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SUPREME COURT OF
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STATE OF WASHINGTON

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

Plaintiff/Respondent,

v.

CITY OF SEATTLE,

Defendant/Petitioner

PETITIONER'S ANSWER TO MEMORANDUM OF *AMICUS CURIAE*
WASHINGTON DEFENSE TRIAL LAWYERS

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TABLE OF CONTENTS

I. SUMMARY OF ANSWER.....1

II. ANSWER.....2

 A. The Trial Court Did Not Engage in *Burnet* Balancing, Which is Based on the Presumed Admissibility of the Witness. The Court Instead Felt Free to Exclude the City’s New Witnesses Solely Because the City Did Not Satisfy a Local Rule “Good Cause” Showing Requirement that Presumes the Witness is Not Admissible, and Which Therefore Conflicts with *Burnet*.....2

 B. The Decision to Deny a New Trial in This Case Effectively Requires a Party That Has No Obligation Under *Kurtz* and *Praytor* to Conduct Any Pre-Trial Surveillance, But Nevertheless Chooses to Do So, To Uncover Evidence Contradicting Clear and Unambiguous Discovery Responses Before Trial or Risk Later Being Denied a New Trial for a Supposed Lack of Diligence -- Even When All of the Other Requirements for a Grant of a New Trial Under CR 60(b)(3) Have Been Satisfied.....5

III. CONCLUSION.....7

TABLE OF AUTHORITIES

Washington Cases	<u>Page</u>
<i>Barci v. Intalco Aluminum Corp.</i> , 11 Wn. App. 351, 522 P.2d 1159 (1974).....	2
<i>Blair v. TA-Seattle East No. 176</i> , 150 Wn. App. 904, 210 P.3d 326 (2009).....	2
<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484, 933 P.2d 1036 (1997).....	1, 2, 3, 4
<i>Kurtz v. Fels</i> , 63 Wn.2d 871, 389 P.2d 659 (1964).....	1, 5, 6
<i>Praytor v. King County</i> , 69 Wn.2d 637, 419 P.2d 797 (1966).....	1, 5, 6
Statutes and Court Rules	
CR 60.....	1
CR 60(b)(3).....	1, 5, 6
King County Local Rule 4.....	2, 3, 4

I. SUMMARY OF ANSWER

WDTL has correctly focused on why this Court needs to grant review.

1. BURNET Balancing and Local Rules. The trial court felt free to disregard case law balancing requirements in the name of enforcing a local rule. It is time for this Court to state, clearly and unequivocally, that local rules may not be used to circumvent this Court's requirements, established by this Court's decision in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), for excluding evidence as a sanction for failing to comply with a case management order deadline.

2. CR 60(b)(3) and Due Diligence. The trial court denied the City a new trial for a supposed lack of due diligence in conducting pre-trial surveillance, even though Meg and Mark's discovery responses clearly and unambiguously represented Mark as physically and mentally debilitated, and even though under this Court's decisions in *Kurtz v. Fels*, 63 Wn.2d 871, 389 P.2d 659 (1964), and *Praytor v. King County*, 69 Wn.2d 637, 419 P.2d 797 (1966), there is no duty to conduct any surveillance when discovery responses are clear and unambiguous. In upholding the trial court's decision, the Court of Appeals effectively requires that a party who initiates pre-trial surveillance, even though that party is under no obligation to do so, must uncover evidence contradicting clear and unambiguous discovery responses, or risk later being denied a new trial because of a supposed lack of diligence in its pre-trial surveillance efforts. Nothing in this Court's CR 60 jurisprudence supports such a result.

II. ANSWER

A. The Trial Court Did Not Engage in *Burnet* Balancing, Which is Based on the Presumed Admissibility of the Witness. The Court Instead Felt Free to Exclude the City's New Witnesses Solely Because the City Did Not Satisfy a Local Rule "Good Cause" Showing Requirement that Presumes the Witness is Not Admissible, and Which Therefore Conflicts With *Burnet*.

WDTL correctly recognized that the trial court did not engage in *Burnet* balancing because the court believed it was entitled to resolve the issue of the new witnesses under King County Local Rule 4, without engaging in *any* sort of balancing required by the case law.

The record is *crystal clear* on this point. On September 29, 2009, the trial court stated:

[W]e're trying to implement -- the King County local rules here [T]he *Barci* case doesn't address the local rules.

RP (9/29/09-A) 13. The "*Barci* case" is Division One's decision in *Barci v. Intalco Aluminum Corp.*, 11 Wn. App. 351, 522 P.2d 1159 (1974), whose multi-factor balancing test for excluding late-disclosed witnesses foreshadowed Chief Justice Alexander's multi-factor balancing test adopted by this Court in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). As for *Burnet* itself, the trial court did not mention that decision because the court obviously regarded the -- as yet unreversed -- decision of the Court of Appeals in *Blair v. TA-Seattle East No. 176*, 150 Wn. App. 904, 210 P.3d 326 (2009), to be (as the Court of Appeals stated in its decision here) the "controlling appellate authority" on whether *Burnet* balancing applied.

The Court of Appeals stated, and Meg asserts, that the trial court did conduct on-the-record *Burnet* balancing. But if this Court reviews the record citations offered by the Court of Appeals and Meg to support this contention, this Court will find that the trial court was not engaged in *Burnet* balancing ***but in justifying its decision under King County Local Rule 4.***

King County Local Rule 4 establishes a *presumption* of exclusion for any witness not named in the final trial witness and exhibit list every party is required to serve before trial. The rule then imposes on the party seeking relief from that presumption of exclusion the burden to show “good cause” for why the witness was not named in that party’s final list. In the portions of the record cited by the Court of Appeals and Meg, the trial court was explaining why the City had not met its Local Rule 4 burden to show good cause for not listing Investigator Winquist, Beth Powell, or Gordon Jones on its final witness list. The trial court’s references to “trial by ambush” were *not* a finding of willfulness on the part of the City under *Burnet*; they were references to *Local Rule 4’s goal of preventing* trial by ambush, and the rule’s *presumption* that allowing a party to call a witness not named on the list creates the *risk* of such an ambush. Similarly, the trial court’s references to “prejudice” were *not* a finding of “substantial prejudice” under *Burnet*; they were references to how Meg and Mark would be prejudiced -- how their case would be made more difficult -- if they were required to respond to witnesses they had previously assumed they would not have to face, because they were not on the City’s final witness list.

And therein lies the problem addressed by WDTL. Whereas *Burnet* and its progeny establish a presumption *in favor of allowing* a late-designated witness unless the record affirmatively establishes a proper basis for exclusion under the three *Burnet* factors, King County Local Rule 4 reverses that presumption *to create one in favor of exclusion*. Moreover, whereas *Burnet* and its progeny bar excluding the witness unless a *willful* violation of a case management deadline has been established, King County Local Rule 4 requires the party seeking relief to establish “good cause” for not naming the witness on its final witness list, before relief will be granted from the rule’s presumption of exclusion.¹

It is hornbook Washington civil procedure law that a local rule cannot displace the rights granted under the Civil Rules. *Burnet* balancing is a requirement imposed by this Court under the Civil Rules, and the trial court in this case erred in presuming to disregard this Civil Rule balancing requirement in favor of a local rule procedure that is at odds with that requirement. It is time for this Court to seize the opportunity presented by this case and declare that, however much a Superior Court may prefer to favor the imperatives of case management, local rules may not be used to effect such a policy in derogation to the contrary course that has been so clearly charted by this Court since Chief Justice Alexander’s opinion for this Court in *Burnet*.

¹ Moreover, as applied by the trial court in this case, the “good cause” showing requirement effectively became a requirement that the City prove it would have been *impossible* for it to have developed the evidence of these witnesses before the close of discovery, as well as by the time of the deadline for the final listing of witnesses under Local Rule 4. CP 7815 (letter ruling order denying post-trial motions at 6). The resulting conflict with *Burnet* could not be clearer.

B. The Decision to Deny a New Trial in This Case Effectively Requires a Party That Has No Obligation Under *Kurtz* and *Praytor* to Conduct Any Pre-Trial Surveillance, But Nevertheless Chooses to Do So, To Uncover Evidence Contradicting Clear and Unambiguous Discovery Responses Before Trial or Risk Later Being Denied a New Trial for a Supposed Lack of Diligence -- Even When All of the Other Requirements for a Grant of a New Trial Under CR 60(b)(3) Have Been Satisfied.

The WDTL correctly apprehends the disturbing implications of denying the City's request under CR 60(b)(3) for a new trial on damages.

To begin -- and contrary to the accusations of "misrepresentation" leveled by the Court of Appeals and Meg -- the record shows that Meg and Mark gave clear and unambiguous responses during discovery regarding Mark's damages. The record cited by the City in its Petition and in its briefing to the Court of Appeals shows *conclusively* that, in responding to the City's discovery requests during the Winter of 2008, both in writing and at deposition Meg and Mark clearly and unambiguously described Mark as physically and mentally disabled; *and* that this picture painted in discovery was the same picture later painted for the jury. *See* Petition at 3-6; Opening Brief at 13-18.² Accordingly, under this Court's decisions in *Kurtz v. Fels*, 63 Wn.2d 871, 389 P.2d 659 (1964), and *Praytor v. King County*, 69 Wn.2d 637, 419 P.2d 797 (1966), the City had no obligation to conduct any investigation, and the trial court therefore should have been

² That record includes the videotape of Mark's deposition given in March 2008, and which this Court may review via the hyperlinked Corresponding Briefing contained on the "Flashdrives" submitted to the Court of Appeals, copies of which are on file with the Clerk's Office. Mark's presentation at that deposition, and Meg's confirmatory testimony at her deposition that same month, painted a clear and unambiguous picture of a Mark Jones devastated physically and mentally by his fall down the fire station pole hole. *See* Ex. Sub. No. 466D (video deposition of Mark Jones, March 2008); CP 157, 165 & 172 (deposition testimony of Meg Jones regarding her brother's debilitated condition).

reversed for denying a new trial because of a supposed lack of diligence in conducting an investigation when no such investigation was required in the first place, and when all of the other elements for a new trial under CR 60(b)(3) had been satisfied.

The Court of Appeals' decision to instead affirm the trial court effectively requires that defendants, who chose to conduct an investigation simply to verify clear and unambiguous discovery responses, *must not fail to uncover evidence contradicting those responses*. For if they don't uncover such evidence, and a trial court later decides they didn't try hard enough and denies a motion for new trial under CR 60(b)(3) on that basis alone, the Court of Appeals will feel free to uphold that decision as "within the trial court's discretion." If that is now to be the law of Washington, then defendants, especially in cases involving a major damages claim where an effort to verify is a matter of simple prudence, will have no choice but to engage in relentless around-the-clock pre-trial surveillance. Reliance on unambiguous discovery responses will go by the boards; distrust and all that flows from such distrust will become the order of the day, and the risk of invasions of privacy will multiply. Such an outcome is flatly at odds with the rule of *Kurtz* and *Praytor*, yet as the WDTL ably points out, it follows ineluctably from the decisions of the trial court and the Court of Appeals in this case.

III. CONCLUSION

WDTL has correctly highlighted why review should be granted,
and on both issues raised by the City in its Petition for Review.

RESPECTFULLY SUBMITTED this 23rd day of July, 2012.

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

Plaintiff/Respondent,

vs.

CITY OF SEATTLE,

Defendant/Petitioner.

CERTIFICATE
OF SERVICE

I, Patti Saiden, hereby declare as follows: I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, and not a party to nor interested in this action. On July 23, 2012, I caused to be delivered a copy of *Petitioner's Answer to Memorandum of Amicus Curiae Washington Defense Trial Lawyers and Certificate of Service* on the following parties *via Electronic Mail and United States Mail*:

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- *Petitioner's Answer to Memorandum of Amicus Curiae Washington Defense Trial Lawyers; and*
- *Certificate of Service.*

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