

73757-1

FILED  
May 4, 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**

---

---

**REPLY 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
REPLY RE STATEMENT OF THE CASE.....	2
ARGUMENT .....	3
A.    Valet tacitly concedes that Judge Chung erred as a matter of law in refusing to recuse under RCW 4.12.050. ....	3
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. ....	6
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. ....	7
D.    The trial court erred as a matter of law in summarily leveling \$1,000 in sanctions without briefing, argument, explanation, or findings. ....	8
E.    Valet concedes that the trial court erred in (1) interrupting Shoval’s opening argument for over 20 minutes to say that she could not tell the jury why the stipulated medical bills 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, and the error was not “invited.” ....	9
F.    The trial court committed a manifest error affecting Shoval’s constitutional rights by repeatedly commenting on the evidence before the jury.....	11
G.    The cumulative errors require reversal.....	13
CONCLUSION.....	14

## TABLE OF AUTHORITIES

### Cases

<b><i>A.C. v. Bellingham Sch. Dist.</i></b> , 125 Wn. App. 511, 525, 105 P.3d 400 (2004) .....	6
<b><i>Biggs v. Vail</i></b> , 124 Wn.2d 193, 876 P.2d 448 (1994).....	9
<b><i>Burnet v. Spokane Ambulance</i></b> , 131 Wn.2d 484, P.2d 1036 (1997) .....	9
<b><i>Cerrillo v. Esparza</i></b> , 158 Wn.2d 194, 142 P.3d 155 (2006) .....	5
<b><i>Gabel v. Koba</i></b> , 1 Wn. App. 684, P.2d 237 (1969).....	7
<b><i>Hammel v. Rife</i></b> , 37 Wn. App. 577, 682 P.2d 949 (1984).....	7
<b><i>Harbor Enterprises, Inc. v. Gudjonsson</i></b> , 116 Wn.2d 283, P.2d 798 (1991) .....	3
<b><i>In re Marriage of Hennemann</i></b> , 69 Wn. App. 345, P.2d 760 (1993).....	4, 5
<b><i>In re Marriage of Tye</i></b> , 121 Wn. App. 817, P.3d 1145 (2004).....	4, 5
<b><i>Marine Power &amp; Equip. Co. v. State</i></b> . 102 Wn.2d 457, P.2d 202 (1984) (reversing a failure to recuse after years of discovery and numerous scheduling orders).....	4
<b><i>Seattle v. Arensmeyer</i></b> , 6 Wn. App. 116, 491 P.2d 1305 (1971).....	14
<b><i>State ex rel. Floe v. Studebaker</i></b> , 17 Wn.2d 8, 134 P.2d 718 (1943) .....	3, 5
<b><i>State v. Bogner</i></b> , 62 Wn.2d 247, P.2d 254 (1963).....	14

<b><i>State v. Evans</i></b> , 96 Wn.2d 119, 634 P.2d 845 (1981) .....	6
<b><i>State v. Parra</i></b> , 122 Wn.2d 590, 859 P.2d 1231 (1993) .....	3, 4, 5
<b><i>State v. Sullivan</i></b> , 69 Wn. App., 167, 847 P.2d 953 (1993).....	6
Statutes	
RCW 4.12.050 .....	3
Other Authorities	
10 A.L.R. 5 <sup>th</sup> 371 .....	7
Tegland, 5 WASH. PRAC. § 402.11.....	7, 12
Rules	
Court Rule 32(a) .....	11, 12
CR 32(a)(3).....	12
CR 59.....	13
ER 401.....	7

## INTRODUCTION

Although Valet Parking Systems, Inc. (Valet) admittedly owed Simcha Shoval the highest degree of care consistent with both the practical operation of its van, and its status as a common carrier (CP 437, Court's Inst. 7), and although the jury heard uncontroverted testimony that three or four people debarked the van without the driver offering assistance before Simcha tried to debark without assistance (BR 6, 9, 10), the jury nonetheless found Valet *not negligent* (CP 424). The mechanism of Simcha's fall is irrelevant to Valet's negligent failure to provide the highest degree of care – the jury did not even reach contributory negligence.

This case was fraught with error, from an indefensible (and still undefended) refusal to recuse, through inexplicable (and still unexplained) refusals to rule on MILS, to an imprudent (and still not rationalized) summary imposition of sanctions, a headless interruption of Shoval's opening, and even repeated unconstitutional comments on the evidence. The prejudice from any one of these errors would be difficult to overcome before a jury. And any two of them would taint any jury. But the cumulative overwhelming prejudice to Shoval was insurmountable. The Court must reverse and remand for trial before a different judge.

## REPLY RE STATEMENT OF THE CASE

The key point in Shoval's<sup>1</sup> Statement, which is repeatedly conceded in the relevant portions<sup>2</sup> of Valet's Statement, is that Valet owed the highest duty of care to its passengers as a common carrier, yet the driver admittedly permitted numerous passengers, including Simcha Shoval, to debark the van in the dark lot without assistance. See BR 6 (Simcha "was the fourth or fifth person to exit the van" without assistance); BR 9 ("three other people had already exited the van" before Simcha, and before the driver even began to come around to help); BR 10 (Judge Knudson was outside with his wife and Eli Shoval when Simcha fell without assistance). Despite this clear and uncontroverted evidence that Valet breached its high duty to its passengers, the jury found Valet *not negligent*. CP 424.

Valet appears to allege a lack of evidence regarding the precise mechanism of Simcha's fall. BR 8-11. That is irrelevant to whether *Valet* was negligent for failing to provide assistance to its passengers. The jury never reached contributory negligence.

---

<sup>1</sup> Valet repeatedly misspells the Shovals' name as "Shovel" or "Soval." See BR i (heading H.1.), 8, 10-14, 16, 18, 24, 26-28, 31, 37, 40, 43, 44-47, 49. Despite the ubiquity of these errors, they likely are only poor proofreading, rather than an intended insult.

<sup>2</sup> Valet's Statement contains numerous assertions irrelevant to this appeal. See, e.g., BR 3-5, 8-12.

## ARGUMENT

**A. Valet tacitly concedes that Judge Chung erred as a matter of law in refusing to recuse under RCW 4.12.050.**

Although Valet does not do so in a straightforward manner, it tacitly concedes error here by simply ignoring the controlling Supreme Court precedent, *State ex rel. Floe v. Studebaker*, 17 Wn.2d 8, 17, 134 P.2d 718 (1943). Compare BA 16-17 with BR (no discussion). Our Supreme Court reaffirmed *Floe's* holding that a trial court exercises no 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,” in *State v. Parra*, 122 Wn.2d 590, 603, 859 P.2d 1231 (1993) (“The distinction drawn in *Floe* relating to stipulations makes sense” because rulings on preliminary matters do not alert the parties “to any possible disposition that a judge may have toward their case”). While Valet incorrectly argues that *Parra* is apposite even though (a) it is a criminal case, and (b) it involved motions, Valet cites no case overruling or otherwise altering *Floe*. The trial court erred.

Again tacitly conceding error, Valet fails to address cases like *Harbor Enterprises, Inc. v. Gudjonsson*, 116 Wn.2d 283, 803 P.2d 798 (1991) (reversing a failure to recuse, where numerous substantive motions were pending, but no rulings were yet made);

***Marine Power & Equip. Co. v. State***, 102 Wn.2d 457, 687 P.2d 202 (1984) (reversing a failure to recuse after years of discovery and numerous scheduling orders); ***In re Marriage of Tye***, 121 Wn. App. 817, 90 P.3d 1145 (2004) (reversing a failure to recuse after entering a stipulated trial-scheduling order); and ***In re Marriage of Hennemann***, 69 Wn. App. 345, 848 P.2d 760 (1993) (same). Compare BA 13, 15, 18 with BR (no discussion). Cases like these hold (directly contrary to Valet's arguments) that "no discretion is involved where the judge's sole entries on a form order on pretrial procedures were 'dates regarding the trial date, deadlines for submission of various documents, and the dates for settlement and pretrial conferences.'" ***Tye***, 121 Wn. App. at 821 (quoting ***Hennemann***, 69 Wn. App. at 347).

In any event, the policy underlying the discretionary-ruling proviso in RCW 4.12.050 is to prevent parties from "waiting to see the disposition of the judge before asserting the right." ***Parra***, 122 Wn.2d at 599. Where, as here, the parties simply stipulate to procedural matters, the judge does not – and did not – signal any predilections regarding the merits of the case. This Court should reverse and remand for trial with a different judge.

Valet nonetheless argues that Judge Chung correctly “interpreted” the statute. BR 25-30. These arguments are unavailing, where Valet ignores all of the existing precedent holding (in similar circumstances) that simply entering a stipulated order changing the trial date – even where the judge must write-in some specific provisions – is not a discretionary act obviating recusal. See, e.g., **Parra**, 122 Wn.2d at 603 (reaffirming **Floe**’s holding that a court exercises no 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”); accord **Tye**, 121 Wn. App. at 821 (trial court wrote-in various dates/items); **Hennemann**, 69 Wn. App. at 347. These cases control here.

As for interpretation, Valet fails to argue that the statute is ambiguous – and no case so holds. Statutory interpretation is therefore improper. See, e.g., **Cerrillo v. Esparza**, 158 Wn.2d 194, 201, 142 P.3d 155 (2006) (“when a statute is not ambiguous, only a plain language analysis of a statute is appropriate”). To the extent that the trial court purported to interpret the statute to avoid recusal (an analysis that appears nowhere in the record) it erred as a matter of law. This Court should reverse and remand for trial before a different 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.**

The trial court erred in reserving rulings on 50% of the contested MILs,<sup>3</sup> and in compounding that error by ruling that reserving means the plaintiff may not discuss the issue before the jury – effectively granting the MILs without a ruling. BA 18-23. While Valet argues that any given decision to reserve a ruling is not an abuse of discretion, it fails to grapple with the issue raised here: is reserving ruling on half of the contested MILs prejudicial because it condemns counsel to raising those many issues before the jury, directly contrary to the very purpose of MILs? BA 19 (citing **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)). While it is true that no Washington case has ruled on an issue like this, that is apparently because no trial judge has ever reserved ruling on so many MILs, while simultaneously ruling that a reservation means the plaintiff may not raise the issue before the jury. The prejudice is overwhelming.

---

<sup>3</sup> Valet’s Case Statement talks about “nine out of forty-two” MILs, simply ignoring that more than half of the MILs were stipulated or stricken.

**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 also abused its discretion in allowing Valet to claim that this particular type of incident had never happened before. BA 23-25 (citing 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. 5<sup>th</sup> 371))). The prejudice from such improper testimony is difficult to overstate.

Valet argues that *Martini* supports the ruling "because the conditions were sufficiently similar and the actions were sufficiently numerous." BR 36. Yet Valet cites *no* testimony that the conditions during thousands of trips to unspecified places over the past 25 years were in any way similar. BR 35. Valet even goes out of its way to point out that there was *no evidence* as to the precise mechanism of this fall. See BR 8-12.

Valet generally states that it "had worked at similar events" and had "*transported passengers to and from the same parking lot to the same Temple in the previous year.*" BR 35 (emphasis Valet's). But even these vague allegations – much narrower than the admitted testimony, and having nothing to do with the precise

dark location where the van stopped that night – are insufficient to raise the *Martini* exception. Indeed, Valet fails to disclose that in *Martini*, the trial court had limited the evidence admitted to “the absence of other accidents – *but only on the night in question.*” *Martini*, 121 Wn. App. at 171 (emphasis added). Yet Judge Chung allowed testimony that this same incident had never happened to thousands of people, in countless unspecified locations, over the past 25 years! RP 835, 839.

The prejudice was overwhelming. The trial court erred. This Court should reverse.

**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 leveled a \$1,000 punitive fine on some unspecified person without briefing, argument, authority, or findings. RP 90-92. This violated precedent and due process. BA 25-27. This Court should reverse.

Valet responds by providing some incomplete context, and some inapposite authority and argument, none of which was mentioned to the trial court when the sanctions were imposed. *Compare* BR 18-20, 37-38 *with* RP 90-92. Yet Valet fails to cite any case permitting a trial court to summarily impose even a monetary

sanction without any authority or explanation. *Id.* Washington courts are not empowered to impose sanctions *ipse dixit*. BA 27 (citing ***Biggs v. Vail***, 124 Wn.2d 193, 201, 876 P.2d 448 (1994)). A trial court risks appearing personally prejudiced against a party and/or her counsel in such circumstances. While (as Shoval explained in her opening brief at BA 27) a full blown ***Burnet*** analysis is not required, due process requires more than just, “Well, that’s the ruling of the Court. Let’s move on.” RP 92. The trial court erred, and this Court should reverse and remand to a different judge.

**E. Valet concedes that the trial court erred in (1) interrupting Shoval’s opening argument for over 20 minutes to say that she could not tell the jury why the stipulated medical bills 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, and the error was not “invited.”**

The trial court erred in (1) interrupting Shoval’s opening argument for over 20 minutes to say that she could not tell the jury why the stipulated medical bills 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. BA 28-35. Simply put, the

trial court destroyed Shoval's credibility at the very outset of the case. It should have granted a mistrial. This Court should reverse.

Valet's own argument nicely illuminates the problem:

Ms. Shoval moved *in limine* to preclude Valet Parking "from *in any way mentioning or addressing medical specials or the amount awarded to plaintiff* in front of the jury because it is *irrelevant and prejudicial.*" CP 178 . . . Ms. Shoval argued that to put the amount of medical specials "in front of the jury absolutely confuses them." RP 70.

Despite her unequivocal position, Ms. Shoval nevertheless explained to the jury in her opening statement that "[t]here are no medical bills to consider as that was handled in another proceeding." RP 138.

BR 39 (italics original; underlining added). As the Court can plainly see, Shoval's MIL had nothing to do with her opening statement. She moved to preclude Valet from mentioning the amount of medical specials, and told the jury that medical bills were not before them. If anything, the two positions are entirely consistent. Yet the court erroneously sustained Valet's objection based on *Shoval's* MIL, and wound up delaying Shoval's opening statement for 20 minutes. The opening is crucial. This error was highly prejudicial.

Valet concedes error, arguing only *invited* error.<sup>4</sup> BR 41-42. Blaming the victim – or her counsel – is no help here. The trial court made (another) serious legal error at the outset of this case,

---

<sup>4</sup> Valet cites only criminal cases, which have no application here. BR 41.

substantially prejudicing Shoval's credibility before the jury, and then refused to remedy it by granting a mistrial. It thus manifested in a direct and devastating fashion the threatened prejudice from refusing to rule on so many MILs.

Valet does not even try to argue that the trial court's ruling was not erroneous or prejudicial. BR 38-42. Shoval did not "invite" the trial court's erroneous ruling, but instead did everything she could to stop the court from making the error. BA 29-33. The Court should reverse and remand for trial before a different judge.

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

Shoval carefully laid out the trial court's many improper comments on the evidence, entering the fray, berating plaintiff's counsel, and even supporting the defendant, all in front of the jury. BA 35-49. Valet's primary response is to quibble about what the record says. BR 35-45. This record speaks for itself.

Valet's only substantive response is to argue that Shoval could not use Valet-owner Campbell's deposition during her cross-examination of Valet-owner Lynn. BR 45-47. But Court Rule 32(a) states in relevant part:

(a) Use of Depositions. At the trial . . . any part or all of a deposition, so far as admissible under the Rules of Evidence applied *as though the witness were then present and testifying, may be used against any party* who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party . . . for any purpose permitted by the Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, . . . of a . . . private corporation . . . which is a party *may be used by an adverse party for any purpose.* [Emphases added.]

Shoval specifically argued that Campbell and Lynn – who own defendant Valet – were corporate officers: “Your Honor, it’s—it’s a corporation. They’re both corporate officers.” RP 695. Shoval was entitled to use Campbell’s deposition for *any* purpose under CR 32(a), and certainly to cross-examine another corporate officer.

Valet argues about exceptions in CR 32(a)(3), but those concern depositions of unavailable witnesses, and are irrelevant. Valet also raises a comment from Mr. Tegland, but that is not controlling authority, and it contradicts the plain language of the rule. BR 46. And in any event, the trial court’s comments before the jury – erroneously casting doubt on Shoval’s veracity – are the concern here, not musings about drafters’ intent on appeal.

Valet's final argument is that the trial court's "expression of appreciation to the jury for their patience" is not a comment on the evidence. No, in fact, it was a comment on Shoal's entire case. Context matters here. The court first thanked *Lynn* – an owner of the defendant – for *her* patience, right after Shoal finished her cross. RP 716-18. Then it used the same terms with the jury. The message was clear. Sending the jury out to deliberate with "thanks for your patience" ringing in their ears was highly prejudicial. They swiftly found no negligence. The prejudice was insurmountable.

**G. The cumulative errors require reversal.**

The cumulative errors discussed above – or any portions of them – justify reversal. Valet claims Shoal "waived" all of these errors by not seeking a new trial under CR 59, yet it cites no authority so holding. BR 47. There is no such waiver doctrine. That CR is irrelevant here.

Valet also relies on form instructions telling the jury to disregard the trial court's many erroneous rulings, comments on the evidence, and so forth. BR 48-49. While jurors are presumed to follow such instructions, the errors here are so frequent and prejudicial that these instructions were inadequate to cure the prejudice. In any event, a "comment on the evidence is deemed to

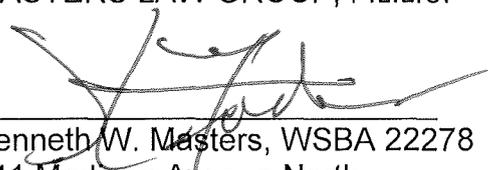
be prejudicial and reversible error is committed, unless it affirmatively appears from the record that appellant could not have been prejudiced by the trial judge's statement." **Seattle v. Arensmeyer**, 6 Wn. App. 116, 121-122, 491 P.2d 1305 (1971) (citing **State v. Bogner**, 62 Wn.2d 247, 382 P.2d 254 (1963)). Valet does not even attempt to meet this standard, and cannot.

### CONCLUSION

For the reasons stated, the Court should reverse and remand for a new trial with a different judge.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of May, 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**

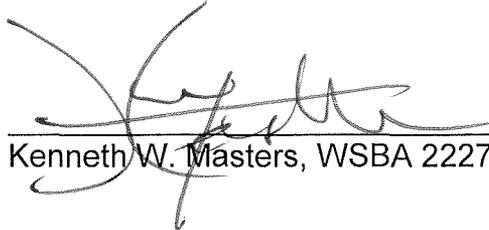
I certify that I mailed, or caused to be mailed, a copy of the foregoing **REPLY BRIEF OF APPELLANT** postage prepaid, via U.S. mail on the 4<sup>th</sup> day of May, 2016, to the following counsel of record at the following addresses:

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

## 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.]

### NOTES:

**Rules of court:** *Demurrers abolished—CR 7(c).*

**Application—2009 c 332:** See note following RCW 90.03.110.