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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 OPENING BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
APPENDICES	vii
TABLE OF AUTHORITIES	viii
ASSIGNMENTS OF ERROR.....	1
STATEMENT OF ISSUES	1
1. <u>Pre-Trial Surveillance</u> : If, just before trial begins, investigators observe a personal injury plaintiff functioning in a social setting without any physical limitations and drinking copious amounts of alcohol, and these observations establish that the plaintiff misrepresented his condition and his drinking when responding to discovery requests, does a trial court abuse its discretion by excluding the investigators’ evidence because the misrepresentations weren’t discovered earlier?.....	1
2. <u>Witnesses with Knowledge Discovered During Trial</u> : If, during presentation of the plaintiff’s case, the defendant learns of witnesses who have material evidence, and the plaintiff hid that evidence from the defendant by giving misleading discovery responses, does a trial court abuse its discretion by refusing to allow the defendant to call the witnesses?	2
3. <u>Alcohol Evidence Bearing on Causation And Fault</u> : Does a trial court abuse its discretion when it excludes evidence of a personal injury plaintiff’s alcohol abuse, when the defendant was prepared to prove that the abuse was a proximate cause of the plaintiff’s injuries?	2
4. <u>Alcohol Evidence Bearing on Damages</u> : Does a trial court abuse its discretion when it excludes evidence of a personal injury plaintiff’s post-accident drinking, when the defendant was prepared to prove that such drinking would negatively impact the plaintiff’s ability to recover from the accident and his injuries?	2

5. Grounds for New Trial Under CR 60(b): If a plaintiff is awarded damages for personal injuries based on testimony that he cannot do normal physical activities without pain and is no longer able to work, does a trial court abuse its discretion in denying a post-judgment motion for a new trial when: (1) surveillance videotape obtained after trial shows the plaintiff engaging in a variety of physical activities with no signs of pain or impairment; and (2) physicians who had certified the plaintiff as totally disabled testify, following review of the videotape, that they were deceived and the plaintiff actually is capable of full-time employment?2

6. Test for Due Diligence Under CR 60(b): Is it an error of law to deny a motion for a new trial under CR 60(b) on the ground that greater efforts at surveillance of the opposing party before the discovery cutoff could perhaps have succeeded in discovering that party’s falsehoods, even though those falsehoods were embodied in the opposing party’s responses to discovery?2

I. INTRODUCTION3

II. STATEMENT OF MATERIAL FACTS10

A. December 23, 2003: Mark Jones Falls After Pushing Through the Door to a “Pole Hole” at a Seattle Fire Station. He Claims No Memory of the Events Leading Up to the Fall10

B. 2004 Through 2005: Mark Undergoes Rehabilitation and Reports Substantial Progress in Recovering From His Injuries.....11

C. 2006: Starting that Spring, Mark Reports Increasing Pain and Deteriorating Physical and Mental Ability; Mark Sues in December.....12

	<u>Page</u>
D. 2008: Mark Responds to the City’s Discovery Requests by Representing He has Been Debilitated by the Accident, and Denying Any History of Alcohol Abuse	13
1. Medical Records Show Mark and His Twin Sister Meg Jones Reporting That Mark’s Condition is Bleak.....	13
2. When Deposed in March 2008, Mark Denies Alcohol Use, Claims Constant Pain, and Presents as in Terrible Shape	14
3. Meg in Her Deposition Confirms Mark’s Reports of Constant Pain and Decreased Ability to Function, and His Claimed Sobriety	15
4. To the Doctors Conducting Independent Medical Examinations, Mark Reports Devastating Problems From His Fall and Denies Alcohol Use	17
5. Private Investigators Put Forth “[H]erculean [E]fforts” to Conduct Surveillance of Mark, But Are Unable to Observe Him.....	18
E. Meg Has Mark Declared Incompetent in July 2008, Then Replaces Mark as the Plaintiff in This Lawsuit in November.....	19
F. May 2009: Meg Prevents the City From Redeposing Mark, Representing That His Condition Had “Not Substantially Changed” Since His Deposition The Year Before	19
G. Mark’s Ex-Wife is Deposed and Describes Him as an Alcoholic Who Continued to Drink Heavily After His Accident	20

	<u>Page</u>
H.	July 2009: Meg Again Prevents the City From Redeposing Mark, Again Testifying That Mark’s Condition Has Not Changed Since March 2008.....23
I.	The Trial Court Excludes the City’s Evidence of Mark’s Alcohol Abuse.....25
J.	Just as the Trial is Getting Underway, <i>The City Cracks the Case</i> : Investigators Find Mark Appearing Pain-Free and Drinking Heavily at a Bar, and Mark’s Sister Beth Powell and His Father Gordon Jones Come Forward Confirming Mark’s Alcoholism and Casting Doubt on His Claimed Injuries. But the Trial Court Prevents the Jury From Hearing <i>Any</i> of This Evidence29
K.	Mark Reprises His Deposition Performance at Trial and Receives a \$12.75 Million Verdict.....33
L.	The Trial Court Denies a New Trial Because the City Did Not Show It Was “Impossible” to Uncover the Truth About Mark’s Condition and Drinking Before the Discovery Cutoff.....37
M.	Despite Post-Trial Surveillance Video Showing Mark Looking Remarkably Better Than He Claimed at Trial, and Despite Damning Declarations From the Worker’s Compensation Panel Doctors Stating That the Video Proved Mark Had Deceived Them, the Trial Court Denies the City’s Motion to Vacate the Judgment38
III.	STANDARD OF REVIEW42
IV.	ARGUMENT43
A.	Mark and Meg Jones Had a Duty to Be Truthful in Responding to Discovery, and the City was Entitled to the Relief Necessary to Preserve its Right to a Fair Trial When the Falsity of Those Responses Became Manifest43

	<u>Page</u>
B.	The Trial Court Erred by Excluding the Evidence the City Uncovered On the Eve of and During the Course of the Trial, Establishing That Plaintiff’s Discovery Responses Were False and Misleading47
1.	The Trial Court Erred by Excluding the City’s September 7, 2009 Surveillance Evidence.....47
2.	The Trial Court Erred by Excluding Testimony From Mark’s Sister, Beth Powell52
3.	The Trial Court Erred by Excluding Testimony From Mark’s Father Gordon Jones.....54
a.	The Trial Court Erred By Excluding Gordon’s Testimony Based on “[H]ow [H]e [W]as [D]isclosed” When, in Compliance With King County Local Civil Rule 26, Gordon Had Been Repeatedly Disclosed as a Possible Primary Witness By Plaintiff and Repeatedly Reserved as a Possible Primary Witness by the City.....54
b.	The Trial Court Committed the “Unthinkable” by Excluding Gordon’s Highly Relevant, Highly Probative Testimony on All Central Issues, Under an Incorrect Application of ER 40356
C.	The Trial Court Erred by Denying the Motion to Vacate the Judgment Under CR 60(b).....61

	<u>Page</u>
1. The Trial Court Erred in Denying a New Trial Under CR 60(b)(3) Based on a Purported Failure to Exercise Reasonable Diligence Before the Trial, Where the City Was Entitled to Rely upon the Plaintiff’s Discovery Responses	63
2. The Trial Court Erred in Denying a New Trial Under CR 60(b)(4) Based on Fraud, Misrepresentation, or Other Misconduct, Where the Plaintiff Never Disclosed Mark Jones’ “Remarkable Physical Recovery.”.....	73
D. The Trial Court Erred by Excluding Virtually All Evidence of Mark’s Alcohol Use.....	80
1. The City Offered Substantial Evidence to Support Its Alcohol Defenses on Causation and Damages.....	81
2. The Trial Court Applied ER 403 Incorrectly to Exclude the Alcohol Evidence.....	91
E. The Exclusion of Key Evidence Deprived the City of a Fair Trial on Proximate Cause and Contributory Fault, as Well as Damages. Moreover, the Scope of Mark and Meg’s Dishonesty Mandate a Remand for a New Trial on <i>All</i> Issues, and Subject to the City’s Right to Renew Its Motion for Summary Judgment on Grounds of Impermissible Speculation.....	93
II. CONCLUSION.....	96

INDEX TO APPENDICES

Case No. 65062-9-I (Consolidated with Case No. 66161-2-I)

APPENDIX	DOCUMENT
App. A	01/20/10 Letter Ruling on Post-Trial Motions, CP 7810 – 7816
App. B	10/18/10 Memorandum Decision and Order Denying City of Seattle’s Motion to Vacate, CP 9778 – 9787, with highlighting
App. C	<i>Mark Jones Summary of Surveillance</i> (“Surveillance log”), CP 9499-9519
App. D	D – 1: 09/27/09 Declaration of Gordon B. Jones, re his observations and treatment of Mark Jones, CP 4068-4075 D – 2: 09/27/09 Declaration of Gordon B. Jones, re telephone call from Richard Kilpatrick, CP 4060-4061
App. E	E - 1: 08/04/10 Declaration of William J. Stump, M.D., CP 8272-8276 E - 2: 09/30/10 Second Declaration of William J. Stump, M.D., CP 9485-9489
App. F	F – 1: 08/03/10 Declaration of Roy D. Clark, Jr., M.D., CP 8267 – 8271 F – 2: 09/28/10 Second Declaration of Roy D. Clark, Jr., M.D., CP 9451-9458
App. G	Trial Ex. 521 – Illustrative Chart showing Mark Jones’ “Missed Steps”
App. H	05/12/10 Mark Jones’ Rehab Clinic Outpatient Record Dictated by Peter C. Esselman, MD, CP 9535
App. I	Timeline

TABLE OF AUTHORITIES

Washington Cases	<u>Page</u>
<i>Barci v. Intalco Aluminum Corp.</i> , 11 Wn. App. 342, 522 P.2d 1159 (1974).....	42, 48, 50, 51, 52, 56
<i>Blair v. TA-Seattle East #176</i> , 150 Wn. App. 904, 210 P.3d 326 (2009), <i>rev. granted</i> , 168 Wn.2d 1006 (2010), <i>argued</i> Oct. 26, 2010.....	55
<i>Blomster v. Nordstrom, Inc.</i> , 10 3 Wn. App. 252, 11 P.3d 883 (2000).....	42
<i>Brashear v. Puget Sound Power & Light Co.</i> , , 100 Wn.2d 204, 667 P.2d 78 (1983).....	81
<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484, 933 P.2d 1036 (1997).....	48, 50, 52, 56
<i>Carson v. Fine</i> , 123 Wn.2d 206, 867 P.2d 610 (1994).....	56, 58, 59, 91, 92
<i>Council House, Inc. v. Hawk</i> , 136 Wn. App. 153, 147 P.3d 1305 (2006).....	42
<i>Curtis Lumber Co. v. Sortor</i> , 83 Wn.2d 764, 522 P.2d 822 (1974).....	50
<i>Davidson v. Muni. of Metro. Seattle</i> , 43 Wn. App. 569, 719 P.2d 569 (1986).....	57
<i>Detention of Turay</i> , 139 Wn.2d 379, 986 P.2d 790 (1999)	51
<i>Erickson v. Robert F. Kerr, M.D., P.S.</i> , 125 Wn.2d 183, 883 P.2d 313 (1994).....	91
<i>Fox v. Evans</i> , 127 Wn. App. 300, 111 P.3d 267 (2005)	86
<i>Fred Hutchinson Cancer Research Ctr. v. Holman</i> , 107 Wn.2d 693, 706, 732 P.2d 974 (1987).....	42, 48, 50, 51, 52, 56
<i>Gammon v. Clark Equip. Co.</i> , 38 Wn. App. 274, 686 P.2d 1102 (1984), <i>aff'd</i> , 104 Wn.2d 613, 707 P.2d 685 (1985).....	43, 44, 74

	<u>Page</u>
<i>Gardner v. Seymour</i> , 27 Wn.2d 802, 180 P.2d 564 (1947)	94, 95
<i>Griffith v. City of Bellevue</i> , 130 Wn.2d 189, 922 P.2d 83 (1996).....	50
<i>Holaday v. Merceri</i> , 49 Wn. App. 321, 742 P.2d 127 (1987).....	63
<i>Kramer v. J.J. Case Mfg. Co.</i> , 62 Wn. App. 544, 815 P.2d 708 (1991).....	85, 90, 91
<i>Kurtz v. Fels</i> , 63 Wn.2d 871, 389 P.2d 659 (1964)	44, 64, 65, 66, 70
<i>Little v. Countrywood Homes, Inc.</i> , 132 Wn. App 777, 133 P.3d 944 (2006).....	95
<i>Lockwood v. AC & S</i> , 109 Wn.2d 235, 744 P.2d 605 (1987)	56
<i>Locke v. City of Seattle</i> , 162 Wn.2d 474, 172 P.3d 705 (2007).....	13
<i>Lundberg v. Baumgartner</i> , 5 Wn.2d 619, 106 P.2d 566 (1940)	85, 86, 92
<i>Marshall v. Bally's Pacwest, Inc.</i> , 94 Wn. App. 372, 972 P.2d 475 (1999).....	95
<i>Mitchell v. Wash. State Inst. of Pub. Policy</i> , 153 Wn. App. 803, 225 P.3d 280 (2009).....	74
<i>Moore v. City of Des Moines</i> , ___ Wn. App. ___, 241 P.3d 787, 2010 WL 4292399.....	95
<i>Palmer v. Waterman S.S. Corp.</i> , 52 Wn.2d 604, 328 P.2d 169 (1958).....	85, 92
<i>Peluso v. Barton Auto Dealerships, Inc.</i> , 138 Wn. App. 65, 155 P.3d 978 (2007).....	48, 50, 52, 56
<i>Peoples State Bank v. Hickey</i> , 55 Wn. App. 367, 777 P.2d 1056 (1989)	73, 80
<i>Praytor v. King County</i> , 69 Wn.2d 637, 419 P.2d 797 (1966)	64, 65, 70
<i>Roberson v. Perez</i> , 123 Wn. App. 320, 96 P.3d 420 (2004).....	66, 74

	<u>Page</u>
<i>Salas v. Hi-Tech Erectors</i> , 168 Wn.2d 664, 230 P.3d 583 (2010).....	56, 57, 58
<i>Seals v. Seals</i> , 22 Wn. App. 652, 590 P.2d 1301 (1979)	44
<i>Parry v. Windermere Real Estate/East, Inc.</i> , 102 Wn. App. 920, 10 P.3d 506 (2000), <i>rev. den.</i> 143 Wn.2d 1015 (2001)	55
<i>Spokane County v. Specialty Auto</i> , 153 Wn.2d 238, 103 P.3d 792 (2004).....	50
<i>State v. Boehme</i> , 71 Wn.2d 621, 430 P.2d 527 (1967)	45, 51
<i>State v. Robinson</i> , 79 Wn. App. 386, 902 P.2d 652 (1995)	42
<i>Stibbs v. Stibbs</i> , 37 Wn.2d 377, 223 P.2d 841 (1950).....	96
<i>Taylor v. Cessna Aircraft Co.</i> , 39 Wn. App. 828, 696 P.2d 28 (1985).....	42, 74, 77
<i>Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	43, 44, 52, 53, 63, 70
<i>Wilson v. Olivetti North Am., Inc.</i> , 85 Wn. App. 804, 934 P.2d 1231 (1997).....	59

Federal Cases

<i>Bros, Inc. v. W.E. Grace Mfg. Co.</i> , 351 F.2d 208, 211 (5th Cir. 1965)	73
<i>Rozier v. Ford Motor Co.</i> , 573 F.2d 1332 (5th Cir. 1978).....	74
<i>U.S. v. Meester</i> , 762 F.2d 867, <i>U.S. v. Mende</i> , 43 F.3d 1298 (9th Cir. 1995).....	59
<i>U.S. v. Mende</i> , 43 F.3d 1298 (9th Cir. 1995)	59

Other State Cases

Detillier v. Smith, 638 So.2d 445 (La. App. 1994)51

Drehle v. Fleming, 129 Ill. App. 2d 166, 263 N.E.2d 348
(1970), *aff'd*, 49 Ill.2d 293, 274 N.E.2d 53 (1971).....66

Foerstel v. St. Louis Pub. Serv. Co., 241 S.W.2d 792 (Mo. Ct.
App. 1951)66, 67, 70

Higgins v. Star Elec., Inc., 908 S.W.2d 897 (Mo. Ct. App.
1995)67

Kraus v. Taylor, 710 A.2d 1142 (Pa. Super. Ct. 1998).....85

Lubbers v. Norfolk & Western Ry. Co., 105 Ill.2d
201, 473 N.E. 2d 955 (1984).....67, 68, 70, 71

Court Rules

CR 150

CR 26(e)(2)44

CR 353, 71, 72

CR 59(a).....63

CR 6074

CR 60(b).....1, 2, 9, 47, 61

CR 60(b)(3).....8, 39, 41, 61, 63, 64, 73

CR 60(b)(4).....9, 41, 73, 74, 77, 80

ER 10250, 57, 58

ER 40157

ER 40258

	<u>Page</u>
ER 403	5, 28, 54, 56, 57, 58, 59, 60, 91, 92
KCLCR 26	32, 54
KCLCR 26(b)(4).....	51

Treatises

4 KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE § CR 60 (5 th ed. 2009).....	63
KARL B. TEGLAND, COURTROOM HANDBOOK ON WASHINGTON EVIDENCE: RULE 403 (2007-08 ed.).....	57
<i>Admissibility of Evidence, in Action for Personal Injury or Death, of Injured Party's Use of Intoxicants or Illegal Drugs on Issue of Life Expectancy</i> , 86 A.L.R. 4th 1135 (1991).....	85

Other Authorities

6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 15.01 (5 th ed. 2005).....	81
6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 33.01 (5 th ed. 2005).....	86
6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 34.04 (5 th ed. 2005).....	85

ASSIGNMENTS OF ERROR

Appellant City of Seattle assigns the following errors:

1. The trial court erred by excluding evidence of Mark Jones' use of alcohol and his associated drinking history.
2. The trial court erred by excluding evidence obtained by surveillance of Mark Jones the day before the start of trial.
3. The trial court erred by excluding testimony from proposed witness Beth Powell.
4. The trial court erred by excluding testimony from proposed witness Gordon Jones.
5. The trial court erred by denying the City's post-verdict motion for a new trial.
6. The trial court erred by entering a judgment on the jury verdict in favor of the plaintiff.
7. The trial court erred by denying the City's CR 60(b) motion to vacate the judgment and order a new trial.
8. The trial court erred in entering the specifically marked portions of its October 18, 2010 CR 60(b) ruling as set out in App. B, to the extent they are construed as findings of fact under CR 52(a)(4).

STATEMENT OF ISSUES

The following issues pertain to the assignments of error:

1. Pre-Trial Surveillance: If, just before trial begins, investigators observe a personal injury plaintiff functioning in a social setting without any physical limitations and drinking copious amounts of alcohol, and these observations establish that the plaintiff misrepresented his condition and his drinking when responding to discovery requests, does a trial court abuse its discretion by excluding the investigators' evidence because the misrepresentations weren't discovered earlier?

2. Witnesses with Knowledge Discovered During Trial: If, during presentation of the plaintiff's case, the defendant learns of witnesses who have material evidence, and the plaintiff hid that evidence from the defendant by giving misleading discovery responses, does a trial court abuse its discretion by refusing to allow the defendant to call the witnesses?
3. Alcohol Evidence Bearing on Causation And Fault: Does a trial court abuse its discretion when it excludes evidence of a personal injury plaintiff's alcohol abuse, when the defendant was prepared to prove that the abuse was a proximate cause of the plaintiff's injuries?
4. Alcohol Evidence Bearing on Damages: Does a trial court abuse its discretion when it excludes evidence of a personal injury plaintiff's post-accident drinking, when the defendant was prepared to prove that such drinking would negatively impact the plaintiff's ability to recover from the accident and his injuries?
5. Grounds for New Trial Under CR 60(b): If a plaintiff is awarded damages for personal injuries based on testimony that he cannot do normal physical activities without pain and is no longer able to work, does a trial court abuse its discretion in denying a post-judgment motion for a new trial when: (1) surveillance videotape obtained after trial shows the plaintiff engaging in a variety of physical activities with no signs of pain or impairment; and (2) physicians who had certified the plaintiff as totally disabled testify, following review of the videotape, that they were deceived and the plaintiff actually is capable of full-time employment?
6. Test for Due Diligence Under CR 60(b): Is it an error of law to deny a motion for a new trial under CR 60(b) on the ground that greater efforts at surveillance of the opposing party before the discovery cutoff could perhaps have succeeded in discovering that party's falsehoods, even though those falsehoods were embodied in the opposing party's responses to discovery?

I. INTRODUCTION

This case illustrates what can go wrong when a trial court fails to honor two basic principles of civil litigation: (1) the civil trial process is a search for truth, and (2) a party to a civil damages action must never be allowed to frustrate that search by misleading responses to discovery.

Mark Jones, a City of Seattle firefighter, fell down a fire station “pole hole” the morning of December 23, 2003. No one saw the fall, and Mark¹ claimed he could not remember what happened. Mark began rehabilitation and reported progress until the Spring of 2006, when he began telling doctors he was in constant pain, and barely able to function.

Mark sued. His discovery responses portrayed a man wracked by pain and physical and mental disability; his presentation at deposition in March 2008 seemed to confirm those responses. Doctors appointed by worker’s compensation authorities concluded Mark was totally disabled; a CR 35 medical examiner substantially concurred. The City did surveillance, but investigators never could observe Mark.

In July 2008, Mark’s twin sister Meg Jones, got herself appointed Mark’s guardian, then replaced him as the plaintiff. Trial now was set for September 2009. In mid-2009, Meg blocked the City’s attempts to depose

¹ Because the last name Jones is common to more than one person involved in this case, the City will use first names for clarity. No disrespect is intended.

Mark for a second day by testifying his condition was substantially unchanged from when the City deposed him the year before.

A major pre-trial issue concerned Mark's drinking. He testified he never abused alcohol and had not drunk since Spring 2006. Meg corroborated Mark's story, as did Mark's medical record entries. But Mark's former wife Ann Jacobs had testified at deposition that Mark was a lifelong alcoholic who abused alcohol throughout their marriage (which ended Spring 2006). Based on Ann's testimony and Harborview Hospital records showing Mark underwent an alcohol withdrawal protocol following his accident, Dr. Gregory Rudolf, a substance abuse expert, opined Mark's fall likely was caused by alcohol withdrawal disorientation, and alcohol abuse would impair Mark's recovery.

On Friday, September 4, the trial court (Judge Susan Craighead) excluded both Seattle's alcohol withdrawal theory of the accident's cause, and its alcohol abuse damages defense. The court ruled Dr. Rudolf's opinions lacked foundation, and allowing the City to introduce evidence on either issue would violate ER 403.

The following Monday, investigators tracked Mark to a bar where Meg had dropped him off. They saw someone who was neither in pain nor disabled, and who drank several beers in less than an hour.

Two days later, one of the investigators spoke to Beth Powell, Mark's younger sister. Mark had represented in discovery that Beth had no knowledge of his present condition. But in an ensuing offer-of-proof deposition, Beth testified she had seen Mark engage in a variety of rigorous activities. Beth also said Meg had admitted Mark was an alcoholic, but “[f]irst things first” (CP 3794) -- which Beth understood meant winning the case against Seattle before getting treatment for Mark.

Finally, the investigators contacted Mark's father, Gordon Jones. As with Beth, Mark and Meg's discovery responses represented that Gordon had no knowledge of Mark's present condition. (Mark saw Gordon for physical therapy after the accident but stopped going in mid-2006.) Gordon gave a declaration stating Mark had been hunting, fishing, and partying *the month before the start of trial*. Gordon also confirmed Mark's alcohol abuse, and expressed concern that Mark and Meg were pursuing damages based on misrepresentations about Mark's condition.

The trial court excluded all of this evidence. The court excluded the investigators because the City had not proven it was “impossible” to have uncovered the same evidence before the close of discovery. CP 7815 (App. A). The court excluded Beth Powell because she was not on Seattle's witness list and supposedly lacked personal knowledge of any material facts. RP (9/29/09) 23. Acknowledging the “extremely

explosive” implications of Gordon’s evidence, RP (9/29/09-A) 24, the court excluded him because the City had not disclosed the content of his testimony before the close of discovery -- *even though Meg listed Gordon as a witness and Seattle designated any witness listed by the plaintiff.*

In a trial appearance the trial court described as a “fairly dramatic presentation[,]” RP (12/14/09) 40, Mark struggled to his feet, pulled himself along the jury box and, after settling seemingly painfully into the witness chair, recounted how he had been left to feel “80 years old” by his fall. RP (9/29/09-A) 122. Meg corroborated Mark’s story. The plaintiff’s experts testified Mark would require round-the-clock, “24/7” care for the rest of his life. The jury heard Mark claim he could not remember how he ended up at the bottom of the pole hole, and his lawyer’s theory that, in the middle of the night, Mark must have mistaken the pole hole door for the bathroom door. With the City’s alcohol withdrawal theory excluded, plaintiff’s theory was left as the only explanation for Mark’s fall. The jury found the City liable, refused to find Mark at fault, and awarded damages of \$12,750,000 including a requested \$2,400,000 for lifetime care.

Seattle appealed. Surveillance of Mark resumed, resulting in eleven hours of videotape taken over nine days in April and June 2010. In the video Mark manifested no pain, engaged in activities he and Meg at

trial had denied he could do, *and* consumed copious quantities of alcohol.² Seattle’s counsel showed the video to Dr. William Stump and Dr. Roy Clark, the surviving members of the worker’s compensation panel. Drs. Stump and Clark concluded Mark had deceived them, and that he was actually fully functioning physically and mentally, and capable of full-time work. Counsel submitted the video to Theodore Becker, a Ph.D in human performance and expert in biomechanical engineering, who concluded Mark was fully functioning physically and mentally, and that the contrast between Mark’s claimed and actual condition was “as stark and extreme” as Dr. Becker had ever seen. CP 9461.

Seattle moved for a new trial. *Never denying the accuracy of the surveillance video*, Mark and Meg instead claimed that what the video showed was consistent with a “remarkable physical recovery” (CP 9263-64) Mark supposedly experienced between his deposition in March 2008 and the beginning of trial in September 2009. But they had never disclosed the “remarkable physical recovery” during discovery or trial, instead blocking a second deposition of Mark by claiming Mark’s

² All of the video was submitted to the trial court and is found in the record at Exhibit Sub. No. 466A. The trial court was also provided with a CD juxtaposing several of Mark Jones’ March 2008 deposition claims with relevant portions of the surveillance video; this compilation is at Exhibit Sub. No. 466E. These materials can be viewed by clicking on the hyperlink to the exhibits in the CD-ROM version of this brief, and an annotation showing what can be seen when is attached as App. C.

condition shortly before trial was *unchanged* from his 2008 deposition. Mark and Meg also asserted the trial had concerned only cognitive problems caused by the accident, about which they asserted the surveillance video supposedly could shed no light. But a review of the trial record conclusively established that they had claimed Mark suffered from *both* physical and mental disability; and Drs. Clark, Stump, and Becker all testified that surveillance video *does* shed meaningful light on Mark's cognitive abilities. Finally, Mark and Meg submitted declarations from some of Mark's treating physicians, who purported to substantiate Mark's claimed debility. But none of these doctors watched more than snippets of the video, and none had seen Mark outside their offices. As one of his treating physicians admitted at trial, the best evidence of Mark's condition was how he functioned out in the world, and the surveillance video was just such evidence.

Judge Craighead acknowledged that the Mark Jones she saw in the video did not match the mental picture she formed of his condition at trial. Yet she still denied the City's motion. Finding the surveillance was new, material, and not merely cumulative or impeaching, the court nonetheless denied a new trial under CR 60(b)(3) because the City had not been sufficiently diligent in its investigation of Mark before trial, and denied a

new trial under CR 60(b)(4) because there was not clear and convincing evidence of fraud.

The court's exclusion of the evidence the City uncovered as trial was getting underway, and the court's subsequent refusal to grant the City's CR 60(b) motion, are linked by a common error: The failure to appreciate that a trial is above all a search for the truth, and that a trial court must insure that a party does not profit from breaching its duty to be forthright in discovery. Under the trial court's rulings, a party in Mark or Meg's position need only manage to hide the truth until the discovery cutoff bell rings. Then, unless a party like the City proves it was *impossible* to have uncovered the deception before the close of discovery, the evidence proving the deception will be excluded and the deceiver can carry off the deception at trial. In denying the City's CR 60(b) motion, the court took this reasoning one step further, ruling the City had no right to rely on the presumptive truthfulness of Mark and Meg's discovery responses. Under the trial court's approach, civil litigants must assume their opponents are lying in discovery and hire investigators to shadow them day and night, hoping something will come up before discovery ends that proves they are lying.

This is not the law in Washington. Nor should it be. The judgment should be vacated, and a new trial ordered. The City should also

be allowed to revisit the issue of whether, based on a fully developed record of Mark's alcohol abuse, the case should be dismissed because a jury must engage in speculation to determine the cause of Mark's accident.

II. STATEMENT OF MATERIAL FACTS³

A. **December 23, 2003: Mark Jones Falls After Pushing Through the Door to a "Pole Hole" at a Seattle Fire Station. He Claims No Memory of the Events Leading Up to the Fall.**

The City of Seattle hired Mark as a firefighter in 1999. RP (9/29/09-A) 104. Mark had worked at Station 33 on at least six occasions before his 24-hour shift on December 22-23, 2003. RP (9/29/09-A) 117, 119; RP (10/15/09) 27-29; Ex. 529. At about 3:00 a.m. on December 23, 2003, Mark fell down Station 33's fire pole hole, landing 15 and one half feet below on the apparatus bay floor. CP 6; Ex. 75; RP (9/17/09-A) 147-48. He suffered significant injuries from the fall. CP 515-23.

Nobody saw the fall. CP 7814; Ex. 75. Mark claims that the last thing he remembers is climbing the stairs to the bunkroom at precisely 1:37 a.m. RP (9/29/09-A) 119-21; RP (10/8/09) 27. Another witness reported seeing Mark downstairs after 2:00 a.m. *See* RP (9/24/09) 156-59. Mark claims to remember "[n]ot one eenie-weeny, teeny-weeny, little bit" about what transpired after he says he went upstairs. RP (10/8/09) 35. A

³ To assist the Court in tracking the sequence of events, the City has prepared a chronology with record citations. *See* App. I.

medic testified Mark said he got up to go to the bathroom; no records confirm this testimony. RP (9/17/09-A) 149-50, 156-57, 159-60.

B. 2004 Through 2005: Mark Undergoes Rehabilitation and Reports Substantial Progress in Recovering From His Injuries.

Dr. Peter Esselman, a rehabilitation specialist, oversaw Mark's initial rehabilitation and was "optimistic early on[.]" RP (9/16/09) 3, 7-8, 64. In December 2004, Mark had a comprehensive neuropsychological evaluation which found Mark's cognitive abilities "are generally within or exceed normal expectations for his age and education level. *This is consistent with his report of near complete recovery of cognitive functioning.*" CP 10489 (emphasis added).

Dr. Andrew Friedman became Mark's pain management doctor. RP (9/17/09-A) 9-10. From late 2004 to early 2005, Dr. Friedman noted that Mark's recovery was "going forward and it looked like maybe he was going to get back to work and maybe he was going to function more normally." RP (9/17/09-A) 52-53. By late 2005, Dr. Friedman noted that Mark was "remarkably better" and "breathing fully[.]" CP 2411. In September, Dr. Esselman noted there did "not appear to be any significant permanent restrictions due to the cognitive impairment." CP 10494. By December, he was "very encouraged" that Mark could eventually return to

full time work. RP (9/16/09) 38, 64-66; 10496-97.⁴ According to Dr. Friedman, Mark's general upward trend continued through early 2006, by which time "things [were] going extraordinarily well[.]" CP 2413-17; RP (9/17/09-A) 128.

C. 2006: Starting that Spring, Mark Reports Increasing Pain and Deteriorating Physical and Mental Ability; Mark Sues in December.

In Spring 2006 Mark started reporting increased pain -- about the same time his attorney contacted Dr. Friedman to request impressions of Mark's condition and prognosis. CP 2419, 2768.⁵ By July 2006, Dr. Friedman expressed doubts for the first time about Mark's ability to perform full-time work. CP 2766; RP (9/17/09-A) 36. By October 2006, Mark and "his sister decided that he could not work." CP 2420. In November 2006, Dr. Esselman opined for the first time that Mark would not be able to resume gainful employment. RP (9/16/09) 34-35. Mark sued Seattle on December 22, 2006. CP 5-8.

⁴ At trial, Dr. Esselman tried to distance himself from the improvements he had recorded, suggesting they were the result of Mark exaggerating how good he felt, presenting well because he'd had a good night of sleep before coming in, and even *of the doctor himself deliberately not accurately recording Mark's true condition* (in a supposed attempt to help Mark by being optimistic). RP (9/16/09) 38-39, 64-67.

⁵ By May 2006, Meg was coming to all Mark's appointments. CP 108, 2442-43, 2764. It would become important that the medical personnel treating Mark had little to go on other than his and Meg's reporting of his condition and his performance in their offices. See RP (9/17/09-A) 60 (Dr. Friedman explaining that he had to rely on Mark's reporting because "[p]ain is notoriously subjective"); RP (9/16/09) 63, 101 (Dr. Esselman knew about Mark's condition only from Mark's and Meg's reporting).

D. 2008: Mark Responds to the City’s Discovery Requests by Representing He Has Been Debilitated by the Accident, and Denying Any History of Alcohol Abuse.

On October 1, 2007, the trial court stayed the case pending the Supreme Court’s decision in *Locke v. City of Seattle*. CP 7899-7900.⁶ The stay was lifted in January 2008, and the trial re-set for June 16, 2008. CP 7901-04. The City propounded three requests for production, and the parties by May had collectively generated 13,000 pages of discovery. CP 7937. The City propounded two sets of interrogatories including questions about damages. CP 7937. Mark responded that he had “received multiple injuries, from the top of my head and my brain on down to my legs[,]” had “more problems than I can remember to list[,]” and referred the City to his medical records. CP 7417-19.

1. Medical Records Show Mark and His Twin Sister Meg Jones Reporting That Mark’s Condition is Bleak.

Medical records painted a grim picture. *See, e.g.*, CP 2423-25, 2785-92. Based on his pain reports, Mark had a morphine pump installed in January 2007. CP 2762-72. Drs. Friedman and Esselman agreed in February 2007 that Mark “is never going to make it back as a firefighter and [it is] unlikely that he will really be employable in a real capacity

⁶ In *Locke*, the City challenged the constitutionality of the statute allowing firefighters and police officers to sue their employer in negligence for damages in excess of their worker’s compensation benefits. The Supreme Court upheld the statute in a decision issued on December 13, 2007. *See* 162 Wn.2d 474, 172 P.3d 705 (2007).

based on the combination of physical and cognitive deficits as well as depression secondary to the injury.” CP 2774-75.

2. When Deposed in March 2008, Mark Denies Alcohol Use, Claims Constant Pain, and Presents as in Terrible Shape.

The City deposed Mark on March 6. CP 70. His presentation and testimony in the videotaped deposition painted a grim picture of his condition. *See* Deposition Video (Ex. Sub No. 466D).⁷ He reported his right hip throbbed and was “in pain all the time” and that his ribs were “constantly in pain” and felt “shocky.” CP 83. When he coughed it felt like he was going to “blow the side of [his] head off,” and he would avoid moving his head from side to side because it would “hurt[] like you have a headache.” CP 83. He could walk his dog for no more than five minutes before pain and exhaustion stopped him. CP 97. He could not throw a ball because he had “lost the mobility in [his] right arm to throw at all.” CP 87.

Mark testified his condition had “pretty much just stayed the same” from the time when he got out of the hospital through the time he started working a light duty job. CP 84, 10052. After leaving that job, his

⁷ The video of Mark’s deposition is in the record at Exhibit Sub. No. 466D. A CD juxtaposing portions of the deposition with portions of the surveillance video is at Exhibit Sub. No. 466E. Both can be viewed by clicking on the hyperlinks contained in the CD-ROM version of this brief.

condition got “worse” and had stayed that way: “I think I have more pain. I describe it like *I feel like I’m 80 years old*, you know, like I -- I get up in the middle of the night and I just feel like a train hit me, and my day starts just like that. Just trying to walk is such a big task for me.” CP 85 (emphasis added). Mark testified that “most of my day is restricted, it’s about the best way that I can put it.” CP 97. He equated getting through his daily activities to climbing Mt. Everest: “[I]t’s just such a struggle from the point A when I get up and I’m trying to get going through it. So it’s hard for me to pin one specific thing and say has this affected just this one thing, it’s -- *it’s affected every piece of me.*” *Id.*

Mark testified that he consumed *no* alcohol for two years prior to the deposition. CP 91. “I was never treated for alcoholism, never had an issue with that.” CP 89. He said that, before the accident, he was having 3-4 drinks on Friday nights and sometimes on weekends. CP 89.

3. Meg Confirms Mark’s Reports of Pain and Decreased Ability to Function, and His Claimed Sobriety.

The City then deposed Meg. CP 130. She stated there was a period of time “early on” where Mark had been doing better, even “great.” CP 155-56. While there was an “ebb and flow” to his recovery, Meg said he was “better” by early 2005. CP 164. Mentally, he was “good to go” as a firefighter, although not quite physically ready to return to work. CP 164. Mark had made “super gains” to the point that “we actually thought

we were going to be able to get him back to work[.]” CP 156. While undergoing physical therapy with their father, Gordon Jones, Mark was “actually jogging on treadmill.” CP 156.⁸ But from when Mark moved in with Meg in April 2006 after separating from his wife Ann, he was in “pretty bad shape” and having some “not so good days[.]” CP 155-56; RP (10/7/09) 32. “I can tell you from the time he’s lived with me that he has a very difficult time with the memory stuff,” reported Meg. CP 166. And by January 2007, “it seemed as though things were on a *pretty steady downhill slide* in most of the areas for him.” CP 155 (emphasis added).

Meg testified that Mark’s aerobic activity from March 2007 to March 2008 was limited to stretching out in the therapy pool and “walking the dog when he felt up to it.” CP 165-6. The variation between good days and bad days was the difference between being able to walk 400 yards and being able to walk 50 yards. CP 157. “He’s a guy that sits there every day and barely gets up, struggles to get up, forces himself willfully to get up. He’s a guy that’s in pain constantly[.]” CP 172. “[W]hat I’ve watched is somebody’s whole life get completely taken away from him. I have watched somebody try to figure out how to function in that life as best as he knows how, and it’s not getting any easier, *it’s getting worse*

⁸ Gordon worked as a physical therapist out of his home in Helena, Montana. CP 72, 4069. He treated Mark from May 2004 to June 2006. CP 4072-73. Meg declared that neither she nor Mark had seen their dad since 2006. CP 8079-80.

each day.” CP 172 (emphasis added). Asked if Mark drank alcoholic beverages, Meg implied he did not, stating she did not “allow alcohol in the house.” CP 161.

4. To the Doctors Conducting Independent Medical Examinations, Mark Reports Devastating Problems From His Fall and Denies Alcohol Use.

During the worker’s compensation process, a panel of three doctors examined Mark to determine his current medical status, future treatments needs, and ability to work: (1) William Stump (neurologist); (2) the late James Green (orthopedic surgeon); and (3) Roy Clark (psychiatrist). CP 10022. Meg attended the evaluation and relayed much of the history. CP 10022, 10039. Mark reported many problems, stating that the accident “devastated [his] life,” CP 10036-38, 10060, and that he now “ ‘pretty much live[s] on the couch.’ ” CP 10063. He claimed not to use alcohol. CP 10038, 10062. The panel found no objective orthopedic cause for the reported pain, but noted Mark might have thalamic pain syndrome. CP 10069.⁹ The panel found him totally disabled. CP 10072.¹⁰

The City supplemented the panel exam with a stipulated CR 35 exam by Dr. David Coppel, a neuropsychologist. CP 10501-15. Dr.

⁹ Thalamic pain syndrome is a central pain condition originating in the brain and is generally not objectively verifiable. CP 8273, 9487.

¹⁰ Drs. Clark and Stump withdrew their finding after viewing the surveillance video, concluding Mark deceived them. CP 8267-71, 8272-76, 9451-58, 9485-89 (Apps. E,F).

Coppel concluded Mark's cognitive functioning had declined but it was unlikely the December 2003 injury was the cause, attributing it instead to Mark's reported pain, anxiety, and depression. CP 10514-15.

5. Private Investigators Put Forth “[H]erculean [E]fforts”¹¹ to Conduct Surveillance of Mark, But Are Unable to Observe Him.

In January 2008, the City hired investigator Jess Hill to supplement ongoing discovery. CP 8203, 8679. After Mark's deposition, Hill conducted 26 hours of surveillance over the course of four days outside where Mark said he lived, but never saw him. CP 71, 8203-04.

Upon learning Mark planned to be in Montana in May, Hill hired two local investigators, who conducted 18.5 hours of surveillance without locating Mark. CP 8204, 8706-07. Hill also hired Montana investigators to look for Montana dissolution files, Idaho investigators to find possible dissolution files and interview two of Mark's former employers, and contacted Mark's ex-wife Ann Jacobs but could not secure an interview. CP 8688-89, 8696, 8698, 8701-04.¹²

¹¹ As put by Plaintiff's counsel, CP 6559, who also described the City's investigators as has having gone “all over hell's half acre” to determine the nature and extent of Mark's activities. RP (9/11/09) 104; CP 8203.

¹² In May 2009 the City would re-engage Hill to canvass Mark's former neighborhood and again contact Ann Jacobs. CP 8204-05, 8760-70.

E. Meg Has Mark Declared Incompetent in July 2008, Then Replaces Mark as the Plaintiff in This Lawsuit in November.

On May 2, trial was continued to December 1. CP 7941. A mediation was held, after which Mark's original counsel withdrew. CP 7966-75, 8010, 8012. The trial was continued again, this time to September 8, 2009, with a new discovery cut-off that was eventually extended to August 7. CP 1481, 8074-77.

In June 2008, Meg petitioned for Mark to be declared legally incapacitated, and was appointed his guardian in July. CP 19, 8052, 9222-28. In November, the trial court granted Meg's motion to be substituted for Mark as the plaintiff in this action. CP 14-16, 21.

F. May 2009: Meg Prevents the City From Redeposing Mark, Representing That His Condition Had "Not Substantially Changed" Since His Deposition The Year Before.

In May 2009, the City sought to redepose Mark. CP 49. Meg opposed, claiming the "information requested by the defense is already in its possession by way of the medical records, is now provided by Meg Jones' Declaration or can be provided by way of answers to specific Interrogatories." CP 230. "[V]erifying that Mark's condition *ha[d] not substantially changed*" since his March 2008 deposition, Meg declared Mark's "overall condition was *roughly the same* with similar variations as he and I and the medical records have frequently described." CP 225, 268 (emphasis added). "Mark has an extremely difficult time negotiating

through the limited life he can now lead. He has *constant pain* of varying degrees.” CP 265 (emphasis added). Meg declared Mark could not endure another deposition. *See* CP 267.

The trial court denied a redeposition, and the City moved for reconsideration. CP 292-305. Plaintiff’s counsel represented that Mark’s “*recovery has generally plateaued* and he is simply attempting to cope with his long-term, chronic injuries.” CP 358 (emphasis added). The court denied reconsideration. CP 537-38.

G. Mark’s Ex-Wife is Deposed and Describes Him as an Alcoholic Who Continued to Drink Heavily After His Accident.

The City had suspicions about the role alcohol could be playing in Mark’s reported decline and may have played in the events leading up his accident. In November 2003, shortly before his fall, Mark was arrested for driving under the influence (“DUI”). CP 333-37, 412.¹³ The blood alcohol content results on his DUI citation were .168 and .191. CP 334-37.¹⁴ Dr. Gregory Rudolf, a specialist in addiction medicine and chemical dependency, opined that a blood alcohol level of .191 was “extremely high” and Mark’s ability to operate a motor vehicle with that much alcohol in his system showed he had a “very high level of alcohol dependency” in

¹³ Mark pled guilty to negligent driving. CP 1806-13.

¹⁴ Mark blew a .096 on the preliminary breath test when he failed to follow the officer’s instructions to blow correctly. CP 336.

November 2003. RP (9/11/09) 3; CP 2375-76, 2448-50. Moreover, shortly after his fall Mark was placed on an “Alcohol Withdrawal” protocol because of his high scores on the “Clinical Indicators and Withdrawal Assessment.” CP 317-18, 324-31, 404, 427; RP (9/11/09) 26.¹⁵

As discussed, Mark and Meg’s deposition answers and the entries in the medical records cited by Mark in his interrogatory responses minimized Mark’s alcohol use. During the court-ordered alcohol assessment stemming from his DUI arrest, Mark reported that he had abstained since November 2003. CP 383. Mark and Meg claimed the symptoms underlying the hospital Alcohol Withdrawal directive were from his chewing tobacco habit. CP 90, 161. Mark reported mere “occasional alcohol use” according to medical record entries made soon after his fall. CP 513, 519, 522. In December 2004 he listed his alcohol use as “seldom” (CP 525); he did not report drinking in mid-2006 (CP 2366-67, 4034-35, 4037); and in 2008 he told the worker’s compensation panel that he was not using alcohol. CP 10038, 10062.

¹⁵ Plaintiff submitted a declaration from the Harborview discharge attending physician stating that the initiation of alcohol withdrawal orders does not necessarily mean that Mark was diagnosed with alcohol withdrawal, but that doctor did not even remember Mark as a patient. CP 1816-18.

In her deposition in May 2009, Ann Jacobs flatly contradicted this picture. Ann considered Mark an alcoholic and said alcohol played a “starring role” in his anger problems that plagued their marriage. CP 395-99. She testified Mark had been attending AA since before they married, and Meg knew he was going to AA to stop drinking. CP 395-96. Mark initially drank 4-10 beers at a time “a couple times a week.” CP 394. His son Jesse was born and Mark “*drank more after that*. He drank more as time went by.” CP 400 (emphasis added). “I know that alcoholism is a progressive disease and that people drink more as time goes by. So I’m not going to deny that that happened with Mark. He drank more later.” CP 395.¹⁶

Following his November 2003 DUI arrest, Ann did not think Mark was drinking during the Thanksgiving/Christmas season of 2003 because “we were getting along better[,]” which happened when he was sober. CP 400. But the day before his December 22-23 shift, they “were fighting” and Mark retreated to the garage to build a tricycle for Christmas. CP 401. Ann could not rule out that Mark was drinking then. CP 401.

¹⁶ Responding to questions at his deposition about whether Ann had issues with his drinking, Mark said Ann would get upset when he would have “*a beer*” because she felt “being hot in a hot tub and having *a beer*” did not go together. CP 88. Ann testified Mark’s deposition answers denying alcohol problems were not truthful. CP 427.

Ann testified that Mark's pattern of drinking ten or so beers continued after his injury. CP 410. He drank to the point of passing out *while taking narcotics*. CP 418. On one occasion in mid-May 2006, he drank 14-16 beers over 5-6 hour period and while still "very drunk" tried to drive away with their son Jesse. CP 410, 421.

Ann also testified Mark did not truthfully report his alcohol history to his treating physicians. CP 398.¹⁷ Mark "*never told* [Dr. Esselman] how much he was drinking." CP 398. Dr. Friedman admitted he did not know whether Mark was drinking in mid-2006, when medical records showed a "downturn" in Mark's recovery. CP 2366-67; 3966-67. He testified Mark had not reported any problems with alcohol dependence or abuse, his DUI arrest, or the frequency or amount of his use. CP 4034-35, 4037.

H. July 2009: Meg Again Prevents the City From Redeposing Mark, Again Testifying That Mark's Condition Has Not Changed Since March 2008.

On July 29, 2009, with Judge Susan Craighead now assigned to the case, the City again requested permission to redepose Mark. CP 1235. Meg successfully opposed this final effort on the grounds that the City had just re-deposed her, and she knew "what has transpired in his life." CP 10594-95. She again asserted Mark's "overall condition was *roughly the*

¹⁷ Ann went to every appointment before they separated in April 2006. CP 399.

same with similar variations” as it had been the year before. CP 225, 268. “[W]e deal with a physical condition that leaves him *very limited both mentally and physically*, and the different variations is [sic] all the problems or compromises that come up with all his problems.” CP 9838. Meg testified the “variations” involved the location, rather than the extent or existence, of the pain: Mark “lives in pain constantly.” CP 9841.

Meg testified Mark had suffered “*significant slides* in regards to the physical, the mental, the emotional stuff” since his high point in early 2006. CP 9821. When asked about an average day for Mark, Meg responded: “If he feels up to it, he’ll go for a walk with me with the dogs. A lot of times he might sit and watch TV all day.” CP 9829. Going to the shooting range was “about the only thing left that he can do.” *Id.* Meg rejected the notion that the evidence of Mark having bought hunting tags¹⁸ meant he was able to hunt, explaining that now “[h]unting means you go and you buy the license.” CP 9830.¹⁹ Meg described the one time she took him pheasant hunting: It “didn’t work out very well” because Mark “got about a hundred yards into the field and *he sat down and that was it.*” CP 9829-30.

¹⁸ See CP 2329-31.

¹⁹ “Well, I know he purchased the tags. I don’t know how much he’s been able to go hunting. I think he likes to -- I mean, *the idea of purchasing the tag doesn’t mean you went hunting.*” CP 9830.

Asked about alcohol, Meg admitted Mark might have a drink or two with friends but maintained he had not had a problem with alcohol. CP 9822-23, 9835. The “reality” Meg presented to the City less than two months before trial was that Mark needed “all kinds of care every given day.” CP 9853.

I. The Trial Court Excludes the City’s Evidence of Mark’s Alcohol Abuse.

Meg moved to prohibit the City from presenting evidence on Mark’s alcohol use before and after his accident. CP 1763-82, 2029. Counsel argued that the prejudicial effect would outweigh the evidence’s probative value, stating his client would “lose if [evidence of Mark’s drinking] comes in.” RP (9/4/09) 44. Supporting the motion, Mark declared: “I have never been diagnosed as an alcoholic. I do not consider myself to be an alcoholic. I have never been in an alcohol treatment program.” CP 1930. Mark said Ann’s post-accident estimate of 4-10 beers several times a week was “too high” but did not offer another figure, saying only that his present alcohol use was “pretty minimal.” CP 1931.²⁰

The City opposed on liability and damage grounds. CP 2269-84. It set forth the available evidence showing Mark’s drinking history: (1)

²⁰ In his declaration, Mark did not deny having consumed alcohol between his DUI arrest and his fall, stating only that *he did not recall*. CP 1931. This was inconsistent with his deposition testimony, where he said he was drinking on the weekends in the month before the accident. CP 2389.

Ann's testimony about Mark's drinking (CP 2333-59); (2) his admission that he was drinking the month leading up to the accident (CP 2389); (3) his high blood alcohol content while driving in November 2003 (CP 333-37, 412, 2375-76); (4) the Alcohol Withdrawal protocol administered after the fall (CP 2376, 2392-2400); and (5) his continued concealed drinking after the accident. CP 1075, 1882, 2333-59, 2366-67, 2376.

- Liability. In July 2009 the City had moved for summary judgment on the ground that Plaintiff could not prove, without asking the jury to speculate, about what happened between 1:37 a.m. and Mark's fall that made the City's actions the cause of the fall. CP 607-21, 1228-33. Allowing that "the City makes some compelling arguments for contributory negligence," the court still denied the City's motion for summary judgment. RP (7/31/09) 18-19; CP 1322-23.

The City argued Mark's drinking was relevant to its liability for his fall. CP 2279-82. Based on the evidence of his drinking history, Dr. Rudolf opined Mark suffered from chronic alcoholism, would more likely than not experience impairment if his drinking pattern was interrupted, was likely experiencing an impairment the night of his fall, and the impairment was a likely cause of his accident. CP 2278-79, 2372, 2375-76. The City argued this evidence of pre-fall impairment was also relevant to contributory negligence, because it explained why Mark

missed several visual and tactile warnings leading up to his fall. *See* CP 2277-82; *see also* Ex. 521 (App. G) (exhibit showing missed warnings).

- Damages. The City set forth the evidence then available showing how Mark's post-accident alcohol use affected his recovery and his apparent decline after mid-2006. CP 2273-76. Dr. Rudolf opined that Mark's "clearly high level of alcohol abuse, post accident, while being treated with narcotic medication in a compromised neurologic state, *probably did hinder his recovery significantly.*" CP 2386. Dr. Stump testified: "Alcohol is a neurotoxin...which means that alcohol kills brain cells....The more alcohol you use the more brain cells you kill....If I have a patient with a brain injury I strongly advise them to use no alcohol, because...they can't afford to lose any more brain cells." CP 2446.

The trial court excluded *all* evidence of Mark's pre-accident alcohol consumption and alcohol withdrawal-based disorientation. CP 2817; RP (9/4/09) at 110-13. Although the court stated "we know that Mr. Jones had struggled with a drinking problem in the years leading up to the accident," it dismissed the City's disorientation theory as too speculative. RP (9/4/09) 110-12. The court also excluded *all* the post-accident evidence of his alcohol use, except one incident in May 2006, CP 2817; RP (9/4/09) 113-22, because of the supposed absence of evidence that Mark drank after receiving the pain pump, and because the court could not

see the connection between drinking and a negative impact on recovery. RP (9/4/09) 113-22.

But the “big issue” for the trial court was ER 403: The court thought the City wanted to use alcohol evidence to attack Mark’s character. RP (9/4/09) 113. But instead of policing the City’s evidence to make sure it did not cross the line into an attack on character, the court barred the City from presenting its alcohol defense on liability and damages *in its entirety*.

The court’s ruling came before it heard the offer of proof from Dr. Rudolf on September 11, when he explained that Mark’s level of drinking is “consistent with the likely potential for withdrawal, and certainly consistent with some level of alcohol-related impairment[.]” RP (9/11/09) 10-11. Dr. Rudolf explained that Mark, impaired by alcohol withdrawal, could have undone any mechanism used to secure the door. RP (9/11/09) 31-2, 34-35. On damages, Dr. Rudolf opined Mark’s level of alcohol abuse “*significantly affected his recovery*[.]” RP (9/11/09) 42-43. Mixing narcotics with heavy alcohol use “would be expected to have an adverse effect” on cognition, memory, mental function, and induce “a heightened sensitivity to pain.” RP (9/11/09) 41-42.

The court was unmoved: “I’ve had enough. I have heard so much today about this alcohol issue. There is *not one word that I heard today*

that changes anything about what I've already ruled.” RP (9/11/09) 144 (emphasis added). The court allowed the City to supplement its offer of proof during the trial. *See* RP (9/4/09) 115-116. The City duly submitted testimony from Dr. Friedman that *alcohol kills brain cells*, long term alcohol use leads to *sexual dysfunction and depression*, and mixing alcohol and narcotics can *exacerbate depression* and other psychosocial problems. CP 4005, 4032-33; RP (9/17/09-A) 123-25. The City also submitted testimony from Dr. Stump, who confirmed that if a person who suffered a brain injury is consuming alcohol and exhibiting increased cognitive difficulties, “*alcohol is the cause for the worsening, not the original brain injury.*” CP 4656-57 (emphasis added). But the court remained steadfast in refusing to revisit its exclusion ruling.

J. Just as the Trial is Getting Underway, *The City Cracks the Case: Investigators Find Mark Appearing Pain-Free and Drinking Heavily at a Bar, and Mark’s Sister Beth Powell and His Father Gordon Jones Come Forward Confirming Mark’s Alcoholism and Casting Doubt on His Claimed Injuries. But the Trial Court Prevents the Jury From Hearing Any of This Evidence.*

Three days after the trial court ruled on Meg’s *in limine* motion, investigators for the City found Meg driving Mark from bar to bar, on the evening of Labor Day Monday, September 7, 2009. At Bert’s Tavern, in Mill Creek, Washington, investigator Rose Winqvist, looking for someone in Mark’s reportedly debilitated condition, did not recognize him at first

because he “did not appear to be disabled.” CP 4310.²¹ He was not limping or rocking back and forth or looking uncomfortable or appearing to be in any pain. CP 4310-11. In fact, he looked like he was having a “great time.” CP 4310. Meg picked him up from Bert’s Tavern after he had consumed several beers, including at least three within one hour. CP 4310.

The City’s trial counsel first brought this evidence to the court’s attention on September 11, and then on October 12 offered it for impeachment. *See* RP (9/11/09) 114; CP 4276-81. The court refused to allow the evidence because the City had not caught Mark drinking in public before the discovery cut-off. RP (10/14/09) 17.

Two days after the investigators saw Mark at Bert’s Tavern, Ms. Winquist came across Mark’s sister Beth Powell. CP 3777-78, 8207. In February 2008, Mark represented that all persons with knowledge of his injuries and damages would be identified and disclosed as a trial witness. CP 7415-16. Beth was never identified on any of the plaintiff’s witness lists as such a person. CP 7425-30, 7470-79, 7488-89, 7561-76, 7599-

²¹ Winquist’s account of the evening was confirmed by the testimony of the other two investigators on the scene. *See* CP 4313-18. Winquist also took several pictures of Mark, using her cellphone camera. Defendant’s Pre-Trial Ex. 16.

7602, 7625-28, 7635-40.²² But in a deposition taken for an offer of proof, Beth described incidents from 2005 through 2009 that directly contradicted Mark and Meg’s portrait of Mark, including Mark spending all day cutting a hedge while operating a gas trimmer from atop a ladder in the Spring of 2005 and lifting a kayak from the top of a car to his pickup in the Summer of 2009. CP 3780-81, 3788, 4065. Beth also confirmed Mark’s history of alcohol abuse, testifying that when she asked Meg, just months before the start of trial, why Meg had not helped their brother address his alcohol problem, Meg admitted Mark had a problem but insisted on “*[f]irst things first*” (which Beth took to mean first winning the lawsuit against Seattle). CP 3782, 3794.²³

The trial court denied the City’s request to call Ms. Powell: “[There is] no way I can see, under our local rules [i.e., KCLCR 26], to allow Ms. Powell to testify.” RP (9/29/09) 23.²⁴

²² Mark also did not identify her as a person with knowledge during his deposition -- in response to questions about family, he named her (using her full name “Elizabeth”) as a sister, but said he had not seen her in a couple years and that he did not regularly see her before the accident. CP 73. Yet when confronted with the City’s initial request that Ms. Powell be allowed to give an offer of proof, Plaintiff’s counsel acknowledged knowing about her: “We talked about siblings I remember Meg describing to me there’s a sister who is a wing nut, *so we really shouldn’t* --” RP (9/11/09) 105. Presumably, the words left unsaid were “...disclose her as a person with knowledge.”

²³ Meg did not deny that she and Beth spoke regularly, admitted that she and Mark had seen Beth (although not intentionally), and *did not deny Beth’s testimony about the “[f]irst things first” admission*. CP 3779, 8079.

²⁴ The court also concluded Beth lacked personal knowledge of material facts, even though her testimony plainly established such knowledge. *See* RP (9/29/09) 23.

After plaintiff's counsel learned that the City's investigator was making calls to Montana, they left a phone message for Gordon Jones, Mark's father, telling him the City was getting "pretty desperate" and "there is nothing they should need from you." CP 4060-61 (App. D-2). But Gordon provided the City with a declaration in which he testified that his son had "spent the better part of August [2009] in Helena...hunting, camping, [and] partying[.]" CP 4068-69 (App. D-1). He also testified about his knowledge of Mark's history of alcohol abuse and need for treatment. CP 4068-75. Although plaintiff had disclosed Gordon Jones as Mark's father and as someone who had provided Mark with physical therapy, as with Beth, plaintiff omitted Gordon from the list of family members who had knowledge about how the fall impacted Mark's life. *Compare* CP 7485, 7570 *with* CP 7425, 7469-70, 7562-63. But unlike with Beth, Gordon was listed on plaintiff's final witness list, CP 76265, and on the Joint Statement of Evidence as a witness for plaintiff, CP 7637, *and the City had reserved the right to call any witnesses identified by either party.* CP 4342, 4355, 4369, 4380, 4382, 4389, 4393.

Yet when the City tried to call Gordon, *see* CP 4079-83; RP (9/29/09) 3, the trial court barred him. The court admitted Gordon's evidence was "extremely explosive" but ruled the City should have disclosed its content before the discovery cutoff. RP (9/29/09) 24-25, 27-

28; RP (9/30/09) 69 (trial court: “[I]n light of how incendiary he is, I am still very, very, very -- I don’t know how much more clear I can make it, reluctant to think that I would ever let him testify.”). The City later renewed its request to call Gordon, CP 4224-29, but the court refused to relent.²⁵

K. Mark Reprises His Deposition Performance at Trial and Receives a \$12.75 Million Verdict.

“[T]he evidence adduced at trial really did paint a picture...of someone who’s suffered significant physical disabilities.”

- The Honorable Susan Craighead.²⁶

Called to testify, Mark made his way to the stand slowly, with a pronounced limp and evident difficulty, gripping counsel table, then the jury box, and finally the witness stand railing. CP 9892-94. He looked, moved, and talked much as he had during his March 2008 deposition. CP 9892-93; *see* Ex. Sub. No. 466D (Dep. Video). “It was,” as the trial court put it, a “*fairly dramatic presentation.*” RP (12/14/09) 40.

Mark testified that he “shuffle[s] around like an 80 year[] old and hurt[s] like hell.” RP (9/29/09-A) 122. He testified to debilitating pain: “[M]y head don’t work, my mouth, my words don’t work, I don’t breathe,

²⁵ Trial court: “I just have to say that coming in the middle of the trial, I mean if this issue had come up in July it would be a whole different story, but coming in the middle of the trial, I’m just not going to allow it.” RP (10/14/09) 11.

²⁶ RP (10/8/10) 35.

I hurt like hell, and I'm trying to function the best I can." RP (9/29/09-A) 124. "[N]ot being able to do what [he] could do before" led to depression. RP (10/8/09) 115. Whereas before he was able to hunt with his old friends, Mark testified that he would often "lay on the couch" and watch the hunting channel, especially the "handicapped shows" featuring people who have overcome their handicaps. RP (9/29/09-A) 126-30; RP (10/8/09) 91-92. He testified about being a "handicapped hunter" and said, "I try to call them hunts, but they're probably outings[.]" RP (9/29/09-A) 126, 128-29.

Meg reinforced her brother's self portrait of a man severely debilitated by injury. RP (10/1/09) 161, 169-70. Meg said that a personal attendant was necessary because "*we know he's not going to get any better.*" RP (10/1/09) 177.²⁷ Mark's friends highlighted his claimed physical limitations. RP (9/21/09) 123; RP (9/24/09) 74; RP (9/30/09) 47, 195; RP (10/1/09) 17. When Ann Jacobs testified, the jury only heard from her about how Mark was worse, not what Ann knew about his drinking. RP (10/8/09) 162-63, 200.²⁸

²⁷ Following Meg's testimony, the City argued Meg had opened the door for the admission of alcohol evidence. RP (10/1/09) 183-94. But the trial court stood by its ruling. RP (10/1/09) 194-98.

²⁸ The trial court instructed Ann on the limits of her testimony. RP (10/8/09) 148-53. Following Ann and Mark's testimony the trial court thought that "all the reasons I've stated for keeping alcohol out are still there." RP (10/8/09) 208.

Plaintiff's experts painted a picture of someone suffering from a "complicated constellation of impairments," which arose from and featured his physical disability. RP (9/22/09) 107, 110-11 (Anthony Choppa, Plaintiff's vocational counselor). Plaintiff's neuropsychologist expert, Glenn Goodwin, Ph.D., testified Mark's chronic pain, brain injury and fatigue "*interact synergistically*" to affect his cognitive abilities. RP (9/22/09) 201. Jo Anne Brockway, Ph.D., a psychologist, testified Mark's inability to exercise due to pain and pulmonary issue affected his mental health. RP (9/23/09) 218-19.²⁹

Dr. Esselman did "not expect Mr. Jones to get better" and predicted worsening pain unless the jury awarded him the "absolutely essential" lifetime care plan, providing care 24 hours a day, 7 days a week. RP (9/16/09) 45, 60-61, 63, 101; RP (9/23/09) 40. Dr. Friedman testified about how Mark's reported pain "*has been pretty continuous. I don't think there are times where he doesn't have pain[.]*" RP (9/17/09-A) 10. Dr. Friedman testified Mark had "ups and downs" during recovery, but as of the trial "he still has a lot of pain" and "most likely will have more pain as he gets older." RP (9/17/09-A) 24, 34, 56.

²⁹ Dr. Brockway knew what she did about Mark's inability to exercise only through Mark and Meg's reports. RP (9/29/09) 52.

Dr. Goodwin testified Mark's cognitive performance had declined since he was tested in December 2004. RP (9/23/09) 154. Because brain injuries generally get better with time, Dr. Goodwin attributed the decline to factors other than the injury to Mark's brain. RP (9/22/09) 199-200; RP (9/23/09) 154. Dr. Goodwin agreed with Dr. Coppel's conclusion that the recorded neurocognitive decline was attributable to Mark's reported pain, anxiety and depression. RP (9/23/09) 153-54; CP 10514-15.³⁰

Dr. Friedman told the jury Mark's "biggest problem" was "functioning in the real-world environment." RP (9/17/09-A) 28-29. Dr. Esselman stated "the true test is what people can do in their environment, what he can do in his day-to-day life." RP (9/16/09) 29.

Plaintiff's counsel in closing told the jury that Mark suffered from "chronic pain 24/7." RP (10/20/09) 75. "*Everything about this accident affects every part, every system in his body, and is impacting his health.*" RP (10/20/09) 79. "Because he has so much pain, because the residuals of his injuries is to [sic] great, that getting going in the morning is like the tin

³⁰ Dr. Goodwin administered an MMPI exam to determine whether Mark was malingering -- a test that had not been administered during any prior examination. Mark received a 30 on the "fake bad" scale, "which is well above the cutoffs for over-reporting" symptoms. CP 10528. Raw scores over 28 normally "should raise very significant concerns about the validity of self-reported symptoms." CP 9455. But Dr. Goodwin minimized the significance of Mark's score based on the presence of other "validity measures." RP (9/22/09) 212-13; RP (9/23/09) 194.

man, and that not just during recovery. That's *every day for the rest of his life.*" RP (10/20/09) 77.

The jury found the City negligent and found Mark not at fault. CP 4730-32. The jury awarded damages totaling \$12,752,094, including the \$2,433,006 requested for 24/7 lifetime care. *Id.*

L. The Trial Court Denies a New Trial Because the City Did Not Show It Was "Impossible" to Uncover the Truth About Mark's Condition and Drinking Before the Discovery Cutoff.

The City moved for judgment as a matter of law and, in the alternative, a new trial. As to a new trial, the City argued, *inter alia*, that the court erred in excluding virtually all evidence of Mark's drinking before and after the accident and also erred in excluding the City's investigatory evidence and the testimony of Beth Powell and Gordon Jones. CP 4912-16; RP (12/14/09) 35-48, 76-88.

The trial court faulted the City for not having undertaken an investigation of Mark's drinking history "a long time before trial begun." RP (12/14/09) 44. The court also faulted the City for not having found Mark drinking in public before the September 4 ruling excluding alcohol: "Now, look, the kind of information that was apparently elicited by this investigator, there's no reason it couldn't have been elicited months earlier." RP (12/14/09) 77. The trial court denied the City's motion for judgment as a matter of law and a new trial. CP 7823-27. In its letter

ruling, the trial court held the City failed to meet its supposed burden of showing “it would have been *impossible* to have undertaken [successful] surveillance of Jones before the discovery cutoff[.]” CP 7815 (App. A).

M. Despite Post-Trial Surveillance Video Showing Mark Looking Remarkably Better Than He Claimed at Trial, and Despite Damning Declarations From the Worker’s Compensation Panel Doctors Stating That the Video Proved Mark Had Deceived Them, the Trial Court Denies the City’s Motion to Vacate the Judgment.

“I wouldn’t have envisioned what I saw on that video based on the evidence I heard at trial ...”

- The Honorable Susan Craighead.³¹

Believing the verdict rested on misconduct and misrepresentation, those responsible for City’s defense resumed surveillance of Mark following the trial. Over the course of 9 days in April and June 2010, investigators took over 11 hours of surveillance footage, with the camera rolling whenever Mark could be filmed. CP 9483-84, 10132-34. The video shows Mark engaged in vigorous activities, pain free, enjoying himself, and drinking heavily. *See* Surveillance Video (Ex. Sub. No. 466A); App. C (Surveillance log). *As the trial court acknowledged*, the Mark Jones seen on video is not the Mark Jones presented at trial. *See* RP (10/8/10) 35; CP 9785.

³¹ RP (10/8/10) 35.

Based on the surveillance video, Drs. Stump and Clark, the surviving doctors from the 2008 worker's compensation exam, retracted their conclusion that Mark was totally disabled, now finding malingering was the only rational explanation for the glaring inconsistency between Mark's presentation during the exam and what is shown on the surveillance video. CP 8270-71 (App. E-1); CP 8274-76 (App. F-1). Both doctors referred the City to Theodore Becker, Ph.D., a well-known expert in applied biomechanics, who performed a biomechanical analysis of the complete video footage. *See* CP 10183-361. Dr. Becker concluded:

The biomechanical functions for all limbs and spine are within *normal* limits for work and activity of daily living tasks. The cognitive motor skill biomechanics are within *normal* limits. It is the opinion of the analyst that the subject, *Mark Jones*, has the *ability to work full time* in tasks and functions/activities related to previous work experiences.

CP 10210. Based on this newly discovered evidence, the City moved to vacate the judgment under CR 60(b)(3) and (4). CP 8181-202, 8235-39.

In response, Plaintiff asserted Mark had made a “***remarkable physical recovery*** that allows him to do most normal activities on his good days” and claimed Plaintiff had “never denied that by the start of trial Mark Jones had regained a lot of physical abilities.” CP 8305, 8311, 8356. Plaintiff asserted the damages case tried to the jury was only about Mark's cognitive damages, and that a surveillance video is not sufficient

to assess cognitive impairments. *See, e.g.*, CP 8309, 8343-48.³² Finally, Plaintiff asserted the City's motion to vacate should be denied because the City did not discover Mark's true condition soon enough. CP 8327-38.

The City's reply set forth extracts from the trial record demonstrating Plaintiff had presented a damages case that was about Mark's reported physical *and* cognitive problems, and the combined effects of those problems. CP 9430-34. Drs. Stump, Clark, and Becker confirmed that the video footage showed Mark had not been accurately reporting his physical condition *or* his true cognitive state. CP 9451-58 (App. F-2)³³, 9459-64, 9486-89 (App. E-2). And the City demonstrated its diligence in attempting to discover Mark's true condition through discovery and pre-trial surveillance and how its diligence was thwarted by misrepresentation and concealment. *See* CP 9439-48.

³² Upon viewing the surveillance video, the Workers Compensation Unit of the City's Personnel Department scheduled an independent medical examination with six medical specialists, to provide the City with updated opinions relevant to Mark's current disability status for pension purposes. CP 9465-67, 9490-96. As of September 24, 2010, Mark had not shown up for any of the scheduled exams even though the notices warned that his benefits could be terminated if he did not appear. CP 9496. The City had paid out over \$1,070,000 on Mark's claim, including \$541,920 in a pension reserve to be administered by the State for his tax-free monthly disability pension of \$4,575. CP 9494.

³³ Dr. Clark opined that "[b]ecause the surveillance video negates the existence of significant chronic pain or mobility limitations (see Dr. Ted Becker's report), it calls into serious question whether there was any real cognitive decline post-2005 or whether Mr. Jones simply became familiar with the testing protocols and was able to exaggerate or fake his symptoms." CP 9457 (App. F-2).

The trial court “acknowledge[d] that the mental picture created at trial was very different from what appears on the video.” CP 9785 (App. B). Under CR 60(b)(3), the trial court agreed the video footage was material, neither cumulative nor merely impeaching, and was discovered after the trial. CP 9779-80. But the court ruled the City had not exercised due diligence in discovering Mark’s true condition soon enough, finding the City had no right to rely on Mark’s and Meg’s representations made in response to the City’s discovery requests. CP 9780-82.

As for the City’s CR 60(b)(4) argument that judgment should be vacated due to fraud and other misconduct, the trial court ruled the City did not prove fraud by clear and convincing evidence because Mark supposedly was not smart enough to pull off a fraud in light of the cognitive deficits he claims to have; Mark and Meg were merely seeing the glass as half-empty; stress, not misrepresentation could have explained why the portrait of his injuries developed at trial was so very different from his appearance on the video; and finally, because there was objective evidence that he was in fact injured by the fall -- a fact the City has never denied. *See* CP 9782-87.

III. STANDARD OF REVIEW

Admission of evidence is a matter of discretion, but that discretion is abused where the trial court's ruling is "manifestly unreasonable or based on untenable grounds or reasons." *Blomster v. Nordstrom, Inc.*, 103 Wn. App. 252, 259, 11 P.3d 883 (2000). A trial court decision not supported by the evidence is based on untenable grounds. *State v. Robinson*, 79 Wn. App. 386, 400, 902 P.2d 652 (1995). A trial court decision based on an error of law is also untenable. *Council House, Inc. v. Hawk*, 136 Wn. App. 153, 159, 147 P.3d 1305 (2006). In general, "a trial court should not exclude testimony unless there is a showing of intentional or tactical nondisclosure, of willful violation of a court order, or the conduct of the miscreant is otherwise unconscionable." *Barci v. Intalco Aluminum Corp.*, 11 Wn. App. 342, 351, 522 P.2d 1159 (1974). It also is an abuse of discretion to exclude testimony "as a sanction absent any showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct." *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 706, 732 P.2d 974 (1987).

The denial of a new trial motion is also reviewed for an abuse of discretion. *Taylor v. Cessna Aircraft Co., Inc.*, 39 Wn. App. 828, 831, 696 P.2d 28 (1985).

IV. ARGUMENT

A. Mark and Meg Jones Had a Duty to Be Truthful in Responding to Discovery, and the City was Entitled to the Relief Necessary to Preserve its Right to a Fair Trial When the Falsity of Those Responses Became Manifest.

“[T]he way we have our civil rules designed is that people are allowed to rely on what evidence has been presented by the discovery cutoff, through the depositions, through the interrogatories, et cetera...

- The Honorable Susan Craighead.³⁴

The City’s assignments of error and issues on appeal are linked by a common thread: the trial court’s failure to apprehend the true meaning of the right to rely on discovery responses which it so precisely articulated, at what would prove the turning point of this case.

In *Washington State Physicians Insurance Exchange & Association v. Fisons Corp.*, our Supreme Court embraced the view that “a spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials[.]” *See* 122 Wn.2d 299, 342, 858 P.2d 1054 (1993), quoting with approval *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 686 P.2d 1102 (1984), *aff’d*, 104 Wn.2d 613, 707 P.2d 685 (1985). As the Supreme Court recognized, the aim of our liberal system of discovery is “to make a trial less a game of blindman’s b[uff] and more a fair contest with the basic issues and facts

³⁴ RP (9/11/09) 111 (referring to the City’s attempt to call witnesses whom the trial court thought had not been identified on the City’s witness list).

disclosed to the fullest practicable extent.” *Fisons*, 122 Wn.2d at 342, quoting in part *Gammon*, 38 Wn. App. at 280.

Misleading discovery responses therefore will not be tolerated, because they frustrate that purpose. *Fisons*, 122 Wn.2d at 346 (“[I]t is the misleading nature of the drug company’s responses that is contrary to the purposes of discovery”). If parties learn of facts that make their prior responses inaccurate and they do not correct those responses, they are just as guilty of a knowing concealment as if they had concealed the truth from the outset. *Seals v. Seals*, 22 Wn. App. 652, 654, 590 P.2d 1301 (1979); *see* CR 26(e)(2) (a party has a duty to amend a prior response he knows is no longer true and a failure to amend would be a knowing concealment). And when a party has breached its obligation of candor, it is no answer to say that the opposing party could have ferreted out the truth by going outside the discovery process itself. As Justice Hale wrote over forty years ago in *Kurtz v. Fels*:

[W]here a party to an action, in clear and unambiguous terms under oath, asserts the existence or nonexistence of a fact whereof such party has knowledge, or in the ordinary course of affairs would be expected to have knowledge, the adverse party may rely on such statements and, in the exercise of reasonable diligence, is not required to look behind the statements.

Kurtz, 63 Wn.2d 871, 875, 389 P.2d 659 (1964) (affirming grant of new trial).

The City's trial counsel expressed the fundamental reason for these rules at the crucial turning point of this case: "[A]re we looking for the truth here? [T]he answer's yes." RP (9/11/01) 105. Counsel was right on the mark: trial *is* a search for the truth, *e.g.*, *State v. Boehme*, 71 Wn.2d 621, 632-33, 430 P.2d 527 (1967), and discovery is the means by which the evidence is uncovered from which the trier of fact will determine the truth. Misleading discovery responses deprive the opposing party of access to the truth, and prejudice the truth-seeking process. When a party shows its opponent has frustrated the search for truth by false or misleading discovery responses, it should receive whatever relief is necessary to restore the balance and assure that a fair trial can still be had.

The trial court lost sight of these principles. When the City first brought to the court's attention evidence that Mark and Meg Jones had not been truthful in their discovery responses, the initial response was to suggest *the City* was engaging in trial by "ambush." RP (9/11/09) 111. The court even bridled at the idea that the City was entitled to so much as make an *offer of proof* from Beth Powell because the City had not listed her as a witness. RP (9/11/09) 106 ("[H]ow can an offer of proof include testimony from someone who wouldn't be able to testify at trial anyway because they weren't disclosed[?]").

While the court ultimately allowed Beth Powell's deposition as an offer of proof, RP (9/11/09) 115; CP 3772-3801, the court ignored the City's plea that it wait for that testimony, and the investigators' evidence, before definitively ruling on the City's alcohol defense. Even though the City told the court that the new evidence would directly contradict the picture of an abstaining Mark Jones that been used so effectively to undermine the foundation for Dr. Rudolf's opinions, the court brusquely dismissed the City's offer of proof and refused to reconsider its ruling striking the City's alcohol defense. *See* RP (9/11/09) 108-11, 144-47.

The die was cast. Having dismissed the possibility that the newly uncovered evidence might have any bearing on the alcohol issue without even waiting to hear what that evidence might prove to be, the trial court ultimately refused to allow the City to present *any* of the new evidence on *any* issue. The investigators' description of a hale and hearty Mark Jones at Bert's Tavern, and Beth's and Gordon's evidence describing a Mark Jones still able to enjoy a life of hunting, fishing and partying, were excluded because the City could not prove it was "impossible" to have uncovered this evidence in time to disclose it during discovery.³⁵ The

³⁵ The trial court gave some additional reasons for excluding some of this evidence, which the City will address later in this brief. But the common thread that binds the exclusion of all of this evidence is the notion that the City somehow forfeited its right to introduce relevant evidence because it did not uncover it before the close of discovery.

court then compounded its error when confronted with the results of the post-judgment surveillance and the conclusions of the surviving members of the 2008 workers compensation panel that they had been deceived by a phony performance of physical and mental debility. Instead of calling Mark and Meg to account for their deception, the court again blamed the City for not having earlier uncovered the truth that Mark and Meg had gone to such great lengths to hide.

The trial court made a fundamental error in applying the rules of discovery. In ruling both on the City's request to add witnesses and on its CR 60(b) motion, the court applied the rules of fair and open discovery to protect the Joneses and deny the City any remedy for Mark and Meg's misleading discovery responses. As the balance of the Argument demonstrates, the trial court erroneously elevated compliance with deadlines for their own sake over the search for the truth, thereby frustrating that search and depriving the City of a fair trial.

B. The Trial Court Erred by Excluding the Evidence the City Uncovered On the Eve of and During the Trial, Establishing That Plaintiff's Discovery Responses Were False and Misleading.

1. The Trial Court Erred by Excluding the City's September 7, 2009 Surveillance Evidence.

It is reversible error for a trial court to exclude a late-disclosed witness with relevant testimony for "failure to comply with a discovery

time table” without finding (1) a willful or deliberate violation of discovery orders or “other unconscionable conduct” that (2) “substantially prejudiced the opponent’s ability to prepare for trial.” *Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn. App. 65, 69-71, 155 P.3d 978 (2007) (reversing for failure to make findings), citing *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) and *Fred Hutchinson Cancer Research Ctr.*, *supra*, 107 Wn.2d at 706. Excluding a witness without making such “essential findings is an abuse of discretion.” *Peluso*, 138 Wn. App. at 70. Thus, “where a witness does not become known until shortly before trial and prompt answer is made upon discovery of such witness the court should *not* exclude the witness's testimony.” *Barci*, 11 Wn. App. at 350 (bold added) (citation omitted).

On September 7, 2009, after the discovery cutoff and after alcohol was ruled out of the case on September 4, the City’s investigators finally found Mark in public. The evening before the first day of trial, they saw him in a bar having a great time, not appearing in any way disabled, walking without a limp, socializing, and drinking several beers in less than an hour. CP 4309-11. They also saw Meg driving Mark to and from these establishments. CP 4314. The City’s trial team brought this new information to the trial court’s attention on September 11, RP (9/11/09)

114, and offered the surveillance evidence to impeach Mark. CP 4276-4318; RP (10/14/09) 12-17.

Plaintiff's counsel did not dispute the evidence was relevant, or deny Mark was in the bars on the eve of trial. Counsel instead argued that allowing this evidence would amount to trial by ambush -- even though it was not available until long after the discovery cutoff and Mark and Meg were fully aware that Mark was at the bars. The only possible "ambush" was that the City had located Mark looking normal and drinking in public -- something Mark and Meg evidently thought the City would never manage before the case went to trial. Counsel's position was tantamount to arguing the City's surveillance evidence must be excluded after the discovery cutoff because Mark and Meg would otherwise have to confront the truth about Mark's condition at trial.

Plaintiff need not have worried. The trial court excluded the evidence, and without finding a willful discovery violation, "unconscionable conduct" by the City, or that allowing the evidence would prejudice Plaintiff's ability to prepare for trial. It considered no lesser sanction. Instead, the court excluded this highly relevant

impeaching evidence solely on the basis the City should have found it and disclosed the fact of that discovery before the discovery deadline passed.³⁶

The trial court's use of the discovery cutoff as a bright-line boundary for excluding new relevant evidence was error under *Peluso*, *Burnet*, *Fred Hutchinson*, and *Barci*. The presumption in favor of admitting late-disclosed witnesses with relevant evidence, absent unconscionable misconduct and extreme prejudice to the opposing party, reflects Washington's merits-oriented, truth-based legal system. Washington prefers deciding cases on the merits, recognizing that trials are, in fact, a search for the truth where substance must prevail over form. These principles are stated both in the court rules, such as CR 1 and ER 102,³⁷ and in numerous appellate decisions since the adoption of the Civil Rules in 1967.³⁸ As the Supreme Court has recognized, "the rules of

³⁶ THE COURT: ...[C]ertainly *if this information had come to light before trial started, preferably before the discovery cutoff, we would be in a completely different situation.* Surveillance is, of course, completely permissible under those circumstances. But we're not in that situation. We are in the middle of trial.

* * * *

And it is simply -- I can't imagine a better example, well, there have been a number of examples of trial by ambush in this case, but that would be right up there, and I can't allow the investigator to testify, so I'm sorry, but that's my ruling. RP (10/14/09) 17

³⁷ CR 1 (the rules are to be construed to secure the "just...determination of every action"); ER 102 ("These rules shall be construed...to the end that the truth may be ascertained and proceedings justly determined").

³⁸ *E.g.*, *Curtis Lumber Co. v. Sortor*, 83 Wn.2d 764, 766, 767, 522 P.2d 822 (1974) (civil rules are designed to eliminate the procedural traps and technicalities that characterized the pre-civil rules "sporting theory of justice"); *Griffith v. City of Bellevue*, 130 Wn.2d 189, 192, 922 P.2d 83 (1996) (the rules should be applied to place substance over form); *Spokane County v. Specialty Auto*, 153 Wn.2d 238, 103 P.3d 792 (2004) (same).

discovery are designed to enhance the search for truth in both civil and criminal litigation.” *State v. Boehme, supra*, 71 Wn.2d at 632-33. Truth-seeking is primary even if it makes a trial a bit “messy,” which is why interviews, depositions, or even continuances during trial are preferable to excluding relevant evidence.

This truth-enhancing foundation of the Civil Rules also trumps local court rules.³⁹ Moreover, the City easily met the “good cause” requirement of King County Local Civil Rule 26(b)(4), which must be construed *in pare materia* with case law principles including the eleven *Barci* factors set out at 11 Wn. App at 349-50.⁴⁰ “Truth is what we’re always after in this courtroom and in any other courtroom.” *Detillier v. Smith*, 638 So.2d 455, 447-48 (La. App. 1994) (finding no error in admitting surveillance video made on third day of trial showing plaintiff removing the cervical collar she wore during court and moving her head

³⁹ See *Detention of Turay*, 139 Wn.2d 379, 389-91, 986 P.2d 790 (1999) (failure to fully comply with requirements of King County local rule for a new trial motion did not require rejection where the submission satisfied “the spirit, if not the letter” of the rule).

⁴⁰ *Barci* reversed the exclusion of a late-designated expert witness before the trial resumed where there was no evidence of a tactical non-disclosure, only that the plaintiffs “had considerable difficulty in finding a medical expert to testify in their behalf,” 11 Wn. App. at 349, so that there was no showing of “intentional or tactical nondisclosure, of willful violation of a court order, or the conduct of the miscreant is otherwise unconscionable.” *Id.* at 351. In *Fred Hutchinson*, the expert was disclosed the Friday before trial began when it was first known he would testify and the opposing party had to settle for an interview before the witness took the stand. 107 Wn.2d at 706-07. The Supreme Court noted that, while the party whose witness was designated late did not violate the discovery rule, “[i]f they had, however, *it would have been error to have excluded the testimony.*” *Id.* at 707 (emphasis added).

and neck freely, contradicting her testimony at trial). And what greater “good cause” could there be than facilitating the search for the truth?

Here the trial court sacrificed the truth when it excluded the City’s September 2009 surveillance evidence without finding the City engaged in a discovery violation or other “unconscionable conduct” related to disclosure of the surveillance evidence, or that Plaintiff would be irretrievably prejudiced. Washington law requires both findings *and* an on-the-record balancing of potential sanctions before testimony is excluded. The failure to make the findings and do the balancing before excluding the surveillance evidence was an abuse of discretion requiring reversal under *Peluso*, *Barci*, *Burnet*, and *Fred Hutchinson*.

2. The Trial Court Erred by Excluding Testimony From Mark’s Sister, Beth Powell.

Beginning with the first response to the City’s discovery requests, on February 5, 2008, Plaintiff never identified Beth as a person with knowledge relevant to the claims or subject matter of this lawsuit.⁴¹ The City thus was left in the same position as the physician in *Fisons*: “no

⁴¹ Plaintiff’s first supplement, on February 29, 2008, answered Interrogatory No. 7 further by stating, “Persons who may have information have been disclosed in plaintiff’s disclosure of potential witnesses, as supplemented,” and did not add to No. 10. CP 7433. Plaintiff’s Third Supplemental responses, on July 10, 2008 did not address either interrogatory answer. CP 7523. When the City propounded an additional interrogatory on June 17, 2009, seeking the identity of “all witnesses and other individuals...with whom you have communicated, or with whom anyone on your behalf has communicated, regarding this lawsuit,” CP 7613, Plaintiff objected on the basis of “attorney work product,” and again did not identify Beth Powell. *Id.*

conceivable discovery request could have been made by the [City] that would have uncovered...[Ms. Powell], given the above and other responses” of Plaintiff. *Fisons*, 122 Wn.2d at 1083.

Based on the information provided by Plaintiff, the City could not reasonably be expected to unearth a sibling from whom Mark was alienated. Only when Ms. Winqvist fortuitously contacted Beth on September 9, 2009, did the City learn of Beth’s first-hand observations of Mark’s physical agility as recently as the month before trial, Mark’s life-long struggle with alcohol addiction, and Meg’s admission to her sister that she was prioritizing a successful trial outcome over getting addiction treatment for Mark.

The trial court committed the same legal errors in excluding Beth’s testimony as it did in excluding the pre-trial surveillance evidence. It failed to make the required findings of intentional non-disclosure by the City and irreparable prejudice to Plaintiff. In fact, the record would not have supported such rulings, because it was Plaintiff who deliberately failed to identify Beth as a person with relevant knowledge when Plaintiff knew what Beth would say if she ever came to light.⁴² The exclusion of

⁴² The court said Beth lacked personal knowledge of material facts, but Beth’s testimony clearly established her personal knowledge of Mark’s actual physical abilities (based on numerous personal observations), and personal knowledge of Mark’s continued alcohol abuse (including an admission made to Beth by the party plaintiff, Meg Jones). *Compare* RP (9/29/09) 23 *with* CP 3772-801.

Beth's testimony requires reversal because it denied the City the chance to impeach Mark's picture of his recovery, drinking history, and damages.

3. The Trial Court Erred by Excluding Testimony From Mark's Father Gordon Jones.

The trial court excluded Gordon Jones as a witness for two reasons: (1) Gordon was disclosed as a witness "in the middle of trial"; and (2) his testimony was unfairly prejudicial under ER 403. RP (10/14/09) 11; RP (9/29/09) 27-28. This was error.

a. The Trial Court Erred By Excluding Gordon's Testimony Based on "[H]ow [H]e [W]as [D]isclosed" When, in Compliance With King County Local Civil Rule 26, Gordon Had Been Repeatedly Disclosed as a Possible Primary Witness By Plaintiff and Repeatedly Reserved as a Possible Primary Witness by the City.

Neither the local rules governing witness disclosure, nor any case law, precluded the City from calling Gordon as a witness. Contrary to the trial court's erroneous characterization of the record, Gordon *was* a "disclosed" witness, by both parties.⁴³ Nothing in the language of KCLCR 26 either bars litigants from reserving the right to call another

⁴³ Plaintiff disclosed Gordon as a possible primary witness in April 2009 as "Mark Jones' father," CP 7570, and listed Gordon in Plaintiff's Witness and Exhibit List and Joint Statement of Evidence. CP 7637. When the parties filed their disclosures of possible primary and additional witnesses, *both* sides reserved the right to call witnesses identified by either party. CP 4369, 4463-64, 4394, 4406, 4476, 4481.

party's disclosed witnesses,⁴⁴ or provided a basis for excluding Gordon as an "undisclosed witness."⁴⁵ The trial court's approach improperly exalted form over substance. A party cannot be prejudiced when another party calls a witness on his list, because no competent attorney would list a witness unless they were familiar with that witness's possible testimony.⁴⁶

Here, Mark and Meg's only *real* surprise was that the City learned what Gordon knew in time to call him as a witness. The court's exclusion of a witness prepared to give evidence the court itself recognized as material (indeed, "explosive"), based on a nonexistent discovery failure

⁴⁴ Moreover, where *both* sides reserved the right to call the other's witnesses as a matter of long established and universal practice, they effectively agreed to that method of preserving their rights to identify all possible witnesses with relevant knowledge and call them as witnesses at trial. A party who reserves its right to call the other party's witnesses necessarily waives any objection to the other party's practice. Otherwise its own reservation is ineffective and meaningless, and also improper under CR 11 as lacking a legal basis.

⁴⁵ Nor could it in the face of the principle that local rules cannot detract from the rights established by the Civil Rules. *See Parry v. Windermere Real Estate/East, Inc.*, 102 Wn. App. 920, 928, 10 P.3d 506 (2000), *rev. denied*, 143 Wn.2d 1015 (2001) ("Under CR 83, superior courts can adopt local rules that are not inconsistent with the Rules of Civil Procedure. A local rule that restricts a valuable right granted by a statewide civil rule conflicts with such rule and cannot be given effect").

⁴⁶ *Blair v. TA-Seattle East #176*, 150 Wn. App. 904, 210 P.3d 326 (2009), *rev. granted*, 168 Wn.2d 1006 (2010), *argued* Oct. 26, 2010, does not support excluding Gordon as an "undisclosed" witness. *Blair* involved an attempt by the plaintiff to call the defendant's lay witnesses as her own expert witness in an apparent effort to evade a sanctions order from the trial court for willful misconduct in discovery, circumstances not present here. Here, Plaintiff described Gordon as Mark's father, and the testimony Gordon would have provided came from his personal knowledge as their father. Plaintiff did not complain the description of his relevant knowledge was deficient, or that she lacked notice of Gordon's knowledge, nor could she plausibly have done so. None of the bases *Blair* used to exclude witnesses even remotely applies here.

and without required findings, was contrary to *Peluso, Barci, Burnet* and *Fred Hutchinson*.

b. The Trial Court Committed the “Unthinkable” by Excluding Gordon’s Highly Relevant, Highly Probative Testimony on All Central Issues, Under an Incorrect Application of ER 403.

The court also excluded Gordon under ER 403 because he was a “potentially explosive” witness against Plaintiff’s case. This was an incorrect basis for excluding Gordon’s indisputably relevant, impeaching evidence which was highly probative of not only liability, contributory fault, and damages, but also of Mark’s and Meg’s overall credibility. The rule states:

Although relevant, evidence may be excluded if its probative value is *substantially* outweighed by the danger of *unfair prejudice*, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403 (emphasis added). All parts of the rule must be applied in the context of the evidence rules and their concepts of probative value and materiality. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 671-73, 230 P.3d 583 (2010); *Carson v. Fine*, 123 Wn.2d 206, 224-25, 867 P.2d 610 (1994); *Lockwood v. AC & S*, 109 Wn.2d 235, 256-57, 744 P.2d 605 (1987).

The fundamental premises of the evidence rules are: (1) “[a]ll relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by

other rules or regulations applicable in the courts of this state,” ER 402;⁴⁷ and (2) the rules “are to be construed...to the end that the truth may be ascertained and proceedings justly determined.” ER 102. Using ER 403 to exclude relevant evidence thus is “an extraordinary remedy” to be used only sparingly. K. Tegland, *Courtroom Handbook on Wash. Evidence*, Ch. 5, Rule 403 at 212 (2007-08 ed.).

All relevant evidence is by definition prejudicial to the party against whom it is offered. ER 403 exclusions are limited to evidence that is “*unfairly*” prejudicial, that is, evidence that will “stimulate an emotional response rather than a rational decision” and is “designed to appeal to the trier of fact’s passion and prejudice.” *Salas*, 168 Wn.2d at 671-72. The Supreme Court most recently applied these principles in *Salas* to hold a plaintiff’s immigration status should have been excluded in his negligence action against his employer. Exclusion was required because immigration status *per se* was of “low probative value” in helping to determine lost future earnings, while “immigration is a politically sensitive issue [that]...can inspire passionate responses that carry a significant danger of interfering with the fact finder’s duty to engage in reasoned deliberation.”

⁴⁷“Relevant evidence” includes both probative value and materiality. ER 401; *Davidson v. Muni. of Metro. Seattle*, 43 Wn. App. 569, 573, 719 P.2d 569 (1986). Evidence is probative if it tends to prove or disprove a fact at issue; evidence is material if that fact is of consequence to the ultimate outcome. *Id.*

168 Wn.2d at 672. Admission of his undocumented status thus was an abuse of discretion. 168 Wn.2d at 672-73.⁴⁸

Salas is the unusual case where evidence was properly excluded under ER 403. As the Supreme Court explained in *Carson*:

It is not the purpose of . . . ER 403, to exclude testimony because it is offered by an overly persuasive witness. Rather, the focus of these rules is on the prejudicial substance of the proposed testimony.

* * * *

Both rules [FRE 403 and ER 403] are concerned with what is termed “unfair prejudice”, which one court has termed as prejudice caused by evidence of “*scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.*” . . . evidence may be unfairly prejudicial under rule 403 if it appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish, or “triggers other mainsprings of human action.”

123 Wn.2d at 222-23 (emphasis added) (citations and quotations omitted).

The rules presume relevant evidence will be admitted, ER 402, and the jury therefore will hear all the facts it needs to get to the truth. ER 102.

The party seeking exclusion therefore bears the burden of showing **both** “unfair prejudice” **and** that such unfair prejudice “substantially outweighs” the evidence’s probative value. 123 Wn.2d at 225. Moreover, “the ability of the danger of unfair prejudice to substantially outweigh the

⁴⁸ The court rejected the employer’s argument that the trial court’s decision to admit the evidence could be affirmed on the basis that “the issue of *Salas*’ immigration status arose late and the court was not provided sufficient relevant authority on the issue.” The court emphasized that a fair trial is paramount, **not** the timing of when the issue arose. *Salas*, 168 Wn.2d at 673.

probative force of evidence is ‘quite slim’ where the evidence is undeniably probative of a central issue in the case.” *Id.* at 224.⁴⁹

In *Wilson v. Olivetti North America, Inc.*, 85 Wn. App. 804, 934 P.2d 1231 (1997), the Court of Appeals *reversed* the trial court’s exclusion of the plaintiff’s evidence of sexual harassment in the workplace, which the court had rejected as prejudicial because it was harmful to the opposing party. *See* 85 Wn. App. at 814. *Carson* characterized such mistaken exclusions as “unthinkable”:

[N]early all evidence will prejudice one side or the other in a lawsuit. Evidence is not rendered inadmissible under ER 403 just because it may be prejudicial. . . . Various types of evidence and witnesses prejudice one party or the other; prejudicial evidence and credible witnesses make lawsuits. Under ER 403 the court is not concerned with this ordinary prejudice. ***It is unthinkable that a trial court would decline to admit evidence probative of the central issue in a case based solely on the witness’ profession, the manner in which the witness dresses or on whether the court***

⁴⁹ The Eleventh Circuit’s explanation of why a Rule 403 exclusion is an “extraordinary” remedy, cited with approval by our Supreme Court in *Carson*, demonstrates Judge Craighead’s error in excluding Gordon’s evidence, as well as her error in excluding evidence of Mark’s alcohol abuse:

Courts have characterized Rule 403 as ***an extraordinary remedy to be used sparingly*** because it permits the trial court to exclude otherwise relevant evidence. . .

Relevant evidence is inherently prejudicial; but it is only ***unfair*** prejudice, ***substantially outweighing*** probative value, which permits exclusion of relevant matter under Rule 403. Unless trials are to be conducted on scenarios, on unreal facts tailored and sanitized for the occasion, the application of Rule 403 must be cautious and sparing. Its major function is limited to ***excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.***

U.S. v. Meester, 762 F.2d 867, 875 (11th Cir. 1985) (emphasis added) (citations omitted). *Accord U.S. v. Mende*, 43 F.3d 1298, 1302 (9th Cir. 1995): “the danger of prejudice must not merely outweigh the probative weight of the evidence, but ***substantially*** outweigh it.”

believes that the jury may think that the witness owes either party some obligation or loyalty.

123 Wn.2d at 224-25 (emphasis added).

Here Judge Craighead did “the unthinkable”: her ER 403 analysis ignored both the presumption of admissibility of relevant evidence and the express language of the rule. She substituted “prejudice” (harmful to the opponent’s case) for the very different “unfair prejudice,” and then ignored the rule’s requirement that the unfair prejudice of the challenged evidence must also *substantially* outweigh its probative value. Perhaps the court’s rationale rested on who Gordon Jones was: Mark and Meg’s father, whose “explosive” testimony could alone turn the case against Mark and Meg. But there was no contention, nor could there be, that the nature of a father’s proffered testimony -- that his son was not as injured as he wanted the jury to believe; that he had a serious and current and continuing problem with alcohol abuse; that neither he nor his twin sister were telling the truth in court -- was *inherently inflammatory*, as was Mr. Salas’ immigration status.

Gordon’s testimony was not cumulative and was *highly* probative of all issues in the case. His first-hand knowledge that Mark “was hunting, camping, partying” and helping his sister Tammy with “things around her house” as late as August 2009, a month before trial, CP 4069, was undeniably probative of his mental and physical capacity, a critical

component of the measure of damages -- confirmed by the jury's award of \$2.4 million for 24/7 care, every penny of the amount Meg and Mark requested. And by the time Gordon's testimony was offered, it was the only evidence left to impeach Mark and Meg, because the trial court had excluded all of the City's other impeachment witnesses. Given the impeachment value of Gordon's evidence on the central issues of this case, the ruling excluding it impermissibly skewed the truth-finding process. It was an abuse of discretion rising to an error of law that, standing alone, requires a new trial.

C. The Trial Court Erred by Denying the Motion to Vacate the Judgment Under CR 60(b).

Armed with the eleven hours of surveillance video showing Mark engaging in vigorous physical activities and normal social interaction, the withdrawal of the worker's compensation doctors' finding of total disability, *and* Dr. Ted Becker's opinion that Mark's biomechanical functions were all within normal limits, the City moved to vacate the judgment and for a new trial. It relied on two subsections of CR 60(b) which provide independent bases to vacate a judgment based on:

- (3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);
- (4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

Amazingly, Meg responded by asserting that Mark had made a “*remarkable physical recovery* that allows him to do most normal activities on his good days” and claiming she “never denied that by the start of trial Mark Jones had regained a lot of physical abilities.” CP 8305, 8311, 8356. The *manifest* contradiction between this position and Plaintiff’s position during discovery and trial has two important implications for this case.

First, the failure to disclose the “remarkable physical recovery” at any time before or during trial ultimately allowed Meg and Mark to present a misleading picture of Mark to the jury, which the trial court refused to let the City refute. Meg asserted Mark’s condition, which she described as extreme debilitation, was “roughly the same” first to *prevent* another deposition of Mark, and second to *avoid* Mark having to attend the entire trial. This in turn heightened his “dramatic presentation” the two times he was in front of the jury during the six-week trial. As a result, the jury heard a one-sided damages case that compromised the search for truth and denied the City a fair trial.

Second, when considered in light of Mark’s alcohol consumption seen in the 2010 video, Plaintiff’s “remarkable physical recovery” response eviscerated the basis for the trial court’s numerous rulings excluding alcohol evidence for lack of foundation about Mark’s alcohol

use after the accident. If Mark indeed had experienced a “remarkable physical recovery” *and* was drinking in public by the time of trial, the City was entitled to present evidence *both* of that recovery *and* of the effect of that drinking on Mark’s future prospects.

As the City will show, the trial court abused its discretion in denying the City’s motion to vacate the judgment under both CR 60(b)(3) and (4). Moreover, Plaintiff’s “remarkable physical recovery” response effectively admits to serious discovery violations under *Fisons*, for which sanctions should be imposed on remand.⁵⁰

1. The Trial Court Erred in Denying a New Trial Under CR 60(b)(3) Based on a Purported Failure to Exercise Reasonable Diligence Before the Trial, Where the City Was Entitled to Rely upon the Plaintiff’s Discovery Responses.

Evidence is “newly discovered” for purposes of CR 60(b)(3) if it (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of reasonable diligence; (4) is material; and (5) is not merely cumulative or impeaching. *See Holaday v. Merceri*, 49 Wn. App. 321, 329, 742 P.2d 127 (1987).⁵¹ The trial court ruled that elements 2, 4, and 5 were satisfied

⁵⁰ Any sanctions for discovery abuse is normally imposed by the trial court after a hearing, rather than by the appellate court in the first instance. *See, e.g., Fisons*.

⁵¹ *Holaday* applied the test in the context of CR 59(a); the test for CR 60(b)(3) is the same. *See* 4 K. TEGLAND, WASH. PRAC., Rules Prac. § CR 60, at 553 (5th ed. 2009).

but still denied relief because the City supposedly failed to exercise reasonable diligence.⁵² CP 9779-82.

The trial court's analysis eviscerates two presumptions under well-established law: that parties must give forthright answers in discovery (and update those answers when known facts have changed), and that each party is entitled to rely on the other's responses. The Supreme Court has addressed pre-trial diligence in the context of a motion to vacate a judgment based on newly discovered evidence, first in *Kurtz v. Fels*, 63 Wn.2d 871, 389 P.2d 659 (1964), and later in *Praytor v. King County*, 69 Wn.2d 637, 419 P.2d 797 (1966). In both cases, the court held that, where the adverse party has given false or misleading responses to discovery requests, the required diligence is reduced to the absolute minimum *and* is satisfied if the moving party made use of ordinary discovery procedures directed at discovering the facts at issue.

In *Kurtz*, the plaintiff alleged she suffered fainting spells as a result of a motor vehicle accident and testified she had never fainted before the accident. 63 Wn.2d at 872. When presented with several post-trial affidavits that Kurtz suffered fainting spells for many years before the accident, the trial court granted a new trial based on this newly discovered

⁵² The trial court did not address the first element -- whether the newly discovered evidence would probably change the result -- in the context of CR 60(b)(3), but only in the context of CR 60(b)(4), under which probability of change is immaterial.

evidence. *Id.* at 872-73. The Supreme Court rejected Kurtz’s argument that “the claimed newly discovered evidence...had at all times been available to respondents and that reasonable diligence before trial would have led to its discovery.” *Id.* at 873. The court held that, *even if reasonable diligence might otherwise have led to discovery of the preexisting condition*, the defendant was entitled to rely on the plaintiff’s sworn testimony:

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. ***Perhaps this is so***, but 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. at 874 (emphasis added). The court affirmed the grant of a new trial because “[c]ounsel had a right to rely on [Kurtz’s] testimony when she stated under oath in her deposition that she had never suffered fainting spells previously.” *Id.* at 875 (emphasis added).

The Supreme Court applied this rule two years later in *Praytor* to reverse the denial of a motion to vacate as an abuse of discretion.⁵³ More

⁵³ In *Praytor*, a key issue at trial was whether a stormwater catch basin had a concrete bottom to prevent seepage. 69 Wn.2d at 638-39. The testimony that it did was essentially un rebutted. *Id.* But, after trial, removal of an accumulation of mud revealed that the catch basin was bottomless. *Id.* The trial court refused to vacate the judgment, but the Supreme Court held this was an abuse of discretion and reversed. The court reasoned the post-trial discovery of the basin’s true condition was “newly discovered evidence” that had previously been concealed from “ordinary inspection.” *Id.* at 639-40.

(footnote continues on next page)

recently, the Court of Appeals addressed the diligence requirement in the context of a motion to vacate based on newly discovered evidence that was not disclosed in response to discovery requests, in *Roberson v. Perez*, 123 Wn. App. 320, 96 P.3d 420 (2004). There, the court observed that “[d]iligence is not a consideration in determining whether a new trial is an appropriate remedy for a discovery violation[.]” *Id.* at 334. “Where a party has resorted to pretrial discovery procedures and the opposing party fails to comply in good faith therewith, such procedure constitutes the exercise of appropriate diligence.” *Id.*, quoting *Drehle v. Fleming*, 129 Ill. App. 2d 166, 263 N.E.2d 348, 351 (1970), *aff’d*, 49 Ill.2d 293, 274 N.E.2d 53 (1971) (reversing denial of new trial where party failed to identify or produce key witness statement in response to discovery requests).

As the court observed in *Roberson*, Washington is not unique in requiring minimal diligence where the adverse party has given false or misleading responses to discovery. The Missouri Court of Appeals applied the same rule to reverse the denial of a new trial in *Foerstel v. St. Louis Public Service Co.*, 241 S.W.2d 792 (Mo. Ct. App. 1951),⁵⁴

The evidence could not have been discovered through reasonable diligence before trial, as the moving party had reasonably relied upon the other side’s unambiguous pre-trial representations. *Id.*, citing *Kurtz*, 63 Wn.2d at 875.

⁵⁴ In *Foerstel*, the plaintiff claimed his spine was fractured in an automobile-streetcar collision in St. Louis. *Foerstel*, 241 S.W.2d at 794. At his deposition, the plaintiff answered “no” to whether he had ever been hospitalized in St. Louis for any reason. *Id.* Three physicians testified for the plaintiff at trial that the plaintiff’s x-rays “clearly”
(footnote continues on next page)

observing that the defendant was “thrown off the trail” by an answer which, if given truthfully, would have revealed that the plaintiff’s claimed injury preexisted the accident. *Id.* at 795. The court held that, in such circumstances, the plaintiff was “in no position” to claim lack of diligence, and “the degree of diligence required of defendant in the conduct of its subsequent investigation...is surely reduced to the minimum”:

The law does not exact perfection on the part of the defendant in uncovering damaging evidence which, if disclosed by plaintiff when called for, would have prevented the compounding of many errors; and the concealment of which in this case misled defendant’s counsel and resulted in an imposition upon three eminent doctors and, as it appears, upon the jury.

*Id.*⁵⁵ The Illinois Supreme Court applied the same rule to reverse the denial of a new trial in *Lubbers v. Norfolk & Western Railway Co.*, 105 Ill.2d 201, 473 N.E.2d 955, 85 Ill. Dec. 356 (1984), rejecting the defendant’s contention that the plaintiff failed to exercise reasonable diligence when it didn’t depose any of the defendant’s employees identified in interrogatory responses. The court held that the diligence

showed a fracture, not a developmental condition. *Id.* After the jury’s verdict for the plaintiff, the defendant discovered x-rays taken at City Hospital in St. Louis nine months before the collision, showing the plaintiff’s spine in the same condition as after the collision. *Id.* At least one of plaintiff’s testifying physicians reversed his opinion after reviewing this evidence. *Id.* at 795. The trial court denied a new trial; the Missouri Court of Appeals held this was an abuse of discretion and reversed. *Id.* at 796-97.

⁵⁵ See also *Higgins v. Star Elec., Inc.*, 908 S.W.2d 897, 904-05 (Mo. Ct. App. 1995) (reversing denial of new trial based on newly discovered evidence, the court held minimal diligence was required where plaintiff misrepresented extent of injuries and failed to update interrogatory answers).

requirement “does not go so far as to force parties acting in good faith to assume the possibility of fraud in the answers to discovery requests and take extraordinary steps to discover it in the limited time they have before trial.” 473 N.E.2d at 960.⁵⁶ The court reasoned that, even if additional depositions would have uncovered the newly discovered evidence, “it would distort the concept of equity to hold that diligence required [the plaintiff] to depart from his chosen pretrial strategy to anticipate or guard against the kind of chicanery alleged here.” *Id.*

Here, Plaintiff’s discovery responses and trial testimony were as misleading as in any of cases just discussed. Instead of disclosing the “remarkable physical recovery” revealed in the 2010 video, Meg and Mark Jones consistently painted the grimmest portrait of Mark’s condition and denied any improvement. The misrepresentations extended across the spectrum of discovery, even to the point of “seeding” Mark’s medical

⁵⁶ Mr. Lubbers was injured in a collision at a Norfolk-operated crossing and sought to prove that the signal was defective. *Id.* at 956-57. In response to discovery requests, Norfolk stated it had a policy of inspecting signals every two weeks, and produced a signal inspection card indicating that the signal in question had been inspected every two weeks during the past year, including shortly before the accident. *Id.* at 957. After a defense verdict, Richard Polley, a Norfolk employee who had never been disclosed, informed Lubbers’ attorney that he had inspected the signal shortly after the accident and the signal inspection card contained no reports of any inspections during the six weeks before the accident. *Id.* at 958. Polley’s supervisor had taken the card and warned him to keep quiet if he wanted to keep his job. *Id.* Lubbers moved for a new trial, alleging Norfolk intentionally concealed the names of Polley and his supervisor, gave false interrogatory responses, falsified the inspection card, and engaged in witness tampering. *Id.* The trial court denied a new trial, but the intermediate court of appeals reversed and the Illinois Supreme Court affirmed the reversal.

records with reports “confirming” Mark’s debilitated state. *See* CP 8270-71, 8274, 9452, 9456-58, 9486. They continuously “confirmed” that Mark suffered constant pain and was physically and mentally unable to work in any capacity, never once disclosing the “remarkable physical recovery.”

If Mark had indeed experienced such a “remarkable physical recovery,” had “regained a lot of his physical abilities” by the start of trial, and “could do most normal activities on his good days,” he was *not* in “roughly the same” condition as when his deposition was taken in March 2008 -- unless, of course, he lied in his deposition about his debilitated state because he had “regained a lot of his physical abilities” by 2006 *and never lost them thereafter*.

Judge Craighead acknowledged that the “mental picture created at trial was very different from what appears on the video,” that she “wouldn’t have envisioned” what she saw in the video, and that the trial evidence “really did paint a picture...of someone who’s suffered significant physical disabilities.” CP 9785; RP (10/8/10) 35. Yet even though this “very different” mental picture was clearly the same as was depicted during discovery and at trial, the trial court refused to give the City the relief to which it was entitled on the ground that the City failed to exercise reasonable diligence before trial.

The trial court found that the City “devoted little effort to investigating...until early 2009,” and then investigated only the liability issues and “did not focus on Mr. Jones’ damages at all.” CP 9780. To begin, these findings ignore the undisputed evidence of *dozens of hours* of surveillance during Spring 2008, during a time when the City’s discovery was incontrovertibly focused on the issue of damages, as investigators attempted to observe Mark Jones out in the real world. Moreover, the trial court ignored *Kurtz* and *Praytor*’s holdings that categorical statements under oath can “forestall further investigation” and excuse the defendant from conducting any investigation. *Kurtz*, 63 Wn.2d at 874. Where a party has violated their discovery obligations under the Civil Rules and *Fisons*, they may not escape the consequences of those violations based on their adversary’s lack of diligence. *Id.*; *see also Foerstel*, 241 S.W.2d at 795; *Lubbers*, 173 N.E. at 959-60.

The trial court faulted the City for making “strategic and tactical decisions” to “rel[y] on the records of Mr. Jones’ treating physicians” and thus “not to undertake any critical evaluation of Mr. Jones’ damages claims.” CP 9782. But under *Kurtz* and *Praytor*, the City was entitled to do precisely that. The trial court similarly faulted the City for its “apparent failure...to interview and/or depose any of the people with whom Mr. Jones...testified he was spending time prior to trial.” CP 9781.

But the City was entitled to take the Joneses' sworn statements about Mark's condition *at face value*, and was not required to "assume the possibility of fraud" and take extraordinary steps to uncover it before trial. *Lubbers*, 473 N.E. at 960.

The trial court's assertion that the City "did not focus on Jones' damages at all" is patently wrong. The City continued investigating despite Meg and Mark's unequivocal statements. The City propounded numerous requests relating to damages. CP 7417-19, 7936-37. *Three times* the City sought to redepose Mark -- only to lose because of Meg's continued to assert that nothing had changed in Mark's (supposedly) debilitated condition. Finally, outside the scope of discovery itself, the City's investigators spent dozens of hours attempting to find and observe Mark. CP 8203-04, 8706-07. This record shows a *highly* diligent defendant, adhering to the venerable proverb, "trust -- but verify."

As an example of the City's supposed lack of diligence, the court said the City "did not seek to have Jones examined independently by any medical doctors to verify any of his physical complaints, pursuant to CR 35, even though the City would have been entitled to do so." CP 9781. But in February 2008, Mark was examined by the worker's compensation panel, which found Mark permanently and totally disabled. CP 10022-89. Mark's treating physicians and trial experts agreed with and relied on

those findings to buttress their conclusions and recommendations. And the City obtained an *agreed* CR 35 examination by a neuropsychologist (Dr. Coppel), who confirmed the findings of Mark's treating physicians and the worker's compensation panel. *See* RP (10/8/10) 42.

The trial court also faulted the City for not inquiring of Mark at trial about playing horseshoes, which was mentioned at a motion hearing during trial. CP 9781. But Mark had testified in March 2008 he was unable to use his right arm to throw due to his injuries, and Meg testified more than a year later that his condition remained "roughly the same[.]" CP 268. The trial testimony about Mark's activities, such as hunting and fishing, was that he could do them only in a very limited way, and no better than an "80-year-old man" could manage. The City had every reason to expect a similar answer about horseshoes -- to the extent he could play, it was for only for a few minutes at a time, with at best a truncated throw, and with frequent breaks to sit and rest -- and cannot fairly be faulted for not pursuing a line of questioning when the likely answer was both obvious and unfavorable. In the surveillance video, however, Mark is revealed playing in a horseshoe tournament lasting over two hours, throwing with a full range of motion (*see* Becker Report, CP 10183-361), never sitting down and pausing only for more beer, and even capable of a "victory dance" after a particularly satisfying toss. *See*

Exhibit Sub. No. 466A (Sur. Video) at 0:41:13; CP 9516. In sum, the trial court abused its discretion in refusing to vacate the judgment and in denying the City a new trial under CR 60(b)(3).

2. The Trial Court Erred in Denying a New Trial Under CR 60(b)(4) Based on Fraud, Misrepresentation, or Other Misconduct, Where the Plaintiff Never Disclosed Mark Jones' "Remarkable Physical Recovery."

CR 60(b)(4) is aimed at judgments which were "unfairly obtained," whether due to fraud, misrepresentation, or other misconduct. *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 372, 777 P.2d 1056 (1989). "It is immaterial whether the misrepresentation was innocent or willful. The effect is the same whether the misrepresentation was innocent, the result of carelessness, or deliberate." 55 Wn. App. at 371, citing *Bros, Inc. v. W.E. Grace Mfg. Co.*, 351 F.2d 208, 211 (5th Cir. 1965).⁵⁷ It is also immaterial whether the misrepresentation or nondisclosure would have made a difference in the outcome of the trial, as "a litigant who has engaged in misconduct is not entitled to 'the benefit of calculation, which can be little better than speculation, as to the extent of

⁵⁷ In *Bros, Inc.*, a patent infringement case, the defendant's nondisclosure of a brochure describing a product that allegedly violated a patent was grounds to vacate the judgment regardless of "aspersions of purposeful misconduct." 351 F.2d at 211.

wrong inflicted upon his opponent.” *Taylor v. Cessna, supra*, 39 Wn. App. at 836⁵⁸ (citation and quotation omitted).⁵⁹

Here the court focused only on “fraud,” and did not address the alternate and more easily proven grounds of “misrepresentation, or other misconduct” also asserted by the City. *See Mitchell v. Washington State Inst. of Pub. Policy*, 153 Wn. App. 803, 825, 225 P.3d 280 (2009) (“misrepresentation and other misconduct” can also satisfy CR 60(b)(4)). The trial court found that the difference between the mental picture portrayed during discovery and at trial and in the surveillance video was simply a matter of “perspective” and that from Mark and Meg’s perspective, “[t]he overweight man throwing horseshoes in the

⁵⁸ In *Taylor*, the plaintiff alleged that a crash of a Cessna airplane was caused by a faulty fuel-selector valve. 39 Wn. App. at 830. After a defense verdict, the plaintiff learned that defendant Cessna had failed to disclose the existence of fuel-selector valve testing and to produce the test results, which were directly responsive to the plaintiff’s discovery requests. *Id.* at 836. The trial court denied a motion for new trial under CR 60(b)(4). *Id.* at 835. Finding Cessna’s conduct to be “incorrect but not unreasonable,” the trial court refused to find fraud, misrepresentation, or other misconduct. *Id.* at 835. The Court of Appeals reversed. Citing Washington’s strict intolerance for violations of the discovery rules, the court disagreed that Cessna’s conduct was reasonable and held it was an abuse of discretion to deny a new trial. *Id.* at 835-36. The court declined to analyze whether the withheld test results would have affected the outcome, holding that “[a] new trial based on the prevailing party’s misconduct does not require a showing the new evidence would have materially affected the outcome of the first trial.” *Id.* at 836, citing *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978).

⁵⁹ *Accord Roberson*, 123 Wn. App. at 336 (quoting *Taylor* in affirming the granting of new trials under CR 60 due to failure to provide complete discovery responses); *Gammon*, 38 Wn. App. at 282. In *Gammon*, the appellate court ordered a new trial where the full extent of the defendant’s failure to produce accident reports responsive to discovery request came to light during trial, but the potential impact on the verdict was unclear. 38 Wn. App. at 282. The court stated, “It is precisely because we cannot know what impact full compliance would have had, that we must grant a new trial.” *Id.*

surveillance footage is a far cry from the man Mark Jones once was.” CP 9783. Minimizing the difference as nothing more than a case of Mark and Meg “see[ing] the glass as half empty, even while the City now sees it as half full[,]” the court concluded: “This is not fraud.” CP 9784.

Of course, Mark and Meg had not portrayed the accident as leaving Mark’s “glass...half empty”: They portrayed Mark as a glass *shattered and incapable of being pieced back together*. Moreover, in finding no fraud, the court ignored the evidence of Drs. Stump, Clark, and Becker, all of whom ruled out any possibility that the contrast between the video and Mark’s presentation at trial could be explained away as a mere matter of “perspective.” Dr. Stump testified that the “*only* rational explanation” for the difference between Mark’s presentation at his examination and the video was “that he behaved in that manner of his own volition, due to malingering rather than the result of any true physical disability or cognitive impairment.” CP 8274 (App. E-1). Dr. Clark testified that “[t]he *only* possible explanations for the discrepancy are a miraculous recovery or false presentation due to malingering or secondary gain,” and noted that recent recovery had previously been ruled out and in any case was “not a plausible explanation.” CP 8270-8271 (App. F-1). Dr. Becker concluded that the inconsistency between Mark’s claims of debility and

the evidence of the surveillance video was as “stark” and “extreme” as any he had ever seen. CP 9461.

The court did *not* find that the opinions of these experts were inadmissible or incredible; the court simply *ignored* them.⁶⁰ It ruled that a new trial was not required because Mark’s treating physicians stood by their prior testimony after viewing “portions” of the surveillance video and because it believed malingering was improbable. *See* CP 8792-93, 9784.

This reasoning is patently untenable. The post-trial opinions of Drs. Stump and Clark created a conflict in the medical expert opinions that did not exist at the trial because Mark’s true condition was never disclosed. Meg actually called Dr. Stump in her case-in-chief to testify about the worker’s compensation panel’s finding that Mark was totally disabled, RP (9/21/09) 148, 149, and her experts testified they relied upon the panel’s finding in reaching their own conclusions, RP (9/17/09-A) 37-39, RP (9/22/09) 109-110, 138, 161-62. In a new trial that evidence would not exist, while Drs. Stump and Clark, having reversed their opinions and concluded Mark is malingering, will be witnesses *for the City*.

⁶⁰ The court mentioned only Dr. Becker in its memorandum decision, and then only to assert that the City should have hired him before trial, with no explanation for why the City should have done so when there was not yet any surveillance video for Dr. Becker to examine and when Mark had been examined by Drs. Stump, Clark, and Green and found him disabled. CP 9781-82.

Failing to address the significance of Drs. Stump and Clark’s reversal of their opinions, the trial court accepted Plaintiff’s assertions that “the real gravamen of Mr. Jones’ loss was his brain injury[,]” the video can “shed[] meaningful light only on his physical condition” and any apparent discrepancy is explained by Mark’s problems being worse in stressful times (e.g., when having to testify in court). CP 9785-86. To begin, in finding that Mark’s physical injuries did not play a significant part in the jury’s verdict, the court violated the rule that a party seeking a new trial under CR 60(b)(4) need not show that the new evidence would have materially affected the outcome of the first trial. *Taylor*, 39 Wn. App. at 836. Moreover, the court’s conclusions also ignored the trial and post-trial evidence in at least three respects.

First, Plaintiff’s case was not even *primarily* about the brain injury, but about a combination of physical and cognitive injuries. Plaintiff’s counsel stated in closing argument: “I doubt that you’ve heard [of] *the combination of physical and cognitive injury like Mark has.*” RP (10/20/09) 81-82 (emphasis added). Mr. Choppa, the vocational counselor, testified that Mark has significant pain, fatigue, balance problems, cognitive problems that affect his ability to make judgments, have insights, plan and follow through, and significant depression and anxiety and fear, and “[*t]hose elements all combine* to prevent him from

[being employable].” RP (9/22/09) 110-11. Plaintiff’s neuropsychologist expert, Glenn Goodwin, Ph.D., testified that Mark’s chronic pain, brain injury, and fatigue “interact synergistically” to affect his cognitive abilities. RP (9/22/09) 201. Dr. Esselman testified that Jones’ pain and mental health impairments were “interrelated” and “can’t be looked at in isolation.” RP (9/16/09) 67.⁶¹ As Plaintiff’s counsel summarized in closing: “Everything about this accident affects every part, every system in his body, and is impacting his health.” RP (10/20/09) 79.

Second, the trial court ignored the City’s expert testimony that the video did shed highly meaningful light on Mark’s cognitive abilities. Drs. Clark and Stump agreed that the video provided a sufficient basis to assess mental health impairments, including cognitive and mood disorders. CP 9452, 9486. Dr. Clark testified that “[c]ognitive abilities and emotional well-being can be judged reliably from activities, body language, and facial expressions.” *Id.* He described specific examples of tasks and activities performed by Mark in the surveillance video that demonstrated normal cognitive ability and even mimicked clinical testing. CP 9453-54.

⁶¹ Testimony from Mark’s friends also focused on physical limitations. David Coatsworth, a firefighter friend, testified, “o[b]viously the physical injuries, the orthopedic injuries, are devastating to him.” RP (9/30/09) 47. Matthew Hartill, another firefighter friend, testified that, “Mark, physically, he’s a broken man.” RP (9/30/09) 195. A third firefighter friend, Peter Gauweiler, was succinct when asked to assess how Mr. Jones had changed: “He physically can’t do anything.” RP (10/1/09) 17.

Drs. Clark and Stump agreed with Dr. Esselman's trial testimony that things like emotional impact, executive function, organization, judgment, and the like do not show up particularly well in tests, but rather "the true test is what people can do in their environment, what he can do in his day-to-day life, and...work environment, especially." CP 9452, 9486.⁶² Finally, Dr. Becker testified to his forensic experience in using surveillance video to evaluate malingering claims, his conclusion that the surveillance video established that Mark was functioning normally, and his conclusion that Mark's inconsistency was as "stark and extreme" as he had ever encountered. CP 9461, 10210.

Third, the trial court ignored the expert testimony that stress could not explain Mark's inconsistent presentations. Dr. Clark testified that "[a]lthough a person with mental health impairments can experience periods of reduced symptoms, symptoms of the degree that were found to exist in Mr. Jones are not substantially reduced or eliminated by reduction of stress." CP 9454. Dr. Stump similarly rejected stress as a valid explanation because "(1) the difference is too severe, and (2) ...central

⁶² Between the five days of surveillance in April 2010 and the four days in June 2010, Mark presented to Dr. Esselman in May 2010 as he had appeared in court, "shuffling" and affecting pain. CP 9535 (App. H). It apparently never occurred to Dr. Esselman that Mark's affect of pain and debility was only a doctor's office performance, done to persuade Dr. Esselman to refill the pain pump, and that the *real* Mark Jones was the person who appeared in the surveillance video.

pain [like that diagnosed in Mark] is relatively steady and not subject to the extreme fluctuations that would be required to explain Mr. Jones' inconsistent presentations." CP 9488.

To obtain a new trial under CR 60(b)(4), the City was not required to prove by clear and convincing evidence that Mark and Meg, Mark's doctors, and all their witnesses fabricated their testimony in a conspiracy to recover a large verdict from the City; *inadvertent* misrepresentation requires a new trial under CR 60(b)(4). *Hickey*, 55 Wn. App. at 371. All the City had to show is that Mark's condition or abilities were misrepresented, whether purposefully or inadvertently. The City did that, and much more. The trial court abused its discretion in refusing to vacate the judgment and denying a new trial.

D. The Trial Court Erred in Excluding Virtually All Evidence of Mark's Alcohol Use.

By excluding virtually all evidence concerning Mark's history of alcohol abuse before and after the accident, the trial court prevented the City from presenting its theories that (1) alcohol withdrawal was a proximate cause of Mark's fall and (2) Mark's drinking adversely impacted his life expectancy and recovery. This was error.

1. **The City Offered Substantial Evidence to Support Its Alcohol Defenses on Causation and Damages.**

• **Causation.** An injury may have more than one proximate cause, and the jury is entitled to consider all possible causes supported by substantial evidence. *Brashear v. Puget Sound Power & Light Co., Inc.*, 100 Wn.2d 204, 207-08, 667 P.2d 78 (1983); WPI 15.01. Plaintiff's theory of causation was that Mark mistakenly went through the door to the pole-hole thinking it was the door to the restroom. The sole support for that theory was the uncorroborated testimony of a single first responder, who said he heard Mark say he was going to the bathroom. *See* RP (9/17/09-A) 150, 159-60.⁶³ But the City was prepared to offer substantial evidence supporting an alternate theory -- that Mark's fall was caused by an abnormal level of disorientation induced by alcohol withdrawal, and no reasonable safety measure could have prevented the fall.

In support of its theory, the City offered Dr. Rudolf's opinions that Mark was abnormally disoriented when he fell, that his disorientation more likely than not the result of alcohol-induced impairment or early withdrawal, and that the disorientation caused or contributed to the fall. RP (9/11/09) 6, 16-19, 36-37. Dr. Rudolf opined that Mark had to have

⁶³ On cross-examination, the witness admitted he had not told any of the City's attorneys who he had spoken to about this case that Mark had made any statement to him, much less that he had said he had been going to the bathroom. *See* RP (9/17/09-A) 151-52. Nor was any medical or investigatory record offered by Plaintiff to confirm this story.

been abnormally disoriented (not just “groggy”) to enter the pole hole by mistake because Mark (1) as a firefighter, was expected to be alert on quick notice at all hours; (2) had worked at Station 33 before and had been there all day; and (3) missed several cues between his bed and winding up in the pole hole, including the location of the door several feet from the bathroom door, the warning sign on the door, opening the heavy door, and the light shining through the pole hole from below. RP (9/11/09) 14-18. Dr. Rudolf opined that no reasonable barrier would stop a person in such a state. RP (9/11/09) 36.

The trial court excluded Dr. Rudolf’s opinions based on lack of foundation, stating there was “no evidence...of what the drinking history was in December of 2003 that led to a supposed conclusion of either alcohol withdrawal or...heightened disorientation.” RP (9/11/09) 145-46. But the record shows that Dr. Rudolf rested his opinion that Mark was likely drinking in the weeks and days before the accident, including drinking within two days of the accident, upon solid evidence that the trial court erred in dismissing.

First, Dr. Rudolf relied on evidence of Mark’s historical pattern of heavy drinking. RP (9/11/09) 7-9. This included Ann Jacobs’ testimony that Mark would typically drink four to ten beers, a few times per week, which Dr. Rudolf took to be the minimum because a spouse is often

unaware of the actual level of drinking or will underreport it. RP (9/11/09) 7-8. Dr. Rudolf also relied upon the fact that Ann considered Mark to be an alcoholic, and that he had sporadically attended Alcoholics Anonymous. RP (9/11/09) 7-8; *see* CP 391, 395.

Second, Dr. Rudolf relied upon objective evidence that Mark drank in the weeks leading up to the accident. RP (9/11/09) 7. This included the DUI citation Mark received on November 3, 2003, when his blood alcohol readings were more than twice the legal limit, which led Dr. Rudolf to conclude that someone alert enough to operate a vehicle with that level of blood alcohol content is likely “a heavy drinker on a regular basis.” RP (9/11/09) 7. And it included Mark’s admission that he continued to drink three to four beers on Friday nights and weekends, after the DUI. RP (9/11/09) 7, 21-22; CP 2389.

Third, Dr. Rudolf relied upon evidence that Mark probably drank on the evening of Sunday, December 21, 2003, the day before he reported for duty at the fire station and less than 30 hours before his fall at 3:00 a.m. on the 23rd. RP (9/11/09) 9-10, 30. Ann had testified that anger and verbal abuse were major features of Mark’s drunkenness. CP 396, 407-08, 429. On December 21, Mark and Ann got into an argument about whether a tricycle for their son would be assembled before Christmas. CP 401. Mark then retired to the garage, ostensibly to assemble the tricycle, which

he failed to complete. *Id.* Although Ann did not know for certain whether Mark drank that day, it is reasonable to infer, given the established link between his drinking and anger, that he did.⁶⁴ Dr. Rudolf observed that drinking on December 21 fit, in terms of timing, with the withdrawal symptoms that could have been expected on December 23. RP (9/11/09) 9-10, 24-25.

Fourth, Dr. Rudolf relied upon Harborview's implementation of an alcohol withdrawal protocol. RP (9/11/09) 11-12. Dr. Rudolf found this evidence particularly strong because Mark's symptoms fit the "entire range of criteria" for diagnosing alcohol withdrawal, and he had several "extremely high" readings. RP (9/11/09) 11-12.

In sum, Dr. Rudolf had more than an adequate foundation for his opinions, which in turn provided substantial evidence to support the City's alcohol withdrawal theory of causation. The trial court's ruling to the contrary cannot be sustained as a reasoned exercise of discretion. Moreover, by the time of the offer of proof hearing, the trial court knew that the City had uncovered a witness (Beth Powell) who was prepared to confirm Ann Jacobs' testimony about Mark's history of alcohol abuse. The trial court's refusal to delay its ultimate decision until that evidence

⁶⁴ The trial court acknowledged that it "appear[ed] that [Jones] may have been drinking shortly before the shift when this accident took place, while he was putting together the tricycle[.]" RP (9/4/09) 111.

had been developed (e.g., through Beth's offer-of-proof deposition), or at least reconsider it after reviewing Beth's evidence, was also an abuse of discretion.

- **Damages.** The jury may consider a person's health, habits, and activities, in addition to other factors, in determining the extent to which an injury diminished his life expectancy, quality of life, and expected earnings. See WPI 34.04 and cmt.; CP 4759 (Court's Instruction No. 23). Evidence of a history of alcohol abuse is thus relevant and admissible to reduce the plaintiff's damages. See *Palmer v. Waterman S.S. Corp.*, 52 Wn.2d 604, 607-08, 328 P.2d 169 (1958); *Lundberg v. Baumgartner*, 5 Wn.2d 619, 106 P.2d 566 (1940); *Kramer v. J.J. Case Mfg. Co.*, 62 Wn. App. 544, 815 P.2d 708 (1991).⁶⁵

In *Lundberg*, where the decedent was intoxicated when he was struck and killed by a car, the Supreme Court held it was not error to admit the testimony of three police officers who each had witnessed the decedent under the influence of alcohol on separate occasions. 5 Wn.2d at 621-22. The court stated the rule that "the amount of compensation which the dependents of one wrongfully killed may be entitled to recover is affected

⁶⁵ See also *Kraus v. Taylor*, 710 A.2d 1142 (Pa. Super. Ct. 1998) ("Evidence of appellant's chronic drug and alcohol abuse strongly suggests that his life expectancy deviates from the average."); *Admissibility of Evidence, in Action for Personal Injury or Death, of Injured Party's Use of Intoxicants or Illegal Drugs on Issue of Life Expectancy*, 86 A.L.R. 4th 1135 (1991).

by his habit of drinking intoxicants,” as “[s]uch a habit tends to lower a man’s earning capacity, to shorten his expectancy of life, to impair his usefulness as a father, and to lessen his protection and support of his family.” *Id.* at 621. The court reasoned that, although the officers’ testimony alone might have been insufficient to be probative of an alcohol problem, it was supported by other evidence in the record, including the decedent’s daughter’s testimony that she had sometimes seen her father drink and had seen him intoxicated at least once, and that his drinking had increased in the last year and a half of his life following his wife’s death. *Id.* at 621-22.

In addition, under the doctrine of avoidable consequences, evidence of post-accident alcohol use is relevant where alcohol use is against doctor’s orders and there is evidence from which the jury could conclude that the alcohol use exacerbated the plaintiff’s injuries or impeded his recovery. *Fox v. Evans*, 127 Wn. App. 300, 304, 111 P.3d 267 (2005). “A person who is liable for an injury to another is not liable for any damages arising after the original injury that are proximately caused by the failure of the injured person to exercise ordinary care to avoid or minimize such new or increased damages[.]” WPI 33.01 (5th ed. 2005); *see e.g., Fox*, 127 Wn. App. at 304 (holding that it was a proper exercise of discretion to instruct the jury on failure to mitigate where the

plaintiff discontinued beneficial treatment and refused recommended treatments).

The City offered substantial evidence that Mark's alcohol abuse continued after the accident, including while he was on prescription narcotics for pain and under Dr. Esselman's orders not to consume alcohol. Ann testified that Mark would drink to the point of passing out once per week while taking narcotic medications. CP 418. She testified that he continued his pattern of drinking upwards of 10 beers per episode after April 2006. CP 410. For example, on one occasion in May 2006, when Mark was on narcotic medications, he drank 14-16 beers while driving and wanted to take Jesse with him while "very drunk." CP 410, 421; RP (9/17/09-A) 113.

The trial court presumed to find "no evidence that [Jones] has been drinking since January 2007, when the pain pump was implanted." RP (9/4/09) 114. But by July and August 2009, Meg and Mark both admitted that Mark was no longer entirely abstaining from alcohol while on the pain pump. CP 1931, 9835. And the trial court itself acknowledged that Mark "was on narcotics at the same time he was drinking in 2006[.]" RP (9/8/09) 10, and that Dr. Rudolf's opinion that alcohol abuse harms brain injured patients taking narcotic medications did not depend on the

narcotics being administered through a pain pump. CP 2386; RP (9/11/09) 41, 82.

Moreover, at the September 11 offer of proof hearing, the City tried to alert the court that it had new evidence showing Mark was continuing to abuse alcohol right up to the time of the trial (the investigators who saw him drinking four days earlier, and Beth's testimony that Meg had recently admitted that Mark was continuing to abuse alcohol). Incredibly, the court acknowledged the newly disclosed witnesses could "fill the gap" the court perceived in the foundation for the City's damages theory.⁶⁶ Literally seconds before ruling that Dr. Rudolf's lacked foundation for his opinions, the trial court "recogniz[ed] that the defense counsel have very recently come up with some evidence concerning use of alcohol since the pain pump was implanted in 2007[.]" RP (9/11/09) 146-47. Yet instead of pausing to consider all the evidence, the court slammed the door on the City's alcohol damages defense.

This was a patent abuse of discretion. Given the evidence that Mark was continuing to abuse alcohol, the City should have been permitted to present testimony on direct and cross-examination that the abuse would materially impair Mark's recovery from his injuries. Dr.

⁶⁶ See RP (9/11/09) 111 ("I don't necessarily believe that Mr. Jones wasn't drinking since he had his pump, but the point is, we don't have any -- *up until this second anyway*, we have had no evidence to the contrary...").

Rudolf opined that Mark's continued drinking would likely have an adverse effect on Mark's recovery and general life expectancy. RP (9/11/09) 43-45.⁶⁷ Mark's pattern of drinking was "quite significant" and would affect his quality of life by impairing his cognitive abilities, mood, mental health, and physical recovery from his injuries, and his relationships. RP (9/11/09) 38.⁶⁸ According to Dr. Rudolf, the "only level of alcohol use that would be advisable for Mr. Jones would be zero." RP (9/11/09) 44-45. Dr. Rudolf testified: "I have an opinion that [Jones'] clearly high level of alcohol abuse post accident, while being treated with narcotic medication in a compromised neurologic state, probably did hinder his recovery significantly." RP (9/11/09) 97. The offer of proof through Dr. Rudolf thus directly addressed the trial court's concern that there was a lack of expert testimony linking Mark's alcohol use to adverse effects on his recovery, life-expectancy, and future quality of life; the court therefore erred by dismissing Dr. Rudolf's testimony as "speculative." RP (9/11/2009) 147; *see also* RP 9/4/09 112.

⁶⁷ Meg argued that all of Mark's treating doctors said that alcohol did not impact his recovery, RP (09/04/09) 16, but *Mark never told his doctors about his drinking* and they never figured it out. CP 398, 1882, 2366-67, 3966-67, 4034-35, 4037.

⁶⁸ Dr. Rudolf testified it is "highly contraindicated for a patient with a brain injury to use alcohol" and "highly contraindicated for a patient on narcotics to abuse alcohol." RP (9/11/09) 34. He further testified that mixing alcohol and narcotics would affect cognition, memory, general mental functioning, and mood, and could cause depression, anxiety, sleep disorders, and sexual dysfunction. RP (9/11/09) 41-42.

Meg's motion to exclude evidence of her brother's alcohol use relied heavily on this Court's decision in *Kramer v. J.J. Case Mfg. Co.*, 62 Wn. App. 544, 815 P.2d 708 (1991). *See* CP 1781. In *Kramer*, the plaintiff, Gary Kramer, sued Case after he was injured in a backhoe accident. 62 Wn. App. at 546. Before trial, Kramer sought to exclude evidence of his past alcohol and marijuana use as irrelevant and highly prejudicial. *Id.* at 556. Case asserted that substance abuse was relevant to Kramer's earning capacity and work-life expectancy. *Id.* The trial court deferred ruling on the motion until a week later, when Case requested a ruling in anticipation of cross-examining Kramer's economist on the issue. *Id.* at 557. Case did not prepare an offer of proof linking substance abuse to decreased life expectancy, but the trial court still allowed evidence of Kramer's substance abuse. *Id.* After a trial in which Kramer, his wife, and sister were all cross-examined about his drug and alcohol habit, the jury returned a verdict for Case. *Id.*

On appeal, this Court found that the trial court had abused its discretion in allowing evidence of substance abuse because Case had not established the probative value of the substance abuse evidence. *Id.* at 559. That differs markedly from this case, where the City made an offer of proof establishing both Mark's post-accident alcohol abuse and the causal link between alcohol use during recovery and decreased life-

expectancy and quality of life. Had Case made such an offer of proof in *Kramer*, the trial court's ruling would have been correct. Here, the City made precisely such an offer, buttressed by additional offers of proof,⁶⁹ yet the court still refused to allow the evidence. This was error.

2. The Trial Court Applied ER 403 Incorrectly to Exclude the Alcohol Evidence.

As discussed above, under ER 403, evidence is presumed admissible and, where evidence is probative of a "central issue" in the case, the likelihood that a danger of unfair prejudice will substantially outweigh the probative force of the evidence is "quite slim." *Carson, supra*, 123 Wn.2d at 224-25.⁷⁰

Causation and damages were "central issues" in this case. The trial court discounted the probative value of the evidence supporting an alcohol withdrawal theory on the grounds that there were other possible explanations for being disoriented in the middle of the night. RP (9/4/09) 112-15. But, as explained above, there was substantial evidence from which to infer that Mark's pattern of chronic alcohol abuse, coupled with his sober periods while on-duty at the fire station, was likely to have

⁶⁹ See CP 2446, 4005, 4032-33, 4656-57; RP (9/17/09-A) 123-35; RP (9/22/09) 169-73.

⁷⁰ See, e.g., *Erickson v. Robert F. Kerr, M.D., P.S., Inc.*, 125 Wn.2d 183, 190-91, 883 P.2d 313 (1994) (in medical malpractice case, where physician's credibility was a "central issue" and physician testified from memory, trial court abused its discretion in excluding, under ER 403, evidence that physician had forgotten the decedent had died).

resulted in alcohol withdrawal at the time of the accident. The trial court's finding that there were alternative explanations for Mark's disorientation does not justify preventing the jury from considering the City's theory of causation. As for damages, the City offered a plenitude of evidence that continuing drinking by Mark would materially adversely impact his recovery from his injuries, life expectancy, and quality of life.

The court reasoned that the evidence of Mark's alcohol abuse could result in unfair prejudice because it could be used as "character evidence" rather than to prove the City's theories of causation and damages. RP (9/4/09) 113 ("This is a real attack on Mr. Jones' character"). But that is not a proper basis for excluding evidence that is highly probative on a central issue. The solution is not to exclude the evidence but to police the conduct of counsel to make sure they do not cross the line between permissible use of the evidence and an improper attack on character, and to give any curative or limiting instructions that may be necessary to insure a fair trial. *See Carson*, 123 Wn.2d at 225. Nor has it been established that a person's drinking history, *per se*, is the sort of inflammable evidence that can be deemed *unfairly* prejudicial -- a legal conclusion that could not be reached under Washington law without overruling *Palmer* and *Lundberg*. The trial court's decision to exclude the City's alcohol evidence based on ER 403 was error.

E. The Exclusion of Key Evidence Deprived the City of a Fair Trial on Proximate Cause and Contributory Fault, as Well as Damages. Moreover, the Scope of Mark and Meg's Dishonesty Mandate a Remand for a New Trial on *All* Issues, and Subject to the City's Right to Renew Its Motion for Summary Judgment on Grounds of Impermissible Speculation.

While Mark Jones claimed no memory of his accident, a first responder testified Mark told him that "he had gotten up to go to the bathroom, he's not sure what had happened, [and] he must have fallen through the hole." RP (9/17/09-A) 149-50, 159-60. This evidence sheds no light on what caused Mark, at 3 a.m. on a dark December morning: (1) to turn the wrong direction and head to the pole hole door rather than the bathroom; (2) once at the pole hole door, to ignore the warning sign on the door and push open the closed door; and (3) continue his forward progress despite immediately confronting bright light flooding up from the truck bay upon opening the door. Beyond evidence suggesting the room was so dark that Mark could not have seen the pole hole warning sign when standing by his bed, there is no evidence to support a finding that this chain of events actually led to Mark's fall. Yet this was the only theory of causation presented to the jury, because the City could not propose an alternative due to the exclusion of the City's alcohol evidence.

Under Washington law, causation cannot be established by speculation. Nor can it be established by circumstantial evidence unless there is only one possible explanation for the accident. The leading case is

Gardner v. Seymour, 27 Wn.2d 802, 180 P.2d 564 (1947), in which a store manager died following an unwitnessed fall down an elevator shaft. The elevator used a cable that a person could pull to summon the car to their floor. Though the elevator doors typically opened only at the floor where the car was standing, a person could open the doors on another level and pull the tiller cable to summon the car. If the car was summoned this way, the doors where the elevator had been would not close, leaving the shaft open and unprotected.

The Supreme Court determined there was sufficient evidence to establish the elevator had inadequate safety devices and the employer therefore failed to provide a safe workplace. The court then considered two competing scenarios for how the accident took place: (1) the worker saw the doors open, assumed the elevator car was there, and walked into the open shaft; or (2) the worker forced the doors open to pull the cable and summon the car, and lost his balance before the car arrived. Because there was no testimony to support one over the other, the court concluded either was possible and the jury's finding of liability could only be the result of improper speculation. 27 Wn.2d at 805-06. Reversing the judgment on the jury verdict and dismissing the case as a matter of law, the court reasoned:

[N]o legitimate inference can be drawn that an accident happened in a certain way by simply showing that it might have happened in

that way, and without further showing that it could not reasonably have happened in any other way. A theory cannot be said to be established by circumstantial evidence, even in a civil action, *unless the facts relied upon are of such a nature, and so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them.*

Gardner, 27 Wn.2d at 810 (citations and quotations omitted, emphasis added).⁷¹

Here, Mark's lawyers could characterize their theory of the accident as the "only possible cause" only because the trial court improperly excluded the City's evidence of an alternative cause. Mark and Meg's misleading discovery responses also denied the City the opportunity to show it was entitled to summary judgment, because a jury would have no rational basis for rejecting the City's alcohol withdrawal theory in favor of Mark's theory. This Court should order a new trial on the issue of causation, and also authorize the City to renew its motion for summary judgment. This Court should also reinstate the City's defense of contributory fault,

⁷¹ *Gardner* has been applied to uphold the summary judgment dismissals of personal injury claims based on impermissible speculation as to causation. *See, e.g., Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 972 P.2d 475 (1999) (plaintiff injured while exercising on treadmill; summary judgment dismissal affirmed where plaintiff could not remember the accident and there was no rationale basis for a jury to choose between plaintiff's theory of defective design and defendants' theory that plaintiff simply tripped and fell); *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 133 P.3d 944 (2006) (*per curiam*) (plaintiff injured when falling off a ladder; summary judgment dismissal affirmed where plaintiff could not remember the accident and there was no rationale basis for finding that possible defects in the ladder actually caused the injury); *Moore v. City of Des Moines*, ___ Wn. App. ___, 241 P.3d 787, 2010 WL 4292399 (2010) (plaintiff injured when struck by car when pedestrian in crosswalk; summary judgment dismissal affirmed where plaintiff could not remember the accident and there was no rational basis for a jury to choose between plaintiff's theory of hazardous crosswalk and defendant's theory that plaintiff tripped and fell just before car struck).

because a jury could conclude that alcohol withdrawal caused Mark to miss several warning signs that he was heading towards the wrong door.

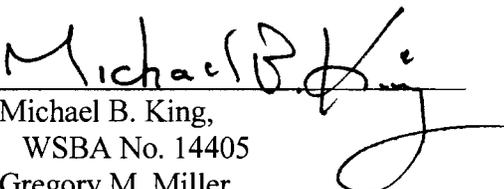
Finally, this Court should order a new trial on whether the City breached its duty to provide Mark a safe workplace. Mark's testimony has been called into general doubt by the degree of his dishonesty established by the totality of the evidence discovered by the City. The ancient maxim, *falsus in uno, falsus in omnibus*, clearly applies here. See, e.g., *Stibbs v. Stibbs*, 37 Wn.2d 377, 379, 223 P.2d 841 (1950) (reversing denial of new trial based on newly discovered evidence). As Dr. Stump observed, "a person can lie that he does not remember." CP 9488.

II. CONCLUSION

This Court should reverse and remand for a retrial on all issues, subject to the City's right to renew its motion for summary judgment.

RESPECTFULLY SUBMITTED this 7th day of January, 2011.

CARNEY BADLEY SPELLMAN, P.S.

By 
Michael B. King,
WSBA No. 14405
Gregory M. Miller,
WSBA No. 14459

Attorneys for Appellant

INDEX TO APPENDICES

Case No. 65062-9-I (Consolidated with Case No. 66161-2-I)

APPENDIX	DOCUMENT
App. A	01/20/10 Letter Ruling on Post-Trial Motions, CP 7810 – 7816
App. B	10/18/10 Memorandum Decision and Order Denying City of Seattle’s Motion to Vacate, CP 9778 – 9787, with highlighting
App. C	<i>Mark Jones Summary of Surveillance</i> (“Surveillance log”), CP 9499-9519
App. D	D – 1: 09/27/09 Declaration of Gordon B. Jones, re his observations and treatment of Mark Jones, CP 4068-4075 D – 2: 09/27/09 Declaration of Gordon B. Jones, re telephone call from Richard Kilpatrick, CP 4060-4061
App. E	E - 1: 08/04/10 Declaration of William J. Stump, M.D., CP 8272-8276 E - 2: 09/30/10 Second Declaration of William J. Stump, M.D., CP 9485-9489
App. F	F – 1: 08/03/10 Declaration of Roy D. Clark, Jr., M.D., CP 8267 – 8271 F – 2: 09/28/10 Second Declaration of Roy D. Clark, Jr., M.D., CP 9451-9458
App. G	Trial Ex. 521 – Illustrative Chart showing Mark Jones’ “Missed Steps”
App. H	05/12/10 Mark Jones’ Rehab Clinic Outpatient Record Dictated by Peter C. Esselman, MD, CP 9535
App. I	Timeline

APPENDIX A

Superior Court of the State of Washington
For the County of King

SUSAN J. CRAIGHEAD
Judge

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January 20, 2010

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Re: Jones v. City of Seattle, No. 06-2-39861-1
*Motion for Mistrial, Motion to Amend Judgment as a Matter of Law, Motion for New Trial;
Motion for Remittitur, Cross-motions for Sanctions*

Counsel,

Before me are a series of post-trial motions in this matter. Fundamentally the City of Seattle takes the position that the cumulative effect of alleged misconduct by plaintiff's counsel and alleged errors by the court deprived the City of a fair trial. In my analysis below I will address the specific standards for obtaining relief for each motion and discuss the specific arguments made, but to the extent that the same argument is made in different motions I will only discuss that argument once.

Motion for a Mistrial:

The City has in its multiple motions for mistrial primarily focused on the conduct of opposing counsel, Todd Gardner. In this motion, the City also raises some of the court's rulings with respect to questioning during the defense case, allowing the L&I investigator Robert Leo to testify, allowing the plaintiff's animation, and rulings during closing argument. The City emphasizes that it was prejudiced by the *cumulative* effect of all of these decisions and Mr. Gardner's conduct.

Conduct of Counsel

Because the City's complaints about Mr. Gardner's conduct underlie its motion for a mistrial, its motion pursuant to CR 59, and its motion for sanctions, the court begins its analysis with this issue.

The court must observe at the outset that the record cannot possibly reflect the actual experience of trying this case. By its nature, the written record creates the appearance that only one person is

ORIGINAL

speaking at a time. Throughout the trial, the lawyers talked over one another, over the witness, and over the court. In just the small fraction of the transcript that has been provided to me, I am struck by how often I told counsel (on both sides) to stop yelling, stop interrupting, and to let me hear the objection. Counsel on both sides treated each other with a profound lack of respect, from the very first morning when I had to resolve at which table each side would sit. The record is unable to reflect the tone of counsel's voice, their gesticulations, or the rolling of eyes. It does not record sighs, laughter, or under-the-breath comments. It is unable to capture sidebar discussions in their full emotional intensity. The record also cannot reflect events that take place during breaks or after the court reporter has left for the evening. It also rarely reflects the hours witnesses spent waiting in the hall to testify or the instances in which they had to be rescheduled due to unanticipated delays in the proceedings.

Neither can the record reflect events that never happened. The City alleges, for example, that the firefighters in the audience were disruptive. At no time did the court witness any disruptions; the court staff reported no disruptions to me; Juror No. 5's Declaration indicates that she saw no disruptions. The City also alleges inappropriate eye contact between jurors 11 and 12 and the plaintiff's paralegal during sidebars. I was not present, of course, during these interludes, but my staff was instructed to observe the courtroom and reported no inappropriate contact.

The City is able to document many of their criticisms of Mr. Gardner's conduct in the record, but whether by design or by happenstance, the conduct of defense counsel that provoked Mr. Gardner's inappropriate responses oftentimes was of the sort inadequately captured by the record. The City made 92 motions in limine before trial; the court granted 55 of them in whole or in part. The court granted 20 of the plaintiff's 29 motions in limine in whole or in part. It should be noted that the court ruled on many of these motions without oral argument because the contention between the lawyers was such that it would have taken days to argue all of the motions orally. The number of motions in limine and the fact that they were not all subject to oral argument led to some confusion among counsel and the court.

Turning to the City's specific allegations, the City alleges that Mr. Gardner violated motions in limine on several occasions – by mentioning insurance in voir dire, by mentioning the conclusion of L&I in opening, and by saying that the Fire Department investigation concluded that the accident could have been prevented. Viewing these violations of the court's orders in limine after all the evidence was presented, however, their impact on the trial was minimal. Mr. Gardner did not refer to *liability* insurance in voir dire, just to insurance; while in and of itself that might have given the jury the impression that the City was insured, several witnesses at trial testified that the City was "self-insured," and the City's benefits witness, Marge Garrison, specifically mentioned that she had a responsibility to the citizens of the City to scrutinize every bill. All of this evidence created the impression that the City did not have insurance. Similarly, by the end of trial the jury heard testimony from the Department's Safety Chiefs that the fire pole was not guarded by the door, and they heard testimony from Mr. Leo from L&I that a door is not a guard. While I recognize that the defense believes none of this evidence should have been admitted, the fact is that it was admitted and it diminished the significance of Mr. Gardner's remark in opening. As for the word "prevented," I believe I observed at the time that the word did not jump out at me when Mr. Gardner uttered it; in the context of a seven week trial, its significance is minimal.

Once trial began, defense moved for a mistrial after the plaintiff's first witness, Mr. Lawless, testified that after the accident, latches were installed on the pole hole door. There is no question this testimony violated an order in limine; the jury was immediately instructed to disregard the comment and I have no

reason to believe the jury failed to follow my instruction. Defense implies that Mr. Gardner and Mr. Lawless planned to elicit this information, and that Mr. Gardner highlighted it by responding “whoa, whoa, whoa!” when it came out. As the court recalls, there was an objection to virtually every question Mr. Gardner asked on re-direct examination and, as Mr. Lawless stated in his declaration, he had never experienced so many objections in all the many, many times he has testified. The significance of the one mention of latches at the beginning of this long trial is not great in the context of the whole trial.

As for Mr. Gardner’s speaking objections, the court has already sanctioned Mr. Gardner \$650. His comments during defense counsel’s examination of witnesses were certainly problematic, as I made clear during the trial. But this jury was instructed that the lawyers’ remarks, statements, and arguments are not evidence; I have no reason to believe the jury did not distinguish between the evidence and the bluster of attorneys. Moreover, to the extent that Mr. Gardner’s frustration had any impact on the jury, it more likely damaged the plaintiff’s case than the defense case. Similarly, Mr. Gardner’s tendency to ask, as he puts it, “closed ended” questions (in the defense view, “leading” questions) diminished the power of his case.

With respect to Mr. Gardner’s comments, it is important to note the role the City played in provoking these comments. For example, Mr. Gardner’s “Good Lord” comment came at the noon hour, after Mark Jones had spent an entire morning on the stand, and was going to be called back to the stand after lunch. This was the second time Jones had been on the witness stand; defense had refused Mr. Gardner’s offer to let defense exceed the scope of his direct when Jones testified in the plaintiff’s case to avoid a return trip to court. Mr. Jones had no memory of the accident; multiple expert and lay witnesses testified about his post-accident course; the court had limited the areas of inquiry available to the defense. Nonetheless, Ms. Bremner posed meandering, repetitive questions, occasionally veering into areas foreclosed by orders in limine – such as the substance of arguments between him and his former wife during their divorce. On this occasion and several others, the repetitive questions posed by defense counsel gave the impression of deliberately delaying the proceedings so as to force the plaintiff to reschedule witnesses and deliberately antagonizing Mr. Gardner in the hopes of provoking a reaction. To the extent that the City complains the court should have imposed more severe sanctions on Mr. Gardner, the court tried to weigh the circumstances and the role played by the defense in the events – not all of which could be reflected in the record.

Other alleged grounds for mistrial

The City raises a series of alleged errors: The dismissal of Juror No. 9, allowing L&I investigator Leo to testify, the emphasis on the findings of the Safety Chiefs in plaintiff’s closing argument, plaintiff’s use of animation in closing, argument in plaintiff’s closing concerning deterrence, plaintiff’s explanation of how a contributory negligence finding would impact any award, allowing “good character” evidence of the plaintiff.

The court believes that the record adequately reflects its decision with regard to Juror No. 9. The court does not believe that allowing Mr. Leo to testify was error; if it was error, the weight of the evidence presented through other witnesses established that a door is not a guard of a pole hole and any error with respect to Mr. Leo is harmless. Similarly, the court is not persuaded that it erred when it allowed the Safety Chiefs to testify about their investigation and their observation that the chain was not in use when Jones fell. The defense appears to be arguing for an extension of the law to expand ER 407 to prohibit evidence of post-accident investigations as well as post-accident remedial measures; the

appellate courts may be friendly to this argument, but given the state of the law at this time, this court does not believe it erred.

In closing argument, Mr. Gardner argued (perhaps not as gracefully as he could have) that fully compensating Jones would deter the City from overlooking the safety of firefighters. He did not argue that the City should be punished, and he did not argue that the verdict should "send a message." As we have all learned in law school, deterrence is one of the policy reasons underlying the entire field of tort law; the plaintiff cites Johnson v. Spider Staging Co., 87 Wn.2d 577, 583 (1976) and some other cases indicate that one of the purposes of tort liability is to encourage safety and deter negligence through full compensation. However, these cases do not speak to whether such an argument can be made to a jury. The defense cites Broyles v. Thurston County, 147 Wn. App. 409 (2008) for the proposition that one may not make a deterrence argument along these lines because the jury instructions do not authorize damages for purposes of deterrence, only for compensation. In this case, the court overruled the defense objection to this line of argument because deterrence is a policy underpinning of tort liability, and because one of the reasons we award money damages when we know money cannot really bring back whatever was lost in an accident is to provide a financial incentive to encourage safety (another way of putting "deterrence.") Perhaps this case will afford the appellate court an opportunity to define the parameters of closing argument on this subject. Regardless, the few lines of plaintiff's closing related to this subject do not warrant a mistrial.

Finally, with respect to closings, defense objected to Mr. Gardner's explanation of how contributory negligence would impact any award. The court overruled the objection because the instruction indicates that the jury's determination will form the basis of apportionment of damages, and Mr. Gardner's explanation was accurate. The court has been unable to find any case law supporting the defense position on this issue. The court notes that in criminal cases, the jury is told nothing in the instructions about the reasons they are asked to determine, for example, whether a defendant used a deadly weapon or whether an aggravating factor applies. Here, the instruction does inform the jury of the reason for its determination; I am not persuaded that Mr. Gardner's argument was improper.

Last, defense alleges the City was unfairly treated by the court in its rulings on motions in limine, its rulings on objections during the questioning of witnesses and the conduct of closing arguments. Under very difficult circumstances, the court used its best judgment to resolve each and every issue fairly.

Decision:

The defense urges that the court consider all of the alleged errors and the conduct of opposing counsel in total when deciding whether to grant its motion for mistrial. A trial court should grant a mistrial when an irregularity in the trial proceedings is so prejudicial that it deprives the defendant of a fair trial. State v. Babcock, 145 Wn. App. 157 (2008). Among the factors the court should consider is (1) the seriousness of the irregularity; (2) whether the challenged evidence was cumulative of other evidence properly admitted and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction with a jury is presumed to follow.

Taking all of the City's allegations into account, I am not persuaded that the City was deprived of a fair trial. In particular, I do not believe that the misconduct of Mr. Gardner damaged the City's case. The City has not provided any declarations suggesting that the jury did not follow the court's instructions to base its decision on the evidence and the court's instructions. The size of the verdict alone and the

failure to assign any contributory negligence to Jones do not establish that the City did not receive a fair trial. It is true that the City was not able to argue its alcohol theory and therefore, as the City argues in its motion, it was not able to "impeach" the plaintiff's argument that Jones has been and is "a good man" with evidence that he had driven drunk, that he had engaged in binge drinking, and that he had not told the Fire Department he was an alcoholic. That this is the reason cited by the City in its motion for mistrial for needing to argue its "alcohol theory" speaks volumes. The motion for mistrial is denied.

Motion for Judgment as a Matter of Law:

The City moves for judgment as a matter of law pursuant to CR 50(b). A CR50(b) motion should be granted where the evidence, viewed in the light most favorable to the non-moving party, shows no substantial evidence or reasonable inference there from can sustain a verdict in favor of the non-moving party. Morse v. Antonelis, 112 Wn. App. 941 (2002). The substantial evidence test requires that evidence presented be sufficient to persuade a fair-minded, rational person of the truth of the declared premise.

Chiefly, the City argues that no evidence was presented at trial indicating how or why Jones fell down the fire pole hole, and therefore the jury must have reached its verdict by speculation. It is true there was no percipient witness to Jones' fall. But viewing the evidence in the light most favorable to the non-moving party, the reasonable inferences from the substantial circumstantial evidence that was presented establish a very sound basis for the jury's verdict. Many times juries are faced with situations where there is no direct evidence of a proposition, but they properly reach decisions on the basis of circumstantial evidence, which they are instructed is just as valuable. Here the jury was aware that Jones did not use fire poles, he was wearing shorts and a T-shirt and therefore was not dressed either to comfortably use the fire pole or visit the apparatus bay in December; there was evidence that the door to the landing/bathroom was indistinguishable in the dark from the door to the pole hole; and there was evidence that he told a medic attending to him after the fall that he had just gotten up to use the bathroom. Reasonable inferences from all of this evidence sustain the jury's verdict. Similarly, reasonable inferences from all of this evidence sustain the jury's verdict that Jones was not contributorily negligent.

The motion for judgment as a matter of law pursuant to CR 50(b) is denied.

Motion for a New Trial

The City seeks a new trial pursuant to CR 59. The legal basis for the City's motion is not explicitly stated in its motion, but it appears that the City is relying on CR 59(1) (irregularity in the proceedings, (2) misconduct by the prevailing party; and (8) error in law at trial. The City argues that a new trial is required because the exclusion of its "alcohol theory" improperly deprived it of its best defense; because of the preclusion of the City's surveillance evidence; the conduct of plaintiff's counsel; and because the court allowed interviews with the City's two Safety Chiefs.

The court has addressed the City's argument that it should have been permitted to present its "alcohol theory" in the record on several occasions. The motion was re-argued multiple times throughout the trial. The court does not believe it was error to exclude this theory in light of the lack of admissible evidence to support it. The City's appellate counsel made assertions at oral argument on this motion that are not supported by the facts. The City never disclosed that Beth Powell would be a witness at

trial and literally surprised plaintiff's counsel and the court by flying her in from Montana to testify at a hearing to allow the City to make its offer of proof. I allowed a deposition of Ms. Powell, which revealed that she had very little personal knowledge of Jones' consumption of alcohol. It would have been grossly unfair to the plaintiff to allow an undisclosed witness on a critical subject to testify, when plaintiff would have had no opportunity to undertake its own investigation of Ms. Powell. The defense did not disclose that it would call Gordon Jones, the father, until mid-way through trial. The City has been aware that Jones received physical therapy treatment from his father (paid for by the City) since the outset of this lawsuit; defense counsel questioned Mark Jones and Meg Jones about the father's treatment of Mark at their depositions. The suggestion that the defense did not know anything about Gordon Jones until mid-way through this trial is false. Gordon Jones' knowledge of any alcohol use by Mark Jones since 2007 was not based on his personal knowledge. To have allowed him to testify at that point in the trial about such explosive information would have been unfair to the plaintiff. The exclusion of the City's "alcohol theory" and the court's exclusion of Beth Powell and Gordon Jones as witnesses are not error and do not justify a new trial.

The court excluded the City's surveillance evidence, gathered after the trial began, for similar reasons. None of the investigators involved in this surveillance had ever been disclosed. 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. The court did not err when it excluded this evidence.

The court has discussed the conduct of plaintiff's counsel elsewhere in this ruling. The court has also addressed on the record the argument concerning interviews of Chiefs Verlinda and Gablehouse. The court authorized these interviews after defense counsel ignored the court's repeated inquiries as to its position on this issue and in exasperation the court finally ordered the City to provide contact information to the plaintiff. The court notes that Chief Verlinda's testimony made clear he has thought about Jones' fall every day for months. It is highly unlikely that an interview shortly before these chiefs testified induced them to change their minds; to the extent it was error to allow the interviews, the testimony of these witnesses hewed closely to their investigation of the accident, and any error is harmless.

The motion for a new trial pursuant to CR 59 is denied. The City has also not established that remittitur is appropriate here.

Cross-Motions for Sanctions

Before the Court are cross-motions for sanctions for the behavior of plaintiff's counsel Todd Gardner and defense counsel Anne Bremner and Ron Bemis. Following the verdict, the court set a briefing schedule to allow all of the parties' post-trial motions to be considered; among these motions were the cross-motions for sanctions. Although the court has not specifically heard oral argument on the cross-motions for sanctions, hundreds of pages of briefing and attachments from the record have been submitted by the parties.

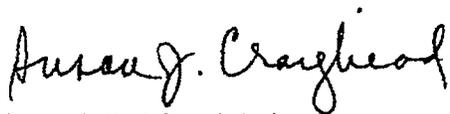
The court previously imposed sanctions in the total amount of \$650 on Mr. Gardner, all of which have been paid. The court previously imposed sanctions in the amount of \$250 on Mr. Bemis, which to the court's knowledge have not been paid. No sanctions have been imposed thus far on Ms. Bremner.

During trial, defense counsel frequently requested the imposition of sanctions on Mr. Gardner, but plaintiff did not make similar motions regarding the conduct of defense counsel. All three attorneys contributed to the extraordinarily unprofessional behavior and poisonous atmosphere of this trial. In their pleadings, plaintiff's counsel set forth a long list of examples of the conduct of both defense counsel that, had they been raised as a basis for sanctions as they occurred, most likely would have resulted in contemporaneous sanctions. Specifically, Ms. Bremner appears to have violated the court's orders on plaintiff's motion in limine No. 14, No. 18, and No. 19. Mr. Bemis, in addition to the record of arguably contemptuous behavior set forth in plaintiff's post-trial pleadings, appears to have violated the court's order in limine as to taxation. The aspersions cast on plaintiff's counsel by defense counsel suggesting that he was perpetrating a fraud on the court and similar comments unnecessarily aggravated tensions among counsel. The pleadings and the record reflect ample grounds to sanction both Ms. Bremner and Mr. Bemis. Mr. Gardner's failure to follow the court's clear direction regarding the questioning of Mr. Leo was also sanctionable.

Nonetheless, the court is mindful that generally summary contempt is addressed at the moment it occurs or at the conclusion of the proceeding, as defense counsel points out. While one of the purposes of punitive sanctions for contempt, however, is to protect the authority and dignity of the court, RCW 7.21.050, it is not clear that there is authority for waiting until post-trial motions to sanction contemptuous conduct. There are cases, such as State v. Hobble, 125 Wn.2d 383, 295-297 (1995) that provide that a court may impose sanctions on contemptuous conduct until the final orders are signed; but in Hobble, the contempt was adjudicated immediately and sanctioned within a week. In absence of clear authority allowing the court to impose sanctions in these circumstances, the court denies the cross-motions for sanctions.

I hope I will never again try case where a juror sends a note to the court indicating she is so disturbed by the contentiousness of the lawyers that she is not sure she can withstand the remaining weeks of the trial. Neither the profession nor the clients were served well. Let us all, including this court, learn from this experience.

Sincerely,

A handwritten signature in cursive script that reads "Susan J. Craighead". The signature is written in black ink and is positioned above the typed name.

Susan J. Craighead, Judge

APPENDIX B

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FILED

KING COUNTY, WASHINGTON

OCT 18 2010

SUPERIOR COURT CLERK
BY LEANNE SYMONDS
DEPUTY

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

MARGIE (MEG) JONES, AS GUARDIAN)
OF MARK JONES,)
)
Plaintiff,)
)
v.)
)
CITY OF SEATTLE,)
)
Defendant.)

NO. 06-2-39861-1 SEA

MEMORANDUM DECISION AND
ORDER DENYING CITY OF
SEATTLE'S MOTION TO VACATE

The City of Seattle has moved to vacate the judgment entered on the verdict in this case pursuant to CR 60(b)(3) and (4). The City conducted surveillance of Mark Jones during April and June of 2010 and bases its motion on more than 11 hours of video surveillance. The City argues that Mr. Jones' appearance in the surveillance video is at odds with Mr. Jones' appearance at trial and the testimony the jury heard about his physical and cognitive limitations following his fall down a pole hole at a Seattle fire station. The Court has reviewed all of the surveillance footage, all of the cases cited by the parties, and all of the testimony of the damages witnesses at trial as well as all of the submissions of both parties in connection with this motion to vacate.

MEMORANDUM DECISION AND ORDER
DENYING CITY OF SEATTLE'S MOTION
TO VACATE- 1

Susan J. Craighead, Judge
King County Superior Court
516 Third Avenue, C203
Seattle, WA 98104

1 Civil Rule 60 strikes a balance between the conflicting principles that litigation must be
2 brought to an end and that justice should be done. The civil rules provide a mechanism for
3 parties to exchange information and undertake investigation in preparation for trial. The goal
4 of these discovery rules is to ensure that both sides have all the information they need to
5 fully and fairly litigate their case, so that their dispute may be resolved once and for all at
6 trial. Our adversarial system of justice demands hard work on the part of all parties to ensure
7 that the jury hears all of the evidence and arguments available to support each position
8 before rendering its verdict. In a personal injury case such as this one, if a jury finds liability
9 on the part of a defendant (as the jury found here against the City), the jury is then asked to
10 determine an amount of damages that will fairly compensate the injured person for his loss
11 and will enable him to make the most of what capabilities he still has. The jury in this case
12 was not asked to determine whether Mr. Jones is totally disabled, but rather to compare
13 what he has been through, what his life is like now and will likely be in the future with what
14 his life was like before the accident and would likely have been in the future. The City's
15 motion to vacate must be viewed in light of these fundamental principles of our system of
16 civil justice.
17

18
19 Newly Discovered Evidence: This case has been pending since 2006. The City
20 contends that the judgment against it should be vacated on the basis that the post-trial video
21 surveillance constitutes "newly discovered evidence." A judgment may be vacated under CR
22 60(b)(3) if the City establishes that the evidence (1) probably would change the result if a
23 new trial were granted; (2) was discovered since the trial; (3) could not have been discovered
24 before the trial by the exercise of diligence; (4) is material to the issue and (5) is not merely
25 cumulative or impeaching. Praytor v. King County, 69 Wn. 2d 637, 639 (1966). It is apparent
26

MEMORANDUM DECISION AND ORDER
DENYING CITY OF SEATTLE'S MOTION
TO VACATE- 2

Susan J. Craighead, Judge
King County Superior Court
516 Third Avenue, C203
Seattle, WA 98104

1 to this Court that the surveillance video is material to the issue of damages and is neither
2 cumulative nor impeaching; the evidence was discovered since the trial. The critical question
3 is whether the City acted with due diligence to discover evidence that Mr. Jones's physical
4 and cognitive capabilities were greater than what the plaintiff demonstrated that they were at
5 trial.

6 The City contends that it exercised due diligence, but failed to discover Mr. Jones'
7 true condition because he and Meg Jones were concealing it from opposing counsel and his
8 physicians. The City argues that it only managed to obtain surveillance video of Mr. Jones
9 after the trial was underway. Moreover, the City argues, it justifiably relied on the opinion of
10 the three panel physicians who evaluated Mr. Jones for Labor & Industries and who
11 determined that he was permanently totally disabled and unable to work. Yet, the City
12 claims, it is impossible for Mr. Jones' assertions about the extent of his disability to have
13 been accurate in light of the physical abilities he demonstrates in the video surveillance.

14 The City devoted little effort to investigating this case until its third set of lawyers was
15 retained in early 2009. Prior to that event, the City had deposed Mark and Meg Jones and
16 retained an investigator to conduct background research on Mark Jones, attempt to talk with
17 his former wives, and attempt to put him under surveillance. Mr. Jones did not leave the
18 home he shared with his sister, Meg Jones, on the days the investigator waited outside.
19 When new attorneys were substituted, they began to vigorously investigate the liability
20 issues in the case. A major focus for these attorneys, who took the case to trial in the fall of
21 2009, was an attempt to discredit Mr. Jones and demonstrate that he was responsible for
22 falling down the pole hole. The City did not focus on Mr. Jones' damages at all.
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1 The City now claims that it would have inquired thoroughly into Mark Jones'
2 capabilities if the Court had permitted a second deposition with Mr. Jones, but this claim is
3 belied by the apparent failure of the City to interview and/or depose any of the people with
4 whom Mr. Jones already testified he was spending time prior to trial. The City was well
5 aware of Mr. Jones' ability to hunt and fish, and there is no evidence that the City asked
6 plaintiff's counsel for a more complete list of everything Mr. Jones was capable of doing. The
7 City makes much of Mr. Jones' ability to play horseshoes in the video, yet the City was
8 aware he played horseshoes at trial and never elicited this information before the jury. After
9 the third set of lawyers came on board, they used the private investigator to explore liability
10 issues and did not again attempt to conduct surveillance on Mr. Jones until after the trial was
11 underway.
12

13 Perhaps most important, the City did not seek to have Mr. Jones examined
14 independently by any medical doctors to verify any of his physical complaints, pursuant to
15 CR 35, even though the City would have been entitled to do so. Had the City chosen to do
16 so, the City could have selected experts with qualifications to match those of the plaintiff's
17 physicians. The City did arrange for Mr. Jones to be examined by a defense
18 neuropsychologist, who was not called at trial; this neuropsychologist's findings were in line
19 with those of the plaintiff's expert neuropsychologist, including the validity measures that
20 demonstrated that Mr. Jones was "putting forth optimum effort" on the neuropsychological
21 tests. RP 9/22/09 at 209. The City claims it relied on the opinions of the panel physicians
22 who examined Mr. Jones for worker's compensation purposes; the two surviving members of
23 the panel have now changed their opinions based on the video surveillance. One of them,
24 Dr. Stump, testified at trial that he was alert for signs of malingering when he examined Mr.
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MEMORANDUM DECISION AND ORDER
DENYING CITY OF SEATTLE'S MOTION
TO VACATE- 4

Susan J. Craighead, Judge
King County Superior Court
516 Third Avenue, C203
Seattle, WA 98104

1 Jones, but he found none – all of Mr. Jones symptoms made sense in light of his injuries.
2 The City could also have arranged for more independent medical examinations of Mr. Jones
3 in the worker's compensation process, but did not do so. Now the City has retained a well
4 known physical capacities expert, Dr. Ted Becker, who opines based on the video that Mr.
5 Jones' bio-mechanical abilities are within normal limits.
6

7 The only explanation the City has for failing to retain medical experts or an expert
8 such as Dr. Becker prior to trial was that the City relied on the records of Mr. Jones' treating
9 physicians. Be the City's strategic and tactical decisions as they may have been, the City
10 chose not to undertake any critical evaluation of Mr. Jones' damages claims. The City cannot
11 now take a second bite of the apple because it failed to make the most of its first. The
12 motion to vacate pursuant to CR 60(b)(3) is denied.

13 Fraud:

14 The City also moves to vacate the judgment pursuant to CR 60(b)(4), alleging that
15 Mark and Meg Jones committed fraud by misleading the City in their depositions and
16 discovery responses, and in misleading Mark Jones' physicians. By extension, the City also
17 contends that the jury was misled by the Joneses. These are very serious allegations. As
18 much as our system of justice values the finality of judgments, ultimately the truth is more
19 important than the trouble it takes to find it. Wright & Miller, *Federal Practice and Procedure*,
20 Sec. 2861 at 321. Nonetheless, the law sets a high bar before allegations of fraud can result
21 in vacation of a judgment. Fraud must be proven by clear and convincing evidence and must
22 have prevented the losing party from fully and fairly presenting its case. Peoples State Bank
23 v. Hickey, 55 Wn. App. 367, 372 (1989).
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MEMORANDUM DECISION AND ORDER
DENYING CITY OF SEATTLE'S MOTION
TO VACATE- 5

Susan J. Craighead, Judge
King County Superior Court
516 Third Avenue, C203
Seattle, WA 98104

1 The City contends that it was misled by the depositions and discovery responses of
2 Mark and Meg Jones who, the City argues, falsely portrayed the extent of Mr. Jones'
3 disability. The City contrasts Mark Jones' appearance at his deposition and at trial (during
4 both of which he rocked back and forth almost constantly) and his appearance on the
5 surveillance video. Further, the City points to statements by both Mark and Meg Jones to the
6 effect that his life had devolved due to pain and lack of mobility to the point that he mainly
7 sat on the couch and watched the hunting channel; physical activity was limited to walking
8 the dogs or hunting trips better characterized as "outing." The City contends that this
9 information could not have been truthful in light of the physical capabilities demonstrated in
10 the surveillance video, especially given testimony from Mark Jones' physicians that he could
11 not be expected to get any better.
12

13 At oral argument, the City acknowledged that perspective plays a role in how Mark
14 and Meg Jones may have viewed his disability. Mark Jones had been an outdoorsman his
15 whole life, hunting from a young age and felling trees as a logger. Before his accident, he
16 could be relied upon to find his way out of the woods on time, no matter how long he had
17 been hunting. He served as a crew chief in the Air Force, worked as a police officer, and built
18 a reputation as an aggressive and strong Seattle firefighter. His physique even earned him a
19 page in the firefighter calendar. The overweight man throwing horseshoes in the surveillance
20 footage is a far cry from the man Mark Jones once was. Viewing the video in its entirety, the
21 Court saw a portion from April 2010 where after engaging in some physical activity at the RV
22 campsite, he sat down in a chair next to his female companion and rocked, just as he had a
23 trial, for almost an hour. The video then picks up with Mark Jones and his friend walking on a
24 beach littered with drift wood. Mr. Jones fell and had to be helped up. The video surveillance
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MEMORANDUM DECISION AND ORDER
DENYING CITY OF SEATTLE'S MOTION
TO VACATE- 6

Susan J. Craighead, Judge
King County Superior Court
516 Third Avenue, C203
Seattle, WA 98104

1 sheds no light on Mr. Jones' cognitive abilities. Dr. Brockaway, Mr. Jones' treating
2 psychologist at the time of trial, testified that she was working on helping Mr. Jones see the
3 "positives" in his life to help him be less negative about himself. RP 9/29/09 at 68. When it
4 comes to describing Mr. Jones' capabilities, it would have been very natural for Mark Jones
5 and his sister to see the glass as half empty, even while the City now sees it as half full. This
6 is not fraud.

7
8 Second, the City contends that Mark and Meg Jones mislead his physicians and they,
9 in turn, mislead the jury. Nearly all of the medical professionals who testified have submitted
10 declarations indicating that the video did not change their opinions of Mr. Jones' level of
11 disability. Mr. Jones has been treated for years by a large team of highly qualified,
12 experienced physicians, including Peter Esselman, M.D., Chairman of the Department of
13 Rehabilitation and Physical Medicine at the University of Washington and Andrew Friedman,
14 M.D., a pain specialist and chief of Rehabilitation Medicine at Virginia Mason. These
15 physicians were supported over the years by countless nurses, therapists, psychologists,
16 and so on. None of the medical witnesses who testified indicated that they had any
17 suspicion that Mr. Jones was malingering; to have malingered successfully for upwards of
18 five years would require substantial medical knowledge, extraordinary acting ability, and an
19 ability to focus that the neuropsychologists concluded Mr. Jones lacks.

20
21 Moreover, objective measures supported the physicians' assessments of the ongoing
22 physical symptoms experienced by Mr. Jones. Dr. Friedman, for example, testified to
23 hypertrophy of the muscles around Mr. Jones' right shoulder. This enlargement of the
24 muscles results from a patient holding his muscles tight in response to pain. RP 9/17/09 at
25 17. Dr. Hudson, a pulmonologist, testified that Mr. Jones' lung capacity had been reduced

1 by almost half as a result of the accident, to the point that it was worse at the time of trial
2 than it would have been when Mr. Jones turned 80 or 90 had he not been injured. RP
3 9/18/09 at 196-199. Dr. Goodwin, the neuropsychologist, testified that he was convinced Mr.
4 Jones was portraying his cognitive symptoms accurately, based on his demeanor, the
5 manner in which he presented himself (speaking tangentially, losing track of thoughts) and
6 the fact that the validity measures both he and the defense neuropsychologist employed
7 demonstrated that Mr. Jones was putting forth optimal effort. RP 9/22/09 at 211. The Court
8 is not persuaded that Mr. Jones was able to fool all of these medical professionals for a
9 period of years, especially now that his full scale I.Q. had dropped to the low-average range.
10

11 The City contends that the lay witnesses who testified about the changes they have
12 observed in Mr. Jones were "exaggerating." All of them testified under oath. These
13 witnesses included an 85-year-old-man with whom Mr. Jones now goes hunting; six of his
14 firefighter colleagues testified, commenting on how the accident seemed to dull Mr. Jones'
15 sharp wit and how hard it was for him to visit the station and watch them go out on an alarm
16 without them. The City fails to establish that all of these people deliberately helped to create
17 a false impression for the jury, or that that all of them were misled by Mr. Jones. Even Mr.
18 Jones' former wife, called by the City to describe their acrimonious divorce, testified that "we
19 struggled daily with the effects of his brain injury[.]" and that his mental faculties seemed to
20 have deteriorated over time. RP 10/8/09 at 182-83, 187, 200.
21

22 The City highlights the distinction between the picture of Mr. Jones at trial and the
23 image captured by the surveillance video, arguing that both could not be true at the same
24 time. The Court acknowledges that mental picture created at trial was very different from
25 what appears on the video. However, as the plaintiff argues, the real gravamen of Mr. Jones'
26

MEMORANDUM DECISION AND ORDER
DENYING CITY OF SEATTLE'S MOTION
TO VACATE- 8

Susan J. Craighead, Judge
King County Superior Court
516 Third Avenue, C203
Seattle, WA 98104

1 loss was his brain injury; the video sheds meaningful light only on his physical condition. To
2 the extent that the video's portrait of Mr. Jones' physical capabilities contrasts with the one
3 painted at trial, the plaintiff has provided explanations other than fraud for the contrast. As
4 the plaintiff argues, the jury learned that Mr. Jones was at his worst under the stress of trial
5 and, before that, at his deposition. The testimony at trial underscored that Mr. Jones did not
6 like having to discuss his problems with his doctors, much less be forced to talk about them
7 before a jury in open court. As Dr. Friedman testified, he becomes depressed even going to
8 the clinic, and that he uses denial to cope with his injuries; he is better when his depression
9 is better and when he is engaged socially. RP 9/17/09 at 40-41. Dr. Brockaway testified that
10 that when Mr. Jones "is overly stressed he just shuts down." RP 9/23/09. One of his major
11 challenges, she testified, was to be able to endure stressful situations without
12 decompensating. His friend, Peirre Gauweiller, testified that "Mark doesn't want to talk about
13 [the trial], he wants to talk about other things. That's who Mark is." RP 10/1/09 at 38. In the
14 video surveillance, Mr. Jones was in a relaxed setting and accompanied by a woman who
15 was apparently a girlfriend. As plaintiff points out, the jury was told by Mr. Jones' physicians
16 and his sister that he had ups and downs, and that what the jury saw was Mr. Jones at his
17 most stressed.
18

19
20 Finally, the jury in this case had hours to consider Mr. Jones's credibility, as well as
21 that of his sister. They heard about six weeks of testimony, and were in a position to
22 evaluate the credibility of all of the witnesses and the qualifications of the experts and the
23 bases for their opinions. Under the circumstances, deference should be afforded to the jury's
24 role as the finder of fact in this case. See Pederson's Fryer Farms, Inc. v. Transamerica Ins.
25 Co., 83 Wn. App. 432, 435 (1996).
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MEMORANDUM DECISION AND ORDER
DENYING CITY OF SEATTLE'S MOTION
TO VACATE- 9

Susan J. Craighead, Judge
King County Superior Court
516 Third Avenue, C203
Seattle, WA 98104

1 In light of all of these considerations, the Court cannot find that the City has proven
2 fraud by clear and convincing evidence. The motion to vacate pursuant to CR 60(b)(4) is
3 denied.

4 It is hereby

5 ORDERED that the motion to vacate the judgment is denied.

6 DATED this 18th day of October, 2010.
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10 Susan J. Craighead, Judge
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APPENDIX C

Mark Jones
Summary of Surveillance

April 18, 19, 22, 23, 2010 – 3 hours and 53 minutes
 April 24, 2010 – 3 hours and 40 minutes
 April 25, 2010 – 1 hour and 30 minutes
 June 2, 4, 5, 2010 – 2 hours and 20 minutes
 Total Hours 11 hours and 23 minutes

— Indicates break in video

Sunday, April 18, 2010				
Time	Start	Description	End	Notes
4:48 p.m.		<i>Agent Note: commenced with a mobile surveillance-check of the claimant's resident, while in the area.... The claimant appeared to be installing side-steps on the truck. Agent departed to retrieve surveillance vehicle and gear.</i>		50 min working on car/18 min. filmed
5:24 p.m.	00:05	Mark works on red truck, near left front tire with Meg to his right.	00:26	
	00:27	Mark waves with right hand to someone behind him.	00:43	
	00:44	Mark looks back to his right and points downward with his hand as if to say "we are down here."	06:37	
	06:38	Mark uses tools; lays back onto left side on left shoulder, then on back works under left front tire.	11:17	
	11:18	Mark moves to right side of truck behind right tire, uses tools to tighten bolts, scoots over to his right and uses tools to tighten bolts, and easily gets up.	12:05	
5:38 p.m.	12:06	Mark gets up off ground and walks around front of truck, bends over and pick up tools from ground and returns to the house.	13:05	
5:41 p.m.	13:06	Mark stands in driveway; red truck backs into driveway.	14:18	
Monday, April 19, 2010				
7:13 a.m.	14:19	Red truck with Meg driving and Mark Jones as		

Time	Start	Description	End	Notes
		passenger.	18:47	
	18:48	Meg parks the truck, Mark sits in truck, small boy in back seat, little boy gets out of the truck.	19:08	
	19:09	Meg leaves area with door open; she goes around to the passenger side rear door and opens it.	19:36	
	19:37	Mark Jones stays in truck and appears to read out loud.	21:45	
7:21 a.m.	21:46	Mark gets out of truck.	24:21	
7:24 a.m.	24:22	Mark and Meg leave area.	24:23	
	24:24	Both walk – Mark carries a mug in his right hand.	25:13	
7:25 a.m.	25:14	Mark and son walk hand in hand toward pier.	26:31	
7:30 a.m.	26:32	Enter pier ramp.	27:13	
7:38 a.m.	27:14	All peer over pier, Mark looks down into the water.	27:37	
7:39 a.m.	27:38	Mark appears to be engaged in conversation with two female ferry employees.	29:28	
9:01 a.m.	29:29	Meg and Mark Jones walk out of pier, without son, mug in Mark Jones's right hand; both walk back to the truck.	30:34	2 min. walking
9:02 a.m.	30:35	As Mark walks he does a quick left turn and stops, bends over to pick up a newspaper left on the ground.	31:15	
9:03 a.m.	31:15	Both get back into red truck.	31:19	
9:11 a.m.	31:20	Meg gets out of red truck, and walks into the PCC Natural Markets (grocery store) Mark remains in the truck and begins to read the newspaper, but places it on the dash, pulls something out of his pocket and begins to look down at it (possibly a cell phone).	34:29	4 min. in truck
9:15 a.m.	34:30	Meg returns to the vehicle, and Mark then looks up, picks up the newspaper and begins to read.	35:00	
10:34 a.m.	35:01	Rite-Aid Pharmacy.	35:04	Shopping at Rite-Aid
10:37 a.m.	35:05	Green Toyota Tacoma with Washington license plate B10159G in front of a grocery store.	35:09	
10:38 a.m.	35:10	Mark Jones comes out of Rite-Aid and gets into the passenger side of green truck with a plastic bag.	35:36	
	35:37	Green truck drives away.	35:37	
10:57 a.m.	35:38	Green truck in Costco parking lot, nobody in vehicle.	35:56	

Time	Start	Description	End	Notes
11:04 a.m.	35:57	Inside Costco, Mark Jones looks at movie videos.	36:43	21 min. shopping at Costco
	36:44	Engages briefly with store clerk.	38:02	
11:06 a.m.	38:03	Mark reads display of Disneyland tickets with drinking cup in right hand, he lifts left arm (shoulder height) to replace Disneyland package back on the stand.	38:36	
11:07 a.m.	38:37	Mark walks through aisle, without limp (approx. 55 steps), then turns a corner.	39:43	
11:08 a.m.	39:44	Mark watches over Meg's left shoulder at a machine.	39:58	
	39:59	Mark walks over to someone and appears to ask for help, a Costco employee (red vest) walks over to assist, then Mark appears to say something to the employee, and the employee walks away.	40:30	
	40:31	Both continue to stand near the machine, then move over near an ATM machine, and appear to walk out of the store.	42:41	
11:12 a.m.	42:42	Green truck parked in parking lot.	42:55	
11:13 a.m.	42:56	Both return to truck with cart of items; items are removed from the cart to the truck.	43:26	
	43:27	Mark appears to check his phone.	43:04	
	44:05	Mark pulls his drinking cup he placed in one of the boxes and gets into the truck.	44:25	
	44:26	Meg returns the cart and returns to the truck.	45:07	
11:15 a.m.	45:08	Green truck backs out and drives away.	45:23	
Thursday, April 22, 2010				
10:09 a.m.	45:24	Green truck backs up into driveway with what appears to be firewood in the bed of the truck.	45:01	9 min. moving and loading truck
	46:02	A male with a white baseball cap gets out the passenger side and Meg gets out of the driver side of the truck.	46:10	
10:11 a.m.	46:23	A male with a white baseball cap gets into the driver's side of white pickup truck and drives forward a short distance.	46:02	
	47:30	Red pickup truck leaves.	47:33	
	47:34	White pickup truck backs up into the driveway.	47:57	
	47:58	Red truck then backs up and parks in front of the white pickup truck.	48:04	
10:12 a.m.	48:05	Mark (in camouflage jacket and white baseball cap) gets out of the white truck, walks to back of truck and opens tailgate and proceeds back	48:38	

Time	Start	Description	End	Notes
		toward the house.		
10:14 a.m.	48:39	Meg appears to pick up heavy wood chunks and throw them into the back of the white pickup truck.	49:01	
	49:02	Meg reaches down and picks up something and throws into truck.	49:02	
	49:03	Mark walks down the stairs, now with a white cowboy hat on, with green bag in his left and a large red duffle bag in his right hand, places the small bag into the back of the truck, then uses both hands to pick up a large red bag and heaves it into the truck, he walks back toward the house.	49:28	
10:17 a.m.	49:28	Meg comes back toward the truck with a red scooter and places it in the back of the truck and walks back toward the house.	49:44	
	49:52	Mark walks back toward the truck and carries a green suitcase in his right hand, and something in his left hand and places them in the back of the truck, he walks toward the driver door of the truck and takes a cowboy hat off and places it on the dash, and closes the door and walks back toward the house.	50:34	
10:18 a.m.	50:38	Meg walks down the stairs with a red duffle bag and what appears to be a water jug.	50:43	
1:02 p.m.	50:43	Mark at gas station, filling gas in his truck, he goes to driver's side of white truck, with door open, appears to look at phone, closes door, goes back to gas pump, walks around truck and disappears.	52:50	
1:06 p.m.	52:52	Returns to gas pump, opens door and leans into truck, two times.	53:50	
1:07 p.m.	53:50	Walks to back of truck, walks around to right side of truck and reaches in and picks up a bicycle with right hand and places it outside of the truck.	54:48	
1:09 p.m.	54:58	Picks up bicycle with both arms (over head) and places it the bed of the truck, walks back to the truck and gets in.	55:46	
1:11 p.m.	55:46	At Cigar Land, a closer look at the back of truck includes wood, bike, scooter, ice chest, two fishing poles; Montana license plate AFX-730.	56:18	
	56:19	Walks to truck and drives off.	56:31	
1:24 p.m.	56:32	At Desire; truck shown in parking lot.	56:39	

Time	Start	Description	End	Notes
1:53 p.m.	56:40	Mark comes out of Desire with a dark bag in hand, and walks without limp to truck.	58:05	
3:30 p.m.	58:06	White truck in parking lot, Mark gets out of truck with cowboy hat and he and girlfriend walk hand in hand into Channel Marker Pub & Grill.	58:59	
4:22 p.m.	59:05	Mark and girlfriend walk out of Channel Marker Pub & Grill and get into white truck.	59:53	
4:24 p.m.	59:54	Mark walks into Goodies Mini Mart.	1:00:07	
4:25 p.m.	1:00:08	Mark walks out of the Mini Mart with a brown bag in his left hand and case of beer in his right hand, he gets in the truck.	1:00:18	
4:29 p.m.	1:00:42	In line to ferry terminal.	1:00:50	
6:24 p.m.	1:00:50	Mark arrives at The Point Casino with girlfriend and enter, Mark has a beer bottle in his right hand.	1:01:57	
6:29 p.m.	1:01:58	Mark drinks from beer bottle and places it in the garbage just before they enter the casino.	1:02:01	
7:22 p.m.	1:02:11	Mark and girlfriend leave casino, and walk back to truck.	1:02:10	
7:28 p.m.	1:03:47	Truck leaves the casino parking lot.	1:04:10	
8:04 p.m.	1:04:11	Girlfriend gets out of driver's side of white truck at Hadlock House Bar and goes inside.	1:04:28	
8:06 p.m.	1:04:35	Mark and girlfriend exit the tavern and leave.	1:04:48	
8:08 p.m.	1:04:49	Mark and girlfriend arrive at the Valley Tavern.	1:05:44	
8:39 p.m.	1:05:45	Mark and girlfriend leave the Valley Tavern; girlfriend drives off with the truck and Mark stands in the parking lot.	1:07:42	
Friday, April 23, 2010				
7:28 a.m.	1:07:43	White truck parked in Fort Flagler State Park campsite.	1:08:08	
7:39 a.m.	1:08:09	Sign Fort Flagler State Park	1:08:11	
7:57 a.m.	1:08:12	White truck parked next to travel trailer.	1:08:28	
10:01 a.m.	1:08:29	Mark and girlfriend seen outside of trailer, dumps liquid out of a container.	1:08:43	
	1:08:44	Mark takes 4 steps up (approx 3 feet) into trailer; girlfriend follows.	1:08:47	
10:05 a.m.	1:08:52	Mark outside of trailer, bends over, cleans something out of container and kicks it away		

Time	Start	Description	End	Notes
		with his right leg, and returns to trailer, takes 4 steps up into trailer.	1:09:09	
10:06 a.m.	1:09:12	Mark again outside of trailer, dumping liquid out of container and walks back to trailer, takes 4 steps up into trailer.	1:09:27	
10:16 a.m.	1:09:38	Mark outside of trailer with cup in hand, walks to passenger side of truck, moves to back of truck and removes scooter, appears to place a battery charger to the trailer and connect it to the scooter.	1:12:49	
10:20 a.m.	1:12:54	Mark and girlfriend get into truck and leave.	1:14:53	
12:51 p.m.	1:14:55	Mark and girlfriend return to trailer at campsite and Mark removes groceries from truck, carries many bags at a time.	1:15:59	30 min. of standing, and 3 x in and out of trailer
12:54 p.m.	1:18:30	Mark steps up into trailer.	1:18:32	
	1:18:54	Mark comes out of trailer and picks up what appears to be a case of beer, places it into the back of the trailer and has one can in his hand.	1:20:14	
12:57 p.m.	1:20:15	Mark gets into the truck and appears to look for something in the back seat, and appears to light up a cigar.	1:21:22	
	1:21:23	Mark removes folding chairs from the trailer, and hugs and kisses his girlfriend.	1:22:37	
	1:23:38	Mark steps back up into the trailer.	1:24:04	
1:02 p.m.	1:24:05	Mark steps out of the trailer.	1:24:49	
1:03 p.m.	1:25:50	Mark rotating trailer stabilization pads on all four corners of the trailer with a torque wrench.	1:28:33	
1:06 p.m.	1:28:34	Mark bends over and flips green tarp; continues moving around camp site; brings out more chairs and sets up a table stand.	1:34:41	
1:12 p.m.	1:34:42	Mark steps back up into trailer, steps back out and cleans table.	1:37:39	
1:15 p.m.	1:37:40	Mark drinks from what appears to be beer can.	1:38:34	
1:16 p.m.	1:38:35	Mark carries a couple of heavy pieces of wood and drops it near the trailer and places the heavy piece of wood under the first step to the trailer; he appears to have a phone between his left shoulder and ear, carries two pieces of wood and throws them near the chairs.	1:39:19	
1:17 p.m.	1:39:20	Mark talks on the phone while carrying wood over to a wood pile.	1:41:39	
1:20 p.m.	1:41:54	Mark makes a phone call and talks with the phone between his left shoulder and ear and walks around.	1:42:40	

Time	Start	Description	End	Notes
	1:42:54	Mark continues carrying wood.	1:43:08	
	1:43:09	Mark grabs his beer can, grabs a chair and sits down.	1:44:13	
	1:44:14	Mark picks up his chair and moves to the other side of his girlfriend (who is also drinking beer) and sits down, drinks more beer.	1:47:14	16 min. sitting
	1:47:15	Mark drinks more beer.	1:50:13	
1:28 p.m.	1:50:14	Mark appears to put chew in his mouth.	1:54:16	
1:32 p.m.	1:54:17	Mark drinks more beer.	1:57:34	
1:35 p.m.	1:57:35	Mark drinks more beer.	2:00:11	
1:38 p.m.	2:00:12	Mark gets up from his chair and stands while he talks to girlfriend.	2:03:06	
1:41 p.m.	2:03:07	Mark steps back up into trailer.	2:03:36	
1:42 p.m.	2:03:37	Mark out of trailer.	2:04:19	
	2:04:20	Mark sits down and talks to girlfriend.	2:06:19	
1:44 p.m.	2:06:20	Mark gets up and continues to talk to girlfriend.	2:04:13	
1:45 p.m.	2:07:14	Mark drinks his beer, dumps out the rest (small portion), and smashes the can with a stomp of his foot.	2:08:07	
1:46 p.m.	2:08:08	Mark takes another can of beer out of the trailer and sits down.	2:09:41	
1:48 p.m.	2:09:42	Mark drinks more beer, while he talks to girlfriend.	2:13:23	
1:51 p.m.	2:13:24	Mark drinks more beer.	2:13:43	
1:52 p.m.	2:13:44	Mark and girlfriend leave the campsite on foot, both with beer in hand and Mark places more chew in his mouth.	2:14:03	32 min. walking on beach
1:54 p.m.	2:15:40	Both walk toward the beach.	2:15:41	
2:19 p.m.	2:15:42	Mark and girlfriend walk along beach near logs.	2:17:01	
2:20 p.m.	2:17:02	Mark appears to trip while walking on the logs.	2:17:49	
2:21 p.m.	2:17:50	Mark gets up and appears to look for drift wood, and carries a piece of driftwood, with beer in hand.	2:18:13	
2:24 p.m.	2:18:14	Back at campsite.	2:20:23	
2:33 p.m.	2:20:24	Mark comes out of camper with beer in hand and sits in camp chair, and talks to girlfriend.	2:26:52	
2:39 p.m.	2:26:53	Mark drinks beer.	2:27:18	
2:39 p.m.	2:27:19	Mark gets up from chair, appears to have more chew.	2:27:41	
2:40 p.m.	2:27:42	Mark steps back into trailer.	2:28:04	
2:40 p.m.	2:28:04	Mark steps back out of trailer and sits down.	2:31:08	
2:43 p.m.	2:31:09	Mark gets up and moves chair to the right side of girlfriend.	2:23:15	

Time	Start	Description	End	Notes
2:47 p.m.	2:34:16	Mark drinks beer.	2:36:00	
2:48 p.m.	2:36:01	Mark drinks beer.	2:38:11	
2:51 p.m.	2:38:12	Mark drinks beer.	2:39:29	
2:52 p.m.	2:39:30	Mark gets up smashes his beer can on the ground with his foot, while he talks to his girlfriend, and grabs another beer.	2:40:45	
2:53 p.m.	2:40:50	Mark does circling hip movements, and runs into the trailer with girlfriend running to the trailer.	2:41:27	
2:54 p.m.	2:41:27	Mark comes out the trailer, grabs beer can and girlfriend races from the trailer to Mark and start hugging and kissing each other.	2:41:49	
2:57 p.m.	2:43:50	Mark takes one step up into the trailer, steps back out and raises both arms up.	2:46:31	
2:59 p.m.	2:46:32	Mark grabs a green box out of the trailer that includes colored balls.	2:48:24	8 min. playing Bocce Ball
3:01 p.m.	2:48:24	Mark and girlfriend begin to play Bocce Ball.	2:52:00	
3:05 p.m.	2:52:01	Mark throws the ball up as if to make a basketball shot, then throws his second ball underhand.	2:52:05	
3:05 p.m.	2:52:44	Mark throws his first ball, then on his second throw does a hip wiggle with the throw.	2:52:54	
3:08 p.m.	2:54:17	Mark and girlfriend turnaround and throw the Bocce Balls underhand behind them; Mark throws one overhead.	2:55:10	
3:09 p.m.	2:55:37	Mark grabs two beers from the trailer and grabs a mug and walks to the truck.	2:55:01	
	2:57:02	Mark steps back up into the trailer.	2:57:14	
3:12 p.m.	2:57:15	Mark steps out of the trailer with beer in hand .	2:58:20	
3:13 p.m.	2:58:21	Mark walks to driver's side of the truck with two beers in hand and gets in; he grabs the red mug off the dash and drives away.	2:59:23	
3:16p.m.	2:59:59	White truck leaves area.	3:00:34	
7:09 p.m.	3:00:59	Mark and girlfriend return to trailer; Mark carries a cooler in his left hand and a bag of charcoal in his right hand and placed the red mug on the picnic table; a young boy appears; the young boy apparently takes off his clothes inside the trailer and throws them out to Mark; Mark hangs them up; the clothes appear to be wet; Mark's jeans appeared wet and dirty.	3:02:48	
7:11 p.m.	3:02:49	Marks sets the cooler on the ground and the girlfriend takes a green backpack and places its content into the cooler.	3:03:17	

Time	Start	Description	End	Notes
7:12 p.m.	3:03:18	Mark pours water into the cooler and removes what appear to be sand dollars and/or clams.	3:05:42	
7:15 p.m.	3:05:43	Mark goes to truck and lifts up the tailgate and removes an empty beer can and a helmet; Mark goes into the trailer.	3:06:20	
7:20 p.m.	3:06:25	Mark comes out of the trailer with a change of clothes on and hangs his wet clothes to dry; checks his beer can; takes out a folding chair and places it near the fire pit; Mark steps up into the trailer	3:08:21	
7:23 p.m.	3:08:27	Mark steps out of the trailer	3:08:04	
7:24 p.m.	3:09:05	Mark begins to split wood with an ax, bends over, and appears to start a fire in the fire pit.		
7:26 p.m.	3:11:06	Mark appears to engage in short conversation with someone.		
7:28 p.m.	3:13:25	Mark opens a beer can.		
	3:14:36	Mark starts a fire in the fire pit.		
7:30 p.m.	3:15:08	Mark starts to chop wood with an ax.		
7:33 p.m.	3:18:36	Mark drinks his beer.		
7:37 p.m.	3:22:40	Mark sets up tripod.		
7:39 p.m.	3:24:21	Mark drinks out of red mug, adds more beer to red mug.		
7:40 p.m.	3:25:49	Mark drinks beer.		
7:41 p.m.	3:26:29	Mark has more chew, and talks with girlfriend.		
7:42 p.m.	3:27:59	Mark drinks beer.		
7:44 p.m.	3:29:10	Mark drinks beer.		
7:44 p.m.	3:29:45	Mark steps up into trailer.	3:29:50	
7:47 p.m.	3:29:51	Mark steps out of trailer, and talks with son.	3:30:36	
7:48 p.m.	3:31:03	Mark grabs red mug from trailer.		
7:51 p.m.	3:32:20	Mark goes into trailer.		
8:03 p.m.	3:32:36	Girlfriend and Mark's son sit at table.		
8:06 p.m.	3:32:45	Mark comes out of trailer with red mug, goes back into trailer and comes back out with tray.		
8:07 p.m.	3:33:58	Mark places tripod over fire with metal grate and starts to cook.		
8:08 p.m.	3:34:40	Mark steps back into trailer and grabs red mug.		
8:08 p.m.	3:34:58	Mark drinks out of red mug.		
8:10 p.m.	3:36:27	Mark sits down for short period.		
	3:37:07	Mark sits down, grabs red mug.		
	3:37:33	Mark drinks out of red mug.		
8:12 p.m.	3:39:07	Mark drinks out of red mug.		
8:13 p.m.	3:40:20	Mark gets up and moves chair.		
	3:40:05	Mark has conversation with son, points to something with left arm raised shoulder height.		

Time	Start	Description	End	Notes
8:14 p.m.	3:40:57	Mark drinks out of red mug.		
8:16 p.m.	3:43:13	Mark has conversation with son.		
	3:44:20	Mark drinks out of red mug.		
8:17 p.m.	3:44:22	Mark drinks out of red mug.		
8:18 p.m.	3:44:41	Mark still cooking steak.		
	3:45:18	Mark talking with girlfriend.		
8:19 p.m.	3:45:45	Mark takes out his phone and appears to text, looks up and talks to son and continues to text, looks up again, talks to son and continues to text, again looks up and talks to son and continues to text.		5 min. texting while talking to son
8:23 p.m.	3:49:36	Mark continues to text while girlfriend cooks steak.		
8:23 p.m.	3:50:20	Mark continues to text while talking to son who is standing next to him.		
8:24 p.m.	3:50:30	Mark places phone in pocket and continues talking to son, with a hug and pats and rubs on son's back.	3:50:45	
	3:50:46	Continues talking with son.	3:51:03	
8:25 p.m.	3:52:09	Mark drinks out of red mug, watching steak on grate.		
8:27 p.m.	3:53:52	Mark removes steaks from grate and steps up into trailer with plate.	3:54:23	
Saturday, April 24, 2010				
5:33 a.m.	00:00	Trailer at campsite.	00:19	
8:05 a.m.	00:31	Mark steps down out of trailer.		
8:08 a.m.	02:34	Mark, girlfriend and son get into truck.		
8:37 a.m.	02:35	Truck at Just Ask Rental, Mark appears to be talking with someone inside.		
8:44 a.m.	03:48	All three near Anderson Lake Road.		
8:54 a.m.	04:01	All three walk with bags, fishing poles, and net.		
8:55 a.m.	04:14	Mark walks down towards the water.		
10:14 a.m.	04:38	All three walk back up from the water with all their gear.	05:36	
10:26 a.m.	05:37	All three appear to be at a garage sale.	05:59	
10:27 a.m.	06:00	Mark walks back to truck and gets in.	06:09	
10:59 a.m.	06:10	Mark talks with someone at a cash machine at Bank of America; uses cash machine.	07:41	

Time	Start	Description	End	Notes
11:30 a.m.	09:07	Mark gets out of truck at QFC.	11:16	
11:33 a.m.	11:44	Mark outside of the truck and talks with son who is in the car; there is an orange contraption in the bed of the truck.		
11:35 a.m.	12:07	Mark and girlfriend talk outside of the truck, they get in and leave.		
11:38 a.m.	13:00	At True Value, Mark seen returning to truck.	13:12	
11:46 a.m.	13:13	Mark back at truck, and turns back into True Value and then returns to truck.	14:18	
11:49 a.m.	14:19	Mark returns to truck with a shovel raised high above his head for approximately 19 steps, talks with girlfriend and places it in the back of the truck.		
11:50 p.m.	14:41	Mark appears to pick up son and place him on a stack of bags of what appears to be peat moss, and races around the truck to get in, the son tries to get in the truck behind him and Mark blocks his entrance and then lets him in.	15:22	
12:12 p.m.	15:22	All return to camp site, Mark moves around the campsite with ease, checking the clothes he hung to dry the day before.		
12:15 p.m.	18:45	Mark steps up into trailer.	19:05	
12:21 p.m.	19:06	Mark steps down out of the trailer and moves about the camp site with ease; both Mark and son open a box and pour its contents into the green ice chest of clams they dug the day before; girlfriend starts chopping wood.	21:28	
12:23 p.m.	21:29	Mark starts chopping wood with an axe.	23:33	Chops wood for 2 min
12:26 p.m.	23:53	Mark grabs a can of beer and opens it, grabs his red mug and pours the beer into the red mug and drinks what remains from the can; Mark continues to walk around the campsite; cooks something on the grate in the fire pit.		
12:33 p.m.	28:45	Mark drinks out of red mug and talks with girlfriend sitting near fire pit.		
	30:21	Mark drinks out of red mug.		
12:37 p.m.	31:31	Mark drinks out of red mug.		
12:38 p.m.	33:25	Mark moves about the campsite		
12:41 p.m.	36:16	Mark puts up what appears to be a flag pole with American flag.		

Time	Start	Description	End	Notes
12:43 p.m.	38:33	Mark steps up into trailer for a few seconds and steps back out.	38:46	15 min. putting up flag pole
12:46 p.m.	38:44	Mark continues putting up flag pole.	44:08	
12:49 p.m.	44:09	Mark steps up onto the back of the trailer about 4 feet and appears to be adjusting the flag pole.	51:11	
12:56 p.m.	51:12	Mark completes putting up the flag pole.	51:13	
12:56 p.m.	52:14	Mark converses with son and moves about the campsite, mug in hand.	53:59	
1:00 p.m.	54:00	Mark removes wood from the truck and carries them to the campfire.	54:51	
	54:52	Mark starts chopping wood.	55:38	
1:01 p.m.	55:59	Mark drinks out of red mug; stokes fire;	57:21	
1:03 p.m.	57:22	Mark takes shirt off over his head and steps up into trailer.	1:00:33	
1:10 p.m.	1:00:34	Mark moves to fire pit with red mug in hand, girlfriend cooks sausage.		
1:11 p.m.	1:01:18	Mark opens can of beer and pours it into red mug; sits at campfire.		
1:13 p.m.	1:03:19	Mark stomps on can with right leg.		
1:15 p.m.	1:05:32	Mark drinks beer.		
1:18 p.m.	1:07:48	Mark cooks eggs in a skillet on the grill.		11 min cooking eggs
1:22 p.m.	1:12:05	Mark drinks beer.		
1:24 p.m.	1:13:47	Mark still cooking scrambled eggs.		
1:26 p.m.	1:16:21	Mark drinks beer.		
1:27 p.m.	1:17:24	Mark drinks beer.		
1:29 p.m.	1:18:57	Mark steps up into trailer.	1:19:02	
1:33 p.m.	1:19:03	Mark moves about the campsite, places more logs into fire pit, walks easily, grabs mug, sits down and eats with girlfriend and son, and talks with girlfriend.		
1:35 p.m.	1:21:41	Mark drinks beer and continues talking with girlfriend and son and eating.		
1:36 p.m.	1:22:36	Mark drinks beer.		
1:38 p.m.	1:23:54	Mark drinks beer, and gets up with mug.	1:24:47	
1:39 p.m.	1:24:50	Mark helps son with something and steps up into the trailer.	1:25:20	
1:43 p.m.	1:25:21	Mark back out of trailer, eats from skillet, holding the skillet in his left hand, he finishes what is in the skillet.	1:26:20	
1:44 p.m.	1:26:21	Mark holds out the skillet in his left hand, raised above shoulder for 14 seconds.	1:26:35	
	1:26:21	Mark continues to walk around campsite, put skillet on grate near fire pit, look at sand dollars, continues cleaning skillet.	1:33:39	

Time	Start	Description	End	Notes
1:51 p.m.	1:33:39	Mark drinks beer out of girlfriend's beer bottle.		
1:52 p.m.	1:34:37	Mark steps up into trailer.	1:34:40	
1:53 p.m.	1:34:41	Mark steps out of trailer, continues cleaning skillet and talks with girlfriend.		
1:55 p.m.	1:35:31	Mark steps up into trailer.	1:36:32	
2:17 p.m.	1:36:33	Mark outside the trailer putting on shoes.	1:37:32	
2:18 p.m.	1:37:33	Mark, girlfriend and son leave the campsite.	1:39:37	
2:22 p.m.	1:39:38	Mark and girlfriend at docking area of campground (per investigator report).	1:40:10	
3:14 p.m.	1:40:11	Mark sitting in truck at liquor store, gets out with phone in hand; talks and walks with phone into the store.	1:41:52	
3:21 p.m.	1:41:53	Mark comes out of the liquor store with two bags.	1:42:44	
3:59 p.m.	1:42:45	Mark back at campsite, takes two beer cans out of back of trailer and hands them to girlfriend, he places more wood on the fire.	1:46:36	
4:03 p.m.	1:46:37	Mark drinks beer from bottle and appears to get ready to depart in the truck; Mark drinks beer.	1:48:56	
	1:48:57	Mark removes the case of beer from the back of the trailer and removes two cans and places the box case into the fire pit and takes the cans toward the truck; girlfriend sits in the truck.	1:50:32	
4:07 p.m.	1:50:33	Mark opens can and drinks beer and gets into the truck.	1:50:54	
4:18 p.m.	1:50:55	Mark and girlfriend walk to horseshoe pits. Mark and girlfriend play horseshoes.		28 min. playing horse-shoes
	1:58:35	Son rides up on bicycle, Mark and girlfriend continue playing horseshoes.		
4:46 p.m.	2:14:36	Mark and girlfriend finish playing horseshoes and leave in truck.	2:14:37	
4:53 p.m.	2:14:38	Mark and girlfriend return to campsite, Mark carrying scooter over shoulder, with red mug in hand; places a large wood piece on the fire pit; appears to fix scooter while drinking from the red mug.		6 min. fixing scooter
4:59 p.m.	2:19:54	Mark steps up into trailer.	2:20:59	
5:02 p.m.	2:21:00	Mark out of trailer separating what appears to be shells into a container.	2:21:35	
5:05 p.m.	2:21:36	Mark moves about the camp and steps up into the trailer.	2:24:22	

Time	Start	Description	End	Notes
5:06 p.m.	2:24:23	Mark comes out of the trailer with plastic bag and places into it what appear to be seashells and sand dollars.	2:27:30	10 min. separating seashells and organizing clothes
	2:27:31	Mark continues about the campsite; adds more wood to fire, places son's shoes next to fire pit; places more shoes next to fire pit for drying; Mark steps up into trailer.	2:31:06	
5:20 p.m.	2:31:07	Marks sweeps out entrance of camper, and down steps, brings out a vacuum; empties vacuum bag, replaces the bag into the vacuum, and replaces cover; plugs vacuum into camper; takes cover off, checks vacuum bag and replaces cover; plugs vacuum into camper and vacuums green Astroturf; unplugs vacuum; wraps cord, and returns vacuum into trailer.	2:37:07	6 min. fixing and using vacuum
5:26 p.m.	2:37:08	Mark cleans hands and shoes from vacuum dust.	2:37:53	
5:29 p.m.	2:39:60	Mark drinks beer and leaves campsite on foot toward beach.	2:40:08	
5:41 p.m.	2:40:19	Mark back at campsite; fixes log in fire pit; steps up into trailer.	2:40:51	
5:43 p.m.	2:40:52	Mark steps back out of trailer; gathers up items from the picnic table, walks to truck with red mug and green soda bottle like Squirt; does something with his hands inside the back of the truck and walks back to campsite; drinks out of mug.	2:42:37	
5:45 p.m.	2:42:38	Mark steps up into trailer, then steps back out and drinks beer; talks with little girl playing with basketball and places chew in mouth; goes to back of truck and takes out pieces of wood and places on fire pit; stokes fire; walks around campsite and takes plastic red cup and goes to truck and stands next to passenger side truck with door open.	2:48:16	
5:52 p.m.	2:51:34	Mark closes door of truck and steps out, drinks out of plastic red cup.	2:51:39	
5:56 p.m.	2:51:40	Mark starts changing windshield wipers (new from package) while talking with girlfriend, and completes replacement.	2:57:54	
6:02 p.m.	2:57:55	Mark talks with son who is playing with hot fire stick and appears to tell him to bring it back to the fire pit, and steps up into trailer.	2:58:28	
6:03 p.m.	2:58:29	Mark out of trailer, looks at red mug and red		

Time	Start	Description	End	Notes
		cup, and takes the red cup over to the truck, goes to the back side of the truck and does something with both arms on the inside of the truck; he comes back with the red plastic cup and steps up into the trailer.	2:59:37	
6:07 p.m.	2:59:38	Marks steps back up into the trailer.	2:59:39	
6:07 p.m.	2:59:40	Mark back out of trailer near passenger side of truck with red plastic cup in hand; walks to passenger side door of truck; drinks out of plastic red cup; appears to talk to someone in the campsite and appears to give directions.	3:02:40	
6:10 p.m.	03:02:41	All three appear to get ready to leave camp.		
	03:03:16	Mark drinks from red mug (not cup) and takes red cup to the truck, gets into truck and leaves.	3:04:55	
6:31 p.m.	03:04:56	Mark and girlfriend under pier near water; appear to look for clams; son appears; continues to look for clams.	03:29:49	35 min. clam digging
	03:29:50	Mark uses shovel to dig.	03:38:14	
7:05 p.m.	03:38:15	Mark walks along the beach.	03:38:29	
7:18 p.m.	03:38:30	Sign of Mystery State Park.	03:38:35	
8:27 p.m.	03:38:36	Mark, girlfriend and son return to campsite and enter trailer; Mark appears to add wood to fire pit.	03:40:50	
8:30 p.m.	03:40:51	Mark steps up into trailer	03:41:37	
Sunday, April 25, 2010				
8:16 a.m.	00:01	Mark outside campsite, steps up into trailer.	01:03	
9:30 a.m.	01:04	Son comes out of trailer and hands pans up to open trailer door.	01:29	
10:18 a.m.	01:30	Mark, girlfriend and son exit the trailer; Mark begins to clean and organize camp; folds camp chairs; picks up empty plastic bottles; Mark steps up into trailer.	11:51	
10:31 a.m.	11:52	Mark steps out of trailer; son inside truck; Mark and girlfriend carry heavy ice chest from back of truck to side of trailer; Mark looks at passenger and driver's side windshield wipers; they all get in truck and leave; Mark appears to pour water into red mug.	18:49	
10:50 a.m.	18:50	Mark, girlfriend and son at Mystery Bay State Park walk toward the water; they appear to look		17 min. of

Time	Start	Description	End	Notes
		for clams; a lot of bending over.	35:46	searching for clams
11:07 a.m.	36:02	They return to the truck and depart.	38:40	
11:12 a.m.	38:40	Arrived at Nordland General store and entered.	39:25	
11:19 a.m.	39:26	Mark comes out of the store with a case of beer and places it in the back of the truck with his left arm; girlfriend has a six pack of bottled beer and she places it into the back of the truck, she takes the six pack of beer and hands it to Mark; girlfriend takes one bottled beer out and goes around to the passenger side and gets in; Mark takes one bottle of beer out of the six pack and places the remaining in the back of the truck; Mark gets in the truck with one bottle of beer in hand.	40:52	
11:21 p.m.	40:53	They depart in the truck from the store.	40:53	
12:13 p.m.	40:54	Arrive back at campsite; Mark gets out of truck with bottle of beer in hand; opens the tailgate; unlocks the trailer and opens the back of the trailer door; removes a gray storage box; empties items from the grey storage box and carries it to the back of the truck; Mark and girlfriend place clams from the plastic bags into the gray storage box; Mark also removes many clams from the green bag into the gray storage box.	47:00	
12:19 p.m.	47:01	Mark and girlfriend take the flagpole down; he rolls up the flag and places it the trailer; brakes down the flagpole and places them back into a box; Mark gathers folding chairs; puts things away, cleans camp site; takes folding table apart and puts it away.	1:05:00	
12:41 p.m.	1:05:01	Mark begins to raise the stabilization stands from the left rear trailer with a turning mechanism; he may have gone around to do the other side (out of sight); folds up green tarp and put it away; continues to clean up camp.	1:11:59	
12:58 p.m.	1:12:00	Mark gets into the truck and backs up to the trailer with girlfriend in the bed of the truck giving direction; hitches trailer to truck and continues to clean up and put things away; Mark makes room for green ice chest by removing items, and placing ice chest into the back of the truck; both Mark and girlfriend get into truck and drive away with camper in tow.	1:30:09	

Time	Start	Description	End	Notes
Thursday, June 2, 2010				
9:24 a.m.	0:00:00	Mark's truck (with Montana license plate AFX-730) was in the parking lot of the Grub Stake Cocktail & Lounge	0:00:18	
10:35 a.m.	0:00:19	Mark at gas station getting gas and having a conversation with an older gentleman while he pumps and pays for gas.	0:01:40	
10:37 a.m.	0:01:45	Mark gets into truck.	0:02:04	
10:42 a.m.	0:02:05	Mark's truck at Laib-ation Station	0:02:07	
11:02 a.m.	0:02:08	Mark outside Laib-ation Station talks to older gentleman; they both go inside.	0:02:48	
11:09 a.m.	0:02:50	Mark and older gentleman come out of Laib-ation Station; Mark with cell phone in hand; Mark appears to clean it; walks around and gets into car with older gentleman driving a silver sedan with Montana License plate 5C-56450 and they leave.	0:03:38	
11:13 a.m.	0:03:39	Mark and older gentleman at Bob's Valley Market; Mark bends over to fix his pants/shoe; Mark and older gentleman get into vehicle and leave.	0:04:19	
11:23 a.m.	0:04:19	Surveillance shows Jockey Drive street sign.	0:04:20	
11:25 a.m.	0:04:21	Surveillance shows rural area of residence.	0:04:50	
2:33 p.m.	0:04:51	Mark returns to truck at Laib-ation Station, grabs a jacket, friend (older gentleman) and Mark go back into Laib-ation Station.	0:05:29	
2:38 p.m.	0:05:29	Mark is at Laib-ation Station and throws jacket into the truck and goes into Laib-ation Station	0:05:40	
3:49 p.m.	0:05:41	Mark comes out of Laib-ation Station, walks around the parking lot, rolls up his sleeves and gets into his friends silver sedan vehicle and leaves.	0:06:46	
4:31 p.m.	0:06:50	Mark returns to Laib-ation Station with male and enter.	0:06:58	
4:56 p.m.	0:06:59	Mark comes out of Laib-ation Station, gets into his truck.	0:07:24	
05:02 p.m.	0:07:26	Mark's truck at Grub Stake Cocktail Lounge.	0:07:46	
06:17 p.m.	0:07:46	Mark at Grub Stake Cocktail Lounge; stands		

Time	Start	Description	End	Notes
		outside of Chevrolet Silverado truck with Montana license plate SMLNWAV and talks to someone.	0:10:45	
06:20 p.m.	0:10:45	Mark talks to someone else in the parking lot	0:11:06	
	0:11:13	Mark continues to talk to girlfriend in parking lot and drinks beer from plastic cup.	0:16:42	
	0:16:43	Mark and girlfriend walk toward Grub Stake, but stand in front of it in a long conversation.	0:17:27	
	0:17:28	Mark and girlfriend go inside to Grub Stake.	0:17:36	
07:01 p.m.	0:17:37	Mark and girlfriend outside near horseshoe pit, beer in hand, hug and kiss.	0:17:44	2 ½ hours playing horseshoes/ 1 hr 4 min. filmed
	0:17:45	Mark and girlfriend turn around and appear to make fun of someone and laugh; Mark does a hip wiggle.	0:17:58	
07:02 p.m.	0:17:59	Mark and girlfriend play horseshoes, with beer in hand.	0:18:06	
07:05 p.m.	0:18:07	Mark and girlfriend continue to play horseshoes and drink beer (1/2 cup beer in Mark's hand).	0:20:45	
	0:20:46	Waitress brings another beer and takes empty beer bottle.	0:21:02	
07:08 p.m.	0:21:03	Mark starts drinking new cup of beer and has conversation with waitress.	0:21:56	
	0:21:57	Mark's girlfriend takes cup of beer Mark was drinking from – Mark opens bottle of beer.	0:21:58	
	0:23:08	Mark drinks from beer bottle.		
	0:25:15	Mark drinks from beer bottle.		
	0:27:35	Mark drinks from beer cup.		
	0:33:30	Mark drinks from beer cup.		
	0:33:41	A male has a conversation with Mark and they laugh together.	0:34:07	
	0:35:19	Mark drinks from beer bottle.		
	0:37:14	Mark drinks from beer bottle.		
7:28 p.m.	0:38:28	Apparently celebrating, Mark does a pirouette, hip wiggle, pirouette, hip wiggle, fairy dance.	0:41:13	
7:53 p.m.	0:41:14	Mark continues to play horseshoes; Mark with full cup of beer in hand and finishes it.	1:02:21	
	1:02:21	Mark starts drinking from girlfriend's cup of beer and starts a conversation with another male player.	1:06:12	
9:13 p.m.	1:06:13	Mark continues to play horseshoes.	1:07:41	
9:20 p.m.	1:07:42	Mark continues to play horseshoes, full beer cup in hand.	1:22:07	

Time	Start	Description	End	Notes
Friday, June 4, 2010				
11:18 a.m.	1:22:08	Mark enters Grub Stake	1:22:09	
11:20 a.m.	1:22:09	Mark comes out of Grub Stake and meets his sister (Meg Jones); they appear to be down on the ground working under a car.	1:24:44	
	1:24:45	They stand outside and talk.	1:26:17	
	1:26:50	Mark and Meg go into the Grub Stake.	1:26:55	
11:33 a.m.	1:26:56	Mark and girlfriend enter the Grub Stake.	1:27:56	
11:40 a.m.	1:27:57	Mark in his truck; Red truck with Washington license plate B76493N (Registered to Margie Jones) leaves the parking lot; Mark leaves the parking lot in his white truck.	1:30:08	
11:47 a.m.	1:30:09	White truck and sister in white truck make a u-turn.	1:30:13	
11:50 a.m.	1:30:14	Sign says Great Falls and Helena.	1:30:22	
4:54 p.m.	1:30:22	Mark's girlfriend was in her vehicle at the Grub Stake; Mark enters as passenger and they leave.	1:32:00	
5:00 p.m.	1:32:01	Mark and girlfriend on Smith Road.	1:32:11	
5:19 p.m.	1:32:12	Girlfriend's vehicle at restaurant and tavern called Causeway Chalet.	1:32:29	
5:19 p.m.	1:32:30	Sign Hauser Dam Rd.	1:32:33	
5:20 p.m.	1:32:34	Causeway Chalet.	1:32:38	
7:57 p.m.	1:32:39	Mark and girlfriend outside on patio talk with another male; Mark goes back into the Causeway Chalet.	1:35:47	
9:36 p.m.	1:35:48	Outside of Causeway Chalet with Mark's girlfriend's car in parking lot.	1:36:00	
Saturday, June 5, 2010				
11:01 a.m.	1:36:01	Mark and girlfriend at Bob's Valley Market in white truck; Mark outside of vehicle and looks at right side of truck door; Mark talking to a male, now both look at the inside of the truck door and talk.	1:37:05	
	1:37:06	Mark pulls out from the back of the truck what appears to be a piece of wood and continues to look at the right passenger door; girlfriend gets		

Time	Start	Description	End	Notes
		into the passenger side; Mark stands at the door and talks to his girlfriend; Mark gets into the truck and they leave.	1:39:44	
11:10 a.m.	1:39:45	Signs Douglas Circle and Evergreen Estates.	1:39:50	
11:16 a.m.	1:39:51	Truck drives near Percy Road.	1:39:57	
11:20 a.m.	1:39:58	Mark's truck with fishing boat on trailer hitch.	1:40:06	
11:22 a.m.	1:40:07	Mark's truck turns.	1:40:20	
11:26 a.m.	1:40:21	Mark gets into passenger side of truck at ranch.	1:40:42	
11:28 a.m.	1:40:43	Sign John G Mine Road.	1:40:44	
11:37 a.m.	1:40:45	Mark works on hitch of truck with girlfriend; Mark backs up the driveway in truck with fishing boat on hitch.	1:42:00	46 min. working in field on irrigation
11:48 a.m.	1:42:01	Mark and girlfriend stand out in field.	1:44:08	
	1:44:09	Mark, girlfriend and another male are doing something out in the field; Mark appears to work on something out in the field.	1:46:57	
	1:46:58	Mark suddenly runs toward something out of the picture.	1:46:42	
	1:46:43	Mark picks up two long poles, drops one down, and takes the other one back to where he was working, walks back and hands it to where the male and girlfriend work; Mark holds the pole while the other male pounds it into the ground; Mark continues to pound the same pole with a sledge hammer.	1:50:00	
11:59 a.m.	1:50:15	Mark gets down on his knees and continues to work on the pole; they continue to work in the field.	1:58:14	
12:09 p.m.	1:59:08	Mark, girlfriend and male leave in silver sedan.	1:59:48	
12:17 p.m.	1:59:48	Mark, girlfriend and male return and continue to work in the field; appear to work on irrigation system, watching sprinklers, and changing their positions.	2:13:11	
12:31 p.m.	2:13:12	Mark backs out of the long driveway with the fishing boat.	2:13:41	
12:46 p.m.	2:13:42	Sign: Gates of the Mountains – Recreation Area.	2:13:46	
12:55 p.m.	2:13:46	Mark seen near back of boat, preparing the boat.	2:15:24	
	2:15:24	Mark began to back the boat into the lake.	2:16:26	
12:59 p.m.	2:16:26	Mark continues to back the boat into the lake; Mark pulls the truck forward and brings the		

Time	Start	Description	End	Notes
		trailer out of the water; he parks the truck and returns to the boat.	2:19:10	
1:03 p.m.	2:19:10	Mark and girlfriend leave the boat launch.	2:19:13	
1:07 p.m.	2:19:13	Mark and girlfriend continue further out into the lake with fishing poles.	2:20:37	

APPENDIX D

APPENDIX D - 1

The Honorable Susan J. Craighead

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KING COUNTY, WASHINGTON

SEP 28 2009

SUPERIOR COURT CLERK
BY LEANNE SYMONDS
DEPUTY

SUPERIOR COURT OF WASHINGTON
IN AND FOR KING COUNTY

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

Plaintiff,

v.

CITY OF SEATTLE,

Defendant.

NO. 06-2-39861-1 SEA

DECLARATION OF:
GORDON B. JONES

I, Gordon Jones, hereby declare as follows:

1. I am over the age of 18 years, make this Declaration based on personal knowledge, and am competent to testify to the facts contained herein.
2. I am Mark and Meg Jones father. Providing this declaration to the court is not easy for me. I feel strongly that my son, Mark and daughter, Meg, are not being truthful with the court with respect to Mark's injuries and overall physical and mental health issues. I understand that Mark is claiming that he is too disabled to attend the trial. That is not true. Mark spent

the better part of August in Helena, MT. He was hunting, camping, partying and helping his sister Tammy with things around her house.

3. It is no secret that Mark was injured when he fell through the pole hole, while on duty as a firefighter, employed by the City of Seattle. To the extent that those injuries contribute to his current physical and medical issues, I don't know, but some of the issues were there prior.
4. I have been a Physical Therapist since October 1961. I had a very successful practice in Helena, MT up until 1998. I sold it, to enjoy some retirement time with my wife and family. To keep active and busy, I currently see patients in my home and have treated all of my family members over the years, including my son, Mark, after his injury in December 2003.
5. My wife and I were married for 50 years. She passed away on April 29, 2005. We raised six children.
6. Although it has not been the topic of conversation in our family, it has been no secret that, my wife, and three of our six children have abused alcohol and/or drugs. I have come to accept this fact and have always supported them in their journey to recovery. My wife went been through treatment for alcoholism in 1980 and was clean and sober until she died. Mark has had issues with alcohol since he was a teenager.

He has never been through treatment and has tried to hide his alcoholism from me. Mark's sister, Meg enables Mark's disease.

7. Between 1994 and 1996, Mark and his then wife, Shawna, managed rental property for me in Clancy, MT. After Mark and Shawna left the property, I began to hear that Mark and his wife were having a lot of parties on the property that I owned - and they lived. I became concerned because the property had a large hot spring pool. I was worried that somebody was going to get hurt at one of the parties and fall into the pool. I was worried that Mark was creating a lot a liability for me and wanted to end our business relationship. Mark was taken off of the corporation as an officer in 1998 and I in turn agreed to give him a percentage of the proceeds of the property when it sold.
8. As it turned out, Mark's wife Shawna was embezzling money from the rentals on the property. Mark claimed at the time to have no knowledge of this. I'm not sure I believed him, since the stolen money was deposited into their joint checking account. Shawna was convicted of theft and has just finished paying me restitution. She and Mark divorced shortly thereafter. Mark's name was removed from the property because of my concerns centering around his

drinking and the liability that it was creating for my wife and me. I have always told Mark that when the property sells, he will receive the money that I promised to him. Despite my assurances to Mark, that he will be paid when the property sells, he has hired a lawyer and has threatened to sue the Alhambra Corporation. I am not angry or upset with Mark about this. Mark seems angry with me over the fact that the property has not sold.

9. After Mark's divorce from Shawna, Mark continued to drink and party. He went to work for in Helena for about a year. Mark then moved to Seattle. Meg told me that Mark would go to bars and drink so heavily that he would forget where he parked his car. He would call her and she who would have to drive him around and help him find his car. I remember Meg being very annoyed by Mark's behavior when he drank. These black outs happened many times before his accident. I heard on conversation between Mark and Meg, when he asked her to help in look for his car. Meg was busy and denied his request. For anyone to attribute Mark's current memory loss to his accident is absurd. This behavior was happening long before Mark fell through the fire pole.
10. In 1999, after Mark's divorce from Shawna, he moved to Seattle and joined the Seattle Fire Department and worked with his

sister, Meg. In 2001 he married his second wife, Anne. Alcohol continued to cause problems for Mark. In November 2003, a month before his accident, he received a DUI and had a court ordered Breathalyzer installed in his car. It's possible that Mark may have quit drinking for short periods of time, but to my knowledge he has never been completely clean and sober. In the years before my wife's passing, she was very worried about Mark and his drinking. One of the last things she said to me was that, she hoped and prayed that Mark would get into treatment. That has unfortunately, never happened. Even after Mark's accident, while he was in the hospital, I saw two individuals bring Mark a 6 pack of beer!

11. Mark has always been an avid hunter. Ever since he moved to Seattle he still comes back to MT several times a year to hunt. It is his passion. Mark continued to hunt in MT after his 2003 injury. He routinely applies for every tag available. He is usually successful at getting a deer or two every season.
12. In May 2004, 5 months after Mark's fall, I began treating Mark with a specialized form of physical therapy, (PT) called myofascial and cranial sacral, stimulation, ultra sound and exercise program along with the aqua pool therapy. Mark was not happy with the PT treatments he was receiving in Seattle.

He told me there were problems. He wasn't getting the same kind of treatment, had issues getting his allotted time in pools and just in general wasn't happy with the type of PT he was receiving. Between May 2004 and June 2006, I treated Mark approximately 137 times. Although the treatments were somewhat sporadic, by June 2006, Mark was showing significant signs of improvement. He was walking without a cane, he was bicycling, swimming and walking with ease. His pain medication was down to 15mg of Oxycontin per day. I vividly recall one early morning after several days of treatment - Mark woke me up at 4:00 a.m. to tell me he was pain free!! This was a huge deal. I felt confident that Mark was really on the road to recovery.

13. Shortly after that announcement, Mark returned to Seattle. It was also during this time that I began to see a pattern of behavior emerge. Between our visits, Mark would return to Seattle and drink, this in combination with the narcotics he was taking I knew could be detrimental to his healing program. I was very worried about Mark when he went back to Seattle. It seemed as though when he returned to Seattle, he fell into old patterns of behavior with Meg and his fellow firefighter friends. By this time, Mark was going through another divorce and had moved in with his twin sister, Meg. Meg has

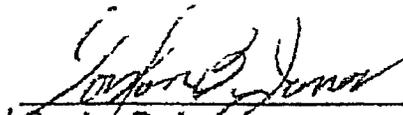
always enabled and covered for Mark. Things went downhill fast. I knew things were very bad when I became aware that Mark had had morphine pump installed for his pain. Things took a real nosedive after that. He stopped coming to his PT appointments with me.

14. I had trouble understanding how this could happen. I knew at one point, Mark was getting better. I could only assume that Mark had not told his doctors about his alcohol use. I just couldn't believe they would have allowed him to have the morphine pump.
15. Mark's issues have become so clouded that it is impossible to really know the extent of his injuries or pain. How do we know how much pain he is in, if it is continually masked?
16. I do not believe my son needs a full time caregiver. My son needs to get clean and sober, in an accredited 90-day inpatient treatment program and then be properly evaluated for injuries and pain. I would like to see my son get the treatment he so desperately needs and see what his prognosis is after he is helped. I would welcome an opportunity to have my son back in Montana, and back into rigorous PT treatments with me or in a controlled program in Seattle. I love Mark very much and want him to get well.
15. It is very disheartening for me to go against my children in the

action, but I believe deep in my heart that Mark will not be able to heal if he is awarded a large sum of money. He will blow through it and not get the help he so desperately needs. Meg enables Mark and has refused to admit that he is an alcoholic and abuses prescription drugs. Mark needs to be in a controlled program where he can be evaluated and monitored over a period of time that can be adjusted accordingly to his progress or consistent improvement. I could not live with myself if I did not make the court aware of my son's long, ongoing addiction, which has significantly impacted his ability to function.

I declare under penalty of perjury under the laws of the State of Washington and of the United States that the foregoing is true and correct.

EXECUTED at Helena, Montana, this 27th day of September 2009.



Gordon B. Jones

APPENDIX D - 2

The Honorable Susan J. Craighead

FILED
KING COUNTY, WASHINGTON

SEP 28 2009

SUPERIOR COURT CLERK
BY LEANNE SYMONDS
DEPUTY

SUPERIOR COURT OF WASHINGTON
IN AND FOR KING COUNTY

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

Plaintiff,

v.

CITY OF SEATTLE,

Defendant.

NO. 06-2-39861-1 SEA

DECLARATION OF:
GORDON B. JONES

I, Gordon B. Jones hereby declare as follows:

1. I am over the age of 18 years, make this Declaration based on personal knowledge, and am competent to testify to the facts contained herein.

On Saturday, September 26, 2009, I received a telephone call from Mark and Meg's attorney, Mr. Kilpatrick. The message stated, "Hello Mr. Jones, I am Richard Kilpatrick, I represent Meg Jones as guardian for Mark Jones in a suit filed against the City of Seattle. I have heard that an investigator from Seattle was in Montana harassing some of Mark's friends and trying to intimidate them. I would like to know if you have been harassed or intimidated in any way." He went on to state that, "The City (of Seattle) is pretty desperate and I would like any information you can give me. I am

DECLARATION - 1
11049-030064 437349

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1 trying to figure out who has been contacted and what the investigator is doing." He then
2 went on to give me his personal cell phone number and then said, "I know that you have
3 been treating Mark for several years. I already have the physical therapy notes. I have
4 had them for quite some time. The City of Seattle has them as well so there is nothing
5 they should need from you."

6 I did speak to Ms. Winqvist regarding the case that my son has filed against the
7 City of Seattle. Ms. Winqvist did not in any way try to "intimidate" me as the attorney
8 suggested. She asked me to tell her what I knew about my son Mark and I did. She was
9 very professional, and compassionate in her dealings with me. She simply asked me to
10 be truthful and I was. I declare under penalty of perjury under the laws of the State of
11 Washington and of the United States that the foregoing is true and correct.

12 EXECUTED at Helena, Montana this 27th day of September, 2009.

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15 Gordon B. Jones
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DECLARATION - 2
11049-030064 437349

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APPENDIX E

APPENDIX E -1

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KING COUNTY
The Honorable Susan J. Craighead
SUPERIOR COURT CLERK
E-FILED

CASE NUMBER: 06-2-39861-1 SEA

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SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF KING

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

Plaintiff,

v.

CITY OF SEATTLE,

Defendant.

NO. 06-2-39861-1 SEA

DECLARATION OF WILLIAM J.
STUMP, M.D.

WILLIAM STUMP, M.D., declares:

1. I am a neurologist. I graduated from M.S. Hershey College of Medicine in Hershey, Pennsylvania, in 1973. I completed my neurology training in 1978 and have practiced medicine continuously in the state of Washington since that time. I am board certified in my specialty of neurology. I am over the age of eighteen and otherwise competent to testify.

2. In February 2008, through my affiliation with the Central Seattle Panel of Consultants, I was retained by the City of Seattle Personnel Department, Worker's Compensation Unit, to review the medical records of Mark Jones, to examine Mr. Jones, and

DECLARATION OF WILLIAM J. STUMP, M.D. -- 1

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BADLEY
SPELLMAN**

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1 to provide my opinions regarding various issues, including whether Mr. Jones was too
 2 disabled to be employed in any capacity. Two other physicians, James Green, M.D.
 3 (orthopedic surgery), and Roy Clark, M.D. (psychiatry), were retained to provide opinions
 4 within their respective areas of expertise, and we contributed to a joint report ("Panel
 5 Report") dated February 28, 2008. Dr. Green, Dr. Clark, and I concluded that Mr. Jones was
 6 totally and permanently disabled.

7 3. In the Panel Report, I concluded that Mr. Jones' subjective reports of constant,
 8 severe pain could not be identified with any objectively verifiable condition. I stated: "Mr.
 9 Jones does not have an orthopedic condition which would be expected to produce the pain
 10 complaints he voices; however, he may have a thalamic pain syndrome due to his brain
 11 injury." *Panel Report* at 48. Thalamic pain syndrome is a neurological disorder in which a
 12 person is hypersensitive to pain as a result of damage to the thalamus, a part of the brain
 13 involved in sensation. Although thalamic pain syndrome is a rare disorder more commonly
 14 seen in stroke patients, and is difficult to diagnose, it was considered the likely cause of Mr.
 15 Jones' pain because no orthopedic reason for pain could be identified, yet Mr. Jones' pain
 16 complaints had been accepted by his treating physicians and a head trauma was noted,
 17 suggesting intracranial injuries.

18 4. Based on my conclusion that Mr. Jones' pain originated in the thalamus and
 19 his self-reported difficulties with short-term memory, I concluded in the Panel Report that
 20 Mr. Jones was probably incapable of returning to full-time work in any capacity. I stated:
 21 "Physically, Mr. Jones would be capable of returning to work in a modified capacity;
 22 however, from a cognitive standpoint, he is incapable of returning to reasonably continuous
 23 full-time employment on a more probable than not basis." *Panel Report* at 51. At the trial of
 24

DECLARATION OF WILLIAM J. STUMP, M.D. - 2

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1 this case in September 2009, I was called by the Plaintiff to testify, and I testified consistent
2 with my findings in the Panel Report.

3 5. I have reviewed surveillance footage taken of Mr. Jones in April and June
4 2010. Mr. Jones' activities and presentation as displayed in the surveillance footage is not
5 consistent with his presentation during my examination of him on February 28, 2008. There
6 is such a gross disparity between Mr. Jones' presentation during my examination and in the
7 surveillance footage that I must retract my previous opinion that Mr. Jones is totally and
8 permanently disabled due to cognitive and mood disorders and a chronic pain syndrome. In
9 fact, because significant further recovery from his injuries was ruled out, the only rational
10 explanation for Mr. Jones' presentation at my examination is that he behaved in that manner
11 of his own volition, due to malingering rather than the result of any true physical disability or
12 cognitive impairment.

13 6. Although I am not able to rule out some degree of thalamic pain syndrome or
14 cognitive impairment based on the surveillance footage alone, the footage casts serious doubt
15 on whether those conditions exist in Mr. Jones. If Mr. Jones has thalamic pain syndrome or
16 cognitive impairment, his condition is extremely mild and does not appear to be limiting his
17 physical or social activities in any significant way. Mr. Jones' activities in the surveillance
18 footage are inconsistent with the range of motion and other restrictions found in the "Doctor's
19 Estimate of Physical Capacities" attached to the Panel Report. Furthermore, if the
20 surveillance footage had been available to me at the time of the panel examination, I have no
21 doubt that I would have reached very different conclusions regarding Mr. Jones and his
22 ability to work.

23 7. For instance, I probably would have disagreed with the diagnosis of cognitive
24 disorder due to traumatic brain injury. *See Panel Report* at 47. That diagnosis was made

DECLARATION OF WILLIAM J. STUMP, M.D. - 3

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1 primarily based on Mr. Jones' subjective, self-reported but unverified complaints of short-
 2 term memory problems and incapacity for normal social interaction, which were accepted by
 3 his treating physicians and seemed to be confirmed by Dr. Clark's evaluation of Mr. Jones.
 4 *See Panel Report* at 43-44. However, the apparent lack of a pain syndrome (which, like the
 5 cognitive disorder, was thought to be the result of a brain injury) as well as the gregarious
 6 affect displayed by Mr. Jones in the surveillance footage and apparent ability to interact
 7 normally with others, belie the existence of a cognitive disorder.

8 8. Mr. Jones' abilities as demonstrated in the surveillance footage cannot be
 9 explained by his use of an intrathecal pain pump; neither thalamic pain syndrome nor
 10 cognitive difficulties are treatable with narcotics. Mr. Jones was able to fool the system and
 11 lead us to conclude he was totally and permanently disabled, and the pain pump appears to
 12 have been used as a prop to achieve that goal.

13 9. After I viewed the surveillance footage of Mr. Jones, I recommended that the
 14 City's defense team retain Theodore Becker, Ph.D., to perform biomechanical analysis of the
 15 surveillance footage. I was aware of Dr. Becker's expertise in that area because I had
 16 reviewed and relied upon his analysis in other legal proceedings. It is my understanding that
 17 Dr. Becker's analysis of the surveillance footage of Mr. Jones indicates that Mr. Jones has no
 18 significant physical limitations and should be capable of full-time work in some capacity.
 19 Given my knowledge of Dr. Becker's methods and expertise, I am inclined to give substantial
 20 weight to his conclusions, which I take to be confirmation of my independently reached
 21 conclusions.

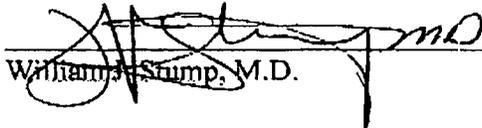
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 DECLARATION OF WILLIAM J. STUMP, M.D. - 4

**CARNEY
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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

DATED this 4th day of August, 2010, at Seattle, Washington.



William J. Stump, M.D.

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DECLARATION OF WILLIAM J. STUMP, M.D. - 5

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APPENDIX E - 2

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SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF KING

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

Plaintiff,

v.

CITY OF SEATTLE,

Defendant.

NO. 06-2-39861-1 SEA

SECOND DECLARATION OF
WILLIAM J. STUMP, M.D.

WILLIAM STUMP, M.D., declares:

1. I am over the age of eighteen and competent to testify. My qualifications and experience are described detail in my first declaration, dated August 4, 2010. I am board certified in my specialty of neurology, which I have practiced for over 30 years.

2. I have reviewed the expert declarations submitted by the plaintiff. Dr. Friedman expresses surprise that Dr. Clark or I would change our opinions based on surveillance video. Physicians regularly rely upon surveillance in the context of panel examinations when it is available because it is an effective tool for detecting malingering.

SECOND DECLARATION OF WILLIAM J.
STUMP, M.D. - 1

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1 3. Physicians, whether examining patients or conducting disability evaluations,
2 must rely to a large extent on the examinee's subjective complaints, descriptions of physical
3 and mental impairments, and demonstration of physical capacity. Most are forthcoming and
4 reliable, but a certain percentage will seek to influence the physician's conclusions by false
5 presentation. Surveillance is more reliable than clinical examination in such cases. An expert
6 in biomechanics can perform an independent physical capacities evaluation based on
7 surveillance footage that is in many ways more reliable than a clinical evaluation because the
8 subject is demonstrating physical and mental capacities in a normal environment. Dr. Becker
9 is the most qualified biomechanics expert I know, and he is experienced in video analysis,
10 which is why I recommended he be consulted in this case. Dr. Becker is regularly called
11 upon in the worker's compensation context when surveillance evidence is obtained. I have
12 reviewed Dr. Becker's report in this case. It is of the type and kind Dr. Becker has produced
13 in past cases and upon which I and other panel physicians have relied in resolving disability
14 issues including the presence or absence of malingering on the part of the claimant.

15 4. Dr. Friedman's statement that surveillance is an improper basis to reach
16 conclusions about a person's cognitive condition is incorrect. I agree with the statement
17 made by Peter Esselman, M.D., at the trial of Mr. Jones' civil case that things like emotional
18 impact, executive function, organization, judgment, and the like do not show up particularly
19 well in tests, but rather "the true test is what people can do in their environment, what he can
20 do in his day-to-day life, and you know, work environment, especially." Esselman, Trial p.
21 29. Dr. Esselman acknowledged at trial that he had never seen Mr. Jones outside the clinic
22 and all his information about Mr. Jones' activities outside the clinic came from self-reporting.
23 Esselman, Trial p. 63. I also note that Dr. Friedman acknowledged, "Pain is notoriously
24 subjective." Friedman, Trial p. 60. It therefore surprises me that neither Dr. Friedman nor

SECOND DECLARATION OF WILLIAM J.
STUMP, M.D. - 2

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1 Dr. Esselman is willing to reconsider his opinion in light of the surveillance footage, as it
2 shows Mr. Jones in "his environment," engaging in a wide variety of activities that require
3 organization and planning, without any indication of cognitive difficulty, and engaging in
4 vigorous physical activities, without any indication of pain or discomfort.

5 5. Neither Dr. Friedman, Dr. Esselman, nor our panel was able to find any
6 orthopedic reason for Mr. Jones' continued complaints of chronic pain four to five years after
7 his injury. We accepted his reported impairment because Mr. Jones did suffer serious
8 physical injuries and his self-reported complaints of chronic pain and mobility limitations
9 were repeatedly noted in his medical records. The panel concluded that Mr. Jones suffered
10 from a central pain condition, thalamic pain syndrome.

11 6. Because central pain conditions originate in the brain, making them not
12 objectively verifiable in general, they are susceptible to faking by self-reporting of chronic
13 pain. At the same time, faking of a severe central pain condition is susceptible to detection
14 through surveillance because a central pain condition generally does not result in wide
15 variations in pain level. In other words, the person might have "slightly better" days but
16 should not experience days with little or no pain if, as Mr. Jones is said to have reported, his
17 baseline pain level is 5 or above on a 1-to-10 scale. Therefore, if a person previously
18 diagnosed with a central pain condition with pain at that level is seen engaging in vigorous
19 physical activities with little or no indication of pain, it is strong evidence that the person was
20 malingering.

21 7. I have reviewed the trial testimony of Dr. Friedman where he stated that Mr.
22 Jones' pain level is continuously in the 5-to-10 range on a 1-10 scale. Friedman, Trial p. 10-
23 11. Pain at a level 5 profoundly impacts a person's ability to function. Although such a
24 person is able to engage in some physical activities and attend to basic needs, a person with

SECOND DECLARATION OF WILLIAM J.
STUMP, M.D. - 3

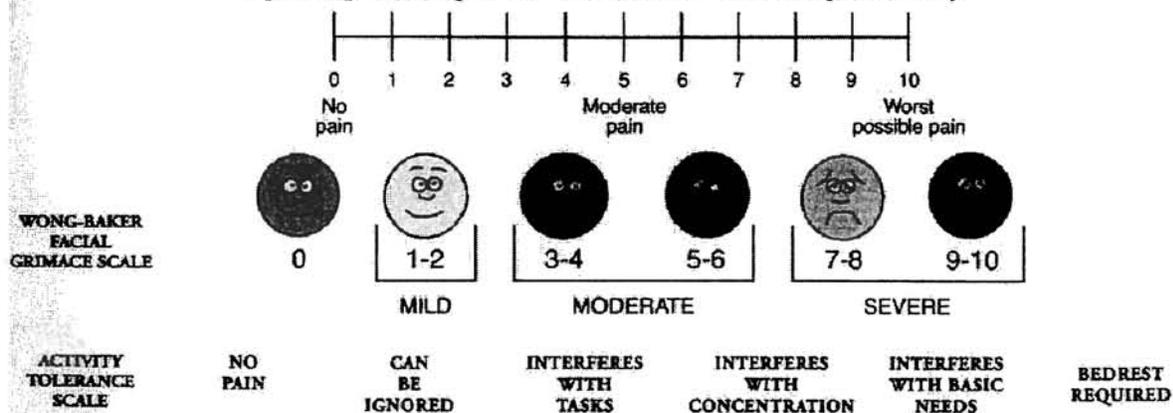
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1 constant pain at level 5 or above would not be able to engage in the vigorous physical
 2 activities that Mr. Jones does in the surveillance video, nor would he be able to do so while
 3 maintaining a gregarious and pleasant affect as he does. This is illustrated by the Universal
 4 Pain Assessment Tool and Wong-Baker Facial Grimace Scale, reproduced below, which are
 5 commonly used to assist patients and caregivers in assessing pain levels:

6 UNIVERSAL PAIN ASSESSMENT TOOL

7 This pain assessment tool is intended to help patient care providers assess pain according to individual patient needs.
 8 Explain and use 0-10 Scale for patient self-assessment. Use the faces or behavioral observations to interpret
 9 expressed pain when patient cannot communicate his/her pain intensity.



15 8. Mr. Jones' expert witnesses explain the difference in his presentation at the
 16 panel examination versus in the surveillance by asserting that he has increased pain and
 17 cognitive difficulties in stressful times. In my opinion, stress is not a valid explanation for the
 18 difference for two reasons: (1) the difference is too severe, and (2) as explained above,
 19 central pain is relatively steady and not subject to the extreme fluctuations that would be
 20 required to explain Mr. Jones' inconsistent presentations.

21 9. Plaintiff's Opposition quarrels with my characterization of memory problems
 22 as self-reported and unverified, stating, "There were numerous confirmations of memory
 23 issues from lay and expert witnesses." But this statement ignores the fact that memory
 24 problems can be feigned -- a person can lie that he does not remember.

SECOND DECLARATION OF WILLIAM J.
 STUMP, M.D. - 4

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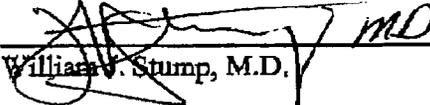
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1 10. Mr. Choppa gives opinions regarding Mr. Jones' physical and mental abilities.
 2 Mr. Choppa is a rehabilitation counselor and is necessarily reliant on physician diagnoses and
 3 findings regarding impairment. Mr. Choppa is not qualified to opine whether Mr. Jones was
 4 a malingerer or whether the surveillance video is a sufficient basis to assess his physical and
 5 cognitive abilities.

6 11. Where there is no reason to suspect malingering, our tendency as physicians in
 7 the clinical setting is to accept complaints at face value. In the case of Mr. Jones, I did not
 8 suspect malingering until I viewed the surveillance video. Before reaching the opinions
 9 stated in my first declaration, I refreshed my recollection of Mr. Jones' presentation at the
 10 panel examination by reviewing the Panel Report and by viewing portions of Mr. Jones'
 11 videotaped deposition, which was taken within days after the panel examination. Based on
 12 the surveillance video, I conclude on a more probable than not basis that Mr. Jones was
 13 malingering and is not totally disabled but is employable. He certainly is not in need of a
 14 24/7 personal attendant.

15 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF
 16 THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND
 17 CORRECT TO THE BEST OF MY KNOWLEDGE.

18 DATED this 30 day of September, 2010, at Bremerton, wa
 19 Washington.

20 
 21 _____
 22 William J. Stump, M.D.

23
 24

 SECOND DECLARATION OF WILLIAM J.
 STUMP, M.D. - 5

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APPENDIX F

APPENDIX F - 1

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KING COUNTY

The Honorable Susan J. Craighead
SUPERIOR COURT CLERK
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CASE NUMBER: 06-2-39861-1 SEA

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SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF KING

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

Plaintiff,

v.

CITY OF SEATTLE,

Defendant.

NO. 06-2-39861-1 SEA

DECLARATION OF ROY D. CLARK,
JR., M.D.

ROY D. CLARK, JR., M.D., declares:

1. I graduated from The University of Kansas School of Medicine in 1969. I completed a rotating internship at Good Samaritan Hospital and Medical Center in Portland, Oregon in 1970 before serving as a United States Air Force General Medical Officer at Mt. Home AFB, Idaho until September 1972. I became a Fellow (resident physician-in-training) in the Mayo Graduate School of Medicine, Mayo Clinic, Rochester, Minnesota: Internal Medicine, October 1972 - June 1975; Neurology, July 1975 - September 1976; and Psychiatry, October 1976 - September 1978. I became licensed as a Physician and Surgeon

DECLARATION OF ROY D. CLARK, JR., M.D. - 1

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1 in the state of Washington (MD 00016516) in 1978 and have practiced medicine continuously
2 in the state of Washington since that time. My specialty is psychiatry.

3 2. In 1975, I achieved certification by the American Board of Internal Medicine.
4 I earned certification in General Psychiatry by the American Board of Psychiatry and
5 Neurology in 1982, followed by Added Qualifications in Addiction Psychiatry, March 31,
6 1993 – March 31, 2003, and Subspecialty Certification in Forensic Psychiatry, 1999 - 2009.
7 The American Board of Psychiatry and Neurology requested my service as a Part II (Orals)
8 Examiner from 1986 to 1996 and again in 2003. I am a member in good standing of the
9 American Medical Association, the Washington State Medical Association, and the King
10 County Medical Society. I was a founding co-director of the program now known as the
11 Washington Physicians Health Program and also served as Secretary-Treasurer until 2001. I
12 am a peer-elected Fellow of the American College of Physicians and its Washington State
13 Chapter. I am also a peer-elected Distinguished Fellow of the American Psychiatric
14 Association and member of the Washington State Psychiatric Association and served as
15 President of the King County Chapter, 1984-1985. In addition, I am a member of the
16 American Society of Addiction Medicine and its Washington State Chapter, serving as Chair
17 1991-1993. I am a Clinical Associate Professor in the Department of Psychiatry and
18 Behavioral Sciences, University of Washington. My clinical practice involves the treatment
19 of adult patient with psychiatric disorders. My forensic practice includes the evaluation and
20 treatment of injured workers over more than twenty years.

21 3. In February 2008, as part of my forensic work through the Central Seattle
22 Panel of Consultants, I participated in a panel examination of Mark E. Jones along with
23 William Stump, M.D. (neurology), and James Green, M.D. (orthopedic surgery). Following
24 the examination and review of medical records, Dr. Green, Dr. Stump, and I authored a joint

DECLARATION OF ROY D. CLARK, JR., M.D. - 2

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1 report ("Panel Report") dated February 28, 2008, in which we concluded that Mr. Jones was
2 totally and permanently disabled. Dr. Green is since deceased.

3 4. In the Panel Report, I concluded that Mr. Jones would be unable to return to
4 reasonably continuous employment due to permanent cognitive and mood disorders and
5 mental health impairment. *Panel Report* at 47, 54. I concluded that Mr. Jones' permanent
6 mental health impairment was:

7 best described as falling between Category IV (4) and Category V (5) of
8 permanent impairments of mental health, per WAC 296-20-340. Taking into
9 account the additional impairment resulting from the permanent cognitive
impairment, Category V (5) would be the most appropriate.

10 *Panel Report* at 55. This was largely based on my interviews of Mr. Jones and his sister and
11 their reports of his profound difficulties with short-term memory and social interaction, which
12 appeared to consistent with the notations in Mr. Jones' medical records. In WAC 296-20-
13 340, a Category IV (4) impairment is defined as including some or all of the following:

14 Very poor judgment, marked apprehension with startle reactions, foreboding
15 leading to indecision, fear of being alone and/or insomnia; some psychomotor
16 retardation or suicidal preoccupation; fear-motivated behavior causing
17 moderate interference with daily life; frequently recurrent and disruptive organ
18 dysfunction with pathology of organ or tissues; obsessive-compulsive
19 reactions causing inability to work with others or adapt; episodic losses of
20 physical function from hysterical or conversion reactions lasting longer than
21 several weeks; misperceptions including sense of persecution or grandiosity
22 which may cause domineering, irritable or suspicious behavior; thought
disturbance causing memory loss that interferes with work or recreation;
periods of confusion or vivid daydreams that cause withdrawal or reverie;
deviations in social behavior which cause concern to others; lack of emotional
control that is a nuisance to family and associates; moderate disturbance from
organic brain disease such as to require a moderate amount of supervision and
direction of work day activities.

23 In WAC 296-20-340, a Category V (5) impairment is defined as including some or all of the
24 following:

DECLARATION OF ROY D. CLARK, JR., M.D. - 3

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Marked apprehension so as to interfere with memory and concentration and/or to disturb markedly personal relationships; depression causing marked loss of interest in daily activities, loss of weight, unkempt appearance, marked psycho-motor retardation, suicidal preoccupation or attempts, or marked agitation as well as depression; marked phobic reactions with bizarre and disruptive behavior; psychophysiological reactions resulting in lasting organ or tissue damage; obsessive-compulsive reactions that preclude patient's usual activity; frequent or persistent loss of function from conversion or hysterical reactions with regressive tissue or organ change; defects in perception including frank illusions or hallucinations occupying much of the patient's time; behavior deviations so marked as to interfere seriously with the physical or mental well-being or activities of others; lack of emotional control including marked irritability or overactivity.

5. I have reviewed the video surveillance footage taken of Mr. Jones in April and June 2010. His physical presentation and affect in the video are markedly different than during the panel examination and do not support the diagnosis of a cognitive or mood disorder. Likewise, Mr. Jones' presentation and affect in the video do not support either a Category IV (4) or a Category V (5) mental health impairment under WAC 296-20-340.

6. If at the time of the panel examination I had seen Mr. Jones participate in the activities depicted in the video footage and present with the affect exhibited by him therein, I would not have diagnosed him with any cognitive or mood disorder or mental health impairment. If Mr. Jones had a clinically diagnosable cognitive or mood disorder or a Category IV (4) or Category V (5) mental health impairment, he would be incapable of normal social interaction in the manner depicted in the video footage, including carrying on a romantic relationship and generally exhibiting an extroverted and sociable affect. Mr. Jones' observable facial expressions and psychomotor activity are not congruent with clinical levels of depression or anxiety.

6. Mr. Jones' presentation during the panel examination and in the video is so incongruous that I can no longer stand by the conclusion in the Panel Report that Mr. Jones is totally and permanently disabled. The only possible explanations for the discrepancy are a

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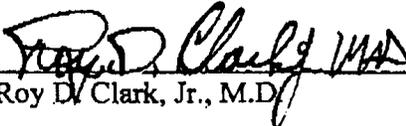
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miraculous recovery or false presentation due to malingering or secondary gain. Due to the nature of Mr. Jones claimed injuries and the length of time since onset, significant further recovery was previously ruled out and, in my opinion, is not a plausible explanation for the discrepancy.

9. Upon viewing the video of Mr. Jones, I immediately thought of Theodore Becker, Ph.D., an expert in biomechanics, because I had previously seen and relied upon his work and knew he had the ability to perform biomechanical analysis of video footage and regularly does so. Based on my familiarity with Dr. Becker's methods, expertise, and past work, I believe his opinions are reliable. Thus, I suggested that the City's defense team ask Dr. Becker if he was available for this case.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

DATED this 3rd day of August, 2010, at Seattle, Washington.



Roy D. Clark, Jr., M.D.

DECLARATION OF ROY D. CLARK, JR., M.D. - 5

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APPENDIX F - 2

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SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF KING

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

Plaintiff,

v.

CITY OF SEATTLE,

Defendant.

NO. 06-2-39861-1 SEA

**SECOND DECLARATION OF ROY D.
CLARK, JR., M.D.**

ROY D. CLARK, JR., M.D., declares:

1. I am over the age of eighteen and competent to testify. My qualifications and experience are described in detail in my first declaration, dated August 3, 2010. I am a licensed and board-certified psychiatrist, and I have practiced psychiatry for over 30 years. My practice has included the evaluation and treatment of injured workers for over 20 years.

2. I have reviewed the expert declarations submitted by the plaintiff. From the declarations, it appears that the declarants reviewed only "portions" or "snippets" of the surveillance video. I have reviewed the entire 11.3 hours of footage taken over the course of nine days in April and June 2010, which I consider a significant period of observation

**SECOND DECLARATION OF
ROY D. CLARK, JR., M.D. - 1**

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1 especially because Mr. Jones was unencumbered by a clinical setting. To fully appreciate the
2 significance of the surveillance video for cognitive and mood issues, one should view all or
3 substantially all the footage.

4 3. I disagree with the criticism by Andrew Friedman, M.D., and Jo Ann
5 Brockway, Ph.D., that the surveillance footage of Mr. Jones is not a sufficient basis to assess
6 mental health impairments, including cognitive and mood disorders. Cognitive abilities and
7 emotional well-being can be judged reliably from activities, body language, and facial
8 expressions. I agree with Peter Esselman, M.D., one of Mr. Jones' treating physicians, when
9 he testified at Mr. Jones' trial that things like emotional impact, executive function,
10 organization, judgment, and the like do not show up particularly well in tests, but rather "the
11 true test is what people can do in their environment, what he can do in his day-to-day life, and
12 you know, work environment, especially." Esselman, Trial p. 29. This is one of the reasons
13 surveillance is reliable to verify a person's complaints of cognitive or mood disorders and is
14 regularly relied upon in the context of panel examinations where malingering is suspected.

15 4. In a clinical examination, unless there is some overt evidence of malingering,
16 physicians are reliant upon the claimant's or patient's complaints, history, medical records,
17 and presentation. In the Panel Report, which I understand was referenced at the trial, I
18 concluded based on self-reported complaints and history, both taken by the panel from Mr.
19 Jones and his sister and reflected in the medical records, and Mr. Jones' presentation that he
20 had a permanent mental health impairment as defined in Category V under WAC 296-20-340.
21 I did not suspect malingering, largely because Mr. Jones had suffered significant injuries and
22 his complaints were well-documented. Physicians, including treating physicians, can be
23 influenced in their judgments by different factors. These can include loyalty to one's patient
24 and unwillingness to change one's conclusions when faced with findings that are inconsistent

SECOND DECLARATION OF
ROY D. CLARK, JR., M.D. - 2

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1 with a previous diagnosis or opinion. I changed my opinion for one reason only: Mr. Jones
2 demonstrated in the surveillance video physical and cognitive function that, on a more
3 probable than not basis, rules out any mental health impairment, much less a Category V
4 impairment as was diagnosed.

5 5. If Mr. Jones had such an impairment, at least some of the symptoms would be
6 unmistakable even on a "silent" video. Dr. Brockway acknowledges that the surveillance
7 video shows "good mood and normal social interaction" and that Mr. Jones does not appear
8 depressed. I can say with confidence that Mr. Jones exhibits none of the outward signs of any
9 degree of mental health impairment, much less a Category V impairment, and simply appears
10 to be having a good time engaging in a variety of vigorous activities and interacting normally
11 with his son and a female companion.

12 6. For example, in the surveillance video, Mr. Jones displays none of the
13 observable indications of depression, including sadness or loss of pleasure in activities. The
14 video also shows none of the indications of a cognitive disorder, including psychomotor
15 retardation, difficulty concentrating, difficulty making decisions, memory problems, impaired
16 cognitive-motor skills, difficulty assembling parts, distractibility, perseveration, or reluctance
17 to engage in spontaneous activities.

18 7. Instead, the video shows Mr. Jones (1) engaging in activities that require
19 organization and planning (*e.g.*, going to a store and making purchases; camping with a
20 trailer; launching a boat with gear for fishing); (2) engaging in normal social activities (*e.g.*,
21 playing games; conversing with and relating to his companion and others; texting); (3) multi-
22 tasking (*e.g.*, talking on the phone while moving firewood; texting and talking), and much
23 more. I could describe numerous examples from the surveillance footage where Mr. Jones
24 displays normal cognitive functioning and judgment. One further example is where Mr.

SECOND DECLARATION OF
ROY D. CLARK, JR., M.D. - 3

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1 Jones retrieves an electric scooter from his pickup or fifth-wheel trailer and undertakes some
2 repairs. During this time, Mr. Jones exhibits planning and organizational skills, sound
3 memory, multi-tasking ability, and more. Mr. Jones plugs in the scooter to charge, realizing
4 that it will need to be charged before use, and planning for such use. He retrieves tools from
5 a specific storage compartment on the trailer without searching. He is interrupted several
6 times and engages in conversation during the process, but generally stays on task and
7 successfully completes the repairs to the scooter such that the young boy can ride it. This
8 scenario is analogous to testing that might be administered to evaluate a person for cognitive
9 disorders, but more realistic because it occurred in a normal setting.

10 8. I specifically recall Mr. Jones' presentation at the panel examination. I have
11 also refreshed my recollection of his presentation by reviewing the Panel Report and the
12 videotaped deposition of Mr. Jones, which was taken several days after the panel
13 examination. Mr. Jones' presentation in the surveillance video, including as described above,
14 is inconsistent with his presentation at the panel examination, including his statement to me
15 that he "pretty much live[s] on the couch" as a result of his physical and cognitive limitations.
16 Panel Report p. 42. The degree of inconsistency in Mr. Jones' presentations cannot be
17 explained by "ups and downs" or "stress." It is simply too great a difference. Although a
18 person with mental health impairments can experience periods of reduced symptoms,
19 symptoms of the degree that were found to exist in Mr. Jones are not substantially reduced or
20 eliminated by reduction of stress.

21 9. Dr. Goodwin states: "Nothing in the information I have reviewed leads me to
22 believe that there is any evidence of malingering on the part of Mr. Jones, as it relates to the
23 findings and evidence associated with his traumatic brain injury." Perhaps Dr. Goodwin has
24 not reviewed all of the information I have reviewed. For instance, he states he reviewed only

SECOND DECLARATION OF
ROY D. CLARK, JR., M.D. - 4

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1 “portions” of the surveillance video. Even after reviewing just portions of the footage,
2 however, I am surprised that someone in Dr. Goodwin’s position and field would not have
3 serious concerns regarding the presence of total disability or malingering.

4 10. I am particularly surprised by Dr. Goodwin’s statement in light of the results
5 of the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) he administered to Mr.
6 Jones in 2009, after the panel examination. The MMPI-2 is considered an important and
7 reliable tool for detecting malingering. To my knowledge, no other professional had
8 previously administered an MMPI-2 to Mr. Jones. Mr. Jones received a score of 30 on the
9 “fake bad scale” (FBS), which is a measure of the degree to which the subject may be seeking
10 to “fake bad,” *i.e.*, to exaggerate or fabricate physical symptoms. Dr. Goodwin stated in his
11 report: “FBS = 30, which is well above the cutoffs for over-reporting of symptomatology[.]”
12 Goodwin Report p. 12. Dr. Goodwin does not mention the MMPI-2 or the FBS score in his
13 recent declaration.

14 11. I agree with Dr. Goodwin that an FBS score of 30 is well above the cutoff for
15 over-reporting of symptomatology. Indeed, according to a statement published by experts
16 involved in developing the FBS, “raw scores above 22 should raise concerns about the
17 validity of self-reported symptoms and that raw scores above 28 should raise very significant
18 concerns about the validity of self-reported symptoms, particularly with individuals for whom
19 relevant physical injury or medical problems have been ruled out.” Here, the FBS score
20 should have been particularly alarming because, although Mr. Jones had suffered significant
21 physical injuries in 2003, by 2008 when we examined him and 2009 when the MMPI-2 was
22 administered, there was no objective, orthopedic basis to support Mr. Jones’ pain complaints -
23 - he was diagnosed with a central pain syndrome based on self-reporting of chronic pain.
24

SECOND DECLARATION OF
ROY D. CLARK, JR., M.D. – 5

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1 12. In Dr. Goodwin's report and in his trial testimony, Dr. Goodwin minimized
2 Mr. Jones' FBS score. At trial, Dr. Goodwin stated he could "interpret that fake bad score as
3 being unintentional and just a reflection of the fact he has a lot of symptoms, and he's just
4 letting us know what they are." Goodwin, Trial p. 213. In his report, although Dr. Goodwin
5 noted that this was Mr. Jones' fourth neuropsychology exam, such that Mr. Jones had "some
6 familiarity with instrumentation and practice effects," Dr. Goodwin rationalized that others
7 had accepted Mr. Jones' symptoms as real, noting that "[t]he extent of his injuries has been
8 well documented within his medical records" and that the injury-related residuals had been
9 accepted by our independent panel in 2008. Goodwin Report p. 18. In my opinion, even
10 assuming Dr. Goodwin appropriately minimized the high FBS score before the surveillance
11 video became available, the video places the high FBS score in a new light. Because it is
12 difficult to detect malingering in a clinical examination, where self-reporting is key, the video
13 suggests to me that Mr. Jones' complaints were "well documented" simply because he had
14 been malingering for quite some time.

15 13. The assertion that the surveillance video does not speak to the existence of
16 cognitive deficits is invalid for an additional reason: it calls into question findings by two
17 neuropsychologists that Mr. Jones experienced a decline in cognitive abilities after 2005. A
18 neuropsychological evaluation by Naomi Chaytor, Ph.D., and Dawn Ehde, Ph.D., in 2004
19 found that Mr. Jones had average to superior cognitive abilities. In September 2005, Mr.
20 Jones' physician for rehabilitation medicine, Peter Esselman, M.D., was of the opinion that
21 there did "not appear to be any significant permanent restrictions due to the cognitive
22 impairment." In December 2005, Dr. Esselman noted: "The patient also reports no cognitive
23 symptoms related to his head injury and no complaints of memory problems." However, in
24 2006, in the months before Mr. Jones initiated legal proceedings, complaints of cognitive

**SECOND DECLARATION OF
ROY D. CLARK, JR., M.D. - 6**

**CARNEY
BADLEY
SPELLMAN**

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1 problems reappeared in the medical records. In addition, in 2008, neuropsychologist David
2 Coppel, Ph.D., evaluated Mr. Jones and found that his cognitive abilities had declined since
3 the 2004 evaluation.

4 14. Cognitive problems from organic brain injury get better over time, not worse.
5 Dr. Coppel thus attributed the decline to increased depression due to chronic pain and limited
6 mobility. In 2009, Glenn Goodwin, Ph.D. performed another neuropsychology evaluation of
7 Mr. Jones and concurred with Dr. Coppel's conclusion. Because the surveillance video
8 negates the existence of significant chronic pain or mobility limitations (see Dr. Ted Becker's
9 report), it calls into serious question whether there was any real cognitive decline post-2005
10 or whether Mr. Jones simply became familiar with the testing protocols and was able to
11 exaggerate or fake his symptoms. This is a recognized risk of repeat testing.

12 15. I have reviewed Dr. Becker's report in this case and find it confirmatory of my
13 independent conclusion that Mr. Jones was malingering during our examination.
14 Biomechanical analysis based on surveillance video is commonly done and is considered
15 particularly useful in detecting malingering because it permits a physical capacities evaluation
16 based on the claimant's activities in a normal setting. If I had any doubt regarding the
17 validity of the methods used by Dr. Becker or his conclusions, I would not have
18 recommended that the City contact him to evaluate Mr. Jones' biomechanical functions based
19 on the video, nor would I rely on his conclusions. Dr. Becker is regularly called upon for his
20 biomechanics expertise when surveillance evidence is obtained, and his report in this case is
21 of similar kind and quality as his reports I have relied upon in previous matters.

22 16. In reviewing the surveillance video as well as Mr. Jones' deposition testimony,
23 neither of which was available at the time of the panel examination, I learned that Mr. Jones
24 consumes alcohol regularly. When I asked Mr. Jones about his alcohol consumption habits at

**SECOND DECLARATION OF
ROY D. CLARK, JR., M.D. - 7**

**CARNEY
BADLEY
SPELLMAN**

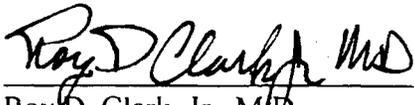
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1 the panel examination, he stated that he did not drink alcohol, noting that his mother was an
2 alcoholic. Panel Report p. 41. Now that I am aware of Mr. Jones' historical use and
3 apparently present abuse of alcohol (in combination with morphine), this raises serious
4 concerns about whether cognitive deficits, if present, were related to alcohol and/or opioid
5 abuse.

6 17. Although I would welcome the opportunity to re-examine Mr. Jones, it is my
7 understanding that a new panel has been formed to evaluate Mr. Jones. Nevertheless, having
8 reviewed the 11.3 hours of surveillance footage, I am able to conclude on a more probable
9 than not basis that Mr. Jones does not have impairments consistent with my conclusions in
10 the Panel Report and is not so affected by the residuals of traumatic brain injury that he needs
11 a personal attendant to negotiate his daily activities. I am convinced that my diagnosis of
12 permanent mental health impairment was based on a deception.

13 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF
14 THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND
15 CORRECT TO THE BEST OF MY KNOWLEDGE.

16 DATED this 28th day of September, 2010, at Seattle,
Washington.

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19 _____
Roy D. Clark, Jr., M.D.

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24
SECOND DECLARATION OF
ROY D. CLARK, JR., M.D. - 8

CARNEY
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APPENDIX G

Evidence of Mark Jones' Knowledge and Choices



Evidence will be:



What Mark Jones Knew:

- He knew the location of the pole hole door, and its available chain
- He knew Station 33, having been on prior shifts there
- Typical firefighter is in bunk room at least 4-5 times per shift before lights out at night

- He failed to distinguish between the separate, different doors
- He took the wrong direction and to the wrong door
- Did not proceed with "situational awareness"
- Did not proceed carefully and cautiously in low light conditions
- He failed to heed the "CAUTION POLE HOLE" sign
- He began to push open the heavy, spring-tensioned, caution-signed guard door
- He failed to notice the light coming up from below, illuminating the pole hole
- He continued to push open the door anyway, failing to notice he's entering wrong room
- At some point turned to left instead of properly using the step-in platform landing straight ahead
- Stepped on into the left offset pole hole without heeding the uplighting
- No evidence that he properly gripped the fire pole to control, slow, or stop his descent

Pltf. / Def. Exhibit # 521
06-2-39861-1 SEA

Meg Jones as Guardian of Mark Jones

vs.

City of Seattle

FILED

KING COUNTY, WASHINGTON

OCT 12 2009

SUPERIOR COURT CLERK
BY LEANNE SYMONDS
DEPUTY

Instructive
Not to go to Jury

APPENDIX H

JONES, MARK E H2350849
Rehab Clinic - Outpt Record Authenticated
Service Date: May-12-2010
Dictated by Esselman, MD, Peter C on May-12-2010

64138

CHIEF COMPLAINT:

The patient is a 46-year-old man status post traumatic brain injury and other traumatic injuries in work-related fall on 12/23/2003. He returns today for routine follow-up.

INTERVAL HISTORY:

The patient's problems continue. He has ongoing pain, primarily on his right side. He is concerned about some water retention and some lower abdominal pain and is seeing his primary care provider today.

The patient continues to participate in a home exercise program. He and his sister reported to me today that they now have a treadmill and he is able to go for up to 15 minutes at a very slow walking speed. He also participates in a therapy pool when they are able.

SOCIAL HISTORY:

The patient continues to be supported by his sister, who is at the clinic visit today.

PHYSICAL EXAMINATION:

Vital signs: Blood pressure 166/109, pulse 74, temperature 36.6. General: The patient is alert and in no acute distress. His affect is fair today. Examination of his gait shows him to have a shuffling gait pattern but no loss of balance.

ASSESSMENT AND PLAN:

The patient is a 46-year-old male, who continues to have multiple problems related to his traumatic injury sustained on 12/23/2003. I spent a good deal of time today with the patient and his sister discussing ongoing disability issues and coverage of ongoing medical care. The patient clearly is unable to work in any capacity at this time and will require life-long medical management for multiple issues.

We did discuss that the patient could follow-up with Dr. Jo Ann Brockway, the Rehabilitation Psychologist at Harborview Medical Center.

I also discussed with the patient that I am stopping my Outpatient Rehabilitation Clinic. My role over the past couple years has primarily been one of coordination of care. Dr. Friedman continues to monitor his pain and pain pump, Dr. Hudson is following his pulmonary issues, and the patient does have a primary care physician. At this time I will not refer him to another outpatient Rehabilitation physician. I did give the patient my card and that, if he needs to be seen sometime in the next six months to year, I would be happy to schedule him in to be seen on an add-on basis.

I spent 35 minutes with the patient with greater than 50% of the time in counseling and coordination of care.

Signature Line

Electronically Reviewed/Signed On: 05/26/10 at 11:10

Esselman, MD, Peter C
Attending, Dept. of Rehabilitation
Box 359740
Seattle, Wa

APPENDIX I

Jones v. City of Seattle
Court of Appeals Case No. 65062-9-1
King County Superior Court Case No. 06-2-39861-1-SEA

TIMELINE

Date	Narrative	Page No.
1999	The City hires Mark as a firefighter.	RP (Sept. 29, 2009-A) at 104
2/2002	Mark drinking 4-10 beers at a time a couple times a week, drinking more as time went on, and fighting with Ann when drinking.	CP 394-401
11/04/2003	Mark arrested for driving under the influence while returning from hunting trip with firefighter friend.	CP 333-37, 412
Thanks-giving 2003	Mark's firefighter friends note that Mark not drinking at poker party over the Thanksgiving holiday.	CP 1830-31, 1834
12/2003	Mark reports drinking 3-4 beers on at least the Friday nights of December. Ann did not think he drank after his DUI arrest, recalled him going to AA with his daughter.	CP 89, 400-01, 412-413
12/20/2003	Ann's birthday dinner at fire station where Mark was working.	CP 402
12/21/2003	Mark's firefighter friend recalls Mark drinking root beer at dinner but does not address whether Mark had anything to drink while they were unloading a pig into his garage.	CP 1830-31
12/21/2003	Mark and Ann fighting; Mark retreats to garage alone.	CP 401
12/22/2003	Mark reports to work at Station 33.	RP (Sept. 29, 2009-A) at 117
12/23/2003	Mark pushes through the pole hole door of Station 33, falling down the hole at approximately 3:00 a.m.	Ex. 75
12/23/2003	Mark tests negative for alcohol in emergency room.	CP 1788
12/26/2003	Physician Orders for Alcohol Withdrawal initiated at 10:00 a.m.	CP 317-322
01/24/2004	Mark instructed to avoid alcohol during recovery by Dr. Esselman.	CP 1075
2004	Dr. Esselman oversees Mark's initial rehabilitation and is "optimistic early on[.]"	RP (Sept. 16, 2009) at 64
3/31/2004	Mark reports not drinking since November 2003 at court ordered alcohol assessment.	CP 2722

Date	Narrative	Page No.
9/15/2004	Mark undergoes a neuropsychological evaluation, which finds that his “cognitive abilities are generally within or exceed normal expectations for his age and education level. This is consistent with his report of near complete recovery of cognitive functioning.”	CP 10484-89
9/29/2004	Mark pleads guilty to negligent driving arising from DUI arrest.	CP 1812-13
12/2004	Dr. Friedman became Mark’s pain management doctor.	RP (Sept. 17, 2009-A) at 9-10
5/2004-6/2006	Mark receives physical therapy from his father in Montana.	CP 4072-73
12/17/2004	Joe Kane, Mark’s firefighter friend, reports that Mark can’t have just one drink once he starts.	CP 525
Late-2004 - Early-2005	Dr. Friedman notes that Mr. Jones’ recovery was “going forward and it looked like maybe he was going to get back to work and maybe he was going to function more normally. Then he was doing really well.”	RP (Sept. 17, 2009-A) at 53-55
Early 2005	Mark is mentally “good to go” as firefighter.	CP 164
2/25/2005	Dr. Friedman notes that Mark is functioning at a significantly improved level.	CP 2732-34
3/01/05	Dr. Friedman notes excellent progress, with concerns about Mark returning to firefighter job.	CP 2736
3/08/2005	Dr. Friedman notes that Mark is doing progressively better, reporting minimal pain and feeling great.	CP 2738
Mid-2005	Mark’s recovery appears to have stalled for a period, discussion of pain pump.	RP (Sept. 17, 2009-A) at 34; 2741-44, 2746-47
Spring 2005	Mark hedge-trimming on a ladder for an entire day.	CP 4065
9/28/2005	Dr. Esselman notes that there did “not appear to be any significant permanent restrictions due to the cognitive impairment.”	CP 10494
12/15/2005	Dr. Friedman notes that Mr. Jones was “remarkably better” and “breathing fully[.]”	CP 2411

Date	Narrative	Page No.
12/21/2005	Dr. Esselman is "very encouraged" by Mark's improvement, thinking that he could conceivably return to full time work at some point. Dr. Esselman notes that Mark "reports no cognitive symptoms related to his head injury and no complaints of memory problems."	RP (Sept. 16, 2009) at 37-38, 64-66; CP 10496-97
1/2006	Mark's general upward trend continues -- things "going extraordinarily well for him."	RP (Sept. 17, 2009-A) at 128; CP 2413-14
3/14/2006	Mark still reporting progress and overall is still moving forward through ups and downs. Making "super gains" before April 2006.	CP 156, 2417
3/2006	Mark reportedly not drinking through March 2008.	CP 91
3/2006-1/2007	Mark working light duty at Dispatch through roughly January 2007 after leaving Medic One.	RP (Sept. 28, 2009) at 210, 216
4/2006	Mark separates from Ann and moves in with Meg (who begins going to his appointments) and continues drinking upwards of ten or so beers per episode.	CP 108, 410; RP (Oct. 7, 2009) at 32
5/03/2006	Mark starts reporting increased pain and, according to Meg, is in "pretty bad shape."	CP 155, 2419
5/2006	Mark drinks 14-16 beers over a 5-6 hour period and wants to drive away with his son while drunk.	CP 410-21
7/07/2006	Dr. Friedman doubts Mark's ability to return to full time work for the first time.	CP 2766; RP (Sept. 17, 2009-A) at 36
7/18/2006	Dr. Friedman discusses Mark's condition and prognosis at the request of Mark's attorney.	CP 2768
10/24/2006	Mark and Meg decide that he cannot work.	CP 2420
11/2006	Dr. Esselman opines for the first time that Mr. Jones would not be able to work on a reasonably continuous basis in gainful employment.	RP (Sept. 16, 2009) at 34-35
12/22/2006	Mark sues the City.	CP 5-8

Date	Narrative	Page No.
2007	Medical records show Mark and Meg reporting a bleak picture of his condition; Mark testifies that his condition was getting worse from roughly mid-2006 through March 2008	CP 84-5, CP 2774-84
1/08/2007	Mark has a morphine pain pump implanted and, according to Meg, undergoes a “pretty steady downhill slide.”	CP 155, 2772
2/06/2007	Dr. Friedman and Dr. Esselman agree that Mark is never going to make it back as a firefighter.	CP 2774
10/01/2007	Initial trial date stricken and the case stayed pending the Washington Supreme Court’s decision in <i>Locke v. City of Seattle</i> .	CP 7899-7900
1/2008	Trial re-set for June 16, 2008.	CP 7901-04
1/2008	The City hires investigator Jess Hill to enhance its ongoing discovery efforts.	CP 8203, 8679
2/2008	Mark answers the City’s first set of interrogatories, references his medical records in response to question about injuries.	CP 7417-22
2/28/2008	Mark undergoes independent medical examination conducted by William Stump, MD, neurology, James F. Green, MD, orthopedic surgery; and Roy D. Clark, Jr., MD, psychiatry. The panel finds him totally disabled.	CP 10022-89
2/2008	Mr. Hill completes background inquiry on Mark.	CP 8679
3/06/2008	The City deposes Mark.	CP 69-108; Deposition Video
3/10/2008	The City deposes Meg.	CP 131-74
3/26/2008	Mr. Hill conducts 7.5 hours of surveillance at the address given by Mark in his deposition.	CP 8204
4/18/2008	Mr. Hill conducts 6 hours of surveillance at the address given by Mark in his deposition.	CP 8204
4/22/2008	Mr. Hill conducts 7.5 hours of surveillance at the address given by Mark in his deposition.	CP 8204

Date	Narrative	Page No.
4/29/2008	Mr. Hill conducts 5 hours of surveillance at the address given by Mark in his deposition.	CP 8024
5/02/2008	Judge Canova grants a joint motion to continue the trial date to December 1, 2008.	CP 7941
5/05/2008	Mediation occurs.	CP 8012
5/2008	Mark's original lawyer withdraws.	CP 7954, 8052
Mid-2008	Over 13,000 pages of documents have been produced in discovery.	CP 7936-37
5/2008	Mr. Hill hires two investigators in Montana to conduct 18.5 hours of surveillance related to Mark's daughter's high school graduation, hires Idaho investigators to search for possible dissolution files and to interview former employers, attempts to contact Mark's first wife, and contacts Ann, who does not grant interview.	CP 8204, 8701-04, 8706-07, 8688-89, 8696, 8698
6/17/2008	Dr. Friedman reviews IME report and agrees with conclusion that Mark is not capable of working.	CP 1976
6/30/2008	Dr. Coppel issues report from his CR 35 neuropsychological evaluation of Mark, concludes that his neurocognitive functioning had declined since 2004, but finds it "unlikely" that the recorded decline in neurocognitive functioning resulted from his December 2003 injury.	CP 10501-15
7/21/2008	Judge Canova grants Mark's motion to continue trial date. Trial date set for September 8, 2009.	CP 8076-77
7/31/2008	Meg appointed guardian for Mark by Snohomish County Superior Court.	CP 19
11/12/2008	Meg substituted for Mark as plaintiff.	CP 21
2/2009	Stafford Frey Cooper appears for the City.	CP 23
4/06/2009	Plaintiff listed Gordon in disclosure of possible primary witnesses, describing him only as Mark's father.	CP 7570
5/2009	The City re-engages Mr. Hill to conduct four investigative tasks, including canvassing Mark's former neighborhood and locating Ann.	CP 8204-05, 8768, 8770
5/04/2009	The City moves to take its second deposition of Mark.	CP 49

Date	Narrative	Page No.
5/04/2009	Dr. Goodwin reports Mark's "fake bad score" of 30.	CP 10528
5/07/2009	Meg declares that Mark's "overall condition is roughly the same . . ."	CP 268
5/15/2009	On May 15, 2009, Judge Canova denies the City's motion to compel a second day of deposition of Mark Jones.	CP 292
5/26/2009	The City moves for reconsideration of the order denying a second deposition.	CP 10566-77
5/29/2009	The City deposes Ann.	CP 390-432
6/12/2009	The City replies in support of its motion to reconsider the order denying a second deposition.	CP 530-36
6/15/2009	Judge Canova denies the City's motion to reconsider his ruling denying a second deposition.	CP 537-38
Summer 2009	Mark building shelves and hauling a kayak around.	CP 3779-80, 4065
July 2009	Meg tells Beth "first things first" when asked about getting help for Mark's alcoholism.	CP 3794, 4064
7/02/2009	The City moves for summary judgment on proximate causation.	CP 607-21, 1228-33
7/20/2009	Plaintiff opposes the City's motion for summary judgment on proximate causation.	1174-97
7/21/2009	The City deposes Meg for a second time.	CP 9819-57
7/29/2009	Before Judge Craighead, the City renews its motion that Mark be compelled to attend a second deposition.	CP 1235-1247
7/30/2009	Plaintiff opposes second deposition on basis that nothing supporting Judge Canova's rulings had changed.	CP 10595
7/31/2009	The trial court denies the City's motion for summary judgment	CP 1322; RP (July 31, 2009) at 18-19
August 2009	Mark hunting, partying, and camping in Montana.	CP 4068-69

Date	Narrative	Page No.
8/6/2009	Dr. Lisa McIntyre does not remember Mark but declares that the ordering of the initiation of alcohol withdrawal orders does not necessarily mean that there has been a diagnosis of alcohol withdrawal.	CP 1817
8/07/2009	Discovery cut-off.	CP 1481
8/14/2009	Mark declares that he does not recall drinking at all between his DUI arrest and his fall.	CP 1931
8/26/2009	Declaration from Plaintiff's expert, Dr. Russell Vandebelt, in support of Plaintiff's theory that Mark was not suffering symptoms of disorientation from alcohol withdrawal when he fell. Declaration from Dr. Friedman in support of Plaintiff's theory that Mark's drinking did not affect his recovery.	CP 1838-48, 1873-76
8/28/2009	Meg moves <i>in limine</i> to exclude all evidence of Mark's drinking.	CP 1763-82
9/02/2009	The City opposes Meg's motion to exclude alcohol evidence.	CP 2269-84
9/02/2009	Joint Statement of Evidence.	CP 7635-85
9/03/2009	Plaintiff's reply in support of alcohol motion in limine.	CP 2692-705
9/04/2009	The trial court excludes alcohol evidence, subject to one exception and further offers of proof.	RP (Sept. 4, 2009) at 110-18
9/07/2009	Meg driving Mark from one bar to another; investigators find Mark drinking at Bert's Tavern in Mill Creek.	CP 4309-11, 4313-18
9/08/2009	The City submits supplemental briefing on alcohol.	CP 2827-31
9/08/2009	Jury selection begins.	RP (Sept. 8, 2009)
9/10/2009	Ms. Winquist contacts Beth.	CP 3777-78, 8207
9/11/2009	Dr. Rudolph testifies during an offer of proof hearing.	RP (Sept. 11, 2009) at 3
9/11/2009	The City presents Beth in court for an offer of proof and discloses that Mark was found in a bar.	RP (Sept. 11, 2009) at 103, 114-15

Date	Narrative	Page No.
9/11/2009	Trial court refuses to change ruling excluding alcohol.	RP (Sept. 11, 2009) at 144
9/13/2009	Beth deposed.	CP 3772-3801
9/14/2009	Opening statements. Trial court refuses to change ruling excluding alcohol. Plaintiff's counsel explains that Mark was just dropped off at Bert's Tavern to play with their horseshoe team.	RP (Sept. 14, 2009) at 104-11
9/17/2009	The City examines Dr. Friedman during an offer of proof outside of the presence of the jury.	RP (Sept. 17-A, 2009) at 123-35
9/21/2009	Meg calls Dr. Stump in her case in chief.	RP (Sept. 21, 2009) at 144-49
9/22/2009	The City examines Mr. Choppa during an offer of proof outside of the presence of the jury.	RP (Sept. 22, 2009) at 168-73
9/24/2009	The City files supplemental briefing supporting admission of alcohol evidence.	CP 3747-67
9/26/2009	Plaintiff's counsel telephones Gordon to say that that City is getting pretty desperate and that "there is nothing they should need from you."	CP 4060-61
9/27/2009	Gordon declares that Mark needs treatment for his alcoholism, not a full-time caregiver.	CP 4074
9/29/2009	The City moves to call Gordon and Beth; trial court denies motion.	CP 4079-83; RP (Sept. 29, 2009-A) at 3-28
9/29/2009	Mark testifies.	RP (Sept. 29, 2009) at 92-143
9/30/2009	The trial court re-iterates its opposition to allowing Gordon to testify.	RP (Sept. 30, 2009) at 10-11, 67-72
10/01/2009	Meg testifies; the trial court refuses to change its ruling on alcohol evidence.	RP (Oct. 1, 2009) at 81-98
10/08/2009	The City calls Mark and Ann. The trial court instructs Ann on the limits of her testimony and does not change its ruling on alcohol.	RP (Oct. 8, 2009) at 148-53, 208

Date	Narrative	Page No.
10/08/2009	The trial court does not change its ruling excluding Gordon.	RP (Oct. 8, 2009) at 209-16
10/12/2009	The City renews its motion to call Gordon.	CP 4224-29
10/12/2009	The City moves to present surveillance evidence.	CP 4276-80
10/12/2009	The City submits rebuttal witness disclosures.	CP 4339-40
10/14/2009	The trial court does not change its ruling excluding Gordon.	RP (Oct. 14, 2009) at 9-12.
10/14/2009	Dr. Stump deposed and offer of proof taken during deposition.	CP 4647-66
10/14/2009	The trial court denies the City's motion to present surveillance evidence.	RP (Oct. 14, 2009) at 16-17
10/20/2009	Dr. Stump deposition read to the jury without offer of proof.	CP 8607-08, 8647-64
10/20/2009	Closing Arguments.	RP (Oct. 20, 2009)
10/22/2009	The jury returns a verdict for Mark, awarding him \$12.75 million in damages, including \$2.4 million for lifetime care. The jury found the City negligent and did not find Mark contributorily negligent.	CP 4730-32
11/20/2009	The City moves for a judgment as a matter of law and a new trial under CR 59.	CP 4906-22
12/14/2009	The trial court hears argument on the motion for a new trial.	RP (Dec. 14, 2009)
1/20/2010	The trial court denies the City's motion for a new trial.	CP 7806-16. 7838-42
1/22/2010	The trial court enters judgment on the verdict.	CP 7817-18
2/19/2010	The City files a notice of appeal.	CP 7828-29
4/18/2010	Investigators conduct surveillance of Mark.	Ex. Sub No. 466A; CP 10138-40

Date	Narrative	Page No.
4/19/2010	Investigators conduct surveillance of Mark.	Ex. Sub No. 466A; CP 10140-43
4/22/2010	Investigators conduct surveillance of Mark.	Ex. Sub No. 466A; CP 10143-47
4/23/2010	Investigators conduct surveillance of Mark.	Ex. Sub No. 466A; CP 10147-50
4/24/2010	Investigators conduct surveillance of Mark.	Ex. Sub No. 466A; CP 10150-58
4/25/2010	Investigators conduct surveillance of Mark.	Ex. Sub No. 466A; CP 10158-64
5/12/2010	Mark presents to Dr. Esselman as continuing to have multiple problems.	CP 9535
6/02/2010	Investigators conduct surveillance of Mark.	Ex. Sub No. 466A; CP 10168-75
6/03/2010	Investigators conduct surveillance of Mark.	Ex. Sub No. 466A; CP 10175-76
6/04/2010	Investigators conduct surveillance of Mark.	Ex. Sub No. 466A; CP 10176-79
6/05/2010	Investigators conduct surveillance of Mark.	Ex. Sub No. 466A; CP 10179-82
6/25/2010	The City moves to vacate the judgment under CR 60(b).	CP 8181-202
8/03/2010	Dr. Clark declares that he no longer stands by his opinion that Mark is totally and permanently disabled.	CP 8267-71

Date	Narrative	Page No.
8/03/2010	Dr. Becker performs applied biomechanical analysis of the surveillance video, concludes that Mark's biomechanical functions and cognitive motor skills are within normal limits.	CP 10183-10361
8/04/2010	Dr. Stump retracts his opinion that Mark is totally and permanently disabled.	CP 8272-76
8/04/2010	The City supplements its motion to vacate the judgment.	CP 8235-40
8/25/2010	The Worker's Compensation Unit of the Personnel Division of the City of Seattle schedules independent medical examinations for Mark.	CP 9468-70
8/30/2010	Meg declares that she is worn down but does not address Mark's condition as shown on the surveillance videos.	CP 8794-8800
9/03/2010	Dr. Goodwin reviews portions of the City's surveillance video and declares that none of his opinions have changed.	CP 8792-93
9/10/2010	Mark does not appear for his appointment to be examined by Dr. Becker as part of the independent medical examination ordered by the Workers Compensation Unit.	CP 9463-64, 9471-72
9/15/2010	Dr. Friedman declares that Mark has made a "remarkable recovery physically" but that he does not feel deceived by Mark and Meg.	CP 8355-62
9/16/2010	Dr. Esselman declares that there is nothing shown that changes his mind.	CP 8823-32
9/16/2010	Mr. Choppa declares that his opinion has not changed.	CP 8827-35
9/20/2010	Meg opposes the City's motion to vacate the judgment.	CP 9263-9313
9/22/2010	Mark does not appear for an independent medical examination ordered by Workers Compensation Unit.	CP 9474
9/22/2010	Dr. Becker rebuts the declarations supporting Meg's opposition to the motion to vacate and declares this case presents as "stark and extreme a case of inconsistency as [he has] ever encountered."	CP 9459-64
9/23/2010	Mark does not appear for an independent medical examination ordered by Workers Compensation Unit.	CP 9477

Date	Narrative	Page No.
9/28/2010	Dr. Clark rebuts the declarations supporting Meg's opposition to the motion to vacate and declares that "his diagnosis of permanent mental health impairment was based on a deception."	CP 9451-58
9/30/2010	Dr. Stump rebuts the declarations supporting Meg's opposition to the motion to vacate and reiterates his conclusion that Mark is malingering.	CP 9485-89
9/30/2010	The City replies in support of its motion to vacate the judgment.	CP 9417-48
10/18/2010	The trial court denies the City's motion to vacate the judgment.	CP 9778-87
10/19/2010	Notice of Appeal to the Court of Appeals, Division 1	CP 9788-99