

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

BENJAMIN G. WOLFF and JULIE A. WOLFF, a married couple,	)	
	)	No. 69110-4-I
Petitioners,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
	)	
DESIGN GUILD HOMES OF WA, INC., a Washington corporation, Contractor Registration No. DESIGGH952B4; and DEVELOPERS SURETY & INDEMNITY CO., Bond No. 851618C,	)	
	)	
Respondents.	)	
-----	)	
DESIGN GUILD HOMES OF WA, INC.,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
FLOORCRAFT, INC.; D L SIGLER CONSTRUCTION, LLC, formerly known as D L SIGLER CONSTRUCTION; and J & M TOSO CONSTRUCTION, INC.,	)	
	)	
Third-Party Defendants.	)	
	)	FILED December 24, 2012

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Per Curiam. Benjamin and Julie Wolff, plaintiffs below, appeal the trial court order denying their affidavit of prejudice. The commissioner stayed the trial court proceedings, granted discretionary review, and referred a court's motion on the merits to reverse to a panel of judges. See RAP 18.14(d), (e)(2). Because the Wolffs were

entitled to a change of judge under RCW 4.12.040 and .050, we grant the motion, reverse the order denying the motion for a change of judge, and remand for further proceedings.

Under RCW 4.12.040 and .050, a party in a superior court proceeding is entitled to one change of judge upon the timely filing of an affidavit of prejudice. See In re Marriage of Tye, 121 Wn. App. 817, 820, 90 P.3d 1145 (2004); Harbor Enters., Inc. v. Gudjonsson, 116 Wn.2d 283, 285, 803 P.3d 798 (1991). An affidavit of prejudice is timely if filed and called to the court's attention "before the judge presiding has made any order or ruling involving discretion." RCW 4.12.050.

It is well established that the trial court does not exercise discretion for purposes of an affidavit of prejudice when it enters an agreed order or stipulation involving certain pre-trial preliminary issues. See State ex rel. Floe v. Studebaker, 17 Wn.2d 8, 16-17, 134 P.2d 718 (1943) (stipulated order consolidating two court actions did not invoke trial court's discretion). Our Supreme Court has observed that

many issues may be resolved between the parties and presented to the court in the form of an agreed order. These matters will generally resolve pretrial disputes regarding such issues as admissibility of evidence, discovery, identity of witnesses, and anticipated defenses. If the parties have resolved such issues among themselves and have not invoked the discretion of the court for such resolution, then the parties will not have been alerted to any possible disposition that a judge may have toward their case.

State v. Parra, 122 Wn.2d 590, 600, 859 P.2d 1231 (1993). Generally, the trial court

does not exercise discretion for purposes of an affidavit of prejudice when entering agreed orders or stipulations on “matters relating merely to the conduct of a pending proceeding, or to the designation of the issues involved, affecting only the rights or convenience of the parties, not involving any interference with the duties and functions of the court.” Id. at 603.

At the time it denied the affidavit of prejudice, the trial court had entered only a stipulated order, signed by all the parties, granting defendant/third-party plaintiff Design Guild Homes leave to file a first amended answer, affirmative defenses, and a third-party complaint. The stipulation fully resolved the issue among the parties and did not call upon the trial court to exercise its discretion. The court erred in denying the Wolffs’ affidavit of prejudice.

The stay is lifted and the order denying the affidavit of prejudice is reversed. The case is remanded to the trial court for further proceedings consistent with this opinion.<sup>1</sup>

Reversed and remanded.

For the Court:

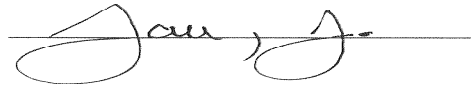
Becker, J.

Cox, J.

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<sup>1</sup> The commissioner noted in her ruling granting discretionary review that because of the procedural posture, the Wolffs did not call the trial court’s attention to the relevant authority.

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