mixed question of law and fact requiring factual findings); *Garcia v. Dep't of Labor & Industs.*, 86 Wn. App. 748, 751, 939 P.2d 704 (1997) (same). And, like former Criminal Rule 3.3(h) referenced in *Lile*, PCLR 3 also uses the term "may," which 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, 340 P.3d 908 (2014). Division Two erred in overlooking these key indicators of discretion – that Judge Stolz had the power to deny the order, and by local rule, was required to consider good cause to extend the court-imposed case management deadlines.[8]

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[7] "The court, either on motion of a party or on its own initiative, may modify any date in the Order Setting Case Schedule for good cause . . ."

[8] As Petitioners pointed out in their prior petition for review, Division Three held that granting a stipulated order of continuance in a marital dissolution was discretionary, even in the absence of a local civil rule such as exists in Pierce County, by analogizing to the criminal rules. *See Marriage of Welton,* 180 Wn. App. 1027, 2014 WL 1514595, *3-4 (2014), cited in Petitioners' prior Petition for Review (Cause No. 93601-3) at 13-14. Division Three so held because, after carefully analyzing *Parra,* it concluded that "most of the same factors must be considered in the civil context" as apply to criminal cases. To the extent Division Two's Decision on remand creates a distinction between civil and criminal cases

Moreover, as previously referenced, the Court of Appeals interpretation is also inconsistent with this Court's decision in *Parra*. In *Parra*, the trial court granted a series of unopposed motions by the parties relating to disclosures and discovery of information. 122 Wn.2d at 592-93. This Court found that the grant of these motions was a discretionary decision.[9] *Id.* at 601-03. As this Court reiterated in *Lile*, the *Parra* "ruling was discretionary because to either 'grant or deny a motion involves discretion.'" *Lile*, 188 Wn.2d at 778 (quoting *Parra*, 122 Wn.2d at 601).

Reasoning by analogy to other contexts in which trial court judges are given broad latitude to manage their cases, this Court has also recognized that trial court judges have discretion to deny *pro hac vice* petitions even where such petitions are duly authorized and despite the fact that they are routinely granted. *See, e.g., Estate of Williams,* 48 Wn.2d 313, 315, 293 P.2d 392 (1956) (holding that merely because an application for an out of state attorney to appear is usually granted, it does not "change the fundamental character of the judicial action itself, as one involving the

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for purposes of exercising a notice of disqualification, it is inconsistent with *Welton*, which eschews any principled basis to distinguish between civil and criminal cases for this purpose.

[9] In discussing whether the unopposed motion for discovery was discretionary, this Court in *Parra* examined the case of *Rhinehart v. Seattle Times Co.*, 51 Wn. App. 561, 578, 754 P.2d 1243 (1988), which held that two orders—one setting a date certain to comply with an earlier discovery order and one permitting substitution of counsel—were discretionary. Quoting *Rhinehart* favorably, this Court in *Parra* stated that "[t]he exercise of discretion is not involved where a certain action or result follows as a matter of right upon a mere request; rather, the court's exercise of discretion is invoked only where in the exercise of that discretion, the court may either grant or deny a party's request." *Parra*, 122 Wn.2d at 597 (quoting *Rhinehart*, 51 Wn. App. at 578). This definition of an exercise of discretion is carried through into *Lile*. *See* 188 Wn.2d at 778.

exercise of discretion."). There is no way to square Division Two's conclusion that extensions of several fact and expert witness disclosure deadlines is not discretionary in this case because it purportedly "impacted only the parties' convenience" with this Court's recognition that decisions on discovery and on *pro hac* applications are discretionary.

Boiled down, Division Two fails to recognize that the nature of a discretionary decision is one that implicates choice. If a litigant needs to ask for permission of the court, the decision on that request is necessarily discretionary. *See Judicial Discretion*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("[A] court's power to act or not act when a litigant is not entitled to demand the act as a matter of right."). This straight-forward, bright-line rule is set forth in *Lile* and *Parra*. Division Two's failure to apprehend this rule and apply it to Judge Stolz's decision to grant the parties' requested extension of the witness disclosure deadline is an error that must be corrected by this Court, lest it be repeated by other Washington courts. The Decision on remand conflicts with *Lile* and *Parra* and this Court should accept review pursuant to RAP 13.4(b)(1) to rectify that conflict.

B. The Decision on remand is also at odds with the growing body of precedent affirming the broad discretion of trial court judges to manage their dockets, raising an issue of substantial public interest under RAP 13.4(b)(4).

At its essence, Division Two rests its entire holding that Judge Stoltz exercised no discretion on the premise that her ruling "did not change any of the *court* dates set in the case schedule" such as a motion hearing, the pretrial conference, or the trial date. 2018 WL 6813964, at *2 (emphasis

added). But under that reasoning, unless a court date – not merely a case scheduling deadline – was changed, there could be no exercise of discretion. This new distinction, not found in *Lile* or any other decision of this Court or any other Washington appellate court, effectively reads the case management functions of the Washington courts out of the affidavit-of-prejudice process. Such a result conflicts with the growing body of precedent—of which *Lile* is only the most recent example—affirming the broad discretion that trial court judges have in managing their dockets under the authority of case management orders, exemplified by the order whose deadlines were at issue here.

Superior courts across the state have developed more and more robust local rules giving their trial court judges wide latitude to manage their case dockets, including: King County (local rules first adopted 1974); Spokane County (1979); Pierce County (1990); and Kitsap County (2011)—the list goes on. Indeed, Pierce County's local rules governing extensions of the case schedule expressly provide that amendments to a trial court's case schedule may only be modified for good cause, specifically requiring the trial court to make a finding regarding whether that standard has been met and to deny a requested extension if it has not been. *See* Pierce County Local Civil Rule 3(e) ("The court, either on motion of a party or on its own initiative, may modify any date in the Order Setting Case Schedule for good cause . . ."). The fact that many counties throughout the state have adopted similarly detailed procedures for their internal case management highlights the

importance of giving trial courts latitude to manage their dockets and enter case management orders governing how individual cases will proceed.

Moreover, Washington's appellate courts have for decades treated case management rulings as discretionary and accordingly reviewed them only for an abuse of discretion. *See, e.g.*, *Willapa Trading Co. v. Muscanto, Inc.*, 45 Wn. App. 779, 785, 727 P.2d 687 (1986) ("[A] party does not have an absolute right to a continuance, and the granting or denial of a motion for a continuance is reversible error only if the ruling was a manifest abuse of discretion." (citation omitted)). This directly echoes the language of RCW 4.12.050, and there would be no principled basis on which to apply a different definition to that term as it is used in the statute from how it is generally used in the appellate context. In its decision on remand, Division Two has all too clearly ignored the rise of, and importance of, case management to achieving the goals of Washington State's system of civil justice. Many components of litigation (including scheduling issues, discovery battles, and sanctions disputes) will have nothing to do with an actual date in court, but each is clearly a discretionary matter where the trial court could make rulings favorable to one side or the other. These considerations are all for naught under Division Two's approach. And, if literally applied, Division Two's approach could have the impact of stripping away the litigants' rights under RCW 4.12.050 if the trial court issued an order changing the trial date or court appearance, before any party filed a motion or made any other request to the court – simply because it changed a *court* date.

Division Two has muddled the clear and bright-line "grant or deny" rule set out in *Lile*. Without review and correction, the Decision on remand will sow confusion and create significant uncertainty because any other test—including the vague "duties and functions" test apparently applied by the Court of Appeals—is highly subjective and would be unworkable in practice. RCW 4.12.040 and 050 provide litigants and their attorneys an absolute, "unqualified" right to disqualify a trial court judge, but only insofar as they timely exercise that right. *See Lile*, 188 Wn.2d at 780-81 ("A change of judge is a matter of right . . . the rule is unqualified."). This Court should provide practitioners and trial courts throughout the state with guidance about which actions cause parties to lose the ability to "affidavit" so that they do not unknowingly waive their right to disqualify a judge by agreeing to an early case management request from the opposing party. Parties have a right to know whether they are waiving a material right by seeking orders to extend disclosure deadlines or other case management deadlines. Recognition of these important, practical realities compels the conclusion that more guidance from this Court is needed. This Court should grant review on this matter of substantial public interest pursuant to RAP 13.4(b)(4).

VI. CONCLUSION

The Decision on remand misapprehends and misapplies the Court's ruling in *Lile*, and sows considerable confusion regarding when case management orders constitute discretionary rulings under RCW 4.12.050. This Court should grant review under RAP 13.4(b)(1) to rectify the conflict between the Court of Appeals' Decision and its opinions in *Lile* and *Parra*, and

under RAP 13.4(b)(4) to provide additional guidance regarding what constitutes a discretionary ruling for purposes of applying RCW 4.12.050. The Court should then reinstate the trial court's judgment in favor of Petitioners.

Respectfully submitted this 15th day of March, 2019.

CORR CRONIN LLP

By: MBK #14405 by for
Emily J. Harris, WSBA 35763
Kelly H. Sheridan, WSBA 44746

CARNEY BADLEY SPELLMAN, P.S.

By: Michael B. King
Michael B. King, WSBA 14405
Gregory M. Miller, WSBA 14459

Attorneys for Respondents Ste. Michelle Wine Estates Ltd. and Saint-Gobain Containers, Inc.,

968 00001 jc115814ws

CERTIFICATE OF SERVICE

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

☒ Email via Appellate Portal to the following:

Emily J. Harris Corr Cronin Michelson Baumgardner Fogg & Moore LLP 1001 4th Ave Ste 3900 Seattle WA 98154-1051 eharris@corrcronin.com lnims@corrcronin.com elesnick@corrcronin.com	Robert B. Kornfeld Kornfeld Trudell Bowen Lingenbrink PLLC 3724 Lake Washington Blvd NE Kirkland WA 98033-7802 rob@kornfeldlaw.com
Howard M. Goodfriend Ian C. Cairns Smith Goodfriend, PS 1619 8th Ave N Seattle WA 98109-3007 howard@washingtonappeals.com ian@washingtonappeals.com	

DATED this 15th day of March, 2019.

Patti Saiden

Patti Saiden, Legal Assistant

APPENDICES

Appendix A: Unpublished decision terminating review after remand in *Godfrey v. Ste. Michelle Wine Estates Ltd, et al.*, issued by Division II of the Court of Appeals on December 27, 2018.

Appendix B: Court's Order granting Petitioners' prior Petition.

Appendix C: Prior Unpublished decision terminating review in *Godfrey v. Ste. Michelle Wine Estates Ltd, et al.*

APPENDIX A

2018 WL 6813964
Only the Westlaw citation
is currently available.

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
|
December 27, 2018

Appeal from Pierce County Superior Court, 12-2-12968-7, Honorable Katherine M. Stolz, Judge.

Attorneys and Law Firms

Ian Christopher Cairns, Smith Goodfriend P.S., 1619 8th Ave. N., Seattle, WA, 98109-3007, for Appellant.

Howard Mark Goodfriend, Smith Goodfriend P.S., 1619 8th Ave. N., Seattle, WA, 98109-3007, Robert B. Kornfeld, Kornfeld Trudell Bowen & Lingenbrink PLL, 3724 Lake Washington Blvd. Ne., Kirkland, WA, 98033-7802, for Appellant/ Plaintiff.

Emily J. Harris, Corr Cronin Michelson Baumgardner Fogg & Moore LLP, 1001 4th Ave. Ste. 3900, Seattle, WA, 98154-1051, Gregory Mann Miller, Michael Barr King, Carney Badley Spellman P.S., 701 5th Ave. Ste. 3600, Seattle, WA, 98104-7010, for Respondent.

UNPUBLISHED OPINION

Lee, A.C.J.

***1** This case again comes before us on remand from our Supreme Court for reconsideration in light of *State v. Lile*, 188 Wn.2d 766, 398 P.3d 1052 (2017). After considering *Lile*, we hold that the trial court erred in rejecting an affidavit of prejudice because the stipulated order extending witness disclosure deadlines was not a discretionary decision. Accordingly, we reverse and remand for further proceedings.

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, asserting manufacturing and design defects.

On June 7, 2013, Judge Garold E. Johnson entered an order amending the case schedule. The order included dates for the parties

to disclose their witnesses and discovery deadlines. The pretrial conference was set for the week of June 16, 2014. And the trial date was set for July 7, 2014.

On December 19, 2013, Godfrey's case was reassigned to Judge Katherine M. Stolz. On January 6, 2014, Judge Stolz entered a stipulated order extending the deadline for the parties to disclose witnesses to each other. The stipulated order did not change the pretrial conference date or the trial date.

On March 3, Godfrey signed an affidavit of prejudice against Judge Stolz. On March 7, Godfrey moved to have Judge Stolz recused based on the affidavit of prejudice. Judge Stolz ruled that Godfrey's affidavit and motion were not timely because she had already signed a discretionary order in the case. After the bench trial, the trial court dismissed Godfrey's product liability claim and entered judgment in favor of Ste. Michelle.

Godfrey appealed, arguing in relevant part that the trial court erred by rejecting Godfrey's affidavit of prejudice. *Godfrey v. Ste. Michelle Wine Estates Ltd.*, noted at 195 Wn. App. 1007, 1-2 (July 19, 2016). In a previous opinion, we held that the trial court's signing of a stipulation and order to extend the parties' deadline for witness disclosures was not a discretionary decision. *Id.* at 2-3. Because signing the stipulation and order was not a discretionary decision, the trial court erred in rejecting the affidavit of prejudice, and we reversed. *Id.* at 3.

Our Supreme Court subsequently decided *State v. Lile*. In *Lile*, the Court held that the trial court's ruling on an agreed motion for trial continuance was a discretionary decision for purposes of RCW 4.12.050. 188 Wn.2d at 778. The Court reasoned that continuances, regardless of the parties' agreement, "have a significant impact on the efficient operation of our courts and the rights of the parties, particularly in criminal proceedings." *Id.* Following its decision in *Lile*, the Supreme Court granted Ste. Michelle's petition for review in this case, and remanded to this court for reconsideration in light of *Lile*.

ANALYSIS

A. *STATE V. LILE*

In *Lile*, the parties orally requested that the trial court continue the trial date based on their agreement. 188 Wn.2d at 771. The trial court orally granted the trial continuance. *Id.* The defendant subsequently filed an affidavit of prejudice. *Id.* The trial court ruled that the affidavit of prejudice was untimely because its ruling on the agreed continuance was discretionary. *Id* at 772.

***2** The Supreme Court held that the trial court's ruling on the parties' agreed trial continuance was a discretionary act for purposes of RCW 4.12.050. *Id.* at 778. The Court emphasized that in determining whether a ruling involves discretion for purposes of RCW 4.12.050, the most relevant consideration is the substance and impact of a request—not the form of the request. *Id.* Where the request

impacts the duties and functions of the trial court, a ruling on the request is discretionary for purposes of RCW 4.12.050. *Id.* But a ruling on a stipulated agreement is nondiscretionary where the agreement affects only the rights or convenience of the parties, and does not impact or interfere with the duties and functions of the court. *Id.*

Continuances of trial dates, regardless of whether the parties agree, "have a significant impact on the efficient operation of our courts and the rights of the parties, particularly in criminal proceedings." *Id.* A ruling on an agreed trial continuance involves discretion because the court must consider the request's impact on " 'various factors, such as diligence, materiality, due process, a need for an orderly procedure, and the possible impact of the result on the trial.' " *Id.* at 776 (internal quotation marks omitted) (quoting *In re Recall of Lindquist*, 172 Wn.2d 120, 130, 258 P.3d 9 (2011), *as corrected* (Sept. 7, 2011)). And because the motion for a continuance impacted the duties and functions of the trial court, the trial court's ruling on the motion to continue the trial date involved discretion. *Id.* at 778.

B. STIPULATED ORDER EXTENDING WITNESS DISCLOSURE DEADLINES

The stipulated order extending witness disclosure deadlines changed only the dates the parties had to make witness disclosures to each other; it did not change any court dates. Ste. Michelle argues that "*Lile* holds that the inquiry for discretion under RCW 4.12.050 is whether the parties had the right to the relief sought, or whether the court had discretion to grant or deny the relief. *Lile*, 188 Wn.2d at 788." Suppl. Br. of Resp't at 6. Ste. Michelle essentially argues that the inquiry in determining whether a ruling was discretionary under RCW 4.12.050 is whether the court had discretion. Ste. Michelle's argument begs the question of how to determine whether a ruling is discretionary for purposes of RCW 4.12.050.

Lile instructs us, however, on how to determine whether a ruling on a stipulated agreement is discretionary for purposes of RCW 4.12.050. *Lile* expressly held that we determine whether a ruling on a stipulated agreement is discretionary by considering the substance and impact of the request. *Lile*, 188 Wn.2d at 778. If the request impacts the functions and duties of the courts and the efficient operation of the courts, then the ruling is discretionary for purposes of RCW 4.12.050. If the request impacts only the rights or convenience of the parties, and does not interfere with the duties and function of the court, then the ruling is nondiscretionary. *Id.*

Here, the stipulated order extending the deadline for the parties to disclose witnesses to each other impacted only the parties' convenience. The stipulated order extending witness disclosure deadlines did not impact the court's calendar, the operation of the court, the parties' rights, orderly procedure, or due process because it did not change any of the court dates set in the case schedule. Unlike in *Lile*, the parties here did not request a trial continuance or otherwise seek a change that would impact the court's schedule.

Under the framework presented in *Lile* for determining whether a ruling on a stipulated agreement is discretionary for purposes of RCW 4.12.050, Judge Stolz's ruling was not discretionary because the substance and impact of the stipulated order extending witness disclosure deadlines did not impact the court's functions or duties. Therefore, we again determine that the trial court erred by finding that Godfrey's affidavit of prejudice was untimely. Because the affidavit of prejudice was timely, we reverse and remand for further proceedings.

*3 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, J.

All Citations

Not Reported in Pac. Rptr., 2018 WL 6813964

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APPENDIX B

THE SUPREME COURT OF WASHINGTON

ROLFE and KIRSTINE GODFREY and ROBERT KORNFELD, Respondents, v. STE. MICHELLE WINE ESTATES, LTD., et al., Petitioners.	)	No. 93601-3 **ORDER** Court of Appeals No. 46963-4-II

Department I of the Court, composed of Chief Justice Fairhurst and Justices Johnson, Owens, Wiggins and Gordon-McCloud, considered at its November 7, 2017, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is granted and the case is remanded to the Court of Appeals Division II for reconsideration in light of Supreme Court No. 93035-0, *State of Washington v. Travis Lee Lile.*

DATED at Olympia, Washington, this 8th day of November, 2017.

For the Court

Fairhurst, C.J.
CHIEF JUSTICE

APPENDIX C

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

Howard Mark Goodfriend, Ian Christopher Cairns, Smith Goodfriend PS, Seattle, WA, Robert B. Kornfeld, Kornfeld Trudell Bowen & Lingenbrink PLLC, Kirkland, WA, for Appellants.

Emily J. Harris, Seann C. Colgan, Corr Cronin Michelson Baumgardner Fogg &, Seattle, WA, Kenneth Wendell Masters, Masters Law Group PLLC, Bainbridge Island, WA, for Respondents.

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.

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.

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.

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.

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

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CARNEY BADLEY SPELLMAN

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