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No. 65062-9-I
(consolidated with No. 66161-2-I)

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

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

Plaintiff/Respondent,

v.

CITY OF SEATTLE,

Defendant/Appellant.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Susan Craighead)

APPELLANT'S SUPPLEMENTAL BRIEF REGARDING *BLAIR v.*
TA-SEATTLE EAST NO 176, 171 Wn.2d 342, 245 P.3d 797 (2011)

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I. INTRODUCTION

The Washington Supreme Court announced its decision in *Blair v. TA-Seattle East No. 176*, 171 Wn.2d 342, 254 P.3d 797 (April 21, 2011), after all briefing had been submitted in this appeal. The decision reversed the Court of Appeals decision (150 Wn. App. 904, 210 P.3d 326 (2009)) relied on by Meg Jones in her Brief of Respondent (*see* pages 65 and 66). The City of Seattle submitted the decision under RAP 10.8 as an additional authority. The City submits this supplemental brief under RAP 10.1(h) to explain the effect of *Blair* on this appeal.

II. ANALYSIS

A. **The Supreme Court's Decision in *Blair* Reaffirms That Trial Courts Must Apply the Three-Part *Burnet* Test Before Excluding a Witness as a Sanction for Late Disclosure.**

In *Blair*, a truck driver, Maureen Blair, alleged that she was injured when she slipped and fell on a gasoline spill in a truck stop parking lot owned by TravelCenters of America. Blair did not timely disclose her proposed witnesses, and when she finally did disclose them, she listed them in a manner that did not comply with KCLR 26(b). TravelCenters moved to strike the proposed witness list. The trial court granted that motion in part, striking one witness and forcing Blair to choose 7 out of the 14 witnesses she originally wanted to call. Blair instead listed 11 witnesses in her final witness list, prompting another motion to strike. The

trial court struck two of Blair's medical experts and imposed \$500 in sanctions. This Court affirmed the order striking the witnesses, even though the trial court made no on-the-record findings addressing the factors first set forth in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

The Supreme Court reversed. The Supreme Court held that the record must show that a trial court has considered three factors when it imposes a severe sanction such as witness exclusion, striking a complaint or imposing a default: "a lesser sanction, the willfulness of the violation, and substantial prejudice arising from it." *Blair*, 171 Wn.2d at 348, quoting *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 688, 132 P.2d 115 (2006) (relying on *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997)). The Court rejected this Court's statement, expressly relied upon by Meg, that trial courts need not address all the *Burnet* factors before striking a witness: "*Mayer* clearly held that trial courts do not have to utilize *Burnet* when imposing *lesser* sanctions, such as monetary sanctions, **but must consider its factors before imposing a harsh sanction such as witness exclusion.**" *Blair*, 171 Wn.2d at 349 (italics in original; bold added), citing *Mayer*, 156 Wn.2d at 690.¹

¹ The Supreme Court's reading of *Mayer* was correctly anticipated by Division III in *Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn. App. 65, 69-71, 155 P.3d 978 (2007) (holding that the trial court abused its discretion in excluding testimony without finding
(footnote continued on next page)

The Supreme Court then examined the trial court's orders striking Blair's witnesses to see if they contained findings as to willfulness, prejudice, and lesser sanctions, or whether the record as a whole reflected consideration of all those factors. The Supreme Court held that the trial court abused its discretion in imposing the sanction of witness exclusion because the trial court made no findings as to willfulness, prejudice, or lesser sanctions in its orders, and did not otherwise address the *Burnet* factors on the record in support of its orders striking the witnesses. *Blair*, 171 Wn.2d at 348-49. The Supreme Court further held that appellate courts may not presume to cure a trial court's failure to conduct on-the-record *Burnet* balancing by "consider[ing] the facts in the first instance as a substitute for the trial court findings that our precedent requires," and rejected this Court's attempt to uphold the sanctions on that basis. *Blair*, 171 Wn.2d at 351.

In addition to her reliance on the language of the Court of Appeals' decision in *Blair* now squarely disapproved by the Supreme Court, Meg also claims the trial court here was not required to apply *Burnet*'s three-part test because the sanction in that case involved a dismissal levied under CR 37(b)(2), which in turn had been triggered by CR 26(f). *See*

that a lesser sanction was unavailable, that the violation was willful, or that substantial prejudice resulted). *Accord Blair*, 171 Wn.2d at 349 n.2 (Division III's *Peluso* decision correctly interpreted *Mayer*).

Brief of Respondent at 53. *Blair* has foreclosed this distinction, as well. In *Blair*, the sanction of witness exclusion was imposed for a failure to comply with KCLR 26, not under CR 37 for a failure to comply with CR 26, yet the Supreme Court still found the trial court abused its discretion when it failed to comply with *Burnet*. *Blair*, 171 Wn.2d at 348-49.

Meg also argues that this Court's decision in *Lancaster v. Perry* stands for the proposition that a trial court need not analyze prejudice and the possibility of lesser sanctions before striking a witness for untimely disclosure under KCLR 26. Brief of Respondent at 53-54, citing *Lancaster v. Perry*, 127 Wn. App. 826, 833 n.2, 113 P.3d 1 (2005). But as stated, the Supreme Court in *Blair* has held that trial courts contemplating excluding witnesses for violations of KCLR 26 *must* apply the *Burnet* factors before doing so; there are *no* exceptions to this requirement when such a sanction is under consideration. Footnote 2 of *Lancaster*, where the Court of Appeals disregarded the trial court's failure to analyze two of the three *Burnet* factors, is no longer good law after *Blair*.

B. The Trial Court's Decisions Excluding Rose Winqvist, Beth Powell, and Gordon Jones Fail the Requirement of an On-The-Record Consideration of All the *Burnet* Factors.

"[W]hen a trial court 'chooses ones of the harsher remedies...it *must be apparent from the record* that the trial court *explicitly* considered whether a lesser sanction would probably have sufficed,' and whether it

found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial." *Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 693-94, 41 P.3d 1175 (2002) (emphasis in original), quoting *Burnet*, 131 Wn.2d at 494 (quotations omitted). Moreover, for a trial court to satisfy its burden of indicating on the record its consideration of the *Burnet* factors, the court must do more than rest on mere conclusions about those factors, *Rivers*, 145 Wn.2d at 696; the record must also contain the trial court's reasoning in reaching those conclusions. *Marina Condo. Homeowner's Ass'n v. Stratford at the Marina, LLC*, 161 Wn. App. 249, 262, 254 P.3d 827 (2011),² citing *Rivers*, 145 Wn.2d at 696 (holding a trial court abused its discretion by ordering the severe sanction of a default when the record showed nothing more than a limited, boilerplate finding on a required *Burnet* factor).³ And although that consideration need not be manifested within the four corners of a written order, the record as a whole must demonstrate it. *See Blair*, 171 Wn.2d at 348. Finally, the trial court cannot base a finding of the *Burnet* factor of

² *Marina Condominium Homeowner's Association* was decided and published after briefing was complete in this case. It therefore is being offered as an additional authority under RAP 10.8, by a second statement of additional authority.

³ Presumably this is so for the same reason that other balancing of factors by trial courts (e.g., when deciding whether to admit evidence under ER 403) must be done on-the-record -- so the appellate court can review the trial court's reasoning and satisfy itself that there has been no abuse of discretion.

willfulness merely on the violation of a discovery order, because “then the on-the-record finding of willfulness that *Burnet* requires is meaningless.” *Blair*, 171 Wn.2d at 350 n.3.⁴

Here, for each of the witnesses in question -- Rose Winqvist, Beth Powell, and Gordon Jones -- the trial court failed to expressly consider all of the *Burnet* factors, and also failed to offer any explanation for why it reached the conclusions it did for those factors the court did consider.⁵

1. Rose Winqvist.

Counsel for the City gave a valid reason for not listing Winqvist as a witness: the facts about which Rose would have testified (Mark’s

⁴ This holding underscored the long-standing rule in Washington that a party should be allowed to add a witness so long as the discovery of that witness and their evidence is promptly disclosed, even if the request comes after discovery and case schedule deadlines for doing so have passed, unless the party seeking to add the witness is guilty of truly willful disregard of those deadlines or otherwise “unconscionable conduct.” *See, e.g., Barci v. Intalco*, 11 Wn. App. 342, 351, 522 P.2d 1159 (1974). This aspect of *Blair* also establishes that certain broad language in some decisions of the Court of Appeals from the early 1990s, issued in the immediate wake of the adoption of the King County Superior Court case management rules, can no longer be treated as accurate statements of Washington law. *See Deutscher v. Gabel*, 149 Wn. App. 119, 141, n.1, 202 P.3d 355 (2009) (Dwyer, J, dissenting) (observing that the statements in those decisions could not survive as correct statements of the law in the wake of *Burnet*).

⁵ The reason why the trial court systematically failed to fulfill its obligations under *Burnet* can be found in its philosophy of case management, under which deadlines such as those imposed under KCLR 26 effectively displaced the overarching imperative of the search for the truth. Hence, the trial court’s insistence, in its letter memorandum decision denying the City’s post-trial motions, that, once the discovery and witness disclosure deadlines had passed, the City had to prove it was “impossible” for the City to have observed Mark’s true condition, or to have uncovered the true state of Beth Powell’s or Gordon Jones’ knowledge about Mark, before those deadlines had passed. *See CP 7815*. The trial court’s approach turns *Washington State Physicians Insurance Exchange v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993), on its head, effectively encouraging the kind of misconduct engaged in here by offering the hope that it will be rewarded if the evidence can stay hidden until the discovery cutoff and witness disclosure bells ring.

drinking at a bar, while looking just fine and manifesting no disability) arose out of “conduct that occurred the night before the trial started.” RP (10.14.09) 13; *see also* CP 4276-4320. While Meg argues that the City willfully violated its obligations under KCLR 26 by not listing Winquist, Meg failed to cite any on-the-record finding to that effect. *See* Brief of Respondents, at 58. In fact, the record shows the trial court did not find the City’s disclosure of Rose Winquist to have willfully violated the deadlines for witness disclosure established by KCLR 26. *See* RP (10.14.09) 12-17.⁶ Under *Blair*, the failure to address that *Burnet* factor means the trial court abused its discretion in imposing the harsh sanction of witness exclusion.

The trial court also erred by not considering whether a sanction less severe than excluding Rose Winquist would have sufficed. *See* RP (10.14.09) 12-17. Under *Washington State Physicians Insurance Exchange v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993), “the least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed.” 122 Wn.2d at 355-56. In turn, under *Burnet* there must be at least some basis in the record for a trial

⁶ Indeed, one must ask how the City could have been obligated to name Winquist as a witness at all before it did, given that, until she saw Mark at the bar, she literally had nothing about which she could testify which would have been admissible as relevant evidence. Indeed, to have listed her any earlier could have violated the court rules, precisely because she could not have been called as a witness until she had personal knowledge of admissible facts.

court's apparent belief that the wholesale exclusion of a critical fact witness's testimony was the least severe sanction adequate to punish a party for the late disclosure. *See Deutscher v. Gabel*, 149 Wn. App. 119, 141, 202 P.3d 355 (2009) (Dwyer, J, dissenting).

Meg claims the trial court considered as a lesser sanction whether to allow a "sanitized" version of Winqvist's testimony. Brief of Respondents at 58-59, citing RP (10.14.09) 12-13. Meg then states, without citing a finding to this effect, that a "sanitized" version of Winqvist's testimony would not have minimized the prejudicial effect of the late disclosure. Brief of Respondents at 59 (no citation to the record). To begin, the record does not support the proposition that the City, in describing its summary of Winqvist's evidence as "sanitized," was actually proposing that the trial court could have "sanitized" Winqvist's testimony as a less severe sanction or that the trial court actually considered it. In any event, Meg's argument fails under *Blair* because the trial court never explained on the record how allowing a "sanitized" version of Winqvist's testimony would have failed as a lesser sanction. Meg's speculation that it would not have sufficed to allow a sanitized version of Winqvist's testimony does not satisfy the *Burnet* requirement that the *trial court* explain its reasons on the record for rejecting a lesser sanction. Because the trial court in fact never considered a lesser sanction,

much less explained why it was rejecting one, the court abused its discretion in excluding Winquist as a witness.

In sum, out of the three required *Burnet* factors, the trial court mentioned only what it presumed would be the prejudice to Meg's case from allowing a late disclosed witness to testify.⁷ Because the trial court failed to consider two out of the three *Burnet* factors before excluding Winquist as a witness, that exclusion was an abuse of discretion under *Blair* and *Burnet*.

2. Beth Powell.

The trial court erred under *Blair* and *Burnet* by excluding Beth Powell without considering whether lesser sanctions would have sufficed. *See* RP (9.29.09-A) 22-23. Meg argues that the trial court considered authorizing a deposition of Beth as a lesser sanction, *see* Brief of Respondents at 62, but the deposition had nothing to do with sanctions. Instead, taking a deposition of Beth was the only means by which the trial court (albeit begrudgingly) would allow the City to make an offer of proof about Beth's knowledge. *See* RP (9.11.09) 115-16, 147-48. Failing to consider on the record whether a lesser sanction could have cured or compensated for the late disclosure of Beth before excluding her

⁷ That finding was in error for reasons already discussed in the City's briefing. *See* Reply Brief at 15-16.

testimony is an abuse of discretion under *Blair* and *Burnet*. Indeed, the deposition itself gave Meg an opportunity to learn anything she didn't already know about Beth's knowledge, and to challenge her testimony if she could. *See also Deutscher*, 149 Wn. App. at 141-42 (Dwyer, J. dissenting) (exclusion of testimony would not have been an appropriate sanction for the violation of a trial court's witness disclosure schedule where the late disclosure resulted from reliance on the completeness and accuracy of responses to discovery requests, and those responses turned out to be materially misleading).

The trial court did make an implicit finding of willfulness by stating that good cause for the late disclosure was not established. *See RP* (9.29.09-A) 22-23; *Rivers*, 145 Wn.2d at 698 ("A party's disregard of a court order without reasonable excuse or justification is deemed willful."). That finding is insufficient, however, since nothing in the record reflects the trial court's reasoning in reaching the conclusion that good cause was not shown. *See Rivers*, 145 Wn.2d at 696 (holding that trial court abused its discretion by ordering a drastic sanction supported by a mere boilerplate finding on a required *Burnet* factor); *Marina Condo. Homeowner's Ass'n*, 161 Wn. App. at 261 (mere conclusions are inadequate). The reason for requiring an explanation is aptly illustrated here, because the City actually had *excellent* cause for leaving Beth off its

witness list: The City had relied on Meg's discovery responses, which by stating that Beth had not seen Mark for several years indicated that Beth had no knowledge of Mark's current condition.⁸ See *Deutscher*, 149 Wn. App. at 142 (Dwyer, J., dissenting) (since under *Kurtz v. Fels*, 63 Wn.2d 871, 874, 389 P.2d 659 (1964), litigants are entitled to rely on the completeness and accuracy of responses to discovery requests, relying on the other party's representations in discovery responses provides a "more-than-adequate excuse for not believing that [a critical fact witness] was a witness with relevant testimony" and therefore not listing that witness under KCLR 26 as someone who may be called).

The trial court also failed to indicate on the record what the prejudice to Meg's ability to present her case would be if it allowed Beth to testify (e.g., about Meg's statement admitting that Mark needed treatment for alcohol abuse but "first things" had to come "first"). See RP (9.29.09-A) 22-23. Meg argues the prejudice was obvious (see Brief of Respondent at 60), but this assertion at best only invites this Court to "consider the facts in the first instance as a substitute for the trial court findings that our precedent requires[,]" *Blair*, 171 Wn.2d at 351, and *Blair* has expressly foreclosed taking that course. In sum, the trial court abused

⁸ That the discovery responses were misleading about Beth's knowledge is addressed in the City's Opening Brief at 52-54, and in its Reply Brief at 16-17.

its discretion in excluding Beth Powell because it failed to make required findings and failed to offer any reasoning to support the conclusory finding it did make.

3. Gordon Jones.

The City explained in its briefing that Gordon Jones was not disclosed late because the City designated all witnesses designated by Meg, and Meg designated Gordon. *See* Opening Brief at 54-56 and Reply Brief at 17-18.⁹ However, even if this Court disagrees with the City on that issue, the trial court still abused its discretion by excluding Gordon based on the timing of the City's disclosure of him as a witness, because the trial court never considered on the record whether lesser sanctions would have sufficed. *See* RP (9.29.09-A) 23-25. The trial court erred under *Blair* by failing to make a necessary *Burnet* finding before excluding Gordon Jones.¹⁰

⁹ The issues of whether this manner of designation is sufficient to comply with KCLR 26, and whether the King County Superior Court would exceed its limited power to promulgate local rules if it insisted on requiring anything more, were before the Supreme Court in *Blair*, which elected not to reach them. *See Blair*, 171 Wn.2d at 351 n.4.

¹⁰ As for prejudice, the trial court's statement that Gordon's testimony would have been "extremely explosive," while certainly establishing that a wrongful exclusion of Gordon cannot be upheld as harmless, *see* § II.C, *infra*, cannot establish unfair prejudice to Meg justifying the sanction of exclusion, because the only "prejudice" was the likely surprise that the City had managed to uncover Meg and Mark's effort to hide from the City the true extent of Gordon's knowledge, in time for the City to call Gordon as a witness at trial. She and Mark already knew what Gordon knew, and how damaging it would be to their case. And as for willfulness, the trial court's implicit finding on this point fails for the same reason its similar finding regarding Beth Powell fails.

C. The Trial Court's Error in Excluding Crucial Fact Witnesses Was Not Harmless and Mandates a New Trial.

When a trial court errs by failing to apply the *Burnet* factors before excluding a witness, the orders excluding the witnesses should be vacated. *See Blair*, 171 Wn.2d at 351. In *Blair*, vacating the order excluding the witnesses also required reversal of the summary judgment order that was predicated on excluding the witnesses. *Id.* at 351-52. Here, vacating the orders excluding Rose Winqvist, Beth Powell, and Gordon Jones must result in a new trial because the testimony of each of the three witnesses was material to the outcome of the trial.

Rose Winqvist saw Mark drinking in public three days after the trial court had excluded the City's alcohol evidence from trial because there was no recent evidence of Mark drinking. Winqvist also observed that Mark did not appear to be disabled or in pain. This evidence was crucial to the City's defense that Mark was not as injured as he claimed, both before trial and during his courtroom presentation. Winqvist's evidence was also central to the City's defenses that alcohol withdrawal was a proximate cause of Mark's fall, and that Mark's continuing alcohol abuse would adversely affect his recovery and life expectancy. *See* Opening Brief at 80-96. Winqvist's testimony would not have been cumulative since the

City was not allowed to call any other witnesses who would have testified about Mark's true condition and continued drinking right before trial.¹¹

Beth's testimony was material for her up-to-date observations of Mark's condition, and her knowledge of Meg's "first things first" admission in which Meg prioritized a trial victory over getting Mark help for his continuing alcohol abuse. Gordon also had contemporaneous knowledge about the actual impact of Mark's fall on his life and Mark's continuing struggle with alcohol. Both of those issues were central to the case that was tried, yet the City was denied the opportunity to rebut Meg's case by presenting Beth and Gordon's testimony to the jury, which would have been anything but cumulative. Indeed, Gordon's evidence was so obviously damaging to Meg and Mark's case that the trial court called it "extremely explosive" and "incendiary." RP (9.29.09.A) 24-25, 27-28; RP (9.30.09) 69.

In sum, each of the three witnesses had material knowledge of central issues to the case, none of which can be dismissed as merely

¹¹ Remarkably, neither Meg nor Mark submitted a declaration in which they denied the accuracy of what Winqvist reported she and her colleagues observed. *Cf.* CP 8078-81 (Meg's declaration during trial providing "background information" about Beth and Gordon); CP 8794-8800 (Meg's declaration in opposition to the City's CR 60(b) motion); CP 9713-14 (October 15, 2010 Declaration of Mark Jones). Instead, Meg's counsel explained Mark's presence at the bar as related to his horseshoe playing. RP (9.14.09) 108. A total non-sequitur at the time, the reference to horseshoe playing has taken on a pronounced new significance, presumably not intended by counsel when the statement was made, in light of the revelations of the post-judgment surveillance video.

cumulative and whose wrongful exclusion therefore cannot be deemed harmless. Moreover, the totality of the evidence presented by these witnesses calls into question the credibility of Meg and Mark's story on every issue in the case, including Mark's claim that he cannot recall the circumstances surrounding his fall. Accordingly, upon vacating the rulings excluding Winquist, Beth, and Gordon, the Court should remand for a new trial on all issues.

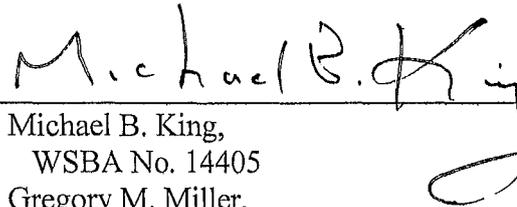
III. CONCLUSION

The Supreme Court's decision in *Blair* conclusively establishes that the trial court abused its discretion by failing to satisfy its obligation to engage in on-the-record balancing of the *Burnet* factors before excluding Rose Winquist, Beth Powell, and Gordon Jones. And because this error was not harmless, the City should be granted a new trial.

RESPECTFULLY SUBMITTED this 30th day of September, 2011.

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Guardian of MARK JONES,

Respondent,

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CITY OF SEATTLE,

Appellant.

CERTIFICATE
OF SERVICE

I, Patti Saiden, hereby declare as follows: I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, and not a party to nor interested in this action. On September 30, 2011, I caused to be delivered a copy of *Appellant Supplemental Brief Regarding Blair* and *Certificate of Service* on the following parties via *Electronic Mail* and *United States Mail*:

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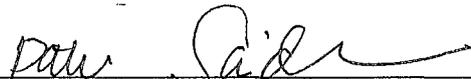
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