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I. INTRODUCTION

The trial court granted a new trial based on factual findings of jury misconduct and the jury verdict being contrary to the great weight of the evidence shocking the conscience of the court. The trial court properly exercised its discretion in granting a new trial. The trial court properly exercised its discretion in denying the appellant nurseries and Pierce County's motions for reconsideration on the order granting new trial. The trial court also properly exercised its discretion in denying Pierce County's motion for summary judgment and CR 50 motion to dismiss. This Court should affirm the trial court's decisions at issue in this appeal.

This case involves a broken drainage system owned by the appellants causing repeated flooding on the McCoy property for over five years to this present day. The appellants know their broken drainage system is flooding the McCoy property. The appellants know the McCoy's did not permit appellants to flood their property. In addition, appellants have admitted they were trespassing on McCoy's property.

The McCoys tried their case against the appellant nurseries and Pierce County to recover damages caused by flooding from the broken drainage system. The 14 day trial resulted in an unjust verdict against the McCoys despite the overwhelming evidence the McCoys presented to the jury substantiating their claims against the nurseries and Pierce County.

Post-verdict interviews with the jury and follow up investigations revealed at least two jurors engaged in misconduct. The jury foreperson is one of the two jurors. These two jurors concealed information about their prior specialized experience during voir dire. These two jurors injected outside information concerning their undisclosed specialized experience into closed jury deliberations. This outside information – extrinsic evidence, became part of the information the jury discussed and could have relied upon in rendering the verdict in favor of the appellant nurseries and Pierce County. This vitiated the verdict.

The verdict shocked the conscience of the court and was contrary to the great weight of evidence presented during the trial. Accordingly, the trial court granted a new trial. (CP 248 – 249). The McCoys respectfully request this Court to affirm the trial court's decision granting new trial and denial of appellant Pierce County's motions to dismiss.

## II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The McCoys acknowledge the appellants' assignments of error, but believe the issues pertaining to those assignments of error are more appropriately formulated as follows:

- 1) Whether the trial court must order a new trial when two jurors failed to disclose material information during jury selection and such disclosure would have provided a valid basis for a challenge for cause?
- 2) Whether the trial court must order a new trial when two jurors injected extrinsic information that they should have disclosed in jury selection into deliberations when that extrinsic information could have affected the jury's determination on key liability and damages issues in the case?
- 3) Whether the trial court must order a new trial on the basis of the verdict being contrary to the great weight of the evidence establishing water trespass when both appellant nursery presidents admitted during trial that nursery water intruded the McCoy property without the McCoys' permission?

- 4) Whether the trial court reasonably exercised its discretionary decision denying appellants' motions for reconsideration on new trial when several grounds exist for denial of reconsideration?
- 5) Whether the trial court appropriately denied Pierce County's CR 56 and CR 50 motions to dismiss as a matter of law when the McCoys presented competent and substantial evidence that Pierce County's negligent ditching and jet-rodding (mechanically forced cleaning) caused additional flooding of water on the McCoy property resulting in further damage to the McCoy property?

### III. RESTATEMENT OF FACTS

#### **A. Appellants' Broken Drainage System Floods McCoys**

This case began in 2006, when Mr. McCoy discovered two sinkholes in his yard from a broken pipe belonging to the nursery across the street, Kent Nursery. (RP 270:5-8; RP 277:14-16; CP 1047) Mr. McCoy requested the owner of Kent Nursery to repair the pipe and gave him permission to come on the property for that purpose. (RP 275:16 – 276:16).

Mr. McCoy waited months for Mr. Mauritsen to repair the broken pipe, but Mr. Mauritsen never came to repair the pipe. (RP 276:19-

20; RP 1510:15 – 1511:4; RP 1559:18 – 1560:13; CP 1048). Water from the sinkholes flooded the McCoy property whenever it rained more than two consecutive days.

During the summer of 2006, Fir Run Nursery, LLC (Fir Run) purchased 20 acres of property from Kent Nursery and began a tree growing operations (RP 1611:9-15, EX 89) utilizing Kent Nursery's drainage pipe system (RP 1547:6-16;CP 1049). Mr. McCoy spoke with Mr. Michael Fenimore, president of Fir Run about the flooding on his property. (RP 273:20 – 274:1; RP 507:2-15; RP 1619:4-13; RP 1620:3-25).

More sinkholes developed on the McCoys' property along the drainage pipe lines as the recurrent flooding continued. Every time it rained more than two consecutive days, large volumes of water from the nursery property and water from the county road traveled into a drainage basin on the Pierce County right of way, through pipes under the county road and out of the broken drainage pipe sections on the McCoys' land flooding it. (CP 1049).

In the latter half of 2006, the McCoys attempted to prevent further flooding of their land from the nurseries' and county water by building a dirt berm (i.e. small mound of dirt) around the perimeter of their property (RP 271:1-13; CP 1048). The berm failed to

prevent water from flooding the McCoys' property. (RP 274:2-4; CP 1049, and Exhibit 54). The McCoys also placed sandbags to keep the nurseries and county water off their property. The sandbags failed to prevent the property from flooding. (RP 274:2-3; Exhibit 54).

The McCoys called Pierce County Public Utilities and complained about the flooding of their property in late November 2006. Pierce County employee Gary Koden met with Mr. McCoy on December 20, 2006, took photographs of the flooding, the county's drainage basin and the McCoys' land. (RP 1300:2-12).

In 2007 Pierce County employee Mark Schumacher inspected the drainage basin. (EX 22) The drainage basin lid was partially open and the basin was full of sediment. (EX 22) Mr. Schumacher determined the ditches next to basin needed clearing and the basin and pipe under the county road needed to be "jet-rodded" (i.e., mechanically force cleaned). (EX 22; CP 1051).

Pierce County trenched ditches next to the drainage basin and jet-rodded the drainage basin and pipe. (RP 374:8-15; RP 1219:4-13; RP 1292:9-12; RP 1306:25 – 1307:6; RP 1536:1-11; EX 22) As a result, more water was diverted from the county road into the ditch. (RP 1305:15 – 1307:1) This water discharged onto McCoys'

land. McCoys' flooding worsened after the ditching and jet-rodding. (CP 1051).

### **B. Why this Drainage System Was Built**

Harold Louderback built the now broken drainage system. (RP 899:10-19; RP 902:1-15, Exhibits 67, 68). In 1963 Mr. Louderback purchased 70 acres of land in Orting, Washington.(RP 891:17 – 892:3) Mr. Louderback purchased the land in order to grow rhubarb and raise chickens. (RP 892:25 – 893:1).

Mr. Louderback discovered soon after buying the land it was saturated with water both above and below the ground. (RP 904:3-14; RP 998:23 – 999:1) This saturation made it difficult for him to grow rhubarb. (RP 999:1-8). Mr. Louderback, desiring to rid his land of this water, started constructing a clay tile pipe drainage system to collect and discharge the unwanted excess surface water and water below the ground (i.e., ground water) off of his land. (RP 984:1-9; RP 1002:22 – 1003:2) Mr. Louderback installed the clay tile pipes. (RP 995:11-13) The pipes abutted each other leaving smalls gaps for water to enter, collect and flow through. (RP 941:1-8, EX 67, EX 68)

Mr. Louderback obtained permission to continue his drainage system through his neighbor's property, Mr. Hahn and/or Mr.

Westby and finished initial construction of the clay tile drainage system by 1969 (RP 939:10-14) Mr. Louderback later added more clay tile pipes and connected those pipes to the drainage system (RP 929:21 – 930:5; RP 934:1-10). Upon completion, the drainage system collected, channeled, and discharged both ground and surface water off Mr. Louderback's land through Mr. Hahn's land and into Horse Haven Creek. (EX 67, EX 68).

### **C. Drainage System Maintenance History and Change of Ownership**

Throughout the next three decades, Mr. Louderback replaced pipe on his own land and on Mr. Hahn's land where the pipe ran through as needed. (RP 924:8-18; RP 974:23 – 975:4; RP 995: 14-16; RP 996:1-8; EX 84). He replaced sections of pipe wherever it had collapsed with sections of concrete or plastic PVC pipe. (RP 975:5-8; RP 996:11-18; RP 1008:16-18; RP 1013:14-17; EX 84). Mr. Louderback made repairs to the entire drainage system at his own expense (EX 84).

#### **1. Change of Ownership of Louderback Property**

In 1990, nine years prior to the last maintenance of the drainage system, Kent Nursery Inc. purchased 56 acres of land from Mr.

Louderback. (RP 996:19-20; RP 1022:25 – 1023:3; RP 1499:4-8; EX 65, EX 66).

Mr. Louderback informed Kent Nursery Inc. of the drainage system, and showed Kent Nursery where the drainage system ultimately discharged the water through neighboring properties.(RP 996:21 – 997:12;RP1001:2-6; RP 1025:11-18;RP 1503:14-23; RP 1504:6-11; RP1543:24–1543:4).

Unlike Mr. Louderback, Kent Nursery Inc. did not maintain the drainage system. (RP 1001:16-24; RP 1552:10-18). Kent Nursery installed a commercial sprinkler system on the land increasing the amount of surface water saturating the nursery soil and collecting into the drainage system. (RP 1540:1 – 1541:5)

## 2. Change of Ownership of Hahn Land

In 1993, Mr. Hahn sold his land to Mr. Rolland Harstrom, which contained the drainage system installed by Mr. Louderback. (RP 218:13-22). However, Mr. Hahn did not disclose the drainage system to Mr. Hartstrom at time of purchase. (RP 220:12 -24) The McCoys subsequently purchased Lot 4 from Mr. Hartstrom in 1995. (RP 227:24-25)

In late 1995, early 1996, Mr. Hartstrom discovered water started bubbling up from the ground from the nursery drainage system. (RP

220:12-24; RP 228:5-14). Mr. Harstrom went across the street and spoke to Mr. Richard Mauritsen, then president of Kent Nursery Inc. Mr. Mauritsen told Mr. Harstrom of the drainage system and that it served to channel the nursery's water off the land and into Horse Haven Creek. (RP 228:13 - 229:9; RP 230:17-20).

Mr. Harstrom subsequently sued the Hahns over the pipe for failing to disclose the drainage system at time of purchase. (RP 229:10-18) During litigation, Mr. Harstrom recorded a License/Permissive Use Agreement with the Pierce County Auditor. (RP 220:25 – 221:11; EX 1) The written license acknowledged the drainage pipe on Lot 3 and gave Kent Nursery Inc. permission to continue to have the pipe there as long as it properly maintained the pipe. (RP 240:3-10, EX 1) If Kent Nursery failed to maintain the pipe and the pipe caused damage to the land, Kent Nursery would be responsible for all resultant damages. (RP 234:21-23, RP 1029:1-16; RP 1035:17 – 1036:15; EX 1).

Ultimately, the Hahns had to buy back the property from Mr. Hartstrom. Approximately six months later, Ester Hahn sold Lot 3 to the McCoys. (CP 1044-1045, RP 440:18-22) The License/Permissive Use Agreement was acknowledged by both parties at time of purchase and the McCoys signed a Hold Harmless Agreement binding only between them and Ester Hahn

regarding the drainage pipe. (RP 441:7-18). Kent Nursery was not a party to the Hold Harmless Agreement. ( RP 498:15-18; EX 92 ).

#### **D. Lawsuit and Trial**

No flooding or sinkholes occurred on the McCoy land until six years later in 2006 when the section of the drainage pipe collapsed resulting in flooding of their property. (RP 498:24 – 299:2).

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 McCoy's filed suit in October 2008. (RP 275:16-19; RP 1026:21 – 1027:3; CP 456-464) The McCoy's initially filed against the nurseries. The McCoy's then amended their complaint adding Pierce County as a defendant in March 2009 after filing a claim and receiving no response from the county. (CP 456-464) The trial for the suit started on Wednesday, March 10, 2010 with argument of pre-trial motions. ((RP 1-68)

##### 1. Unrecorded Jury Selection

Voir dire started the next day on March 11, 2010. (RP 104:21) All parties counsel voluntarily waived the recording of voir dire by the court reporter (RP 103:17-19). However, notes during voir dire were taken by counsel and the trial court judge (CP 831; RP 33:2—

23; RP 48:14-17 of 4/30 Motion for new trial; RP 23:3-5 of 7/23 motion for reconsideration)

During voir dire, counsel questioned 41 members of the venire. Venire member 5, Carolynn Harkins became juror 2 and foreperson of the jury. Venire member 6, Ellis Faulkner became juror 11.

McCoys' counsel reviewed juror 11's responses to the jury questionnaire. He listed his employer as "retired" and had answered "yes" to serving on a jury before. McCoys' counsel asked juror 11 specific questions about his prior Experience with clay tile pipe. Juror 11 disclosed he had worked for the Kansas State Fair and had dug up and replaced old clay tile pipes that were on the fairgrounds. The pipes were replaced because fairgrounds had flooded from the pipes not draining water. (CP 281-283)

McCoys' counsel reviewed juror 2/foreperson's questionnaire. Her occupation was not answered but left blank. She answered "no" to serving on a jury before. McCoys' counsel asked juror 2/foreperson specific questions about her property she had purchase that contained a wetland. (CP 284-287) She acknowledged that she knew there was a wetland on the property when she bought it and in the wintertime the water stayed on the property. Juror 2/foreperson disclosed she had to add a buffer and

fence line as well as place signs indicating the presence of a wetland on her property. She specifically disclosed that she had to tightline drain pipes to the wetland and she had discussions with Pierce County about the tightlining, but received no resolution. She also had to landscape so the water would flow away from her home. (CP 284-287, but see CP 831) Voir dire of the venire took the entire day. The trial court swore in the jury panel in the afternoon on March 11, 2010 (RP 106:2-6)

2. McCoys' Engineer and Geologist Testify On Drainage System and Conditions of Properties

- Damon DeRosa - Engineer

Damon DeRosa, P.E., civil engineer, testified on behalf of the McCoys concerning (1) the condition of the drainage system at issue; (2) whether there was a natural watercourse where the drainage system was located; and (3) Pierce County's actions impacting the drainage system (RP).

Mr. DeRosa initially assessed that the water seen in the photographs and videos on the McCoy property was a combination of surface water from the public road and a combination of groundwater from the nurseries. He also assessed from photographs and videos of the sinkholes on the McCoy property

that a broken drainage pipe underneath created the sinkholes (RP 563:2-3; RP 613:9-11).

*a. On-site Investigation of Properties*

In August 2009, Mr. DeRosa along with Mr. Creveling conducted an onsite investigation of the McCoy, nurseries' and county property. (RP 563:4-6). As a part of the on-site investigation, Mr. DeRosa dug test pits on nursery and McCoy properties, walked up and down the road looking at the ditching on the County right-of-way leading to the drainage basin, and Examined the drainage basin. (RP 563; 6-11).

First, Mr. DeRosa inspected the McCoy house, garage, and surrounding pavement. (RP 563:11-13). Mr. DeRosa observed quite a few sheetrock cracks inside the McCoys' home along with an off level floor. (RP 586:21 – 587:2). Mr. DeRosa confirmed these structural damages resulted from sinkholes created by the broken clay tile drainage pipe. (RP 587:4-7). Mr. DeRosa, in his professional opinion, determined that living in the McCoy home was and is not safe for the McCoy family. (RP 587:11–13; CP 1002-1003).

Second, Mr. DeRosa Examined of the drainage basin located across the street from the McCoy property on the County

right-of-way. He observed four pipes coming from the nurseries properties into the drainage basin and one pipe going out towards the McCoy' property. (RP 563:24 – 564:2). Inside the drainage basin, there was a lot of water, muck and silts. Mr. DeRosa also saw a pre-cast hole in the drainage basin. (RP 576:24). The significance is that the hole collected public drainage, i.e.,run-off from the county road. The water from the catch basin, travels through pipe under the county road and onto the McCoys' property from the end of the broken pipe. (RP 577:10-19).

Third, Mr. DeRosa Examined the ditches on the side of the road to the catch basin within the County right-of-way. The ditches Extended approximately a couple hundred feet. The ditches diverted the water into the drainage basin through the basin's pre-cast hole. (RP 577:1-9; RP 577:25 – 578:1-4).

*b. Mr. DeRosa's Analysis of Alleged Natural Drainage Course*

Mr. DeRosa began his analysis by reviewing historic aerial photographs of the properties. Mr. DeRosa analyzed an aerial photograph by the Washington State Department of Transportation dated 1961. (Exhibit 99) . The photograph did not show any natural drainage course going through any of the properties. (RP 566:21). The photograph also did not show any wetland on the McCoy property. (RP 568:21-23)

Mr. DeRosa reviewed a second aerial photograph from the Washington State Department of Transportation dated March 21, 1969. (RP 570:10-13; Exhibits 100, 101). It showed the McCoys' house, garage, and driveway. The photograph showed the trenched pipeline going through the McCoy property all the way out to the Horse Haven Creek<sup>1</sup>. (RP 572:17-20). Specifically, the photograph showed the recent trenching of the pipeline that was on the same course of what he discovered to be the pipeline at issue. (RP 574:1-7). The 1969 photograph did not show any water courses on the McCoy property. The area next to Horse Haven Creek was dry with no wetlands. The photograph was taken during the wet season. (RP 573:7-9).

Based on Mr. DeRosa's analysis of the aerial photographs, he determined there was no natural drainage course on the McCoys' property. (RP 573:14-18).

Mr. DeRosa next reviewed comprehensive drainage maps, which also did not show a drainage course going through the properties. (RP 564:11-18). The comprehensive drainage maps were dated from the late 1980's. They show all artificial and natural drainage courses that the Pierce County Public Works Department

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<sup>1</sup> The pipeline was identified by a long line of freshly dug dirt.

mapped. The maps showed no natural drainage course, and no artificial drainage logged in at that time (RP 574:16-21).

Mr. DeRosa then reviewed the Pierce County Geographic Information System or GIS. The GIS did not show a drainage course. (RP 575:8-12). The GIS did show the pipeline trench as previously shown in the 1969 photograph. (RP 594: 15- 20). Finally, Mr. DeRosa reviewed all the contour maps available. The maps showed no natural drainage course. (RP 575:14, 576:5-6).

Mr. DeRosa also reviewed a computerized LiDar map county employee Dennis Dixon prepared during litigation. Mr. DeRosa uses those types of maps for conceptual layouts for engineering. However, Mr. DeRosa found that those maps are not accurate and require further ground-truthing and surveying. (RP 638:7-8). The Dixon LiDar map, Mr. DeRosa opined, could not be used to determine where drainage basin boundaries could be because it is inaccurate (RP 639:6- 13).

*c. Mr. DeRosa's Analysis of Pierce County's 2007 and 2008 Drainage Activities*

Mr. DeRosa reviewed documents pertaining to what Pierce County did with respect to the ditching and drainage basin. He specifically reviewed Pierce County's inspection and maintenance records. (RP 578:14 – 20).

The records show Pierce County ditched 200 feet north and south of the catch basin, jet-rodged the clay tile pipe connected to the drainage basin and vactored the drainage basin. (RP 578: 8-9, 579:1-3; Exhibit 22). Jet-rodging is a high-pressure hose with a high pressure nozzle put down in the catch basin and into the pipe where they spray high-pressure water to get to the sediments down the pipe and into the nExt structure where they can vactor it out. (RP 579:8-12).

Mr. DeRosa also reviewed Mr. Louderbacks' records from the Soil Conservation Service. Those records verified multiple drain pipes coming in from the nurseries going into the drainage basin and one pipe going out of the catch basin towards the McCoy property. (RP 576:10-20).

Mr. DeRosa testified as to his professional findings based on his investigation. First, when Pierce County ditched in mid 2007 it caused more water to flow into the drainage basin (RP 628:13-14). Mr. DeRosa testified that when the county ditched, it diverted water from the county road onto the McCoy property (RP 641:3-6). Mr. DeRosa determined from his investigation that the McCoy's property became a dumping ground for the county and nurseries' water. (RP 585:11 -20). Approximately 90 percent of the water is

coming from the nurseries and 10 percent is coming from the county road (RP 603:2-4).

Second, Pierce County failed to take any erosion control methods during the ditching (RP 584:14-19, 627:12). Erosion control means stabilization of the earth (RP 584:21). The county did not put jute matting down, did not hydroseed and did not put geotech-style fabric down. (RP 584:24– 25). 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. (RP 585:2-7).

Third, when Pierce County jet-rodged the clay tile pipe, the high-pressure water, when it hit a pipe joint, eroded the foundation soil the pipe was on and accumulated sediment to one point without capturing it. (RP 581:13-20). As the foundation to the pipe eroded it caused the pipe to settle which, in turn further compromised the pipeline system. Jet-rodging adversely affected a drainage system that was already in disrepair. (RP 582:11 – 16; CP 1002).

Fourth, the jet-rodging caused more water to discharge onto the McCoy's property because it removed the sediment that was blocking the flow of water in the drainage basin. Jet-rodging

allowed additional water to intrude on the McCoy property. (RP 583:1-9). Also, the county, according to its own inspection notes, did not send a camera down into the catch basin and pipe to determine what they were dealing with. (RP 583: 13 -16, 22-24). Mr. DeRosa concluded the county should not have jet-rodded an older system like this one. (RP 584:7-9)

Mr. DeRosa concluded from his investigation that the McCoy' property became a dumping ground for the county and nurseries' water because of the broken drainage system and Pierce County drainage activities. (RP 585:11 -20; CP 995-1003; CP 1036-1038).

- William Creveling, L.G., L.D.

William Creveling, the only geologist testified on the behalf of the McCoy's concerning (1) the natural conditions of the lands (2) groundwater and surface water movement through the lands (3) damage to the McCoy's land and property caused by focused channeling and discharge of the appellants' surface and groundwater through the drainage system. (RP)

*a. Review of Relevant Information Of Geological Conditions*

Mr. Creveling is familiar with the geological layout of the area the parties' properties are situated, which is the Puyallup Valley.

(RP 706:22-707:1). The Puyallup Valley is a broad alluvial valley and it is very nearly flat. (RP 707:1-2; RP 736:14 – 21).

Mr. Creveling analysis included reviewing maps of soil deposits through the U.S. Department of Agriculture's Soil Survey for Pierce County. He reviewed as-built drawings from the Tacoma Pierce County Health Department for recent waste water systems that were developed on nurseries' properties, which also contained information of their soil logs and their winter table measurements through the winter. Mr. Creveling along with Mr. DeRosa during the on-site investigation Excavated test holes on Kent Nursery and McCoy properties. They also analyzed contour maps, reviewed photographs and videos of all the involved properties. (RP 713:20 – 714:7). Mr. Creveling reviewed the initial design instructions for drainage system. (RP 753:8 – 16, Exhibit 67).

Mr. Creveling along with Mr. DeRosa went on-site observed the alignment of the drainage system relative to the sinkholes that were found on the properties and dug test holes on the Kent Nursery and McCoy properties. (RP 713:22 – 714:7).

*b. Geological Findings Of Property Conditions*

First, the test holes confirmed the types of soils on the Kent Nursery and McCoy properties were consistent with the

Department of Agriculture Soil Survey. (RP 716:20 – 717:2; RP 718:6-11). Mr. Creveling found that mainly on the McCoy property, the youngest and most recent soil deposits present are called the Pilchuck Fine Sands. (RP 710:4-7). Pilchuck is very well and rapidly drained, which means it water moves quickly into and out of the soil. (RP 711:24-25). However, the nurseries' properties contain mainly Orting Loam. Orting Loam has a very slow infiltration rate, which means it is very slow for it to take water and accept water to infiltrate and evacuate away from the property (RP 710:18-25). Unlike Pilchuck, Orting Loam maintains very high saturation (absorbs a lot of water) and eventually the water saturation level moves through the soil to add to the volume of either the Puyallup River or Horse Haven Creek. (RP 713:1-4).

Second, Mr. Creveling determined there was no natural watercourse or drain on or running through the McCoy property originating from the nurseries' properties. (RP 736:10-14; RP 1744:10 – 1745:1; RP 1752:16 – 1754:23).

*c. Distinguishing Man-Made Drainage from Natural Drainage*

Mr. Creveling Explained that the way the water carried away through man-made pipes off the nursery property is fundamentally different than water would be carried naturally without the man-

made pipes. Naturally, without the pipe system, the water travels through a slow, buffered and uniform process of moving through the various soils. (RP 772:5 – 774:6). However when water is transported through the pipe, water is collected artificially over 50 acres, and then rather than allowing it to move through at its normal permeability, it is collected to one single point and discharged through one point. (RP 774:8 – 15, RP 1747:22 – 1748:9).

Here, the drainage pipe line collected water from 50 acres and pointed it to one location at a highly accelerated rate and volume that would not have occurred in nature (RP 737:15 – 738:2)

Mr. Creveling also distinguished the difference of how water travels through a pipe versus traveling through a ditch. Water moving across the surface of a ditch has immediate contact with the soil surface, thus causing friction and slowing the rate of speed water travels. Water running through a pipe is presented with less friction, thus travelling at a faster rate of speed and at higher volumes than water traveling through a ditch. (RP 1769:14 – 1770:2).

*d. What Caused The Drainage System To Break*

The purpose of the clay tile pipe installation was to de-water the farm, and to lower the water level in the farm in order to have more

success with agriculture. (RP 759:6 – 13). Approximately one million gallons of water<sup>2</sup> would pass through the pipeline in response to any immediate rain event with some lag time. (RP 766:13-18; CP 1002).

Mr. Creveling determined the reason why the drainage system broke was because of the tremendous quantity of water leaving the nursery property and lack of maintenance of the pipe. The pipes consequently collapsed causing surface and groundwater from the collapsed pipes to flood the McCoy property.. (RP 762:13 -18, RP 1754:24 – 1756:3; CP 1001-1002).

*e. Whether Heavy Equipment Affected Buried Drainage Pipes*

Mr. Creveling addressed the concern of whether heavy equipment would disturb or damage tile pipe under ground. In his Experience, he had not seen a pipe collapse that is buried two or three feet underground. Most culverts that are driven over from a road to a driveway are only covered by approximately a foot to 18 inches of soil. The surrounding forces in the soil weights provide a greater pressure than pressure from a dump truck two or three feet above the pipe where the dump truck load is dissipated at a 60 degree angle. (RP 1778:19 – 1779:18).

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<sup>2</sup> 1, 075,325 gallons per every four months.

In the McCoy property, If the pipe was buried at two feet, load dissipation occurs. That means that for every foot below the soil, one is dissipating the load almost two feet outward. If there is pipe two feet to three feet underground, it would be difficult to damage pipe from driving on top of the ground. (RP 776:10 – 777:20). The soils on the McCoy site had great load support. It would qualify for building of weights of 3,000 pounds per square foot. (RP 779:3-6).

*f. Whether the McCoy Property Benefited from Drainage System*

Mr. Creveling addressed the issue of whether the pipe benefitted the McCoy property. The answer was no. The reason is that the pipe running through the McCoy property is above the water table. There was no way the pipe could drain the water table because the water table is below the pipe. 763:22-764:7, RP 1748:14 – 1750:24)

3. The McCoy's Damages Testimony

Mr. McCoy testified of the damage to his garage and his home since the drainage pipes broke and flooded his property. Mr. McCoy also told the jury of the emotional distress he and his wife are Experiencing as a result of the flooding from the broken drainage system and the nurseries and Pierce County's refusal to repair the system. (RP 274:13- 275:1; RP 278:14 – 280:22; RP

356:23-24; RP 358:11 – 360:19; RP 369:5 – 370:7; RP 372:25 – 373:13; RP 378:23 – 379:25; RP 381:16 – 388:7; RP 403:1 – 406:21; RP 412:19 – 415:2)

4. Jury Verdict and Post-Verdict Interview of Jurors

The jury reached a verdict on April 12, 2010. The jury found for the nurseries and Pierce County and awarded the nurseries for trespass by Mr. McCoy. The trial court polled the jury. In the courtroom the jury agreed with the verdict 12-0. (RP 2040)

After the jury was released, McCoys' counsel along with appellant's counsel interviewed the jury. During the interview jurors made a number of factual statements. (CP 626-628). Statements made by jury foreperson Carolynn Harkins, juror Ellis Faulkner and juror Tina Britton surprised McCoy's counsel.

*a. Jury Foreperson – Carolynn Harkins*

Jury foreperson Carolynn Harkins made the following factual statements during the interview to McCoy's counsel:

1. Her home was damaged as a result of flooding and the clay tile system on her property (CP 155)<sup>3</sup>;
2. She personally incurred costs for the repair of her home as a result of the clay tile, flooding and wetland issues on her property (CP 155)<sup>4</sup>;

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<sup>3</sup> Paragraph 3, lines4-5.

3. Mr. McCoy should have taken ownership of his property and paid for his home damages as she had done (CP 155)<sup>5</sup> and;
4. Mr. McCoy didn't take responsibility for the damage occurring on his property (CP 155)<sup>6</sup>;
5. She was pissed-off during closing statement when McCoy's counsel looked at her with a look she interpreted as preaching to her about the McCoy's damages<sup>7</sup>

*b. Juror 11 – Ellis Faulker*

Juror 11, Ellis Faulkner made the following factual statement during the interview to McCoy's counsel:

1. He said in his professional Experience with replacing broken pipe, when the ground gets wet and soggy, any type of heavy equipment would crush clay tile pipes buried underneath like eggshells. (CP 155)<sup>8</sup>

Members of the jury said that the McCoys should have continued to pound on the doors of the nurseries before filing suit. They also said they had already Exchanged email and contact information with each other including the two alternates. (CP 155-156).<sup>9</sup> During polling, juror Tina Britton agreed that the verdict was

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<sup>4</sup> Paragraph 3, lines 5-6.

<sup>5</sup> Paragraph 4, lines 9-10.

<sup>6</sup> Paragraph 4, lines 10-11.

<sup>7</sup> Paragraph 4, lines 11-13.

<sup>8</sup> Paragraph 5, lines 15-17.

<sup>9</sup> Paragraph 6, lines 19-20; Paragraph 7, lines 1-3

her verdict and was the verdict of the jury. (RP 2041) However, during the interview, she stated she disagreed with the verdict. Upon hearing this, the McCoys decided to have Ms. Britton interviewed by an independent investigator to ascertain what statements of fact were said by the jury foreperson and juror Ellis Faulkner during deliberations.

5. Motion for Judgment, New Trial and Supporting Reply Juror Affidavit

The McCoys filed their motion for judgment as a matter of law or in the alternative for new trial on April 21, 2010. They asserted several statements of ground in support of their motion. (CP 597-625).

The McCoys argued judgment as a matter of law be granted regarding defendant nurseries trespass since they admitted to trespass during trial and no genuine issue of material fact rebutted their trespass. (CP 601-603). The McCoys additionally argued that there was no legally sufficient basis for a reasonable jury to have found the McCoy's trespassed on defendant nurseries properties. (CP 603-605) (RP 4/30/10 Motion Judgment or New Trial 5:1 – 7:24). The trial court denied the motion for judgment as a matter of law. (CP 251; RP, Motion for Judgment or New Trial, pg. 31). However, the court granted the McCoys' motion for new trial.

The McCoys requested the trial court in the alternative, to grant a new trial on seven separate grounds. However, the trial court rendered its decision granting new trial upon two grounds, the verdict against the great weight of evidence of defendants' trespass (first ground) and jury misconduct (fourth ground). The trial court did not issue rulings on the other five grounds for new trial.

The first ground for new trial was the jury's verdict against the great weight of the evidence. The great weight of the evidence showed defendant nurseries admitted to trespassing on the McCoys' property. (CP 606-608)

The second ground for new trial was there no evidence of trespass by the McCoys. There was no evidence at trial showing the McCoys trespass on the defendant nurseries properties. (CP 608-609).

The third ground for new trial was because of defense counsel misconduct. Defense counsel made improper closing argument concerning apportionment of damages to a non-party that had been precluded from allocations by the court's prior ruling. Defense counsel improperly inserted a question of whether the McCoys trespassed on the verdict form when their counter-claim failed to assert a trespass claim. (CP 609-611).

The fourth ground for new trial was because of jury misconduct. The jurors failed to completely and truthfully respond to questions in voir dire. The jurors injected Extrinsic evidence into jury deliberations. The jurors also improperly created an unforeseen burden of Exhaustion of remedies adverse to plaintiff not included in the court instruction to the jury. The juror Exchanged email and contact information during the course of trial. (CP 611-619).

The fifth ground for new trial was the damages awarded were so inadequate to the McCoy's and Excessive to the defendants as to unmistakably indicate the verdict was the result of passion or prejudice in the action for the injury to land (CP 619-620).

The sixth ground for new trial was because of incorrect evidentiary rulings. The court allowed previously non-disclosed evidence intentionally withheld by defendants into trial. The court permitted a previously non-disclosed county employee to testify. The court prohibited the McCoy's from introduction of letters from defense counsel regarding defendants' refusal to repair the pipe. The court required authentication of undisputed ER 904 documents. (CP 620-622). The final and seventh ground for new trial was the court jury charge. (CP 622-23)

*a. Juror Tina Britton's Declaration*

The McCoys obtained a declaration of juror Tina Britton. McCoys' counsel filed and served the declaration to all counsel before the hearing of the motion for new trial pursuant to CR 59(a) and CR 59(c). (CP 224- 227)<sup>10</sup> Ms. Britton provided the following relevant factual statements:

1. Juror Carolynn Harkins stated she used to sell real estate and based upon that, she informed the jurors that a document is not legal unless it has two signatures on it. (CP 194)<sup>11</sup>.
2. Juror Carolynn Harkins stated the Permissive Use Agreement was not valid because there was only one signature on it and Mr. McCoy should have known this. (CP 194)
3. Juror Carolynn Harkins made a comment that a document not being legal unless it was notarized.(CP 194)
4. During jury deliberations juror Carolynn Harkins discussed some of her own problems with the County and compared her problems to what was going on in the case. (CP 194)
5. After deliberation, juror Carolynn Harkins stated she and her husband took ownership and fixed their problems and did not go after the County even though they could have. (CP194)
6. When they were deliberating juror Ellis Faulkner stated in his Experience, jet-rodding did not harm the clay pipe or undermine the soil. (CP 194)

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<sup>10</sup> See also CP 693-698.

<sup>11</sup> See also CP 228, CP 697

7. The jurors Exchanged email addresses so that they could keep in touch after the case. (CP 195)

On April 29, 2010 the trial court having reviewed and considered all parties pleadings and heard argument granted a new trial.. On May 14, 2010 the trial court entered the order granting new trial after consideration of parties arguments. On July 23, 2010 the trial court denied motions for reconsideration filed by the nurseries and Pierce County.

#### IV. ARGUMENT

##### **A. Standard Of Review**

Given the appellant's varied challenges on appeal, there are different standards of review that apply. The appellants largely ignore the standard of review in their briefs.

##### 1. Decision on new trial is reviewed for abuse of discretion

The grant or denial of a new trial is a matter within the trial court's discretion. *State v. Jackman*, 113 Wn.2d 772, 777, 783 P.2d 580 (1989). The court's decision will be disturbed only for a clear abuse of that discretion or when it is predicated on an erroneous interpretation of the law. *Id.* A court abuses its discretion when its decision is " 'manifestly unreasonable, or Exercised on untenable

grounds, or for untenable reasons.’ ” *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 204, 75 P.3d 944 (2003) (quoting *State Ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

2. The trial court’s decision granting new trial is entitled to the highest level of deference available.

Greater deference is owed the decision to grant a new trial than the decision to deny a new trial. *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn.App. 266, 271, 796 P.2d 737 (1990). Ordinarily, a much stronger showing of an abuse of discretion is required to set aside an order granting a new trial, than one denying a new trial. *McKay v. General Accident, etc., Corporation, Ltd.*, 163 Wash 92, 299 P. 987 (1931); *Mathison v. Norton*, 187 Wash. 240, 60 P.2d 1 (1936).

3. The trial court’s decision on motion for reconsideration is reviewed for abuse of discretion.

The trial court’s decision on a motion for reconsideration is discretionary. In *State Ex rel. Clark v. Hogan*, 49 Wash.2d 457 (1956). Because the grant or denial of a motion for reconsideration is within the sound discretion of the trial court it will be overturned only upon an abuse of discretion. *Lilly v. Lynch*, 88 Wn.App. 306 (Div II. 1997).

4. CR 50 and CR 56 Motions

An appellate court reviews a ruling on a CR 50 and CR 56 motion as a matter of law, de novo. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 187, 23 P.3d 440 (2001); *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). However, it applies the same standard as the trial court. *Goodman v. Goodman*, 128 Wash.2d 366, 371, 907 P.2d 290 (1995). This requires that the truth of the nonmoving party's evidence must be accepted by the trial court, and the court must draw *all favorable inferences from that evidence that may reasonably be evinced from it*. *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 73, 684 P.2d 692 (1984). (emphasis added).

**B. The Trial Court Exercised Reasonable Discretion Granting New Trial Based On Its Factual Findings of Jury Misconduct.**

Trial courts have wide discretion in granting or refusing new trials, and the Exercise of this discretion in granting a new trial will not be interfered with by appellate reviewing courts Except in situations where pure questions of law are involved, and reviewing appellate courts will not interfere with the ruling of the trial court unless it can be said from the record that the trial court abused its discretion. *Dibley v. Peters*, 200 Wash. 100, 108, 109, 93 P.2d 720 (1939). This is because the decision by the trial judge in granting a new trial is viewed less critically and more effect is given to it than a

decision denying a new trial. The reason for this is that a new trial places the parties where they were before, while a decision denying a new trial concludes their rights, and hence a broad discretion is necessarily vested in the trial judge, who sees the witnesses, and knows of the degree of intelligence they have and their apparent candor, and must necessarily see and know much of the trial, which a record in writing will not impart to the appellate reviewing courts. Therefore, unless the trial judge abused his discretion in granting a new trial, his decision to that effect will not be disturbed. *State v. Taylor*, 60 Wn.2d 32, 41, 371 P.2d 617 (1962).

Moreover, there is a fundamental difference between the question presented on an appeal from an order granting and one denying a new trial, and especially is this so where the trial court has granted the motion because of its peculiar advantage in observing the effect on the jury of prejudicial evidence. The trial judge, by his very presence, is in a favored position. The critical question at issue then is: Did the respondents have a fair trial? The trial judge thought that they did not. The question is not whether the reviewing appellate court would have decided otherwise in the first instance, but whether the trial judge was justified in reaching his conclusion. In that respect, he has a very wide discretion. *State v. Taylor*, 60 Wn.2d 32, 41, 42.

Here, the trial court judge listened and took notes during the unrecorded voir dire and throughout the entirety of the trial. The trial judge intently listened to the responses of the venire as they were asked questions by the parties' counsel. The trial judge was present and heard all the trial testimony from all the fact and Expert witnesses taking notes of the same. (CP) The trial judge's observations and his hearing of the questions asked and responses of the venire, witnesses and counsel provided in his courtroom were incorporated into his decision to grant a new trial in the Findings of Fact section in the court's order. (CP). This Court is required to give the utmost deference to that discretionary decision granting a new trial.

1. The trial court reasonably Exercised its discretion in considering McCoy counsel's affidavit/declaration and juror Britton's affidavit/declaration under CR 59(a)(2) and CR59(c)

Civil Rule 59 allows a party to file a motion for new trial. When filing a motion for new trial on the ground of jury misconduct under CR 59(a)(2), *such misconduct may be proved by the affidavits of one or more of the jurors*. CR 59(a)(2) (emphasis added). In conjunction, Civil Rule 59(c) specifically addresses the issue of when affidavits are served. The rule states:

**(c) Time for Serving Affidavits.** When a motion for new trial is based on affidavits, they shall be filed with the motion. The

opposing party has 10 days after service to file opposing affidavits, but that period may be Extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. *The court may permit reply affidavits. CR 59(c)*(emphasis added)

Here, McCoys' counsel timely filed her affidavit/declaration with the motion. The appellant nurseries and county's counsel filed their individual affidavits in opposition. McCoys' counsel submitted a reply affidavit of juror Britton. The trial court sensibly considered these affidavits within its discretionary power under CR 59(a)(2) and CR 59 (c). Indeed, appellate courts typically consider affidavits/declarations of party counsel and/or jurors on trial court decisions granting new trial. See *Loeffelholz v. Citizens For Leaders With Ethics And Accountability Now (C.L.E.A.N)*, 119 Wn.App. 665, 679 82 P.3d 1199 (2004); *Allyn v. Boe*, 87 Wn.App. 722, 728, 943 P.2d 364 (1997); *Robinson v. Safeway Stores*, 113 Wn.2d 154, 156, 776 P2d 676 (1989).

The appellants' argue the trial court abused its discretion by considering McCoys' counsel and juror Britton's affidavit. Since CR 59 (a)(2) and CR 59(c) Explicitly allow consideration of these affidavits, the appellants' argument is meritless.

2. The trial court reasonably Exercised its discretion by finding facts confirming juror misconduct in voir dire.

The Washington State Constitution provides that a right to a jury trial inviolate. *Article 1 § 21 of the Washington State Constitution.*

This right to a trial by jury includes the right to an unbiased and unprejudiced jury and a trial by a jury. One or more whose members is biased or prejudiced, is not a constitutional trial. *Robinson v. Safeway Stores*, 113 Wn.2d 154, 159 (1989) (citing *AlExson v. Pierce County*, 186 Wash. 188, 193 (1936)). Therefore, the jury must necessarily act as a unit and the misconduct of any juror, actual or implied, which forestalls or prevents a fair and proper consideration of the case, is the misconduct of the jury and vitiates the verdict. *Mathisen v. Norton*, 187 Wash. 240, 245(1936) (emphasis added).

Voir dire is a fundamental component of any jury trial. However, without the honest participation of all potential jurors, voir dire cannot achieve its goals. Both Ninth Circuit and Washington State courts emphasize:

[I]n most situations, voir dire, the method we have relied upon since the beginning should suffice to identify juror bias. This is because of truthful disclosure of information during voir dire sets up a challenge for cause (or in less clear-cut cases, a peremptory challenge) that can be Exercises before resources are devoted to trying a case to verdict. Cause challenges lie for implied (or presumed) bias as well as for actual bias. Honesty is at the heart of the jury selection process in an adversarial system; indeed, voir dire means to speak the truth. The whole point of voir dire process is to elicit information from the venire that may shed light on bias, prejudice, interest in the outcome, competence and the like so that counsel and the parties may Exercise their judgment about whom to seat and whom to challenge.

*Fields v. Brown*, 431 F.3d 1186, 1196-97 (9<sup>th</sup> Cir. 2005) (citation and quotations omitted).

A juror's misrepresentation or failure to speak when called upon during voir dire regarding a material fact constitutes an irregularity affecting substantial rights of the parties. *Gordon v. Deer Park Sch. Dist.* 414, 71 Wash.2d 119, 122, 426 P.2d 824 (1967). A new trial is required "when the information withheld by the juror is material and a truthful response would have provided a basis for challenge for cause." *State v. Carlson*, 61 Wn.App. 865, 878, 812 P.2d 536 (1991) (citing *State v. Briggs*, 55 Wn.App. 44, 54 776 P.2d 1347 (1989)).

A recognized basis for a challenge for cause is for bias, either actual or implied. See RCW 4.44.170(1) and (2); RCW 4.44.180(4); *State v. Cho*, 108 Wn.App. 315, 324, 30 P.3d 496 (2001).

*a. Jury foreperson failed to disclose material facts in voir dire*

Here the jury foreperson failed to disclose in voir dire that: (1) she had been in a strikingly similar situation the McCoy's were facing, which was damage of her own home from flooding and pipes involving Pierce County; (2) she and her husband had to pay out of their own pockets for those damages; (3) she felt that Pierce County was partly responsible for those damages; (4) her personal

bitterness of having to pay out of her own pocket for damages she attributed to Pierce County; (5) her attitude of towards the McCoys of “if I had to pay, then you have to pay too”; and (6) her prior real estate Experience and the nature and Extent of that Experience. She omitted an answer in her jury questionnaire pertaining to her occupation.

Any reasonable trial court would find this jury foreperson similarly situated as the McCoys had a keen interest in the McCoys case particularly given the same issues of flooding, pipes, home damage and Pierce County as a culpable party for those damages. Without a doubt, this jury foreperson was so caught up in the McCoy’s case and the trial court’s decision granting new trial to the Extent 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. The jury foreperson was so personally entangled that she forgot she had said in voir dire that she had to tightline drainpipe all the way to the wetland on her property.

Any reasonable trial court would find this jury forepersons undisclosed actual bias against the McCoys was “if I had to pay, you have to pay too” This jury foreperson admitted in the post-verdict review that she thought the Tom McCoy should have taken

ownership of his own property and paid for home damages as she had done.

Any reasonable trial court would find this jury foreperson's undisclosed implied bias upon considering the commonalities between her and the McCoys: (1) flooding (2) damage from flooding (3) drainage pipes (4) Pierce County as involved party and (5) result of damage caused by Pierce County.

Any reasonable trial court would find the McCoys were denied the opportunity to Examine this jury foreperson to determine whether she should be Excused for cause since she failed to disclose material information of her real estate Experience during voir dire.

Appellants argue the jury foreperson disclosed she had been a realtor in the past in voir dire. The trial judge, however after review of his notes taken during voir dire found that the jury foreperson did not disclose material information of her specialized real estate Experience in voir dire.

*b. Juror 11 failed to disclose material facts in voir dire*

Juror 11, Mr. Ellis Faulkner, failed to disclose material information concerning: (1) prior specialized Experience with jet-

rodding pipes, and (2) prior specialized Experience with weight displacement, which is the effect that heavy trucks would have on pipes while driving over them.

Juror 11 only discussed during voir dire his Experience replacing old broken clay tile pipes that were broken while working at the Kansas State Fairgrounds. Pierce County's negligent jet-rodding of broken pipes was a critical issue in the case against Pierce County. Just as important, what caused the drainage pipes to collapse was the central issue in the case against the nurseries.

Juror 11 contended in his declaration that he was not asked about jet-rodding and whether not he had any Experience in jet-rodding. However, he admitted that if he had been asked he would have answered truthfully. Whether a juror failed to disclose his prior Experience in good faith is irrelevant. *Kuhn v. Schall* 155 Wash.App. 560, 228 P.3d 828 (2010). Furthermore, once there is a finding of juror misconduct, the juror who committed the misconduct cannot in a separate declaration deny the prejudicial effect on his or her misconduct. *State v. Bennett*, 71 Wash. 673 (1913).

Juror 11's undisclosed bias originating from undisclosed material information of specialized Experience in voir dire, deprived the McCoy's from making a challenge for cause.

What these two jurors failed to disclose in voir dire affected the substantial right of the McCoy's of an unbiased jury. Thus, it cannot be said that the trial court abused its discretion in finding the nondisclosure during voir dire required a new trial.

3. The trial court properly Exercised its discretion in finding facts confirming jurors committed misconduct by injecting Extrinsic evidence in closed jury deliberations.

When a juror withholds material information during voir dire and then later injects that information into jury deliberations, the court must inquire into the prejudicial effect of the combined, as well as the individual, aspects of the juror's misconduct. *State v. Johnson*, 137 Wn.App. 862, 869, 155 P.3d 183 (2007) (citing *State v. Briggs*, 55 Wn.App. 44, 53, 776 P.2d 1347 (1989)).

With respect to the improper injection of Extrinsic information, a new trial "must be granted unless it can be concluded beyond a reasonable doubt that Extrinsic evidence did not contribute to the verdict." *Briggs*, 55 Wn.App. at 56 (citations omitted). "Any doubt that the misconduct affected the verdict must be resolved against the verdict." *Id* at 55 (citing *Halverson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973)); see also *Brown v. Spokane County Fire Protection Dist. No. 1*, 100 Wn.2d 188, 198, 668 P.2d 571 (1983) ("If...the trial court, in its discretion, has any doubt that the

comments affected the outcome of the trial, the trial court must grant a new trial.”).

Extrinsic evidence is “information that is outside all the evidence admitted at trial, either orally or by document.” *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wash.App. 266, 270, 796 P.2d 737 (1990), review denied, 116 Wash.2d 1014, 807 P.2d 883 (1991); It is jury misconduct for jurors to interject Extrinsic evidence into the jury deliberations, because such evidence is not subject to objection, cross Examination, Explanation, or rebuttal. *State v. Balisok*, 123 Wash.2d 114, 118, 866 P.2d 631 (1994) Jurors may, however, rely on their personal life Experience to evaluate the evidence presented at trial during the deliberations. *Richards*, 59 Wash.App. at 274, 796 P.2d 737. But they may not inject specialized personal Experience not disclosed in voir dire into jury deliberations. *Loeffelholz v. Citizens For Leaders With Ethics And Accountability Now (C.L.E.A.N)*, 119 Wn.App. 665, 679 82 P.3d 1199 (2004)

In determining whether a juror’s comments constitute Extrinsic evidence rather than personal life Experience, courts Examine whether the comments impart the kind of specialized knowledge that is provided by Experts at trial. See *State v. Carlson*, 61 Wash.App. 865, 878, 812 P.2d 536 (1991); *State v. Briggs*, 55 Wash.App. 44, 58, 776 P.2d 1347 (1989). (emphasis added).

Expert testimony is testimony based on “scientific, technical, or other specialized knowledge.” ER 702. *Hough v. Stockbridge*, 152 Wn.App. 328, 216 P.3d 1077 (2009). Lay witness testimony on the other hand is limited to opinions or inferences which are rationally based on perception, helpful to a clear understanding of witness testimony or determination of a fact in issue but not based on scientific, technical, or other specialized knowledge. ER 701.

Here the two jurors who failed to disclose prior specialized Experience during voir dire, injected Extrinsic information relating that Experience into jury deliberations. The jury foreperson’s injection of Extrinsic information relating to the legality or contractual binding of a license based on her prior real estate Experience are comments that a Expert in the real estate field would make in a court of law. The jury foreman’s personal Experience concerning her home being damaged by flooding and pipes is not within the realm of a typical juror’s life Experience.

Juror 11 likewise, injected Extrinsic comments regarding his undisclosed technical and specialized knowledge of jet-rodding and weight displacement that an Experts in specialized field such as engineering and geology would make in a court of law. Actually, McCoys’ geologist specifically testified about weight displacement regarding heavy trucks and buried pipes. His testimony concerning

weight displacement was the only evidence provided at trial on that issue.

Consequently, when these two jurors injected undisclosed, Extrinsic information into deliberations, it was not subject to objection, cross Examination, Explanation, or rebuttal. This Court when reviewing these facts cannot say the trial court abused its discretion by finding the two jurors committed jury misconduct by injecting Extrinsic evidence necessitating a new trial.

4. Affidavits of Other Jurors Confirm Jury Misconduct.

The trial court reviewed the late submitted affidavits of ten other jurors including the jury foreperson and juror 11. The affidavits of Jeremy Leaf, Sally Evans, Cheryl Thresher, Ellis Faulkner and Carolynn Harkins in particular, confirm the factual statements contained in McCoy counsel and juror Tina Britton's affidavits rather than rebut them. (CP 781 – 790).

Juror Sally Evans affidavit stated:

- "Ellis (juror 11) did mention that heavy trucks can sink down into weight soil and damage pipes"
- "Ellis pointed out that Mr. Creveling did not talk about the affect of wet soil when he testified about the pipes on the McCoy property."
- "While we were talking with the lawyers, Carolynn mentioned that she took care of her own situation without going after the County." (CP 290-293)

Juror Jeremy Leaf affidavit stated:

- “so Ellis was telling her [juror Britton] that in his Experience, it is possible for heavy equipment to crush an underground pipe”
- “When we talked about the Permissive Use Agreement..we continued to go over it and talk about our personal Experiences, like Carolynn with her real estate background”
- “During the lawyer interview that Carolynn mentioned that she probably could have tried to sue the County but chose not to”
- “Carolynn just said she was ‘pissed off’ when Sarah Lee continually looked at her in the eyes during closing argument and tried to get her to nod her head and agree.” (CP 294-297)

Juror Cheryl Thresher affidavit stated:

- “Ellis did not speak in generalities, instead he gave us very specific Examples from his own background about things like the ground at the Kansas fairgrounds being wet and finding crushed underground drainage pipes after heavy equipment ran over them”
- “During deliberations, I recall that Carolynn made some comments about working as a real estate agent in the past and whether a document had to be notarized to be considered legal.” (CP326-329; CP 332-335)

Juror Ellis Faulker (juror 11) affidavit stated:

- “If I or the jury pool had been asked about Experience with jet-rodding, I would have answered truthfully.” (CP 281-283)

The affidavits of jurors Steven Riley, Kristi Morton, Martha Kruzner, William Jennings and Troy Thomas were drafted by Pierce County in a boiler-plate fashion and merely signed by the jurors. These affidavits contain statements that inhere to the verdict and

shed no light on the jury misconduct issue. (CP 822-826; CP 298-299; CP 276-278; CP 278-279; CP 273-275; CP 288-289).

**C. The Trial Court Reasonably Exercised Discretion Granting New Trial Because It Found The Great Weight Of The Evidence Established Nurseries' Water Trespass.**

A trespass is an intrusion onto the property of another that interferes with the other's right to Exclusive possession. *Bradley v. American Smelting & Ref. Co.*, 104 Wn.2d 677, 6901-91, 709 P.2d 782 (1985); *Borden v. City of Olympia*, 113 Wn.App. 359, 373, 53 P.3d 1020 (2002) (CP 1064)<sup>12</sup>. The concept includes trespass by water. *Buxel v. King County*, 60 Wn.2d 404, 409, 372 P.2d 250 (1962); *Hedlund v. White*, 67 Wn.App. 409, 418, 836 P.2d 250 (1992) (CP 1065).

Corroborated admissions of a party may constitute substantial evidence of any fact in issue even if the admissions are later denied. See *Smith v. Leber*, 34 Wash.2d 611, 622, 209 P.2d 297 (1949).

Here, both Kent Nursery and Fir Run Nursery presidents admitted on the witness stand that water from their properties goes onto the McCoys' property without the McCoys' consent. (RP 1509:16 -1510:1; RP 1543:5 – 1545:1; RP 1571:3-9; RP 1579:15-

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<sup>12</sup> Plaintiffs' Trial Brief page 23.

24; RP 1700:13-25; RP 1735:18-25 See also RP 539:4-13) Additionally, numerous photographs and videos<sup>13</sup> confirm the nurseries admissions that their water intrudes on the McCoys' property. This recurrent intrusion of nurseries water on the McCoys' property interferes with the McCoys' Exclusive use of their property. Despite the admissions, plaintiffs' testimonies, Expert testimonies and photographic evidence, the jury found no such trespass by the nurseries occurred. This is what, in part shocked the court's conscience. The jury's utter disregard of the obvious compelled the court to grant a new trial. Based upon the trial court record, the trial court correctly found the great weight of the evidence presented at trial established nurseries' water trespass despite the verdict.

Appellant nurseries argue they had some right to dump their water onto the McCoy property based on premise that their drainage system is a natural watercourse that allows for dumpage. However the underlying facts in the record do not support their argument. First, the area which all properties are located lie within a broad alluvial valley. In a broad alluvial valley, the natural watercourses are ever changing. So what may be a watercourse

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<sup>13</sup> Well over a hundred photographs and at least 3 separate videos at various dates from 2006 – 2010 entered into evidence.

one decade may not be one in another decade. *Halverson v. Skagit County*, 139 Wn.2d 1, 983 P2d 643 (1999) (CP 1057 – 1059)

Second, the case upon which they rest their premise is inapposite – both factually and legally. In *Wilber v. Western Properties*, the waters at issue were defined as floodwaters, which are governed by riparian law. “These were obviously flood waters, but in no sense of the word, can they be characterized as diffuse surface waters...accordingly we must consider Wilber and Western riparian owners along the drainway.” *Wilber v. Western Properties*, 14 Wn.App. 169, 171 (1975) The waters here are diffuse surface water and ground water, are governed by common enemy law and its Exceptions. Thus, *Halverson v. Skagit County* applies and arguably overrules *sub silencio Wilber* in cases involving waters within broad alluvial valleys.

Third, the natural flow of surface water and ground water land was artificially altered by Louderback’s man-made drainage system. Before installation of the drainage system the surface water and ground water slowly dispersed through a wide area including more than the McCoy property. After installation of the drainage system, the surface water and groundwater was collected at a higher rate and volume and discharged at a single point. The

single point was the end of the pipe at Horse Haven Creek. Now this single point is the McCoys' property

The nurseries arguments in light of the trial court's substantial record and case law lack validity. Accordingly, this Court should affirm the trial court's grant of new trial on this issue of trespass.

**D. The Trial Court Reasonably Exercised Its Discretion In Denying Appellants' Motions For Reconsideration.**

The grant or denial of a motion for reconsideration is within the sound discretion of the trial court and as such, it will be overturned only upon an abuse of discretion. *Lilly v. Lynch*, 88 Wn.App. 306 (1997).

Motions for reconsideration do not provide litigants with an opportunity for a second bite at the apple. Courts will not permit parties to merely re-argue issues already addressed. *Anderson v. Farmers Ins. Co. of Washington*, 83 Wn.App. 725 (1995). Moreover, the trial court may decline to consider new arguments or new evidence on reconsideration where those arguments or evidence were available earlier. *Marquis v. City of Spokane*, 76 Wn.App. 853, 861 (1995); *Bingle v. Lloyd*, 13 WnApp. 844, 848 Div 3, (1975); See also *Washington Handbook on Civil Procedure*, Section 65.1 (2005).

In this case, the trial court had many reasonable grounds to deny appellants' motions for discretion. First, appellant nurseries failed to timely file on every ground the trial court based its decision in granting the new trial. (CP 776) The nurseries did not address the specific reasons in fact and law regarding the admissions of their water trespass. Under CR 6(b), the trial court had no discretion to allow additional time for them to submit supplemental pleadings on that issue. (CP 775) Second, the appellant nurseries and county submitted juror affidavits that could have been obtained earlier. They did not obtain the juror declarations until May 24, 2010, more than a month after the filing of McCoys' motion for new trial. (CP 778-779) Third, they failed to request an Extension of time of up to 20 days for submission of additional affidavits. CR 59(c). They failed to give the court any reasonable Explanation for the delay. (CP 779) Fourth, the untimely submitted juror affidavits offered no new evidence, instead they confirmed the facts contained in McCoys' counsel and juror Britton's affidavits. *Marquis v. City of Spokane*, 76 Wn.App. 853 (1995). (CP 778-779).

**E. The Trial Court Properly Denied Pierce County's CR 50 and CR 56 Motions Because The McCoys Presented Substantial Evidence Establishing Triable Issues of Fact To Submit To The Jury**

Judgment as a matter of law under CR 50 is appropriate only when no competent and substantial evidence Exists to support a

verdict. *Faust v. Albertson*, 167 Wash.2d 531, 222 P.3d 1208 (2009) (citing *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wash.2d 907, 915, 32 P.3d 250 (2001)). In reviewing a ruling on a motion for a judgment as a matter of law, the appellate court engages in the same inquiry as the trial court. *Stiley v. Block*, 130 Wash.2d 486, 504, 925 P.2d 194 (1996).

A party who challenges with a judgment as a matter of law “admits the truth of the non-moving party’s evidence and all inferences which can reasonably be drawn [from it].” *Davis v. Early Constr. Co.*, 63 Wash.2d 252, 254, 386 P.2d 958 (1963). Courts interpret this evidence “against the [original] moving party and in a light most favorable to the non-moving party.” *Id.*

The question boils down to whether the non-moving party can meet his/her evidentiary burden to establish a triable issue of fact. Typically, a party “may establish any fact by circumstantial evidence.” *Tabak v. State*, 73 Wash.App. 691, 696, 870 P.2d 1014 (1994). Before juries, circumstantial and direct evidence are viewed as equivalently valuable. See 6 WASHINGTON SUPREME COURT COMMITTEE ON JURY INSTRUCTIONS, WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL § 1.03, at 22 (2005). Corroborated admissions of a party may constitute substantial evidence of any fact in issue even if the

admissions are later denied. See *Smith v. Leber*, 34 Wash.2d 611, 622, 209 P.2d 297 (1949).

The nonmoving party is “ ‘not bound by the unfavorable portion of [the] evidence, but is entitled to have [the] case submitted to the jury on the basis of the evidence ... most favorable to [her] contention.’ ” *Lewis v. Simpson Timber*, 145 Wash.App. 302, 189 P.3d 178 (2008) (citing *Venezelos v. Dep’t of Labor & Indus.*, 67 Wash.2d 71, 72, 406 P.2d 603 (1965))

Once the non-moving party meets their burden, the court “must defer to the jury as trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence.” *State v. Hernandez*, 85 Wash.App. 672, 675, 935 P.2d 623 (1997).

In an action for negligence, a plaintiff must prove the Existence of a duty, breach of that duty, resulting injury, and proximate causation. *Alhadeff v. Meridian on Bainbridge Island, LLC*. 167 Wn.2d 601, 618, 220 P.3d 1214 (2009). A defendant has a duty to use reasonable care, when the risk to the plaintiff is reasonably foreseeable. David K. DeWolf & Keller W. Allen, 16 Wash. Prac. §1.11 (2009).

Here, the evidence presented by the McCoys and their Experts, when viewed in the light most favorable to the McCoys, leads to permissible inferences that Pierce County could be found negligent in failing to properly maintain ditches and by jet-rodding drainage basin in the county right of way which caused additional flooding on the McCoys' property.

Accordingly, the court cannot say, as a matter of law, that the evidence was not substantial or that there was no reasonable inference to not allow the McCoys' negligence claim against Pierce County to be submitted to the jury.

**F. RAP 14 and RAP 18 Allow The McCoys to Recover Costs, Attorney Fees and Expenses As A Prevailing Party To The Appeal**

RAP 14.2 provides that a party that substantially prevails on review. Under RAP 18.1 a party can recover attorney fees and Expenses. Accordingly, the McCoys, should they substantially prevail on review of this appeal, respectfully requests this Court to grant the appropriate attorney fees, Expenses and costs to the McCoys.

**V. CONCLUSION**

The McCoys respectfully request this Court to affirm the trial

court's decisions granting new trial, denying reconsideration and denying Pierce County's CR 50 and CR 56 motions to dismiss.

DATED this 4<sup>th</sup> day of April, 2011

Respectfully submitted



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STATE OF WASHINGTON  
SUPERIOR COURT  
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**DECLARATION OF SERVICE**

The undersigned declares that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. I caused this Declaration and the following document:

**BRIEF OF RESPONDENTS**

to be served on April 4, 2011 on the following parties and in the manner indicated below:

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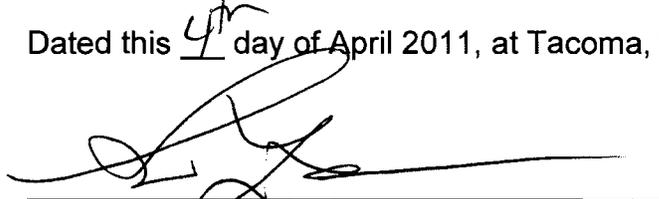
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by Facsimile

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

Dated this 4<sup>th</sup> day of April 2011, at Tacoma, Washington.



SARAH L. LEE