

COURT OF APPEALS  
DIVISION II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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TOM P. MCCOY and KATHLEEN A. MCCOY,

Plaintiffs/Respondents.

v.

KENT NURSERY, INC., a Washington corporation doing business in  
Pierce County, STEVE MAURITSEN and "JANE DOE" MAURITSEN,  
husband and wife and the marital community comprised thereof,  
RICHARD MAURITSEN and PHYLLIS MAURITSEN, individually, and  
husband and wife and the marital community comprised thereof,

Defendants/Appellants,

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REPLY BRIEF OF APPELLANTS  
KENT NURSERY, INC., AND MAURITSEN

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## REPLY ARGUMENT

### 1. **Plaintiffs Failed to Make a Strong Affirmative Showing of Juror Misconduct .**

Defendants Kent Nursery, Inc. and Mauritsen have already provided the Court with the appropriate standard for review of alleged jury misconduct. The plaintiffs, however, argue in their respondents' brief beginning at page 40 that the trial court's grant of a new trial should be confirmed because the trial judge sat through the 16 day jury trial, and therefore is in the best position to exercise discretion. The plaintiffs really hope that this Court find that the trial court's opinion that the totality of the circumstances and evidence in the case cried out for a new trial was correct.<sup>1</sup>

The trial judge stated in part to support the court's grant of the plaintiffs' motion for new trial as follows:

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.

Then, during the court's ruling on July 23, 2010 denying the defendants' motion for reconsideration of the court's granting of a new trial, the judge again stated the following:

All right. If you look at the totality of the circumstances

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<sup>1</sup> Verbatim Record of Proceedings, April 30, 2010, 48:14-49:4; Verbatim Record of Proceedings, July 23, 2010, 28:17-23.

in this matter, this issue, to be fair to both sides, cries out for this thing to be tried again, and that's why I ruled that way. And I'm going to deny the motion for reconsideration. Any you can try it again, and that's fair.

The Respondents entire argument throughout their brief is an attempt to gloss over the actually facts presented during trial, ignoring those facts and evidence they dislike, and then creating turmoil involving the jury where none existed. As presented in the Appellants' opening brief, attorney Lee's declaration contained nothing but her own self serving impressions that do not support the plaintiffs' contention of jury misconduct during voir dire. CP 626-628.

Moreover, Juror Tina Britton's declaration concerned the jury deliberation process and does not indicate an introduction of extrinsic evidence by juror number 2 or 11. Thus, the trial court erred by granting the plaintiffs' motion for a new trial upon that basis.

“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.” *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 203, 75 P.3d 944 (2003)(quoting *State v. Balisck*, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994)).

The plaintiffs' claim of jury misconduct does not even withstand the discrepancies between their attorney Sarah Lee's declaration of April

21, 2010 and the declaration of Juror Tina Britton prepared on April 27, 2010. In attorney Lee's April 21, 2010 declaration she fails to raise any issue whatsoever regarding juror number 2's past experience as a realtor or juror number 11's so-called knowledge of jet-rodding. The basis for the plaintiffs' motion for new trial concerning jury misconduct made no mention of jet-rodding or real estate experience. CP 626-628; CP 697-698.

On pages 43 – 49 of the respondents' brief they contend that jurors 2 and 11 failed to disclose facts or information regarding their backgrounds that the plaintiffs argue were material. Attorney Lee's own notes prepared during voir dire indicate that juror number 2 disclosed issues concerning her own property, issues with Pierce County, and the tightline of drainage pipes to a wetland area on her property. Juror number 2 was identified during voir dire as number 5.<sup>2</sup>

It is ironic that no one but Ms. Lee ever heard juror number 2 mention anything about clay tile pipes being on her own property. Ms. Lee attempted to discredit and crucify juror number 2 in the eyes of the trial court by arguing that clay tile pipe existed on the juror's property and was not disclosed. Verbatim Record of Proceedings, April 30, 2010, 12:12-14:22; Verbatim Record of Proceedings, July 23, 2010, 18:12-

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<sup>2</sup> See CP 154 – 156; CP 284 – 287, paragraph 6; CP 485 -487; CP 490 – 491; CP 626-628; CP 829 – 831; CP 831.

23:13; CP 821:6-822:13; CP 829-846. And, the trial court allowed this conduct to proceed, even over objection by counsel. Verbatim Record of Proceedings, April 30, 2010, 44:19-25.

However, based upon all of the facts and so-called evidence of jury misconduct before the trial court on April 30, 2010, two very divergent impressions of what was said or what was being represented to the court as jury misconduct arose. What is clear is that the plaintiffs were grasping at straws to invent some type of misconduct hoping that the trial court would bite. And, unfortunately for the appellants, the trial court bit. However, as seems apparent from the record before the trial court, a ‘strong affirmative showing of misconduct’ did not exist.

As the court is aware, under CR 59(a)(2), “a verdict may be vacated and a new trial granted” due to “[m]isconduct of prevailing party or jury . . . .” The trial court's decision to grant a new trial will be reversed only upon evidence of clear abuse of its discretion or when based on an erroneous interpretation of the law. *State v. Briggs*, 55 Wn.App. 44, 60, 776 P.2d 1347 (1989). The trial court abuses its discretion when its decision is manifestly unreasonable or exercised on unreasonable or untenable grounds. *State v. Cho*, 108 Wn.App. 315, 30 P.3d 496 (2001). The defendants’ contention throughout this appeal has been that the trial court abused its discretion with manifestly unreasonable grounds. As

cited above, the trial court's grounds for a new trial is the judge's belief that the totality of the circumstances cried out for a new trial.<sup>3</sup>

In *Cho*, the appropriate test for deciding whether a new trial should be granted based on juror nondisclosure was discussed. *Cho*, 108 Wn.App. at 321. The test is (1) whether the movant could demonstrate that the nondisclosure during voir dire was material and (2) whether disclosure would have been a basis for a challenge for cause. *Id.*

The plaintiffs' claim that jurors 2 and 11 concealed their personal biases by failing to reveal information during voir dire. The evidence for the nondisclosure consists of a declaration of attorney Sarah Lee based upon her post jury interview conducted in the presence of the entire jury panel and all trial counsel, Sarah Lee and Nathaniel Green for the plaintiffs, and defense counsel Joseph Diaz, James Macpherson, John Salmon, and David Hammermaster as counsel for the defendant counterclaimants. The plaintiffs further contend that the sole declaration of Juror Tina Britton also supports their contentions of misconduct.

Only attorney Lee's declaration alleges a failure to disclose. Ms. Lee claimed that juror number 2 failed to disclose her own home damage from flooding resulting from an alleged clay tile pipe on her property. Ms. Lee also claimed that juror 11 failed to disclose his professional

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<sup>3</sup> Verbatim Record of Proceedings, April 30, 2010, 48:14-49:4; Verbatim Record of Proceedings, July 23, 2010, 28:17-23.

experience with heavy equipment crushing clay tile pipe. The plaintiffs however do not claim that they ever asked the type of questions that would have elicited the responses they now allege were not voluntarily provided by jurors 2 or 11. Nevertheless the plaintiffs seem to argue that the juror's purported nondisclosure was material and would have amounted to bias sufficient to challenge for cause.<sup>4</sup>

It is well recognized that a prospective juror is not obligated to volunteer information or provide answers to unasked questions. *Cho*, 108 Wn.App. at 327. Plaintiffs' attorneys' failure should not now be grounds for a new trial.

Even if jurors 2 and 11 may not have voluntarily disclosed information regarding former involvement in real estate matters, knowledge about crushing of clay tile pipe by heavy equipment, or experience with jet-rodding; the plaintiffs fail to show how the nondisclosure is material to this case and would have established grounds for a challenge for cause. The record presented to the trial court does however provide facts that supported disclosure by juror number 2 of her past experience as a realtor and juror number 11 expressing his vast knowledge and experience with broken clay tile pipes and the replacement

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<sup>4</sup> CP 612:12- 614:9, 614:15-618:6 compared with plaintiffs' counsel's argument on April 30, 2010 before the trial court Verbatim Records of Proceedings, April 30, 2010, 12:12-17:23.

of the same. CP 629-637; CP 648-651; CP 677-681; CP 699-701; CP 734-736; CP 737-740; CP 903-911.

Unlike the bias found in *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 776 P.2d 676 (1989); *Gordon v. Deer Park Sch. Dist.* 414, 71 Wn.2d 119, 426 P.2d 824 (1967); and *Allison v. Dep't of Labor & Indus.*, 66 Wn.2d 263, 401 P.2d 982 (1965), the undisclosed information here does not provide a basis for a challenge for cause. In all three cases, certain jurors concealed information they were specifically questioned about during voir dire. See *Robinson*, 113 Wn.2d at 156 (juror was questioned about and concealed his bias against Californians and that he had been a defendant in a lawsuit against a Californian); *Gordon*, 71 Wn.2d at 121 (in a case involving a school teacher, juror was questioned about his potential biases but did not reveal until after trial that he was sympathetic to school teachers); *Allison*, 66 Wn.2d at 264-65 (one juror was questioned about and concealed his bias against the defendant and one juror failed to disclose a back injury when asked about previous injuries). In those cases juror bias was established.

The declarations provided by defense counsel in opposition to the motion for new trial, and the declarations provided by the jurors, indicate that the professional backgrounds of both juror number 2 and juror number 11 were disclosed during voir dire.

Furthermore, the respondents' argument concerning alleged extrinsic evidence being brought into the jury deliberations should likewise fail. Beginning on page 49 of the respondents' brief the plaintiffs' argue that extrinsic evidence was introduced into the jury deliberation. In the instant case, jurors 2 and 11 are accused of sharing their own personal life experiences during jury deliberations, as their life experiences related to acts and evidence produced during trial. These life experiences caused the jurors to question the facts and testimony of not only the plaintiffs but also of the plaintiffs' expert witnesses.

Inconsistencies in evidence are matters which affect weight and credibility and are within the exclusive province of the jury. *Herriman v. May*, 142 Wn. App. 226, 232, 174 P.3d 176 (2007); *Dupea v. City of Seattle*, 20 Wn.2d 285, 290, 147 P.2d 272 (1944). Jurors may rely on their personal life experiences to evaluate the evidence presented during trial. *Breckenridge*, 150 Wn.2d at 199 n. 3 (citing *Richard v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 274, 796 P.2d 737 (1990)). In *Richards*, 59 Wn. App. at 269, 273-74, Division One of the Court held that it was not misconduct for a juror to rely on medical knowledge that she had disclosed during voir dire to analyze the plaintiff's medical records and support her opinion that the plaintiff's birth defects were not caused

by medical malpractice. Such knowledge is not extrinsic evidence. *Richards*, 59 Wn. App. at 273-74.

The declarations of all jurors provided for the trial court's review indicate that no juror brought in extrinsic evidence during the jury deliberation process. The juror declarations provided that jurors 2 and 11 merely supplied their own life experiences to help evaluate the evidence presented during trial. The defense verdict should be reinstated for all defendants.

**2. Defendant Kent Nursery Did Not Admit Trespass, and the Great Weight of Evidence at Trial did not Support a finding of Trespass.**

The Respondents argue at pages 54 to 57 that defendant Kent Nursery, through the testimony of its corporate officer Steve Mauritsen, admitted that it has been trespassing on the plaintiffs' property. However, the only testimony from Mr. Mauritsen elicited during trial indicates that water from Kent Nursery does cross the McCoy property as it follows the natural drainage course to the Horse Haven Creek. When Mr. Mauritsen met with Mr. McCoy in 2006, and then later in response to letters received from Tom McCoy, it was made clear that the tile pipe on the plaintiffs' property was the plaintiff's to maintain.<sup>5</sup> Although the plaintiffs contend that the dewatering drainage system does not serve their property, the

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<sup>5</sup> Ex 83, Ex 84, Ex 85, and Ex 86.

evidence offered at trial by Harold Louderback, Cindy Hahn, and Owen Reese, P.E. was to the contrary. RP 967:19-972:12; RP 1059:18-1060:3; RP 1415:7-15; RP 1430:6-16; Ex 118.

The jury heard and evaluated all of the testimony presented during trial, from both the plaintiffs' exhibits and also from the defendant's exhibits, and the evidence presented through the respective witnesses. The jury weighed the testimony that was in conflict and determined that the defendants' evidence and testimony was more credible. For example, on page 31 of the Respondents' Brief, the plaintiffs argue that the pipe running through the McCoy property is above the water table. However, the testimony of plaintiffs' geologist William Creveling was impeached by the testimony of the defendants' engineering hydrologist, Owen Reese, P.E. with testimony that soil logs for the McCoy property prepared by Mr. Creveling's own firm indicated that the ground water levels on the McCoy property rose above the level of the dewatering drainage pipes located on the McCoy property, draining the ground water present there.<sup>6</sup>

Mr. Reese testified during trial that the dewatering system on the plaintiffs' property, that plaintiffs claim belong to the defendant nurseries,

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<sup>6</sup> RP 848:17-849:19; RP 1389:14-1390:24; RP 1393:20-1394:17; RP 1395:4-1396:16; RP 1400:6-1416:16; RP 1429:24-1430:16; RP 1431:5-1432:11; RP 1432:20-1436:9; Ex 14; Ex 70; Ex 117; Ex 123; Ex 124; Ex 128.

does serve the plaintiffs' property through the collection of water that then drains to Horse Haven Creek. Mr. Reese's testimony went as follows:

Q And would you also be able to conclude that, due to the design of this pipe, that water would be able to infiltrate into the pipe on that property?

A Yes, the pipe would be serving to remove excess groundwater from that property, so you would have flow from that higher groundwater level, into the pipe, and out to discharge to Horse Haven Creek.

RP 1415:7-15.

Q Now, based on your investigation and review, have you reached any professional opinion regarding the clay tile drainage system on the properties west of 150th Avenue East and -- that is of similar design to the Kent Nursery property drainage system?

A Yes. It's my professional opinion that the -- that the drain tile system west of 150th Avenue is -- is serving those properties as the soil logs indicate a water level above the pipe. So you would expect flow from that higher pressure, the higher water level into the pipe, and it would serve to remove excess water from those properties as well.

RP 1430:6-16.

The plaintiffs also discussed during trial that they had a recorded permissive use/license agreement ("license") that they relied upon concerning the ownership and maintenance of the clay tile drainage system on Lot 3. The license apparently relied upon by the plaintiffs was a red herring that the trial court allowed to go forward over objection from the defendants, ignoring legal authority provided for the court's review. CP 479, Section C, lines 6-19; CP 495-498. A permissive use terminates when the licensor dies or alienates the servient estate. *Granston v. Callahan*, 52 Wn.App. 288, 296, 759 P.2d 462 (1988). The grant of

permission being personal, it cannot continue beyond the termination of ownership. *Id.* The Court in *Granston*, quoted 2 G. Thompson, *Real Property* § 345, at 241-42 (1980) as follows:

[A] change in the title and ownership of the alleged servient estate operates as a revocation of a permissive use previously granted and such use may then become adverse and ripen into an easement.

The testimony presented during trial from Rolland Hartstrom, the licensor of the recorded license, was that he did not seek agreement from defendant Kent Nursery or anyone on its behalf concerning the purported license across Lot 3. RP 253:15-18. Mr. Hartstrom admitted during trial that he really did not know much about the license but he confirmed that his interest in Lot 3 was eliminated when he sold the Lot to Esther Hahn in September of 1997. RP 235:20-23; RP 239:2-242:17. Esther Hahn then sold Lot 3 to the plaintiffs in February of 1998 and obtained a hold harmless agreement from them. RP 268:14-24; RP 433:11-14; RP 436:2-437:20; RP 497:16-498:23; Ex 92.

Although the court allowed the license as plaintiffs' exhibit 1 to go to the jury, the court decided not to allow any jury instructions regarding the law on "license". The defendant nurseries objected on the record that their proposed jury instructions were not given to the jury. RP 1059:25-1060:12.

The testimony from witnesses, and the physical evidence produced during trial, support the decade's long drainage course where ground water has flowed along the natural contours and swales from the higher ground to the creek below. That during the course of decades the ground water was collected in underground pipes to help facilitate farming activities on the property. There was no evidence to support an intentional trespass.

The plaintiffs attempted to confuse the jurors by claiming that defendant Kent Nursery increased the amount of water draining through the dewatering system. The plaintiffs claim that the use of an agricultural sprinkler system on the nursery property for the watering of the trees being farmed has caused harm to the plaintiffs. (See p 15 of Respondents' Brief) Unlike the jurors who had the benefit of hearing all of the trial testimony and weighing the credibility of the witnesses, the plaintiffs hope to deceive this Court by misstating facts and testimony. In fact, Kent Nursery does sprinkle during the summer months but the testimony of Steve Mauritsen clarified the sprinkler issue. Mr. Mauritsen testified that the sprinklers water up to three quarters of an acre at a time and may be used from June through September for periods of up to 4 hours a day and that the water sprinkled may penetrate up to 8 inches below the surface. RP 1554:13-1555:23. There was no evidence produced at trial that the water from the

sprinklers have ever been collected by the clay tile dewatering drainage system that lies about four feet below the surface on the nursery property, let alone that it has made its way onto or across the plaintiffs' property.

Although Mr. McCoy was aware that repairs of the dewatering drainage system could be done within a matter of several hours, he refused to do any repairs on the system because he refused to acknowledge that the system serves his property or that the issues affecting the system were caused by his predecessor in interest Harold Hahn. RP 210-211; RP 212; RP 448:11-449:21; RP 455:22-456:11; RP 498:24-499:7; Ex 83; Ex 84. The jury heard that Mr. McCoy instead intentionally filled in sink holes with dirt without replacing or repairing any damaged drainage pipe, causing water flowing through the system to now back up and to collect on the defendants' property during periods of heavy precipitation until the water gets to a depth that it then flows on the surface following the natural contours for the area. RP 464:16-466:14. The jurors were in the best position to weight all of the testimony and evidence that supports their collective verdict reached after being instructed by the trial court.

The jury was instructed on the law of trespass, prescriptive easements, common enemy doctrine, and duty of servient estates where negligent or intentional acts cause damage to easements. CP 567-578. Jury Instruction No. 31 instructed the jury as follows:

It is the duty of the owner of an easement to keep it in repair; the owner of the servient tenement is under no duty to maintain or repair it, in the absence of an agreement therefore or servient negligent or intentional acts.

CP 577.

The jury verdict for the defendants as to their respective liability and the award of damages on the defendant nursery's counterclaims should be affirmed.

**3. Verdict on the Defendants' Counterclaims should be Reinstated.**

Rather than reiterate the defendant/counterclaimants' arguments in an additional reply brief, defendant Kent Nursery incorporates its arguments into this reply brief. The respondents argued beginning on page 25 of their brief regarding the nurseries' counterclaims that no evidence of a natural waterway existed across the McCoy's property. Exhibits and testimony from a number of witnesses including Harold Louderback, Cindy Hahn, Dennis Dixon, Owen Reese, P.E. all supported the natural drainage course that follows the contours and swales from the higher ground on the eastside of 150<sup>th</sup> Avenue East to the west across the McCoy property to the southwest and Horse Haven Creek.<sup>7</sup>

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<sup>7</sup> Ex 71, Ex 74, Ex 98, Ex 123; Ex 124; RP 971:21-972:12; RP 1059:18-1061:23; RP 1163:13-1166:10; RP 1372:16-1377:3.

Testimony for Mr. McCoy and the defendants' expert indicated that the flow of water through the clay tile pipes across the McCoy could be blocked by the dirt that Mr. McCoy used to fill in two sinks holes found on Lot 3. RP 1391:19-1393:6. That the blockage could cause the water to backup the drainage system and to discharge and overflow on the defendant nursery's land. This collection of water caused damage to the trees being grown by Kent Nursery and made land on Fir Run Nursery un-useable for nursery purposes.

In *Wilber*, the Court recognized that a lower landowner's duty not to impede or obstruct the flow of water through a natural drainway without providing adequate drainage to accommodate the water flow during times of ordinary high water. *Wilber v. Western Properties*, 14 Wn.App. 169, 173, 540 P.2d 470 (1975). The Court found that a person who so obstructs a natural drain caused damage by flooding, which damage would not have resulted without the obstruction, is liable for such damage regardless of negligence. *Id.*, 14 Wn.App. at 173-74.

The jury verdict in favor of the counterclaimants should be reinstated.

## II. JOINDER IN OTHER DEFENDANTS' ARGUMENTS

Defendants Kent Nursery, Inc., and Mauritsen hereby join in each of the arguments raised by the co-Appellants in their individual reply briefs.

## III. CONCLUSION

For the reasons set forth above, Defendants Kent Nursery, Inc., and Mauritsen respectfully request that the trial court's 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 and that the jury's verdict of April 12, 2010 in favor of all Defendants be reinstated.

Appellants also request their reasonable costs and attorney fees under RAP 14.3.

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

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MAURITSEN, individually, and husband and wife and the marital community comprised  
thereof,

Defendants/Appellants,

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Proof of Service of Reply Brief of Appellants Kent Nursery, Inc.,  
and Mauritsen

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