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SUPREME COURT
STATE OF WASHINGTON
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NO. 87343-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RECEIVED BY E-MAIL *[Signature]*

MARGIE (MEG) JONES,
as Guardian of MARK JONES,

Plaintiff/Respondent,

v.

CITY OF SEATTLE,

Defendant/Appellant

STATEMENT OF ADDITIONAL AUTHORITY

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 ORIGINAL

STATEMENT OF ADDITIONAL AUTHORITY

During oral argument, three Justices inquired about witness exclusion not as a discovery sanction, but under the Rules of Evidence. Justice Pro Tem Worswick first asked whether the witness exclusion was a *Burnet v. Spokane Ambulance* issue, or an ER 403 issue. Justice Gordon-McCloud followed up. Referring back to Justice Pro Tem Worswick's first question on this matter, Justice Stephens later asked whether Jones was arguing that Beth Powell, Gordon Jones, and Rose Winquist were properly excluded on some ground "independent" of *Burnet*. Justice Pro Tem Worswick then asked for citations to the record on this issue.

While Jones briefed this issue in her Answer to Petition for Review at pages 8-11, and in her Supplemental Brief pages 18-19, counsel referred generally to the excerpts provided yesterday, but failed to provide specific citations. Jones therefore provides the following specific citations both to the excerpts of the trial court's evidentiary rulings, and also to the appellate court opinion affirming those rulings, which are not challenged in this Court:

A. Excerpts of trial court rulings.¹

9/14 RP 109 – Beth Powell:

[referring to Powell's offer-of-proof deposition and *in limine* rulings on alcohol-use evidence] I need to look at the evidence myself. I'm not changing any rulings at this time. I have to take very seriously how late this witness was disclosed.

It's -- that is a really big problem, and so I'm trying to be fair to both sides, and I have to keep in mind the timing and I have to keep in mind the content, and those are the two things.

9/29 RP 23 – Beth Powell:

And I've already ruled that what she mostly wants to say has to do with alcohol, and yet she has virtually no personal knowledge, and what little information she has, even if it were admissible, does not appear to me to change the basic rationale that I have given for why post-accident use of alcohol, or to the extent she could say anything about pre-accident use of alcohol, would make it relevant.

9/29 RP 27-28: Gordon Jones:

. . . I'm sorry, but I cannot do that three weeks into the trial, especially given that I still haven't seen anything that suggests that the analysis I've already given as to the relevance or lack thereof of the alcohol history is changed by this . . .

9/30 RP 69 – Gordon Jones:

Time out. I have excluded him. They think -- and I just don't know how the testimony's going to come in, but I'm very concerned about him testifying, because he's such an

¹ These record excerpts were included in the materials provided to court and counsel on the day of argument.

explosive witness on all the other points. There's like 99 percent of the declaration's completely inappropriate.

10/08 RP 212 – Gordon Jones:

Wait a minute. Here's what I'm struggling with. If I'm going to treat him as a treater, then don't all the rules about you not being able to be in touch with him as a treater apply? I mean, you know, this is one of the reasons we have it both ways or not.

10/14 RP 11 – Gordon Jones:

[T]he defense has never -- had never named him as a witness, didn't interview him until after the trial began, now wants to call him in his capacity as a treater, when if he was going to be considered a treater, the defense couldn't have talked to him in the first place . . .

B. Excerpts of appellate court holdings.

Unpublished Opinion at 32:

The trial court gave an additional reason, beyond that of untimely disclosure, for excluding Powell's testimony—much of that testimony concerned Mark's purported use of alcohol, evidence which the trial court had already determined to be inadmissible. Thus, the exclusion of Powell's testimony was also warranted based upon the trial court's prior ruling excluding alcohol-use evidence. This basis for exclusion is independent of the City's conduct in failing to disclose Powell.

The trial court properly exercised its broad discretion in excluding Powell's testimony. In so ruling, the court relied upon voluminous briefing and extensive oral argument. Moreover, the court judiciously ordered the parties to depose Powell prior to its ruling, such that it could ensure a sound basis for that ruling. Powell's testimony was properly excluded based upon both the late disclosure of Powell as a witness and the content of her expected testimony. The trial court did not err by so ruling.

See also Unpub. Op. at 29.

Unpublished Opinion at 38-39:

Notwithstanding the propriety of the trial court's exclusion of Gordon's testimony based upon the highly irregular and prejudicial manner in which he was disclosed, the trial court set forth an independent reason for such exclusion—yet again, the majority of the City's proffered testimony concerned Mark's alleged alcohol use. As the trial court had already ruled multiple times, the City had not demonstrated that evidence of Mark's alcohol use was relevant to this litigation. Moreover, Gordon's testimony in particular was highly "explosive," given that he was expected to testify regarding familial conflicts resulting from Mark's alleged alcohol use. The trial court's exclusion of Gordon's testimony on this alternative basis was itself a proper exercise of that court's discretion.

The trial court did not abuse its broad discretion in excluding the testimony of Gordon Jones, a witness first disclosed by the City three weeks into trial, based upon the numerous grounds for exclusion set forth by the court.

RESPECTFULLY SUBMITTED this 11th day of June,
2013.

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CERTIFICATE OF SERVICE BY MAIL

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Subject: 87343-7 Jones v. City of Seattle - Statement of Additional Authority

STATEMENT OF ADDITIONAL AUTHORITY

Case: *Jones v. City of Seattle*

Case Number: 87343-7

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Thank you!

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