NO. 89636-4

SUPREME COURT OF THE STATE OF WASHINGTON

FIKRETA CUTUK and SEJFUDIN CUTUK,

Petitioner,

v.

JEFFREY F. BRAY, M.D.,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDING PARTY

Respondent Jeffrey F. Bray, M.D., asks the Court to deny the Cutuks' petition for review.

II. COURT OF APPEALS DECISION

The Court of Appeals, in its October 28, 2013 unpublished decision, affirmed the trial court's order granting Dr. Bray a new trial in this medical malpractice action based on juror misconduct in looking up and injecting into deliberations a dictionary of negligence. The Court of Appeals concluded that the trial court "correctly resolved all doubts about the demonstrated misconduct in favor of granting a new trial" and "did not abuse its discretion by resolving the request for a new trial without an evidentiary hearing after receiving conflicting evidence of misconduct." *Slip Op. at 12-13.*

III. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court properly make a factual finding, based on juror declarations and without conducting an evidentiary hearing, that a juror looked up the definition of negligence in a dictionary and discussed that definition with other jurors in deliberations?

2. Was it tenable, and thus within the discretion vested in him, for the trial court to conclude that he had at least some doubt as to whether the misconduct of the juror in looking up a dictionary definition of

negligence and discussing that definition with other jurors during deliberations affected the verdict in favor of the Cutuks in this obstetrical malpractice lawsuit so as to warrant the grant of Dr. Bray's motion for new trial under CR 59(a)(2) and *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 750 P.2d 1257 (1988)?

IV. COUNTERSTATEMENT OF THE CASE

The Court of Appeals' unpublished decision adequately relates the facts. The salient facts are as follows.

In this medical malpractice lawsuit, the trial court, Judge Ronald L. Castleberry, instructed the jury that Dr. Bray could be found negligent only if the Cutuks proved that he failed to exercise "the degree of skill, care and learning expected of a reasonably prudent obstetrician/gynecologist in the state of Washington acting in the same or similar circumstances at the time of the care or treatment in question." CP 199 (WPI (Civ.) 105.02). He had also admonished the jurors not to consult dictionaries. CP 179; *Cutuks' App. Br. at 7.* Nonetheless, no fewer than four jurors, Juror Lang, CP 168, ¶6, Juror Jones, CP 170-71, ¶5, Juror Satterwhite (the foreperson), CP 141, ¶5, and Juror Wiebusch, CP 107, swore unequivocally that a juror injected a purported dictionary definition of negligence into deliberations. The jury returned a 10-2 verdict for the Cutuks. CP 224. Jurors Lang and Jones were the two dissenting jurors. CP 167 (¶3),

170 (¶3), 224. Jurors Satterwhite and Wiebusch thus had voted for the verdict.

Other jurors who signed declarations were more equivocal, stating essentially that they did not recall hearing a dictionary definition of negligence being discussed. Juror Occhiuto swore that, to the best of his recollection, the jury had discussed only the court's definition, but acknowledged that a juror had said "he would, or did" look up negligence in a dictionary. CP 111-12. Juror Thompson, CP 109, and Juror Mertens, CP 120, swore that they did not remember hearing a dictionary definition discussed, although Mertens acknowledged that a wish to be able to consult a dictionary was expressed during deliberations. Juror Klamp acknowledged that the jury had been "struggling with 'negligence'," but swore that a dictionary definition of negligence had not been discussed "[a]s far as I can recall." CP 114.[1]

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

There was no irregularity in the rulings of either court below. The Cutuks do not claim, nor could they, that the Court of Appeals'

[1] Juror Patzer, in a kind of non-denial denial, stated: I do not agree ... that any juror reported during deliberations that he or she had looked up a definition of negligence in a dictionary at home or online, or reported that definition to the jury. I never heard any juror do any such thing. ... I did not do [that and] I did not tell the other jurors about any dictionary definition of negligence .... If ... I said something that led another juror to believe I had, or said I had, looked up the definition of negligence at home or online, that juror is mistaken or I may have chosen my words poorly. Again I did not look up the definition of negligence in a dictionary, online, or any other source, nor did I mean to convey that I had to any other juror and I don't believe that I did." CP 124-25.

unpublished decision is in conflict with any decision of this Court or of the Court of Appeals so as to warrant review under RAP 13.4(b)(1) or (2). No constitutional question is involved so as to warrant review under RAP 13.4(b)(3). Nor, contrary to the Cutuks' assertions, does the Court of Appeals straightforward decision raise any issue of substantial public interest that should be determined by this Court so as to warrant review under RAP 13.4(b)(4).

A. Whether Reviewed for Abuse of Discretion or *De Novo*, the Trial Court's Finding that the Alleged Juror Misconduct Occurred is Amply Supported by the Juror Declarations.

Generally, appellate courts review rulings on motions for new trial for abuse of discretion, unless the ruling is predicated on an error of law. *Teter v. Deck*, 174 Wn.2d 207, 215, 274 P.3d 336 (2012), *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 158, 776 P.2d 676 (1989). But, "because the denial of a new trial 'concludes [the parties'] rights,'" *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997) (quoting *Baxter v. Greyhound Corp.*, 65 Wn.2d 421, 437, 397 P.2d 857 (1964)), appellate courts require "a much stronger showing of abuse of discretion to set aside an order granting a new trial than one denying a new trial," *Teter*, 174 Wn.2d at 215 (citation omitted).

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons, and a

decision to grant a new trial is manifestly unreasonable if it is "'outside the range of acceptable choices, given the facts and the applicable legal standard.'" *Teter*, 174 Wn.2d at 215 (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)).

A trial court's findings of fact are reviewed to determine whether they are supported by substantial evidence. *Robinson*, 113 Wn.2d at 157. "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Id.* at 158 (quoting *Holland v. Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978)).

According to *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 271, 796 P.2d 737 (1990), *rev. denied*, 116 Wn.2d 1014 (1991), "[w]hether the alleged misconduct exists, whether it is prejudicial and whether a mistrial is declared are all matters for the discretion of the trial court." But, because "appellate courts are in as a good a position as trial courts to review written submissions," they may review *de novo* trial court decisions that are based solely on affidavits and other documentary evidence. *See McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 759, 260 P.3d 967 (2011), *rev. denied*, 173 Wn.2d 1029 (2012); *Indigo Real Estate Servs., Inc. v. Wadsworth*, 169 Wn. App. 412, 417, 280 P.3d 506 (2012).

Thus, the Cutuks argue, *Pet. at 9-13*, that the *de novo* standard of review should apply to a trial court's determination that juror misconduct

occurred when affidavits alleging misconduct are in conflict, as if it might make a difference in this case.[2] But, even if reviewed *de novo*, Judge Castleberry's finding that jurors discussed a definition of "negligence" that one of them attributed to a dictionary is amply supported by the juror declarations and withstands *de novo* review.

It is undisputed that jurors in this case had been admonished not to look up terms in dictionaries. No fewer than four jurors, two of whom had voted for the Cutuks, nonetheless swore in post-trial declarations that a juror had reported looking up the definition of "negligence" in a dictionary and relating it to at least some other jurors during deliberations. Although other jurors swore they could not remember such a discussion, no other juror directly contradicted those four jurors, and no evidence was offered to prove or suggest that the four jurors were biased or corrupt or had difficulty hearing or understanding what had been said. Nor was any evidence offered to explain how those four jurors might have been mistaken about having heard another juror report having looked up a dictionary definition of "negligence," and then discussing that definition with some jurors during deliberations.

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[2] The Cutuks have never disputed that "consultation of a dictionary by the jury is misconduct," *see App. Br. at 12 n.3*, or that the question whether such misconduct, if it occurred, was prejudicial is to be reviewed for abuse of discretion, see *App. Br. at 12*.

B. Contrary to the Cutuks' Assertions, the Juror Declarations Were Not Sharply Conflicting and the Trial Court Was Not Obliged to Conduct an Evidentiary Hearing Before Deciding that the Declarations Established that Juror Misconduct Had Occurred.

CR 59(a)(2) authorizes misconduct on the part of a juror to be proved "by the affidavits of one or more of the jurors." GR 13(a) allows use of a declaration when an affidavit is required or permitted.

Contrary to the Cutuks' assertions, the post-verdict juror declarations in this case did not feature "sharp factual inconsistencies," *Pet. at 3*, and were not "sharply in conflict with each other," *Pet. at 14,* and the court did not have to "completely reject half of the declarations to arrive at its finding that the misconduct occurred," *Pet. at 9.* Because it is a near impossibility that any definition of negligence that a juror professed to have obtained from a dictionary was the same as the one in Court's Instruction No. 8, CP 199 and WPI (Civ.) 105.02, the trial judge had a tenable reason for doubting that deliberations were unaffected or a fair trial was had, obligating him to grant Dr. Bray a new trial. *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 137, 750 P.2d 1257 (1988).

An evidentiary hearing was not required and would not likely have resolved a "conflict" among juror recollections in the Cutuks' favor. As the trial court noted, "[i]t doesn't surprise me that there is not a total unanimity that all 12 don't come in and say, 'Yeah, we heard a definition

of negligence as reported by one of the jurors.'" CP 35. That no juror admitted to misconduct, *see Pet. at 3*, is not a reason to suspect that Jurors Lang, Jones, and Satterwhite lied, or all mistakenly thought they had heard a fellow juror relate a dictionary definition of negligence, or were brainwashed by Dr. Bray's "investigating team" (as the Cutuks speculate might have happened, *Pet. at 12*). Nor is there reason to suppose an evidentiary hearing would have either yielded a confession or persuaded the trial court that four jurors, including two who had voted for the plaintiffs' verdict, had made up or misremembered what their declarations reported they had heard. Even if Judge Castleberry should have discounted the declarations of Jurors Lang, Jones, and Satterwhite as fabrications because Dr. Bray's "investigating team" obtained them, it was *the Cutuks'* "investigating team" that obtained Juror Wiebusch's declaration, and his recollection matched that of Jurors Lang, Jones and Satterwhite:

> I recall that on the beginning of the last day Juror Number 5, Jerry, stated that he had looked up the definition of negligence in a dictionary the previous evening. I do not recall what that definition was. It was discussed briefly by a couple of jurors.

CP 107. And, although Juror Occhiuto (whose declaration the Cutuks' team obtained) swore that, to the best of his recollection, "there was never a conversation amongst us jurors of any definition of negligence other than the definition provided by the court," he also acknowledged that

"[t]here was a juror who said he would, or did, look up the word in a dictionary." CP 112.

The Cutuks cite no Washington decision reversing the grant of a new trial for juror misconduct because of a trial judge's failure to summon a panel of former jurors back to court to be examined under oath in an evidentiary hearing. There are no such decisions, and the Cutuks concede that they cannot show a conflict between the Court of Appeals' unpublished decision in this case and any other published decision. The Court of Appeals' decision thus is not one that deals with any aspect Washington law governing new trials based on juror misconduct so in need of clarification as to call for review under RAP 13.4(b)(4).

Washington law vests substantial discretion in trial judges hearing CR 59(a)(2) motions. Appellate courts give even more deference to trial court decisions to grant new trials than to rulings that deny new trials, *Teter*, 174 Wn.2d at 215, the reason being that a "the denial of a new trial 'concludes [the parties'] rights.'" *Palmer v. Jensen*, 132 Wn.2d at 197 (quoting *Baxter*, 65 Wn.2d at 437). This case involves a ruling granting a new trial, leaving the parties' rights unconcluded and affording the Cutuks the chance of persuading a new panel of jurors whose deliberations are not tainted by a member's misconduct. The Cutuks fail to propose a new, clarifying rule that would both reverse the order granting new trial in this

case and provide meaningful guidance for trial judges in other cases. The Court of Appeals so recognized, wisely rejecting what it accurately characterized as the Cutuks' argument: that "if one side disputes the allegations [in a post-verdict juror declaration – or even four such declarations, as in this case], then the court must conduct an evidentiary hearing to resolve the dispute."

Of the numerous decisions cited in the Cutuks' petition, just two are ones in which Washington courts have faulted trial court judges for not holding evidentiary hearings.[3] Both reversed rulings on motions to vacate judgments, but not for any reason involving juror misconduct. In *Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936 (1994), a trial court was reversed for failing to hold an evidentiary hearing before denying a motion to set aside a default judgment, where the defendant had submitted three affidavits controverting an affidavit of in-person service of process upon him. Reasoning that the affidavits presented "an issue of fact which can only be resolved by determining the credibility of the witnesses," the Court of Appeals reversed. But the ruling that *Woodruff* reversed is one that concluded the parties' rights, and thus is not one that

[3] The Cutuks cite, *Pet. at 10-11*, a number of federal court evidentiary-hearing decisions. Federal decisions are sometimes consulted by Washington appellate courts when issues concern court rules modeled on a federal rule of civil procedure. There is, however, no federal counterpart to CR 59(a)(2), *i.e.*, a rule expressly allowing juror misconduct to be shown by declaration. The federal decisions the Cutuks cite thus are not instructive.

is analogous to a ruling granting a new trial.

In *Marriage of Maddix*, 41 Wn. App. 248, 703 P.2d 1062 (1985), the trial court vacated part of a marital dissolution decree based on one spouse's affidavit alleging fraud by the other in procuring the decree, which the other spouse's affidavit controverted. The case was remanded for an evidentiary hearing. *Marriage of Maddix* is not like this case. It presented a pure one-against-one swearing contest with, apparently, no evidence corroborating or impeaching either spouse's testimony, such that whom to believe depended on hearing from and observing both.

Here, four jurors swore to the same thing; no other jurors directly contradicted them; and other jurors gave testimony tending to confirm that references to a dictionary were made in deliberations. Even if it could be said that a question of whether a "sharp conflict" between or among juror declarations should mandate summoning twelve former jurors back for interrogation before granting a motion for new trial was one of substantial public interest, this case is not an appropriate one to address that question because no "sharp conflict," much less resolvable only by the weighing of credibility at an evidentiary hearing, is presented.

The Cutuks argue this case is like *McCoy*, 163 Wn. App. 744, and *Tarabochia v. Johnson Line, Inc.*, 73 Wn.2d 751, 440 P.2d 187 (1968), which reversed orders granting new trials. Neither decision is on point or

instructive because neither involved jurors obtaining information extrinsic to a trial despite having been instructed not to do so, and neither addressed trial courts' obligations to hold post-verdict evidentiary hearings.

In *McCoy*, two jurors allegedly had failed to disclose in voir dire certain information about their background or experience that they subsequently cited and discussed during deliberations. As the *McCoy* court noted, because it is not misconduct for a juror to cite personal experience in deliberations, juror statements during deliberations about personal background or experience may not be considered on a motion for new trial *unless* the experience stems from a background that the juror, during voir dire, falsely denied or failed to disclose despite being called upon to do so.[4] In *McCoy*, voir dire had not been reported, precluding a finding that the experiences the two jurors invoked during deliberations were ones they had concealed in void dire. *McCoy* did not involve juror disobedience of an explicit court instruction not to consult a dictionary for a definition of a word of central importance and of which the court's instructions provided the operative definition.

Tarabochia, according to the Cutuks, *Pet. at 20*, is an example of a

[4] *McCoy*, 163 Wn. App. at 761 (quoting *Richards*, 59 Wn. App. at 274) ("whether a juror's interjection of specialized knowledge 'outside the realm of a typical juror's general life experience' into deliberations constitutes prejudicial misconduct depends on the questions asked during voir dire; a juror does not commit misconduct by bringing knowledge and experiences known to the parties into deliberations."

decision reversing the grant of a new trial and reinstating a jury verdict "where there was no showing that new material facts were discovered by the jury that could have influenced the jury." *Tarabochia,* however, is not at all like this case. It was a slip-and-fall case. The court held that "new information" that the losing party claimed the jury had obtained had not been extrinsic to the trial; rather, the jury had simply sought to confirm testimony that wet crystalline urea is slippery by experimenting with crystalline urea and shoes that were admitted in evidence and present in the jury room for deliberations.

C. The Court of Appeals Correctly Determined that the Trial Court Properly Resolved All Doubts About Whether the Juror Misconduct May Have Affected Verdict by Granting a New Trial.

The Cutuks argue, *Pet. at 15-18*, that the record does not disclose the source or the content of the dictionary definition of negligence that was injected into the deliberations. They assert, *Pet. at 17, 19,* that the Court of Appeals merely conjectured that the definition of negligence differed from that set forth in the trial court's instructions, and that the meaning of "negligence" is so commonly understood that its dictionary definition cannot have been prejudicial to Dr. Bray. However, no dictionary that the Cutuks cite or could cite, would define negligence specifically as the "failure to exercise the degree of skill, care and learning expected of a reasonably prudent obstetrician/gynecologist in the state of

Washington acting in the same or similar circumstances at the time of the care or treatment in question," which is how the trial court had instructed the jury, CP 199.[5] As the trial court rightly concluded, *any* deviation from the court's definition of negligence *may* have been material to jurors who one juror described as "struggling with 'negligence'," CP 114, and the guiding principle is that a trial court "is obliged to grant a new trial" if it has *any doubt* about whether misconduct affected the jury's verdict. *Adkins*, 110 Wn.2d at 137. The trial court was justified in having at least some doubt whether consultation of a dictionary taints the verdict for the Cutuks, and thus acted within its discretion in granting Dr. Bray a new trial. Having some doubt obliged the trial court to grant a new trial, not to disregard its doubt. *Adkins*.

The Cutuks cite *Herndon v. City of Seattle*, 11 Wn.2d 88, 118 P.2d 421 (1941), as requiring proof of juror misconduct "with certainty." *Pet. at 4-5*. *Herndon* is inapposite for multiple reasons, not the least of which is that *Herndon* did not involve jurors looking up (despite having been

[5] The Cutuks argue, *Pet. at 18, n.9*, that Dr. Bray could not have been prejudiced if the jury applied an "ordinary prudent person" standard because if the jury found he did not meet that standard, then "he surely fell below the higher standard of care required of a physician." The Cutuks miss the point. Dr. Bray was entitled to have his judgment evaluated according to a single, professional standard of care, not some alternative standard no matter what the alternative was. And, it is not at all self-evident that a jury applying a "reasonably prudent person" standard would have found Dr. Bray negligent under a professional standard because, among other reasons, a jury applying the ordinary negligence standard might have been disinclined to weigh expert medical opinion testimony that a jury, applying the professional standard, would have decided favored Dr. Bray.

instructed not to) or discussing a dictionary definition of negligence, or any other key term defined by the trial court's instructions. Nor did it concern when an evidentiary hearing is appropriate or required.[6]

The Cutuks cite *State v. Adamo*, 128 Wash. 419, 223 P. 9 (1911), as recognizing "some presumptions in favor of the integrity of the jury." *Pet. at 15*. *Adamo* involved jurors seeing a newspaper in the jury room that disclosed that the murder defendant was being tried a second time for a murder of which he had previously been found guilty. But, in that 1911 case, there evidently had been no instruction admonishing jurors not to read news articles about the case. *Adamo*, that is, was neither an "evidentiary hearing" decision or a jury misconduct decision.

Lockwood v. AC&S, 109 Wn.2d 235, 744 P.2d 605 (1987), cited by the Cutuks, *Pet. at 17*, also is inapposite because there the juror misconduct (advising other jurors that the defendant companies could afford to pay, based on having looked the companies up "on the stock exchange") was discovered *during trial* and the trial court gave a

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[6] *Herndon* involved a juror driving by the place where the car accident at issue had occurred. The decision does not indicate that jurors had been admonished not to do that, and the Supreme Court held that doing so had not "apprised [the juror] of anything that she and the other jurors did not already know," and that "[n]o matter in dispute could have been affected by the juror's short view of the intersection in which the accident happened." The Court went on to explain that "[t]here was not, at any time during the trial, any dispute as to any feature of the intersection or as to any streets, buildings or structures appurtenant to that intersection. There was no issue as to the visibility at that intersection, nor was there any allegation that any change had been accomplished in any of the physical surroundings. All parties agreed as to measurements, description, and physical conditions of the intersection." *Herndon*, 11 Wn.2d at 105.

cautionary instruction that the jury was presumed to have obeyed. Moreover, the *Lockwood* court affirmed the denial of a new trial as within the trial court's discretion, suggesting that it would have been within the trial court's discretion to grant a new trial based on the same evidence. The same holds for the Cutuks' citation to *State v. Fry*, 153 Wn. App. 235, 220 P.3d 1245 (2009), *rev. denied*, 168 Wn.2d 1025 (2010), *Pet. at 16*, where jurors looked up "substantial" in a dictionary, the trial court determined that neither the dictionary nor the juror's use of the dictionary influenced the verdict, and the Court of Appeals affirmed the trial court's denial of a motion for new trial, finding no abuse of discretion.

VI. CONCLUSION

Washington law relating to the exercise of a trial judge's discretion when ruling on a CR 59(a)(2) motion does not need to be changed or clarified. The trial court correctly applied CR 59(a)(2) and pertinent case law and acted within its discretion in granting Dr. Bray's motion for new trial. The Court of Appeals also properly applied pertinent, well-settled standards of review in affirming the trial court's grant of a new trial. The Cutuks' petition for review should be denied.

RESPECTFULLY SUBMITTED this 27th day of December, 2013.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on December 27, 2013, I caused a true and correct copy of the foregoing Answer to Petition for Review to be delivered in the manner indicated below to the following counsel of record:

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Dear Clerk of Court,

Attached for filing in .pdf format is the Answer to Petition for Review in *Cutuk v. Bray,* Supreme Court Cause No. 89636-4. The attorney filing this answer is Mary Spillane, WSBA No. 11981, (206) 628-6656, e-mail: mspillane@williamskastner.com.

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