

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

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

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

Plaintiff/Respondent,

v.

CITY OF SEATTLE,

Defendant/Appellant.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Susan Craighead)

ERRATA TO APPELLANT'S
OPENING BRIEF AND REPLY BRIEF

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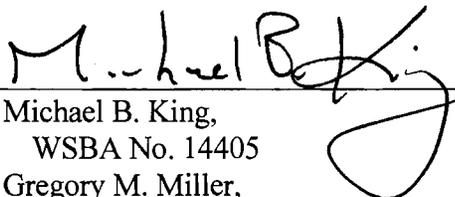
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Review of the Appellant City of Seattle's Opening Brief and Reply Brief during the process of preparing the RAP 10.9 Corresponding Briefs revealed errors in record citations and wording quoted from record sources.

The links in the Corresponding Briefs direct the user to the correct pages. Counsel for the City have marked the affected pages to indicate corrections, and have attached those marked pages to this Errata. Affected pages for the Opening Brief are found at Appendix A; affected pages for the Reply Brief are found at Appendix B.

RESPECTFULLY SUBMITTED this 6th day of May, 2011.

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ERRATA TO APPELLANT'S
OPENING BRIEF AND REPLY BRIEF - 1 -

APPENDIX

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

II. STATEMENT OF MATERIAL FACTS³

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

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

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

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

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

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

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

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

¹¹ As put by Plaintiff's counsel, CP 6559, who also described the City's investigators as having gone “all over hell's half acre” to determine the nature and extent of Mark's activities. RP (9/11/09) 104; CP 8203. ⁵

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

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

On May 2, trial was continued to December 1. CP 7941. A mediation was held, after which Mark's original counsel withdrew. CP 7966-75, 8010, 8012. ^{8052.} The trial was continued again, this time to September 8, 2009, with a new discovery cut-off that was eventually extended to August 7. CP 1481, 8074-77.

In June 2008, Meg petitioned for Mark to be declared legally incapacitated, and was appointed his guardian in July. CP 19, ~~8052~~, 8222-28. In November, the trial court granted Meg's motion to be substituted for Mark as the plaintiff in this action. CP 14-16, 21.

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

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

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

The trial court denied a redeposition, and the City moved for reconsideration. CP ²⁹¹292-305. Plaintiff’s counsel represented that Mark’s “*recovery has generally plateaued* and he is simply attempting to cope with his long-term, chronic injuries.” CP 358 (emphasis added). The court denied reconsideration. CP 537-38.

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

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

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

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

November 2003. RP (9/11/09) ⁷ 3; CP 2375-76, 2448-50. Moreover, shortly after his fall Mark was placed on an "Alcohol Withdrawal" protocol because of his high scores on the "Clinical Indicators and Withdrawal Assessment." CP 317-18, 324-31, 404, 427; RP (9/11/09)

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

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

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

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

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

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

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

¹⁸ See CP 2329-31.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

After plaintiff's counsel learned that the City's investigator was making calls to Montana, they left a phone message for Gordon Jones, Mark's father, telling him the City was getting "pretty desperate" and "there is nothing they should need from you." CP 4060-61 (App. D-2). But Gordon provided the City with a declaration in which he testified that his son had "spent the better part of August [2009] in Helena...hunting, camping, [and] partying[.]" CP 4068-69 (App. D-1). He also testified about his knowledge of Mark's history of alcohol abuse and need for treatment. CP 4068-75. Although plaintiff had disclosed Gordon Jones as Mark's father and as someone who had provided Mark with physical therapy, as with Beth, plaintiff omitted Gordon from the list of family members who had knowledge about how the fall impacted Mark's life. *Compare* CP 7485, 7570 with CP 7425, 7469-70, 7562-63. But unlike with Beth, Gordon was listed on plaintiff's final witness list, CP 7626¹, and on the Joint Statement of Evidence as a witness for plaintiff, CP 7637, and the City had reserved the right to call any witnesses identified by either party. CP 4342, 4355, 4369, 4380, 4382, 4389, 4393.

Yet when the City tried to call Gordon, *see* CP 4079-83; RP (9/29/09) ^A3, the trial court barred him. The court admitted Gordon's evidence was "extremely explosive" but ruled the City should have disclosed its content before the discovery cutoff. RP (9/29/09) 24-25, 27-

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28; RP (9/30/09) ⁷¹ (trial court: “[I]n light of how incendiary he is, I am still very, very, very -- I don’t know how much more clear I can make it, reluctant to think that I would ever let him testify.”). The City later renewed its request to call Gordon, CP 4224-29, but the court refused to relent.²⁵

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

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

- The Honorable Susan Craighead.²⁶

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

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

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

²⁶ RP (10/8/10) 35.

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

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

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

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

already

man, and that not just during recovery. That's *every day for the rest of his life.*" RP (10/20/09) 7⁶7.

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

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

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

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

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

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

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

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

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

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

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

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

conceivable discovery request could have been made by the [City] that would have uncovered...[Ms. Powell], given the above and other responses” of Plaintiff. *Fisons*, 122 Wn.2d at 1083. ³⁵²

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

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

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

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

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

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

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

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

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

other rules or regulations applicable in the courts of this state,” ER 402;⁴⁷ and (2) the rules ⁽¹⁾are to be ⁽²⁾construed...to the end that the truth may be ascertained and proceedings justly determined.” ER 102. Using ER 403 to exclude relevant evidence thus is “an extraordinary remedy” to be used only sparingly. K. Tegland, *Courtroom Handbook on Wash. Evidence*, Ch. 5, Rule 403 at 212 (2007-08 ed.).

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

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

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

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

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

⁵⁴ In *Foerstel*, the plaintiff claimed his spine was fractured in an automobile-streetcar collision in St. Louis. *Foerstel*, 241 S.W.2d at 794. At his deposition, the plaintiff answered “no” to whether he had ever been hospitalized in St. Louis for any reason. *Id.* at 795. Three physicians testified for the plaintiff at trial that the plaintiff’s x-rays “clearly”
(footnote continues on next page)

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

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

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

showed a fracture, not a developmental condition. *Id.*⁶¹ After the jury’s verdict for the plaintiff, the defendant discovered x-rays taken at City Hospital in St. Louis nine months before the collision, showing the plaintiff’s spine in the same condition as after the collision. *Id.* At least one of plaintiff’s testifying physicians reversed his opinion after reviewing this evidence. *Id.* at 795. The trial court denied a new trial; the Missouri Court of Appeals held this was an abuse of discretion and reversed. *Id.* at 796-97.

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

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

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

wrong inflicted upon his opponent.” *Taylor v. Cessna, supra*, 39 Wn. App. at 836³⁷ (citation and quotation omitted).⁵⁹

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

⁵⁸ In *Taylor*, the plaintiff alleged that a crash of a Cessna airplane was caused by a faulty fuel-selector valve. 39 Wn. App. at 830. After a defense verdict, the plaintiff learned that defendant Cessna had failed to disclose the existence of fuel-selector valve testing and to produce the test results, which were directly responsive to the plaintiff’s discovery requests. *Id.* at 834. The trial court denied a motion for new trial under CR 60(b)(4). *Id.* at 834. Finding Cessna’s conduct to be “incorrect but not unreasonable,” the trial court refused to find fraud, misrepresentation, or other misconduct. *Id.* at 835. The Court of Appeals reversed. Citing Washington’s strict intolerance for violations of the discovery rules, the court disagreed that Cessna’s conduct was reasonable and held it was an abuse of discretion to deny a new trial. *Id.* at 835-36. The court declined to analyze whether the withheld test results would have affected the outcome, holding that “[a] new trial based on the prevailing party’s misconduct does not require a showing the new evidence would have materially affected the outcome of the first trial.” *Id.* at 836, citing *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978).

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

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

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

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

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

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

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

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