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70422-2

COURT OF APPEALS NO. 70422-2-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

HANNAH JONES,  
Appellant,

v.

REGENCY PACIFIC, INC.,  
Respondent.

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APPEALS  
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BRIEF OF RESPONDENT

King County Cause No. 10-2-21303-1

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## I. INTRODUCTION

Appellant has not identified a single legal, evidentiary or procedural error allegedly committed by the trial court before or during the jury trial that resulted in a verdict for the defense. Rather, the only issue before this Court is whether to impute “bias” to a juror, Lee Ann Cox, because she lived near one of Regency’s attorneys, Jennifer Lauren, and, if so, whether that alleged bias was sufficient to support a challenge for cause. At the time of trial, this issue was well vetted by the trial court twice, first Ms. Jones’ arguments were soundly rejected during trial and second, her arguments were soundly rejected when raised in a post-trial motion for new trial after the jury returned its verdict in favor of the defense.

For the first time on appeal, Ms. Jones argues quite ironically that Juror Cox “willfully” hid the fact that she lived in the same neighborhood as one of the defense counsel during voir dire, only to voluntarily disclose this fact more than a week after trial testimony commenced. This argument is starkly at odds with Ms. Jones’ position before the trial court, with the trial judge’s factual findings, with Juror Cox’s sworn testimony, and with the undisputable evidence in this case. Appellant’s new argument is illogical on its face since it asserts that a juror would willfully hide facts in order to be selected for a jury only to disclose those “hidden” facts one week later. Even overlooking the record before this Court and this inescapable logical flaw,

Ms. Jones' new arguments are also untimely and ignore established Washington law.

In an argument that can only be seen as desperation, Appellant apparently advocates for a rule that would disqualify a juror from serving if the juror lived in close proximity to one of the parties or their attorney. Not only would such a "proximity" rule deprive the trial court of discretion to manage its courtroom, but it would prove to be unworkable in some of the less populated counties in this state.

Rather than applying a non-existent standard to the juror issue raised in this case, the trial court properly assessed the available information and determined that there was no evidence that Juror 11 (Juror Cox) was not impartial or could not continue to serve on the jury. Under Washington law, the trial court did precisely what it was supposed to do when this issue was raised at the time of trial and the trial court's ruling on that issue should not now be overturned.

Regency respectfully submits that the jury in this case fairly evaluated the evidence before finding that Regency did not engage in neglect and that its negligence did not cause or contribute to Ms. Jones' alleged damages.<sup>1</sup> Regency asks that this Court uphold the verdict.

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<sup>1</sup> The jury found no neglect. Although the jury found regency negligent, the jury also found that negligence was not the cause of any alleged injuries. CP 15.

## II. FACTUAL BACKGROUND

Ms. Jones alleged that she developed a bed sore during her nine-day stay at Regency at NorthPointe in June, 2007, and that sore subsequently aggravated her preexisting severe vascular disease such that she required a partial amputation to her left lower leg. Regency denied these claims and presented convincing evidence that their care and treatment of Ms. Jones was proper and did not cause any alleged damages.

The case was tried before King County Superior Court Judge Richard Eadie. Voir dire was conducted on February 19 and 20, 2013. VRP 2/19/13, 2/20/13. During voir dire, Ms. Jones' counsel informed jurors that she intended to request an award of \$33 million. VRP 2/19/13 at p. 76. Counsel for each side was given, and used, seven peremptory challenges to exclude jurors. VRP 2/20/2013 at p. 113-114.

Approximately one week after the jury was empaneled, Juror 11 (Juror Lee Ann Cox) informed the Court Bailiff, Mary Powell, that she recognized Jennifer Lauren, one of Regency's attorneys, as a neighbor. The Court Bailiff informed the trial judge and the parties of Juror Cox's disclosure off the record. Because Ms. Jones did not request that a record be made at that time, the record is silent as to the precise date that Juror Cox first recognized Ms. Lauren.

Ms. Jones' counsel moved to excuse Juror Cox on February 28,

2013. VRP 2/28/13 at 3:11-3:12. Arguing against the Motion, Ms. Lauren informed the Court that she did not have a relationship with Juror Cox:

I realize she lives two doors down from me. I met her four years ago when she moved into my [sic] house. We talked about my fence. That's the extent of my relationship with juror number 11. If I had a 20 minute conversation with her I would not have recognized her.

VRP 2/28/13 at 3:14-3:19. The Court Bailiff further informed the trial court that Juror Cox knew Ms. Lauren's son's name, that the juror walked in the neighborhood, and had seen Ms. Lauren with her son. *Id.* at 8:21-8:23. Additionally, Juror Cox reported to the Court:

.. that she is an adult, and she can put that aside, and she feels she can be here. She just wanted us to know that it was on her mind.

*Id.* at pp. 8:25-9:3.

Plaintiff's counsel, Jeff Grant, argued Ms. Jones' motion to excuse Juror Cox. During oral argument, Mr. Grant did not request that Juror Cox be questioned by the trial court or the parties; did not request a mistrial and specifically refuted any suggestion that Juror Cox or Ms. Lauren had acted improperly:

Well, first, let's make clear what it is not. We are not implying or stating that there is any improper conduct or improper contact.

*Id.* at 3:21-3:23. The trial court denied the motion, without prejudice, allowing Ms. Jones to revisit the issue at the close of evidence. *Id.* at 6:25-

7:5. Ms. Jones renewed her motion to excuse Juror Cox on March 20, 2013.

In the present appeal, Ms. Jones notes, out of context, that on March 20, 2013 Judge Eadie stated that Juror Cox had been “on my mind the entire trial.” Appellant suggested that this statement was the trial judge’s recognition of concern of impropriety regarding Juror 11. However, Appellant’s suggestion of concern is not supported by the evidence. Instead, the trial judge was clear and affirmatively stated that after considering Juror Cox throughout the trial, he did “not believe it would be right to exclude her.” VRP 3/20/13 at 105:23-106:5. Again, Ms. Jones’ counsel did not request to voir dire Juror Cox nor did they request a mistrial prior to the case being referred to the jury. *Id.*

At the close of evidence, Regency argued that it did not neglect Ms. Jones and that it was not negligent. In the alternative, Regency argued that if there was any negligence it was limited to charting errors only, and that those alleged charting oversights did not proximately cause any of Ms. Jones’ claimed damages. VRP 3/20/13 at 94:3-95:8. On March 21 2013, the jury returned its verdict and held in favor of Regency’s alternative theory: finding that Regency was negligent but that its negligence did not proximately cause Ms. Jones’ injuries. CP 253-254.

Faced with an adverse verdict, Ms. Jones moved for a new trial claiming juror misconduct and juror bias. CP 278-442. Ms. Jones went to

great lengths to try to find evidence of bias or misconduct: retention of a private investigator to spy on defense counsel's family home; questioning of jurors at length and research into the neighborhood of Juror 11 and Ms. Lauren.<sup>2</sup> VRP 293-296. Despite great effort, Ms. Jones was unable to uncover any evidence of bias or any evidence to even suggest that either Ms. Lauren or Juror Cox were less than truthful with the trial court when explaining that they were not acquainted socially and had no common financial interests.

In Respondent's opposition to Ms. Jones' motion, CP 447-507, both Ms. Lauren and Juror Cox again reiterated that they did not recognize each other during voir dire. CP 476-480; CP 485-490. Juror Cox specifically refuted any suggestion that she recognized Ms. Lauren earlier in the proceedings:

At the time I participated in the jury selection, I did not know or recognize any of the parties or their counsel. When the Court asked if we knew any of the counsel, parties or witnesses he listed, I was being completely truthful when stating that I did not. At that point, I honestly did not recognize anyone.

CP 487. Juror Cox also confirmed that she did not have a relationship with

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<sup>2</sup> Ms. Jones' investigator unearthed and submitted as public record documents indicating when the Lauren family purchased their home and for how much, when Ms. Cox purchased her home, the subdivision's restrictive covenants, the distance between Ms. Cox's home and Ms. Lauren's home, the location of the mailboxes, the nearest grocery store, and property disclosure statements filled out by yet a *third* family who sold a home located in the subdivision. CP 293, 294, 298.

Ms. Lauren:

I had only met her once before in May of 2008, when I initially moved into my house. At that time we discussed the fence she had erected, as I was researching the community rules of building a fence on my property. Since then, I have not had any contact with Ms. Lauren other than waving to her once as I drove past her at the mailbox. I was not even aware that she had a four-year-old daughter.

CP 488.

In addition to explaining the extent of her relationship with Ms. Lauren, Juror Cox specifically refuted hearsay allegations from another juror, Amy Phillips and an alternate juror, Charles Hunger, who accused Juror Cox of making derogatory remarks about Plaintiff's counsel. Juror Cox specifically clarified that during the trial jurors would only make comments about counsel's appearances. CP 485. Other jurors also submitted declarations refuting the comments reported by Ms. Phillips and Mr. Hunger. CP 491-492, 494.

Importantly, at the time of trial Appellant did not argue that Juror Cox purposefully failed to disclose that she lived in the same neighborhood as Ms. Lauren. Appellant likewise did not request that the Court further question or further voir dire Juror Cox, or any other member of the jury.

After lengthy oral argument, the trial judge denied Ms. Jones' request for a new trial. CP 523; 534-535. In so ruling, the court specifically found:

The nondisclosure was not intentional on her part, and she volunteered and brought it to the attention of the Court when she thought of it.

...

**I don't have any doubt in my mind ... that this nondisclosure was not intentional. And a major reason for that finding is that --- is that she then, when it occurred to her, she volunteered it. (Emphasis supplied.)**

VRP 5/17/13 at p. 39:11-39:16, 40:9-40:14.

Having thrice failed to convince the trial court that Juror Cox was anything but an impartial juror, Ms. Jones now makes unfounded allegations of perjury against Juror Cox which border on the absurd.

### **III. ARGUMENT AND AUTHORITIES**

**A. Ms. Jones waived her right to assert a mistrial by waiting until after the jury rendered a verdict for the defendant to move for the court to find a mistrial.**

On February 28, 2013, Ms. Jones moved to have Juror 11 removed for cause. VRP 2/28/13 at 3:11-3:12. Plaintiff renewed her motion on March 20, 2013. VRP 3/20/13 at 103:25-107:22. In neither instance did Ms. Jones request a mistrial or assert juror misconduct. *Id.* Ms. Jones' decision not to request a mistrial, and instead her decision to proceed with allowing the case to go to the jury, forecloses Appellant's ability to cry foul post-trial and on appeal.

Under Washington law, Ms. Jones' strategic decision to not move for a mistrial (despite being aware of the issue for nearly a month during trial) waives any right to allege juror misconduct for the first time in a post-trial CR 59 motion. *Casey v. Williams*, 47 Wash.2d 255, 257, 287 P.2d 343 (1955). In *Casey*, the Washington Supreme Court recognized that a party may not wait until after trial to claim, for the first time, juror misconduct where they are aware of the issue during trial:

...if actual misconduct had occurred, but respondents had a remedy, and it was their duty, if they expected to claim error based upon the alleged misconduct of appellant and the jury, not only to call the matter to the attention of the trial court, **but, also, to claim a mistrial** and ask that the jury be discharged and not to wait, as did respondents in this case, until an adverse verdict had been rendered, and then, for the first time, claim error based upon such alleged misconduct.

*Id.* (emphasis added). See also *Fleenor v. Erickson*, 35 Wash.2d 891, 215 P.2d 885 (1950) (“Appellants did not voice any objection to the conduct of the jury during the course of the trial. We hold that therefore appellants waived their right to claim a new trial for the misconduct of this juror.”).

Ms. Jones' failure to move for a mistrial during trial when the juror issue was raised constitutes a waiver of her right to move post-trial for a new trial based on juror misconduct. Her appeal should fail on that reason alone.

**B. A trial court's decision regarding alleged juror bias is afforded significant discretion on appeal.**

Whether juror misconduct occurred, whether it was prejudicial, and

whether a mistrial is warranted are matters within the discretion of the trial court. *Richards v. Overlake Hos. Medical Center*, 59 Wn.App. 266, 271, 796 P.2d 737 (1990). The trial court's decision on these matters will not be overturned on appeal unless there is evidence of an abuse of discretion. *Id.* (Citing *State v. Rempel*, 53 Wn.App. 799, 801, 770 P.2d 1058 (1989)). "Further, a trial court only abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.* (Citing *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971)).

The discretion afforded to the trial court in observing, evaluating, and deciding matters of credibility, particularly when juror bias is alleged, cannot be overstated:

The standard of review is more than just a ritual formula to be recited by a reviewing court. **The abuse of discretion standard accepts that the trial judge is better suited, for many reasons, to make these discretionary decisions. This is particularly so with a question such as juror bias.** Again, juror bias is not something that can be calculated with precision approaching mathematical certainty. The trial judge here had before him the witnesses, lawyers, jurors, and the parties. He heard what they said and observed the manner in which they said it. We are limited to a cold record. Thus, the trial judge, not this court, was in the best position to pass upon this motion.

*Dalton v. State*, 115 Wn.App. 703, 718-19, 63 P.3d 847, 856 (Sweeney, J. (dissenting) (emphasis added)).

**C. Ms. Jones' arguments that Juror Cox committed perjury are unfounded.**

Washington law favors stable and certain verdicts and requires proof that juror misconduct, if any, impacted the verdict. *Richards*, 59 Wn.App. at 271-271. As such, a strong, affirmative showing of juror misconduct must be proven:

Verdicts should be upheld and the free, frank and secret deliberation upon which they are based held sacrosanct unless (1) the affidavits of the jurors allege facts showing misconduct and (2) those facts support a determination that the misconduct affected the verdict.”

*Ryan v. Westgard*, 12 Wn.App. 500, 530 P.2d 687 (1975) (citations omitted).

To establish juror misconduct during voir dire, the Washington State Supreme Court has chosen to follow the test established by the U.S. Supreme Court. To justify a new trial, a party must prove (1) that “a juror failed to answer honestly a material question on voir dire” and (2) that “a correct response would have provided a valid basis for a challenge for cause.” *In re Det. of Broten*, 130 Wn.App. 326, 337, 122 P.3d 942 (2005) (citing *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984)). *State v. Cho*, 108 Wn.App. 315, 322, 30 P.3d 496, 499-500 (2001). As the U.S. Supreme Court explained in *McDonough*:

To invalidate the result of a three-week trial because of a juror's mistaken, though honest response to a question, is to

insist on something closer to perfection than our judicial system can be expected to give.

...

We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

*McDonough*, 464 U.S. at 555-56, 104 S. Ct. at 849-50.

Element one of the *McDonough* test requires a complaining party to prove that a juror “failed to answer honestly a material question on voir dire.” Washington courts affirm that an inadvertent or mistaken failure to disclose information does not constitute ‘misconduct’ and will not serve as a basis for a new trial:

Here, juror eight did not intentionally fail to disclose the stalking incident nor did she give misleading or false answers during voir dire. She simply later recalled the event, and Broten’s possible involvement, during trial. .... As in *McDonough*, juror eight’s ‘mistaken, though honest, response’ to questioning during voir dire did not constitute misconduct; thus, Broten fails to establish the first prong of the *McDonough* test.

*In re Det. of Broten*, 130 Wn.App. 326, 337 (2005).

Here, to support her claim that a new trial was warranted, Ms. Jones argues, for the *first* time on appeal, that Juror Cox willfully hid her alleged “relationship” with Ms. Lauren during voir dire even though they admit she

thereafter disclosed her appreciation that they were neighbors more than a week after the jury was empanelled.<sup>3</sup> Not only does this argument lack evidentiary support, as explained below, it is contrary to the explicit factual findings by the trial court, which found that there was **no doubt** that Juror Cox's nondisclosure was unintentional. VRP 5/17/13 at 39:9-15. This Court should decline Ms. Jones' invitation to substitute her opinion for that of the trial judge, who observed the jury, the parties and counsel for more than five weeks. *Hough v. Stockbridge*, 152 Wn.App. 328, 216 P.3d 1077 (2009), review denied 168 Wash.2d 1043, 234 P.3d 1173 ("Judge considering a motion to dismiss juror for bias weighs the credibility of the challenged juror based on her observations.")

Ms. Jones' argument that Juror Cox willfully failed to disclose that she lived near Ms. Lauren during voir dire is based upon nothing but her speculative and creative interpretation of a record she failed to perfect. Here, Juror Cox's disclosure that she recognized Ms. Lauren when she heard her name in the courtroom was made to the Court Bailiff, although the discussion of this disclosure was not recorded in the transcript at the time. See, generally, VRP 2/26/13, 2/27/13. CP 487:18-488:9. Thus, the record is silent as to the precise date of the disclosure. Faced with this silence, Ms.

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<sup>3</sup> Similarly, Ms. Jones implies but does not explicitly accuse Ms. Lauren of failing to disclose an alleged "relationship" with Juror Cox until Juror Cox pointed out the proximity of the two family's homes.

Jones relies on declarations filed by two of her attorneys, Jason Young and David Marks, claiming that Juror Cox first informed the court that she recognized Ms. Lauren on February 26, 2013. CP 359, 344. Then, Appellant pores through the record in an attempt to refute that Juror Cox could have first recognized Ms. Lauren on February 26, 2013 upon hearing Ms. Lauren's name because in fact Ms. Lauren's name was not in the transcript for that day. This self-fulfilling exercise of counsel is of no merit. The more reasonable interpretation of the events is not that Juror Cox committed perjury by saying she first connected second-chair counsel to living in her neighborhood when she heard her name, but rather, that Ms. Jones' counsel is simply incorrect in their memory of what day Juror Cox made her disclosure to the Bailiff.

As Juror Cox explained:

During the second week of trial, Ms. Andrews verbally referred to her co-counsel as "Ms. Lauren." A light bulb went off in my head, and that was the first time I connected the name Jennifer Lauren as that of my neighbor.

CP 487. Ms. Jones examined the record on February 26, 2013 and correctly points out that Ms. Andrews did not refer to Ms. Lauren by name on the record on February 26, 2013. However, Ms. Jones' attorney also testified:

**Within a day of Ms. Cox's disclosure that she was Ms. Lauren's neighbor**, the Bailiff informed the Court that Ms. Cox had also reported she knew the name of Ms. Lauren's son.

CP 359. Similarly, Mr. Marks testified that Juror Cox disclosed that she knew Ms. Lauren's son on February 27, 2013. CP 344.

In fact, Juror Cox informed the Court Bailiff that she knew Ms. Lauren's son on February 28, 2013. VRP 2/28/13 at 8:17-8:18, 8:21-8:23.<sup>4</sup> A careful review of the record on February 27, 2013 – the day before Juror Cox disclosed that she knew Ms. Lauren's son's name – shows that not only did Ms. Andrews refer to Ms. Lauren by name, VRP 2/27/13 at 135:9-135:10, but also that Ms. Lauren, who was second-chair counsel, spoke before the jury for the first time on February 27, 2013. VRP 2/27/13 at 106:14.

Thus, logic tells us that Ms. Jones' counsel misremembered the date of Juror Cox's disclosure that she now recognized Ms. Lauren as living in her same neighborhood. Regardless, Juror Cox's declaration is fully consistent with the verbatim record. There is no factual basis to support the contention that Juror Cox's declaration is not accurate just because Appellant's counsel has a different recall which has no support in the record. There likewise is no rule that the argument of self-interested counsel carries more weight than the sworn declaration of a juror. There is no legal

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<sup>4</sup> The Bailiff: Yeah, she spoke to me this morning and said that she was on her way. ...  
The Court: and what else did she say?  
The Bailiff: Well, she knows your son's name, and she walks in your neighborhood, and she's seen you with your son.

authority which would support such a contention. “Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” *DeHeer v. Seattle Post-Intelligencer*, 60 Wash.2d 122, 126, 372 P.2d 193, 195 (1962).

The uncontested evidence before the trial court is that Juror Cox was so unfamiliar with Ms. Lauren, and Ms. Lauren with Juror Cox, that neither recognized the other until more than a week after the jury was empanelled. As the trial court found, there is no possible interpretation of the facts other than to accept Juror Cox’s uncontroverted, sworn testimony that she did not recognize Ms. Lauren – who she had not spoken to in approximately five years – until after trial had commenced.

The facts herein are similar to *State v. Rempel*, 53 Wn.App. 799, 800-01 (1989), rev’d on other grounds, 114 Wash.2d 77 (1990). In *Rempel*, a juror did not immediately realize during voir dire that she knew the alleged victim in a criminal prosecution. Well after commencement of trial, the juror realized that she knew the victim and reported this fact to the court. *Id.* The court soundly rejected a defense motion for a new trial holding that an honest failure to disclose information is not juror misconduct and does not provide a basis for a new trial. *Id.*

Here, the record supports that neither Ms. Lauren nor Juror Cox

recognized the other until Juror Cox's voluntary disclosure, more than a week into trial. Ms. Jones' implication otherwise – that somehow Juror Cox and Ms. Lauren willfully deceived the court, only to have Juror Cox willingly disclose the information after a week of trial – defies logic and borders on the absurd.

**D. Appellant failed to establish “actual bias” or “implied bias” which could support a for cause challenge to Juror Cox.**

Because an honest mistake in answering *voir dire* does not constitute misconduct, it is unnecessary to proceed to the second step of *McDonough* test. *In re Det. Of Broten*, 130 Wn.App. at 328 (citing *McDonough*, 262 U.S. at 556). Likewise here, the Court need go no further to deny this appeal. See also *State v. Rempel*, 53 Wn.App. 799, 800-01 (1989) rev'd on other grounds, 114 Wash.2d 77 (1990).<sup>5</sup> However, Ms. Jones is similarly unable to prove the second element of the *McDonough* test: that a truthful disclosure would have provided a basis for a challenge for cause. *State v. Cho*, 108 Wn.App. 315 (2001).

A juror's acquaintance with a party, by itself, is not grounds for a

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<sup>5</sup> It is notable that Appellant's counsel previously admitted that the facts in this case fall well short of misconduct: “Well, first, let's make clear what it is not. **We are not implying or stating that there is any improper conduct or improper contact.** But given the fact that the juror has disclosed that she has this relationship, I think, makes it self-evident that the juror recognizes that this is an issue. And given, you know, where we are in this case, the number of alternates that we have, and **even the low threshold of the appearance of impropriety, we think it would be appropriate that this juror be excused.**” VRP 2/28/13: 2-3 (emphasis added).

challenge for cause. *State v. Tingdale*, 117 Wash.2d 595, 601, 817 P.2d 850, 853 (1991) (citing *Wise v. Commonwealth*, 230 Va. 322, 337 S.E.2d 715 (1985) (social relationship between prosecutor and juror not grounds for disqualification), cert. denied, 475 U.S. 1112, 106 S.Ct. 1524, 89 L.Ed.2d 921 (1986)). In fact, were the court to, of its own accord, dismiss a juror merely because of an acquaintance with a party, that action would constitute abuse of discretion. *Tingdale*, 117 Wash.2d at 602.

Defined by statute, there are three bases for which to challenge a juror for cause:

- (1) For such a bias as when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias.
- (2) For the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this code as actual bias.
- (3) For the existence of a defect in the functions or organs of the body which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the party challenging

RCW §4.44.170. Ms. Jones argues that a “for cause” challenge would have been viable because Juror Cox was either actually biased (2 above) or was biased by implication (1 above). She further argues herein that the trial court

misapplied the law by failing to resolve any doubts about her ability to be impartial in favor of a new trial. Her arguments fail for three simple reasons: Juror Cox was not actually biased, Juror Cox was not implicitly biased, and the trial court had no doubts about that juror's impartiality to resolve the issues raised by Ms. Jones.

**1. Juror Cox did not demonstrate “actual bias.”**

To prove actual bias, the complaining party must prove to “the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging...” See RCW 4.44.170. As courts have explained, this factual inquiry is within the discretion of the trial judge. *Hough v. Stockbridge*, 152 Wn.App. 328, 341, 216 P.3d 1077, 1084 (2009) (citing *Ottis v. Stevenson–Carson Sch. Dist. No. 303*, 61 Wn.App. 747, 752–53, 812 P.2d 133 (1991)).

Relying on a Ninth Circuit case evaluating a California District Court ruling, Appellant asks this Court to adopt a standard never before applied in Washington: that actual bias is a state of mind “that leads to an inference that the person will not act with entire impartiality.” Appellant’s Brief at 21 (citing by incorrect analogy *United States v. Gonzalez*, 214 F.3d 1109, 1111-12 (9<sup>th</sup> Cir. 2000)). Such is not the law in Washington, where courts recognize that “a jury is expected to bring its opinions, insights, common sense, and everyday life experience into deliberations.” *State v. Briggs*, 55

Wn.App. 44, 58, 776 P.2d 1347 (1989). Although a party is entitled to a fair trial, no one is entitled to “‘a perfect one,’ for there are no perfect trials.” *Rempel*, 53 Wn.App. at 803 (citing *Brown v. United States*, 411 U.S. 223, 231–32, 93 S.Ct. 1565, 1570, 36 L.Ed.2d 208 (1973)).

Further, *Gonzalez* is not on point factually. *Gonzalez* involved a criminal drug prosecution. During voir dire, a prospective juror admitted that her ex-husband was a drug dealer and that his actions had led to the breakup of her family, which included a five-year old child. The juror admitted that the experience was “painful.” *Id.* at 1110-1111. The California District Court Judge asked the juror three times if she could be impartial, and the juror equivocated all three times, stating that she would “try to” put aside her feelings and view the case fairly. Nevertheless, the district court denied a motion to dismiss the juror for cause, the juror remained empanelled, and found Mr. Gonzalez guilty. Mr. Gonzalez appealed, and the Ninth Circuit reversed, holding that:

A juror is considered to be impartial ‘only if he can lay aside his opinion and render a verdict based on the evidence presented in court....’

*Gonzalez*, 214 F.3d at 1114 (citing *Patton v. Yount*, 467 U.S. 1025, 1037 n.12, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984)). Focusing on the juror’s three equivocal responses to the court’s inquiries, the Ninth Circuit found that the juror had not offered these assurances and thus was subject to a challenge for

cause. Notably, unlike the dicta cited by Ms. Jones, the Ninth Circuit holding here is in fact remarkably similar to the law in Washington. *See e.g. State v. Gosser*, 33 Wn.App. 428, 433, 656 P.2d 514 (1982) (quoting *State v. White*, 60 Wash.2d 551, 569, 374 P.2d 942 (1962)); *State v. Noltie*, 116 Wash.2d 831, 839, 809 P.2d 190 (1991) (question on actual bias is whether the juror can “put these notions aside and decide the case on the basis of the evidence given at the trial and the law as given him by the court.”)

Unlike the juror in *Gonzalez*, Juror Cox clearly and unequivocally testified that she could be impartial:

If I ever felt that I could not be fair and impartial on any topic of the case, I would have informed the bailiff, Mary Powell. The fact that Ms. Lauren lives in my neighborhood did not cause me to favor the defendant in any way.

...

I felt it was up to the Court to decide whether it was pertinent, and I would abide by their decision in the matter.

CP 488. Nevertheless, Ms. Jones claims that Juror Cox evidenced “actual bias” by commenting to another juror that she was “shocked it had not made a difference to the court that Ms. Lauren was [her] neighbor.” See Appellant’s Brief at 22 (citing CP 348-349).

The trial court, taking Juror Cox’s **entire** statement into account, specifically rejected this comment as evidence of actual bias, pointing out that if a juror’s feeling that she should not be on a jury was sufficient to

establish a challenge for cause, “you would be in trouble in our jury system.” VRP 5/17/13 at 38:7-38:13. The trial court was correct: Juror Cox’s subjective surprise is not, without more, sufficient to support a claim that she was actively biased in favor of the defense under Washington law.

Ms. Jones’ argument that Juror Cox’s subjective surprise that living near one of the defense counsel would not disqualify her from jury service amounted to “bias” in favor of the defense is particularly exaggerated given United States Supreme Court cases making it clear that even a preconceived notion as to the guilt or innocence of a party is not sufficient to establish bias:

To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror’s impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

*Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).

Here, Juror Cox did offer these assurances – she explicitly testified that she was not biased in favor of the defense and that she could decide the case fairly. CP 488.

Ms. Jones claims that the trial court misapplied the law by failing to resolve any doubts as to Juror Cox’s bias in favor of a new trial, Brief of Appellant at 22 (citing *State v. Cho*, 108 Wn.App. at 330). However, she

presents no evidence that any such doubts existed at all, much less that they were resolved against her. Given (1) the lack of evidence of any bias on the part of Juror Cox; (2) the trial court's rulings; and (3) the evidence here, there is no evidence of error.

**2. Juror Cox was not implicitly biased.**

Defined by statute, implied bias includes a close family relationship (kinship within the fourth degree), a close business relationship (partner, employer), a financial interest in the outcome of the trial, or where a juror served on a jury trying a case on substantially the same issues. See RCW 4.44.180.4. Here, it is uncontested that there is no "close family relationship" between Juror Cox and Ms. Lauren and that Juror Cox had not "served on a jury trying a case on substantially the same issues." *Id.* Before the trial court, Ms. Jones argued that a 'business relationship' existed by suggesting that Juror 11 (Juror Cox) and counsel share ownership in common elements of property by virtue of their ownership of homes in the same community. However, Regency established both that the "common ownership relationship" was too attenuated to establish 'implied bias,' and more importantly, that Ms. Jones was wrong: the residents of the neighborhood do not have common ownership of any property. CP 502-503.

Faced with an inability to meet the statutory definition of implied bias, Ms. Jones invites this court to ignore RCW 4.44.180.4 and again

requests that the Court adopt a variation of the Ninth Circuit's reasoning in *Gonzalez*, 214 F.3d at 1112-1113. See Appellant's Brief at 25. As above, *Gonzalez* considered a California District Court opinion and was factually distinguishable from the case here, and the court's holding relied on the fact that the juror was asked three times whether she could be impartial, but was unable to testify that she could.

Because implied bias is found only in "extraordinary circumstances," *State v. Boiko*, 138 Wn.App. 256 at 261-262 (2007), Washington cases finding implied bias are rare and involve relatively extreme facts. In *State v. Cho*, the court opined that "examples might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." *Cho*, 108 Wn.App. at 325 n. 5 (quoting *Smith v. Phillips*, 455 U.S. 209, 222, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) (O'Connor, J., concurring)). These factual circumstances are not present here. Juror Cox was merely a member of the same residential neighborhood as one of the defense counsel. She had no involvement or direct relationship with any of the participants in the trial.

Citing *Boiko*, Ms. Jones argues that Juror Cox's "factual circumstances" created a presumption of bias, despite the lack of evidence

that Juror Cox purposefully withheld any information. Appellant's Brief at 24-25. Notably, in *Boiko* the "exceptional circumstances" present were the uncontested fact that the challenged juror was married to the key witness for the state. *Boiko*, 138 Wn.App. at 259-260, 264. In contrast, the "exceptional circumstances" alleged by Ms. Jones are listed, and factually refuted, as follows:

- Juror Cox's close residential proximity to Ms. Lauren. However, both Ms. Lauren and Juror Cox testified that the two had spoken but once in the four-to-five years preceding trial. See CP 477, 487. Further, neither recognized the other until at least a week into trial. CP 476, 487.
- The uncontested fact that the Canterbury Woods subdivision where Ms. Lauren and Juror Cox reside has protective covenants. This fact is not unlike many other residential subdivisions.
- The uncontested fact that residents in Canterbury Woods have the right to file suit against each other. This is likewise a universal tenet.
- Ms. Jones' speculation that Juror Cox would have a "natural tendency to be empathetic towards and side with a neighbor." This despite Juror Cox's clear denial of such a tendency. CP 488.

- Ms. Jones’s speculation that Juror Cox would “need to maintain and further a positive relationship with a neighbor.” A contention made of whole cloth.

See Appellant’s Brief at 26.

In essence, Ms. Jones urges this court to rule that implied bias exists merely because of residential proximity in a neighborhood subject to protective covenants. There is no Washington case so holding and, despite a diligent search, Regency was unable to locate a single case in the United States where mere residential proximity constituted the “extreme circumstances” necessary to sustain a claim of implied bias.

Ms. Jones surmises, without evidence, that living in the same subdivision as Ms. Lauren would somehow cause Juror Cox to sympathize with, and favor, Regency. In *State v. Pepon*, 62 Wash. 635, 114 P. 449, 453 (1911) the court warned against assuming that jurors were willing to abandon their impartiality at the “slightest provocation:”

... if we assume that jurors are so quickly forgetful of the duties of citizenship as to stand continually ready to violate their oath on the slightest provocation, we must inevitably conclude that a trial by jury is a farce and our government a failure.

*Id.* Setting aside a verdict merely because of a juror’s residential proximity to counsel for either party would render the value of a verdict nearly meaningless, as nearly every juror would be potentially disqualifiable if,

when faced with a disadvantageous result, parties could challenge the juror's impartiality merely by measuring property lines.

Ms. Jones claims that the trial court misapplied the law by failing to resolve any doubts regarding Juror Cox's alleged bias in favor of a new trial. Once again, Ms. Jones fails to demonstrate that any such doubts about alleged bias existed. The trial court having observed the witnesses, parties, and the jury over a six-week trial determined that Juror Cox was not biased. That decision of the trial court should not be overturned on nothing more than speculation and innuendo.

**E. The trial judge had no duty to develop a record on Ms. Jones' behalf.**

Ms. Jones claims that the trial court committed error because *it* did not order voir dire of Juror Cox during trial or before deliberation.<sup>6</sup> See Assignment of Error No. 1, Appellant's Brief at 11. Again relying upon federal law (this time the Fifth Circuit) Ms. Jones claims that the trial court had an affirmative duty to "develop the facts" on her behalf. Appellant's Brief at 11 (citing *U.S. v. Nell*, 526 F.2d 1223 (5<sup>th</sup> Cir. 1976)). This is not the law in Washington, where assessing misconduct is solely within the discretion of the trial court:

In assessing alleged juror misconduct, the trial judge necessarily acts as '**both an observer and decision**

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<sup>6</sup> It is of paramount importance to note that Ms. Jones did not request to voir dire Juror Cox at any time.

**maker.** Because such ‘fact-finding discretion’ allows the judge to weigh the credibility of jurors, we must accord the court’s decision substantial deference.

*State v. Rafay*, 168 Wn.App. 734, 822, 285 P.3d 83, 127-28 (2012) (emphasis added) review denied, 299 P.3d 1171 (Wash. 2013) and review denied, 176 Wash.2d 1023, 299 P.3d 1171 (2013) and cert. denied, 134 S. Ct. 170, 187 L. Ed. 2d 117 (U.S. 2013). See also *Hough v. Stockbridge*, 152 Wash. App. at 341 (emphasis added) (citing *Ottis v. Stevenson–Carson Sch. Dist. No. 303*, 61 Wn.App. 747, 752–53, 812 P.2d 133 (1991) (“The judge weighs the credibility of the challenged juror **based on her observations**. The question for the judge is whether the challenged juror can set aside preconceived ideas and try the case fairly and impartially. We defer to the judge’s factual determinations.”))

As the sole decision maker and fact finder, the trial court has no duty to establish a record on a party’s behalf. *State v. Jordan* 103 Wn.App. 221, 11 P.3d 866 (2000), review denied 143 Wash.2d 1015, 22 P.3d 803. As the *Jordan* Court explained, a trial court may have multiple, legitimate reasons for refusing to conduct voir dire:

We also do not fault the trial judge for not questioning the juror. First, the questioning may have been embarrassing to the juror. Second, if the judge had questioned her, the parties presumably would also have been entitled to question her. And this may have put her in an adversarial position with the State. Further, if the juror had denied sleeping, the State may have proposed calling other jurors

to report their observations. But this could have put the juror in an adversarial position to the other juror-witnesses. We conclude that the trial judge acted well within his discretion in not calling the juror.

...

The test is whether the record establishes that the juror engaged in misconduct. We are unwilling to impose on the trial court a mandatory format for establishing such a record. **Instead the trial judge has discretion to hear and resolve the misconduct issue in a way that avoids tainting the juror and, thus, avoids creating prejudice against either party.**

*Id.* at 228-229 (emphasis added).

Ms. Jones asks this Court to abandon the existing Washington legal standard and hold that the trial court committed error by failing to voir dire Juror Cox – despite the fact that Ms. Jones never requested that Juror Cox be subjected to voir dire. In support of her argument, Ms. Jones relies on *U.S. v. Nell*, 526 F.2d 1223 (5<sup>th</sup> Cir. 1976) and *Hughes v. U.S.*, 258 F.3d 453, 457-58 (6<sup>th</sup> Cir. 2001). Not only does neither court consider Washington law, neither case supports Ms. Jones’ position that a trial court has the duty to voir dire an allegedly biased juror absent a party’s explicit request.

*Nell* involved a Florida matter where a potential juror, Schane<sup>7</sup>, knew the defendant and knew who he was and had “had a little problem

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<sup>7</sup> Another potential juror, Bougher, admitted bias but the Court refused a motion to strike him for cause. The appellate court found this was error.

with” a union, which was an issue in the pending case. *Id.* at 1228-1229. After the trial court denied a motion to strike Schane for cause, the defense **requested the opportunity for additional voir dire**. The request was denied. *Id.* In this context, the Fifth Circuit reversed, finding that additional questioning could have revealed that Schane was biased, and that therefore the trial court had a duty to develop the factual record. *Id.* at 1230. *Nell* did not consider, much less rule, whether a trial judge has a duty to develop this record where voir dire was not requested by counsel.

This issue was addressed in *Hughes v. U.S.*, *supra*. Therein, the petitioner requested a new trial based on ineffective assistance of counsel because his attorney did not further question or move to excuse for cause a juror who **admitted** he was biased. The Court of Appeals reversed the trial court and ordered a new trial because neither the trial court, nor defense counsel, followed up on the juror’s statement that she could not be fair. *Hughes*, 258 F.3d at 458. The Sixth Circuit pointed out that a trial court had the affirmative duty to exclude a juror **who explicitly admits bias**. *Id.* at 459. Here, Juror Cox expressly testified that she was **not** biased. VRP 2/28/13 at pp. 8:25-9:3 and CP 488. As such, neither the trial judge’s failure to excuse nor the trial judge’s (or counsel’s) failure to conduct (or ask) further questions of the juror is at issue here.

Consistent with Washington law, the trial judge in this matter relied upon the his own observations, witness statements, statements from the court bailiff and the court's own observations of the jury over five weeks of testimony. Having weighed this information, the trial court, as fact finder on this issue, found that Juror Cox was qualified to serve. Ms. Jones did not request to voir dire Juror Cox, and the trial court had no obligation to do so when the trial court was satisfied with the information it already had available to it.

Finally, without citation to any authority, Ms. Jones claims that the trial court had a duty to disclose allegations allegedly made by alternative Juror Hunger that the panel was on the "verge of a mistrial." As a preliminary matter, it is not clear that any such revelations occurred at all, as the trial judge informed counsel that Mr. Hunger's declaration did not comport with the Court Bailiff's memory of the conversations. Presumably, if any such conducts were made, the Court Bailiff would have reported them to the court. *State v. Rose*, 43 Wash.2d 553, 556, 262 P.2d 194 (1953) ("We will not simply presume the judicial assistant acted improperly"). Secondly, no authority supports the premise that a judge must communicate every juror disclosure to counsel. *State v. Brenner*, 53 Wn.App. 367, 374, 768 P.2d 509, 513 (1989), overruled on other grounds, *State v. Wentz*, 149 Wash.2d 342, 68 P.3d 282 (2003).

**F. The trial court did not abuse its discretion in finding that the jury did not engage in misconduct.**

Ms. Jones claims that the jury committed misconduct by making comments about her counsel after trial had commenced such as that they were “suing machines” and “greedy trial lawyers.” The only support for the alleged pre-deliberation comments are two declarations that rely exclusively on hearsay statements allegedly overheard by Juror Phillips and Alternate Hunger, which were brought to the attention of the Court and were explicitly refuted. CP 485 (“What I recall being said about various counsel dealt with observation of appearances.”). *See also* CP 491-492, CP 494, CP 500 (“There were comments made about everyone in the courtroom including your team and ourselves.”). Further, although Alternate Hunger claimed that he informed the bailiff of these comments and stated to her that “we were on the verge of a mistrial,” the trial court found that “There are some aspects of his affidavit that do not correspond to the bailiff’s clear recollection of how those conversations developed.” VRP 5/17/13 at 18:8-18:11.

To support her claim that the jury’s dislike of her attorneys entitles her to a mistrial, Ms. Jones relies upon *Turner v. Stime*, 153 Wn.App. 581, 222 P.3d 1243 (2009). *Turner* is distinguishable for several reasons. First, in *Turner* the trial court *granted* a motion for a new trial, and the Court of Appeals was reviewing *that decision* for abuse of discretion. Finding that

the trial court did not abuse its discretion, the Court of Appeals relied upon the “significant discretion” accorded a trial court to “determine what investigation is necessary on a claim of juror misconduct.” *Id.* (citing *Alexon v. Pierce County*, 186 Wash. 188, 193, 57 P.2d 318 (1936)). The Court of Appeals noted that “[t]he findings here were based on the trial court’s presence during the multi-day trial.” *Id.* at 588. The court further observed:

... despite the manner in which the words are presented, **the trial court, not the litigants, must determine whether misconduct occurred and whether there is a reasonable doubt as to whether the Turners were denied a fair trial.**

*Id.* at 594 (emphasis added).

Second, *Turner* is not on point factually. That matter involved jurors’ pre-existing racial biases against the Plaintiff’s Japanese-American attorney. During trial, some jurors made racially charged comments, while other jurors laughed. Examining the racial slurs allegedly made, the trial court found that these comments were closely linked to Plaintiff’s case and her claimed damages:

First, one or more jurors referred to Mr. Kamitomo as “Mr. Havacoma.” This name demonstrates that jurors associated Mr. Kamitomo closely with his client, Ms. Turner, who was in a coma for many of the 45 days of her hospitalization.

*Id.* at 593-94.

Here, the only alleged (and disputed) comments identified by Ms. Jones were made regarding her attorneys’ trial strategy, not their ethnicities.

Ms. Jones made the strategic decision to have five attorneys in attendance on a daily basis compared to only two on the defense (see each day's RP, p. 1 and RP 2/19/13 p. 35:17-23); to use elaborate, sophisticated electronic presentation techniques far in excess of the ELMO used by defense counsel (eg VRP 2/20/13 p. 124:20-25; p. 126:3-15; p. 173:4-8; p. 176:20-25; 2/25/13 p.25:14); and to tell the jury during voir dire that they were seeking an award of \$33 million to compensate Ms. Jones for a nine-day stay at Regency at NorthPointe. VRP 2/19/13, p. 76. Even if some jurors were put off by this excess and determined that the attorneys were "greedy trial lawyers," any such determination was made during the trial, in contrast with the preconceived and concealed juror bias at issue in *Dalton v. State*, 115 Wn.App. 703, 63 P.3d 847 (2003).

Further, Ms. Hannah Jones, not her daughter Josephine Jones-Hill, was the plaintiff in this matter. There is no evidence that any juror criticized Ms. Jones, nor is there is no evidence that any juror criticized Ms. Jones-Hill, much less referred to her as an "opportunist trying to profit from her mother's injuries" as Ms. Jones now claims. See Appellant's Brief at 29.

Finally, even if the jurors in this matter did engage in misconduct, Ms. Jones must show that such misconduct was actually prejudicial. Not all juror misconduct warrants a new trial. Misconduct only warrants a new trial

when it is prejudicial. *State v. Lemieux*, 75 Wash.2d 89, 91, 448 P.2d 943 (1968); *State v. Briggs*, 55 Wn.App. 44, 55, 776 P.2d 1347 (1989); *State v. Rempel*, 53 Wn.App. 799, 801, 770 P.2d 1058 (1989), rev'd on other grounds, 114 Wash.2d 77, 785 P.2d 1134 (1990), *Kuhn v. Schnall*, 155 Wn.App. 560, 575, 228 P.3d 828 (2010).

Even if Ms. Jones could demonstrate that the jurors' dislike of her attorneys was imputed to her, which she cannot, and has not done, Ms. Jones has failed to demonstrate prejudice. Courts regularly uphold jury verdicts even where negative comments are made over the course of trial. *See Hosner v. Olympia Shingle Co.*, 128 Wash. 152, 222 P.2d 466 (1924) (Holding that statement by one of the jurors during the progress of the trial, but prior to commencement of jury deliberation, did not warrant a new trial) citing *State v. Aker*, 54 Wash. 342 (1909). In *Aker*, the Supreme Court held that a juror commenting to another that a defendant was guilty did not qualify as "juror misconduct" to support a new trial simply because jurors were entitled to make up their minds as the case proceeded:

... defendant sought to show by the affidavit of a juror that, at a recess during the progress of the trial while the prosecuting witness was giving her testimony, the jury was taken to the jury room, and while there a juror expressed in a positive manner his opinion that the defendant was guilty, and other jurors acquiesced in the statement, and expressed themselves in substance to the same effect. It is contended that this was such misconduct on the part of the juror as entitled the accused to a new trial. ...We think this is not

such misconduct as can be shown by the affidavit of a juror.

*Id.* at 345. *See also* *Razor v. Retail Credit Co.*, 87 Wash.2d 516, 532, 554 P.2d 1041 (1976).

Here, whether the jurors liked or disliked plaintiff's counsel was irrelevant – their opinions in this case were based upon the evidence:

It is my opinion that this case was strictly about Hannah Jones and Regency Pacific Inc. Plaintiff and Defense counsel were merely vehicles to present the evidence and merited no more consideration than that. No personal feelings about any of the counsel influenced or affected my decision in any manner.

CP 486.

Although pre-deliberation juror communication about the case is discouraged, Washington law does not require a new trial where such communication occurs. Further, such communication 'inheres in the verdict' and may not serve as a basis for a new trial.

#### **IV. CONCLUSION**

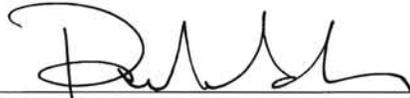
Ms. Jones' claims of juror bias and misconduct were thoroughly evaluated by the trial court on three occasions. On each occasion, the trial court found that Ms. Jones' complaints, such as that a juror lived near defense counsel and that other jurors may not have liked her attorneys, did not constitute bias or misconduct and were insufficient to support a new trial. She now claims that Juror Cox committed perjury and complains that the

trial court did not order a voir dire that she never requested. These arguments are simply without merit.

After a multi-week trial, the jury in this case fairly found that while Regency was negligent, that negligence did not cause Ms. Jones' alleged injuries. The trial court did not abuse its discretion or misinterpret the law in refusing Ms. Jones' motion for a new trial. Regency respectfully submits that the verdict in this case was proper, it was supported by the evidence, and it should stand.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of April, 2014.

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