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DIVISION II

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STATE OF WASHINGTON  
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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON AT TACOMA

Pierce County Superior Court Cause No. 08-2-13924-2

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TOM P. MCCOY and KATHLEEN A. MCCOY,

Plaintiffs/Respondents,

v.

FIR RUN NURSERY, LLC, a Washington limited liability company  
doing business in Pierce County, Washington, and S. MICHAEL  
FENIMORE and GAYLA A. FENIMORE and their marital  
community,

Defendants/Appellants

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BRIEF OF APPELLANTS  
FIR RUN NURSERY, LLC and FENIMORE

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ORIGINAL

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## **INTRODUCTION AND ADOPTION BY REFERENCE**

Plaintiffs filed litigation in Pierce County Superior Court seeking recovery for damages alleged to have occurred due to water intrusion across and under a county road from two adjacent tree nurseries. All defendants have appealed an order by the trial court that set aside a unanimous jury verdict in favor of defendants after sixteen days of trial.

The defendant appellants consist of Pierce County, Kent Nursery and its officers, and Fir Run Nursery and its officers. Defendants Fir Run Nursery, LLC, S. Michael Fenimore and Gayla A. Fenimore (hereinafter collectively referred to as "Defendant Fir Run Nursery") purchased their property from Defendant Kent Nursery, Inc. in 2006 and the nursery defendants share a general commonality of interests.

To promote judicial economy pursuant to RAP 10.1(g)(2), Defendant Fir Run Nursery will adopt by reference each section of the brief by Defendants Kent Nursery and Mauritsen, and include a summary to minimize the necessity to cross-reference to each adopted section. Instead, this brief will focus on facts and arguments unique to Defendant Fir Run Nursery or will emphasize and supplement the adopted section.

Pursuant to RAP 10.1(g)(2), Defendant Fir Run Nursery also adopts by this reference all of the arguments set forth by Defendant Appellant Pierce County in its brief, Section III.A., pages 12 through 32, entitled "Argument – A New Trial Should Not Have Been Ordered Because There Was No Juror Misconduct."

### **ASSIGNMENTS OF ERROR**

Defendant Fir Run Nursery adopts by this reference the assignments of error by Defendants Kent Nursery and Mauritsen, summarized as follows:

1. The trial court erred in granting Plaintiffs' CR 59 motion for new trial after the jury returned a verdict in favor of the Defendants.
2. The trial court erred in failing to strike the Declaration of Juror Tina M. Britton.
3. The trial court erred in each finding of fact (1 through 10).
4. The trial court abused its discretion in concluding that there was critical non-disclosure during voir-dire by Juror Two.
5. The trial court abused its discretion in concluding that there was critical non-disclosure during voir-dire by Juror Eleven.
6. The trial court abused its discretion in concluding that Juror Two injected extrinsic evidence during deliberation.

7. The trial court abused its discretion in concluding that juror Eleven injected extrinsic evidence during deliberation.
8. The trial court abused its discretion in concluding that the verdict was contrary to the clear weight of the evidence.
9. The trial abused its discretion in denying Defendants' motion for reconsideration of the order granting a new trial.

#### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Defendant Fir Run Nursery adopts by this reference the issues pertaining to the assignments of error by Defendants Kent Nursery and Mauritsen, summarized as follows:

- Did the trial court err in setting aside the unanimous jury verdict after sixteen days of trial? (Assignment of Error 1)
- Were the defendants prejudiced by the court's consideration of, and reliance upon, a late juror declaration in support of plaintiffs' motion for a new trial? (Assignment of Error 2)
- Are the proposed findings of facts sufficient when there is no evidence to support the granting of a new trial? (Assignment of Error 3)
- Did the trial court abuse its discretion in finding jury misconduct during voir dire for withholding background infor-

mation when the trial court conducted no fact finding?  
(Assignments of Error 4, and 5)

- Did the trial court abuse its discretion in finding jury misconduct, without conducting any fact finding, by relying upon a contested declaration from the plaintiffs' attorney that repeated alleged comments made by jurors during a post trial interview? (Assignments of Error 6 and 7)
- Did the trial court err by concluding that water flowing from defendants' property necessarily constitutes trespass when the underground de-watering system had been in existence for many decades and followed the natural drainage course? (Assignment of Error 8)
- Did the trial court err by denying the motion for reconsideration and by not reinstating the jury verdict despite ten juror declarations supporting the motion? (Assignment of Error 9)

#### **STATEMENT OF THE CASE**

Defendant Fir Run Nursery adopts by this reference the statement of the case by Defendants Kent Nursery and Mauritsen, summarized as follows (please refer to the adopted section for citations to the record):

Procedural History Summary. Plaintiffs filed suit in 2008 and a sixteen-day jury trial was held in 2010. The individually named defendants sought dismissal of the claims against them due to the corporate structure of the nurseries but the trial court denied the motions. The jury was sent out to deliberate without any objection to the jury instructions by plaintiffs' attorney, and returned a unanimous defense verdict and assessed damages against plaintiffs in favor of the nursery defendants on their counterclaims.

The attorneys interviewed the jurors following the trial, and plaintiffs subsequently brought a CR 50 and CR 59 motion seeking a new trial based on juror misconduct and a verdict contrary to the clear weight of evidence. Plaintiffs' motion was supported by a declaration from plaintiffs' attorney and an untimely declaration by one juror, and the motion for a new trial was granted. A subsequent motion for reconsideration by defendants, supported by declarations from 20 jurors, was denied, and all defendants have appealed.

Factual History Summary. The earliest version of the underground clay tile de-watering system was constructed many, many

decades ago along the natural drainage course.<sup>1</sup> The system under the nurseries was added to several times in the 1960s by Kent Nursery's predecessor in interest Harold Lauderback (with the assistance of the U.S. Department of Agriculture), who also constructed the concrete basin and maintained the system while he was the owner of the property.<sup>2</sup>

The system originates on the nursery property and continues under the McCoy property, where it was enhanced and expanded by one of the McCoy's predecessors in interest, Harold Hahn, to assist with drainage problems on what is now the McCoy property.<sup>3</sup> The system drains water as it passes beneath the McCoy property and benefits the McCoy property.<sup>4</sup>

A portion of the McCoy property known as Lot 3 was a focal point of this litigation. Esther Hahn had sold Lot 3 to the Hartstroms as part of a four-lot 14 acre deal but the Hartstroms sued Esther to rescind the sale for failing to disclose the existence of the underground clay tile de-watering system, when Rolland Hartstrom discovered water bubbling up out of the ground on Lot 3.<sup>5</sup> Esther

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<sup>1</sup> RP pg 1373; RP pg 1374; RP pg 1375

<sup>2</sup> RP pg 902-905

<sup>3</sup> RP pg 953-956

<sup>4</sup> RP pg 1425; RP pg 1430

<sup>5</sup> RP pg 229

then resold Lot 3 to the McCoys who had already bought Lot 4 from the Hartstroms.

The McCoys were aware of the underground clay tile de-watering system when they purchased Lot 3 in 1998, and shortly thereafter Tom McCoy actually participated in the replacement of a broken tile on the property of his downhill neighbor, Gary Edwards that occurred about 35 feet away from the McCoy garage.<sup>6</sup> According to both Mr. Edwards and Mr. McCoy, the repair involved inserting a section of plastic pipe to replace the broken clay tile and only took “a couple hours.”<sup>7</sup>

Early in 2006, Tom McCoy first noticed water coming out of two sinkholes in the ground on Lot 3 near the fence across from the concrete catch basin.<sup>8</sup> The McCoys testified that the water from that first winter caused considerable damage to their land and home. Later, in the summer of 2006, Tom McCoy saw broken tile pipes at the bottom of the sinkholes and filled the sinkholes in with dirt without doing any repairs or notifying any of the defendants.<sup>9</sup> The McCoys claim continuing damage from the unrepaired tile line.

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<sup>6</sup> RP pg 210-211

<sup>7</sup> RP pg 212; RP pg 456-457; RP pg 518

<sup>8</sup> RP pg 460; RP pg 500

<sup>9</sup> RP pg 466-467

Facts Specific to Defendant Fir Run Nursery. Defendant Fir Run Nursery, LLC ("Fir Run") was formed in 2004<sup>10</sup> by S. Michael Fenimore and Gayla A. Fenimore during the reorganization of a family-run business that had been in existence since 1975.<sup>11</sup> Fir Run was interested in moving the business to agricultural land in Pierce County, and Mike Fenimore found out that Kent Nursery had 20 acres available in the Orting area.<sup>12</sup> Fir Run examined the land in question, and negotiated a purchase and sale with Kent Nursery that closed on June 28, 2006.<sup>13</sup>

The property at issue in this litigation is solely owned by Fir Run,<sup>14</sup> with Mike and Gayla Fenimore managing the business and acting as officers of the corporation.<sup>15</sup> Prior to purchasing the property, Fir Run was not informed that there is an underground system of clay pipes used to de-water some of the acreage.<sup>16</sup>

Within a few months of Fir Run purchasing the property in June, 2006, Mike Fenimore observed Tom McCoy using a large pile of dirt to build a berm around the front and south side of the McCoy

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<sup>10</sup> RP pg 1610

<sup>11</sup> RP pg 1607

<sup>12</sup> RP pg 1611 - 1612

<sup>13</sup> RP pg 1612

<sup>14</sup> RP pg 1611

<sup>15</sup> RP pg 1607

<sup>16</sup> RP pg 1623, RP pg 1690

property.<sup>17</sup> There were particularly heavy rains in December, 2006 and into January, 2007, and Mike Fenimore saw some flooding and water over 150<sup>th</sup> Street for the first time.<sup>18</sup>

Late in December, 2006 or early in January, 2007, Mike Fenimore had his first and only personal encounter with Tom McCoy, when Mike Fenimore assisted Tom McCoy in placing sand bags along the front of the McCoy property.<sup>19</sup> Neither Fir Run nor Mike Fenimore had any other contact from the plaintiffs until the filing of this litigation.<sup>20</sup>

Apparently plaintiffs have letters that they claim were mailed to Fir Run and the Fenimores dated July 30, 2007.<sup>21</sup> Those letters are addressed to the defendants at the physical location of Fir Run Nursery on 150<sup>th</sup> Street, across the street from the McCoy property, where there was no mail delivery.<sup>22</sup> The letters include the following paragraph:

We have discussed this matter with you and know you are fully aware of this problem. At this time you have chosen not to resolve the issue at hand, and we are making this our last attempt to resolve this situation.<sup>23</sup>

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<sup>17</sup> RP pg 1615

<sup>18</sup> RP pg 1619

<sup>19</sup> RP pg 1619; RP pg 1620-1621

<sup>20</sup> RP pg 1627

<sup>21</sup> Ex 64

<sup>22</sup> RP pg 1628

<sup>23</sup> Ex 64, RP pg 1667

The letter to Fir Run was mailed with the additional payment of a restricted delivery fee, return receipt requested.<sup>24</sup> Mr. McCoy admitted at trial that a receipt card signed by Fir Run was not returned, and when asked “And did the envelope come back? Do you have it sitting in your office somewhere?” Mr. McCoy responded “I might have. I’m not sure.”<sup>25</sup>

Mike Fenimore of Fir Run said that he did not see this letter until six or seven months after the filing of the litigation, and testified that he had never spoken with Mr. McCoy except for that one time while assisting with sandbags<sup>26</sup> and that he was never approached and asked to fix the system.<sup>27</sup>

Fir Run Nursery and the Fenimores did not know that the McCoy's claimed they are responsible for flooding and water damage until Fir Run and the Fenimores were served with the Summons and Complaint on November 8, 2008.<sup>28</sup>

Tom Fenimore was asked at trial why Fir Run did not repair the broken clay tiles on the McCoy property, and he responded:

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<sup>24</sup> Ex 64a

<sup>25</sup> 511

<sup>26</sup> 1667, 508, 509-510

<sup>27</sup> 1668

<sup>28</sup> 1627, 1724

Number one, I thought that the system on my land was my responsibility. Number two, I was never approached by anyone to fix anything. And, number three, the water was flowing through a system that, apparently, had existed since before I was born, and that each individual property owner had their own responsibility.<sup>29</sup>

Late in 2009 an open ditch was constructed on adjacent property immediately to the South of the McCoy property.<sup>30</sup> Any excess surface water or water from the concrete catch basin now builds up along the East side of 150<sup>th</sup> Avenue East until it crests and crosses the road to the South of the McCoy property and is impeded by the berm on the McCoy property, making its way to the new open ditch.<sup>31</sup> The surface water then travels to the West toward Horse Haven Creek in the ditch, completely bypassing the McCoy property, which means that any water on Lot 3 necessarily enters the property through the broken system.<sup>32</sup>

## **ARGUMENT**

Defendant Fir Run Nursery adopts by this reference the argument by Defendants Kent Nursery and Mauritsen, and provides supplemental and additional argument as follows:

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<sup>29</sup> RP pg 1727-1728

<sup>30</sup> RP pg 1655

<sup>31</sup> RP pg 1659

<sup>32</sup> RP pg 1659-1660

The Original Ruling Granting a New Trial Lacked a Credible Basis in Fact. The plaintiffs motion for a judgment notwithstanding the verdict, based on CR 50, and the concurrent motion for a new trial based on CR 59, were supported only by a three page declaration from plaintiffs' attorney that contained hearsay statements purportedly gleaned from the post-trial interview of the jurors as well as several misstatements concerning juror responses during voir dire.<sup>33</sup> All defense counsel countered with declarations of their own in direct conflict with the statements of plaintiffs' counsel.<sup>34</sup>

Then, just the day before the hearing, defense counsel received a declaration from Juror Tina Britton that also contains hearsay and improper opinion,<sup>35</sup> along with a second declaration by plaintiffs' counsel where she throws a blanket over ALL the facts in her reply brief by stating:

That I have personal knowledge of the facts contained in Plaintiffs Reply on Motion for Judgment as a Matter of Law (JNOV) And/Or For New Trial Pursuant to CR 50 and CR 59 and that the facts are accurate to the best of my knowledge and belief.<sup>36</sup>

The following exchange occurred between this defense counsel and the Court at the original hearing

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<sup>33</sup> CP pg 154-156

<sup>34</sup> CP pg 160-168, CP 188-191, CP 208-212, CP 230-232, CP pg 179-182, CP 648-651

<sup>35</sup> CP pg 192-195

<sup>36</sup> CP pg 225

(MR. MACPHERSON):

24 I will highlight a couple of things that have  
25 been brought up by the Court. Juror No. 2 did not mention  
1 a clay tile system. She does not have a clay tile system  
2 on her property.  
3 All of the other attorneys in the room that  
4 listened to the interviews have contested what was said by  
5 Ms. Lee in her declaration. She's wrong. That wasn't  
6 said.  
7 What she [Juror 2] talked about was a wetlands, and she  
8 talked about water damage to her property that she fixed  
9 herself; not that there was some kind of a system that came  
10 across and damaged her from a neighbor similar to this  
11 case. However, those questions could have been asked  
12 during voir dire, and were not. Unfortunately, we didn't  
13 do voir dire on the record. And, so, all of us in the room  
4 are --

15 THE COURT: Who waived that?

16 MR. DIAZ: Well, we all did, Your Honor.

17 MR. MACPHERSON: Exactly.

18 So, the person that's going to benefit from the  
19 waiver is now the plaintiffs. And now they're saying the  
20 things they could have said in voir dire were critical.  
21 And if that was going to be an important part of their  
22 case, it's hindsight now. But, we don't have that. And  
23 all of us here are going to have to think back of what we  
24 did hear during voir dire. But, everything that you have  
25 heard from the declaration, which are in front of the  
1 Court, are very specific about these two particular jurors.  
2 But, the thing I want to mention, and emphasize,  
3 to begin with, is that the juror declaration we have here  
4 does not say that she changed her opinion or that she  
5 somehow voted differently because of the comments that were  
6 made by her co-jurors. Nothing in that declaration says  
7 that, or that there was some sort of improper influence.  
8 I challenge the Court's comment on the juror  
9 who says that he knew something about how vehicles affect  
10 underground pipes. You are entitled to reject the opinions  
11 of experts. That expert opinion could have been wrong.  
12 And jurors are allowed to go back --

13 THE COURT: Are you able to insert your extrinsic  
14 experiences?

15 MR. MACPHERSON: Yes, absolutely.

16 THE COURT: Your common experience, that's one  
17 thing, but not specifics.

18 MR. MACPHERSON: I think you can say to your  
19 other jurors, "Hey, the expert said that this doesn't  
20 happen. In my experience, it has happened. It happened to  
21 me."

22 You're entitled to consider the -- You are not  
23 supposed to put special weight on the expert's evidence.<sup>37</sup>

The party seeking to overturn a jury verdict based on improper responses to voir dire questions should shoulder the burden of proving exactly what was asked and how the prospective juror responded, not provide contested declarations or ask the Court to remember.

The purpose of voir dire is to protect the right to an impartial jury by exposing possible biases during the questioning process. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554, 104 S. Ct. 845, 78 L.Ed.2d 663 (1984). For this process to serve its purpose, truthful answers by prospective jurors are necessary. *Id.*

In *McDonough*, the Supreme Court refused to grant a new trial when a juror did not disclose in voir dire that his son had received a broken leg as the result of an accident when questions were asked whether jurors, or members of their immediate family,

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<sup>37</sup> April 30, 2010 Hearing Transcript, pg 37-39

had sustained any severe injuries resulting in disability or prolonged pain and suffering, stating that “[t]o invalidate the result of a 3-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.” *McDonough*, 464 U.S. at 555.

The U.S. Supreme Court held that to obtain a new trial, a party must first demonstrate that (1) a juror failed to honestly answer a material question on voir dire, and (2) show that a correct response would have provided a valid basis for a challenge for cause. *McDonough*, 464 U.S. at 556. Washington law is in accord with *McDonough*: *In re Elmore*, 162 Wn.2d 236, 172 P.3d 335 (2007); *In re Det. of Broten*, 130 Wn. App. 326, 336, 122 P.3d 942 (2005).

In our case, there is no written record of the voir dire, yet the trial court made actual findings of fact regarding voir dire responses to support the decision to grant a new trial. The decision was based solely on the judge’s own memory of the voir dire and the declarations of plaintiffs’ and one contested juror declaration, and the decision was made despite contrary declarations from defense counsel and ten other jurors.

By granting the CR 59 motion for a new trial, the trial court abused its discretion and effectively chose to believe the hearsay statements of plaintiffs' attorney, to ignore the contrary declarations of all defense counsel, to accept at face value the blanket statement by plaintiffs' counsel that she has personal knowledge of all the facts in her reply brief, and to exclude the life experiences allegedly described by two jurors during deliberations, all without undertaking any fact finding to determine if juror misconduct actually occurred during either voir dire or deliberations.

The final comment by the trial court speaks volumes regarding his personal opinion of the trial evidence:

(THE COURT)

23 The question, "Could this have possibly affected  
24 the verdict?" I think anybody listening to this trial for  
25 the 16 days was stunned, including the defense, when this  
1 came back the way it did.  
2 In looking at the totality of the circumstances,  
3 and the evidence in this case, I think it cries out for a  
4 new trial, and that will be the order of the Court.<sup>38</sup>

At the subsequent hearing to enter the order to memorialize the trial court's ruling, the following exchange takes place:

19 THE COURT: All right. Anything else,  
20 Mr. Macpherson?  
21 MR. MACPHERSON: Well, that the Findings of Fact

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<sup>38</sup> April 30, 2010 Hearing Transcript, pg 49-50

22 include, for example, something that's in my head, Your  
23 Honor, and I want the record to reflect that I was not  
24 shocked by the verdict. And I object to an order saying  
25 that either myself or my clients were shocked by the  
1 verdict. We expected the verdict and we felt that the  
2 verdict was appropriate.

3 THE COURT: Okay.

4 MR. MACPHERSON: And, similarly, the other facts  
5 that the Court apparently found were contested. For  
6 example, whether or not there was a clay tile system  
7 underneath Juror 2's home is contested. And none of us,  
8 the rest of us in that room, heard that from Juror No. 2.  
9 And only one person did, and that was the one making the  
10 declaration that the Court heard.

11 THE COURT: What do you say to that, Ms. Lee?

12 MS. LEE: Your Honor, everybody was there. I  
13 think that -- I know what I heard and, Your Honor, I'm an  
14 officer of the court, so I have a duty to make sure that  
15 what I put in my declaration is truthful.<sup>39</sup>

Defendants objected to virtually every single line of the proposed order<sup>40</sup> but the order was entered without modification, other than a last minute handwritten line by plaintiffs' counsel inserting a reference to a verbatim record that was not even read by the trial court.<sup>41</sup> Despite the protestations at the hearing, the order and even includes the trial court's opinion of this defense counsel's reaction to the verdict: "The jury's verdict shocked the conscience of the court and shocked all the litigants, including Defendants' counsel."<sup>42</sup>

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<sup>39</sup> May 14, 2010 Hearing Transcript, pg 11-12

<sup>40</sup> CP pg 235-238

<sup>41</sup> CP pg 866; May 14, 2010 Hearing Transcript, pg 17

<sup>42</sup> CP pg 866

Apparently the trial court believed plaintiffs' counsel to be a more truthful officer of the court, since her declaration was diametrically opposed by defense counsel. Again, there was no effort to undertake any fact finding on the issue of juror misconduct.

The Original Ruling Granting a New Trial was Procedurally Flawed. The declaration of juror Tina Britton was filed the day before the plaintiffs' motion for a new trial.<sup>43</sup> CR 59(c) requires supporting declarations to be "filed with the motion", and the opposing party is given at least 10 days to obtain and file opposing declarations. When the trial court declined to strike the untimely declaration, defense counsel attempted to correct the procedural error by bringing a motion for reconsideration,<sup>44</sup> complete with ten detailed declarations from other jurors that were unavailable for the original motion.<sup>45</sup> Even a cursory review of the ten declarations filed in support of the motion for reconsideration reveals that no juror misconduct has occurred, and that there was no improper concealment during voir dire.

The Trial Court Misapplied the Legal Standard. The plaintiffs counsel placed great weight on *Halverson v. Anderson*, 82 Wn.2d 746, 513 P.2d 827 (1973) in her arguments in support of her CR 59

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<sup>43</sup> CP pg 192-195

<sup>44</sup> CP 262-267, CP 268-270, CP 303-317

<sup>45</sup> CP 273-275, CP 276-278, CP 279-280, CP 281-283, CP 284-287, CP 290-293, CP 294-297, CP 298-299, CP 326-329

motion. There the Court granted a new trial when the weight of juror declarations revealed that one of the jurors provided information regarding the earning capacity of airline pilots during deliberations. *Halverson* sets forth a two-part test: First, is there juror misconduct? Second, has the aggrieved party been prejudiced by that misconduct? If there is juror misconduct, the Court is to consider whether there has been prejudice, and resolve any doubt in favor of a new trial.

Plaintiffs twisted the standard to suggest that any doubt regarding alleged juror misconduct must be resolved in favor of a new trial. The so-called "misconduct" in our case involves a non-existent clay tile drainage system on Ms. Harkins property, and the sharing of backgrounds and life experiences by both Ms. Harkins and Mr. Faulkner during the nearly sacrosanct process of jury deliberation. Certainly this does not rise to misconduct in the first place, and there was nothing for the trial court to resolve.

And even if misconduct can be found, "(n)ot all instances of juror misconduct merit a new trial; there must be prejudice." *State v. Barnes*, 85 Wn.App. 638, 668-669, 932 P.2d 669 (1997); *State v. Tigano*, 63 Wn.App. 336, 341, 818 P.2d 1369 (1991). "A strong, affirmative showing of misconduct is necessary in order to

overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.” *In re Elmore*, 162 Wn.2d 236, 267, 172 P.3d 335 (2007), citing *State v. Balisok*, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994).

It is improper to look behind the verdict and examine the mental processes of the jurors during deliberation. In *Breckenridge v. Valley General Hospital*, 150 Wn.2d 197, 205, 75 P.3d 944 (2003), the Washington Supreme Court discussed this prohibition:

In *Cox v. Charles Wright Academy, Inc.*, 70 Wash.2d 173, 176, 422 P.2d 515 (1967), the defendant in a personal injury suit argued that it was error for the trial court to have granted additur or, in the alternative, a new trial. The plaintiff supported his motion for an increase in the verdict with a juror's affidavit discussing the way that the jury had calculated the damage award in the case. This court found that the affidavit contained statements that inhaled in the verdict, stating: “The mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors' intentions and beliefs, are all factors inhering in the jury's processes in arriving at its verdict, and, therefore inhere in the verdict itself, and averments concerning them are inadmissible to impeach the verdict.” *Id.* at 179-80, 422 P.2d 515. **The Cox court went on to note that to hold otherwise would be to allow nearly all verdicts to be attacked by the losing party.** *Id.* at 180, 422 P.2d 515. Emphasis added

The defendants provided the trial court with ten consistent declarations showing a lack of juror misconduct and support for the verdict.<sup>46</sup> The ten declarations describe Tina Britton as a “hold out” who would not agree with the other jurors, despite being given much more time to explain her positions, and the ten declarations uniformly consider it a travesty that a declaration from a single juror on a few minor points, rife with opinions instead of facts, would be sufficient to set aside the verdict, particularly after investing so many days in trial, and after carefully reviewing the evidence and applying the jury instructions to the detailed special verdict form.

As cautioned by the Washington Supreme Court in *Cox*, supra, and reaffirmed by that same court in *Breckenridge*, supra, for the trial judge to order a new trial in our case would allow nearly all verdicts to be attacked by the losing party.

Timely Objections Were Not Made. The jury instructions and special verdict form<sup>47</sup> were crafted through many hours of consultation and compromise by all counsel after all testimony had concluded and those documents included detailed definitions of trespass and burden of proof and ordinary care and negligence. The

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<sup>46</sup> CP 273-275, CP 276-278, CP 279-280, CP 281-283, CP 284-287, CP 290-293, CP 294-297, CP 298-299, CP 326-329

<sup>47</sup> CP pg 543-587

concept of plaintiffs' comparative negligence was included throughout the instructions and the special verdict form. Plaintiffs' counsel did not object to any of the instructions or object to the special verdict form<sup>48</sup> and they were afforded the opportunity to emphasize or highlight specific instructions or portions of the special verdict form, and did so.

The jurors applied the instructions to the testimony presented and determined that defendants did not trespass, and that the negligence of plaintiffs was a proximate cause of damage to defendants. Plaintiffs cannot now argue that the jury was confused or somehow misapplied the jury instructions. Any complaints about the law as presented to the jury, or the special verdict form, have been waived.

The Trial Court Abused Its Discretion. While granting a CR 59 motion for new trial generally is within the sound discretion of the trial court, *Thompson v. Grays Harbor Community Hosp.*, 36 Wn.App. 300, 675 P.2d 239 (1983), this Court may review de novo if the appeal is based on an allegation of legal error. *Marvik v. Winkelman*, 126 Wn.App. 655, 109 P.3d 47 (2005). To the extent that the trial court failed to accept the concept of an ancient

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<sup>48</sup> RP pg 1857

underground de-watering system as a “natural watercourse” through the application of *Wilber v. Western Properties*, 14 Wn.App. 169, 540 P.2d 470 (1975) as more fully described and argued in the brief by Defendant Kent Nursery, and found as a matter of law that the defendant nurseries trespassed, the trial court has made a legal error that can be correct by this Court de novo.

However, a trial court’s decision to grant a new trial because he disagrees with the verdict, or believes the verdict was the result of passion or prejudice, is an abuse of discretion. *Thompson*, supra. As stated in *Edwards v. Le Duc*, 157 Wn.App. 455, 459, 238 P.3d 1187 (2010): “A trial court abuses its discretion when its decision is manifestly unreasonable, is exercised for untenable reasons, or is based on untenable grounds. *Lian v. Stalick*, 106 Wash.App. 811, 824, 25 P.3d 467 (2001).”

Our record is rife with instances of abuse of discretion as exemplified by several exchanges between defense counsel and the trial court and set forth in this brief and in the brief by Defendant Kent Nursery. Even a cursory review of the paucity of admissible factual evidence in the slender declaration by plaintiffs’ counsel

supporting her CR 59 motion for a new trial<sup>49</sup> and the untimely declaration by Juror Tina Britton<sup>50</sup> reveals a predisposition by the trial court to grant the motion based upon his own reaction to the verdict.

Even when the defendants attempted to correct the error by bringing a detailed motion for reconsideration, with ten additional juror declarations to rebut and clarify the declarations of plaintiffs' counsel and Juror Tina Britton, the trial court refused to follow the appropriate standard for juror misconduct and ordered a new trial.

### **CONCLUSION**

Defendant Appellants Fir Run Nursery, LLC and Fenimore request that the Order on Plaintiffs' Motion for Judgment as a Matter of Law and/or in the Alternative for New Trial under CR 50 and CR 59 be reversed.

Defendant Appellants Fir Run Nursery, LLC and Fenimore also request that the jury's verdict of April 12, 2010 in favor of all Defendants be reinstated.

Defendant Appellants Fir Run Nursery, LLC and Fenimore also request and that the trial court be ordered to enter judgment in favor of defendants in accordance with the verdict.

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<sup>49</sup> CP 154-156

<sup>50</sup> CP 192-195

Defendant Appellants Fir Run Nursery and Fenimore also  
request their reasonable costs and attorney fees under RAP 14.3.

Respectfully submitted this 4<sup>th</sup> day of March, 2011.

KOPTA, & MACPHERSON



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DECLARATION OF SERVICE

STATE OF WASHINGTON

BY \_\_\_\_\_

On March 4, 2011, I delivered a copy of the foregoing pleading to: DEPUTY

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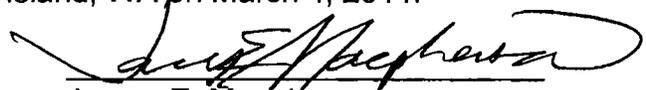
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A copy also was emailed to each attorney as indicated.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Bainbridge Island, WA on March 4, 2011.

  
James E. Macpherson