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No. 96952-3

No. 46963-4

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents,

and

ROBERT KORNFELD,
Additional Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE KATHERINE M. STOLZ

APPELLANTS' SUPPLEMENTAL BRIEF TO ADDRESS
STATE V. LILE

SMITH GOODFRIEND, P.S.

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I. INTRODUCTION

The Supreme Court's decision in *State v. Lile*, 188 Wn.2d 766, 398 P.3d 1052 (2017) does nothing to undermine this Court's prior decision that the trial court's order approving the parties' stipulation to extend witness disclosure deadlines did not involve discretion and that appellant Rolfe Godfrey's affidavit of prejudice was thus timely under RCW 4.12.050. The *Lile* Court's reasoning was entirely consistent with this Court's decision distinguishing between trial continuances that "have a significant impact on the efficient operation of our courts and the rights of the parties, particularly in criminal cases," and stipulations "affect[ing] *only* the rights or convenience of the parties," that do "*not* involv[e] any interference with the duties and functions of the court." 188 Wn.2d at 788, ¶¶ 28-29 (emphasis in original; alterations in original and added). This Court should adhere to its previous decision reversing and remanding for a new trial.

II. ARGUMENT

A. *Lile* confirms that this Court correctly held that the trial court's approval of the parties' stipulation to extend witness disclosure deadlines is not a discretionary ruling under RCW 4.12.050.

This Court correctly held that "the trial court erred by rejecting the affidavit of prejudice" because the parties' January 6

stipulation and trial court order extending the “deadline for witness disclosures is not a discretionary decision.” (Op. 5) This Court’s decision was correct under the law it cited and remains correct under *Lile*.

Lile confirmed that a stipulation “affect[ing] *only* the rights or convenience of the parties, [and] *not* involv[ing] any interference with the duties and functions of the court” is nondiscretionary under RCW 4.12.050. 188 Wn.2d at 778, ¶ 28, quoting, *State v. Parra*, 122 Wn.2d 590, 603, 859 P.2d 1231 (1993) (emphasis in original; alterations in original and added). *Lile* was a criminal assault case in which the trial court approved the prosecutor and defense attorney’s agreement to a one-week continuance of the trial date. At a pre-trial conference, the trial court then denied the defendant’s affidavit of prejudice, believing it had exercised discretion in granting the agreed continuance. The continuance contributed to delays in *Lile*’s case resulting in scheduling conflicts and forcing the transfer of the case to another judge – a “frustrating dilemma’ of competing demands for court time.” 188 Wn.2d at 772, 778 n.7, ¶¶ 12, 29 (alterations removed).

The Supreme Court held the affidavit was untimely because “a ruling on an agreed or unopposed continuance is discretionary for

purposes of RCW 4.12.050.” 188 Wn.2d at 776, ¶ 22. The Court focused on the substance of the trial court’s order rather than its form, reasoning that “[c]ontinuances, even when unopposed, have a significant impact on the efficient operation of our courts” and that “the continuance ruling here impacted the ‘duties and functions of the court,’ and *therefore involved discretion.*” 188 Wn.2d at 778, ¶ 29 (emphasis added) (quoting *Parra*, 122 Wn.2d at 603). The Court emphasized that “*the substance and impact* of a request is the most relevant consideration for assessing whether discretion is employed in ruling on the request.” 188 Wn.2d at 778, ¶ 27 (emphasis added and removed).

The *Lile* Court specifically rejected the notion, espoused by St. Michelle here, that *any* stipulated order calls for the trial court’s exercise of discretion because the trial court is free to reject it. To the contrary, citing *Parra*, the *Lile* Court distinguished those stipulated agreements that “affect *only* the rights or convenience of the parties,” 188 Wn.2d at 778, ¶ 28, reaffirming a party’s “unqualified” right to disqualify a trial judge under RCW 4.12.050 by means of a timely affidavit – one that is filed before the trial court “has made any order or ruling involving discretion.” 188 Wn.2d at 775, 781, ¶¶ 21, 35.

The stipulation extending witness disclosure deadlines in this case had *no impact* on the duties or functions of the trial court. It did not continue a hearing or the trial date, change how or when the case would be resolved, or require any action whatsoever from the trial court. In contrast to a stipulation continuing a trial, which, as reflected in *Lile*, directly affects the court’s own schedule and the administration of justice in other cases,¹ the stipulation changed only the dates on which the parties would exchange information *between themselves*. If affixing its signature to the stipulation in this case required the trial court to exercise “discretion” under RCW 4.12.050, then *any* stipulation, no matter how mundane or irrelevant to the operation of the court, would be discretionary.

This Court’s decision was entirely consistent with and anticipated the Supreme Court’s *Lile* opinion. Like the *Lile* Court, this Court cited *Parra* to hold that “[t]he parties may, as they have here, resolve various issues and present stipulated orders regarding

¹ The cases identified by *Lile* as “relevant precedent” involving “agreed continuance requests,” all involved continuances of a *trial*. 188 Wn.2d at 777, ¶ 26 (citing *Floe v. Studebaker*, 17 Wn.2d 8, 134 P.2d 718 (1943); *State v. Espinoza*, 112 Wn.2d 819, 774 P.2d 1177 (1989); *State v. Dennison*, 115 Wn.2d 609, 801 P.2d 193 (1990)). Consistent with *Parra*, and its holding that the substance, and not the form, of a stipulation determines whether approving it involves discretion, the *Lile* Court disapproved of the suggestion in *Floe* that approval of any stipulation is *per se* non-discretionary. 188 Wn.2d at 778, ¶ 28.

discovery, identity of witnesses, and deadlines for submission of documents” – all matters with little or no impact on the court – without forfeiting the right to disqualify the judge. (Op. at 5, citing *Parra*, 122 Wn. 2d at 600)

Holding the trial court exercised discretion here by accepting the parties’ stipulation would eviscerate the “unqualified” right to file an affidavit of prejudice. *Lile*, 188 Wn.2d at 781, ¶ 35. It would also discourage parties from resolving matters that affect only themselves and then seeking the court’s approval to ensure those agreements are enforceable, contrary to well-established judicial policy. *See, e.g.*, CR 2A (enforcement of stipulations). *Lile* rejected such a stilted interpretation of RCW 4.12.050 and instead confirmed that parties can and should resolve matters that do not impact the court without forfeiting the right to a change of judge. This Court should reaffirm its earlier decision as entirely consistent with *Lile*.

B. The 2017 amendment to RCW 4.12.050 is irrelevant to the stipulated order extending witness disclosure deadlines.

As *Lile* noted, the Legislature amended RCW 4.12.050 in 2017 to provide that a “ruling on an agreed continuance” does not preclude disqualification of a judge even if it “may involve discretion.” *See* 188

Wn.2d at 775 n.5, ¶ 21; Laws of 2017 ch. 42, § 2. This amendment is irrelevant here for three reasons.

First, the extension of witness disclosure deadlines is not a “continuance”; a continuance involves the postponement of a trial or hearing. See CONTINUANCE, Black’s Law Dictionary (10th ed. 2014) (“The adjournment or postponement of a trial or other proceeding to a future date”). *Lile* itself and the “relevant precedent” addressing “agreed continuance requests,” all involve postponing a trial, underscoring the distinct nature of the stipulation in *Lile* and that at issue in this case. 188 Wn.2d at 777, ¶ 26.

Second, the amended statute provides that an agreed continuance *may* involve discretion – not that it necessarily does. Thus even if extending witness disclosure deadlines could be construed as a “continuance,” *Lile* still requires a court to evaluate its “substance and impact” on the court (non-existent here) to determine whether it involved discretion. *Lile*, 188 Wn.2d at 778, ¶ 27; see also *Lile*, 188 Wn.2d at 775, n.5 ¶ 21 (noting amendment “expands the list of *potentially* discretionary” acts that do not forfeit right to disqualify judge) (emphasis added).

Third, the recent amendment addressing stipulations for trial continuances is of scant relevance in discerning the Legislature’s

original intent nearly a century ago concerning a matter the 2017 amendment did *not* address – stipulations affecting only the parties themselves. “The views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.” *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 840, 108 S. Ct. 2182, 100 L. Ed. 2d 836 (1988).

Neither *Lile* nor the 2017 amendment to RCW 4.12.050 overruled prior cases holding that rulings on scheduling matters that do not result in the continuance of trial, including setting discovery deadlines, are “arrangement of the calendar” that do not involve discretion under former RCW 4.12.050. *See, e.g., Hanno v. Neptune Orient Lines, Ltd.*, 67 Wn. App. 681, 682-83, 838 P.2d 1144 (1992) (order setting dates for mediation, plaintiff’s settlement demand, and pretrial conference was “arrangement of the calendar”); *Tye v. Tye*, 121 Wn. App. 817, 821, 90 P.3d 1145 (2004) (affidavit was timely though filed after case scheduling order specifying dates for discovery cutoff and other deadlines). These cases, unaddressed in *Lile*, confirm that an extension of witness disclosure deadlines cannot involve discretion because it is simply “arrangement of the calendar.”

C. *Lile* recognized that trial courts exercise special discretion in continuing criminal trials because of the unique interests at stake in a criminal case.

Lile is inapplicable for yet another reason – it involved a continuance of a criminal trial, invoking considerations that go far beyond the mere calendaring concerns underlying whether to extend witness disclosure deadlines in a civil case. A trial court’s duty to protect the defendant’s right to, and public interest in, a speedy trial in a criminal case provide grounds to reject an agreed continuance that are absent here.²

The *Lile* Court recognized that criminal and civil cases involve distinct interests. 188 Wn.2d at 778, ¶ 29 (continuance of trial can “have a significant impact on the efficient operation of our courts and the rights of the parties, *particularly in criminal proceedings*”) (emphasis added); 188 Wn.2d at 776-77, ¶ 24 (*Floe’s* “precedential

² For instance, a trial court must exercise discretion in deciding whether the defendant understands his waiver of the right to a speedy trial by agreeing to a continuance. *State v. Lopez*, 74 Wn. App. 264, 268-69, 872 P.2d 1131 (reviewing whether defendant’s “signature on the agreed continuance order . . . [was] a knowing and voluntary waiver of his right to a speedy trial because [of] his language difficulty”), *rev. denied*, 125 Wn.2d 1004 (1994). A trial court similarly exercises discretion in finding the prosecution’s late amendment of a criminal information unfairly forced the defendant to choose between “agreeing” to a continuance, or proceeding with unprepared counsel. *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980) (“the State cannot force a defendant to choose between these rights”).

effect . . . is suspect” because it was a civil case; CrR 3.3(f), unlike civil rules, “provides trial courts discretion in granting continuances”). “A speedy trial in criminal cases is not only a personal right protected by the federal and state constitutions, it is also an objective in which the public has an important interest.” *State v. Striker*, 87 Wn.2d 870, 876, 557 P.2d 847 (1976) (citations omitted).³ The unique considerations governing continuances of criminal trials provide an additional basis for holding Godfrey’s affidavit timely under RCW 4.12.050.

D. *Lile* has no bearing on the trial court’s error in excluding nearly all of Mr. Godfrey’s evidence, which provides an independent basis for reversal.

This Court did not address the trial court’s erroneous exclusion of nearly all of Godfrey’s liability evidence as a sanction for failing to file a “separate” Joint Statement of Evidence. In the unlikely event this Court holds the stipulated order extending witness disclosure deadlines involves discretion, it should nonetheless reverse and remand for a new trial. (App. Br. 25-38)

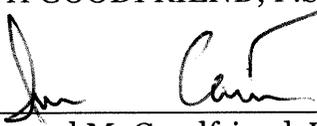
³ For instance, under RCW 10.46.085, a court may continue a child sex abuse case only for substantial and compelling reasons and only if the benefit of postponement outweighs the detriment to the victim.

III. CONCLUSION

Lile confirms this Court correctly held Mr. Godfrey's affidavit of prejudice was timely. This Court should adhere to its previous decision reversing and remanding for a new trial.

Dated this 12th day of February, 2018.

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DECLARATION OF SERVICE

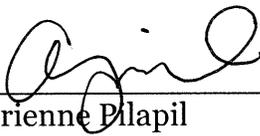
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 12, 2018, I arranged for service of the foregoing Appellants' Supplemental Brief to Address *State v. Lile*, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 12th day of February, 2018.



Andrienne Pilapil

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