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STATE OF WASHINGTON
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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.

SUPPLEMENTAL BRIEF OF PLAINTIFF/RESPONDENT

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 ORIGINAL

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INTRODUCTION

The City first disclosed the three witnesses at issue here (1) a few days after trial began, (2) when Meg's case-in-chief was nearly over, and (3) when this six-week trial was nearly over. Disclosing witnesses during trial is not just a discovery violation, it is an ambush. The City's misconduct is unprecedented.

When witnesses are first disclosed during trial – long after discovery is over – there is little a trial judge can do to advance the purposes of discovery or to remedy the insurmountable prejudice. There is no practical remedy for allowing a witness disclosed during trial to offer controversial testimony that violates a crucial pre-trial order. The only available “lesser sanction” is a mistrial, which is not a sanction, but a reward for misconduct.

Here, lengthy colloquies documenting the judge's sound rulings satisfy *Burnet* and its progeny. The City does not even challenge the evidentiary rulings excluding two of these witnesses on independent grounds. Its meritless CR 60(b)(3) argument is founded on its own misrepresentation of the record. No abuse of discretion occurred here. This Court should affirm.

STATEMENT OF THE CASE

- A. **Before excluding the witness at issue, the trial court ruled on two other late-disclosed City witnesses, applying the *Burnet* analysis.**

The parties' primary witness disclosures were due April 6, 2009, additional witness disclosures were due May 18, 2009, and the discovery cutoff was August 7, 2009. CP 3589-90, 8074. The City submitted its final witness list on August 24, 2009, listing none of the witnesses that are the subject of its appeal, Beth Powell, Gordon Jones, and Rose Winquist. CP 4580-97. This six-week trial began on September 8, 2009. CP 8076-77.

One-and-a-half weeks before trial, the court granted in part and denied in part Meg's motion to exclude late disclosed witnesses William Partin, CPA, and Richard Adler, M.D. CP 2112-13. Meg's motion included a detailed discussion of *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). CP 1509-14. The trial court "spent a great deal of time . . . trying to devise" a lesser sanction, where it is "not [the] Court's practice to exclude witnesses" CP 2116-17. The court rejected "usual sanctions," such as attorney fees or late depositions at the offending party's expense, ruling that they would "not remedy the problem here because they [would] not allow [Jones'] counsel to

adequately investigate and respond” *Id.* The court struck Adler, but permitted Partin to testify, ruling that counsel’s familiarity with Partin from prior cases mitigated the prejudice resulting from the City’s late disclosure. *Id.*

B. Three weeks into trial, just days before Meg rested, the trial court struck Beth Powell, ruling that her testimony was prejudicial and irrelevant under the order *in limine*.

Three days into trial, the City “surprise[d]” everyone, bringing Mark’s estranged sister Beth Powell into court. 9/29 RP 22. The City principally argued that Powell was not a trial witness, but was there to make “an offer of proof” regarding Mark’s alleged alcohol-use and his ability to be present in court,¹ also claiming that it could “use [Powell] as an impeachment witness.” 9/11 RP 103-08, 113-14; 9/29 RP 22-23.² Despite the City’s “ambush,” the trial court reserved ruling, ordering Meg to depose Powell over the weekend.

¹ This testimony was irrelevant, where the trial court lacked the authority to compel a non-party’s presence in the courtroom. 9/11 RP 108. And Mark’s doctors agreed that forcing him to sit through trial would be detrimental to his health and well-being. 10/8 RP 16.

² The trial court had already excluded the City’s various alcohol theories, ruling that “pre-incident alcohol use evidence” was “fundamentally based on speculation,” prohibited under ER 403, and “a real attack on [Mark’s] character,” and that the City could not “articulate, let alone support” its theory that post-fall alcohol-use evidence was relevant. Unpub. Op. at 7, 10 (quoting 9/04 RP 112-13); Unpub Op. at 11 (quoting 9/04 RP 113-14). This was plainly attempted character assassination. Unpub. Op. at 12-13 (quoting 9/14 RP 110). The appellate court affirmed. Unpub. Op. at 15, 17-18. The City does not seek review here.

9/11 RP 111, 115-16. Nearly all of Powell's proffered testimony was about alcohol. Unpub. Op. at 19-20; 09/29 RP 23; CP 3620, 3778, 3782-84, 3794-98, 3800.

Two weeks into trial, the City disclosed Powell as a "potential rebuttal witness." CP 3620-22; Unpub. Op. at 19, 25. There is no separate disclosure for a "potential rebuttal witness." CP 3589.

The City never moved in writing to call Powell and never raised *Burnet*. Meg moved to exclude Powell, citing *Burnet* and *Mayer*, and indicating that the court had "previously mentioned familiarity" with those cases. CP 3590 (citing *Burnet, supra*, and *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 132 P.2d 115 (2006)). The City filed no response.

The court struck Powell on September 29, "after overseeing years of pretrial litigation, with the trial well under way, and with the benefit of voluminous briefing and oral argument," including three City pleadings on alcohol-use evidence, "a lengthy colloquy between the parties and the trial court regarding Powell's proffered testimony [and] the benefit of Powell's deposition testimony." Unpub. Op. at 19-20, 29-30; 9/29 RP 22-23, 25-26, 28. The court found no "case where a late disclosure was so late," saw no good reason for Powell's late disclosure, and rejected the claim that she

was a "rebuttal witness." *Id.* The appellate court affirmed, ruling (1) that Powell was an "ambush"; (2) that "the timing of [her] disclosure – which was 'a complete surprise'" – was itself prejudicial; and (3) that after "voluminous briefing and extensive oral argument," the court "judiciously" ordered Powell's deposition before ruling, providing a "sound basis" for her ruling. Unpub. Op. at 30, 32.

Relying on Powell's deposition, the trial court also excluded her on evidentiary grounds: she had "virtually no personal knowledge," her deposition did not change the court's *in limine* rulings excluding alcohol-use evidence, and her testimony was irrelevant under those rulings. 9/29 RP 22-23. The appellate court held that this "basis for exclusion is independent of the City's conduct in failing to disclose Powell." Unpub. Op. at 32.

C. The court struck Gordon Jones the same day, ruling that his testimony was irrelevant and that prejudice resulting from permitting his testimony would cause a mistrial.

Having failed to list Gordon as a potential witness, the City first sought permission to call him on September 29, just days before Meg rested. 10/7 RP 131; CP 4079-84, 6678-81.³ The City principally argued that it had timely disclosed Gordon by reserving

³ The City intended to elicit testimony about Mark's alleged alcohol use, despite *in limine* orders excluding such evidence. Unpub. Op. at 33.

the right to call Meg's listed witnesses, arguing in passing that it should be permitted to call Gordon even if he were not disclosed, albeit without discussing the *Burnet* test. CP 4079-84.

After lengthy argument, the court ruled that Gordon's testimony was unfairly prejudicial and irrelevant under the court's *in limine* ruling prohibiting alcohol-use evidence. 9/29 RP 27-28. The court also excluded Gordon under *Burnet*, (1) finding no case where a witness was disclosed so late ("almost at the end of plaintiff's case"); (2) reminding the parties that she had been "pretty firm about excluding witnesses and testimony" earlier in the case; (3) rejecting the City's argument that Gordon was a "rebuttal witness"; and (4) concluding that "'the risks of unfair prejudice, perhaps to the point of a mistrial, [were] too great' to allow [Gordon's] testimony." Unpub. Op. at 37 (quoting *id.* at 27-28); 29 RP 24-26 (distinguishing *Blair v. TA-Seattle East #176*, 150 Wn. App. 904, 210 P.3d 326 (2009)).⁴

The City again moved to call Gordon the next day, arguing that the court could limit the scope of his testimony to Mark's one-time comment that he was pain free. 9/30 RP 64-72. But the City

⁴ This Court later accepted review and reversed in *Blair v. TA-Seattle East #176*, 171 Wn.2d 342, 254 P.3d 797 (2011).

quickly made it apparent that it still wanted Gordon to testify about alcohol. 10/14 RP 10-11. Although "99 percent" of Gordon's proffered testimony was irrelevant, the court reserved ruling on whether he could testify for rebuttal or impeachment. 9/30 RP 69-71. After Meg acknowledged Mark's "one time" pain-free comment, the City filed a second written motion to call Gordon on "rebuttal," repeating its arguments that Gordon was timely disclosed. CP 4224-29; 10/07 RP 52; 10/8 RP 209-16.

After again considering the pleadings and thinking "long and hard" about the issue, the court excluded Gordon's testimony just days before the six-week trial ended. 10/14 RP 11-12. Assuming *arguendo* that the City could rely on its "reservation of rights" to call Meg's witnesses, the court ruled that it could not call Gordon to testify "regarding completely different issues than those for which [he] was initially disclosed." Unpub. Op. at 35-36. She also ruled that the City proposed calling Gordon as a treating health care provider, but had violated the rules prohibiting *ex parte* communication with treaters. 10/14 RP 11-12.

In all, there are at least three lengthy on-the-record colloquies addressing the admissibility of Gordon's testimony, and lesser sanctions in particular, including limiting the scope of

Gordon's testimony and permitting him to testify for impeachment. The appellate court thus affirmed under *Burnet*, holding (1) that the City's "own intentional failure to investigate resulted in [its] untimely disclosure"; (2) that the prejudicial effect of calling Gordon at the close of plaintiff's case was "dramatic"; and (3) that permitting Gordon's testimony would have caused a mistrial, which is no lesser sanction. Unpub. Op. at 33, 37-38. The appellate court also affirmed the "independent" evidentiary ruling excluding Gordon's testimony under the *in limine* rulings excluding alcohol-use evidence. *Id.* at 38-39.

D. Just days before this six-week trial ended, the court struck Rose Winqvist, ruling that no limitation on Winqvist's testimony could cure the City's "ambush."

Four days into trial, the City first revealed that it had hired a new investigator, Rose Winqvist, after preventing discovery of its prior investigator and striking his court-ordered deposition. CP 3592-93, 8206; 9/11 RP 114.⁵ But even then, the City did not name Winqvist or state any intent to call her as a witness. 9/11 RP 114. Ten days into trial, the City first claimed that Winqvist was an

⁵ The City hid its prior investigator, Jess Hill, for 17 months, refusing to allow his deposition despite listing him as a witness, and after the court ordered his deposition, striking him the night before. Unpub. Op. at 44 n.13; CP 3600-01, 3606, 6818, 8203.

"additional rebuttal witness." CP 3620-22. Meg objected, noting that there is no separate "rebuttal witness" disclosure, that the City willfully violated the order striking its prior investigator, and that a continuance would be a reward, not a sanction. CP 3587-95.

Four weeks into trial (first day of the City's case), the court rejected the City's claim that Winqvist was a rebuttal witness, ruling that the City easily should have anticipated everything Winqvist would purportedly rebut. 10/8 RP 10-11, 14-15. Four days later, the City moved for the first time to call Winqvist for "impeachment." CP 4276-4318. The City then proposed a "sanitized" version of Winqvist's testimony. 10/14 RP 12-13. Just days before trial ended, the court struck Winqvist, unable to imagine a better example of "trial by ambush." *Id.* at 17.

The appellate court affirmed, holding (1) that the City's non-disclosure was an "ambush" and "part of a larger strategy to prevent Jones from deposing the City's investigators"; (2) that Meg would be extremely prejudiced, having had no opportunity to counter-investigate or develop opposing witnesses; and (3) that "[t]he voluminous record in this case demonstrates that the trial court 'perform[ed] the necessary balancing' required by *Burnet*" Unpub. Op. at 40-41, 43, 44 n.13

ARGUMENT

- A. **The City's willful late disclosures resulted in overwhelming prejudice and limited choices for lesser sanctions, distinguishing this case from *Burnet*, *Rivers*, *Blair*, *Teter*, and every other published decision addressing late-disclosed witnesses.**

The trial court correctly concluded that no published Washington case addresses discovery sanctions, where, as here, witnesses are first disclosed after trial has begun. Unpub. Op. at 36-37. The City's misconduct is unprecedented.

In *Burnet*, 18 months before trial the court limited discovery and precluded testimony on one of plaintiffs' negligence claims, ruling that plaintiffs failed to properly plead the claim. 131 Wn.2d at 491-92, 502. The appellate court affirmed, characterizing the issue as a "compliance problem with a scheduling order." *Id.* at 492-93.

This Court held that the trial court abused its discretion by excluding the plaintiffs' claim and related discovery without first considering willfulness, prejudice, and the least severe sanctions "that could have advanced the purposes of discovery and yet compensated [defendants] for the effects of [plaintiffs'] discovery failings." *Id.* at 494, 497. The sanction imposed was "too severe in light of the length of time to trial." *Id.* at 497-98

In *Rivers v. Wash. State Conference of Mason Contractors*, the trial court dismissed plaintiff's case as a discovery sanction over three months before trial. 145 Wn.2d 674, 683, 694 n.86, 41 P.3d 1175 (2002). Defendants moved to compel plaintiff's answers to interrogatories after a series of missed discovery deadlines. 145 Wn.2d at 680-81. The trial court granted the motion on April 16, 1999, but the written order required plaintiff to comply by April 12 (an extended deadline plaintiff previously requested) and plaintiff did not receive it until April 20. *Id.* at 681-82. Although plaintiff immediately served her interrogatory answers, the court dismissed the case slightly more than three months before trial. *Id.* at 683, 694 n.86. This Court reversed and remanded with instructions to expressly consider *Burnet*. *Id.* at 696, 700.

In *Blair*, the court struck the only two medical experts plaintiff included on her witness list, ruling that adding them violated the court's prior order limiting plaintiff to seven witnesses as a sanction for missed discovery deadlines. 171 Wn.2d at 346-47. Three days before trial, defendant's moved to dismiss with prejudice, arguing that plaintiff could not prove causation without testimony from any medical witnesses. *Id.* The court later granted defendant's motion. *Id.* This Court reversed, holding that neither

the court's orders, nor oral argument, nor "colloquy between the bench and counsel," reflected any consideration of the **Burnet** factors. *Id.* at 348-49.

Most recently, in **Teter v. Deck** the trial court struck plaintiffs' key medical expert as a discovery sanction on the first day of trial. There, plaintiffs were forced to replace a medical expert one month before trial when their expert suddenly withdrew, citing a professional conflict. 174 Wn.2d 207, 212, 274 P.3d 336 (2012). Plaintiffs immediately notified defendants and made their new expert available for deposition. 174 Wn.2d at 212. Defendants refused, and Judge Washington granted their motion to strike on the first day of trial. *Id.*

After the jury returned a defense verdict, then Judge González granted plaintiffs a new trial, ruling (in part) that Judge Washington erroneously struck the expert. *Id.* at 214-15. Reviewing *de novo*, this Court affirmed, holding that Judge Washington's written order failed to address the **Burnet** factors and that he "made no record other than the order: he held no colloquy with counsel and heard no oral argument on the motion." *Id.* at 216, 218. This failed **Burnet**.

This case is different than *Burnet*, *Rivers*, *Blair*, and *Teter*, in every significant respect.⁶ Powell, Gordon, and Winquist were not disclosed 18 months before trial (*Burnet*) or even three months before trial (*Rivers*), when the “usual” sanctions, such as terms or depositions at the City’s request might have remedied the prejudice caused. Nor were they disclosed a month before trial (*Teter*) or weeks before trial (*Blair*), affording the plaintiffs some opportunity to counteract the new testimony.

Rather, Powell was disclosed when Meg’s case was more than half over, Gordon when Meg’s case was just days from over, and Winquist when the entire trial was days from over. Meg was entitled to prepare her case in reliance on the (now unchallenged) *in limine* rulings prohibiting the vast majority of these witnesses’ proffered testimony. “The trial court was properly concerned with the prejudice to Jones caused by introducing a new defense witness into the mix even as the presentation of the plaintiff’s case in chief progressed” – or worse, was over. Unpub. Op. at 31.

The willfulness and prejudice here are so obvious as to require little more analysis than “trial by ambush” – as the trial court

⁶ A graphic representation of these differences is attached to this brief.

ruled. The City's tactical late disclosures were so late that the court had few options beyond witness exclusion or a mistrial. But a mistrial is no lesser sanction, it rewards misconduct while further prejudicing the opponent and burdening the trial courts. This case is unprecedented.

B. The trial court complied with *Burnet*.

The trial court was fully briefed on and familiar with *Burnet*. She considered countless written motions and numerous lengthy oral arguments. The colloquy on these witnesses spanned 10 days and takes up 136 pages of the record. The court's discretionary rulings satisfy *Burnet* and its progeny.

Discovery sanctions are generally within the sound discretion of the trial court. *Teter*, 174 Wn.2d at 216 (citing *Burnet*, 131 Wn.2d at 494). A court may impose the most severe discovery sanctions, such as excluding a witness, only upon a showing that (1) the discovery violation was willful or deliberate, (2) the violation substantially prejudiced the opponent's ability to prepare for trial, and (3) the court explicitly considered lesser sanctions "that could have advanced the purposes of discovery" while compensating a party prejudiced by the opposition's "discovery failings." *Teter*, 174 Wn.2d at 216-17; *Burnet*, 131 Wn.2d at 494-497. Findings on the

Burnet factors must be on the record, either orally or in writing. *Teter*, 174 Wn.2d at 217; *Blair*, 117 Wn.2d at 344. Oral *Burnet* findings may be found in the court's colloquy with counsel or oral argument. *Id.*

1. 136-pages of colloquy spanning ten days satisfy *Burnet*.

In this six-week trial, 10 days include on-the-record colloquy addressing the City's tactical late disclosures of Powell, Gordon and Winquist. These 136-pages of colloquy easily satisfy *Burnet*.

The City's intentional failure to investigate resulted in its late disclosure of Powell and Gordon. Winquist's late disclosure was even worse, "part of a larger strategy to prevent Jones from deposing the City's investigators." Unpub. Op. at 44 n.13.

Mark disclosed Powell in 2008 – there is no excuse for the City's failure to contact her for 18 months. CP 7198. Surprising everyone with Powell three days into trial was an "ambush," the epitome of willfulness. Unpub. Op. at 30-31 (citing 9/11 RP 111).

The City did not and could not have timely disclosed Gordon because, "[w]hen [the City] made [its] primary disclosure, [it] had no idea what Gordon . . . would say because [it] hadn't done [its] investigation yet." Unpub. Op. at 35 (quoting 10/8 RP 215). The trial court correctly rejected the City's "false" suggestion that it "did

not know anything about Gordon . . . until mid-way through [the] trial," where the City had paid his physical therapy bills since 2005. Unpub. Op. at 37 (citing CP 7815); CP 7330, 7336, 7337-38.

Winqvist was the second investigator the City intentionally hid from Meg. Unpub. Op. at 44 n.13. The City's assertion that it had no obligation to disclose Winqvist until she found Mark in a bar is preposterous – the City was obligated to disclose any investigator. CP 3601, 3630; CR 26(e)(2)(B)&(3). "As it had many times before, the trial court described . . . Winqvist's disclosure as 'an ambush.'" Unpub. Op. at 43 (quoting 10/14 RP 17).

The timing of each late disclosure created immense prejudice. Surprising everyone with Powell three days into trial, the City insisted that she was there for an offer of proof, waiting seven more days to claim she was a "rebuttal witness." 9/11 RP 103; CP 3620-21. Meg's case in chief was more than half over.

The parties were already three weeks into trial, "almost at the end of the plaintiff's case," when the City first disclosed Gordon. Unpub. Op. at 33 (citing 9/29 RP 25). Permitting his "explosive" testimony would have been so prejudicial as to likely cause a "mistrial." Unpub. Op. at 37 (citing 9/29 RP 27-28).

As with Powell and Gordon, the extreme delay in disclosing Winquist was blatantly prejudicial. Unpub. Op. at 43 (citing 10/14 RP 17). “[W]ithin days of the end of trial,” the City wanted Winquist to tell the jury that Mark looked and acted completely normal the day before trial. 10/14 RP 12-13, 17. With timely disclosure, Meg could have dealt with that testimony prophylactically, but the prejudice is crippling when her case is already over.

The “voluminous” record also amply shows the trial judge’s careful consideration of lesser sanctions. One-and-one-half weeks before trial, the judge struck a late-disclosed witness, ruling that no lesser sanction would allow Meg to “adequately investigate and respond.” CP 2117. That prejudice worsened as trial wore on, making it even less likely that any sanction short of exclusion would suffice to cure the prejudice.

For each witness, the judge carefully considered and rejected the City’s arguments that these witnesses could testify for rebuttal or impeachment. She even ordered Meg to depose Powell after trial had started, revealing that Powell had nothing relevant to say. The same was true for Gordon. The judge also rejected the City’s proposals to limit Gordon’s and Winquist’s testimony.

The judge refused to grant the City's fondest wish: a mistrial. The City tardily offered these witnesses to testify about alcohol use, prohibited under the court's *in limine* ruling. But Meg obviously relied on those rulings in presenting her case. Allowing the City to put on previously-excluded testimony on such an "explosive" topic half-way through Meg's case (Powell), near the end of her case (Gordon), or near the end of trial (Winquist), plainly would have caused a mistrial, rewarding the City's misconduct.

2. This Court should affirm on the independently sufficient evidentiary rulings striking Powell and Gordon, which the City does not challenge.

Powell and Gordon both would have testified primarily about Marks' alleged alcohol use, ruled inadmissible before trial. 9/29 RP 22-23; 9/30 RP 69. After "voluminous briefing and oral argument," the judge exercised her broad discretion over evidentiary rulings, excluding Powell and Gordon based on "the content of [their] expected testimony," "independent" of their late disclosure. Unpub. Op. at 29, 32, 38-39. The City does not challenge the *in limine* rulings excluding alcohol-use evidence or the evidentiary rulings excluding Powell and Gordon. This Court should affirm these unchallenged, highly discretionary, evidentiary rulings.

No case suggests that a trial judge must apply *Burnet* when exercising its broad discretion over evidentiary rulings in the heat of trial. This Court should not impose that heavy burden here.

C. No new trial was warranted.

To obtain a new trial under CR 60(b)(3), the City had to prove that its utter failure to diligently investigate was excused by its reliance on a "clear and unambiguous" factual assertion that was false. Unpub. Op. at 51; *Kurtz v. Fels*, 63 Wn.2d 871, 875, 389 P.2d 65 (1964). The proffered assertion is Mark's medical records, which the City claims it relied on as Meg's "substantive answers to the City's damages interrogatories." PFR 3, 17-20. These records, the City claims, are inconsistent with Mark's appearance in snippets of cherry-picked post-trial surveillance.

This argument depends entirely on the City's false assertion that Meg's statement that Mark made a "remarkable physical recovery" is an attempt to explain the surveillance video by suggesting that Mark recovered after trial. Unpub. Op. at 51-52. But the very medical records the City claims to have relied on show that Mark made a "remarkable physical recovery" in 2005 and 2006. CP 2411, 2414. Meg repeated the same at her deposition

and again at trial. CP 156; 10/01 RP 124. Mark's physical injuries, make his ability even to walk "remarkable."

The City took these statements "out of context" "[i]nstead" of identifying a false factual assertion like the one in *Kurtz*. Unpub. Op. at 51. Indeed, "[t]he City misrepresents the record when it chides [Meg] for 'fail[ing] to disclose' Mark's 'remarkable physical recovery.'" Unpub. Op. at 52 (quoting BA 62). Seeing through the City's misrepresentation, the appellate court, the trial court, and Mark's doctors were convinced that the video did not contradict Mark's representations about his condition, finding it an improper means to assess his cognitive problems. Answer 7-8.

CONCLUSION

This Court should affirm.

RESPECTFULLY SUBMITTED this 26th day of March, 2013.

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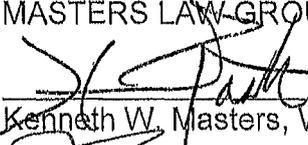
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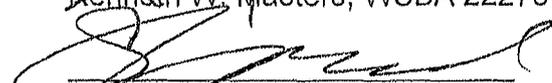
CONCLUSION

This Court should affirm.

RESPECTFULLY SUBMITTED this 26th day of March, 2013.

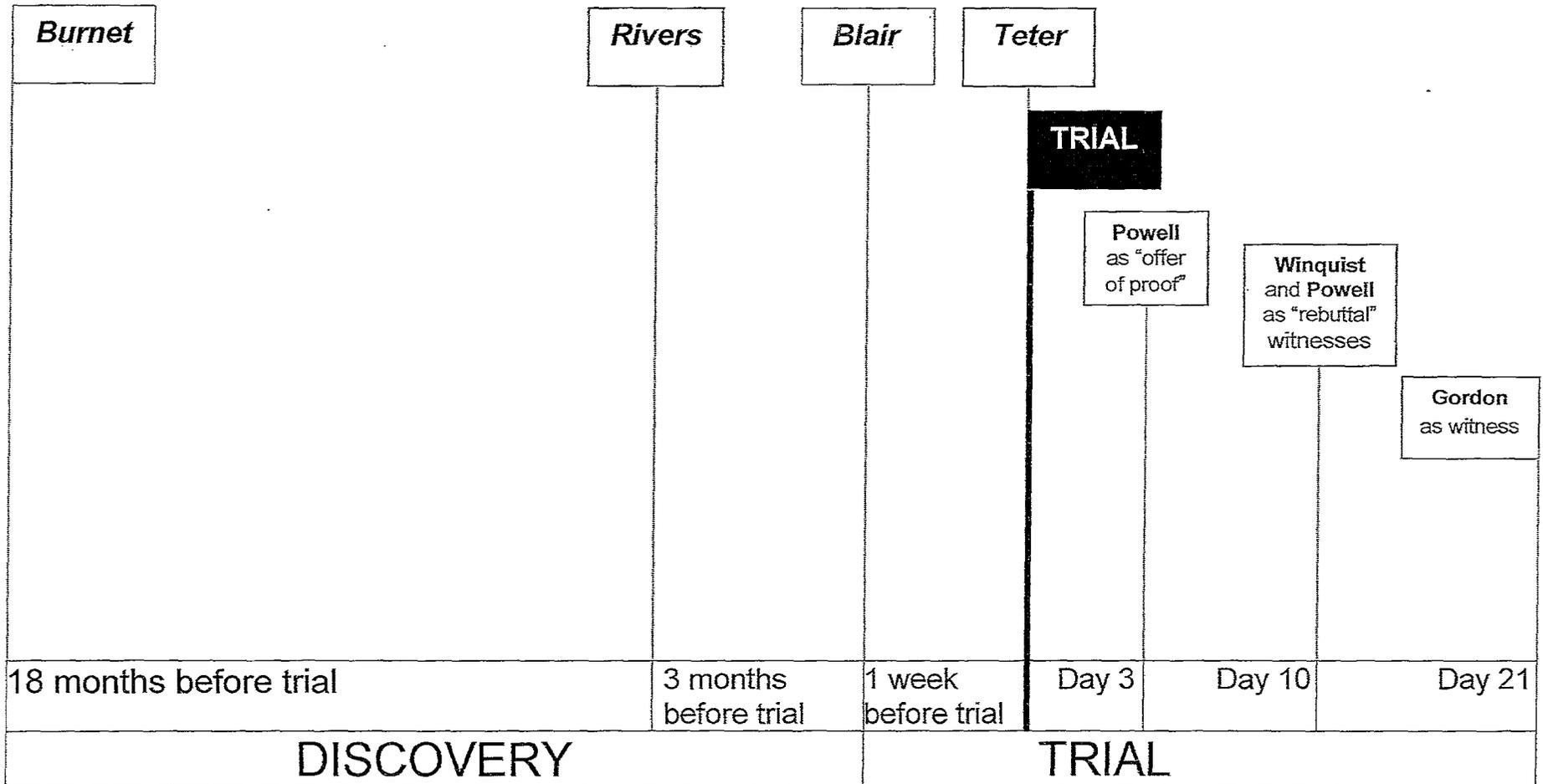
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Jones v. City of Seattle
TIMELINE OF CASES & WITNESS
 18 Months Before to 21 Days Into Trial



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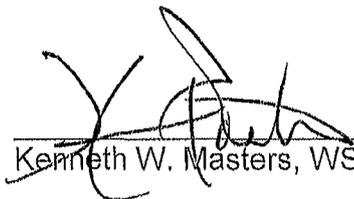
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Cc: Ken Masters; Shelby Lemmel
Subject: 87343-7 - Jones v. City of Seattle - SUPPLEMENTAL BRIEF OF PLAINTIFF/RESPONDENT

Please accept for filing the attached:

SUPPLEMENTAL BRIEF OF PLAINTIFF/RESPONDENT

Case: *Jones v. City of Seattle*

Case Number: 87343-7

Attorney: Kenneth W. Masters

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THANK YOU.

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