69917-2
NO. ~~66917-2~~-1

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

MICHAEL FARROW and LIDIA FARROW,

Appellants/Plaintiffs,

v.

FLOWSERVE US INC.,
solely as successor to EDWARD VALVES, INC.,

Respondent/Defendant.

Appeal from the Superior Court of Washington
for King County
(Cause No. 08-2-0717704 SEA)

SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES **PAGE(S)**

STATE RULES

I. SUPPLEMENTAL QUESTION PRESENTED FOR REVIEW

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.2d __, __ P.3d__, 2013 WL 6504364 (December 12, 2013) (and authority cited therein), on the propriety of the trial court's ruling?

II. ARGUMENT

In *Jones v. City of Seattle*, __ Wn.2d __, the Washington Supreme Court held that where a local rule and a superior rule conflict, the superior rule governs. *Id* at ¶ 47. That holding is entirely consistent with the trial court's decision to exclude Mr. Wortman's prior deposition testimony under Washington Rules of Evidence 804(b)(1) and the King County Asbestos Order Rules ("KC Asbestos Rules"). As explained in the opening brief of Flowserve US Inc., solely as successor to Edward Valves, Inc. ("EVI"), these rules do not conflict. They work in tandem to provide an efficient mechanism through which depositions can be used in multiple cases involving different parties while simultaneously ensuring that all litigants have a full and fair opportunity to examine witnesses before their

testimony can be admitted. The trial court's ruling was correct before *Jones* and remains correct today.

A. In *Jones v. City of Seattle*, the Supreme Court held that where a local rule and a superior rule conflict, the superior rule governs.

In *Jones*, a firefighter was severely injured after he fell fifteen feet through a fire station "pole hole" and sued the city of Seattle for damages alleging that it was negligent in failing to block the door to the fire pole. After the discovery cutoff and after trial began, the city attempted to call three previously undisclosed witnesses to support its theory that the firefighter was an alcoholic and that his alcoholism was compromising his recovery. The trial court excluded the testimony of all three witnesses based on its interpretation of King County Local Rules 4 and 26, which create a presumption that late-disclosed witnesses will be excluded absent a showing of good cause. KLCR 4(j), 26(k)(4). *Jones*, __ Wn.2d __, at ¶46.

The Supreme Court found that the local rules directly conflicted with the presumption required by Civil Rule 37(b) and the Supreme Court's decision in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) — namely, "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

exclusion." *Jones*, __ Wn.2d __, at ¶ 46 (citing *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 688, 132 P.3d 115 (2006); *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997)). Resolving the conflict, the Court held that "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*." *Jones*, __ Wn.2d __, at ¶ 47.

The Supreme Court concluded that the trial court erred by excluding the testimony of the late-disclosed witnesses without first considering the *Burnet* factors. It ultimately held that the error was harmless, however, because the excluded testimony was cumulative of other testimony. *Id.* at ¶¶ 79-89.

Here, there is no dispute that the local rules must be applied consistently with both the Civil Rules and the Evidence Rules. While the Supreme Court's decision in *Jones* confirms this basic proposition, it does not otherwise affect the propriety of the trial court's ruling.

The trial court did not exclude Mr. Wortman's prior testimony as a sanction for late disclosure requiring consideration of the *Burnet* factors. The court excluded his testimony because it was inadmissible hearsay under the Evidence Rules. 1/7/2013 Hearing 29-31; CP 641-642. In fact, Judge Lum specifically asked the parties whether he needed to consider the *Burnet* factors during the hearing on the motion to exclude Mr.

Wortman's testimony or whether the motion presented only an evidentiary question. 11/2/2012 Hearing 45. The parties agreed that the motion presented only an evidentiary question and did not implicate *Burnet*. 11/2/2012 Hearing 45-49, 71.

The evidentiary question presented to Judge Lum was whether Mr. Wortman's deposition testimony from another case could be offered against EVI under ER 804(b)(1) as an exception to the hearsay rule where: (1) EVI was not a party to the earlier lawsuit, (2) plaintiff's counsel never issued a style-notice under KC Asbestos Rules for notifying non-parties like EVI of the deposition, and (3) EVI consequently did not know about the deposition, did not attend the deposition, and had no opportunity to examine Mr. Wortman. The court correctly found that under these circumstances, Mr. Wortman's testimony failed to qualify for admission under 804(b)(1).

No part of the court's holding was based on a local rule that conflicted with a superior rule of procedure or evidence. The propriety of the court's ruling, therefore, is not affected by the Supreme Court's decision in *Jones*.

B. There is no conflict between the KC Asbestos Rules and ER 804(b)(1).

The trial court's decision to exclude Mr. Wortman's deposition testimony from a previous lawsuit was not based on a local rule that conflicts with a superior Civil Rule or Evidence Rule. While the court referred to both the KC Asbestos Rules and the Washington Rules of Evidence when it barred Mr. Wortman's testimony, these rules do not conflict. Rather, they work together so a deposition can be used in multiple cases involving different parties while simultaneously ensuring that all litigants have a full and fair opportunity to examine a witness before the witness's testimony can be offered against them.

ER 804(b)(1) serves a gate-keeper function, admitting testimony from unavailable witnesses only when the opposing party or its predecessors-in-interest had a previous opportunity to examine the witness. ER 804(b)(1). Nothing in the KC Asbestos Rules conflicts with this rule or changes its requirements. The KC Asbestos Rules merely gives non-parties the opportunity to examine a witness as required by ER 804(b)(1) so that the testimony can be used against them in future cases.

The KC Asbestos Rules allow asbestos litigants to issue a style-notice to non-parties who are intended to be bound by a witness's testimony. The rule says that a party must serve a "style notice" and pre-

deposition statement describing the subject matter and substance of the anticipated testimony on counsel for all parties whom the proponent intends to bind with the testimony. KC Asbestos Rule 5.6(d)(7); CP 2098. If a party follows this mechanism, and the style notice is properly served, then the deposition can be used in other cases. *Id.* at KC Asbestos Rule 1.3(b); CP 2065 ("'Style' discovery generally applicable to all parties, who have been properly notified pursuant to applicable court discovery rules, shall be filed in this cause") (emphasis in original).

No part of the style notice procedure conflicts with ER 804(b)(1). If plaintiff's counsel had served EVI with a style notice before Mr. Wortman's deposition, EVI could have cross-examined Mr. Wortman and his deposition might have been admissible. The failure to do so however, hardly means that the King County rule conflicts with 804(b)(1) or that Mr. Wortman's testimony can now be offered against EVI or others who never had an opportunity to examine Mr. Wortman.

C. Because the KC Asbestos Rules and ER 804(b)(1) do not conflict, the trial court's ruling is entirely consistent with the Supreme Court's holding in *Jones v. City of Seattle.*

Nothing in *Jones* affects the propriety of the trial court's rulings in this case. The trial court barred Mr. Wortman's deposition testimony because it was inadmissible hearsay and did not qualify for an exception

under ER 804(b)(1). That rule requires that EVI or its predecessor-in-interest must have an opportunity to examine Mr. Wortman before his testimony can be offered against it. ER 804(b)(1).

No such opportunity ever existed. Mr. Wortman's deposition was taken in an entirely separate lawsuit. EVI was not a party to that lawsuit. It did not know about the lawsuit. It did not know that Mr. Wortman was deposed. And it did not attend the deposition.

While plaintiff's counsel could have given EVI an opportunity to examine Mr. Wortman by issuing a style-notice in accordance with the KC Asbestos Rules, he never did. This failure, however, hardly creates a conflict between the KC Asbestos Rules and the ER 804(b)(1). It merely confirms that ER 804(b)(1)'s requirements were not satisfied and that the trial court was therefore correct to exclude Mr. Wortman's testimony against EVI.

III. CONCLUSION

For the foregoing reasons, the trial court's judgment and order granting summary judgment in favor of Flowserve US Inc., solely as successor to Edward Valves, Inc., was correct and should be affirmed.

RESPECTFULLY SUBMITTED this 8th day of January, 2014.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 8th day of January, 2014, I caused a true and correct copy of the foregoing document, Suppemental Brief of Respondent, to be delivered in the manner indicated below to the following counsel of record:

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

Dena S. Levitin, Legal Assistant