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STATE OF WASHINGTON
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No. 96952-3

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondents,

v.

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

Petitioners.

and

ROBERT KORNFELD,
Additional Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENTS

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I. INTRODUCTION

Former RCW 4.12.050 granted litigants the right to disqualify a judge before that judge “has made any order or ruling involving discretion.” Petitioner Ste. Michelle’s assertion that *any* ruling by a judge involves “discretion” deletes that word from the statute, making an affidavit of prejudice untimely if the judge “has made any order or ruling” whatsoever. In signing the parties’ stipulation, a judge exercises discretion *only if* the order impacts “the duties and functions of the court.” *State v. Lile*, 188 Wn.2d 766, 778, ¶ 29, 398 P.3d 1052 (2017). The trial court here erred in refusing to recuse after signing a stipulated order extending witness disclosure deadlines that did not affect the duties and functions of the court.

The trial court’s order striking respondent Rolfe Godfrey’s critical liability evidence and sanctioning his counsel \$10,000 also compels a new trial. Without addressing any of the *Burnet* factors¹, the trial court struck Godfrey’s exhibits and expert witness testimony – including Ste. Michelle’s own maintenance records that supported Ste. Michelle’s liability for a defective bottle that shattered causing permanent injury to Godfrey’s hand – solely because his counsel failed to file a separate Joint Statement of Evidence (“JSE”) after

¹ *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

being hospitalized before trial. But Godfrey's counsel had already provided Ste. Michelle his proposed JSE three days before it was due; Ste. Michelle simply chose not to acknowledge it, filing its own JSE instead. Either of these errors mandates a new trial.

II. STATEMENT OF THE CASE

In February 2010, Godfrey suffered a devastating injury to his hand from a wine bottle manufactured by respondent Saint Gobain and bottled by respondent Chateau Ste. Michelle (collectively "Ste. Michelle") that shattered while he was opening it. After Godfrey sued Ste. Michelle, Pierce County Superior Court Judge Katherine Stoltz ("the trial court") denied his affidavit of prejudice under former RCW 4.12.050 (CP 205-06), ruling it untimely because she had exercised discretion in signing a stipulated order extending the deadline for Ste. Michelle to disclose its primary witnesses and for both parties to disclose rebuttal witnesses. (CP 158-59)²

After refusing to recuse, the trial court presided over a bench trial in October 2014, at which it excluded nearly all of Godfrey's liability and causation evidence (as well as the testimony of his experts, who relied on that evidence) as a sanction for Godfrey's

² The trial court also erroneously ruled that it had exercised discretion in signing a stipulated order for a CR 35 exam of Godfrey. (CP 206, 222) The trial court did not sign that order – a superior court commissioner did. (CP 163)

failure to file his own JSE under Pierce County Local Rule 16(b)(4). (RP 83-86, 161-70; CP 587-88; *see generally* App. Br. 7-15) That evidence included Ste. Michelle's maintenance records documenting malfunctions with its bottling line at the time it processed the bottle that crippled Godfrey, which were critical to his theory the bottle was defective when it left Ste. Michelle's control (RP 201-06, 328-34, 337-38, 396, 498-502, 1512, 1583; 10/15 RP 129), and consumer complaints involving similar bottle breakages that refuted Ste. Michelle's contention that a damaged bottle would have broken immediately, rather than in the hands of a consumer. (RP 156, 226-27, 396) The trial court further ruled that Godfrey's experts could not offer *any* opinions based on the excluded exhibits (RP 201-04, 328, 331-34, 353), including that malfunctions on Ste. Michelle's bottling line rendered the bottle defective (RP 337-38, 352-53, 370-71, 498-502, 515-16), and that the force generated by removing a cork is an order of magnitude lower than that necessary to shatter a non-defective bottle. (RP 474-76)

Godfrey's trial counsel, respondent Robert Kornfeld, had previously disclosed his expert witnesses, identified his exhibits pursuant to ER 904, and sent Ste. Michelle a proposed JSE containing all his witnesses and exhibits three days before it was due.

(CP 337-49, 483, 488, 490; RP 80) The trial court's sanction was based entirely on the fact that Kornfeld could not file a JSE on the day it was due because he was hospitalized with a massive infection following dental surgery. Ste. Michelle thus unilaterally filed a "Joint Statement of Evidence Submitted by Defendants" that did not reference Godfrey's proposed JSE, did not identify Godfrey's witnesses and contained objections only to Godfrey's exhibits. (CP 314-36, 484)

The trial court found in favor of Ste. Michelle, entered judgment against Godfrey, and sanctioned Kornfeld \$10,000 for not filing a separate JSE. (CP 587-88, 688-702, 761-62, 765-66) In a July 2016 decision, the Court of Appeals reversed, holding Godfrey's affidavit of prejudice was timely. 195 Wn. App. 1007. The Court of Appeals did not address Godfrey's argument that the trial court erred in excluding nearly all of his liability evidence. (See App. Br. 25-38; Reply Br. 9-23)

This Court first stayed, then granted, Ste. Michelle's petition for review and remanded to the Court of Appeals to reconsider its opinion in light of this Court's decision in *Lile*. The Court of Appeals again held Godfrey's affidavit of prejudice was timely. (Appendix A) This Court granted review, without limiting the scope of the issues

before the Court. See RAP 13.6 (“[T]he Supreme Court may specify the issue or issues as to which review is granted.”).

III. ARGUMENT

A. The trial court did not exercise discretion in signing a stipulation extending witness disclosure deadlines that affected only the parties and not the duties or functions of the court.

This Court has never adopted the “bright-line rule” espoused by Ste. Michelle, under which *any* trial court ruling renders a subsequent affidavit of prejudice untimely. Consistent with the plain language of former RCW 4.12.050, this Court has repeatedly held that only a judge’s previous “orders or rulings involving discretion” prevent a party from exercising the “substantial and valuable right” to a change of judge. *Harbor Enterprises, Inc. v. Gunnar Gudjonsson*, 116 Wn.2d 283, 291, 803 P.2d 798 (1991).

As this Court explained in *Lile*, a stipulated order is not a “ruling involving discretion” when, as here, it “affect[s] *only* the rights or convenience of the parties,” 188 Wn.2d at 778, ¶ 28 (emphasis in original), and does not impact the “duties and functions of the court.” 188 Wn.2d at 778, ¶ 29, quoting *State v. Parra*, 122 Wn.2d 590, 603, 859 P.2d 1231 (1993). The trial court here did not exercise discretion because approving an agreement to extend the date by which the parties were required to disclose their witnesses to

each other was a routine scheduling order that had no impact on the court.

The version of RCW 4.12.050(1)³ at issue in this case granted any party the right to a change of judge by filing an affidavit stating his or her belief that the judge cannot be fair and impartial, so long as that right is exercised before the judge has made a “ruling involving discretion”:

PROVIDED, That such motion and affidavit is filed and called to the attention of the judge before he or she shall have made any ruling whatsoever in the case, either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, and before the judge presiding has made any order or ruling involving discretion . . .

“Statutes must be interpreted and construed so that all the language used is given effect.” *Spokane Cty. v. Dep’t of Fish & Wildlife*, 192 Wn.2d 453, 458, ¶ 9, 430 P.3d 655 (2018) (quoted source omitted). Ste. Michelle’s “bright-line rule” writes the word “discretion” entirely out of former RCW 4.12.050.

Every ruling of a judge – by definition – “implicates choice” (Pet. 14), even if in only the most literal and technical sense, because a judge

³ Godfrey filed his affidavit of prejudice in 2014, before the Legislature amended RCW 4.12.050, Laws of 2017, ch. 42, to “expand[] the list of potentially discretionary acts that do not serve as a basis for the loss of the right to disqualification.” *Lile*, 188 Wn.2d at 775 n.5.

may choose to sign or not to sign a proposed order. Ste. Michelle concedes that under its “bright line rule” any ruling “that requires action by a trial court is discretionary” (Pet. 6), even if – as here – that action is nothing more than announcing its ruling or affixing its signature to a piece of paper. The Court of Appeals correctly rejected as entirely circular Ste. Michelle’s contention that “the inquiry for discretion” is “whether the court had discretion to grant or deny the relief.” (App. A 4) Ste. Michelle perpetuates its tautology in this Court, arguing the trial court had “discretion to deny the requested extension, and her ruling was accordingly discretionary.” (Pet. 11)

This Court in *Lile* gave meaning to the language “order or ruling involving discretion” in former RCW 4.12.050 by holding 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). This Court distinguished between a judge’s approval of a stipulation that impacts the court and 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.” *Lile*, 188 Wn.2d at 778, ¶ 28, quoting, *Parra*, 122 Wn.2d at 603 (emphasis in original; alterations in original and added). The *Lile* Court thus held that a judge’s ruling granting the parties’ stipulated

request to continue a trial date was a “ruling involving discretion” because the continuance of a criminal trial “impacted the ‘duties and functions of the court’” by contributing to delays in the case that forced its transfer to another judge. 188 Wn.2d at 772, 778, ¶¶ 12, 29, quoting *Parra*, 122 Wn.2d at 603.

Unlike the continuance of the trial date in *Lile*, extending some of the witness disclosure deadlines in this case impacted only when the parties would exchange information *between themselves*. The stipulation did not continue a hearing, did not change the trial date, did not affect how or when the case would be resolved, and did not affect the assignment or disposition of cases in Pierce County Superior Court. It was a routine agreement the trial court approved as a matter of course precisely because *it had no impact on the court*.

Indeed, this Court recognized in *Parra* that approving a pretrial stipulation regarding the “identity of witnesses,” the same type of order at issue in this case, does *not* involve discretion. 122 Wn.2d at 600. The stipulation extending witness disclosure deadlines here falls within the class of “certain stipulated agreements” affecting only the parties that is not a “ruling involving discretion” under the statute. *Lile*, 188 Wn.2d at 778, ¶ 28.

Approving a stipulation impacting the duties and functions of the court involves discretion because a court cannot rely on the parties to assess those impacts and must instead assess them itself, a point *Lile* underscored by stressing the practical considerations facing the trial judge in that case when presented with the stipulated motion to continue a criminal trial:

As Judge Uhrig noted, the court's schedule following the continuance had become a "frustrat[ing] . . . dilemma" of competing demands for court time. He wished to "make every effort to make sure this case gets out . . . without any further delay," which ultimately proved impossible, due in part to the continuance at issue in this case. Judge Uhrig transferred the case to Judge Garrett when Judge Uhrig's schedule could no longer accommodate Lile's trial.

188 Wn.2d at 778-79 n.7, ¶ 29 (citations omitted). An order continuing a trial date – even by agreement – is discretionary because the trial court must still "consider various factors, such as diligence, materiality, due process, a need for orderly procedure, and the possible impact of the result on the trial." *Lile*, 188 Wn.2d at 776, ¶ 23 (quoted source omitted).

These factors are absent here. The trial court faced no "frustrating dilemma" in extending the date for disclosure of Ste. Michelle's witnesses and the parties' rebuttal witnesses. The trial court's only justification for refusing to honor Godfrey's affidavit was

that it had exercised discretion when signing two stipulated orders – including one it did not actually sign – because “I d[id] not need to sign them.” (CP 219) But that is true of every order. The trial court’s and Ste. Michelle’s flawed reasoning contradicts this Court’s admonition that “*the substance and impact* of a request is the most relevant consideration for assessing whether discretion is employed in ruling on the request.” *Lile*, 188 Wn.2d at 778, ¶¶ 27-28 (emphasis added and removed).⁴

Lile did not represent a sea change in this Court’s affidavit of prejudice jurisprudence. The Court did not overrule any of its precedents, with the sole exception of *Floe v. Studebaker*, 17 Wn.2d 8, 134 P.2d 718 (1943), which the *Lile* Court also distinguished because it was a civil case in which the stipulation both “consolidat[ed] two cases and continu[ed] one” of them. 188 Wn.2d at 776, ¶ 24. Instead, *Lile* cited as “relevant precedent,” *State v. Espinoza*, 112 Wn.2d 819, 774 P.2d 1177 (1989) and *State v. Dennison*, 115 Wn.2d 609, 801 P.2d 193 (1990), both holding that an agreed or unopposed order granting a continuance of a criminal trial was an “order or ruling involving

⁴ Ste. Michelle’s insistence that the trial court’s ruling was discretionary because Pierce County Local Rule 3(e) requires “good cause” (Pet. 12) ignores this Court’s observation in *Lile* that the parties’ agreement to modify a deadline affecting only themselves, in and of itself, constitutes good cause to approve it. 188 Wn.2d at 778, ¶ 28.

discretion,” and did not even question Court of Appeals’ decisions holding that orders on scheduling matters that do not result in the continuance of trial, including setting discovery deadlines, do not involve discretion under RCW 4.12.050.⁵ Setting the *date* on which the parties will disclose witnesses to each other is far more akin to the non-discretionary “arrangement of the calendar” under former RCW 4.12.050 than it is to continuing a trial date.

Ste. Michelle fails to explain how the stipulation in this case required the trial court to consider potential impacts on the duties and functions of the court. It instead speculates that the extension for identifying witnesses *could* “jeopardize the trial date” in the form of a future continuance or “disrupt the orderly management of the case” in some unidentified manner. (Pet. 11) If the hypothetical future “impacts” posed by Ste. Michelle render the approval of a stipulation discretionary under *Lile*, then approving *any* stipulation – no matter how mundane or irrelevant to the operation of the court – would be a discretionary act, a result rejected by *Lile*. 188 Wn.2d

⁵ See, e.g., *Hanno v. Neptune Orient Lines, Ltd.*, 67 Wn. App. 681, 682-83, 838 P.2d 1144 (1992) (pretrial orders setting dates for mediation, plaintiff’s settlement demand, and pretrial conference was “arrangement of the calendar” within the provision of former RCW 4.12.050); *Marriage of Hennemann*, 69 Wn. App. 345, 347, 848 P.2d 760 (1993) (no discretion in signing form order setting trial date, deadlines for submission of various documents, and dates for settlement and pretrial conferences); *Tye v. Tye*, 121 Wn. App. 817, 821, 90 P.3d 1145 (2004) (same).

778, ¶ 28 (approving “certain stipulated agreements” is not discretionary under former RCW 4.12.050).

Ste. Michelle also downplays the critical fact that this is a civil case. (Pet. 7 n.5) This Court’s precedent holding that approval of agreed “continuances” are discretionary arises exclusively in the criminal context. As this Court noted in *Lile*, the impacts of a trial continuance are manifest in criminal cases where, unlike civil cases, both the defendant and public have an important interest in a speedy trial. 188 Wn.2d at 778, ¶ 29. Accordingly, the criminal rules unlike the civil rules, explicitly provide trial courts discretion to deny a stipulated request to continue a trial date. 188 Wn.2d at 778, ¶ 29, citing CrR 3.3. The concerns that animate CrR 3.3 are simply not present in a civil case.

Holding that Godfrey’s affidavit of prejudice was untimely would nullify the long-standing policy encouraging parties to resolve matters that affect only themselves by stipulation without forfeiting the right to a change of judge. *Parra*, 122 Wn.2d at 601 (“Stipulations are favored by courts and will be enforced unless good cause is shown to the contrary.”). While the plain language of former RCW 4.12.050 controls, in close cases this Court has consistently construed the statute in favor of a party’s right to a change of judge:

The statute's history reflects an accommodation between two important, and at times competing, interests: a party's right to one change of judge without inquiry and the orderly administration of justice. This history also reflects a decision to accord greater weight to the party's right to a change of judge.

Marine Power & Equip. Co., Inc. v. Indus. Indem. Co., 102 Wn.2d 457, 463, 687 P.2d 202 (1984). This Court should affirm the Court of Appeals decision holding that Godfrey timely filed his affidavit of prejudice under former RCW 4.12.050.

B. The trial court abused its discretion by excluding nearly all of Godfrey's exhibits and expert testimony establishing Ste. Michelle's liability without addressing the *Burnet* factors.

The trial court committed a second fundamental error requiring a new trial by excluding Godfrey's liability and causation evidence, and imposing \$10,000 in sanctions against his counsel for failing to timely file a separate Joint Statement of Evidence. This Court cannot reverse the Court of Appeals without addressing this independent basis for a new trial. RAP 13.7(b).⁶

Ste. Michelle contends the trial court's exclusion of evidence was "harmless," but the evidence it cites was critical to Godfrey's case for liability and causation. (Reply Pet. 4-7) Godfrey's experts testified

⁶ Given the inordinate delay in resolving this appeal, this Court should address this issue under RAP 13.7(b) rather than subject Godfrey to another round of litigation in the Court of Appeals.

only generally about defects that *can* arise during the bottling process because the trial court barred them from testifying that bottling defects in fact caused Godfrey’s injury based on Ste. Michelle’s own records, including a work order stating bottles “were bouncing and some of them breaking” on the day Ste. Michelle processed the bottle that crippled Mr. Godfrey – a problem Ste. Michelle did not fix until the next day. (CP 884; *see* RP 331 (trial court: “he can testify in the abstract all he wants”), 332 (trial court: “he can only talk in general terms . . . he can’t come and say . . . that this is how this bottle was damaged during the course of the process based on these documents”), 452 (trial court: “there isn’t enough foundation to determine how he can make conclusions about this bottle”))

The trial court found Godfrey’s experts “unpersuasive” only because it did not allow them to testify that deficiencies in Ste. Michelle’s bottling line caused the bottle to weaken so much that it broke apart when subjected to the normal force of a cork screw. (*See* CP 691 (faulting expert for not “offer[ing] testimony concerning what caused the incident bottle to break []or . . . whether the incident bottle was defective when it left the . . . control of Ste. Michelle”)) Godfrey explained in numerous offers of proof the foundation for his experts’ opinions establishing that the bottle was defective, yet the

trial court refused to consider any of it. (See, e.g., RP 337-38, 352-53, 474-76, 498-502, 515-17)

A trial court abuses its discretion if its ruling applies the wrong legal standard or is unsupported by the record. *Teter v. Deck*, 174 Wn.2d 207, 220, ¶ 24, 274 P.3d 336 (2012). The trial court's order here fails on both counts.

Before a court can impose the sanction of excluding a party's witnesses or exhibits, it must affirmatively find on the record that 1) the party willfully violated its discovery obligations or court order, 2) the violation substantially prejudiced the opposing party, and 3) lesser sanctions are insufficient. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997); *Teter*, 174 Wn.2d at 216-17, ¶ 16. A "court may impose only the least severe sanction that will be adequate to serve its purpose in issuing a sanction." *Teter*, 174 Wn.2d at 216, ¶ 16. A court's failure to explain its *Burnet* analysis on the record is necessarily an abuse of discretion requiring a new trial. *Keck v. Collins*, 184 Wn.2d 358, 368-69, ¶¶ 24-26, 357 P.3d 1080 (2015); *Blair v. Ta-Seattle E. No. 176*, 171 Wn.2d 342, 344, ¶ 1, 254 P.3d 797 (2011); *Teter*, 174 Wn.2d at 222, ¶ 27.

The trial court did not analyze any of the *Burnet* factors on the record before imposing its draconian sanction. Ste. Michelle cites to

the trial court's characterization of Godfrey's failure to file a separate Joint Statement of Evidence ("JSE") as "willful" in its sanctions order (Reply 5, citing CP 587), but simply reciting the word "willful" without any explanation or analysis does not satisfy *Burnet*. See *Burnet*, 131 Wn.2d at 494 (reasons for imposing sanction must "be clearly stated on the record"); *Blair*, 171 Wn.2d at 348, ¶ 16 (orders that contained only "bare directives" did not satisfy *Burnet*).

The trial court's order is not supported by the undisputed factual record. The trial analogized Godfrey's failure to sign off or modify Ste. Michelle's JSE to the last-minute "surprise witness" that would conclude an episode of *Perry Mason* (RP 83-84), but Godfrey had repeatedly disclosed the excluded evidence to Ste. Michelle. He did so 1) on summary judgment, 2) in exchanging witness and exhibits lists, 3) in providing a draft of the JSE three days before it was due, and 4) in his ER 904 designations. (CP 337-49, 483, 488, 490, 808-15, 828, 832, 834-42, 884, 909, 916-78)

Nor does the record support a finding of a "willful" violation of the requirement that "the parties" file a JSE under Pierce County Local Rule 16(b)(4), which directs parties to file a JSE listing each party's witnesses, exhibits, and objections to the opposing party's exhibits. A JSE is not, as the trial court erroneously believed, a

disclosure mechanism, but rather is used as a joint index of evidence at trial. The parties disclose evidence through witness and exhibit lists, which Godfrey undisputedly provided Ste. Michelle *before* the JSE was due. (CP 337-41, 483, 488)

Ste. Michelle's assertion that Godfrey failed "to participate in the drafting or filing of the [JSE]" (Reply Pet. 5), ignores that on August 26, 2014, – three days before the JSE was due – Kornfeld sent Ste. Michelle a draft JSE listing *all* of Godfrey's exhibits and witnesses, which were the same as those cited on summary judgment, and which Godfrey listed in his witness and exhibits lists, and ER 904 designations. (CP 483, 490, 508; RP 80) Ste. Michelle then, after Kornfeld was hospitalized with an infection following surgery, filed a JSE "submitted by defendants" that omitted any mention of Godfrey's witnesses or Godfrey's objections to Ste. Michelle's exhibits. (CP 314, 492) Even accepting the flawed premise that the local rule required Kornfeld to file a "separate" JSE, Kornfeld could not and did not "willfully" violate a court order by failing to provide objections while incapacitated. *Blair*, 171 Wn.2d at 350 n.3 (2011) (rejecting argument

“willfulness follows necessarily from the violation of a discovery order”).⁷

The trial court compounded its legal error in failing to consider lesser sanctions. It granted Ste. Michelle’s request to gut Godfrey’s case by excluding *every* exhibit to which Ste. Michelle objected in its “separate” JSE.⁸ Ste. Michelle concedes the trial court did not make any findings regarding lesser sanctions, and instead argues “[t]he consideration of lesser sanctions . . . was inherent in the trial court’s sanctions order.” (Reply Pet. 6) But this Court has rejected the notion that *Burnet* findings can be “inherent” in an order and has “quite clearly held that *explicit* findings regarding the *Burnet* factors must be made on the record.” *Teter*, 174 Wn.2d at 226, ¶ 37 (emphasis added); *see also Blair*, 171 Wn.2d at 349-50, ¶¶ 18-19 (rejecting argument that “the record speaks for itself”).

The trial court also never explained how Ste. Michelle was prejudiced – let alone *substantially* prejudiced – by a two-week delay

⁷ *See also Barr v. MacGugan*, 119 Wn. App. 43, 48, 78 P.3d 660 (2003) (severe depression of attorney grounds for relief from dismissal of lawsuit under CR 60(b)(11)); *Gocolay v. New Mexico Fed. Sav. & Loan Ass’n*, 968 F.2d 1017, 1021 (10th Cir. 1992) (party did not “willfully” violate discovery order because his “chronic health problems render[ed] him physically unable to comply with the court’s discovery order”).

⁸ The trial court also admitted all of Ste. Michelle’s exhibits, including photographs of bottle fractures and other evidence that had never been disclosed to Godfrey, without allowing Godfrey to raise any objections. (CP 350, 353, 357; 10/15 RP 85-91)

in receiving Godfrey’s objections to its exhibits. Ste. Michelle received Godfrey’s objections to its exhibits weeks before trial and within the 14 days allowed by ER 904(c). *See Jones v. City of Seattle*, 179 Wn.2d 322, 344, ¶ 47, 314 P.3d 380 (2013) (“The local rules may not be applied in a manner inconsistent with the civil rules”). Likewise, the trial court never explained how it remedied “prejudice” arising from Godfrey’s failure to object to *Ste. Michelle’s* exhibits in a JSE on the date it was due by excluding *Godfrey’s* exhibits –Ste. Michelle’s own bottling and other records it produced in discovery, upon which Godfrey’s experts had relied in expressing opinions when deposed by Ste. Michelle. (*See* CP 810-15; RP 163, 202, 337-38)⁹ Rather than explain on the record the prejudice to Ste. Michelle arising from the absence of a “separate” JSE, as required by *Burnet*, the trial court instead accepted Ste. Michelle’s erroneous assertion that “prejudice is not a prerequisite” to a sanction excluding evidence. (CP 440)

⁹ As it did below, Ste. Michelle attempts to provide *post hoc* support for the trial court’s sanction by complaining not about Godfrey’s failure to file his own JSE, but about the fact Godfrey combined numerous documents into three exhibits that Ste. Michelle included in its “separate” JSE. (Reply Pet. 5) Disclosing large exhibits does not violate PCLR 16(b)(4), or any other rule, and cannot support a sanction for the “*failure to file*” a JSE. (CP 587-88 (emphasis added); *see also* App. Br. 33-36; Reply Br. 17-20)

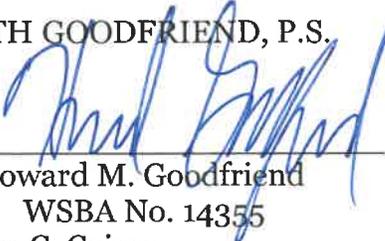
The trial court's draconian sanctions for failing to file a "separate" JSE, while Godfrey's counsel was post-operatively ill, unequivocally violated *Burnet*. This Court should remand for a new trial and reverse the monetary sanctions against Kornfeld.

IV. CONCLUSION

Godfrey was subjected to an unfair trial before a judge, who should have recused five years ago. This Court should affirm the Court of Appeals and remand for a new trial.

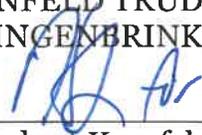
Dated this 30th day of July, 2019.

SMITH GOODFRIEND, P.S.

By: 

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WSBA No. 14355
Ian C. Cairns
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KORNFELD TRUDELL BOWEN
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By: 

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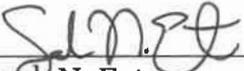
DECLARATION OF SERVICE

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

That on July 30, 2019, I arranged for service of the foregoing Supplemental Brief of Respondents, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 30th day of July, 2019.



Sarah N. Eaton

December 27, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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

Appellants,

v.

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

Respondents,

and

ROBERT KORNFELD,

Additional Appellant.

No. 46963-4-II

UNPUBLISHED OPINION

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

FACTS

In 2010, Godfrey, while working as a server, was injured after a bottle of Ste. Michelle wine shattered in his hand. In 2012, Godfrey filed a product liability suit against Ste. Michelle, asserting manufacturing and design defects.

No. 46963-4-II

On June 7, 2013, Judge Garold E. Johnson entered an order amending the case schedule. The order included dates for the parties to disclose their witnesses and discovery deadlines. The pretrial conference was set for the week of June 16, 2014. And the trial date was set for July 7, 2014.

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

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

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

Our Supreme Court subsequently decided *State v. Lile*. In *Lile*, the Court held that the trial court's ruling on an agreed motion for trial continuance was a discretionary decision for purposes of RCW 4.12.050. 188 Wn.2d at 778. The Court reasoned that continuances, regardless of the

parties' agreement, "have a significant impact on the efficient operation of our courts and the rights of the parties, particularly in criminal proceedings." *Id.* Following its decision in *Lile*, the Supreme Court granted Ste. Michelle's petition for review in this case, and remanded to this court for reconsideration in light of *Lile*.

ANALYSIS

A. *STATE V. LILE*

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

The Supreme Court held that the trial court's ruling on the parties' agreed trial continuance was a discretionary act for purposes of RCW 4.12.050. *Id.* at 778. The Court emphasized that in determining whether a ruling involves discretion for purposes of RCW 4.12.050, the most relevant consideration is the substance and impact of a request—not the form of the request. *Id.* Where the request impacts the duties and functions of the trial court, a ruling on the request is discretionary for purposes of RCW 4.12.050. *Id.* But a ruling on a stipulated agreement is nondiscretionary where the agreement affects only the rights or convenience of the parties, and does not impact or interfere with the duties and functions of the court. *Id.*

Continuances of trial dates, regardless of whether the parties agree, "have a significant impact on the efficient operation of our courts and the rights of the parties, particularly in criminal proceedings." *Id.* A ruling on an agreed trial continuance involves discretion because the court

must consider the request's impact on “ ‘various factors, such as diligence, materiality, due process, a need for an orderly procedure, and the possible impact of the result on the trial.’ ” *Id.* at 776 (internal quotation marks omitted) (quoting *In re Recall of Lindquist*, 172 Wn.2d 120, 130, 258 P.3d 9 (2011), *as corrected* (Sept. 7, 2011)). And because the motion for a continuance impacted the duties and functions of the trial court, the trial court's ruling on the motion to continue the trial date involved discretion. *Id.* at 778.

B. STIPULATED ORDER EXTENDING WITNESS DISCLOSURE DEADLINES

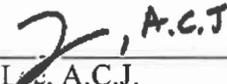
The stipulated order extending witness disclosure deadlines changed only the dates the parties had to make witness disclosures to each other; it did not change any court dates. Ste. Michelle argues that “*Lile* holds that the inquiry for discretion under RCW 4.12.050 is whether the parties had the right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

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

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

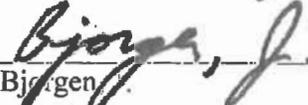
Under the framework presented in *Lile* for determining whether a ruling on a stipulated agreement is discretionary for purposes of RCW 4.12.050, Judge Stolz's ruling was not discretionary because the substance and impact of the stipulated order extending witness disclosure deadlines did not impact the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

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


I., A.C.J.

We concur:


Wierswick, J.


Bjorgen

SMITH GOODFRIEND, PS

July 30, 2019 - 4:53 PM

Transmittal Information

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Appellate Court Case Title: Rolfe and Kirstine Godfrey and Robert Kornfeld v. Ste. Michelle Wine Estates, Ltd., et al.
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