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No. 96952-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents,

AND

ROBERT KORNFELD,

Additional Appellant.

**RESPONDENTS' SUPPLEMENTAL BRIEF
ON IMPACT OF *STATE v. LILE***

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I. INTRODUCTION

This supplemental brief addresses the impact of *State v. Lile*, 188 Wn.2d 766, 398 P.3d 1052 (2017) on this Court’s July 19, 2016 decision terminating review. In its decision this Court held that the “the trial court’s entry of the stipulated order relating to a deadline for witness disclosures is not a discretionary decision” and the “trial court erred by rejecting the affidavit of prejudice.” *Lile* teaches, however, that discretion under RCW 4.12.050 does not depend on whether the order arose from a stipulation or an opposed motion. Rather, discretion is determined by examining whether the parties were entitled to the relief as a matter of right or whether the court had discretion to grant or deny the order, impacting the duties of the court.

Applying *Lile* here, the trial court’s order extending Respondents’ time to disclose witnesses as well as establishing a separate deadline to disclose Respondents’ expert opinions was discretionary. The parties were not entitled to entry of the order because the trial court was required to determine if there was good cause to change established court-imposed deadlines, and the order necessarily impacted the duties and functions of the court. Under *Lile*, the trial court’s order denying the affidavit of prejudice was without error and should be upheld.

II. SUPPLEMENTAL ARGUMENT

In *Lile*, the issue was whether an order granting an agreed request for a trial continuance was discretionary under RCW 4.12.050. 188 Wn.2d at 772. Division One, recognizing a split in the decisions of the Supreme Court, ruled that the continuance order was not discretionary because it was

an agreed order and the affidavit of prejudice was therefore timely. *Id.* at 774; *State v. Lile*, 193 Wn. App. 179, 186-193 (2016) (holding that “acceptance of joint motion and signing of agreed order were not discretionary acts.”). The Supreme Court granted review and rejected Division One’s holding that stipulated motions were categorically non-discretionary. 188 Wn.2d at 776. The Supreme Court’s reasoning is controlling as to the issues at hand here.

The Supreme Court began its analysis by declaring that agreed motions should not be treated differently than opposed motions for purposes of RCW 4.12.050 and that it was error to “focus[] on the form of the continuance request, rather than its substance or impact.” 188 Wn.2d at 776. The Court held that regardless of the form of the request for continuance, the order was discretionary because: “the Court must consider various factors, such as diligence, materiality, due process, a need for orderly procedure, and the possible impact of the result on the trial.” *Id.* (quoting *In re Recall of Lindquist*, 172 Wn. App. 120, 130, 258 P.3d 9 (2011)). In sum, the substance of the decision, not form, controls whether the order is discretionary under RCW 4.12.050.

Like the Appellants here, Division One in *Lile* relied upon *State ex rel. Floe v. Studebaker*, 17 Wn. 2d 8, 15-17, 134 P.2d 718 (1943) and *State v. Parra*, 122 Wn.2d 590, 859 P.2d 1231 (1993) to support the position that stipulated orders are non-discretionary. The Supreme Court in *Lile* rejected that line of reasoning. In its 1943 *Floe* opinion, the Court held that the trial court’s approval of a stipulated order consolidating two cases and

continuing one of the cases was not discretionary. *Floe*, 17 Wn.2d at 17. But, as the Court recognized in *Lile*, two subsequent Supreme Court opinions effectively overruled *Floe*. In *State v. Espinoza*, the Court noted that a ruling on a continuance motion “‘requested by respondent and joined by the State’ is discretionary.” 188 Wn.2d at 776 (quoting *State v. Espinoza*, 112 Wn.2d 819, 822-23, 774 P.2d 1177 (1989)). Shortly thereafter, in *State v. Denninson*, the Court “found that a trial court’s ruling on a continuance motion the parties stipulated to was discretionary.” *Id.* at 776-77 (citing *State v. Denninson*, 115 Wn.2d 609, 620 & n. 10, 801 P.2d 193 (1990)). Even though *Floe* was not referred to in *Espinoza* and *Denninson*, the holdings directly contradict *Floe*, overruling it *sub silentio*. And, in *Lile*, the Court said, loud and clear, that *Denninson* and *Espinoza* control. *Id.* at 777 & 787. As such, any reliance on *Floe* or its progeny for the proposition that stipulated orders are nondiscretionary is misplaced.

The Supreme Court further declared that while it referenced *Floe*, its “decision in *Parra* did not reaffirm *Floe*’s holding.” *Id.* In *Parra*, the trial court granted a series of unopposed motions by the parties relating to disclosures and discovery of information. As the Court reiterated in *Lile*, the *Parra* “ruling was discretionary because to either ‘grant or deny a motion involves discretion’ and the substance of the request, rather than its form, controls.”¹ *Id.* at 788 (quoting *Parra*, 122 Wn.2d at 601). Notably,

¹ In discussing whether the unopposed motion for discovery was discretionary, the *Parra* Court examined the case of *Rhinehart v. Seattle Times Co.*, 51 Wn. App. 561, 578, 754 P.2d 1243 (1988), which held that two orders – one setting a date certain to comply with an earlier discovery order and one permitting substitution of counsel – were

however, *Lile* did not discuss – much less adopt – *Parra*’s *dicta* that a stipulation does not invoke the discretion of the court because “the parties will not have been alerted to any possible disposition that a judge may have toward their case.” *Compare Parra*, 122 Wn.2d at 600 with *Lile*, 188 Wn.2d at 788. Instead, *Lile* further cautioned, based on *Parra*, that for a stipulated order to be nondiscretionary, it must “affect[] only the rights or convenience of the parties, [and] not involv[e] any interference with the duties and functions of the court.” *Id.* (quoting *Parra*, 122 Wn.2d at 603). The Court concluded that “like the omnibus application in *Parra*, the continuance ruling [in *Lile*] ‘impacted the duties and the functions of the court,’ and therefore involved discretion.” *Id.*

Leaving no doubt, the *Lile* Court then addressed the argument that a continuance was a “calendar matter” falling within RCW 4.12.050(1). The Court rejected the argument, stating it “is not supported by the language of the statute, which we have previously construed as distinguishing ‘preparing the calendar from granting a continuance.’” *Id.* at 779 (quoting *Lindquist*, 172 Wn.2d at 130-31)²; *see also Rhinehart*, 51 Wn. App. at 578 (distinguishing between preparing the calendar, such as by issuing a form

discretionary. Quoting *Rhinehart* favorably, the *Parra* Court defined an exercise of discretion as: “The exercise of discretion is not involved where a certain action or result follows as matter of right upon a mere request; rather, the court’s exercise of discretion is invoked only where in the exercise of that discretion, the court may either grant or deny a party’s request.” *Parra*, 122 Wn.2d at 597 (quoting *Rhinehart*, 51 Wn. App. at 578). This definition of exercise of discretion is carried through into *Lile*. 178 Wn.2d at 778 (“To either grant or deny a motion involves discretion.” (quoting *Parra*, 122 Wn.2d at 601)).

² The *Lile* Court’s repeated citation to *Lindquist* – which involved a denial of a motion to continue a civil sufficiency hearing – makes clear that its reasoning regarding continuances extends beyond trial dates and beyond criminal cases.

scheduling order, and rulings granting a continuance, which involve discretion); *cf. Tye v. Tye*, 121 Wn. App. 817, 820-21, 90 P.3d 1145 (2004) (holding that a computer generated scheduling order was an arrangement of the calendar under RCW 4.12.050 and not discretionary, and further noting “it is the substance of the court’s action as discretionary or not that is critical”).

Here, on January 6, 2014, the trial court signed a stipulated order for extension of certain witness disclosure deadlines. CP 158-59. As noted in the stipulation, Appellants had already served their witness disclosures. The stipulated order extended the court-established deadline for Respondents’ disclosure of names, addresses and CVs of possible primary witnesses. It also created a new and separate deadline for Respondents’ disclosure of expert opinions and extended the deadline for disclosure of rebuttal witnesses. The stipulation further excepted the disclosure of the Respondents’ examining physician report from the disclosure deadlines, with the deadline and terms of the CR 35 examination to be established by a future stipulated order. On January 7, 2014, the stipulated order for the deadline and terms of the CR 35 exam was signed by a court commissioner instead of the trial court judge to whom it was directed. CP 160-163. Appellants filed a motion for recusal/affidavit of prejudice on March 3, 2014 and argued to the trial court that the January orders were not discretionary because they were based on the parties’ stipulation. CP 219 (Hearing Transcript March 7, 2014 at 4:23-5:2) (“If there was a motion filed, I would agree with Your Honor that there would have been a

discretionary ruling; but based upon those cases that I cited where all the parties have stipulated that the order be made, that does not constitute a discretionary order.”) The trial court disagreed, finding that the stipulated orders were discretionary and denying the affidavit of prejudice as untimely. CP 206.

On appeal, this Court held that “rulings on pretrial stipulated orders relating to scheduling and deadlines are not discretionary for purposes of RCW 4.12.050 because they do not alert an individual party to the trial court’s disposition.” Unpub. Op. at 5 (citing and quoting *Washington v. Parra*, 122 Wn.2d 590, 600, 859 P.2d 1231 (1993) (“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.”))).

That reasoning is plainly contrary to the Supreme Court’s ruling in *Lile* in a number of respects. First and critically, *Lile* holds that stipulated orders are not categorically excluded as non-discretionary acts for purposes of RCW 4.12.050. Second, even putting aside the form of the order, the inquiry for discretion does not depend on whether the court’s ruling will reveal the possible disposition of the judge. Rather, *Lile* holds that the inquiry for discretion under RCW 4.12.050 is whether the parties had the right to the relief sought, or whether the court had discretion to grant or deny the relief. *Lile*, 188 Wn.2d at 788. If the latter, the court’s ruling necessarily impacts the duties and the functions of the court, and therefore involved discretion.

Applying *Lile* to this appeal is a straight-forward exercise. The January 6, 2014 order: 1) modified the Respondent’s witness disclosure deadlines; 2) created a new deadline for Respondent’s disclosure expert opinions; 3) modified the rebuttal witness deadline; and 4) exempted disclosure of Respondent’s medical expert opinions from the deadlines. CP 158-59. Under *Lile*, the question is whether the court had discretion to grant or deny the relief sought. That answer is undeniably yes.³

Under Pierce County Local Rule (PCLR) 3, a trial court “*may* modify” any date on the Order Setting Case schedule “*for good cause.*” PCLR 3 (emphasis added). Thus, like former Criminal Rule 3.3(h) referenced in *Lile* and *Dennison*, PCLR 3 also uses the term “*may*”, which is “an indication that a referenced course of action is discretionary rather than mandatory.” *Dependency of M.P.*, 185 Wn. App. 108, 116 n. 3, 340 P.3d 908 (2014). Indeed, such orders are reviewed for an abuse of discretion. *See e.g., Willapa Trading Co. v. Muscanto, Inc.*, 45 Wn. App. 779, 785, 727 P.2d 687 (1986) (“a party does not have an absolute right to a continuance, and the granting or denial of a motion for continuance is reversible error only if the ruling was a manifest abuse of discretion.” (citing

³ The January 7, 2016 order setting out the terms of the CR35 examination and timing for disclosure of opinions is also a discretionary order under the *Lile* test. This Court held that the January 7th order could not be discretionary under RCW 4.12.050 because a commissioner’s ruling “does not apprise anyone of the predisposition on the part of the judge.” Unpub. Op. at 6. The test under *Lile*, however, is whether the court had discretion to grant or deny the order. Rulings on CR 35 exams are discretionary. CR 35 (the court...may order the party to submit to a physical examination...for good cause shown...) And, the commissioner’s CR 35 order became the presiding judge’s discretionary order when Appellant did not move to revise it within 10 days of its entry. RCW 2.24.050.

Martonik v. Durkan, 23 Wn. App. 47, 596 P.2d 1054 (1979)); *Northern State Constr. Co. v. Banchemo*, 63 Wn.2d 245, 386 P.2d 625 (1963) (motion for continuance addressed to the sound discretion of the court). The trial court was not required to modify the court-established deadlines to give Respondent additional time to disclose witnesses and even more time to develop expert opinions. The trial court could have said no. Like the continuance in *Lile*, various factors such as diligence, a need for orderly procedure, and the possible impact of the result on the trial would be considered in assessing the relief requested. And, like the order in *Parra*, orders modifying witness disclosure deadlines and granting additional time for developing expert opinions have a significant impact of the efficient operation of the courts in a manner, not unlike trial continuances.

Moreover, while *Lile*, *Parra* and *Dennison* are criminal cases, their reasoning is just as applicable to civil cases. Indeed, these criminal cases rely on civil cases such as *In re Lindquist* (order continuing a civil hearing) and *Rinehart* (order setting a date certain to comply with an earlier discovery order and order permitting substitution of counsel) to reach their results. Nor is there a material distinction to be drawn from the fact that the decision in *Lile* arises in the criminal context: *Lile* does not turn on the constitutional right to a speedy trial or any other right specific to criminal matters. Whether criminal or civil, both types of cases share the same concerns for determining whether an order is discretionary for purposes of RCW 4.12.050. And, had the civil-criminal distinction been meaningful, the Supreme Court would not have granted Respondents' Petition for

Review – acknowledging that this Court’s opinion conflicted with *Dennison* and *Espinoza* – and remanded for consideration in light of *Lile*.

Last, *Lile* also demonstrates that the witness disclosure order at issue is not a ministerial “calendar matter” deemed nondiscretionary by RCW 4.12.050(1). As pointed out by *Lile*, courts have long distinguished “preparing the calendar from granting a continuance.” Preparing a calendar involves the act of generating a form scheduling order, either electronically or by filing in dates. *Rhinehart*, 51 Wn. App. at 578; *Hanno v. Neptune Orient Lines Ltd.*, 67 Wn. App. 681, 838 P.2d 1144 (1992), *In re Marriage of Hennemann*, 69 Wn. App. 345, 848 P.2d 760 (1993). Put simply, the preliminary act of preparing a calendar is not the same as the discretionary decision for good cause to modify previously established-court deadlines. An order modifying witness disclosure deadlines is no more a calendar matter than an order setting a date certain to comply with discovery, like the order in *Rhinehart*.

As such, under any reading of *Lile*, the stipulated order at issue here, which changed court-established witness disclosure deadlines, involved discretion.⁴

⁴ The result is the same even if this Court were to look at whether the trial court’s order alerted the parties to any possible disposition that a judge may have toward their case. Here, the order at issue clearly favored Respondents by granting additional time to disclose witnesses and even more time for Respondents to develop expert opinions. That the order also extended the time for disclosure of all rebuttal witnesses – as a necessary consequence of extending Respondents’ deadlines – does not change this analysis.

III. CONCLUSION

Because the trial court could, but was not required to modify the witness disclosure deadline and provide additional time to disclose expert opinions, the stipulated order was discretionary, and Appellant's affidavit of prejudice was untimely. This Court's decision terminating review therefore should be vacated and the trial court's judgment should be affirmed.⁵

Respectfully submitted this 13th day of February, 2018.

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⁵ In their appeal before this Court, Appellants also sought review of the trial court's imposition of sanctions under *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). Brief of Appellants at 3 (Assignments of Error 3, 4, 5 & 6) & 25-40. This Court did not address the *Burnet* issue in its decision terminating review. Unpub. Op. at 2 n.1. The Court only reversed the monetary sanctions award against attorney Kornfeld because "the trial court erred in rejecting Godfrey's affidavit of prejudice." Unpub. Op. at 6. Appellants did not raise the *Burnet* issue to the Supreme Court, beyond a footnote appended to the Conclusion section of their Answer, which Petitioners argued to the Supreme Court constituted a waiver of that issue. See Petitioners' Reply to Issue Raised in the Joint Answer (Nov. 29, 2016). The Supreme Court's grant of review was limited to the issue raised in Petitioner's Petition for Review. See Order Granting Petition for Review (Nov. 7, 2017). Accordingly, Respondents contend that the *Burnet* issue is no longer available as an alternate ground for granting relief to Appellants. RAP 13.4(d); 13.7(b).

CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

1. I am employed at Corr Cronin Michelson Baumgardner Fogg & Moore LLP, attorneys of record for Respondents herein.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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