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ADOPTION BY REFERENCE

Defendants Fir Run Nursery, LLC, S. Michael Fenimore and Gayla A. Fenimore (hereinafter collectively referred to as “Defendant Fir Run Nursery”) and Defendant Kent Nursery, Inc. share a general commonality of interests in this appeal, particularly with regard to arguments supporting the reinstatement of the jury verdict. To promote judicial economy pursuant to RAP 10.1(g)(2), Defendant Fir Run Nursery adopts by this reference each section of the reply brief by Defendant Kent Nursery and will attempt to focus on argument unique to Defendant Fir Run Nursery.

ARGUMENT

Fir Run Facts Remain Uncontested. Plaintiffs have expended a large portion of their page limit on a “Restatement of Facts”¹, which merely emphasizes that the jury was asked to consider a great deal of witness testimony and expert opinion that now are subject to sometimes wildly divergent interpretation.

However, virtually none of the salient facts unique to Defendant Fir Run Nursery have been contested. The “highlights” of those facts are:

¹ Brief of Respondents, pgs. 10 - 38

Defendant Fir Run Nursery bought the property on June 28, 2006, many months after the first two sinkholes appeared²;

Defendant Fir Run had no knowledge of the underground clay tile system prior to purchase³;

Defendant Fir Run Nursery, through its officer Mike Fenimore, had just one brief personal encounter with plaintiff Tom McCoy, where neither the clay tile system nor responsibility for repair of the system was discussed or even mentioned⁴;

Defendant Fir Run Nursery did not receive a letter from plaintiffs describing the flooding situation and demanding some kind of resolution,⁵ and

Defendant Fir Run Nursery was never told that plaintiffs held them responsible for the flooding and was never asked to repair the underground clay tile system prior to the litigation⁶.

The allegation that "it was only after two years of unsuccessful attempts to resolve repair and/or replacement of the drainage system with the nurseries and the county, that the

² RP pg 1612

³ RP pg 1623, RP pg 1690

⁴ RP pg 1619; RP pg 1620-1621

⁵ Ex 64, RP pgs 1667, 508, 509-510

⁶ RP pg 1668

McCoys filed suit in October 2008⁷ is patently false as to Defendant Fir Run Nursery, and is indicative of the broad brush approach used by plaintiffs' counsel throughout the litigation.

The jury considered the uncontested facts unique to Defendant Fir Run Nursery, along with the witness testimony and the exhibits and the expert opinions regarding all parties, applied the jury instructions to the facts, answered the questions on the special verdict form, and found that none of the defendants were liable to plaintiffs, and that plaintiffs were liable to both nurseries on their counterclaims.

Fir Run Did Not Admit Trespass. Plaintiffs' counsel argues that "appellants have admitted they were trespassing on McCoy's property."⁸ Actually, officers for the nurseries merely responded affirmatively to questions under cross-examination as to whether they knew water entered the underground clay tile system on their properties, and passed under the county road onto and plaintiffs' property, without plaintiffs' specific consent or permission.

The mere fact of water moving from one place to another, with knowledge of one party and without consent of another party, does not establish trespass: That is a decision left to the jury. The

⁷ Brief of Respondents, pg 17

⁸ Brief of Respondents, pg 7

jury received detailed instructions and a special verdict form⁹ setting forth the standards for trespass and nuisance and the common enemy doctrine and easements, and applied those standards to the testimony heard and exhibits admitted, with the assistance and argument of all counsel during closing arguments. Plaintiffs' attorney did not object to any of the jury instructions, or the special verdict form and she was free to emphasize particular testimony and exhibits and expert testimony during closing argument on the issue of trespass.

In an effort to bolster the argument that defendant nurseries necessarily committed trespass, plaintiffs' attorney spends a great deal of time going over the expert testimony presented by plaintiffs' witnesses at trial.¹⁰ Of course, the jury was given an instruction regarding expert opinions:

A witness who has special training, education or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given this type of evidence, you may consider, among other things, the education, training, experience, knowledge and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering

⁹ CP pg 543-587

¹⁰ Brief of Respondents, pgs 19-31

the factors already given to you for evaluating the testimony of any other witness.¹¹

The plaintiffs' experts are not infallible, and the jury was entitled to believe the testimony from defendants' expert Owen Reese that the clay tile dewatering system, intact and in operation, actually benefits plaintiffs' property as it passes through, collecting excess water from plaintiffs' property and taking it out to Horse Haven Creek.¹²

Similarly, the jury was entitled to believe the testimony from defendants' expert Owen Reese that there is a natural swale that passes through plaintiffs' property,¹³ and that groundwater naturally flows from the defendant nurseries properties' downhill across plaintiffs' property to Horse Haven Creek, following the path of the underground clay tile dewatering system.¹⁴

There also was testimony to support the position of the defendant nurseries that the underground clay tile dewatering system had been in existence for many decades, and pre-existed the purchase of the nursery properties by Harold Louderback in

¹¹ CP 548

¹² RP pgs 1415, 1430

¹³ RP pgs 1374-1375

¹⁴ RP pgs 1377-1378, EX 71

1961,¹⁵ and there are aerial photographs show that there has been a natural water course running from the nursery properties across the plaintiffs' property since at least 1931.¹⁶

Finally, plaintiffs cannot dispute that Tom McCoy saw the broken clay tile pipe at the bottom of a sink hole on his property and chose to fill the hole back in with dirt rather than effectuate repairs,¹⁷ despite having witnessed and participated in an earlier similar repair that took just a few hours,¹⁸ and there was testimony by defendants' expert that filling in the hole probably led to the blockage.¹⁹

Plaintiffs' seem to believe that the sympathy generated by innumerable photographs and videos showing massive flooding on their property is sufficient evidence to prove that someone other than plaintiffs must be at fault. It is within the purview of the jury to decide that water flowing through an ancient underground clay tile watercourse that provides a benefit to plaintiffs' property does not constitute trespass²⁰, and that plaintiffs' own failure to repair the

¹⁵ RP pg 932-933

¹⁶ Ex 123, Ex 124

¹⁷ RP pg 466-467

¹⁸ RP pg 210-211, RP pg 212; RP pg 456-457; RP pg 518

¹⁹ RP pg 1391-1392

²⁰ RP 1857, 1858, 1860 - Defendants lodged objection to the trial Court's refusal to instruct the jury on the proper standard for maintenance of an ancient watercourse under *Wilber v. Western Properties*, 14 Wn.App. 169, 540 P.2d 470

system when the broken pipe was visible at the bottom of a sink hole led to a blockage, with subsequent flooding that backed up onto the property of defendant nurseries, causing compensable damage to defendant nurseries. That decision should be left to the jury and not taken away by the trial judge.

There Was No Juror Misconduct. Defendant Fir Run Nursery already has supplied this Court with the appropriate standard for considering juror misconduct during deliberation,²¹ and during voir dire,²² and has argued that the jurors' deliberations inhere in the verdict itself and are not subject to impeachment.²³ "[T]o hold otherwise would be to allow nearly all verdicts to be attacked by the losing party."²⁴ Plaintiffs' attorney has provided nothing to the contrary, but improperly applies those standards to the various declarations supplied on both sides of the Motion for New Trial and the subsequent Motion for Reconsideration.

(1975) and its progeny; but it appears that the jurors logically applied that standard anyway.

²¹ *Halverson v. Anderson*, 82 Wn.2d 746, 513 P.2d 827 (1973); *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); *In re Elmore*, 162 Wn.2d 236, 267, 172 P.3d 335 (2007)

²² *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554, 104 S. Ct. 845, 78 L.Ed.2d 663 (1984); *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)

²³ *Breckenridge v. Valley General Hospital*, 150 Wn.2d 197, 75 P.3d 944 (2003)

²⁴ *Breckenridge*, *supra* at 205, citing *Cox v. Charles Wright Academy, Inc.*, 70 Wash.2d 173, 176, 422 P.2d 515 (1967)

For example, juror misconduct during voir dire is grounds for a new trial only when the non-disclosure would have provided a recognized basis for a challenge for cause, such as bias.²⁵ The inability to use the information to exercise a preemptory challenge is insufficient.²⁶ Defendant Fir Run Nursery strongly disagrees that Juror 11, Ellis Faulkner was incomplete or deceptive in his voir dire responses, but even if the contested allegations in the declarations of plaintiffs' counsel²⁷ and Juror Tina Britton²⁸ are correct, the voir dire responses did not reveal or imply any bias. Instead, they revealed life experience in construction and drainage systems.²⁹ While such information might be useful when considering a preemptory challenge, they are not a basis for a challenge for cause.

Plaintiffs' counsel also seems to imply that the jurors should have volunteered information during voir dire.³⁰ As stated in *State v. Cho*, 108 Wn.App. 315, 3275, 30 P.2d 496 (2001): "A prospective juror is not obligated to volunteer information or provide

²⁵ *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554, 104 S. Ct. 845, 78 L.Ed.2d 663 (1984)

²⁶ *State v. Cho*, 108 Wn.App. 315, 30 P.2d 496 (2001)

²⁷ CP 154, CP 224

²⁸ CP 192

²⁹ CP 281

³⁰ Brief of Respondents, pg 48

answers to unasked questions,” citing *State v. Brenner*, 53 Wn.App. 367, 372, 768 P.2d 509 (1989).

Juror misconduct during deliberations that will support a motion for a new trial focuses on the insertion of extrinsic evidence that was not presented at trial. Such improper evidence does not include life experiences,³¹ and the jurors are entitled to share past experiences that may assist in the deliberations.

As stated in *State v. Brewster*, 152 Wn.App. 856, 218 P.3d 249 (2009):

It is misconduct for a juror to introduce extrinsic evidence into deliberations. Extrinsic evidence is defined as information that is outside all the evidence admitted at trial, either orally or by document. This is especially true of highly specialized information, outside the realm of a typical juror's general life experience." **But where the juror's background is known to the parties, who then allow the juror to serve on the jury, and the juror imparts specialized information in evaluating the evidence introduced at trial, there is no misconduct.**

In support of her motions, Brewster's counsel alleged that two jurors (a social worker and a sheriff's deputy) introduced specialized knowledge, outside the record and the scope of everyday experience, relating to recognition of homelessness, the habits and practices of the habitually homeless, and certain police practices and procedures. But Brewster accepted the venire with knowledge of the jurors' backgrounds. If the jurors discussed the evidence in light of their

³¹ *Breckenridge v. Valley General Hospital*, 150 Wn.2d 197, 75 P.3d 944 (2003)

experience, it was therefore not misconduct.
(Citations omitted, emphasis added.)

In our case, no “extrinsic evidence” was inserted into the jury deliberations. Instead, as permitted by Washington law and encouraged by our jury system, Ms. Harkins and Mr. Faulkner examined the admitted evidence in the light of their own backgrounds and experiences. Plaintiffs’ counsel had every opportunity to follow up on these areas of inquiry during voir dire and to seek removal of either potential juror for cause based upon the answers received, or she could have used a preemptory challenge. Plaintiffs’ counsel cannot now use her own inaction as grounds to overturn the verdict.

This Court Should Review De Novo. While it is true that granting a CR 59 motion for new trial generally is within the sound discretion of the trial court,³² this Court may review de novo if the appeal is based on an allegation of legal error.³³ A trial court abuses its discretion when its decision is manifestly unreasonable, is exercised for untenable reasons, or is based on untenable grounds.³⁴ The determination of whether there has been an abuse

³² *Thompson v. Grays Harbor Community Hosp.*, 36 Wn.App. 300, 675 P.2d 239 (1983)

³³ *Marvik v. Winkelman*, 126 Wn.App. 655, 109 P.3d 47 (2005)

³⁴ *Edwards v. Le Duc*, 157 Wn.App. 455, 459, 238 P.3d 1187 (2010)

of discretion in our case necessarily requires this Court to carefully review all of the declarations on both sides.

As this Court reviews each declaration in turn, two general areas of inquiry are warranted: Were the responses of Ms. Harkins and Mr. Faulkner to properly worded questions during voir dire sufficient grounds for a challenge for cause in light of information now known? Did Ms. Harkins and/or Mr. Faulkner inject extrinsic evidence during voir dire outside of their general life experiences?

Defendant Fir Run Nursery is confident that a careful review and consideration of all declarations will lead this Court to the inescapable conclusion that there was no juror misconduct, and that there has been an abuse of discretion by the trial Court. However, even if juror misconduct is found, this Court then must decide whether there is prejudice sufficient to warrant a new trial.³⁵ All evidence points to the conclusion that the verdict would have been the same.

CONCLUSION

Defendant Appellants Fir Run Nursery, LLC and Fenimore renew the requests contained in their Brief of Appellants that the

³⁵ *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); *In re Elmore*, 162 Wn.2d 236, 267, 172 P.3d 335 (2007)

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, and that they be awarded their reasonable costs and attorney fees under RAP 14.3.

Respectfully submitted on May 4, 2011.

KOPTA & MACPHERSON

A handwritten signature in black ink, appearing to read "James E. Macpherson", written over a horizontal line.

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COURT OF APPEALS
DIVISION II

11 MAY -4 PM 4: 04

STATE OF WASHINGTON

BY _____
DEPUTY

DECLARATION OF SERVICE

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

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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 May 4, 2011.

A handwritten signature in black ink, appearing to read "James E. Macpherson", written over a horizontal line.

James E. Macpherson