

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

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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

*Plaintiff/Respondent,*

v.

CITY OF SEATTLE,

*Defendant/Appellant.*

**FILED**  
COURT OF APPEALS  
DIVISION ONE  
MAY -6 2011

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

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ERRATA TO APPELLANT'S  
OPENING BRIEF AND REPLY BRIEF

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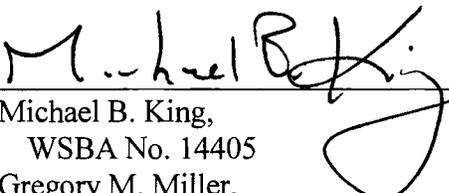
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Review of the Appellant City of Seattle's Opening Brief and Reply Brief during the process of preparing the RAP 10.9 Corresponding Briefs revealed errors in record citations and wording quoted from record sources.

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 6<sup>th</sup> day of May, 2011.

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

# APPENDIX

## B

Bert's Tavern, on Monday, September 7,<sup>9</sup> three days after the court excluded alcohol from the case. CP 2817-818 (Order signed September 4, filed September 8, 2009). On September 11, the City disclosed Winquist's evidence, three days before opening statements. RP (9/11/09) 114. The City squarely met its obligation of prompt disclosure.

Had the trial court followed *Burnet*,<sup>10</sup> it would not have ruled the City willfully delayed disclosure. The City did not "hide" its investigator or her evidence. The City clearly could not disclose the evidence *before it even existed*, and just as clearly had no obligation to disclose Winquist as a witness before she had uncovered anything about which she could testify. The City identified Winquist as a rebuttal witness nearly three weeks before Meg rested her case. CP 3620-21. That the City waited until its case to formally *move* to call Winquist as a witness is irrelevant.<sup>11</sup>

Nor did Meg establish substantial prejudice. She did not know until September 4 that alcohol would be excluded from the case, and had

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<sup>9</sup> Although Winquist and her team did not have the benefit of a video camera, they were able to take several still photos. Pre-Trial Ex. 16; see Appendix K (reproducing photos).

<sup>10</sup> Meg claims the Supreme Court's decision in *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 132 P.3d 115 (2006), relieved the trial court of making *Burnet* findings in this case. See BR 54. Meg misstates *Mayer*, which held only that *Burnet* findings were not required where a sanction was purely monetary; the court was careful to distinguish monetary sanctions from more severe sanctions (e.g., the exclusion of witnesses). See *Mayer*, 156 Wn.2d at ~~130-131~~

<sup>11</sup> This is what Meg says is the "35 days" she claims the City waited before disclosing what Winquist had learned. Meg knows better. That Winquist and her colleagues found Mark in a bar looking fit and drinking was disclosed *four days* later, on September 11. See RP (9/11/09) 114.

just “help” -- BR 77) lift a kayak from a car onto his pickup in the *Summer of 2009*. CP 3780-81, 3788, 4064-65.<sup>13</sup>

**c. Gordon Jones.**

The City expressly reserved the right to call any witness on Meg’s witness list, and Gordon was on Meg’s list. Meg responds that KCLR 26 “says nothing about this practice,” BR 63, ignoring that nothing in the rule precludes it. *Cf. Allied Fin. Servs.*, 72 Wn. App. at 167 (interpreting predecessor rule) (The scope of a rule “must be derived from the wording used”). Meg then says the City did not list Gordon as a witness on the joint statement of evidence, BR 6~~7~~<sup>4</sup>, but the rule does not extend to witnesses not designated by a party on the joint statement of evidence. *Cf. Allied Fin. Servs.*, 72 Wn. App. at 167.<sup>14</sup>

Meg faults the City for not timely investigating Gordon’s knowledge, but then argues the City *was not allowed to contact him* because she disclosed him only as a treatment provider while omitting him from the list of family members with knowledge of the impact of Mark’s

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<sup>13</sup> Authorizing a deposition of Beth had nothing to do, as Meg implies, with consideration of “lesser sanctions” (BR 62) -- it was only the means by which the trial court (albeit reluctantly) allowed the City make an offer of proof of her testimony.

<sup>14</sup> Neither *Allied Financial Services* nor *Blair v. TA-Seattle East #176*, 150 Wn. App. 904, 201 P.3d 326 (2009), supports Meg’s position. As previously discussed, *Allied Financial Services* involved a party who filed no witness list *at all* and claimed an *implied right* under former KCLR 16(a)(3) to call witnesses listed on the opponent’s witness list. *See* 72 Wn. App. at 167-68. In *Blair*, the plaintiff could not call the defendant’s lay witnesses as experts after the trial court struck her own experts as a sanction, because to allow her to do so would reward “tactical” misconduct. *See* 150 Wn. App. at 910-11. The trial court found no misconduct by the City.

Dr. Friedman noted Mark was “remarkably better” and “things [were] going extraordinarily well[.]” CP 2411, 2413-17; RP (9/17/09-A) 128. *Meg said at her deposition* that Mark had made “super gains” and “amazing improvements” by the end of 2005, to the point that “we actually thought we were going to be able to get him back to work[.]” CP 156. *Meg repeated this to the jury*, adding that 2005 was a “turning point” and a “landmark time frame in terms of [Mark’s] recovery,” and that by then Mark was even jogging or running on a treadmill. RP (10/1/09) 125; RP (10/7/09) 54, 118; *see also* CP 156.

The story could not end there, of course, because a man in that condition cannot credibly ask a jury to award \$20 million in general damages or \$2,433,006 to pay for a 24/7 personal attendant for the rest of his life. Thus, *Meg said at her deposition* that by Fall 2006 “it seemed as though things were on a *pretty steady downhill slide* in most of the areas for him.” CP 155 (emphasis added). Dr. Friedman agreed Mark “started to slide” by mid-2006 and “became more depressed and less active and just *looked worse*.” RP (9/17/09) 53, 55 (emphasis added).<sup>20</sup> *Mark and Meg then “decided” Mark could not work, and Drs. Friedman and*

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<sup>20</sup> Meg points to Dr. Friedman’s post-trial declaration as supporting the plateau theory (BR 72), but immediately following the part of the declaration she quotes, Dr. Friedman contrasts medical record entries from 2005 (“physically doing great,” “progressively better”) with those from late 2006 into 2007 (“more pain,” “more depressed,” “quite distressed”) -- the very downhill slide reports for which Meg now seeks to avoid responsibility. CP 8356.

- 8207

they found him at Bert's Tavern, CP 8206, and he only went there *after* the trial court's September 4 ruling excluding the City's alcohol defenses. Diligence does not guarantee success; often one must be both diligent and *lucky*. The City was not required to have a team of investigators working the case in both Seattle and Montana 24 hours a day, seven days a week. The trial court's conclusion that the City was not diligent implies the City *was* obligated to maintain never-ending surveillance -- a ruling with no support in the law (or common sense, for that matter), and therefore an abuse of discretion. *Fisons*, 122 Wn.2d at 339 ("A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law").

Nor did the City rely only upon surveillance. It used all the traditional discovery methods, including a CR 35 examination, to discover Mark's true condition. The City even asked Meg to supplement all discovery responses, CP 7620, not relying on Meg fulfilling her obligation under CR 26(e)(2) to amend a discovery response that is no longer correct. In sum, the trial court's findings -- that the City "devoted little effort to investigating this case" until 2009, "did not focus on Mr. Jones' damages at all," and "chose not to undertake any critical evaluation of Mr. Jones' damages claims," CP 9780, 9782 -- are not supported by substantial evidence and therefore constitute an abuse of discretion. *Fisons*, 122

**3. CR 60(b)(4) -- Meg's Concessions, Expressly and By Her Silence, Admit Fraud and Misrepresentation, or at the Very Least Flagrant Discovery Misconduct.**

The surveillance video established that Meg and Mark committed fraud and misrepresentation, or at the very least flagrant discovery misconduct, when they claimed Mark was at most an occasional beer drinker. At his deposition, Mark denied ever having an alcohol problem and said he had not touched alcohol for two years. CP 91. In her deposition, Meg strongly implied Mark abstained after he moved in with her in the Spring of 2006, and denied knowing of any past alcohol problems. CP 161. In the Summer of 2009, Mark and Meg both retreated from these complete denials, Mark now claiming he drank only "occasionally," while Meg said she would not be surprised if he had "a beer or two . . . every now and again." CP 1931, 9835. The City pointed out that these claims cannot be reconciled with the heavy, constant drinking shown on the surveillance video. OB <sup>6-</sup>7. Meg greets this damning fact with silence, apparently realizing there really is nothing she *can* say.

As for Mark's physical and mental recovery, Meg's "plateau" concession, combined with the absence of any denial that the video shows Mark does not need a 24/7 attendant, also establishes fraud, misrepresentation, or at the least discovery misconduct. Mark's doctors standing by their opinions on this point may show commendable loyalty,

but that won't save their opinions on cross-examination. They were given only 16 *minutes* out of the more than 11 *hours* of video -- less than 3 percent -- to review.<sup>28</sup> Nor did any of Mark's doctors claim to have professional experience detecting malingering; Drs. Becker, Stump, and Clark have such experience.<sup>29</sup>

Moreover, Mark's physicians had never seen Mark outside the clinical setting (where Meg had done most of the talking since the Spring of 2006), and acknowledged that Mark's performance in the "real world" would be the best evidence of his abilities. RP (9/17/09) 28-29; RP (9/16/09) 29, 63. And while Dr. Friedman took umbrage at the suggestion he and Mark's other doctors could have been fooled over the course of nearly five years of treatment, CP 8356, the blunt truth is that, when Mark presented in May 2010, Dr. Esselman once again dutifully recorded that Mark's problems were "continu[ing]," with "ongoing pain" and a "shuffling gait." CP 9535 (App. H to OB). Yet the video taken in April and June 2010 showed Mark with neither condition *when out in the real world*.

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<sup>28</sup> Meg's counsel admitted at the CR 60 hearing: "Your Honor, the DVDs [sic] supplied all the treating physicians, was [the City's] highlighted DVD...and that's what's described as the snip[pets] [in their declarations]." RP (10/8/10) 88. The total amount of surveillance footage contained on the City's "highlights" DVD was just over 16 minutes.

<sup>29</sup> Conspicuously absent was any post-trial declaration from Mark's pulmonologist, Dr. Leonard Hudson, whose subjective tests Meg incorrectly cites as objective evidence. BR 12.