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NO. 87343-7

SUPREME COURT OF THE STATE OF WASHINGTON

MARGIE (MEG) JONES as Guardian of MARK JONES,

Plaintiff/Respondent,

v.

CITY OF SEATTLE,

Defendant/Petitioner.

**AMENDED MEMORANDUM OF *AMICUS CURIAE*
WASHINGTON DEFENSE TRIAL LAWYERS
IN SUPPORT OF PETITION FOR REVIEW**

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ORIGINAL

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I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

Washington Defense Trial Lawyers (“WDTL”) is a nonprofit organization of attorneys who devote a substantial portion of their practice to representing individuals, companies, or entities in defense of civil litigation. WDTL appears in this and other courts as *amicus curiae*.

WDTL’s mission includes fighting for justice and balance in the civil court system; here specifically, its interest is in supporting a fair and even handed application of the case law and local rules regarding discovery, disclosures, and witness exclusion. Proper rulings regarding evidence and witness exclusion are of the utmost importance to every litigant in the civil justice system.

II. INTRODUCTION

In trial, the overarching goal of evidentiary rulings is that “the truth may be ascertained and proceedings justly determined.” ER 102. This is consistent with Washington’s longstanding policy of determination of cases on their merits. *See, e.g., Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 594-95, 220 P.3d 191 (2009) (noting “the reverence our state constitution gives to the jury trial right and the important policy of deciding cases on the merits”). Unfortunately, this goal was not met and this policy was not implemented in this case.

Instead, as is explained in the City's petition for review, this is a case where a man came to court and told the jury that he was severely and irreparably injured in a fall. He unequivocally asserted that he could not do many of the most basic things in life. He claimed he needed 24 hour assistance for the rest of his life. The independent medical examiners and, for the most part the City, believed him. They relied upon the fact that he was telling the truth in his sworn discovery answers. However, the City also applied the old adage, "trust but verify."

While discovery was still pending, the City put investigators in two states to work to try to confirm the man's story. CP 8203-05 (Decl. of Investigator Hill). They did not have any luck finding him. These investigators were not deposed or scheduled to be witnesses.

Then, just before the trial commenced and again after the trial was concluded, a third investigator for the City did find the plaintiff outside his home. And what did she find? A picture – literally, a video -- that was, in the trial judge's words, "very different" from the picture the man had created at trial. CP 9785 (Memo. Decision and Order Denying Mot. to Vacate at 8:24-25).¹

As part of her investigation, the third investigator also learned for the first time the relevance of the testimony of the plaintiff's father and his

¹ Exhibit 466E very effectively demonstrates just how shockingly different the reality was from man's portrayal of himself in the lawsuit.

sister. These potential witnesses had information to share with the jury that was much more substantial than the plaintiff had claimed. It was information that belied the story the man had told in the lawsuit.

Regardless, the trial court excluded all three witnesses – the father, the sister, and the third investigator. It did so by impermissibly elevating the local civil rules over the longstanding Supreme Court precedent.

The trial court also denied a motion for a new trial based upon the post-trial surveillance evidence. In doing so, it did not just require diligence by the City, but instead ruled that it was incumbent upon the City to show that it was “impossible” to have acquired the evidence of actions that had not taken place earlier, earlier.²

WDTL urges this Court to accept review in order to make clear and reaffirm: (1) Supreme Court precedent trumps local rules and Court of Appeals decisions; (2) a party is sufficiently diligent in discovery when it relies upon unequivocal answers of its opponent; (3) a party should not be penalized for attempting to verify its opponent’s discovery responses; and

² CP 7815 (Jan. 20, 2012 letter ruling, page 6) (“The defense has not shown that it would have been impossible to have undertaken surveillance of Jones before the discovery cutoff, allowing the plaintiff to respond to whatever the investigator turned up and allowing depositions of the investigators.”).

In addition to the burden of proof error, this reasoning ignores the fact that the City did undertake surveillance of the plaintiff prior to the discovery cutoff; it unfortunately was fruitless. It also ignores that, where the evidence at issue is simply a video of the plaintiff himself out in public, the plaintiff should already be well aware of, and able to discuss, the activities he has undertaken publicly.

(4) “impossibility” of earlier discovery is not required for evidence to be considered “newly discovered” on a Rule 60(b)(3) motion.

III. STATEMENT OF THE CASE

WDTL adopts the City of Seattle’s (the “City’s”) Statement of the Case.

IV. ARGUMENT

A. The law is, and has been, “clear”: on the record Burnet balancing is required before a witness may be excluded.

For years, it has been the law of Washington that when a trial judge imposes one of the harsher remedies under CR 37 the reasons for that imposition must be clearly stated on the record, and when the most severe sanctions are ordered, it must be apparent from the record that the trial court explicitly considered, *inter alia*, willfulness and whether a lesser sanction would have sufficed. This rule was first set forth in *Snedigar v. Hodderson*, 53 Wn. App. 476, 487, 768 P.2d 1 (1989), *rev’d in part*, 114 Wn.2d 153, 786 P.2d 781 (1990). It has been reiterated by this Court many times since.

The leading case is *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). In that medical malpractice action, the trial court issued a scheduling order with a deadline for disclosing expert witnesses. *Id.* at 489. Four months after that deadline had passed, the plaintiffs made

clear that they were including among their other claims a claim that the hospital had been negligent in credentialing physicians. *Id.* at 490.

The hospital sought and received a protective order precluding discovery on the credentialing claim. *Id.* at 490-91. The Court of Appeals upheld the order, characterizing it as an appropriate response to a “compliance problem with a scheduling order.” *Id.* at 493.

On review, the Supreme Court agreed that trial court judges have considerable discretion to enter discovery orders that are just. *Id.* at 493-94. However, it also held that the discretion is not absolute. *Id.* When imposing one of the harsher sanctions such as witness exclusion, the trial court must make it clear on the record that it explicitly considered, *inter alia*, whether lesser sanctions would suffice.³ *Id.* at 494.

In *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 688, 132 P.3d 115 (2006), this Court reiterated that, when excluding witnesses as a discovery sanction:

the record must show three things -- the trial court's consideration of a lesser sanction, the willfulness of the violation, and substantial prejudice arising from it.

³ Additionally, without an express finding of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct, it is an abuse of discretion to exclude testimony as a discovery sanction. *Burnet*, 131 Wn.2d at 494. This portion of the *Burnet* rule dates back even further. See, e.g., *Barci v. Intalco Alum. Corp.*, 11 Wn. App. 351, 522 P.2d 1159 (1974).

Id. (*Burnet* extended the *Snedigar* test to “at a minimum ...[a] sanction excluding testimony...” (emphasis supplied).

Teter v. Deck, 174 Wn.2d 207, 274 P.3d 336 (2012) is also illustrative. There, discovery had been acrimonious and, in 2009 (the same year as the orders at issue in this case) the trial court excluded an important expert for the Teters. *Id.* at 212; *Teter v. Deck*, 2010 Wash. App. LEXIS 2388, *7 (2010) (unpublished). In the exclusion order, the trial court entered findings that the Teters: (1) had failed to comply with the case scheduling order; (2) had failed to comply with three separate court ordered deadlines for disclosing a particular type of expert; (3) had failed to comply with an order requiring a concise summary of the expert’s opinion; (4) did not provide a reasonable opportunity to depose the expert; and (5) that all of these failures by the Teters had prejudiced the defense in trial preparation. *Teter v. Deck*, 2010 Wash. App. LEXIS 2388, *7 (2010) (unpublished). After a defense verdict, then-Judge (now-Justice) González granted plaintiffs’ motion for a new trial, ruling that the exclusion order had been entered in error.

The case made its way to this Court, which explained:

We have quite clearly held that explicit findings regarding the *Burnet* factors must be made on the record when a court imposes the most severe discovery sanctions, like excluding a witness.

Teter, 174 Wn.2d 226. In *Teter* -- even with the findings that were entered by the trial court -- the mandatory *Burnet* analysis was missing. The Court rejected the invitation to cobble a *Burnet* analysis together from other parts of the record. *Id.* at 218. That analysis needed to be done at the time the order excluding the witness was entered; anything less was error. *See id.* A similar holding was reached in *Blair v. TA-Seattle East No. 176*, 171 Wn.2d 342, 349-50, 254 P.3d 797 (2011) (rejecting the contention that the record could show that the court undertook a *Burnet* analysis; the explicit *Burnet* analysis was required to be completed on the record contemporaneously with the order; anything less was reversible error.).

B. The Superior Court Local Rules do not, and cannot, trump Supreme Court precedent.

Despite the “clear” Supreme Court precedent, in this case, the trial court and the Court of Appeals focused on the local civil rules. Specifically, they addressed King County Local Rule 26(b)(4).⁴ The trial court explicitly stated that this rule was its focus, not the precedent upon which the *Burnet* case was built,⁵ and by logical extension not on the *Burnet* factors: “we’re trying to implement -- the King County local rules here... the *Barci* case doesn’t address the local rules.” RP 13 (9/29/12-A).

⁴ It provided: “Any person not disclosed in compliance with this rule may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires.”

⁵ *E.g., Barci v. Intalco Alum. Corp.*, 11 Wn. App. 342, 522 P.2d 1159 (1974).

But nothing about the local rules can change the fact that the exclusionary order was entered in error under binding Supreme Court precedent. Trial courts may not supplant the Supreme Court's authority by local rule. See *Harbor Enters. v. Gudjonsson*, 116 Wn.2d 283, 293, 803 P.2d 798 (1991) (local rules may not conflict with rules promulgated by the Supreme Court); CR 83 (lower courts may adopt local rules provided they do not conflict with rules promulgated by the Supreme Court); see also *Frazier v. Heebe*, 482 U.S. 641, 645, 107 S. Ct. 2607 (1987) (the highest court may exercise its inherent supervisory power to ensure that local rules are consistent with 'the principles of right and justice' (discussing the corresponding federal system)).

Moreover, *Burnet*, *Blair* and *Teter* all involved violation of local rules regarding discovery and disclosures; yet, in none of these cases was the offending order exempted from the *Burnet* requirements. And in none of these cases was the deficient exclusionary order allowed to stand, despite local rules that ostensibly would have authorized it.

C. Court of Appeals opinions do not, and cannot, trump Supreme Court precedent.

The timing in *Teter* matters. Implicit in the Supreme Court's statement about the clarity of the law is the fact that the applicable law

was already clear in January 2009 when the order at issue in *Teter* was entered (and before the orders in this case were entered).

Nevertheless, in this case, as an alternative, the Court of Appeals upheld the exclusionary order by finding that its case law -- rather than the “clear” Supreme Court precedent on the matter -- was the “controlling authority” and allowed entry of an exclusionary order without *Burnet* analysis. *See* Decision at 27-8. This contention disrespects this Court and the American justice’s system’s bedrock principles of precedent and *stare decisis*. The contention must be rejected.

D. The defense was diligent under the case law, but the burden was set too high by the lower courts.

The real dispute about whether the video evidence was “newly discovered,” thus warranting a new trial under CR 60(b)(3) focused on whether the City was diligent in obtaining the video. The trial court said it was not because it had not shown it was “impossible” to find the plaintiff outside dancing and playing games and doing the other things he is shown doing on the video prior to the discovery cutoff.

Ironically, this position either assumes that the plaintiff did this quite frequently before trial (a truth in stark contrast to representations he made during discovery and at trial), or it requires very intrusive almost-24

hour surveillance of the plaintiff to catch him on the rare occasion that he did these things.⁶

In many circumstances, 24 hour intensive surveillance would be considered unduly intrusive and unwarranted. But the flip side of that is that such intensive surveillance must not be required of defendants in order to meet diligence requirements. For if it is required, there is a very real risk that it may happen; such is the risk of letting the Court of Appeals' decision stand. However, as the City explains in its petition, the case law does not require it, and the trial court erred when it effectively ruled otherwise. A new trial should have been ordered.

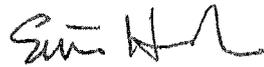
V. CONCLUSION

For the policy, legal, and practical reasons described, WDTL requests that this Court accept review of the case, reverse the decision of the Court of Appeals below and remand the case for new trial.

Respectfully submitted this 3rd day of July, 2012.



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⁶ It is a virtual certainty that plaintiff would have sought an order precluding much less than 24 hour surveillance by the City in this case. *See* RP 3-12 (9/25/09 motion hearing – erroneously dated as 9/24/09 on the cover page, but correctly dated in the header) (arguing about surveillance consisting of sitting in a car, looking at shoes, etc.).

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on the date last shown below, I caused a true and correct copy of the *Amended Memorandum of Amicus Curiae Washington Defense Trial Lawyers in Support of Petition for Review* to be served, in the manner indicated, to the parties listed below:

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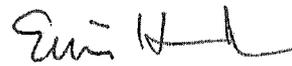
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DATED this 3rd day of July, 2012, at Federal Way, Washington.



Erin H. Hammond

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Dear Mr. Carpenter:

Pursuant to the Court's prior permission for electronic filing by WDTL's amicus committee, attached is the *Amended Memorandum of Amicus Curiae Washington Defense Trial Lawyers in Support of Petition for Review* in the above-referenced case. The substance of the brief is not changed. This filing simply corrects an inadvertent omission of Stew Estes as a lawyer on the brief.

I am hereby contemporaneously serving electronically, by copy of this message, counsel of record who by agreement have accepted this method of service. Additional copies will be served by US Mail on two of the attorneys, as indicated on the attached Certificate of Service.

Thank you,

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