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STATE OF WASHINGTON  
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No. 87343-7

SUPREME COURT  
OF THE STATE OF WASHINGTON

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

*Plaintiff-Respondent,*

v.

CITY OF SEATTLE,

*Defendant-Petitioner.*

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ON PETITION FOR REVIEW FROM DIVISION I  
OF THE COURT OF APPEALS

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**SUPPLEMENTAL BRIEF OF PETITIONER  
CITY OF SEATTLE**

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OF PETITIONER  
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## I. SUMMARY INTRODUCTION

The decisions of the trial court and the Court of Appeals in this case violated the touchstone requirement of the Superior Court Civil Rules, of a *just* determination of every action. CR 1.

- Burnet balancing. The trial court excluded City witnesses with new, material, non-cumulative evidence directly contradicting the presentation of Mark Jones as so mentally and physically debilitated he needs assisted living care 24 hours a day, 7 days a week for life. The trial court did not balance the factors set forth in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997); instead, it excluded the new evidence based on a local rule which the court interpreted as requiring the City to prove it was *impossible* to have uncovered the evidence before the close of discovery. These rulings conflict with the Civil Rules, which favor the introduction of newly discovered evidence at trial.

- CR 60(b)(3). Post-judgment investigation showed Mark Jones manifesting abilities directly at odds with the way he had been presented to the jury. Although the trial court agreed that video recordings showed a very different Mark Jones from the picture of Mark painted for the jury, the court denied a new trial solely because it felt the City should have uncovered this evidence before trial. This ruling conflicts with the City's right under *Kurtz v. Fels*, 63 Wn.2d 871, 389 P.2d 659 (1964), and *Praytor v. King County*, 69 Wn.2d 637, 419 P.2d 797 (1966), to rely on the plaintiff's discovery responses, which clearly and unambiguously portrayed Mark Jones as mentally and physically debilitated.

## II. SUPPLEMENTAL STATEMENT OF FACTS

Mark Jones sought damages following a fall down a Seattle fire station “pole hole,” alleging his fall was caused by City negligence. A jury in 2009 found the City negligent, found this negligence proximately caused Mark’s fall, and awarded \$12.75 million in damages. The City now seeks a retrial on the amount of damages to which Mark is entitled.

In 2008 the City did discovery on Mark’s damages. Meg Jones, Mark’s twin sister, responded to the City’s interrogatories on Mark’s behalf under a power of attorney,<sup>1</sup> by referring to Mark’s medical records. CP 7419 (“I have more problems than I can remember to list. *See medical records in possession of City.*” (emphasis added)). The City then received the report of a three physician member Workers’ Compensation panel, which had reviewed Mark’s medical records and conducted orthopedic, psychiatric, and neuropsychological assessments of Mark’s condition. CP 10022-10077. The records reflected that Mark was substantially disabled mentally and physically. *See* App. A (chart listing medical record entries set forth in the panel report, with CP cross-references). The panel found Mark had reached a point of “maximum medical improvement with reference to ... orthopedic and neurological treatment,” and to be “100 percent disabl[ed]” and unemployable due to cognitive impairments. CP 10072. A CR 35 neuropsychological examination in May produced similar results. CP 10512-15.

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<sup>1</sup> In June 2008 Meg successfully petitioned to have Mark declared incapable of managing his affairs. She was appointed his guardian and substituted as the plaintiff.

The City then deposed Mark and Meg.<sup>2</sup> Meg testified that Mark was substantially disabled mentally and physically, and no longer able to work. *See* App. B (chart listing relevant deposition answers, with CP cross-references). Mark testified that he felt like an “80 year old man,” who is in pain “all the time.” CP 82, 85; Ex. Sub. No. 466D (Dep. Video, Part 1, time entry 11:27:14-40; Part 2, time entry 1:11:00-:45). His testimony and his affect were consistent with the picture of his condition painted by Meg’s deposition testimony. *See* App. B.

Trial was continued to September 2009. In May 2009 the City sought a second deposition of Mark. CP 49. Successfully opposing that deposition, Meg testified by declaration that “Mark’s overall condition is roughly the same with similar variations as he and I and the medical records have frequently described.” CP 268. “Mark has an extremely difficult time negotiating through the limited life he can now lead. He has *constant pain* of varying degrees.” CP 265 (emphasis added); *see* Apps. A & B (references to constant pain). The City was allowed a limited second deposition of Meg, during which she explained that the “variations” she referred to in her declaration did not mean a variation in the degree of Mark’s disability: “[W]e deal with a physical condition that leaves him *very limited both mentally and physically*, and the different variations is

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<sup>2</sup> The deposition transcripts are at CP 69-109 (Mark) and CP 130-74 (Meg). A video of Mark’s deposition is in the record at Ex. Sub. No. 466D, and can be viewed by clicking on the hyperlink to it located on the Court of Appeals Corresponding Briefs thumbdrive, copies of which are on file with the Clerk.

[sic] all the problems or compromises that come up with all his problems.”  
CP 9838 (emphasis added).<sup>3</sup>

The City supplemented its discovery with investigation. Investigators never saw Mark during surveillance<sup>4</sup> done in Spring 2008.<sup>5</sup> A final surveillance effort before trial did not locate Mark until after trial began, when investigators saw him at a bar on September 7. *See* CP 4309-18 (declarations of the investigators who saw Mark).<sup>6</sup> Investigator Rose Winquist testified by declaration that Mark’s affect was inconsistent with how his condition had been described in responses to the City’s discovery requests; he manifested neither pain nor disability. CP 4310. The City promptly disclosed that Mark had been seen at the bar, but was not allowed to call Ms. Winquist to testify about what she and her colleagues observed. RP (9/11/09) 114 (disclosure); RP (10/14/09) 17 (ruling).<sup>7</sup>

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<sup>3</sup> Meg responded in July to a requested update of discovery responses by making no changes in the responses to damages discovery. CP 7620. Meg also made no change to those responses either before the close of discovery or before the start of trial.

<sup>4</sup> The record reflects that all surveillance of Mark was in public places where there was no expectation of privacy.

<sup>5</sup> Investigators monitored Meg’s home, where Mark was living, for several days in March and April, but Mark did not appear. CP 8204. In May investigators in Montana were hired to observe Mark at his daughter’s high school graduation, but Mark did not appear. CP 8204. Deposition testimony from Meg and Mark described Mark as spending the vast majority of his time inactive inside Meg’s home. CP 97, 172.

<sup>6</sup> The investigators had followed Meg from her house, saw her pick up Mark from one establishment and drop him off at the bar where he was then observed for about two hours. CP 4313-14, 4316-17.

<sup>7</sup> The City disclosed on September 11 that Mark had been observed at the bar four days earlier. RP (9/11/09) 114. The City then amended its witness list to add Ms. Winquist as the one of its investigators who would testify. CP 3620-21. Meg moved to strike, claiming the City had violated its discovery obligations by failing to disclose that Ms. Winquist was engaged in surveillance. CP 3587-95. The City had previously objected on work product grounds to discovery asking whether the City was engaged in  
(Footnote is continued on the next page.)

The City had been told during discovery that, of Mark's immediate family members, neither his sister Beth Powell nor his father Gordon Jones had knowledge of how Mark's accident was presently affecting him.<sup>8</sup> The City learned, after the close of discovery and through the efforts of its investigators, that Beth and Gordon said they had personal knowledge of Mark's condition contradicting the way that condition had been described in responses to the City's discovery requests. CP 3777, 3780-81, 3788 (Beth's deposition, taken 9/13/11); CP 4065 (Beth's dec.); CP 4068-69 (Gordon's dec.). The City promptly disclosed the content of Beth's and Gordon's evidence,<sup>9</sup> but was not allowed to call either of them

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surveillance, and this objection had been set aside only for an investigator (Mr. Jess Hill) who had been listed by the City as a trial witness, and only if the City intended to call him to testify at trial. *See* CP 3630 (original objection to interrogatory asking for identity of any investigators); CP 1242 (work product objection reasserted in opposition to motion to compel); CP 1336 (order compelling deposition of Investigator Hill only if the City "intends to call Hill as a witness"). The City then struck Hill as a witness because he had no personal knowledge. CP 3606-07. Ms. Winqvist was retained as an investigator on August 21, and was without personal knowledge of Mark's condition until she observed him at the bar on September 7. CP 8206-07.

<sup>8</sup> Meg's responses to the City's "persons with knowledge" discovery request excluded Beth and Gordon from the list of family members Meg said had knowledge of how the accident was presently affecting Mark. *See* CP 7415-16, 7425-30, 7433, 7469-79, 7485, 7488-89, 7561-76, 7599-02, 7625-28, 7635-40 (plaintiff's witness lists, the contents of which were adopted as the response to the City's request for identification of persons with knowledge of Mark's damages); *see also* CP 73 (deposition testimony stating Beth had not seen Mark since 2006); CP 8079 (Meg's declaration opposing allowing the City to call Gordon at trial, stating Gordon had not seen Mark since 2006).

<sup>9</sup> The City disclosed Beth Powell within 24 hours of learning of her knowledge; Meg's counsel was able to take her deposition two days later, and the City formally added her as a witness five days after that. RP (9/11/09) 103-04 (initial disclosure); CP 3772-803 (Beth's deposition, taken 9/13/09); CP 3620-21 (witness list amendment on 9/18/09). Gordon provided a declaration on September 27, the City disclosed it the next day and moved to add Gordon as a witness the day after that. CP 4068-75 (Gordon's dec., reflecting dates of execution and filing); CP 4079-83 (motion to call).

at trial. RP (9/29/09-A) 22-23 (ruling on Beth), 23-28 (ruling on Gordon); RP (10/14/09) 11 (renewed ruling on Gordon).

Trial began with motions *in limine* on September 4. Testimony began on September 14 following opening statements. Meg and Mark again described Mark as substantially disabled mentally and physically, consistent with the way his condition had been described in discovery. *See* App. C (chart listing relevant testimony, with RP citations). Mark again described himself as feeling like an 80 year old man, in constant pain:

I feel like I'm 80 years old[.]....[M]y head don't work, my mouth, my words don't work, I don't breathe, I hurt like hell, and I'm trying to function the best I can.

RP (9/29/09-A) 122, 124.<sup>10</sup> Barred from calling Winquist, Powell, and Gordon Jones, the City had no witness who could directly contradict Meg and Mark's characterization of Mark's condition.

Meg's experts testified that, while Mark had "ups and downs" during recovery, as of the trial "he still has a lot of pain": "I don't think there are times where he doesn't have pain[.]" RP (9/17/09-A) 10, 24, 34, 56 (Dr. Friedman); *see also* RP (9/17/09-A) 10-11, 24 (Dr. Friedman) (Mark's "constant" pain averages "5" on the "1 to 10" pain scale). Her experts also testified that Mark required assisted living care 24 hours a

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<sup>10</sup> Mark's presentation was the same as during his deposition. CP 9892-94. He made his way slowly to the stand, with a pronounced limp and evident difficulty, gripping the counsel table, then the jury box, and finally the witness stand railing. *Id.* The trial court called Mark's presentation "fairly dramatic[.]" RP (12/14/09) 40. The jury had no other opportunity to observe him, as he only had to come to court to testify. CP 9829.

day, seven days a week, for the rest of his life, to cope with the debilitating effects of the pain and its adverse impact on his cognitive functions. RP (9/23/09) 129-30 (Dr. Goodwin).

Plaintiff's counsel told the jury that Mark suffered from "chronic pain 24/7" and would so suffer "every day for the rest of his life." RP (10/20/09) 75-76; *see* App. C. Counsel also highlighted the City's failure to call any witness who could directly contradict the picture of Mark painted by Meg and Mark. RP (10/20/09) 82. The jury found the City liable and awarded \$12,752,094 in damages, including every penny of the \$2,433,006 requested for 24/7 lifetime assisted living care. CP 4730-32.

The City moved for a new trial under CR 59, which was denied on January 20, 2010. CP 7806-08, 7809-16. The trial court reaffirmed its decisions to exclude Winquist, Powell, and Gordon Jones. CP 7814-15. Regarding Winquist's surveillance evidence, the court ruled the exclusion proper in part because the City failed to show it was "*impossible*" to have discovered such evidence before the close of discovery. CP 7815 (emphasis added). Judgment on the jury's verdict was entered on January 22, CP 7817-18, and the City timely appealed.

Surveillance resumed; Mark was observed by investigators over nine days in April and June 2010, in Washington and Montana. CP 9483-84. An 11 hour video record showed Mark capable of a variety of activities. *See* App. D (screenshots taken from video, showing Mark

engaged in various activities).<sup>11</sup> Dr. Theodore Becker did a biomechanical analysis of the video, and concluded Mark was functioning normally mentally and physically, and could work full-time. CP 10210 (conclusion); *see* CP 10183-361 (full report). The surviving members<sup>12</sup> of the Workers' Compensation panel testified by declaration that they were withdrawing their February 2008 findings that Mark was 100 percent disabled and unemployable. CP 8272-76, 9485-89 (Dr. Stump's decs.); CP 8267-71, 9451-58 (Dr. Clark's decs.). Worker compensation records showed Mark had not sought reimbursement for any 24/7 assisted living care. CP 8278.

The City moved for a new trial, including under CR 60(b)(3). The trial court found the City's evidence was new, material, and neither merely cumulative nor merely impeaching. CP 9779-80. The court acknowledged that the "mental picture [of Mark] created at trial was very different from what appears on the video." CP 9785.<sup>13</sup> The court did not

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<sup>11</sup> The video is in the record at Ex. Sub. No. 466A, and can be viewed by clicking on the hyperlink to it located on the Court of Appeals Corresponding Briefs thumbdrive. A CD containing portions of the deposition video juxtaposed with portions of the post-trial surveillance video is in the record at Ex. Sub. No. 466E, and can also be viewed by the clicking on the hyperlink located on the same thumbdrive.

<sup>12</sup> Dr. William Stump and Dr. Roy Clark, Jr. Dr. James Greene had passed away.

<sup>13</sup> Neither Meg nor Mark questioned the *bona fides* of the surveillance video. There was no suggestion that the video did not accurately present the events it depicted. Dr. Friedman had told the jury that Mark's "biggest problem" was "functioning in the real-world environment." RP (9/17/09-A) 28-29. Dr. Esselman had told the jury that "the true test is what people can do in their environment, what [Mark] ... can do in his day-to-day life." RP (9/16/09) 29. Though Meg submitted declarations from several of her trial experts and Mark's treating physicians disputing the significance of the surveillance video, it is undisputed that: (1) none of her witnesses had ever seen Mark in a real world setting; and (2) none viewed more than 16 minutes of the surveillance video.

find the responses to the City's damages discovery to be unclear or ambiguous. The court nevertheless denied a new trial under CR 60(b)(3) finding the City's pre-trial surveillance efforts had not been sufficiently diligent. CP 9780-82. The City timely appealed, and that appeal was consolidated with the appeal from the judgment on the jury's verdict.

### III. SUPPLEMENTAL ARGUMENT

**A. The Trial Court Erred in Failing to Apply the *Burnet v. Spokane Ambulance* Factors and Instead Excluding Several City Witnesses Based on Local Rule Requirements. The City Was Entitled to Call These Witnesses, Who Would Have Directly Challenged the Plaintiff's Damages Case.**

After the close of discovery and the submission of final witness lists (deadlines established by local rule), the City sought to add Rose Winquist, Beth Powell, and Gordon Jones as witnesses. The trial court did not evaluate the City's request under the factors first set forth by this Court in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).<sup>14</sup> The court instead held that whether the City could call these witnesses would be decided under the local rules. *See* RP (9/29/09-A) 13 (“*[W]e’re trying to implement -- the King County local rules here.* For example, the *Barci* case doesn’t address the local rules.” (emphasis added)).<sup>15</sup>

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<sup>14</sup> This Court most recently summarized those factors in *Teter v. Deck*, 174 Wn.2d 207, 210, 274 P.3d 336 (2012), a case involving sanctions for pre-trial discovery deadline violations (“Before excluding a witness as a sanction for discovery violations, the trial court must make findings that the violation was willful and prejudicial and was imposed only after explicitly considering less severe sanctions”).

<sup>15</sup> The trial court was referring to *Barci v. Intalco Alum. Corp.*, 11 Wn. App. 342, 522 P.2d 1159 (1974), whose multi-factor balancing test anticipated *Burnet* and which the City argued should be applied by the court. RP (9/29-09-A) 8-13; CP 4081 (brief at 3) (Footnote is continued on the next page.)

The rule relied on by the trial court, King County Local Civil Rule 4(j), establishes a presumption of *exclusion* if a witness is not listed on a party's final witness list, and requires the party seeking to add a witness to show "good cause" to overcome that presumption.<sup>16</sup> In denying the City's motion for new trial under CR 59, the trial court ruled that the City failed to establish good cause because the City failed to show it was "impossible" to have uncovered the new witnesses' evidence before the close of discovery. CP 7815 (discussing Winkvist surveillance evidence). In contrast, *Burnet* establishes a presumption of *admissibility* and requires the *opposing* party to show *willful misconduct* on the part of the party seeking to add the witness, in order for the witness to be excluded.

*Burnet* set forth the requirements for exclusion of a witness under the Superior Court Civil Rules, and based those requirements on the rules' touchstone principle of achieving a just resolution in civil actions. *See*

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(citing *Barci*). The City also cited Division Three's *Burnet* decision in *Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn. App. 65, 155 P.3d 978 (2007). CP 4082 (brief at 4) (citing *Peluso*). This Court later approved of *Peluso* in reversing Division One's conflicting decision in *Blair v. TA-Seattle East No. 176*, 150 Wn. App. 904, 210 P.3d 326 (2009). *See* 171 Wn.2d 342, 349 n.2, 254 P.3d 797 (2011).

<sup>16</sup> KCLCR 4(j) also refers to the "witness disclosure requirements" of King County Local Civil Rule 26. KCLCR 26 requires parties to disclose "primary witnesses" and "additional witnesses" by deadlines established by the case schedule order. KCLCR 26(b)(4) (now KCLCR 26(k)(4)) establishes a presumption of exclusion for non-compliance with the disclosure requirements of that rule *identical* to the presumption of exclusion established by KCLCR 4(j) for its *final* witness list requirement. KCLCR 26 also places an identical burden to show good cause on the party seeking relief from that rule's exclusion presumption. Under King County case schedule orders, the KCLCR 26 deadlines predate the discovery cutoff and KCLCR 4 deadlines by several *months*. Although Meg raised the KCLCR 26 "primary witness" deadline in her motion to strike Powell and Winkvist, the trial court did not base its rulings on that deadline. This Court held in *Blair* that it was error to exclude witnesses under KCLCR 26 without also balancing the *Burnet* factors.

*Burnet*, 131 Wn.2d at 498 (noting the “underlying principle” of CR1). This Court then held in *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 41 P.3d 1175 (2002), that the requirement to balance the *Burnet* factors applies to case management as well as discovery deadlines. *See* 145 Wn.2d at 677 (reversing for a failure to do *Burnet* balancing, where the trial court dismissed in part for a failure to comply with the predecessor to KCLCR 4). That *Burnet* must be applied whenever a party seeks to exclude a witness for a failure to comply with a discovery or case management deadline was reaffirmed in *Blair v. TA-Seattle East No. 176*, 171 Wn.2d 342, 254 P.3d 797 (2011), when this Court reversed Division One’s ruling that courts need not always apply *Burnet* when deciding whether to exclude a witness.

Local rules that conflict with a valuable right granted by the civil rules “cannot be given effect.” *Parry v. Windermere Real Estate/East, Inc.*, 102 Wn. App. 920, 928, 10 P.3d 506 (2000) (citing *King County v. Williamson*, 66 Wn. App. 10, 13, 830 P.2d 392 (1992)); *see also Harbor Enters., Inc. v. Gudjonsson*, 116 Wn.2d 283, 293, 803 P.2d 798 (1991) (a local court rule cannot negate a valuable right granted by statute); *see generally* CR 83(a) (authorizing local rules that are not “inconsistent” with the Civil Rules). The ability to call witnesses to give relevant evidence is plainly a “valuable right,” which goes directly to the goals of truth-seeking and deciding cases on their merits.

The Court of Appeals held the trial court was not required to apply *Burnet* because the court supposedly was entitled to rely on the *Court of*

*Appeals'* decision in *Blair*. The Court of Appeals stated that this Court in *Blair* established a “different procedural approach” to *Burnet* requirements, and that its decision in *Blair* was the “controlling appellate authority” at the time of the trial court decisions in this case. See Decision at 27-28. This reasoning ignores this Court’s express holding in *Blair* that this Court had “clearly held” in *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 132 P.2d 115 (2006), that on-the-record balancing of the *Burnet* factors must be done whenever a witness is stricken for a failure to comply with discovery or case management deadlines. *Blair*, 171 Wn.2d at 349, citing *Mayer*, 156 Wn.2d at 688, 690 (emphasis added).<sup>17</sup>

The Court of Appeals also stated the trial court *did* balance the *Burnet* factors. See Decision at 29-32 (Powell), 36-38 (Gordon Jones), 42-43 (Winqvist). But the trial court made *crystal* clear that it viewed the issue of exclusion as one to be decided under the local rules, not case-law balancing requirements.<sup>18</sup> The court was well aware of the requirements

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<sup>17</sup> The Court of Appeals also did not explain how its decision in *Blair* could constitute “the controlling appellate authority” given Division III’s earlier decision in *Peluso* (*supra*), with which Division One in *Blair* expressly acknowledged its decision in *Blair* was in conflict. See *Blair*, 150 Wn. App. at 909 n.9 (“We decline to follow *Peluso* and its reasoning interpreting the *Burnet* decision”).

<sup>18</sup> As previously noted (n. 15, *supra*), the trial court declined to apply the multi-factor balancing approach of *Barci v. Intalco Alum. Corp.*, 11 Wn. App. 342, 522 P.2d 1159 (1974), because it did not address the local rules. RP (9/29/09-A) 13. The court also stated its commitment to enforcing deadlines established by the local rules. *Id.* 24-25 (“I’ve been pretty firm about excluding witnesses and testimony that’s [sic] late disclosed”). The court framed its rationale for refusing to allow the City to call Beth and Gordon in terms of the local rules’ “good cause” standard. *Id.* 23 (Beth), 24-25 (Gordon). The trial court excluded Ms. Winqvist because she had been proffered as a witness after the discovery cutoff and after trial had gotten underway. RP (10/14/09) 17. For additional discussion of the record bearing on whether the trial court balanced the  
(Footnote is continued on the next page.)

for *Burnet* balancing, having done that balancing the month before in deciding to exclude a City expert witness whose opinions were still being developed less than two weeks before the start of trial. CP 2115-17. The trial court did *not* do *Burnet* balancing once trial was underway because the court believed that whether to allow the City to call any of these witnesses was a matter of “implement[ing] ... the King County local rules[.]” RP (9/29/09-A) 13.

Washington appellate courts may not salvage a trial court’s failure to conduct *Burnet* balancing by doing the balancing for them. *Blair*, 171 Wn.2d at 351 (an appellate court may not “consider the facts in the first instance as a substitute for the trial court findings that our precedent requires”). Nor could the exclusion of these witnesses be fairly sustained under *Burnet*. Ms. Winqvist had no personal knowledge of relevant evidence until she saw Mark at the bar on September 7, 2009, and the City promptly disclosed her evidence when the City sought to add her as a witness. The City was told in discovery that neither Beth Powell nor Gordon Jones had personal knowledge of how the accident was presently affecting Mark, and the City promptly disclosed their evidence of Mark’s current condition when the City sought to add them as witnesses. Moreover, in Gordon’s case, Meg listed him as a witness on *her* witness designation, and the City in its designation expressly stated that it reserved

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*Burnet* factors, *see* the City’s Supplemental Court of Appeals Brief Regarding *Blair* (filed 9/30/11) at 4-12.

the right to call anyone on Meg's list.<sup>19</sup> A finding that the City willfully disregarded its obligations could not be sustained on this record.

It is a reality of the litigation process that parties sometimes do not become aware of witnesses with material testimony to offer until the trial itself is underway. The Civil Rules impose no burden on the proponent of a witness, who is proposed to be called during trial, to show good cause for why that witness should be allowed to testify merely because their name does not appear on a pre-trial witness list. This Court should reaffirm squarely that parties have the *right* to call any witness whose testimony is material and not merely cumulative, *unless the opposing party shows that allowing that witness to testify would prejudice the fairness of the trial itself*. Moreover, the just resolution of such an issue requires consideration of several factors that the trial court must apply in light of the facts at hand. *See, e.g., Barci*, 11 Wn. App. at 349 (regarding witnesses proffered during trial who have not been disclosed during discovery, trial courts should consider several factors including the good faith effort of the proponent to comply with discovery obligations). The

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<sup>19</sup> *See* CP 7626, 7637, 4342, 4355, 4369, 4380, 4382, 4389, 4393. The trial court ruled that the City could not satisfy its local rule witness designation obligation by reserving the right to call an opponent's listed witnesses, and the Court of Appeals agreed. *See* Decision at 34-35. In *Blair*, this Court declined to resolve whether a party satisfies any local rule witness designation obligation they may have by reserving in their witness designation the right to call any witness listed by the opposing party. *See Blair*, 171 Wn.2d at 351, n. 4. Petitioners Blair raised the issue in their Petition for Review, and as their counsel aptly asked during oral argument, "What is the prejudice to the other side of calling a witness they've listed?" Oral Argument Audio in *Blair* at time entry 16:57-17:05 (TVW Supreme Court audio archives for 10/26/10).

trial court erred here because it did not apply such factors and instead treated the matter as one of “implement[ing]” local rules.

The court clarified after trial that it believed exclusion was proper in part because the City had not shown it was “*impossible*” to have uncovered evidence before the close of discovery. CP 7815 (emphasis added) (discussing Winqvist surveillance evidence). *Nothing* in the Civil Rules supports allowing trial courts to impose so draconian a standard, which no one could ever actually satisfy. Parties seeking a new trial under either CR 59 or CR 60(b)(3) need show only that they exercised due diligence in their pre-trial discovery efforts.<sup>20</sup> Thus, had the City not learned of Winqvist’s, Powell’s and Gordon Jones’s evidence until mid-2010 and submitted their declarations in support of its CR 60 motion, the City would not have been required to prove it was “impossible” to have uncovered their evidence before trial.

If parties who receive clear and unambiguous discovery responses are entitled under CR 59 and 60 to rely on those responses and are not required to conduct further investigation (and they are not, *see* § III.B, *infra*), it follows that parties can have no greater duty of diligence imposed on them during trial. Indeed, CR 59 and 60 establish a preference for the submission of any new evidence at trial, rather than waiting to seek relief

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<sup>20</sup> *See* § III.B, *infra* at 17-18 (discussing five part test governing disposition of motions for new trial under either rule). The trial court here, during the hearing on the City’s CR 60 motion, recognized the City could only be expected to have exercised *ordinary* diligence. RP (10/8/10) 37 (“[W]e’re really looking at if the City had exercised sort of ordinary diligence, not hired 150 investigators”).

based on such evidence after an adverse verdict. It contradicts the underlying purpose of the Civil Rules to impose a more restrictive standard on the admission of newly discovered evidence during trial than is required to vacate a judgment under CR 60 after trial. No authority supports the contrary decisions of the trial court and the Court of Appeals in this case, save a philosophy of prioritizing case management which this Court squarely rejected 16 years ago in *Burnet*.<sup>21</sup>

Nor was excluding these witnesses harmless error. Mark and Meg had painted a picture for the jury of a man wracked with pain and so disabled mentally and physically that he requires assisted living care 24 hours a day, 7 days a week, for the rest of his life. See App. C. The City had no witness who could directly challenge this picture, and plaintiff's counsel took full advantage of this deficiency in closing argument. RP (10/20/09) 82; see *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 876-877, 281 P.3d 289 (2012) (holding that an erroneous jury instruction is prejudicial where it “[i]s actively urged upon the jury during closing argument” (citation omitted)).<sup>22</sup>

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<sup>21</sup> The City of course agrees that case management is an important tool for today's trial courts. See, e.g., *Blair*, 171 Wn. 2d at 353 (J. Johnson, J. concurring). And local rules can facilitate case management. This Court could harmonize the local rules with the Civil Rules and the *Burnet* factors by holding that the local rules do not apply to newly discovered evidence, leaving the local rules in place as a case management tool. But local rule requirements must not be allowed to displace the truth-seeking and merits-based decision goals of the Civil Rules.

<sup>22</sup> The trial court recognized the potentially devastating effect Gordon's evidence could have had on the plaintiff's damages case. See RP (9/29/09-A) 27; RP (9/30/09) 71 (calling the proffered testimony of Gordon Jones “explosive” and “incendiary”).

**B. The Trial Court Erred in Denying the City’s Motion for a New Trial for a Supposed Lack of Diligence. Under This Court’s Decisions in *Kurtz v. Fels* and *Praytor v. King County*, the City Was Entitled to Rely on the Plaintiff’s Clear and Unambiguous Responses to the City’s Damages Discovery Requests.**

Post-judgment surveillance of Mark Jones resulted in 11 hours of video showing Mark out in public carrying out numerous tasks and enjoying a quality of life inconsistent with how Mark had been portrayed to the jury. *See* App. D (screenshots taken from video, showing Mark engaged in various activities). Dr. Becker conducted a biomechanical analysis of the video and concluded that Mark was functioning normally both mentally and physically, and was capable of full-time employment. In light of this evidence, Drs. Clark and Stump, the surviving members of the 2008 Workers’ Compensation panel, withdrew their opinions that Mark was totally disabled and unemployable. Moreover, review of worker compensation records showed Mark still had not sought reimbursement for any 24/7 assisted living care.

Under CR 60(b)(3), a party is entitled to a new trial if the evidence supporting the motion is (1) new, (2) material, (3) not merely cumulative or impeaching, (4) the jury more likely than not would have made a different decision had it had the benefit of the new evidence, and (5) the moving party could not, with the exercise of due diligence, have introduced the new evidence either at trial or in support of a motion for new trial under CR 59.<sup>23</sup> The trial court expressly found that the City’s

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<sup>23</sup> Although Washington decisions stating this test have done so where the new trial request has arisen under CR 59, *see, e.g., Holaday v. Merceri*, 49 Wn. App. 321, 329, 742 P.2d 127 (1987) (CR 59), there is no question that the test also governs new trial requests  
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supporting evidence was new, material, and neither merely cumulative or impeaching. CP 9779-80. The trial court also acknowledged that “the mental picture [of Mark] created at trial was very different from what appears on the video.” CP 9785. The *sole* basis for the trial court’s decision denying a new trial under CR 60(b)(3) was its conclusion that the City had not been duly diligent because -- in the court’s view -- the City had inadequately investigated Mark’s damages. CP 9780-82.<sup>24</sup>

In denying a new trial for an insufficiently diligent investigation, the court misapplied the law. Under this Court’s decisions in *Kurtz v. Fels*, 63 Wn.2d 871, 389 P.2d 659 (1964), and *Praytor v. King County*, 69 Wn.2d 637, 419 P.2d 797 (1966) (collectively “*Kurtz/Praytor*”), a party seeking a new trial under CR 60(b)(3) has *no* obligation to do *any* investigation when that party does discovery and the responses are clear and unambiguous. *See Kurtz*, 63 Wn.2d at 875; *Praytor*, 69 Wn.2d at 640. The City therefore had no obligation to conduct any investigation, because it was entitled to rely on the plaintiff’s clear and unambiguous responses to the City’s damages discovery requests.<sup>25</sup>

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made under CR 60(b)(3). *See* 4 K. Tegland, Wash. Prac., Rules Prac. § CR 60, 553 (5th ed. 2006). Moreover, it is CR 60’s incorporation of CR 59’s express application of a due diligence test for new evidence offered to support a motion for new trial which gives rise to the conflict between both of those rules and the trial court’s unprecedented “impossibility” standard for allowing new evidence to be introduced at trial.

<sup>24</sup> The City does not concede its efforts were inadequate. For example, a reasonable investigator could have concluded from Mark not appearing outside of Meg’s home during any of the several days when the home was being observed that the investigative efforts had confirmed Mark’s and Meg’s story. For a more detailed discussion, *see* the City’s Opening Brief at 13-25, 70-72, and its Reply Brief at 24-25.

<sup>25</sup> A point made in the City’s CR 60 motion papers. *See, e.g.* CP 8196-97 (City’s motion at 16-17 (“*Praytor* and *Kurtz* are particularly instructive here”).

The Court of Appeals stated it was deferring to the trial court's discretion in upholding the denial of a new trial under CR 60(b)(3). Decision at 52.<sup>26</sup> But given Meg and Mark's clear and unambiguous discovery responses on damages, the City under *Kurtz/Praytor* had no obligation to conduct any investigation *as a matter of law*; the trial court therefore abused its discretion when it denied a new trial on the ground of an inadequate one. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (a trial court "necessarily" abuses its discretion when it applies the wrong legal standard). The Court of Appeals also criticized the City for failing to establish that Mark and Meg had engaged in misconduct. *See* Decision at 51-52.<sup>27</sup> But this reasoning conflates the separate requirements for a new trial under CR 60(b)(3) and CR 60(b)(4); a party need not prove misconduct to obtain a new trial under CR 60(b)(3), only under CR 60(b)(4).

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<sup>26</sup> The Court of Appeals also stated that the surveillance video did not contradict Meg and Mark's discovery and trial representations about Mark's condition. *See* Decision at 52. The Court of Appeals did not explain how it could possibly be deferring to the trial court, when the trial court found "the mental picture [of Mark] created at trial *was very different from what appears on the video*" (CP 9785 (emphasis added)). As for the suggestion that the surveillance video did not contradict Meg and Mark's representations about Mark's condition, the City is confident that this Court's review of the video will confirm for the Court that the Court of Appeals was wrong on this vital point.

<sup>27</sup> The Court's related assertion, that the City misrepresented the record, has no merit. *See* Motion for Reconsideration at 12-17 (demonstrating the accuracy of the City's representations).

The City's new evidence established facts directly at odds with the damages story told by Mark and Meg during discovery and at trial.<sup>28</sup> The notion that Mark suffers from disabilities so severe that he requires assisted living care 24/7 for the rest of his life flies in the face of what the surveillance video alone shows he in fact can do. *See* App. D (screenshots). No reasonable jury with the benefit of the City's new evidence would award the damages Mark was awarded.

#### IV. CONCLUSION

This Court should vacate the judgment on jury verdict, and remand for a new trial on damages. The City was deprived of a fair trial on damages, and fundamental fairness mandates a new trial.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of March, 2013.

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<sup>28</sup> The surveillance video itself falls within the category of evidence establishing "physical facts." *See, e.g., Fannin v. Roe*, 62 Wn.2d 239, 243, 382 P.2d 264 (1963), quoting *Mouso v. Bellingham & N. Ry. Co.*, 106 Wash. 299, 303, 179 P. 848 (1919 ("[W]hen 'physical facts are uncontroverted, and speak with a force that overcomes all testimony to the contrary, reasonable minds must follow the physical facts, and therefore cannot differ'").

**APPENDICES TO SUPPLEMENTAL BRIEF  
OF PETITIONER  
CASE NO. 87343-7**

<b>APPENDIX</b>	<b>DESCRIPTION</b>
APP. A	EXTRACTS FROM WORKERS' COMPENSATION PANEL REPORT, 2/28/2008, REPORTING REVIEW OF MARK JONES' MEDICAL RECORDS AND PANEL'S OWN TESTING (with CP page citations)
APP. B	EXTRACTS FROM MARCH 2008 DEPOSITION TESTIMONY OF MARK & MEG JONES (with CP page citations)
APP. C	EXTRACTS FROM VERBATIM REPORTS OF PROCEEDINGS OF 2009 TRIAL TESTIMONY OF MARK & MEG JONES AND FROM PLAINTIFF'S CLOSING ARGUMENT (with RP page citations)
APP. D	SCREENSHOTS FROM APRIL AND JUNE 2010 SURVEILLANCE VIDEO SHOWING MARK JONES ENGAGED IN VARIOUS ACTIVITIES (excerpts from Ex. Sub No. 466A)

# **APPENDIX**

## **A**

**APPENDIX A:  
EXTRACTS FROM WORKERS' COMPENSATION PANEL  
REPORT, 2/28/2008, REPORTING REVIEW OF MARK JONES'  
MEDICAL RECORDS AND PANEL'S OWN TESTING**

CLERK'S PAPERS	PANEL REPORT	DESCRIPTION
10036	15	<p>Mark reporting ongoing, daily headaches, seemingly brought about by side-to-side head movements</p> <p>Mark reporting ongoing memory difficulties</p> <p>Mark reporting difficulty determining location and following directions</p> <p>Mark reporting difficulty with short-term memory</p>
10037	16	<p>Mark reporting difficulty with word-finding</p> <p>Mark reporting difficulty multi-tasking and working under stress</p> <p>Mark reporting difficulty expressing thoughts, losing train of thought</p> <p>Mark reporting his right shoulder hurts all the time</p> <p>Mark reporting entire right side is numb</p> <p>Mark reporting pain throughout the right side of his body</p> <p>Mark reporting that he has to rock when he sits</p> <p>Mark reporting reduced range of right shoulder motion</p> <p>Mark reporting ongoing, continuous pain in right thoracic area</p> <p>Mark reporting continuous pain throughout entire right thoracic area from shoulder to thigh</p> <p>Mark reporting shortness of breath from walking – any walking brings on shortness of breath</p> <p>Mark reporting low back pain</p>
10038	17	<p>Mark reporting continuous pain in right hip and discomfort with movement of the hip</p> <p>Mark reporting that he tends to use a pillow when he sits</p> <p>Mark reporting frequent falls</p> <p>Mark reporting difficulty extending right leg, making ambulation difficult</p> <p>Mark reporting difficulty with twisting maneuvers</p>
10040	19	<p>Mark reporting whole-body rotation causes pain</p>

<b>CLERK'S PAPERS</b>	<b>PANEL REPORT</b>	<b>DESCRIPTION</b>
		Dr. Stump reports Mark shows short-term memory difficulties and difficulties with emotional control
10041	20	Dr. Stump reports Mark has a lurching but stable gait and mild instability
10060	39	Mark reporting the accident has "devastated his life" and taken everything away from him
10061	40	Mark reporting depression due to extent of residual limitations, particularly with memory and cognitive functioning  Mark reporting that the pain pump had leveled him out
10063	42	Mark reporting that much of the time he will pretty much live on the couch
10064	43	Mark used a small cushion under his right buttock when sitting during the Worker's Comp Exam, leaned to the left and rocked to and fro  Mark reporting ongoing depression  Mark has difficulty with recent information and exhibited what appeared to be some difficulties with word-finding
10066	45	Dr. Clark concurs with Drs. Stump and Green that Mark's pain syndrome is likely central, likely thalamic, in origin.
10072	51	The Panel concluded Mark is incapable of returning to reasonably continuous full-time employment on a more-probable-than-not basis.

# **APPENDIX**

## **B**

**APPENDIX B: EXTRACTS FROM MARCH 2008  
DEPOSITION TESTIMONY OF MARK & MEG JONES**

CLERK'S PAPERS (DEPOSITION PAGE)	DESCRIPTION
MARCH 6, 2008	MARK JONES DEPOSITION
82 (51)	Mark reported continuing pain in right ankle.
82 (52)	Mark reported his hip throbs and is in pain all the time. When he touches the right side of his hip it feels like the fall had just happened.
82 (52-53)	<p>Mark reported that breathing is a daily problem: "I feel like someone squished me in a can, like I can't get my lung opened up to breathe."</p> <p>He reported running out of air while walking. Small colds get him in trouble.</p>
83 (55-56)	<p>Mark reported that the ribs on his right side are "constantly in pain[.]" "[T]hey're shocky. You touch them and they're just shocky all over[.]"</p> <p>He reported his ribs are in pain all the time, pretty much maintaining the same thing [shocky and constantly in pain].</p>
83 (56)	Mark reported he doesn't move his head left to right, or he holds it fairly still when he does, because the movement hurts him.
83 (56)	Mark reported getting headaches pretty much daily: "if I cough, I feel like it's going to blow the side of my head off, the top of my head."
83 (56-57)	Mark reported numbness down the whole right side of his body.
83 (57)	Mark reported memory loss and disorientation while driving.
85 (62)	<p>Mark reported being in worse physical condition than when he was working his light duty job (where he reported that he "really didn't have a job" and that he stayed in bed a lot there. CP 84 (pg 59).</p> <p>He described it as feeling like he was 80 years old.</p> <p>"I get up in the middle of the night and I just feel like a train hit me, and my day starts just like that."</p> <p>He reported that just trying to walk was a big task for him.</p>
87 (71)	Mark reported losing all the mobility in his right arm, so he does not throw the ball with his son.

<b>CLERK'S PAPERS (DEPOSITION PAGE)</b>	<b>DESCRIPTION</b>
91 (89)	Mark reported his pain does not go up and down as much since he had the pain pump installed.
95 (102)	Mark reported than an average day depends on how he is feeling.  "A lot of times if I lay down, then it makes it easier on me."
97 (110-12)	Mark reported that the accident limited his ability to take his dog out for a walk and makes most of his day restricted; comparing his injury to how tough it is to climb Mount Everest.  "[I]t's just such a struggle from the point A when I get up and I'm trying to get going through it. So it's hard for me to pin one specific thing and say has this affected just this one thing, it's — it's affected every piece of me."
97 (112)	Mark reported walking with somebody so he does not get lost and that he can do short little distances — maybe 5 minutes before wanting to turn around and go back.  He reported breaking after walking for 5 minutes because he hurts.
97 (113)	Mark reported on good days he could move around more and was not lying down on the couch every half hour.
<b>MARCH 10, 2008</b>	<b>MEG JONES DEPOSITION</b>
155 (101)	Meg reported that Mark underwent a dramatic physical and mental change at roughly the same time as he got the pain pump. Around that time, "it seemed as though things were on a pretty steady downhill slide in most of the areas for him."
155 (101)	Meg reported that by the time he moved in with her, "he was in pretty bad shape."
157 (107)	Meg reported that on a good day of walking, Mark might be able to walk 200-400 yards. On a bad day he might not even get 50 yards and that would take half an hour.
157 (108)	Meg reported that Mark's definition of walking the dog consists of him driving his truck half a mile to the nearest dog park (the only one he can remember how to get to, even though it is not an off-leash park) and standing there while the dog runs around.

<b>CLERK'S PAPERS (DEPOSITION PAGE)</b>	<b>DESCRIPTION</b>
157 (109)	Meg reported that Mark "can't remember where he's going or where he's come from."
165 (140)	Meg reported that the only aerobic exercise Mark had done over the previous year was just in the pool and walking the dog when he feels up to it.
166 (143)	<p>Meg reported that from the time Mark has lived with her "he has a very difficult time with the memory stuff."</p> <p>"We have a conversation, and about a half hour later it's like we never had it.</p> <p>"If I ask him to do more than one task at a time, it doesn't happen."</p>
172 (166)	Meg reported that Mark is now "a guy that sits there every day and barely gets up, struggles to get up, forces himself willfully to get up. He's a guy that's in pain constantly, . . ."
172 (166)	Meg reported that Mark can't take Jesse down a water slide and can't ride a bike with him.
172 (166-67)	Meg reported that "Putting salad in a bowl and trying to figure out how to make the salad dressing go on there is a big deal."
172 (167)	<p>Meg reported "Every part of his life has been affected[.]"</p> <p>Meg reported he doesn't know how to communicate with people any more.</p> <p>Meg reported that "he rides in a car now, and they call that hunting. That's not what he used to do, that's not what he was like."</p>
172 (167)	Meg reported that Mark's whole life has been completely taken away from him.
172 (167)	Meg reported that Mark's functioning in life is getting worse each day.

# **APPENDIX**

## **C**

**APPENDIX C: EXTRACTS FROM  
 VERBATIM REPORTS OF PROCEEDINGS OF  
 2009 TRIAL TESTIMONY OF MARK & MEG JONES AND  
 FROM PLAINTIFF'S CLOSING ARGUMENT**

<b>VOLUME</b>	<b>TESTIMONY</b>
	<b>MARK JONES TESTIMONY</b>
9/29 - Vol. XII-A, at 102-03	Mark testified that the Montana lawsuit was too complicated for him to figure out.
9/29 - Vol. XII-A, at 122	Mark testified that "I feel like I'm 80 years old."  "When I get up, that's what scares me, that I think I'm not going to walk again . . ."  Mark testified that he "hurt[s] like hell."
9/29 - Vol. XII-A, at 123	Mark testified that he had problems getting a full breath of air, "it feels like I'm in a can, where I can't get a breath, so my breathing gets messed up. I don't go very far, and then I have – I'm trying to get a damn breath of air."
9/29 - Vol. XII-A, at 123	Mark testified that laying down is a lot more comfortable for him and he pays for it when he gets up, but that is the trade-off
9/29 - Vol. XII-A, at 124	Mark testified that "my head don't work, my mouth, my words don't work, I don't breathe, I hurt like hell[.]"
9/29 - Vol. XII-A, at 124	Mark testified that he uses a urinal by his bed because he is too tired of trying to navigate to the bathroom
9/29 - Vol. XII-A, at 125	Mark testified he does not vacuum the stairs or the upstairs in Meg's house.
9/29 - Vol. XII-A, at 126	Mark testified that he hunts as a "handicapped hunter."
9/29 - Vol. XII-A, at 128	Mark testified that he tries to call what he does hunting, but "they're probably just outings [.]"
9/29 - Vol. XII-A, at 129	Mark testified that most all of the people who used to hunt with him don't anymore because he can't hunt the way they do.
9/29 - Vol. XII-A, at 130	Mark testified that he has to get up earlier to get mobile.

<b>VOLUME</b>	<b>TESTIMONY</b>
9/29 - Vol. XII-A, at 130	Mark testified that he favors sitting on one hip over the other and isn't able to sit very well.
10/8 - Vol. XVI, at 41	Mark testified that it used to take him one day to get to Montana, but now it takes two
10/8 - Vol. XVI, at 42	Mark testified that he can't remember the time or years now
10/8 - Vol. XVI, at 46	Mark testified that his pain changes all the time, from his hips to his back.
10/8 - Vol. XVI, at 47	Mark testified that he is excited about his good days, but then he'll be "a mess again, or worse in this part and then wondering why I'm at – so I don't know how I get better with one [whoever has been working with him] or something else."
10/8 - Vol. XVI, at 47	Mark testified that he does not recall dates or times and has issues with memory because of his head injury.
10/8 - Vol. XVI, at 48	Mark testified that it did not sound accurate for him to have said he was pain free.
10/8 - Vol. XVI, at 59	Mark testified that he functions now by writing everything down in order to remember. He forgets what happened the week before.
10/8 - Vol. XVI, at 70	Mark testified that he wants to be independent but is not able to be because of the accident.
10/8 - Vol. XVI, at 70	Mark testified that he has to have someone, like Meg, around when he showers.
10/8 - Vol. XVI, at 75	Mark testified that he can't remember specifics from his deposition because of his head injury
10/8 - Vol. XVI, at 83	Mark testified that he has a hell of a time remembering dates or times because of his head injury.
10/8 - Vol. XVI, at 92	Mark testified that he likes to watch shows on handicapped hunters, where people have overcome their handicaps or learned different techniques to do what they love.
10/8 - Vol. XVI, at 93	Mark testified he rocks because it helps alleviate the pain in his head.
10/8 - Vol. XVI, at 96	Mark testified that people do special things to care for him so can do certain tasks. Care comes into all aspects of his life.

<b>VOLUME</b>	<b>TESTIMONY</b>
10/8 - Vol. XVI, at 115	Mark testified that, with regards to anxiety and depression, that trying to understand what happened to him and to work through it is an ongoing deal, "you just don't get all smashed up like this and jump up and it's all good, honey, you don't. It's a life-long deal and I'm trying to come to grips with it myself."
10/8 - Vol. XVI, at 115	Mark testified that he is sure there are days when he is depressed about not being able to do what he could do.
10/8 - Vol. XVI, 130-31	Mark testified that that he would benefit from a care attendant because even the easiest things in his life, things he used to taken for granted had become such a big deal. And the care attendant would help since he doesn't know what tomorrow will bring.
	<b>MEG JONES TESTIMONY</b>
10/1 - Vol. XIV, at 141	Meg testified that Mark's lungs are compromised since the accident such that he seems to catch any colds going around and that causes more stress than he already has over breathing or struggling with breathing.
10/1 - Vol. XIV, at 142	Meg testified that Mark has panic attacks. She testifies about one where one side of his face got completely red and he sweated like he had just gotten out of the shower, gasped for air, and got down on his hands and knees while trying to catch his breath.
10/1 - Vol. XIV, at 142-43	Meg testified that Mark freezes up and gets shortness of breath while driving.
10/1 - Vol. XIV, at 143	Meg testified that Mark's panic attacks are bad enough that she has to take him to the hospital.
10/1 - Vol. XIV, at 148	Meg testified that Mark loses his keys and has problems with household chores due to his cognitive shortcomings.
10/1 - Vol. XIV, at 149	Meg testified that Mark gets lost driving and has to call her.
10/1 - Vol. XIV, at 149-50	Meg testified that Mark has judgment problems, such as wanting to shoot at a propane tank and painting duck decoys in the living room instead of the garage.
10/1 - Vol. XIV, at 151	Meg testified that Mark can't follow simple shopping lists because of his cognitive defects.
10/1 - Vol. XIV, at 152	Meg testified that Mark will order too many items online because he forgets about previous orders.

<b>VOLUME</b>	<b>TESTIMONY</b>
10/1 - Vol. XIV, at 153	Meg testified that conversations with Mark can be very jumbled and broken. He doesn't have a conversation where there is a beginning, a middle, and an end.
10/1 - Vol. XIV, at 153	Meg testified that Mark shuts down when he is stressed out.
10/1 - Vol. XIV, at 153-54	Meg testified that Mark forgets wallets and cell phones and loses keys.
10/1, at 154-55	Meg testified that Mark buys stuff he already has.
10/1 - Vol. XIV, at 156-57	Meg testified that Mark starts projects and then does not finish them. She can't expect that he will get tasks done.
10/1 - Vol. XIV, at 157-58	Meg testified that Mark ate a by-the-pound salad at the store before paying because it did not occur to him that he needed to pay first.
10/1 - Vol. XIV, at 158	Meg testified that she has to organize his pills so he remembers to take them.
10/1 - Vol. XIV, at 159	Meg testified that Mark's sleeping and eating patterns are disrupted.
10/1 - Vol. XIV, at 159-60	Meg testified that she is concerned about Mark's light-headedness when he is driving. She is also concerned about his obliviousness.
10/1 - Vol. XIV, at 160	Meg testified that Mark forgot he was pulling his fifth-wheel and did not have the clearance to drive through an espresso stand.
10/1 - Vol. XIV, at 161	Meg testified that his mobility problems, such as not being able to look over his left shoulder, give her concerns about his ability to drive.
10/1 - Vol. XIV, at 162-63	Meg testified that Mark does not have good judgment when it comes to shooting guns with Jesse in Bothell.
10/1 - Vol. XIV, at 163-64	Meg testified that she became Mark's guardian because she worried about people taking advantage of him due to his brain injury. She used examples of Mark being too free with his money to help friends in need.
10/1 - Vol. XIV, at 164	Meg testified that she has to make lists to keep Mark busy while she is at work.
10/1 - Vol. XIV, at 165	Meg testified that Mark can't vacuum upstairs unless she brings the vacuum up there.

<b>VOLUME</b>	<b>TESTIMONY</b>
10/1 - Vol. XIV, at 166	Meg testified that now she'll go up on the ladder and he'll hand her stuff instead of the other way around.
10/1 - Vol. XIV, at 168	Meg testified that Mark rocks most when he has been sitting for periods of time and the pain and stress get to him.
10/1 - Vol. XIV, at 168	Meg testified that laying down helps Mark.
10/1 - Vol. XIV, at 168-169	Meg testified that Mark breaks out in sweat when the pain travels through his body, hips, and back. His shirt gets soaking wet and his breathing becomes short and labored when he gets stressed.
10/1 - Vol. XIV, at 169	Meg testified that getting Mark moving and mobilized in the mornings is a long process.
10/1 - Vol. XIV, at 169-70	Meg testified that Mark always has a giddy-up in his gait now.
10/1 - Vol. XIV, at 173-74	Meg testified that Mark got so stressed and agitated about flying and clearing security with his pain pump that they would not let him on the plane. That is his "new normal now."
10/1 - Vol. XIV, at 175	Meg testified that driving to Montana with Mark is always a two-day affair now because of limitations on sitting time and bladder issues.
10/1 - Vol. XIV, at 176-77	Meg testified that a care attendant will be needed because she won't always be around.
10/1 - Vol. XIV, at 181	Meg testified that even with a care taker for Mark she would not be able to move back to the normal role of a sister, not when "you are dealing with somebody like Mark at the level that you are for as long as you have, . . ."
10/1 - Vol. XIV, at 199	Meg testified that the life care plan was appropriate for Mark.
10/1 - Vol. XIV, at 206-07	Meg testified that examples she gave to illustrate Mark's cognitive problems were ongoing or current.
10/7 - Vol. XV, at 27	Meg testified that Mark is a disabled hunter.
10/7 - Vol. XV, at 28-29	Meg testified that the one time she took Mark hunting she had to deal with his panic attack.
10/7 - Vol. XV, at 48	Meg testified that she would question Mark's ability to care for Jesse if it was just Mark by himself in an unstructured setting.

<b>VOLUME</b>	<b>TESTIMONY</b>
10/7 - Vol. XV, at 122	Meg testified that Mark does not do well with multitasking or responding very quickly and that makes Meg nervous as a passenger.
10/7 - Vol. XV, at 124	Meg testified that it's a true statement from Mark's perspective that Meg is all he has left. His kids from his first marriage don't understand what happened to him in terms of the brain injury and communication difficulties.
10/7 - Vol. XV, at 124-25	Meg testified that their siblings struggle to understand the physical and cognitive issues Mark faces every day.
10/7 - Vol. XV, at 127	Meg testified that in relationship to Mark's injuries and complications he feels like he is in an 80 year old body.
	<b>PLAINTIFF'S CLOSING ARGUMENT</b>
10/20 – Vol. XXIV at 75-76	“What are the long term consequences of his physical injuries? He has chronic pain 24/7. I can't even imagine that. I don't know if anybody here can either. Can you imagine having pain that at a baseline of 4 to 6 out of 10, 24 hours a day, seven days a week? . . . . The chronic pain means that he has this forever, and the doctor says it's not going to get any better. It could with time get worse. . . . Because he has so much pain, because of the residual of his injuries is to (sic) great, that getting going in the morning is like the tin man, and that not just during recovery. That's every day for the rest of his life.”

# **APPENDIX**

## **D**

**APPENDIX D: SCREENSHOTS FROM APRIL AND JUNE 2010  
SURVEILLANCE VIDEO SHOWING MARK JONES  
ENGAGED IN VARIOUS ACTIVITIES**

This Appendix was created by taking “screen shots” from the surveillance video, and organizing those shots by topic. The City has provided date and time stamp information, so the Court may locate each image on the surveillance video.

Following is a list of where each date when surveillance video was shot, in April and June 2010, may be located in the record:

<u>Date</u>	<u>Record</u>
April 19, 2010	Exhibit Sub No. 466A
April 22, 2010	Exhibit Sub No. 466A
April 23, 2010	Exhibit Sub No. 466A
April 24, 2010	Exhibit Sub No. 466A
April 25, 2010	Exhibit Sub No. 466A
June 2, 1010	Exhibit Sub No. 466A
June 5, 2010	Exhibit Sub No. 466A

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23.	Cleans campsite, sweeps, empties and replaces vacuum bag ....	18
24.	Takes down campsite and hitches trailer to truck.....	19
25.	Plays horseshoes for over 2 ½ hours and celebrates with a double pirouette. ....	20
26.	Launches and pilots a boat loaded with fishing gear. ....	21



1. Works on truck.



2. Shops at Costco.



3. Shops at Mini Mart.

April 22, 2010 4:25 PM



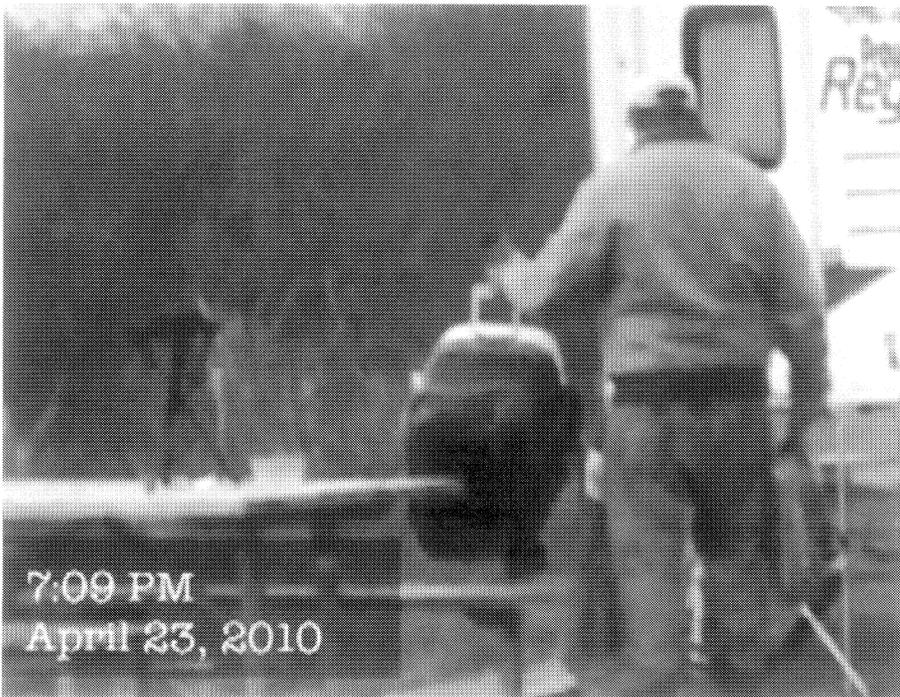
4. Connects battery charger of the trailer to the scooter.



5. Lowers stabilizer jacks on all four corners of the trailer.



6. Removes grocery bags from truck and carries many bags at a time.



7. Carries cooler and charcoal and red mug.

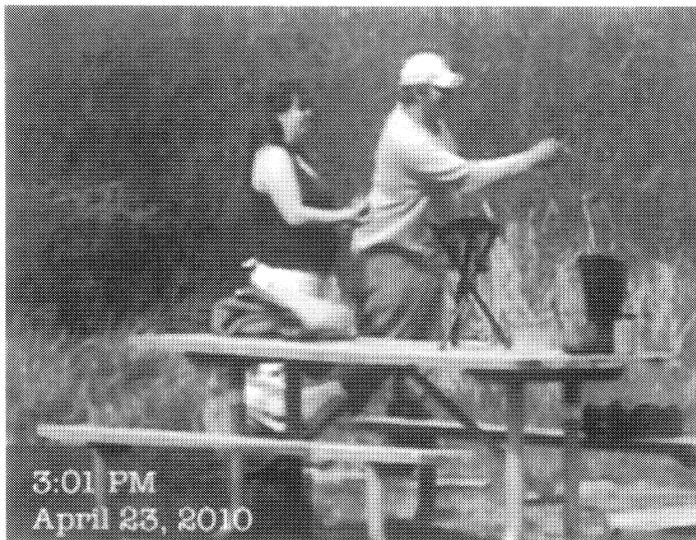


8. Organizes camp site.

April 23, 2010 1:06 PM



9. Talks on a cell phone while carrying logs



10. Plays Bocce Ball with companion.



11. Starts fire in fire pit.

April 23, 2010 7:29 PM



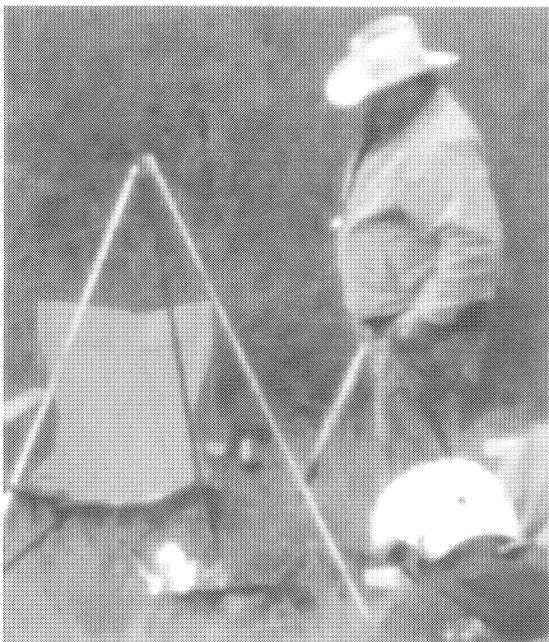
12. Chops wood and adds to the fire.



April 23, 2010 7:37 PM



April 23, 2010 7:38 PM



April 23, 2010 8:07 PM



April 23, 2010 8:10 PM

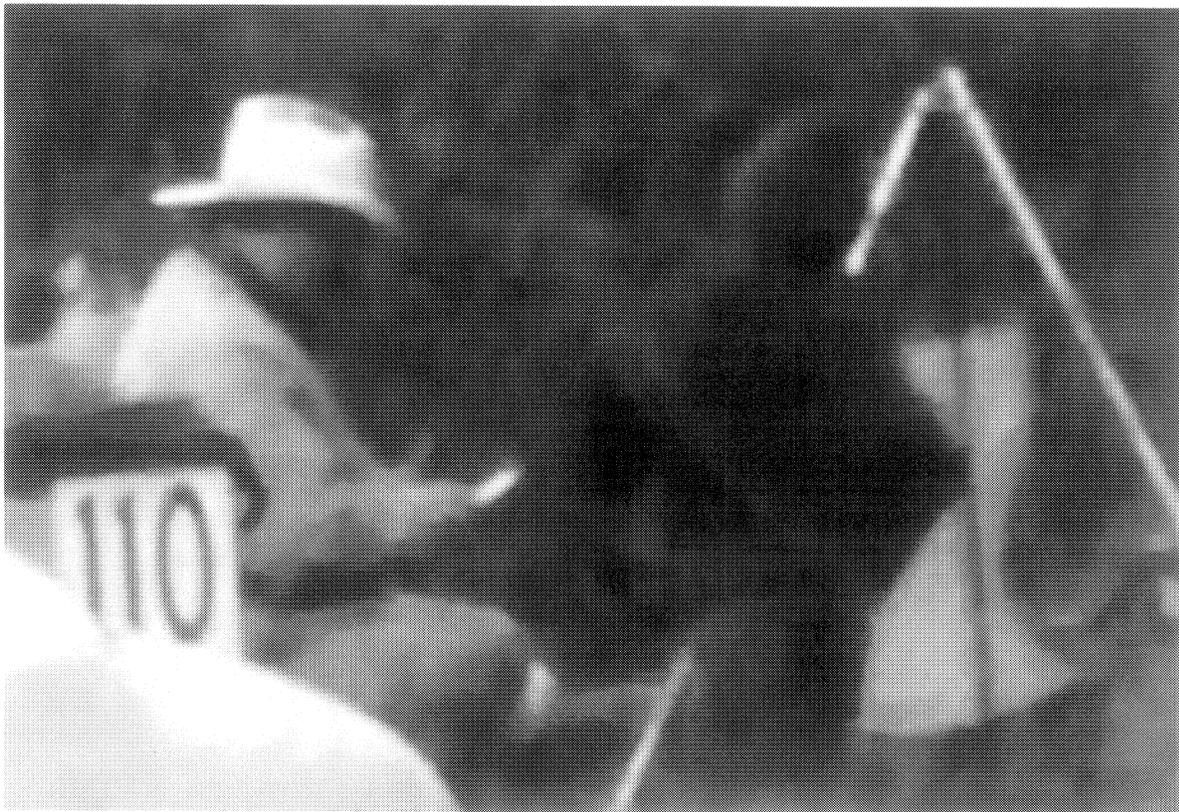
13. Sets up tripod over fire and cooks meal.



April 23, 2010 8:19 PM



April 23, 2010 8:23 PM

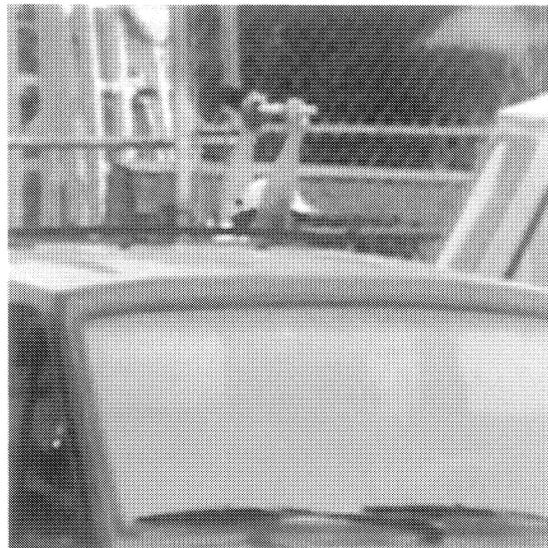


14. Texts on cell phone while talking to son.

April 23, 2010 8:23 PM



15. Gets cash from cash machine.



16. Celebrates purchase of shovel.



17. Digs for clams with shovel.



18. Horses around with son.

April 24, 2010 11:50 PM



April 24, 2010 12:23 PM

19. Takes over the wood chopping from his female companion.



April 24, 2010 1:18 PM



April 24, 2010 1:19 PM



April 24, 2010 1:20 PM



April 24, 2010 1:21 PM

20. Cooks eggs in skillet on grill.



April 24, 2010 4:53 PM



April 24, 2010 4:56 PM

21. Repairs an electric scooter.



April 24, 2010 5:56 PM



April 24, 2010 5:56 PM

22. Replaces windshield wipers and while talking to companion.



April 24, 2010 5:20 PM



April 24, 2010 5:21 PM



April 24, 2010 5:21 PM

23. Cleans campsite, sweeps, empties and replaces vacuum bag.

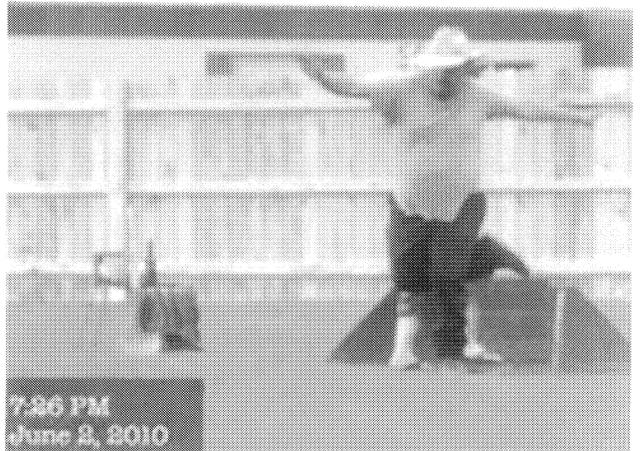
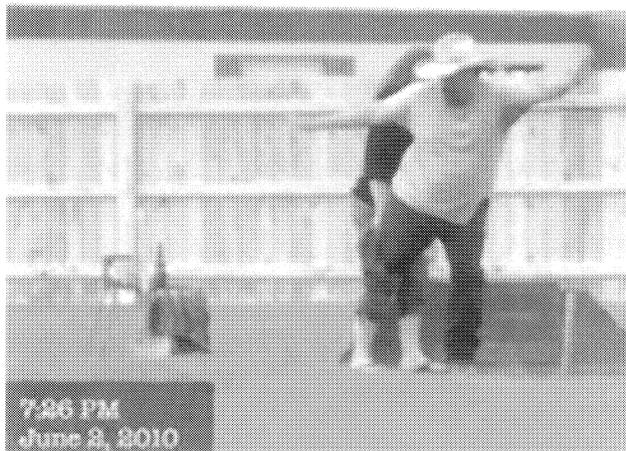
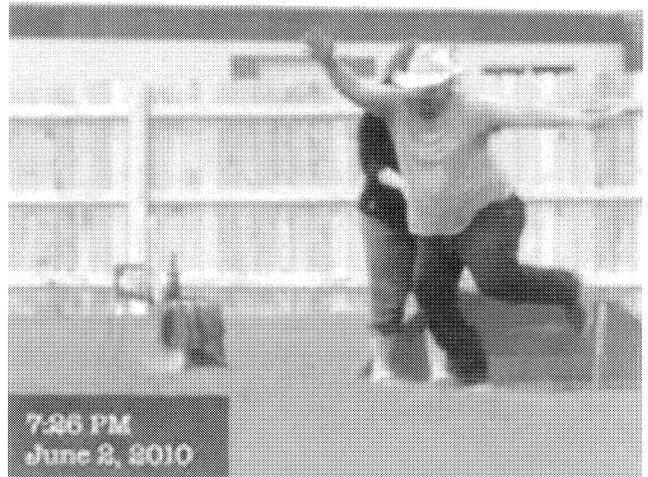


12:59 PM  
April 25, 2010



1:15 PM  
April 25, 2010

24. Takes down campsite and hitches trailer to truck.



25. Plays horseshoes for over 2 ½ hours and celebrates with a double pirouette.



26. Launches and pilots a boat loaded with fishing gear.