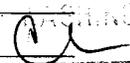


COURT OF APPEALS
DIVISION II

NO. 411059

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STATE OF WASHINGTON
BY 
DEPUTY

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

TOM P. McCOY and KATHLEEN A. McCOY, Respondents

v.

KENT NURSERY, INC.; STEVE MAURITSEN and "JANE DOE"
MAURITSEN; RICHARD MAURITSEN and PHYLLIS MAURITSEN;
MICHAEL S. FENIMORE and GAYLA A. FENIMORE; FIR RUN
NURSERY; and PIERCE COUNTY PUBLIC WORKS AND
UTILITIES, Appellants

**REPLY BRIEF OF APPELLANT PIERCE COUNTY PUBLIC
WORKS AND UTILITIES**

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ORIGINAL

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I. ARGUMENT SUMMARY

As is typical, the jurors in this case were instructed that "...it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence" CP 545, WPI 1.02. On appeal the rule is essentially the same. Appellate Courts will "decline to consider facts recited in the briefs but not supported by the record." *Sherry v. Financial Indem. Co.*, 160 Wash.2d 611, 615, (2007).

The McCoys assert in their Response that Pierce County caused damage to their property because "the McCoys' flooding worsened after the ditching and jet rodding." *Resp. Br.* 13. They also assert that there was juror misconduct because two jurors "concealed information about their specialized experience during voir dire" and "injected outside information concerning their undisclosed specialized experience into closed jury deliberations" *Resp. Br.* 8. These assertions, however, are not supported by the record. Therefore this Court should remand the case for entry of judgment in favor of Pierce County.

II. ARGUMENT

A. **There Was No Competent Evidence to Prove Pierce County's Actions Caused Any Harm to Respondents**

In their argument section, beginning on page 58, McCoys argue for

several pages why Pierce County should not have been dismissed from the case as a matter of law. They provide no analysis of any facts and merely conclude that "Pierce County could be found negligent in failing to properly maintain ditches and by jet rodding (sic) drainage basin in the county right of way which caused additional flooding on the McCoys' property." *Resp. Br.* 61. Plaintiffs provide no references to the record to show that the County caused additional flooding.

An appellate court reviews de novo a trial court's order denying a CR 50 motion for judgment as a matter of law. Judgment as a matter of law may be granted at the close of the plaintiff's case if the plaintiff has been "fully heard" and "there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party." *Estate of Bordon v. State Dept. of Corrections*, 122 Wash.App. 227, 240 (2004).

In their Restatement of Facts Plaintiffs recite testimony from their expert, Damon DeRosa, in an attempt to establish that Pierce County caused some harm to them when it performed routine maintenance activities on 150th Ave. A close reading of that testimony shows that it was based on little more than conjecture and speculation and that there was no evidence of a causal connection between the County's acts and flooding on Plaintiffs' property.

There are two elements of proximate cause: legal causation and

cause in fact (the "but for" test). *Bragelman v. Snohomish County*, 53 Wn. App. 381, (1989). Cause in fact exists if a plaintiff's injury would not have occurred "but for" the defendant's negligence. *Walker v. Transamerica Title*, 62 Wn. App. 399, (1992). There is no cause-in-fact if the connection between an act and the later injury is indirect and speculative. *Walters v. Hampton*, 14 Wn. App. 548 (1975).

Plaintiffs' factual discussion of Pierce County's involvement in this case begins on pages 12-13 of their brief. After providing a brief, if inaccurate, bit of background information, Plaintiffs assert that, "McCoys' flooding worsened after the ditching and jet-rodding." *Resp. Br.* 13. Rather than citing to testimony or other evidence to support this vital fact, Plaintiffs instead cite to CP 1051, which is the tenth page of Plaintiffs' Trial Brief, in which Plaintiffs argued that "Pierce County's actions make Problems Worse".¹ This trial brief was not produced as evidence during trial.

Subsequent sections of their Response similarly argue, without any support from the record, that Pierce County's actions made the flooding worse. Plaintiffs spend approximately four pages of their brief describing Mr. DeRosa's trial testimony. *Resp. Br.* 23-26. That testimony can be

¹ Pierce County moves via a separate motion to strike this and other portions of the Plaintiffs' brief for failure to comply with RAP 10.3.

summarized as follows. Mr. DeRosa reviewed County records which showed that the County ditched the road and jet rodded pipe to "get sediments down the pipe and into the nExt (sic) structure where they can vector it out."² *Resp. Br.* 23-24. Mr. DeRosa reviewed farmer Louderback's records showing pipes entering and exiting the junction box. *Resp. Br.* 24. DeRosa stated that ditching "caused more water to flow into the drainage basin." *Id.* DeRosa claimed that County ditches "diverted water from the county road onto the McCoy property." *Id.* DeRosa "determined from his investigation that the McCoys' property became a dumping ground for the county and nurseries' water." *Id.* DeRosa speculated that "(a)pproximately 90 percent of the water is coming from the nurseries and 10 percent from the county road." *Resp. Br.* 24-25.

DeRosa then described the alleged deficiencies in Pierce County's erosion control methods. "Because of the county's failure to take erosion control methods, the disturbed ditch soil when it rained was diverted collected into the drainage basin along with surface water and ultimately into the clay tile pipe." *Resp. Br.* 25. Finally, Plaintiffs assert that DeRosa testified that jet rodding "adversely affected a drainage system that was

² Mr. DeRosa did not observe the maintenance and that in fact sediments were not "pushed down the pipe." Appellant Pierce County's Opening Brief at 9-10, 44-45. RP 1287:7-21.

already in disrepair." In addition to CP 1002, a page from DeRosa's report, which was not in evidence, Plaintiffs cite RP 582:11-16 for this important factual statement. Mr. De Rosa did not testify, however, that jet rodding adversely *affected* the system. What he said was, "But, it will also -- it will make the system a whole lot worse than what it is because you are continually shooting high-pressure water in cracks or in the joints of the clay tile pipe, and that will cause erosion and then the pipe will tend to want to settle at that point. It makes the system -- it makes it a whole lot worse." RP 582 (actually 583):11-16.

Similarly, Plaintiffs assert that jet rodding, "caused more water to discharge onto the McCoys' property." *Resp. Br.* 25. What Mr. DeRosa actually said at RP 584:1-9 is:

Q Is it your professional opinion -- again, this is on a more probable than not basis -- that, when Pierce County jet-rodde 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.

Here, the witness was asked directly whether Pierce County caused more water to enter on to McCoys' property. His response was that "it would" and that "additional water could get in." "Would have" or "Could have"

do not establish "but-for" causation. There was no testimony that in fact Pierce County caused any harm.

In contrast, the evidence overwhelmingly established that the flooding of the McCoy property occurred before the County did any maintenance and that the maintenance activities were conducted in response to the flooding. EX 22.³ At least as far back as the mid-1990s there were issues relating to the broken drain tiles on lot 3. RP 230:12 – RP 231:19, RP 236:20 – RP 237:4. And as result of these issues with drain tile, the McCoys signed a hold harmless agreement releasing Esther Hahn for any liability whatsoever related to the drainage pipe. EX 92. Plaintiffs' own Response Brief describes extensive flooding to their property before the County performed any maintenance. *Resp. Br.* 11-12.

In addition Plaintiffs' expert, Mr. Creveling stated that the "tremendous quantity of water leaving the nursery property and lack of maintenance of the pipe..." caused the system to fail. *Resp. Br.* 30. Creveling testified that the failure was not caused by anything the County did or did not do. Appellant's Opening Brief Pages 39-40. RP 842:11-21. RP 1768:13-20.

³ Pierce County "Request for Action" dated 11/22/2006 states, "Please check roadside ditches/drainage structure in the area to determine why there is water backing up and flooding area." The investigator comment is "All our ditches are open from what the neighbors told me the water use to run thru the field where this berm is and the water never impacted everyone else."

In summary, Mr. DeRosa was required to produce some analysis showing that the County had done something that actually caused damage to Plaintiffs' property. He could have quantified the amount of water entering the drainage system as a result of County activities (assuming those activities had the effect he speculates they did). DeRosa's conclusory opinions were not an adequate substitute for providing an analysis of the facts readily available to him.⁴ Furthermore, his testimony was deficient on its face in establishing any causal connection between County maintenance activities and damage to Plaintiffs' property. There was no evidence of negligence. Therefore Pierce County should have been dismissed under CR 50.

B. There Was No Evidence of Juror Misconduct

1. The Court Abused Its Discretion in Granting a New Trial

The trial court granted a new trial because it did not agree with the jury. In doing so, the court applied the wrong legal standard and based its decision on untenable grounds. "A strong, affirmative showing of juror misconduct is required to impeach a verdict." "Verdicts should be upheld and the free, frank and secret deliberation upon which they are based held

⁴ Pierce County's analysis showed water contributed by the road was less than 1% of total surface water in the basin. (RP 1227:12-17.) Any increase in this amount due to ditching activities would literally be a drop in the bucket.

sacrosanct unless (1) the affidavits of the jurors allege facts showing misconduct and (2) those facts support a determination that the misconduct affected the verdict." (Citations omitted.) *Ryan v. Westgard*, 12 Wash.App. 500, 503 (1975). The policy favoring stable and certain verdicts and the necessity of maintaining the secrecy of deliberation and frank and free discussion by all jurors must yield: (1) if the affidavit(s) of the juror(s) alleges facts showing misconduct, and (2) those facts are sufficient to justify making a determination that the misconduct, if any, affected the verdict." *Richards v. Overlake Hosp. Medical Center*, 59 Wash.App. 266, 271-272, (1990).

At the conclusion of Plaintiffs' motion for a new trial, the court stated in its ruling from the bench,

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.

RP 50:2-4. Then again, at the Defendant's motion for reconsideration, the court restated its reasons for granting a new trial.

All right. If you look at the totality of the circumstances 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. And you can try it again, and that's fair.

RP 29:17-23 (July 23 2010). The court based its ruling on the totality of the circumstances and "fairness" because there was no tenable basis either

on or off the record upon which to base its decision. All the court had before it at the motion for a new trial was the self-serving, hearsay declaration of one of the Plaintiffs' attorneys and the lately submitted declaration of juror Tina Britton. Neither of these declarations was sufficient to demonstrate any juror misconduct.

In relying on Ms. Lee's declaration the trial court mistakenly relied on the fact that Ms. Lee is "an officer of the court" and uncritically accepted her version of events because they supported the trial court's decision based on "fairness."⁵

THE COURT: Now, Mr. Diaz, that's not true. Number 2, the presiding juror, she had a precise same set of circumstances that she personally went through. That's according to an officer of the court. Not something that might be related, or whatever. And she never disclosed that in the voir dire. And, if you look at the questions that were asked, it was incumbent upon her, in my mind, to have disclosed the set of circumstances that she herself went through.

⁵ It is noteworthy that the only person out of the 18 people in the room during the juror interviews (including Ms. Lee's co-counsel) to hear Ms. Harkins say that "her home was damaged as a result of flooding and the clay tile system on her property" and that "she personally incurred costs for the repair of her home as a result of the clay tile, flooding and wetland issues on her property," was Ms. Lee. See *Resp. Br.* 32. CP 164-166, 179-181, 190-91, 209-211, 273-299, 332-335. Subsequent declarations show that not only did Ms. Harkins not make that statement but that in fact she does not have a clay tile system on her property. CP 287. In response McCoy's argue without any support in the record that "without a doubt, this jury foreperson was so caught up in the McCoy case and the trial court's decision granting new trial to the extent (sic) she provided a false statement in her declaration to the trial court. She swore there were no tile pipes on her property, when Pierce County public records showed the contrary." *Resp. Br.* 46.

RP 33:24-34:8. Faced with the glaring discrepancy between Ms. Lee's version of events and the other attorneys who were present, as well as ten jurors, the court should have at least conducted a fact finding hearing.⁶

But we think the better approach in this case is a remand for further findings after an evidentiary hearing in which the parties may, if they choose, present additional testimony to illuminate juror number eight's answers on voir dire as well as the statements he allegedly made to defense counsel after the verdict. We are unwilling to declare the trial court's order an abuse of discretion until the trial court has had the opportunity to consider the issue of implied bias, an issue not raised or briefed below. *State v. Cho*, 108 Wash.App. 315, 329, (2001).

But the court never questioned any of the jurors about what was said during deliberations or in the post-trial interview. If it had it would have discovered that Ms. Lee was mistaken since Ms. Lee's declaration was refuted by ten of the jurors and four attorneys who were present in the jury room after the trial when the alleged statements were made. CP 164-166, 179-181, 190-91, 209-211, 273-299, 332-335. Ms. Lee's co-counsel, who also was present at the post-trial interview, declined to make a declaration. RP 44:7-13.

If the grounds for a new trial can be whatever an "Officer of the Court" claims to have heard in a jury interview, regardless of the accuracy

⁶ While Plaintiffs claim that the trial court reviewed its notes taken during voir dire (*Resp. Br.* 47) there is nothing in the record to indicate that the trial court took or reviewed any notes regarding voir dire or what those notes might have been.

of those claims, then any party will have grounds for a new trial whenever their attorney alleges juror misconduct. This is obviously not the correct test. The grounds for granting a new trial must be tenable, and the decision must be reasonable. *Overlake Hospital* at 271. It was an abuse of discretion to grant a new trial on those grounds.

2. No Juror Withheld Any Information

Plaintiffs concede that Juror 11 "discussed during voir dire his Experience (sic) replacing old broken clay tile pipes that were broken while working at the Kansas State Fairgrounds." *Resp. Br.* 48. Plaintiffs also apparently concede that Juror 11 was not asked about jet rodding during voir dire. *Id.* But Plaintiffs then argue that because Juror 11 stated that "...if had he been asked (about jet rodding) he would have answered truthfully" he should have somehow known that "Pierce County's negligent jet rodding of broken pipes was a critical issue in the case against Pierce County." *Resp. Br.* 48. To do this, Juror 11 would have needed to be a mind reader since Plaintiffs' counsel did not reveal this critical issue during jury selection. "A prospective juror is not obligated to volunteer information or provide answers to unasked questions." *State v. Cho*, 108 Wash.App. 315, 327, (2001). It was Plaintiffs' duty to inquire about the issues important to the case. Similarly, Ms. Harkins does not have a drain tile system on her property. Therefore, there was nothing for

her to disclose regarding this nonexistent drainage system during voir dire.

3. Nothing the Jurors Allegedly Withheld Was Material

Juror nondisclosure of information during voir dire may only be grounds for a new trial if that nondisclosure was material and that a truthful disclosure would have provided a basis for a challenge for cause. *State v. Cho*, 108 Wash. App. 315, 321, (2001). In this case none of the alleged nondisclosures, even if they had occurred, would have provided a basis for a challenge for cause. Therefore, it was error to grant a new trial based on nondisclosure of information.

4. There Was No Extrinsic Evidence Injected by Jurors

Plaintiffs have not shown that any extrinsic evidence was considered by the jury. What the record demonstrates is that the alleged misconduct was actually a discussion of the evidence in the light of the jurors' own personal experiences. It is not misconduct for jurors to use common sense or consider their own life experiences in reaching a verdict. *Johnson v. Carbon*, 63 Wn.App. 294, 302, (1991). *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 204, (2003) (juror's statements regarding the manner in which an emergency room doctor would react to a particular situation, based on a juror's personal experiences visiting an emergency room, did not constitute misconduct). Here, Ms. Brittons' declaration as well as the declarations of ten other jurors demonstrates that the jurors

used their common sense and life experiences in evaluating the evidence that was presented at trial just as they were instructed to do by the trial court. As for jet rodding, for example, Andrew Greatwood testified at length on jet rods and vactor trucks used in County road maintenance. RP 1280-1292.

5. The Alleged Misconduct Had No Effect on the Verdict

"Verdicts should be upheld and the free, frank and secret deliberation upon which they are based held sacrosanct unless (1) the affidavits of the jurors allege facts showing misconduct and (2) those facts support a determination that the misconduct affected the verdict." *Ryan v. Westgard*, 12 Wash.App. 500, 503, (1975). The alleged misconduct in this case had no effect on the verdict. As stated previously, there was no evidence that Pierce County did anything to cause damage to the McCoys' property. That the jury found that the County had not caused McCoys' damages was a result of the lack of evidence in the Plaintiffs' case against the County. Declarations filed by 10 jurors prove that the alleged misconduct had an no effect on the outcome and that all jurors spoke their minds and based their decision on the evidence.

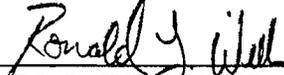
III. CONCLUSION

For the forgoing reasons, Pierce County respectfully requests this Court to remand for entry of judgment in favor of Pierce County in accord

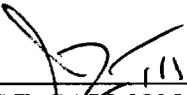
with the jury verdict in this case.

DATED this 4th day of May, 2011.

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I hereby certify that a true copy of the foregoing REPLY BRIEF OF APPELLANT PIERCE COUNTY PUBLIC WORKS AND UTILITIES was delivered this 4th day of May, 2011, by ABC Legal Messengers to the following:

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