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No. 87343-7

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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.

CORRECTED BRIEF OF *AMICUS CURIAE* WASHINGTON DEFENSE TRIAL LAWYERS

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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 pro bono *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 all litigants 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. Washington has a longstanding policy of determining 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 policy was not implemented in this case.

The trial court excluded three witnesses, elevating the local civil rules over the longstanding Supreme Court precedent. The trial court also denied a motion for a new trial based upon video surveillance evidence. In doing so, it required much higher standard than "due diligence" as set forth in the rule, instead holding that the City must show that it was "impossible" to have acquired the evidence earlier.[1] The video evidence was not consistent with Plaintiff's claims of catastrophic injuries, and was in the trial court's opinion, "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).

Amicus WDTL urges this Court to reverse the Court of Appeals and remand this matter for a new trial on damages.

III. STATEMENT OF THE CASE

Amicus WDTL adopts the City of Seattle's (the "City") Statement of the Case, as set out in its *Brief of Respondent*, and *Respondent's Supplemental Brief*. Amicus will not enter into the debate over precisely

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[1] 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 imposition of an unreasonable and improper burden of proof, this reasoning ignores the fact that the City did undertake surveillance of the plaintiff prior to the discovery cutoff. However, it 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.

what the voluminous record stands for, but would emphasize the following facts which appear undisputed or at least well supported.

In March 2008, Defendant deposed Plaintiff. He claimed his condition was catastrophic. "Just trying to walk is such a big task for me." CP 85". "[I]t's just such a struggle from the point A when I get up and I'm trying to get going through it." CP 97. He had "lost the mobility in [his] right arm to throw at all." CP 87. As even the trial court observed, "the evidence adduced at trial really did paint a picture...of someone who's suffered significant physical disabilities." RP (10/8/10) 35.

When the City made a request to re-depose him in May 2009, his sister (and now the guardian of an incapacitated person, CP 19) claimed his condition was "roughly the same". CP 225, 268. The City renewed the request in July, and Plaintiff successfully opposed these efforts. CP 1235.

The City used investigators to review these claims in January and May 2008, however, they were unable to observe him. CP 8203, 8679. Plaintiffs state that "The City attempted public surveillance for six days total in March, April and May 2008. CP 8203-04, 8706-07." *Brief of Respondent,* at 78.

Investigators for the City finally found Plaintiff Mark on September 7, 2009. CP 4310. The court excluded the evidence because the City had not obtained this information before the discovery cut-off. RP

(10/14/09) 17. The City asserts, and the surveillance appears to support, that Mark did not suffer from the physical disabilities he portrayed at trial. *See*, Appendix D to *Supplemental Brief of Petitioner*. The City contends that Plaintiff did not accurately describe his physical condition and a new trial must be allowed in the interests of justice.

IV. ARGUMENT

Anyone reading the briefing cannot help but come away with the impression that a possibility exists that a man deceived a jury about his injuries and walked away with over $12 million, just because the defendant was a little late in catching him. If so, it seems misguided to say that a "local rule" authorizes this miscarriage of justice.

A. *Burnet* Findings Are Required Before A Witness May Be Excluded.

1. The "Requisite Findings" Are Nowhere to Be Found.

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, <u>and</u> 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 a 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, this 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 <u>must make it clear on the record</u> that it explicitly considered, *inter alia*, whether lesser sanctions would suffice.[2] *Id.* at 494.

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[2] 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).

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:

> [T]he 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.

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

The Court has referred to these as the "requisite findings". *Blair v. TA-Seattle East No. 176*, 171 Wn.2d 342, 348-51, 254 P.3d 797 (2011). There is not, as Plaintiff asserts, an exception that allows this Court to dispense with proper findings when the supposed basis for the ruling is "obvious." [3]

A recent case, *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012), is also illustrative. There, discovery had been acrimonious and, in 2009 the trial court excluded an important expert for the Teters. *Id.* at 212. 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

[3] Plaintiff argues: "The willfulness and prejudice here are so obvious as to require little more analysis than 'trial by ambush'[.]" *Suppl. Br. of Resp.*, at 13.

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 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 (emphasis supplied). This is consistent with *Burnet*:

> In that regard, we rely upon *Hutchinson* and note that there was no finding by the trial court of willful violation on the part of the Burnets. Indeed, the record would not support such a finding.

Burnet, supra at 497.

Here, these findings are absent, and the trial court rulings are improper.

2. There is A Strong Preference For Written Findings.

Note that the *Burnet* Court carefully distinguished between "the record" and "findings," *id.*, suggesting a preference for written findings of

fact, rather than a verbal back and forth with counsel that may or may not adequately address these discovery abuse standards.

Here, it is undisputed that the trial court did not enter findings of fact in support of the witness exclusions, nor did it enter an order setting out its analysis, nor even did it issue a memorandum ruling. The court's analysis is not even set forth in one specific, cohesive location in the transcript. This is not in keeping with the *Burnet* edict, nor *Teter's* requirement that the findings be "explicit."

Plaintiffs ask the Court to ignore this failure because the issue of witness exclusion was discussed frequently on the record during the trial. *Supplemental Brief of Respondent*, at 15 (arguing that the issues were discussed over ten separate days, and the pages of transcript recording this "colloquy" added together total 136 pages). But, this type of scattered analysis is not a procedure that this Court has endorsed. A reviewing court should not have to scour the record to determine the basis for the trial court's ruling.

In *Blair,* the written findings entered by the trial court were missing the mandatory *Burnet* analysis. The Court of Appeals forgave this failure, stating "the record before us provides adequate grounds to evaluate the trial court's decision in imposing discovery sanctions." *Blair, supra at* 909. This Court reversed, rejecting the invitation to glean the

"requisite findings" by cobbling together a *Burnet* analysis from disparate parts of the record.

> Even if the two orders could be read this way, the August 14 order needed to set forth findings under *Burnet* independent of the later-entered October 15 order. ***The October 15 order itself is not supported by Burnet findings.***

Id. at 218 (emphasis supplied).[4]

Curiously, this Court's last pronouncement seemed to back away from the clear language in *Teter* (that endorsed specific written findings), and hinted that a broader approach might be acceptable:

> 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.*

Blair, *supra* at 348 (emphasis supplied). Perhaps this should be taken not as an endorsement of this approach, but as an observation that even a scouring of the record would not reveal anything.

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[4] This seems similar to the argument advanced by Plaintiffs here. They contend that a ruling that excluded a witness one-and-a-half weeks before trial should suffice as a finding on one *Burnet* factor (prejudice) for the <u>later</u> excluded witnesses. *Suppl. Br. of Resp.*, at 17. However, this flies in the face of *Blair* which held that each exclusion of a witness must be independently supported with findings. "The October 15 order itself is not supported by *Burnet* findings." *Id.* at 218. This rule is logical because each witness is different – the prejudice caused by the late disclosure of one witness may be completely different from that caused by another. A party may have such familiarity with the witness or the facts to be covered that prejudice is minimal.

Regardless, this Court could now take the opportunity to announce a clear rule on the form of *Burnet* findings. As of today, our trial courts do not have clear direction as to the accepted procedure in this context – sometimes an order may be enough, sometimes an order combined with colloquy is not, sometimes nothing short of written findings suffices. The correct procedure is murky. This case presents a vivid illustration of that fact. Trial court administration would be advanced by greater clarity.

The Court should announce a strong preference for written findings of fact in a ruling excluding a witness as a discovery sanction. While a cohesive oral ruling or memorandum opinion might suffice, this should be the exception. The transcript of an oral argument does not typically lend itself to methodical or organized analysis (as shown here). A reviewing court should not be made to read hundreds of pages of transcript to divine the trial court's thought process.

Here, the record does not support the exclusion of the witnesses as there are no findings of fact, no comprehensive oral ruling, nor a memorandum opinion. Rather, we are left with a smattering of a busy trial court's thoughts over a period of days and weeks, in ever-changing circumstances.

B. The Local Rules of a Superior Court Do Not Trump Supreme Court Precedent.

Despite clear Supreme Court precedent, here the trial court and the Court of Appeals focused on the local civil rules. Specifically, they addressed King County Local Rule 26(b)(4).[5] The trial court explicitly stated that this rule was its focus, not the precedent upon which the *Burnet* case was built.[6] The trial court did not focus 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). 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).

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

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[5] 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."

[6] *See, e.g., Barci v. Intalco Alum. Corp.*, 11 Wn. App. 342, 522 P.2d 1159 (1974).

of these cases was the deficient exclusionary order allowed to stand, despite local rules that ostensibly would have authorized it.

This Court should reach the same conclusion.

C. The Court of Appeals Did Not Adhere to This Court's Precedent.

The timing of the *Teter* decision is significant. 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. This position ignores principles of precedent and *stare decisis*.

D. Photographic Depictions of One's Own Actions Are Hardly a Surprise or "Ambush."

Plaintiffs contend that the City engaged in "ambush" trial tactics. *Brief of Respondent*, at 1. The parties debate who did what in discovery. Amicus WDTL would only observe that the evidence offered included photographic depictions and testimony about Plaintiff engaging in

physical activities[7]. One can hardly be ambushed by a photograph of one's own activities.

In *Scott v. Harris*, 550 U.S. 372 (2007), the Supreme Court carved out an exception to the summary judgment rule on disputes of fact that may find application here:

> When opposing parties tell two different stories, ***one of which is blatantly contradicted by the record, so that no reasonable jury could believe it***, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

Scott v. Harris, 550 U.S. 372, 380-81 (2007) (emphasis supplied).

Here, the photographs speak for themselves.

E. The Trial Court Set an Unreasonably High Burden on Defendant To Show Due Diligence Under the New Trial Standard.

The trial court declared that Defendant City must show that it was "impossible" to find plaintiff engaging in these contested activities prior to

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[7] There is no intrusion into a private place "when the plaintiff has merely been observed, or even photographed or recorded, in a public place." *See also, Sanders v. American Broadcasting Co. Inc.,* 20 Cal.4th 907, 914 (1999). As the U.S. Supreme Court has held, "no such expectation of privacy extended to the visual observation of [the defendant's] automobile arriving on his premises after leaving a public highway, nor to movements of objects such as the drum of chloroform outside the cabin in the 'open fields.'"; *United States v. Knotts,* 460 U.S. 276, 282 (1983); and, *Shulman v. Group W Productions, Inc.,* 18 Cal.4th 200, 232 (1998) (holding that filming a rescue attempt at an accident scene, 50-feet down an embankment of an interstate highway, was not an invasion of plaintiff's privacy).

the discovery cutoff. RP (9/11/09) 108-11, 144-47. This is not the proper test. The standard for the grant of a new trial in this circumstance is:

> To warrant the granting of a new trial on the ground of newly discovered evidence, it must appear (1) such evidence will probably change the result of the trial; (2) the new evidence has been discovered since the trial; (3) it could not have been discovered before trial by the exercise of due diligence; (4) it is material, competent and otherwise admissible; and (5) it is not merely cumulative or impeaching.

Kurtz v. Fels, 63 Wn.2d 871, 874, 389 P.2d 659, 661 (1964). The trial court found that the City had satisfied elements 2, 4, and 5. CP 9782-87. Nowhere in this standard is found an "impossibility" test.

The 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 Court of Appeals set out the trial court's analysis of the City's due diligence in requesting a new trial:

> In determining that the City did not exercise the requisite diligence to justify the grant of a new trial, the trial court further noted that the City (1) devoted little effort to investigating the case until its third set of lawyers were retained and, even then, did not focus at all on Jones's damages, (2) failed to depose any of Mark's friends with whom he was spending time following his fall, and (3) did not seek to have Mark examined by a medical doctor, which it was entitled to do pursuant to CR 35.

Jones v. City of Seattle, 166 Wn. App. 1027 (2012). The Court held that the trial court acted within its discretion in denying the request. *Id.*

The trial court's sweeping assumptions about case handling are of concern to Amicus. The court seems to have imposed the Gold Standard of discovery and investigation on defendants in all civil matters. To the extent that this language is allowed to stand, trial courts across the state will be allowed to deny requests for new trial under the guise of "You didn't do everything you possibly could have done."

Such a rule could cause two unwelcome results: defendants would be forced to engage in a "scorched earth" defense, increasing litigation costs to all sides, and all parties would know that misrepresentations have little consequence. When bare-knuckled fighting is tolerated in discovery, reciprocation becomes the only way to protect oneself. As this Court has observed, "[m]isconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense." *Washington State Physicians Insurance Exchange and Association v. Fisons Corporation,* 122 Wn.2d 299, 355, 858 P.2d 1054 (1993).

In the trenches, we find the trial court's arbitrarily-imposed standard of care for defending a civil case to be unrealistic. Retaining private investigators and conducting video surveillance is expensive, and often unfruitful (as demonstrated by the City's first two empty attempts). And even in larger cases like this, defendants usually will not incur this

expense unless there is a reason to suspect the plaintiff's version of his condition. This reality meshes nicely with the legal principle that a party is *entitled to rely* upon another party's sworn answers. *See, infra.*

As to the obligation imposed to take depositions, parties do not typically depose every person listed in an opponent's Initial Disclosures or interrogatory answers. Indeed, to do so here would have exceeded the venue county's limits on depositions. *King County Local Civil Rule* 26(b)(3) ("A party may take no more than 10 depositions"). Plaintiffs often list between five and ten "damages" witnesses, who are hand-picked from numerous supporters such as friends and family members. People with negative information are not listed.

Lastly, independent medical examinations under Civil Rule 35 are expensive, often costing more than $3,000. And, orthopedic evaluations are not able to detect subjective factors such as pain, endurance, or distress.

These onerous discovery requirements should not be imposed lightly, especially on a party who contends that they (and the jury) were deceived into believing Plaintiff's version of his condition. Amicus WDTL urges this Court not to impose these expensive and time consuming actions as what is required to defend a case with "due diligence."

F. An Adversary is Entitled to Rely Upon Sworn Assertions of Fact: Further Investigation is Unnecessary to Satisfy the Due Diligence Factor for the Grant of a New Trial.

Years ago, a plaintiff – caught in a lie, but not until after winning at trial – made the same argument that the Jones' make here. "Plaintiffs say that a reasonably diligent investigation of the facts before trial would inevitably have led to the discovery of the same evidence before trial that the parties now proffer after trial." *Kurtz v. Fels,* 63 Wn. 2d 871, 874, 389 P.2d 659, 661 (1964).

This court reversed and granted a new trial ***even though a diligent investigation would have discovered this evidence,*** stating "Perhaps this is so[.]" *Id.* (emphasis supplied). The Court concluded that no further investigation was needed because the plaintiff swore to the lie, thus eliminating the defendant's reason to investigate further:

> [B]ut the matter of diligence in investigating yielded to the categorical statements, made under oath, on a subject well within a party's knowledge which could, we think, forestall further investigation of the point involved.

Id.

The question is one of reliance. "[T]he adverse party may rely on such statements[.]" *Id.,* at 875. More importantly, a party is not obligated to conduct additional investigation. "[I]n the exercise of reasonable

diligence, [the adverse party] is not required to look behind the statements." *Id.*

When an inspection would not reveal a condition and there is testimony that the condition does not exist, a party "as well as the court and jury, were entitled to rely upon the assurances and positive statements of these agents, ***and in the exercise of reasonable diligence appellant was not required to look behind the statements***." *Praytor v. King County*, 69 Wash.2d 637, 640, 419 P.2d 797, 799 (1966) (citing *Kurtz, supra* at 640) (emphasis supplied).

The Court of Appeals has extended this principle beyond sworn testimony to written discovery responses. "The exercise of reasonable diligence does not require a party to look behind the [interrogatory] answers." *Seals v. Seals*, 22 Wn.App. 652, 656, 590 P.2d 1301, 1304 (1979) (citing *Kurtz, supra*).

As here, CP 9782-87, the evidence in *Praytor* was not simply impeachment or cumulative:

> The objective nature of the newly discovered evidence and its singular importance in fairly determining the issue between the parties renders it substantially more than cumulative and readily elevates it out of the realm of being simple impeachment. And, there is more than a passing probability that it could change the result of the trial.

Id. (reversing denial of motion for new trial).

The Court of Appeals has framed the issue as whether we are required in civil litigation to assume one is lying:

> Accordingly, for over four decades, the standard to which the trial court and the majority hold Deutscher -- that, as Goble's lawyer, she was required to assume that Dr. Gabel was being deceitful in his discovery responses and investigate the case in that light -- has not been the law in Washington.

Deutscher v. Gabel, 149 Wn.App. 119, 143, 202 P.3d 355, 366 (2009) (Dwyer, A.C.J., dissenting) (citing *Kurtz, supra*) (debating whether imposition of monetary sanctions against attorney, or witness exclusion, was the appropriate remedy).

This common sense approach is rooted on the need for truthful conduct in litigation. A new trial should have been ordered.

V. CONCLUSION

Amicus WDTL requests that this Court reverse the decision of the Court of Appeals below and remand the case for new trial.

Respectfully submitted this 30th day of April, 2013.

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CERTIFICATE OF SERVICE

I, Stewart A. Estes, hereby certify under the laws of the State of Washington that on the 30th day of April 2013, I electronically filed a true and accurate copy of the *Brief of Amicus Curiae WDTL* with the Washington Supreme Court via email to this address: Supreme@courts.wa.gov. I further certify under the laws of the State of Washington that I caused true and accurate copies of the same document to be served on all parties of records via e-mail at the addresses below:

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Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929
supreme@courtswa.gov

Stewart A. Estes

Stewart A. Estes, WSBA #15535

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From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, April 30, 2013 1:19 PM
To: 'Stewart A. Estes'
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Subject: RE: Jones v. City of Seattle, Supreme Court No. 87343-7

Received 4/30/13

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From: Stewart A. Estes [mailto:sestes@kbmlawyers.com]
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Subject: Jones v. City of Seattle, Supreme Court No. 87343-7

Dear Mr. Carpenter:

Attached please find the (proposed) *Corrected* Amicus Curiae Brief of WDTL in this matter.

Stew

From: Stewart A. Estes
Sent: Tuesday, April 30, 2013 12:14 PM
To: 'supreme@courts.wa.gov'
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Subject: Jones v. City of Seattle, Supreme Court No. 87343-7

Dear Mr. Carpenter:

Pursuant to the Court's prior permission, please find attached WDTL's application to file an Amicus Curiae Brief in the above matter, and the attached (proposed) brief.

I am hereby contemporaneously serving electronically, by copy of this message, counsel for the parties, and the Washington State Association for Justice Foundation, who by agreement have accepted this method of service.

Thank you,

Stew Estes
Chair, WDTL Amicus Committee

STEWART A. ESTES
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