

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
May 31, 2012, 2:49 pm
BY RONALD R. CARPENTER
CLERK

NO. 87343-7

RECEIVED BY E-MAIL

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Plaintiff/Respondent,

v.

CITY OF SEATTLE,

Defendant/Appellant

ANSWER TO PETITION FOR REVIEW

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

Attorney for Respondent

ORIGINAL

FILED
MAY 31 2012
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

TABLE OF CONTENTS

INTRODUCTION	1
STATEMENT OF RELEVANT FACTS THE CITY OMITTS.....	2
A. The City concedes liability, seeking a new trial on damages only.....	2
B. Mark's recovery has always been up and down, contrary to the City's claims that Mark and his sister and legal guardian Meg were deceptive about his recovery and damages.	2
C. Procedure.....	5
REASONS THIS COURT SHOULD DENY REVIEW.....	8
A. This Court should deny review, where the City does not seek review of the trial court's independently dispositive reasons for excluding Powell, Gordon, and Winquist.	8
1. These witnesses would have primarily testified about alcohol, which was irrelevant under the trial court's unchallenged <i>in limine</i> rulings.....	8
2. There is at least one additional basis for excluding each of these witnesses.	11
3. This Court should not accept review to again revisit Burnet , which the Court has twice recently reiterated.....	13
B. As the appellate court correctly held, the trial court properly performed the on-the-record balancing required under Burnet and its progeny.	14
C. There is no conflict with Kurtz and Praytor , which are inapposite and thus inapplicable.	18
CONCLUSION	20

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Blair v. TA-Seattle E. No. 176</i> , 171 Wn.2d 342, 254 P.3d 797 (2011).....	13, 14, 16, 18
<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484, 933 P.2d 1036 (1997).....	passim
<i>Kurtz v. Fels</i> , 63 Wn.2d 871, 389 P.2d 659 (1964).....	passim
<i>Praytor v. King County</i> , 69 Wn.2d 637, 419 P.2d 797 (1966).....	passim
<i>Teter v. Deck</i> , ___ Wn.2d ___ (2012).....	13, 14, 16
RULES	
ER 403.....	6
RAP 13.4(b)(1).....	14
OTHER AUTHORITIES	
CR 59.....	5, 7
CR 60.....	5
CR 60(b)	passim

INTRODUCTION

The trial court correctly excluded Beth Powell, Gordon Jones and Rose Winqvist on numerous grounds, including irrelevance, lack of personal knowledge, improper use of a so-called rebuttal witness, and disclosure so late it was incomparable to any precedent. The appellate court affirmed on multiple grounds. Yet the City challenges only the exclusion of these witnesses as a discovery sanction for their phenomenally late disclosure, ignoring the other independent reasons for their exclusion. Independently sufficient grounds to affirm make review unnecessary.

The appellate court also correctly held that the trial court amply considered willfulness, prejudice and lesser sanctions before excluding Powell, Gordon and Winqvist. There is no conflict – **Jones** follows **Burnet** and its progeny. This Court need not reiterate the law governing discovery sanctions – again – where the trial and appellate courts correctly followed this Court's precedents.

This matter does not conflict with this Court's decisions in **Kurtz** and **Praytor**, holding that a defendant is entitled to a new trial under CR 60(b)(3) if it relies on a clear and unambiguous factual assertion that is false. Here, as on appeal, the City fails to identify a false factual assertion. This Court should deny review.

STATEMENT OF RELEVANT FACTS THE CITY OMITTS

A. The City concedes liability, seeking a new trial on damages only.

Former Seattle firefighter Mark Jones was, by all accounts, one of the City's finest. 09/30 RP 34, 161-64, 189-90; 10/01 RP 13, 16, 72. Aggressive, incredibly fit, bright, dedicated and loyal, Mark was the firefighter his colleagues aspired to be. *Id.* Mark was engaging, quick-witted, and friendly – a phenomenal athlete and avid outdoorsman. 09/29 RP 93-95; 10/01 RP 72-99, 102, 115.

The life Mark knew and his career of service ended when, while detailed at Fire Station 33 on December 22 and 23, 2003, Mark got up to use the bathroom, walked through the pitch-black bunkroom, opened an unlit and unguarded door, and plummeted 15 feet down the pole-hole onto a concrete floor. BR 4-5, 10-12, 22. He was the second firefighter to fall through this pole-hole. CP 1340. The City now concedes liability for this easily preventable tragedy, seeking a new trial on damages only. PFR 1 n.2.

B. Mark's recovery has always been up and down, contrary to the City's claims that Mark and his sister and legal guardian Meg were deceptive about his recovery and damages.

The City's entire fact section is an effort to show that the surveillance images of Mark playing horseshoes and camping

contradict Mark's damages claims. PFR 2-14. But Mark never asserted that he is "totally disabled." CP 9791. His damages are measured by comparing "what he has been through, what his life is like now and will likely be in the future with what his life was like before the accident" *Id.* "The overweight man throwing horseshoes in the surveillance footage is a far cry from the man Mark Jones once was." CP 9795.

The City does not contest that Mark suffered severe injuries, including extensive bodily damage and a diffuse axonal brain injury. Unpub. Op. 2; BR 10-12. He continues to suffer severe pain and a whole constellation of cognitive deficits, including:

- ◆ Continuous chest, shoulder, hip, pelvis, and lower back pain;
- ◆ A "combination of sleep disturbance, chronic pain, decreased mobilities, susceptibility to fatigue, sexual dysfunction, [and] decreased sense of smell and taste";
- ◆ Confusion, disorientation, and path-finding problems;
- ◆ Difficulty concentrating, distractibility, poor follow-through, and poor memory;
- ◆ Slow thinking and "processing speed";
- ◆ Poor executive function – problem solving, organizing, planning, prioritizing, and decision making;
- ◆ Poor judgment, insight, self-expression, and presentation;
- ◆ Emotional or "neurobehavioral" problems including anxiety and depression, resulting from his brain injury and from adjusting to living "with all of the complexities of his injuries."

09/17 RP 10-19, 25-30, 32-34; 09/22 RP 182-84, 187, 190.

For 2.5 years after his fall, Mark did everything in his power to return to the SFD. BR 13-19, 21-22. His doctors agreed that more than any patient they had seen, Mark was "dedicated," "insistent," and "desperate" to work. 09/16 RP 30; 09/17 RP 35. In early 2005, Mark attempted several light-duty jobs for the SFD, such as working around the firehouse. 09/16 RP 31-32. But Mark simply did not have the cognitive or physical ability to work, even in this "very supportive" environment with "a lot of accommodations." 09/16 RP 32-33, 63-64; 09/28 RP 213-15.

The realization that Mark could not work was naturally a low-point in his recovery, which has always been "up and down." BR 22; 09/16 RP 36-37, 66; 09/17 RP 55, 128. Mark would "do better for a while and then worse for a while." 09/04 RP 121; 09/16 RP 33-34, 65-66; 09/17 RP 53, 54-55, 127-28. He "plateau[ed]" in early 2006, after which he has continued to go up and down without any overall improvement. CP 8356; BR 20-22.

The City claims that Mark "adopted" his medical records as his discovery responses on damages and that following a "promising recovery" through 2005, these records reveal a steady decline into "near-total physical and mental incapacity by Winter 2008." PFR 3-4. This is false. Records from 2005 state that Mark

is "losing ground physically and emotionally," and document continuing and increasing pain and cognitive deficits. CP 2741, 2743-44, 2746, 2748, 2752. Records from 2006 through 2008 indicate that Mark's recovery continued to be "up and down," and was "status quo" overall. CP 2783, 2804, 2789, 2791. In short, Mark's extensive medical records document his always "up and down" recovery. CP 2756-57, 2760, 2764, 2783, 2804.

C. Procedure.

Following a six-plus-week trial, the jury found that the City negligently failed to guard the pole-hole enclosure, awarding Mark \$12.75 million. CP 4730-32. The trial court denied the City's CR 59 motion for a new trial or judgment as a matter of law, and the City's CR 60 motion to vacate. CP 7806-08, 8181-202, 9790-9799. The appellate court affirmed, noting that each ruling challenged on appeal was discretionary and that "this case in particular exemplifies the propriety of deferring to the trial court in such matters." Unpub. Op. 5.

The appellate court correctly affirmed the trial court's *in limine* rulings excluding pre- and post-fall alcohol-use evidence, other than two occasions of Mark drinking after his fall. Unpub. Op. 13-18. The City argued that pre-fall alcohol use contributed to

Mark's fall and that post-fall alcohol use contributed to the City's "perceived downturn in Mark's recovery." Unpub. Op. 7, 10. After voluminous pleadings and argument, the trial court "excluded pre-incident alcohol-use evidence, noting 'several problems': It was "fundamentally based on speculation," prohibited under ER 403, and "a real attack on [Mark's] character." *Id.* at 10-11 (quoting 09/04 RP 112-13). The court excluded post-fall alcohol-use evidence, ruling that the City could not "articulate, let alone support" its theory that post-fall alcohol use was somehow relevant. Unpub. Op. 11 (quoting 09/04 RP 113-14). The court later confronted the City with its repeated attempts to get "alcohol in as character evidence." Unpub. Op. 12 (quoting 09/14 RP 110). The appellate court affirmed these *in limine* rulings. *Id.* at 15, 17-18. The City does not seek review.

The appellate court also affirmed the exclusion of Beth Powell, Gordon Jones, and Rose Winquist, on "numerous grounds," including irrelevance, lack of personal knowledge, improper use of a so-called rebuttal witness, and late disclosure. Unpub. Op. 18-44. The City asks this Court to review only one – late disclosure. The appellate court correctly held (1) that the other grounds are

independently sufficient to affirm and (2) that the trial court amply considered the **Burnet** factors. *Id.* at 29-32, 36-39, 42-44.

The appellate court correctly affirmed the order denying the City's CR 59 motion for a new trial or judgment as a matter of law, holding that the trial court acted within its discretion in making the evidentiary rulings upon which the City's motion was based. Unpub. Op. 44-46. The City does not seek review.

The court also correctly affirmed the order denying the City's CR 60(b) motion. Unpub. Op. 46-55. The City seeks review of this decision only as it pertains to CR 60(b)(3).

On appeal (as here) the City argued that it exercised the diligence necessary to obtain a new trial under CR 60(b)(3), relying on this Court's decisions in **Kurtz** and **Praytor**. PFR 17-20; Unpub. Op. 50-52; **Kurtz v. Fels**, 63 Wn.2d 871, 389 P.2d 659 (1964); **Praytor v. King County**, 69 Wn.2d 637, 419 P.2d 797 (1966). The appellate court correctly held that the City failed to show a "clear and unambiguous" factual assertion. Unpub. Op. 51; **Kurtz**, 63 Wn.2d at 875. As discussed below, the City "instead" "misrepresent[ed] the record." Unpub. Op. at 52; Argument § C.

The court was also unconvinced that the surveillance video contradicted Mark's representation of his condition, as were Judge

Craighead and all of Mark's doctors, who testified that the video did not change their opinions, and was not a proper means to assess Mark's cognitive problems. BR 81-83; Response to City's Recon. Motion ("Response") 12. And the appellate court upheld the trial court's three grounds for determining that the City failed to exercise requisite diligence, none of which the City here mentions. Unpub. Op. at 52; CP 9780-82.

REASONS THIS COURT SHOULD DENY REVIEW

- A. This Court should deny review, where the City does not seek review of the trial court's independently dispositive reasons for excluding Powell, Gordon, and Winqvist.**

The City asks this Court to review only the exclusion of Powell, Gordon, and Winqvist as a discovery sanction for their phenomenally late disclosure. PFR 14-16. Again, this was only one basis for excluding these witnesses. The City does not seek review of any of the other "numerous grounds for exclusion set forth by the court." Unpub. Op. 39. This Court should deny review.

- 1. These witnesses would have primarily testified about alcohol, which was irrelevant under the trial court's unchallenged *in limine* rulings.**

As discussed above, the City does not seek review of the trial court's *in limine* rulings excluding pre- and post-fall alcohol-use evidence. The City neglects to mention that Powell, Gordon, and

Winqvist would have primarily testified about alcohol, prohibited by these *in limine* rulings. This is an independent – and unchallenged – basis to affirm. This Court should deny review.

Three days into trial, the City “surprised everyone,” offering Mark’s estranged sister, Beth Powell, “not [as] a trial witness, [but as] an offer of proof” on alcohol. Unpub. Op. at 18; 09/11 RP 104, 106.¹ Although this was plainly an “ambush,” the trial court ordered the parties to depose Powell before ruling. Unpub. Op. 19; 09/11 RP 111, 116. The deposition confirmed that nearly all of Powell’s testimony would have been about alcohol. Unpub. Op. at 18-19; 09/29 RP 23; CP 3620, 3778, 3782-84, 3794-98, 3800.

Three weeks into trial, the City moved to call Mark’s father, Gordon Jones. 09/29 RP 27; CP 4079. “As with Powell,” Gordon would have “primarily” testified about alcohol. Unpub. Op. 36 (quoting CP 4082). His declaration was almost entirely about alcohol and “family conflicts unrelated to this litigation.” Unpub. Op. 36; 09/29 RP 27-28; 09/30 RP 69; CP 4068-75.

Just days before the six-plus-week trial was over, the City first moved to call private investigator Rose Winqvist. Unpub. Op.

¹ One week later, the City identified Powell in its “rebuttal” witness disclosure. CP 3620-22. Meg objected. CP 3587-95.

40-41. Like the others, Winquist would have talked about alcohol: that she observed Mark in a tavern, "talking on his cell phone, playing video games, and drinking three Bud Light beers." *Id.*

The trial court correctly excluded Powell's testimony, under its *in limine* rulings prohibiting alcohol-use evidence:

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. The appellate court correctly held that "[t]his basis for exclusion is independent of the City's conduct in failing to disclose Powell." Unpub. Op. 32.

The trial court correctly excluded Gordon's testimony on the same basis (*id.* at 33; 09/29 RP 27-28; 09/30 RP 69):

I still haven't seen anything that suggests that the analysis I've already given as to the relevance or lack thereof of the alcohol history is changed by this . . .

Here too, the appellate court correctly held that irrelevance and unfair prejudice were "independent" and "alternative" reasons for excluding Gordon's testimony. Unpub. Op. 38-39.

Winquist's alcohol-use testimony was also irrelevant under the trial court's *in limine* rulings. Unpub. Op. 40-41. Even the City's

“sanitized” version of Winquist’s testimony would have placed Mark in a bar. 10/14 RP 12-13.

These are independently sufficient grounds to affirm. This Court need not take review.

2. There is at least one additional basis for excluding each of these witnesses.

The trial court also excluded Powell’s testimony because she lacked personal knowledge. Unpub. Op. 20; 09/29 RP 23. This is plainly correct – the City agrees that Powell and Mark were “alienated.” BA 53. Aside from a short visit at the hospital, Powell never visited Mark in the years before or after his fall. CP 3776-77, 3790. Powell even admitted that some of her testimony was based on second-hand accounts. CP 3782, 3798.²

Gordon also lacked personal knowledge – like Powell, he admitted that some of his proffered testimony was based on second-hand accounts. CP 4068-69, 4071-72. He had not seen Mark since 2006, and professed no knowledge of Mark’s physical, mental, or cognitive condition. CP 4068-75, 8079. And the City

² Without any argument or support, the City baldly asserts that they established her knowledge. PFR at 11 n.14. The City does not seek review of the trial court’s ruling rejecting its assertion.

wanted to call Gordon as a treater, but had violated the rules regarding *ex parte* communications with treaters. 10/14 RP 11.

The trial court also correctly rejected the City's argument that Winquist was really a "rebuttal witness." 10/08 RP 10-16. Long before the City moved to call Winquist, the trial court refused the City's request to compel Mark's presence in court, finding that it lacked legal basis. 09/11 RP 107-09; 10/08 RP 12-16.³ The City did not appeal this obviously correct ruling.

Just days before trial was over, the City moved to call Winquist, arguing that she was a "rebuttal witness" whose testimony contradicted Mark's assertion that he could not be in court. 10/08 RP 10, 15-16. The trial court correctly rejected this argument, where Mark never claimed that he could not be in court, but that "it is difficult for him to sit for long periods of time." *Id.* at 16. This became obvious during his testimony. *Id.* Mark's doctors opined that it would be "detrimental" for him to be in court. *Id.* "[T]hat has nothing to do with what happened in the bar." *Id.*

There was no evidence to rebut – the jury was never told why Mark was not always in court. Nor did Winquist's proffered testimony contradict any evidence before the jury:

³ Meg is the named plaintiff.

[I]f the position that the plaintiff is taking was that, gosh, Mark is so disabled he can't go out, he can't have a conversation with a woman, he – you know, all of those kinds of things, and you have evidence to contradict that, that would be one thing, but what you're doing is setting him up . . . it's not a contradiction, because there's been no position taken that he can't do these things.

10/08 RP 10-16. The jury heard extensive evidence that Mark can still do many of the things he loved before his devastating fall, including hunting, fishing, housework, yardwork, and spending time with his girlfriend. BR 32 (with numerous record citations). It is nothing new – or contradictory – that he can “have a conversation with a woman” or use a cell phone. 10/08 RP 14-15, 49.

Here too, these are independently sufficient grounds to affirm. This Court should deny review.

3. This Court should not accept review to again revisit *Burnet*, which the Court has twice recently reiterated.

This Court has twice recently reaffirmed *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), so need not take review to do so again. *Blair v. TA-Seattle E. No. 176*, 171 Wn.2d 342, 254 P.3d 797 (2011); (*supra*) and *Teter v. Deck*, ___ Wn.2d ___, ___, P.3d ___ (2012). This is particularly so, where the Court would affirm the exclusion of each witness on “independent” – and unchallenged – bases. Unpub. Op. 32, 39. And as discussed below, the City's alleged conflict is non-existent – the

trial court plainly considered the *Burnet* factors, making a record more than sufficient for appellate review. *Infra*, Argument § B; PFR 14-16 (citing RAP 13.4(b)(1)).

Attempting to bolster its conflict argument, the City accuses the Court of Appeals Division One of "institutional hostility to *Burnet*." PFR 15-16. Quite the opposite, the appellate court discussed *Burnet* and *Blair* at length, and correctly summarized this Court's holding in *Blair*. Unpub. Op. 21-25. Simply put, where (as in *Burnet*, *Blair*, and *Teter*) no colloquy discloses the trial court's rational exercise of discretion, the trial court must enter findings regarding willfulness, prejudice, and lesser sanctions to permit appellate review. Here, Division One found the ample colloquies with the careful trial judge sufficient for review. *Id.* at 29-32, 36-38, 43-44.

B. As the appellate court correctly held, the trial court properly performed the on-the-record balancing required under *Burnet* and its progeny.

The City grossly misrepresents the appellate court's holding, falsely claiming that the court upheld "the exclusion of witnesses despite the trial court's failure to do *Burnet* balancing on the record." PFR 15-16. In addition to affirming on the other bases

Identified above, the appellate court held the trial court amply considered the factors. Unpub. Op. 29-32, 36-38, 43-44.

The City's willfulness was obvious. The trial court ruled that the City's late disclosures of Powell and Winquist were an "ambush." *Id.* at 30, 43 (citing 09/11 RP 111, 10/14 RP 17). An "ambush" is the epitome of willfulness. *Id.* at 31. "Such language is not used to describe unintentional behavior." *Id.*

As to Gordon, the trial court rejected the City's "false" proposition that it "did not know anything about Gordon . . . until mid-way through [the] trial," correctly noting that City had been paying Gordon's physical therapy bills from Mark's treatment since 2005. *Id.* at 37 (quoting CP 7815). The City "intention[ally]" chose not to investigate, so had no idea what Gordon would say. Unpub. Op. 37 (citing 10/08 RP 215). This tactical decision "resulted in the untimely disclosure." Unpub. Op. 37.

Prejudice was equally obvious – "the timing of the disclosure itself . . . created the prejudice." *Id.* 30 (Powell), 33 (Gordon), and 43 (Winquist). Powell was "a complete surprise" – the City disclosed her after trial commenced "when plaintiff would have had no opportunity to undertake its own investigation." *Id.* at 30-31

(quoting CP 7815). Permitting Powell's testimony "would have been grossly unfair." Unpub. Op. 31 (quoting CP 7815).

The City disclosed Gordon "three weeks into trial," "almost at the end of the plaintiff's case," thus "the prejudicial effect [was] dramatic." Unpub. Op. 33 (quoting 09/29 RP 25). The court found no published case with such a late disclosure. Unpub. Op. at 36-37 (citing 09/29 RP 24). The "risks of unfair prejudice" would perhaps warrant a "mistrial." Unpub. Op. 33 (quoting 09/29 RP 27-28).

Worse still, the City disclosed Winqvist "within days of the end of trial." 10/14 RP 17. It was "obvious" that this "ambush-like trial tactic . . . would unduly prejudice Jones's ability to present the case 'he had already largely presented' to the jury." Unpub. Op. 43. The appellate court (and trial court) saw this for exactly what it was – "part of a larger strategy to prevent Jones from deposing the City's investigators." *Id.* at 44 n.13.

The trial court also considered lesser sanctions. Unlike in ***Blair*** and ***Teter***, however, a court facing repeated ambushes during trial has few options. For instance, the court considered allowing Powell to testify for rebuttal or impeachment. 09/11 RP 115-16, 147-48. After "voluminous briefing and extensive oral argument,"

the court “judiciously” ordered Powell’s deposition before ruling, providing a “sound basis” for her ruling. Unpub. Op. 32.

Lengthy colloquy demonstrates that the trial court seriously considered allowing Gordon to testify for rebuttal or impeachment, deferring ruling until after Mark and Meg testified. 09/30 RP 64, 67-72; 10/14 RP 11.⁴ It became obvious, however, that the City would still ask Gordon about alcohol. 10/14 RP 10-11. Faced with these insufficient options, the court ultimately concluded that the only alternative to excluding Gordon’s testimony was to declare a mistrial, which no one wanted. Unpub. Op. 38.

The trial court also seriously considered the City’s attempts to limit the scope of Winquist’s testimony and rejected its argument that she was a rebuttal witness. Unpub. Op. 40-41; 10/14 RP 12-13. Again, even the City’s supposed “sanitized” version of Winquist’s testimony would have inquired about alcohol, whose exclusion is unchallenged here. 10/14 RP 12-13. And Winquist was not a rebuttal witness – nothing she would have said contradicted anything the jury had already heard. 10/08 RP 10-16.

⁴ The court also considered, and rejected, the City’s belated argument that Gordon “should be allowed to testify as to his treatment of Mark,” where the City had violated the rules governing contact with treaters. *Id.* at 10-12.

Moreover, *Burnet* requires that trial courts "consider lesser sanctions 'that could have advanced the purposes of discovery and yet compensated [the opposing party] for the effects of the . . . discovery failings.'" Unpub. Op. 31 (quoting *Burnet*, 131 Wn.2d at 497). But "unlike the parties in *Burnet* and *Blair*, the parties in this case were already in the course of trying this case" when the City finally disclosed Powell, Gordon and Winqvist. Unpub. Op. 31, 38, 41. No sanction, lesser than exclusion, would have "advanced the purposes of discovery," which had "long since passed." *Id.* at 31.

C. There is no conflict with *Kurtz* and *Praytor*, which are inapposite and thus inapplicable.

The appellate court correctly held that *Kurtz* and *Praytor* do not excuse the City's failure to diligently investigate, where the City failed to demonstrate "that Jones 'in clear and unambiguous terms under oath, assert[ed] the existence or nonexistence of a fact' upon which the City relied." Unpub. Op. 50-51 (quoting *Kurtz*, 63 Wn.2d at 875). The City still does not identify a clear assertion under *Kurtz*, vaguely citing Meg and Mark's "discovery responses on damages." PFR 18. This Court should deny review.

In *Kurtz*, the plaintiff testified that she had never fainted before the automobile collision that she claimed caused her fainting

spells. Unpub. Op. 50; *Kurtz*, 63 Wn.2d at 872-73. This was false – she had suffered fainting spells for years. *Id.* This Court held that the defendants had a right to rely on the plaintiff's false testimony, so were entitled to a new trial under CR 60(b)(3). *Id.*

Kurtz (and *Praytor*) are inapposite. Again, the City identifies no false factual assertion like the one in *Kurtz*. Unpub. Op. 51; PFR 17-20. On appeal, the City “[i]nstead” took “out of context” statements that Mark’s recovery was “remarkable.” Unpub. Op. 51. These statements did not refer to the post-trial surveillance video as the City claimed, but to Mark’s many bodily injuries and the diffuse bleeding in his brain. *Id.*; BR 74-75; Response 3-5, 13-14.

Mark previously disclosed his “remarkable physical recovery” in 2005 medical records noting his “fairly remarkable change for the better,” and that he was “remarkably better.” CP 2411. Meg repeated the same at her deposition and at trial. CP 156; 10/01 RP 124. Thus, the appellate court held that “[t]he City misrepresents the record when it chides Jones for ‘fail[ing] to disclose’ Mark’s ‘remarkable physically recovery.’” Unpub. Op 52 (quoting BA 62).

In a slightly different version of this argument, the City now suggests that the image of Mark in the surveillance video is

inconsistent with his medical records, which the City claims to have relied upon as his "substantive answers to the City's damages interrogatories." PFR 3, 17-20. Again, however, these records detail Mark's always up and down recovery, and first described Mark's physical recovery as "remarkable" in 2005. *Supra*, Statement of the Case; BR 73-77; Response 9-13; Unpub. Op. 51.

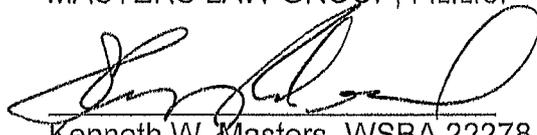
Falsely accusing the appellate court of only "nominally acknowledging the authority of *Kurtz* and *Praytor*," the City argues that the court "conflate[d]" CR 60(b)(3) and CR 60(b)(4), taking "the City to task for supposedly failing to establish that Mark and Meg had engaged in misconduct." PFR 18-19; Unpub. Op. 49-52. The only "misconduct" here is the City's misrepresentations. *Id.*

CONCLUSION

This Court should deny review.

RESPECTFULLY SUBMITTED this 31st day of May 2012.

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



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 caused to be mailed, a copy of the foregoing
ANSWER TO PETITION FOR REVIEW postage prepaid, via U.S.
mail on the 31st day of May 2012, to the following counsel of record
at the following addresses:

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

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



Kenneth W. Masters, WSBA 22278
Shelby R. Frost Lemmel, WSBA 33099

OFFICE RECEPTIONIST, CLERK

To: Shelly Winsby
Cc: 'Shelby Lemmel'
Subject: RE: 87343-7 - Jones v. City of Seattle - Answer to Petition For Review

Rec. 5-31-12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Shelly Winsby [<mailto:shelly@appeal-law.com>]
Sent: Thursday, May 31, 2012 2:49 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'Shelby Lemmel'
Subject: 87343-7 - Jones v. City of Seattle - Answer to Petition For Review

ANSWER TO PETITION FOR REVIEW

Case: Jones v. City of Seattle

Case Number: 87343-7

Attorney: Kenneth W. Masters

Telephone #: (206) 780-5033

Bar No. 33099

Attorney Email: shelby@appeal-law.com

THANK YOU.

Shelly Winsby
Secretary for Masters Law Group
241 Madison Avenue No.
Bainbridge Island WA 98110