

July 19, 2016

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UNPUBLISHED OPINION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, J. — Following a bench trial, the trial court found in favor of Ste. Michelle Wine Estates in Rolfe Godfrey’s product liability suit against it. Godfrey appeals, arguing that the trial court erred by rejecting his timely filed affidavit of prejudice and motion for change of judge. Godfrey’s trial and appellate counsel, Robert Kornfeld, separately appeals the trial court’s imposition of monetary sanctions against him. Kornfeld argues that the sanctions were improperly imposed and that the trial court erred by not making the required findings before imposing attorney

fees. Ste. Michelle concedes that the trial court did not make the required findings. Because the trial court erroneously rejected the affidavit of prejudice, we reverse and remand for a new trial.¹ We also vacate the monetary sanctions imposed against Kornfeld.

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 file a product liability suit against Ste. Michelle,² asserting manufacturing and design defects.

On January 6, 2014, the trial court entered a stipulation and order for extension of witness disclosure deadlines. On January 7, the superior court commissioner entered a stipulation and order for examination under CR 35.

On March 3, Godfrey signed an affidavit of prejudice. On March 7, the trial court heard Godfrey's motion for change of judge and ruled that Godfrey's affidavit and motion were not timely because two discretionary orders had already been signed. Godfrey moved for reconsideration of the trial court's ruling, which was denied.

On March 21, the trial court entered an amended case scheduling order setting deadlines for discovery cutoff and the filing of a joint statement of evidence. On September 26, Ste. Michelle moved for an award of sanctions against Godfrey for failing to comply with the trial court's scheduling order when Godfrey failed to timely file a joint statement of evidence. The trial court entered an order granting Ste. Michelle's motion for award of fees and costs, ordering "Plaintiff's

¹ Godfrey also argues that the trial court erred by imposing sanctions for failure to file a joint statement of evidence and excluding portions of his expert's testimony. Because we reverse based on the affidavit of prejudice challenge, we do not address the remainder of Godfrey's issues.

² Godfrey's initial complaint included his wife, Kirstine Godfrey, but she stipulated to a dismissal with prejudice and is not a party to this appeal.

counsel of record [to] pay Defendants the sum of \$10,000 within fourteen (14) days of the entry of this Order.” Clerk’s Papers at 761.

Trial began on September 29. After the bench trial, the trial court dismissed Godfrey’s product liability claim and entered judgment in favor of Ste. Michelle. Godfrey and his trial counsel appeal.

ANALYSIS

A. AFFIDAVIT OF PREJUDICE

Godfrey argues that the trial court erroneously rejected of his affidavit of prejudice based on the entry of the January 6 and January 7 stipulation and orders. Specifically, Godfrey contends that the trial court did not exercise discretion in entering the January 6 order because the parties stipulated to the order and the order was purely ministerial. Therefore, his affidavit of prejudice was timely. Godfrey also contends that the trial court erred by deeming the superior court commissioner’s January 7 entry of the parties’ stipulated order a discretionary ruling. We agree that the trial court erred by rejecting Godfrey’s affidavit of prejudice.

RCW 4.12.040 allows “a party in a superior court proceeding the right to one change of judge upon the timely filing of an affidavit of prejudice.” *State v. Dennison*, 115 Wn.2d 609, 619, 801 P.2d 193 (1990). When a party properly files such an affidavit, the judge must step aside. RCW 4.12.040; *Harbor Enters., Inc. v. Gudjonsson*, 116 Wn.2d 283, 285, 803 P.2d 798 (1991) (once a party timely complies with the statute, prejudice is deemed established and the judge who is the subject of the affidavit is divested of authority to proceed in the action). Whether RCW 4.12.050 imposed a duty on the judge to step aside under the circumstances is a question of law that we review de novo. *In re Parenting Plan of Hall*, 184 Wn. App. 676, 681, 339 P.3d 178 (2014).

An affidavit of prejudice is timely filed if called to the court's attention before the judge has "made any ruling whatsoever in the case" on a motion by either party, and "before the judge presiding has made any order or ruling involving discretion." RCW 4.12.050(1). In other words, an affidavit of prejudice is "timely so long as it was filed before the court made any ruling apprising the parties of the court's predisposition in the case." *State v. Parra*, 122 Wn.2d 590, 600, 859 P.2d 1231 (1993).

Discretionary rulings, for purposes of RCW 4.12.050, do not include "the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial." RCW 4.12.050(1). Setting, renoting, or resetting a show cause or motion for hearing is a calendaring action that is not discretionary for purposes of RCW 4.12.050. *State v. Dixon*, 74 Wn.2d 700, 703, 446 P.2d 329 (1968); *see also In re Marriage of Tye*, 121 Wn. App. 817, 821, 90 P.3d 1145 (2004) (holding "the ministerial acts of entering uncontested case scheduling orders" do not involve the court's discretion for purposes of RCW 4.12.050). Many issues, often involving pretrial disputes regarding "discovery, identity of witnesses, and anticipated defenses," may be resolved between the parties and presented to the court in the form of an agreed order. *Parra*, 122 Wn.2d at 600. "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." *Parra*, 122 Wn.2d at 600.

On January 6, 2014, the trial court signed and entered a stipulated order for extension of witness disclosure deadlines. On January 7, the superior court commissioner signed a stipulation and proposed order for examination under CR 35. On March 3, Godfrey signed a motion and

affidavit of prejudice. On March 7, the trial court heard arguments regarding Godfrey's affidavit of prejudice and motion for change of judge. The trial court rejected Godfrey's affidavit of prejudice, ruling that the affidavit was untimely because the court had entered two discretionary orders: the January 6, 2014 order and the January 7, 2014 order.

1. January 6 Stipulation and Order

A stipulation is an agreement between parties. *Parra*, 122 Wn.2d at 601. The parties may, as they have here, resolve various issues and present stipulated orders regarding discovery, identity of witnesses, and deadlines for submission of documents. *Id.* at 600; *see Tye*, 121 Wn. App. at 821. Rulings on pretrial stipulated orders relating to scheduling and deadlines are not discretionary for the purposes of RCW 4.12.050 because they do not alert an individual party to the trial court's disposition. *Parra*, 122 Wn.2d at 600 ("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."); *see Tye*, 121 Wn. App. at 821.

Here, the trial court signed the January 6 stipulation and order extending the deadline for witness disclosures. The trial court's entry of the stipulated order relating to a deadline for witness disclosures is not a discretionary decision. Thus, the trial court erred by rejecting the affidavit of prejudice based on the January 6 stipulation and order.

2. January 7 Stipulation and Order

Godfrey argues that the trial court erred by determining that the commissioner's entry of the parties' stipulated order was a discretionary ruling. We agree.

A superior court commissioner and a superior court judge are separate and distinct judicial officers. A ruling by a commissioner, even if discretionary, does not apprise anyone of any predisposition on the part of the judge. Thus, it follows that a superior court commissioner's ruling cannot be a discretionary ruling under RCW 4.12.050 that would preclude an affidavit of prejudice against the superior court judge. The trial court erred by deeming the superior court commissioner's January 7, 2014 order to be a discretionary ruling that precluded the trial court from accepting Godfrey's affidavit of prejudice.

We reverse the trial court's order denying Godfrey's motion for change of judge and remand for a new trial. *See Hanno v. Neptune Orient Lines, Ltd.*, 67 Wn. App. 681, 683, 838 P.2d 1144 (1992); *In re Marriage of Hennemann*, 69 Wn. App. 345, 348, 848 P.2d 760 (1993).

B. IMPOSITION OF SANCTIONS AGAINST GODFREY'S COUNSEL

Kornfeld, who represented Godfrey at trial and on appeal, challenges the trial court's imposition of \$10,000 in attorney fees against him. He argues that the sanctions were improperly imposed and that the trial court failed to make the required findings. We agree that the sanctions were improperly imposed.

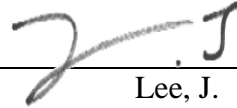
Here, the trial court imposed sanctions against Kornfeld after rejecting Godfrey's affidavit of prejudice. Because the trial court erred in rejecting Godfrey's affidavit of prejudice, the trial court's imposition of monetary sanctions was improper. Therefore, we vacate the sanctions imposed on Kornfeld in favor of Ste. Michelle.

CONCLUSION

We hold that the trial court erroneously rejected the affidavit of prejudice. We also hold that the imposition of monetary sanctions against Kornfeld was improper. Therefore, we reverse,

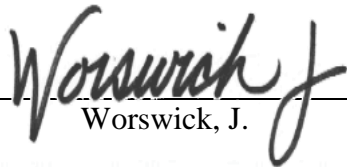
vacate the monetary sanction against Kornfeld, and remand for a new trial.

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.

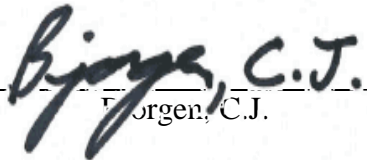


Lee, J.

We concur:



Worswick, J.



Berger, C.J.