

65062-9

ORIGINAL
65062-9

No. 65062-9-I
(consolidated with No. 66161-2-I)
DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION I
2011 MAR 30 PM 1:44

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)

APPELLANT'S REPLY BRIEF

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Ave., Suite 3600
Seattle, WA 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215

Michael B. King,
WSBA No. 14405
Gregory M. Miller,
WSBA No. 14459
Jason W. Anderson
WSBA No. 30512
Justin P. Wade
WSBA No. 41168

Attorneys for Appellant

TABLE OF CONTENTS

	<u>Page</u>
I. SUMMARY OF REPLY	1
II. ARGUMENT IN REPLY	6
A. Mark and Meg’s False and Misleading Discovery Responses Prevented The City From Learning The Truth About Mark’s Condition and Continued Drinking Until Immediately Before Trial. The Trial Court’s Refusal, in the Name of Case Management, to Allow the City to Call the Witnesses to Prove What it Learned Ignored the Purpose of the Civil Rules -- To Decide Cases Based on the Truth -- and Deprived the City of a Fair Trial.....	6
1. <i>Fisons’</i> Standard for Discovery is Designed to Assure that the Discovery Process Uncovers the Truth. The Trial Court’s Insistence on Enforcing Case Management Deadlines Above All Else Prevented the City from Presenting the Jury with the Truth	6
2. The Trial Court Erred in Failing to Apply the Good Cause Standard of King County Local Civil Rule 26, Which Cannot Serve as a Jurisprudential “Safe Harbor” For the Exclusion of Winquist, Beth, and Gordon	9
3. Meg’s Defense of the Jones’ Conduct During Discovery Ignores Much of the City’s Argument, and Relies Heavily on Exactly the Kind of Arguments Made by the Drug Company in <i>Fisons</i>	11
4. Meg’s Discrete Defenses of the Individual Exclusion Rulings are Meritless.	14
a. Investigator Rose Winquist.....	14
b. Beth Powell.....	16
c. Gordon Jones	17

	<u>Page</u>
B. Meg Fails to Salvage the Trial Court’s Ruling Denying the City’s Motion to Vacate the Judgment under CR 60(b)	18
1. “Mark’s Recovery ‘Plateaued’ in 2006” -- Meg Has Changed Her Story <i>Again</i>	19
2. CR 60(b)(3) -- The City Was Entitled to Rely on the Jones’ Discovery Responses. The Trial Court’s Finding that the City Was Not Diligent Ignored that Right, and Is Not Supported by Substantial Evidence. The Trial Result Would Have Been Different with the Newly Discovered Evidence.....	23
a. The City was Entitled to Rely.....	23
b. The City Exercised Reasonable Diligence.....	24
c. The Post-Trial Video Is a “Smoking Gun”.....	26
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.....	29
C. The Trial Court Erred in Excluding Virtually all Evidence of Mark’s Alcohol Use.....	32
1. The City Offered Substantial Evidence to Support Its Alcohol Use Defenses on Causation and Damages.....	32
2. The Trial Court Erred in Excluding Alcohol Evidence Under ER 403.....	39
D. The City Should Receive a New Trial on Causation and All Other Liability Issues, as Well as On Damages.....	40
III. CONCLUSION.....	42

INDEX TO APPENDICES

Case No. 65062-9-I (Consolidated with Case No. 66161-2-I)

APPENDIX DOCUMENT

- App. J Color Still Shots from April and June 2010 Surveillance Videos with Index
- App. K Color Photos of Mark Jones at Bert's Tavern, September 7, 2009 (reproducing photos contained in Pre-Trial Exhibit No. 16)

TABLE OF AUTHORITIES

Washington Cases	<u>Page</u>
<i>Allied Fin. Servs., Inc. v. Mangum</i> , 72 Wn. App. 164, 864 P.2d 1, <i>amended</i> , 871 P.2d 1075 (1993).....	11, 17
<i>Barci v. Intalco Aluminum Corp.</i> , 11 Wn. App. 342, 522 P.2d 1159 (1974).....	8
<i>Bernsen v. Big Bend Elec. Co-op., Inc.</i> , 68 Wn. App. 427, 842 P.2d 1047 (1993).....	39
<i>Blair v. TA-Seattle East #176</i> , 150 Wn. App. 904, 201 P.3d 326 (2009).....	17
<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484, 933 P.2d 1036 (1997).....	7, 15, 16
<i>Carson v. Fine</i> , 123 Wn.2d 206, 867 P.2d 610 (1994).....	39
<i>Conrad v. Alderwood Manor</i> , 119 Wn. App. 275, 78 P.3d 177 (2003).....	32
<i>Dempere v. Nelson</i> , 76 Wn. App. 403, 886 P.2d 219 (1994).....	10
<i>Fannin v. Roe</i> , 62 Wn.2d 239, 382 P.2d 264 (1963).....	28
<i>Gardner v. Seymour</i> , 27 Wn.2d 802, 180 P.2d 564 (1947).....	40, 41
<i>Kramer v. J.I. Case Mfg.</i> , 62 Wn. App. 544, 815 P.2d 798 (1991).....	38, 39
<i>Kurtz v. Fels</i> , 63 Wn.2d 871, 389 P.2d 659 (1964).....	19, 23
<i>Lancaster v. Perry</i> , 127 Wn. App. 826, 113 P.3d 1 (2005).....	10

	<u>Page(s)</u>
<i>Lundberg v. Baumgartner</i> , 5 Wn.2d 619, 106 P.2d 566 (1940).....	39
<i>Madill v. L.A. Seattle Motor Express, Inc.</i> , 64 Wn.2d 548, 392 P.2d 821 (1964).....	34
<i>Marshall v. AC & S, Inc.</i> , 56 Wn. App. 181, 782 P.2d 1107 (1989).....	35
<i>Mayer v. Sto Indus., Inc.</i> , 156 Wn.2d 677, 132 P.3d 115 (2006).....	15
<i>Rogers Potato Serv., LLC v. Countrywide Potato, LLC</i> , 152 Wn.2d 387, 97 P.3d 745 (2004).....	32
<i>Southwick v. Seattle Police Officer John Doe No. 1</i> , 145 Wn. App. 292, 186 P.3d 1089 (2008).....	10
<i>Taylor v. Cessna Aircraft Co.</i> , 39 Wn. App. 828, 696 P.2d 28 (1985).....	28, 32
<i>Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	<i>passim</i>

Federal Cases

<i>Lonsdorf v. Seefeldt</i> , 47 F.3d 893 (7th Cir. 1995)	31
<i>Loughan v. Firestone Tire & Rubber Co.</i> , 749 F.2d 1519 (11th Cir. 1985)	33

Other Cases

<i>Stokes v. Boeing Co.</i> , BIIA No. 08-22585 (April 27, 2010).....	27
--	----

Page(s)

Court Rules

ER 403	33, 39
ER 404(b).....	33
ER 406	33
ER 703	33, 37, 40
ER 705	37, 40
CR 26(e)(2)	25
CR 35	25
CR 60	4, 11, 18, 19, 20, 28, 41
CR 60(b)(3).....	18, 23
CR 60(b)(4).....	19, 28, 29, 32
KCLR 26.....	9, 10, 17
KCLR 26(b)	10, 11
KCLR 26(b)(4).....	9

I. SUMMARY OF REPLY

The City of Seattle does *not* want a “do-over.” The City wants a fair trial, which it was denied by systematic discovery abuse.

The City recognizes that this appeal presents the Court with a choice: overturn a jury verdict, which no appellate court likes to do, or allow *blatant* discovery violations to go uncorrected and leave the verdict forever suspect. And while the prospect of reversing a judgment on a jury verdict after a long trial is obviously not attractive, here that *must* be the answer. The jury never had the chance to hear both sides of the story; a new jury must be given that chance. Any other ruling will make a mockery of the truth-seeking purpose of our judicial system.

The City does not deny that Mark Jones loved being a front-line firefighter, or that Mark’s fall caused injuries that may mean he can no longer be one. But the City denies this could justify Mark and Meg’s conduct here. Seeking damages for injuries a firefighter believes his employer’s negligence caused is one thing. Falsifying the historical record of his recovery, so a jury awards millions in damages, is quite another. So, too, is hiding the firefighter’s lifelong battle with alcohol abuse, when that concealment denies the employer legitimate defenses.

Meg and Mark did just that. They seeded Mark’s medical records with descriptions they could later point to as “proving” Mark had been left so debilitated that he can barely manage to pour a bowl of cereal. They

persuaded several medical professionals, including the City's worker's compensation panel, that Mark was so impaired physically and mentally he could never work again. Then they submitted those same records and opinions to the City in response to discovery requests as "proof" of Mark's condition, and his right to millions in damages -- a claim reinforced by Mark's dramatic deposition performance in March 2008. And throughout they denied Mark ever had an issue with alcohol, with Mark testifying at his deposition that he stopped drinking even the occasional beer by 2006.

Mark and Meg knew these claims were false. That Mark had been seriously injured *was* true. That Mark had been left so debilitated he could no longer enjoy hunting, fishing, camping and a robust social life was *not* true. Nor was it true Mark's physical and mental processes were so impaired he could no longer be gainfully employed. In fact, Mark regularly traveled to Montana where, throwing off the constraints of the performance reflected in his deposition, he was again the heavy drinking "hale fellow, well met" he had been before the accident. But Mark and Meg were not about to let the City or a jury know this -- especially not when they were going to ask that jury to award \$2,433,006 so Mark could receive the "24/7" care they claimed he would need *for the rest of his life*.

Their scheme almost came undone, when the City uncovered the truth just as trial was getting underway. Investigators observed Mark in a bar the night before trial was to begin and three days after the trial court

had struck the City's alcohol evidence -- a gregarious and capable Mark, with an evident thirst for beer. Two days later investigators learned from Mark and Meg's sister Beth Powell that Mark was doing just fine on his visits to Montana, and that Meg had admitted she was willing to suppress the truth about Mark's drinking to win the case: "*first things*" had to come "*first.*" CP 3782, 3794. Finally, their father Gordon Jones confirmed Mark continued to hunt, fish and party in Montana, and to drink heavily.

The City promptly disclosed this evidence and sought permission to call lead investigator Rose Winquist, Beth, and Gordon as witnesses. *But the trial court said "no."* The court ruled that the City failed to prove it was *impossible* for its investigators to have uncovered this evidence before the close of discovery, so it would be "unfair" to allow the City to "ambush" Mark and Meg with such "explosive" evidence with the trial underway. Denied this evidence, the City could not bolster the foundation for its alcohol causation and mitigation defenses which the court had found wanting. Nor could it effectively rebut the contrived but powerful portrait of a former firefighter left so debilitated that he would need lifetime "24/7" care costing millions. Finally, the City was denied the chance to impeach Mark and Meg as parties who had systematically falsified evidence and thus did not deserve the jury's trust.

The City was denied a fair trial because the trial court turned the principles of *Fisons* on their head, using them to protect the discovery

abuser by refusing to let the City call Winkvist, Beth, and Gordon. The court compounded these errors when it denied the City's CR 60 motion. Eleven hours of surveillance video taken over several days in April and June of 2010 revealed Mark's true condition. The video showed Mark capable of doing *far* more than pouring a bowl of cereal -- and drinking heavily as he carried out his many tasks. The video also confirmed the testimony of Winkvist, Beth, and Gordon, and established that Meg and Mark had hidden Beth and Gordon's knowledge. Mark and Meg submitted declarations opposing the CR 60 motion, *but they did not dispute the accuracy of the video.*

To the video the City added the testimony of the surviving members of the worker's compensation panel and Dr. Becker's biomechanical analysis. Dr. Becker was the only expert who could evaluate Mark's condition based on evidence of his ability to function *in the outside world and when Mark was unaware he was being observed and therefore not "adjusting" his behavior.* Dr. Becker concluded Mark was fully functioning physically and mentally, and the surviving members of the worker's compensation panel concluded Mark had deceived them during their exam. That several of Mark's doctors stuck to their opinions after reviewing only *a few minutes* of the video only proves doctors are sometimes loath to believe they can be fooled.

The trial court acknowledged the City's evidence was new, material, and anything but cumulative. The court recognized that the Mark Jones shown on the surveillance video was not the Mark Jones presented to the jury. Yet the court refused to grant a new trial, once again accusing the City of a lack of diligence. The court refused to recognize that, when one party successfully frustrates the search for truth by discovery abuse, the result of a trial tainted by that abuse *must* be set aside. Blaming the victim for unmasking the opponent's deception "too late," as the court did here, is both unfair and wrong.

A personal injury plaintiff deprived of a fair trial by a defendant's discovery abuse is entitled to a new trial. Here a personal injury defendant was deprived of a fair trial by the plaintiff's discovery abuse. Trials must be fair to both sides. When a plaintiff violates *Fisons* and the rules designed to make sure trials are fair, the defendant should be given the same remedy as a plaintiff who is the victim of such abuse. The court failed to do that here, first by excluding witnesses who could have testified to the truth and then by refusing to order a new trial in the face of compelling new evidence proving Mark and Meg misrepresented Mark's condition and his continued drinking. This Court should reverse and remand for a new trial on all issues.

II. ARGUMENT IN REPLY

A. **Mark and Meg's False and Misleading Discovery Responses Prevented The City From Learning The Truth About Mark's Condition and Continued Drinking Until Immediately Before Trial. The Trial Court's Refusal, in the Name of Case Management, to Allow the City to Call the Witnesses to Prove What it Learned Ignored the Purpose of the Civil Rules -- To Decide Cases Based on the Truth -- and Deprived the City of a Fair Trial.**

1. ***Fisons'* Standard for Discovery is Designed to Assure that the Discovery Process Uncovers the Truth. The Trial Court's Insistence on Enforcing Case Management Deadlines Above All Else Prevented the City from Presenting the Jury with the Truth.**

Comparing this case to *Fisons* is anything but "incredible." See Brief of Respondent ("BR") 61. The Supreme Court in *Fisons* sought to do far more than expand the basis for imposing sanctions for discovery violations. The court's ultimate purpose was to change how parties approach discovery. The adversary approach would be replaced by "a spirit of cooperation and forthrightness," because the latter is "is necessary for the proper functioning of modern trials." *Fisons*, 122 Wn.2d at 342. The standard announced to test the adequacy of a discovery response reflects this change: Is the response "consistent with the letter, spirit *and purpose of the rules*"? *Id.* at 344 (emphasis added).

The "purpose of the rules" is to facilitate the search for the truth and thereby achieve a just determination in every case. Since the Civil Rules' adoption in 1967, Washington courts have repeatedly rejected the

“sporting theory of justice” in favor of the search for truth. *See* Opening Brief (“OB”) at 50-51 & nn. 37-39 (citing authorities). In recent years, our Supreme Court has declared that concern for case management must be similarly tempered. In *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), Justice Alexander, writing for the majority reversing a trial court’s exclusion of an expert for failure to comply with a scheduling order, responded to Justice Talmadge’s concern for case management by emphasizing the underlying purpose of the Civil Rules:

The dissent . . . prefer[s] to interpret the civil rules for superior court in a way that facilitates what it describes as the “case management powers of the trial court.” . . . While we are not unmindful of the need for efficiency in the administration of justice, *our overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action.* *See* CR 1.

131 Wn.2d at 498 (emphasis added).

Here the City uncovered evidence, just as trial was beginning, showing Meg and Mark were about to present a picture of Mark to the jury *they knew was not true*. What is indeed “incredible”¹ about this case is the

¹ Meg characterizes the City’s claims as “incredible,” evidently hoping the terminology will make the claims seem unbelievable. The sad fact is these claims arise out of a record that discloses events that *should* strike the Court as incredible, indeed shocking. The Court will see this for itself when it reviews the surveillance video showing Mark functioning normally when he does not know he is being observed, and compares that to the video showing how Mark presented himself in his March 2008 deposition -- the same way he presented himself to his treating and examining physicians starting in the Spring of 2006, and to the jury at trial. *See* Ex. Sub. No. 466A (surveillance video); Opening Brief (“OB”), App. C (Surveillance Log); Ex. Sub. No. 466D (Mark’s deposition video); CP 9892-9893 (presentation at trial). To help the Court with that review, the City has
(footnote continued on next page)

way the trial court responded to this revelation. The court did not try to find out what the new witnesses had to say, or if there were legitimate reasons why the evidence had not been uncovered earlier. Instead, the court declared even an *offer of proof* to be a waste of time, because the City had neither disclosed the evidence during discovery nor put the witnesses on its final witness list:

[H]ow can I consider a witness who isn't on the witness list and wouldn't be being called at trial for an offer of proof?

* * * *

I'm just having a really hard time understanding intellectually, this is what I'm struggling with, Ms. Bremner, how can an offer of proof include testimony from someone who wouldn't be able to testify at trial anyway because they weren't disclosed, that's what I'm struggling with[.]

RP (9/11/09) 105-06. The court was so focused on enforcing deadlines established by the rules that it forgot the *underlying purpose* of those rules -- to facilitate the search for truth and thereby achieve a just result.

The exclusion of Investigator Winquist, Beth Powell, and Gordon Jones followed from this root error. The court failed to recognize that a deadline alone does not justify excluding relevant evidence that comes to the attention of the party seeking to offer it after the deadline has passed. This Court's decision in *Barci v. Intalco Aluminum Corp.*, 11 Wn. App. 342, 522 P.2d 1159 (1974), is crystal clear on this point of law:

prepared a collection of still shots taken from the video, assembled them by topic, and attached them to this brief as the City's Appendix J.

[W]here a witness does not become known until shortly before trial and prompt answer is made upon discovery of such witness *the court should not exclude the witness's testimony.*

11 Wn. App. at 350 (emphasis added). The court's exclusion rulings fatally compromised the trial because they allowed Mark and Meg to keep the truth about Mark's condition and his drinking hidden from the jury.

2. The Trial Court Erred in Failing to Apply the Good Cause Standard of King County Local Civil Rule 26, Which Cannot Serve as a Jurisprudential "Safe Harbor" For the Exclusion of Winqvist, Beth, and Gordon.

Meg seeks shelter for the trial court's rulings in the pretrial witness identification requirement of a King County Superior Court local rule -- presently KCLR 26(b)(4) -- and Court of Appeals' decisions about that rule. Neither can save the trial court's rulings.²

First, KCLR 26(b)(4) expressly allows an unlisted witness to testify if there is "good cause" for doing so. The City had *the best possible cause* for adding these witnesses³ -- their evidence showed Mark and Meg had been trying to hide Mark's true condition and his continuing drinking from the City by misleading discovery responses. Winqvist literally had nothing to testify about until Meg took Mark bar hopping and Winqvist and her team caught them at it, and that did not *happen* until the

² Meg's attempt to justify the exclusion of Winqvist, Beth, and Gordon under KCLR 26 turns in part on fact allegations specific to each witness, which the City will address below. *See* Section A.4.

³ The City disputes it needed to "add" Gordon, whom the City contends had been designated in compliance with the rule (which the City addresses in Section A.4.c, *infra*).

evening of September 7, 2009. As for Beth and Gordon, the City had no reason to call them until it learned they knew about Mark's true condition and his continuing drinking; that did not happen until the trial was just getting under way. If not for a diligent investigator's lucky break right after the court excluded the City's alcohol evidence, quite possibly *none* of this would have come to light in time for the City to present it to the jury. But Winkvist did catch that break, the evidence did come to light, and the City had *compelling* cause for adding Winkvist, Beth, and Gordon to its witness list.

Second, the case law applying KCLR 26 and its predecessor rule upon which Meg relies, *see* BR 52, does not support the trial court's refusal to allow the City to call these witnesses:

- *Southwick v. Seattle Police Officer John Doe No. 1*, 145 Wn. App. 292, 186 P.3d 1089 (2008), involved a declaration from an expert witness introduced to oppose a motion for summary judgment; the witness had never been disclosed in discovery or in compliance with the witness designation deadline of former KCLR 16(a)(4). *See* 145 Wn. App. at 301.
- *Lancaster v. Perry*, 127 Wn. App. 826, 113 P.3d 1 (2005), involved the exclusion of experts that the trial court found had deliberately not been selected by the witness designation deadline of KCLR 26(b) in an attempt to gain a tactical advantage. *See* 127 Wn. App. at 828-830.
- *Dempere v. Nelson*, 76 Wn. App. 403, 886 P.2d 219 (1994), involved the exclusion of an expert who had not been identified and was sought to be added just 13 days before trial, where the proponent could offer no better excuse than she had not been able to "locate" such an expert until then. *See* 76 Wn. App. at 405-406.

- *Allied Financial Services, Inc. v. Mangum*, 72 Wn. App. 164, 864 P.2d 1, *amended*, 871 P.2d 1075 (1993), 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 167-168.

While some of these cases may sound similar to this one, none of them actually supports a trial court refusing to let a party add a witness after the KCLR 26(b) deadline has passed, when -- as here -- the good cause for adding the witness is the opposing party's violation of its *Fisons* obligations. If a party's hiding of the truth does not establish "good cause" for adding a witness, what does? The trial court erred as a matter of law when it excluded Winquist, Beth and Gordon.

3. Meg's Defense of the Jones' Conduct During Discovery Ignores Much of the City's Argument, and Relies Heavily on Exactly the Kind of Arguments Made by the Drug Company in *Fisons*.

Meg's defense of the Jones' discovery conduct is remarkable as much for what it does not address as for the defense it does offer.

- The City argued Meg breached her discovery obligations when she failed to update discovery to disclose that Mark had enjoyed a "remarkable physical recovery" shortly before trial, as she claimed in her response to the City's CR 60 motion.⁴ OB 61-62. Meg never addresses how this reflects on the truthfulness of her pre-trial discovery responses.

⁴ Meg now denies she responded to the CR 60 motion by asserting Mark had made a remarkable physical recovery before trial; the City will address this claim in its discussion of the CR 60 issues, Section II.B.1, *infra*.

She does not deny having repeatedly claimed in 2009 that Mark's physical condition had *not* changed since his March 2008 deposition -- claims that persuaded the trial court to deny a second deposition of Mark. If he *was* making a "remarkable physical recovery," her representations that his condition had not changed were false.

- The City argued the Jones' discovery responses became misleading when they systematically seeded Mark's medical records with entries falsely describing him in decline, then incorporated those records into their discovery responses. OB 64-71. Meg asserts no falsity in the reporting of Mark's condition to his physicians,⁵ but ignores the broader *Fisons* implications. Meg never denies that the contents of Mark's medical records were incorporated into the response to the City's interrogatory asking how the accident had affected Mark, making the reports to Mark's doctors the Jones' substantive response to the City's discovery request. If those representations were false -- and the surveillance video establishes they *were* false⁶ -- the inevitable conclusion is that Meg and Mark breached their discovery obligations.

When Meg responds to the City's argument, she engages in precisely the kind of a parsing of the City's discovery requests that *Fisons*

⁵ This is a truly incredible claim that, among other things, rests on a hopelessly selective reading of those records. See Section II.B.1, *infra*.

⁶ The still shots taken from the surveillance video and set forth in Appendix J illustrate the many ways in which the surveillance conclusively proves the representations' falsity.

condemned. For example, she says the City “never propounded interrogatories about alcohol use” (BR 60), implying the City had an obligation to ask “the right” question about alcohol use, and therefore may not complain that it never learned the true scope of Mark’s drinking from the answers to the questions it *did* ask. This directly conflicts with *Fisons*’ mandate that a party “must *fully* answer all interrogatories and all requests for production, unless a specific and clear objection is made.” *Fisons*, 122 Wn.2d at 353-54 (emphasis in the original). The same medical record entries that recorded the Jones’ false story about Mark’s condition also recorded the Jones’ *other* false story about a Mark Jones who rarely drank so much as an occasional beer.⁷ Mark and Meg have no more right to defend on the basis that they weren’t asked the right question about Mark’s drinking than the drug company in *Fisons* had the right to argue it was never asked specifically about the existence of “Dear Doctor” letters. The responses the company gave misleadingly implied that no such letters existed, *see Fisons*, 122 Wn.2d at 354, as did the Jones’ responses about Mark’s drinking.

Perhaps the most striking example of Meg’s attempt to revert to pre-*Fisons* days is her response to the City’s argument about Beth Powell

⁷ The surveillance also conclusively proves the falsity of this story. *See* Appendix J (no. 28, still shots illustrating Mark’s near-constant drinking); *see also* Section II.C, *infra* (discussing the record pertaining to Mark’s alcohol abuse).

BR 61-62. Meg states that “[t]he simplest interrogatory could have ‘uncovered’ [Beth] Powell, including, for example, ‘name all living relatives.’” She thus takes *precisely* the position the drug company took about the “Dear Doctor” letters which the Supreme Court rejected in *Fisons*. Nor did the City need to ask such a question: Mark and Meg had already told the City during their depositions that Mark’s living relatives included Beth Powell. The *real* problem -- which Meg ignores -- is that, in answering Interrogatory No. 10’s request for the identity of persons with knowledge of (*inter alia*) Mark’s “injuries and damages,” Mark and Meg represented Beth was not among the “living relatives” -- to use Meg’s phrase -- who had personal knowledge of those injuries and damages. See CP 7416, 7433, 7481-82, 7523. That representation was false.⁸

4. Meg’s Discrete Defenses of the Individual Exclusion Rulings are Meritless.

a. Investigator Rose Winqvist.

Investigator Winqvist did not “follow[] Mark for weeks.” BR 54. After three weeks of trying to find Mark, she and her team found him at

⁸ Meg tries to excuse not listing Beth as a person with knowledge by suggesting she did so because Beth “did not have any relevant knowledge as she and Mark were ‘estranged’ and had been for some time.” BR 61. Yet Meg has never specifically denied she had the “first things first” conversation with Beth. This testimony *alone* establishes that Meg knew Beth was a person who should have been disclosed. Meg’s failure to update her discovery responses to name Beth as a person with knowledge after this exchange is a stark example of a material discovery violation in a record full of such violations.

Bert's Tavern, on Monday, September 7,⁹ 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*,¹⁰ 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.¹¹

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

⁹ 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).

¹⁰ 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 120-121.

¹¹ *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.

prepared for the possibility that adverse alcohol evidence would come in. She knew Mark was drinking at bars on September 7 -- she was his chauffeur. If Meg needed more time to prepare, the proper remedy was a continuance, not exclusion of highly probative evidence. Yet there is no consideration of a lesser sanction anywhere in the record.¹²

b. Beth Powell.

Meg faults the City for not contacting Beth after “Mark identified [Beth] in his March 2008 deposition, stating that he did not regularly see Powell before his fall and that he did not think he had seen her since.” BR 59. But why would the City contact Beth when Meg never identified her as a person with knowledge, and Mark affirmatively represented she had *no knowledge*? Had the court followed *Burnet*, it could not have found the City’s “late” disclosure of Beth was willful.

Meg maintains even now that Beth had “virtually no personal knowledge.” BR 60-61. Yet Beth’s knowledge included Meg’s admission that although Mark had an alcohol problem, “[f]irst things” had to come “first.” CP 3794. And Beth had also seen Mark spend all day cutting a hedge from atop a ladder in the Spring of 2005 and single-handedly (not

¹² That the City’s trial counsel described her summary of Winquist’s evidence as “sanitized” does *not* mean, as Meg implies (BR 58-59), that the trial court actually considered, as a lesser sanction, allowing “a ‘sanitized’ version of Winquist’s testimony.” See RP (10/14/09) 12-13.

just “help” -- BR 77) lift a kayak from a car onto his pickup in the *Summer of 2009*. CP 3780-81, 3788, 4064-65.¹³

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 63, 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 167.¹⁴

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

¹³ 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.

¹⁴ 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.

injuries on his life. The City is compelled to ask, in the face of such contradictory arguments: Just what *is* Meg's position? Meg also asserts Gordon did not have personal knowledge of the matters addressed in his declaration because "Gordon had not seen Mark since 2006," citing her own declaration testimony. BR 69, citing CP 8079. But Gordon stated he *did have* "personal knowledge" that "Mark spent the better part of August [2009] in [Montana]...hunting, camping, partying and helping his sister Tammy with things around her house." CP 4068-69. It is *Meg* who lacks personal knowledge, testifying that since 2006 Mark sometimes went to Montana without her and that, even when they went together, they often stayed at different places. RP (10/1/09) 174; CP 9836.¹⁵

B. Meg Fails to Salvage the Trial Court's Ruling Denying the City's Motion to Vacate the Judgment under CR 60(b).

The unrebutted video surveillance and expert analysis conclusively revealed Meg and Mark's material misrepresentations to the City, to the trial court, and to the jury. This new evidence easily met the CR 60(b)(3) test as evidence that would change the trial's result. The trial court's

¹⁵ Meg also claims (BR 64, n.40) Judge Craighead excluded Gordon Jones for not being on the City's witness list partly because she had earlier excluded Meg's witness Robert Leo for not being on Meg's witness list, citing RP (9/28/09) 4-27. But Leo *did* testify. He was only excluded from Meg's case in chief, and the ruling specifically allowed rebuttal testimony. *Id.* at 27. Rather than being hurt by the ruling "excluding" Leo, Meg's case was *enhanced*: Leo testified as the last witness, and addressed a critical liability issue, essentially as an expert. See RP (10/20/09) 23-54 (Leo regarding L & I standards for fire pole safety). Had the trial court followed its own form, Gordon would at least have been allowed to testify to rebut Meg and Mark's presentation of Mark's condition.

conclusion that the City was not sufficiently diligent in obtaining this evidence is error: (1) under *Kurtz v. Fels*, 63 Wn.2d 871, 389 P.2d 659 (1964), the City was entitled to rely on the Jones' discovery responses, which hid from the City the truth the surveillance revealed; (2) the City's discovery and investigation efforts more than meet any reasonable diligence requirement. The City also met the CR 60(b)(4) standard, as the video conclusively established the falsity of both the Jones' discovery responses and their presentation to the jury.

1. "Mark's Recovery 'Plateaued' in 2006" -- Meg Has Changed Her Story *Again*.

Meg's shifting versions of Mark's recovery progression are becoming difficult to track. So far, there have been three distinct versions -- one during discovery and at trial, another in response to the CR 60 motion, and yet another on appeal:

- The "Initial Recovery, Then Steady Downhill Slide" Version. During discovery and at trial, Meg said Mark had made remarkable gains both physically and mentally until mid-2006, but then went into a "steady downhill slide"¹⁶ which saw Mark by 2008 manifesting the debilitated mental and physical condition which remained substantially the same by the time of trial and from which Mark had no hope of recovery.
- The "Remarkable Physical Recovery by Trial" Version. Confronted with the post-trial video and Dr. Becker's report, Meg responded that, "by the start of trial," Mark had made "a remarkable *physical* recovery" but no significant *cognitive* improvements.¹⁷ She claimed her damages case "was never about

¹⁶ CP 155.

¹⁷ CP 8305, 8311 (emphasis added).

Mark's physical limitations" but concerned cognitive problems to which the video supposedly did not speak, and explained that Mark presented poorly to the doctors and when testifying because of stress and reluctance to talk about his problems.¹⁸

- The "Initial Recovery, Then Plateau" Version. After the City demolished the notion that the trial was primarily about Mark's mental impairments, both in its CR 60 reply and its Opening Brief, Meg *now* argues that Mark's condition "plateaued" physically *and* mentally in 2006, and has stayed *there*, with minor variations, ever since.

The "plateau" version *concedes* the downhill slide *never happened*. The plateau version thus contradicts (1) Meg and Mark's presentation to his physicians and the worker's compensation panel; (2) Meg and Mark's deposition testimony and written discovery responses; (3) Meg's declaration opposing a second deposition of Mark; (4) *and* Meg and Mark's trial testimony.¹⁹

Meg's original story -- "initial recovery, then steady downhill slide" -- is fully described in the Opening Brief at pages 11-18 and in the chronology set forth in Appendix I. By December 2004, Mark reported, and a neuropsychological evaluation found, a "near complete recovery of cognitive functioning." CP 10489. In September 2005, Dr. Esselman agreed there did "not appear to be any significant permanent restrictions due to the cognitive impairment." CP 10494. In late 2005 and early 2006,

¹⁸ CP 8325-26; CP 8795-96.

¹⁹ The City *never* contended the post-trial evidence showed Mark made a remarkable recovery "*after trial*." BR 72 (emphasis added).

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).²⁰ *Mark and Meg then “decided” Mark could not work, and Drs. Friedman and*

²⁰ 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.

Esselman agreed. CP 2420 (Friedman “agree[ing]” to “support” Mark and Meg’s “deci[sion]”); RP (9/16/09) 34-35. Mark and Meg then painted a grim picture for the worker’s compensation panel in February 2008 and in their March 2008 depositions. Meg said Mark’s “condition . . . leaves him very limited both mentally and physically.” CP 9838. On a good day, he could walk maybe 400 yards on flat ground; the treadmill now was out of the question. CP 157, 165.²¹ “He’s a guy that sits there every day and barely gets up, . . . and it’s not getting any easier, it’s getting worse each day.” CP 172.²²

Meg then prevented an updated deposition of Mark by declaring his condition had “*not substantially changed*” since March 2008 and was “*roughly the same* with similar variations as he and I and the medical records have frequently described.” CP 225, 268 (emphasis added). And Mark *did* present the same at trial as he did for his deposition -- in terrible condition. CP 9892-93. Judge Craighead found the trial evidence “really did paint a picture . . . of someone who’s suffered significant physical

²¹ At trial, Dr. Friedman testified that Mark’s (self-reported) pain level *never* falls below “5” on the Wong-Baker “1 to 10” facial grimace pain scale. *See* RP (9/17/09) 10-11. “5” is a significant, debilitating level of pain. *See* CP 9487-88.

²² Mark similarly testified he had gotten worse since mid-2006, CP 84-85, and this was reflected in the medical records as well, CP 2761-85. Two neuropsychologists noted a cognitive decline from his 2004 status, and because brain injury symptoms only get better, not worse, they developed a theory to explain it -- that he performed worse on their tests because he was depressed from dealing with so much pain and not being able to work. CP 10514-15; RP (9/23/09) 153-54. The surveillance video demolished this explanation. *See* CP 9454-57.

disabilities,” and the “mental picture created at trial was very different from what appears on the video.” RP (10/8/10) 35; CP 9785. If there was no downhill slide after the 2006 plateau, Meg and Mark have a *lot* of explaining to do, and a jury should decide the credibility of that explanation.

2. CR 60(b)(3) -- The City Was Entitled to Rely on the Jones' Discovery Responses. The Trial Court's Finding that the City Was Not Diligent Ignored that Right, and Is Not Supported by Substantial Evidence. The Trial Result Would Have Been Different with the Newly Discovered Evidence.

a. The City was Entitled to Rely.

Meg does acknowledge a party has a right, under *Kurtz v. Fels*, to rely on unambiguous, sworn discovery responses, and may do so in lieu of a reasonably diligent investigation. BR 76. But her ensuing attempt to distinguish *Kurtz* confuses the requirements for a new trial under CR 60(b)(3). The City was entitled to rely on the discovery responses regardless of whether Mark's doctors “stood by their opinions” or the post-trial evidence was a “smoking gun.” BR 77, 79. Reliance on discovery responses waives the requirement of *reasonable diligence*, not the probability of changing the trial outcome (discussed in Section II.B.3, *infra*). Meg then claims that, even if the City was entitled to rely on their discovery responses, it cites no misleading discovery response. Yet her concession that the “steady downhill slide” never happened is sufficient,

standing alone, to establish that virtually all the Jones' discovery responses -- including deposition testimony -- were at the least misleading, if not outright false.

b. The City Exercised Reasonable Diligence.

The City did not merely trust but also sought to verify Mark and Meg's discovery responses, including 26 hours of public surveillance in Washington and 18.5 hours in Montana. All conducted months before trial. CP 8204, 8706-07. Yet while the trial court initially acknowledged the issue was whether the City exercised "*ordinary* diligence," not whether it hired "150 investigators," RP (10/8/10) 37 (emphasis added), it ultimately concluded that the City did not meet that standard.

There is no legal or factual support for this conclusion. The City's team of investigators not only conducted dozens of hours of public surveillance -- they also spent days in early 2008 and mid-2009 researching Mark's legal history, interviewing nine of his former neighbors, and attempting to interview his ex-wives. CP 8675-76, 8680-86, 8689, 8696, 8698, 8701-04, 8760-65. That the first investigator team failed to find Mark out in public does not prove lack of diligence. The City was not given Mark's itinerary but instead was told, "[a] lot of times he might sit and watch TV all day," and "much of the time he will 'pretty much live on the couch.'" CP 9829, 10063. When the new investigator team began looking for Mark in August 2009, it took three weeks before

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

Wn.2d at 345 (findings unsupported by substantial evidence “cannot stand.”

c. The Post-Trial Video Is a “Smoking Gun.”

Despite Judge Craighead’s recognition of the stunning difference between Mark’s presentation in the video and at trial, Meg claims the post-trial video is not a “smoking gun.” But Meg does not deny that the video, by itself, proves two things: (1) Mark does not need a 24/7 personal attendant and (2) he consumes copious quantities of alcohol, despite his morphine pump and doctor’s orders not to drink. If presented at trial, these facts more probably than not would have changed the outcome.

- **Physical Condition and Capability.** When asked why Mark needed a 24/7 attendant, Dr. Goodwin testified Mark is incapable of “multi-tasking” or carrying out tasks more complicated than pouring cereal into a bowl and adding milk:

A. ... [H]e can’t function independently. He may be able to do some very basic things, like take care of basic activities of daily living, like getting up, taking a shower, that kind of thing, getting dressed, but when it comes to what’s called instrumental activities of daily living, these are things that are more complex, that involve multitasking, higher levels of organization and planning, such as meal planning, going to the grocery store, you know, even doing volunteer work, and, you know, driving to and from a places [sic], so forth. He has simple path-finding difficulties and disorientation, so there’s issues there related to getting places.

Yeah, he may be able to pour a bowl of cereal and put milk on it, but not anything more complex with meal planning, especially if there’s distraction going on.

RP (9/23/09) 129-30. Based on this and similar testimony, the jury awarded every penny of the 2.4 million requested for 24/7 care for life.

The video conclusively proves Mark is capable of the “instrumental activities of daily living,” including “multi-tasking.” Dr. Clark, who reviewed all 11-plus hours of video, observed:

The video...shows none of the indications of a cognitive disorder, including psychomotor retardation, difficulty concentrating, difficulty making decisions, memory problems, impaired cognitive-motor skills, difficulty assembling parts, distractibility, perseveration, or reluctance to engage in spontaneous activities.

...Instead, the video shows Mr. Jones (1) engaging in activities that require organization and planning (*e.g.*, going to a store and making purchases; camping with a trailer; launching a boat with gear for fishing); (2) engaging in normal social activities (*e.g.*, playing games; conversing with and relating to his companion and others; texting); (3) multi-tasking (*e.g.*, talking on the phone while moving firewood; texting and talking), and much more.

CP 9453.²³ Dr. Becker, who also reviewed the entire video and analyzed 464 individual screenshots, concluded Mark’s physical and cognitive functions were normal. CP 10210.²⁴

- **Drinking.** Scene after scene shows Mark consuming copious quantities of alcohol.²⁵ His drinking confirms the testimony of

²³ The still shots taken from the video illustrate these and several other activities. *See* Appendix J (including nos. 2, 3, 8, 9, 10, 13, 14, 22, 23, 25 & 26)

²⁴ Dr. Becker’s similar analysis of surveillance video has been accepted in other cases as conclusive, overriding contrary treating physician opinions. *See, e.g., Stokes v. Boeing Co.*, BIIA No. 08-22585 (April 27, 2010); CP 10668-180687.

²⁵ The still shots highlight several drinking episodes. *See* Appendix J (no. 28).

Beth, Gordon, and Investigator Winqvist regarding Mark's use of alcohol, and destroys Meg and Mark's credibility. Moreover, this was the kind of heavy drinking Dr. Rudolf, Dr. Stump, and Dr. Friedman all said would impair Mark's recovery. CP 2386, 2446, 4005, 4032-33, 4656-57; RP (9/11/09) 41-43; RP (9/17/09-A) 123-25.

Meg did not dispute the video's contents: her CR 60 declaration was silent. *See* CP 8794-8800. Judge Craighead remarked at the CR 60 hearing that she was troubled by the absence of declarations from either Mark or his female companion seen in the video. RP (10/8/11) 40. When Meg then submitted declarations from both that -- like Meg's -- did not dispute the video's content, CP 9709-15, Judge Craighead disregarded them. CP 9709-15, 9887-91.

The City did not need to prove beyond a reasonable doubt, or even by clear and convincing evidence, that the outcome of a new trial would be different. Only a preponderance was required,²⁶ and the City met this burden through the surveillance video *alone*.²⁷

²⁶ The trial court addressed the probability of a different trial outcome as if it were an element under CR 60(b)(4), requiring clear and convincing evidence. It is not. *Taylor v. Cessna Aircraft Co.*, 39 Wn. App. 828, 836, 696 P.2d 28 (1985).

²⁷ The video is a film record recording events as they transpired. It therefore falls within the category of evidence establishing "physical" facts, which may not be controverted by testimony. *See, e.g., Fannin v. Roe*, 62 Wn.2d 239, 243, 382 P.2d 264 (1963) ("[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'" (quoting *Mouso v. Bellingham & Northern Ry. Co.*, 106 Wash. 299, 303, 179 P. 848 (1919))).

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 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.²⁸ Nor did any of Mark's doctors claim to have professional experience detecting malingering; Drs. Becker, Stump, and Clark have such experience.²⁹

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*.

²⁸ 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.

²⁹ 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.

As for Mark's friends: They did not necessarily "perjure[] themselves," more likely they were fooled. BR 80. Regardless, their testimony is incredible in light of the video. For example, one of Mark's friends testified Mark could fish no more than 20 minutes "because he physically cannot do it" and taking Mark out was like fishing with a "five-year-old kid": "He's totally distracted, doesn't remember he's got a lure in the water, because he starts talking about something else and he's totally distracted, doesn't remember that he's fishing." RP (10/1/09) 17. Yet as Judge Craighead acknowledged, "[t]hat's not really what I saw on the video,"³⁰ and when pressed, Meg's counsel agreed, "I didn't see it either[.]" RP (10/8/10) 65-66. Whatever weight a second jury may give to Mark's friends' testimony in the face of what the video shows, that testimony does not defeat the City's right to a new trial.

The absence of any denial of what was plain on the face of the video established Meg and Mark's misconduct. *See Lonsdorf v. Seefeldt*, 47 F.3d 893 (7th Cir. 1995) (reversing denial of plaintiff's motion under equivalent federal rule where defendant did not deny having altered key evidence, as post-trial evidence suggested). Under CR 60(b)(4), the misconduct need only be such that the losing party was prevented from fully and fairly presenting its case. The City need not show that Mark

³⁰ Indeed, not. *See* Appendix J (no. 26, showing Mark launching and piloting his fishing boat).

would have had *no* case; whether the result would probably be different is *not* a required element for relief under CR 60(b)(4). *Taylor v. Cessna Aircraft Co.*, 39 Wn. App. 828, 836, 696 P.2d 28 (1985).

C. The Trial Court Erred in Excluding Virtually all Evidence of Mark’s Alcohol Use.

1. The City Offered Substantial Evidence to Support Its Alcohol Use Defenses on Causation and Damages.

- **Causation.** Just as Meg premised her causation theory on circumstantial evidence, the City was entitled to premise its alternate theory in part on circumstantial evidence, which is just as reliable as direct evidence. *Conrad v. Alderwood Manor*, 119 Wn. App. 275, 281-82, 78 P.3d 177 (2003).³¹ Moreover, an expert may give opinions based on circumstantial evidence. *Rogers Potato Serv., LLC v. Countrywide Potato, LLC*, 152 Wn.2d 387, 392, 97 P.3d 745 (2004) (expert testimony was properly based on circumstantial evidence, not “mere assumptions or speculation”).

Meg asserts the chain “would have” prevented Mark’s fall. BR 6-7. But the City was prepared to show that no reasonable safety measure would have prevented the fall because Mark was suffering from alcohol withdrawal. RP (9/11/09) 34-35. Dr. Rudolf relied on direct and circumstantial evidence to conclude Mark was an alcoholic and

³¹ See CP 7814 (trial court denying City’s Motion for Judgment as a Matter of Law because substantial circumstantial evidence supported the jury’s verdict on causation).

experienced withdrawal-induced disorientation. Reciting disputed facts does not establish that Dr. Rudolf's opinion was based on speculation, as opposed to circumstantial evidence. It is not the trial court's role to judge the credibility of fact witnesses in deciding whether expert testimony has adequate foundation or should be excluded under ER 403.

Evidence of Mark's Drinking Habit. Meg argues for the first time that ER 404(b) barred Dr. Rudolf from relying on evidence of Mark's drinking habit to opine that Mark has abused, and will continue abusing, alcohol until successfully treated. But habit evidence is admissible under ER 406 to prove that a person acted in conformity therewith. As a specialist in addiction medicine and chemical dependency, Dr. Rudolf was entitled to make this inference under ER 703, an inference the trial court acknowledged "ma[de] sense in the context of his practice." RP (9/11/09) 147. The inference is not speculation. The evidence was more than sufficient to prove a habit under ER 406³² -- which probably explains why Meg did not pursue an ER 404(b) argument below. *See Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519, 1522-24 (11th Cir. 1985) (trial court properly allowed habit evidence to establish plaintiff was

³² In 2002, Mark would drink 4-10 beers in a sitting, at least a "couple of times a week," and he drank progressively "more as time [went] by." CP 394-95, 400. Mark admitted that, even after his DUI arrest six weeks before the accident, he continued drinking 3-4 beers, 1-3 nights a week. CP 2389. Ann's and Mark's testimony established Mark's habit of heavy drinking and was corroborated by specific examples (e.g., his ability to operate a car with a BAC level of .17/.19), the testimony of Beth, Gordon, and Investigator Winquist, and ultimately the post-trial video.

drinking on the job before the accident *even though there was no direct evidence of drinking on that particular day*).³³

Mark's DUI Six Weeks Before the Accident. Meg does not deny that Mark's ability to operate a car with a BAC of at least .17 tended to establish his alcohol addiction. She notes the DUI evaluator did not find dependency. BR 36. But Mark told the evaluator he abstained from alcohol after his arrest. CP 383. Unless Mark lied at his deposition about drinking after the arrest, his false reporting to the DUI evaluator reinforces Dr. Rudolf's opinion that Mark "had a very consistent pattern of underreporting his alcohol use at every turn when asked." CP 2376.

Mark's Drinking Before His Shift. Meg asserts Mark abstained during the six weeks before he fell -- "according to [his] friends and family." BR 36. But Mark testified otherwise at his deposition. Nor did Mark merely "speculate" about "maybe" having 3-4 beers on a *single* Friday in the month before the accident (BR 35) -- he corrected counsel when asked to clarify the extent of his drinking:

- Q. In the month before the accident, about how much alcohol did you drink a week on average?
- A. Maybe some on Friday night towards the weekend, maybe three or four.

³³ Nothing in *Madill v. L.A. Seattle Motor Express, Inc.*, 64 Wn.2d 548, 392 P.2d 821 (1964), holds otherwise. There the evidence about the plaintiff's habit was conclusory and without any supporting detail as to whether the drinking was sufficiently regular to constitute a habit. *See* 64 Wn.2d at 551-552.

Q. And is that just one day a week, maybe three or four one day a week?

A. No, on the Friday night maybe on the weekend.

CP 2389 (emphasis added).³⁴ Dr. Russell Vandenbelt, the expert Meg relies on to assert Dr. Rudolf ignored evidence, BR 40, *ignored Mark's deposition testimony* in concluding there was "no evidence whatsoever suggesting that Mr. Jones was consuming alcohol at all in the days, or even the month and a half, before his fall." CP 1842.

Meg asserts there was no evidence Mark drank on the evening of Sunday, December 21, less than 30 hours before his fall. BR 36. She cites Ann's testimony, but Ann testified she did not know whether Mark drank by himself in the garage after they fought over the tricycle. CP 401. She thought he abstained during the month before the accident because they were getting along better. CP 400. But, again, Mark *admitted* he drank during that period. CP 2389. And Ann testified that anger and verbal abuse were major features of Mark's drinking. CP 396, 400-01, 407-08. Their fighting, combined with Mark's admitted continued

³⁴ That Mark attempted to change his story in a declaration supporting the exclusion of alcohol evidence only reinforces Dr. Rudolf's understanding that Mark habitually under-reported his drinking. CP 1931, 2376; RP (9/11/09) 20-21, 30, 91. Moreover, affidavits that contradict, without explanation, previously given clear testimony are considered incredible as a matter of law. *Cf. Marshall v. AC & S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989).

drinking³⁵ and the opportunity to drink on the 21st, permitted an inference that Mark drank that day.³⁶

The Alcohol Withdrawal Protocol. Dr. Rudolf determined the most likely explanation for Mark's alcohol withdrawal symptoms, which fit the entire range of criteria under the CIWA scale, was "that he did, indeed, have alcohol withdrawal." RP (9/11/09) 11. The protocol was initiated on Friday, December 26, no later than five days -- not seven as Meg claims -- after Sunday, December 21, the day when Mark could have been drinking after having fought with Ann.³⁷ Meg's expert witness opined that causes other than alcohol withdrawal could have been responsible for Mark's symptoms. CP 1845. But Dr. Rudolf addressed that theory, testifying that the treatment choices and Mark's responses were "more consistent with alcohol withdrawal than it would be from other causes of psychotic symptoms." RP (9/11/09) 27-29, 102. This is a

³⁵ In light of Mark's systemic underreporting of his alcohol use, Dr. Rudolf could reasonably treat Mark's admission as being *less than* his actual drinking, contrary to Meg's claim that Mark was not drinking enough to go through withdrawal. See RP (9/11/09) 91. This was not an unreasonable assumption or an admission by Dr. Rudolf that his theory lacked sufficient evidence. BR 39. In fact, Dr. Rudolf's inference is consistent with Dr. Friedman's medical training and practice of tripling self-reported alcoholic consumption estimates. CP 1874; RP (9/17/09) 132.

³⁶ Meg also cites the declaration testimony of a fire department lieutenant, Joseph Kane, who had dinner with Mark on December 21 and says Mark drank root beer. CP 1831. But this could just as easily mean that Mark was concealing his drinking, and does not make the inference that Mark drank alcohol that day any less plausible. Indeed, Mark apparently lied to Lieutenant Kane, saying he had not drunk since his DUI. CP 1831.

³⁷ And Dr. Rudolf explained why the symptoms would not have surfaced until then -- Mark's immediate and continued sedation after being admitted put the withdrawal symptoms in a "holding pattern." RP (9/11/09) 12.

classic battle-of-the-experts question for the jury to decide, not proof that Dr. Rudolf's testimony lacked foundation.

Continued Drinking After the Accident. Dr. Rudolf opined that Mark's continued drinking after his fall demonstrates the severity of his drinking problem, providing additional support for his opinion that Mark, as an untreated alcoholic, was unable to stop his pattern drinking for the week leading up to his accident. *See* CP 2376-77; RP (9/11/09) 44. There was ample evidence of Mark's continued drinking after his fall, including the excluded testimony of Ann, Beth, Gordon, and Investigator Winqvist, and finally the post-trial video.

Meg complains that Dr. Rudolf's opinion that Mark was abnormally disoriented relied on inferences. BR 34-40. But the rules allow experts to make "inference[s]" based on the facts they perceive and to testify in terms of those inferences. ER 703 and 705. Ample foundation supported Dr. Rudolf's opinions. He relied on circumstantial as well as direct evidence, as is permitted; his opinions were not speculative. Meg's criticisms are grounds for cross-examination, not exclusion.

- **Damages.** The City offered expert testimony that Mark's known level of alcohol use would impact his recovery, life and work expectancies, and quality of life. The trial court was not entitled to exclude that testimony based on the existence of contrary opinions or

because it decided Mark did not drink after the pain pump was installed in January 2007, impermissibly resolving a disputed fact issue. There was plenty of evidence that Mark drank heavily before 2007, during the critical first three years of his recovery. *See* OB 23, 87-89. For example, there was testimony that Mark would drink to the point of passing out once per week while taking narcotics. CP 418.³⁸ And there likewise was ample evidence that Mark continued his heavy drinking after January 2007: Not only did Mark and Meg retract their prior denials that Mark drank -- evidence from Beth, Gordon, and Investigator Winqvist confirmed that Mark's drinking problem had not abated by the time of trial. OB 29-33; RP (9/11/09) 111, 146-47; CP 1931, 9835.³⁹

The City satisfied the standard established in *Kramer v. J.I. Case Mfg.*, 62 Wn. App. 544, 815 P.2d 798 (1991). In *Kramer*, there was no offer of proof regarding the probative value of the substance use evidence. 62 Wn. App. at 559. Here, the City provided detailed offers of proof. *See* RP (9/11/09) 1-150; OB 91 n.69. In *Kramer* there was no evidence about the effects of substance use. 62 Wn. App. at 559. Here, the City offered this evidence from Drs. Rudolf, Stump, and Friedman, causally linking heavy drinking, brain injuries, and narcotic pain medication to diminished

³⁸ The trial court acknowledged Mark "was on narcotics at the same time he was drinking in 2006[.]" RP (9/8/09) 10.

³⁹ And the surveillance video has since established Mark continued heavy drinking after the trial. *See* CP 9499-9519; Appendix J (still shots of Mark's drinking).

quality of life, thus establishing the probative value of the alcohol evidence. *See* OB 27-29, 88-91.⁴⁰ In *Kramer* there was no evidence linking the plaintiff's substance use to a negative effect on the plaintiff. 62 Wn. App. at 559-60. The opinions offered here were not mere generalizations. *See* RP (9/11/09) 37-38 (Dr. Rudolph linking Mark's 2006 downturn to alcohol abuse); CP 2386, 4075. To the extent the opinions depended on "hypothetical" evidence that Mark drank heavily, that was no hypothetical. *See* CP 410, 418, 421, 3794, 4068, 4075.⁴¹

2. The Trial Court Erred in Excluding Alcohol Evidence Under ER 403.

Highly probative evidence should not be excluded under ER 403 absent unfair prejudice. *Carson v. Fine*, 123 Wn.2d 206, 224-25, 867 P.2d 610 (1994). Meg offers no real defense of the trial court's application of ER 403. She scoffs at the notion that the trial court could have policed the boundary between proper use of highly probative evidence and a character

⁴⁰ The relevance of alcohol to the issue of damages is established by *Lundberg v. Baumgartner*, 5 Wn.2d 619, 621-22, 106 P.2d 566 (1940), which Meg fails to address, except to basically agree with the City's suggestion that this Supreme Court decision would need to be overruled to affirm the trial court here. *See* BR 43 n. 29.

⁴¹ In a throwaway line, Meg appears to be asserting that the City waived its argument that Mark failed to mitigate his damages through his continued drinking by not pleading that argument as an affirmative defense. BR 42. But Meg fails to address on appeal how the City's noncompliance, if any, affected her substantial rights. *See Bernsen v. Big Bend Elec. Co-op., Inc.*, 68 Wn. App. 427, 433-34, 842 P.2d 1047 (1993) (non-compliance is considered harmless and the defense of failure to mitigate is not waived unless the substantial rights of a party have been affected). The record shows she was more than ready to meet the defense, but clearly preferred not to, because -- as her counsel admitted during the motion *in limine* arguments on September 4 -- she feared the issue could cost her the case. RP (9/4/09) 44.

assault. But that is the job of the trial court judge, and the court proved it could do that when it limited the City to introducing just one instance of alcohol use. RP (9/4/09) 114-15; (9/11/09) 147. Moreover, prejudicial facts can be a proper basis for an expert's opinion or inferences according to ER 703. Under ER 705, the jury need not hear every fact underlying those opinions or inferences. The trial court abused its discretion by excluding all evidence that was probative of the City's defenses in this case instead of using the available tools to minimize any unfair prejudice.

D. The City Should Receive a New Trial on Causation and All Other Liability Issues, as Well as On Damages.

Causation cannot be established by speculation, even in the face of substantial evidence of inadequate safety features. *Gardner v. Seymour*, 27 Wn.2d 802, 180 P.2d 564 (1947). Meg argues Mark fell down the hole because he thought it was the door leading to the bathroom and because it was unguarded. Mark claimed not to recall how the accident happened, and there were no witnesses to his fall. The *only* evidence supporting the claim was an uncorroborated statement that Mark said he had gotten up to go to the bathroom.

If the evidentiary record began and ended with this statement, this case arguably would fall outside *Gardner's* prohibition against speculation about causation. But the record contains *another* possible explanation: Disorientation due to alcohol withdrawal caused Mark's fall. And if the

evidence before the jury had set forth Meg's and the City's competing possible explanations, Meg's claim should have been dismissed with prejudice under *Gardner* and its progeny.⁴²

Responding to the City's request that it be allowed to revisit this issue on remand, Meg argues first that "[t]he City does not...explain why a reversal on damages would reopen summary judgment." BR 85. But the City is arguing that a reversal *on the alcohol issue*, especially in light of the evidence that the trial court disregarded in making its alcohol decision (Winqvist, Beth, and Gordon) and the evidence supporting the CR 60 motion (the surveillance video showing Mark drinking heavily), warrants reopening summary judgment on causation. Meg next argues "[t]here is no connection between damages arguments and the City's obligation to provide a safe workplace." *Id.* Meg ignores that in between "duty" and "damages" comes "causation," and it is causation that the City seeks to have reopened. Finally, Meg argues "this . . . is just another attempt to blame Mark for something that is the City's fault." *Id.* But proving "fault" requires proving "causation." Meg's rhetoric assumes she prevails on causation, and that assumption is not warranted.

⁴² Meg touches briefly on *Gardner*; she makes no attempt to come to grips with the several decisions of the Court of Appeals identified in the City's Opening Brief which have applied *Gardner* to dismiss claims like Meg's.

III. CONCLUSION

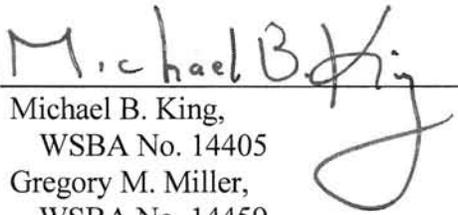
Mark and Meg's case was based on systematic falsehood and misrepresentation:

- Mark is in constant pain, and can no longer enjoy life.
- Mark can do little more than pour himself a bowl of cereal for breakfast, and needs 24/7 care.
- Mark can no longer be gainfully employed.
- Mark rarely if ever takes a drink.

The surveillance video *alone* disproves these claims. The judgment should be reversed, a new trial ordered on all issues, and the City permitted to revisit whether the case should be dismissed for impermissible speculation on causation. The legal system's integrity requires no less.

RESPECTFULLY SUBMITTED this 30th day of March, 2011.

CARNEY BADLEY SPELLMAN, P.S.

By: 
Michael B. King,
WSBA No. 14405
Gregory M. Miller,
WSBA No. 14459

Attorneys for Appellant

APPENDICES

INDEX TO APPENDICES

Case No. 65062-9-I (Consolidated with Case No. 66161-2-I)

APPENDIX	DOCUMENT
App. J	Color Still Shots from April and June 2010 Surveillance Videos with Index
App. K	Color Photos of Mark Jones at Bert's Tavern, September 7, 2009 (reproducing photos contained in Pre-Trial Exhibit No. 16)

APPENDIX

J

APPENDIX J

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. 466C
April 22, 2010	Exhibit Sub No. 466C
April 23, 2010	Exhibit Sub No. 466C
April 24, 2010	Exhibit Sub No. 466C
April 25, 2010	Exhibit Sub No. 466C
June 2, 1010	Exhibit Sub No. 466C
June 5, 2010	Exhibit Sub No. 466C

TABLE OF CONTENTS

1.	Works on truck.	3
2.	Shops at Costco.	4
3.	Shops at Mini Mart.	4
4.	Connects battery charger of the trailer to the scooter.	5
5.	Lowers stabilizer jacks on all four corners of the trailer.	5
6.	Removes grocery bags from truck and carries many bags at a time.	6
7.	Carries cooler and charcoal and red mug.	6
8.	Organizes camp site.	7
9.	Talks on a cell phone while carrying logs	7
10.	Plays Bocce Ball with companion.	8
11.	Starts fire in fire pit.....	9
12.	Chops wood and adds to fire.....	9
13.	Sets up tripod over fire and cooks meal.....	10
14.	Texts on cell phone while talking to son.	11
15.	Gets cash from cash machine.	12
16.	Celebrates purchase of shovel.	12
17.	Digs for clams with shovel.....	12
18.	Horses around with son.	13
19.	Takes over the wood chopping from his female companion.	14
20.	Cooks eggs in skillet on grill.....	15
21.	Repairs an electric scooter.	16
22.	Replaces windshield wipers while talking to companion.....	17
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
27.	Goes to liquor store by himself and purchases goods.	22
28.	Drinking.	23



5:34 PM
April 18, 2010



5:37 PM
April 18, 2010

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.

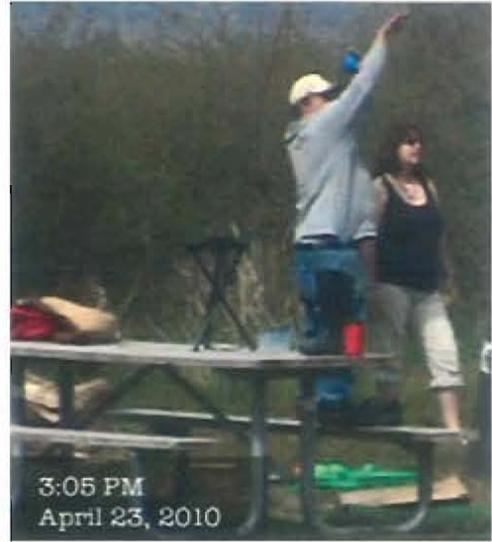


8. Organizes camp site.

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



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.

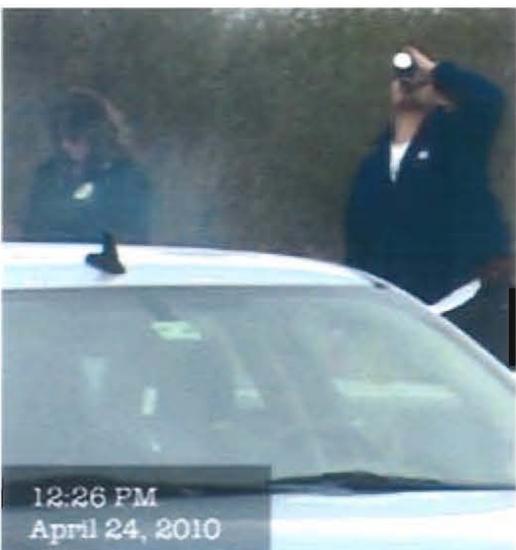


26. Launches and pilots a boat loaded with fishing gear.



April 24, 2010 3:21 PM

27. Goes to liquor store by himself and purchases goods.



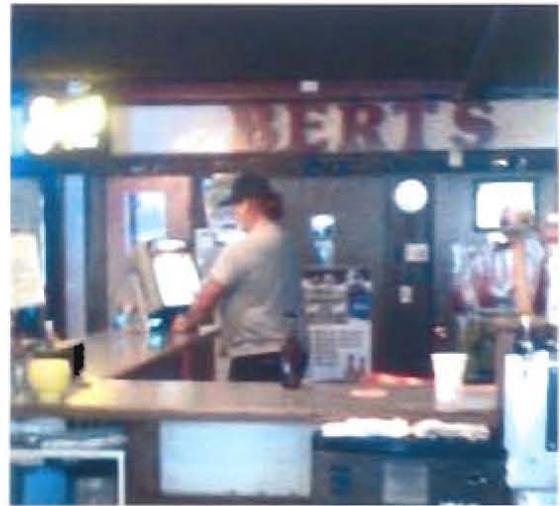
28. Drinking.

APPENDIX

K

APPENDIX K

Appendix K is a reproduction of Pre-Trial Exhibit 16, a collation of color photographs taken of Mark Jones at Bert's Bar, on Monday, September 7, 2009, by City Investigator Rose Winqvist.



Mark Jones at Bert's Bar, September 7, 2009