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

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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

Respondent,

v.

CITY OF SEATTLE,

Appellant.

BRIEF OF RESPONDENT

Honorable Judge Susan Craighead

MASTERS LAW GROUP, P.L.L.C.
Kenneth W. Masters, WSBA 22278
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

Attorneys for Respondent

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INTRODUCTION

In 96 pages challenging six highly discretionary rulings, the City gives short shrift to Judge Craighead's careful decisions, ignoring her informed discussion in favor of short, out-of-context snippets. The City also ignores overwhelming evidence supporting Judge Craighead's rulings. The City even fails to disclose controlling authority contrary to its witness disclosure arguments.

Judge Craighead correctly excluded alcohol evidence. The City's "withdrawal" theory was entirely speculative. And Mark's doctors opined that post-fall alcohol consumption did not impact Mark's recovery. The City offered nothing to the contrary.

Judge Craighead correctly excluded witnesses the City failed to disclose until the middle of trial. There is no good cause – the City just eschews responsibility for its failure to do timely discovery. The prejudice caused by its trial-by-ambush tactics is obvious.

And Judge Craighead correctly denied the City's CR 60(b) motion. New evidence does not include evidence the City knew about, but failed to pursue. Expert opinions in the City's favor are not clear and convincing evidence, where all of Mark's doctors and medical experts stand by their opinions that Mark is totally disabled.

This Court should affirm.

RESTATEMENT OF ISSUES

1. “Pre-trial Surveillance” – Was the Honorable Susan Craighead well within her broad discretion in rejecting testimony from a personal investigator whom the City disclosed in the middle of trial – 2.5 weeks after she surveilled Mark¹ – particularly where the City had previously surveilled Mark and refused to make its investigator available for the court-ordered deposition?
2. “Witness With Knowledge Discovered During Trial” – (a) Was Judge Craighead well within her broad discretion in excluding Beth Powell, whom the City knew about since at least March 2008, but failed to timely disclose? (b) Was Judge Craighead well within her broad discretion in excluding Gordon Jones, whom the City knew about since 2005, but failed to include on its witness and exhibit list, and failed to identify as a City witness on the joint statement of evidence?
3. “Alcohol Evidence Bearing on Causation and Fault” – Did Judge Craighead properly exclude speculation that Mark might have been unusually disoriented due to alcohol withdrawal when he fell,² where Dr. Rudolph readily acknowledge that there was no evidence that Mark consumed alcohol in the days and weeks before the fall, such that he could not know if Mark was actually withdrawing from alcohol?
4. “Alcohol Evidence Bearing on Damages” – Did Judge Craighead properly exclude some – but not all – of the evidence on Mark’s post-accident drinking, where (a) the City provided no expert testimony or offer of proof linking drinking to a decreased quality of life or failure to mitigate damages; (b) the City failed to affirmatively plead failure to mitigate, and only belatedly changed to arguing a decrease

¹ To avoid confusion, this brief uses first names for Mark, Meg, Gordon, and Ann Jones.

² Dr. Rudolph actually backed off his opinion that Mark was withdrawing, stating the he was suffering from early stages of withdrawal. 09/11 RP 36-37.

in Mark's quality of life; (c) such evidence is highly prejudicial; and (d) Mark's doctors opined that alcohol did not affect his recovery?

5. "Ground for New Trial Under CR 60(b)" – Did Judge Craighead properly exercise her broad discretion in denying the CR 60(b) motion, where (a) the video surveillance does not show Mark doing anything that the City did not already know he could do; and (b) Mark's own doctors stood by their opinions that he is permanently disabled, cannot work, and cannot live independently?
6. "Test for Due Diligence Under CR 60(b)" – Where there were no "falsehoods" in the discovery process, did Judge Craighead correctly deny the City's request for a do-over?

STATEMENT OF THE CASE

- A. **After getting up in the middle of the night to use the bathroom, firefighter Mark Jones fell 15.5-feet down an unguarded pole hole onto a concrete floor.**

Firefighter Mark Jones was "detailed" (on loan) at Station 33 on December 22 and 23, 2003. 09/15 RP 179; 09/29 RP 116-18. After Mark cooked dinner for the other firefighters, he and firefighter Kevin McSherry went to sleep in the second-floor bunkroom at about 10:00 or 10:30 p.m. 09/15 RP 182-83, 193; 09/29 RP 119. McSherry awoke to a strange noise – like a moan or a groan – at about 3:00 in the morning. 09/15 RP 183-84. Concerned that Mark was not in his bunk, he got up to look for him, finding Mark lying a few feet from the base of the pole, calling for help. *Id.* at 184.

McSherry and the two other firefighters on duty, Roy Witt and acting Lieutenant Mason Phelps, went into “firemen mode,” calling a medic and assessing and stabilizing Mark. *Id.* at 182, 186, 208-09; 09/16 RP 135. Mark told medic Daniel Bachmeier that he was “really hurt” and that he had gotten up to use the bathroom and must have fallen down the pole hole. 09/17 RP 149-50.³

B. The bunkroom lighting and configuration made it impossible to distinguish between the bathroom door and the pole-hole door.

1. The bunkroom was pitch black.

Battalion Chief Richard Verlinda, one of four Safety Chiefs in the Seattle Fire Department (SFD), and Chief John Gablehouse, supervising chief of health and safety, investigated Mark’s fall. 09/17 RP 163, 165-66; 09/24 RP 89, 105. The investigation revealed that the pole-hole light was burned out and had been for quite some time. 09/17 RP 187-88; 09/24 RP 64, 107, 110-11. Firefighters and Station Captain Raul Angulo mistakenly thought the light – when working – was only supposed to come on during

³ The City complains that no “records” confirm Bachmeier’s testimony. BA 11. Bachmeier did not write down Mark’s statement because it was not pertinent to his in-field diagnosis and was not something the receiving physician at the hospital would need to know. 09/17 RP 152-53.

an alarm. 09/17 RP 188; 09/21 RP 209. But the light should have been on at all times. *Id.*

The SFD investigation concluded that the bunkroom was “extremely dark.” 09/24 RP 108, 110. Firefighters who regularly slept in the bunkroom universally agreed that it was extremely dark. 09/15 RP 214 (you could only make out general shapes); *Id.* (it was impossible to see the warning sign); 09/24 RP 8-9 (you could not see the person in the bunk next to you and could not read the sign on the pole-hole door); 09/30 RP 41 (the bunkroom was “extremely dark”); 10/01 RP 42-43, 47-48 (the bunkroom is “pretty much pitch black”).

2. The bathroom door and pole-hole door – which looked very similar – were located on the same wall mere feet from one another.

The hallway and pole-hole doors are located on the same bunkroom wall, just 6.5-feet apart. 09/17 RP 176, 178; 09/24 RP 148. Station 33 is the only Seattle Station that has a pole-hole door on the same wall as an exit door. 09/24 RP 9, 178. The pole-hole door and exit door “are very similar . . . [T]here’s very little distinguishing between the two.” 09/24 RP 108; *see also* 09/17 RP 177. The absence of any “visible indications” distinguishing the two

doors led the SFD investigators to conclude that Mark was not a cause of the fall. 09/17 RP 178-79.

C. After a prior fall down the same pole hole gave the City notice of the fall risk at Station 33, the City put a chain across the pole-hole entry to prevent further accidents.

In 1976, Firefighter Ed Swan fell down the same pole hole Mark fell down. 09/14 RP 161; CP 710, 905. The City recognized that the pole-hole door and the warning sign were insufficient to prevent someone from inadvertently entering the pole hole. 09/14 RP 197. In response to Swan's fall, the City added a chain across the pole-hole door to prevent further accidents. *Id.* at 161; 09/24 RP 104-05. The chain was the height of a standard deck rail and had a simple pull-back latch that hooked into an eyelet mounted on the door-frame. 09/14 RP 201; 09/24 RP 179; Ex 89, p.7.

D. But the City long ago stopped using the chain – if it had been up, Mark would not have fallen.

The City never did anything to ensure that the chain was used. 09/14 RP 198; 09/15 RP 212; 09/17 RP 179; 10/12 RP 148, 158. Captain Angulo, who was stationed at 33 for 7-to-8 years before Mark fell, did not know that the chain was supposed to be up other than when civilians were visiting. 09/14 RP 200; 10/14 RP

152; 10/15 RP 19. The chain was almost always down, including when Mark fell:

- ◆ McSherry – has never seen the chain up. 09/15 RP 181. It is always “dangling,” including the day Mark was injured. *Id.*
- ◆ Stanley – the chain was almost always down. 10/01 RP 52.
- ◆ Phelps – does not recall the chain ever being up. 09/15 RP 230. He never put the chain up and never saw anyone else put it up. *Id.*

Safety Chiefs Verlinda and Gablehouse agreed that the chain should have been put back each time it was taken down to use the pole hole. 09/17 II RP 18, 20, 25-26; 09/24 RP 98-99. When the chain was not used, the pole-hole door was no safer than when Swan fell. 09/14 RP 198. The chain “would have” stopped Mark’s fall. 09/14 RP 201-03; 09/17 II RP 13; 09/24 RP 112.

E. This fall cut far short Mark’s lifelong dream of being a firefighter.

Like many young boys, Mark always wanted to be a firefighter. 09/29 RP 103. Mark was a natural athlete and outdoorsman, beginning work as a logger when he was just 14-years old. *Id.* at 93-96. After college, he joined the Air Force, serving as a crew chief and later a sergeant on the F-111. *Id.* at

97-98.⁴ Following his honorable discharge from the Air Force, Mark worked for two Idaho police departments – one with the SWAT team – leaving to go into business with his parents. *Id.* at 99-101.

Mark's twin sister, Meg, often encouraged him to join her in the SFD, and he "made [the] leap" when the family business failed. 09/29 RP 103; 10/01 RP 94. Mark moved in with Meg and was accepted into drill school in 1999. 09/29 RP 104; 10/01 RP 97-98. Mark loved everything about firefighting (09/29 RP 115):

. . . It's one of the most rewarding things I think I've ever done in my entire life, you know, make a difference in somebody's life, very few of us – very few of us are ever picked to do this.

I was very fortunate that I got to be picked to do it for a portion of my life, and I am very honored about doing that

F. Mark was bright, quick-witted, and an excellent firefighter – the guy other firefighters wanted to be next to on the scene.

Before his tragic fall, Mark lit up a room. 09/30 RP 32-33. Everyone liked Mark – he was quick-witted, bright, warm and engaging. 09/30 RP 32-34, 161; 10/01 RP 72, 115. He was always in a great mood, befriending everyone with a smile and his signature nickname – "home skillet." *Id.*

⁴ During this time, Mark married and had three children, now all adults living in Montana. *Id.* at 97-98.

Mark was attractive, physically fit and “very strong,” appearing in the SFD calendar. 10/01 RP 16, 72; Ex 96/39. He was a great athlete, wrestling and playing basketball in high school, and playing football in high school and for one season in college. 09/29 RP 93-95; 10/01 RP 115; Ex 96/6. Chief Tom Richardson laughingly recalled wrestling with Mark at the Station – Mark soundly “thrumped” him. 10/01 RP 72.

An avid outdoorsman, hunter and fisherman, Mark was the type of guy who could be dropped in the middle of the woods and find his way out. 09/28 RP 211-12; 10/01 RP 99; 10/07 RP 80; Ex 96/5. He did just about everything one could do outside: water skiing, snow skiing, horseback riding, fishing, shooting, camping, and hunting. 09/29 RP 93; 10/01 RP 102; Ex 96/13 & 15.

Mark was “an excellent firefighter” – “very aggressive” and “very helpful.” 09/30 RP 34; 10/01 RP 72. He was “a worker” – one of the highest compliments in the SFD. 09/30 RP 161; 10/01 RP 72. He was always first on the scene, and always got the job done. 09/30 RP 162-64. He never complained. *Id.* at 161.

Other firefighters wanted to be next to Mark on the scene:

Mark Jones was hardworking, a go-getter, not afraid to get his hands dirty. In the military they have a term, someone you want in the foxhole with you. Mark Jones was hard-charging, fearless, someone you want to have with you on the fire, physically can do the job, was a great fireman.

09/30 RP 189-90; 10/01 RP 13. It is difficult to imagine that one could actually feel safe charging into a burning building, but they did with Mark next to them (10/01 RP 13):

He was that guy that you wanted in that fire, he was that guy, he was a hard-working guy, dedicated, loyal, that guy I wanted to be. . . . I never felt that my life was in jeopardy when we were going into a burning building together. He was that type of guy.

“When you called 911, you were reassured that you had the best crews coming, and [Mark] was that type of guy.” *Id.* at 16.

G. Mark sustained a traumatic brain injury, tearing the “wires” throughout his brain.

Mark sustained a “diffuse axonal injury” – a shearing trauma, resulting when the brain is shaken such that “wires” all over the brain are “torn”. 09/21 RP 21, 38-39. This shaking also damaged Mark’s corpus callosum, which allows the two sides of the brain to communicate. *Id.* at 22-23. There was bleeding in the frontal lobe and in the ventricles – the brain’s inner spaces. 09/16 RP 9. There was bruising where Mark’s brain hit his skull. 09/21 RP 21-22.

This type of injury causes a “variety” of problems:

[I]f wires are cut all over the brain, the patient is going to have a whole variety, a whole constellation of problems . . . cognitive difficulties . . . their thinking is slow, they have short-term memory loss, they start going somewhere and they can't remember where they were going or why they were going there.

They will have mood changes, personality changes, fatigue, sleep deprivation or sleep difficulties [and] depression.

Id. at 40-41. A diffuse axonal injury also damages executive function – the ability to solve a problem, follow simple directions, organize thoughts, concentrate, and pursue a situation. *Id.* Mark has all of these problems. *Infra*, Statement of the Case § P, K.

Diffuse axonal injuries do not repair over time – they worsen as unused parts of the brain degenerate or disappear entirely. 09/21 RP 51-52. Mark can learn to better adapt, but his neuropsychological deficits are permanent. *Id.* at 51; 09/22 RP 204-05.

H. Mark had extensive bone fractures, and organ, muscle, and tissue damage throughout his body.

Mark fractured his pelvis in multiple places, his vertebrae at levels 3 through 6, and nearly all the ribs on his right side. 09/16 RP 9-10. Fractured bones punctured Mark's lung, damaged his liver, and ruptured his bladder. *Id.* at 10, 21. Mark had surgery to

remove handfuls of necrotic tissue preventing his lungs from sufficiently expanding. *Id.* at 184-86.

Mark had exceptional lung capacity before the fall – his forced vital capacity (FVC), measured by the volume and speed of a complete exhale, was 116% of the predicted FVC for a male of his age and height. *Id.* at 195-96.⁵ By 2004, Mark’s FVC had fallen to 74% of predicted FVC, and by 2009, it had fallen to 63% of predicted FVC. *Id.* at 196. Mark’s pre-fall FEV1, measured by the amount of air exhaled in one second, was 101% of predicted. *Id.* By 2004, Mark’s FEV1 had fallen to 61% of predicted FEV1, and by 2009, it had fallen to 54% of predicted FEV1. *Id.* at 196-97.

In short, Mark’s lung capacity is already worse than that of an average 80-to-90 year-old man. *Id.* at 200. Mark’s lung function will get worse. *Id.* at 197-98. If Mark’s lung function continues to decline as it has, he will become a “pulmonary cripple.” *Id.* 198.

I. Mark’s twin sister, Meg, and other fellow firefighters stayed by Mark’s side for his month-long hospitalization at Harborview.

Meg learned about Mark’s accident when she was working out at the Station before her shift started. 10/01 RP 118. Mark was

⁵ Mark had a pre-fall baseline, likely as part of his firefighting physical. *Id.* at 191.

in triage when Meg arrived at Harborview. *Id.* at 120. Doctors had already put in a chest tube – blood was running onto the floor. *Id.*

Doctors intubated⁶ Mark in the ICU because he could not breathe on his own. *Id.* at 120. He was “heavily sedated” and “very bloated.” *Id.*; Ex 96/41. Mark was “very confused” most of the time he was at Harborview, and had difficulty answering questions as simple as “who are you.” 10/01 RP 121-22; 10/07 RP 78. He was scared and combative – he had to wear restraints. 09/30 RP 193-94; 10/01 RP 122.

Fortunately, Mark does not remember much about his month-long hospitalization. 09/29 RP 120-21. Mark remembers Meg rubbing his back, and his friend and fellow firefighter Pierre Gauweiler walking him to the shower. *Id.* at 121. He remembers his Fire Chief saying that he would never leave Mark behind. *Id.*

J. Mark began intensive therapy programs trying to deal with his severe physical and cognitive deficits.

Mark was discharged on January 23, 2004, after 20 days in the ICU and 10 days in the inpatient rehabilitation unit. 09/16 RP 21-23. Dr. Peter Esselman, Harborview’s Chief of Rehabilitation,

⁶ “Intubation means placing a tube though, either, the mouth or the nose, into the back of the throat, and then into the windpipe, or the trachea. . . . [I]t allows you to use mechanical ventilation.” 09/16 RP 178.

became Mark's attending physician in the rehabilitation unit, and continued to manage Mark's care after he was discharged. *Id.* at 4, 22-23. When Mark started outpatient treatment, he immediately exhibited all of the problems typically associated with a diffuse axonal brain injury – mood swings, irritability, personality changes, memory deficits, cognitive deficits, and executive functioning deficits. *Id.* at 25-27. He was still on crutches, and had pain in his pelvis, left hip, right-side ribs, and lungs. *Id.* at 25, 28-29

In December 2004, Mark also began treating at the Virginia Mason pain-management clinic with Dr. Andrew Friedman, the department head of physical medicine and rehabilitation. 09/17 RP 9. Mark worked “intensively” with Dr. Friedman – sometimes daily – for the first six months, after which he saw Dr. Friedman every two months. *Id.* at 9-10. In early 2005, Mark enrolled in an in-patient pain-management program, followed by three more weeks of intensive outpatient pain-management therapy. *Id.* at 20-21. He then continued to work with Dr. Friedman, trying to improve his function and return to work. *Id.*

In January 2007, Dr. Friedman installed a “pain pump” – a catheter that delivers narcotics into the spinal fluid – hoping to better control Mark's pain and decrease side effects. *Id.* at 21. The

pain pump significantly reduces the amount of narcotic required to treat Mark's pain. 09/17 RP 23; 10/01 RP 138-40. The pump improved Mark's function, and alleviated the problem that Mark often forgot to take his medications on time due to his cognitive deficits. 09/17 RP 21, 23; 10/08 RP 59.

K. Mark obviously suffers from severe pain and a whole constellation of cognitive deficits.

Mark's pain is continuous, though some times are worse than others. 09/17 RP 10-11. Although he has pain in his chest, shoulder, hip, pelvis, and lower back, his worst pain is right-sided chest pain, resulting from his rib fractures, lung injury, and nerve injury. *Id.* at 11-19.

Mark has a "combination of sleep disturbances, chronic pain, decreased mobilities, susceptibility to fatigue, sexual dysfunction, [and] decreased sense of smell and taste." 09/22 RP 182; *see also* 09/17 RP 25-28, 32-34. He is easily confused, he gets disoriented, and he has path-finding problems. 09/22 RP 182-83, 187. He has difficulty concentrating – he cannot remember things. 09/17 RP 34; 09/22 RP 183, 187. He is easily distracted and has poor follow-through. 09/17 RP 30. His thinking and his "processing speed" are slow. 09/22 RP 182-83, 187.

Mark has problems with executive function – problem solving, organizing, planning, prioritizing, and decision making – and has problems with judgment, insight, self expression and presentation. 09/17 RP 29; 09/22 RP 183, 187. Mark also has emotional problems or “neurobehavioral problems,” including anxiety and depression. 09/17 RP 33-34; 09/22 RP 184, 188. He is more vulnerable and more susceptible to being taken advantage of. 09/22 RP 184. His neurobehavioral problems result directly from his brain injury, and from adjusting to living “with all of the complexities of his injuries.” *Id.* at 184, 190.

L. Mark did everything he could to get back to work.

Of all of Dr. Esselman’s patients, Mark was one of the most “dedicated and insistent” that he would get back to work:

[Mark] was more than many of my patients, just dedicated and insistent that he was going to get back to work, and was doing everything he could to get back to work, and that lasted a good year and a half to two years after his injury, maybe even to this day, if you were to ask him, but we worked hard . . . to get him to a level where he could return to work in some capacity.

09/16 RP 30. Returning to work was “terribly important” to Mark – they spent a great deal of time “trying to figure that out.” *Id.*

Dr. Friedman agreed that Mark was more “desperate” to get back to work than any patient he’d seen:

Mark's identity has memory tied up in being a firefighter, and he, more than most anybody I've ever dealt with, was sort of desperate to get back to work.

09/17 RP 35. All who witnessed Mark's recovery agreed that he was doing everything he could to get back to work:

- ◆ Meg – “[Mark's] goal, from the very beginning, when he was in the – even in the hospital, was to get better, to be able to go back to work.” 10/01 RP 124. Mark had so many doctors visits “where all he would say to them is I just want to get better, I just want to get back to work” *Id.* at 127-28.
- ◆ Coatsworth – “Mark was going to PT, as far as I could tell, religiously, trying to get well . . . he spoke often, wanting to get back on ladder 12.” 09/30 RP 45.
- ◆ Ann Jacobs Jones⁷ – “[Mark] was trying really hard to get back to work. He was going to physical therapy, and they were coming to our house.” 10/08 RP 159.

And Mark's doctors never found any indication that he was “malingering”; *i.e.* “faking.” 09/21 RP 105-06; 09/22 RP 210. Mark underwent four neuropsychological tests: (1) a “very brief, quick and dirty kind of screening” one month after he was injured; (2) a second test performed by Dr. Dawn Ehde in 2004 to determine whether Mark would return to work; (3) a third test performed by the City's Dr. David Coppel in 2008; and (4) a fourth test performed by plaintiff's expert neuropsychologist Dr. Glen Goodwin. 09/22 RP 175, 176, 195-98. Drs. Coppel and Goodwin included “validity

⁷ Ann is Mark's ex-wife – they separated in April 2006, and had an acrimonious divorce lasting 1.5 years. 10/08 RP 160, 174, 182.

measures” in their testing – questions designed to determine whether the patient is “putting forth optimum effort, giving an honest try and trying their hardest.”⁸ 09/23 RP 193-94.

Mark passed “every single one” of the validity measures “without any problem.” *Id.* at 194. There was “no question about whether [Mark] was putting forth optimum effort, trying his hardest during the testing, and giving an honest try” *Id.* In short, there is no evidence of malingering.⁹ 09/21 RP 106; 09/23 RP 189.

The City mentions that Mark scored high on a “fake bad” scale (BA 36 n.30), which measures whether a patient is over-reporting symptoms. 09/22 RP 212. But Dr. Goodwin stated “with confidence” that Mark was not over-reporting his symptoms. *Id.* at 212-13. Mark just had “a lot of symptoms.” *Id.* at 213.

Finally, the City notes that Mark’s doctors had to rely on Meg’s reporting and Mark’s “performance in their offices.” BA 12 n.5. Dr. Esselman has worked with Mark since January 2004. 09/16 RP 22-23. Dr. Friedman has worked with Mark since December 2004. 09/17 RP 9. They believe Meg and Mark, and

⁸ Dr. Goodwin explains how these validity measures work at 09/22 RP 201-03. Dr. Goodwin did not see any validity measures in Dr. Ehde’s testing. *Id.* at 203.

⁹ The panel exam doctors also found no evidence that Mark was malingering. 09/21 RP 149. As discussed below, they changed this opinion after reviewing the post-trial surveillance video. *Infra*, Argument § E.

they believe what they saw. Both stood by their opinions after seeing the post-trial surveillance video. CP 8355-62, 8823-26.¹⁰

M. Despite Mark's tremendous efforts, he was unable to work, even part-time and in a protected environment.

After completing the in-patient pain program in early 2005, Mark attempted light duty for the SFD over the next 1.5 years, working in the firehouse on and off, working in the Harborview medic office, and working at a 911 call center. 09/16 RP 31-32. These were "very supportive" environments, with "a lot of accommodations" to allow Mark "to work at his pace and his level." *Id.* at 64. But Mark simply did not have the cognitive or physical ability to work. 09/16 RP 32-33; 09/28 RP 213-15.

At the 911 call center, Mark would observe call takers and radio operators, listening in on the call. 09/30 RP 18. Although he was "[d]efinitely" making an effort, Mark just could not "function" in either role. *Id.* at 19-20. He never got past observing. *Id.* at 19.

Mark's supervisor, Captain Thomas Walsh, noticed Mark "squirreling" around to get comfortable and rocking. 09/28 RP 213. Mark broke out in sweats and lost his breath, often pausing to

¹⁰ All of Mark's doctors and medical experts reaffirmed their opinions after seeing the surveillance tape. CP 8355-62, 8821-22, 8823-26, 8827-35.

inhale mid-sentence. *Id.* Sometimes Mark had to lay down for awhile – other times, Walsh just sent him home. *Id.* at 213-14. Mark called himself their “mascot” – he ended up taking out the garbage and getting coffee. *Id.* at 212.

N. Mark’s recovery has always been up and down.

The City incorrectly suggests that Mark improved steadily until 2006, but took a downturn in the spring. BA 11-12. Mark’s recovery has always been up and down, as Judge Craighead correctly recognized. 09/04 RP 121.

The City claims that “[f]rom late 2004 to early 2005, Dr. Friedman noted that Mark’s recovery was ‘going forward.’” BA 11 (quoting 09/17 RP 52-53). Dr. Friedman was referring to the time Mark spent in the in-patient pain clinic, and particularly when he had a catheter in place to numb his chest wall with local anesthesia. 09/17 RP 13, 20, 53. This is not a long-term solution – the anesthesia becomes toxic. *Id.* at 13. Nor can Mark live forever in an in-patient pain clinic.

Mark “started to slide” after leaving the in-patient pain clinic in early 2005, getting worse “throughout ’05.” 09/17 RP 53. Although he improved in December ’05, while doing a lot of physical therapy, he later backslid again. *Id.* at 53, 54-55. Mark’s

“course has been roughly like that, he’d do better for a while and then worse for a while.” *Id.* at 55.

The City also takes out of context Dr. Friedman’s statement that Mark had a “general” upward trend through early 2006 (BA 12), omitting his clarification that Mark had “ups and downs” during that time. 09/17 RP 127-28. Dr. Friedman specifically rejected the City’s theory that Mark had a “nosedive” after 2006, stating Mark’s course was “up-and-down since that time, as well.” *Id.* at 128.

Dr. Esselman agreed (09/16 RP 65-66):

I think if you look at the entire spectrum of the peaks and the valleys and such, that really he’s consistently, in some way, kind of the same throughout, with a little bit of ups and a little bits of downs within that, but consistently all those problems were still there from the beginning, and all along.

See also id. at 33-34. Dr. Esselman related Mark’s high points to intensive pain treatment and physical therapy. *Id.* at 37, 66.

The high point the City focuses on – one appointment in December 2005 – was related to intensive physical therapy and optimism “that maybe [they] were on the right track.” *Compare* BA 11-12 *with* 09/16 RP 38, 66. Consistent with his up-and-down course, Mark was having a particularly good day – he was bad again three-months later. *Id.* at 38-39.

And when suggesting that Mark took a downturn in Spring 2006, the City ignores Dr. Esselman's opinion that a low-point in mid-2006 was related to the realization that Mark would not return to work. *Compare* BA 12 *with* 09/16 RP 36. This had a "significant psychological impact" on Mark:

[W]e finally had to give up on that goal, and kind of his identity, I would imagine, he would say that his identity was as a worker, as a firefighter, and finally realizing several years into this that he was never going to get back to that, that was really a loss for him.

Id. at 36-37. Faced with the reality that Mark will never work again, Dr. Esselman opined that Mark will never have another high point like the one he reported in 2005. *Id.* at 66.

In a final misguided attempt to support its claim that Mark progressed continuously until 2006, the City briefly mentions Dr. Ehde's 2004 neuropsychological test. BA 11; 09/22 RP 195, 199. Dr. Ehde's report omitted "significant" areas of impairment in the raw test data. *Id.* at 196. Mark was below the 6th percentile in problem solving that involved speed. *Id.* at 197. He also had six tests in the "borderline impaired range" – between the 3rd and 8th percentile. 10/07 RP 151. Dr. Ehde testified that Mark "definitely had a significant brain injury." *Id.* at 150.

Since the 2004 test, Mark became “significantly more distressed and depressed as the reality of [his injuries] has set in over time.” 09/22 RP 199. Depression, chronic pain, and fatigue – all of which are related to Mark’s fall – led to lower neuropsychological tests scores in 2008, particularly in memory and processing speed. *Id.* at 200-01; 09/23 RP 155; 10/07 RP 155-56. This is “very common.” 09/22 RP 200-01.

O. Mark tries to hide his pain and his deficits.

Mark does not like to talk about himself. 09/29 RP 122; 10/01 RP 159. He tries to minimize his profound deficits, or deny them altogether. 09/17 RP 40; 09/22 RP 208; 09/23 RP 206.

Mark is very embarrassed about who he is now, and about not being able to get back to who he used to be. 10/01 RP 212. Mark is “very used to being capable, confident, [and] knowing what to do in a situation.” 09/23 RP 211. Now he is afraid that people see him as “incapable, incompetent, in his words, as a retard.” *Id.* at 212. This is a “huge loss” (*id.* at 213):

[Mark has] lost his job, he’s lost his social support group, he’s lost his sense of himself as a competent – an individual who takes care of things, helps people out, and instead kind of becomes a person who needs help . . . that’s a huge loss for him.

P. Mark is not the man he used to be.

Formerly an excellent conversationalist, Mark's conversations are now "broken" – he loses his train of thought and jumps around. 09/30 RP 20, 35-36, 47, 56; 10/01 RP 153. His intellect and wit have slowed. 09/30 RP 195, 199; 10/01 RP at 73. He has the memory of an "Alzheimer's" patient and the attention-span of a five-year-old. 10/01 RP 16-17. His judgment is such that if "nobody got hurt and nobody died" it's a good day. 10/01 RP 151.

Mark tries, but his deficits are apparent in the mundane tasks of everyday life – the following are just a few examples. Mark and his young son Jesse have shot at trees and balloons in Meg's backyard from inside the house, breaking windows in the process. *Id.* at 162-63. Mark has also called Meg to ask how far away he and Jesse needed to be from a large propane tank to "safe[ly]" shoot it. *Id.* at 149-50.

One time at a grocery store, Mark ate his entire to-go container of salad, without realizing he had to pay first. *Id.* at 157-58. He loses his phone, keys and wallet, all the time, without even realizing it, and he quickly forgets things he has done, like the time he was fixated on buying a blanket for his first grandchild and

unintentionally ordered eight. *Id.* at 148, 152-55. He will work for weeks on end to learn something new, like tying a fly-fishing knot, only to forget how to do it. *Id.* at 155-56.

At times, Mark is obviously in pain, rocking, grinding his teeth, or doing other things to compensate. 09/21 RP 138; 09/23 RP 210; 09/30 RP 47; 10/01 RP 73, 168; 10/08 RP 93. Mark often hobbles and cannot sit or stand for long periods. 09/30 RP 47, 195; 10/01 RP 73. His pain and his physical deficits are worse when he is under stress. 09/17 RP 55; 10/01 RP 166-68. As Judge Craighead succinctly put it, “the overweight man” seen in the City’s surveillance video “is a far cry from the man Mark Jones once was.” CP 9783.

Formerly an expert hunter and fisher, Mark now hunts with a disabled license, often not even firing his rifle. 09/21 RP 123; 10/07 RP 119-20. Since the accident, Mark befriended Art Clemente, an 85 year-old man he met at the Kenmore rifle range. 09/21 RP 113-15. They like the Kenmore range because they are “both kind of handicapped,” and the range has benches they can sit on and sandbags they can rest their rifles on while shooting. *Id.* at 114.

Clemente and Mark “have done what [they] call hunting.” *Id.* at 121. In 2007, Mark got approved for a program allowing

disabled hunters to hunt game to prevent crop degradation. *Id.* at 121-23. Mark and Clemente typically walked for about an hour and then drove to a viewpoint where they could “pose like hunters.” *Id.* at 123. Mark often sat down, rocking back and forth. *Id.* at 142. They have never shot anything. *Id.* at 123.

Mark also goes geese hunting with Dave Woods on Wood’s farm on the Columbia. 09/24 RP 72. They only walk about two blocks, and ninety-nine percent of the time Woods, who is twenty years Mark’s senior, puts out the decoys and builds the blind. *Id.* at 71-72; 09/29 RP 92. After two hours, Mark sleeps right on the ground for “a good hour” before he is ready to go again. 09/24 RP 72-73. One time, the game warden thanked Woods for “taking the handicapped person hunting” – you can tell just by looking at Mark for five or six minutes that he is disabled. *Id.* at 73-74.

Q. Mark is unemployable and needs assistance to live independently.

In early 2007, Mark’s doctors told him that he would not be able to work again. 10/01 RP 127. Meg describes hearing the horrible news:

I didn't realize at that time that we were going to be met also Dr. Allen . . . Dr. Friedman, and Dr. Esselman, we all had sat down in the doctors' office, and it was at that time that Dr. Esselman had shared with Mark he just didn't feel that he was . . . ever going to be able to go back to work, and actually placed him on full disability, and it was one of those memorable moments, because there wasn't a dry eye left in the room, because we had so many visits where all [Mark] would say to them is I just want to get better, I just want to go back to work, don't tell me anything negative, I'm just going to go back to work, and then we had finally reached this place where reality had set in pretty much for all of us You don't see doctors cry very often, but that was a room full of tears that day.

Id. at 127-28. Mark's doctors reported that he is totally disabled, concluding to a reasonable medical certainty that he is permanently unemployable. 09/16 RP 34-35; 09/17 RP 35; 09/22 RP 110.

Mark also cannot live independently – it is “absolutely essential” that Mark has “companion care.”¹¹ 09/16 RP 45-46; 09/17 RP 50-51; 09/23 RP 129, 217. If he has someone to structure his day, Mark can independently perform activities of daily living like getting up, taking a shower, and getting dressed. 09/16 RP 47-48; 09/17 RP 50-51; 09/23 RP 129-30. But he cannot handle more complex tasks like shopping or meal-planning. *Id.*

¹¹ Since the fall, Meg, and before her, Mark's ex-wife Ann, have filled this role. 10/08 RP 181, 200-01; 09/17 RP 51.

Mark “may be able to pour a bowl of cereal and put milk on it, but not anything more complex.” 09/23 RP 130.

STATEMENT OF PROCEDURE

The City’s Statement of the Case discusses the trial and Judge Craighead’s highly discretionary rulings, barely addressing what happened. BA 1-41. Meg discusses the court’s correct rulings in her Argument and provides the following background.

Mark filed suit against the City on December 22, 2006. CP 8019-22. The trial court stayed the case in October 2007, pending outcome of the Washington Supreme Court’s decision in ***Locke v. City of Seattle and Lindell v. City of Seattle***, 162 Wn.2d 474, 172 P.3d 705 (2007).¹² CP 7899-7900. The trial court lifted the stay in January 2008, setting trial for June 16, 2008. CP 7901-03.

On February 28, 2008, Mark had a panel examination as part of the workers-compensation process, with a City-selected neurologist, orthopedic surgeon, and psychiatrist. CP 10022-89. The panel, which typically favors the requesting party (the City),

¹² In ***Locke***, the Court upheld RCW 41.26.281, allowing firefighters and police officers to bring negligence claims against their employers for damages exceeding their workers compensation benefits.

found that Mark is totally and permanently disabled. *Id.*; 09/17 RP 37-39; 09/21 RP 148.¹³

The City deposed Mark on March 6, and deposed Meg on March 10. CP 69-109, 130-74. The trial court continued the trial in May 2008, after which Mark had a neuropsychological evaluation with another City doctor. CP 199-213, 7941. The court continued the trial to September 8, 2009. CP 8076-77. Meg was appointed Mark's guardian, substituting as the plaintiff. CP 19, 21, 270-276.

The City's current trial counsel appeared in February 2009. CP 23.¹⁴ On May 4, 2009, the City moved to compel Mark's second deposition. CP 49-50. The trial court denied the City's motion, and its motion for reconsideration, after calling for a response. CP 292, 537-38. The City deposed Meg for a second time in July (CP 9819-57) and again moved to compel Mark's second deposition. CP 1235-47. Judge Craighead denied that motion. CP 3601.

The discovery cutoff was August 7, 2009. CP 1481. In September, the trial court granted Meg's motion *in limine*, excluding

¹³ As discussed below, however, two of the panel doctors (the third is deceased) rescinded their decision after seeing surveillance video of Mark playing bocce ball and horseshoes. *Infra*, Argument § E.

¹⁴ This is the City's third set of attorneys. CP 8024-26, 8038-39.

alcohol evidence on (1) causation – the City’s theory that Mark fell due to the early stages of alcohol withdrawal; and (2) damages – the City’s theory that Mark failed to mitigate his damages by consuming alcohol after he fell.¹⁵ 09/04 RP 10-18. This issue is discussed at length below. Argument § B. Briefly, the court rejected the causation theory because it was “fundamentally based on speculation” and because the speculation was unfairly prejudicial (ER 403) – a “real attack on [Mark’s] character.” 09/04 RP 112-13. The court rejected the damages theory because the City did not plead failure to mitigate, and could not connect alcohol use to diminished recovery or quality of life. *Id.* at 113-14.

Trial began on September 8 and lasted for over six weeks. The jury found that the City was negligent, awarding Mark \$12.75 million. CP 4730-32. The court denied the City’s CR 59 motion for a new trial or judgment as a matter of law, entering judgment on the verdict on January 21, 2010. CP 7806-08, 7817-18. The City appealed, and Meg cross-appealed. CP 7828-42.

Four months later, the City filed a CR 60(b) motion to vacate the Judgment. CP 8181-202. After carefully considering

¹⁵ The court’s order was subject to additional offers of proof. 09/04 RP 115. And the court allowed the City to put on evidence, at trial, of one incident of alcohol use in 2006 (which the City had claimed was two incidents). *Id.* at 114-15.

voluminous pleadings and lengthy arguments, Judge Craighead denied the City's motion. CP 9778-87. The City appealed. CP 9788-99. This Court consolidated the appeals.

ARGUMENTS

A. Standards of review. (BA 42-43).

This Court reviews the City's issues for a manifest abuse of discretion. **Lancaster v. Perry**, 127 Wn. App. 826, 830, 113 P.3d 1 (2005) (excluding witnesses under KCLR 26); **Haley v. Highland**, 142 Wn.2d 135, 156, 12 P.3d 119 (2000) (denying a motion to vacate under CR 60(b)); **State v. Turner**, 156 Wn. App. 707, 713, 235 P.3d 806 (2010) (motions *in limine* and evidentiary rulings).

B. The City is not searching for the truth – it is searching for a do-over. (BA 43-47).

In the first sentence and throughout its 96-page brief, the City bemoans its allegedly frustrated search for “the truth,” alleging that two “truth[s]” never came out – Mark's activities and Mark's alcohol consumption. BA 3, 43-47. The truth, however, is that the jury was told again and again – by witnesses for both sides – that

Mark continues to participate, as best as he can, in many of the things he loved before his devastating fall¹⁶:

- ◆ Hunting: 09/16 RP 52-54, 72-73; 09/17 RP 41; 66; 09/21 RP 121-23, 130-33, 142; 09/22 RP 156-57; 09/23 RP 37, 156; 09/24 RP 71-74, 76-82; 09/29 RP 126-27; 09/30 RP 20-23; 10/01 RP 36; 10/07 RP 28; 10/08 RP 44-45, 96, 98, 168.
- ◆ Fishing: 09/22 RP 156; 09/23 RP 37, 156; 09/24 RP 74-75; 09/29 RP 126; 10/01 RP 36; 10/08 RP 168
- ◆ Shooting: 09/21 RP 114-15; 10/08 RP 44.
- ◆ Driving to Montana visit friends and family: 09/17 RP 41, 66; 09/23 RP 156, 158; 09/24 RP 78; 09/29 RP 129, 133-34; 10/08 RP 98.
- ◆ Spending time with a girlfriend: 09/17 RP 66, 97; 09/22 RP 155; 09/23 RP 157.
- ◆ Building shelves: 09/29 RP 126; 10/01 RP 176.
- ◆ Lifting a kayak: (or other large objects): 09/16 RP 80; 09/21 RP 155; 09/29 RP 126; 10/01 RP 176.
- ◆ Doing housework: 09/22 RP 157; 09/23 RP 156-57, 159; 09/29 RP 125; 10/01 RP 148-49;
- ◆ Doing yard work: 09/16 RP 79; 09/22 RP 157, 163; 09/23 RP 158.

In its opening statement, the City made its pitch that if Mark could do all of these things, then he was not seriously impaired:

¹⁶ The City's CR 60 motion focused heavily on footage of Mark playing horseshoes, "yet the City was aware he played horseshoes at trial and never elicited this information before the jury." CP 9781. The City also belatedly focused on camping – it knew that Mark went camping after he fell (CP 420), but failed to elicit that information as well. 10/08 RP 154-205.

[Mark] can hunt, he can fish. . . . he's in Montana quite a bit, hunting, but he also drives, and he drives in Montana a lot . . . but what counsel's trying to tell you so he sounds severely damaged, brain damaged, and unable to basically subsist, that he needs a life care companion . . . why he can do those things, why people don't stop him from doing those things, if they are worried that he's so impaired.

09/14 RP 143-44. There was more of the same in closing statements. 10/20 II RP 174-77. After a six-week trial, the jury awarded Mark half of the damages he sought. CP 4730-32.

And the truth about the alcohol issue is that the City just wants to attack Mark's character, not to seek the truth. 09/04 RP 112-13, 114. The City relied on Ann's deposition laying out in great detail her recollection of Mark's alcohol consumption during and after their marriage. CP 390-431. Mark and Meg responded, at times agreeing with Ann, and often denying or explaining her statements. CP 88-91, 161, 1930-31. But Mark's alcohol consumption was ultimately irrelevant – the City failed to articulate or support with expert opinion any connection between alcohol use and diminished recovery or quality of life. 09/04 RP 114.¹⁷

In short, the City ginned up every theory it could to get alcohol evidence before the jury, and it was obvious that the City

¹⁷ And as discussed below, Mark's doctors assumed that Ann's recollection of Mark's alcohol consumption was accurate, and testified that alcohol consumption did not impact Mark's recovery. Argument § C.2.

would have emphasized such evidence throughout their case, if permitted to do so. 09/04 RP 110-114. The City wanted to call Mark a drunk as often and as loud as it could, hoping that the jury would turn against him. Judge Craighead saw right through the City's attempts to smear Mark. CP 7814.

Finally, for all its talk about untruthful discovery, the City never brought a discovery motion claiming misconduct, never points to any untruthful or misleading discovery responses, and never articulates why its failures to timely conduct discovery and disclose witnesses are excusable. The City wants to blame Mark, Meg and Judge Craighead for the manner in which it tried its case, and for the fact that it lost.

C. Judge Craighead was well within her broad discretion in excluding alcohol evidence, correctly concluding that it was speculative, irrelevant, and highly prejudicial. (BA 80-92).

1. The trial court correctly refused testimony that Mark was withdrawing from alcohol when he fell, where such evidence was speculative, irrelevant, and unfairly prejudicial. (BA 80-85).

“First of all . . . this testimony is fundamentally based on speculation . . . The second problem [i]s it is not really clear that one is more or less comparatively negligent based on the reason one is disoriented The big issue for me is Evidence Rule 403.”

The Honorable Susan Craighead, 09/04 RP 112-13

The City offered Dr. Gregory Rudolph to testify that when Mark fell, he was unusually disoriented due to alcohol withdrawal.¹⁸ BA 81. But Mark was not drinking for at least 1.5 months before he fell. CP 400-01, 1830-31, 1834. Judge Craighead correctly excluded Dr. Rudolph, ruling that his testimony was speculative, irrelevant, and unfairly prejudicial. 09/04 RP 112-13; 09/11 RP 145. This Court should affirm.

Fewer than 10% of individuals withdrawing from alcohol ever experience disorientation or other dramatic symptoms. CP 1843. If alcohol withdrawal symptoms arise, they usually begin 12-to-24 hours after heavy drinking ceases, peaking on the second day of abstinence. 09/11 RP 86, 88. At the latest, symptoms appear five days after abstinence begins. *Id.* at 24, 88-89. Thus, for Mark to have been withdrawing when he fell on December 23rd, he had to have been heavily drinking not more than five days earlier. *Id.*

But Mark's friends and family testified that he did not drink any alcohol for over six weeks before he fell. CP 400-01, 1830-31, 1834. Mark speculated that he "maybe" had three or four beers on a Friday night during this time-frame, but did not specifically recall.

¹⁸ Dr. Rudolph later acknowledged that he could not support his alcohol withdrawal opinion, switching gears to an early-stages-of-withdrawal theory. *Id.*

CP 2389-90; *see also* CP 1931. Mark reported for duty on December 22nd at 7:30 a.m. CP 92. He drank root beer at dinner on the 21st, after which he and Ann assembled Christmas toys. CP 401, 1831. Ann – the only person who was with Mark – does not think he was drinking. CP 401. Mark was on duty on the 20th – Ann came to the Station for dinner.¹⁹ CP 400, 402.

The circumstantial “evidence” the City relies on is conjecture:

- ◆ “Historical pattern of heavy drinking” (BA 82-83) – the City offers no authority for the proposition that past drinking can be used to prove action in conformity therewith; *i.e.*, that Mark was drinking days before he fell. Such speculation is barred by ER 404(b).
- ◆ “[T]he DUI citation Mark received” (BA 83) – Mark’s DUI citation, received November 3, 2003, was reduced to negligent driving after his evaluator found no signs of alcohol dependency. CP 1764, 1814. Mark abstained from drinking after the citation. CP 400-01, 1830-31, 1834.
- ◆ “[E]vidence that Mark probably drank on the evening of Sunday, December 21” (BA 83-84) – According to Mark’s friends and family, he was not drinking on the 21st. CP 401, 1831. The City has no contrary evidence – it just speculates that Mark drank the moment he left Ann’s side. BA 83-84.
- ◆ “[I]mplementation of an alcohol withdrawal protocol” (BA 84) – Ordering an alcohol withdrawal protocol (CIWA protocol) does not indicate a diagnosis of alcohol dependency or withdrawal, and there is no record of any such diagnosis.²⁰ CP 1817. An ICU dietician initiated the CIWA protocol

¹⁹ Not even the City accuses Mark of drinking while on duty. 09/11 RP 22.

²⁰ Mark did not meet with Harborview’s substance abuse counselor before being discharged, which would have been expected if there had been a concern about alcohol dependency or withdrawal. CP 1817.

because she was surprised by Mark's agitation. 09/04 RP 13-14; CP 1845. Mark's agitation is easily explained by his traumatic brain injury, pulmonary distress, or "ICU psychosis."²¹ CP 1817, 1845. Agitation secondary to alcohol withdrawal would have been apparent immediately after Mark fell and when he was admitted, but Mark became agitated 50 minutes after he was intubated, over four hours after he was admitted.²² CP 1769, 1818, 1845, 1927-28. The CIWA protocol was initiated seven days after Mark supposedly consumed alcohol – withdrawal symptoms appear no later than five days after abstaining.²³ 09/11 RP 24, 84.

Dr. Rudolph plainly acknowledged that he did not know Mark's "level of drinking" in the days before he fell. 09/04 RP 112; 09/11 RP 36.²⁴ To support his speculation, Dr. Rudolph had to

²¹ Sedated ICU patients are often "extremely disoriented and confused," leading to combativeness and agitation, referred to as "ICU psychosis." CP 1845.

²² Firefighters Phelps and McSherry, who were on duty with Mark, agreed that Mark did not exhibit any signs of alcohol withdrawal before or after he fell. CP 1868, 1870-71. Bachmeier, the medic who treated Mark, has witnessed many people withdrawing from alcohol in his 12 years as a medic. CP 1927-28. Bachmeier did not "see any symptoms that would even suggest that [Mark] was going through alcohol withdrawal." *Id.* It is unreasonable to conclude that Mark, who did not exhibit any of the lesser signs of withdrawal during his shift, was suddenly in "frank disorientation" when he fell. CP 1844.

²³ Mark's CIWA scores started peaking at 7:00 a.m. December 27, five days after he reported for duty on December 22. CP 1770, 1847. Even assuming, against all of the evidence, that he was drinking heavily the night before his shift started, it would be "extremely unlikely" that his symptoms would have peaked between December 27 and 29. CP 1847. And if, as Dr. Rudolph assumed, Mark last drank on Friday, December 19, Mark would not have experienced any symptoms on the 27th, much less peak symptoms. 09/11 RP 24, 86, 88-89.

²⁴ The City incorrectly suggests that Powell's testimony cured this obvious defect. BA 84-85. Powell was nowhere near Mark in December 2003, so she had no idea whether he was drinking in the relevant time-frame. CP 3776, 3790.

“assume” that Mark was drinking “heavily” on Thursday (December 18) and on Friday (December 19) (09/11 RP 23):

Certainly the Thursday and Friday that he was off there would be no concern for alcohol withdrawal if he had not drank heavily on those days. So we do have to – we do have to assume he was drinking heavily those days.

In fact, Dr. Rudolph’s entire opinion was premised on a series of assumptions, the first of which was that Mark was unusually disoriented when he fell. 09/04 RP 112; 09/11 RP 15-19, 25; CP 1848. That assumption was based on additional inaccurate assumptions – and a profound lack of knowledge – about the bunkroom lighting conditions when Mark fell. 09/04 RP 112; 09/11 RP 15-17, 64-65. The City did not give Dr. Rudolph the SFD’s final report concluding that the bunkroom was “extremely dark” and that Mark did not cause his fall. 09/11 RP 92; *Supra*, Statement of the Case § B. Dr. Rudolph reviewed only a bunkroom schematic and a few pictures. *Id.* at 15-16, 64-65. He speculated that Mark missed “visual cues” and that “most people would have seen” the sign on the pole-hole door, unaware that the sign was not visible in the pitch-black bunkroom. *Id.* at 17; *Supra*, Statement of the Case § B.1. Unable to explain how Mark supposedly missed “visual cues,” and unaware of the obvious explanation – that it was too dark to

see them – Dr. Rudolph just assumed that Mark was unusually disoriented. 09/04 RP 112; 09/11 RP 15-19, 25.

Working backward from his incorrect assumption that Mark was unusually disoriented, Dr. Rudolph opined that alcohol withdrawal caused Mark's disorientation based on two additional assumptions: that Mark has a drinking problem, so he must have been drinking heavily not more than five days before he fell. 09/11 RP 20-24. Piling up assumptions is like running a pyramid scheme: in the end, it is all speculation. *Id.*; CP 400-01, 1830-31, 1834.

Indeed, Dr. Rudolph even seemed to admit that his theory was unsupportable, testifying that if Mark drank only on weekends, as Mark testified, then it was "absolutely less likely that he would have gone into withdrawal." 09/11 RP 90-91. This does not rise to the level of a reasonable medical certainty. And although Dr. Rudolph opined that Mark engaged in binge drinking, not daily maintenance drinking (*id.* at 90), the City omits testimony from Dr. Russell Vandenberg, an expert in psychiatry, neurology, and addiction medicine, that cessation of binge drinking could lead to

minor withdrawal symptoms, but that it is “extremely unlikely” that cessation would lead to disorientation. CP 1842-43.²⁵

The City fails to mention Dr. Vandenbelt or his opinion that Dr. Rudolph’s theory was pure speculation. BA 80-85; CP 1848. This was not a mere “disagreement” between experts (CP 1848):

[T]his is not simply a situation where experts in addiction medicine disagree. There is no evidence that would support a conclusion that [Mark] was suffering symptoms of disorientation from alcohol withdrawal at the time he fell on December 23, 2003. One would have to ignore the evidence and speculate in order to reach that conclusion. On the other hand, all of the evidence I reviewed demonstrates that [Mark] was not going through alcohol withdrawal at all, and certainly not suffering the relatively rare severe symptoms of disorientation or delirium at the time he fell . . .

Dr. Vandenbelt also opined that Dr. Rudolph was outside his area of expertise and was not even offering “a medical opinion” (*id.*):

Dr. Rudolph states in his deposition that from what he knows about how [Mark] fell, he must have been disoriented. This is not a medical opinion. Expertise in addiction medicine does not provide one with expertise to reconstruct how this accident occurred or whether one would need to be disoriented beyond the normal grogginess one experiences at 3 a.m. in order to fall down the pole hole. . . .

The above evidence amply supports Judge Craighead’s correct ruling that Dr. Rudolph’s opinion was “based on speculation, based on assumption.” 09/11 RP 145. The City also neglects to

²⁵ This is consistent with Mark’s normal red blood cells, which appear fatty in chronic alcoholics. 09/11 RP 90; CP 1842.

address Judge Craighead's ruling that the City's "withdrawal" theory was irrelevant to comparative fault, where Mark "would have had no idea that stopping drinking . . . could lead to disorientation." 09/11 RP 89; *see also* 09/04 RP 112-13. Mark had no known history of withdrawal symptoms, other than occasional grouchiness. 09/11 RP 89; CP 399, 1843. In sum, the City's alcohol withdrawal theory was speculative and irrelevant.²⁶ This Court should affirm.

2. The City never showed that post-fall alcohol use was relevant – it just wanted to attack Mark's character, which the trial court correctly disallowed. (BA 85-91).

"[T]he defense has been unable to articulate, let alone support with expert opinion, the connection between alcohol use and the diminishment of [Mark's] recovery or his quality of life." 09/04 RP 114.

"Here's the basic problem that we're having here. You want alcohol in as character evidence, that's the fundamental problem." 09/14 RP 110.

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The City's argument on the probative value of post-fall alcohol use was a "moving target." 09/04 RP 113. And as the trial court correctly noted, Dr. Rudolph first opined that alcohol was relevant to damages after the City grew concerned that the trial

²⁶ The trial court's third correct basis for rejecting Dr. Rudolph's testimony on this point – ER 403 – is discussed below. *Infra*, Argument § C 3.

court would reject its alcohol withdrawal theory. 09/11 RP 146.²⁷ The City argued that post-fall drinking was relevant to mitigation, but the City never pleaded failure to mitigate. 09/04 RP 113-14. The City then “morphed” its argument into a quality of life argument, but the City never showed that post-fall drinking impacted Mark’s recovery, work-life expectancy, or quality of life, without which the evidence is irrelevant and unfairly prejudicial. *Id.* at 114. It was “completely obvious” that the City “want[ed] alcohol in as character evidence.” 09/14 RP 110. This Court should affirm.

Evidence of alcohol use is obviously prejudicial, so it is admissible only if there is a tight nexus between alcohol use and a damages reduction. See *Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 559-60, 815 P.2d 798 (1991). In *Kramer*, a products liability case arising out of a work-site personal injury, Case Manufacturing offered evidence of Kramer’s drug and alcohol use, asserting that it could provide expert testimony that substance abuse decreases earning capacity and work-life expectancy. 62

²⁷ For the first time at his July 24, 2009 deposition, Dr. Rudolph claimed that post-fall alcohol consumption impaired Mark’s recovery. 09/11 RP 146. Dr. Rudolph raised this point after his deposition was supposed to have been over, and 12 minutes before he was scheduled to see a patient. *Id.* at 146-47. The trial court found that it was reasonable for Meg not to have attempted to continue the deposition under the circumstances. *Id.*

Wn. App. at 556. The trial court deferred ruling pending Case's offer of proof. *Id.* at 556-57.

Before the offer of proof, the trial court allowed Case to inquire about substance abuse, and ultimately excluded Case's expert testimony linking substance abuse and work-life expectancy. *Id.* at 557-59. This Court held that Kramer's substance abuse was irrelevant absent expert testimony or any other indication that substance abuse affected Kramer's employment. *Id.* at 559.²⁸

The City attempts to distinguish *Kramer*, arguing that Dr. Rudolph's offer of proof established "the causal link" between post-fall alcohol use and decreased life-expectancy and quality of life.²⁹ BA 90-91 (no citation). But Dr. Rudolph's opinion was based on broad generalizations about alcoholics. 09/11 RP 38, 43-45. Dr. Rudolph admitted that his "expertise is the understanding of typical

²⁸ This Court did not reverse, however, where alcohol use was relevant only to damages, which the jury never reached. *Id.* at 560. The Court nonetheless noted its concern that alcohol could have tainted the verdict, but the Court could not tell with certainty from the inadequate record. *Id.* at 559-60.

²⁹ Similarly, the City relies on *Lundberg v. Baumgartner*, a wrongful death case in which the court broadly stated that a "habit of drinking intoxicants . . . tends to lower a man's earning capacity [and] to shorten his life expectancy . . ." 5 Wn.2d 619, 621, 106 P.2d 566 (1940). To the extent that *Lundberg* suggests that evidence of consumption is alone sufficient to prove decreased earning capacity, shortened life expectancy, or the like, it is outdated and inconsistent with *Kramer*. 62 Wn. App. at 559-60.

effects of alcohol with regard to typical behavior . . . and [the] likelihood of accidents in general in heavy drinkers.” *Id.* at 96.

Dr. Rudolph could not articulate that post-fall alcohol use impaired Mark:

Q. Can you point to any specific medical record and articulate for us how alcohol after the accident actually impaired Mark Jones . . . ?

A. No, I cannot do that, because I’m not privy to the day-to-day reporting of symptoms, other than what I see on a document from a medical visit, a very isolated moment in time, and not being able to relate that to known use of alcohol in the time frame around that medical visit, it’s just impossible for me to make definitive statements on that, so I will not do that.

Id. at 77. Nor did Dr. Rudolph opine that alcohol use reduced Mark’s life expectancy. And Mark’s employment records and work history gave no indication that alcohol affected Mark’s ability to work. 09/22 RP 173.

All of this amply supports Judge Craighead’s ruling that the City failed to articulate or support a “connection between alcohol use and diminishment of [Mark’s] recovery or his quality of life,” without which alcohol evidence is irrelevant and unfairly prejudicial. 09/04 RP 114; *Kramer*, 62 Wn. App. at 559. But there is plenty more, too. The City focuses on Ann’s testimony about Mark’s post-fall alcohol consumption. BA 87. It omits, however, that Dr.

Friedman, Mark's pain doctor of five years, "assume[d] that everything Mark's ex-wife, Ann Jacobs Jones, [said] in her deposition [was] true," and opined that alcohol did not impact Mark's recovery. *Compare* BA 87 with 09/17 RP 103-04, 132; CP 1874-75.

Dr. Esselman, Mark's treating physician since his original hospitalization, testified that even if he assumed that Mark is an alcoholic, he would not change Mark's assessment and prognosis:

I think if I knew for sure that [Mark] had a history of alcoholism, that would change nothing about my assessment of him today . . . about the prognosis or everything I've said today, it wouldn't change it.

CP 1882-83. Dr. Esselman did not think that alcohol had any bearing on "the trajectory of [Mark's] recovery." CP 1883.

And generalizations about brain-injured persons avoiding or reducing drinking do not undermine Mark's doctors' opinions. CP 1875. For example, Mark's neuropsychological test scores were the highest in late 2004 – when his ex-wife testified that he was drinking four-to-ten beers, two-or-three times a week. *Id.* Mark's neurological test scores were lower in 2008, when he was drinking significantly less, supporting Dr. Friedman's conclusion that Mark's purported alcohol use did not negatively impact his recovery. *Id.*

Dr. Goodwin also rejected the idea that generalizations about alcohol use shed light on Mark's recovery (09/23 RP 149):

Q. [I]f a person has four to five drinks a night, how would that impact them, when you're looking at their status on eval?

...

A. Hypothetically, it depends on, you know, the person, it depends on their activity level, it depends on how educated they are, it depends on their coping strategies. There are some people that can drink five, six, seven drinks a night, and be absolutely perfectly fine . . . So it really depends on an individual case. It's a speculative answer. . . .

In its 96-page brief, the City spends not one sentence acknowledging this testimony from Drs. Esselman, Friedman, and Goodwin. The City cannot prove an abuse of discretion while ignoring everything that supports Judge Craighead's decision.

And the minutiae the City focuses on do not undermine these doctors' opinions. BA 85-91. For example, the City notes that Mark's doctors instructed him not to consume alcohol. BA 87 (no citation).³⁰ All patients prescribed narcotics are "counseled" not

³⁰ While the City gives no record cites here, it cites *Fox v. Evans*, in which this Court upheld a failure to mitigate instruction where six doctors, including the plaintiff's three treating doctors, unanimously agreed that the plaintiff's refusal to treat her depression impeded her recovery. 127 Wn. App. 300, 302, 306, 111 P.3d 267 (2005). *Fox* is inapposite – the City did not plead failure to mitigate as an affirmative defense, and unlike Fox's doctors, Mark's doctors opined that alcohol did not effect his recovery. Compare 127 Wn. App. at 302 with CP 9-13.

to drink alcohol due to increased sedation. CP 1874. The concern about combining narcotics and alcohol is a potential physical injury from an alcohol-related accident. CP 1874-75; 09/17 RP 133. That has not happened. *Id.* Consuming alcohol while on prescription medications did not negatively effect Mark. 09/17 RP 103-04.

The City incorrectly states that “Mark never told his doctors about his drinking.” BA 89 n.67 (emphasis omitted). Dr. Esselman said that he did not hear about drinking from anyone other than Mark (CP 1882), and Dr. Friedman said that Mark did not report alcohol dependence or abuse, or specific quantities or amounts. CP 4034-35, 4037. Dr. Friedman triples the alcohol consumption his patients report. CP 1874; 09/17 RP 132. Speculation about what Mark’s doctors may not have known is irrelevant – having assumed that Ann accurately reported Mark’s alcohol consumption, both doctors opined that alcohol did not impact Mark’s recovery. CP 1882-83, 1874-75.

Finally, the City claims that the trial court erroneously rejected post-fall alcohol use in light of alleged evidence that Mark was “continuing to abuse alcohol” after he had the pain pump installed in 2007. BA 87-88. The City glosses over an important

and obvious distinction between alcohol use and abuse, citing only evidence of occasional alcohol use (*id.*):

- ◆ Mark still drinks an occasional beer (CP 1931);
- ◆ Mark has “a beer or two” with friends (CP 9835);
- ◆ Ann thought Mark was not drinking at all after the pain pump was installed (CP 420); and
- ◆ The City’s private investigator witnessed Mark consume three beers on one occasion. CP 4310.

Dr. Freidman, who installed the pain pump, was unconcerned about Mark’s drinking – the pain pump significantly reduces any effect from mixing alcohol and narcotics. CP 4033; 09/17 RP 21, 23.

In any event, the City’s late-disclosed evidence that Mark has an occasional beer after the pain pump was installed does not cure the obvious lack of foundation for Dr. Rudolph’s opinions. BA 88. Dr. Rudolph’s causation opinion lacked foundation because he had no evidence Mark was drinking in a time-frame that could have caused withdrawal when he fell. 09/11 RP 77. His opinion on post-fall alcohol consumption lacked foundation because it was derived from his knowledge of alcoholics in general – not from any personal knowledge of Mark or Mark’s recovery. *Id.* at 77, 96-97.

In short, the City takes snippets of Judge Craighead’s ruling out of context, claiming she “slammed the door” on the City’s alcohol defense. BA 88. Judge Craighead plainly and correctly

ruled that the City's causation theory was speculative and irrelevant and that the City's damages theory failed to connect alcohol and diminished recovery or quality of life. 09/04 RP 112-14. This Court should affirm.

3. In addition to the many reasons for excluding alcohol evidence discussed above, the trial court properly excluded alcohol evidence under ER 403. (BA 91-92).

The trial court also rejected Dr. Rudolph's testimony under ER 403, ruling that it was a "real attack on [Mark's] character that would be difficult to overcome." 09/04 RP 113. The City does not deny its character assassination, but suggests that the trial court should have admitted the evidence, policing counsel to ensure that they did not cross the line. BA 92. That would have been impossible – Dr. Rudolph's testimony is premised on his assumption that Mark has a drinking problem (09/11 RP 7, 21, 96-97), and as Judge Craighead noted, counsel was completely out of control. See *e.g.*, CP 7816. There is no way to limit that testimony to prevent the unfair prejudice that undoubtedly arises.

The City mistakenly claims that the trial court rejected the City's "withdrawal theory" because there were "other possible explanations for being disoriented in the middle of the night." BA 91 (citing 09/04 RP 112-15). The court addressed a hypothetical

cause of disorientation only to illustrate the City's failure to establish relevance – its proffered evidence shed no light on Mark's comparative fault. 09/04 RP 112-13. The City ignores the court's correct conclusion that "one is [not] more comparatively negligent because of the reason that he was disoriented." *Id.* at 113.

"As for damages," the City did not offer a "plentitude of evidence" – it offered a plentitude of speculation that post-fall alcohol consumption negatively impacted Mark. *Supra*, Argument § D.2. The trial court did not purport to reject alcohol evidence as "*per se*" unfairly prejudicial – she demanded what is required by the law – probative value outweighing the obvious prejudice attached to evidence of substance abuse. BA 92; *Kramer*, 62 Wn. App. at 559-60. This Court should affirm.

D. The City did not do its discovery in a timely fashion – failing to disclose Rose Winqvist, Beth Powell, and Gordon Jones had nothing to do with supposedly misleading discovery responses. (BA 47-61).

Under KCLR 26(b), parties must disclose possible primary and rebuttal witnesses according to the case management schedule established under KCLR 4(e). *Lancaster*, 127 Wn. App.

at 830.³¹ These disclosures are very broad, including “all persons . . . whom the party reserves the option to call as witnesses at trial.” KCLR 26(b)(1).

The purpose of the case management schedule and witness disclosures is to provide order and to allow the parties to prepare for trial and timely conduct discovery. 127 Wn. App. at 833. “[W]itnesses not timely disclosed may not testify at trial, absent a showing of good cause.” *Id.* at 828; KCLR 26(b)(4).³²

Three weeks before trial, the parties must exchange “lists of the witnesses whom each party expects to call at trial.” KCLR 4(e) & (j). A witness not listed on a party’s witness list “may not be used at trial” unless good cause is shown. KCLR 4(j). One week before trial, the parties must file a joint statement of evidence, “containing . . . a list of the witnesses whom each party expects to call at trial.” KCLR 4(e) & (k). “All witnesses must be listed, including those

³¹ *Lancster* discusses former KCLR 26(f), which is now KCLR 26(b)(4).

³² The City offers no support for its assertion that there is a “presumption in favor of admitting late-disclosed witnesses.” BA 50. KCLR 26(b)(4) permits no such presumption.

whom a party plans to call as a rebuttal witness.” KCLR 4, *Official Comment* ¶5.³³

Under these local rules and this Court’s decisions interpreting them, it is abundantly clear that witnesses not timely disclosed on the primary possible witness disclosures, witness and exhibit list, and joint statement of evidence, cannot testify absent a showing of good cause for the untimely disclosure. KCLR 4(j) & (k); KCLR 26(b)(4); ***Southwick v. Seattle Police Officer John Doe No. 1***, 145 Wn. App. 292, 301-02, 186 P.3d 1089 (2008) (holding that a trial court properly excludes testimony of a late-disclosed witness “even in the absence of a showing of prejudice”); ***Lancaster***, 127 Wn. App at 828; ***Dempere v. Nelson***, 76 Wn. App. 403, 405-06, 886 P.2d 219 (1994) (affirming an order striking an expert witness disclosed 13 days before trial); ***Allied Fin. Servs. Inc. v. Mangum***, 72 Wn. App. 164, 168, 864 P.2d 1, 871 P.2d 1075 (1993) (*discussed below*).

Yet the City all but ignores the local rules and fails to mention any of the above-cited cases. BA 47-52. The City argues that this Court should apply the three-part discovery-sanction test

³³ “The only exception” arises when a party could not reasonably anticipate the need to call a witness before trial. *Id.* As discussed below, the City has not met this standard.

articulated in ***Burnet v. Spokane Ambulance***, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).³⁴ BA 47-52. ***Burnet*** is inapposite. There, the misconduct at issue was the failure to comply with CR 26(f), governing discovery conferences. ***Burnet***, 131 Wn.2d at 493. The discovery sanction – dismissing a claim – was levied under CR 37(b)(2), which is triggered by CR 26(f). *Id.* at 493-94.³⁵

In ***Lancaster***, this Court refused to impose the ***Burnet*** standard, where the trial court struck a witness for untimely disclosure under KCLR 26 and CR 26(b)(4). 127 Wn. App. at 831-32. Lancaster sued Perry for injuries sustained in an automobile accident. 127 Wn. App. 828. Perry twice failed to disclose any expert witnesses, first stating that he would call a not-yet-identified doctor to conduct an independent medical examination under CR 35, and then naming three experts and stating that one would likely examine Lancaster. *Id.* at 829.

³⁴ ***Burnet*** requires the court to consider whether (1) the discovery violation was willful or deliberate; (2) the opposing party is substantially prejudiced in its ability to prepare for trial; and (3) a lesser sanction would have sufficed. 131 Wn.2d at 494.

³⁵ ***Burnet*** distinguished ***Allied*** and ***Dempere***, *supra*, holding that (1) the sanction imposed in ***Burnet*** was “significantly more severe” than excluding witnesses; and (2) the non-wrongdoing party was not “as greatly prejudiced as the non-wrongdoing parties in ***Allied*** and ***Dempere***. *Id.* at 496-97.

About two months before trial, the trial court granted Lancaster's motion to exclude Perry's undisclosed witnesses. *Id.* Stating that KCLR 26 needed to be taken more seriously, the court found no good cause to excuse the untimely disclosure. *Id.* Although this Court noted that it would have been "preferable" for the trial court to analyze prejudice and lesser sanctions, the Court affirmed, holding that Perry's disclosure frustrated the purpose of the scheduling rule. *Id.* at 833 n.2.

Lancaster is consistent with the subsequent holding in **Mayer v. Sto Indus. Inc.**, 156 Wn.2d 677, 132 P.3d 115 (2006). **Mayer** involved monetary sanctions awarded under CR 26(g), requiring an attorney to sign all discovery requests, responses, and objections. 156 Wn.2d at 682, 686. The Court refused to apply **Burnet**, holding that **Burnet** was applicable only to the harshest sanctions levied under CR 37(b). *Id.* at 688-89.

1. **The trial court properly excluded investigator Rose Winqvist, whom the City disclosed for the first time after trial started. (BA 47-52).**

After following Mark for weeks, Rose Winqvist obtained video surveillance of Mark the day before trial started. But the City waited almost six weeks to move to call Winqvist. There was no

good cause for the delay, so the trial court properly excluded Winquist. This Court should affirm.

On August 9, 2007, the City stated in answers to interrogatories that it did not have an investigator. CP 3630. The City never supplemented that answer. CP 3592-93. The City hired its first investigator, Jess Hill, in January 2008, first disclosing Hill on June 1, 2009. CP 4348, 4355, 8203.

The City refused to allow Hill's deposition. CP 3600-01. The trial court ordered the City to produce Hill no later than August 12, 2009, but the City continued to stall and to object, finally striking Hill on August 11, 2009. CP 3600-01, 3606. Ten days after striking Hill – and two weeks after the discovery cutoff – the City hired investigator Winquist to follow Mark. CP 3589-90, 8206. The City did not disclose Winquist. CP 3592-93.

On Sunday, September 7, Winquist found Mark at a bar with his horseshoes team. CP 4309; 09/14 RP 108. Trial started on Monday, but the City waited until Thursday, September 11, before it “brought [Winquist] to the trial court's attention,” stating that an unnamed investigator took pictures of Mark in a bar on Sunday night. BA 48; 09/11 RP 114. This reference was imbedded in the City's argument that the court should allow Powell – another late-

disclosed witness – to make an offer of proof on Mark’s ability to sit in the courtroom. 09/11 RP 104-116.³⁶ The City never indicated that it intended to call its unnamed investigator. *Id.*

On September 18, the City filed a “disclosure of additional rebuttal witnesses,” naming Winquist for the first time. CP 3620-22.³⁷ Meg objected. CP 3587-95. On October 12 – just days before the trial ended – the City moved for the first time to call Winquist as an impeachment witness. CP 4276-4318. Meg moved to strike. CP 4511-13.

The City incredibly suggests, without any authority or discussion, that it “easily” met KCLR 26(b)(4)’s good cause requirement. BA 51. But the City’s late disclosure was exactly what the trial court called it – an “ambush”:

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 . . .

³⁶ While Meg was in court every day, Mark was not as it was physically painful and emotionally upsetting. 09/14 RP 41; 09/29 RP 76; CP 66. The court refused to order Mark to be in court other than when he was scheduled to testify. 09/11 RP 108; CP 2851.

³⁷ The local rules do not provide for a “rebuttal” witness disclosure, nor was Winquist (or Powell) a rebuttal witness – “somebody that responds to something that [the City] couldn’t possibly have anticipated.” 09/29 RP 25.

10/14 RP 17.³⁸ The City struck Hill to avoid his deposition, hiring Winquist just ten days later, long after the discovery cutoff. CP 3589-90, 8206. The City does not explain why it hid Winquist from Meg, or why it waited to within “days of the end of trial” to move to call Winquist. 10/14 RP 12-13, 17; CP 3592, 4276-4318.

Equally incredibly, the City argues that there was no ambush because Meg knew that Mark was at a bar playing horseshoes. BA 49. The City successfully prevented Meg from obtaining discovery regarding its investigators. Meg did not know that the City was continuing surveillance of Mark, much less what Winquist’s opinions about Mark might be. BA 48-49. This goes to the core purpose of KCLR 26 – to allow timely discovery and trial preparation. *Lancaster*, 127 Wn. App. at 833. Despite the City’s preaching about gamesmanship, its trial-by-ambush tactics are a prime example of it.

³⁸ The City complains that the trial court struck Winquist even though the court recognized that it would have been a “completely different situation” if the City had disclosed Winquist before trial, preferably before the discovery cutoff. BA 50 n.36 (citing 10/14 RP 17) (emphasis omitted). The court’s point was simply that timely-disclosed surveillance evidence is generally admissible. 10/14 RP 17. Disclosing a witness “within days of the end of trial” is plainly more prejudicial than disclosing a witness after the case-management deadlines, but before trial. *Id.*

The City incorrectly claims that the trial court excluded Winquist “solely” because the City should have found and produced alcohol-consumption evidence sooner. BA 49-50. The problem was not only that the City was finally doing discovery well past the cutoff, but also that it waited 35 days after Winquist found Mark to move to call her. This is a far cry from the “prompt” disclosure the City acknowledges it must make. BA 48 (citing *Barci v. Intalco Aluminum Corp.*, 11 Wn. App. 342, 350, 522 P.2d 1159 (1974)). The City deliberately withheld Winquist – Judge Craighead properly excluded her. *Barci*, 11 Wn. App. at 350-51.

Even assuming *arguendo* that the trial court had to apply the *Burnet* test, it properly excluded Winquist. The City’s untimely disclosure was willful, where it fails to provide any excuse for shielding its investigators from discovery and waiting 35 days to disclose Winquist. *Johnson v. Horizon Fisheries, LLC*, 148 Wn. App. 628, 638, 201 P.3d 346 (2009) (holding that failing to provide a reasonable excuse amounts to willful nondisclosure). Prejudice is equally obvious – Meg cannot conduct discovery or prepare her case when the City hides its witnesses. *Lancaster*, 127 Wn. App. at 833. And the court considered lesser sanctions – the City’s belated offer of a “sanitized” version of Winquist’s testimony. 10/14

RP 12-13. This would not have minimized the prejudicial effect of calling Winquist days before trial was over.

In sum, the City did not have good cause for disclosing Winquist so late and the prejudice is obvious.

2. The trial court properly excluded Beth Powell, whom the City first disclosed after trial started, and then only for an offer of proof. (BA 52-54).

The City is far less than forthcoming about Beth Powell. BA 52-54. Mark identified Powell in his March 2008 deposition, stating that he did not regularly see Powell before his fall and that he did not think he had seen her since. CP 7198.³⁹ The City elected not to follow up until Winquist “fortuitously contacted” Powell on September 9, 2009, two days into trial. BA 53.

On September 11, 2009, the City “surprise[d]” everyone, attempting to call Powell to make an offer of proof regarding Mark’s past alcohol consumption and his ability to be present during trial. 09/11 RP 104, 105, 109; 09/29 RP 22. The City insisted “she’s not a trial witness, this is an offer of proof.” 09/11 RP 106.

The trial court ordered Meg to depose Powell over the weekend, reserving on whether she would allow Powell to testify as

³⁹ The court reporter made a phonetic mistake in the deposition transcript and referred to Powell as “Elizabeth Howell” instead of Elizabeth Powell.

an offer of proof or for impeachment. *Id.* at 115-16, 147-48. One week later (September 18) the City identified Powell in its “rebuttal” witness disclosure. CP 3620-22. Meg objected. CP 3587-95.

The trial court ultimately excluded Powell because (1) she was late-disclosed; (2) she had “virtually no personal knowledge”; and (3) her testimony was irrelevant:

I can't even find a case where a late disclosure was so late, and certainly there has not been good cause established. And I've already ruled that what she mostly wants to say has to do with alcohol, and yet she has virtually no personal knowledge, and what little information she has, even if it were admissible, does not appear to me to change the basic rationale that I have given for why post-accident use of alcohol, or to the extent she could say anything about pre-accident use of alcohol, would make it relevant.

09/29 RP 23. Prejudice was also obvious – the City did not disclose Powell until trial had already started. *Id.*; BA 53.

The City claims that it was misled by Meg's failure to disclose Powell in response to interrogatory No. 7, asking for “each person you believe has knowledge of facts relating to [the] claim.” CP 7415; BA 52, 52 n.41. But Meg objected under work product, stating that she would disclose witnesses pursuant to the case schedule. CP 7415. The City never responded and never propounded interrogatories about alcohol use.

Meg's supplemental discovery responses indicated that persons with knowledge were included in the supplemental potential witness disclosure. CP 7433. Meg did not include Powell, believing that she did not have any relevant knowledge as she and Mark were "estranged" and had been for some time. CP 7191. Meg was correct – the City agrees that Mark and Powell were "alienated." BA 53. There is no indication that Meg's counsel ever spoke to Powell or had any idea what she would belatedly say about Mark. BA 53; 09/11 RP 105.

And Judge Craighead was correct that Powell had "virtually no personal knowledge" about post-fall alcohol use. BA 53 n.42 (citing CP 3772-801); 09/29 RP 23. Powell never visited Mark during his marriage to Ann, or after he moved in with Meg. CP 3790. Powell claims that she saw Mark drinking only one time after he fell. CP 3782. She never observed Mark in a bar. *Id.*

The City's comparison to *Fisons* is incredible. BA 52-53 (citing *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993)). There, the Court held that "no conceivable discovery request could have . . . uncovered the relevant documents," where the pharmaceutical company purported to produce all relevant documents, but withheld

documents discussing a primary ingredient in the product at issue. *Fisons*, 122 Wn.2d at 352. The simplest interrogatory could have “uncovered” Powell, including, for example, “name all living relatives.” Of course, the City did not need interrogatories to uncover Powell – it had known about her since 2008. CP 7198.

The City plainly has not shown good cause for violating KCLR 26. The only reason that the City did not timely disclose Powell is that it never contacted her before the discovery cutoff. The City’s untimely disclosure was willful – it offers no good reason for failing to contact Powell sooner. *Johnson*, 148 Wn. App. at 638. Prejudice is obvious – Powell was a “complete surprise” after trial had started. 09/29 RP 22; *Lancaster*, 127 Wn. App. at 833. The trial court considered lesser sanctions, requiring Meg to depose Powell on the weekend to determine whether Powell could come in for rebuttal or impeachment. 09/11 RP 115-16, 147-48.

In sum, the City knew about Powell since March 2008, but simply chose not to contact her until it was too late.

3. The City knew about Gordon Jones since at least 2005 – it had no good cause for waiting to disclose him until trial was half over. (BA 54-56).

The City argues that it timely “disclosed” Gordon via a statement in its possible witness disclosures reserving the right to

call any witness Meg disclosed. BA 54-56. The City does not and cannot provide any authority indicating that such a reservation is sufficient to satisfy KCLRs 4 or 26, which say nothing about this practice. *Id.* And the City did not list Gordon on its subsequently-filed witness and exhibit list or on the joint statement of evidence, plainly indicating that it did not intend to call Gordon. CP 2612-17, 6678-81. This Court should affirm.

In January 2005, the City received medical records from Gordon for physical therapy he provided Mark. CP 7780. Gordon sent the City additional records April 9, 2006, June 14, 2006, and February 1, 2007. CP 7781-7793. On March 5, 2008, Meg's supplemental discovery responses identified Gordon as a physical therapist for Mark. CP 7485. Mark also discussed Gordon during his deposition the next day. CP 7197.

In April 2009, Meg included Gordon on her possible primary witness disclosure. CP 4416, 4422. The City never listed Gordon. CP 4342-4356, 4357-70, 4383-85. Although the City reserved the right to call witnesses Meg identified (CP 4369), it listed at least 17 witnesses Meg had already identified – just not Gordon. *Compare* CP 4342-4356, 4357-70 and 4383-85 *with* CP 4504-20. The City did not put Gordon on its witness and exhibit list. CP 4118, 6678-

81. Gordon is on the joint statement of evidence, but was marked only as Meg's witness – 10 witnesses were marked for both Meg and the City. CP 2612-17.

On September 28 – three weeks into trial – the City moved for permission to call Gordon. CP 4079-84; 09/29 RP 16, 19. The court denied the City's motion, ruling that: (1) there was no good cause for the late disclosure; (2) the court had previously excluded late-disclosed plaintiff's witnesses and testimony,⁴⁰ (3) it would be extremely prejudicial to allow Gordon in at the end of Meg's case; and (4) nothing Gordon said changed her ruling that alcohol evidence was irrelevant. 09/29 RP 25, 27-28. When the City re-raised the issue, the court ruled that 99% of Gordon's declaration was "completely inappropriate." 09/30 RP 69. When the City re-raised the issue again, the court noted an additional problem – the City wanted to call Gordon as a traitor, but had violated the rules regarding *ex parte* contact with traitors. 10/14 RP 11.

⁴⁰ The trial court excluded Robert Leo, an L&I investigator, who Meg disclosed, but inadvertently left off her witness list and joint statement of evidence, due to a clerical error. 09/28 RP 4-27. The court also excluded testimony from Norris Edwards, another medic who heard Mark say that he fell when he got up to use the restroom, because although Meg disclosed Edwards and included him on the joint statement of evidence, she did not disclose what he would say. 09/17 RP 143-46.

The City's argument that it timely disclosed Gordon is at odds with this Court's decision in **Allied Fin. Servs.**, holding that a party may not call witnesses included only on the adverse party's witness list. 72 Wn. App. 164. In **Allied**, the Mangums appealed a trial court order prohibiting them from calling any witnesses as a sanction for failing to submit a witness and exhibit list. 72 Wn. App. at 165-66. This Court rejected the argument that former KCLR 16(a)(3) – now KCLR 4(j) – implicitly permitted the Mangums to call Allied's witnesses, holding that the local rule "requires a party to list 'any' and all witnesses, including those listed by the opposing party." *Id.* at 167-68.

This Court reached a similar result in **Blair v. TA-Seattle East #176**, holding that Blair's reservation of rights in her primary witness disclosure did not allow her to call the opposing parties' witnesses. 150 Wn. App. 904, 210 P.3d 326 (2009), *rev. granted*, 168 Wn.2d 1006 (2010)). After the trial court struck eight of Blair's 15 possibly primary witnesses as a sanction for late disclosure, Blair filed a pre-trial witness list naming, as possible experts, two doctors listed as lay witnesses on defendant TravelCenters' witness disclosure. *Id.* at 907-08. This Court affirmed the order striking the two doctors, holding that Blair could not call the two doctors under

her reservation of rights. *Id.* at 910-11. The Court reasoned that allowing Blair to do so would “convert” TravelCenters’ lay witnesses to Blair’s expert witnesses, evading KCLR 26(b)’s requirements governing the scope of lay and expert witness disclosures. *Id.*

Since the City did not put Gordon on its witness and exhibit list, it could not call him to testify absent a showing of good cause. KCLR 4(j); **Allied**, 72 Wn. App. 167-68. The City had to list Gordon – even though Meg listed him. **Allied**, 72 Wn. App. 167-68. The joint statement of evidence exacerbates the City’s failure to list Gordon on its witness list – the joint statement of evidence lists 10 witnesses for Meg and the City, but lists Gordon only for Meg. CP 2612-17; KCLR (4)(k).

And the City’s late disclosure is far more egregious than the situation in **Blair**. The City attempted to call Gordon in the middle of trial, at the end of Meg’s case – Blair disclosed her intent to call the doctors two weeks before trial started. 150 Wn. App. at 907-08; 09/29 RP 23-24. The City did not have good cause – it knew about Gordon since 2005 (10/14 RP 12):

[W]e had the L & I records, of course, for years, so I think that it’s long known to everybody what the nature of this testimony would be.

Neither at trial nor on appeal has the City attempted to explain why it waited to until the middle of trial to disclose Gordon.

BA 54-61. Judge Craighead got it right:

Let's face it. When you made your primary disclosure, you had no idea what Gordon Jones would say because you hadn't done the investigation yet.

10/08 RP 215. Amazingly, the City denied this point. *Id.* It is hard to say which is worse – not timely investigating and trying to call Gordon anyway, or investigating Gordon and intentionally choosing not to timely disclose him.

The City claims that no prejudice would have resulted from allowing Gordon to testify because “competent” counsel would have been familiar with his testimony. BA 55. But Meg elected not to call Gordon and the City’s actions indicated that it did not intend to call him. Trial counsel never spoke to Gordon – Meg’s prior attorney talked to Gordon once, a long time ago, and it was about therapy, not alcohol.⁴¹ 09/29 RP 22. After the City got hold of Gordon, he would not speak to Meg’s counsel. *Id.*

Allowing Gordon to testify would have been far more damaging than denying Meg any opportunity to do timely discovery

⁴¹ Attorney Todd Gardner mistakenly stated that co-counsel Dick Kilpatrick spoke with Gordon – it was actually Brad Moore, prior counsel. 09/29 RP 22.

and prepare for trial. Meg's case was almost over. She would have had to recall many of her witnesses and possibly call additional witnesses, which still would not undo the prejudice of a surprise witness for whom Meg was obviously unprepared. The trial court correctly noted that allowing Gordon to testify likely would have caused a mistrial. 09/29 RP 27-28.

4. The obvious prejudice provides an additional basis for excluding Gordon. (BA 56-61).

The City next claims that the trial court incorrectly excluded Gordon under ER 403. BA 56-61. The City grossly overstates the probative value of Gordon's testimony, claiming that it was probative of liability, contributory fault, damages, and credibility. BA 56. But Gordon's declaration was mostly about Mark's alcohol consumption. CP 4068-75. The City ignores the court's ruling that "99 percent" of Gordon's declaration was inadmissible under the *in limine* ruling excluding alcohol-consumption evidence. 09/29 RP 27-28; 09/30 RP 69. Allowing his testimony would have changed the entire course of the trial – by ambush.

The City incorrectly states – without any support – that Gordon had "first-hand knowledge" of Mark's activities. BA 60. Gordon does not state the basis of his professed knowledge, and even admits that some of his claims are based on second-hand

accounts. CP 4068-69, 4071-72. Gordon had not seen Mark since 2006, and did not profess any personal knowledge about how Mark was doing physically, mentally or cognitively at the time of trial. CP 4068-4075, 8079.

In any event, the City's lengthy ER 403 argument misses the point. ER 403 focuses on the "prejudicial substance of the proposed testimony." *Carson v. Fine*, 123 Wn.2d 206, 222-23, 867 P.2d 610 (1994) (cited at BA 56, 58). A classic example is accurate (albeit repulsive or gruesome photographs) which are admissible so long as their probative value outweighs their prejudicial effect. *Carson*, 123 Wn.2d at 223. ER 403 is concerned with whether the proffered evidence is "likely to arouse an emotional response rather than a rational decision among the jurors." 123 Wn.2d at 223.

Here, however, Judge Craighead's primary concern was that the late disclosure unfairly prejudiced Meg:

I can't find that the City has shown good cause for why this was so late disclosed, and the prejudicial effect is dramatic, coming in almost at the end of the plaintiff's case, to even hear about this . . . it is simply too late . . .

09/29 RP 25; *see also id.* at 27-28; 10/14 RP 11. Indeed the court readily acknowledged that “it would be a whole different story” if the City had timely disclosed Gordon. 10/14 RP 11.

Yet the City ignores the obviously prejudicial late disclosure, comparing only the probative value of Gordon’s testimony against the prejudicial effect of the substance of his testimony. BA 60-61. The City cannot show an abuse of discretion without addressing the true basis of Judge Craighead’s discretionary ruling.

Finally, the trial court considered a lesser sanction – permitting Gordon to testify (as a rebuttal or impeachment witness) regarding Mark’s statement to Gordon that he was “pain-free” for one night while staying at Gordon’s home. 9/30 RP 64, 67-72. The record makes quite clear that the court very seriously considered allowing Gordon to testify for this limited purpose. *Id.* But it became obvious that the City was not serious about limiting the scope of Gordon’s testimony, and Meg testified to this point in any event. 10/07 RP 52; 10/14 RP 11.⁴² Judge Craighead ultimately excluded Gordon based on the extreme prejudice caused by the untimely disclosure. *Id.*

⁴² The City continued to argue that the court should permit Gordon to testify on the treatment he provided Mark, L&I issues, and the City’s “theory” that Mark declined in 2006. 10/14 RP 10-11.

In sum, the City had no good cause for failing to disclose Winquist, Powell or Gordon. This Court should affirm.

E. Judge Craighead properly denied the City's CR 60(b) motion. (BA 61-80).

1. Imagining a nonexistent fraud, the City grossly misconstrues a statement about Mark's physical recovery, which plateaued years before trial. (BA 61-63).

The City's CR 60(b) argument is premised largely on an out-of-context snippet from Meg's response to the City's CR 60(b) motion, stating that "[w]hile Mark still suffers chronic pain and will for the rest of his life, he made a remarkable physical recovery that allows him to do most normal activities on his good days, despite his chronic pain." BA 62, 68-69; CP 8304-05. The City incorrectly suggests that Meg devised Mark's "remarkable physical recovery" to explain the post-trial surveillance. BA 39-40, 62-63. This argument lacks support – and credibility.

It is indeed "remarkable" that Mark is able to hunt, fish, help around the house, and the like – he fell 15.5 feet onto a concrete floor, suffering four broken vertebrae, ten broken ribs, multiple pelvic fractures, a punctured lung, a ruptured bladder, a lacerated liver, and diffuse bleeding in the brain. CP 8304, 8311-12. Meg's CR 60(b) response referred directly to these injuries when stating

that Mark “made a remarkable physical recovery” CP 8304-05.

And Dr. Friedman’s declaration on this point plainly refers to a “remarkable physical recovery” preceding a “basic plateau”:

Mark made in many ways a remarkable recovery physically and he is to be applauded for the great effort it took to achieve what he did. However, he was not able to get back to his former pre-injury status. Once Mark finished improving to a basic plateau his course became up and down but not overall improving.

CP 8356. Mark’s “basic plateau” occurred in 2006, after which he has not improved overall. *Supra*, Statement of the Case § O; CP 8356-57. No one – other than the City – suggested that Mark’s physical recovery occurred after trial.

The City suggests that Meg’s statement about Mark’s physical recovery contradicts her statement that Mark was “roughly the same” when the City sought to re-depose him. BA 62, 69. But Mark was roughly the same when the City asked to re-depose him in 2009, as he was when the City first deposed him in March 2008. CP 225, 268. Mark’s physical recovery plateaued in 2006, long before he was deposed. *Supra* Statement of the Case § O.

In sum, the City’s accusation that Meg devised Mark’s remarkable physical recovery to explain the post-trial surveillance is

truly incredible and patently false. The City ought to read more closely, particularly in if it is going to seek sanctions. BA 63.

2. **CR 60(b)(3) – The jury heard plenty about the types of activities seen in the post-trial surveillance – the City does not get a do-over because it wishes it had highlighted Mark’s activities more. (BA 63-73).**

Be the City’s strategic and tactical decisions as they may have been, the City chose not to undertake any critical evaluation of Mr. Jones’ damages claims. The City cannot now take a second bite of the apple because it failed to make the most of its first.

The Honorable Susan Craighead, CP 9782

The City’s primary argument is that its failure to timely discover the post-trial surveillance is excused because Meg concealed Mark’s “remarkable physical recovery” until after trial. BA 63-73. As discussed above, however, this argument distorts post-trial pleadings and declarations and ignores trial testimony that Mark improved significantly until 2006. And the cases upon which the City relies are inapposite – nothing in the post-trial surveillance reveals anything new, much less contradicts anything Mark has done or said. This Court should affirm.

To obtain a new trial under CR 60(b)(3), the moving party must show that new evidence (1) would probably change the result if a new trial were granted; (2) was discovered since the trial; (3)

could not have been discovered before trial by exercising diligence; (4) is material; and (5) is not merely cumulative or impeaching. CP 9779 (citing *Praytor v. King County*, 69 Wn.2d 637, 419 P.2d 797 (1966)). The trial court denied the City's CR 60(b)(3) motion, finding that the City failed to show that reasonable diligence would not have produced similar surveillance. CP 9779-82.⁴³ The trial court held that the City did little to investigate until hiring its third set of lawyers in 2009, after which the City focused on its alcohol withdrawal theory, not on damages:

- ◆ The City did not interview or depose any of Mark's friends or family, other than Meg;
- ◆ The City knew that Mark hunted and fished, but did not inquire about what else he could do; and
- ◆ The City knew Mark played horseshoes, but never raised the issue at trial.

CP 9780-82. In short, the City made a tactical decision to focus on liability and "chose not to undertake any critical evaluation of [Mark's] damages claims." CP 9782. CR 60(b)(3) is not a do-over.

The City argues that its duty to exercise reasonable diligence was "reduced to the absolute minimum," where Meg allegedly provided misleading discovery responses. BA 64-66. But

⁴³ The court found that the City had satisfied elements 2, 4, and 5, and discussed element 1 – whether the new evidence would probably have changed the outcome of trial – in the context of discussing CR 60(b)(4). CP 9782-87.

the City does not cite any supposedly misleading discovery response (and there are not any), instead basing this argument on its theory that Mark “revealed” his “remarkable physical recovery” for the first time in response to the post-trial surveillance. BA 64-68. Again, this theory is meritless.

And Meg did not deny improvement (BA 68) – she testified that Mark was doing “amazingly well” about the time he left Harborview. 10/07 RP 54. She described Mark as having “really good times” as well as bad times throughout his recovery, and as having done “remarkably well” in late 2005. 10/01 RP 124. Mark’s doctors testified to the same up and down recovery. *Supra*, Statement of the Case § N.

If Meg and Mark painted a “grim” picture of Mark’s recovery, it is only because they naturally focus on how different his life is from what it used to be. CP 9784. This is no different than the City highlighting Mark’s abilities and downplaying his deficits. *Id.*

The inapposite cases the City relies on do not excuse its failure to procure the surveillance footage before trial. BA 64-69. In *Kurtz v. Fels*, the plaintiff swore in deposition and during trial that she never fainted before the car accident from which she sought damages, but the post-trial affidavits revealed that she

suffered fainting spells for many years before the accident. 63 Wn.2d 871, 872-73, 389 P.2d 659 (1964). The Court rejected the argument that reasonable diligence could have uncovered Kurtz's dishonesty, holding that the defendant had a right to rely on her sworn statements. *Id.* at 875.

In ***Foerstel v. St. Louis Pub. Serv. Co.***, the plaintiff sought damages for a spinal fracture allegedly resulting from a collision, and denied having previously been seen at the hospital. 241 S.W. 2d 792, 794-95 (Mo. Ct. App. 1951). The appellate court reversed the trial court's denial of a new trial, where x-rays taken before the collision, but discovered post-trial, revealed that the spine was in the same condition nine months before the accident. *Id.* at 795.

And in ***Lubbers v. Norfolk & W. Ry Co.***, 105 Ill. 2d 201, 473 N.E.2d 955 (1984), the plaintiff, who was injured in a cross-walk, sought to prove that the cross-walk signal was defective. 473 N.E.2d at 956-57. The defendant produced an inspection card indicating that the signal had been inspected every two weeks for the past year. *Id.* at 957. After trial, a witness came forward indicating that the signal had not been inspected for six weeks before the accident and that the defendant had concealed this

information from the plaintiff. *Id.* at 958. The appellate court reversed the denial of a new trial. *Id.* at 961.

The post-trial surveillance video does not remotely resemble the type of smoking-gun evidence at issue in these cases. The City did not see Mark pulling 80 pounds up a seven-story building, or carrying hoses and ropes up a three-story ladder, like he did before his fall. 02/29 RP 105-07. The post-trial surveillance shows Mark playing horseshoes, camping with his girlfriend, and lifting his young son's bike. CP 9808. The City knew that Mark played horseshoes and never inquired at trial. CP 9781. The City knew that Mark camped – at the same location as seen in the surveillance video – but never inquired in discovery or at trial. CP 151, 415, 420, 9808. And the jury was told that Mark could lift 50 pounds and that he helped move a kayak. 09/21 RP 155; 10/01 RP 176.

The City argues that it should not be faulted for failing to inquire about horseshoes, claiming that Mark would have lied about how well he could play. BA 72.⁴⁴ The City can only speculate about what Mark would have said, because it did not ask. *Id.* The City

⁴⁴ Mark had difficulty throwing overhand – like a baseball – but not throwing underhand. CP 8360.

neglects to mention that in the horseshoes “tournament” it refers to, Mark was playing “periodic games of horseshoes” – not longer than 28 minutes – with long breaks in between games. CP 10171-74; Ex 466A at June 2, 7:00 p.m. to 9:31 p.m. The “victory dance” the City mentions (BA 72) is a bad “pirouette.” CP 9808.

In any event, “[t]hrowing horseshoes is certainly no more physical than occasional hunting [or] fishing.” CP 8830. And the City omits the video clips showing Mark’s girlfriend helping him up after he fell while walking on the beach, or Mark sitting in a chair rocking for an hour, the same way he did at trial. CP 9783.

The City’s remaining arguments attempt to defend its tactical decisions during discovery. BA 70-72. Tactical decisions are not grounds to vacate a six-week trial. CP 9781; *In re Marriage of Knutson*, 114 Wn. App. 866, 872, 60 P.3d 681 (2003).

The City takes issue with the trial court’s statement that it did not focus on damages, arguing that it spent “dozens of hours” trying to video Mark. BA 70, 71. The City attempted public surveillance for six days total in March, April and May 2008. CP 8203-04, 8706-07. When the attorneys who tried the case came on in 2009, they hired an investigator to focus on liability, conducting public surveillance only after trial began. CP 8206-07, 9781.

The City complains that it was not allowed to re-depose Mark, but his first deposition covered his activities at length. BA 71; CP 94-97. The City never asked Mark's friends about his capabilities. CP 9781. The City's discovery requests asked Mark about the injuries he sustained, not about how his injuries affected his abilities. *Compare* BA 70-71 *with* CP 7417-19, 7936-37.

The City claims that it was "entitled" to rely on Mark's treating physicians under *Kurtz*. BA 71-72; CP 9781-82. Again, *Kurtz* is inapposite – Mark's doctors did not mislead the City – they stood by their opinions. CP 8355-62, 8792-93, 8823-35.

In sum, the City does not get a do-over because it chose not to more thoroughly pursue Mark's activities sooner.

3. CR 60(b)(4) – there was no fraud or misrepresentation here – all of Mark's doctors stood by their opinions after seeing the post-trial surveillance. (BA 73-80).

"Nearly all of the medical professionals who testified have submitted declarations indicating that the video did not change their opinions of [Mark's] level of disability. [Mark] has been treated for years by a large team of highly qualified, experienced physicians . . . [who] were supported over the years by countless nurses, therapists, psychologists, and so on. None of the medical witnesses who testified indicted that they had any suspicion that [Mark] was malingering; to have malingered successfully for upwards of five years would require substantial medical knowledge, extraordinary acting ability, and an ability to focus that the neuropsychologists concluded [Mark] lacks."

The Honorable Susan Craighead, CP 9784

The City's CR 60(b)(4) argument necessarily implies (1) that Mark's doctors and friends all perjured themselves; or (2) that for more than five years Mark has been faking it, fooling his friends and a team of highly-trained and well-respected doctors and medical professionals. CP 9784. Both scenarios are unbelievable. This Court should affirm.

The party attacking a judgment under CR 60(b)(4) must prove – by clear and convincing evidence – that fraud or misrepresentation prevented it from fully and fairly presenting its case. *Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990). The clear and convincing standard of proof “is a high one.” *Queen City Farms v. Cent. Nat’l Ins. Co.*, 126 Wn.2d 50, 97, 882 P.2d 703 (1994). This Court’s review is limited to determining whether the evidence shows that the alleged fraud or misrepresentation was “highly probable.” *Dalton v. State*, 130 Wn. App. 653, 666, 124 P.3d 305 (2005). The Court will not re-weigh disputed evidence, even when there is evidence on both sides of an issue. *Dalton*, 130 Wn. App. at 666-67.

The City accuses Judge Craighead of “ignor[ing]” testimony from the City’s experts that the surveillance video “shed highly

meaningful light on Mark's cognitive abilities." BA 78-79. But Mark's doctors contradicted the City's experts, opining that there is no "scientific basis" for reversing highly-justified medical opinions based on the silent video:

- ◆ Rehabilitation Counselor Choppa: "[T]he impact of [Mark's] brain injury on his employability cannot be assessed by looking at a silent videotape." CP 8831.
- ◆ Dr. Brockway: "There is no scientific basis that I have ever read about, been trained on or been exposed to among the inter-disciplinary teams that I work with on the rehabilitation wing at Harborview for reaching any conclusion from the short snippets in this video about Mark's usual psychological or cognitive function, and most particularly about his ability to function in a sustained way under stress or pressure." CP 8835.
- ◆ Dr. Goodwin: "Surveillance videotape typically does not provide meaningful information to neuropsychologists with respect to understanding the complexities of an individual's mental state, particularly with respect to frontal lobe brain injury." CP 8822.
- ◆ Dr. Friedman: "Other than demonstrating [that Mark] can have some decent days in the right circumstances, it is not medically or scientifically appropriate to draw any further conclusions from this video." CP 8359. "I am surprised that Dr. Stump or Dr. Clark or any physician would say they changed their minds about anything based on this video. Conclusions about a person's cognitive condition should be based on cognitive data or conditions that tax the cognitive elements in question and observed over a significant period of time. The Mr. Becker, who never saw or examined [Mark], would draw conclusions from a video of this type . . . No one can determine from these few days whether Mark can consistently physically perform over time what is necessary for a job, and no one can assess the cognitive problems from the video either." CP 8360-61.

Nor did Judge Craighead “ignore[]” expert testimony that stress could not explain the difference between how Mark appeared at trial and in the video. BA 79-80. Mark’s doctors also contradicted this testimony, explaining that given the hostility and stress of trial, “[t]he jury most likely saw Mark functioning at one of his lowest points” CP 8360; *see also* CP 8834-35.⁴⁵ The jury was told that Mark actually hurts more when he is under stress and that the stress of trial impacted his ability to communicate and his physical appearance. 09/17 RP 55-56; 10/01 RP 166-70. The video, however, shows Mark in a “very relaxed and unpressured setting.” CP 8360.⁴⁶ The expectation is that Mark would appear different in these settings. *Id.*

The City ignores that Mark’s doctors stood by their opinions that Mark is totally disabled, unequivocally stating that they do not feel that Mark misled them (BA 78-80):

- ◆ Dr. Friedman: “I have not changed my opinion that Mark is totally disabled. I do not remotely feel that Mark and his sister, Meg, were conning me or the other doctors. . . . There is simply nothing in the video inconsistent with what Meg and Mark have presented to me or what I concluded

⁴⁵ The City’s panel exam doctors also saw Mark at his worst. *Id.*

⁴⁶ The woman pictured in the surveillance video explained that Mark always has physical and cognitive difficulties, although he tries to hide his pain and has days when he looks better than others. CP 9709-12.

about Mark or what I testified to about Mark's injuries." CP 8356. "You do not have to be an invalid to be totally disabled." CP 8358.

- ◆ Dr. Esselman: "There is nothing shown in this video that makes me change my opinion that [Mark] continues to have a total disability and is unable to work in any capacity at this time." CP 8824. "The video does not show any activities that are inconsistent with my testimony. . . . the activities shown in the video demonstrate that [Mark] is following my recommendations to participate in activities that he enjoys to the best of his abilities." CP 8825-26.
- ◆ Dr. Goodwin: "[N]one of the opinions I have offered in this matter . . . have changed. Nothing about the information I have reviewed leads me to believe that there is any evidence of malingering on the part of [Mark] as it relates to the findings and evidence associated with his traumatic brain injury." CP 8822.
- ◆ Dr. Brockway: "Nothing in the video or declarations alters my opinions or affects the testimony I gave about Mark Jones." CP 8834.
- ◆ Rehabilitation Counselor Choppa: "My opinion has not changed from the opinions I expressed at trial and in my deposition: Mark Jones is not capable of gainful employment. . . . [Mark] has objective evidence of brain injury and ongoing brain damage, and suffers chronic pain . . . but he is 'not dead.' I encourage all of my clients, including Mark Jones, to do everything they can to remain as active as they can. It would be counter productive for Mark to 'do nothing.'" CP 8828, 8829-30.

Objective evidence supported Mark's doctors' assessments, including hypertrophy of Mark's right-shoulder muscles, drastically reduced lung-capacity, Mark's demeanor and presentation during neuropsychological testing, and validity measures in neuropsychological testing (including the City's) indicating that

Mark was putting forth optimal effort. CP 7894-85 (citing 09/17 RP 17; 09/18 RP 196-99; 09/22 RP 211); 8361-62. And as Judge Craighead correctly noted, the City has not shown that Mark's friends who testified – his 85 year-old hunting buddy and six firefighter colleagues – deliberately misled the jury or were misled by Mark. CP 9785. Fooling his friends and doctors – and accordingly the jury – would have taken “substantial medical knowledge, extraordinary acting ability,” and focus and cognitive abilities that Mark lacks. CP 9784.

In short, the City's CR 60(b)(4) motion did nothing more than “create a conflict in the medical expert opinions.” BA 76. But this is not summary judgment – creating a fact question is insufficient. Ruling against the City does not indicate that Judge Craighead ignored the City's experts. Overwhelming evidence from Mark's doctors supports Judge Craighead's careful decision. This Court should affirm.

F. The City is not entitled to a do-over on its summary judgment motion.

The City asks that in the event that this Court reverses on any of the above-discussed grounds, this Court should “authorize” it to renew its motion for summary judgment that causation was

speculative because Mark does not remember how he fell. BA 95. All but one of the City's arguments are about damages. The City does not and cannot explain why a reversal on damages would reopen the summary judgment motion. There is no connection between damages arguments and the City's obligation to provide a safe workplace. BA 96. The City's obligation to ensure that the chain was used, or to provide a working guard, has nothing to do with anything Mark or Meg said about Mark's injuries.

Gardner v. Seymour is inapposite. BA 94-95 (27 Wn.2d 802, 180 P.2d 564 (1947)). ***Gardner*** provides that causation is speculative if there are "at least two equally reasonable explanations" for an injury and no way to know which one caused the injury. 27 Wn.2d at 806. This does not mean that the City can gin up a completely speculative causation theory – alcohol withdrawal – to invoke ***Gardner***.

But even assuming arguendo that the alcohol withdrawal theory was not speculative, it does not support summary judgment. Mark fell down the pole hole because he thought it was the door leading to the bathroom and because it was unguarded.

In short, this argument is just another attempt to blame Mark for something that is the City's fault. The City knew that it needed

to guard the pole-hole door – and did so in 1976 – but failed to enforce its chosen safety measure. This Court should affirm.

CONCLUSION

This Court should affirm.

RESPECTFULLY SUBMITTED this 28 day of February 2011.

MASTERS LAW GROUP, P.L.L.C.

A handwritten signature in black ink, appearing to read 'Kenneth W. Masters', written over a horizontal line.

Kenneth W. Masters, WSBA 22278
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Avenue North
Bainbridge Is, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENT** postage prepaid, via U.S. mail on the 28 day of February 2011, to the following counsel of record at the following addresses:

Attorneys for Respondent:

SWANSON GARDNER, P.L.L.C.
Todd W. Gardner
4512 Talbot Road S.
Renton, WA 98055

RICHARD B. KILPATRICK, P.S.
Richard B. Kilpatrick
1750 112th NE, Suite D-155
Bellevue, WA 98004

Attorneys for Appellant:

CARNEY BADLEY SPELLMAN
Michael B. King
Gregory M. Miller
Jason W. Anderson
Justin P. Wade
701 Fifth Avenue, #3600
Seattle, WA 98104-7010

STAFFORD FREY COOPER
Anne M. Bremner
Ronald S. Bemis
James R. Lynch
601 Union St Ste 3100
Seattle, WA 98101-1374


Shelby R. Frost Lemmel, WSBA 33099

APPENDICES TO BRIEF OF RESPONDENT
Jones v. City of Seattle
No. 65062-9-1

Letter Ruling Denying City of Seattle's Post-Trial Motions

Memorandum Decision And Order Denying City Of Seattle's
Motion to Vacate

Declaration of Glenn Goodwin, Ph.D. In Opposition To
Defendant's Motion For New Trial

Declaration of Peter C. Esselman, MD, In Opposition To
Defendant's Motion To Vacate Judgment Pursuant to CR 60(b)

Declaration of Anthony Choppa In Opposition To Defendant's
Motion For New Trial

Declaration of Jo Ann Brockway In Opposition To Defendant's
Motion To Vacate Judgment Pursuant To CR 60(b)

Declaration Of Dr. Andrew Friedman In Opposition To
Defendant's Motion To Vacate Judgment

Chronology

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CP 7809

Received

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

JAN 25 2010

SUSAN J. CRAIGHEAD
Judge

Law Office of
Swanson & Gardner
King County Courthouse
Seattle, Washington 98104-2312
E-mail: susan.craighead@kingcounty.gov

January 20, 2010

Anne M. Bremner
Stafford Frey Cooper
601 Union St Ste 3100
Seattle, WA 98101-1374

Todd W. Gardner
Swanson Gardner, PLLC.
4512 Talbot Rd S
Renton, WA 98055-6216

Richard B. Kilpatrick
Richard B. Kilpatrick P.S.
1750 112th Ave Ne Ste D155
Bellevue, WA 98004-3727

Ronald Bemis
Stafford Frey Cooper PC
601 Union St Ste 3100
Seattle, WA 98101-1374

James R. Lynch
Stafford Frey Cooper
601 Union St Ste 3100
Seattle, WA 98101-1374

Michael B. King
Carney Badley Spellman
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010

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

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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,



Susan J. Craighead, Judge

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

8 MARGIE (MEG) JONES, AS GUARDIAN)
9 OF MARK JONES,)

10 Plaintiff,)

11 v.)

12)
13 CITY OF SEATTLE,)

14)
15 Defendant.)

NO. 06-2-39861-1 SEA

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

16 The City of Seattle has moved to vacate the judgment entered on the verdict in
17 this case pursuant to CR 60(b)(3) and (4). The City conducted surveillance of Mark Jones
18 during April and June of 2010 and bases its motion on more than 11 hours of video
19 surveillance. The City argues that Mr. Jones' appearance in the surveillance video is at odds
20 with Mr. Jones' appearance at trial and the testimony the jury heard about his physical
21 and cognitive limitations following his fall down a pole hole at a Seattle fire station. The Court
22 has reviewed all of the surveillance footage, all of the cases cited by the parties, and all of
23 the testimony of the damages witnesses at trial as well as all of the submissions of both
24 parties in connection with this motion to vacate.
25

26 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

CP 9778

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

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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.
25
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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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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 "outings." 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
25
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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
26

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

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 Gauweiler, 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).
26

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

FILED

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CASE NUMBER: 06-2-39861-1 SEA

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THE HONORABLE SUSAN CRAIGHEAD

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

MARGIE (MEG) JONES, as Guardian of Mark
Jones,

No.: 06-2-39861-1 SEA

Plaintiff,

DECLARATION OF GLENN
GOODWIN, Ph.D. IN OPPOSITION
TO DEFENDANT'S MOTION FOR
NEW TRIAL

vs.

CITY OF SEATTLE,

Defendant.

The undersigned hereby declares under penalty of perjury of the laws of the state of Washington that the facts stated below are true and correct.

I am competent to testify on my own behalf and all of my testimony is based upon my own personal knowledge or upon my review of documents that are considered to be reasonably reliable in the field of neuropsychology. I have reviewed the portions of the City of Seattle's surveillance video of Mark Jones that were filed as part of its CR 60 Motion, together with the Declarations of Dr. Stump, Dr. Clark and Ted Becker, Ph.D. I have also reviewed portions of my trial testimony of September 22-23, 2009, my findings from my examination of May 4-5, 2009 and Dr. David Coppel's CR 35 report.

DECLARATION OF GOODWIN IN OPPOSITION TO
DEFENDANT'S MOTION FOR NEW TRIAL - Page 1 of 2

SWANSON ❖ GARDNER, PLLC
Attorneys at Law
4512 Talbot Road South
Renton, Washington 98055
(425) 226-7920
Facsimile (425) 226-5168

1 Following my review of this information, as a neuropsychologist who evaluated Mr.
2 Jones, none of the opinions I have offered in this matter, either in writing as memorialized in
3 my neuropsychological consultation report dated May 4-5, 2009 or as transcribed in my
4 deposition and trial testimony have changed.

5 Nothing about the information I have reviewed leads me to believe that there is any
6 evidence of malingering on the part of Mr. Jones, as it relates to the findings and evidence
7 associated with his traumatic brain injury. My opinion following my evaluation of Mr. Jones
8 was that he was not malingering. Dr. Coppel reached the same conclusion following his
9 testing of Mr. Jones, noting at page 13 of his report, "Performance on testing did not suggest a
10 dissimilated or malingering pattern."

11 Surveillance videotape typically does not provide meaningful information to
12 neuropsychologists with respect to understanding the complexities of an individual's mental
13 state, particularly with respect to frontal lobe brain injury.
14

15 Dated: September 3, 2010

16 
17 _____
18 Glenn Goodwin, Ph.D.

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Honorable Susan Craighead

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

MARGIE (MEG) JONES, AS GUARDIAN
OF MARK JONES,

No.: 06-2-39861-1 SEA

Plaintiff,

DECLARATION OF PETER C.
ESSELMAN, MD, IN OPPOSITION TO
DEFENDANT'S MOTION TO VACATE
JUDGMENT PURSUANT TO CR 60(b)

vs.

CITY OF SEATTLE,

Defendant.

I, Peter Esselman, MD, am over the age of 18, and make this declaration from first hand personal knowledge.

1. I am a specialist and Board certified in Physical Medicine and Rehabilitation. I am the Chair of the Department of Rehabilitation Medicine at the University of Washington and Chief of Rehabilitation Medicine at Harborview Medical Center. I also previously served on the Board of the Brain Injury Association of Washington.

DECLARATION OF PETER C. ESSELMAN, MD, IN
OPPOSITION TO DEFENDANT'S MOTION TO
VACATE JUDGMENT PURSUANT TO CR 60(B)

Richard B. Kilpatrick, P.S.
1750 - 112TH AVE NE, Suite D-155
Bellevue, WA 98004
(425) 453-8161
Fax: (425) 605-9450
dick@triallawyersnw.com

1 2. I am one of Mark Jones' treating physicians. I became involved in his
2 medical care as his attending physician when he was transferred to the Inpatient
3 Rehabilitation Unit at Harborview Medical Center on January 13, 2004. I have
4 continued to see Mr. Jones since that time and last saw him on May 12, 2010. I will
5 continue to follow him in the future.

6 3. I have reviewed the silent surveillance video put together by the City of
7 Seattle and provided to the Court that shows Mr. Jones playing horseshoes,
8 chopping wood, and participating in other physical activities. Over the past several
9 years, Mr. Jones has reported to me that he is able to participate in physical activities
10 that include walking on a treadmill, riding a stationary bicycle, and participating in a
11 swimming pool exercise activity. In addition, Mr. Jones is known to have the ability to
12 participate in activities such as hunting, going to a shooting range, and taking trips. I
13 have known Mr. Jones for over six years and he has worked extremely hard to
14 improve and regain function over that period of time. His course has fluctuated with
15 good periods followed by bad periods. I expected, and still expect, that this up and
16 down course will continue. The activities in the video are consistent with activities he
17 is known to participate in and with his fluctuating course.

18 4. There is nothing shown in this video that makes me change my opinion
19 that Mr. Jones continues to have a total disability and is unable to work in any
20 capacity at this time. My opinion continues to be that his disability is not solely due to
21 his physical limitations but to a large degree the result of the cognitive problems
22

23 DECLARATION OF PETER C. ESSELMAN, MD, IN
24 OPPOSITION TO DEFENDANT'S MOTION TO
25 VACATE JUDGMENT PURSUANT TO CR 60(B)

Page 2 of 4

Richard B. Kilpatrick, P.S.
1750 - 112TH AVE NE, Suite D-155
Bellevue, WA 98004
(425) 453-8161
Fax: (425) 605-9450
dick@triallawyersnw.com

1 caused by his traumatic brain injury. The video does not reveal any activities that
2 require a high level of cognitive or executive function of the type that substantially
3 contribute to Mr. Jones' disability. In addition, the video does not address any issues
4 related to limitations in endurance or limitations in the ability to carryout physical
5 activity over a prolonged period of time that would be required in a work environment.

6 5. I testified at the trial regarding Mr. Jones' injuries from the fall at the Fire
7 Station, his attempts to recover from his injuries, and the long-term consequences.
8 The video does not show any activities that are inconsistent with my testimony. I did
9 testify that there were up and down periods with times that he was looking better and
10 doing well, periods of time when his pain was worse, the psychological issues were
11 worse, and he was not doing so well. I also testified in regards to the consequences
12 of his traumatic brain injury, specifically the cognitive limitations, problems with multi-
13 tasking, and problems with executive functioning. It continues to be my opinion that
14 the combination of Mr. Jones' physical, cognitive, and psychological issues caused
15 by his injury prevents him from working in any capacity.

16 6. I also testified that it is very important for Mr. Jones to participate in
17 activities such as volunteer activities or hunting. I told the jury that hunting "keeps
18 him active to the extent that he can be active, gets him out of the house with friends,
19 doing things in an outdoor environment. I would strongly endorse that he do things
20 like this to the best of his ability." 5 RP 54:5-9. If anything, the activities shown in the
21
22

23 DECLARATION OF PETER C. ESSELMAN, MD, IN
24 OPPOSITION TO DEFENDANT'S MOTION TO
25 VACATE JUDGMENT PURSUANT TO CR 60(B)

Page 3 of 4

Richard B. Kilpatrick, P.S.
1750 - 112TH AVE NE, Suite D-155
Bellevue, WA 98004
(425) 453-8161
Fax: (425) 605-9450
dick@triallawyersnw.com

1 video demonstrate that Mr. Jones is following my recommendation to participate in
2 activities that he enjoys to the best of his abilities.

3 I declare under penalty of perjury, of the laws of the State of Washington, that
4 the foregoing is true and correct.

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

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8 Peter C. Esselman, MD

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23 DECLARATION OF PETER C. ESSELMAN, MD, IN
24 OPPOSITION TO DEFENDANT'S MOTION TO
VACATE JUDGMENT PURSUANT TO CR 60(B)

25 Page 4 of 4

Richard B. Kilpatrick, P.S.
1750 - 112TH AVE NE, Suite D-155
Bellevue, WA 98004
(425) 453-8161
Fax: (425) 605-9450
dick@triallawyersnw.com

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THE HONORABLE SUSAN CRAIGHEAD

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,

vs.

CITY OF SEATTLE,

Defendant.

No.: 06-2-39861-1 SEA

DECLARATION OF ANTHONY CHOPPA
IN OPPOSITION TO DEFENDANT'S
MOTION FOR NEW TRIAL

The undersigned hereby declares under penalty of perjury of the laws of the state of Washington that the facts stated below are true and correct.

I am competent to testify on my own behalf and all of the information set forth in this Declaration is based upon my own personal knowledge or upon records that are considered to be reasonably reliable in the field of vocational rehabilitation. I have a master's degree in rehabilitation counseling and am certified as a rehabilitation counselor, case manager and a disability management specialist.

I am a principal at OSC and our biggest client is the State of Washington Department Labor & Industries. I have also received a contract from the Department of Veteran Affairs

DECLARATION OF CHOPPPA IN OPPOSITION TO
DEFENDANT'S MOTION FOR NEW TRIAL - Page 1 of 6

SWANSON ❖ GARDNER, PLLC
Attorneys at Law
4512 Talbot Road South
Renton, Washington 98055
(425) 226-7920
Facsimile (425) 226-5168

1 serving veterans with service connected disabilities. I also do forensic work for both
2 plaintiff's and defendant's attorneys, including all of the trial attorneys who were involved in
3 this case on both sides. In this case, I was asked to evaluate the records and interview Mark
4 Jones in order, in part, to render an opinion concerning his employability following his
5 accident on December 23, 2003.

6 I have recently reviewed the Declarations of Dr. Stump, Dr. Clark and Ted Becker,
7 Ph.D. that were submitted in support of the City's CR 60 Motion, together with the portions of
8 video surveillance presented as part of that Motion. In addition, I am familiar with the
9 newspaper articles, Internet postings, and TV coverage generated by the release of the City's
10 motion to the press. I have reviewed a transcript of my trial testimony, Mr. Jones' life care
11 plan and a number of the medical records I had previously reviewed prior to trial, which
12 include records from Harborview, Virginia Mason, the neuropsychological reports from Dr.
13 Goodwin and Dr. Coppel, the City's panel exam, Mr. Jones' pre-accident employment records
14 and the depositions of Mark Jones, Meg Jones and Ann Jacobs-Jones. I have also reviewed
15 the recent Declarations of Mr. Jones' treating physicians, Dr. Friedman and Dr. Esselman, his
16 treating psychologist, Dr. Brockway, and neuropsychologist Dr. Glen Goodwin.

17
18 My opinion has not changed from the opinions I expressed at trial and in my
19 deposition: Mark Jones is not capable of gainful employment. The ability to be gainfully
20 employed requires the following:

21 1. Productivity. The individual must be competitive in terms of productivity. The
22 ability to perform the amount of work required by one's supervisor, in competition with others
23 who want that job, is critical to employability.
24
25

1 2. Quality. The quality of the individual's work must be consistent for the industry.
2 Only a certain number of errors are tolerated in the world of competitive employment.

3 3. Personal interaction. The individual must be able to interact inter personally on an
4 appropriate level with co-workers and the public.

5 4. Sustainability. In order to remain employed, the individual must be able to sustain
6 his or her job and be able to participate in their own individual interpersonal roles at home,
7 whether it is as a spouse, parent, friend or volunteer. If all the individual is doing after work
8 is attempting to recover sufficiently to go back the next day, employment will not be
9 sustainable.

10 My first reaction when I saw the media coverage of the City's Motion and surveillance
11 videotape segments was one of dismay for Mark Jones. It appeared this was an attempt
12 embarrass, humiliate or otherwise paint Mark Jones as someone who is dishonest. Based
13 upon my interactions with Mr. Jones and my review of his records, he gave everything he had
14 to try to return to work as a Firefighter and, when that door was closed to him, he worked
15 equally hard to be re-trained as a dispatcher to try and stay active within the firefighting
16 community. It is also my impression that Mark Jones is anxious about how he is perceived by
17 others and does not like to be treated as someone who is disabled. Therefore, I am concerned
18 that public humiliation like this could be very hard, emotionally, on Mark.
19

20 I was concerned that the video ignored Mr. Jones' brain injury and suggested that the
21 reason he could not work was because of his "broken ribs and chronic pain."

22 However, my other impression of my review of the videotape surveillance is, "Good
23 for you, Mark." He has objective evidence of brain injury and ongoing brain damage, and
24 suffers chronic pain from nine broken ribs, lung damage and lost pulmonary capacity,
25

1 multiple fractures of his pelvis and spine, laceration of his liver and rupture of his bladder, but
2 he is "not dead." I encourage all of my clients, including Mark Jones, to do everything they
3 can to remain as active as they can. It would be counter productive for Mark to "do nothing."

4 At trial I testified that I was aware that since the accident Mark has had girlfriends. I
5 also testified that he remained physically capable of hunting (including hunting for deer,
6 turkey, geese and ducks), fishing, using his computer, taking care of his own ADL's, cooking,
7 vacuuming and performing other household chores on at least a limited basis, helping in the
8 yard, running errands, driving in familiar areas, interacting with his young son, Jesse
9 (including going to the movies, shopping and go-carting), and taking care of his dog.

10 None of the activities I saw on the surveillance videotape are inconsistent with what I
11 understood Mark was capable of doing at the time I testified. There is nothing in the
12 videotape that suggests to me that Mark is a malingerer. His activities are not inconsistent
13 with any of the limitations I saw in his medical records or in the City's Panel Exam.

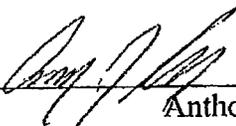
14 Throwing horseshoes is certainly no more physical than occasional hunting, fishing, go-
15 carting or doing household chores. I am pleased that he is still able to go in a camper to Fort
16 Flagler, where I understand much of this videotape was taken. I know from my review of
17 records that Mark had gone to Fort Flagler with Jesse and with his ex-wife, Ann Jacobs-Jones,
18 between the date of his injury and trial. The City's physicians, including Dr. Stump and Dr.
19 Clark, indicated in their Doctor's Estimate of Physical Capacities that he could occasionally
20 lift 26-50 pounds. I did not see him lifting anything that appeared to come close to exceeding
21 50 pounds in the video. Chopping wood for a few minutes does not equate with the physical
22 capacity to be gainfully employed on a consistent basis.
23
24
25

1 More importantly, the impact of Mark Jones' brain injury on his employability cannot
2 be assessed by looking at a silent videotape. The medical records and testimony document
3 objective evidence of bleeding within Mr. Jones' corpus callosum, frontal lobe and other areas
4 in his brain. Bleeding is evident in multiple areas on CT scans. These are objective findings.
5 Meg Jones and other witnesses gave graphic real world examples of Mark's difficulties from
6 impaired brain function. None of the testimony concerning the nature and extent of his brain
7 injury was rebutted by defense witnesses in any reports or medical records that I reviewed, or
8 that I was asked about by the defense attorneys in trial. Neuropsychological testing by both
9 the defendant's expert and plaintiff's expert showed long term problems with memory and,
10 more predominately, with frontal lobe functions, including executive function, judgment and
11 planning. These deficits are consistent with the problems Mark demonstrated when he tried to
12 retrain to work as a dispatcher. Physically, he could work as a dispatcher, but his inability to
13 multitask (a common sequelae of frontal lobe injury) or process the information he received
14 efficiently and rapidly made it impossible for him to do this type of work. The videotape adds
15 nothing to my understanding of his brain injury. The deficits Mark has from his brain injury,
16 as per the medical experts, would not preclude him from playing horseshoes, digging a hole or
17 chopping wood.
18

19 Similarly video of a person's good days does not demonstrate whether that person can
20 or cannot work from a physical standpoint. To be employed a person has to be able to have
21 consistency – show up and have that consistent level of physical performance needed to do
22 the job, and then show up again and every other day and be able to perform. If chronic pain
23 produces any significant number bad days where physical performance is reduced, then a
24 person is not employable in the real market. I also testified to this consistency requirement at
25

1 the trial. The video shows only a small segment of a few days of Mark Jones. It does not and
2 cannot demonstrate that he has no bad periods when he is less physically able. The records I
3 had reviewed demonstrated Mark had always had up and then down periods and this video
4 also did not address those.

5 Dated: September 16, 2010

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9 Anthony J. Choppa

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Honorable Susan Craighead

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,

vs.

CITY OF SEATTLE,

Defendant.

No.: 06-2-39861-1 SEA

DECLARATION OF JO ANN
BROCKWAY IN OPPOSITION TO
DEFENDANT'S MOTION TO VACATE
JUDGMENT PURSUANT TO CR 60(b)

I am Jo Ann Brockway PhD. and I make this declaration from first hand personal knowledge.

1. I am a licensed clinical psychologist. I am a Clinical Associate Professor at the UW medical school. I work at the Harborview Medical Center in Rehabilitation Psychology. I work in concert with physicians of many backgrounds. I have treated Mark Jones and I testified at his trial.

2. I have reviewed the surveillance video that I am told the City has filed with the Court as some proof Mark is not disabled. I have also reviewed the declarations recently submitted by Dr. Stump, Dr. Clark and Dr. Becker.

DECLARATION OF JO ANN BROCKWAY IN
OPPOSITION TO DEFENDANT'S MOTION TO
VACATE JUDGMENT PURSUANT TO CR 60(B)

Richard B. Kilpatrick, P.S.
1750 - 112TH AVE NE, Suite D-155
Bellevue, WA 98004
(425) 453-8161
Fax: (425) 605-9450
dick@triallawyersnw.com

CP 8833

1 3. Nothing in the video or declarations alters my opinions or affects the
2 testimony I gave about Mark Jones.

3 4. First, given Mark's head injuries, chronic pain and psychological issues
4 Mark is going to be variable in his functioning with both good periods and bad
5 periods. He will in general look and feel better in lower anxiety and lower stress
6 environments.

7 5. Nothing in the video demonstrates that Mark does or does not have
8 cognitive disorders or problems with executive functions. The video simply doesn't
9 speak to the cognitive problems because of the type of activity illustrated.

10 6. The video does not speak to a mood disorder, one way or the other.
11 Many people who have major depression can enjoy life at moments. That is not at all
12 unusual. The very definition of depression in the DSM IV states only that symptoms
13 occur "most of the day, nearly every day." Nearly every day does not require the
14 same appearance every day. A video showing a few days of apparently good mood
15 and normal social interaction does not tell us what Mark's other days are like. It is
16 neither diagnostic of anything nor does it rule out anything. Some patients can also
17 appear to be far better than a clinical interview reveals that they really are.

18 7. The video cannot tell us whether we are seeing a period of remission in
19 major depression that has followed active depression and will be followed by another
20 period of active depression. Thus seeing a "normal" mood on a few days in April or
21 June does not fairly tell us anything about Mark's depression or ability to work.

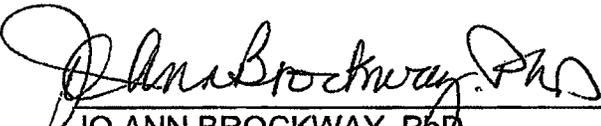
22 8. The video also does not reveal anything about anxiety or stress
23 disorders. As you recall I was also addressing significant anxiety and post-traumatic

1 stress with Mark. This had a significant effect on his sleep, as well as on his ability to
2 function on a day to day basis, particularly in crowded, or pressured situations. This
3 video shows Mark in familiar and relaxed settings and does not reveal anything about
4 Mark's ability to function under pressure or in a stressful situation. Nor does this
5 video not reveal anything about Mark's sleep patterns or functioning in the middle of
6 the night or on first awakening.

7 9. There is no scientific basis that I have ever read about, been trained on
8 or been exposed to among the inter-disciplinary teams that I work with on the
9 rehabilitation wing at Harborview for reaching any conclusion from the short snippets
10 in this video about Mark's usual psychological or cognitive function, and most
11 particularly about his ability to function in a sustained way under stress or pressure.

12
13 I declare under penalty of perjury, of the laws of the State of Washington, that the
14 foregoing is true and correct.

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

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19 JO ANN BROCKWAY, PhD

FILED

10 SEP 20 AM 8:30

KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 06-2-39861-1 SEA

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Honorable Susan Craighead

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

MARGIE (MEG) JONES, AS GUARDIAN
OF MARK JONES,

No.: 06-2-39861-1 SEA

Plaintiff,

DECLARATION OF
DR. ANDREW FRIEDMAN IN
OPPOSITION TO DEFENDANT'S
MOTION TO VACATE JUDGMENT

vs.

CITY OF SEATTLE,

Defendant.

I am Dr. Andrew Friedman, over the age of 18 and I make this declaration from first hand personal knowledge.

1. I am one of Mark Jones' physicians. I am Board Certified in Physical Medicine and Rehabilitation and Pain Medicine and Electrodiagnostic Medicine.

2. I testified at the trial regarding the medical consequences from Mark's injuries when he fell in the fire station. I have reviewed my trial testimony. I am familiar with the surveillance video which has been supplied me by the City and I also saw some of it on the internet when the publicity blitz came. I have reviewed the declarations of Drs. Stump and Clark, and also a declaration from a Ted Becker.

DECLARATION OF
DR. ANDREW FRIEDMAN IN OPPOSITION TO
DEFENDANT'S MOTION TO VACATE JUDGMENT

Richard B. Kilpatrick, P.S.
1750 - 112TH AVE NE, Suite D-155
Bellevue, WA 98004
(425) 453-8161
Fax: (425) 605-9450
dick@triallawyersnw.com

1 3. I have not changed my opinion that Mark is totally disabled. I do not
2 remotely feel Mark and his sister, Meg, were conning me or the other doctors. I have
3 seen Mark for five years and because of that long exposure I have a good idea of
4 Mark's variable range of presentation. He and Meg have also been consistent in their
5 reporting of the up and down nature of Mark's problems which are consistent with my
6 own experience, observations, and conclusions. There is simply nothing in the video
7 inconsistent with what Meg and Mark have presented to me or what I concluded
8 about Mark or what I testified to about Mark's injuries.

9 4. Mark made in many ways a remarkable recovery physically and he is to
10 be applauded for the great effort it took to achieve what he did. However, he was not
11 able to get back to his former pre-injury status. Once Mark finished improving to a
12 basic plateau his course became up and down but not overall improving. For
13 example my clinical notes include statements on March 1, 2005: "...but overall he is
14 physically doing great. There are more concerns coming up regarding cognition." On
15 March 8, 2005: "He is doing progressively better. . . . His difficulties with thinking
16 continue to be an issue . . ." In contrast on October 24, 2006 I noted Mark was worse
17 with more pain. "When he gets more pain, he tends to be more depressed, to have
18 tighter musculature, and overall to look worse." On March 28, 2007 I noted: "Today,
19 Mark appears disorganized cognitively ... rambling ... quite distressed." On other
20 days I noted Mark was tracking better.

21 5. This up and down nature of functioning in chronic pain patients is
22 common. I testified to the up functioning for Mark in the trial at several points,
23

1 including: "...and so the course has been roughly like that, he'd do better for a while
2 and then worse for a while." RP VI-A 55:5-7. I explained the medical basis for the up
3 and down: "Well, from a chemical basis, it's probably related to adrenaline, when
4 people get stressed and their stress hormones are altered and then pain hurts more,
5 and there's good evidence for that. You know, just from a resiliency and coping
6 strategy, people get their coping mechanisms overwhelmed, and so they tend to hurt
7 more and function less well." RP VI-A 55:21 – 56:4.

8 6. The video is not inconsistent with anything that formed the basis of my
9 opinions or my observations over five years. The video shows Mark playing
10 horseshoes, chopping wood, camping with a girlfriend and so forth. These are all
11 activities of a type Mark had been doing and was able to do for a long time before the
12 trial, during at least his better periods. In response to defense questions as well as
13 plaintiff questions I testified that Mark had been driving and had driven numerous
14 times to Montana, a 28 hour trip; he has had girlfriends; has been hunting; has both a
15 shotgun and rifles; can dress himself and bathe himself; can do laundry, and can do
16 meal preparation and he can fish. RP Vol. VI-A 56:3-25.

17 7. Had I been asked a question about Mark's capability to do any activity
18 depicted by the video I would have equally acknowledged his ability to do those
19 during many periods. This includes horseshoes, Bocce Ball, chopping wood, hauling
20 wood or other objects less than about 50 pounds, setting up or breaking down his
21 trailer or similar RV and anything else demonstrated there. I understood that
22 everyone involved in the trial knew Mark had a trailer and also knew Mark had been

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DECLARATION OF
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DEFENDANT'S MOTION TO VACATE JUDGMENT

Richard B. Kilpatrick, P.S.
1750 – 112TH AVE NE, Suite D-155
Bellevue, WA 98004
(425) 453-8161
Fax: (425) 605-9450
dick@triallawyersnw.com

1 playing in horseshoe tournaments at the time of trial too. I have frankly encouraged
2 Mark to do as much as he can, even with some pain, and to get as socially involved
3 as he can. None of that, however, means he does not have serious sequella from his
4 fall and is not totally disabled. You do not have to be an invalid to be totally disabled.

5 8. I did not conclude that Mark was totally disabled because I thought he
6 could never physically do the kinds of activities shown in the video, though Mark is
7 clearly far less able physically than he was before the fall at the station. To be able
8 to work, a person needs to be able to perform to the minimum level all the time, not
9 just some of the time, and during his down periods Mark will not be as able as he was
10 during those few days in the video.

11 9. The major component of Mark's total disability comes from his cognitive
12 impairments. I testified about the cognitive impairments at the trial and their
13 significance.

14 Well, his biggest problem, I think, is, you know, functioning in the real-
15 world environment. It's difficult for him to be organized, it's difficult for
16 him to attend to something that he needs to get done, he's impulsive,
17 both, verbally and in the things that he does, which is a common thing
that happens with brain injury, and his sort of resiliency in problem-
solving skills are impaired, so it -- he has a lot of problems related to his
cognition.

* * *

18 "[My note for December 7, 2008] says, based on his presentation to me
19 and conversations with his family, it is clear that he is forgetful, that he's
20 distractible, that he has impulsivity and poor follow-through, and so I
think it's quite clear that cognitive and psychological issues are quite
disabling for him."

21 RP Vol. VI-A 29:4-13 & 30:3-13.

1 10. I addressed the up and down nature of chronic pain and all its
2 accompaniments:

3 I think that he'll continue to have similar pains as he's having now, that
4 they'll go up and down, depending on changes in the structure of his
5 body or changes in the events of his life, and, you know, as he gets
6 older he'll accumulate more wear and tear and degenerative
7 problems, and most likely will have more pain as he gets older.

8 11. The video shows that Mark had at least a few decent days in April and
9 June of this year and he was able to perform basic physical functions in a low stress
10 environment. This is the same general function I understood for Mark in low stress
11 environments for most of the several months before the trial. Other than
12 demonstrating he can have some decent days in the right circumstances, it is not
13 medically or scientifically appropriate to draw any further conclusions from this video.
14 The activities shown on the video do not significantly call on the executive functions
15 and other brain function problems involved for Mark's IADLs that I was concerned
16 about. The motor skills displayed in the surveillance have essentially nothing to do
17 with the higher cognitive skills that were discussed at trial and my opinion Mark Jones
18 is totally disabled from gainful employment (executive function, abstraction, emotional
19 regulation and so forth).

20 12. I understand great significance is being attached to how Mark was not
21 able to sit long or other appearance features during his testimony as compared to the
22 video. I already mentioned stress is a significant factor that impairs function in chronic
23 pain patients and it also does so in brain injured patients too. I tried to explain this to
24 the jury in my testimony. I even mentioned that stress made things go worse for Mark

1 during his divorce. The stress of having to appear in front of strangers and testify and
2 be cross-examined by a hostile attorney, or potentially hostile and strange doctors at
3 the panel exam for the City, had to be quite stressful for Mark. The jury most likely
4 saw Mark functioning at one of his lowest points during the Fall. The surveillance
5 video was of Mark in a very relaxed and unpressured setting with a girlfriend. Had I
6 been asked at trial I would have said and I repeat here that I would not have
7 expected Mark to function the same at trial as he does in a relaxed environment like
8 hanging out with a girlfriend.

9 13. The video highlight throwing balls and horseshoes. What Mark had
10 trouble with was an overhand throwing motion like baseball players use, not
11 underhanded or shot-putt style. Like most of his problems, this was periodically better
12 or worse, not constant, as I testified to at trial. The problems concerns abduction
13 (pulling his arm straight out to the side and up above his head), not raising the arm
14 straight to his front. Mr. Gardner asked me about "periodic" pain and stiffness. I
15 talked about guarding in his upper thorax and stated: "So when he's in a lot of pain,
16 it's really hard for him to raise his arm overhead, that muscle will pull him down,
17 basically creates the shoulder situation." RP VI-A 13:19-22. I certainly did not state
18 he could never do this.

19 14. I am surprised that Dr. Stump or Dr. Clark or any physician would say
20 they changed their minds about anything based on this video. Conclusions about a
21 person's cognitive condition should be based on cognitive data or conditions that tax
22 the cognitive elements in question and observed over a significant period of time.

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DECLARATION OF
DR. ANDREW FRIEDMAN IN OPPOSITION TO
DEFENDANT'S MOTION TO VACATE JUDGMENT

Page 6 of 8

CP 8360

Richard B. Kilpatrick, P.S.
1750 - 112TH AVE NE, Suite D-155
Bellevue, WA 98004
(425) 453-8161
Fax: (425) 605-9450
dick@triallawyersnw.com

1 This video did not do either. It should also be clear I formed my opinions of total
2 disability well before the City's panel exam. My records show I wrote a letter to the
3 City in February 2007 with an opinion of total disability. My opinions were in no way
4 based on Dr. Stump or Dr. Clark then, and they are not based on those doctors' now.
5 I was asked by the City to review the panel report and asked if I agreed, which I did.
6 As should be clear I do not agree with what those two doctors may be suggesting
7 and I do not agree there is any medical basis to draw conclusions contrary to mine
8 from the surveillance video.

9 15. I was also surprised that Mr. Becker, who never saw or examined Mr.
10 Jones, would draw conclusions from a video of this type with a few hours from a few
11 days in a person's life, especially if he knew of the significant injuries and
12 documented brain injury and cognitive problems. No one can determine from these
13 few days whether Mark can consistently physically perform over time what is
14 necessary for a job, and no one can assess the cognitive problems from the video
15 either. For example Mr. Becker states Mark's movements are normal. Mark has
16 always had an issue with his right hip. Mark was in to see me on December 22, 2009.
17 I examined Mark and noted his flexibility is generally "quite impaired." I specifically
18 examined internal rotation of Mark's right hip on December 22, 2009. I stated it "was
19 between 10 – 15 degrees about 5 – 10 degrees less than his uninvolved left hip but
20 on the right he has a firm end point which does not exist on the left." This
21 measurement is determined through manipulation, it is not something the patient can
22 effectively fake. This does not necessarily create a markedly visible limp, but it

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24 DECLARATION OF
25 DR. ANDREW FRIEDMAN IN OPPOSITION TO
DEFENDANT'S MOTION TO VACATE JUDGMENT

1 contributes to problems in Mark's gait and would likely become more noticeable
2 during tired or stressful times. It is surely not normal. The video in fact seems to
3 confirm impaired flexibility.

4 I declare under penalty of perjury, of the laws of the State of Washington, that
5 the foregoing is true and correct.

6 DATED this 15th day of September, 2010, at Seattle, Washington.

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8  9/15/10

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10 ANDREW FRIEDMAN, MD

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

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
	Mark drank anywhere between 4 and 10 beers, probably a couple of times a week. At times he went 4-5 months without drinking at all.	CP 394-96
11/04/2003	Mark arrested for driving under the influence while returning from hunting trip with firefighter friend.	CP 333-37, 412
	The charge was reduced to negligent driving.	CP 1812-13, 1931
Mid-November 2003	Ann reports that Mark stopped drinking after the DUI, and took his daughter, who was living with them for a short time, to AA meetings.	CP 400, 401-02, 412-13
Thanksgiving 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
	Mark reports that after the DUI arrest, he "[m]aybe" drank three to four beers on Friday nights, but he does not specifically recall drinking any alcohol after the DUI, and before he fell.	CP 89, 1931, 2722
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
	Mark and Ann fought about whether Mark would have time to finish putting together Jesse's tricycle before going to work.	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
	Dr. McIntyre, Mark's attending physician in the ER, ordered the alcohol withdrawal protocol after a registered dietician noted that Mark was highly agitated.	CP 1864, CP 399
	Dr. McIntyre declared that initiating the alcohol withdrawal protocol does not mean that there was a diagnosis of alcohol withdrawal or dependency and that it was unlikely that Mark was withdrawing.	CP 1817-18
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
2004	Pulmonary function tests reveal that Mark's injuries from the fall caused a sharp decrease in his lung capacity.	9/16/09 RP at 190-201
3/31/2004	Mark reports not drinking since November 2003 at court ordered alcohol assessment.	CP 2722
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
	Dr. Dawn Ehde (quoted above) testified at trial that Mark "definitely had a significant brain injury." His test results were typical for a brain injury.	10/7 RP 150-51
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
	Dr. Esselman continued as Mark's doctor.	09/16 RP 23
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. The doctor's chart note refers only to a "Joe." Joe Kane was never deposed and was not called at trial.	CP 525 CP 525, 4506, 4347
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 Early-2005 was going to function more normally. Then he was doing really well."	RP (Sept. 17, 2009-A) at 53-55
1/11/2005	City receives medical records from Gordon Jones	CP 7780
Early 2005	Mark is mentally "good to go" as firefighter Meg reports that Mark seemed "good to go," but after a strength and endurance test, he crash[ed] again.	CP 164 CP 164-65
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 Dr. Friedman notes that Mark is having cognitive problems such as remembering information and confusion with directions while driving.	CP 2736 CP 2737
3/08/2005	Dr. Friedman notes that Mark is doing progressively better, reporting minimal pain and feeling great Dr. Friedman notes that Mark continues to have significant cognitive difficulty.	CP 2738 CP 2738-39
4/29/05	Dr. Friedman notes that Mark's pain complaints have increased again and that Mark's affect is depressed and his thinking process is not linear.	CP 2741
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
9/3/05	Dr. Friedman notes that Mark is not doing very well and that he does not think that Mark could be independently competitive in a work environment.	CP 2746

9/28/2005	Dr. Esselman notes that there did "not appear to be any significant permanent restrictions due to the cognitive impairment."	CP 10494
11/2005	Mark spends much of November in Helena, MT undergoing intensive physical therapy with his father	CP 7794-98
12/15/2005	Dr. Friedman notes that Mr. Jones was "remarkably better" and "breathing fully[.]	CP 2411
	Dr. Friedman notes that the improvement followed a couple of weeks of intensive physical rehabilitation with Gordon Jones	CP 2754
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
1/11 – 1/15/06	Mark undergoes intensive physical therapy with his father in Helena, MT	CP 7798
1/17/06	Dr. Friedman notes that Mark is continuing to gradually improve though he still has good days and bad days	CP 2756
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
	Mark moved in with Meg, who does not allow alcohol in her home	10/07 RP 32 CP 161 1931
4/2006	Mark spends most of April in Helena, MT receiving intensive physical therapy with his Gordon Jones	CP 7788-92
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
11/2006	Mark spends much of November receiving intensive physical therapy from his father in Helena, MT	CP 7781-87

12/22/2006	Mark sues the City.	CP 5-8
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 84-85, 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
3/28/07	Dr. Friedman notes that although Mark is "less on the couch" after the pain-pump installation, Mark continues to have pain and to "struggle cognitively"	CP 2776
8/9/07	Answering Meg's interrogatories, the City states that it had not hired an investigator or obtained surveillance photos/video of Mark. The City did not later update this response.	CP 3629-31
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
3/6/2008	The City deposes Mark.	CP 69-108; Deposition Video
	Mark discusses Gordon Jones and all his siblings, including Beth Powell.	CP 72-73
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
3/28/08	Dr. Friedman notes that Mark is more distressed because he talked about all his injuries at his recent deposition.	CP 2786-87
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
4/28/08	Dr. Friedman notes that Mark is doing "about status quo"	CP 2789
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

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
	Dr. Friedman notes that Mark is doing generally fairly well for him, though he still has physical and cognitive problems.	CP 2790
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
	Dr. Coppel concluded that Mr. Jones' current decline is more likely related to the ongoing factors mentioned by other evaluators including variable levels of pain, anxiety and depression.	CP 10515
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
9/17/08	Dr. Friedman notes that Mark is essentially status quo with the exception of an improvement in his depression.	CP 2791
11/12/2008	Meg substituted for Mark as plaintiff	CP 21
12/5/08	Dr. Friedman notes that Mark is "status quo" though he has a new girlfriend and has been more cheerful.	CP 2795
2009	Pulmonary functions tests reveal that Mark's lung capacity again fell significantly	9/16/09 RP at 190-201
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
5/04/2009	Dr. Goodwin reports Mark's "fake bad score" of 30.	CP 10528
	Dr. Goodwin concluded that Mark was not malingering - he put forth optimum effort and gave an honest picture of his strengths and weaknesses	9/22 RP 212-13; 9/23 RP 189
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

5/29/09	Dr. Friedman notes Mark has been "essentially stable" over the last month, but still has several difficulties, including chronic pain and cognitive impairments.	CP 2799
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.	CP 1174-97
7/21/2009	The City deposes Meg for a second time.	CP 9819-57
7/24/09	Meg moved to compel discovery from the City, including interrogatory responses and the deposition of investigator Hill.	CP 1242, 1337
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	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
8/3/09	Judge Craighead orders the City to supplement all previous requests for production and interrogatories and to produce investigator Hill for deposition if he is to be a trial witness. The trial court denied the City's motion to compel a second deposition of Mark.	CP 1336-37
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
	Dr. McIntyre states that it was unlikely that [Mark] was in alcohol withdrawal in the hour before he arrived at Harborview.	CP 1817-18
8/7/2009	Discovery cut-off.	CP 1481
8/12/09	City refuses to provide Hill for deposition and strikes him as a witness.	CP 3606
8/14/2009	Mark declares that he does not recall drinking at all between his DUI arrest and his fall.	CP 1931
8/21/09	City hires new investigator Rose Winquist, but does not tell Meg.	CP 8206

8/26/2009	Declaration from Plaintiffs expert, Dr. Russell Vandenberg, in support of Plaintiffs theory that Mark was not suffering symptoms of disorientation from alcohol withdrawal when he fell. Declaration from Dr. Friedman in support of Plaintiffs 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
9/2/2009	The City opposes Meg's motion to exclude alcohol evidence.	CP 2269-84
9/2/2009	Joint Statement of Evidence.	CP 7635-85
9/3/2009	Plaintiffs reply in support of alcohol motion in limine.	CP 2692-705
9/4/2009	The trial court excludes alcohol evidence, subject to one exception and further offers of proof.	RP (Sept. 4, 2009) at 110-18
9/7/2009	Meg driving Mark from one bar to another; investigators find Mark drinking at Bert's Tavern in Mill Creek.	CP 4309-11, 4313-18
9/8/2009	The City submits supplemental briefing on alcohol.	CP 2827-31
9/8/2009	Jury selection begins.	CP (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
9/11/09	Judge Craighead reserves ruling, ordering Meg to depose Powell over the weekend.	9/11/09 RP at 103-116
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 examine Dr., Friedman during an offer of proof outside of the presence of the jury.	RP (Sept. 17-A, 2009) at 123-35
9/18/09	City files Defendant's Disclosure of Additional Rebuttal Witnesses for the first time identifying Rose Winquist and Beth Rowell as trial witnesses.	CP 3620-22
9/20/09	Meg objects and moves to strike Winquist and Powell.	CP 3587-3595
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	Plaintiffs 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 allow Gordon to testify.	RP (Sept. 30, 2009) at 10-11, 67-72
	Judge Craighead reserves ruling on whether Gordon will testify in rebuttal.	9/30/09 RP at 67-72.
10/1/2009	Meg testifies; the trial court refuses to change its ruling on alcohol evidence.	RP (Oct. 1, 2009) at 81-98
10/8/2009	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
10/8/2009	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
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 10147-60
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
6/2/2010	Investigators conduct surveillance of Mark.	Ex. Sub No. 466A; CP 10168-75
6/3/2010	Investigators conduct surveillance of Mark.	Ex. Sub No. 466A; CP 10175-76
6/4/2010	Investigators conduct surveillance of Mark.	Ex. Sub No. 466A; CP 10176-79
6/5/2010	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
8/3/2010	Dr. Clark declares that he no longer stands by his opinion that Mark is totally and permanently disabled.	CP 8267-71
8/3/2010	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
8/4/2010	Dr. Stump retracts his opinion that Mark is totally and permanently disabled.	CP 8272-76
8/4/2010	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
9/3/2010	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 the does not feel deceived by Mark and Meg.	CP 8355-62
9/16/2010	<u>Dr. Esselman declares that there is nothing shown that changes his mind.</u>	<u>CP 8823-32</u>
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] encountered."	CP 9459-64
9/23/2010	Mark does not appear for an independent medical examination ordered by Workers Compensation Unit.	CP 9477
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