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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Plaintiff/Respondent,

v.

CITY OF SEATTLE,

Defendant/Petitioner.

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SUPREME COURT
STATE OF WASHINGTON
2013 MAY 14 P 12:27
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BRIEF OF AMICUS CURIAE, WASHINGTON STATE
ASSOCIATION OF MUNICIPAL ATTORNEYS, IN SUPPORT OF
DEFENDANT/PETITIONER

Milton G. Rowland, WSBA #15625
Foster Pepper PLLC
422 West Riverside Ave., Ste 1310
Spokane, Washington 99201
Tel: (509) 777-1610
Fax: (509) 777-1616

Attorneys for Amicus, Washington
State Association of Municipal
Attorneys

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I. IDENTITY AND INTEREST OF AMICUS

The Washington State Association of Municipal Attorneys (“WSAMA”) files this amicus brief to support the arguments raised in the City of Seattle’s Petition for Review and Supplemental Brief, and joins the legal arguments made in Seattle’s briefing on the subject matter of this amicus brief. As noted *infra*, the issues in this case have a major impact on the taxpayers of municipalities of all sizes in the state because of the typically high deductibles paid by taxpayers before insurance coverage begins, or the situations for which there is no insurance coverage at all. Thus judgments of this size will mean that other programs go unfunded.

The Washington State Association of Municipal Attorneys is a not-for-profit corporation, lawfully organized under the laws of the State of Washington, representing the attorneys for Washington’s cities and towns. Washington has 281 cities and towns, ranging from Seattle, at over half a million citizens, to Krupp, with a population of about 60.

All of these municipalities are responsible for paying tort claims; many employ police officers and firefighters covered by the LEOFF laws, allowing them both workers compensation and civil suits for tort liability. As such, any of these various cities and towns may

find themselves in the same position as Seattle, paying large insurance premiums and covering the huge deductibles, which can amount to several hundred thousand dollars or more, such as the current \$6,500,000 in Seattle's case.¹ These deductibles, also known as "self-insured retentions" or SIRs, are paid with taxpayer money before any insurance money is reached.

As noted at ¶6 of the Rowland Declaration submitted with the motion for leave to file this amicus brief, for Spokane between 1993 and 2007, the SIR varied, but was usually an amount in excess of \$500,000, and was often \$1M. This means that the first million dollars of any tort verdict against the City of Spokane had to be paid by taxpayers. Rowland Dec., ¶6. Spokane also had one large damages case for which there was no insurance coverage at all. *See Keller v. City of Spokane*, 104 Wn.App. 545, 17 P.3d 661 (2001), *affirmed*, 146 Wn.2d 237, 44 P.3d 845 (2002), for a discussion of the facts and issues involved in the *Keller* case, as well as the amount in issue. For cities and towns around the State, their SIRs are matters of public record, often meeting and sometimes exceeding \$1M. For counties in the County Risk Pool, the county's deductible is a matter of public record,

¹ See, e.g., <http://www.seattle.gov/cafrs/pdf/2011CAFRComplete.pdf>, at p. 140.

but frequently exceeds \$100,000. *See* Rowland Dec., ¶ 7.

As stated in its motion, WSAMA addresses two issues:

1) Application of CR 60(b)(3). Given the dramatic impact upon government agencies and their taxpayers of damages claims based upon deception, should a trial court look with favor on a motion for a new trial based upon newly-discovered evidence, where (a) the movant makes a prima facie showing that the evidence presented to the jury on a key issue in the case, like damages, was demonstrably false or materially incomplete; and (b) there is prima facie evidence that the moving party did not deliberately fail to engage in basic investigative discovery efforts prior to trial?

2) Due Diligence Standard of CR 60(b)(3) for newly discovered evidence: Is a party entitled to reply upon sworn testimony and other materials provided in discovery, consistent with established case law, in order to be “duly diligent” under the rule; or is the party also required, before trial, to conduct expensive and often-unhelpful surveillance and similar “extra-discovery” efforts to insure it does not lose a post-trial motion to vacate when the testimony and other evidence provided in discovery turns out to be false?

Public agencies may not have the resources to undertake extra-

discovery investigation of the validity of claims of traumatic brain injury and related inability to do self-care. This can make them more susceptible to an extraordinarily large judgment against them, just as occurred to Seattle. If the agency comes upon post-judgment information to the effect that the finder of fact was actively misled, or was given materially incomplete information, that the discovery provided was misleading, false, or materially incomplete (without necessarily any fault of counsel), that evidence should be sufficient to vacate the judgment. But if that evidence is not accepted to vacate the judgment, it is the taxpayers who suffer in the exhaustion of the taxpayer-funded self-insured retention, in higher long-term future insurance costs, and long-term higher SIR requirements. It can also mean the diminishment or loss of municipal services and programs due to reduced resources.

Given these impacts, it is critical that the existing standard for a new trial based on new evidence under CR 60 be applied and reinforced by this Court to insure that trial courts are receptive to post-trial motions based upon new evidence that was unavailable before the close of discovery or trial. This Court should confirm that the new evidence should be carefully considered. It should send the clear

message that motions for a new trial based upon demonstrable misconduct by a party should be looked on favorably by trial courts, and that new trials in such circumstances are encouraged.

Second, the City of Seattle made a prima facie showing that the jury was actively and purposefully misled by the plaintiff (Amicus makes no allegation toward counsel), leading to a closing argument that told the jury that Mr. Jones could not take care of himself and would need lifetime care. The jury obviously was impressed by the argument, and awarded every penny sought (over \$2.4M) for lifetime care. The taxpayers are paying that bill. Because of the deception that appears to have been conducted by plaintiffs Jones, the truth finding process failed, through no fault of Seattle.

WSAMA agrees with the City of Seattle that the well-established law of Washington provides that a party has the right to believe interrogatory answers and medical reports provided in discovery, and is under no duty to conduct expensive and often fruitless surveillance or other extra-discovery efforts. And when post-trial surveillance reveals a deception of this magnitude, the courts must be receptive to a motion for a new trial, in the interests of justice and in fulfillment of the purposes of the Rules of Civil Procedure of obtaining

a just determination on the merits. CR1.

WSAMA is concerned that this case represents a radical if unintended departure from this Court's longstanding view that the Civil Rules are to be interpreted so as to administer justice. If we assume that there is a substantial disparity between discovery responses and trial testimony, on the one hand, and the results of post-discovery cutoff and post-trial surveillance conducted on the other hand,² a trial court should not interpret the late-discovered evidence and rules in a manner most calculated to keep such evidence from the jury.³

In other words, in its decisions to exclude the eve-of-trial evidence, and later to deny the motion for a new trial, the trial court both prevented the jury from deciding whether this evidence would be material and prevented the defendant from presenting the only substantial material available to cast doubt on the largely-subjective testimony of the plaintiff and his self-reporting to physicians. This resulted in great prejudice and financial burden to Seattle and its

² See Appendix D to Seattle's Supplemental Brief.

³ It has long ago been held that a trial court's own view of the newly discovered evidence as believable or not should not impact the outcome of the motion. The newly-discovered evidence is for the jury. *In re Anderson's Estate*, 163 Wash. 228, 1 P.2d 231 (1931).

taxpayers. WSAMA is concerned the same can happen to the other cities and towns in the State.

II. STATEMENT OF THE CASE

WSAMA incorporates by reference the Statement of the Case contained in the City of Seattle's Petition for Review and Supplemental Brief.

III. ARGUMENT

WSAMA posits the following hypothetical: What if a plaintiff played the part of a seriously injured person extremely well, getting health care professionals and the jury alike to believe that he "can't function independently,"⁴ that he was getting "worse each day,"⁵ whose mental and physical condition was so grim that he needed someone near for him to shower safely,⁶ who could not follow simple shopping lists,⁷ who could not carry the vacuum upstairs,⁸ whose physician was so fooled into believing that he was catastrophically damaged that he told the jury that plaintiff could not be counted on to perform tasks

⁴ RP (9/23/09) 129-30.

⁵ CP 172.

⁶ 10/8-Vol. XVI, at 70

⁷ Testimony of Meg Jones, 10/1-Vol. XIV, at 151.

⁸ *Id.* at 165.

more complex than pouring cereal into a bowl?⁹ The jury awarded this plaintiff over \$12M, which is more than the annual general fund budget of many WSAMA members, including an amount in excess on \$2M for around-the-clock care.

But what if that same plaintiff, after the close of discovery, assuming himself to be in the clear,¹⁰ let down his hair and acted up to his actual physical and mental capabilities for the first time, not knowing he was performing for a camera? What if this was a man who, in the opinion of a doctor who watched 11 hours of after-trial surveillance videos, demonstrated “none of the indications of a cognitive disorder, including psychomotor retardation, difficulty concentrating, difficulty making decisions, memory problems, impaired cognitive-motor skills...”¹¹ The trial court’s initial response to the after-trial surveillance photos and video was that the “mental picture

⁹ RP (9/23/09) at 129-130.

¹⁰ WSAMA notes that at the in limine rulings the Friday before jury selection began, the trial court ruled that evidence of alcohol was not to be admitted. The very next Monday, a holiday, plaintiff was observed making his rounds to bars, playing darts, acting very normally. This new evidence of the plaintiff’s abilities was excluded.

¹¹ CP 9453.

created at trial was very different from what appears on the video.”¹²

This strikes WSAMA as an understatement.¹³

On a motion for a new trial on these facts, the question should not be “why did you [defendant] not conduct this surveillance before?”, but “how can we as a society tolerate this abuse of our justice system, this fraud on our taxpayers, this palpable miscarriage of simple justice?” The legislature has waived sovereign immunity to require the taxpayer to pay for damages actually caused a plaintiff by the tortious conduct of its elected and appointed officials,¹⁴ but not for this.

This Court has devised a system that allows for admission of late-discovered evidence when the evidence simply was not there previously, and for retrial when the miscarriage of justice has been this complete, and evidence discovered after trial is available to prove it. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997); CR 59(a)(4); CR 60(b)(3) (depending upon the timing of the motion).

¹² RP (10/8/10) 35; CP 9785.

¹³ This Court’s attention is directed to Appendix J to Appellant’s Reply Brief, submitted March 30, 2011, and the video footage referenced in the Petition for Review.

¹⁴ RCW 4.96.010.

And yet the trial court concluded that Seattle could not get in the eve-of-trial evidence because it was too late under a local rule, and that the post-trial evidence should not lead to a new trial because Seattle could have done more surveillance before discovery cutoff. The appellate division agreed.¹⁵ With all respect, it should be assumed that such surveillance (and some was conducted) would not have been successful for the simple reason that a con of this magnitude would be carefully undertaken.¹⁶ Any prior surveillance would by definition have been ineffective and a waste of taxpayer money.

WSAMA believes that the information contained in Appendix C to Seattle's Petition for Review is likely to have influenced a jury, had the jury only been allowed to see it. The effect of these photos and video on cross examination of plaintiff, his sister, and his health care witnesses would have been (and should still be) substantial.

Seattle has made a prima facie showing that it acted with reasonable diligence, making surveillance efforts long before discovery

¹⁵ The Court of Appeals also criticized Seattle for late disclosure of the video and photographic evidence, but the disclosure appears to have been made within days of the surveillance. *See* Seattle's Petition for Review, at p. 11. This does not appear to be a legitimate issue for this Court's decision.

¹⁶ The trial court concluded that the video evidence was not necessarily inconsistent with plaintiff's trial testimony of "peaks and valleys." Seattle argued that the condition to which plaintiff and his witnesses testified and the condition observed on video could not both have been true. A jury should have been allowed to resolve this question.

cutoff. But those efforts were as unsuccessful as surveillance efforts usually are—investigators often spend countless unproductive hours watching an inactive house. In this case, too, there were medical records, sworn statements, and testimony to back up the plaintiff's claims, rendering surveillance of somewhat dubious utility. But they were conducted.

Only after the trial court ruled that alcohol was out of the case did plaintiff take a night out on the town, and when he was observed, he acted very normal—like any uninjured man out for a few drinks at a few of his favorite haunts. But this evidence was ruled inadmissible under a local rule inconsistent with *Burnet, supra*, and the jury never heard it. That prevented defense counsel from using the evidence to cast doubt upon plaintiff's story, largely subjective, about how he couldn't follow a shopping list or take a shower without a care provider nearby. He could certainly play darts while drinking and carrying on conversations, like anyone else.

Then when, after trial, plaintiff *really* felt himself in the clear, and did the many things he could do all along but misled the jury about, even that evidence could not get to the jury. The trial court, not following the plain language of CR 59 and CR 60, held that Seattle did

not make enough of a showing—enough diligence (it could have undertaken more surveillance earlier on in the case).

The decisions below place an inordinate burden on a defendant in a civil case. That burden is to (a) disbelieve the medical testimony and interrogatory responses given even though they appeared accurate and consistent (so as to make surveillance appropriate), and (b) conduct expensive surveillance in order to obtain such evidence with no reason to believe the surveillance would be successful. Unless the surveillance is actually fruitful, of course the money spent is wasted.

This is too high a burden. So long as a party is reasonably diligent, probative and material evidence acquired after the close of discovery or after trial is “newly discovered” and should lead to a new trial, according to the language of the rules.

Ironically, WSAMA believes that surveillance of this sort would not likely be conducted frequently, unless this Court affirms. This Court’s decision in *Locke v. City of Seattle*, 162 Wn.2d 474, 172 P.3d 705 (2007), interpreting RCW 41.26.281, allows certain municipal personnel, like plaintiff Jones, to maintain *both* a civil action for damages *and* a worker’s compensation claim; this double process is not available to any other plaintiff in the State, or anywhere else, as far as

WSAMA is aware.¹⁷ In this kind of case only, after the jury trial was complete, Seattle still had good reason to conduct surveillance, related to the worker's compensation claim. Ordinarily that motivation will be lacking.

It would be especially unfortunate to force cities to consider surveillance in every case, given that the kind of misleading testimony apparently present here will only occur in a tiny minority of cases. Yet when it happens, the result can be catastrophic for a city and its taxpayers, as here.

Yet if this Court affirms, setting a precedent that punishes a party for reliance upon physician exams, medical records and sworn testimony, and also elevating local rules over *Burnet* balancing, cities and counties have no choice but to conduct surveillance early and before any real reason to do so appears, just to avoid this result.

WSAMA discourages this kind of result as inconsistent with the

¹⁷ Usually, the workers' compensation system is based upon a trade-off of more certain recovery for employees with decreased risk of large awards for employers. Indeed, when originally devised, industrial insurance systems were subjected to universal constitutional attack, and were generally upheld because of the fairness of the trade-off. Cf. *Mountain Timber Co. v. State of Washington*, 243 U.S. 219 (1917); "The statutory and constitutional immunity granted to complying employers is crucial to workers' compensation law. The legislature granted this immunity to complying employers in exchange for their relinquishment of all their common-law defenses to claims of work-related injury." *Kendall v. U.S. Dismantling Co.*, 20 Ohio St.3d 61, 65, 485 N.E.2d 1047 (1985).

purpose of the Civil Rules, CR 1, inconsistent with the waiver of sovereign immunity, and inconsistent with the need, in times of declining revenues, to allocate scarce municipal resources elsewhere. Such extra-discovery efforts should not be necessary to insure fair compensation – no more and no less – for an injured firefighter or police officer.

WSAMA believes that the standards under *Burnet* and under CR 59-60 are well explained by Amicus Washington Defense Trial Lawyers and the City of Seattle, and those standards will not be repeated here at length.¹⁸ However, WSAMA would point out the following:

--The trial court's role on a motion for a new trial based upon newly discovered evidence is more akin to a gatekeeper than to a finder of fact. The trial court should be persuaded of the materiality of the new evidence, of course, but should not decide whether the new evidence would certainly have impacted the outcome. In a case like this, it is hard to believe that the jury would *not* have been affected by this evidence. Certainly direct examination, cross examination, and

¹⁸ See Amended Memorandum of Amicus Curiae Washington Defense Trial Lawyers in Support of Petition for Review, at pp. 7-10; Appellant's Petition for Review, at pp. 14-20.

final summation would have been entirely different. It is hard to believe that plaintiff's counsel, wishing to maintain credibility with the jury, would have blithely made the same argument that his client was going to need 24-hour care for the rest of his life (and should receive over \$2M to fund it), in light of this evidence.

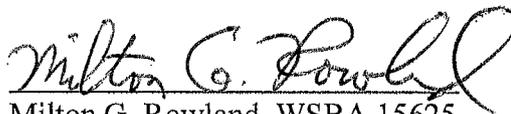
--In the same vein, the standard for newly discovered evidence is reasonable diligence," CR 59(a)(4), not perfection-with-benefit-of-hindsight. It could be, of course, that plaintiff made a remarkable and speedy recovery (plaintiff does not appear to claim this) or that this footage reflects the *only* time plaintiff did the things that he did so well in the post-trial footage and photos. But the jury should decide this question, not the court.¹⁹ Seattle should get a new trial on damages.

IV. CONCLUSION

Amicus curiae Washington State Association of Municipal Attorneys respectfully requests this Court to reverse the decisions of the trial court and the Court of Appeals and remand for a new trial on damages.

¹⁹ This indeed has been the law since *Kurtz v. Fels*, 63 Wn.2d 871, 389 P.2d 659 (1964), in which this Court held that a defendant had a right to rely on statements made under oath about her physical condition, and was not required to conduct expensive surveillance.

RESPECTFULLY SUBMITTED this 13th day of May 2013.

A handwritten signature in cursive script that reads "Milton G. Rowland". The signature is written in black ink and is positioned above the typed name.

By: Milton G. Rowland, WSBA 15625
Attorney for Amicus, Washington
State Association of Municipal
Attorneys

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From: OFFICE RECEPTIONIST, CLERK
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Subject: WSAMA - Amicus Curiae - Jones v. City of Seattle

The Honorable Ronald R. Carpenter, Supreme Court Clerk:

On behalf of Milton G. Rowland, WSBA No. 15625, attached hereto please find electronic copies of the Brief of Amicus Curiae, Washington State Association of Municipal Attorneys, in Support of Defendant/Petitioner and the Certificate of Service regarding same. If you have any additional questions concerning this, please contact Mr. Rowland directly at 509.777.1610.

Thank you for your attention to this matter.

Pam McCain
Foster Pepper PLLC