No. 320669

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

BRENT W. McFARLAND

Plaintiff/Appellant

v.

BNSF RAILWAY COMPANY

Defendant/Respondent.

REPLY BRIEF OF APPELLANT

C. Marshall Friedman *(Pro Hac Vice)*
C. MARSHALL FRIEDMAN, P.C.
1010 Market Street, 13th Floor
St. Louis, MO 63101-2000
Telephone: (314) 621-8400

Steven Lawrence Jones, WSBA #4876
EYMANN ALLISON HUNTER JONES, PS
2208 W. 2nd Avenue
Spokane, WA 99201-5417
Telephone: (509) 747-0101

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A. THE TRIAL COURT'S EXCLUSION OF APPELLANT'S THREE WITNESSES - ROBERT RUSSELL, ED HOLM, AND ANDREW PILLAR - CONSTITUTED REVERSIBLE ERROR.

1. Respondent BNSF Concedes The Trial Court Committed Error. Harmless Error Analysis Should Not Be Considered In This Case.

BNSF concedes, as it must, that the trial court **committed error**[1] by excluding McFarland's three witnesses - Robert Russell, Ed Holm, and Andrew Pillar - as a discovery sanction without undertaking and performing the required *Burnet*[2] analysis. Indeed, the trial court explicitly found McFarland's failure to timely disclose these three witnesses resulted from a "lack of diligence". The trial court did not find McFarland's conduct was either willful, deliberate, or tactical. In addition, the trial court never considered nor found that imposition of a lesser sanction would not vindicate Local Rule 4 (h)(1)(D) or that BNSF would be substantially prejudiced where all three witnesses currently were, or in Russell's case had been, BNSF employees and were either disclosed (Holm and Pillar) seven weeks before trial or the subject of fairly intense discovery efforts (Robert Russell) and testimony four months before trial and formally disclosed in Appellant's Trial Management

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[1] "The trial court's failure to fully consider the *Burnet* factors was harmless." (Respondent BNSF's Brief, p. 2) "[T]he incomplete Burnet analysis was harmless error". (BNSF, p. 3) "BNSF acknowledges that the trial court did not perform a full *Burnet* inquiry on the record when granting its motion in limine." (BNSF Brief, p. 32)

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

Report served 8 days before trial. The trial court performed none of the requisite analysis and made none of the required findings in spite of the fact that McFarland's counsel expressly and specifically brought *Burnet* and its requirements to the trial court's attention.[3] BNSF contended that Local Rule 4 (h)(1)(D), not *Burnet,* was decisive and this prompted the trial court to err and fail to discharge its duties under the Supreme Court's controlling authority of *Burnet* and its progeny. Having pursued a "win at all costs, the governing law be damned" approach in the trial court, BNSF now seeks to salvage the error-laden result - that BNSF incited the trial court to create and which BNSF profited from - by simply alleging the error BNSF precipitated was "harmless".

Certainly Appellant is not the only one to perceive the wicked irony of BNSF's position on appeal. In the face of the explicit request for application of *Burnet* and its progeny, BNSF took the untenable position that the Local Rule trumped *Burnet.* BNSF successfully persuaded the trial court to do exactly as BNSF requested: exclude the three witnesses without consideration of the *Burnet* factors. Respondent BNSF achieved precisely the result that it sought in the trial court. Now, however, BNSF

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[3] See Appellant's Opening Brief, pp. 27-29 and CP.711-714, Par 13. In addition, as the Supreme Court also recognized in *Jones v City of Seattle*, 179 Wn.2d 322, 340 (¶ 38), "**it has been clear since at least 2006** that trial courts **must** consider *Burnet* factors before excluding witnesses." [Bold and underlining supplied, italics in original.]

concedes on appeal that the trial court ruling it demanded and received is (and has been) completely indefensible.

In this procedural posture and as a matter of policy, BNSF's request for consideration of the harmless error rule on appeal should be rejected. A party should not be encouraged to take such an untenable and indefensible position in the trial court and gamble that its ill-gotten victory can be protected through application of the "harmless error" rule on appeal. This approach and result - which is what BNSF seeks - encourages all parties to take untenable and indefensible positions in the trial court, and, furthermore promotes - rather than deters - the injection of error into trials, the complication of trial court rulings, the complication of resulting appeals, and, ultimately, leads to otherwise unnecessary retrials. These deleterious consequences for the justice system naturally flow from consideration of the "harmless error rule" under the circumstances and procedural posture in this case and should be discouraged. For these reasons, consideration of the "harmless error rule" should be rejected in this case.

2. Even If Considered, The Harmless Error Rule Announced In The Supreme Court's Opinion In *Jones v. City of Seattle* Is Not Applicable Here Because The Case At Bar Is Procedurally Distinguishable From *Jones*.

The case at bar is procedurally distinguishable from *Jones v. City of Seattle*, 179 Wn.2d 322, 314 P.3d 380 (Wash. 2013), the

only appellate opinion ever to apply harmless error analysis to a *Burnet* violation, on multiple crucial issues. In *Jones*, and unlike the instant case, the City appealed only on the issue of damages;[4] witness exclusion became an issue only *after* trial started;[5] the trial court partially completed the required *Burnet* analysis on willfulness,[6] lesser sanctions, and prejudice for each of the three witnesses at issue;[7] all three witnesses were deposed during trial thus permitting the trial court to determine whether each witness's testimony was either substantively inadmissible ("as irrelevant and unduly prejudicial" on the alcohol issue) or cumulative;[8] and "both parties acknowledged that the rulings on witness exclusion are subject to review for harmless error."[9] **None** of the *Jones* procedural circumstances mentioned above exist in the current case. In deciding that the trial court's *Burnet* error was harmless in *Jones* the Supreme Court emphasized:

> This court has **never** applied harmless error analysis to a *Burnet* violation, but this case **comes to us in a procedural posture that distinguishes it from previous *Burnet* cases** addressing witness exclusion.

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[4] *Jones v City of Seattle*, 179 Wash.2d 322, 338

[5] Gordon Jones's testimony was only disclosed "three weeks after the start of the trial". *Jones, supra*, at 343 (¶ 45). Beth Powell's testimony was first offered "three days after the start of the trial." *Jones, supra*, at 344 (¶ 49). Rose Winquist was not mentioned by name until September 18 only days before the end of trial. *Jones, supra*, at 348 (¶ 61).

[6] The trial court, however, erroneously conflated lack of "good cause" with willful/deliberate non-disclosure.

[7] *See, Jones, supra*, pp. 344-352

[8] *Jones, supra*, at 356 (¶ 79).

[9] *Jones, supra,* at 338 (¶ 32)

Jones v. City of Seattle, 179 Wn.2d 322, 356, 314 P.3d 380, 396-397 (¶ 75) [Emphasis supplied].

A fair reading of the Supreme Court's opinion in *Jones* reveals that all of the above procedural considerations were important. But manifestly the Supreme Court emphasized the meticulous manner in which the trial court sifted through the deposition testimony of the three excluded witnesses[10] and made crucial findings as to whether their testimony was admissible, at all, or simply cumulative. The trial court, for substantive evidentiary reasons, determined the bulk of the excluded witness testimony (Mark Jones' historic and current use of alcohol and visiting bars) was simply inadmissible because it was irrelevant and/or too prejudicial. The trial court determined that even if this testimony had been properly disclosed, it still would have been excluded as irrelevant and too prejudicial. The Supreme Court determined this evidentiary ruling was within the trial court's sound discretion, and the *Burnet* violation was of no consequence, because the alcohol testimony was properly excluded because of its content, an entirely independent ground. In the case at bar, the trial judge did not order that the depositions be taken, did not meticulously sift through the proposed testimony, made no findings

[10] The three excluded witnesses were the injured plaintiff's father, sister, and a female private investigator who first met plaintiff at a bar the night before the trial began.

as to the substantive admissibility of any of the proposed testimony, and did not determine any of the excluded testimony from Russell, Holm or Pillar was inadmissible on any substantive evidentiary ground.

The trial court in *Jones* also determined that the remainder of the testimony, from the three excluded witnesses, addressed Mark Jones post-accident activities and enjoyment of life (e.g., his hunting, his fishing, driving to Montana, meeting and dating women, performing chores, assisting a sister, and similar conduct). The trial court determined there was no dispute about these factual issues because plaintiff Mark Jones had already admitted, before the jury, that he could and did engage in these activities. Consequently, the testimony from the three excluded witnesses was cumulative on an **undisputed** factual issue. Hence, excluding additional testimony on an undisputed factual issue was "harmless error".[11]

Unlike the plaintiff's post-accident activities in *Jones*, the efficacy of the second-generation Omega hydraulic cross key

[11] In addition, the Supreme Court specifically emphasized that the *Jones* trial court had permitted the Appellant City of Seattle to use the content of the deposition of Beth Powell in the cross-examination of plaintiff Mark Jones and his sister Meg Jones even though Powell was excluded as a witness. Hence, the Supreme Court considered that Appellant City had received the benefit of some of the testimony of this excluded witness and the Supreme Court recognized "[t]hese accommodation[s] satisfy *Burnet's* lesser sanction prong." *Jones, supra,* at 346 (¶ 53).

installer and its adequacy as an alternative method/equipment for installing difficult, hard to install cross keys at the time McFarland was injured in 2010 was a **disputed** issue in the trial court as it still is in this court.[12] McFarland attempted to establish the second-generation hydraulic cross key installer had been successfully employed by BNSF at its Vancouver Repair Track as an effective means for installing difficult cross keys and was, therefore, a viable alternative to the 12 pound sledgehammer method from 2006 to the current time. The trial court's exclusion, however, of witnesses Russell, Holm, and Pillar significantly handicapped McFarland in presenting his case and thereby eliminated nearly all of McFarland's favorable evidence on this issue. The primary effect of the trial court's ruling was that BNSF was able to present its side of the story, but McFarland could not. BNSF manifestly benefitted from the trial court's ruling which meant only BNSF's version of these crucial events was presented to the jury. The excluded testimony was not cumulative and its exclusion was not harmless error. (*See also*, pp. 8-11, below)

[12] For instance, BNSF, citing trial testimony of Jeremy Putnam, continues to urge that the second generation cross key installer was ineffective and could not be used on 50 percent of the cross keys. (BNSF Brief, p. 17) BNSF further urges that use of the second-generation cross key installer at Seattle had fallen out of favor and basically been abandoned. (BNSF Brief, p. 18) The case at bar is, in this real sense, drastically different and distinguishable from *Jones*. Here, the excluded evidence related to a material and **disputed** factual issue.

In the case at bar, the trial court did not order the excluded witnesses be deposed, did not sift through their testimony, and did not determine whether the excluded testimony was cumulative. No trial court findings were made on these issues in the present case. Procedurally, this completely distinguishes the instant case from *Jones.* For this additional reason, the harmless error analysis applied in *Jones v. City of Seattle* should not be considered nor applied in this case.

3. The Testimony Of Appellant's Witnesses Robert Russell, Ed Holm, and Andrew Pillar Was Not Cumulative. The Trial Court's Exclusion Of These Witnesses Was Not Harmless.

Although BNSF alleges that the "hydraulic press was thoroughly covered at trial" (BNSF Brief, p. 8), that was not the case. The exclusion of Russell, Holm, and Pillar effectively prevented McFarland from introducing evidence to establish that BNSF had tried, tested, successfully implemented and used the second generation Omega hydraulic cross-key installer at locations other than Pasco, specifically, Vancouver and Seattle.

BNSF states/implies that Appellant's witness Jeff Neufer had personal knowledge and could have testified to the efficacy of the second generation Omega hydraulic installer at Vancouver. (See, BNSF's Brief, pp. 9-10) But BNSF's contention is patently

incorrect. Jeff Neufer testified that he left Vancouver and transferred to Pasco while the revisions of the hydraulic cross-key installer were still being worked on at Vancouver. Specifically, witness Jeff Neufer testified "**they were working on that probably still when I came to Pasco** (RP 204:14-15) **in 2004.**" (RP 204:22) Neufer never saw the second generation hydraulic cross key installer used at Vancouver. (RP P189: L4-7) Neufer never saw the hydraulic cross key installer used at Pasco (RP P189:L8-10) and he was not even aware one had been ordered or delivered to Pasco. (RP P189:11-13) Manifestly, Jeff Neufer's testimony could not possibly be a substitute for Robert Russell's for multiple reasons, including that Neufer never saw the completed second generation hydraulic installer in operation anywhere.

Respondent BNSF also cites to deposition testimony of Richard Lovin, a BNSF supervisor at Seattle. (See, BNSF's Brief, pp. 9-10) But, first, Lovin's knowledge of the use of the hydraulic cross-key installer was quite limited. Lovin had only seen the hydraulic installer used at Seattle.[13] (8:9-15) Lovin had not seen it

[13] Respondent's Brief (p. 10) quotes the question posed to Lovin: "Are you aware that there's been a pusher, hydraulic pusher, at Vancouver for maybe a dozen years?" (CP 52:2-3) but then completely ignores and omits Lovin's answer that: "**No, I had no idea there was a pusher in Vancouver for a dozen years.**" (CP 52:4-5) and the jury was expressly instructed that the evidence it was to consider consists of the testimony heard from witnesses and exhibits. (Instruction No..1; CP 606) The jury was also instructed that the comments of the lawyers during the trial including the lawyers remarks, statements and arguments are not evidence. Id.

used elsewhere. (14: 3-6; 18:16-18) Lovin did not know why the hydraulic cross-key installer had been purchased by BNSF (9:1-3) Lovin was unsure whether the hydraulic cross-key pusher was even being used at Seattle (8: 16-18) and had "**no idea** if they're using it right now." (8:20) Moreover, BNSF Supervisor Lovin was not an advocate of the hydraulic cross-key pusher. ("I don't think it's better than any of the multitude of options we have." (12: 11-12)) Clearly, the testimony from Russell - who was intimately involved in developing the hydraulic cross key pusher as well as Holm and Pillar - who were using it at the Seattle Repair Track at the time Lovin had "no idea" whether it was being used - would not have been cumulative of Lovin's limited testimony on this issue. Again, BNSF conflates being able to present BNSF's side of the story to the jury with the jury being able to hear **all** the relevant evidence.

Because the Omega hydraulic cross key installer was **never** put into actual use at the BNSF Pasco facility, none of the remaining witnesses (e.g., McFarland,[14] Schroeder,[15] Fox, Barnes, [16] Putnam, or BNSF Supervisors Risdon or Long)[17] was able to

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[14] McFarland had never seen the hydraulic cross key installer used. (RP P245: L2)

[15] Schroeder only knew that BNSF tried to put the hydraulic pusher in service, hooked it up to the forklift hydraulics and it did not work. (RP P82:24-P83:7) And Schroeder reiterated, when asked by the jury, that "I don't know what connections are on the pusher because we haven't had it in service." (RP P106: L24-25) BNSF tried to rig the cross key installer up one time, and did not succeed. (RP P109:L5-9)

[16] Barnes had never seen the mechanical cross key installer used. (RP P 212:L16-17)

[17] Indeed, BNSF's Brief expressly represents that the Omega hydraulic cross-key installer was not even used at Pasco **after** McFarland's injury. (BNSF Br. 14) BNSF's Brief states:

testify as to its efficacy in installing cross keys because these witnesses had only seen it tried only once, or not at all. The testimony from Russell, Holm, and Pillar - who had far more extensive hands-on experience and knowledge of the development and use of the hydraulic cross key installer on a day-to-day basis at other BNSF repair tracks - would not have been cumulative.[18] And the exclusion of such evidence was manifestly not harmless under the prevailing standards. The Supreme Court, in the context of deciding whether error in the admission or exclusion of evidence in a civil case was "harmless", has described the standard as including the following multiple prongs:

> An error is harmless if it is "**trivial**, or **formal**, or **merely academic**, **and** was **not prejudicial to the substantial rights** of the party assigning it, **and** in **no way affected the final outcome** of the case."

Viet v. Burlington Northern Santa Fe Corporation, 171 Wash.2d 88, 99, 249 P.3d 607, 612 (Wash. banc 2011) (¶ 24) [Emphasis supplied]. The trial court's exclusion of McFarland's witnesses and

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"Putnam, Neufer, McFarland, Long, Risdon, carman Kevin Schroeder, carman Bert Barnes, and former carman David Fox **all testified that it had not been used.** *Id.*

[18] BNSF has cited and partly quoted *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 170, 876 P.2d 435 (1994). The *Havens* opinion stated, "The evidence need not be identical to that which is admitted; instead, harmless error, if error at all, results **where evidence is excluded which is, in substance, the same as other evidence which is admitted.**" *Id.* [Emphasis supplied]. Here, the admitted evidence was **not in substance, the same** as the evidence excluded from Russell, Holm, and Pillar. Ryan Risdon's grudging admission the Omega hydraulic cross key installer existed coupled with Risdon's contention that they could **not** get it to work, that it had **not** been used, and was only a prototype would **not** have been "**in substance the same**" as the testimony that would have been elicited from Russell, Holm, and Pillar.

evidence in the case at bar was not trivial, formal nor academic. So, BNSF has failed to satisfy the first prong of the multi-prong test in *Viet.* And in addition, the trial court's ruling prejudiced the substantial rights of McFarland and also affected the final outcome of the case. Defendant's contentions to the contrary must be rejected because they are not supported by any fair reading of the record in this case.

4. Under *Dependency of M.P.*, A *Burnet* Violation Is Presumed Reversible Error Unless The Record Affirmatively Demonstrates The Error Was Harmless.

BNSF's harmless error contentions should also be rejected as a matter of law because they are directly refuted by the Court of Appeals opinion in *Dependency of M.P., Washington, Social & Health Services v. Parvin*, ___ P.3d ___, 2014 WL 7338732 (Wash.App.Div.1). In *Dependency of M.P.*, the trial court excluded two late disclosed witnesses in a child neglect/dependency proceeding in violation of *Burnet.* The issue of the *Jones* harmless error analysis was raised, and the Court of Appeals determined that a *Burnet* violation was **presumptively reversible error.** Unless the record affirmatively demonstrated that the error was harmless, reversal was required. In emphasizing this principle, the Court of Appeals ruled:

> The **erroneous exclusion of a party's witnesses *is reversible error unless*** the error was

> **harmless**. Jones, at 356, 314 P.3d 380. In *Jones*, our supreme court applied, for the first time, a harmless error analysis to a *Burnet* violation. [Footnote 5 omitted] The court held the error in that case was harmless because the excluded testimony was largely irrelevant or cumulative. Jones, at 356-57, 314 P.3d 380. **Here, we are unable to determine whether the excluded testimony would have been cumulative, irrelevant, or otherwise inadmissible.** The admissibility of the excluded testimony was not litigated below and there is little in the record to indicate, in more than general terms, the nature of the testimony expected to be elicited from the excluded witnesses. **On this record, we are unable to say the exclusion of Bramlett's witnesses was harmless**. Accordingly, the orders establishing the guardianship and dismissing the dependency **must be reversed**.

Dependency of M.P., *supra*, at p. 5; (¶ 23) [Emphasis supplied].

The same legal principle and analysis apply to the instant case. The trial court's exclusion of Appellant's witnesses - Russell, Holm, and Pillar - is presumed reversible error and the record in this case manifestly fails to demonstrate that the error was harmless. Hence the trial court's judgment "**must be reversed**" just as in *Dependency of M.P.*

5. The Concurring Opinion Of Justice Gonzalez In *Jones* Expressly Addresses Witnesses Disclosed After Trial Begins And Has No Applicability To The Case At Bar.

Respondent BNSF also cites and references the concurring opinion of Justice Gonzalez in *Jones* as part of BNSF's

effort to salvage its ill-gotten verdict and judgment. The concurring opinion in *Jones*, however, affords BNSF no support.[19]

First, the obvious: the concurring opinion in *Jones* is not binding and need not be followed since it is not a majority opinion. *See, e.g., Harris v. Drake*, 116 Wn.App. 261, 65 P.3d 350, 355, n. 24 (Wash.App. 2003)

Second, Justice Gonzales makes it perfectly clear that his concern focused upon cases wherein the undisclosed witnesses were **first disclosed after** trial had begun.[20] Justice Gonzales' concurring opinion stated:

> At some point in the progress of a lawsuit, the trial court's duty to fairly and expeditiously manage cases must trump *Burnet's* **presumption** that a litigant may present new, undisclosed evidence at any time. That point is certainly reached **after trial begins** – and **at the very latest after opening statements.** A judge does not abuse his or her discretion by requiring a party who discloses witness **after the beginning of trial** to show good cause why the witnesses should be allowed to testify.
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> * * * *
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> In contrast, **after trial has begun**, under great time pressure to complete the case, litigants should not be entitled to the **presumption** that new witnesses will be allowed to testify.

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[19] By seeking solace in the concurring opinion, Responded BNSF, at least tacitly, recognizes that the opinion of the Court in *Jones* does not favor BNSF. BNSF would not resort to a concurring opinion if the principal opinion of the Court supported BNSF.

[20] Justice Gonzales noted that "the city offered testimony from three different witnesses between 3 and 20 days after trial began." Jones, supra, at 405 (¶ 121)

Jones v. City of Seattle, 179 Wn.2d 322, 356, 314 P.3d 380, 373-374 (¶s 119-120) (Gonzalez, J., concurring) [Emphasis supplied]. McFarland's excluded witnesses were all disclosed and listed prior to trial.[21] BNSF's purported reliance upon the concurring opinion of Justice Gonzalez in *Jones* is entirely misplaced and completely unjustified.

6. Respondent BNSF's Contentions Concerning "Waiver" Are Without Merit.

BNSF has constructed a "waiver" argument (*see*, BNSF's Brief, pp. 38-39) which must be rejected. BNSF contends that McFarland "waived" the right to call Robert Russell as a witness by not calling Kelly Zimmerman (the BNSF Safety Assistant at Pasco), David Bertholf (a BNSF Supervisor at Seattle), or Dr. Stephen Morrissey (McFarland's expert ergonomist)

Not to belabor the factual situation, but Robert Russell was intimately involved in the development of both the first and second generation Omega hydraulic cross key installers at BNSF's Vancouver facility during 2000-2006, and retired from BNSF in 2008. Neither Zimmerman, nor Bertholf, nor Morrissey had anything whatsoever to do with the development of the hydraulic cross key installer at Vancouver. BNSF has set forth no factual basis

[21] Apart from being a key topic in George Apostolou's depositions and McFarland's efforts to locate and depose him during April - May, 2013, Robert Russell was listed in Appellant's Trial Management report (See, CP 691) that was served on filed with the Court on August 6, 2013, 8 days before trial.

demonstrating McFarland was compelled to call any of these witnesses ***in lieu*** of Robert Russell. Nor has BNSF set forth any reason why McFarland could not call any of these witnesses **in addition** to Robert Russell. And *State v. McWatters*, 63 Wn. App. 911, 916, 822 P.2d 787 (1992) does not support Respondent's "waiver" argument in this case. In *McWatters*, the trial court **deferred** making a decision over whether a particular witness could be called by the criminal defendant. Later the trial court asked defense counsel whether counsel still intended to call the witness, and the trial court was told no. Hence, no ruling was made. Under these circumstances, this Court stated "[t]he witness was never called and the **court did not rule on the admissibility of the testimony**. In light of the facts, Mr. McWatters waived his right to have this issue reviewed." *Id.* at 791. Unlike *McWatters*, Appellant repeatedly sought to call Robert Russell and the trial court repeatedly excluded Russell.[22] There were rulings on the exclusion of Russell by the trial court in the case at bar. BNSF's contentions are entirely without merit and should be rejected.

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[22] Respondent's other cited authority, *Reilly v. NatWest Markets Group, Inc.*, 181 F.3d 253, 268 (2nd Cir. 1999), similarly does not support BNSF's contentions. As with *McWatters*, NatWest decided not to call the witnesses. In contrast, McFarland, in the case at bar, repeatedly sought to call Russell as a witness but was prohibited from doing so by the trial court. **Manifestly, there was a ruling by the trial court that Russell would not be permitted to testify.** There was **no such ruling** in *Reilly* or *McWatters*.

7. No Formal Offer Of Proof Pursuant to Evidence Rule 103 (a) (2) Was Required With Regard To The Exclusion Of Ed Holm Or Andrew Pillar.

The trial court's exclusion of **witnesses** Holm and Pillar pursuant to Local Rule 4 (h)(1)(D) was imposed as a discovery sanction; it was **not** an evidentiary ruling based upon the Washington Rules of Evidence. BNSF has cited no authority that indicates Evidence Rule 103(a)(2) is applicable under these circumstances,[23] and, to the contrary and by its terms, Rule 103 focuses on "Rulings on Evidence", not discovery sanctions nor exclusion of witnesses.

When the trial court sustains an objection (e.g. irrelevant, hearsay, prejudicial, etc.) to a question, an offer of proof is often required to determine whether the objection had merit and whether the objection should, or should not, have been sustained. Such circumstances, however, are completely different from the trial court's exclusion of all testimony from witnesses Holm and Pillar in this case. Holm and Pillar's testimony was excluded in its entirety, but not for any evidentiary reason, so an offer of proof would be superfluous under these circumstances. The trial court did not rule on evidentiary grounds and, consequently, the purpose of Evidence

[23] The sole opinion cited by BNSF was *Seattle First National Bank v. West Coast Rubber, Inc.*, 41 Wn.App. 604, 705 P.2d 800 (Div. 1, 1985). This testimony was excluded as a result of an evidentiary ruling, **not** as a sanction. *Seattle First National Bank* has no applicability to this case.

Rule 103 (a)(2) requiring an offer of proof[24] under some circumstances would not be served and is not applicable here.

In addition under *Burnet*, the legal authority emphasizes that the **trial court must make a finding** on the issue of whether the evidence - which would have been introduced through the excluded witness - would have "substantially prejudiced" the party opposing its admission if introduced. It is at least implicit from this *Burnet* requirement that the trial court will make such inquiry as the trial court deems sufficient for the trial court to make its finding on the "substantially prejudiced" factor of *Burnet.* For this additional reason, a formal offer of proof is not required.

Finally, BNSF's offer of proof contention is also at odds with the Court of Appeals opinion in *Dependency of M.P., Washington, Social & Health Services v. Parvin*, ___ P.3d ___, 2014 WL 7338732 (Wash.App.Div.1) which recognized the *Burnet* violation was presumptively reversible error unless the record affirmatively established otherwise.

B. EXCLUSION OF EXHIBIT 14 WAS ERROR

8. The Exclusion Of Exhibit 14 (The JSA) Was Reversible Error.

[24] "The purpose of an offer of proof is to (1) inform the court of the legal theory under which the offered evidence is admissible; (2) inform the trial judge of the specific nature of admissibility; and (3) create a record for review." *Walker v. Bangs*, 92 Wn.2d 854, 860, 601 P.2d 1279, 1283 (Wash.banc 1979). These purposes are not applicable in the case at bar.

BNSF has raised - for the first time in its Brief in this Court - an "authenticity" objection to Appellant's Exhibit 14, the BNSF Zone 1 JSA describing the use of the Omega hydraulic cross key installer to install a cross key. BNSF did not raise Rules 901-904 of the Washington Rules of Evidence nor "authenticity" in its motion in *limine* as a ground to exclude Exhibit 14. (CP 730-731) BNSF did not raise Evidence Rules 901-904 nor authenticity during the oral argument over its motion in *limine*. (RP pp. 27-29) BNSF did not raise Evidence Rules 901-904 nor authenticity as an objection to Exhibit 14 in the Trial Management Report. (CP 665) The authenticity of Exhibit 14 was a non-issue at trial because BNSF never objected to Exhibit 14 on authenticity grounds, and the trial court's rejection and exclusion of Exhibit 14 had nothing to do with authenticity. BNSF cites no authority that holds the trial court's exclusion of evidence can be justified on grounds that were **not even presented** to the trial court. Nor has BNSF cited any authority permitting BNSF to shift, on appeal, an objection to a different ground not presented to the trial court. BNSF's newly developed authenticity arguments should not be considered and must be rejected.

To recapitulate, the grounds actually presented to the trial court for exclusion of the 2011 BNSF JSA were: that the JSA

existed in working or draft form only and had not been put into use (CP 730-731);[25] that the JSA was irrelevant, unduly prejudicial, and should be excluded pursuant to ER 401, 402, and 403 (Id.); that the JSA was confusing and would waste the jury's time (Id.); that the JSA was created in June of 2011 a year after Appellant's injury and did not exist at the time of the injury (RP P27: L20-P28:L8); that the JSA did not say the hydraulic cross-key installer should be used but only **provides the steps if one elects to use it** (RP P29:L1-3); [26] and the JSA was not used in Pasco.[27] (RP P29: L4-6)

Although the BNSF Zone 1 JSA for the Hydraulic Cross Key Press was adopted in June 2011, development of the tool had been completed and it had been put into use in 2006, 4-5 years earlier. The tool **existed** and **pre-dated** McFarland's injury by 3-4 years, even though the BNSF JSA which, in effect, admitted the same tool constituted a viable alternative means for hydraulically, rather than manually, installing cross-keys was not formally adopted until after McFarland's injury. Under these circumstances,

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[25] On its face, Exhibit 14 indicated it was developed by the BNSF Zone 1 Safety Committee and former BNSF Manager Mike Blackwell, then **approved** by BNSF Manager Emery W. Connor (deceased) and also **approved** by Christopher M. Schilreff. Exhibit 14 had also been **reviewed** on March 3, 2012. **Nothing about Exhibit 14 indicated it was a mere draft or had not been put into use.**

[26] BNSF's contention that Exhibit 14, the JSA which BNSF convinced the trial court to exclude from evidence, provided steps on using the second generation Omega hydraulic cross key installer "**if one elects to use it**" clearly indicate in BNSF's counsel's words that the hydraulic cross key installer was a **viable alternative** to driving in cross keys with a sledge hammer.

[27] As made patently clear, BNSF decisions of whether to adopt or restrict the use equipment was typically made systemwide by the mechanical department, not locally.

BNSF's admission - in Exhibit 14 - **that BNSF considered the second generation hydraulic cross key installer, completed in 2006, to be a viable alternative to the sledge hammer for installing cross keys** was relevant whether BNSF's admission was published before or after McFarland's injury. None of the grounds raised by BNSF in its written motion in *limine*, at the hearing, or even in the TMR[28] support excluding this relevant evidence. The trial court erred and abused its discretion by excluding Exhibit 14.

C. BNSF'S OTHER CONTENTIONS.

9. The Trial Court Erred By Overruling Appellant's Motion For New Trial.

Contrary to BNSF's contentions, McFarland did address the trial court's order summarily overruling McFarland's motion for new trial in his opening brief. (See, pp. 6, 36-38) Similarly, McFarland's Motion for New Trial Pursuant to Rule 59 (CP 588-601), Exhibit I (CP 544-565), Exhibits A-L (CP 566-587), and McFarland's Memorandum of Law in Support of his Motion for New Trial Pursuant to Rule 59 (CP 534-543) were also all before this Court as part of the Clerk's Papers. However, since the substantive law issues presented in the motion for new trial were identical to those

[28] BNSF asserted only Evidence Rules 402, 403, 602, or 802 in the TMR. (CP 665)

briefed in under Points I and II in the Appellant's Opening Brief, and since Appellant had used his entire allotted 50 pages of brief in an effort to cogently present the evidence and legal arguments once, they were not repeated under a separate section addressing solely the motion for new trial.

10. The Jury Never Reached The Issue Of Medical Causation And, Therefore, Respondent BNSF's Contentions Concerning This Issue Are Immaterial To This Court's Decision.

BNSF's Brief has raised the issue of causation. (See, BNSF's Brief, pp. 12-13) Under the FELA, the decision concerning whether the railroad's negligence caused "in whole or in part" the worker's injuries is left entirely to the judgment of the jury if there is any evidence to support it. *See*, *CSX Transportation, Inc. v. McBride*, __ U.S. __, 131 S.Ct. 2630 (2011), *Sentilles v. Inter-Carribean Shipping Corp.*, 361 U.S. 107, 80 S.Ct. 173 (1959), *Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957). The causation issue is exclusively for the jury and not the court. The jury, however, in this case **did not reach** and **did not decide** "causation" in its special verdict. Consequently, BNSF's causation contentions are entirely beside the point and deserve no consideration in this Court's decision.

11. BNSF's Contentions That Evidence Of A Safer Way To Install Cross Keys With A Hydraulic Cross Key Installer Was Either Inadmissible Or Insufficient Are Without Merit.

In various sections of BNSF's Brief (*see*, e.g., pp. 33-38; 46-48) BNSF has again raised its contention that evidence concerning the second-generation Omega hydraulic cross key installer being an alternative piece of equipment/alternative method for installing cross keys was either irrelevant or insufficient. BNSF's contentions are entirely without merit.

First, BNSF has raised several contentions that have nothing to do with the trial of this case or this appeal. BNSF argues that "negligence is not presumed from the mere fact of an accident or injury", that the railroad need not provide and "absolutely safe or perfectly safe working environment", that no place of employment is free from danger, etc. (see, e.g., pp. 33-34) Such contentions were not issues in the trial court below, and are not issues in this Court. BNSF's abstract contentions simply have no connection to the trial or appeal of the instant case.

In addressing the legal significance of evidence that an alternative piece of equipment or alternative method was available to install cross keys, BNSF cites to and quotes from the Supreme Court's opinion in *Seeberger v. Burlington N. R. Co.*,

138 Wn.2d 815, 982 P.2d 1149 (1999) stating that a more suitable tool is irrelevant if the tool actually used has not been shown to be unsafe. (See, BNSF Brief, pp. 46-47) A key weakness in BNSF's argument, however, is that the cited and repeated quotation is *from the dissenting opinion* of Justice Madsen, who was on the losing side of a 6-1 vote. And indeed, the federal opinions cited by BNSF in its brief (e.g., *Soto*, *Stillman*; see BNSF Brief, pp. 35-36) are the same judicial opinions cited by Justice Madsen in his dissent.

BNSF's contentions to the contrary notwithstanding, the law has been clear since at least the United States Supreme Court's opinion in *Stone v. New York C. & St. L. R. Co.*, 344 US 407, 73 S.Ct. 358 (1953) that when there are two or more ways to perform a task, the employer railroad directs the task to be performed in one way (or fails to provide the employee the equipment/means to perform the task in the alternative manner), and complaints are made about the method/tools the employer has provided, then there is a jury case on employer negligence. As BNSF states in its brief, this case was submitted to the jury on that theory. However, nearly all the evidence the jury was allowed to hear about the second generation hydraulic cross key installer was that it was a prototype, it was still in development, it was

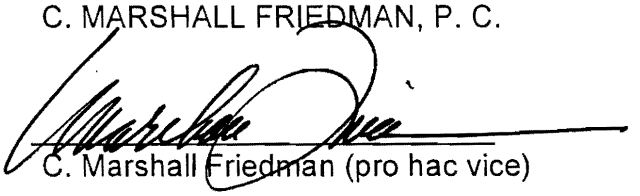
untested, BNSF could not get it to work, and even where it had been used it had been abandoned. The favorable evidence that would have helped establish that the second-generation hydraulic cross key installer was an effective piece of equipment (e.g., the testimony from witnesses Robert Russell, Ed Holm, Andrew Pillar, and Exhibit 14) was all excluded. As a consequence the jury received only a fragmentary view of the evidence skewed entirely in BNSF's favor. This was error for the reasons set forth above, and was prejudicial and reversible error.

CONCLUSION

For the reasons stated above, this Court should reverse the trial court and remand this case for trial.

Dated this 16th day of January, 2015.

C. MARSHALL FRIEDMAN, P. C.



C. Marshall Friedman (pro hac vice)

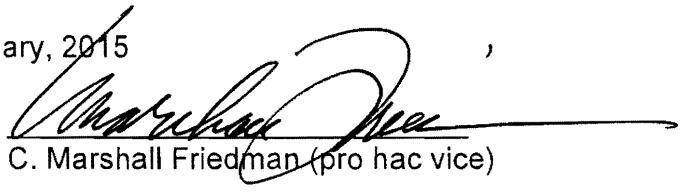
CERTIFICATE OF SERVICE

I, C. Marshall Friedman, hereby declare that I caused to be served a true and correct copy of the foregoing Reply Brief of Appellant, by first-class US Mail delivery, to all parties named below.

(1) Bradley Scarp, Esq., Kelsey E. Endres, Esq., Montgomery Scarp, PLLC, 1218 Third Avenue, Suite 2700, Seattle, Washington 98101, Attorneys for Defendant - Respondent BNSF Railway Company;

(2) William J. Flynn, Jr., Flynn Merriman McKennan PS, 8203 W., Quinault Ave., Suite 600, Kennewick, WA 99336-7128 formerly plaintiff's counsel

Dated this 16th day of January, 2015



C. Marshall Friedman (pro hac vice)