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No. 65062-9-1
(consolidated with No. 66161-2-1)

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

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

Respondent,

v.

CITY OF SEATTLE,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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INTRODUCTION

The City's brief is not a Supplemental Brief about ***Blair v. TA-Seattle E. No. 176***, 171 Wn.2d 342, 254 P.3d 797 (2011) ("***Blair II***"). It is a second reply brief on the City's argument that the trial court impermissibly excluded the City's late-disclosed witnesses, Rose Winqvist, Beth Powell, and Gordon Jones. The City reargues this issue for ten pages, spending comparatively little time on ***Blair II***. Compare Supp. Br. at 4-14 and at 1-4. The RAPs do not permit re-argument of factual issues in the guise of supplemental briefing on new legal authority.

Legally, ***Blair II*** adds little to this case that the parties have not already addressed at length under the cases ***Blair II*** reaffirms – ***Mayer v. Sto Indus., Inc.***, 156 Wn.2d 677, 688, 132 P.3d 115 (2006) and ***Burnet v. Spokane Ambulance***, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997)). BA 47-56; BR 52-53; Reply 6-9, 14-17. Factually, ***Blair II*** is nothing like this case.

And the City misrepresents Jones' discussion of ***Blair v. TA-Seattle E. No. 176***, 150 Wn. App. 904, 210 P.3d 326 (2009) ("***Blair I***"), which was limited to an issue that ***Blair II*** did not reach. Supp. Br. at 2-3. ***Blair II*** adds little to the analysis and does not permit the City to repeat factual arguments from its 158 pages of briefing.

ARGUMENT

A. *Blair II* is factually inapposite and adds little to the legal issues already discussed at length.

Blair II holds that a trial court must create a record sufficient for appellate court review when it imposes a severe sanction, such as striking a witness. *Blair II*, at 348. ““The record must show three things – the court’s consideration of a lesser sanction, the willfulness of the violation, and substantial prejudice arising from it.”” *Id.* at 348 (quoting *Mayer*, 156 Wn.2d at 688 (relying on *Burnet*, 131 Wn.2d at 494)). As the City puts it, *Blair II* simply “reaffirms” *Burnet*. Supp. Br. at 1. As such, *Blair II* adds no new legal analysis to this case. *Infra*, Argument B. It is a reiteration of *Burnet*, discussed at length already. BA 47-56, BR 52-53, Reply 14-17.

Jones argued that *Burnet* is inapposite, where the discovery sanction – dismissing a claim – was levied under CR 37(b)(2), not, as here, under KCLR 26. BR 52-53. *Blair I* had nothing to do with Jones’ argument on this point. *Id.*

The City had every opportunity to respond in its Reply Brief, and did so. Reply 9-10, 15 n.10. Although *Blair II* did not address a similar argument, it held that *Burnet* applies in the context of a sanction issued under KCLR 26. The Supplemental Brief spends

one paragraph on this point. Supp. Br. at 3-4. **Blair II** is not an excuse to write a second reply brief rehashing factual issues that the City already addressed at length.

Factually, **Blair II** is nothing like this case. It involved a series of pre-trial motions and orders, during which the trial court struck many of Blair's witnesses, including her only medical experts. **Blair II** at 346-47. These sanctions resulted in a summary judgment order dismissing Blair's case, as she could not prove causation without her medical experts. *Id.* at 347.

But there was nothing in the record showing the trial court's consideration of the **Burnet** factors (*id.* at 348):

Neither of the trial court's orders striking Blair's witnesses contained any findings as to willfulness, prejudice, or consideration of lesser sanctions, nor does the record reflect these factors were considered. For example, there was no colloquy between the bench and counsel. There was no oral argument before the trial court entered its orders, and the orders themselves contain bare directives.

By providing no record for review, the Supreme Court held that the trial court abused its discretion under **Burnet** and **Mayer**, *supra*. *Id.* In contrast, our record reveals lengthy colloquy and argument, including Judge Craighead's sound rationale for excluding the City's late-disclosed witnesses. *Infra*, Argument § D.

B. The City grossly misstates Jones' discussion on *Blair I* in the Response Brief.

Exacerbating its sandbagging, the City repeatedly states that Jones cited *Blair I* for an unspecified point of law that the Supreme Court reversed. Motion at 2, 3; Supp. Br. at 3-4. This is patently false. BR 65-66. Jones discussed *Blair I* for one point only – that the City did not timely disclose Gordon Jones simply by reserving the right to call Jones' witnesses. BR 65-66 (citing *Blair I*).¹ This is also the only point on which the City discussed *Blair I*. BA 55 n.46; Reply 17 n.14.

Contrary to the City's assertion, the Supreme Court did not address this point, as the City belatedly acknowledges in a footnote. Compare Supp. Br. at 3 and at 12 n.9 (citing *Blair II* at 351 n.4). The City's suggestion that Jones' discussion of *Blair I* supports the City's motion to supplement is as meritless as it is dishonest.

¹ *Blair I* was not Jones' only authority on this point, or even her primary authority. BR 65-66. Rather, Jones relied primarily on this Court's decision in *Allied Fin. Servs. Inc. v. Mangum*, raising *Blair I* only for its agreement with *Allied*. *Id.* (citing 72 Wn. App. 164, 168, 864 P.2d 1, 871 P.2d 1075 (1993)). In any event, this Court's decision in *Blair I* is still good law on this point, where *Blair II* did not address this issue. 171 Wn.2d at 351 n.4; see *Ambach v. French*, 167 Wn.2d 167, 173, 216 P.3d 405 (2009).

C. The City uses *Blair II* as an excuse to rehash factual arguments the City already extensively addressed in 158 pages of briefing.

The City's first heading says it all – ***Blair II*** “reaffirms” ***Burnet***. Supp. Brief at 1. It is telling that the City relies not on ***Blair II***, but on other cases discussing ***Burnet*** – the same cases the City discusses in its opening brief and Reply. *Id.* at 5.

In fact, the Supplemental Brief is not really about ***Blair II***. The City spends most of its brief rehashing its arguments on the exclusion of late-disclosed witnesses. Supp. Br. at 4-14. A supplemental brief is not a second – very late – reply brief, and the City's briefing is abusive. Jones has already disposed of the City's late-disclosed-witness arguments, so will not waste this Court's time by restating her position. See BR 50-71.

When the City is not rehashing factual issues, it attacks Judge Craighead, arguing that her mismanagement of this matter explains her failure to address the ***Burnet*** factors. Supp. Br. at 5-6 & 6 n.5. Judge Craighead had complete command of this case and these rulings. BR 54-71 (citing and discussing 09/11 RP 115-16, 147-48; 09/23 RP 23; 09/29 RP 22, 25, 27-28; 09/30 RP 64, 67-72; 10/08 RP 215; 10/14 RP 11-13, 17). The record reveals her careful consideration of willfulness, prejudice, and lesser sanctions. *Id.*

This is all that *Blair II*, *Burnet*, and *Mayer* require. Judge Craighead need not use “magic words” referencing the *Burnet* factors – nor did the City ask her to.

D. The City’s harmless error argument ignores Judge Craighead’s careful treatment of the excluded witnesses.

This Court is not being asked “to consider the facts in the first instance” – again, Judge Craighead carefully considered willfulness, prejudice, and lesser sanctions on the record. *Compare* Supp. Br. at 3, 13 *with* BR 54-71 (citing and discussing 09/11 RP 115-16, 147-48; 09/23 RP 23; 09/29 RP 22, 25, 27-28; 09/30 RP 64, 67-72; 10/08 RP 215; 10/14 RP 11-13, 17). Her decisions were thoughtful and cautious. *Id.* At times, her careful consideration included exhaustive colloquy with counsel, spanning several days. *Id.* Her sound reasoning is abundantly clear on the record. *Id.*

E. This Court should not permit the City to file a reply.

Regardless of whether this Court grants the City’s motion, the City accomplished its objective, sandbagging Jones with a Supplemental Brief. This brings the City to 173 pages of briefing. That is more than enough.

CONCLUSION

The City's Supplemental Brief is not about *Blair II*, which has little to do with this case. The City uses *Blair II* as an excuse to repeat arguments about Judge Craighead's rulings excluding the City's late-disclosed witnesses. Judge Craighead's rulings were careful and correct, as the record plainly reveals.

RESPECTFULLY SUBMITTED this 29th day of
September, 2011.

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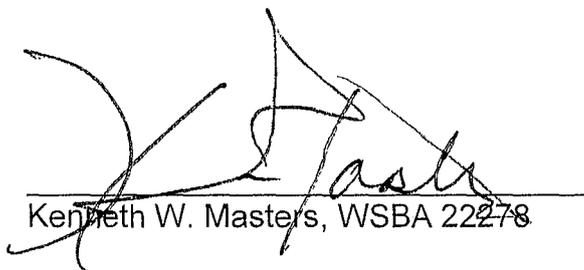
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