

73757-1

FILED
January 27, 2016
Court of Appeals
Division I
State of Washington

73757-1

NO. 73757-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE

SIMCHA SHOVAL,

Appellant,

v.

VALET PARKING SYSTEMS, INC.,

Respondent

Judge Samuel Chung, Presiding

BRIEF OF APPELLANT

LAWRENCE KAHN LAW MASTERS LAW GROUP, P.L.L.C.
GROUP, PS

Lawrence M. Kahn
135 Lake St. S., Ste 265
Kirkland, WA 98033-6487
(425) 453-5679

Kenneth W. Masters, WSBA 22278
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

Attorneys for Shoval

TABLE OF CONTENTS

INTRODUCTION.....	1
ASSIGNMENTS OF ERROR	2
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	3
STATEMENT OF THE CASE.....	5
A. Simcha Shoval was visiting friends and family in Seattle when she fell in the dark from Valet’s parking-lot shuttle van after leaving the synagogue around 10 p.m.	5
B. Valet’s driver – who is also its owner – contradicted five eyewitnesses’ testimony, but conceded that Valet owed the highest duty of care to Simcha Shoval and that she was not there in time to help any of the people who exited the van on the night in question.	9
C. Procedural History.	10
ARGUMENT.....	12
A. Judge Chung erred as a matter of law in refusing to honor an affidavit of prejudice under RCW 4.12.050, where the parties’ two stipulations to continue the trial date had been accepted, but no judge made any discretionary rulings prior to the affidavit’s filing.	12
1. Procedure.	12
2. Shoval’s timely affidavit of prejudice under RCW 4.12.040 & .050 deprived Judge Chung of jurisdiction.	13
3. Precedent also provides that the trial court erred as a matter of law in refusing to recuse.	16
B. The trial court erred in initially “reserving” 50% of the contested MILs, compounding that error by	

	ruling that reserving an MIL is tantamount to granting it.....	18
C.	The trial court erred under ER 401 in summarily denying plaintiff’s second MIL barring defendants from arguing that no prior similar incidents had occurred.....	23
D.	The trial court erred as a matter of law in summarily leveling \$1,000 in sanctions without briefing, argument, explanation, or findings.....	25
E.	The trial court erred in (1) interrupting Shoval’s opening argument for over 20 minutes to say that she could not tell the jury that the stipulated damages were not before it; and (2) denying plaintiff’s motion for a mistrial, where the court’s statements in front of the jury “made [plaintiff’s counsel] a liar” before the jury, and were “hamstringing” the plaintiff’s case.	28
	1. Standards of Review.....	28
	2. The trial court erred by interrupting Shoval’s opening argument for over 20 minutes to state that she could not mention that special damages were not before the jury, causing enormous prejudice to Shoval.....	29
	3. The trial court abused its discretion in denying a mistrial.	34
F.	The trial court committed a manifest error affecting Shoval’s constitutional rights by repeatedly commenting on the evidence before the jury.	35
G.	The cumulative errors require reversal.	49
	CONCLUSION	50

Table of Authorities

	Page(s)
Cases	
<i>A.C. v. Bellingham Sch. Dist.</i> , 125 Wn. App. 511, 105 P.3d 400 (2004).....	19, 34
<i>Adcox v. Children's Orthopedic Hosp. & Medical Ctr.</i> , 123 Wn.2d 15, 864 P.2d 921 (1993).....	36
<i>Biggs v. Vail</i> , 124 Wn.2d 193, 876 P.2d 448 (1994).....	27
<i>Blair v. TA-Seattle E. No. 176</i> , 171 Wn.2d 342, 254 P.3d 797 (2011).....	26
<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484, 933 P.2d 1036 (1997).....	27
<i>Dods v. Harrison</i> , 51 Wn.2d 446, 319 P.2d 558 (1957).....	44
<i>Egede-Nissen v. Crystal Mountain, Inc.</i> , 93 Wn.2d 127, 606 P.2d 1214 (1980).....	37, 38, 43, 45, 49
<i>Fenimore v. Donald M. Drake Constr. Co.</i> , 87 Wn.2d 85, 549 P.2d 483 (1976).....	18, 24
<i>Gabel v. Koba</i> , 1 Wn. App. 684, 463 P.2d 237 (1969).....	24, 25
<i>Hamilton v. Dep't of Labor & Indus.</i> , 111 Wn.2d 569, 761 P.2d 618 (1988).....	36
<i>Hammel v. Rife</i> , 37 Wn. App. 577, 682 P.2d 949 (1984).....	24
<i>Harbor Enterprises, Inc. v. Gudjonsson</i> , 116 Wn.2d 283, 803 P.2d 798 (1984).....	13, 15

<i>Ide v. Stoltenow</i> , 47 Wn.2d 847, 289 P.2d 1007 (1955)	33
<i>In re Marriage of Hennemann</i> , 69 Wn. App. 345, 848 P.2d 760 (1993).....	18
<i>In re Marriage of Tye</i> , 121 Wn. App. 817, 90 P.3d 1145 (2004).....	18
<i>In re Parenting Plan of Hall</i> , 184 Wn. App. 676, 339 P.3d 178 (2014).....	12
<i>Marine Power & Equip. Co. v. State</i> . 102 Wn.2d 457, 687 P.2d 202 (1984)	13, 15
<i>Martini v. State</i> , 121 Wn. App. 150, 89 P.3d 250 (2004).....	24
<i>Mayer v. Sto Indus., Inc.</i> , 156 Wn.2d 677, 132 P.3d 115 (2006)	26, 27
<i>Palmer v. Jensen</i> , 132 Wn.2d 193, 937 P.2d 597 (1997)	33
<i>Risley v. Moberg</i> , 69 Wn.2d 560, 419 P.2d 151 (1966).....	38
<i>Rivers v. Wash. State Conf. of Mason Contractors</i> , 145 Wn.2d 674, 41 P.3d 1175 (2002).....	26
<i>Seattle v. Harclan</i> , 56 Wn.2d 596, 354 P.2d 928 (1960)	36
<i>State v. Brush</i> , 183 Wn.2d 550, 353 P.3d 213 (2015)	35
<i>State v. Cockrell</i> , 102 Wn.2d 561, 689 P.2d 32 (1984).....	13
<i>State v. Condon</i> , 72 Wn. App. 638, 865 P.2d 521 (1993).....	28

State v. Davis, 175 Wn.2d 287, 290 P.3d 43 (2012)	49
State v. Dennison, 115 Wn.2d 609, 801 P.2d 193 (1990)	13, 17
State v. Dixon, 74 Wn.2d 700, 446 P.2d 329 (1968)	13
State v. Evans, 96 Wn.2d 119, 634 P.2d 845 (1981)	19, 34
State ex rel. Floe v. Studebaker, 17 Wn.2d 8, 134 P.2d 718 (1943)	16, 17
State v. Gilcrist, 91 Wn.2d 603, 590 P.2d 809 (1979)	34
State v. Guajardo, 50 Wn. App. 16, 746 P.2d 1231 (1987)	18
State v. Hopson, 113 Wn.2d 273, 778 P.2d 1014 (1989)	34
State v. Jackson, 83 Wash. 514, 145 P. 470 (1915)	38
State v. Johnson, 124 Wn.2d 57, 873 P.2d 514 (1994)	34
State v. Koloske, 100 Wn.2d 889, 676 P.2d 456 (1984), <i>overruled</i> <i>on other grounds by State v. Brown</i> , 111 Wn.2d 124, 761 P.2d 588 (1988)	24
State v. Kroll, 87 Wn. 2d 829, 558 P.2d 173 (1976)	28
State v. Parra, 122 Wn.2d 590, 859 P.2d 1231 (1993)	13, 16, 17
State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995)	24

<i>State v. Sullivan,</i> 69 Wn. App. 167, 847 P.2d 953 (1993).....	19
<i>Storey v. Storey,</i> 21 Wn. App. 370, 585 P.2d 183 (1978).....	49
<i>Teter v. Deck,</i> 174 Wn.2d 207, 274 P.3d 336 (2012).....	27
<i>Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.,</i> 122 Wn.2d 299, 858 P.2d 1054 (1993).....	26, 28
Statutes	
RCW 4.12.040.....	3, 12, 13, 14, 15
RCW 4.12.050.....	3, 12, 13, 14, 15, 16
Rules	
CR 11	27
CR 32(a)(1)	41, 47
CrR 3.3(f)(1)	18
CrR 4.7	17
ER 401	2, 23, 24
ER 402	24
ER 613	42
RAP 2.5(a)(3)	36
Other Authorities	
10 A.L.R. 5th 371.....	24
49 A.L.R.3d 1186 (1973).....	36
80 A.L.R.4th 989 (1989).....	24

Notes, <i>Judicial Intervention in Trials</i> , Wash. U.L.Q. 843 (1973).....	36
Tegland, 5 WASH. PRAC. § 402.11	24
WASH. STATE CONST. ART. IV, § 16.....	35, 36

INTRODUCTION

Simcha Shoval fell while exiting a shuttle van in the late evening. The five eyewitnesses testified that the driver gave no warnings to wait for her to come around and open the door to help passengers off the van. The driver – who owns the van company – admitted that at least four people debarked the van without her assistance. She also admitted that her company, a common carrier subject to the highest duty of care to its passengers, has an employee rule requiring such assistance. Yet she blamed the victim for failing to wait for her assistance. The jury found no negligence.

This troubling result was caused by a remarkable series of trial court errors. The Honorable Samuel Chung improperly refused to honor an affidavit of prejudice. He refused to rule on 50% of the parties' contested motions *in limine* (MIL) and erred within the few he did rule on. He interrupted plaintiff's opening statement (based on an inapposite MIL) to prevent her from telling the jury that it would not be deciding *stipulated* damages. At that point, the court improperly denied a mistrial to avoid the prejudice. It then violated our Constitution by commenting on the evidence – many times.

This Court should reverse and remand for a new trial before a different judge. No fair trial occurred here, and no justice either.

ASSIGNMENTS OF ERROR

1. Judge Chung erred as a matter of law in refusing to honor an affidavit of prejudice. CP 30.
2. The Presiding Judge erred as a matter of law in failing to transfer this case to a different trial judge. CP 38-40.
3. The trial erred in initially “reserving” 50% of the contested motions *in limine* (MIL),¹ compounding that error by subsequently ruling that reserving an MIL is tantamount to granting it (*i.e.*, the court generally refused to allow the evidence to be addressed before the jury at the appropriate time – such as opening statement – effectively granting those MILs without ruling on them).
4. The trial court erred as a matter of law under ER 401 in denying plaintiff’s second MIL barring defendants from mentioning that no prior similar incidents had occurred. RP 125-27.
5. The trial court erred as a matter of law in summarily leveling \$1,000 in sanctions without argument or findings. RP 89-92.
6. The trial court erred in (a) interrupting plaintiff’s opening argument for over 20 minutes to prevent Shoal from telling the jury

¹ The parties filed 49 MILs. CP 149-56, 167-80, 219-33, 389-91, 397-404; RP 29-31, 37-98. The parties stipulated on 24, and three were stricken, leaving 22 contested MILs. *Id.* Of those, the Court granted seven of defendant’s, and two of plaintiff’s; and reserved ruling on 11 MILs (seven of plaintiff’s, and four of defendant’s). *Id.* Eleven is 50% of 22.

stipulated special damages were not before it, and to “rule” that because this MIL was “reserved,” plaintiff could not mention it in opening, but the court nonetheless would not rule on the MIL; and (b) denying plaintiff’s immediate motion for a mistrial. RP 138-47.

7. The trial court erred in commenting on the evidence on numerous occasions. RP 262,

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did Judge Chung err as a matter of law in refusing to honor an affidavit of prejudice under RCW 4.12.050, where Judge Yu had accepted the parties’ first stipulation to continue the trial date, then newly-assigned Judge Chung accepted a similar stipulation, but neither judge made any discretionary rulings before Shoal filed her affidavit of prejudice?

2. Did the Presiding Judge err as a matter of law in failing to transfer this action to a different judge, where RCW 4.12.040 expressly required her to do so?

3. Did the trial court abuse its discretion in initially “reserving” 50% of the MILs, and in subsequently ruling that “reserving” meant that counsel could not raise the issue before the jury, yet then declining to rule on the issues as they came up, effectively granting those allegedly “reserved” MILs without actually ruling on them?

4. Did the trial court err as a matter of law in denying plaintiff's second MIL, which would have forbidden the defendant from mentioning the irrelevant and highly prejudicial suggestion that there were no prior similar incidents over 25 years?
5. Did the trial court err in summarily imposing \$1,000 in sanctions without giving any explanation, a hearing, or findings?
6. Did the trial court abuse its discretion in interrupting plaintiff's opening argument for over 20 minutes to state that plaintiff could not mention during opening that special damages were not before the jury; and in denying plaintiff's motion for a mistrial, where the court's statements before the jury "made [plaintiff's counsel] a liar" before the jury, and were "hamstringing" the plaintiff's case?
7. Did the trial court violate our State Constitution and commit reversible error by repeatedly commenting on the evidence in front of the jury?
8. Does the cumulative error in this case require reversal and remand to a different judge?

STATEMENT OF THE CASE

A. Simcha Shoval was visiting friends and family in Seattle when she fell in the dark from Valet's parking-lot shuttle van after leaving the synagogue around 10 p.m.

Simcha Shoval is a resident of Israel who was visiting friends and family here in Seattle in September 2012. RP 372. She has been married to Eli Shoval for over 34 years. RP 366. They have three children, one born in Israel, and two born in the United States. RP 367. The Shovals had previously lived in Seattle for nine years after Simcha was invited to UW for a post-doctoral fellowship. RP 367-68. She was the first person in her family to go to high school, much less to college, graduate school, and post-graduate work. RP 366-67. Despite suffering a difficult childhood with an abusive father, she was a strong, independent and healthy woman into her 60s. RP 213-14, 288-89, 366, 370-71.

On September 28, 2012, the Shovals went to Temple B'nai Torah to celebrate Yom Kippur with their friends, Judge Richard Knutson and his wife, Patricia Gorman, their daughter, and their daughter's friend. RP 215, 290, 372. They parked in a lot some distance away, which the Temple uses to accommodate drivers for the well-attended events around Yom Kippur. RP 372-73. The Temple hires a van service, defendant Valet Parking Systems, Inc.,

to shuttle people from the parking lot to the Temple, and then back to the lot after the service. RP 178, 180; Ex 4. The group took the shuttle to the Temple. RP 373.

After the service, the six friends stood around talking with the Cantor until after 10 p.m. RP 217-18, 292. Judge Knutson testified that they then had help getting into the van at the Temple. RP 218. He sat in the front passenger seat because he has a bad knee and it is easier to get in and out there. RP 223-24. When they arrived at the parking lot, he, his wife Patricia, and Eli Shoval, each got out of the van before either his daughter's friend or Simcha got out. RP 218. The Judge closed the passenger door behind him. RP 228. No one climbed over the front seat to follow him out. *Id.*²

He was talking with Eli and Patricia when Simcha exclaimed as she fell to the ground. RP 218-19. She fell because "the area around the step was just totally black dark." *Id.* He did not recall seeing any lights on in the parking lot. RP 226-27. The step from the van to the ground is between 10 and 12 inches. RP 222.

Judge Knutson did not hear the driver give any warnings to wait for her to open the doors before debarking the van. RP 219.

² Valet's driver disputed some of the eyewitness testimony reported here, but this section just summarizes the eyewitnesses' testimony, while the next section summarizes the driver's version of events.

The driver did not reach the side door until after Simcha was in pain on the ground. RP 219.

Patricia largely confirmed her husband's testimony. She has attended this Temple for years, and the shuttle service has always provided someone to help them out of the van at the Temple. RP 291, 296. They were the last to leave the Temple parking lot, around 10 p.m. RP 292-93. Judge Knutson was in the front passenger seat. RP 293. Patricia and Eli were sitting in the seat near the side doors, while Simcha and the two younger women sat behind them. RP 293. Either Patricia or Eli (but not Simcha) opened the side door and got out, while Judge Knutson exited through the front passenger door. RP 294-95. The women were all dressed up for this special event, so no one was climbing over the front seat to follow Judge Knutson out. RP 295, 420.

Like her husband, Patricia never heard the driver say anything like, "I'll open the door" or "I'll come around." RP 296. Indeed, she does not remember hearing a driver give any warnings like that in the last four or five years she has been riding the van. RP 296-97. That night, the driver did not leave her seat until after Simcha fell to the ground. RP 295.

Eli's Shoval's testimony was similar. It was easy to embark the van to go to the Temple because it was full daylight. RP 373. It was still full daylight when they arrived at the Temple, and there were both a curb and a helper at the Temple. RP 373-74. They stayed long after talking with the Cantor because this was the most moving and impressive ceremony he had ever seen – here or in Israel. RP 374-75. It was completely dark out when they departed from the Temple, but there is a lot of light there. RP 375. Eli sat in the second row next to Patricia, while Simcha and the two younger women sat behind them. RP 376. Judge Knutson was in the front passenger seat due to his knee problems. RP 376-77.

The driver did not speak during the trip to the parking lot, much less warn them to wait in the van while she came around to open the doors. RP 377. On the contrary, Eli asked the driver how to open the side door, and she told him. *Id.* Although it was a struggle for him, he clearly remembers opening the door. RP 377-79. As he stood there talking to Judge Knutson and Patricia, he heard a terrible scream. RP 381. Simcha was on the ground, screaming in pain. *Id.* The driver never left her seat until after Simcha had fallen to the ground. RP 379.

B. Valet's driver – who is also its owner – contradicted five eyewitnesses' testimony, but conceded that Valet owed the highest duty of care to Simcha Shoval and that she was not there in time to help any of the people who exited the van on the night in question.

Tina Campbell owns Valet. RP 161. She also was the driver that night. RP 198, 240. A little after 10 p.m., Campbell was waiting in the van at the Temple watching the very last group speak at length with someone from the Temple. RP 198. In contrast to the eyewitnesses, Campbell claimed that on the way to the parking lot she said, "when we get to the parking lot, I'll come around and help you out of the van." RP 258. She also claimed that Simcha (not Eli) was next to the side door and that, as Campbell got out to come around, Simcha said, "Driver, how do you open this door?" RP 240. Campbell claimed that she tried to explain it to Simcha, but when she was not getting it opened, Campbell allegedly said, "I'm going to come around and help you." *Id.* By this time, according to Campbell, three people were already outside the van because they exited by the front passenger door. *Id.*; RP 251. As she came around the van, she could see through the side windows that Simcha was exiting without waiting for her. RP 240. According to Campbell, Simcha fell because she did not wait for Campbell's assistance. RP 265.

Yet Campbell – and indeed Valet – conceded that as a common carrier, they owed the highest duty of care to Simcha. See, e.g., RP 167-68, 186; CP 437 (Jury Inst. 7, attached as Appendix A). Valet specifically agreed to provide assistance in and out of the vans to all congregation members and guests, young, old, and in between, of all shapes and sizes, and with various physical abilities. RP 180; Ex 4. It had heightened duty to do so. RP 186. And indeed, Valet has codified this employee rule (Ex 1 at 4³):

16. Always make sure that your customers are exiting the van on the curbside. Make sure you get out and offer to physically assist them.

Yet Campbell did not “even think about” taking one of the runners from the Temple down to the lot on her last run in order to ensure that her passengers could get off safely in the dark. RP 234. Nor did she deny that – in violation of her own company rule – she was not there to help Simcha, or any of the other three or four people who had already exited the van.

C. Procedural History.

Shoval’s action (filed June 6, 2013) was assigned to Judge Yu. CP 6. On March 27, 2014, Judge Yu signed the parties’ stipulation and order to continue the trial date from September 2,

³ Page 4 of Valet’s Employee Handbook (Ex 1) is Appendix B.

2014, to February 23, 2015. CP 17-18. On January 20, 2015, newly assigned Judge Chung signed the parties' stipulation and order to continue the trial date to May 18, 2015. CP 21-23.

Judge Chung then refused to honor Shoval's affidavit of prejudice. *See infra*, Argument § A.

The court denied Valet's motion for summary judgment that Shoval could not prove negligence without an expert, where Valet had an employee rule expressly requiring drivers to help passengers debark, and the eyewitnesses (including Campbell) uniformly testified that Campbell failed to do so. CP 41-43; RP 44, 647, 240, 648-49. The court also granted summary judgment that Shoval's special damages of \$80,169.74 were reasonable and necessary as a matter of law. RP 41-43.

The trial court initially reserved ruling on 50% of the parties' MILs. *See infra*, Arg. § B.

The trial court denied Shoval's motion for a mistrial during opening argument. *See infra*, Arg. § E.

The trial court denied Valet's motions for directed verdict. RP 658, 659.

The jury returned a verdict that Valet was not negligent. CP 424-27. It thus did not reach damages.

ARGUMENT

- A. Judge Chung erred as a matter of law in refusing to honor an affidavit of prejudice under RCW 4.12.050, where the parties' two stipulations to continue the trial date had been accepted, but no judge made any discretionary rulings prior to the affidavit's filing.**

Whether a judge erred in refusing to recuse under RCW 4.12.050 is a question of law reviewed de novo. *In re Parenting Plan of Hall*, 184 Wn. App. 676, 681, 339 P.3d 178 (2014). Signing an agreed order does not require the court to analyze evidence, apply law, or exercise discretion – nothing that might warn a party about the judge's disposition toward their case, or otherwise encourage “judge shopping.” Shoal filed her affidavit of prejudice before the trial court exercised any discretion, so her affidavit was timely. It thus deprived Judge Chung of jurisdiction. This Court should reverse and remand for a new trial before a different judge.

1. Procedure.

On March 4, 2015, Shoal filed a motion and affidavit of prejudice (RCW 4.12.040 & .050) regarding Judge Chung. CP 26-29. Judge Chung refused to honor the affidavit. CP 30. His order said that “this court has already made a discretionary ruling per RCW 4.12.050.” *Id.* The order did not specify any such ruling.

On March 18, 2015, Shoval sought reconsideration before Chief Presiding Civil Judge Marianne Spearman. CP 31-35 (citing RCW 4.12.050; **State v. Parra**, 122 Wn.2d 590, 603, 859 P.2d 1231 (1993); and quoting **Harbor Enterprises, Inc. v. Gudjonsson**, 116 Wn.2d 283, 285, 803 P.2d 798 (1984) (citing **State v. Dixon**, 74 Wn.2d 700, 702, 446 P.2d 329 (1968); **State v. Cockrell**, 102 Wn.2d 561, 565, 689 P.2d 32 (1984)); and quoting **Marine Power & Equip. Co. v. State**, 102 Wn.2d 457, 463, 687 P.2d 202 (1984)). Shoval explained that she brought the motion before Judge Spearman because she feared that Judge Chung would be called upon to exercise discretion in ruling on reconsideration. CP 38.

Judge Spearman denied reconsideration. CP 38-40. She ruled that, even “when the parties stipulate to a continuance, the trial court has discretion whether to grant or deny the continuance.” CP 39 n.1 (citing **State v Dennison**, 115 Wn.2d 609, 620 n.10, 801 P.2d 193 (1990)).

2. Shoval’s timely affidavit of prejudice under RCW 4.12.040 & .050 deprived Judge Chung of jurisdiction.

The statute, RCW 4.12.040(1), absolutely forbids a judge to preside over any action where prejudice is properly established:

No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established as hereinafter provided that said judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause.

Where such prejudice is shown, the presiding judge is unequivocally required to transfer the action to another judge (*id.*):

In such case the presiding judge in judicial districts where there is more than one judge shall forthwith transfer the action to another department of the same court, or call in a judge from some other court.

In turn, RCW 4.12.050(1) grants any party or attorney an absolute right to establish such prejudice by motion and affidavit stating that the judge cannot be fair and impartial:

(1) 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.

This affidavit must be filed before the judge makes any rulings or decisions requiring an exercise of discretion (§ .050(1)):

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 calendaring arrangements – including setting the case for trial – are not considered rulings or discretionary decisions (*id.*):

but the arrangement of the calendar, [and] the setting of an action . . . down for . . . trial, . . . shall not be construed as a ruling or order involving discretion within the meaning of this proviso;

Under the plain language of this statute, signing a stipulated order calendaring the case for trial is not a ruling or discretionary decision. This statutory entitlement to file an affidavit of prejudice is a “substantial and valuable right.” ***Harbor Enterprises***, 116 Wn.2d at 291. “[T]here is no discretion in granting a timely motion,” and once exercised, “the statutory right deprives that particular judge of jurisdiction.” 116 Wn.2d at 291; see also ***Marine Power***, 102 Wn.2d at 461-62, (“The statute permits of no ulterior inquiry; it is enough to make timely the affidavit and motion”).

A court's failure to recuse itself under a timely affidavit is reversible error requiring a new trial. ***Harbor Enterprises***, 116 Wn.2d at 293. The trial court erred as a matter of law. The Court should reverse and remand for trial before a different judge.

The Presiding Judge similarly erred in denying reconsideration. While motions for reconsideration generally must be brought before the trial judge, RCW 4.12.040(1) specifically

provides that “the presiding judge in judicial districts where there is more than one judge shall forthwith transfer the action to another department of the same court, or call in a judge from some other court.” Shoval properly invoked the jurisdiction of the Presiding Judge under this statute. The Presiding Judge erred as a matter of law in failing to transfer the case to a different judge. This Court should reverse and remand for trial before a different trial judge.

3. Precedent also provides that the trial court erred as a matter of law in refusing to recuse.

Our Supreme Court long ago determined that courts do not exercise discretion within the meaning of RCW 4.12.050 when simply accepting a stipulation to continue a trial. ***State ex rel. Floe v. Studebaker***, 17 Wn.2d 8, 17, 134 P.2d 718 (1943). There, the trial judge signed a stipulated order consolidating two cases and continuing one of them. ***Floe*** specifically held that a stipulated order continuing a case requires no discretion (17 Wn.2d at 17):

Neither do we think it can be said that the court was called upon . . . to make any ruling involving discretion, as contemplated by the statute. We 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 . . . where all the parties have stipulated that such order be made.

The Supreme Court reaffirmed its ***Floe*** holding in ***Parra***, 122 Wn.2d at 599-600:

The distinction drawn in *Floe* relating to stipulations makes sense. . . .

. . .

As *Floe* implicitly acknowledged, many issues may be resolved between the parties and presented to the court in the form of an agreed order. These matters will generally resolve pretrial disputes regarding such issues as admissibility of evidence, discovery, identity of witnesses, and anticipated defenses. 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.

But in *Parra* – a criminal case – the parties presented the trial court with an omnibus order pertaining to matters “within the discretionary provisions of CrR 4.7.” 122 Wn.2d at 603. Unlike here and in *Floe*, “by bringing their respective issues before the judge in the form of motions, the parties were submitting those matters to the court for resolution.” 122 Wn.2d at 594; see also, *id.* at 603 (“the omnibus application and order submitted to the court **did not constitute a stipulation between the parties**. Rather, the motions raised by the parties through use of that form required an exercise of discretion by the judge.” (emphasis added)).

The criminal context is materially different. There, the grant of a stipulated continuance is a discretionary ruling. See, e.g., *Dennison*, 115 Wn.2d at 620 n.10. But (as in *Parra*) that is simply

because the criminal rules are explicitly discretionary. See, e.g., CrR 3.3(f)(1) (“the court may continue the trial date to a specified date” by stipulation (emphasis added)). Those stipulated continuances require the court to “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.” **State v. Guajardo**, 50 Wn. App. 16, 19, 746 P.2d 1231 (1987). That is, the criminal context – hedged about with constitutional concerns like speedy trial – simply requires the court to exercise careful discretion in these circumstances.

Appellate courts agree that a stipulated motion to reset the civil trial date is not a discretionary ruling. **In re Marriage of Tye**, 121 Wn. App. 817, 90 P.3d 1145 (2004); **In re Marriage of Hennemann**, 69 Wn. App. 345, 347, 848 P.2d 760 (1993). The Court should reverse and remand for a new trial and a new judge.

B. The trial court erred in initially “reserving” 50% of the contested MILs, compounding that error by ruling that reserving an MIL is tantamount to granting it.

Rulings on MILs are generally reviewed for abuse of discretion. See, e.g., **Fenimore v. Donald M. Drake Constr. Co.**, 87 Wn.2d 85, 91, 549 P.2d 483 (1976). The trial court erred in initially “reserving” 50% of the contested MILs. It compounded that

error by ruling that reserving on an MIL is tantamount to granting it. The trial court's failures to rule severely prejudiced the Shovals.

The "purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation." **State v. Evans**, 96 Wn.2d 119, 123, 634 P.2d 845 (1981); **A.C. v. Bellingham Sch. Dist.**, 125 Wn. App. 511, 525, 105 P.3d 400 (2004) (quoting **State v. Sullivan**, 69 Wn. App. 167, 170, 847 P.2d 953 (1993)). In light of their purpose, while a court may reserve on a given MIL, reserving half the contested MILs placed Shoval in an untenable position: either be seen as unduly combative before the jury, or accede to the reservations as rulings against her.

For instance, the trial court reserved ruling on Shoval's MIL 11 to prevent Valet from prejudicially commenting on her decision not to bring a liability expert, where the court had ruled as a matter of law that Valet had a heightened standard of care, and the eyewitness testimony was clear and consistent. See CP 174; RP 44-49. Counsel explained why reserving is prejudicial (RP 48-49):

When the standard of care is set forth in a jury instruction, that's the law. The jury—and it would invade their province to do otherwise, is the determinant of what conduct falls below that heightened duty. So, I see this as a—a pretty simple motion, and a—a pretty simple motion that should be denied.

There is no basis for it. And what's he going to say, that he couldn't argue to Your Honor to—to get a judgment? I mean, if—if you're going to go that way, and you're going to decide that I needed an expert to—to have this jury instruction put before these jurors, then let's just do it right now. Let's—let's do it on a motion for Counsel, and—and dismiss the case right now instead of going through the next six days, because we're not having an expert come in, nor is an expert necessary for that point. And it doesn't matter whether I am proving that they should have had a light, or whether it was dark in the parking lot, or not, all of which is irrelevant based on—not irrelevant, but is—is not the—the issue. The issue is whether those things, and the failure to have those things, required the assistance that was not given.

So, my point of view is, then, if—if you're going to grant this, what—what's he going to say to the jury: They should have had a [*sic*] expert?

THE COURT: Right.

MR. KAHN: They shouldn't be—it's going to confuse the jury.

THE COURT: Right. Well, Mr. Kahn, for my purposes right now, the motion—your Motion No. 11, I'm going to reserve ruling on this issue. . . .

When the trial court reserved ruling (for the eighth time) on Shoval's motion about whether she could call a doctor who resides in Israel via Skype, counsel again explained the consequences of the trial court's repeated failures to rule:

MR. KAHN: —in order for me to plan my trial, all these issues that are being reserved don't tell me what cards I can play and what cards I can't. All they tell me is that I've got all this stuff out there. And I know no more today than I do yesterday in how to try my case. So, it—it—

RP 74. The trial court responded (*id.*):

THE COURT: Mr. Kahn, I guess my response to you is that at this juncture of the trial both of you know this case 10,000 times better than I do. You're asking me to decide on an evidentiary issue that I'm—I'm partly familiar with because of the summary judgment. I want to make the correct ruling. And, before these issues arise, you will let me know that there is an issue that I didn't decide. As we get close to it, we'll make a decision and move forward.

Id. And counsel explained further (RP 74-75):

MR. KAHN: Okay. No, I appreciate that, Your Honor. I'm really referring to the fact of the witness is all, whether I have permission—and I don't think there's any opposition, to call this witness if I should so choose. That's all I want to know. So, I know I can plan, if I do need to call her, I have to make arrangements for that and, you know, to make sure that she's at a proper place where—that I can—where—

THE COURT: Right.

MR. KAHN: I don't want her just at home in her living room where she could have a problem with—

THE COURT: Right.

MR. KAHN: —her home Wi-Fi.

THE COURT: If you're telling me that you may not call her on—

MR. KAHN: I'm—

THE COURT: —rebuttal—

MR. KAHN: —telling you that I would like the opportunity—I'm sorry.

THE COURT: If you're telling me—

MR. KAHN: My apologies.

THE COURT: —that you may or may not call her at this time, you don't know, Court's—I'm going—not going to make a decision on that right now, okay? All right. That concludes the motions in limine from the Plaintiff.

A final example was when the trial court reserved on one of the defendant's MILs (barring arguments and inferences outside the record for punitive results or political effects). RP 92-96. Counsel debated the issue (*id.*), and the court said (RP 96):

[This motion] is reserved.

I think I've set my parameters clear enough that the parties will follow.

[I]f worse comes to worse, I have to reprimand you in front of the jury, which I don't think anyone wants to do, so.

This last somewhat chilling comment – which fairly captures the essence of the purpose for bringing MILs – prompted a further explanation from counsel of why reserving is not sufficient (RP 96):

MR. KAHN: Which is why some clarity would be appreciated. . . . I ask the Court to revisit my trial brief on the issue of deterrence. I believe that I'm on solid ground to be able to say that, ladies and gentlemen, the way you deter this conduct from occurring again—Defendant's conduct, is by giving full and fair damages to the Plaintiff. That's not an argument for punitive damages. That's what I'm entitled to do under the law. And that's the argument that you will hear. So, if you're telling me I can't do that right now, then I should know so I don't run afoul of that. I do think that—according to law, that I'm absolutely entitled to that, Your Honor. I'm not arguing punitive damages.

As these examples show, reserving half the MILs prejudiced Shoval's preparations for trial. As the following arguments show, the court compounded that prejudicial effect by summarily ruling on one reserved MIL, and then ruling that reserving on another MIL meant that Shoval could not discuss that issue before the jury.

C. The trial court erred under ER 401 in summarily denying plaintiff's second MIL barring defendants from arguing that no prior similar incidents had occurred.

The trial court had reserved on Shoval's second MIL to prevent defendants from arguing that no similar incidents had occurred. CP 172; RP 39-40. But when Shoval pressed the issue just prior to opening arguments, the court summarily denied her MIL. RP 124-25. Shoval expressly pressed the prejudice arising from this erroneous ruling (RP 126):

MR. KAHN: From an evidentiary standpoint, Your Honor, do you understand the prejudicial effect of what you're ruling? I don't believe that the Court has considered the fact that what you're doing is saying, in essence, that in every case where you have a driver driving around that hasn't had a wreck and all of sudden that night they decide to get drunk and—and they cream a bunch of people on a sidewalk, that they could say, hey, I never did that before. And what you're doing is not having them—you're speculating whether they acted in conformity with that and that goes along with their habit. It's extremely prejudicial—

He asked the court to reconsider, but it refused. RP 126-27.

A “party’s lack of prior accidents is generally inadmissible to show a lack of negligence in the case at hand.” Tegland, 5 WASH. PRAC. § 402.11, at 308-09 (citing *Hammel v. Rife*, 37 Wn. App. 577, 682 P.2d 949 (1984); *Martini v. State*, 121 Wn. App. 150, 89 P.3d 250 (2004); *Gabel v. Koba*, 1 Wn. App. 684, 463 P.2d 237 (1969); 10 A.L.R. 5th 371). Under ER 401 and 402, it is simply irrelevant that in an unimaginable number of other dissimilar situations no one else had fallen. It was improper and highly prejudicial to allow Valet to present testimony that in the course of over a quarter of a century – with over 2000 customers – nothing like this had ever happened in the entire course of her business. See, e.g., RP 835, 839.⁴

Gabel is salient. There, the “trial court properly rejected the offered testimony as it included lack of accidents on all equipment

⁴ Shoal did not re-raise her objection at this time, which is not a waiver: “Because the purpose of a motion in limine is to avoid the requirement that counsel object to contested evidence when it is offered during trial, the losing party is deemed to have a standing objection where a judge has made a final ruling on the motion, ‘unless the trial court indicates that further objections at trial are required when making its ruling.’” *State v. Powell*, 126 Wn.2d 244, 256-57, 893 P.2d 615 (1995) (citing, *inter alia*, *State v. Koloske*, 100 Wn.2d 889, 895, 676 P.2d 456 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988), *adhered to on reh’g*, 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906, 80 A.L.R.4th 989 (1989); *Fenimore*, 87 Wn.2d at 91). Judge Chung did not permit further objections at trial. RP 127. But Shoal did expressly object to admitting Campbell’s testimony. RP 852.

on the farm, not just the truck, and therefore related to many factors which were not similar to the facts in this case.” 1 Wn. App. at 693.

But here, the trial court allowed exactly that type of evidence, greatly prejudicing Shoval. Indeed, Valet brought Campbell back to the stand and sprung this evidence on Shoval at the end of the trial. RP 839. The trial court committed reversible error on this issue.

D. The trial court erred as a matter of law in summarily leveling \$1,000 in sanctions without briefing, argument, explanation, or findings.

The trial court summarily leveling a \$1,000 sanction on someone – it did not specify whom – without briefing, argument, or findings. RP 90-92. This violated quite a bit of precedent, not to mention due process. The sanction should be reversed.

The trial court denied Valet’s MIL to exclude Dr. Levine’s testimony based on a late disclosure of his notes. RP 87-90. Valet asked for terms for the late disclosure. RP 90-91. The trial court summarily ruled (RP 91):

THE COURT: All right. Those situations, I do recall now, about getting Dr. Rosen to do the examination. I’ll award \$1,000 for sanctions.

Shoval made her objections clear (RP 92):

MR. KAHN: I—I want to just make it clear on this record that there is no basis for any such award; that to the extent it was asked for in discovery, we provided it. It—to the extent we had the information—we had to get the same MMPI data out

of Israel, which was difficult. This was done. And it wasn't like we had, you know, an abundance of time. As soon as I had the report, we gave it to them. So, why is my client getting sanctioned? Why am—are you—even am—why am I getting sanctioned for it, personally? And where's the \$1,000 in—in reference to anything that's gone on in this case?

The trial court nonetheless refused to explain (RP 92):

THE COURT: Well, that's the ruling of the Court. Let's move on.

Sanctions are reviewed for an abuse of discretion. **Blair v. TA-Seattle E. No. 176**, 171 Wn.2d 342, 348, 254 P.3d 797 (2011). An abuse of discretion occurs when a decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. **Mayer v. Sto Indus., Inc.**, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A decision rests on untenable grounds or is based on untenable reasons if the trial court applies the wrong legal standard. **Mayer**, 156 Wn.2d at 684. Questions of law are reviewed de novo. *Id.*

The purposes of sanctions orders are “to deter, to punish, to compensate and to educate.” *Id.* at 690 (quoting **Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.**, 122 Wn.2d 299, 356, 858 P.2d 1054 (1993)). Sanctions should be “proportional to the nature of the discovery violation and the surrounding circumstances” of the case. **Rivers v. Wash. State Conf. of**

Mason Contractors, 145 Wn.2d 674, 695, 41 P.3d 1175 (2002).

Generally, “the court may impose only the least severe sanction that will be adequate to serve its purpose in issuing a sanction.”

Teter v. Deck, 174 Wn.2d 207, 216, 274 P.3d 336 (2012).

It is impossible to deter or educate without explaining some reason for imposing a sanction. While it is clear under **Mayer** that monetary sanctions for discovery violations do not require a full-blown **Burnet** analysis,⁵ that does not permit the trial court to summarily declare a \$1,000 sanction against no specified person for no specified act based on no specified law. *Cf. Biggs v. Vail*, 124 Wn.2d 193, 201, 876 P.2d 448 (1994) (“in imposing CR 11 sanctions, it is incumbent upon the court to specify the sanctionable conduct in its order”; requiring findings on monetary sanctions). Valet did not ask for \$1,000, or for any other specified amount, and did not provide any support for that amount. RP 90-91. The trial court erred in summarily issuing a \$1,000 diktat without explanation or findings. This Court should reverse the sanction.

⁵ **Mayer**, 156 Wn.2d at 690 (discussing **Burnet v. Spokane Ambulance**, 131 Wn.2d 484, 933 P.2d 1036 (1997)).

- E. The trial court erred in (1) interrupting Shoval's opening argument for over 20 minutes to say that she could not tell the jury that the stipulated damages were not before it; and (2) denying plaintiff's motion for a mistrial, where the court's statements in front of the jury "made [plaintiff's counsel] a liar" before the jury, and were "hamstringing" the plaintiff's case.

The trial court erred in (1) interrupting Shoval's opening argument for over 20 minutes to say that she could not tell the jury that the stipulated damages were not before it; and (2) denying plaintiff's motion for a mistrial, where the court's statements in front of the jury "made [plaintiff's counsel] a liar" before the jury, and were "hamstringing" the plaintiff's case. RP 138-147. This Court should reverse and remand for trial.

1. Standards of Review.

The Court reviews the trial court's control of the content of opening statements for an abuse of discretion. *State v. Kroll*, 87 Wn. 2d 829, 834, 558 P.2d 173 (1976). Opening statements properly outline the material the party intends to introduce. *Kroll*, 87 Wn.2d at 834. The standard of review for denial of a mistrial is an abuse of discretion. *State v. Condon*, 72 Wn. App. 638, 649, 865 P.2d 521 (1993). The trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *Fisons*, 122 Wn.2d at 339.

2. The trial court erred by interrupting Shoval's opening argument for over 20 minutes to state that she could not mention that special damages were not before the jury, causing enormous prejudice to Shoval.

Valet stipulated to the amount of Shoval's medical specials. RP 67. After substantial legal debate, the trial court "reserved" ruling on Shoval's MIL 25 to preclude Valet from mentioning the stipulated specials in front of the jury. RP 67-72; CP 178. Just prior to opening statements, Valet represented that it would not do so during its opening argument, so Shoval agreed that the issue could be discussed after openings. RP 130.

Yet when Shoval told the jury that it will not consider the medical bills because they were handled in another proceeding, Valet objected, stating no basis. RP 138. The court sustained the objection, stating no basis. *Id.* Shoval clarified for the jury that its determination will not include the amount of medical bills incurred by Shoval. *Id.* Valet sought a sidebar; although the trial court said "move on," Shoval agreed that a sidebar was necessary. *Id.*

Out of the presence of the jury, Shoval immediately moved for a mistrial. RP 139. The trial court explained that when **Valet** said it would not violate MIL 25, the court just assumed that, "given the fact that [Valet's] not going to be raising it in his opening, that

[Shoval's] not going to be raising it as well. Is that misunderstanding on my part?" *Id.* Shoval answered "Yes." *Id.*

MR. KAHN: . . . What I meant, Your Honor, and what was . . . clear is that [specials are] not part of this [trial]. And I'm telling the jury in opening what they have to determine. They are making no determination about medical specialists [*sic*]; would Your Honor agree with that?

THE COURT: Well, my understanding of my ruling in this case is that the medical specials—the reasonableness of the medical specials in this case has been accepted; isn't that correct?

MR. ROSEN [for Valet]: That is correct.

RP 139. Valet reiterated, however, that the MIL was reserved, to which the court responded with a question to Shoval (RP 140):

THE COURT: . . . That is correct, I have ruled yesterday that I'm reserving a ruling on the issue of how to deal with the medical. So, I didn't—I'm not understanding why you need to get into this issue now in your opening.

Shoval explained the reasons, and the prejudice (RP 140-41):

MR. KAHN: Your Honor, I'm telling the jury what they have to do in this—in this case. And what they have to do is decide the harms and losses, the pain and suffering, that's it.

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. And the jury hasn't and will not make a determination on this. How could it be possible? It's already done. [Paragraphing altered for readability.]

Despite this clear explanation, and after Valet just said it was "willing" to move on, the trial court denied a mistrial, and maintained its position that Shoval could not tell the jury that it would not be deciding the stipulated specials. RP 141. Shoval further objected, pleading with the court in fairness to avoid great prejudice:

MR. KAHN: Your Honor, with all due respect, please, sir, you are missing the point. Okay, you interrupted me in front of this jury. I am entitled to an instruction to tell the jury that, in fact, there are—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**. [Emphasis added.]

(RP 141). Valet called this "hyperbole," and the court maintained its rulings – its reservation of the rulings. RP 142.

Shoval refused to proceed without a ruling. *Id.* Judge Chung told counsel to go outside and "cool off" for 15 minutes. *Id.* Counsel responded as follows (*id.*):

MR. KAHN: Your Honor, you are hamstringing my case. This is not fair to my client that comes all this way to have a case to have this happen. I'll go outside.

When he returned, the trial court reiterated its decision. RP 143.

Shoval persisted (RP 143-44):

MR. KAHN: —reserving [inaudible] special damages is not a ruling. What it is is doing precisely what's happening and will

continue to happen during this trial. And I've explained earlier that inures to the benefit of the Defendant. It's not—

THE COURT: It's kind of hard to pick up because your voice is so soft, Mr. Kahn.

MR. KAHN: Well, I'm trying not to get loud, Your Honor.

THE COURT: I appreciate that.

MR. KAHN: And I apologize for losing my temper. I really do. I—I know you're trying your best and what you think is [inaudible]. But, Your Honor, we need a decision one way or the other because then I could say, well, at the end you're going to have to—you're going to have this—this—it's already been determined what the—

The trial court then agreed to hear the merits, and restated its “understanding” that Shoval was not going to raise the issue during opening argument, despite the fact that Shoval had said no such thing. RP 144. Shoval explained the court's misunderstanding:

MR. KAHN: Okay. What you're misunderstanding is we were not going to mention a [*sic*] amount. We're not—all we're saying is that everybody is wondering when you have medical bills—this is going to confuse the jury. This is why I'm trying to say when you—when you have a—an injury, everybody expects medical bills. Why aren't medical bills a part of this, okay? All I'm saying is that it's not, don't concern yourself with that. All I'm saying is this is the only decision you can make, liability and pain and suffering.

RP 144-45. In response, Valet just asked rhetorically, “what wouldn't confuse the jury?” RP 145. The court maintained its decision not to decide. RP 145-47.

And when the jury came back in, the court compounded Shoval's prejudice, suggesting that taking time to address Shoval's legal arguments imposed an "inconvenience" on the jury; that these "unavoidable" procedures should be "minimized," if possible; and that the jury's "patience and understanding" is needed (RP 148):

THE COURT: Please be seated. We apologize for the inconvenience. There are times when it's necessary to have legal issues discussed outside the presence of the jury. Hopefully we'll try to minimize that as much as we can, but it's always unavoidable and we ask for your patience and understanding. So, we'll resume with Mr. Kahn.

Counsel was thus forced to apologize to the jury (*id.*):

MR. KAHN: Ladies and gentlemen, I apologize for the delay. And I also apologize if you heard me getting excited. I—and I hope that what I do in this courtroom does not affect your decision for my client who we're here for.

When the plaintiff presents sufficient evidence establishing the reasonableness and necessity of his or her medical treatment and expenses, and the defendant elicits no controverting evidence, the reasonableness and necessity of plaintiff's medical expenses are not a matter of legitimate dispute. *Palmer v. Jensen*, 132 Wn.2d 193, 199–200, 937 P.2d 597 (1997); *Idle v. Stoltenow*, 47 Wn.2d 847, 851, 289 P.2d 1007 (1955). Preventing Shoval from telling the jury that it would not be deciding undisputed specials substantially prejudiced her, for the reasons stated above.

3. The trial court abused its discretion in denying a mistrial.

In light of the court's reserving 50% of the MILs, this first encounter with the court's refusals to make decisions loomed large for Shoval's counsel. He could foresee that either there would be more such problems if he could not obtain a ruling or a mistrial, or he would be hamstrung in presenting Shoval's case to avoid raising further problems before the jury and compounding Shovals' prejudice. RP 142, 146. The MILs' whole purpose was to avoid this prejudice. *Evans*, 96 Wn.2d at 123; *A.C.*, 125 Wn. App. at 525.

A trial court abuses its discretion in denying a motion for mistrial when a trial irregularity is so prejudicial that nothing short of a new trial can remedy it. *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994) (quoting *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)); *State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979). The Court considers whether the irregularity (1) was serious, or (2) involved cumulative evidence; and whether (3) the trial court properly instructed the jury to disregard it. *Johnson*, 124 Wn.2d at 76 (quoting *Hopson*, 113 Wn.2d at 284).

It was a serious irregularity for the trial judge to use Shoval's MIL 25 – which pertained solely to Valet mentioning the amount of

stipulated damages to the jury – to bar Shoal from telling the jury that they would not be addressing medical specials because that issue would be decided elsewhere. To erroneously grant an objection on this basis so close to the beginning of Shoal's opening presentation to the jury also called counsel's credibility into question. Whether the stipulated specials would go before the jury was not cumulative of any other evidence. And the trial court not only failed to tell the jury to disregard the improper objection and delay, but it instead emphasized that Shoal was somehow at fault for causing "inconvenience" to the jury. This Court should reverse, grant a mistrial, and remand to a different trial judge.

F. The trial court committed a manifest error affecting Shoal's constitutional rights by repeatedly commenting on the evidence before the jury.

The trial court made manifest errors affecting Shoal's constitutional rights, repeatedly commenting on the evidence before the jury. "The Washington State Constitution does not allow judges to 'charge juries with respect to matters of fact, nor comment thereon.'" *State v. Brush*, 183 Wn.2d 550, 556-557, 353 P.3d 213 (2015) (citing WASH. STATE CONST. ART. IV, § 16). A comment is impermissible if it "conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what

the judge said or did not say that the judge personally believed or disbelieved the particular testimony in question.” **Adcox v. Children’s Orthopedic Hosp. & Medical Ctr.**, 123 Wn.2d 15, 38, 864 P.2d 921 (1993) (citing **Hamilton v. Dep’t of Labor & Indus.**, 111 Wn.2d 569, 571, 761 P.2d 618 (1988)).

Contemporaneous objections are not required where, as here, the interjections are manifest error affecting Shoval’s constitutional right to a fair trial:

While the report of proceedings does not reflect contemporaneous objections to such conduct, concurrent objection is not required. **Seattle v. Harclan**, 56 Wn.2d 596, 598, 354 P.2d 928 (1960), (Finley, J., concurring). Understandably, counsel may be reluctant to note such an objection, particularly in the presence of the jury, and may elect not to object at all if the incidents were only occasional and minor. If, however, the occurrences were as frequent and marked as Crystal Mountain contends, counsel should object to the court’s conduct. Failure to object denies the trial court an opportunity to mitigate the effect of its conduct on the jury, when such conduct has been inadvertent. Manifest error affecting a constitutional right may, of course, be raised at any time. RAP 2.5(a)(3). . . .

A trial judge should not enter into the “fray of combat” nor assume the role of counsel. See generally Notes, *Judicial Intervention in Trials*, Wash. U.L.Q. 843 (1973). An isolated instance of such conduct may be deemed harmless error, however, if it cannot be said to violate constitutional bounds of judicial comment. CONST. ART. 4, § 16. This is particularly true if the response appears invited and represents a natural, limited reaction to an immediate stimulus. In such instances, potential error may be cured by an instruction, if requested. See generally *Gestures or Facial Expressions of*

Trial Judge in Criminal Case, Indicating Approval or Disapproval, Belief or Disbelief, as Ground for Relief, Annot., 49 A.L.R.3d 1186 (1973).

Egede-Nissen v. Crystal Mountain., Inc., 93 Wn.2d 127, 141, 606 P.2d 1214 (1980). And the cumulative effect of repeated interjections may constitute reversible error (*id.*).

On the other hand, the cumulative effect of repeated interjections by the court may constitute reversible error. In the instant case, we believe the trial court, perhaps inadvertently without meaning to do so, actively interceded in the trial more frequently and at greater length than the circumstances warranted.

The Supreme Court has repeatedly gone to the heart of the problem created by such comments:

Every lawyer who has ever tried a case, and every judge who has ever presided at a trial, knows that jurors are inclined to regard the lawyers engaged in the trial as partisans, and are quick to attend an interruption by the judge, to which they may attach an importance and a meaning in no way intended. It is the working of human nature of which all men who have had any experience in the trial of cases may take notice. Between the contrary winds of advocacy, a juror would not be a man if he did not, in some of the distractions of mind which attend a hard fought and doubtful case, grasp the words and manner of the judge as a guide to lead him out of his perplexity. On the other hand, a presiding judge has no way to measure the effect of his interruption. The very fact that he takes a witness away from the attorney for examination may, in the tense atmosphere of the trial, lead to great prejudice.

Egede-Nissen, 93 Wn.2d at 142 (quoting *State v. Jackson*, 83 Wash. 514, 523-24, 145 P. 470 (1915)); *quoted with approval in Risley v. Moberg*, 69 Wn.2d 560, 419 P.2d 151 (1966)..

The trial court first commented on the evidence before the jury during Campbell's opening testimony, after a long series of "legal conclusion" objections, to which Shoal had responded that Campbell had not answered the factual question (RP 185-87):

Q [by Mr. Kahn]: Okay. So, in order to fulfill these recognized duties you make sure that the drivers get out and offer to physically assist your customers.

MR. ROSEN: Your Honor, objection. This calls for a legal conclusion. It's been asked and answered a few times.

THE COURT: All right. Sustained. **I think the—the witness has answered the question.** [Emphasis added.]

The trial judge commented to the jury that Campbell had answered the question she was evading. It thus suggested to them that Shoal improperly repeated the question that Campbell successfully evaded. This prejudiced Shoal before the jury.

The court's second comment on the evidence occurred when Shoal was attempting to cross-examine Campbell using her deposition, over Valet's many and persistent objections:

THE COURT: Mr. Kahn, you need to establish the proper use of the deposition. So, let's go ahead and get that done.

MR. KAHN: Your Honor, I can use the deposition for any purpose. And she just answered a question, and I'm going to show her what she said at that deposition to the exact same question, which is different, Your Honor, than what she gave me now.

THE COURT: All right. I haven't heard which answer that you're attacking. So, let's get that—

MR. KAHN: I can—

THE COURT: —on the record.

MR. KAHN: Your Honor, I must admit, I'm completely confused. I am trying to have her read that, and—and there's an objection that's not—that I—I—he's not telling me whether I'm supposed to impeach her with that. But, and I can't—I'm try—I'm just trying to go forward, Your Honor, in the way that I've—I've done forever. But, let me see this.

BY MR. KAHN:

Q Do—do you—let me read to you what I asked. At Line—

MR. ROSEN: Your Honor—

BY MR. KAHN:

Q —Page 34, Line 14 through 22.

MR. ROSEN: Your Honor, your objection was sustained.

MR. KAHN: I don't believe it was.

THE COURT: Let's move along.

MR. KAHN: Thank you.

BY MR. KAHN:

Q “There are at least three other employees that were available to assist with doors down there at the time, correct?” You—do you see that?

A Yes.

Q And you answered—

MR. ROSEN: Objection, Your Honor.

Q —“They were in the upper”—

MR. ROSEN: This is—

BY MR. KAHN:

Q —“parking lot.”

MR. ROSEN: —improper—

THE COURT: Mr.—

MR. ROSEN: —use of a deposition transcript.

THE COURT: All right.

MR. ROSEN: Mr. Kahn’s reading from the transcript. He hasn’t established there’s any inconsistencies.

MR. KAHN: Your Honor, I have to establish that there is an inconsistent statement by reading the statements that were inconsistent.

MR. ROSEN: That is improper procedure, Your Honor, as the Court knows.

MR. KAHN: Your Honor, I’m going to ask again that there’s—that we please not—

THE COURT: Mr. Kahn—

MR. KAHN: —have speaking objections. I—I mean, I’m trying to get this—

THE COURT: Mr. Kahn, stop, all right? For the sake of the jury, how much more question do you have for this witness, Mr. Kahn?

MR. KAHN: Your Honor, I've got a bit. I'll just move on.

You know—

THE COURT: **No. Please answer the question that I had—I asked you. How much more do you—**

MR. KAHN: I've got a bit.

THE COURT: **About half an hour? Hour?**

MR. KAHN: I think a half-hour. I could've done without objection, so—before noon, but since we have these constant objections that are absurd—

MR. ROSEN: Your Honor, that's an inappropriate comment from Mr. Kahn.

THE COURT: All right. Mr. Rosen—I'm going to send the jury out for an early lunch break. I'm going to—**and we're going to try to get our house in order.** And we'll ask you to come back at 1:15.

RP 202-05 (emphases added). The court thus criticized Shoval's counsel in front of the jury, suggesting that his attempt to simply impeach Campbell was a somehow improper attempt to interject relevant evidence into the case.

Counsel was so concerned by this prejudicial treatment that he asked the court to allow his Rule 9 intern to explain the legal grounds; but the court refused, saying "I'm not going to allow Rule 9 to speak on this case. If you're going to speak, you're going to have to deal with it directly, Mr. Kahn." RP 209-10. So he explained his proper use of the deposition under CR 32(a)(1) ("Any deposition

may be used by any party for the purpose of contradicting or impeaching the testimony of a deponent as a witness or for any purpose permitted by the Rules of Evidence”); and under ER 613 (“Prior statements of witnesses, A, in the examination of a witness concerning a prior statement made by the witness, whether written or not, the Court may require that the statement be shown or its contents be disclosed to the witness at that time”). RP 210. He acknowledged that opposing counsel could object to a question, but defense counsel’s constant speaking objections were prejudicing Shoval’s case before the jury. RP 210-11.

The court’s response was apparently to repeat that trial counsel was not conducting proper impeachment, while giving him a confusing explanation of the proper procedure (RP 211-12):

With respect to the use of the deposition, even if it’s a party deposition, there’s still procedures that you have to follow for impeachment purposes. The question that Ms. Campbell was being asked, I deemed those as impeachment purposes. And you still have to lay a proper foundation to commit the person to that testimony here in court, to credit her prior statement from a deposition, and then get the answer out that way. That wasn’t done in this case. Therefore, I sustained the objection. Now, you know, if you want to do it again, I’m—and do it similarly, I hope, you know, you can move on and learn the proper procedure for doing that. And I will—there probably won’t be an objection at that time.

The court thus improperly entered into the fray and assumed the role of counsel. *Egede-Nissen*, 93 Wn.2d at 141.

The court's third comment on the evidence came when Shoval was trying to ask Campbell if she knew of any reason why five eyewitnesses would fabricate their consistent stories. RP 261. Campbell evaded the question for the third time (RP 261-62):

A: Because the front door was the only door that was opened. So, if they say they went out a different door, they didn't. And they were standing out there when she went out the door. And that was the first time it got opened.

Shoval moved to strike as nonresponsive. RP 262. The following colloquy then proceeded in front of the jury (*id.*):

THE COURT: I'm going to deny the request. **And I think the answer stands.** Go ahead. Ask your next question.

MR. KAHN: I don't think I got an answer to my last—

THE COURT: It's—

MR. KAHN: —one, Your Honor.

THE COURT: We've asked it three times. The—**I think the witness is doing its best trying to answer the question.** Go ahead; next question, please. [Emphases added.]

The court directly supported the key defense witness' credibility. Credibility was everything in this trial. This is highly prejudicial.

The trial court's fourth comment on the evidence came when Shoval tried to impeach Julie Noon, a Valet employee (RP 357):

Q Okay. And were you coached in the deposition?

A I don't remember.

Q Okay. Do you remember having a meeting between Anna, Tina, Mr. Rosen, and yourself before the deposition?

MR. ROSEN: Objection, argumentative.

THE COURT: Goes beyond the scope, Mr. Kahn, so let's stick to the question that—follow-up questions that Mr. Rosen asked. Objection's sustained.

Note that while Valet's objection was "argumentative" (which the question was not) the trial court injected its own objection, "beyond the scope." *Id.* Shoal tried again (RP 358):

Q So, you . . . were not biased or influenced in your testimony today?

MR. ROSEN: Objection.

THE COURT: Mr. Kahn, I've instructed you three times. **It's outside the scope of his cross-examination.**

MR. KAHN: Your Honor, bias is always in scope—

THE COURT: **Stop now.**

MR. KAHN: —examination.

THE COURT: **You had an opportunity.**

Of course, impeachment for bias is always within the scope on cross – in fact, it is a right. See, e.g., *Dods v. Harrison*, 51 Wn.2d 446, 447-448, 319 P.2d 558 (1957). While the trial court has discretion to limit bias inquiries (*id.*), here it prevented Shoal from

inquiring. And perhaps more importantly, the trial court stepped-in to add an incorrect objection and to tell the jury that Shoval already “had an opportunity” to impeach this witness, improperly entering to into the “fray of combat,” and assuming the role of an advocate.

Egede-Nissen, 93 Wn.2d at 141.⁶

The trial court’s fifth comment on the evidence came right after Shoval rested. RP 642. In front of the jury, the court said:

THE COURT: Okay. **Are you going to have motions?**

MR. ROSEN: Yes, Your Honor.

THE COURT: All right. When Plaintiff rests, that means they don’t have any more witnesses they’re going to put on. **And that also means that at that time, the opposing party will make motions regarding the claims that the Plaintiff has made, and that is done outside of the jury.** I know you just got here. But, I’m going to ask you to return to the jury room, and we’ll call you back out as soon as we’re ready. So, **I apologize for the inconvenience, but that’s the way the cookie crumbles sometimes.** [Emphases added.]

RP 643. After the jury left, Shoval immediately objected (*id.*):

MR. KAHN: Your Honor, I don’t think that it was necessary to tell the jury that there were going to be motions. And, in fact, I think it was improper. I’d just like to make my record of it. And I think it’s also improper to invite Counsel to bring a motion in front of the jury.

⁶ When Shoval raised a beyond the scope objection during Valet’s cross, the trial court curtly responded, “This is cross-examination; overruled.” RP 400-01. Such unequal treatment is evident throughout the transcript. See, *e.g.*, RP 105-06, 147, 171-72, 175-76, 209-12, 258, 262, 263, 519-20, 845, 902, 932, 1009-10.

The trial court defended its actions, saying that the jury “had just arrived,” so it had to explain. RP 644. Trial counsel’s objections correctly stated the error and the prejudice.

The trial court’s sixth comment on the evidence occurred when Shoal was examining Valet’s Vice-President, Anna Marie Lynn (RP 694):

Q Okay. So, if Julie [Noon] testified that everybody was standing around, and Angel and—were just standing around and—the other van, waiting for Tina, that last ride, she’d be incorrect?

MR. ROSEN: Objection. That misstates the testimony.

THE COURT: Sustained. **I don’t think that’s what the testimony of Julie was.** [Emphasis added.]

This was a blatant comment on the evidence that called trial counsel’s veracity into question. It is extremely prejudicial.

Shortly thereafter, the trial court again entered the fray and assumed an advocacy role (RP 694-95, emphases added):

MR. KAHN: Your Honor, I’d like to read from—and I believe you have our—our—the copy, Christina Campbell’s deposition? I’d like to read from Page 29, Lines 19 through 24.

MR. ROSEN: Your Honor, I object to this. Why is he reading testimony from a—a different witness?

THE COURT: **Right.** Mr. Kahn—

MR. KAHN: Deposition can be used for any purpose—

THE COURT: Right.

MR. KAHN: —Your Honor.

THE COURT: **Mr. Kahn, this is not the witness who gave the deposition.**

MR. KAHN: Yes.

THE COURT: **Julie Noon testified in the case. So, it would be improper cross-impeachment for this witness.**

MR. KAHN: I misspoke, Your Honor. That's Christina Campbell. She's also an officer of the same corporation.

MR. ROSEN: Your—Your Honor, Ms. Campbell testified as well, and it's—this is not Ms. Campbell on the stand.

MR. KAHN: It doesn't matter, Your Honor. I can use—

THE COURT: Well-

MR. KAHN: —the dep—it's her deposition—

THE COURT: Mr. Kahn—

MR. KAHN: —and it's—

THE COURT: —all right. The ruling of this Court is that you can impeach this witness with her own deposition. **This is a different—deposition of a different position, although she's a party so I'm not going to allow it, okay?**

MR. KAHN: It—Your Honor, it's—it's a corporation. They're both corporate officers.

THE COURT: **Well, it's not the same person, so let's move—let's move on.**

The trial court erred under CR 32(a)(1): "**Any deposition** may be used by any party for the purpose of contradicting or

impeaching the testimony of deponent as a witness or for any purpose permitted by the Rules of Evidence” (emphasis added). More devastatingly, the trial court entered the fray, independently advocating on Valet’s behalf in front of the jury. Arguing against two advocates – one wearing the robe – highly prejudiced Shoal.

The trial court’s eighth comment on the evidence came at the end of Valet V-P Lynn’s testimony. (RP 716-18):

THE COURT: So, this witness is **finally** excused.

MS. LYNN: Thank you, sir.

THE COURT: **Thanks for your patience.**

...

THE COURT [to the jury]: As you probably by know, I’m the worse [*sic*] predictor on time, so I have no guarantees that I can’t [*sic*] provide. But, **thank you for your patience. And we’re—we’re almost there, so please bear with us.**

...

All right. If anything happens over the weekend, let us know. Mr. Palmer will be manning the emails and—**and, again, I want to thank you for your patience.**

The clear import of all of these comments is that it is an inconvenience and a burden for the jury to have to listen to the parties’ evidence, but they are showing remarkable patience. That is of course a remarkably negative message to send to the jury about the importance both of their duty as jurors, and of the case.

Perhaps more concerning, however, is that the Judge was seen to be apologizing to and thanking **one of the officers of the defendant** for her “patience” in testifying. This sort of support for and commiseration with a defendant in front of the jury is highly prejudicial. This entire episode, coming so close to the end of the trial, seriously prejudiced Shoal.

In sum, the trial court manifestly violated Shoal's constitutional right to a fair trial – and the state constitution – by repeatedly commenting on the evidence, entering the fray, and assuming the role of an advocate. **Egede-Nissen**, 93 Wn.2d at 141. This Court should reverse and remand for a new trial before a different judge.

G. The cumulative errors require reversal.

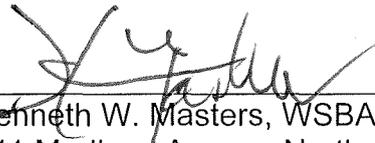
The doctrine of cumulative error recognizes that multiple errors may combine to deny a litigant a fair trial, even where the individual errors do not prejudice the litigant. **State v. Davis**, 175 Wn.2d 287, 345, 290 P.3d 43 (2012); **Storey v. Storey**, 21 Wn. App. 370, 374, 585 P.2d 183 (1978) (applying cumulative error doctrine in the civil context). As the above arguments show, there are many prejudicial errors here. But the cumulative effect of all of the errors also denied Shoal a fair trial. The Court should reverse.

CONCLUSION

The Court should reverse and remand for a new trial with a different judge.

RESPECTFULLY SUBMITTED this 19th day of January, 2016.

MASTERS LAW GROUP, P.L.L.C.



Kenneth W. Masters, WSBA 22278
241 Madison Avenue North
Bainbridge Is, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF APPELLANT** postage prepaid, via U.S. mail on the 19th day of January, 2016, to the following counsel of record at the following addresses:

Lawrence Kahn
Lawrence Kahn Law Group, PS
135 Lake Street, Suite 265
Kirkland, WA 98033

U.S. Mail
 E-Mail
 Facsimile

Amber L. Pearce
Floyd, Pflueger & Ringer
200 West Thomas Street, Suite 500
Seattle, WA 98119

U.S. Mail
 E-Mail
 Facsimile



Kenneth W. Masters, WSBA 22278

INSTRUCTION NO. 7

At the time of the occurrence in question, the defendant was a common carrier.

A common carrier has a duty to its passengers to exercise the highest degree of care consistent with the practical operation of its type of transportation and its business as a common carrier. Any failure of a common carrier to exercise such care is negligence.

9. There is to be no fraternizing with guests or employees of the event venue.
10. Smoking or chewing tobacco is not permitted while employed with VPS. Customers are not allowed to smoke in our company vehicles, please offer to pull over for the customer and have them smoke outside the vehicle.
11. If you ever come to work under the influence of drugs or alcohol, you will be terminated on the spot. We have a no tolerance policy for drugs or alcohol usage. You will be required to pass a drug screening to receive your Chauffeurs License. You will also be enrolled in a random drug screen program through our licensing company, Alliance 2020.
12. If you have an issue with another employee while at work, please bring it to your manager's attention. If you have an issue you would like to discuss with an owner, you are welcome to always contact our office. We have an open door policy and are always ready to listen to you and your concern.
13. Under no circumstances are you to be on a cell phone while driving a Shuttle Van for VPS. Drivers must have an earpiece and comply with Washington States hands free law, if you need to make a call. Drivers are not allowed to talk on their earpiece while driving customers in the van.
14. Customers are to be acknowledged with a friendly greeting (i.e. Good Afternoon, Good Evening) and SMILE, it is our job to start their event off right. Offer passengers a shuttle ride to the venue and assist in loading them into the van. If they have gifts you can also offer to place them into the cargo area of the van. You may also need to hold a customers personal item while they step into the van.
15. If the customer is elderly or handicapped, please take special care to make sure that we meet any special needs that they may have. Please speak with a manager if you are unsure of how to accommodate a person with special needs.
16. Always make sure that your customers are exiting the van on the curbside. Make sure you get out and offer to physically assist them. If you are in a bad weather situation, be especially careful to make sure your passengers have solid footing when they exit the van.
17. Please monitor the cleanliness of your van. Remove any garbage or debris that you can, we want a clean, comfortable, inviting environment for the guests to ride.
18. Vans are to be secured and locked at all times that you are not in the vehicle.
19. Van drivers will be given breaks and lunches from the on site manager. If you need to use the restroom other than at your break times, please do so quickly and return to your route.
20. Food and drink are to be kept out of sight while driving your van. You may bring a lunch box or food in a bag, but it must be kept out of sight. You may eat and drink on your break or lunch. Do not eat or drink in front of guests.
21. You may have the radio in the van on if there are no guests in the van. When guests are in the van please do not play the radio. If a guest requests that you turn on the radio, then it is fine to do so.
22. Drivers are responsible for up to \$500.00 worth of damage done to each vehicle, if found to be at fault in an accident (this is our insurance deductible amount). Drivers need to drive extremely defensive while operating company vehicles. Drivers are required to follow the driving laws of the State of Washington while driving for our company. Drivers are responsible for any tickets that they receive while operating company vehicles. Please obey all traffic laws.
23. There is absolutely no personal use of the company vehicles. If you choose to leave your event route on personal business, you will be held 100% responsible for any damage done to our vehicles. You will also be responsible for any other vehicle or property that you may damage while on personal business. You must have permission from your manager to deviate from your event route.

RCW 4.12.040

Prejudice of judge, transfer to another department, visiting judge— Change of venue generally, criminal cases.

(1) No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established as hereinafter provided that said judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause. In such case the presiding judge in judicial districts where there is more than one judge shall forthwith transfer the action to another department of the same court, or call in a judge from some other court. In all judicial districts where there is only one judge, a certified copy of the motion and affidavit filed in the cause shall be transmitted by the clerk of the superior court to the clerk of the superior court designated by the chief justice of the supreme court. Upon receipt the clerk of said superior court shall transmit the forwarded affidavit to the presiding judge who shall direct a visiting judge to hear and try such action as soon as convenient and practical.

(2) The presiding judge in judicial districts where there is more than one judge, or the presiding judge of judicial districts where there is only one judge, may send a case for trial to another court if the convenience of witnesses or the ends of justice will not be interfered with by such a course and the action is of such a character that a change of venue may be ordered: PROVIDED, That in criminal prosecutions the case shall not be sent for trial to any court outside the county unless the accused shall waive his or her right to a trial by a jury of the county in which the offense is alleged to have been committed.

(3) This section does not apply to water right adjudications filed under chapter 90.03 or 90.44 RCW. Disqualification of judges in water right adjudications is governed by RCW 90.03.620.

[2009 c 332 § 19; 1989 c 15 § 1; 1961 c 303 § 1; 1927 c 145 § 1; 1911 c 121 § 1; RRS § 209-1.]

RCW 4.12.050

Affidavit of prejudice.

(1) 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.

(2) This section does not apply to water right adjudications filed under chapter 90.03 or 90.44 RCW. Disqualification of judges in water right adjudications is governed by RCW 90.03.620.

[2009 c 332 § 20; 1941 c 148 § 1; 1927 c 145 § 2; 1911 c 121 § 2; Rem. Supp. 1941 § 209-2.]