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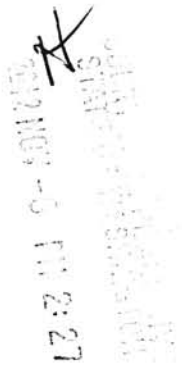

NO. 68406-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

FIKRETA CUTUK and SEJFUDIN CUTUK,

Appellants,

v.

JEFFREY F. BRAY, M.D.,

Respondent.

BRIEF OF RESPONDENT

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I. SUMMARY

CR 59(a)(2) allows proof of juror misconduct by declarations of one or more jurors. Substantial evidence – four juror declarations saying so – support Judge Castleberry's finding that jurors discussed a definition of "negligence" that one juror told them was from a dictionary. Although five jurors signed declarations stating that they did not recall or did not hear such a discussion, "I do not recall" declarations do not contradict or rebut testimony relating specific juror statements and conduct.

No matter what dictionary definition of "negligence" was injected into the jurors' deliberations, it could not have defined "negligence" the same way Judge Castleberry's instructions did, i.e., with reference to the professional standard of care applicable to an OB/GYN. Thus, it was tenable for Judge Castleberry to conclude that injection into jury deliberations of a dictionary definition of "negligence" in this medical malpractice case could well have affected the verdict. His conclusion is entitled to great deference on appeal, and this Court should affirm his decision to grant Dr. Bray's motion for a new trial.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did Judge Castleberry properly make a factual finding, based on the juror declarations the parties submitted, that a juror looked up the definition of negligence in a dictionary and discussed that definition

with the other jurors?

2. Does the testimony of some jurors that they do not recall a juror making a certain extrajudicial statement to the jury in deliberations serve to controvert, and preclude the trial court from crediting, the testimony of other jurors that a juror did make such an extrajudicial statement to the jury during deliberations?

3. On a motion for new trial based on jury misconduct, must a trial court consider or accept a juror's declaration testimony that a certain thing that occurred during deliberations had no effect on the jury's verdict testimony, or is such juror testimony something that the trial court may not consider because it concerns a matter that "inheres" in the verdict?

4. Did the Cutuks preserve for consideration on appeal any hearsay-based objection to Judge Castleberry's consideration of juror declarations submitted to him in support of and in opposition to Dr. Bray's motion for a new trial based on jury misconduct?

5. Are juror declarations that relate extrajudicial information that a juror interjected and that the jury discussed during deliberations hearsay to the extent offered to prove that the extrajudicial information was interjected and discussed during deliberations?

5. Was it tenable, and thus within the discretion vested in him as trial judge, for Judge Castleberry to conclude that he had at least some

doubt as to whether the discussion by some jurors of what they had been told was a dictionary definition of "negligence" affected the verdict in favor of the Cutucks in this obstetrical malpractice lawsuit so as to warrant the grant of Dr. Bray's motion for new trial pursuant to CR 59(a)(2) and *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 750 P.2d 1257 (1988)?

III. COUNTERSTATEMENT OF THE CASE

Fikreta and Sejfudin Cutuk sued Dr. Jeffrey Bray for medical malpractice, alleging that Fikreta lost both of her fallopian tubes because Dr. Bray did not properly diagnose an ectopic pregnancy. CP 234-35, 238-40. Dr. Bray denied liability. CP 229-31.[1] The case was tried to a jury before Judge Ronald L. Castleberry over seven days. CP 207-24.

A. The Court's Admonishments and Instructions to the Jury.

As the Cutuks acknowledge, *App. Br. at 7*, Judge Castleberry "did admonish the jury to not consult dictionaries at the inception of the case."

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[1] Court's Instruction No. 6, CP 197, summarized the parties' claims as follows:

> Plaintiffs claim that Dr. Bray was negligent in his treatment of Fikreta Cutuk by misdiagnosing her ectopic pregnancy as being in her left fallopian tube and surgically removing a portion of this tube when in fact the ectopic pregnancy was in her right fallopian tube. Plaintiffs further claim that as a result of Dr. Bray's negligence, Mrs. Cutuk required another surgery to treat her ectopic pregnancy which included removal of her right fallopian tube, which caused Plaintiffs to incur medical expenses, lost wages, and other damages to which they are entitled. Plaintiffs are not claiming negligence regarding Dr. Bray's post-operative care or failure to inform the Plaintiffs.
>
> Dr. Jeffrey F. Bray denies these claims and contends that he met the standard of care in his management of Mrs. Cutuk's surgery. Dr. Bray denies that the second surgery was required as a result of any claimed negligence. Dr. Bray further denies the nature and extent of the claimed injuries.

See CP 179. Indeed, in granting Dr. Bray's motion for new trial, Judge Castleberry made clear that he had explicitly told the jury "don't look up legal definitions," and that he prides himself "in making it explicit to the jurors that they should not be doing this," and that "[i]t is clear in my mind that I made it clear to the jurors they should not do this." CP 32-33.

As the Cutuks also correctly note, *App. Br. at 3*, the jury "was instructed on the standard of care required of professionals." Court's Instruction No. 5, WPI (Civ.) 105.03, CP 196, told the jury in part that:

> The plaintiff has the burden of proving each of the following propositions:
>
> First, that defendant Dr. Bray failed to follow the applicable standard of care and was therefore negligent;
>
> Second, that plaintiff Fikreta Cutuk was injured; and
>
> Third, that the negligence of defendant Dr. Bray was a proximate cause of the injury to plaintiff Fikreta Cutuk.

Court's Instruction No. 8, WPI (Civ.) 105.02, CP 199, told the jury:

> A health care professional owes to the patient a duty to comply with the standard of care of the profession or class to which he or she belongs.
>
> An obstetrician/gynecologist has a duty 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. Failure to exercise such skill, care, and learning constitutes a breach of the standard of care and is negligence.
>
> The degree of care actually practiced by members of the medical profession is evidence of what is reasonably prudent. However, this evidence alone is not conclusive on

> the issue and should be considered by you along with any other evidence bearing on the question.

B. The Trial and the Verdict.

As the Cutuks correctly acknowledge, *App. Br. at 3*, the parties presented conflicting expert medical testimony.

The jury deliberated over three days, CP 222-24, and on November 8, 2011, returned a 10-2 verdict in favor of the Cutuks, awarding them a total of $71,863.88 in damages. CP 224. Judge Castleberry entered judgment on the verdict. CP 187-88.

C. Dr. Bray's Motion for New Trial Based on Juror Misconduct.

On December 12, 2011, Dr. Bray timely moved for a new trial based on CR 59(a)(2) (juror misconduct). CP 173-85. He supported his motion with declarations of three jurors – the two jurors who had dissented from the verdict, Jill Lang and Cheryl Jones, CP 167-68, 170-71, and the jury foreperson, Joanna Satterwhite, who had agreed with the verdict, CP 140-41.

Juror Lang, one of the dissenting jurors, CP 167 (¶ 3), declared:

> One juror looked up the definition of negligence in a dictionary and reported the definition back to the rest of the jurors. The dictionary definition of negligence was discussed during deliberations.

CP 168 (¶ 6). Juror Jones, the other dissenting juror, CP 170 (¶ 3), declared:

> On Tuesday morning, the third day of deliberations . . . one juror reported to the group that he was struggling with what negligence meant and looked up the definition of negligence in a dictionary. He said he pulled the dictionary off his shelf at his home. He reported the definition back to the rest of the jurors. The dictionary definition of negligence was discussed during deliberations [for] approximately 10 minutes.

CP 171 (¶ 5). And, Jury Foreperson Satterwhite declared:

> One juror had to look up the definition of negligence in a dictionary and reported the definition back to the rest of the jurors. The dictionary definition of negligence was discussed during deliberations.

CP 141 (¶ 5).

On December 19, 2011, counsel for the Cutuks requested, and were given, additional time to seek contact with jurors[2] and respond to the motion. Execution on the judgment was stayed and the hearing on the new trial motion was continued to January 30, 2012. CP 11, 127.

A month later, on January 19, 2012 the Cutuks filed declarations signed by six more jurors – Lora Mertens, Scott Occhiuto, Grace Thompson, Wendy Klamp, Eric Wiebusch, and Jerry Patzer. CP 107-08; 109-10; 111-12; 113-16; 117-23; 124-26.

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[2] Defendant's three juror declarations were obtained with those jurors' permission following interviews they and other jurors gave to counsel at the courthouse after the jury was discharged. *See* CP 4, 118. After the jury was discharged and jurors left the courthouse, the trial court allowed contact with former jurors only under a procedure whereby the court administrator's office would contact a juror at plaintiff's or defense counsel's request and ask whether the juror consented to speak with counsel. CP 7-8. The Cutuks do not assign error to the trial court's procedure in that regard. According to plaintiffs' counsel, three jurors declined to be contacted by him. CP 98. Ultimately, the court had before it nine juror declarations when it ruled on Dr. Bray's new trial motion.

Juror Mertens declared:

> At no time during the deliberation do I recall any juror stating that he or she researched or utilized outside information. At no time did a juror bring in outside information sources and attempt to influence other juror's votes. More than one juror voiced the wish that we had more information regarding definitions of terms like "negligence" and "reasonably prudent". Some said they wished they could use a dictionary. I don't recall anyone saying he or she actually did.

CP 120. Juror Occhiuto declared:

> To the best of my recollection, there were no discussions amongst us jurors of a dictionary definition of the word "negligence". There was a juror who said he would, or did, look up the word in a dictionary, but there was never a conversation amongst us jurors of any definition of negligence other than the definition provided by the court.

CP 111-12. Juror Thompson declared:

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

CP 109. Juror Klamp declared:

> I do not recall any juror telling us that he/she looked up the definition of negligence at home. If this statement was made, I did not hear it and it certainly wasn't reiterated during our discussions. I can assure the court that a dictionary definition was not used or discussed when we were deliberating. . . . On the third day, . . . we were struggling with "negligence". . . . As far as I can recall, we did not discuss any dictionary definition of negligence.

CP 114. Juror Wiebusch declared:

> 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, Juror Patzer declared:

> 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.[3]

D. Judge Castleberry's Ruling on the Motion for New Trial.

On January 30, 2012, Judge Castleberry heard argument on, and granted, Dr. Bray's motion for new trial, CP 30-45, explaining:

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[3] Citing the declarations of Jurors Thompson, Klamp, Mertens, and Patzer, the Cutuks claim, *App. Br. at 6*, that "[f]our jurors denied that any juror had reported looking at a dictionary." Yet, as the actual declaration statements of the jurors quoted above reveal, Jurors Thompson, Klamp, and Mertens at most stated that they did not recall any juror doing so, CP 109, 114, 120, Juror Patzer stated that "he never heard any juror" report "that he or she had looked up a definition of negligence in a dictionary at home or online," and denied that he himself had done so, CP 124-25, and Juror Occhiuto acknowledged that "[t]here was a juror who said he would, or did, look up the word ["negligence"] in a dictionary," CP 112-13. And, although the Cutuks claim, *App. Br. at 6*, that "[f]ive jurors affirmed that no dictionary definition was discussed during deliberations," not all five of the juror declarations they cite, CP 109, 112, 114-15, 120, and 124, are that unequivocal, as several talk in terms of what those jurors "do not recall," And, the Cutuks ignore the fact that Juror Wiebusch whose declaration they submitted declared unequivocally that a juror had stated that he had looked up the definition of negligence, and that, although Juror Wiebusch did not recall what the definition was, "[i]t was discussed briefly by a couple of jurors." CP 107.

[I]f this juror did what is alleged to have been done, it's misconduct. The juror was told in the instructions explicitly don't look up legal definitions. The jurors were repeatedly told by me throughout the trial do not discuss this case. This case should only be based upon that which you see and hear in this courtroom. I mean, I pride myself in terms of making it explicit to the jurors that they should not be doing this. And . . . 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 they should not do this.

It is also clear that from the case law for a juror to do this, even if he didn't discuss it, would be misconduct. . .

[W]hether it occurred or not, is obviously hotly disputed. You have three jurors who I will indicate line up with the defense saying they have specific recollection that this discussion of a definition of negligence did occur.

You have two jurors who have been put forth by the defense [sic, plaintiff] who are a little more ambivalent, but in one fashion or another say, yes, there was a juror who looked up the definition of negligence, and maybe there was some discussion of it.

[The Court then quoted from the declarations of jurors Occhiuto and Wiebusch]

And then, of course, you have the other jurors who say I do not recall any juror telling us that he or she looked up the definition of negligence at home, including that of Jerry, who says I didn't look it up and I didn't discuss it.

* * *

It 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."

So the question is, on an objective standard, has it been shown that in fact a juror said that he or she had looked up adefinition of negligence and then reported that to the jury? And it seems to me by an objective standard it has been. I have at least four jurors who say it did occur. I have a fifth one who says, well, there was something generally like

> that. And then I have three who say they don't recall it occurring . . . And of the three [jurors whose declarations were offered] by the defense, initially there doesn't appear to be any sort of individual motive that I can see other than maybe they didn't like the verdict, but at least one of those voted with the plaintiff.
>
> * * *
>
> So bottom line, the court makes a factual finding that objective proof has been presented to satisfy the court that in fact a juror did look up the definition of negligence and did discuss, however briefly, that definition with the other jurors.

CP 32-37.

Judge Castleberry then addressed the Cutuks' argument that Dr. Bray had made "no objective showing that [the jurors'] discussion had any bearing on the decision of the jury," noting that *Adkins*[4] "was clear that if the trial court has any doubt about whether the misconduct affected the verdict, it's obliged to grant a new trial."[5] CP 37. Judge Castleberry concluded that:

> [I]t's apparent to me that in all probability the misconduct would affect the verdict, because . . . 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.
>
> . . . And, of course, as we all know, medical malpractice has its own unique particular type of definition that brings

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[4] *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 750 P.2d 1257 (1988).

[5] The exact quote from *Adkins* is: "If the trial court has any doubt about whether the [jury] misconduct affected the verdict, it is obliged to grant a new trial." *Adkins*, 110 Wn.2d at 137.

you always back to the standard of care of the practicing physician.

CP 38.

IV. STANDARD OF REVIEW

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).[6]

[6] The Cutuks cite *Cox v. Charles Wright Acad., Inc.*, 70 Wn.2d 173, 179, 422 P.2d 515 (1967), for the proposition that "[o]ur judicial system rests upon the idea of finality in judgment given by the courts." *App. Br. at 16-17*. Their citation to *Cox* is inapt for two reasons. First, as *Palmer*, 132 Wn.2d at 197, explains, the reason an order denying a new trial is accorded less deference on appeal than an order granting a new trial is out of concern about finality. In other words, courts prefer being able to say a trial was fair over enforcing finality for finality's sake. Second, in *Cox*, the court made the statement the Cutuks quote to explain why a juror's declaration revealing "[t]he 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" could not be considered on a motion for new trial or additur. Judge Castleberry did not base his finding of misconduct on mental-process/effects testimony, and in fact noted that he could not consider and had not considered such testimony in the juror declarations submitted to him. CP 38-39.

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.* (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.2d 506 (2012).[7]

V. ARGUMENT

A. To Hold Dr. Bray Liable for Medical Malpractice, the Cutuks Had to Prove with Expert Testimony that He Failed to Meet the Professional Standard of Care Applicable to an OB/GYN.

"Expert [opinion] testimony is required to establish the standard of care. . . in a medical negligence action" because the standard of care is part of an essential element in such a case[8] and is typically beyond the expertise of a layperson. *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001). The Cutuks do not assign error to any of Judge Castleberry's jury instructions and thus tacitly concede that Court's Instruction No. 8 correctly told the jury that, as an "obstetrician/gynecologist [Dr. Bray had] a duty to exercise the degree of skill, care and learning expected of a reasonably prudent obstetrician/gynecologist in the state of Washington

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[7] Thus, the Cutuks, *App. Br. at 9-13*, urge this Court to review *de novo* Judge Castleberry's factual finding based upon juror declarations that the alleged misconduct – consulting a dictionary for the definition of negligence and reporting that definition to other jurors – occurred. 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. The Cutuks do not dispute that "consultation of a dictionary by the jury is misconduct," *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, *App. Br. at 12*.

[8] RCW 7.70.040 provides that one of the propositions that a plaintiff suing for injury due to a health care provider's failure to follow the accepted standard of care (malpractice) must prove is that "[t]he health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances."

acting in the same or similar circumstances at the time of the care or treatment in question," and that "[f]ailure to exercise such skill, care, and learning constitutes a breach of the standard of care and is negligence." CP 199. Stated in reverse, Instruction 8 told the jury that negligence is (and thus means) failure to exercise the degree of skill, care, and learning expected of a reasonably prudent OB/GYN in the State of Washington acting in the same or similar circumstances at the time of the care or treatment in question.

B. In a Medical Malpractice Trial, It Is Misconduct for a Juror to Inject into Jury Deliberations a Dictionary Definition of "Negligence" that Differs from the Definition Set Forth in the Court's Instructions.

The Cutuks concede that consulting a dictionary by a jury "would be misconduct," *App. Br. at 8, 12 n.3*, and that the jury in this case was instructed not to do it, *App. Br. at 7*. The Cutuks do not dispute that it would be misconduct for jurors in such a case to discuss what they were told was a dictionary definition of a term material to their deliberations and about which some of them were "struggling." *See* CP 109, 114, 170. Instead, the Cutuks argue (1) that the juror declarations do not provide strong enough support for Judge Castleberry's findings that a juror looked up the definition of "negligence" in a dictionary and that jurors at least briefly discussed what that juror told them was a dictionary definition of "negligence," and (2) that, even if the misconduct happened, Judge

Castleberry abused his discretion in ordering a new trial. As discussed more fully below, Judge Castleberry had ample bases to find that juror misconduct in fact occurred and that it warranted a new trial.

C. Judge Castleberry Was Entitled to Find that Jury Misconduct Occurred Based on the Juror Declarations the Parties Submitted and Was Not Required to Conduct an Evidentiary Hearing.

The Cutuks complain, *App. Br. at 17-19*, that Judge Castleberry erred by not holding an evidentiary hearing before making his finding of jury misconduct. They cite no decision, however, standing for the proposition 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.

1. CR 59(a)(2) authorizes proof of juror misconduct by declaration(s).

CR 59(a)(2) authorizes misconduct of a juror to be "proved by the affidavits of one or more of the jurors." GR 13(a) authorizes the use of declarations whenever a matter is required or permitted to be supported or proved by affidavit. Washington jury misconduct decisions recognize that findings that misconduct occurred may be made post-trial based entirely on juror affidavits or declarations. *E.g.*, *Robinson*, 113 Wn.2d at 156 (court may rely on a juror's affidavit to establish juror misconduct but not to contest the juror's thought processes in reaching a verdict); *Lindsay v. Elkins*, 154 Wash. 588, 614, 283 P. 447 (1929) (under pre-CR 59(a)

statutes providing that jury misconduct "may be proved by affidavits of one or more of the jurors," use of juror affidavits to prove misconduct based on evidence outside the record is mandatory rather than permissive); *Byerly v. Madsen*, 41 Wn. App. 495, 499, 704 P.2d 1236, *rev. denied*, 104 Wn.2d 1021 (1985) ("the trial court, in ruling on a motion for new trial based on jury misconduct, may consider jurors' affidavits insofar as they state 'the facts showing misconduct, but not as showing the *effect* of such misconduct on the verdict'").[9] Judge Castleberry's reliance on juror declarations was proper.

2. Washington case law does not require an evidentiary hearing before a trial court may find juror misconduct.

The Cutuks' citations to *United States v. Langford*, 802 F.2d 1176 (9th Cir. 1986), and *United States v. Saya*, 247 F.3d 929 (9th Cir. 2001), *App. Br. at 18*, are wholly inapt. Neither decision applied Washington law to a civil tort case, and both cases held that it had *not* been error for federal

[9] *See also Halvorson v. Anderson*, 82 Wn.2d 746, 748, 513 P.2d 827 (1973) ("Examining the affidavits of the jurors and recalling the testimony at the trial, the superior court found that one of the jurors had indeed introduced evidence not presented by the parties at the trial"); *Gardner v. Malone*, 60 Wn.2d 836, 842, 376 P.2d 651 (1962) ("if [a] juror's affidavit establishes misconduct of the jury by facts or circumstances that do not inhere in the verdict, the facts must be considered"); *Lyberg v. Holz*, 145 Wash. 316, 316-17, 259 P. 1087 (1927) ("The facts thought to establish misconduct are shown by the affidavits of three of the jurors. There are no controverting affidavits, and the facts set out in these affidavits must be accepted as true"); *Ryan v. Westgard*, 12 Wn. App. 500, 503, 530 P.2d 687 (1975) ("In considering affidavits concerning jury misconduct filed following a verdict, . . . only those facts should be considered which relate to juror misconduct which in all likelihood influenced the verdict").

district judges to decline to hold post-verdict evidentiary hearings to consider claims of juror misconduct.

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. denied*, 89 Wn.2d 1010 (1977), to suggest that a trial judge *should* examine jurors in court before finding juror misconduct, *App. Br. at 10-11*, is likewise misplaced. In those cases, the issue of juror nondisclosure during *voir dire* arose because the jurors spoke up during trial and disclosed their acquaintance with a witness. Thus, the trial judges could assess the impartiality of undischarged jurors firsthand before deciding whether to grant a mistrial. Neither *Rempel* nor *Colbert* suggests that a mistrial was properly denied *only because* the judge spoke with the juror at issue.

D. Judge Castleberry Properly Found, Based Upon the Juror Declarations, that the Alleged Juror Misconduct Occurred.

The Cutuks argue that the juror declarations submitted to Judge Castleberry were hearsay, *App. Br. at 14-15*, and/or should not have served as the basis for jury misconduct findings because they were not sufficiently certain or strong, *App. Br. at 13-17, 21-22*, or were contradicted, *App. Br. at 8, 16, 18, 19*. The Cutuks are wrong.

1. The Cutuks did not preserve, and indeed waived, any hearsay objection to Judge Castleberry considering the juror declarations to establish what was said and done during deliberations.

The Cutuks do not assign error to any evidentiary ruling Judge Castleberry made. They do, however, citing *Herndon v. City of Seattle*, 11 Wn.2d 88, 118 P.2d 421 (1941), *App. Br. at 14-15*, make a perfunctory argument that the claims "that a juror consulted a dictionary" were hearsay and "may not be considered to prove the allegation that the other juror in fact looked at a dictionary." What *Herndon* said about hearsay is confined to one sentence that followed a lengthy analysis of jury *instructions*:

> The affidavit of one juror that she heard the juror who is charged with misconduct in visiting the scene of the accident, and one other juror, state that they had gone to the scene of the accident is nothing more than hearsay statements, and such an affidavit is insufficient to invoke the discretion of the trial court to grant a new trial. *Lindsay v. Elkins*, 154 Wash. 588, 283 P. 447 [(1929)].

Herndon, 11 Wn.2d at 106. To the extent the Cutuks are making a hear-say-based challenge to Judge Castleberry's finding that a juror looked up "negligence" in a dictionary and that jurors discussed what one of them said was a definition of "negligence" that came from a dictionary, the challenge is not one the Cutuks properly preserved for review. In the trial court, the Cutuks cited *Herndon* as support for an argument that Dr. Bray had not shown misconduct with what they claimed is the requisite degree of "certainty." CP 68. They did not cite it for a hearsay objection to any

juror's assertions of fact. CP 68. The Cutuks never objected to or moved to strike any statements in any juror declaration(s) as hearsay. Moreover, they offered for Judge Castleberry's consideration the declaration of Eric Wiebusch, who declared that another juror ("Jerry") had "stated that he had looked up the definition of negligence in a dictionary the previous evening," and that the definition "was discussed briefly by a couple of jurors." CP 107. The Cutuks do not explain why they are entitled to object on appeal to the court having considered testimony they offered.

RAP 2.5(a) provides that an appellate court "may refuse to review any claim of error which was not raised in the trial court." Even if testimony that another juror said he or she had looked up "negligence" in a dictionary is hearsay, the Cutuks did not so argue in the trial court and instead presented such evidence themselves through the Wiebusch declaration. Generally, failure to preserve an argument for review constitutes waiver of the argument. *Erickson v. Robert F. Kerr, M.D., P.S., Inc.*, 125 Wn.2d 183, 194, 883 P.2d 313 (1994); *Karlberg v. Otten*, 167 Wn. App. 522, 531, 280 P.3d 1123 (2012). Failure to raise a hearsay objection in the trial court waives a hearsay challenge to evidence on appeal. *State v. Perez-Cervantes*, 141 Wn.2d 468, 482-83, 6 P.3d 1160 (2000).

2. Declaration testimony that jurors discussed a definition of "negligence" that one of their number said came from a dictionary was not hearsay.

Even if the Cutuks had preserved a hearsay argument, their reliance on *Herndon* is misplaced to the extent they raise one with respect to Judge Castleberry's finding that jurors *discussed* a definition of "negligence" that one of their number *said* came from a dictionary. *Byerly v. Madsen*, 41 Wn. App. 495, 704 P.2d 1236, *rev. denied*, 104 Wn.2d 1021 (1985), shows why. *Byerly* is similar to this case in that it was a medical malpractice case and one juror testified concerning a statement of fact another juror had made during deliberations that eight other jurors swore they did not recall hearing and that they had not considered:

> The jury returned a special verdict finding Drs. Madsen and Allen and the hospital free of any negligence. In the Byerlys' motion for . . . a new trial, they cited jury misconduct. They attached the affidavit of Douglas E. Helm, the jury foreman, who attested that both before and during deliberations one of the jurors stated in the presence of the other jurors that [a separate] anesthesia group had been a defendant [in the lawsuit] and had settled for $100,000. In response, the doctors and the hospital submitted the affidavits of eight of the jurors who stated that while they recalled some mention of the anesthesiologists, they did not recall any specifics and it was not considered by them during deliberations.

Byerly, 41 Wn. App. at 498. The trial court granted a new trial because of jury misconduct and the Court of Appeals affirmed. *Apropos* the Cutuks' hearsay argument, the Court of Appeals in *Byerly* first noted that juror

affidavits are properly considered to the extent they state facts showing misconduct, but not to the extent they purport to show the effect of the misconduct on the verdict:

> [T]he trial court, in ruling on a motion for new trial based on jury misconduct, may consider jurors' affidavits insofar as they state "the facts showing misconduct, but not as showing the *effect* of such misconduct on the verdict". (Italics ours.) *Gardner[v. Malone]*, [60 Wn.2d 836,] at 842 [(1962)] (quoting *Maryland Cas. Co. v. Seattle Elec. Co.*, 75 Wash. 430, 134 P.1097 (1913)). Under *Gardner*, "[i]t is for the court to say whether the remarks made by the juror . . . probably had a prejudicial effect upon the minds of the other jurors." *Gardner*, [60 Wn.2d] at 840 [Other citations omitted.]
>
> Here, the court properly considered Mr. Helm's affidavit as it related to the alleged statement made in the jurors' presence concerning the Byerlys' settlement with the anesthesiologist. [Citation omitted.] The court also properly reserved to itself the question of the effect of this statement; the jurors' affidavits that they did not consider the remarks inhered in the verdict. [Citation omitted.]

Byerly, 41 Wn. App. at 499-500. The *Byerly* court expressly rejected an argument (based on citation to *Herndon*) that the juror affidavit was hearsay:

> In *Herndon* . . . the court labeled as hearsay a juror's affidavit that he had heard two other jurors state that they had gone to the scene of the accident . . . But here, we have [juror] Helm attesting to a fact of his own personal knowledge, *i.e.*, that the settlement was mentioned before the jury. His affidavit is not offered as proof that the [plaintiffs] *entered into* a settlement with the anesthesiologist; only as proof *that the jury was advised of such a settlement*. Thus, his statements were not hearsay.

Byerly, 41 Wn. App. at 502 (emphases supplied).

Thus, even had the Cutuks argued to Judge Castleberry that he should ignore any juror declaration on grounds of hearsay, the hearsay rule would not have precluded Judge Castleberry from finding, based on the Wiebusch, Satterwhite, Lang, and Jones declarations, CP 107, 141, 168, 171, that some jurors did at least briefly discuss a definition of "negligence" that a juror said had been found in a dictionary.

3. The Satterwhite, Jones, Lang, and Wiebusch declarations were not controverted and were strong enough to establish that the alleged misconduct occurred.

In ruling on a motion for new trial due to alleged jury misconduct, a trial court may credit uncontroverted juror declarations as to what a member of the panel said or did during deliberations. *Lyberg v. Holz*, 145 Wash. 316, 317, 259 P. 1087 (1927). The Cutuks repeatedly characterize the declarations they submitted as conflicting with, rebutting, or contradicting the declarations that Dr. Bray submitted in support of his motion for new trial, *e.g.*, *App. Br. at 8, 16, 18, 19*, or as raising issues of juror/witness credibility, *App. Br. at 9, 12, 17*, and assert that Judge Castleberry "believed one set of jurors over another," *App. Br. at 19*. None of those contentions has merit, and the Wiebusch declaration, which the Cutuks offered, confirmed Dr. Bray's juror declarants' statements as to what had occurred.

Even more to the point for purposes of this appeal, "I do not recall" declarations are not "contradictory" evidence. Again, *Byerly* is on point and defeats the Cutuks' argument.

> [T]he doctors and hospital . . . argue that only Mr. Helm's affidavit reflects knowledge of the settlement and the other affidavits only say the jurors heard some mention of the anesthesiologist, but did not recall any details.
>
> 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*** . . . Mr. Helm's affidavit constitutes sufficient evidence from which the Superior Court could find the settlement had been mentioned in the jury's presence.

Byerly, 41 Wn. App. at 500 (emphasis supplied). *Byerly* not only refutes the Cutuks' argument about contradictory, conflicting, and inconsistent testimony, but confirms that *any one* of the four uncontradicted juror declarations was sufficient to support a finding of juror misconduct. Just as *Byerly* held that the Helm declaration sufficed to support the trial court's finding of jury misconduct in that case, *Byerly* disposes of the Cutuks' contentions that the juror declarations in this case were not sufficiently certain, *App. Br. at 13-14, 21-22*, or objective, strong, and affirmative, *App. Br. at 15-16*, to support Judge Castleberry's conclusion that the alleged misconduct – a juror's interjection of a definition of "negligence" that purportedly came from a dictionary – had in fact occurred.

4. The other declarations did not call into question the "credibility" of the Satterwhite, Jones, Lang, and Wiebusch declarations.

The Cutuks' assertions that an evidentiary hearing was necessary to assess the juror declarants' credibility, *App. Br. at 12, 17*, is unsupported by citation to pertinent authority and is unpersuasive. The declarations describing what the Cutuks admit would be misconduct came both from jurors who had voted for plaintiff and from jurors who had voted for defendant with respect to the 10-2 verdict. And, the jurors in their declarations tended to confirm each other on other pertinent points. No fewer than *four* jurors agreed that the "dictionary definition" discussion occurred. CP 107, 141, 168, 171. Two of the other five jurors who signed declarations admitted that the *idea* of consulting a dictionary came up during deliberations. CP 111-12, 120. One juror who had voted for plaintiff and one juror who had voted for defendant agreed that the "dictionary definition" discussion occurred on the third day of deliberations (Jones, CP 170-71, and Wiebusch, CP 107).

The Cutuks offered no plausible reason why any of the jurors who made such statements would commit perjury. Thus, there was no basis for disbelieving all four juror declarants who described the misconduct or for expecting cross-examination at an evidentiary hearing to prompt recanta-

tion of any juror's testimony.[10] As the court noted in *Byerly*, 41 Wn. App. at 500, it "would serve no purpose" to conduct a hearing take testimony from jurors who professed in declarations to lack specific recall. The same was true here. Moreover, the Cutuks did not cite, and defense counsel reported being unable to find, *see* CP 3, any case authority requiring or even permitting a trial judge to summon back members of a discharged jury for interrogation concerning misconduct during deliberations, and the Cutuks have not cited any such authority on appeal.

5. Juror declarations relating matters that inhere in a verdict may not be considered either to impeach or to "sustain" the verdict.

The Cutuks argument, *App. Br. at 16-17, 24-25*, that, because some jurors testified in declarations that the jury examined the trial evidence painstakingly and made only a modest damage award to the Cutuks, Judge Castleberry abused his discretion by granting Dr. Bray a new trial is without merit. Such testimony was inadmissible and had to be disregarded.[11]

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[10] There is one odd assertion of fact in one of the nine declarations: Mr. Patzer's denial, twice, that he looked up a definition of "negligence" *online* even though no other declarant had described a juror reporting having found a definition of negligence online. CP 124, 125.

[11] What was inadmissible were statements jurors made in their declarations about what they personally had believed (Satterwhite, CP 140 (¶ 4)), or what had "swayed" other jurors (Jones, CP 170 (¶ 4); Lang, CP 167 (¶ 4)), or what kinds of testimony would have been or was important to them (Satterwhite, CP 141 (¶ 6; Lang, CP 167-68 (¶ 5)), or concerning how the jury arrived at its verdict (Thompson, CP 110; Wiebusch, CP 108; Occhiuto, CP 111-12; Mertens, CP 119-23; Patzer, CP 125), or what impact they believe discussion of definitions had or did not have on the verdict (Wiebusch, CP 107), or how

Juror declarations may not be considered to prove how something affected a juror's or the jury's mental processes. *E.g.*, *Gardner v. Malone*, 60 Wn.2d at 840 ("It is not for the juror to say what effect the remarks may have had upon his verdict, but he may state facts, and from them the court will determine what was the probable effect upon the verdict") (quoting *State v. Parker*, 25 Wash. 405, 415, 65 P. 776 (1901)); *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 205, 75 P.3d 944 (2003) ("a juror's postverdict statements regarding the way in which the jury reached its verdict cannot be used to support a motion for a new trial"); *Richards*, 59 Wn. App. at 273 ("[t]he court must make an *objective* inquiry into whether the extraneous evidence . . . could have affected the jury's determination and *not a subjective* inquiry into the actual effect of the evidence on the jury, because the actual effect of the evidence inheres in the verdict") (italics in original); *Adkins*, 110 Wn.2d at 137 ("Jury misconduct . . . results where a juror provides the jury with erroneous statements of law [and w]here [it] can be demonstrated by objective proof without probing the jurors' mental processes, the effect the improper information may have had upon the jury is a question properly determined in the sound discretion of the trial court").

"offended" or "appalled" they are to learn about defense counsel moving for a new trial (Mertens, CP 123; Klamp, CP 115).

The Cutuks argue, *App. Br. at 25*, that, while it is impermissible to consider juror declarations that disclose "mental processes" for the purpose of *impeaching* the verdict, such testimony is or should be admissible to "sustain" a verdict. But facts "linked to [a] juror's motive, intent or belief, or. . . their effect upon [a juror]" are facts that "inhere in" the verdict. *Breckenridge*, 150 Wn.2d at 205. That courts typically recite the rule when explaining why they must ignore evidence offered by a losing party does not mean facts that "inhere in" the verdict may be offered by the winning party to "sustain" the verdict.

The Cutuks' argument that a trial judge should consider juror testimony that misconduct did *not* affect the verdict proposes adoption of a subjective test foreclosed by *Adkins*. Under *Adkins*, once the fact of misconduct is shown, the trial court must make an ***objective*** evaluation of the misconduct's possible effect on deliberations, and is obliged to grant a new trial if he or she has "***any doubt*** about whether the misconduct affected the verdict." *Adkins*, 110 Wn.2d at 137 (emphasis added). The Cutuks' argument is also one that *Byerly* directly refutes. In *Byerly*, 41 Wn. App. at 500, the court held that "jurors' affidavits that they did not consider the remarks [that constituted juror misconduct] inhered in the verdict," which the trial court properly had not considered, reserving to itself the effect of the improper remarks.

The Cutuks cite *Herndon*, 11 Wn.2d at 105, for the proposition that an order for new trial must be reversed when a juror's uncontradicted affidavit states that brief exposure to extrinsic information had nothing to do with the verdict. *App. Br. at 26*. Besides the fact that *Byerly* holds that such disclaimers by jurors "inhere in the verdict" and may not be considered, the Cutuks' reliance on *Herndon* is misplaced because *Herndon* does not hold or imply what the Cutuks cite it for and has no relevance to a "dictionary definition misconduct" case.

The trial court granted a new trial in *Herndon* because of what it thought had been instructional error, saying it would not have done so based solely on what it concluded had been juror misconduct in driving by the scene where the car accident at issue had occurred. Although the trial court cited that conduct along with instructional error in granting a new trial, the Supreme Court held that the grant of the new trial was error and reversed. *Herndon*, 11 Wn.2d at 90, 106. At the end of a decision devoted to the instructional issues, the Supreme Court said this about the juror misconduct:

> The general rule is that an unauthorized view or inspection made by a juror during the progress of a trial, while improper, is not ground for a new trial unless, it appears that the verdict was affected thereby. [Citation omitted.]
>
> The intersection at Second Avenue and Seneca Street, the scene of the collision, is in the main downtown district of Seattle. The juror made a brief stop at this intersection

> while waiting for traffic to clear sufficiently for her to proceed in her car and without getting out of her car. She certainly was not thus apprised of anything that she and the other jurors did not already know. No matter in dispute could have been affected by the juror's short view of the intersection in which the accident happened.
>
> There 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 . . . All parties agreed as to measurements, description, and physical conditions of the intersection. The affidavit of the juror that her incidental view of the intersection had nothing to do with her verdict in the cause and added nothing to her knowledge of the intersection, is uncontroverted.

Herndon, 11 Wn.2d at 104-05.

The 1941 decision in *Herndon* does not stand for the proposition that a court must credit a juror's declaration stating that juror conduct at issue "had nothing to do with her verdict." As explained above, such a proposition is inconsistent and irreconcilable with the test enunciated in *Adkins* in 1986. What mattered in *Herndon* (regardless of whether or not the juror herself believed it did) was that the conduct "added nothing [that mattered] to [the juror's] knowledge of the intersection" the configuration of which was not a subject of dispute or significance in the trial.

In sharp contrast, and more directly on point with this case, is the *Adkins* court's ready recognition that the jury's consultation of a dictionary for a definition of "negligence," even in an *ordinary* negligence trial, "alone could well have affected the verdict." *Adkins*, 110 Wn.2d at 138.

It was even easier for Judge Castleberry to recognize that discussion of an extrajudicial definition of "negligence" in this *professional* negligence trial "could well have" affected the verdict of a jury that several jurors testified had been "struggling" with the meaning of the word "negligence," CP 109, 114, 170.

E. Judge Castleberry Properly Applied the "Any Doubt" Test that *Adkins* Prescribes.

As the Court explained in *Adkins*, 110 Wn.2d at 137, a case in which the jury had looked up dictionary definitions of "negligence" and "proximate cause":

> Where jury misconduct can be demonstrated by objective proof without probing the jurors' mental processes, the effect the improper information may have had upon the jury is a question properly determined in the sound discretion of the trial court. If the trial court has any doubt about whether the misconduct affected the verdict, it is obliged to grant a new trial. [Footnotes omitted.]

Applying that standard, Judge Castleberry concluded that he was obliged to grant Dr. Bray's motion for new trial as no definition of negligence one would ordinarily find in a dictionary would provide the "unique particular type of definition" of negligence that applies in a medical malpractice action. CP 38. Judge Castleberry did not abuse his discretion in so concluding.

1. Contrary to the Cutuks' assertions, it was not error for Judge Castleberry to rely on *Adkins*, rather than *Tarabochia*.

The Cutuks argue that Judge Castleberry erred by looking to *Adkins* rather than *Tarabochia v. Johnson Line, Inc.*, 73 Wn.2d 751, 440 P.2d 187 (1968), for controlling authority. *App. Br. at 19-24.* Given that *Tarabochia* reversed a trial court's grant of a new trial, which is what the Cutuks want this Court to do, and *Adkins* affirmed the grant of a new trial, which is the result they seek to avoid, the Cutuks' effort to align this case with *Tarabochia* and to distinguish *Adkins* is not surprising. *Tarabochia*, however, is inapposite because the evidence that the jury in that case was accused of considering improperly was not extrinsic to the trial. In *Adkins*, the definitions the jury considered not only were extrinsic to the trial, but also one of the definitions was of "negligence." Judge Castleberry properly looked to *Adkins* and not to *Tarabochia* for guidance.

In *Tarabochia* the jury took a bag of urea that had been admitted in evidence at trial – which meant it belonged in the jury room for deliberations, CR 51(h)[12] – and wetted it to find out if it got slippery as trial witnesses had all agreed it did:

> The [testimony] was that the respondent slipped and fell into a hole between plastic bags of urea, a crystalline substance, which he was unloading. There was a conflict in

[12] "After argument, the jury shall retire to consider its verdict. In addition to the written instructions given, the jury shall take with it all exhibits received in evidence, except depositions. . ."

> the evidence as to whether a number of plastic bags had broken and spilled urea and whether this urea had become wet, causing a slippery condition and making the unloading hazardous. The respondent's shoes, a plastic bag like those in which the urea was stowed, and two samples of urea, were introduced in evidence, and were taken to the jury room without objection on the part of the respondent. Members of the jury mixed the urea with water, put it on the plastic bag, and "conducted an experiment" on the bag. The nature of the experiment was not revealed by the affidavits.

Tarabochia, 73 Wn.2d at 752. Thus, the dispute at trial was not over what happened when urea got wet; the dispute was over whether the plaintiff had fallen because of urea that *was* wet. The court held that the jury's wetting of the urea did not warrant a new trial because the result of the jury's experiment was unknown *and* because it was improbable, in light of the *undisputed* testimony, that the result of the jury's experiment would have shown anything other than what all witnesses agreed would happen:

> As the appellant's counsel pointed out during argument in the trial court on this motion, the results of the experiment performed by the jury were not disclosed in the affidavits secured by the respondent. They are not shown in the record. All of the testimony on the question at the trial was that a mixture of water and urea on a plastic bag would be slippery. The respondent suggests that it is possible, or even probable, that the jury's test showed that this combination of substances would not produce a slippery condition. If we are to assume this to be the fact, we must also assume that all of the witnesses who testified on the subject were in error. This would mean that the witnesses on both sides testified out of ignorance or colluded to deceive the jury. We cannot assume such an improbability.

Id. at 753.

Thus, *Tarabochia* was a case in which the jurors did not inject nontrial evidence into deliberations and in which the conduct of the jurors that allegedly occurred could not have affected how the jury weighed conflicting testimony. That is not true here. Just as the dictionary definition of negligence the jury looked up and discussed in *Adkins* was not simply a restatement of the definition of negligence given in the trial court's instructions to the jury, *see Adkins*, 110 Wn.2d at 138, so here ordinary dictionary definitions of negligence would not have mirrored the definition of professional negligence set forth in Judge Castleberry's instructions to the jury. What "negligence" means *determines* how a jury weighs conflicting medical expert testimony bearing on whether a physician met the applicable standard of care. Dr. Bray was entitled to have the jury weigh conflicting testimony concerning his compliance with the applicable standard of care based on – and *only* on – the definition of negligence set forth in Judge Castleberry's standard of care instructions.

That the Cutuks' reliance on *Tarabochia* is misplaced is confirmed by the *Adkins* court's comparative use of *Tarabochia* to illustrate why a new trial was properly granted due to jury consultation of a dictionary:

> A decision granting or denying a motion for a mistrial, as in the case of a motion for a new trial, is 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 maintains that the only question here is one of law, that no element of discretion is involved, and that therefore abuse of discretion is not the applicable standard. He relies upon cases to this effect. In *Tarabochia . . .*, for example, the trial court granted a new trial due to jury experimentation using exhibits taken to the jury room during deliberations, despite the lack of any showing that new material facts were discovered by the jury which must have influenced the jury. [Citation omitted.] The results of the experiment had not been revealed to the trial court, and there was no basis for concluding that the experiment produced results inconsistent with the testimony given. The trial court believed no showing of discovery of new material facts was required. This court held that the trial court erred in granting the new trial, and, further, that 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.

Tarabochia thus involved a case where there was no objective proof*[13] *that new material was before the jury, in contrast to this case. 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, in violation of RCW 4.44.300, a bailiff engages in misconduct by communicating matters to a jury which may prejudice the verdict, and the information supplied to the

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[13] As the *Adkins* court's decision makes clear in the context of this excerpt from *Adkins*, "objective" proof of misconduct is simply evidence that does not involve "probing" jurors' mental processes; it is testimony as to what a juror personally saw or heard. Based on such "objective" proof as to what jurors said they personally heard, Judge Castleberry made his finding of misconduct. That a trial court, in crediting jurors' declaration statements as to what they did or did not personally see or hear, relies upon the court's observations over the years as why some jurors hear some things that other jurors do not hear, or relies upon the court's perceptions as to whether any juror had motivation to fabricate or make up what they said in declarations, does not mean, as the Cutuks contend, *App. Br. at 16*, that the court's determination that misconduct in fact occurred was not "objective."

> 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. Similarly, where a juror supplies the jury with evidence which was not admitted at trial, jury misconduct results. ***Jury misconduct also results where a juror provides the jury with erroneous statements of law. Where jury misconduct can be demonstrated by objective***[14] ***proof without probing the jurors' mental processes, the effect the improper information may have had upon the jury is a question properly determined in the sound discretion of the trial court.*** If the trial court has any doubt about whether the misconduct affected the verdict, it is obliged to grant a new trial. In both of these situations, abuse of discretion is the applicable standard of review.

Adkins, 110 Wn.2d at 136-37 (emphases added; footnotes omitted). Thus, this case, like *Adkins*, is not like *Tarabochia*, the "any doubt" standard applies, and "abuse of discretion is the appropriate standard of review" for Judge Castleberry's decision to grant a new trial.

The Cutuks argue that Judge Castleberry erred by treating *Adkins* as requiring him to order a new trial "automatically" once he found juror misconduct. *App. Br. at 20.* What Judge Castleberry observed was that *Adkins* had been clear "that if the trial court has any doubt about whether the [juror] misconduct affected the verdict, it's obliged to grant a new trial." CP 37. That is what *Adkins* holds. *Adkins* does not hold, and Judge Castleberry did not say, that a finding of misconduct *ipso facto* requires a new trial. Both said that a trial court is "obliged" to order a new trial"[i]f

[14] *See* footnote 13, *supra.*

the trial court has any doubt about whether the misconduct affected the verdict."[15] *Adkins*, 110 Wn.2d at 137; CP 37. Because Judge Castleberry had such doubt, he properly ordered a new trial.

2. Judge Castleberry did not apply an erroneous view of the law in making his discretionary new trial ruling.

The Cutuks assert, *App. Br. at 19, 23*, that a trial court abuses its discretion if it makes an otherwise discretionary ruling on an erroneous view of the law. That statement is correct, but it does not describe what Judge Castleberry did. The "erroneous view of the law" the Cutuks contend Judge Castleberry made seems to be (1) his believing that he could base a finding of misconduct on the juror declarations the parties presented, (2) his ordering of a new trial because he doubted a fair trial had been had, or (3) his not following what they claim *Tarabochia* dictated. Dr. Bray has already addressed why each of those arguments is incorrect.

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[15] The Cutuks cite cases from other jurisdictions to support their assertion that "most jurisdictions" apply "harmless error" analysis when jurors consult books in deliberations. *App. Br. at 24, n.5.* None of those "harmless error" decisions involved cases where a jury had been expressly instructed not to consult a dictionary, as the jury in this case was, CP 32, *App. Br. at* 7, or had looked up the dictionary definition of "negligence" in a professional negligence case. In any event, Washington applies a different, "any doubt," test. *Adkins*, 110 Wn.2d at 137. As the Court explained in *Gardner v. Malone*, 60 Wn.2d at 842, it consciously chose not to follow the approach of the "many courts [that] make no distinctions between affidavits of jurors as to the *fact* of misconduct and affidavits as to the *effect* of that misconduct upon their deliberation, holding that both are things which inhere in the verdict and that jurors' affidavits or statements as to either the fact or its effect are inadmissible because tending to impeach the verdict." The Cutuks do not assign error to the application of, or argue that Washington should abolish, the *Adkins* "any doubt" test or repudiate *Gardner* and either preclude consideration of juror declarations to establish the fact of misconduct or allow consideration of declarations to show that misconduct did not affect deliberations.

As discussed more fully at pages 17-30, *supra*, the juror declarations the parties submitted amply support Judge Castleberry's determination that the alleged jury misconduct occurred. Moreover, as discussed more fully at pages 30-36, *supra*, Judge Casselberry properly granted a new trial because he had doubt that a fair trial had been had. And, the excerpt from *Adkins* quoted at pages 33-35, *supra*, explains why the Cutuks' "error of law" argument based on *Tarabochia* is wrong. The Adkins test was applicable, and Judge Castleberry properly applied it.

F. Judge Castleberry Tenably Concluded that Injection of a Dictionary Definition of Negligence into Jury Deliberations in this Obstetrical Malpractice Trial Could Well Have Affected the Verdict.

Unless a trial judge's finding that jury misconduct occurred is vacated on review, the judge's conclusion that the misconduct warrants a new trial is reviewed for abuse of discretion. *McCoy*, 163 Wn. App. at 759 ("we give ***great deference*** to the trial court's determination of whether juror misconduct affected the verdict") (emphasis added). The Cutuks concede that point, *App. Br. at 12*, but argue that Judge Castleberry abused his discretion not only by giving insufficient weight to what they characterize as conflicts in juror testimony, *App. Br. at 16-18* – an argument Dr. Bray has addressed above, *see* pages 22-30, *supra* – but also by failing to take into account that no juror identified the dictionary from which the purported extrajudicial definition of "negligence" had come, no

juror identified the wording of the purported extrajudicial definition of "negligence" that was interjected into deliberations, *App. Br. at 18, 21-23*, and some jurors had testified about how thoughtfully the jury examined the trial evidence and how modest a damages award the jury had made to the Cutuks, *App. Br. at 16-17, 24-26*. The Cutuks' arguments do not establish that Judge Castleberry abused his discretion in granting a new trial based on interjection into jury deliberations of a dictionary definition of "negligence" in this medical malpractice trial that involved a professional standard of care.

The Cutuks argue that this case differs from *Adkins* because the court in *Adkins* knew what dictionary and definitions the jury had consulted. *App. Br. at 21*. But, as Judge Castleberry pointed out, it did not matter that the juror declarations in this case do not say what dictionary was consulted or what the dictionary definition said – ***any*** dictionary definition of "negligence" would have expressed a standard different from and less specific than the OB/GYN standard of care that applied to the Cutuks' medical malpractice claim against Dr. Bray:

> [I]n all probability the misconduct would affect the verdict, because . . . 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 . . . [a]nd, as we all know, medical malpractice has its own unique particular type of definition

> that brings you always back to the standard of care of the practicing physician."

CP 38. As the *Adkins* court explained about the dictionary definition of "negligence" that the jury consulted in that case:

> [T]hat definition ***did not merely restate the definition of "negligence" given in the jury instructions***. Among other things, the lengthy dictionary definition includes the statement that negligence "is synonymous with heedlessness, carelessness, thoughtlessness, disregard, inattention, inadvertence, remissness and oversight . . . " Black's Law Dictionary 1231 (3d ed. 1933). Further, the definition refers 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. The jury could have been misled by "gross", "ordinary" and "slight" negligence alone. These examples demonstrate 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.

Adkins, 110 Wn.2d at 138 (emphases added). Judge Castleberry told the jury not to look up legal definitions, CP 32, 179; *App. Br. at 7*, and to base its verdict only on what it saw and heard in the courtroom, CP 32, 190. Jurors nonetheless discussed a definition of "negligence" they were told came from a dictionary. The extrajudicial information the jury considered that mattered most to the court in *Adkins*, just as it did to Judge Castleberry, was a definition of "negligence" that the trial court had not provided. Regardless of whether jurors were provided with what purported to be a definition from a legal dictionary or a more general-use

dictionary, there is no chance that the extrajudicial definition they discussed "merely restated the definition" of negligence in Judge Castleberry's instructions. *Adkins*, 110 Wn.2d at 138. A dictionary definition of "negligence" not identical to the one Judge Castleberry gave in his instructions "could well have" misled the jury by diverting the jury's focus and analysis away from the professional OB/GYN standard of care that was supposed to guide its weighing of the evidence in this medical malpractice case.[16] That was what Judge Castleberry found troubling and made him doubt that the verdict was unaffected by the jury misconduct. CP 38.

VI. CONCLUSION

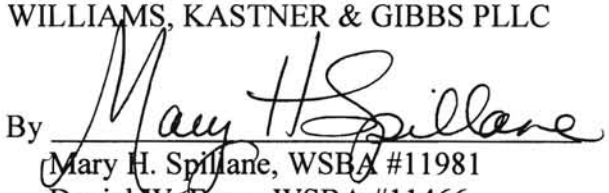
Substantial evidence supports Judge Castleberry's finding that there was discussion during deliberations in this medical malpractice trial of a definition of "negligence" that a juror reported having found in a dictionary. Under the proper standard – that "any doubt" as to whether juror misconduct affected the verdict must be resolved in favor of *granting* a new trial, *Adkins*, 110 Wn.2d at 137 – Judge Castleberry properly and

[16] Indeed, *Adkins* provides, if anything, a *less* compelling example of prejudicial jury misconduct than this case does, because consultation of a *legal* dictionary, as occurred in *Adkins*, would hold out at least a possibility that the jury would see a definition that resembled the "professional standard of care"-based definition the court gave in its Instructions No. 5, 6, and 8. CP 196, 197, 199. Here, the record shows only that a juror vouched for a definition as having come from some unknown dictionary, which makes it more likely that the definition of "negligence" that some jurors discussed equated that word with carelessness without any reference at all to a professional standard of care.

reasonably exercised the discretion that Washington law vested in him as trial judge. Under the proper deferential standard of review applicable to Judge Castleberry's exercise of his discretion, *McCoy*, 163 Wn. App. at 759, this Court should affirm.

RESPECTFULLY SUBMITTED this 6th day of November, 2012.

WILLIAMS, KASTNER & GIBBS PLLC

By 

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 6th day of November, 2012, I caused a true and correct copy of the foregoing document, "Brief of Respondent," to be delivered in the manner indicated below to the following counsel of record:

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