NO. ~~66917-2~~-I 69917-2

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

MICHAEL FARROW and LIDIA FARROW,

Appellants/Plaintiffs,

v.

FLOWSERVE USA, Inc.,

Respondent/Defendant.

Appeal from the Superior Court of Washington
for King County
Cause No. 08-2-07177-4 SEA)

APPELLANTS/PLAINTIFFS' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

On December 19, 2013, the Panel ordered supplemental briefing on the following issue:

> 1. In the event that the panel determines that the trial court excluded the deposition testimony of deceased witness Melvin Wortman at least in part because it determined that plaintiff had violated a local court rule or local order of general applicability to all asbestos cases, what is the effect of the Supreme Court's decision in *Jones v. City of Seattle*, -- Wn.-- (December 12, 2013)(and authority cited therein), on the propriety of the trial court's ruling?

The short answer is that *Jones v. City of Seattle*, -- Wn.-- (December 12, 2013) (and authority cited therein) does not support the propriety of the trial court's ruling. Rather, it supports Appellants' ("plaintiffs") position in this appeal. The longer answer follows.

II. THE TRIAL COURT'S ORAL RULING SPECIFICALLY RELIED AT LEAST IN PART ON A KING COUNTY "LOCAL COURT RULE OR LOCAL ORDER OF GENERAL APPLICABILITY TO ALL ASBESTOS CASES"

At page 19 of the January 7, 2013 hearing in this case, the trial court stated that in an earlier motion in the case he had agreed with Ms. Dinsdale (counsel for another defendant) on her "King County local rules" argument. The trial court (a) specifically referred to the argument that plaintiffs' counsel did not note the Wortman deposition "properly under the King County local rules," and (b) stated "that was one of the bases – several bases on which the court granted Ms. Dinsdale's [defendant's

counsel] motion." (Emphasis added.) At page 30 of the same transcript, the trial court ruled against plaintiffs, stating:

> Mr. Aliment's renewed motion for summary judgment is not only as he's renewed it, but he's basically saying, "Give me summary judgment for the same reason you gave Ms. Dinsdale," and the basis for Ms. Dinsdale's motion was, number one, defects in the case law and, number two, defects in the style order local rules.
>
> So, long story short, the motion to strike the Wortman deposition is granted. That the motion being granted, there are no genuine issues of material fact remaining. (Emphasis added.)

Plaintiffs argued at page 39 of their Opening Brief that defendant's and the trial court's interpretation of the King County Asbestos Order "style order local rules" was inconsistent with ER 804(b)(1) and was in conflict with the Washington Rules of Evidence:

> Under defendant's and the trial court's interpretation of the King County Asbestos Order, plaintiffs in asbestos litigation in King County could comply completely with ER 804(b)(1) and still have prior testimony which complied with ER 804(b)(1) excluded because another plaintiff who did not note the deposition and did not know what questions would be asked failed to issue a pre-deposition statement to scores of non-parties. That not only is inconsistent with [ER] § 1101, but would permit a trial judge to issue orders which bar the use of ER 804(b)(1) in numerous cases even before the judge knew any of the facts of the particular case. That is not only an unsupportable interpretation of the King County Asbestos Order, but puts the Order in conflict with the Washington Rules of

Evidence adopted by the Washington Supreme Court. (Emphasis added.)[1]

III. *JONES v. CITY OF SEATTLE* SUPPORTS PLAINTIFFS' POSITION

The holding in *Jones v. City of Seattle* is dispositive on the issue of the interplay between an Evidence Rule and a local court rule: the evidence rule adopted by the Supreme Court is controlling. The court in *Jones* considered the very similar issue of the relationship between a King County Local Rule and Civil Rules 26 and 37 as interpreted by cases such as *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997) and *Blair v. Ta-Seattle East No. 176,* 171 Wn.2d 342, 254 P.3d 797 (2011). The Supreme Court in *Jones* held that "local rules may not be applied in a manner inconsistent with the civil rules":

> The trial court excluded testimony by Powell and Gordon based on KCLR 4 and 26. These rules creates a presumption that late-disclosed witnesses will be excluded absent "good cause." KCLR 4(j), 26(k)(4).[11] *Burnet* and its progeny require the opposite presumption: that late-disclosed testimony will be admitted absent a willful violation, substantial prejudice to the nonviolating party, and the insufficiency of sanctions less drastic than

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[1] Defendant argued against this at page 24 of Respondent's Brief:

> The style notice procedure does not conflict with ER 804(b)(1). Rather, it works in tandem with ER 804(b)(1) by providing a mechanism through which a deposition can be used in multiple cases while simultaneously ensuring that litigants have a full and fair opportunity to examine a witness before his testimony can be offered against them.

Plaintiffs also dispute that defendant or the trial court correctly interpreted Section 5.6(d)(7) of the King County Asbestos Order for reasons set forth at pages 34-38 of plaintiffs' Opening Brief. If, however, this Court agrees with defendant's interpretation of that subsection, then such subsection is inconsistent with ER 804(b)(1).

> exclusion. *Mayer*, 156 Wn.2d at 688; *Burnet*, 131 Wn.2d at 494.
>
> The local rules may not be applied in a manner inconsistent with the civil rules, and they are therefore subordinate to this Court's holding in *Burnet*.

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[11] KCLR 4(j) provides that "[a]ny witness or exhibit not listed [in accordance with Case Schedule deadlines] may not be used at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires." KCLR 26(k)(4) provides that "[a]ny person not disclosed in compliance with this rule [and the Case Schedule] may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires."

Slip Op., pp. 24-25 (emphasis added). Both the Civil Rules (CR) at issue in *Jones* and the Rules of Evidence (ER) at issue in the instant case were adopted by the Washington Supreme Court.

The inconsistency between KCLR 26(k)(4) and CR 26 and 37 as interpreted by the Supreme Court in *Jones* was that testimony of witnesses was excluded under the local rules for lack of good cause for a late disclosure even though such evidence should not have been excluded under CR 26 and 37, because the trial court did not make the requisite findings under the Supreme Court's interpretation of the civil rules. For example, in *Jones,* the trial court excluded witness Powell's testimony because the City did not demonstrate good cause for not having "discovered the witnesses sooner." Slip Op., p. 27. However, the trial court was required but failed to, find that the City's conduct was "willful," which was required under CR 26 and *Burnet* to justify the witnesses'

exclusion. *Id.*[2] The Supreme Court held such exclusion based on the local rule was error.

The same problem exists in this case. The trial court stretched a rule adopted by King County Superior Court for a particular situation in the asbestos litigation to override a rule of evidence adopted by the Supreme Court. The rule does not apply here, but even if it did, a set of rules adopted in a Superior Court judge can never act to supersede an evidence rule and the case law interpreting it.

Pursuant to ER 804(b)(1), under some circumstances a deposition may be used against a party even though the party was not given notice of the deposition, was not a party in the case in which the deposition was held, and was not present at the deposition. That is the interpretation of ER 804(b)(1) by the Washington Court of Appeals in *Acord v. Pettit*, 174 Wn. App. 95, 302 P.3d 1265 (2013), as well as by federal appellate courts from the Third, Fourth, Sixth, Eighth and Tenth Circuits.[3] All of those circuits interpret "predecessor-in-interest" as that term is used in 804(b)(1) not to require privity between the entities. Rather, all of those courts hold that a predecessor-in-interest includes a party not present at the deposition

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[2] It then held that the error was "harmless. *See Jones* Slip Op., p. 17.

[3] *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179, 1185 (3d Cir. 1978); *Horne v. Owens-Corning Fiberglas Corp.*, 4 F.3d 276, 283 (4th Cir. 1993); *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 126-27 (4th Cir. 1995); *Clay v. Johns-Manville Sales Corp.*, 722 F.2d 1289, 1294-95 (6th Cir. 1983); *Dykes v. Raymark Industries, Inc.*, 801 F.2d 810, 817 (6th Cir. 1986); *Azalea Fleet, Inc. v. Dreyfus Supply & Machinery Corp.*, 782 F.2d 1455, 1461 (8th Cir. 1986); *O'Banion v. Owens-Corning Fiberglas Corp.*, 968 F.2d 1011, 1015 (10th Cir. 1992).

having a similar motive and opportunity to develop the testimony about the same material facts.

The great weight of authority is thus against defendant's insistence that it was necessary for it to have been at the Wortman deposition in order for the deposition to be admitted against it. For example, in *Acord,* 174 Wn. App. at 105-106, the court affirmed admission pursuant to ER 804(b)(1) of Fred Chandler's deposition against defendants even though that deposition was taken in a 1996 case brought by the Acords against a different adjacent land owner. The defendants in *Acord v. Pettit* were not a party to that earlier case, were given no notice of the Chandler deposition, and did not attend the Chandler deposition. The Court of Appeals relied on both federal[4] and Washington cases[5] in interpreting ER 804(b)(1) to permit admission of Mr. Chandler's deposition because the Pettits had a substantially similar motive and interest in questioning Mr. Chandler as did the defendants in the 1996 lawsuit. 174 Wn. App. at 105-106. Only the dissent in *Acord*, citing a few district court cases, agreed with the position taken by Flowserve that a different entity with a substantially similar interest and motive can never satisfy the requirements of ER 804(b)(1).

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[4] *Clay v. Johns–Manville Sales Corp.*, 722 F.2d at 1295; *United States v. DiNapoli*, 8 F.3d 909, 912 (2d Cir.1993).

[5] *State v. King*, 113 Wn. App. 243, 292, 54 P.3d 1218 (2002); *State v. Whisler*, 61 Wn. App. 126, 135, 810 P.2d 540 (1991)

The holding in *Jones* is that the Superior Court cannot override a rule adopted by the Supreme Court by adopting an inconsistent local rule any more than it could decide not to apply that rule in an individual's case. Since both CR 26 and 37 and ER 804(b)(1) were adopted by the Supreme Court, the logic of *Jones* means that the King County Asbestos Order "may not be applied in a manner inconsistent with [ER 804(b)(1)]"[6] as interpreted by the Washington Appellate Courts. The trial court's Order that excludes the Wortman deposition for violation of the King County Asbestos Order when it would be admitted pursuant to ER 804(b)(1) is inconsistent with *Jones* and should be overturned.

IV. *STATE V. CHAVEZ* AND GR 7 ALSO SUPPORT PLAINTIFFS' POSITION ABOUT THE LOCAL RULE

Jones relied, *inter alia*, on *State v. Chavez*, 111 Wn.2d 548, 761 P.2d 607 (1988), which in turn relied, *inter alia,* on GR 7. GR 7 supports plaintiffs' position. It states that "[a]ll local rules shall be consistent with rules adopted by the Supreme Court." The King County Asbestos Style Order as interpreted by the trial court is not consistent with 804(b)(1), for the reasons discussed above.

Similarly, in *State v. Chavez*, 111 Wn.2d at 554, the Supreme Court stated:

> In promulgating and amending local court rules governing practice and procedure, superior courts must follow the guidelines set forth by this court in CR 83 and

[6] *Jones* Slip Op., p. 25.

> GR 7. CR 83 contains three requirements. First, the adoption or amendment of a local rule must be made by action of the majority of the court. Second, the local rule must not be inconsistent with the general rules of procedure as established in the Official Rules of Court that govern all superior courts in this state. (Emphasis added.)

As explained above, a local rule inconsistent with the Rules of Evidence, can no more lead to exclusion of evidence admissible pursuant to those Rules, than a local rule, inconsistent with the Civil Rules, can properly exclude the testimony of witnesses admissible pursuant to the Civil Rules.

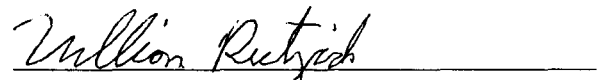
V. CONCLUSION

For the foregoing reasons, as well as reasons previously discussed, the Superior Court's judgment against plaintiffs should be reversed and plaintiffs claim against Flowserve be remanded for trial.

DATED at Seattle, Washington, this 8th day of January, 2014.

Respectfully Submitted,

SCHROETER, GOLDMARK & BENDER



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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

MICHAEL FARROW and LIDIA FARROW, Plaintiffs, v. ALFA LAVAL, INC., et al., Defendants.	NO. 69917-2-1 DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington as follows:

1. I am an employee of Schroeter Goldmark & Bender, over the age of 18, not party to this action and competent to make the following statements:

2. **On January 8, 2014**, the original and one copy of Appellant's Brief was filed with the Court of Appeals of the State of Washington, Division I and copies served upon the attorney of record for the

defendant/respondent by having said copies sent via messenger, postage prepaid to the office address below:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 8th day of January 2014.

NONA FARLEY