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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.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The integrity of every jury verdict is important, and the courts of this state hold that there is a policy "favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury." For that reason, a jury's verdict must not be set aside except in cases where a "strong, affirmative showing of misconduct" is established. State v. Balisok, 123 Wn. 2d 114, 117-118, 866 P.2d 631 (1994) (citing Richards v. Overlake Hosp. Medical Center, 59 Wn. App. 266, 271-72, 796 P.2d 737 (1990), *rev. den'd*, 116 Wn. 2d 1014, 807 P.2d 883 (1991).

In those cases in which misconduct is established, the court may grant a new trial only where the objective evidence indicates that the misconduct could have "materially affected the substantial rights of the moving party." CR 59(a)(2); Aluminum Co. of Am. v. Aetna Cas. & Sur. Co., 140 Wn. 2d 517, 539, 998 P.2d 856 (2000). In other words, the "mere possibility... of prejudice, without more, is not enough to set aside the verdict." Rowley v. Group Health Co-op., 16 Wn.App. 373, 377, 556 P.2d 250 (Div. I, 1976).

In this case, the trial court determined that, on the basis of sharply conflicting declarations, misconduct had occurred. Then, based upon a misapplication of a single case, Adkins v. Aluminum Company of America, 110 Wn. 2d 128, 750 P.2d 1257 (1988), the trial court held that

it was "obliged" to grant a new trial despite the fact that "there was no objective proof that new material was before the jury." Adkins, 110 Wn. 2d at 136.

While the Respondent scores a few points on relatively minor issues in his *Response*, he fails to make headway on the Cutuks' most important arguments, which are that 1) **Dr. Bray failed to meet his burden of proof when he attempted to establish juror misconduct**, and 2) **Because the trial court did not know the extent or the nature of the alleged misconduct, it had no basis for its determination that the misconduct affected the jury verdict.**

II. REPLY TO COUNTERSTATEMENT OF THE CASE

Respondent Bray's Introduction (*Response*, p. 1, ll. 6-7) and Counterstatement of the Case (*Response*, fn. 3, p. 8) suggests that four of the jurors, Thompson, Klamp, Mertens and Patzer, "at most stated that they did not recall" that any jury reported looking at a dictionary and did not, therefore, contradict the recollections of those jurors reporting the alleged incident. In fact, Juror Thompson swore:

> **I do not recall any juror stating that he or she had looked up the definition in a dictionary at home.** CP 109.

Juror Klamp swore:

> **I can assure the court that a dictionary definition was not used or discussed when we were deliberating.** CP 114.

Juror Mertens swore:

> **At no time did a juror bring in outside information sources and attempt to influence other jurors' votes.** CP 120.

Juror Patzer swore:

> **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 other jurors about any dictionary definition of negligence... Again, I did not look up the definition of negligence in a dictionary, online, or any other source...** CP 124-125.

By asserting that the affiants simply "did not recall" whether or not the incident took place, Respondent is attempting to deny the obvious: These jurors flatly denied that the dictionary incident took place. Even Judge Castleberry himself noted that whether the incident of misconduct occurred "is obviously hotly disputed." CP 33. The denying jurors did not simply state they did not remember what happened, they affirmatively and clearly contradicted Dr. Bray's witnesses.

III. REPLY TO RESPONDENT'S DISCUSSION OF THE STANDARD OF REVIEW

Respondent misleadingly suggests, at the second paragraph of page 12 of his *Response*, that the trial court's findings of fact should be

reviewed to determine whether they are supported by substantial evidence. However, this standard does not apply to the finding of fact that the incident of misconduct actually occurred in the instant case. Rather, because the trial court relied entirely on the jurors' declarations, this Court is "in as good a position as [the] trial court to review written submissions" and the review regarding whether Dr. Bray met his standard of proof with his juror declarations is *de novo*. McCoy v. Kent Nursery, Inc., 163 Wn. App 744, 759, 260 P.3d 967 (2011), *rev. den'd*, 173 Wn. 2d 1029 (2012).

Respondent finally concedes that *de novo* review is appropriate at the end of page 12 of his brief. Therefore this Court must determine whether or not the nine juror declarations establish that misconduct was "**shown with certainty**." Herndon v. City of Seattle, 11 Wn. 2d 88, 105, 118 P.2d 421 (1941) (emphasis added). Only if this Court concludes that Dr. Bray has established misconduct "with certainty" may this Court move on to review the trial court's conclusion that the misconduct probably had a prejudicial effect on the minds of jurors. This latter determination, whether the effect could have been prejudicial, is generally subject to the abuse of discretion standard. Richards, 59 Wn.App. at 271. But if the initial determination – that misconduct had been established – is incorrect, this Court need not resolve the question of prejudicial effect.

At footnote 7 of his *Response*, Respondent asserts that the alleged misconduct was "amply supported" by the declarations and therefore

withstands even *de novo* review. The argument is incorrect. The declarations flatly contradict each other and therefore cannot overcome the presumption that the jury followed the court's instructions. State v. Dhaliwal, 150 Wn. 2d 559, 578, 79 P.3d 432 (2003). (Further discussion regarding this argument is provided at pages 12- 17 of this *Reply*.)

Finally, the trial court's conclusion that it was "obliged" to grant a new trial based upon its finding that the jury considered a dictionary definition is a question of law, which is also reviewed *de novo*. Worthington v. Caldwell, 65 Wn. 2d 269, 278, 396 P.2d 797 (1964).

IV. REPLY ARGUMENT

Respondent commences his argument with the assertion that the Cutuks were obligated to establish that he failed to meet the professional standard of care applicable to an obstetrician/gynecologist. This simple statement of the law is neither appealed nor contested by the Cutuks. Nor is the Respondent's second contention, that it is misconduct for a juror to consult a dictionary. Rather, the Cutuks appeal the finding that misconduct occurred and the finding that the supposed misconduct could have affected the jury to the material prejudice of the defendant.

Therefore this Reply addresses the argument in sections C through E of the *Response,* pp. 15-40. For ease of reference, this brief addresses the arguments under the same section notation, starting with "C".

C. An Evidentiary Hearing Is Required Where Written Testimony Is in Conflict.

The trial court erred when it failed to conduct an evidentiary hearing following the receipt of nine declarations, about half of which directly contradicted the statements of the other half. The finding that misconduct had occurred in light of this conflicting evidence strikes at the heart of the justice system's principal that testimony is required before a Court can make a decision that relates to a dispositive issue of fact.

Respondent suggests that the Cutuks are arguing that a trial court "must refrain from making a finding of juror misconduct until it has summoned discharged jurors back to court, examined them under oath, and assessed their credibility." *Response*, p. 15. This is a cynical misstatement of the Cutuks' argument. Rather, the Cutuks have consistently urged that it was error for the Court to make a factual finding that misconduct occurred based solely upon conflicting affidavits. Had the trial court conducted a hearing, the Cutuks or Dr. Bray would have had the opportunity to elicit testimony that explained the discrepancies, or the Court would have been able, based upon live testimony, to assess the credibility of the witnesses. Instead, this trial court simply believed one set of jurors' affidavits over the others, without any basis whatsoever for impeachment other than the court's suggestion that "I don't see a motive for these people to fabricate or make this up." CP 36.

1. CR 59(a)(2) properly allows proof of misconduct where declarations are consistent.

CR 59(a)(2) states that "misconduct may be proved by the affidavits of one or more of the jurors." Nothing in that rule suggests that the decision can be based exclusively upon directly conflicting affidavits, and indeed, none of the cases cited by the Respondent stand for such a proposition.

In Robinson v. Safeway Stores, 113 Wn. 2d 154, 156, 776 P.2d 676 (1989), for example, there was no issue regarding inconsistent juror declarations supporting the trial court's finding that a juror had dishonestly concealed his bias against Californians. Similarly, in Halverson v. Anderson, 82 Wn. 2d 746, 752, 513 P.2d 827 (1973) (see fn. 9 of the *Response*), all the testifying jurors agreed that one juror had injected his specialized knowledge regarding wages in the aviation industry. There was no conflict on the point. As noted by the Supreme Court:

> Here, all of the jurors from whom affidavits were obtained told the same story. The trial court found them credible and it has not been suggested that had they been called to testify or had additional jurors been questioned, doubt would have been thrown upon the veracity of these affiants.

The court distinguished the situation before it from the one presented by the instant case:

> Any juror could testify to the fact of his making the statement, and another juror could deny that he made it, and it would then become a question of deciding which juror or jurors was worthy of belief.

Halverson, 82 Wn. 2d at 751. In other words, Halverson stands for the proposition urged by the Cutuks: A trial court may not properly make a finding of misconduct based on conflicting written testimony alone.

Gardner v. Malone, 60 Wn. 2d 836, 843-846, 376 P.2d 651 (1962) (cited at fn. 9 of the *Response*), discusses three possible instances of juror misconduct. The first claim, that a juror was personally acquainted with a party, was rejected by the trial court following an in-court examination of the suspected juror. The other two claims of misconduct were established by unrebutted testimony. In Lyberg v. Holz, 145 Wash. 316, 317, 259 P. 1087 (1927), the misconduct was established by the affidavits of three of the jurors, and there were no controverting affidavits. Therefore, as pointed out by the opinion, "the facts set out in these affidavits must be accepted as true." The last case cited in the *Response* at footnote 9, Ryan v. Westgard, 12 Wn. App. 500, 504, 530 P.2d 687 (Div. I, 1975), discloses that the trial court relied upon consistent affidavits indicating misconduct (juror discussions regarding their own experiences with truck gas tanks) and nonetheless found that there was "no positive showing that the statement affected the verdict." The appellate court affirmed the denial of a new trial.

Respondent heavily relies upon Byerly v. Madsen, 41 Wn. App. 495, 500, 704 P.2d 1236 (Div. III, 1985), but to no avail. There, one juror,

a Mr. Helms, attested to misconduct while three jurors testified that they did not recall the misconduct. Byerly noted that:

> While the remaining affidavits are not as specific as Mr. Helm's statement, they do not dispute the material facts alleged there. The jurors' present lack of recall of what was said concerning the anesthesiologist does not contradict Mr. Helm's assertion that the settlement was mentioned.

(emphasis added). In addition, the Byerly trial court relied upon its recollection of in-court statements by counsel to buttress the conclusion that misconduct occurred. Id., at 498-99. Byerly may not be applied fairly to the instant case. In Cutuk, several jurors flatly denied that the incident of misconduct took place, swearing that "[a]t no time did a juror bring in outside information sources and attempt to influence other jurors' votes" and "...a dictionary definition was not used or discussed when we were deliberating," and so forth. CP 109, 114, 120, 125-25. In addition, there is no additional observation of trial proceedings by the Cutuk trial court itself which support the conclusion that misconduct occurred.

Finally, Lindsey v. Elkins, 154 Wash. 588, 283 P. 447 (1929), cited in the *Response* at p. 16, simply stands for the proposition that unsworn statements of the jurors are hearsay and therefore insufficient to invoke the discretion of the court to grant a new trial. Based on discussion in Lindsey, Respondent attempts to slip in the notion that the verb "may" in the current statute is mandatory, rather than permissive, implying that

the Cutuk trial court could not have held an evidentiary hearing even if it so wanted. *Response,* p. 16, ll. 1-3. However, the suggestion is unfounded in light of the fact that Lindsey was decided before the current civil rules were enacted.

In summary, the Respondent cites no case, and the undersigned is unaware of any case, in which a finding of juror misconduct was upheld by a reviewing court where the acts constituting the misconduct were "proven" by contradictory affidavits alone.

2. An evidentiary hearing is required any time a dispositive factual issue is contested by admissible evidence.

Respondent quarrels with the Cutuks' citation to United States v. Langford, 802 F.2d 1176, 1180 (9th Cir., 1986) and United States v. Saya, 247 F.3d 929, 934-5 (9th Cir., 2001). Obviously neither case applies Washington civil law, and Appellants did not suggest that they did. Rather, the cases were cited in support of a principal that the Appellants would have thought inarguable: that where contested testimony is presented to a judge, the court should hold an evidentiary hearing before a substantive factual issue is determined.

Similarly, Respondent's attack on the Cutuks' reliance on 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, *rev. den'd*, 89 Wn. 2d 1010 (1977) is misplaced.

Those cases were cited in support of the proposition that the abuse of discretion standard set forth in Richards must be considered in light of the cases from which Richards obtained the standard, i.e., Rempel and Colbert. That issue is now a moot point, as the Respondent has conceded that this Court must review the finding of fact regarding whether or not the misconduct occurred *de novo* because that finding was based exclusively upon written submissions.

Nonetheless, Rempel and Colbert support the Cutuk's contention that a post-trial evidentiary hearing is appropriate when issues of fact are in conflict. In both those cases, the trial court observed and spoke with the jurors that were the source of the claimed misconduct, and the Court of Appeals concluded that it was therefore "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." Colbert, 17 Wn.App at 664-665.

D. The Trial Court Erred When It Found that Juror Misconduct Occurred.

Respondent relies on several declarations which assert that a juror looked up a definition of negligence. No juror admits that he himself did such a thing. Therefore, those portions of the affidavits by jurors Lang, Jones, Satterwhite, and Wiebusch which assert that a juror said he had looked up the definition of negligence are clearly statements made out of court by a third party offered in court to prove the truth of the matter

asserted. See, e.g., Herndon, 11 Wn. 2d at 106 (Holding that a juror's affidavit that she heard other jurors state that they had gone to the scene of the accident is nothing more than hearsay and therefore insufficient to invoke the discretion of the trial court to grant a new trial.) The trial court should not have considered the hearsay statements regarding what one juror allegedly heard another juror say. This Court, in undertaking its *de novo* review of the finding of misconduct, also should not consider the statements.

Respondent argues that the Cutuks did not preserve the challenge based on hearsay for review. *Response* at p. 18. This is simply incorrect. In the Cutuks' *Response to Defendant's Motion for New Trial*, they pointed out that "where the matter in an affidavit concerning the deliberation of a jury is hearsay, the matter is incompetent" and cited to Casey v. Williams, 47 Wn. 2d 255, 287 P.2d 343 (1955). CP 133.

1. Without a hearing, Respondent has failed to carry his burden of proof with respect to whether the misconduct incident occurred.

Even were this Court to consider the hearsay, the hearsay statements themselves do not save the Respondent from the fact that he failed to carry his burden of proof. It was Dr. Bray's burden to establish that misconduct actually happened. 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). The burden is particularly heavy, reflecting

the justice system's respect for both finality and jury verdicts: "Before a new trial may be granted for misconduct of jurors such misconduct must be shown with certainty." Herndon, 11 Wn. 2d at 105.

Dr. Bray did not carry this burden under any standard of review. He presented several declarations asserting that a juror reported that he had looked up a dictionary definition of negligence and discussed that definition. Five other jurors, including the accused juror himself, flatly denied that any such thing had happened. There can be no "certainty" that misconduct happened. There is not even a preponderance of the evidence. And, without an evidentiary hearing, the trial court had no basis to impeach the declarations of those jurors who denied the event.

At pages 20 through 23 of his Response, Dr. Bray returns to the Byerly case, briefly addressed above at pages 8-9 of this *Reply*. Respondent's primary argument is that Byerly supports the granting of a new trial even where affidavits are inconsistent. But that is not a correct analysis of Byerly. In Byerly, a single juror testified, by affidavit, that a settlement between non-parties was discussed in the juror room. The opinion notes that the other affidavits, propounded by the party opposing the grant of a new trial did "**not dispute the material facts alleged there**" because of the other jurors' present lack of recall." Byerly, 41 Wn.App at 500 (emphasis supplied). In other words, there were no contradicting declarations in the Byerly case.

Respondent vainly struggles to force the conflicting affidavits presented in Cutuk into the Byerly mold, asserting that the jury affidavits presented by the Cutuks are also "I do not recall" declarations and therefore did not controvert the Satterwhite, Jones, Lang and Wiebusch declarations. *Response*, pp. 22-23. This Court need merely revisit the declarations themselves in order to determine (and again, this is a de novo review) that jurors Thompson, Klamp, Merten and Patzer flatly deny that the entire dictionary episode occurred. Yes, the word "recall" is used in the declarations, but not in the context of "I do not recall what happened," but rather in the context of "I recall what did not happen." After all, any declaration is based upon the recollections of the affiant. Just as four jurors recall that another juror said he looked at a definition and discussed it with the jury (CP 114, 141, 167, 170), five other jurors recall that no such thing happened. CP 109, 111-12, 114, 120, 125-24.

Respondent then asserts that an evidentiary hearing was unnecessary because the Cutuks do not suggest a "plausible reason why any of the jurors who made such statements [in support of the dictionary incident] would commit perjury." *Response*, at p. 24. This is a most peculiar argument, evidencing a naïve lack of appreciation of the purpose of a hearing.

Hearings are not required only when a party accuses a witness of lying. Rather, a hearing provides the court invaluable information,

allowing it to resolve material facts in dispute. Assessing "credibility" in this context encompasses the consideration of many factors "including demeanor, bias, opportunity, capacity to observe and narrate the event, character, prior inconsistent statements, contradiction, corroboration, and plausibility." In re Det. of Stout, 159 Wn. 2d 357, 382, 150 P.3d 86 (2007; J. Madsen concurring). The trier of fact has the "ability to evaluate blinking eyelids or expressive facial gestures and to hear the hesitation in the voice or observe the uneasy fidgeting of a witness, uncomfortable under sharp questioning." Id. A primary tool used to evoke a witness' response is confrontation through cross-examination. Only in such a setting may the Court resolve issues of credibility and determine how much weight to give evidence because it sees and hears the witnesses. Id. All of these concepts underpin fundamental notions of procedural due process embodied in our justice system.

No, it was not up to the Cutuks to suggest or imply that the jurors who reported the dictionary incident committed perjury. Instead, the trial court abused its discretion when it denied the Cutuk's request for a hearing, and made findings of fact (which are reviewed *de novo*) that an incident of misconduct occurred notwithstanding sharply conflicting declarations. What is good for the goose – Respondent's assertion that there was "no basis for disbelieving all four juror declarants who described the misconduct" (*Response*, p.24) – is good for the gander.

There was also no basis for disbelieving the five juror declarants who denied that the misconduct happened.

Ultimately, on this record, jury misconduct simply was not established. The defendant demanded that the trial court grant a new trial based upon the declarations he obtained. CP 46-54. Under the invited error doctrine, the Respondent is now confined to the evidence he adduced, and which was controverted by the declarations produced by the Cutuks. This Court is respectfully urged to reverse the trial court's order for a new trial.

2. Evidence relating to the appropriate actions of the jury was wrongfully not considered by the trial court.

Respondent is correct with respect to the general rule that the:

> The mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors' intentions and beliefs, are all factors inhering in the jury's processes in arriving at its verdict, and, therefore, inhere in the verdict itself, and averments concerning them are inadmissible to impeach the verdict.

Cox v. Charles Wright Academy, Inc., 70 Wn. 2d 173, 179-80, 422 P.2d 515 (1967). However, just as Dr. Bray was entitled to bring to the court's attention the alleged fact that a juror looked in a dictionary and reported a definition, the Cutuks are entitled to highlight the appropriate acts undertaken by the jury (and denied by no juror). The declarations

establish that the Cutuk jury repeatedly referred to the court's instructions on the standard of care and applied the facts of the case and the court's instructions by writing them up on a whiteboard. CP 109-110, 112, 114, 121, 125.

The trial court, so open to hearing the negative reports provided by the defendant, absolutely refused to consider this evidence:

> To get into all 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 thing that I think the reviewing court abhors because then you are getting into what was the though process of the juror... CP 38.

But facts such as 'we poured over the evidence' and 'we discussed the instructions' and 'we organized the facts' do not reveal the "mental processes" of "individual jurors." Rather, they relate to the collective actions of the jury. By refusing to consider them, the trial court did not balance the undisputed facts that the jury acted appropriately with respect to the court's instructions against conflicting evidence suggesting misconduct and no evidence suggesting prejudicial effect.

E. *Tarabochia*, not *Adkins*, Provides the Correct Framework for Analyzing the Potential Prejudice Caused by the Alleged Misconduct.

The second most important issue in this appeal is the question of whether or not the trial court, having concluded that misconduct occurred, applied the correct legal test when it ruled in favor of Respondent's motion for a new trial. As noted in the *Brief of the Appellant*, the trial

court stated: "[F]ollowing the Adkins logic, **it appears to me that the court is obliged to grant the new trial.**" CP 38 (emphasis added). However, should this Court conclude that Dr. Bray failed to establish that the alleged misconduct occurred, it need not reach the second issue which relates to the effect of the misconduct. However, even if the issue is reached, this Court should find that the trial court erred, as matter of law, when it concluded that the alleged misconduct obliged it to grant a new trial. The trial court misapplied both Adkins and Tarabochia v. Johnson Line, Inc., 73 Wn. 2d 751, 440 P.2d 187 (1968) when, in the absence of objective evidence, it concluded that new material had been considered by the jury and that the jury could have been affected thereby.

Respondent argues that Adkins, rather than Tarabochia, applies to this case because Adkins involved misconduct relating to the definition of negligence, whereas Tarabochia involved an experiment with the evidence conducted by the jury. While initially attractive, the argument relies upon the superficially similar facts of each case, rather than a considered analysis of the nature of the "proof" of misconduct presented by the cases. Furthermore, the argument entirely ignores the fact that both cases agree that objective proof that new material was before the jury must be established before the trial court may rule upon whether that material influenced the jury. Adkins, 110 Wn. 2d at 136, Tarabochia, 73 Wn. 2d at 754.

In Tarabochia, members of the jury mixed urea with water, put it on a plastic bag, and "conducted an experiment." This incident of misconduct was established with unrebutted declarations. Importantly, "the nature of the experiment was not revealed by the affidavits." Tarabochia, 73 Wn. 2d at 752. The proponent of a new trial suggested that "it is possible, even probable, that the jury's test showed that this combination of substances would not produce a slippery condition," therefore explaining the defense verdict in the slip and fall case. Tarabochia, 73 Wn. 2d at 753.

The trial court in Tarabochia held that a new trial was required, citing to Cole v. McGhie, 59 Wn. 2d 436, 447, 361 P.2d 938 (1962) (holding that a jury experiment warranted a new trial where the results of that experiment were disclosed in post-trial proceedings). This state's supreme court reversed, distinguishing Cole: "[T]here is no such certainty in regard to the outcome of the test performed by the jury in this case... [t]here is nothing to indicate that the jurors obtained new evidence which was not introduced at the trial." Tarabochia, 73 Wn. 2d at 754.

Contrast Tarabochia with Adkins. In Adkins, also, the contours of the misconduct were known with certainty. The established facts were that (1) a juror asked the bailiff for a dictionary; (2) the bailiff gave the jury a 1933 Black's Law Dictionary; (3) the jurors looked up the terms "negligence" and "proximate cause" and (4) the definition consulted stated

that negligence "is synonymous with heedlessness, carelessness thoughtlessness, disregard, inattention, inadvertence, remissness and oversight . . ." and referred to "criminal negligence, culpable negligence, gross negligence, hazardous negligence, legal negligence, negligence per se, ordinary negligence, slight negligence, wanton negligence and willful negligence, without explanation of when each of these concepts applies." Adkins, 110 Wn. 2d at 138.

Following careful review of the lengthy definition, the opinion notes that "the definition in Black's Law Dictionary contains legal premises not applicable to the facts of this case, and which could well have confused or misled the jury," leading the court to hold that the trial court did not abuse its discretion in declaring a mistrial. [1] Id. In other words, Adkins involves a case in which there was objective and unrebutted evidence establishing exactly what misconduct occurred and the trial court could fairly exercise its discretion to conclude that the new material was of a nature that could confuse or mislead the jury.

Both Tarabochia and Adkins support the principle that if the misconduct is not established in sufficient detail to fairly lead to the conclusion that juror confusion could result, there is no basis for ordering

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[1] Note that Adkins was simple negligence case. Therefore the risk of prejudicial effect to the defendant by a jury that was considering the lengthy Black's Law Dictionary definition of negligence was great.

a new trial. Indeed, the Adkins opinion underscores this point, stating that the difference between the result in Adkins (new trial order affirmed) and Tarabochia (new trial order reversed) is explained by the fact that "Tarabochia... 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.

Cutuk is more similar to Tarabochia than Adkins when the focus is properly directed on the trial court's objective knowledge of what happened in the jury room. In this case, not only are we confronted with an issue of fact as to whether a dictionary was ever consulted or discussed, we have no evidence whatsoever of what the alleged definition said, or whether it was inconsistent with the instructions provided by the jury.

The trial court incorrectly found, based on conflicting declarations, that a dictionary was examined, and then, based upon Adkins, held that it was "obliged" to grant the new trial:

> I don't have any doubt about whether the misconduct occurred, and I don't have any doubt that it was misconduct. And following the Adkins logic, it appears to me that the court is obliged to grant the new trial.

CP 37-38. However, contrary to the trial court's understanding, not every case involving a juror's consultation with a dictionary requires a new trial. Rather, 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). 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"); 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). In sum, the analysis of whether or not the definition was potentially prejudicial must be made with knowledge of the alleged new definition itself.

In this case, the Cutuk trial court stated:

> the definition of negligence that one normally finds in any Webster's dictionary, any Black's Law Dictionary, one can think of, does not say, well, if you fail to follow the applicable standard of care, that is the equivalent of negligence.

CP 38. Without knowledge of the definition allegedly at issue, the trial court's conclusion must be speculative. It is not based upon "objective evidence" of a definition that was inconsistent with the instructions and/or potentially prejudicial to the defendant as in Adkins. Rather, the trial

court relied upon affidavits which did not set forth the new material allegedly considered by the jury, as in Tarabochia.

Nobody has, or practicably can, look up the term "negligence" in each of the thousands of dictionaries available. Particularly in this age of internet research, it would be important to know the search employed by the juror who allegedly looked up the term (of course, we do not know whether the juror supposedly consulted a book or the internet, or what terms allegedly were searched). A search in Google, for example, for "medical negligence" immediately pops up this explanation in Wikipedia:

> Medical malpractice is professional negligence by act or omission by a health care provider in which the treatment provided falls below the accepted standard of practice in the medical community and causes injury or death to the patient, with most cases involving medical error.

See: http://en.wikipedia.org/wiki/Medical_malpractice. This definition, had it been reviewed and discussed by the jurors, does not prejudice the defendant or vary from the instructions in any meaningful way. As in Tarabochia, we simply do not know the "results" of the alleged misconduct. The trial court therefore abused its discretion when it concluded that objective evidence proved misconduct which could have affected the jury.

In short, Tarabochia stands for the principle that a trial court needs to know what happened before it can weigh the potential prejudicial effect the alleged misconduct had on the jury. "The possibility of prejudice

cannot be based on the tenuous, speculative reasoning that the facts here would only allow." Colbert, 17 Wn.App at 664-665. As with Colbert, so with Cutuk—the proven facts here simply do not add up to prejudice absent an unhealthy dose of speculation. (As an aside, it is interesting to note that the witness statements obtained by Dr. Bray do not mention which dictionary or describe the definition allegedly presented. This curious omission suggests, in itself, that the event either did not happen or the definition did not in fact prejudice the defendant).

Respondent urges too low a bar for finding that misconduct may have affected a jury's verdict. Essentially, Dr. Bray contends that if there is conflicting evidence of misconduct, the trial court is free to find misconduct even without a hearing. It can then, according to Respondent, go on to find that the alleged misconduct, even absent objective evidence of prejudice, materially affected the substantial rights of the losing party (CR 59(a)(2)) and therefore warrants the vacation of a jury verdict.

An illustrative example is that of a losing defendant who introduces (controverted) jury affidavits declaring "Another juror looked up information about the defendant and discussed it with the jury." This cannot be enough to set aside a jury verdict—it simply does not present any facts which would permit a determination of potential prejudice to the defendant. It isn't an ideal situation, of course, "[b]ut the perfect case has not been and never will be tried. The parties here are not entitled to a

perfect trial." Freeman v. Intalco Aluminum Corp., 15 Wn. App. 677, 686, 552 P.2d 214 (1976). Alleged imperfections, without more, do not warrant a new trial.

V. CONCLUSION

In the absence of "strong and affirmative" evidence of misconduct, the Cutuk verdict must stand. State v. Balisok, 123 Wn. 2d 114, 117-118, 866 P.2d 631 (1994). Respondent provided insufficient evidence to establish juror misconduct or that any alleged misconduct affected the verdict. Setting aside the verdict in the instant case can only serve to undermine public confidence in the stability of the jury system, as already lamented by one juror empanelled in Cutuk:

> I have recently been informed that allegations of jury misconduct have been claimed by the Defendant and that a new trial has been requested. I am disappointed to hear this given the hard work that we as jurors put into our deliberations in determining a verdict in this case. CP 118.

Dr. Bray was afforded the opportunity to prove misconduct that could have affected the verdict. He failed to do so. The trial court's grant of his motion for a new trial must be reversed.

RESPECTFULLY SUBMITTED this 6th day of December, 2012.

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Certificate of Service

I, the undersigned, certify that on the 6th day of December, 2012, I caused a true and correct copy of this pleading to be served, by the method(s) indicated below, to the following person(s):

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