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I. ASSIGNMENTS OF ERROR

1. The trial court erred in granting Plaintiffs' CR 59 Motion for a New Trial after the jury returned a defense verdict in favor of all Defendants. This error was compounded by making the following additional errors:

a. The trial court erred by making finding of fact #1 in Plaintiffs' proposed "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" which was adopted by the trial court by finding that "Juror Two/foreperson failed to disclose in voir-dire that her home was damaged as a result of flooding from old drainage pipes, that she felt Pierce County was responsible for her damage and that she and her husband felt they took ownership and paid for the damage to the home despite feeling Pierce County was responsible for the damage". Such a finding was not supported by the evidence presented at trial nor in the post-trial motions and pleadings. The court further erred in making this finding by failing to hold a fact-finding hearing on this allegation.

b. The trial court erred by making finding of fact #2 in Plaintiffs' proposed "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" which was adopted by the trial court by finding that "Juror

Two/foreperson also failed to disclose in voir-dire her prior specialized real estate experience and details of her real estate experience". Such a finding was not supported by the evidence presented at trial nor in the post-trial motions and pleadings. The court further erred in making this finding by failing to hold a fact-finding hearing on this allegation. In fact, the evidence regarding this issue was to the contrary at trial.

c. The trial court erred by making finding of fact #3 in Plaintiffs' proposed "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" which was adopted by the trial court by finding that "Juror Eleven failed to disclose in voir-dire his prior specialized experience relating to jet-rodding clay tile pipes". Such a finding was not supported by the evidence presented at trial nor in the post-trial motions and pleadings. The court further erred in making this finding by failing to hold a fact-finding hearing on this allegation. In fact, the evidence regarding this issue was to the contrary at trial. Further, counsel for Plaintiffs chose not to question this juror on this subject during voir dire.

d. The trial court erred by making finding of fact #4 in Plaintiffs' proposed "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" which was adopted by the trial court by finding that "Juror Eleven failed to

disclose in voir-dire his prior specialized experience relating to weight displacement and the effect that heavy equipment would have while traveling on clay tile pipe buried beneath the ground". Such a finding was not supported by the evidence and neither presented at trial nor in the post-trial motions and pleadings. The court further erred in making this finding by failing to hold a fact-finding hearing on this allegation. In fact, the evidence regarding this issue was to the contrary at trial. Further, counsel for Plaintiffs chose not to question this juror on this subject during voir dire.

e. The trial court erred by making finding of fact #5 in Plaintiffs' proposed "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" which was adopted by the trial court by finding that "Juror Two/foreperson injected extrinsic evidence during jury deliberation. This extrinsic evidence consisted of outside information relating to damage to her home from drainage pipes involving Pierce County, and outside information relating to other real estate transactions and knowledge derived from her specialized prior real estate experience. Juror Two/foreperson drew direct comparisons of this extrinsic evidence with the evidence presented at trial during jury deliberations". Such a finding was not supported by the evidence presented at trial nor in the post-trial

motions and pleadings. The court further erred in making this finding by failing to hold a fact-finding hearing on this allegation. In fact, the evidence regarding this issue was to the contrary at trial. Further, counsel for Plaintiffs chose not to question this juror on this subject during voir dire. Further, by adopting this finding the court violated the province of the jury in such an inquiry into their deliberations.

f. The trial court erred by making finding of fact #6 in Plaintiffs' proposed "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" which was adopted by the trial court by finding that "Juror Eleven injected extrinsic evidence during jury deliberation. This extrinsic evidence consisted of outside information relating to his prior specialized experience relating to jet-rodding clay tile pipes and outside information relating to weight displacement and the effect that heavy equipment would have while traveling on clay tile pipe buried beneath the ground. This information was directly contradicted by plaintiffs' expert during trial". Such a finding was not supported by the evidence presented at trial nor in the post-trial motions and pleadings. The court further erred in making this finding by failing to hold a fact-finding hearing on this allegation. In fact, the evidence regarding this issue was to the contrary at trial. Further, counsel for Plaintiffs chose not to question this juror on this subject during

voir dire. Further, by adopting this finding the court violated the province of the jury in such an inquiry into their deliberations.

g. The trial court erred by making finding of fact #7 in Plaintiffs' proposed "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" which was adopted by the trial court by finding that "Juror Ten, Tina M. Britton's declaration confirms the injections of extrinsic evidence by Juror Two/foreperson. The declaration stated that Juror Two/foreperson during deliberations 'discussed her experience with the County and compared her problems to what was going on in the case.' The declaration stated that Juror Two/foreperson admitted that 'she used to sell real estate . . . and informed the jurors that a document is not legal unless it has two signatures on it . . . her opinion was stated as a fact based on her real estate experience'". Such a finding was not supported by the evidence presented at trial nor in the post-trial motions and pleadings. The court further erred in making this finding by failing to hold a fact-finding hearing on this allegation. In fact, the evidence regarding this issue was to the contrary at trial. Further, counsel for Plaintiffs chose not to question this juror on this subject during voir dire. Further, by adopting this finding the court violated the province of the jury in such an inquiry into their deliberations.

h. The trial court erred by making finding of fact #8 in Plaintiffs' proposed "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" which was adopted by the trial court by finding that "Juror Ten, Tina M. Britton's declaration confirms the injection of extrinsic evidence by Juror Eleven. The declaration state [sic] that Juror Eleven 'admitted to working with pipe through his job in Kansas . . . and stated that in his experience, jet-rodding did not harm the clay pipe or undermine the soil". Such a finding was not supported by the evidence presented at trial nor in the post-trial motions and pleadings. The court further erred in making this finding by failing to hold a fact-finding hearing on this allegation. In fact, the evidence regarding this issue was to the contrary at trial. Further, counsel for Plaintiffs chose not to question this juror on this subject during voir dire. Further, by adopting this finding the court violated the province of the jury in such an inquiry into their deliberations.

i. The trial court erred by making finding of fact #10 in Plaintiffs' proposed "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" which was adopted by the trial court by finding that "The jury's verdict shocked the conscience of the court and shocked all the litigants including defendants' counsel". Such a finding was directly contradicted

by the evidence at trial, and was directly contradicted by all Defendants' counsel on the record. The court erred in basing a reversal of a jury's verdict on the court's own preferences for the outcome of the case.

2. The court erred in failing to dismiss Pierce County as a matter of law at the end of Plaintiffs' case in chief. This compounded the error made by the court in failing to grant Pierce County's motion for summary judgment prior to trial.

Issues Pertaining to Assignments of Error

1. Are the trial court's factual findings supported by the evidence?

2. Did the trial court err as a matter of law in granting a new trial based on the wrong standard and without sufficient proof?

3. Did the trial court err as a matter of law when it considered the hearsay declaration of Plaintiff's counsel?

4. Did the trial court err by not dismissing Pierce County as a matter of law either before or during trial because there was insufficient evidence to prove negligence against the County?

II. STATEMENT OF THE CASE

Following sixteen days of trial, twelve jurors unanimously found that flooding of properties belonging to Plaintiffs and Defendant Nurseries was caused solely by the negligence of Plaintiff, Tom McCoy. CP 116-

124, RP 2041-2043. Trial Judge Frederick Fleming disagreed with the jury verdict and granted a new trial. CP 256. The following summarization of the facts may be helpful to the Court in understanding the nature of this case.

This case involves several parcels of property, two owned by the McCoys on the west side of 150th Avenue East and the Nursery properties located on the east side of the Road. The McCoy parcels were once part of a larger parcel before being subdivided in the 1990's. 150th Avenue East is a County road. See EX 73 (attached as Appendix 1).

In 1995 the McCoys purchased from Roland Hartstrom an old "milking parlor" that had been converted into a residence by Harold Hahn, a farmer who ran dairy cows on the property for decades before selling the property to Hartstrom. RP 1059:3-10, RP 898:24-899:15, RP 227:1-17. After subdividing the property and selling the converted "milking parlor" parcel to Plaintiffs, Hartstrom discovered a broken drain tile on the parcel adjacent to and north of the "milking parlor" property.¹ RP 228:24-229:12, EX 70. A drain tile system had been installed over several decades beginning in the 1930's and ending in the late 1970's and was designed to drain the "nursery properties" located across 150th Avenue

¹ This parcel north of the milking parlor was often referred to as "lot 3".

East as well as Hahn's dairy property to the east of the road. RP 1470:11-15, EX 73. The drain tile system followed the natural drainway through the Plaintiffs' properties down to Horse Haven Creek. EX 113 (attached as Appendix 2), EX 123, EX 124, RP 898:3-15, RP 1227:18–RP 1233:16.

After discovering the broken drain tile, Hartstrom sued Hahn and Hahn agreed to buy back "lot 3". RP 230:12–RP 231:19, RP 236:20–RP 237:4. Later, in 1998, the McCoys purchased lot 3, a one-acre building site with a view of Mount Rainier, from Mr. Hahn for ten thousand dollars. RP 379:1-3, EX 77. At the time of this purchase the McCoys provided Hahn with a hold harmless agreement which absolved Hahn from any responsibility for flooding damages as a result of the drain tile system. EX 92 (attached as Appendix 3).

During the winter of 2005/2006, as a result of the failing drain tile system on the McCoys' property, water that for decades had flowed through the underground pipes under their properties began to back up and flood 150th Avenue East, the Nurseries, and McCoys. RP 270:25–RP 272:5. In 2007 Pierce County road maintenance crews responded to complaints about the flooding. RP 1768:21-23; RP 1292:4-16. The crews cleaned out roadside ditches and cleaned a junction box and culvert under the road by using a device called a vactor truck, which sucks silt and water out of the pipe as the debris is loosened with a jet rod. The jet rod breaks

up obstructions in the pipe and washes the debris back toward the vactor, which then captures the water much like the device used in a dentist's office. RP 1282:17–RP 1283:14. However this maintenance did nothing to alleviate the flooding because the system had failed downstream of the County road on the property belonging to the McCoys. RP 1292:9–1293:12.

In 2008 the McCoys sued the Nurseries and added Pierce County as a Defendant in 2009. CP 1. The case was tried to a jury beginning on March 10, 2010, and concluding on April 12, 2010, with the jury returning a unanimous verdict on behalf of all Defendants. RP 2041:16–RP 2043:17. The jury further found in favor of Defendants Kent Nursery and Fir Run Nursery on their counterclaims against the McCoys. When polled, every juror expressed his or her agreement with the verdict. *Id.* After the verdict was announced and the jurors were released from service, all six of the attorneys involved in the case met with the jurors to discuss the trial. RP 2043:18–RP 2044:15.

Nine days after the verdict, the McCoys filed a Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial, alleging juror misconduct, among other grounds. CP 125-153. In support of this motion, the McCoys submitted only the Declaration of one of their attorneys, Sarah Lee. CP 154-156. The County and the Nurseries

responded to this motion arguing that the McCoys were citing the wrong legal standard for their motion for a new trial and that there was no evidence whatsoever of juror misconduct. CP 157-191, CP 196-212, CP 230-232. Then, on the day before the hearing, the McCoys submitted the declaration of one juror, Tina Britton, purportedly in support of their Motion.² CP 192-195. Without ruling on Defendants' motion to strike this untimely filed declaration, the court denied the Plaintiffs' Motion for Judgment Notwithstanding the Verdict, but granted the Plaintiffs' Motion for a New Trial. In his oral ruling Judge Fleming granted Plaintiffs a new trial essentially because he did not agree with the verdict. "In looking at the totality of the circumstances, and the evidence in this case, I think it cries out for a new trial, and that will be the order of the court." CP 256:18-20. An order granting a new trial was entered, over the objection of all Defendants on May 14, 2010. All of the Defendants then filed motions for reconsideration on May 24, 2010. Along with the motions for reconsideration, the Defendants filed declarations from ten of the jurors. All ten jurors denied any misconduct and contradicted the statements made by Plaintiffs' counsel, Sarah Lee. The motions for reconsideration were denied. The Defendants then brought this appeal.

² The Britton declaration contains no facts to support the granting of a new trial.

III. ARGUMENT

A. A NEW TRIAL SHOULD NOT HAVE BEEN ORDERED BECAUSE THERE WAS NO JURY MISCONDUCT

Washington Civil Rule 59 allows the trial court to order a new trial only under certain circumstances, including where the party moving for a new trial can prove misconduct of the jury that materially affected the substantial rights of the parties. CR 59(a)(2). "The purpose of CR 59 is to 'speed[] up the disposition of the case and avoid[] the unfortunate effects of unnecessary new trials such as are sometimes granted in jury cases and might have been avoided.'" *Scott v. Goldman*, 82 Wn. App. 1, 11, 917 P.2d 131 (1996) (citing Lewis H. Orland and Karl B. Tegland, 14 Wash. Prac., *Trial Practice Civil* § 305 (1986 ed.)). The basic question on appeal is whether the party received a fair trial. *Geston v. Scott*, 116 Wn. App. 616, 620, 67 P.3d 496 (2003) (citing *Olpinski v. Clement*, 73 Wn.2d 944, 951, 442 P.2d 260 (1968)).

"It is well settled that a motion for a new trial is directed to the sound discretion of the trial court." *Vasquez v. Markin*, 46 Wn. App. 480, 483, 731 P.2d 510 (1986). Ordinarily, a trial court is in the best position to "analyze and give proper weight to each affidavit" and to determine whether there was "a possibility of prejudice." *Id.* at 484. However, an erroneous decision may be overturned where "no reasonable judge would

have reached the same conclusion." *Id* at 483. The trial court decision in this case should be reversed because no reasonable judge would conclude that jury misconduct prejudiced the Plaintiff where the Plaintiff failed to present competent evidence of misconduct and evidence presented by Defendants rebuts Plaintiffs' bald assertions.

1. The Plaintiffs Failed to Meet Their Burden of Proof of Juror Misconduct

Plaintiffs made various claims of jury misconduct in their motion for a new trial. None of those claims were supported by any evidence supplied by Plaintiffs. Further, those claims were legally insufficient. The only support for such claims was Plaintiffs' own attorney's self-serving, hearsay statements. Plaintiffs filed an untimely declaration of one juror, but that too did not form a sufficient basis for a new trial, nor did it establish any juror misconduct. Primarily, none of those declarations asserted that any extrinsic evidence was introduced into jury deliberations by any jurors.

New trial on ground of misconduct or irregularities in jury's deliberations should not be granted unless incidents complained of raised reasonable doubt as to whether complaining party received fair trial; and mere possibility of prejudice is not sufficient.

Spratt v. Davidson, (1969) 1 Wash.App. 523, 463 P.2d 179.

2. The Declaration of One Juror Did Not Demonstrate Jury Misconduct

At the initial motion for a new trial, the Plaintiffs submitted a declaration of one juror, Tina Britton. CP 228-229. The lone, untimely filed declaration of this one juror, Tina Britton, did not assert that any extrinsic evidence was considered by the jury. Instead, it included the following information:

1. The jury foreman, Carolyn Harkins, gave her a piece of paper with her recommendations about how deliberations should proceed; i.e., orderly and listening to one another.

2. Ms. Harkins discussed her own problems with the County when she got permits for her own house.

3. After deliberations, Ms. Harkins discussed how she and her husband fixed their own problems instead of going after the County.

4. Ms. Harkins told jurors she used to sell real estate, and gave her opinion that a document is not legal unless it has two signatures.

5. Ms. Britton disagreed and gave her opinion that not all documents needed two signatures.

6. Ms. Harkins gave an opinion that unless notarized a document is not legal.

7. Ms. Britton disagreed and gave her own opinion on that topic.

8. Ellis Faulkner was asked by jurors his opinion about clay tiles and jet rodding. He gave his opinion about both.

9. Mr. Faulkner gave his opinion that he did not believe one of the Plaintiffs' experts.

10. Both Ms. Britton and Mr. Faulkner gave their opinion that the Plaintiff, Mr. McCoy, was not worldly enough to know what to do to fix clay tiles.

11. Jurors exchanged email addresses to keep in touch after the case.

Id.

Analyzing this information, one can only conclude that there was no evidence of misconduct or introduction of extrinsic evidence in this trial. Item 1 is strictly an administrative proposal by the foreperson. Items 2 and 4 were a juror utilizing a past, similar experience as a measure for determining what was reasonable in this case. This past experience was fully disclosed in voir dire (*see* Declarations of Carolyn Harkins and James Macpherson, CP 192, 284-287), and therefore is by definition not an extrinsic piece of evidence. Items 3 and 11 happened after deliberation, and are therefore irrelevant to this inquiry. Items 2, 4, 5, 6, and 7 are

jurors sharing opinions about evidence introduced, and is strictly forbidden inquiry as to the mental processes of the jury. Items 8 and 9 were a juror expressing an opinion about an expert's testimony and sharing his own observations based on his past experience. That is what jurors are supposed to do. This past experience of this juror was fully disclosed in voir dire, and is therefore not extrinsic evidence. It is further inappropriate inquiry into the mental processes of a juror. Item 10 is likewise jurors expressing opinions about the Plaintiff himself. It is not an introduction of extrinsic evidence, and is a further inadmissible inquiry into juror's mental processes.

3. Plaintiffs' Counsel Failed to Offer Any Competent Evidence of Misconduct and Cited the Court to the Wrong Standard

Mere speculation about the effect of misconduct is not sufficient to warrant a new trial. *Vasquez*, 46 Wn. App. at 485. Instead, "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 Pers. Restraint of 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).

The trial court was misled by counsel for the Plaintiffs when she argued that the standard for overturning a jury verdict based on an

allegation of jury misconduct was any evidence whatsoever. The Plaintiffs argued in their brief that "When jurors introduce extrinsic evidence into deliberations, the verdict cannot stand unless the trial court is satisfied the evidence had no effect upon the verdict. If the court has any doubt, it must order a new trial." (Brief of Plaintiffs at 20:8-10.) The Plaintiffs cite to the case of *Halverson v. Anderson*, 82 Wn.2d 746, 513 P.2d 827 (1973), for this proposition. The *Halvorsen* case only stated a limited exception to the above-stated rule, that once affidavits of jurors show facts of misconduct, and those facts are sufficient to justify making a determination that the misconduct affected the verdict, that any doubt about the second half of that equation should be resolved in favor of granting a new trial. In *Halvorsen*, jurors introduced expert testimony in deliberations as to salary amounts of airline pilots, where no such evidence had been admitted in trial.

Here, there was no outside evidence introduced into deliberations. (See Declarations of ten jurors referenced below. CP 273-299, 332-335.) Here, there was no affidavit of any juror establishing any misconduct. The lone declaration from Ms. Britton only outlined a process for discussion, examples of the deliberations of the jurors, but absolutely no testimony of any misconduct or introduction of extrinsic evidence. Therefore, the court

erroneously granted a new trial based on the wrong standard argued by Plaintiffs.

Furthermore, here, counsel for the Plaintiffs violated another well-established principle when she based her entire allegation of jury misconduct on two inadmissible pieces of information: 1) her own hearsay statement, and 2) an inadmissible piece of information from a juror about the jury's mental processes. There was absolutely no evidence presented to the court about any outside influences or introduction of extraneous evidence, which is normally required to overturn a jury's verdict.

a. **The So-Called Evidence of Jurors' Mental Processes Is Inadmissible**

It is well-settled in Washington that while juror affidavits or testimony may be used to establish jury misconduct involving outside influences, such evidence may not be used to contest the thought processes involved in reaching a verdict. *Gardner v. Malone*, 60 Wn.2d 836, 376 P.2d 651 (1962); *Hendrickson v. Konopaski*, 14 Wn. App. 390, 393, 541 P.2d 1001 (1975). Testimony may not be considered if "the facts alleged are linked to the juror's motive, intent, or belief, or described their effect upon him". *State v. Crowell*, 92 Wn.2d 143, 146, 594 P.2d 905 (1979) (quoting *Gardner v. Malone*, 60 Wn.2d 836, 841, 376 P.2d 651, 379 P.2d

918 (1962)). Evidence concerning the mental processes of jurors, including their expressed opinions and when they made up their minds, inheres in the verdict. *State v. Aker*, 54 Wash. 342, 345-46, 103 P. 420 (1909); *Hosner v. Olympia Shingle Co.*, 128 Wash. 152, 154-55, 222 P. 466 (1924); *see also, State v. Hall*, 40 Wn. App. 162, 169, 697 P.2d 597 (1985) (third party's impression that juror had made up mind before end of trial inheres in verdict).

The law of Washington on this subject is consistent with the common law and federal law. The "near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict". *Tanner v. United States*, 483 U.S. 107, 117, 107 S. Ct. 2739, 97 L.Ed.2d 90 (1987), citing 8 J. Wigmore, *Evidence* § 2352, pp. 696-697 (J. McNaughton rev. ed. 1961). The only exceptions to the common-law rule were in situations in which an outside influence was alleged to have affected the jury. *Mattox v. United States*, 146 U.S. 140, 149, 13 S. Ct. 50, 36 L.Ed.917 (1892) (testimony of jurors describing how they heard and read prejudicial information not admitted into evidence was admissible), *Parker v. Gladden*, 385 U.S. 363, 365, 87 S. Ct. 468, 17 L.Ed.2d 420 (1966) (testimony from jurors showing non-juror or third party influence admissible); *Remmer v. United States*, 347 U.S. 227, 228-230, 74 S. Ct.

450, 98 L.Ed.654 (1954) (testimony on bribe offered to juror admissible). In situations that did not fall into this exception for external influence, however, the Supreme Court adhered to the common-law rule against admitting juror testimony to impeach a verdict. *Tanner v. United States*, 483 U.S. at 117 (court upholds lower court's refusal to consider juror affidavits or to hold evidentiary hearing on whether jurors were engaged in drinking and drug use during recesses of trial); *McDonald v. Pless*, 238 U.S. 264, 35 S. Ct. 783, 59 L.Ed.1300 (1915) (testimony of jurors as to how damages were calculated inadmissible); *Hyde v. United States*, 225 U.S. 347, 384, 32 S. Ct. 793, 56 L.Ed.1114 (1912) (testimony of jurors inadmissible to show matters which essentially inhere in the verdict itself).

The common law principle was essentially codified in the Federal Rule of Evidence 606(b). *United States v. Casamayor*, 837 F.2d 1509, 1515 (11th Cir. 1988) ("the alleged harassment or intimidation of one juror by another would not be competent evidence to impeach the verdict under Rule 606(b)"). Even though Washington did not adopt the equivalent of the federal rule, as explained above, the standard in Washington remains essentially the same.

In *State v. Aker*, 54 Wash. 342, 345-346, 103 Pac. 420 (1909), the court held that juror affidavits may not be considered to show that during a recess taken in the prosecution's case in chief, jurors went back into the

jury room and commented about the defendant's guilt. The court also forbade the use of a juror's affidavit to show that he assented to a guilty verdict because of intimidation by other jurors. *Aker*, 54 Wash. at 345-346.

Public policy forbids inquiries into the jury's private deliberations; the mental processes by which jurors reach their conclusion are all factors inhering in the verdict. *State v. Havens*, 70 Wn. App. 251, 256, 852 P.2d 1120 (1993); *State v. Jackman*, 113 Wn.2d 772, 777-78, 783 P.2d 580 (1989).

A trial court faces a delicate situation when the allegations of potential misconduct stem from a dispute between jurors, as the dispute might stem from a disagreement about the case. *United States v. Symington*, 195 F.3d 1080, 1086 (9th Cir. 1999); *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987). This is because a trial judge must not compromise the secrecy of jury deliberations. *Symington*, 195 F. 3d at 1086.

Here, Plaintiffs submit no admissible evidence to support their baseless claim of jury misconduct. There is no evidence whatsoever of any outside influences tainting the jury. All the Plaintiffs submit is a declaration of one juror who apparently disagreed with the majority of other jurors. That evidence is strictly inadmissible as the mental processes

of jurors inheres in the verdict. It is not a proper area of inquiry. Secondly, the Plaintiffs' lawyer submits her own declaration of hearsay statements made by the jurors after the verdict explaining their thought processes. This is also inadmissible on its own right. Further, the subject of this hearsay is likewise inadmissible because it, too, seeks to probe into the mental processes of the jury. Discussion in a jury room as to defendants carrying liability insurance is not grounds for a new trial, where conflicting affidavits of jurors did not successfully impeach the verdict. *Lloyd v. Mowery*, (1930) 158 Wash. 341, 290 P. 710. Superior Court Civil Rules, CR 59.

b. Plaintiffs' Attorney's Declaration About What Jurors Said After the Case Is Inadmissible Hearsay

The Plaintiffs' attorney's declaration as to what the jurors said after the verdict, in addition to being inadmissible inquiries into juror thought processes, is further inadmissible hearsay – the attorney is recounting the statements of the juror to prove the truth of the matter asserted. It is classic inadmissible hearsay, and the court's reliance upon it to overturn the verdict is error. An affidavit of a third person as to statements allegedly made by jurors may not be used to assail a verdict since it is hearsay. *State v. James*, (1967) 70 Wash.2d 624, 424 P.2d 1005.

4. The Trial Court Should Have Inquired About the Facts Alleged by Plaintiffs Before Granting the Extraordinary Remedy of a New Trial

The granting of a new trial is an extraordinary remedy. A new trial should only be granted to prevent injustice. The trial court in this case did not conduct any fact finding hearings to determine if there was any truth to Plaintiffs' attorney's claim of juror misconduct.

"[T]he trial court, in ruling on a motion for a 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.'" *Byerly v. Madsen*, 41 Wash.App. 495, 499, 704 P.2d 1236 (1985) (quoting *Gardner v. Malone*, 60 Wash.2d 836, 842, 376 P.2d 651, 379 P.2d 918 (1962); *Taylor v. Kitsap County Transp. Co.*, 158 Wash. 404, 410, 290 P. 996, Wash. (1930); *Vasquez v. Markin*, 46 Wash.App. 480, 485, 731 P.2d 510, 514 (Wash.App., 1986)). No such inquiry was conducted here.

5. The Defendants Offered Competent Evidence to Demonstrate No Misconduct Occurred

A court is warranted in denying a motion for a new trial on grounds of misconduct of the jury when the showing of misconduct is contradicted by members of jury. *State v. Webb*, (1899) 20 Wash. 500, 55 P. 935.

In light of that lack of fact finding by the trial court, attorneys for Defendants obtained declarations from ten other jurors who heard the case. They were all anxious to defend their actions and establish that no misconduct had occurred. They uniformly disputed Plaintiffs' attorney's claims that one of the jurors, Ms. Harkins, discussed clay tiles in deliberation. They uniformly testified that all jurors were given full right to participate and share opinions. They all categorically denied that any extrinsic evidence was introduced into deliberations, but rather testified that they only considered the evidence presented in court. They noted that the one declaration Plaintiffs' attorney provided the court was from the last remaining holdout juror who was in favor of the Plaintiffs' case early in deliberations. They disputed that items were concealed in voir dire. And they unanimously had strong feelings of disappointment, even lack of faith in the court system because their hard work and effort was disregarded when the trial court set aside the jury verdict in the case. The following are excerpts of their testimony presented to the trial court:

JURORS

1. Steven H. Riley: No extrinsic evidence was introduced, everyone was allowed to express opinions, Ms. Britton was for Plaintiffs

until the very end. He was disappointed that all of their time on the case had been wasted.

2. Kristi Morton: Ms. Harkins never discussed drain tile pipes on her property, and the jury did not consider any evidence except the testimony and evidence admitted by the judge in trial.

3. Martha M, Kruzner: Ms. Harkins never said that there were drain tiles located on her property. The jury did not see, hear, or consider any evidence except the evidence presented during trial testimony. She is very disappointed to learn that the verdict was vacated. All this work and time should not be wasted. The court relied upon "inaccurate and misleading declarations" of Plaintiffs' lawyer and juror Tina Britton.

4. William P. Jennings: All jurors were allowed to voice opinions and did not consider any evidence except for testimony and exhibits admitted in trial. Ms. Harkins never said anything about having drain tiles on her own property. "It is disheartening to hear that all of our efforts over four plus weeks of jury duty were all for nothing."

5. Carolyn Harkins: She explains the paper she gave to Ms. Britton, it was just a proposed outline for how to conduct orderly deliberations. She disclosed in voir dire that she had been a realtor and never stated that they have clay tiles on their land. They have no tile pipe

on their land. The jury considered all the evidence, but no extrinsic evidence was considered. It is a "terrible miscarriage of justice to allow four weeks of hard work and, for some, hardship to be wasted based on the Declaration of one juror who favors the Plaintiffs".

6. Ellis D. Faulkner: I disclosed in voir dire my experience with clay tile pipes, no one asked me any questions about jet rodding during voir dire. Ms. Britton was the last holdout for the Plaintiffs in the jury. Everyone was given opportunities to discuss issues in deliberation. We did not consider any evidence but the evidence presented at trial. "My trust in the jury system has been shaken by the judge's decision to grant a new trial. How can one juror and her opinion (that disagrees with the other jurors) change the outcome without question? How can the losing lawyer change the outcome by making inaccurate statements about a juror and without question?"

7. Troy Thomas: Everyone on the jury had the opportunity to speak their mind during deliberations, Ms. Harkins never said anything about any drainage system on her property. The verdict was based solely on the testimony of the witnesses and the exhibits produced at trial. "I am very disappointed that the Judge decided to disregard the jury's many hours of hard work in this case when he granted a new trial."

8. Sally Evans: Carolyn Harkins absolutely did not talk about her situation at her house to compare it to the County's position during deliberations. She responded to questions in voir dire about that, and mentioned her feelings after the verdict was read, but never during deliberations. She did not find the Plaintiffs' expert, Mr. Creveling, very credible, and Mr. Faulkner's disagreement with him was no different than other juror's disagreement with his opinions. Though the jury exchanged contact information for contact after the trial, they followed the judge's direction not to discuss the case until deliberations. She does not remember Carolyn Harkins saying anything about a clay tile system during voir dire or during deliberations. "I am very disappointed that one juror can overturn what the rest of us decided, especially when we were told that only 10 of us had to agree on any one issue."

9. Jeremy Leaf: Ms. Harkins' notes were nothing more than suggestions on being respectful to each other and the process of deliberation, but nothing about the facts of the case. Ms. Harkins never said anything about clay tiles on her property. She also never compared her situation to the County's position in the trial, but answered questions about her contacts with the County and her development during jury selection. Mr. Faulkner answered questions in jury selection about his experience running heavy equipment, back hoes, and his experience with underground drainage

systems. He did not find Mr. Creveling, the Plaintiffs' expert, very credible. The jury only looked at the testimony and the exhibits they were given, and they never considered any evidence brought from outside the courtroom. Jeremy read the declarations of Tina Britton and Sarah Lee. "I can't believe that the verdict has been overturned based on what I have read in Tina's declaration and Sarah Lee's declaration."

10. Cheryl Thresher: Ms. Harkins "bent over backwards to make sure everyone had a chance to voice their thoughts and opinions, particularly with Tina Britton, who seemed to disagree with most of the jurors, most of the time." Ms. Harkins never made herself out to be an expert in any particular area. She never said anything about having an underground clay tile system on her property. Mr. Faulkner talked about his background with underground drainage systems at the Kansas Fairgrounds during jury selection. He did not hold himself out as an expert but merely spoke of his own life experiences, as did everyone else on the jury. The jurors only considered the testimony and evidence presented at trial.

See Declarations of the ten jurors, CP 273-299, 332-335.

It is not misconduct warranting a new trial for one juror to make comparisons between one of parties and a third person. *Carpenter v. Gooley*, (1934) 176 Wash. 67, 28 P.2d 264. In an action based on negligence in causing plaintiff to be thrown from a horse, jurors' affidavits concerning conversations of jurors related in the jury room

as to their experience in horseback riding could not be used to impeach the verdict in favor of defendant.

Johnston v. Sound Transfer Co., (1959) 53 Wash.2d 630, 335 P.2d 598.

Sadly, the court apparently declined to consider any of the testimony of ten of the other jurors who heard the case. The declarations clearly demonstrate that there was no factual basis to support a ruling for a new trial.

6. Ordering a New Trial Was an Invasion of the Province of the Jury

No legal basis exists for granting a new trial in this case. In fact, granting a new trial, in addition to being an affront to the jurors who gave of their time for so long in this case, was also contrary to the policies of our state. "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 Pers. Restraint of 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). Here, there was no strong, affirmative showing of misconduct, in fact there was no showing of any misconduct on the part of the jury. That which the Plaintiffs' lawyer claimed was misconduct was well within the province of a jury, and is not a valid legal basis for overturning their verdict.

It is generally considered less serious if the misconduct allegation does not involve outside influences or extraneous information. *See, United States v. Klee*, 494 F.2d 394, 395-96 (9th Cir. 1974). Claims that do not involve an outside or extrinsic influence, but rather only a potential intra-jury influence, are not subject to a *Remmer* hearing or further inquiry by the trial court. *United States v. Briggs*, 291 F.3d 958, 963 (7th Cir.) (affirming district court's denial of motion for post-verdict hearing based on a juror's allegations that jurors and the jury foreman behaved improperly during deliberations, including exerting "extreme and excessive pressure on individuals to change votes"), *cert. denied*, 537 U.S. 985, 123 S. Ct. 458, 154 L.Ed.2d 350 (2002); *United States v. Prospero*, 201 F.3d 1335, 1340-41 (11th Cir.) (district court's refusal to grant mistrial or an inquiry into alleged misconduct by two jurors engaged in a "heated discussion" away from the other jurors did not amount to an abuse of discretion and, in fact, would have "invited reversible error" if a contrary decision had been made), *cert. denied*, 531 U.S. 956, 121 S. Ct. 378, 148 L.Ed.2d 292 (2000); *see also, United States v. Yoakam*, 168 F.R.D. 41, 45-46 (D. Kan. 1996) (denying request for investigation based on allegations of juror misconduct obtained from courthouse guard, who overheard two jurors participating in a "heated discussion" concerning their deliberations).

Here, no evidence of outside influences was presented to the court. The jurors merely used their experiences, which were disclosed in jury selection to analyze testimony during trial as they are instructed to do. Further, Plaintiffs' counsel's statement that jurors did not disclose such information in voir dire is inadmissible to this Court. Counsel for the Plaintiffs chose not to transcribe voir dire, therefore there is no record of what the jurors said. Since Plaintiffs bear the burden of proof, their own self-serving statements of what was said (in addition to being contradicted by counsel for Defendants) is not sufficient to carry the burden of proof that there was some kind of failure to disclose. CP 154-156. Counsel's self-serving declaration is also in conflict with the direct testimony of the actual jurors involved, and several other jurors who were present during voir dire. They all testify that each juror gave full disclosure of the topics that counsel now says were not disclosed in voir dire. Again, the Plaintiffs have failed to meet their burden of proof on this matter. Accordingly, the court's Order granting a new trial on this lack of evidence is legally insupportable.

7. Plaintiffs' Rights Were Protected Through Voir Dire

Voir dire protects the right to an impartial jury by exposing possible biases. *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.* *McDonough* was a products liability case in which a juror did not disclose in voir dire that his son had received a broken leg as the result of an accident involving a truck tire when questions were asked whether jurors, or members of their immediate family, had sustained any severe injuries resulting in disability or prolonged pain and suffering. *McDonough*, 464 U.S. at 550-51. The Supreme Court refused to grant a new trial on this basis 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 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*. *Elmore*, 162 Wn.2d at 268; *In re Det. of Broten*, 130 Wn. App. 326, 336, 122 P.3d 942 (2005), *review denied*, 158 Wn.2d 1010 (2006).

Here, Plaintiffs can show neither of the above two requisites in order to obtain a new trial. There is absolutely no evidence that any juror

answered any questions in voir dire dishonestly. As such, Plaintiffs can not meet their burden of proving misconduct on the part of any jurors.

In order for a party to obtain a new trial because of a juror's failure to respond affirmatively to a question on voir dire, such party must first demonstrate that the 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.

McDonough Power Equipment v. Greenwood, (1984) 104 S.Ct. 845, 464 U.S. 548, 78 L.Ed.2d 663.

B. THE TRIAL COURT ERRED BY NOT DISMISSING PIERCE COUNTY AS A MATTER OF LAW BEFORE TRIAL AND DURING TRIAL

Pierce County should have been dismissed from this lawsuit as a matter of law under Civil Rules 56 and 50.³ The undisputed evidence shows that the drain tile pipeline running under the McCoys' property had become the natural drainway by reason of its use for more than 30 years and that Pierce County had no responsibility for the failure of the drainage system. Moreover, there was no competent evidence to show that Pierce

³ Pierce County moved for summary judgment before trial and for a judgment as a matter of law following Plaintiffs' case and again before the case went to the jury. In each of these motions Pierce County argued that there was no evidence to support Plaintiffs' theories of liability against the County. RP 869:11-879:24 and RP 1823:11-1828:2. The jury's verdict confirmed that Pierce County did nothing to cause harm to the Plaintiffs' property. CP 17-26, CP 78-85, RP 1824.

County's maintenance of its culvert or ditches caused any damage to the drainage system or to Plaintiffs' property.

1. The Trial Court Erred in Failing to Find That the Pipes Running Through the McCoy Property Were a Natural Drainway as a Matter of Law

Pierce County cannot be held liable for water discharged into a naturally occurring drainway through which surface water from higher lands drains to the lower land. *Wilber v. Western Properties*, 14 Wash. App. 169 (1975). Manmade drainage structures, such as pipelines, may become natural drainways over a period of time. *Id.* In *Wilber* this Court held that the issue of whether an artificial drainage pipe, such as the drainage system in this case, had become a "natural drainway" should be decided by the court as a matter of law. *Wilber* at 172.

As in this case, the defendant in *Wilber*, Western Properties, had substituted a pipeline for a drainage ditch that crossed its property. When the pipeline proved to be insufficient to handle the floodwaters coming from uphill landowners, those floodwaters backed up onto the Wilbers' property causing damage. Although the ditch, which had been replaced by the pipe, was "obviously an artificially altered drainway" the Court held that:

Whether an artificially altered watercourse has become the 'natural' channel because of its antiquity or the longtime acquiescence of riparian owners is a question to be decided

by the court as a matter of law. *Matheson v. Ward*, 24 Wash. 407, 64 P. 520 (1901). The same rule applies to an irrigation ditch. *Hollet v. Davis*, 54 Wash. 326, 103 P. 423 (1909). We see no reason why the same rule should not apply to a storm drainway.

Thus, because it was uncontroverted that prior to 1969 the ditch had been the drainway for more than 30 years, the trial court was justified in determining that the ditch became the 'natural' channel and land along its route acquired legally recognizable burdens and benefits.

Wilber v. Western Properties, 14 Wash.App. 169, 172, 473

(Wash.App.1975).

In this case there is no dispute that the drainage pipe that crosses under 150th Avenue East and through the McCoy property has been there for over fifty years and that storm water from the County road has flowed through the roadside ditch into this pipe since at least the 1960's when the structure was installed. EX 123, EX 124, RP 896:1-901:17.

On direct examination, Plaintiffs' expert, Damon DeRosa, testified that the pipeline running to Horse Haven Creek can be seen on a 1969 aerial photograph. RP 573:13-25, EX 100. Although the evidence presented at trial showed that the drainage had run through the McCoy's property for many decades prior to 1969, DeRosa's testimony established that the *Wilber* thirty-year period was established no later than 1999.

Furthermore, the Plaintiffs' other expert, William Creveling, testified that Pierce County had not done anything to cause the drainage system to fail.

Q I think you said -- well, I'll ask a direct question. The cause of these sinkholes was a major design flaw back in the '60s, isn't it?

A I think so, yes. Yeah.

Q I mean, essentially --

A I'll change that to just a yes.

Q I mean, it was -- okay. And there's no evidence that Pierce County had any involvement at all with the design of this system, is there?

A That's correct.

RP 842:11-21.

Q Okay. I think you said, in response to a question Ms. Lee asked you, that you didn't think the McCoys had done anything to cause the system to fail. Is that right?

A That's correct.

Q Okay. So, by the same token, you, personally, you don't believe that Pierce County has done anything to make the system fail, do you?

A I don't think they've done anything to make it fail.

RP 1768:13-20.

The pipe running through the McCoy property has been draining stormwater from the County road for more than 30 years. It has become the natural channel for that stormwater as a matter of law. As the *Wilber* court noted:

Undoubtedly, Western had the right to substitute pipeline drainage for the open ditch on its property, but in doing so it must allow the waters to flow without obstruction in normal conditions and in times of recurrent floods. *Western's duty to Wilber was akin to a duty of strict liability.* Violation of one's duty to provide adequate drainage is unreasonable use of one's property.

Wilber v. Western Properties, 14 Wash.App. 169, 173-174 (emphasis added).

As in *Wilber*, the McCoy's failure to maintain the system so as to provide adequate drainage through the system installed on their property by their predecessors was unreasonable. Because the McCoy's failed to provide adequate drainage through their property, Plaintiffs were at fault *as a matter of law*, and Pierce County should have been dismissed from the lawsuit.

2. The Trial Court Erred When it Failed to Dismiss Pierce County From the Lawsuit for Insufficiency of the Evidence

In addition to the reasons set out above, Pierce County should have been dismissed from the case under Civil Rule 50 because there was no evidence that Pierce County was negligent. The Court of Appeals recently

set out the standard for granting a judgment as a matter of law under CR 50 in *Corey v. Pierce County*.

A judgment as a matter of law is only appropriate when no substantial evidence or reasonable inference would sustain a verdict for the nonmoving party. Such a motion can be granted only when it can be said, as a matter of law, that there is no competent and substantial evidence upon which the verdict can rest. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premise. The evidence must be viewed favorable to the non-moving party. In reviewing a decision on a motion for a judgment as a matter of law, an appellate court applies the same standard as the trial court.

Corey v. Pierce County, 154 Wash.App. 752, 760-761, (Wash.App. Div. 1, 2010) (internal citations omitted).

In this case there was insufficient evidence to show that Pierce County violated any duty of care or caused any harm to the Plaintiffs. The only evidence produced by the Plaintiffs at trial having any bearing on County liability was the testimony of Plaintiffs' expert, Damon DeRosa. Mr. DeRosa's testimony, like his earlier declaration in support of Plaintiffs' opposition to summary judgment, consisted of speculation and conjecture and was wholly conclusory and unsupported by any facts. Although it is difficult to determine from the record what Mr DeRosa's opinion was regarding the effect of Pierce County's maintenance on the roadside ditches and culvert, whatever Mr. DeRosa's opinion was, it was not based on any facts.

For example, on direct examination Mr. DeRosa stated that when Pierce County jet rodded the culvert under 150th Avenue East, sediment was pushed down the pipe where it "plugged up the system".

A. When they come and jet-rod this, they insert the hose here spray this really, really high-pressure water. And when they hit a joint, the high-pressure water will tend to erode the foundation soil the pipe's on and accumulate the sediment all to one point. And, on McCoys' property, there's no other structure to get that sediment. So, what they did is, they jet-rodded all this sediment here without capturing it.

Q And what happened -- I mean, what happens --

A Well, with all that sediment accumulated, it put a lot of force -- let's say there's a bunch of sediment here -- it puts a lot of force on this right here because this is about seven feet of what we call pressure head. It's about seven feet of pressure on this end here the sediment has plugged the system up.

Mr. DeRosa also said that additional sediment would be brought into the system as a result of Pierce County's ditch maintenance activities.

A. So, when they do this land-disturbing activity, what happens when it rains, it rains on the disturbed soil, and then it carries more sediment into the pipe because of the soil sitting on the surface. And it is pretty silty soil, so it would run with the water and go into the clay tile pipe, which is the disposal point of the storm water in McCoys' property. McCoys' property is acting as the disposal point of the storm water. So, you are just bringing more sediment into a system that doesn't need it.

During the same direct testimony Mr. DeRosa contradicted himself when he said that instead of plugging the system, cleaning sediment out actually increased the flow of water into the system.

Q Is it your professional opinion -- again, this is on a more probable than not basis -- that, when Pierce County jet-rodged that drainage basin, did that cause more water to go onto Mr. McCoy's property?

A Yes, it would, because, as you move the sediment and clear the sediment, what was blocking the flow of water in the catch basin because of the sediment, now it is cleaned out, now water -- there's no blockage of water, so additional water could get in.

Mr. DeRosa's testimony is inconsistent because it is entirely conclusory.⁴ This "expert" simply made up theories of negligence and causation without bothering to marshal the support of any facts or to do even rudimentary analysis.

Q Now, you don't know the condition of the ditch along 150th when the McCoys brought the property, do you?

A No.

Q And you don't know what the condition of the ditch was in 2006?

A No.

⁴ Mr. DeRosa's Declaration in Opposition to Summary Judgment was drafted by Ms. Lee. EXs 106, 107. In an email to Ms. Lee regarding his Declaration, Mr. DeRosa stated, "Please review and make any changes you see fit-Let me know." EX 108.

Q And you haven't seen any of the County's maintenance efforts yourself?

A No.

Q You don't have any evidence at all that the jet-rodding created any kind of plug in the pipe, do you?

A It would only make the situation worse.

Q My question was, you don't have any evidence that the jet-rodding created any plug, do you?

A No.

Although the Plaintiffs never bothered to investigate what type of pipe lay under 150th Avenue East, Mr. DeRosa testified that the County should have sent a video camera through the culvert before jet rodding to determine whether the pipe under the road was clay drain tile.

Q Is that something, as a professional engineer, you would have done?

A Yes. Yes. I would have sent a camera down to see what we're dealing with before I would have re-ditched or jet-rodded.

Q Why?

A Because you've got to know what you're jet-rodding. And with an older system like this, clay tile pipe, you don't jet-rod clay tile pipe, period. That's something you do not do.⁵

⁵ Harold Louderbach, who built the drainage system and knows more about it than anyone, testified that the culvert under 150th Avenue East was a bell-type concrete

Mr. DeRosa's speculations were pure conjecture since he had no idea what sending a camera into the culvert would reveal.

Q Have you ever gone to see what, actually, is the conveyance system underneath the roadway, whether it's a clay tile pipe or some other type of concrete culvert or steel culvert?

A No. This as-built here shows a 12-inch clay tile pipe being -- existing. It was before the as-builts. So, it shows a 12-inch going to McCoys' property before the as-builts were done. And it just shows all this drainage connected into that 12-inch line. That's the information I got. It being clay tile.

Q But, you don't know for a fact what's underneath that road, 150th Avenue?

A No.

Q And you didn't do anything to try to discover what was underneath the road at 150th Avenue?

A We didn't.

Q Pardon me?

A No, we didn't. We were told it was clay tile.

culvert and not a clay tile pipe as Mr. De Rosa assumed. Q: Can you describe to the jurors how it crossed the road. A: There was a culvert on the road. The tile went through it. An eight-inch went through a 12-inch tile -- or, I should say, a culvert in the road, like they put in any road. And that extended so far and down in the neighbor's field. Q: Okay. Now, I'm not sure if everyone heard. There was what under the road? A: A culvert. Q: A culvert? A: A culvert, I should say. Q: Can you describe the type of culvert that you saw? A: Bell type, what they put in all roads. Q: And what is the -- what is the material or the consistency? What is it made of? A: Cement. Q: And is that the same location that the tile systems that you put in in 1965 -- does it still go the same route under the road? A: Exactly. Q: Did you put any culverts under the road at 150th Avenue? A: Never have. RP 922:23--RP 923:12.

Q Who told you that?

A Property owner, as-builts, looking at the catch basin, looking at it being clay tile running out of the catch basin. So . . .

Q And the property owner you're referring to is Mr. McCoy.

A Yes.⁶

RP 602:3-603:1

Finally, Mr. DeRosa failed to undertake any quantitative analysis which might show how much water the County road runoff contributed to the drainage system.⁷

Q And my understanding is you are actually deferring to Mr. Creveling on the cause of the failure of the drain tiles, right?

A Yes.

Q Is there a way of calculating expected run-off from an impervious surface such as a road to determine what portion of it contributes to a drainage basin?

A Yeah, you can calculate based on hydraulic models and hydrology models.

Q You have not done that calculation, have you?

⁶ Undermining further this reliance on the property owner's knowledge, Mr. McCoy has chosen to remain remarkably ignorant regarding the drain tile system under his property. See, for example, RP 521:8–RP 523:4.

⁷ Pierce County's expert provided the analysis and concluded that the contribution from the County road was approximately one-half (.6) percent of surface water runoff in the basin. RP 1220:23–1227:17.

A No.

Q And you have estimated that 90 percent of the water entering the McCoy property was coming from the nurseries, correct?

A I'd given that an estimate, yeah.

Q But, you have not quantified what portion of those flood waters come from the road, have you?

A I have not quantified, correct.

An expert opinion must have some basis in fact and cannot simply be based on conjecture and speculation. *Riccobono v. Pierce County*, 92 Wn. App. 254, 268 (1998). In this case Mr. DeRosa stated that the County's maintenance activities had "plugged" the pipe, but he had no evidence to support that statement. He assumed that there was a tile drain running under 150th Avenue East when the testimony from the only person who had actually looked was just the opposite. He said the County should have sent a camera into the culvert, but he never did that himself. He claimed that County maintenance activities would cause more water to enter the McCoys property, but he made no effort to do any quantitative analysis of how much additional water would enter McCoys' property as a result of maintenance activities or if in fact those activities led to more water entering the property. DeRosa's testimony was incompetent and insufficient to prove that Pierce County was responsible for any damage to

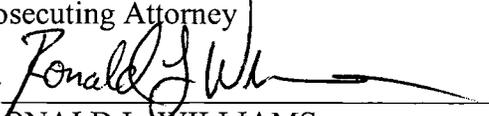
the McCoys' property. Therefore the County should have been dismissed as a matter of law.

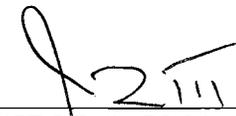
IV. CONCLUSION

This verdict should not have been overturned. The Plaintiffs have failed to meet their burden for such an extreme action by the court. It is a significant burden as the courts have stated, because without such burden, the policy favoring stable and certain verdicts and the secret, frank, and free discussion of the evidence by the jury is significantly undermined. *In re Pers. Restraint of 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). The trial court should be reversed and the jury verdict should be reinstated.

DATED this 3rd day of March, 2011.

MARK LINDQUIST
Prosecuting Attorney

By 
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Ph: (253)798-4282 / WSB # 20812

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing OPENING BRIEF OF APPELLANT PIERCE COUNTY PUBLIC WORKS AND UTILITIES was delivered this 3rd day of March, 2011, by ABC Legal Messengers for next-day delivery to the following:

Sarah L. Lee
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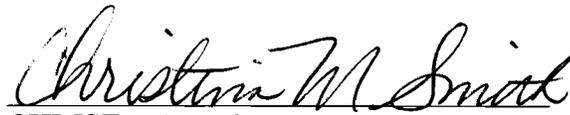
Joseph M. Diaz
DAVIES PEARSON PC
920 Fawcett Avenue
Tacoma, WA 98402-5697

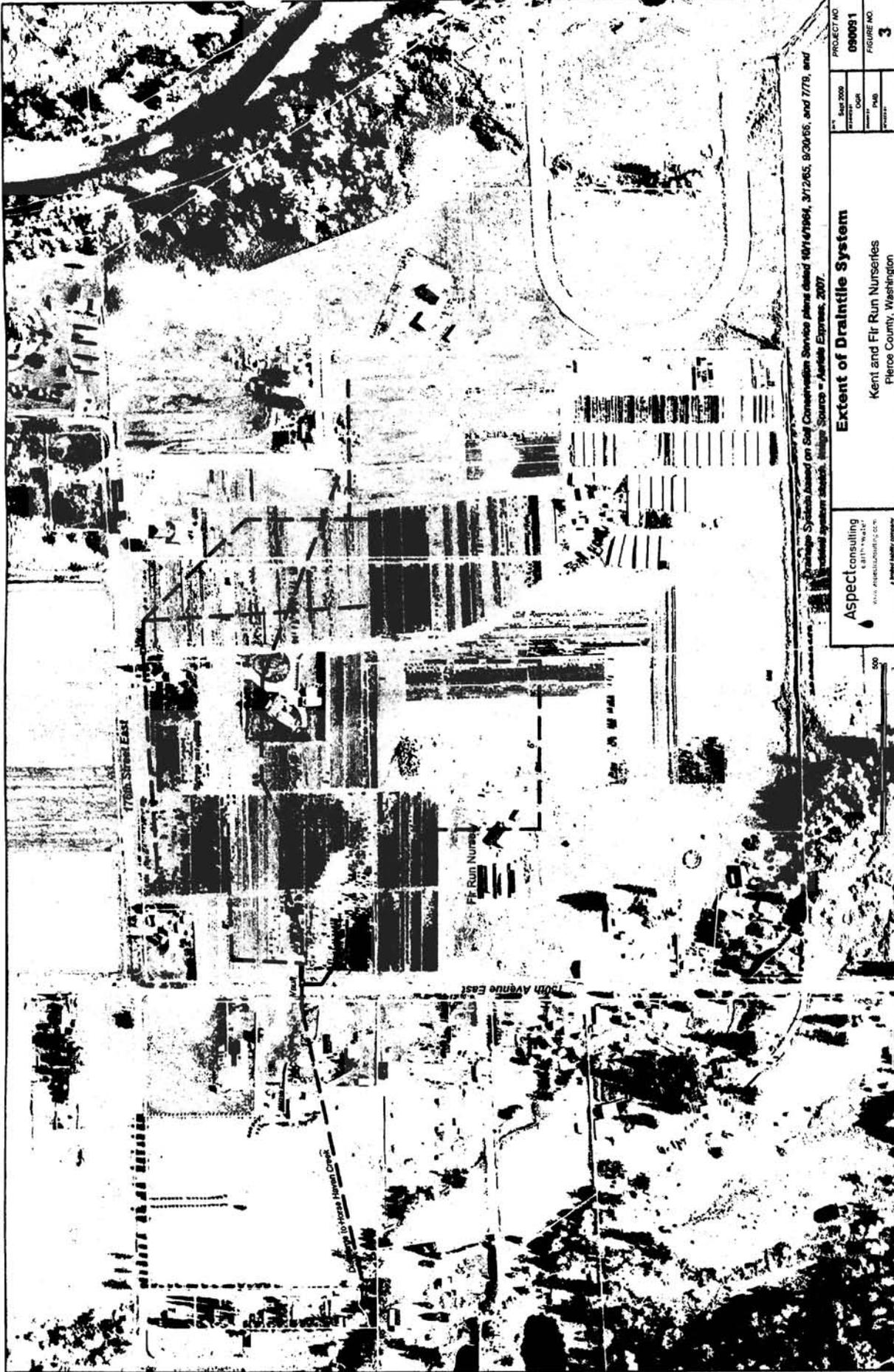
David Gross
HELSELL FETTERMAN LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-4200

11 MAR -4 PM 1:27
COURT OF APPEALS
DIVISION II
BY _____
STATE OF WASHINGTON
DEPUTY

and I delivered by electronic mail and USPS the foregoing to:

James E. Macpherson
KOPTA & MACPHERSON
365 Ericksen Avenue, Suite 323
Bainbridge Island, WA 98110
jim@koptamacpherson.com


CHRISTINA M. SMITH



PROJECT NO 090091		FIGURE NO 3	
DATE	BY	CHKD	APP'D

Aspect consulting
6311 1st Avenue
Walla Walla, WA 99159
A member of the MWH family of companies

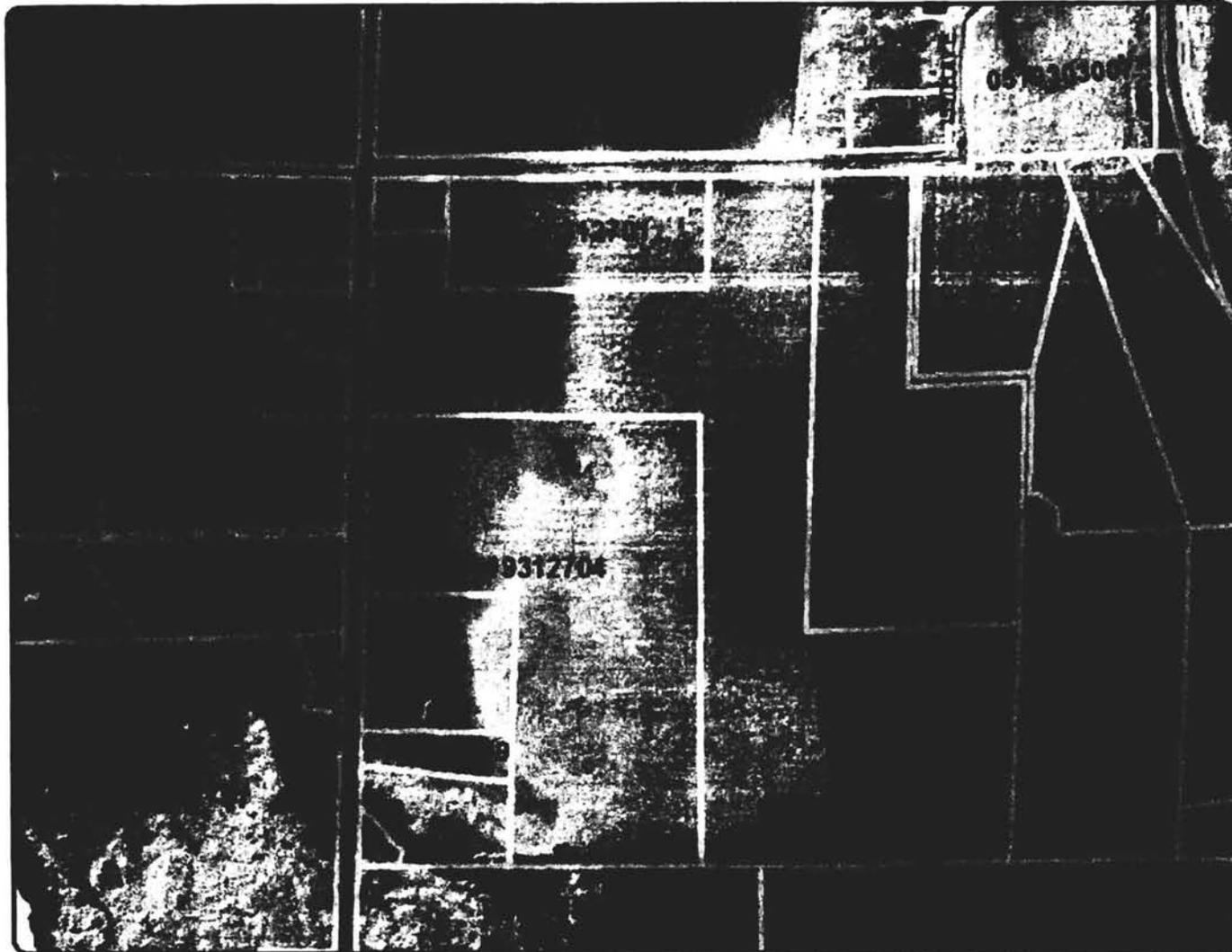
Extent of Drainfield System
Kent and Ft Run Nurseries
Pierce County, Washington

Drainfield System based on Soil Conservation Service plans dated 10/16/1964, 3/12/65, 8/30/65, and 7/79, and
 Exchange Station based on Soil Conservation Service plans dated 10/16/1964, 3/12/65, 8/30/65, and 7/79, and
 related systems sheets. Major Source - Aerial Express, 2007.

APPENDIX 1

Floodplain Review - Information Use Only
Horsehaven Creek Area Watershed - LiDAR Surface

The map features are approximate and are intended only to provide an indication of said feature. Additional areas that have not been mapped may be present. This is not a survey. The County assumes no liability for variations ascertained by actual survey. ALL DATA IS EXPRESSLY PROVIDED 'AS IS' AND 'WITH ALL FAULTS'. The County makes no warranty of fitness for a particular purpose.



Legend

Approximate Parcel Location
 Approximate Parcel Location

2004 LIDAR NAVD88

Elevation

■	185 - 190
■	182 - 185
■	181 - 182
■	180 - 181
■	179 - 180
■	178 - 179
■	177 - 178
■	176 - 177
■	175 - 176
■	174 - 175
■	173 - 174
■	172 - 173
■	171 - 172
■	170 - 171
■	169 - 170
■	168 - 169
■	167 - 168
■	166 - 167
■	134.91 - 166

Plotted by Dennis Dixon, CFM
 8-31-2009



APPENDIX 2

et 113

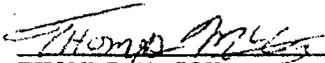
HOLD HARMLESS AGREEMENT

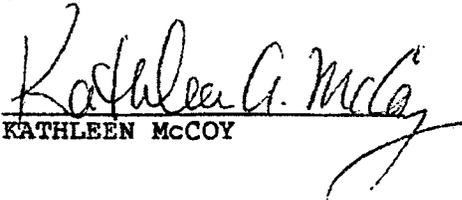
Thomas and Kathleen McCoy are purchasing real estate from Esther L. Hahn, being Lot 3 of Pierce County Short Plat No. 9501130603. Located under such property is a drainage pipe which extends onto and under adjoining property owned by the McCoys. The McCoys are aware of the location of the pipe. Further, they are aware that the existence of the pipe may adversely affect the value of said property.

In consideration of the sale of the property to them at the agreed price, the McCoys agree to hold Esther L. Hahn harmless from any liability whatsoever occasioned by the said drainage pipe.

This agreement is binding on the heirs, successors, and assigns of the McCoys, and inures to the benefit of the heirs, successors, and assigns of Esther L. Hahn.

Dated February 25, 1998.


THOMAS MCCOY


KATHLEEN MCCOY


ESTHER L. HAHN

KENT 00107

1192
APPENDIX 3