68406-0

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No. 68406-0

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

FIKRETA CUTUK and SEJFUDIN CUTUK,
Appellants,

v.

JEFFREY BRAY, M.D.,
Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

This appeal arises out of a medical malpractice action brought by Fikreta and Sejfudin Cutuk against physician Dr. Jeffrey F. Bray. Dr. Bray failed to properly diagnose an ectopic pregnancy, removing Fikreta Cutuk's one healthy fallopian tube. In addition, Mrs. Cutuk was compelled to undergo a second surgery to remove her other tube. Trial took place over the course of seven days, of which over two were consumed by jury deliberations. The jury found for plaintiffs, and awarded them approximately $72,000 in damages.

Following the trial, defense counsel interviewed several jurors and moved for a new trial on grounds of juror misconduct, claiming that an unidentified juror had consulted an unidentified dictionary and reported an undisclosed definition of "negligence" to the jury. Ultimately, nine juror declarations were considered by the trial court. The declarations were sharply in conflict as to whether or not the alleged incident even occurred. The dictionary was never identified, and the alleged definition, either as it appeared in the alleged dictionary or as it was reported to the jury, was never revealed. On these grounds the trial court granted defendant's motion for a new trial.

The Cutuks ask this Court to set aside the order for a new trial and to remand with instructions to that court to reinstate the verdict.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred in entering its January 30, 2012 *Order Granting Defendant's Motion for New trial* dated in Snohomish County Super. Ct. No. 10-2-04313-2. CP 42-44, 31-41.

Issues Pertaining to Assignment of Error No. 1:

A. Whether the trial court erred when it made findings of fact that a juror consulted a dictionary and discussed the definition briefly in the jury room where those findings were based on nine sharply conflicting declarations and the trial court did not hold a hearing to discover the facts.

B. Whether the trial court's conclusion of law that it was "obliged" to grant a new trial must be set aside because that conclusion was based upon findings of fact that are not supported by the record.

C. Whether the trial court erred as matter of law when it relied on Adkins v. Aluminum Company of America, 110 Wn. 2d 128, 750 P.2d 1257 (1988), in holding that it was "obliged" to grant a new trial rather than the case on point, Tarabochia v. Johnson Line, Inc., 73 Wn. 2d 751, 440 P.2d 187 (1968).

D. Whether the trial court erred when it failed to consider whether any presumption of potential prejudice arising out of the alleged misconduct had been rebutted.

Assignment of Error No. 2: The trial court erred when it denied Appellants' motion to conduct a voir dire the entire jury panel regarding the contested issues of fact presented by the Respondents' three juror declarations.

Issue Pertaining to Assignment of Error No. 2: Whether the trial court abused its discretion when it failed to conduct an evidentiary hearing on a matter in which the outcome depended upon credibility issues.

III. STATEMENT OF THE CASE

A. Nature of the Action.

This appeal arises following trial (*Cutuk v. Bray*, No. 10-2-04314-2, Snohomish) on Plaintiff Fikreta Cutuk's medical malpractice case against Defendant Jeffrey Bray, M.D.. Dr. Bray did not properly diagnose an ectopic pregnancy, with the result that Mrs. Cutuk's one healthy fallopian tube was removed. A second surgery was then required to remove the other tube. CP 234.

B. Trial.

Trial was held over the course of seven court days, from October 31 through November 8, 2011. Conflicting expert medical testimony was presented by both the plaintiffs and the defendant. CP 216, 217. The jury was instructed on the standard of care required of professionals. CP 196, 197, 199. The jury deliberated for about two and a half court days. CP

207-24. The jury found respondent Bray negligent and awarded damages to Mrs. Cutuk of $71,795.53. CP 224. On December 5, 2011, the trial court entered a judgment summary and judgment on verdict. CP 187.

C. Defendant's Motion for a New Trial.

Shortly after the judgment summary was entered, Dr. Bray filed a motion for a new trial. Dr. Bray asserted that the jury engaged in jury misconduct by "researching, substituting, and applying the dictionary definition of negligence for the *legal* definition..." CP 173. [1]

In support of his Motion, Dr. Bray filed three declarations gathered following post-trial interviews with the jurors. All three of the declarations state that (1) an unidentified juror stated that he or she had looked up the definition of negligence in a dictionary at home, (2) told the definition to the jurors, and (3) that the jurors briefly discussed the definition on the morning of the third day of deliberations. CP 140-141, CP 167-68, CP 170-171. Of the three jurors who submitted these declarations, two jurors disagreed with the ultimate decision by the jury. CP 167, CP 170. The third had second thoughts post-trial based upon information that was not presented in trial. CP 141.

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[1] Dr. Bray also sought a new trial for an error of law in the jury instructions. CP 174, 176-77, 182-84. The trial court denied that motion, and that ruling has not been appealed.

D. Plaintiffs' Response to Defendant's Motion for a New Trial.

Plaintiffs Cutuk responded to the Motion by arguing that the events as described in the three declarations did not establish prejudicial jury misconduct that would require a new trial. CP 128-139. The Cutuks noted that declarations (1) did not identify the dictionary allegedly used, (2) failed to indicate what the dictionary definition of negligence was or in what words the juror reported it to the jury, and (3) did not identify the juror who allegedly looked up the definition. CP 135-36. The Cutuks pointed out that the definition was allegedly discussed for about ten minutes on the morning of the last day of deliberations, but the jury took several more hours before rendering the verdict. CP 137. In other words, there was no evidence submitted to the court that the jury had "substituted" and "applied" the alleged dictionary definition as contended by Dr. Bray. CP 173. The Cutuks requested that the court deny the motion for a new trial. CP 128.

In the alternative, the Cutuks moved the trial court to empanel the entire jury for a voir dire, or make other evidentiary inquiries. CP 128. This motion for voir dire of the jury was denied. CP 127. However, the Court did provide contact information for those remaining jurors who agreed to speak with plaintiffs' counsel. CP 98-105. The court set oral argument for January 30, 2012. CP 127.

The Cutuks then contacted the other available jurors. CP 98-99. Six additional juror declarations were filed. Four jurors denied that any juror had reported looking at a dictionary. CP 109, 114-115, 120, 124. Five jurors affirmed that no dictionary definition was discussed during deliberations. CP 109, 112, 114-115, 120, 124. All six jurors testified that the jury instructions on standard of care were referenced frequently in the hours prior to the issuance of the verdict. CP 109-110, 112, 114, 119, 121, 125.

Consistent with the three jurors interviewed by defense counsel, none of six jurors presented any information that an alleged dictionary definition influenced the verdict. CP 107, 109, 112, 114-115, 121, 125-126. Rather, all of the jurors described a careful process which involved listing the physician's knowledge of the facts on a whiteboard next to the acts that the physician actually undertook, and what he should have done. CP 107-108, 110, 112, 114, 121-122, 125. The jurors reported that before and during this process they repeatedly referenced the Court's instructions on the standard of care. CP 109, 112, 114, 119-120, 125.

Of the six jurors interviewed by plaintiff's trial attorney, only one stated that another juror, Jerry Patzer, reported looking up the definition of negligence and had briefly discussed it with the jury. CP 107. However, Mr. Patzer flatly denied this claim. CP 125. A last juror recollected that

there was a juror who mentioned looking up the term "negligence," but this affiant did not know whether the juror said he "would, or did" look it up. CP 112.

There were three additional jurors who were not interviewed. These persons did not allow plaintiff's counsel to contact them. CP 98.

E. The Trial Court's Ruling on Juror Misconduct and Grant of a New Trial.

On January 30, 2012, the trial court ruled on Dr. Bary's motion for a new trial. CP 42-43. The trial court was clearly frustrated:

> I mean, I pride myself in terms of making it explicit to the jurors that they should not be doing this. And I have to tell you in the 20 years that I've been a judge this is the first time any juror has been alleged to do something like this. It is clear in my mind that I made it clear to the jurors that they should not do this. CP 32-33.

The trial court did admonish the jury to not consult dictionaries at the inception of the case. CP 179. However, the instructions read to the jury just before it retired for deliberations (CP 222), nowhere repeated this explicit admonition. CP 189-206. The most pertinent instruction reads: "You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you." CP 191.

The Court's findings of fact and conclusions of law are set forth in an oral ruling incorporated into the Order. CP 31-41. First, the Court

determined, as a finding of fact, that a juror looked up a definition and discussed that definition in the jury room. CP 36. Second, the Court held that the act of looking up a definition would be misconduct. CP 37, ll 12-16 (Appellants do not assign error to this second conclusion). Third, relying on the case of Adkins v. Aluminum Company of America, 110 Wn. 2d 128, 131, 750 P.2d 1257 (1988) the trial court concluded, as a matter of law, "**that the court is obliged to grant the new trial.**" CP 38 (emphasis added).

Plaintiffs timely filed a Notice of Appeal from the Order Granting Defendant's Motion for New Trial. CP 12 – 28.

IV. ARGUMENT

A. The Trial Court Erred When It Made a Finding of Fact that a Juror Consulted a Dictionary and Discussed a Definition in the Jury Room.

The first task of the trial court, when considering a motion for a new trial, is to determine whether or not the acts allegedly constituting misconduct actually occurred. As noted above, the trial court relied upon sharply conflicting declarations by the jurors to arrive at the factual conclusion that a juror had consulted a dictionary and discussed the matter in the jury room. CP 36. Appellants assign error to this finding.

1. This Court Reviews Findings of Fact Exclusively Based upon Written Materials De Novo.

CR 59(a)(2) states that "misconduct may be proved by the affidavits of one or more of the jurors." This permissive statement describes the procedure followed in this case. The trial court did not have, or take, the opportunity to judge the credibility of the jurors whose recollections of events in the jury room were wholly inconsistent. The post-trial declarations of the jurors and counsel comprise the entire record upon which the trial court relied in finding of juror misconduct.

Because "appellate courts are in as good a position as trial courts to review written submissions" this court must review *de novo* the trial court's findings of fact. For example, in McCoy v. Kent Nursery, Inc., 163 Wn.App. 744, 759, 260 P.3d 967 (Div. II, 2011), the appellate court applied a de novo standard of review to trial court's determination, based upon affidavits alone, that the alleged jury misconduct had occurred and reversed the trial court's grant of new trial.

It is anticipated that the respondent will urge this Court to adopt an abuse of discretion standard of review. The contention is based on an excerpted sentence originating in Richards v. Overlake Hosp. Medical Center, 59 Wn.App. 266, 271, 796 P.2d 737 (1990), in which this court stated: "Initially, with regard to the claims of juror misconduct, it must be

noted that a decision of whether the alleged misconduct exists, whether it is prejudicial and whether a mistrial is declared are all matters for the discretion of the trial court. The decision of the trial court will be overturned on appeal only for an abuse of discretion." Id. at 271.

The above-quoted sentences from Richards, however, must be considered in light of the case law cited in that case. Richards derived the "abuse of discretion" standard from two cases, State v. Rempel, 53 Wn.App. 799, 770 P.2d 1058 (1989), rev'd on other grounds, 114 Wn. 2d 77, 785 P.2d 1134 (1990) and State v. Colbert, 17 Wn.App. 658, 564 P.2d 1182, review den'd, 89 Wn. 2d 1010 (1977). In both Colbert and Rempel, the trial courts examined certain jurors who were claimed, post-trial, to be so prejudiced as to require a new trial. As noted in Colbert, 17 Wn.App at 664-665:

> The judge observed and talked with both jurors. He was in a better position to measure and weigh these individuals than this court. Certainly we are not in a position to suggest that the trial court misused its discretion in the procedure it followed and in its refusal to declare a mistrial. The possibility of prejudice cannot be based on the tenuous, speculative reasoning that the facts here would only allow.

See, also, Rempel, 53 Wn.App. at 801-802.[2] Therefore the abuse of discretion standard properly was applied. Neither Rempel nor Colbert

[2] Rempel held that a juror's failure to recall during voir dire that she was acquainted with the complaining witness did not require mistrial. In applying the abuse of discretion standard, the court noted that "[i]t is the trial court that is best

stand for the proposition that a trial court's findings of fact on whether the alleged misconduct occurred, on the basis of conflicting affidavits alone, is subject to abuse of discretion review on appeal.

The quotation from Richards, set forth above, therefore incorrectly implies that abuse of discretion is always applied in the review of "a decision of whether the alleged misconduct exists." Richards, 59 Wn.App. at 271. Richards more carefully describes the standard of review earlier in the opinion, at 59 Wn.App. 270-271, where the court states:

> The trial court will normally review this alleged new evidence [of misconduct] and then determine whether the juror's remarks or the new evidence itself probably had a prejudicial effect on the minds of the other jurors. Gardner v. Malone, [60 Wn. 2d 836, 846, 376 P.2d 651 (1962)] (relying on State v. Parker, 25 Wn. 405, 415, 65 P. 776 (1901)). **The trial court then has the discretion to grant or deny a new trial after viewing juror affidavits or examining jurors, which will not be overturned absent an abuse of discretion.** [Emphasis added]

In other words, the first inquiry is a factual inquiry: Did the events which the party challenging the verdict asserts constitute misconduct occur or not? Assuming those events are confirmed, the second inquiry is: Did the

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able to determine if the juror can set aside any preconceived opinion. The trial court is able to observe the juror's demeanor and, in light of the observation, interpret and evaluate the juror's answers to determine whether the juror will be fair and impartial. Rempel, 53 Wn.App. at 801-802.

events constitute misconduct?[3] Finally, the third inquiry is: Did the new evidence have a prejudicial effect on the minds of the jurors? It is that third inquiry which is subject to the abuse of discretion standard under Richards (unless of course, the trial court's ruling is predicated upon erroneous rulings as to the law, see Adkins, 110 Wn. 2d at 136).

In the instant case, of course, there was no opportunity for the trial court to consider the statements in the affidavits in the light of the court's own observations of the jurors. The allegations presented in this case exclusively concern acts that supposedly took place within the private confines of the jury room. The Court's observations of voir dire before trial, and indeed its observations of the entire trial, were therefore irrelevant with respect to what happened in the jury room. This is not a case like that of Gardner v. Malone, 60 Wn. 2d 836, 843, 376 P.2d 651 (1962), in which an abuse of discretion standard was properly applied because the trial court heard a juror testify regarding the comments he made to fellow jurors. This trial court did not hold a hearing which would have afforded it the opportunity to judge the credibility and motivations of the jury. CP 127.

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[3] Appellants do not challenge that consultation of a dictionary by the jury is misconduct. Adkins, 110 Wn.2d at 137-38. However, as discussed infra, a finding of misconduct does not necessarily require a new trial.

The factual finding that a juror consulted a dictionary and reported the definition in this case was made purely upon a written record. This Court is in as good a position to review the material as was the trial court. McCoy, 163 Wn.App. at 759; Smith v. Skagit County, 75 Wn. 2d 715, 718, 453 P.2d 832 (1969); In re Estate of Nelson, 85 Wn. 2d 602, 605–06, 537 P.2d 765 (1975); Indigo Real Estate Services, Inc. v. Wadsworth, ___ Wn. App. ___, 280 P.3d 506 (Div. 1, 2012). Therefore, application of the de novo standard of review is required with respect to the trial court's finding that misconduct occurred.

2. The Trial Court Erred In Finding that the Disputed Juror Misconduct Occurred.

As indicated above, the proper standard for review of the trial court's initial finding of fact, that misconduct occurred, is de novo. But whether the de novo, substantial evidence, or even the abuse of discretion standard is applied, the trial court erred when it made the initial finding that the events constituting misconduct occurred.

The burden of establishing the fact of misconduct was upon Dr. Bray. Wiles v. Northern Pac. Ry. Co., 66 Wn. 337, 343, 119 P. 810 (1911), State v. Earl, 142 Wn.App. 768, 774, 177 P.3d 132 (Div. II, 2008). "**Before a new trial may be granted for misconduct of jurors such misconduct must be shown with certainty.**" Herndon v. City of Seattle,

11 Wn. 2d 88, 105, 118 P.2d 421 (1941) (emphasis added). This, Dr. Bray failed to do. With half the declarations asserting misconduct, and the other half denying the same, misconduct cannot be established under any standard of review. After all,

> ... **The threshold issue is whether posttrial declarations supporting a motion for a new trial adequately demonstrate juror misconduct.** Based on the lack of supporting evidence in the record... we do not reach whether the alleged misconduct affected the verdict, and we do not defer to the trial court's knowledge of the proceedings—information outside the record and available only to the trial court in ordering a new trial.

McCoy, 163 Wn.App. at 759, fn. 8 (emphasis added).

Here, we pause to summarize the declarations of the 9 of 12 jurors that were before the trial court. Four jurors testified that a juror told them that he or she had looked up a dictionary definition of negligence while he or she was at home (CP 107, 140-41, 167-68, 170-71), and a fifth juror stated that another juror said he or she "would, or did" consult a dictionary. CP 112. However, the only juror identified as having made that statement (Jerry Patzer) flatly denied both the statement and the act. CP 125. Five jurors reported that an alleged dictionary definition itself was never discussed. CP 109, 112, 114-15, 120, 124.

All of the claims that a juror consulted a dictionary, offered in evidence to prove the truth of the matter asserted by an out-of-court

declarant, are hearsay, and may not be considered to prove the allegation that the other juror in fact looked at a dictionary. Herndon, 11 Wn.2d at 105 (hearsay in jurors affidavits asserting misconduct on the part of another juror is insufficient to invoke the discretion of the trial court to grant a new trial). For this reason alone, the trial court's finding of fact, that "a juror did look up the definition of negligence" is in error. CP 36. At worst, the declarations suggest that a juror made a claim he or she had looked at a dictionary, but they cannot establish that a juror did in fact consult a dictionary.

As a whole, the trial court's factual finding (that a juror looked at a dictionary and briefly discussed a definition of negligence during deliberations) falls far short of the standard set forth by the case law for a finding of misconduct. As set forth in Richards v. Overlake Hosp. Medical Center, 59 Wn. App. 266, 796 P.2d 737 (1990): "A strong, affirmative showing of juror misconduct is required to impeach a verdict." This "strong, affirmative showing of juror misconduct" is required because "[v]erdicts should be upheld and the free, frank and secret deliberation upon which they are based held sacrosanct unless... the affidavits of the jurors allege facts showing misconduct and those facts support a determination that the misconduct affected the verdict." Ryan v. Westgard, 12 Wn. App. 500, 503, 530 P.2d 687 (1975).

While it is apparent that the trial court in this matter presumed that it could find a "strong, affirmative showing" on the basis of sharply conflicting affidavits, this is a logical error. It is impossible to establish a strong and affirmative showing based upon declarations that flatly contradict each other.

In addition, the trial court incorrectly asserted that, "by an objective standard," misconduct had been established. CP 35. "Objective" is defined as "expressing the nature of reality as it is." Webster's Third New International Dictionary 1556 (3d ed.1993). In contrast, "subjective" is defined as "characteristic of or belonging to reality as perceived ... as opposed to reality as it is." Webster's, at 2275. Here, in crediting certain juror statements over others, the trial judge relied on his observation over the years that "some jurors will hear some things and other jurors will not hear those same things" (CP 35) and "I don't see a motive for these people to fabricate or make this up." CP 36. The finding, in other words, was not "objective;" rather, it was informed by the trial court judge's subjective personal feelings, experiences and prejudices.

The parties, the trial court, and the jurors invested a significant amount of effort in arriving at the verdict. By vacating a verdict in the absence of an objective, strong, and affirmative showing of misconduct, the trial court erred. "Our judicial system rests upon the idea of finality in

judgment given by the courts." Cox v. Charles Wright Academy, Inc., 70 Wn. 2d 173, 179, 422 P.2d 515 (1967). A trial court should not set aside a jury verdict on the basis of conflicting and uncertain affidavits generated by a disappointed party who interviews jurors after the trial. On this record, the trial court's determination that juror misconduct occurred was in error and this Court should reverse and remand with instructions to reinstate the verdict.

B. Alternatively, the Court erred by not holding an evidentiary hearing.

As set forth above, Dr. Bray failed to establish that misconduct actually occurred. For this reason alone, the trial court should be reversed and the verdict reinstated. In the alternative, however, this Court should hold that the trial court abused its discretion when it failed to conduct an evidentiary hearing on a matter in which the outcome depends upon credibility issues.

It is clear that an evidentiary hearing is not mandated every time there is an allegation of jury misconduct. Washington cases such as State v. Parker, 25 Wn. 405, 411, 65 P. 776 (1901), Halverson v. Anderson, 82 Wn. 2d 746, 748, 513 P.2d 827 (1973), and Adkins, 110 Wn. 2d at 131, indicate that where the events allegedly constituting misconduct are

uncontested, the trial court may move directly to the second inquiry before it: Whether or not the events established were in fact misconduct.

In this case, however, the trial court was presented with distinctly inconsistent declarations. Appellate courts review of a denial of a post-verdict evidentiary hearing for an abuse of discretion. United States v. Langford, 802 F.2d 1176, 1180 (9th Cir.1986).[4] The trial court "must consider the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source." United States v. Saya, 247 F.3d 929, 934-5 (9th Cir.2001). Saya explains: "'Although it is usually preferable to hold [an evidentiary] hearing,' it is not necessary where 'the court [knows] the exact scope and nature of the ... extraneous information.'" Id. (citations omitted).

Clearly, that standard was not met here. Half of the jurors denied the alleged incident altogether. Not one of the jurors disclosed the name of the dictionary that was supposedly consulted. Not one of the jurors reported the contents of the alleged definition itself. The incident, if it occurred, remains cloaked in mystery. Rather than making a finding based on inconsistent declarations, the trial court should have recalled the jurors for and considered the credibility of the jurors through examination.

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[4] Federal cases provide guidance in the absence of state authority on the point. Bryant v. Joseph Tree, Inc., 119 Wn. 2d 210, 218–19, 829 P.2d 1099 (1992).

The trial court abused its discretion when it simply believed one set of jurors over another.

C. The Trial Court Erred As Matter of Law When it Relied on Adkins v. Aluminum Company of America and Failed to Consider Whether or not Any Presumption of Prejudice Had Been Rebutted in Concluding that the Alleged Misconduct Required a New Trial.

The third inquiry, as noted above, is whether or not the misconduct, once established, requires a new trial. In its oral ruling, the trial court failed to engage in the appropriate analysis when it erroneously relied upon the case of Adkins v Aluminum Company of America, 110 Wn. 2d 128, 750 P.2d 1257 (1988) and failed to consider the plaintiff's rebuttal evidence. Once the trial court determined that a dictionary had been consulted, it concluded, as a matter of law, that a new trial was required. The court stated: "And following the Adkins logic, **it appears to me that the court is obliged to grant the new trial.**" CP 38 (emphasis added).

1. This Court Reviews Conclusions of Law De Novo.

The trial court's conclusions of law are subject to de novo review. While a decision granting a motion for a new trial is usually discretionary with the trial court, "this principle is subject to the limitation that, when an order granting or denying a motion for a mistrial is predicated upon rulings as to the law, no element of discretion is involved." Adkins, 110

Wn. 2d at 136. See, also, Tarabochia v. Johnson Line, Inc., 73 Wn. 2d 751, 757, 440 P.2d 187 (1968).

As discussed below, the trial court's conclusion of law that it was "obliged" to order a new trial was in error for at least three reasons.

2. The Trial Court's Conclusion of Law Was Based on Findings of Fact that Are Not Supported in this Record.

As indicated at pages 13 - 16 of this brief, the conflicting evidence does not support the finding of fact that misconduct occurred. Therefore the conclusion of law, that the trial court was "obliged" to grant a new trial, is based upon a finding of misconduct that is not supported by proper findings of fact. McCoy, 163 Wn.App at 768; State v. Williams, 96 Wn. 2d 215, 221, 634 P.2d 868 (1981) ("Where findings necessarily imply one conclusion of law the question still remains whether the evidence justified that conclusion").

3. The Trial Court Erred When It Relied on *Adkins v. Aluminum Company of America* Rather than *Tarabochia v. Johnson Line, Inc.*

The trial court relied upon, and cited to, Adkins v. Aluminum Company of America as requiring it to automatically order a new trial following a finding that a juror consulted with a dictionary. However, Adkins does not present the appropriate framework for analyzing the potential juror misconduct in this case.

In Adkins, the unrebutted testimony established that the jury had

taken Black's Law Dictionary (3d ed. 1933), into the jury room and looked up two definitions. 110 Wn. 2d at 137. The trial court read the two definitions that were consulted and therefore was able to determine that the lengthy entries and numerous examples set forth in the dictionary "could well have confused or misled the jury." 110 Wn. 2d at 138. The Supreme Court affirmed the order of a new trial because the "trial court was justified in concluding that it could not reasonably say that the jury was not influenced by the dictionary." Id.

Adkins, therefore, provides guidance only where the trial court is privy to the nature of the extrinsic material considered by the jury. The content of the extrinsic information was before the trial court:

> While the law dictionary did not constitute new evidence as such, the jury nevertheless considered new information during its deliberations which was not admitted as evidence during trial, nor provided it by the court. Under these circumstances, abuse of discretion is the appropriate standard of review. Thus, where... matters [are communicated] to a jury which may prejudice the verdict, **and the information supplied to the jury can be ascertained without probing the jurors' mental processes**, the trial court must grant a new trial if, in its discretion, it has any reasonable doubt that the information prejudicially affected the verdict.

Adkins, 110 Wn. 2d 136-137 [emphasis added]. Unlike the case at bar, the Adkins trial court knew, through uncontested testimony; (1) that extrinsic information was in fact received by the jury, and (2) the nature

and content of that information. It therefore could exercise its discretion to conclude that the extrinsic information likely affected the juror's deliberations. Here, in contrast, the record fails to reveal what dictionary was consulted, what the definition set forth in the dictionary was, and in what words the juror allegedly described the definition to the other jurors.

The Cutuks pointed the trial court to the case that should have guided its decision. CP 247. That case, cited with approval in Adkins, is Tarabochia v. Johnson Line, Inc., 73 Wn. 2d 751, 440 P.2d 187 (1968). In Tarabochia, the trial court granted a new trial because the jurors had engaged in an experiment with exhibits taken into the jury room during deliberations. The record, however, failed to disclose the nature of the experiment, or that any new material facts were discovered by the jury. 73 Wn. 2d at 752. In Tarabochia, the trial court had erroneously concluded that no showing of discovery of new material facts was required. 73 Wn. 2d at 757. Holding that there was no basis for concluding that the experiment produced results inconsistent with the testimony, the Supreme Court reinstated the verdict. 73 Wn. 2d at 754. Because the order was predicated on a question of law, the issue was reviewable as a matter of law, and not under an abuse of discretion standard. 73 Wn. 2d at 757.

"Tarabochia thus involved a case where there was no objective proof that new material was before the jury, in contrast to this case."

Adkins, 110 Wn. 2d at 136.

Similarly, in this case, the record fails to disclose the nature of the extrinsic information supposedly considered by the Cutuk jury. To sustain the trial court's order, the trial court not only assumed that the jury actually received extrinsic evidence, it assumed that the extrinsic evidence contravened the court's instructions. As in Tarabochia, the trial court here obtained reports of improper conduct, but did not know the contours of that conduct or the results reported. The trial court was not in a position to establish that the alleged extrinsic material could have prejudicially affected the deliberations.

It was erroneous to apply Adkins, rather than Tarabochia, to the instant case because the information supplied to the jury could not be ascertained. "A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn. 2d 299, 339, 858 P.2d 1054 (1993). The decision to grant the defendant's motion for a new trial was based upon an error of law.

Ultimately, this court need not wade into the sticky wicket of contested facts. On this record, even assuming that an unidentified juror did claim that he consult an unidentified dictionary and did discuss the supposed definition of negligence briefly with the jury, prejudice to the

verdict cannot be shown under the correct standard as set forth in Tarabochia.

4. The Trial Court Erred When It Failed to Consider Rebuttal Evidence Relating to the Issue of Whether or Not the Alleged Misconduct Potentially Resulted in Prejudice .

The trial court failed to consider whether or not the alleged misconduct actually prejudiced the defendant notwithstanding the rebuttal evidence that there was no prejudice suffered by the defendant.[5] Not every incident of juror misconduct requires a new trial. State v. Adamo, 128 Wn. 419, 424, 223 P. 9 (1924). Rather, even where misconduct is proven, the court must still determine that the misconduct was sufficiently

[5] As pointed out to the trial court, not every case involving a juror's consultation with a dictionary requires a new trial. CP 253 – 254. Harmless error analysis is applied in most jurisdictions, and the degree and the effect of the misconduct must be considered. 31 A.L.R. 4th 623, Prejudicial Effect of Jury's Procurement or Use of Book During Deliberations in Civil Cases (1984). A jury verdict will not be set aside where the use of a dictionary did not materially affect the outcome of the deliberations, where jurors did not rely on the definition, or where the definition consulted may not have been inconsistent with the jury instructions or the jurors' common understanding of the meaning of the word. See, e.g., Dawson v. Hummer, 649 NE.2d 653, 644 (Ind. App 1995) ("We cannot say the fact that the jury read the various definitions from a legal dictionary is, in itself, enough to demonstrate prejudice because... we do not even know which legal dictionary the jury obtained"); Dutton v. Southern Pacific. Transp., 561 SW.2d 892, 896-97 (Tex. Civ. App. 1978, rev'd on other grounds, 576 SW.2d 782) (Consultation with a pocket dictionary held not to be material misconduct in light of the record as a whole); Kaufman v. Miller, 405 SW.2d 820, 826 (Tex. Civ. App. 1966, rev'd on other grounds, 414 SW.2d 164) (On motion for a new trial, verdict upheld where the evidence indicated that no juror remembered the dictionary definitions); In re Estate of Cory, 169 NW.2d 837, 846 (Iowa, 1969) (No new trial where there was no showing that the dictionary definitions were different than the jurors' common knowledge of the terms).

prejudicial to warrant a new trial. Johnson v. Carbon, 63 Wn.App 294, 818 P.2d 603 (1991).

In this case, the plaintiffs presented considerable evidence establishing that the jury engaged in a thoughtful and lengthy deliberation with frequent references to the trial testimony and the court's instructions. The trial court refused to consider this evidence, stating:

> To get into all of this other discussion of, you know, when it occurred and the putting of the factors up on the board, et cetera, et cetera, is the very sort of thing I think the reviewing court abhors because then you are getting into what was the thought process of the juror, et cetera, et cetera. CP 38.

But the prohibition on "probing a juror's mental processes" refers to the rule that a juror may not impeach his or her own verdict. Gardner v. Malone, 60 Wn. 2d at 841, sets forth the rule as follows:

> The crux of the problem is whether that to which the juror testifies (orally or by affidavit) in support of a motion for a new trial, inheres in the verdict. If it does, it may not be considered; if it does not, it may be considered by the court [citing to State v. Parker, supra]. One test is whether the facts alleged are linked to the juror's motive, intent, or belief, or describe their effect upon him; if so, the statements cannot be considered for they inhere in the verdict **and** impeach it. If they do not, it then becomes a matter of law for the trial court to decide the effect the proved misconduct could have had upon the jury. (emphasis added).

The trial court turned this analysis on its head by refusing to consider the testimony that sustained the validity of the verdict. The

evidence that the alleged brief discussion of a dictionary definition by the Cutuk jury did not affect the jury verdict was unrebutted. But the trial court refused to consider it. As discussed in Herndon, 11 Wn. 2d at 105, where the affidavit of a juror stating that brief exposure to extrinsic material had nothing to do with the verdict is uncontroverted, an order for a new trial must be reversed.

Rather, the trial court, erroneously relying on Adkins, began and ended its analysis with the rhetorical question, "does this misconduct affect the deliberative process, and it seems to me it does." CP 37. The trial failed to undertake the last step, which was to consider whether (assuming that misconduct had occurred) any measurable prejudicial effect survived to impinge upon the deliberations in light of the additional facts presented by the plaintiffs.

In this context it is notable that there is nothing in this record that suggests that the trial court found the verdict itself inconsistent with the evidence presented at trial. Cf. Smith v. Kent, 11 Wn.App. 439, 449, 523 P.2d 446 (Div. I, 1974, overruled on other grounds, State v. Cho, 108 Wn.App. 315, 30 P.3d 496 (2001)) (finding of actual prejudice sustained in jury misconduct case where the court characterized the verdict as one that 'shocked' and 'dumbfounded' him). There were no indicia of prejudice in the verdict itself, which was a rather modest award ($71,795.53). The trial court erred, as a matter of law, when it jumped from the erroneous finding of misconduct to the erroneous conclusion that

the misconduct affected the jury without exercising its discretion to consider the entire factual context, including the rebuttal evidence presented by the plaintiffs.

In sum, the trial court's ruling is contrary to the record, based upon multiple erroneous conclusions of law, and must be reversed. The trial court's order for a new trial must be reversed because it abused its discretion when it (1) presumed prejudice on the basis of an erroneous finding of fact; (2) applied the Adkins test to a matter in which the extrinsic evidence allegedly considered by the jury was not established by the party seeking the new trial; and (3) failed to consider whether or not the presumption of prejudice had been rebutted by the party supporting the verdict. All three are erroneous conclusions of law; each warrants reversal. This case should be remanded with instructions to the trial court to reinstate the jury's verdict.

V. CONCLUSION

For all the reasons above, the trial court's order for a new trial should be reversed and the matter remanded with direction to the trial court to enter judgment on the verdict. This court should not condone any slippage from the traditional principle that a jury's verdict should not be set aside except in cases where a strong and affirmative showing of misconduct is established.

The uncertainty introduced into the system by unhappy litigants who interview jurors, and on a thread of suspicion call into question a verdict, has a deleterious effect on the justice system. As noted in State v. Pepoon, 62 Wn. 635, 644, 114 P. 449 (1911):

> In addition, we must indulge some presumptions in favor of the integrity of the jury. It is a branch of the judiciary, and if we assume that jurors are so quickly forgetful of their duties of citizenship as to stand continually ready to violate their oath on the slightest provocation, we must inevitably conclude that a trial by jury is a farce and our government a failure.

Here, the trial court too quickly set aside a fair verdict produced by a fair process. The verdict must be reinstated.

RESPECTFULLY SUBMITTED this 17th day of September, 2012.

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Certificate of Service

I, the undersigned, certify that on the 17th day of September, 2012, I caused a true and correct copy of this brief to be served, by the method(s) indicated below, to the following person(s):

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