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No. \_\_\_\_\_

SUPREME COURT OF  
THE STATE OF WASHINGTON

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No. 65062-9-I

(consolidated with No. 66161-2-I)

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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

*Plaintiff/Respondent,*

v.

CITY OF SEATTLE,

*Defendant/Appellant.*

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STATE OF WASHINGTON  
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APPELLANT'S PETITION FOR REVIEW

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### **I. IDENTITY OF PETITIONING PARTY.**

Defendant and Appellant City of Seattle petitions for review of the decision terminating review identified below.

### **II. COURT OF APPEALS DECISION TO BE REVIEWED.**

Division One of the Court of Appeals issued its decision terminating review (“Decision”) on February 21, 2012 (App. A), and denied the City’s motion for reconsideration on April 4, 2012 (App B).

### **III. STATEMENT OF ISSUES PRESENTED FOR REVIEW.**

The City seeks review of the following two issues<sup>2</sup>:

1. On-the-Record Balancing Required by *Burnet v. Spokane Ambulance*. Did the Court of Appeals err in holding that a trial court was not required to balance the *Burnet v. Spokane Ambulance*<sup>3</sup> factors on the record, before excluding witnesses as a sanction for failure to comply with case management deadlines established by local court rule?

This issue warrants review under RAP 13.4(b)(1) because the Court of Appeals’ decision conflicts with this Court’s decisions in *Blair v. TA-Seattle East No. 176*, 171 Wn.2d 342, 254 P.3d 797 (2011), and *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 688, 132 P.2d 115 (2006), and warrants review under RAP 13.4(b)(4) because it involves a matter of substantial public interest.

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<sup>2</sup> In the Court of Appeals the City sought a new trial on all issues. The City now seeks a new trial only on damages, based on the issues raised in this Petition.

<sup>3</sup> 131 Wn.2d 484, 933 P.2d 1036 (1997).

2. CR 60(b)(3) and Due Diligence. Does a trial court err in denying a motion for new trial under CR 60(b)(3), based on the moving party's supposed lack of due diligence in investigating the opponent's damages claims, when (1) the opponent's discovery responses on damages were clear and unambiguous, and (2) under this Court's decisions in *Kurtz v. Fels*, 63 Wn.2d 871, 389 P.2d 659 (1964), and *Praytor v. King County*, 69 Wn.2d 637, 419 P.2d 797 (1966), a party has no obligation to do any investigation of claims when they are supported by clear and unambiguous discovery responses?

This issue warrants review under RAP 13.4(b)(4) because it involves a matter of substantial public interest.

#### IV. STATEMENT OF THE CASE.

**A. Mark Jones, a Seattle Firefighter, Falls Down a Fire Station "Pole Hole" and Then Sues the City for Damages. Discovery Responses Clearly and Unambiguously Describe Him as Suffering From Severe Physical and Cognitive Impairments.**

Mark Jones, a Seattle firefighter, fell down a Seattle fire station "pole hole" in December 2003. In 2006 he sued the City for damages.<sup>4</sup> Mark's twin sister Meg, also a Seattle firefighter, became Mark's guardian in mid-2008 and substituted as the named plaintiff in Mark's lawsuit. Before that Meg acted under a power of attorney to respond on Mark's behalf to the City's written discovery requests. CP 7422.

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<sup>4</sup> Firefighters may sue their employer in negligence for damages exceeding their Worker Compensation benefits, in what is known as a "LEOFF" action. *See Locke v. Seattle*, 162 Wn.2d 474, 172 P.3d 705 (2007) (discussing Chapter 41.26 RCW, the Washington Law Enforcement Officers and Fire Fighters' Retirement System Act).

In February 2008, Meg answered the City's interrogatories regarding Mark's injuries by referring the City to his medical records:

**INTERROGATORY NO. 12.** If you have sustained any bodily injury as a result of this incident, state the nature of the injury, and the residual effects, if any.

**ANSWER:**

I received multiple injuries, from the top of my head and my brain on down to my legs. *See medical records in possession of the City.*

....

**INTERROGATORY NO. 16.** If you are still suffering from the effects of any physical or mental injury, illness or disability which you contend is the result of the incident, describe in complete detail the nature, extent and duration of each and every one of your present injuries, illnesses, pains, disabilities and symptoms.

**ANSWER:**

I have more problems than I can remember to list. *See medical records in possession of City.*

CP 7417, 7419 (bold-italics added). The contents of Mark's medical records thus were adopted as Mark's substantive answers to the City's damages interrogatories.

The medical records initially documented a promising recovery, from the date of injury through 2005.<sup>5</sup> But starting in mid-2006, the same year the lawsuit was filed, the records clearly and unambiguously

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<sup>5</sup> Mark's cognitive abilities tested in 2004 as "within or exceed[ing] normal expectations," a result consistent with Mark's reported "near complete recovery of cognitive functioning." CP 10489. By the end of 2005, Mark was exhibiting reduced pain and increased range of motion, breathing fully and with a brighter affect, and "look[ing] remarkably better." CP 2411. He was jogging on a treadmill and working 20 hours per week at the fire department. CP 156, 2413.

documented a deteriorating condition that reached a state of near-total physical and mental incapacity by Winter 2008.<sup>6</sup> Then, during depositions taken in March 2008, Meg and Mark testified consistent with this dire damages picture.<sup>7</sup> Mark compared getting through each day to “climbing Mount Everest”: “*I feel like I’m 80 years old .... -- it’s affected every piece of me.*” CP 85, 97 (emphasis added). He testified to constant, disabling rib pain: “You touch them and they’re just *shocky all over[.]*” CP 83 (emphasis added). He said he faced forward at all times because turning his head toward either side caused pain: “*I just don’t do it because it just hurts like you have a headache.*” CP 83 (emphasis added). He testified he could not throw with his right arm because he had “lost the mobility...to throw *at all.*” CP 87 (emphasis added). He said “trying to walk is such a big task” he was unable to do so for more than 5 minutes. CP 84-85, 97. He testified that most days he needed to “lay...down like every half hour on the couch” and that “most of my day is restricted.” CP

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<sup>6</sup> In October 2006 Dr. Andrew Freidman reported Mark had “declined somewhat functionally” and was “no longer working on a daily basis.” CP 2420. In February 2007, Dr. Friedman and Dr. Peter Esselman both reported Mark “*totally disabled*” due to “the combination of physical and cognitive deficits as well as his depression secondary to the injury[.]” CP 2421 (emphasis added). In March 2008 Dr. Friedman reported Mark was “significantly stiff and disabled by his pain” (CP 2428) and “*completely disabled from work...permanently*” (CP 2429 (emphasis added)).

<sup>7</sup> Mark’s deposition presentation was preserved on video, and gives a grim picture of his condition. The video is in the record at Ex. Sub. No. 466D. A CD containing portions of the deposition video juxtaposed with portions of the post-trial surveillance video is in the record at Ex. Sub. No. 466E. The full 11 hours of surveillance video is in the record at Ex. Sub. No. 466A. *All of these can be viewed via the hyperlinks found on the “Flashdrive” Corresponding Briefs submitted by the parties to the Court of Appeals, which are included in the materials transmitted by the Court of Appeals to this Court.*

97. Meg testified Mark could walk no more than 50 yards on a bad day, and just 400 yards -- on flat ground -- on a good day. CP 157. She testified he could no longer use a treadmill or stationary bicycle because “his feet were too numb to do it.” CP 165. “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 (emphasis added).

During a February 2008 examination by a panel of physicians (“Panel”) tasked with assessing the degree of Mark’s disability, to determine the level of his Worker Compensation benefits, Mark and Meg made representations about the extent of Mark’s disability consistent with their deposition testimony. Thus, Mark told the Panel: “[I] pretty much live on the couch.” CP 10063. Based on their representations, as well as the contents of the same medical records whose contents had been made the substance of Mark’s responses to the City’s damages interrogatories, the Panel declared Mark unemployable due to physical and cognitive impairments. CP 100072, 100076.

By Spring 2008 the City had conducted interrogatory discovery, document discovery, and deposition discovery on the issue of Mark’s condition,<sup>8</sup> during which Mark and Meg clearly and unambiguously represented that Mark suffered from near-total physical and cognitive disability. Nor did Mark or Meg change these representations between

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<sup>8</sup> A CR 35 neurophysiological examination, supplementing the physical and cognitive function examination carried out by the Worker’s Compensation Panel, reached results consistent with the Panel’s results. CP 10501-15.

2008 and the start of trial in September 2009.<sup>9</sup> In a successful effort to preclude a second deposition of Mark in 2009, Meg testified by declaration that “Mark’s overall condition is roughly the same with similar variations as he and I and the medical records have frequently described.” CP 268. “Mark has an extremely difficult time negotiating through the limited life he can now lead. He has *constant pain* of varying degrees.” CP 265 (emphasis added). In a second deposition taken shortly before trial, Meg explained that the “variations” she referred to in her declaration did not mean a variation in the degree of Mark’s disability: “[W]e deal with a physical condition that leaves him *very limited both mentally and physically*, and the different variations is [sic] all the problems or compromises that come up with all his problems.” CP 9838.<sup>10</sup>

**B. Consistent With Discovery Responses, at Trial Mark Is Portrayed as So Disabled Physically and Mentally That He Will Need Care 24 Hours a Day, 7 Days a Week -- “24/7” -- for the Rest of His Life.**

Mark presented at trial a year and a half later as he had during his March 2008 deposition.<sup>11</sup> Mark again testified that “*I feel like I’m 80*

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<sup>9</sup> Trial had originally been set for June 2008, then was continued to September 2009.

<sup>10</sup> Asked about Mark’s activities, Meg testified that shooting a rifle was “*about the only thing left he can do.*” CP 9829 (emphasis added). Asked about Mark’s hunting since his injury, Meg testified Mark was no longer able to hunt: “[P]urchasing the [hunting license] tags doesn’t mean you went hunting. I think in his world it gives him the idea that he’s still capable of doing a lot of these things.” CP 9830. Meg testified that, when Mark attempted pheasant hunting, “[h]e got about a hundred yards into the field and he sat down *and that was it.*” CP 9830 (emphasis added).

<sup>11</sup> Mark made his way to the stand slowly, with a pronounced limp and evident difficulty, gripping the counsel table, then the jury box, and finally the witness stand railing. CP 9892-94. “It was,” the trial court later said, a “*fairly dramatic presentation.*” RP (Footnote continues on next page.)

*years old[.]*” RP (9/29/09-A) 122 (emphasis added). He described suffering debilitating pain: “[M]y head don’t work, my mouth, my words don’t work, I don’t breathe, I hurt like hell, and I’m trying to function the best I can.” RP (9/29/09-A) 124. He said that “not being able to do what [he] could do” before the accident had led to depression. RP (10/8/09) 115. He testified he would often “lay on the couch” and watch the hunting channel, especially shows featuring people who have overcome handicaps. RP (9/29/09-A) 126-30; RP (10/8/09) 91-92. He described being a “handicapped hunter”: “I try to call them hunts, but they’re probably outings[.]” RP (9/29/09-A) 126, 128-29.

Meg’s testimony reinforced her brother’s self-portrait of a man severely debilitated by injury, adding that she believed he would need a personal attendant for the rest of his life because “we know he’s not going to get any better.” RP (10/1/09) 169-70, 177 (emphasis added). Mark’s friends testified to how they saw Mark’s condition substantially limit his ability to enjoy his old pastimes. One described how Mark could be taken fishing, but in fact could fish no more than 20 minutes “because he physically cannot do it” and added that 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

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(12/14/09) 40 (emphasis added); *see also Ex. Sub. No. 466D (Mark Jones Dep. Video, viewable on Flashdrive hyperlink).*

he...doesn't remember that he's fishing." RP (10/1/09) 17; *see also* RP (9/21/09) 123; RP (9/24/09) 74; RP (9/30/09) 47, 195.

Plaintiff's experts described Mark as suffering from a "complicated constellation of impairments" which arose from and featured his physical disability. RP (9/22/09) 107, 110-11 (Anthony Choppa, vocational counselor). Plaintiff's neuropsychologist expert, Glenn Goodwin, Ph.D., testified Mark's chronic pain, brain injury and fatigue "interact synergistically" to affect his cognitive abilities. RP (9/22/09) 201. Dr. Friedman testified Mark had "ups and downs" during recovery, but as of the trial "he still has a lot of pain": "***I don't think there are times where he doesn't have pain[.]***" RP (9/17/09-A) 10, 24, 34, 56 (emphasis added); *see also* RP (9/17/09-A) 10-11, 24 (Dr. Friedman) (Mark's "constant" pain averages "5" on the "1 to 10" pain scale).

Dr. Esselman predicted *worsening* pain unless Mark received care 24 hours a day, 7 days a week, for the rest of his life. RP (9/16/09) 45, 60-61, 63, 101; RP (9/23/09) 40. When asked why Mark needed an attendant "24/7," Dr. Goodwin testified Mark was incapable of "multitasking," and had become limited to doing only "very basic things":

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.

*...[H]e 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 (emphasis added).

Plaintiff's counsel in closing told the jury that Mark suffered from "chronic pain 24/7." RP (10/20/09) 75. "*Everything about this accident affects every part, every system in his body,* and is impacting his health."

RP (10/20/09) 79 (emphasis added). "Because he has so much pain, because the residuals of his injuries is to [sic] great, that getting going in the morning is like the tin man, and that's not just during recovery. *That's every day for the rest of his life.*" RP (10/20/09) 76 (emphasis added).

The jury found the City negligent, found Mark fault free, and awarded damages totaling \$12,752,094 including all of the \$2,433,006 requested for 24/7 lifetime care, \$10,000,000 in general damages, and \$255,824 in lost earnings capacity. CP 4730-32.

**C. Just as Trial Was Getting Underway, the City Learned of Evidence Contradicting Mark's Damages Claims. But the Trial Court Excluded All of It -- Without Doing the On-the-Record Balancing Required by *Burnet v. Spokane Ambulance*.**

Although Mark and Meg's discovery responses on damages were clear and unambiguous, the City still retained investigators to try and confirm their accuracy. Despite *dozens* of hours of surveillance, the investigators were unable to observe Mark prior to the close of discovery in August 2009. CP 8203-04, 8706-07 (surveillance efforts); CP 8074-77 (discovery deadline).

Then, on Labor Day Monday, September 7, 2009, just as trial was getting underway, a team of investigators saw Mark at a bar; Mark exhibited none of the problems that Mark and Meg's discovery responses represented he had. CP 4309-18 (investigator decs); Pre-Trial Ex. 16 (photos of Mark at bar). A few days later the City learned that Mark's sister Beth Powell had personal knowledge of Mark's condition contradicting Mark and Meg's discovery descriptions of that condition. CP 3780-81, 3788, 4065 (offer of proof). A few days later still, the City learned that Mark's father Gordon Jones, who gave Mark physical therapy until mid-2006, was prepared to testify that Mark had been hunting, fishing and partying in Montana only weeks before the trial was set to begin -- *again* contradicting Mark and Meg's discovery descriptions of Mark's condition. CP 4068-75 (offer of proof). Moreover, the new evidence *also* contradicted Mark and Meg's discovery responses about who had personal knowledge of how the accident was affecting Mark -- the responses omitted Beth and Gordon from a list of family members said to have such knowledge. CP 7415-16 (Plaintiff's responses to "persons with knowledge" interrogatories, stating they would be answered via Plaintiff's witness lists), CP 7469-70 (witness list identifying "family members" with knowledge of Mark's injuries and their impact).<sup>12</sup>

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<sup>12</sup> The responses identifying family members with knowledge, served in 2008, were phrased to identify those with knowledge of how the accident was *presently* affecting Mark. CP 7415. Mark testified he had not seen Beth since 2005 (CP 72-73), and Meg testified Mark had not seen his father since 2006 (CP 8079). The City had no reason to contact either Beth or Gordon based on what it had been told in discovery, and only learned of their contrary evidence by sheer serendipity as the trial unfolded.

The trial court refused to allow the City to introduce any of this new evidence.<sup>13</sup> The investigator was excluded because no investigator managed to observe Mark before the discovery cutoff and thus none had been listed on the City's final witness list under King County Local Rule ("KCLR") 26. RP (10/14/09) 17. Beth Powell was excluded because she, too, had not been listed on the City's final witness list. RP (9/29/09-A) 23.<sup>14</sup> Gordon Jones was excluded because the City failed to learn of his evidence before the discovery cutoff established under the trial court's scheduling orders. RP (9/29/09-A) 24-25, 27-28; RP (9/30/09) 69; RP (10/14/09) 11.<sup>15</sup> The trial court did not balance on the record the factors set forth in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).<sup>16</sup>

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<sup>13</sup> The Court of Appeals states the City did not fulfill its obligation under *Barci v. Intalco Alum. Corp.*, 11 Wn. App. 342, 522 P.2d 1159 (1974), to promptly disclose its discovery of the evidence to which the witnesses would testify. See Decision at 25-26 (Beth Powell), 35-36 (Gordon Jones), 40-41 (investigator). Yet the City disclosed the evidence of each witness within a few days of its discovery. See RP (9/11/09) 103-104 (Beth), 114-15 (investigator); CP 4060-61 (Gordon). Contrary to the Court of Appeals, the trial court's quarrel with the City was *not* a factual one about lack of promptitude under *Barci*; the trial court faulted the City for failing to prove the evidence was *impossible* to uncover before the discovery deadline set by the local rule, CP 7815, and made clear it regarded *Barci* to be *irrelevant* to its analysis. RP (9/29/09-A) 13 ("[W]e're trying to implement -- the King County local rules here...[T]he *Barci* case *doesn't address the local rules*" (emphasis added)).

<sup>14</sup> The court also ruled Beth lacked personal knowledge of material facts, RP (9/29/09-A) 23, even though the City's offer of proof plainly established she had such knowledge. CP 3780-81, 3788, 4065 (offer of proof).

<sup>15</sup> Unlike Beth Powell, Gordon Jones had been named as a witness by Plaintiff *and* the City had repeatedly reserved the right to call anyone named by the Plaintiff, as had Plaintiff. CP 7626, 7628 (Plaintiff's witness designation including reservation of right); CP 4342, 4355, 4369, 4380, 4382, 4389, 4393 (City's reservations of right).

<sup>16</sup> The Court of Appeals states the trial court did balance the *Burnet* factors on the record. See Decision at 29-32 (Beth Powell), 36-38 (Gordon Jones), 42-43 (Investigator) (*Footnote continues on next page.*)

**D. After Its Appeal Was Underway, the City Obtained Video Surveillance of Mark Jones Showing Him Functioning Contrary to His Discovery Responses and Trial Presentation. The Trial Court Denied an Ensuing Motion for a New Trial Brought under CR 60(b)(3) and (4).**

After the denial of post-trial motions, the entry of final judgment, and the initiation of the City's appeal, the City obtained video surveillance of Mark Jones. Dr. Friedman had told the jury that Mark's "biggest problem" was "functioning in the real-world environment." RP (9/17/09-A) 28-29. Dr. Esselman had told the jury that "the true test is what people can do in their environment, what [Mark] ... can do in his day-to-day life." RP (9/16/09) 29. The video surveillance -- 11 hours taken over 9 days, in April and June 2010 -- showed Mark out in the real world doing a wide variety of tasks in his day-to-day life, including multitasking -- all of which he, Meg and the experts had told the City and the jury Mark could no longer do.<sup>17</sup>

The City moved for a new trial under CR 60(b)(3) and (4). In addition to the surveillance video, the City submitted declarations from Drs. Stump and Clark, the surviving members of the Worker Compensation Panel<sup>18</sup> who, after reviewing the surveillance video,

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Winquist). In fact, the trial court did *not* balance the *Burnet* factors on the record. See City's Supplemental Brief Regarding *Blair* (filed 9/30/11) at 4-12. Nor would the trial court have thought it necessary to do so, given its expressed view that the local rules *supersede caselaw balancing requirements*. RP (9/29/09) 13 ("[W]e're trying to implement -- the King County local rules here. For example, the *Barci* case [i.e., *Barci v. Intalco, supra*] doesn't address the local rules.").

<sup>17</sup> ***The full surveillance video is in the record (Ex. Sub. No. 466A), and can be reviewed by Flashdrive hyperlink.*** Still shots taken from the surveillance video, illustrating the wide variety of activities in which Mark Jones engaged, are reproduced in App. C.

<sup>18</sup> Dr. Green had passed away.

withdrew their prior opinions and testified that Mark was not disabled. CP 8272-76, 9484-89 (Stump Decs), CP 8267-71, 9451-58 (Clark Decs). The motion was further supported by a report from Theodore Becker, a Ph.D in biomechanics, who analyzed the surveillance video frame by frame and concluded that Mark's physical and cognitive functions were normal and that he was capable of full-time work. CP 10210 (Report, p. 7, Summary and Conclusions and Opinion); CP 9459-64, CP 10183-84 (Becker Decs).<sup>19</sup> The motion also was supported by records indicating that Mark had not sought anything but occasional care since the trial, even though the jury had been told he needed care 24/7 and Worker Compensation benefits were available to pay for such care. CP 8277-78.<sup>20</sup>

Although the court found the City's evidence was new, material, and neither cumulative nor impeaching, CP 9779-80, and also "acknowledge[d] that the mental picture created at trial was very different from what appears on the video[.]" CP 9785,<sup>21</sup> the court nevertheless

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<sup>19</sup> Dr. Becker's analyses of surveillance video have been admitted by numerous courts and administrative agencies and accepted as conclusive despite contrary treating physician opinions. CP 10184; *see, e.g., Stokes v. Boeing Co.*, BIIA No. 08-22585 (April 27, 2010) (copy submitted to the trial court, CP 10669-10684).

<sup>20</sup> Mark and Meg did not deny the accuracy of what the surveillance video showed. Though they submitted declarations from several of their experts and Mark's treating physicians presuming to dispute the conclusions of Drs. Stump, Clark and Becker, it is undisputed that: (1) none of Plaintiff's witnesses had ever seen Mark outside their offices in a real world setting; and (2) none of them viewed more than 16 minutes of the 11 hours of surveillance video.

<sup>21</sup> The trial court asserted the surveillance video could shed no light on Mark's cognitive abilities, CP.9785-86, but did not explain how it drew this conclusion given Dr. Becker's un rebutted biomechanical analysis. The trial court also noted Meg and Mark's explanation for the obvious contrast between Mark's physical condition documented on the video with how he presented at trial -- that because testifying put Mark under great  
(Footnote continues on next page.)

refused to order a new trial under CR 60(b)(3), finding the City had not exercised due diligence because of what the court believed to be an inadequate investigation of Mark's true condition. CP 9780-82. The trial court also denied relief under CR 60(b)(4), finding the City had failed to prove fraud by clear and convincing evidence. CP 9782-87.

## V. REASONS WHY REVIEW SHOULD BE GRANTED.

### A. **The Court of Appeals Erred in Ruling That This Court's Decision in *Blair v. TA-Seattle* Established a "Different Procedural Approach" to *Burnet v. Spokane Ambulance's* Balancing Requirement, and That the Trial Court in This Case Therefore Was Not Required to Balance the *Burnet* Factors on the Record.**

The trial court excluded several witnesses because the City proffered them after local rule deadlines for discovery and designation of trial witnesses had passed. The trial court failed to balance on-the-record the factors set forth in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). That the evidence of these witnesses could have changed the outcome on damages is beyond reasonable dispute; the trial court itself called the testimony of Gordon Jones "explosive" and "incendiary." RP (9/29/09-A) 24, 27; RP (9/30/09) 69, 71.

The Court of Appeals held the trial court was not required to balance the *Burnet* factors on the record, stating the trial court was entitled to rely on the *Court of Appeals' decision in Blair v. TA-Seattle East No.*

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stress, the jury only saw him "at his worst." CP 9786. But the trial court did *not* find that the jury would have credited these explanations against the City's post-trial evidence and reached the same result in the face of that evidence.

176, 150 Wn. App. 904, 210 P.3d 326 (2009), in which *it* held that on-the-record *Burnet* balancing was not required every time a witness is excluded as a sanction for violating a case management deadline. The Court of Appeals reasoned that this Court, when it reversed the Court of Appeals in *Blair*, had established a “different procedural approach” to *Burnet* requirements, and that the Court of Appeals’ decision in *Blair* therefore was the “controlling appellate authority” at the time of the trial court decisions in this case. *See* Decision at 27-28. This ruling conflicts with this Court’s holding in *Blair* that *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 132 P.2d 115 (2006), confirmed that on-the-record balancing of the *Burnet* factors must be done **whenever** a witness is stricken as a sanction for failure to comply with case management deadlines:

*Mayer* **clearly held** that trial courts do not have to utilize *Burnet* when imposing *lesser* sanctions, such as monetary sanctions, but must consider its factors before imposing a harsh sanction such as witness exclusion.

*Blair*, 171 Wn.2d at 349 (italics in original; bold added), citing *Mayer*, 156 Wn.2d at 688, 690.<sup>22</sup> This conflict warrants review under RAP 13.4(b)(1).

Moreover, the Court of Appeals’ decision is only the latest in a series of decisions from Division One upholding the exclusion of witnesses despite the trial court’s failure to do *Burnet* balancing on the

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<sup>22</sup> The Court of Appeals’ reasoning also ignored its own statement in *Blair* that it was declining to follow the *contrary* decision of Division Three in *Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn. App. 65, 155 P.3d 978 (2007). *See* 150 Wn. App. at 909, n.9 (“[D]eclin[ing] to follow” *Peluso*’s interpretation of *Burnet*). The Court of Appeals’ decision in *Blair* thus could not constitute “controlling” appellate authority; it could only give rise to a *division of intermediate* appellate court authority.

record. Just last month this Court reversed another unpublished decision by Division One denying a new trial, where the trial court had excluded a key witness without doing *Burnet* balancing. See *Teter v. Deck*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2012 WL 1134818, \*1 (April 5, 2012) (“Before excluding a witness as a sanction for discovery violations, the trial court must make findings that the violation was willful and prejudicial and was imposed only after explicitly considering less severe sanctions”).<sup>23</sup> Here, Division One not only engaged in a plainly untenable characterization of this Court’s decision in *Blair* -- the court also presumed to rely on a series of Division One decisions enforcing local rule case management deadlines which have not been good law at least since 2006, when *Mayer* confirmed that on-the-record *Burnet* balancing must be done before excluding a witness.<sup>24</sup> Division One’s institutional hostility to *Burnet*<sup>25</sup> and its continuing preference for enforcing deadlines established by local rules<sup>26</sup> warrants review under RAP 13.4(b)(4).

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<sup>23</sup> In its new trial order reinstated by this Court, the trial court (King County Superior Court, Hon. Steven C. Gonzalez) stated that the ruling of its predecessor was “[c]ontrary to long-standing Washington law” (citing to Division Three’s decision in *Peluso* and *Burnet* itself). *Teter v. Deck*, 2009 WL 7308840, ¶ 1 (March 13, 2009) (emphasis added).

<sup>24</sup> See *Lancaster v. Perry*, 127 Wn. App. 826, 113 P.3d 1 (2005), *Dempere v. Nelson*, 76 Wn. App. 403, 886 P.2d 219 (1994), and *Allied Fin. Servs. Inc. v. Mangum*, 72 Wn. App. 164, 864 P.2d 1 (1993), all cited by the Court of Appeals (Decision at 27).

<sup>25</sup> That Division One has manifested such hostility has previously been brought to this Court’s attention, most recently in *Teter*. See Petition for Review in *Teter* (filed Nov. 30, 2012) at 20 (stating this Court should grant review in order to “curtail Division 1’s erosion of *Burnet*”).

<sup>26</sup> This includes Division One’s continuing insistence that King County Local Rule 4’s witness listing requirement cannot be satisfied by reserving the right to call an opponent’s listed witness. Compare Decision at 34-35 with *Blair*, 171 Wn.2d at 351 n.4 (noting the issue but choosing not to reach it); see also Decision at 21 (quoting Division One’s (Footnote continues on next page.)

**B. The Court of Appeals Erred in Failing to Reverse the Trial Court's Denial of a New Trial, Which Conflicted With This Court's Controlling Decisions in *Kurtz v. Fels* and *Praytor v. King County*.**

A party is entitled to a new trial under CR 60(b)(3) if it shows the evidence supporting the motion is (1) new, (2) material to the issue sought to be retried, (3) neither cumulative nor merely impeaching, (4) more likely than not would change the result, and (5) could not with the exercise of due diligence have been either introduced at trial or in support of a motion for new trial brought under CR 59.<sup>27</sup> The trial court ruled that the City satisfied the first three elements -- the City's evidence was new, material, and neither merely cumulative nor impeaching. CP 9779-80. The trial court also acknowledged that "the mental picture created at trial was very different from what appears on the video." CP 9785. The trial court denied relief because the City supposedly had not been sufficiently diligent in investigating Mark's damages claim.<sup>28</sup> This ruling squarely

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statement in *Southwick v. Seattle Police Officer John Doe No. 1*, 145 Wn. App. 292, 302, 186 P.3d 1089 (2008), that "[a] trial court properly excludes testimony of a witness not disclosed in accordance with [the local rule], *even in the absence of a showing of prejudice*" (emphasis added). Given this jurisprudence, it should come as no surprise that the trial court here saw its exclusion decisions as *entirely* a matter of enforcing local rules. See RP (9/29/09-A) 13 ("[W]e're trying to implement -- the King County local rules here").

<sup>27</sup> Although Washington decisions stating this test have done so where the new trial request has arisen under rules other than CR 60(b)(3), see, e.g., *Holaday v. Merceri*, 49 Wn. App. 321, 329, 742 P.2d 127 (1987) (CR 59), there is no question that the test also governs new trial requests made under that rule. See 4 K. Tegland, Wash. Prac., Rules Prac. § CR 60, 553 (5th ed. 2006).

<sup>28</sup> The trial court also stated it was deferring to the jury's role as fact-finder, after analyzing the "explanation" from Meg and Mark and their physicians that the difference between Mark on the video and at trial was due to Mark "shutting down" from the stress of testifying. CP 9786. Yet it makes no sense to "defer" to the jury's decision when the whole point of the City's motion was that the jury made its decision based on evidence  
(Footnote continues on next page.)

conflicts with this Court's decisions in *Kurtz v. Fels*, 63 Wn.2d 871, 389 P.2d 659 (1964), and *Praytor v. King County*, 69 Wn.2d 637, 419 P.2d 797 (1966), which established there is no obligation to do *any* investigation of a claim when, as here, the supporting discovery responses are clear and unambiguous.<sup>29</sup>

In upholding the trial court's denial of a new trial under CR 60(b)(3), the Court of Appeals stated it was deferring to the trial court's discretion. Yet given Meg and Mark's clear and unambiguous discovery responses on damages, the City under *Kurtz* and *Praytor* had no obligation to conduct such an investigation *as a matter of law*; the trial court therefore abused its discretion by denying a new trial on that ground.<sup>30</sup> The Court of Appeals nominally acknowledged the authority of *Kurtz* and

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proven to have been *materially incomplete*. That Meg told the jury that Mark was at his worst when put under the "stress" of testifying in court, RP (10/01/09) 166-170, begs the question raised under CR 60(b)(3) -- would a jury make the same damages award (e.g., the full \$2.4 million requested for lifetime "24/7" care) if it had the City's new evidence to weigh in the balance against that explanation?

<sup>29</sup> The City does *not* concede that its investigation lacked diligence. But whether the trial court erred in finding a lack of investigatory diligence is also irrelevant given that, under *Kurtz* and *Praytor*, there plainly was no obligation to do *any* investigation of Mark's claimed damages.

<sup>30</sup> The Court of Appeals' statement that it was deferring to the trial court's exercise of discretion is contradicted by its conclusion that the surveillance video did not contradict Meg and Mark's discovery and trial representations about Mark's condition. *See* Decision at 52. The Court of Appeals cannot in fact be deferring to the trial court, given the trial court found "the mental picture created at trial *was very different from what appears on the video*" (CP 9785 (emphasis added)). Moreover, a primary reason for its stated deference -- that "the trial court in this case *oversaw years of pretrial litigation* and six weeks of trial proceedings" (Decision at 6 (emphasis added)) -- is mistaken. Judge Canova oversaw the pretrial litigation; Judge Craighead got the case *less than two months before trial began*. *Compare* CP 537-38 (Judge Canova order 6/15/09) with CP 1336-37 (Judge Craighead order 8/5/09).

*Praytor*, then took the City to task for supposedly failing to establish that Mark and Meg had engaged in misconduct. *See* Decision at 51-52 (“[T]he City...asserts that Jones was dishonest in failing to disclose Mark's ‘remarkable physical recovery’ prior to trial .... The City misrepresents the record when it chides Jones for ‘fail[ing] to disclose’ Mark's ‘remarkable physical recovery.’”).<sup>31</sup> This reasoning impermissibly conflates the separate requirements for a new trial under CR 60(b)(3) and CR 60(b)(4), because a party need not prove misconduct to obtain a new trial under CR 60(b)(3).

Denying the City a new trial on damages was a gross miscarriage of justice. The trial court and the Court of Appeals denied a new trial in the face of evidence establishing *physical facts* directly at odds with the damages story told by Mark and Meg during discovery and at trial.<sup>32</sup> The notion that Mark Jones should receive millions of dollars in damages to compensate for the effect of disabilities so severe that he supposedly requires 24/7 care for the rest of his life has been rendered preposterous by

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<sup>31</sup> The City did *not* misrepresent the record. *See* Motion for Reconsideration at 12-17.

<sup>32</sup> The surveillance video falls within the category of evidence establishing “physical facts” that 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 & N. Ry. Co.*, 106 Wash. 299, 303, 179 P. 848 (1919). The U. S. Supreme Court recently held in *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 167 L.Ed.2d 686 (2007), that a videotape record of events whose technical reliability is not challenged is conclusive of the facts it documents. ***This Court can satisfy itself as to what the surveillance video documents Mark Jones can do by using the Flashdrive hyperlink to review the full 11 hours (Ex. Sub. No. 466A), as well as viewing the comparison of extracts with Mark’s March 2008 deposition (Ex. Sub. No. 466E).***

what the surveillance video shows he *in fact* can do. No reasonable jury with the benefit of the City's new evidence would award the damages Mark was awarded. Review is warranted as a matter of substantial public interest. RAP 13.4(b)(4).

## VI. CONCLUSION.

This Court should grant review, reverse the Court of Appeals, vacate the damage awards, and remand for a new trial on damages.<sup>33</sup>

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of May, 2012.

CARNEY BADLEY SPELLMAN, P.S.

By: Michael B. King  
Michael B. King, WSBA No. 14405

By: Gregory M. Miller  
Gregory M. Miller, WSBA No. 14459

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<sup>33</sup> This Court could summarily reverse *per curiam* based on the Court of Appeals' clear misreading of *Blair*, especially in light of this Court's subsequent decision in *Teter* and the *continuing* need to curtail Division One's erosion of *Burnet*.

Case No. 65062-9-I

**Index to Appendices to Petition for Review**

<b>APPENDIX</b>	<b>DESCRIPTION</b>
App. A	Decision, filed February 21, 2012.
App. B	Order Denying Motion for Reconsideration, filed April 4, 2012.
App. C	Still Shots from surveillance video, filed March 30, 2011, as "Appendix J" to Appellant's Reply Brief.

# APPENDIX A

**FILED**  
COURT OF APPEALS  
DIVISION ONE  
FEB 21 2012

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

MARGIE (MEG) JONES, as Guardian of Mark Jones,	)	
	)	DIVISION ONE
	)	
Respondent,	)	No. 65062-9-1
	)	(Consol. with No. 66161-2-1)
v.	)	
	)	UNPUBLISHED OPINION
CITY OF SEATTLE,	)	
	)	
Appellant.	)	FILED: February 21, 2012
_____		

DWYER, C.J. — Mark Jones, a Seattle fire fighter, sued the City of Seattle (City) to recover damages for the severe injuries that he sustained after falling 15 feet down a fire station pole hole. Following a contentious six-week trial, the jury found that the City's negligence was the sole cause of Mark's injuries, and the trial court entered judgment on the \$12.75 million jury verdict. The City thereafter moved for a new trial and to vacate the judgment. The trial court denied both motions. The City appeals.

In so doing, the City seeks our review of several discretionary trial court rulings. Our review of these rulings is limited to determining whether the trial court abused the broad discretion afforded to it in making such rulings. Here, the voluminous record includes extensive briefing by the parties, multiple colloquies between counsel and the trial court, and a lengthy letter ruling explaining the trial court's decisions. Our review of this record demonstrates that the trial court acted well within its discretion in making the rulings challenged here by the City. Accordingly, we affirm.

Seattle fire fighter Mark Jones was detailed at Fire Station 33 on December 22 and 23, 2003. At approximately 3:00 a.m., a fellow fire fighter awoke to a groaning noise and found Mark lying at the bottom of the station's fire pole hole. Although Mark later had no memory of his fall, he reported to a responding medic that he believed he had fallen down the pole hole after awakening to use the bathroom.

Mark sustained severe injuries from his 15-foot fall, including traumatic brain injuries and extensive bodily damage. Mark's brain injuries included a "diffuse axonal injury," a shearing trauma in which the "wires" of the brain are "torn," and bleeding in his frontal lobe and ventricles. Mark fractured his pelvis in multiple places, many of his vertebrae, and nearly all of his right ribs. His lung was punctured, and his bladder ruptured. Mark later underwent surgery to remove handfuls of necrotic tissue that were preventing his lungs from expanding.

Mark filed a negligence lawsuit against the City of Seattle on December 22, 2006.<sup>1</sup> Following a stay of the case and two continuances, trial was set for September 8, 2009. Mark's sister, Margie (Meg) Jones, was thereafter appointed as his guardian

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<sup>1</sup> RCW 41.26.281 permits law enforcement officers and fire fighters to sue their employers to recover damages in excess of the amount received under workers' compensation. See Locke v. City of Seattle, 162 Wn.2d 474, 479-80, 172 P.3d 705 (2007). Our legislature has waived the City's sovereign immunity in cases such as this by enacting RCW 4.96.010(1), which provides that [a]ll local government entities . . . shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation. RCW 4.96.010(1); Locke, 162 Wn.2d at 480-81.

and substituted as the plaintiff in the lawsuit.<sup>2</sup> Initially, the parties' case schedule provided a discovery deadline of July 20, 2009. The parties later extended this deadline by mutual agreement to August 7, 2009.

Prior to trial, Jones filed a motion in limine, seeking to preclude the City from introducing evidence regarding Mark's history of alcohol use. The City responded, contending that such evidence was relevant to explaining both the cause of Mark's fall and the subsequent downturn in his recovery. The trial court granted Jones's motion, thus excluding alcohol-use evidence, subject to two limited exceptions.

On September 11, three days after trial commenced, the City called Beth Powell, Mark's sister, to testify—outside the presence of the jury—as an offer of proof. The City's intention was to obtain an order from the trial court allowing Powell to testify to the jury. Powell had not been included in either the City's witness list nor in the parties' joint statement of evidence. Although the trial court had already excluded evidence of Mark's alcohol use, the City asserted that Powell would testify regarding both Mark's history with alcohol and his inability to attend trial due to his injuries. In conjunction with its contention that Powell should be permitted to testify, the City also disclosed that its investigator—who, similarly, had never been previously disclosed and who, at that time, the City did not name—had observed Mark drinking at a tavern on September 7, the evening before trial began. The trial court characterized the City's conduct as an "ambush" and reiterated its previous ruling that evidence of Mark's alcohol use would

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<sup>2</sup> Mark's and Meg's first names are used where reference is made to a specific individual. Their last name, Jones, is used to signify the plaintiff in the case—either Mark, prior to Meg's substitution as plaintiff, or, thereafter, Meg.

not be admitted. The court ordered that Powell be deposed by the parties as a predicate to any ruling on whether she would be permitted to testify.

On September 29, three weeks into trial, the City for the first time moved to call Gordon Jones, Mark's and Meg's father, to testify at trial. Again, notwithstanding that the trial court had prohibited the use of alcohol evidence, much of Gordon's expected testimony concerned Mark's history with alcohol and its relation to his injuries and recovery. The trial court ruled that neither Powell nor Gordon would be permitted to testify.

Then, on October 12, the City moved for permission to introduce surveillance evidence of Mark and the testimony of Rose Winquist, the investigator who had observed and photographed Mark drinking at the tavern on the eve of trial. Although the City had briefly mentioned surveillance evidence weeks earlier, the City named Winquist for the first time in its "disclosure of additional rebuttal witnesses" filed on September 18. The trial court noted that Winquist had not previously been disclosed and that the parties were "within days of the end of trial." Characterizing the City's conduct as "trial by ambush," the court denied the City's motion.

Closing arguments in this six-week trial concluded on October 20, 2009, and the case was submitted to the jury. Two days later, the jury returned its verdict, finding that the City's negligence was the sole cause of Mark's injuries and awarding him \$12.75 million. The City thereafter moved for judgment as a matter of law or, in the alternative, for a new trial. The trial court denied the City's motion and, on January 21, 2010, entered judgment on the jury's verdict.

Several months later, the City moved to vacate the judgment pursuant to CR 60(b)(3) and (4). The City submitted with its motion posttrial video surveillance of Mark engaged in various physical activities, including playing horseshoes and chopping wood. The City asserted that this surveillance constituted newly discovered evidence requiring a new trial. Alternatively, the City contended that the trial court's judgment was procured by misrepresentation of the severity of Mark's injuries. On October 18, 2010, the trial court denied the City's motion.

The City appeals from the trial court's judgment, denial of its motion for a new trial, and denial of its motion to vacate the judgment.

II

At the outset, we note that each of the rulings challenged on appeal is a discretionary ruling which will not be disturbed on appeal absent a showing that the trial court abused its broad discretion. See Cox v. Spangler, 141 Wn.2d 431, 439, 5 P.3d 1265, 22 P.3d 791 (2000). The abuse of discretion standard recognizes that deference is owed to the trial court because it is "better positioned than [the appellate court] to decide the issue in question." Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (quoting Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 403, 110 S. Ct. 2447, 2459 L. Ed. 2d 359 (1990)). Such is true of each of the rulings challenged here.

We additionally note that this case in particular exemplifies the propriety of deferring to the trial court in such matters. "This case is an excellent example of the reason for and the validity of the oft repeated observation that the trial judge who has

seen and heard [the proceedings] is in a better position to evaluate and adjudge than we can from a cold, printed record.” State v. Wilson, 71 Wn.2d 895, 899, 431 P.2d 221 (1967). Although, here, in reviewing the trial court’s rulings, we have the benefit of a “cold, printed record” exceeding 26,000 pages, the trial court in this case oversaw years of pretrial litigation and six weeks of trial proceedings. Indeed, the inadequacy of the record in reflecting the trial itself—and, thus, the propriety of deferring to the soundly exercised discretion of the trial court where that court is in a better position to evaluate the issues at hand—is perfectly exemplified within the record here.

In a lengthy and considered letter ruling concerning many of the issues challenged by the City on appeal, the trial court explained:

The court must observe at the outset that the record cannot possibly reflect the actual experience of trying this case. By its nature, the written record creates the appearance that only one person is speaking at a time. . . . The record is unable to reflect the tone of counsel’s voice, their gesticulations, or the rolling of eyes. It does not record sighs, laughter, or under-the-breath comments. It is unable to capture sidebar discussions in their full emotional intensity. The record also cannot reflect events that take place during breaks or after the court reporter has left for the evening. . . .

Neither can the record reflect events that never happened.

Clerk’s Papers (CP) at 7810-11. The trial court’s reflections concerning the trial of this case elucidate the basis for our deference to that court in reviewing the discretionary rulings challenged herein.

### III

The first discretionary trial court ruling challenged by the City on appeal concerns the admissibility of evidence of Mark’s purported use of alcohol both pre- and post-

incident. The City contends that the trial court abused its discretion by excluding such evidence. We disagree.

Prior to trial, Jones sought, pursuant to a motion in limine, an order prohibiting the City from introducing evidence regarding Mark's consumption of alcohol either before or after the incident, "including, but not limited to, any suggestion that he had an alcohol dependency problem, may have been going through alcohol withdrawal on the night of the accident and any evidence pertaining to his [November 2003] arrest for DUI." CP at 1763. The City responded, asserting that Mark's "history of alcoholism" helped to explain why the incident occurred and that his "continued excessive use of alcohol after the accident" explained the perceived downward turn in Mark's recovery. CP at 2269. The parties submitted voluminous briefing regarding the admissibility of alcohol-use evidence.

With regard to Mark's purported pre-incident alcohol use, the City sought to introduce the testimony of Dr. Gregory Rudolf, an addiction specialist, who was expected to testify that the incident was caused by Mark's disorientation due to alcohol withdrawal—thus suggesting that the City's negligence was not the cause of Mark's injuries. In support of the admissibility of Dr. Rudolf's "alcohol withdrawal theory," the City relied upon (1) the deposition testimony of Ann Jacob Jones, Mark's ex-wife, (2) Mark's blood alcohol content (BAC) level one month before the incident, when he was arrested for DUI, and (3) an order to implement alcohol withdrawal protocols while Mark was at the hospital following his fall.

Ann stated in her deposition that, during the years of 2001 and 2002, Mark consumed 4 to 10 beers a few times per week. However, she testified that his drinking was episodic and that she did not believe that he had consumed alcohol during the months preceding the incident. Ann recalled that she and Mark were getting along well during that period, which she attributed to his abstinence from alcohol. She further recalled that Mark's daughter, who had alcohol dependency issues, was then living with them; Ann stated that, for that reason, Mark refrained from consuming alcohol during that time.

When Mark arrived at the hospital following the incident, his blood alcohol level was zero. Based on Mark's purported history of alcohol use—as demonstrated by Ann's deposition testimony and by Mark's blood alcohol level one month before the incident when he was arrested for DUI—the City proposed that the BAC level of zero indicated that Mark had “interrupted his drinking pattern.” CP at 2272. This “interruption” presumably triggered the alleged alcohol withdrawal. This theory, the City contended, was supported by the order to implement alcohol withdrawal protocols at the hospital following the incident. Based solely upon this evidence, Dr. Rudolf was prepared to testify that Mark “was likely experiencing some degree [of] disorientation associated with long-term alcohol use and/or early-stage alcohol withdrawal on the night of his fall and that such disorientation, rather than mere grogginess, is the most likely explanation” for the fall. CP at 2272.

In support of the motion in limine to exclude alcohol-use evidence, Jones submitted the declaration of Dr. Russell Vandenberg. Referring to the level of alcohol

consumption asserted by Ann, Dr. Vandebelt testified that it was “extremely unlikely that cessation of this level of alcohol consumption would lead to disorientation or delirium.” CP at 1843. He further noted that such severe symptoms develop in only 10 percent of individuals who go through alcohol withdrawal. In order to have been going through such withdrawal on the night of the incident, Dr. Vandebelt testified, Mark would have had to have been consuming alcohol sometime during the days prior to the incident. Moreover, he testified that many of the symptoms of alcohol withdrawal also appear in individuals who have suffered traumatic brain injuries like those suffered by Mark, thus suggesting that the implementation of alcohol withdrawal protocols at the hospital did not necessarily indicate that Mark was experiencing alcohol withdrawal. Indeed, Dr. Vandebelt noted, there was no indication in Mark’s hospital records that he was ever actually diagnosed as suffering from alcohol withdrawal.

In addition, Jones submitted to the trial court the declarations of two fire fighters who were stationed with Mark on the night of the incident, both of whom testified that Mark exhibited none of the symptoms associated with alcohol withdrawal. The responding medic, who had been trained to recognize the symptoms of alcohol withdrawal, similarly indicated that Mark had exhibited no such symptoms. Moreover, Ann stated in her deposition that, notwithstanding his history of alcohol use, Mark had never before suffered from alcohol withdrawal.

With regard to Mark’s alleged post-incident alcohol use, the City first sought to connect a perceived decline in Mark’s recovery with his purported alcohol consumption. The City asserted that Mark had hindered his own recovery—thus failing to mitigate his

damages—by consuming alcohol following the incident. In so doing, the City relied upon portions of Mark’s medical records to relate this perceived downturn to Mark’s and Ann’s separation and to Ann’s testimony that Mark consumed alcohol heavily during that time. The City also offered the deposition testimony of Dr. William Stump and Dr. Rudolf. Dr. Stump generally stated that alcohol has harmful effects when combined with narcotics and that he advises his brain injury patients to abstain from alcohol consumption. Dr. Rudolf opined that a high level of drinking “probably did hinder [Mark’s] recovery significantly.” CP at 2277. Neither of these doctors, however, was among Mark’s treating physicians.

On September 4, the trial court heard oral argument regarding Jones’s motion in limine to exclude such alcohol-use evidence. Although the City had previously asserted that post-incident alcohol-use evidence was relevant to whether Mark had failed to mitigate his damages, during oral argument the City—for the first time—suggested that evidence regarding post-incident alcohol use diminished Mark’s quality of life and, thus, his damages.

The trial court thereafter excluded pre-incident alcohol-use evidence, noting “several problems” with permitting the City to present its “alcohol withdrawal theory” to the jury. First, the trial court noted the speculative nature of Dr. Rudolf’s expected testimony:

First of all, there’s foundation, that this testimony is fundamentally based on speculation, one, that Mr. Jones had been drinking heavily shortly before his shift, and, two, that the symptoms or the protocol, test results, indicated alcohol withdrawal as opposed to other problems that could have caused the same symptoms to be recorded on those protocols.

Report of Proceedings (RP) (Sept. 4, 2009) at 112. Furthermore, the trial court noted that "it is not really clear that one is more or less comparatively negligent based on the reason one is disoriented in the middle of the night." RP (Sept. 4, 2009) at 112-13. Finally, the trial court asserted that "[t]he big issue for me is Evidence Rule 403." RP (Sept. 4, 2009) at 113. The court noted that the probative value of the pre-incident alcohol use testimony is "minimal," while "the prejudice is very, very significant." RP (Sept. 4, 2009) at 113. The court concluded that "[t]his is a real attack on Mr. Jones' character that would be difficult to overcome, and so as a result I'm excluding the pre-accident alcohol consumption/alcohol withdrawal evidence." RP (Sept. 4, 2009) at 113.

With regard to evidence of post-incident alcohol use, the trial court noted that "the defense argument as to the probative value of this evidence . . . [has] been something of a moving target":

Initially, it was argued that this was a failure to mitigate damages . . . but they never pled or mentioned in their answers to interrogatories that they were pursuing a failure to mitigate claim.

Then as the morning wore on, the argument kind of morphed into, if you will, an exacerbation of damages argument. Mr. Jones was advised not to mix alcohol and narcotic pain relievers, and it is well known that alcohol kills brain cells and that mixing alcohol and narcotics is a very bad idea.

The difficulty is that the defense has been unable to articulate, let alone support with expert opinion, the connection between alcohol use and diminishment of Mr. Jones' recovery or his quality of life.

RP (Sept. 4, 2009) at 113-14. Nevertheless, the trial court permitted the City to introduce limited evidence of Mark's post-incident alcohol consumption. The court ruled that the City would be permitted to argue that "factors other than injuries Mr. Jones

sustained have diminished his quality of life, for example, divorce, depression, unrelated to his injuries” and, in so doing, to elicit testimony about two incidents of heavy drinking by Mark in mid-2006. RP (Sept. 4, 2009) at 114-15. Although the trial court determined alcohol-use evidence to be “highly prejudicial,” the court stated that it would reconsider its ruling if the City were able to articulate the effects of alcohol consumption on Mark’s recovery.

The City again sought permission to introduce evidence regarding Mark’s alcohol use following Jones’s opening statement to the jury. The City asserted that Jones had “opened the door” to alcohol evidence eight times in the opening statement and that, if the court refused to allow the presentation of such evidence, it would be “perpetuating a false fictional quality of life claim.” RP (Sept. 14, 2009) at 104. In making this argument, the City urged that Jones had “opened the door” to alcohol evidence by telling the jury that Mark had no alcohol in his system when he arrived at the hospital and that Mark’s friends trusted, counted on, and respected him.

The trial court responded:

Here’s the basic problem that we’re having here. You want alcohol in as character evidence, that’s the fundamental problem.

.....  
You keep trying to come up with an argument that will get it in some other way, and it’s completely obvious that that’s what’s happening. It’s obvious from the way that Dr. Rudolf was prepared to testify, it’s obvious from the arguments that you’re making, and so I am trying to make sure I have an intellectually honest basis to allow any of that evidence in, and I have tried very hard to analyze the evidence rigorously, without being swayed by the desire of either side to have character evidence come in.

RP (Sept. 14, 2009) at 110. The trial court maintained its prior ruling excluding evidence of Mark's history of alcohol use subject to the two exceptions previously noted by the court.

"A trial court has 'broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion.'" Spangler, 141 Wn.2d at 439 (quoting Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997)). The admissibility of expert testimony is among the evidentiary matters within a trial court's broad discretion. Miller v. Likins, 109 Wn. App. 140, 147, 34 P.3d 835 (2001). "A trial court abuses its discretion when its decision 'is manifestly unreasonable or based upon untenable grounds or reasons.'" Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010) (quoting State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)).

Notwithstanding the trial court's broad discretion in ruling on evidentiary matters, "Washington cases consistently hold that it is prejudicial error to submit an issue to the jury when there is no substantial evidence concerning it." Columbia Park Golf Course, Inc. v. City of Kennewick, 160 Wn. App. 66, 90, 248 P.3d 1067 (2011); see also Bd. of Regents of Univ. of Wash. v. Frederick & Nelson, 90 Wn.2d 82, 86, 579 P.2d 346 (1978) ("The supporting facts for a theory and instruction must rise above speculation and conjecture."). Similarly, "[i]t is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted." Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 177, 817 P.2d 861 (1991). Hence, "[w]here there is no basis for [an] expert opinion other than theoretical speculation, the expert testimony

should be excluded.” Queen City Farms, Inc. v. Cent. Nat’l Ins. Co. of Omaha, 126 Wn.2d 50, 103, 882 P.2d 703, 891 P.2d 718 (1994). Furthermore, “when ruling on somewhat speculative [expert] testimony, the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert.” Davidson v. Municipality of Metro. Seattle, 43 Wn. App. 569, 572, 719 P.2d 569 (1986).

Here, the City sought to introduce Dr. Rudolf’s testimony that Mark’s purported disorientation due to alcohol withdrawal was the most likely explanation for the incident. However, the evidence before the trial court demonstrated that this theory was pure speculation. As Dr. Vandebelt testified, Mark would have had to have consumed alcohol in the days preceding the incident in order to have been going through alcohol withdrawal when he fell. Ann stated in her deposition that Mark had not been drinking alcohol during the months before the incident, and the City’s suggestion that Mark may have consumed alcohol without Ann’s knowledge does not constitute evidence. In addition, Dr. Vandebelt testified that, even had Mark been consuming alcohol heavily prior to the incident, it was “extremely unlikely” that the level of consumption reported by Ann would lead to disorientation. Furthermore, the significance attributed by the City to the implementation of alcohol withdrawal protocols is unfounded, in light of the evidence that Mark was not diagnosed with alcohol withdrawal at the hospital following his fall and that such symptoms are also associated with traumatic brain injuries of the sort suffered by Mark.

Thus, Dr. Rudolf’s theory that Mark’s fall was caused by disorientation related to alcohol withdrawal was based solely on speculation, as there was no evidence that the

circumstances necessary to induce such withdrawal were extant. The City offered no factual evidence that Mark had been drinking heavily in the days preceding his fall or that he had, in fact, suffered from alcohol withdrawal. The trial court was well within its discretion in determining that Dr. Rudolf's "alcohol withdrawal theory" was purely speculative, and, thus, the court did not err by excluding this evidence. See, e.g., Safeco Ins. Co., 63 Wn. App. at 177.

The City additionally contends that the trial court erred by excluding post-incident alcohol-use evidence, which, the City asserts, is relevant both to Mark's purported failure to mitigate damages and the extent to which his quality of life has been diminished.

"An injured party generally may not recover damages proximately caused by that person's unreasonable failure to mitigate." Cox v. The Keg Rests. U.S., Inc., 86 Wn. App. 239, 244, 935 P.2d 1377 (1997). However, the causal connection between the purported failure to mitigate and its effects on the plaintiff's injuries and recovery must be substantial. Thus, in Cox, we held that there was insufficient evidence to create a jury question on failure to mitigate where the plaintiff's doctor "did not testify to a reasonable degree of medical certainty" that a medical procedure would have alleviated the plaintiff's injuries. 86 Wn. App. at 245. Rather, the doctor testified only that the plaintiff's recovery may have been hastened had he followed through with the doctor's recommendations. Cox, 86 Wn. App. at 245. This "mere possibility of benefit" was held to be insufficient to justify submitting the issue to the jury. Cox, 86 Wn. App. at 245; see also Hawkins v. Marshall, 92 Wn. App. 38, 47-48, 962 P.2d 834 (1998) (holding that the

trial court did not err by declining to instruct the jury regarding the duty to mitigate damages where no evidence was presented that the failure to follow a doctor's advice had aggravated the plaintiff's condition or delayed her recovery); cf. Fox v. Exans, 127 Wn. App. 300, 306-07, 111 P.3d 267 (2005) (holding that mitigation instruction was warranted where all of the plaintiff's treatment providers testified that she suffered from depression and that her refusal of recommended treatment adversely affected her recovery).

Here, the City failed to establish that Mark's recovery was hindered by alcohol consumption. As the City acknowledged, Mark's treating physicians did not believe that alcohol consumption affected his recovery. Dr. Stump, who is not among Mark's treating physicians, generally stated that narcotics and alcohol are contraindicated and that he advises his brain injury patients to avoid consuming alcohol. Although Dr. Rudolf opined that a high level of drinking "probably did hinder [Mark's] recovery significantly," he provided no specific explanation of the purported effects of alcohol consumption on Mark's recovery. CP at 2277. The City's proffered evidence comes nowhere close to demonstrating to a "reasonable degree of medical certainty" that Mark's recovery was hindered by his alcohol use. See Cox, 86 Wn. App. at 245.

It may be theoretically correct, as the City asserted, that the fact "[t]hat Jones's treating physicians are unwilling to link his downturn . . . to the contemporaneous reported episodes of heavy drinking does not mean the jury cannot . . . make that link." CP at 2276. However, given the paucity of facts provided by the City in support of the professed causal connection between Mark's perceived downturn in recovery and his

alcohol consumption, such a determination by the jury would be sheer speculation. The trial court did not abuse its discretion by declining to invite the jury to speculate as to whether Mark's alcohol consumption affected his recovery. See Columbia Park Golf Course, 160 Wn. App. at 90.

In addition, evidence of Mark's post-incident alcohol use proffered in order to demonstrate diminished work-life expectancy was properly excluded. As we determined in Kramer v. J.J. Case Mfg. Co., 62 Wn. App. 544, 559, 815 P.2d 798 (1991), evidence of substance abuse should not be admitted where neither the extent of the substance abuse nor its effects on the plaintiff's employment is established. There, we concluded that because "nothing in the record indicates that Kramer's drug and alcohol use prior to [his] accident affected his employment[,] . . . the trial court had no basis to conclude that Kramer's substance abuse affected his earning capacity or work-life expectancy." Kramer, 62 Wn. App. at 559. Similarly, here, there is no evidence in Mark's employment record that alcohol affected his employment.

Moreover, as the trial court noted, the speculative nature of the City's proffered alcohol evidence is particularly problematic given "the tremendous prejudicial effect that getting into alcohol can have." RP (Sept. 11, 2009) at 147. The trial court is afforded broad discretion "in balancing the prejudicial impact of evidence against its probative value." Kramer, 62 Wn. App. at 559. "Although another trial judge might well have admitted the same evidence, the decision to not allow admission of the [challenged] evidence is neither manifestly unreasonable nor based on untenable grounds or reasons." State v. Perez-Valdez, 172 Wn.2d 808, 816, 265 P.3d 853 (2011). Thus, the

trial court did not abuse its discretion by excluding evidence of Mark's purported use of alcohol.

IV

The City next contends that the trial court erred by excluding the testimony of Mark's sister, Beth Powell. We disagree.

On September 11, three days after trial commenced, the City called Beth Powell, Mark's sister, to testify as an offer of proof. Powell had been identified neither in the City's witness list nor in the parties' joint statement of evidence. Rather, the City had flown Powell in from Helena, Montana that very morning. The City had notified neither Jones nor the trial court that it intended to call Powell as a witness.

The City asserted that "there's been a fraud in the court" regarding whether Mark was physically able to attend trial. RP (Sept. 11, 2009) at 104. Thus, the City argued that Powell should be permitted to testify to "put on the record the true facts" regarding Mark's physical condition, "so that we at least have that on the record on trial attendance and also on alcohol." RP (Sept. 11, 2009) at 104. The City argued that Powell could "testify that [Mark] has been an alcoholic since he was 13" and with regard to "all [of Mark's] heavy drinking." RP (Sept. 11, 2009) at 114. The City asserted that "[d]rinking has been huge in his life, and it still is." RP (Sept. 11, 2009) at 114. In support of its contention that Powell should be permitted to testify, the City for the first time disclosed that its investigator—who, similarly, had never been previously disclosed and who, at the time, the City did not disclose by name—had observed Mark drinking at a tavern on September 7, the evening before trial commenced.

The trial court characterized the City's failure to disclose Powell as an "ambush," noting that the civil rules are designed such that parties "are allowed to rely on what evidence has been presented by the discovery cutoff, through the depositions, through the interrogatories . . . and they're not supposed to be ambushed, and this certainly looks like an ambush from that point of view." RP (Sept. 11, 2009) at 111.

Nevertheless, the trial court ordered that Powell be deposed prior to any ruling on whether she would be permitted to testify, stating that "[s]he may testify as an offer of proof. At least if we have a deposition, it will be under oath and I can look at that." RP (Sept. 11, 2009) at 116.

Powell was deposed on September 13. Then, on September 18, the City identified Powell in its "disclosure of additional rebuttal witnesses," stating that Powell would testify to "facts regarding potential causes of Jones's injury, and regarding his damages." CP at 3620. The City further asserted that Powell "may also testify in rebuttal to plaintiff's witnesses regarding Jones's alcohol, drug, and/or nicotine use, marriage, medical status, injuries, life activities or history, and other issues relevant to liability and damages, and matters referenced in her deposition." CP at 3620. Jones moved to exclude Powell as a late-disclosed witness. The City thereafter submitted to the trial court supplemental briefing supporting the admission of evidence of alcohol use, to which it attached Powell's deposition as an exhibit.

On September 23, the trial court ruled that Powell's testimony would be excluded. The court determined that the City had not shown good cause for failing to timely disclose Powell, noting that the court "[couldn't] even find a case where a late

disclosure was so late, and certainly there has not been good cause established.” RP (Sept. 29, 2009) at 23. Moreover, the trial court noted that “what [Powell] mostly wants to say has to do with alcohol, and yet she has virtually no personal knowledge, and what little information she has, even if it were admissible, does not appear to me to change the basic rationale that I have given for why post-accident use of alcohol, or to the extent she could say anything about pre-accident use of alcohol, would make it relevant.” RP (Sept. 29, 2009) at 23. Thus, the trial court excluded Powell’s testimony both because the City had failed to timely disclose Powell as a witness, as required by King County Local Court Rule (LCR) 26(b)(4)<sup>3</sup>, and because the City primarily sought to promote testimony regarding Mark’s alleged alcohol use, which the trial court had already determined to be inadmissible.

“[I]t is the proper function of the trial court to exercise its discretion in the control of litigation before it.” Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 777, 819 P.2d 370 (1991). An appellate court will not interfere with a trial court’s exercise of such discretion “unless there has been an abuse of discretion which caused prejudice to a party or person.” Doe, 117 Wn.2d at 777. Specifically, “[t]he decision to exclude witnesses who are not properly disclosed in discovery is within the trial court’s discretion.” Southwick v. Seattle Police Officer John Doe No. 1, 145 Wn. App. 292, 297, 186 P.3d 1089 (2008).

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<sup>3</sup> The King County Local Court Rules were updated on September 1, 2011. This rule, with identical language, is listed as LCR 26(k)(4) as of that date.

LCR 26(b)(4) sets forth the requirements for disclosure of witnesses prior to trial. “Any person not disclosed in compliance with this rule may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires.” Thus, pursuant to this rule, we affirmed a trial court ruling striking a witness’s declaration where the witness had not been timely disclosed. Southwick, 145 Wn. App. at 301-02. There, King County filed a motion for summary judgment asserting that Southwick had not identified any witnesses who could support the allegations in his complaint. Southwick, 145 Wn. App. at 301. Three days before the hearing on the county’s motion, Southwick filed the declaration of a witness who had not been previously disclosed. Southwick, 145 Wn. App. at 301. We affirmed the trial court’s decision to strike that declaration, noting that “[a] trial court properly excludes testimony of a witness not disclosed in accordance with [the local rule], even in the absence of a showing of prejudice.” Southwick, 145 Wn. App. at 302; see also Lancaster v. Perry, 127 Wn. App. 826, 113 P.3d 1 (2005); Dempere v. Nelson, 76 Wn. App. 403, 886 P.2d 219 (1994); Allied Fin. Servs., Inc. v. Magnum, 72 Wn. App. 164, 864 P.2d 1 (1993).

Nevertheless, a trial court’s discretion in excluding witnesses is not unfettered. Previously, we have held that “where 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.” Barci v. Intalco Aluminum Corp., 11 Wn. App. 342, 350, 522 P.2d 1159 (1974) (quoting Jones v. Atkins, 171 S.E.2d 367, 369 (Ga. App. 1969)). There, Intalco moved to exclude the testimony of Dr. S. Thatcher Hubbard, who was disclosed as a witness for the Barcis approximately 10 days prior to

trial. Barci, 11 Wn. App. at 344-45. The Barcis had disclosed Dr. Hubbard as soon as possible, and Intalco conceded that the Barcis had not violated the discovery rules. Barci, 11 Wn. App. at 349. Moreover, the record indicated that the Barcis had not intentionally delayed in discovering or disclosing Dr. Hubbard. Barci, 11 Wn. App. at 349. Based on these circumstances, we reversed the trial court's order excluding Dr. Hubbard's testimony. Barci, 11 Wn. App. at 349-50. In so doing, we set forth multiple factors that a trial court should consider in deciding whether to exclude the testimony of a witness "who was unobtainable and was undisclosed either until just before trial commenced or during the course of trial." Barci, 11 Wn. App. at 349-50. We held that "a trial court should not exclude testimony unless there is a showing of intentional or tactical nondisclosure, of willful violation of a court order, or the conduct of the miscreant is otherwise unconscionable." Barci, 11 Wn. App. at 351.

Later, in Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997), our Supreme Court reversed a Court of Appeals decision affirming a trial court order limiting discovery and precluding testimony on one of the plaintiff's negligence claims. Although the trial court had determined that the claim had not been properly pleaded, the Court of Appeals characterized the issue as a "compliance problem with a scheduling order."<sup>4</sup> Burnet, 131 Wn.2d at 492. Our Supreme Court held that the trial

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<sup>4</sup> Because the defendant had filed a CR 26 motion, the issue of sanctions pursuant to CR 37(b) was at issue. See Burnet, 131 Wn.2d at 493-94. CR 26 authorizes a trial court to direct that the parties confer on the subject of discovery. Sanctions are available pursuant to CR 37(b)(2) where "a party fails to obey an order entered under rule 26(f)." Burnet, 131 Wn.2d at 493-94 (quoting CR 37(b)(2)). Such sanctions include "[a]n order refusing to allow the disobedient party to support . . . designated claims . . . or prohibiting him from introducing designated matters in evidence[.]" Burnet, 131 Wn.2d at 494 (alterations in original) (quoting CR 37(b)(2)).

court abused its discretion by excluding the Burnets' claim, and discovery related to it, without first finding a willful discovery violation by the Burnets and substantial prejudice to the defendant and without considering, on the record, "a less severe sanction that could have advanced the purposes of discovery and yet compensated [the defendant] for the effects of the Burnets' discovery failings."<sup>5</sup> Burnet, 131 Wn.2d at 494, 497.

Noting that "a significant amount of time yet remained before trial" and that "some of the delay in completing discovery was due to . . . bickering between counsel for the opposing parties," the court determined that the sanction imposed was "too severe in light of the length of time to trial."<sup>6</sup> Burnet, 131 Wn.2d at 496-98.

Most recently, the Supreme Court reversed our decision affirming a trial court's exclusion of the testimony of late-disclosed witnesses. Blair v. TA-Seattle East No. 176, 171 Wn.2d 342, 344, 254 P.3d 797 (2011). There, the trial court considered TravelCenters' motion to strike all of Blair's listed witnesses due to untimely disclosure. Blair, 171 Wn.2d at 345-46. Rather than entering the proposed order striking all of the named witnesses, the trial court struck 1 specific witness and additionally ordered Blair to choose 7 of the remaining 14 listed witnesses to be called at trial. Blair, 171 Wn.2d at 346. When the parties exchanged their final witness lists, Blair listed, in addition to

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<sup>5</sup> These findings, the court determined, are a required predicate to the imposition of "the harsher remedies allowable under CR 37(b)." Burnet, 131 Wn.2d at 494 (quoting Snedigar v. Hodderson, 53 Wn. App. 476, 487, 768 P.2d 1 (1989), aff'd in part, rev'd in part, 114 Wn.2d 153, 786 P.2d 781 (1990)). In a later case, the court held that "the reference in Burnet to the 'harsher remedies allowable under CR 37(b)' applies to such remedies as dismissal, default, and the exclusion of testimony—sanctions that affect a party's ability to present its case—but does not encompass monetary compensatory sanctions under CR 26(g) or CR 37(b)(2)." Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 690, 132 P.3d 115 (2006) (internal quotation marks omitted) (quoting Burnet, 131 Wn.2d at 494).

<sup>6</sup> The Burnets "clearly stated that they were contending that [the defendant] was negligent in failing to properly review the physicians' credentials" in April 1991—18 months before the commencement of trial. Burnet, 131 Wn.2d at 490.

the 7 witnesses previously identified, 2 witnesses that had been previously disclosed by TravelCenters. Blair, 171 Wn.2d at 346-47. The trial court then granted TravelCenters' motion to strike the 2 additional witnesses, ruling that Blair had violated the court's previous order. Blair, 171 Wn.2d at 347. Contending that, without those 2 witnesses, Blair could not prove causation in her negligence claim, TravelCenters moved for summary judgment dismissal of the claim. Blair, 171 Wn.2d at 347. The trial court granted the motion and dismissed Blair's claim with prejudice. Blair, 171 Wn.2d at 347.

We affirmed the trial court's decision, rejecting Blair's contention that such sanctions could not be imposed absent written findings by the trial court explaining its rationale in accordance with Burnet. Blair v. TA-Seattle East No. 176, 150 Wn. App. 904, 906-09, 210 P.3d 326 (2009), rev'd, 171 Wn.2d 342, 254 P.3d 797 (2011). We determined that, "[a]lthough the trial court did not enter findings on the record demonstrating its consideration of the Burnet factors, the record before [the court] provide[d] adequate grounds to evaluate the trial court's decision in imposing discovery sanctions." Blair, 150 Wn. App. at 909. We additionally affirmed the trial court's summary judgment dismissal of Blair's claim because she could not prove causation without the testimony of the stricken witnesses. Blair, 150 Wn. App. at 911-12.

The Supreme Court disagreed:

Neither of the trial court's orders striking Blair's witnesses contained any findings as to willfulness, prejudice, or consideration of lesser sanctions, nor does the record reflect these factors were considered. For example, there was no colloquy between the bench and counsel. There was no oral argument before the trial court entered its orders, and the orders themselves contain bare directives. Under Burnet and Mayer, the

trial court therefore abused its discretion by imposing the severe sanction of witness exclusion.

Blair, 171 Wn.2d at 348-49. The court concluded that we had "erroneously endorsed TravelCenters' view that an appellate court can consider the facts in the first instance as a substitute for the trial court findings that our precedent requires." Blair, 171 Wn.2d at 351. Thus, the court held that "the trial court abused its discretion when it imposed the sanction of witness exclusion that was not justified by findings in the record." Blair, 171 Wn.2d at 351.

This case presents a much different situation. As an initial matter, here, the parties' case schedule, issued pursuant to LCR 26(b), provided that possible primary witnesses were to be disclosed by April 6, 2009 and that possible additional witnesses were to be disclosed by May 18, 2009. See LCR 26(b)(1), (2). The case schedule provided a discovery deadline of July 20, 2009, although the parties later extended this deadline by mutual agreement to August 7, 2009. Nevertheless, the City notified neither the trial court nor Jones that it had even contacted Powell until September 11, 2009, when it sought to have Powell testify as an offer of proof. The City did not disclose Powell as a trial witness until September 18, four months after the witness disclosure deadline set forth in the case schedule.<sup>7</sup>

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<sup>7</sup> On appeal, the City contends that it was prevented from earlier learning of Powell by Jones's purportedly misleading conduct during discovery; indeed, the City asserts that, given Mark's allegedly improper conduct, "no conceivable discovery request" could have uncovered Powell. Appellant's Br. at 52-53 (quoting Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 352, 858 P.2d 1054 (1993)). The City appears to contend that Jones's discovery responses prevented it from learning both about Powell's existence and about her knowledge purportedly relevant to this case. Each contention is without merit.

LCR 26(b)(4) clearly provides that “[a]ny person not disclosed in compliance with [LCR 26(b)] may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires.” Here, the City did not disclose Powell by the deadline set forth in the case schedule. At trial, the City contended that, notwithstanding this late disclosure, good cause existed for admitting Powell’s testimony because, the City asserted, Jones had concealed his physical condition and alcoholism, thus impeding the “search for the truth.” RP (Sept. 11, 2009) at 110. However, after allowing the deposition of Powell and considering the parties’ briefing on the issue, the trial court determined—pursuant to its broad discretion in making evidentiary rulings—that no such good cause existed.

On appeal, the City attempts to evade the mandate of LCR 26(b)(4) by asserting that the “truth-enhancing foundation” of the Civil Rules “trumps local court rules.” Appellant’s Br. at 51. Beyond unsubstantiated accusations of fraud, however, the City fails to demonstrate that the “search for the truth” has been impeded. The trial court properly determined that, pursuant to LCR 26(b)(4), no good cause justifying the

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First, the City certainly knew of Powell’s existence, as Mark identified Powell as his sister at his March 6, 2008 deposition. Although the court reporter mistakenly recorded Powell’s name as “Howell,” the City failed to ask any further questions about Powell, including during two later depositions of Meg. Second, as the trial court observed, Powell had “virtually no personal knowledge” about Mark’s alleged alcohol use—the primary issue about which the City sought to introduce Powell’s testimony. Thus, it is unsurprising that Jones may not have identified Powell—a sister from whom, the City concedes, Mark was alienated—as someone with knowledge relevant to this litigation.

The City also appears to contend throughout its briefing on appeal that it was prevented from earlier uncovering Mark’s alleged alcoholism by Jones’s untruthful responses during discovery. Although the City asserted to the trial court that Jones had responded untruthfully to discovery requests, the City never sought a trial court ruling regarding the propriety of Jones’s discovery responses. Accordingly, the trial court made no such ruling. Notwithstanding the City’s allegations on appeal of improper discovery conduct, without a trial court finding addressing whether Jones did, in fact, engage in such improper conduct, we have no ruling to review.

admission of a late-disclosed witness's testimony existed. Absent such good cause, LCR 26(b)(4) directs that Powell's testimony be excluded. See, e.g., Southwick, 145 Wn. App. 292; Lancaster, 127 Wn. App. 826; Dempere, 76 Wn. App. 403; Allied Fin. Servs., 72 Wn. App. 164.

Not to be deterred, the City contends that the trial court erred by excluding Powell's testimony without making the findings of intentional nondisclosure and prejudice that, the City asserts, are required by Burnet. In supplemental briefing on appeal, the City argues that our Supreme Court's decision in Blair, 171 Wn.2d 342, establishes that trial courts must apply the factors set forth in Burnet in order to exclude the testimony of late-disclosed witnesses. However, our Supreme Court had not yet decided Blair when the trial court was considering whether to allow Powell's testimony. Rather, the parties cited to, and the trial court relied upon, our then-controlling decision in Blair, 150 Wn. App. 904. There, we affirmed the trial court's exclusion of witness testimony, determining that "[a]lthough the trial court did not enter findings on the record demonstrating its consideration of the Burnet factors, the record before [the court] provide[d] adequate grounds to evaluate the trial court's decision in imposing discovery sanctions." Blair, 150 Wn. App. at 909. Ultimately, of course, the Supreme Court disagreed, concluding that we had "erroneously endorsed [the] view that an appellate court can consider the facts *in the first instance* as a substitute for the trial court findings that our precedent requires." Blair, 171 Wn.2d at 351 (emphasis added).

But this trial court operated without that guidance at the time that it ruled on the matters before us. Quite understandably, the procedural approach it adopted in ruling

on the admissibility of Powell's testimony was consistent with our decision in Blair. Consequently, the question here is whether the trial court erred by acting consistently with controlling appellate authority where the Supreme Court later ruled that a different procedural approach must be followed.

This question has previously arisen. A generation ago, with regard to the admissibility of a prior conviction under ER 609(a), the rule was that "[i]t is not necessary that the trial judge state his or her reasons for so ruling." State v. Thompson, 95 Wn.2d 888, 893, 632 P.2d 50 (1981), overruled on other grounds by State v. Calegar, 133 Wn.2d 718, 947 P.2d 235 (1997). This changed on the day that the decision in State v. Jones, 101 Wn.2d 113, 677 P.2d 131 (1984), was filed. In Jones, the Supreme Court held that "a trial court must state, for the record, the factors which favor admission or exclusion of prior conviction evidence." 101 Wn.2d at 122. But what of trial court rulings on this question made after Thompson but before Jones?

In State v. Rhoads, 101 Wn.2d 529, 681 P.2d 841 (1984), the Supreme Court provided the answer. The purpose of the Jones decision, the Supreme Court explained, was "to assure that the trial court will perform the necessary balancing and to provide an aid to appellate courts in reviewing the trial court's exercise of discretion." Rhoads, 101 Wn.2d at 535. Thus, with regard to trial court rulings made in the time between the Thompson and Jones decisions, the procedural formality of the evidentiary ruling would not control so as to invalidate otherwise proper rulings. The Supreme Court affirmed the trial court.

Here, the record is more than sufficient "to assure that the trial court . . .

perform[ed] the necessary balancing and to provide an aid to appellate courts in reviewing the trial court's exercise of discretion." Rhoads, 101 Wn.2d at 535. Indeed, the circumstances of this case differ markedly from those in Blair. There, in summarily dismissing Blair's claim, the trial court provided no indication whatsoever of its reasoning. Blair, 171 Wn.2d at 348-49. Significantly, "[n]either of the trial court's orders striking Blair's witnesses contained any findings as to willfulness, prejudice, or consideration of lesser sanctions, *nor [did] the record reflect these factors were considered.*" Blair, 171 Wn.2d at 348 (emphasis added). Furthermore, there was "no colloquy between the bench and counsel" and no oral argument before the trial court entered its orders. Blair, Wn.2d at 348.

Here, far from summarily dismissing a claim without oral argument, the trial court made a discretionary evidentiary ruling after overseeing years of pretrial litigation, with the trial well under way, and with the benefit of voluminous briefing and oral argument by the parties. Prior to the trial court's ruling excluding Powell's testimony—which, as the trial court recognized, "mostly . . . has to do with alcohol," RP (Sept. 29, 2009) at 23—the City had submitted to the court three separate briefs seeking the admission of alcohol-use evidence and, after the court ruled that such evidence would be excluded, had attempted to convince the court that Jones had "opened the door" to the evidence during his opening statement to the jury. In addition, the record includes a lengthy colloquy between the parties and the trial court regarding Powell's proffered testimony. Moreover, because the trial court ordered that Powell be deposed prior to the court's ruling, the court had the benefit of Powell's deposition testimony in determining whether

to admit her testimony at trial notwithstanding the absence of timely disclosure.

After “review[ing] all the materials submitted by the City,” the trial court ultimately excluded Powell’s testimony. RP (Sept. 29, 2009) at 22. The trial judge explained that

Beth Powell was a complete surprise to me, and I gather to plaintiff’s counsel, when she was suddenly brought in at the end of Dr. Rudolf’s . . . testimony in the offer of proof. She has never been disclosed. We were in trial, we were post-jury selection, just before opening statements, as I recall, and she is the sister of . . . Mr. Jones, and there is just absolutely no way I can see, under our local rules, to allow Ms. Powell to testify. It’s beyond—I can’t even find a case where a late disclosure was so late, and certainly there has not been good cause established. And I’ve already ruled that what she mostly wants to say has to do with alcohol, and yet she has virtually no personal knowledge, and what little information she has, even if it were admissible, does not appear to me to change the basic rationale that I have given for why post-accident use of alcohol, or to the extent she could say anything about pre-accident use of alcohol, would make it relevant.

RP (Sept. 29, 2009) at 22-23.

The record regarding Powell’s proffered testimony is not merely extensive—it also indicates that “the trial court . . . perform[ed] the necessary balancing,” as required by Burnet, in determining whether to admit the challenged testimony. See Rhoads, 101 Wn.2d at 535. The trial court noted that the civil rules are designed to permit the parties “to rely on what evidence has been presented by the discovery cutoff, through the depositions, through the interrogatories . . . and they’re not supposed to be ambushed, and this certainly looks like an ambush from that point of view.” RP (Sept. 11, 2009) at 111. As the trial court concluded, the timing of Powell’s disclosure—which was “a complete surprise” to both the court and Jones and occurred after trial had commenced—was itself prejudicial to Jones, as he was permitted “to rely on what

evidence [had] been presented by the discovery cutoff.” RP (Sept. 23, 2009) at 22-23; RP (Sept. 11, 2009) at 111. As the trial court would later explain, “[i]t would have been grossly unfair to the plaintiff to allow an undisclosed witness on a critical subject to testify, when plaintiff would have had no opportunity to undertake its own investigation of Ms. Powell.” CP at 7815. By describing the City’s disclosure of Powell as an “ambush,” the trial court also indicated its belief that the City’s conduct was willful. Such language is not used to describe unintentional behavior.

Moreover, the City’s contention that the trial court erred by not considering lesser sanctions before excluding Powell’s testimony is unavailing. A trial court need only consider lesser sanctions “that could have advanced the purposes of discovery and yet compensated [the opposing party] for the effects of the . . . discovery failings.” Burnet, 131 Wn.2d at 497. Here, no other course of action by the trial court “could have advanced the purposes of discovery,” as the period for discovery had long since passed. Indeed, as the trial court explained, one such purpose is to permit the parties to rely upon the evidence presented by the discovery deadline—the trial court’s exclusion of Powell’s testimony allowed Jones to do so here. Thus, the trial court’s determination that Powell would not be permitted to testify was consistent with the purposes of discovery. Importantly, unlike the parties in Burnet and Blair, the parties in this case were already in the course of trying this case at the time the trial court was required to rule on the admissibility of Powell’s testimony. The trial court was properly concerned with the prejudice to Jones caused by introducing a new defense witness into the mix even as the presentation of the plaintiff’s case in chief progressed.

The trial court gave an additional reason, beyond that of untimely disclosure, for excluding Powell's testimony—much of that testimony concerned Mark's purported use of alcohol, evidence which the trial court had already determined to be inadmissible. Thus, the exclusion of Powell's testimony was also warranted based upon the trial court's prior ruling excluding alcohol-use evidence. This basis for exclusion is independent of the City's conduct in failing to disclose Powell.

The trial court properly exercised its broad discretion in excluding Powell's testimony. In so ruling, the court relied upon voluminous briefing and extensive oral argument. Moreover, the court judiciously ordered the parties to depose Powell prior to its ruling, such that it could ensure a sound basis for that ruling. Powell's testimony was properly excluded based upon both the late disclosure of Powell as a witness and the content of her expected testimony. The trial court did not err by so ruling.

V

The City similarly contends that the trial court erred by excluding the testimony of Mark's father, Gordon Jones. We disagree.

On September 29, three weeks into trial, the City moved for permission to call Gordon Jones, Mark's father, to testify at trial. Gordon was disclosed in neither the City's list of witnesses nor the parties' joint statement of evidence. Nevertheless, the City asserted that Gordon had been properly disclosed because the City had reserved the right to call witnesses listed on Jones's witness lists, among whom was Gordon. The City further contended that, even if Gordon was not properly disclosed, a showing

of intentional nondisclosure, a willful violation of a court order, or other unconscionable conduct was required in order for the trial court to exclude his testimony.

The City sought permission to admit Gordon's testimony regarding Mark's "status before the incident," the "trajectory of [Mark's] recovery and decline," the "continuity between pre-existing conditions and the injuries and deficits claimed [at trial]," and "the causal role of alcohol in stunting [Mark's] recovery." CP at 4082. Notwithstanding the trial court's order that, subject to the limited exceptions set forth by the court, alcohol evidence would be excluded, much of Gordon's expected testimony concerned Mark's history with alcohol and its relation to his injuries and recovery.

The trial court excluded Gordon's testimony, determining that the City had not shown good cause for the late disclosure and that "the prejudicial effect is dramatic, coming in almost at the end of the plaintiff's case." RP (Sept. 29, 2009) at 25. The court ruled:

I still haven't seen anything that suggests that the analysis I've already given as to the relevance or lack thereof of the alcohol history is changed by this, and this is a witness who is absolutely potentially explosive, and I think that the risks of unfair prejudice, perhaps to the point of a mistrial, are too great to allow that to happen.

RP (Sept. 29, 2009) at 27-28. Thus, the trial court excluded Gordon's testimony because (1) the City had not properly disclosed Gordon and no good cause existed for admission of his testimony notwithstanding the late disclosure, (2) Jones would be prejudiced were Gordon allowed to testify after being disclosed three weeks into trial, and (3) the court's prior order excluding evidence of Mark's consumption of alcohol remained effective.

King County's local court rules provide that "the parties shall exchange, no later than 21 days before the scheduled trial date . . . lists of the witnesses whom each party expects to call at trial." LCR 4(j). Where a party fails to disclose a witness in compliance with the case schedule, that witness "may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires." LCR 26(b)(4). The official comment to LCR 4 provides that "[a]ll witnesses must be listed, including those whom a party plans to call as a rebuttal witness. The *only exception* is for witnesses the need for whose testimony cannot reasonably be anticipated before trial; such witnesses obviously cannot be listed ahead of time." LCR 4 Official Cmt. (emphasis added).

We have previously rejected the contention that the right to call witnesses listed by the opposing party is implicit in King County's local court rules. Allied Fin. Servs., 72 Wn. App. at 167-68. There, the trial court prohibited the Magnums from calling undisclosed witnesses at trial because they had failed to submit a witness list required by a pretrial discovery order. Allied Fin. Servs., 72 Wn. App. at 166. The Magnums asserted on appeal that the right to call witnesses listed by an opposing party is implicit in the local court rule mandating witness disclosure.<sup>8</sup> Allied Fin. Servs., 72 Wn. App. at 167. Relying on the plain language of the rule and on the official comment to that rule—which provided that "[a]ll witnesses must be listed, including those whom a party plans to call as a rebuttal witness"—we held that, in order to call witnesses at trial, a party

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<sup>8</sup> The rule discussed therein was, at the time, LCR 16(a)(3). Allied Fin. Servs., 72 Wn. App. at 167. That provision, using the same language, is currently set forth in LCR 4(j).

must “list ‘any’ and *all* witnesses, including those listed by the opposing party, unless the court orders otherwise for good cause.” Allied Fin. Servs., 72 Wn. App. at 167-68.

Here, the City contends not that the rules implicitly permit it to call witnesses listed by Jones but, instead, that it affirmatively reserved the right to call such witnesses by including boilerplate language to that effect in its own witness disclosures. However, the local court rules do not allow the City to call Gordon as a witness based solely upon such a “reservation of rights.”<sup>9</sup> The only exception to the rule requiring parties to disclose their witnesses is when a party could not reasonably have anticipated needing the witness prior to trial. See LCR 4 Official Cmt. As the trial court here explained, the reason that the City did not timely disclose Gordon as a witness is that “[w]hen [the City] made [its] primary disclosure, [it] had no idea what Gordon Jones would say because [it] hadn’t done the investigation yet.” RP (Oct. 8, 2009) at 215.

Thus, this is not a case in which the City could not have anticipated needing Gordon prior to trial, had it diligently investigated. Moreover, although Jones had listed Gordon in witness disclosures, Jones had discussed with Gordon only Mark’s physical therapy—not Mark’s alcohol use. Nevertheless, the City sought to introduce Gordon’s testimony primarily with regard to Mark’s history of alcohol use. The trial court did not err by refusing to allow the City to rely upon a claimed “reservation of rights” to call a witness listed by Jones where the City sought to introduce testimony of that witness

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<sup>9</sup> Inasmuch as the Allied Financial Services decision had made clear that a party did not have the right to call as a witness a person listed as a witness only by the adverse party, there was no actual “right” to be “reserved” by the inclusion of these boilerplate words. A party cannot “invent” a right under the guise of “reserving” it.

regarding completely different issues than those for which the witness was initially disclosed. Allowing the City to do so, particularly three weeks into trial, would contravene the very purpose of the disclosure rules.

The City additionally contends—as it did with regard to the exclusion of Powell’s testimony—that the trial court erred by excluding Gordon’s testimony without considering the Burnet factors of willfulness, prejudice, and the inadequacy of lesser sanctions. As with Powell, the City sought to introduce Gordon’s testimony primarily with regard to Mark’s purported use of alcohol—as the City described it, Mark’s “status before the incident at issue in this litigation, the trajectory of his recovery and decline, the continuity between pre-existing conditions and the injuries and deficits claimed here, and the causal role of alcohol in stunting his recovery.” CP at 4082. Indeed, Gordon’s declaration, submitted to the trial court, largely concerned the family’s history of alcoholism and resulting familial conflicts unrelated to this litigation. Gordon asserted that “[i]t is no secret that Mark was injured when he fell through the pole hole,” but that he did not know “the extent that those injuries contribute to his current physical and medical issues,” as “some of the issues were there prior.” CP at 4069. The contextual inference is that these purported “issues” were alcohol-related.

Although the parties were three weeks into trial when the City informed the court and Jones that it intended to call Gordon as a witness, the trial court excluded Gordon’s testimony only after oral argument by the parties. The court then thoroughly explained its reasons for excluding Gordon’s testimony. The trial court noted that it was unable to find a published appellate decision regarding disclosure of a witness as late as three

weeks into a trial, "particularly a witness who has such extremely explosive information." RP (Sept. 29, 2009) at 24. The court further noted that "the prejudicial effect" of Gordon's late disclosure was "dramatic, coming in almost at the end of plaintiff's case." RP (Sept. 29, 2009) at 25. Finally, because much of Gordon's expected testimony concerned Mark's use of alcohol, the trial court reiterated its earlier ruling, explaining that it "still [hadn't] seen anything that suggests that the analysis . . . already given as to the relevance or lack thereof of the alcohol history is changed by this." RP (Sept. 29, 2009) at 27. The court concluded that Gordon was a "potentially explosive" witness and that "the risks of unfair prejudice, perhaps to the point of a mistrial, [were] too great" to allow his testimony. RP (Sept. 29, 2009) at 27-28.

The trial court's explanation of its ruling amply demonstrates the court's consideration of the factors set forth in Burnet. As the trial court observed, the City did not earlier disclose Gordon as a witness because "[w]hen [the City] made [its] primary disclosure, [it] had no idea what Gordon . . . would say because [it] hadn't done [its] investigation yet." RP (Oct. 8, 2009) at 215. Indeed, as evidenced by the fact that Jones received physical therapy, which was paid for by the City, from his father,<sup>10</sup> the trial court correctly noted that "[t]he suggestion that the defense did not know anything about Gordon . . . until mid-way through [the] trial is false." CP at 7815. Thus, the City's own intentional failure to investigate resulted in the untimely disclosure.

Moreover, the record is rife with language demonstrating that the trial court found

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<sup>10</sup> Gordon worked as a physical therapist. He billed the City for therapy provided to his son Mark after the fall. The City possessed medical records of these treatments.

the late disclosure to be prejudicial.<sup>11</sup> The trial court described the prejudicial effect as “dramatic,” particularly given the “explosive” nature of Gordon’s expected testimony. As with Powell’s testimony, the prejudicial effect to Jones had the court permitted Gordon’s testimony is evident from the timing of the City’s disclosure: the parties were already three weeks into trial, “almost at the end of the plaintiff’s case.” RP (Sept. 29, 2009) at 25. In addition, the fact that Jones had by that time presented almost the entirety of his case to the jury dictates that no lesser sanction consistent with the purposes of discovery could have sufficed. At that point in the trial, the trial court expressed, the only way that the court could avoid prejudice to Jones—other than exclusion of Gordon’s testimony—was to declare a mistrial, thus enabling the parties to re-open discovery and re-try the entire case.<sup>12</sup> Burnet, wherein the late-disclosed witness was disclosed 18 months before trial, does not mandate such a result. See Burnet, 131 Wn.2d 484.

Notwithstanding the propriety of the trial court’s exclusion of Gordon’s testimony based upon the highly irregular and prejudicial manner in which he was disclosed, the trial court set forth an independent reason for such exclusion—yet again, the majority of the City’s proffered testimony concerned Mark’s alleged alcohol use. As the trial court

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<sup>11</sup> The City contends on appeal that the trial court erred by excluding Gordon’s testimony pursuant to an incorrect application of ER 403. However, the trial court did not exclude that testimony simply because it determined that its probative value was outweighed by its prejudicial value. Rather, the trial court explained, Gordon’s testimony was so highly prejudicial due to the City’s disclosure of Gordon as a witness three weeks into trial—“almost at the end of the plaintiff’s case.” RP (Sept. 29, 2009) at 25. The City’s assertion that the trial court engaged in an incorrect balancing pursuant to ER 403 is unavailing.

<sup>12</sup> The trial court was plainly of the view that no amount of additional discovery or tinkering with a brief continuance could cure the prejudice to this plaintiff three weeks into presenting his case to the jury.

had already ruled multiple times, the City had not demonstrated that evidence of Mark's alcohol use was relevant to this litigation. Moreover, Gordon's testimony in particular was highly "explosive," given that he was expected to testify regarding familial conflicts resulting from Mark's alleged alcohol use. The trial court's exclusion of Gordon's testimony on this alternative basis was itself a proper exercise of that court's discretion.

The trial court did not abuse its broad discretion in excluding the testimony of Gordon Jones, a witness first disclosed by the City three weeks into trial, based upon the numerous grounds for exclusion set forth by the court.

## VI

The City additionally contends that the trial court erred by excluding the September 7 surveillance evidence and the testimony of investigator Rose Winquist. We disagree.

During pretrial discovery, Jones submitted an interrogatory inquiring as to whether the City had hired an investigator. In August 2007, the City responded that it had not done so. The City did not thereafter amend that answer. Then, in January 2008, the City hired investigator Jess Hill. The City first disclosed Hill's existence on June 1, 2009. The City refused, however, to allow for Hill's deposition. Upon Jones's motion to compel discovery, the trial court ordered that the City produce Hill for deposition by August 12, 2009 if it intended to call Hill as a trial witness.

After contentious discussion via e-mail, the parties decided that Hill would be deposed on August 12—the date of the deposition deadline imposed by the trial court's order. However, on the evening of August 11, counsel for the City cancelled the

deposition and informed Jones's counsel that Hill was being stricken as a witness. Just 10 days later, on August 21, the City hired a different investigator, Rose Winqvist, to conduct further surveillance of Mark. The City's witness list filed on August 24 listed neither Hill nor Winqvist.

After confirming that it would not seek to present investigator Hill's testimony, the City first revealed, on September 11, that it had hired a different investigator, when it informed the trial court that it had obtained surveillance photographs of Mark drinking at a tavern on the evening before trial. At that time, however, the City neither disclosed Winqvist by name nor indicated that it intended to call her as a witness. Then, on September 18, in the same "disclosure of rebuttal witnesses" in which Powell was first disclosed as a trial witness, the City for the first time disclosed Winqvist as a witness.

Jones objected, requesting that the trial court strike Winqvist as a late-disclosed witness pursuant to the local court rules. Jones contended that, in light of the City's striking of Hill as a witness to avoid deposition, among other concerns, the nondisclosure was a tactical and willful violation of the court's previous order to allow the deposition of investigator Hill. Jones further asserted that "Plaintiff would be extremely prejudiced by a substitute investigator's testimony without discovery before trial with a chance to launch a counter-investigation and develop opposing witnesses." CP at 3695.

Then, on October 12, just days before the end of trial, the City moved for permission to introduce the September 7 surveillance evidence obtained by Winqvist or, in the alternative, to introduce as evidence Winqvist's testimony. The City's surveillance

evidence consisted of photographs of Mark drinking at a tavern on the evening before trial commenced. The City asserted that the evidence obtained by Winquist “show[ed] a very different Mark Jones than whom the jury saw at trial.” CP at 4277. Indeed, the City contended, the evidence “refute[d] [Mark’s] trial testimony” that he “feels like he’s 80 years old.” CP at 4278. The City contended that the surveillance evidence, which included observations of Mark talking on his cell phone, playing video games, and drinking three Bud Light beers, contradicted Mark’s trial testimony. The City sought to introduce Winquist’s testimony that she had observed Mark at the tavern.

Although Winquist had been disclosed for the first time in the City’s “disclosure of rebuttal witnesses” on September 18, the City contended in its motion that Winquist had been timely disclosed as a witness in its witness lists and in the joint statement of evidence. Jones moved to strike the City’s motion, asserting that it contained false information—namely, that Winquist had been timely disclosed.

At a hearing on the motion, with oral argument, the City admitted that Winquist had not, in fact, been timely disclosed. The trial court again characterized the City’s conduct as “trial by ambush,” noting that Winquist had not previously been disclosed and that the parties were “within days of the end of trial.” RP (Oct. 14, 2009) at 17. The trial court then denied the City’s motion to call Winquist, stating that

certainly if this information had come to light before trial started, preferably before the discovery cutoff, we would be in a completely different situation. . . . But we’re not in that situation. We are in the middle of trial. We’re in fact, within days of the end of trial, thank God, and . . . I can’t imagine a better example, well, there have been a number of examples of trial by ambush in this case, but that would be right up there, and I can’t allow the investigator to testify, so I’m sorry, but that’s my ruling.

RP (Oct. 14, 2009) at 17.

As the City conceded at trial, Winquist was not properly disclosed pursuant to the case schedule. Thus, absent good cause for admitting the testimony notwithstanding this late disclosure, such testimony is properly excluded pursuant to LCR 26(b)(4), which mandates that any person not timely disclosed “may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires.” The City asserts that the “good cause” requiring admission of Winquist’s testimony is the “search for the truth.” However, the City’s assertion that such a search is hindered by exclusion of Winquist’s testimony is without merit, in that the application of such a broad platitude to the “good cause” requirement of the rule would necessarily render the rule itself a nullity. Thus, the trial court properly excluded the surveillance evidence and Winquist’s testimony pursuant to LCR 26(b)(4).

Nevertheless, the City contends that the trial court erred by excluding this evidence without finding both a willful discovery violation by the City and prejudice to Jones’s ability to prepare for trial. As we have explained, to the extent that our Supreme Court’s decision in Blair requires procedural formality in excluding the testimony of late-disclosed witnesses, the trial court here did not err by foregoing such formality in reliance upon our then-controlling decision in Blair. More importantly, in excluding Winquist’s testimony and the related surveillance evidence, the trial court *did* consider the willfulness of the City’s late disclosure, the resulting prejudice to Jones, and the ineffectiveness of other remedies.

As it had many times before, the trial court described the City's conduct with regard to Winquist's disclosure as "an ambush," thus indicating that the City behaved willfully in failing to earlier disclose its investigator: "I can't imagine a better example, well, there have been a number of examples of trial by ambush in this case, but [the late disclosure of Winquist] would be right up there." RP (Oct. 14, 2009) at 17. As with the disclosure of Powell and Gordon, the timing of the disclosure itself—of which the trial court, having overseen the entire litigation, was well aware—created the prejudice to Jones. As the trial court acknowledged, "if this information had come to light before trial started, preferably before the discovery cutoff, we would be in a completely different situation." RP (Oct. 14, 2009) at 17. But, instead, the parties were, as the trial court noted, "within days of the end of trial."

The voluminous record in this case demonstrates that the trial court "perform[ed] the necessary balancing" required by Burnet prior to excluding Winquist's testimony and the related surveillance evidence. See Rhoads, 101 Wn.2d at 535. Moreover, the trial court developed a record more than sufficient to "provide an aid to appellate courts in reviewing the trial court's exercise of discretion." See Rhoads, 101 Wn.2d at 535. As that appellate court, we are not precluded from acknowledging the obvious, and, unlike in Blair, we are not "consider[ing] the facts in the first instance" by doing so. See Blair, 171 Wn.2d at 351. The trial court did not abuse its wide discretion in determining that the City's ambush-like trial tactic—disclosing a witness and surveillance evidence just days before the end of trial—would unduly prejudice Jones's ability to present the case "he had already largely presented" to the jury and, therefore, by excluding such

evidence.<sup>13</sup>

## VII

The City further contends that the trial court erred by denying its CR 59 motion for a new trial. Because the trial court did not abuse its discretion in making the evidentiary rulings upon which the City premised its motion for a new trial, we disagree.

On November 20, the City moved for judgment as a matter of law or, in the alternative, for a new trial. As relevant here, the City contended that a new trial was necessary due to the trial court's exclusion of alcohol-use evidence—including the testimony of Dr. Rudolf, Ann Jones, Powell, and Gordon—and its exclusion of Winquist's surveillance evidence. The trial court denied the City's motion. In a lengthy and considered correspondence ruling, the trial court explained its exclusion of the alcohol-use evidence:

The court has addressed the City's argument that it should have been permitted to present its "alcohol theory" in the record on several occasions. The motion was re-argued multiple times throughout the trial. The court does not believe it was error to exclude this theory in light of the lack of admissible evidence to support it. The City's appellate counsel made assertions at oral argument on this motion that are not supported by the facts. The City never disclosed that Beth Powell would be a witness at trial and literally surprised plaintiff's counsel and the court by flying her in

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<sup>13</sup> The record also indicates that the City's failure to disclose Winquist was part of a larger strategy to prevent Jones from deposing the City's investigators. The City not only failed to timely disclose Winquist—it also prevented Jones from deposing its previous investigator, Jess Hill, by first refusing to allow for his deposition and, then, when the trial court ordered that Hill be deposed, by striking Hill from the City's witness list the evening before the deposition was scheduled to occur.

Just 10 days later, the City hired Winquist. However, the City did not disclose Winquist by name until September 18, four months after the deadline for disclosing witnesses, and only later did it move for permission to introduce the surveillance evidence that she had obtained. Thus, the City appears to have evaded the trial court's order that Hill be provided for deposition by obtaining a different investigator and failing to disclose that investigator until well into trial. The trial court, which was fully apprised of these facts and fully aware of these machinations, did not err by precluding the City from profiting from such tactical maneuvers.

from Montana to testify at a hearing to allow the City to make its offer of proof. I allowed a deposition of Ms. Powell, which revealed that she had very little personal knowledge of Jones' consumption of alcohol. It would have been grossly unfair to the plaintiff to allow an undisclosed witness on a critical subject to testify, when plaintiff would have had no opportunity to undertake its own investigation of Ms. Powell. The defense did not disclose that it would call Gordon Jones, the father, until mid-way through trial. The City has been aware that Jones received physical therapy treatment from his father (paid for by the City) since the outset of this lawsuit; defense counsel questioned Mark Jones and Meg Jones about the father's treatment of Mark at their depositions. The suggestion that the defense did not know anything about Gordon Jones until mid-way through this trial is false. Gordon Jones' knowledge of any alcohol use by Mark Jones since 2007 was not based on his personal knowledge. To have allowed him to testify at that point in the trial about such explosive information would have been unfair to the plaintiff. The exclusion of the City's "alcohol theory" and the court's exclusion of Beth Powell and Gordon Jones as witnesses are not error and do not justify a new trial.

CP at 7814-15. The trial court similarly explained its exclusion of Winquist's surveillance evidence:

The court excluded the City's surveillance evidence, gathered after the trial began, for similar reasons. None of the investigators involved in this surveillance had ever been disclosed. The defense has not shown that it would have been impossible to have undertaken surveillance of Jones before the discovery cutoff, allowing the plaintiff to respond to whatever the investigator turned up and allowing depositions of the investigators. The court did not err when it excluded this evidence.

CP at 7815.

An order denying a new trial will not be reversed absent an abuse of discretion.

Aluminum Co. of Am. v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 537, 998 P.2d 856

(2000). In assessing whether the trial court has abused its discretion, the appellate court asks whether "such a feeling of prejudice [has] been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial[.]" Aluminum Co. of Am.,

140 Wn.2d at 537 (internal quotation marks omitted) (quoting Moore v. Smith, 89 Wn.2d 932, 942, 578 P.2d 26 (1978)).

The City contended in its motion for a new trial that it was “deprived of a valid defense” due to the trial court’s exclusion of alcohol-use evidence. CP at 4915. The City further asserted that the trial court erred by excluding the surveillance evidence of Mark drinking at a tavern on the evening before trial commenced. This, the City argued, showed Mark engaged in “conduct inconsistent with the disabilities he now claims.” CP at 4915.<sup>14</sup>

However, as explained above, the trial court did not err by excluding this evidence. Thus, the trial court similarly did not err by denying the City’s motion for a new trial based upon those evidentiary rulings.

#### VIII

The City finally contends that the trial court erred by denying its CR 60(b) motion to vacate the judgment. We disagree.

On June 25, 2010, the City moved to vacate the trial court’s judgment. The City asserted that vacation of the judgment was warranted due to both newly discovered evidence and fraud or misrepresentation. The City submitted with its motion videotape footage of Mark obtained through posttrial surveillance. In the videotape footage, Mark is engaged in activities such as chopping wood and playing horseshoes—activities that,

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<sup>14</sup> Although, in the trial court, the City asserted multiple grounds for a new trial, we address only those grounds for which the City provides argument on appeal. See RAP 10.3(a)(6); Herring v. Dep’t of Soc. & Health Servs., 81 Wn. App. 1, 13, 914 P.2d 67 (1996) (noting that the appellate court does not review assignments of error not supported by legal argument).

the City asserted, Mark “and his expert witnesses told the jury he was physically incapable of doing.” CP at 8182. The City contended that the surveillance footage “confirm[ed] the City’s position that Mr. Jones misrepresented the facts to the jury and deceived his healthcare providers.” CP at 8184. In asserting that it had exercised reasonable diligence in discovery, the City contended that it was entitled to rely upon Mark’s and Meg’s representations of the extent of Mark’s injuries. Mark’s and Meg’s “systematic efforts to hide from the jury the reality of Mark’s condition,” the City argued, had been “conclusively unmasked by the City’s post-trial surveillance.” CP at 8198.

The City thereafter submitted a supplemental memorandum in support of its motion to vacate. In the memorandum, the City provided the opinions of three doctors who had viewed the surveillance footage—Dr. William Stump and Dr. Roy Clark, two members of the workers’ compensation panel that had previously determined Mark to be totally and permanently disabled, and Dr. Theodore Becker, an expert in biomechanics who had never before appeared in these proceedings. Based upon the surveillance footage, Dr. Stump and Dr. Clark retracted their opinions that Mark is totally and permanently disabled and concluded that, based upon the difference between Mark’s behavior in the videotape and his behavior during the medical examination, his behavior during the examination had been a performance. Dr. Becker concluded that Mark’s “biomechanical functions, including cognitive [and] motor skills, are all within normal limits.” CP at 8238.

Jones opposed the City’s motion to vacate, contending that the surveillance footage neither constituted newly discovered evidence nor demonstrated that Mark had

misrepresented the severity of his injuries. Rather, Jones contended, the “City made a tactical decision to focus on liability and liability experts for its manufactured alcohol withdrawal explanation for the fall while it stopped surveillance and put damages on the back burner until after the City lost its summary judgment motion [on causation] just before trial.” CP at 9265. Moreover, Jones asserted, the jury’s verdict was premised upon the City’s negligence and its impacts upon Mark—not upon a belief that Mark “could never do anything physically.” CP at 9279.

On October 18, 2010, the trial court denied the City’s motion to vacate. The trial court noted that “[t]he jury in this case was not asked to determine whether Mr. Jones is totally disabled, but rather to compare what he has been through, what his life is like now and will likely be in the future with what his life was like before the accident and would likely have been in the future.” CP at 9779. The court determined that the City had not been diligent—indeed, “[t]he City devoted little effort to investigating this case until its third set of lawyers was retained in early 2009,” and, even then, “[t]he City did not focus on Mr. Jones’ damages at all.” CP at 9780. The court ruled that, given the City’s tactical decision “not to undertake any critical evaluation of Mr. Jones’ damages claims,” the City could not “take a second bite of the apple because it failed to make the most of its first.” CP at 9782. The trial court additionally noted that portions of the videotape footage not highlighted by the City showed Mark rocking in a chair for almost an hour as he had at trial and being helped up after falling while walking on the beach. Moreover, the court pointed out, “[n]early all of the medical professionals who testified have submitted declarations indicating that the video did not change their opinions of

Mr. Jones' level of disability." CP at 9784. Thus, the trial court concluded that a new trial was not warranted.

A motion to vacate is "addressed to the sound discretion of the trial court, whose judgment will not be disturbed absent a showing of a clear or manifest abuse of that discretion." Morgan v. Burks, 17 Wn. App. 193, 197, 563 P.2d 1260 (1977). "A court abuses its discretion only when its exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons." Vance v. Offices of Thurston County Comm'rs, 117 Wn. App. 660, 671, 71 P.3d 680 (2003).

The City first asserts that a new trial is warranted based on newly discovered evidence—specifically, the videotape surveillance showing Mark engaged in activities which, the City contends, are inconsistent with Jones's portrayal at trial of Mark's capabilities. A trial court judgment may be vacated based on "[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b)." CR 60(b)(3). The granting of a new trial due to newly discovered evidence is justified where (1) the evidence will likely change the result if a new trial is granted, (2) the evidence was discovered since trial, (3) the evidence could not have been discovered prior to trial by the exercise of diligence, (4) the evidence is material, competent, and otherwise admissible, and (5) the evidence is not merely cumulative or impeaching. Kurtz v. Fels, 63 Wn.2d 871, 874, 389 P.2d 659 (1964). "A mere allegation of diligence is not sufficient; the moving party must state facts that explain why the evidence was not available for trial." Vance, 117 Wn. App. at 671.

In exercising the diligence required in order to obtain a new trial based on newly

discovered evidence, the party seeking a new trial may rely upon the statements of the adverse party where that party, "in clear and unambiguous terms under oath, asserts the existence or nonexistence of a fact." Kurtz, 63 Wn.2d at 875. Thus, in exercising the requisite diligence, that party need not "look behind" the statements of its adversary. Kurtz, 63 Wn.2d at 875. Thus, our Supreme Court has held that a new trial was warranted due to newly discovered evidence where the defendant in a negligence lawsuit discovered posttrial that the plaintiff, who had testified under oath that the automobile collision at issue caused her fainting spells, had actually suffered from such spells prior to the collision. Kurtz, 63 Wn.2d at 872-73. Rejecting the plaintiff's contention that the evidence could have been discovered prior to trial had the defendants been diligent, the Supreme Court held that the defendants had a right to rely on her testimony that she had not suffered from fainting spells before the collision. Kurtz, 63 Wn.2d at 874-75. Similarly, in Praytor v. King County, 69 Wn.2d 637, 419 P.2d 797 (1966), our Supreme Court held that a new trial was warranted where a homeowner, who had relied on the county's testimony that a water catch basin near her residence had a sealed concrete bottom, discovered subsequent to trial that the catch basin did not have such a bottom. The homeowner was entitled to rely upon the county's assurances and, thus, was not required, in the exercise of reasonable diligence, to look behind those assurances. Praytor, 69 Wn.2d at 640.

Relying on our Supreme Court's decisions in Kurtz and Praytor, the City contends that it exercised the diligence necessary to obtain a new trial due to newly discovered evidence. The City asserts that it was not required to "look behind

representations made by [Jones]" regarding Mark's physical condition in order to exercise such diligence. CP at 8195-96. The City does not demonstrate, however, that Jones "in clear and unambiguous terms under oath, assert[ed] the existence or nonexistence of a fact" upon which the City relied. Kurtz, 63 Wn.2d at 875. Instead, the City takes out of context Jones's and Dr. Andrew Friedman's descriptions of Mark's recovery as "remarkable," and asserts that Jones was dishonest in failing to disclose Mark's "remarkable physical recovery" prior to trial. That Mark underwent such a "remarkable recovery," the City argues, contradicts Jones's portrayal of his condition during discovery and trial.

The trial court was not moved by the City's contention; nor are we. In opposition to the City's motion to vacate, Jones did, indeed, describe Mark's recovery as "remarkable":

[Mark's] objective injuries included: four broken vertebrae, 10 broken ribs, including one that had to be removed surgically, a punctured lung that became infected and required surgery to remove dead tissue and infection, multiple fractures to his pelvis, a ruptured bladder, lacerated liver, and diffuse bleeding throughout his brain. While Mark still suffers chronic pain and will for the rest of his life, *he made a remarkable physical recovery* that allows him to do most normal activities on his good days, despite his chronic pain.

CP at 8304-05 (emphasis added). Similarly, Dr. Friedman stated that "Mark made in many ways a remarkable recovery physically and he is to be applauded for the great effort it took to achieve what he did. However, he was not able to get back to his former pre-injury status." CP at 8365. However, nowhere does Jones state, contrary to the City's suggestion, that Mark's "remarkable physical recovery" explains the

discrepancy—perceived by the City—between Jones’s representation of Mark’s condition and that portrayed in the posttrial surveillance video. The City misrepresents the record when it chides Jones for “fail[ing] to disclose” Mark’s “remarkable physical recovery.” Appellant’s Br. at 62.

Moreover, the City nowhere convincingly alleges how the videotape footage contradicts Jones’s representation of Mark’s physical condition. As the trial court noted, by the time of trial, the City was aware that Mark was able to hunt, fish, and play horseshoes, but the City neither inquired further about such activities nor elicited such information before the jury. In determining that the City did not exercise the requisite diligence to justify the grant of a new trial, the trial court further noted that the City (1) devoted little effort to investigating the case until its third set of lawyers were retained and, even then, did not focus at all on Jones’s damages, (2) failed to depose any of Mark’s friends with whom he was spending time following his fall, and (3) did not seek to have Mark examined by a medical doctor, which it was entitled to do pursuant to CR 35. “Trial courts have a wide discretion in granting or refusing new trials and the refusal to grant a new trial will not be disturbed unless the court abused its discretion.” Danz v. Shyvers, 48 Wn.2d 319, 326, 293 P.2d 772 (1956). The trial court here acted well within its broad discretion in determining that the City had failed to exercise diligence and, thus, was not entitled to a new trial based on newly discovered evidence.

The City also asserted that a new trial was warranted due to fraud,

misrepresentation, or other misconduct. See CR 60(b)(4).<sup>15</sup> Relief from a judgment pursuant to CR 60(b)(4) is warranted only where the fraudulent conduct or misrepresentation caused the entry of the judgment “such that the losing party was prevented from fully and fairly presenting its case or defense.” Lindgren v. Lindgren, 58 Wn. App. 588, 596, 794 P.2d 526 (1990) (citing Peoples State Bank v. Hickey, 55 Wn. App. 367, 372, 777 P.2d 1056 (1989)). The moving party “must establish the fraud, misrepresentation, or other misconduct by clear and convincing evidence.” Lindgren, 58 Wn. App. at 596. When reviewing an order denying a motion to vacate pursuant to CR 60(b)(4), the appellate court’s review “is limited to determining whether the evidence shows that fraud, misrepresentation, or misconduct was ‘highly probable.’” Dalton v. State, 130 Wn. App. 653, 666, 124 P.3d 305 (2005) (quoting In re Marriage of Schweitzer, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997)). “We review a trial court’s decision to deny a new trial for an abuse of discretion based on ‘the oft repeated observation that the trial judge,’ having ‘seen and heard’ the proceedings, ‘is in a better position to evaluate and adjudge than can we from a cold, printed record.’” Perez-Valdez, 172 Wn.2d at 819 (internal quotation marks omitted) (quoting State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)).

The City asserted in its motion to vacate that “the surveillance videotape constitutes clear and convincing evidence that the judgment was procured by misrepresentation and other misconduct.” CP at 8202. In so asserting, the City relies

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<sup>15</sup> CR 60(b)(4) provides that a trial court judgment may be vacated due to “[f]raud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.”

upon the opinions of Dr. Stump and Dr. Clark, who, after viewing the surveillance videotape footage, concluded that Mark's behavior during his medical examination must have been a performance, and the opinion of Dr. Becker, who stated, based upon that same videotape footage, that Mark's biomechanical functions are "all within normal limits."

However, as the trial court noted, "[n]early all of the medical professionals who testified . . . submitted declarations indicating that the video did not change their opinions of Mr. Jones' level of disability." CP at 9784. After viewing the surveillance footage, Dr. Friedman stated that "[t]here is simply nothing in the video inconsistent with what Meg and Mark have presented to me or what I concluded about Mark or what I testified to about Mark's injuries." CP at 8356. Similarly, Dr. Peter Esselman concluded that "[t]here is nothing shown in this video that makes me change my opinion that [Mark] continues to have a total disability and is unable to work in any capacity at this time." CP at 8824. Thus, Mark's treating physicians concluded that the surveillance footage was consistent both with their own testimony at trial and with Jones's representation of Mark's abilities. Such a conclusion is also supported by the objective medical evidence, including the hypertrophy of Mark's muscles in his right shoulder, Mark's reduced lung capacity, and psychological testing indicating that Mark was portraying his condition accurately and putting forth optimal effort during medical testing. Due to this evidence, the trial court was "not persuaded that Mr. Jones was able to fool all of these medical professionals for a period of years." CP at 9785.

In order to obtain vacation of the trial court's judgment pursuant to CR 60(b)(4),

the City was required to prove *by clear and convincing evidence* that the judgment was procured by fraud, misrepresentation, or misconduct. Lindgren, 58 Wn. App. at 596. The City may be correct that the posttrial opinions of Dr. Stump and Dr. Clark create “a conflict in the medical expert opinions that did not exist at the trial.” Appellant’s Br. at 76. However, this is not a summary judgment proceeding in which the existence of a factual dispute mandates a future fact-finding proceeding. Rather, this is a motion for a vacation of judgment, premised upon an allegation of fraud. Thus, it was for the trial court, which had endured six weeks of trial, to determine whether this evidence, when balanced against that of Mark’s treating physicians, demonstrated *by clear and convincing evidence* that the judgment had been procured by fraud, misrepresentation, or misconduct. The trial court, applying this burden of proof, concluded that it did not. Sufficient evidence supports this trial court determination. The trial court did not abuse its discretion by denying the City’s motion to vacate the judgment.<sup>16</sup>

Affirmed.

Dunne, C.J.

We concur:

Leach, J.

George

<sup>16</sup> The City additionally asserts that it was denied a fair trial due to the purportedly misleading nature of Jones’s discovery responses and, therefore, that it is entitled to a new trial on all issues, including causation. However, as we noted above, notwithstanding the City’s allegations of discovery misconduct by Jones, the City never sought a trial court ruling that any particular discovery response by Jones was improper. Without a trial court finding addressing Jones’s allegedly improper discovery responses, we have no ruling to review. To the extent that the City challenges the content of Jones’s discovery responses, the trial court addressed this in its rulings, which we have reviewed throughout this opinion.

# **APPENDIX B**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

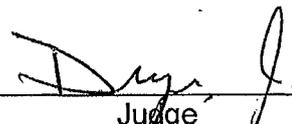
MARGIE (MEG) JONES, as Guardian of Mark Jones,	)	DIVISION ONE
	)	
Respondent,	)	No. 65062-9-1
	)	(Consol. with No. 66161-2-1)
v.	)	
	)	ORDER DENYING
CITY OF SEATTLE,	)	APPELLANT'S MOTION FOR
	)	RECONSIDERATION
Appellant.	)	
_____	)	

The appellant, City of Seattle, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 24<sup>th</sup> day of April, 2012.

FOR THE COURT:

  
\_\_\_\_\_  
Judge

**FILED**  
COURT OF APPEALS  
DIVISION ONE  
APR - 4 2012

# **APPENDIX**

**C**

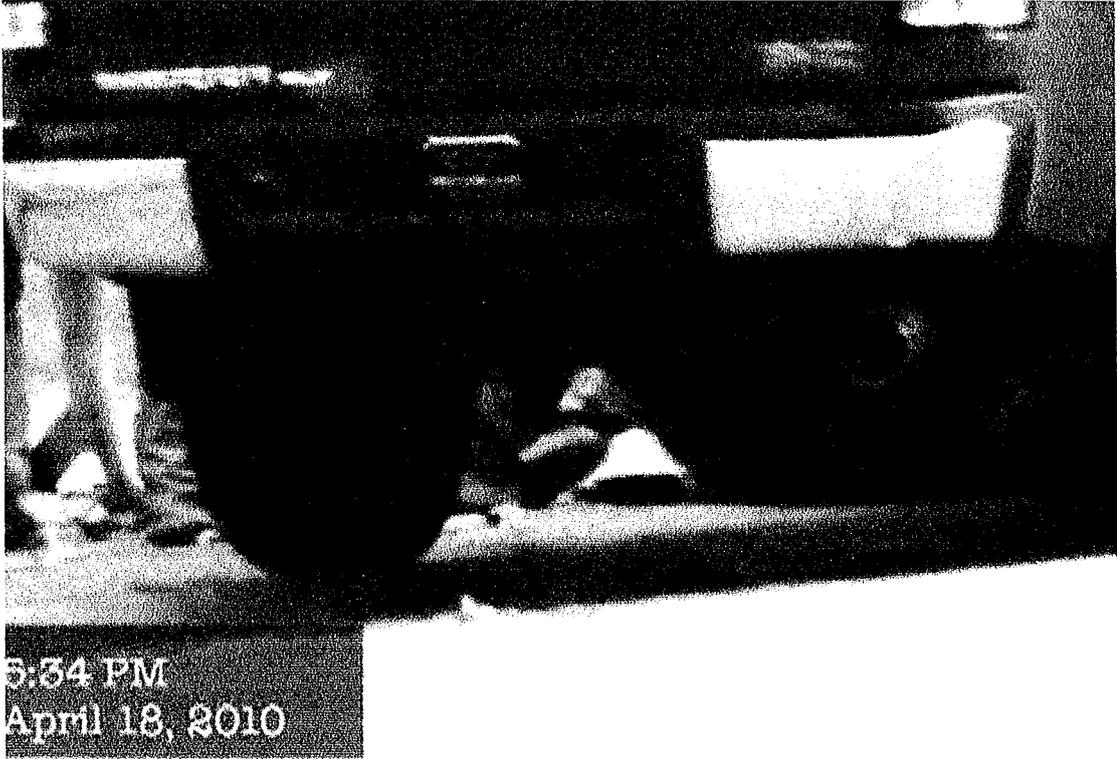
This Appendix was created by taking “screen shots” from the surveillance video, and organizing those shots by topic. The City has provided date and time stamp information, so the Court may locate each image on the surveillance video.

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

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7.	Carries cooler and charcoal and red mug. ....	6
8.	Organizes camp site. ....	7
9.	Talks on a cell phone while carrying logs ....	7
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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



1. Works on truck.



2. Shops at Costco.



3. Shops at Mini Mart.

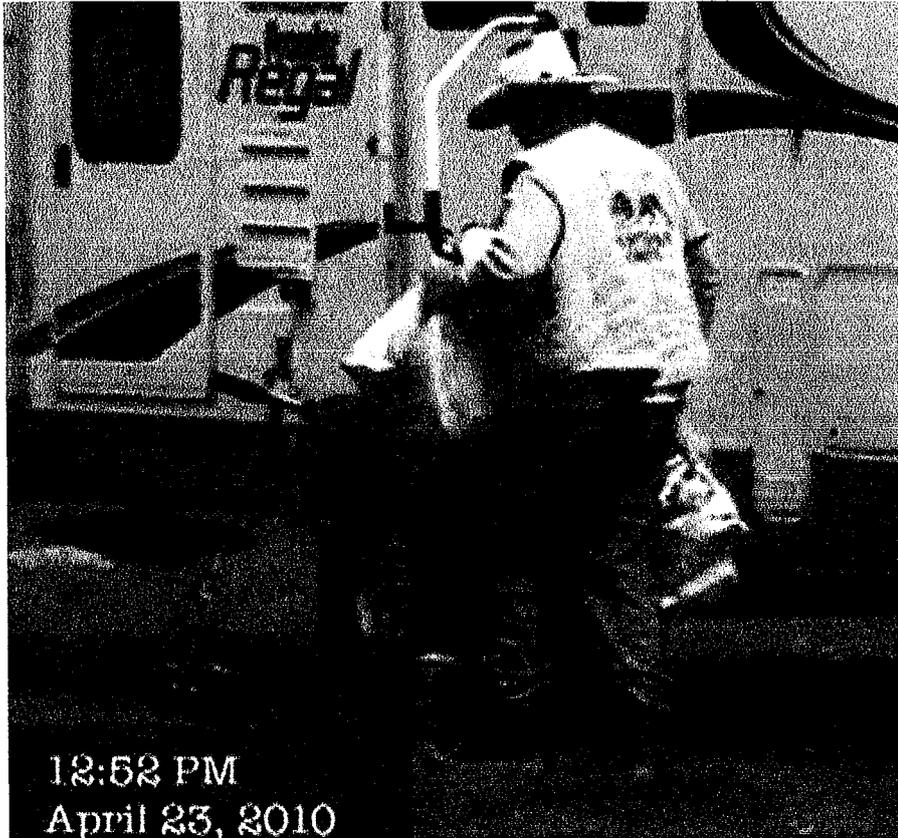
April 22, 2010 4:25 PM



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



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



12:52 PM  
April 23, 2010

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



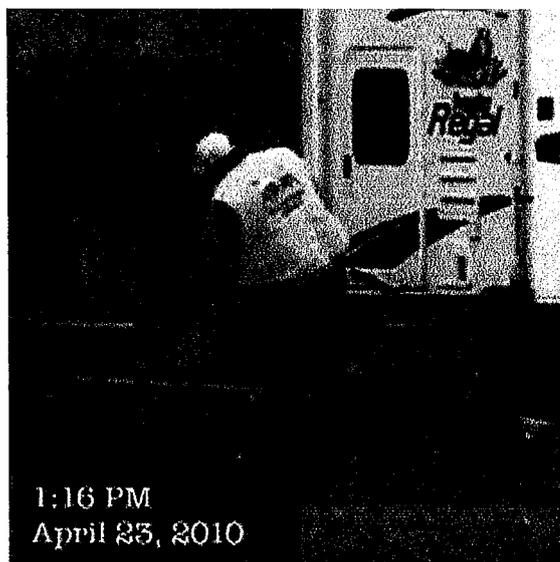
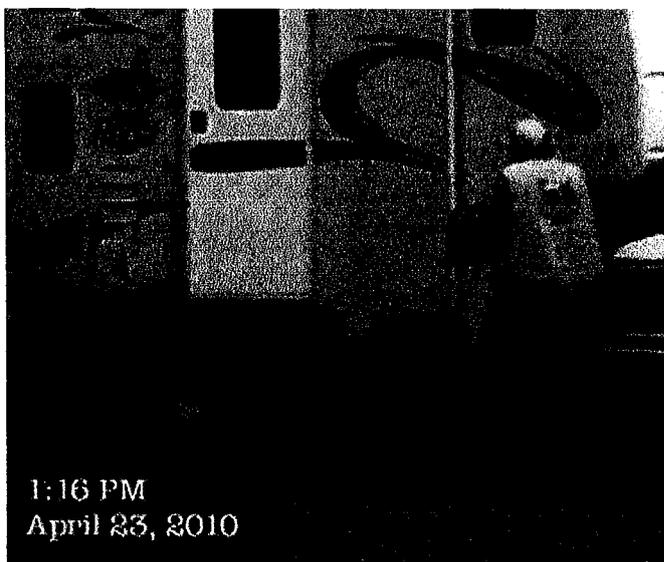
7:09 PM  
April 23, 2010

7. Carries cooler and charcoal and red mug.

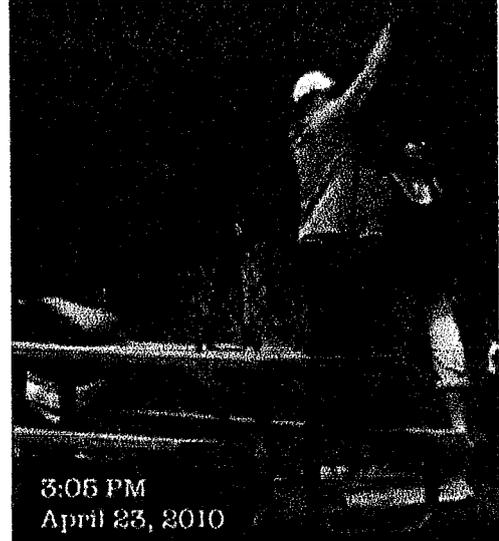


8. Organizes camp site.

April 23, 2010 1:06 PM



9. Talks on a cell phone while carrying logs

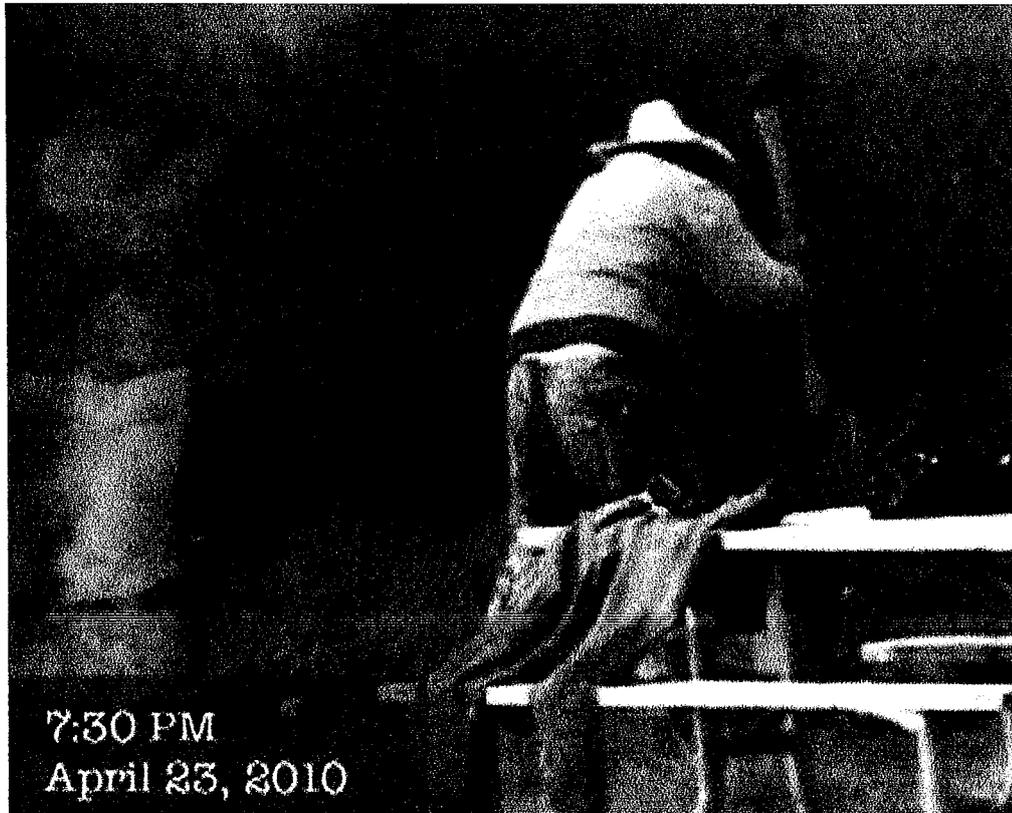


10. Plays Bocce Ball with companion.



11. Starts fire in fire pit.

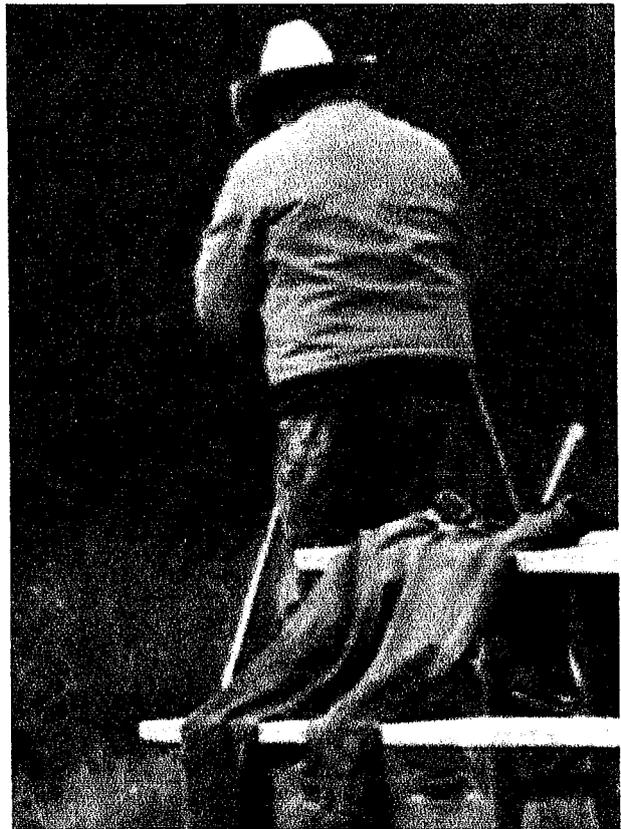
April 23, 2010 7:29 PM



12. Chops wood and adds to the fire.



April 23, 2010 7:37 PM



April 23, 2010 7:38 PM

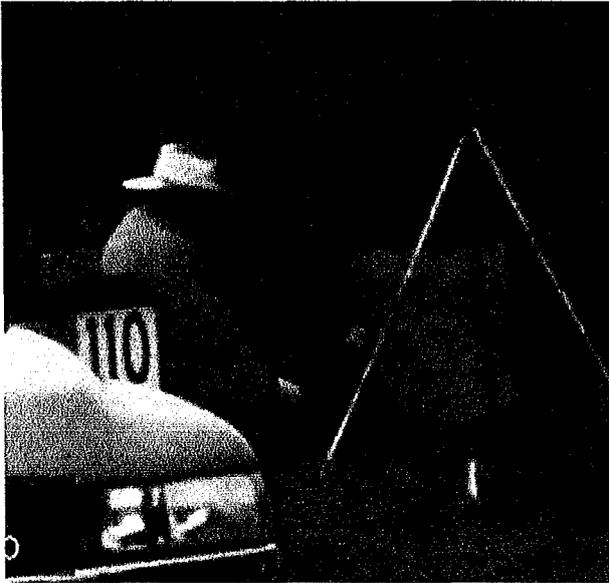


April 23, 2010 8:07 PM

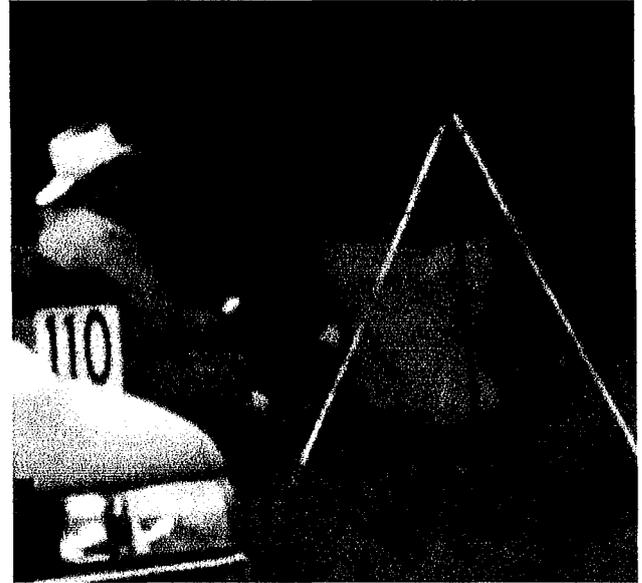


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13. Sets up tripod over fire and cooks meal.



April 23, 2010 8:19 PM



April 23, 2010 8:23 PM

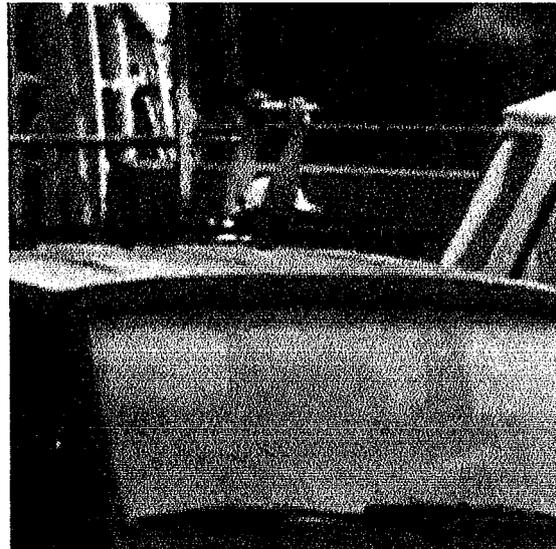


14. Texts on cell phone while talking to son.

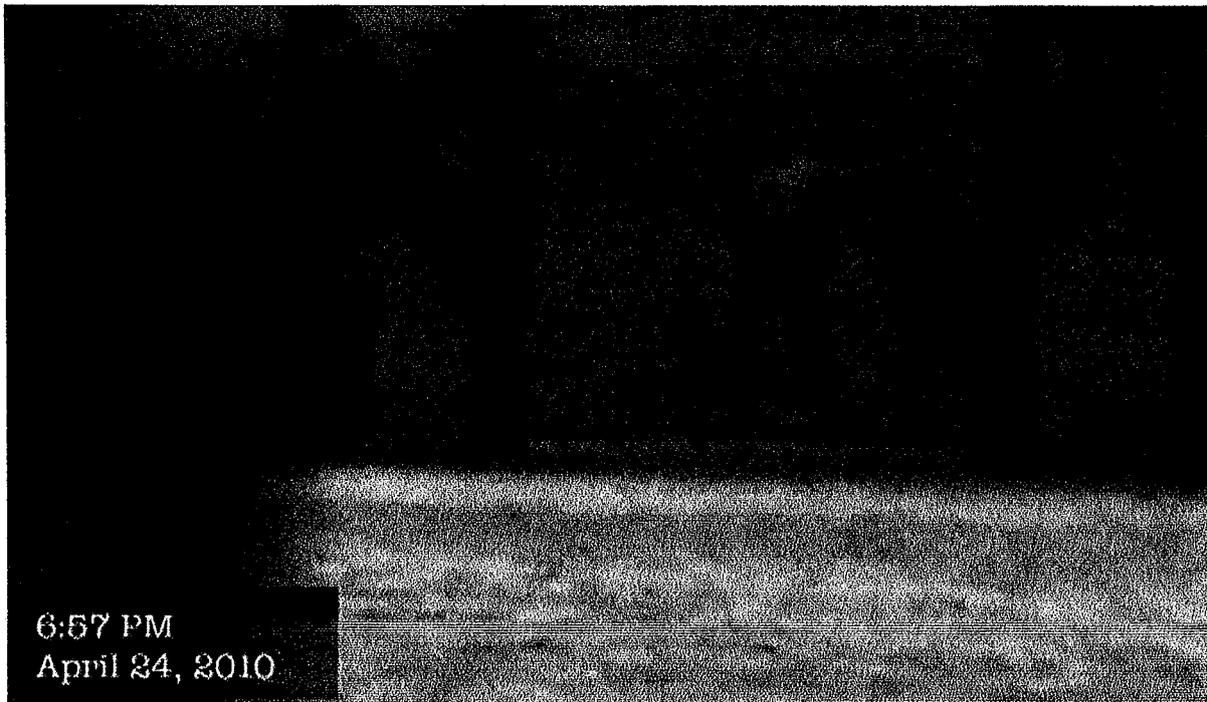
April 23, 2010 8:23 PM



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



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.

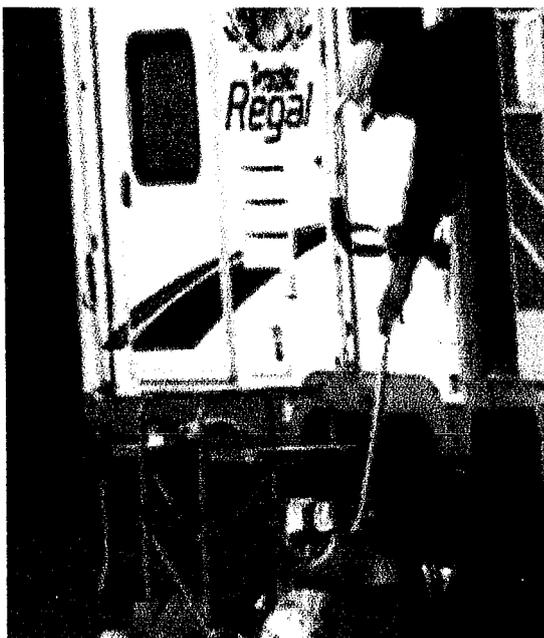


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April 24, 2010 5:56 PM

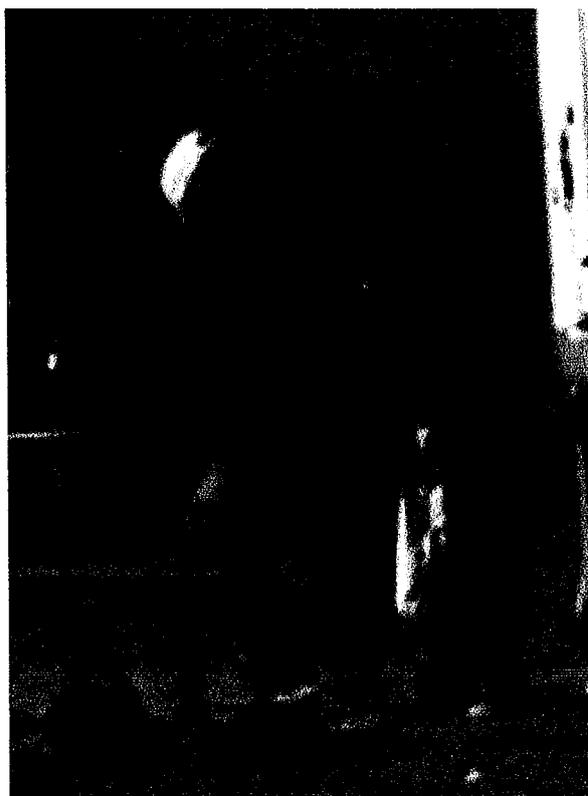
22. Replaces windshield wipers and while talking to companion.



April 24, 2010 5:20 PM



April 24, 2010 5:21 PM

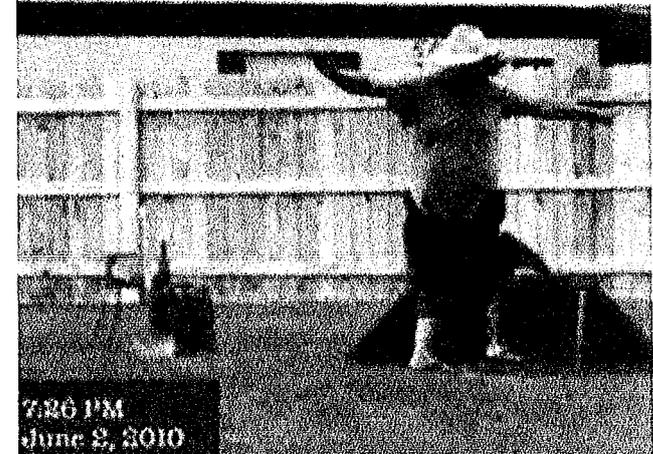


April 24, 2010 5:21 PM

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



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.

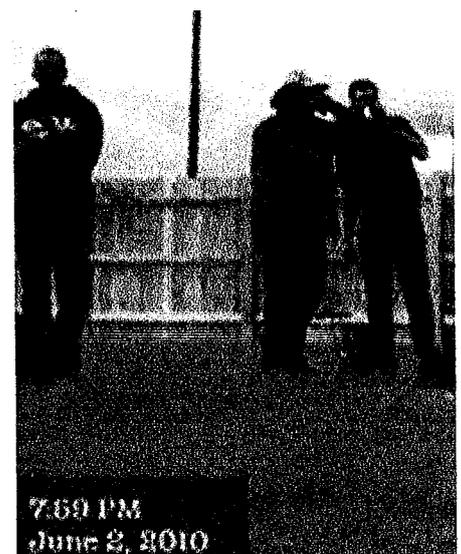
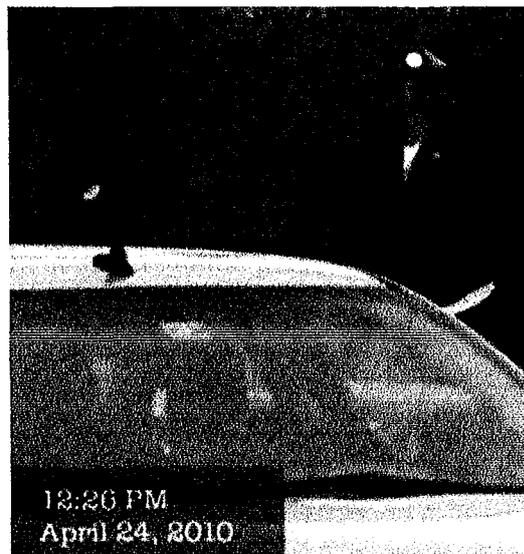
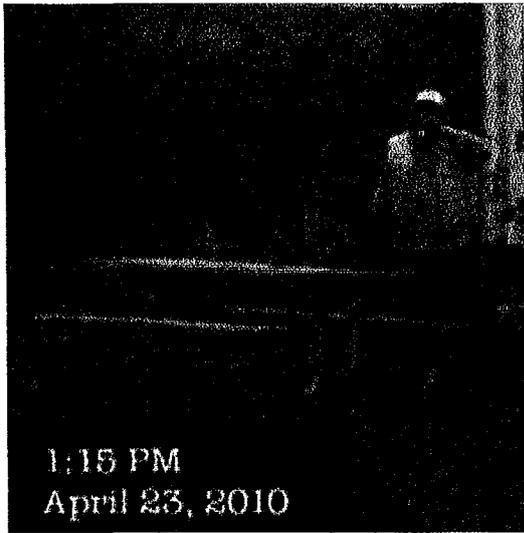


3:15 PM  
April 24, 2010



April 24, 2010 3:21 PM

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



28. Drinking.