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SUPREME COURT  
OF THE STATE OF WASHINGTON

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BRIAN LONG,

Appellant,

v.

BRUSCO TUG & BARGE, INC., a Washington corporation; BO  
BRUSCO and his marital community,

Respondents.

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SUPPLEMENTAL BRIEF OF  
BRUSCO TUG & BARGE, INC., AND BO BRUSCO

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 ORIGINAL

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## I. INTRODUCTION

Petitioner Brian Long (“Long”) asks this Court to do what no other Washington court has done: reverse a trial judge’s discretionary ruling that denied a motion for a new trial based on a juror’s discussion of his background and life experience in the United States Navy, personal history that was disclosed in voir dire. Not only did that discussion inhere in the verdict because it reflected the juror’s beliefs and thought processes, but it introduced no “law” relevant to any legal issue in the case.

Despite knowing the naval background of the juror, Dave Wlaschin, Long made no attempt to excuse him. Long decided to accept him on the jury and used his final peremptory challenge to remove a different juror. Long has no basis for objecting now.

This case presents an opportunity to affirm and clarify that, when a juror’s career background is disclosed in voir dire, a party cannot claim misconduct when a juror discusses those unrelated life experiences merely because the juror uses the word, “law,” when the record shows that the discussion does not contradict, affect, or pertain to the instructions of law provided by the trial judge. Respondents Brusco Tug & Barge, Inc., and Bo Brusco (collectively, “Brusco”) ask this Court to affirm the discretionary decision of the trial court and the unpublished opinion of Washington Court of Appeals that affirmed that discretionary decision.

## **II. BACKGROUND AND PROCEDURAL HISTORY**

### **A. Long abandoned his post and filed a lawsuit.**

Brusco's tugboats serve many ports on the Pacific Coast, including the Port at Everett, Washington. RP 1289-92, 1295, 1345, 1475-76, and 1479-81. For a time, Long had been Brusco's port manager at the Port of Everett. RP 1546-48. Long abandoned his post without notifying anyone of his whereabouts. RP 1344-47, 1585-95, and 2009-35.<sup>1</sup>

As a result of Long's unauthorized absence, and on the very day of that absence, Brusco reassigned Long to ocean captain, the position that he previously held for years with a higher salary. RP 1344-47, 1585-95, 1617-43, 1919-23, 1933, and 2009-35. Long sued, alleging that Brusco violated the Washington Law Against Discrimination by retaliating against Long for what he claimed was his conduct opposing discrimination against Anthony Morgan, a deckhand with a prosthetic leg. CP 1-6.

Long put Morgan to work before Morgan underwent the required physical examination, which revealed that he took Percocet. RP 989-91 and 1554-56. Morgan was discharged after having worked only two days. RP 2169-81. All of this occurred more than three months before Long abandoned his post. The jury was asked to decide only whether the reassignment was (1) in retaliation for Long's alleged complaints that, as

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<sup>1</sup> This required other Brusco personnel to assist an incoming vessel. RP 1854-56.

noted, had occurred months before the reassignment, or (2) his abandonment of his post.

This case was *not* about whether Brusco actually discriminated against *Morgan*. *E.g.*, RP 49–50.<sup>2</sup> In fact, Brusco conceded that Long had a reasonable belief that *Morgan* was discriminated against. RP 2329–30. The jury was not required to decide the propriety of *Morgan*'s hiring or whether Brusco discriminated against him.

**B. Voir dire**

During voir dire, the trial judge, the Honorable William L. Downing, explained the selection process to the jury:

I'll be asking a number of questions of you. The lawyers will have an opportunity to follow up as well and ask some questions, but probably most importantly you're encouraged to look within yourselves and see if there's anything there in your life experience or your personal belief system that's so powerful, it might overwhelm your desire to serve as a fair and impartial juror in this . . . case.

RP 115.<sup>3</sup> The prospective jurors were asked several questions about life

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<sup>2</sup> The Court reminded the jury of this during the trial. *E.g.*, RP 2198–2199.

<sup>3</sup> Judge Downing also explained as follows:

You know, all of our experiences shape, obviously, and that's as it should be, all those things I mentioned earlier, our reasonableness, our insight into human behavior, our ability to judge credibility, all of those things are shaped by all of our experiences. But it's important if you're impaneled as a juror on this case that you accept the law that I communicate to you as being applicable here in the state of Washington and not Arizona, not Scotland, but the laws that apply here, taking those laws and then finding the facts in this case and making a decision.

RP 137–38.

experiences and opinions. *See* RP 129–242.<sup>4</sup> During that period, Wlaschin stated, *inter alia*, that he was retired from the United States Navy and enjoyed boating on Puget Sound. RP 172. Long did not ask Wlaschin anything about his maritime background.<sup>5</sup> After questioning concluded, Judge Downing explained the process of peremptory challenges:

Now, the next phase of the process involves the lawyers having the opportunity to exercise some peremptory challenges. A peremptory challenge is simply the right that any party trying a case to a jury has to exercise a little bit of final shaping, shaving off the rough edges of the jury. The idea is to encourage the confidence and the fairness of the process, which for the most part is a random process, but in the final analysis, any perceived rough edges can be shaved off in order to be sure that the people are as comfortable as possible with the jury we end up with . . . .

RP 253. Long then excused four jurors, and Brusco excused three.

RP 253–56. Instead of striking Wlaschin, Long used his final peremptory challenge to strike a *different* juror. RP 255.

Judge Downing told the empaneled jurors to not perform any investigation, seek out any additional information, or look up

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<sup>4</sup> Judge Downing reminded the jury of the purpose of voir dire. RP 175 (stating, “The purpose of the process . . . is to find out information about all of you, touching upon your qualifications to act as jurors in this cause” and “[y]ou need to concentrate . . . on finding out if there’s anything else in your life experiences or your personal beliefs that could affect your ability to be fair and neutral and impartial in this case.”).

<sup>5</sup> Instead, Long inquired whether, *inter alia*, the jury felt that people with prosthetic limbs could perform jobs as ably as those with natural limbs. *See* RP 177, 188, 214, 218, 221, 222, 223–24, and 228. When asked if they thought that someone with a prosthesis could do a job just as well as someone with a natural limb, the potential jurors who spoke indicated that it would depend upon the job, the person, or the technology. RP 187–92.

information. *See* RP 257–58. The trial lasted over two weeks.

**C. Long's post-trial attempt to impeach the verdict**

After he lost, Long sought a new trial, claiming, *inter alia*, that extrinsic evidence affected the jury's verdict. CP 1768–79. In an attempt to impeach the verdict, Long submitted post-trial affidavits.

In one affidavit, Juror 2 stated that Wlaschin “talked about knowing Navy laws, and that none of the Coast Guard/Ocean/Maritime laws would allow anyone with a prosthesis to work on the deck of a ship or boat.” CP 1781. Juror 2 thought that another juror said, “yeah, that breaks Coast Guard law.” *Id.* Juror 7 said that Wlaschin “talked at length about maritime laws, navy [sic] rules and repeated multiple times that no laws existed that would allow a deckhand with a prosthetic leg to be on a boat.” CP 1784. Wlaschin's oral deliberations were based upon his life experience, not any outside research during trial, as Juror 1 said:

[Wlaschin] started by telling us that he had spent many years on ships and in the U.S. Navy and knew about the law, and about boats, and about safety. He said that he did not know of any law on the books including the Coast Guard laws that would every [sic] let someone work as a deckhand on a boat. He said that these laws simply do not allow people to crew boats and act as Able Bodied Seamen with prosthetics. He knew from serving on ships that boats are very dangerous, and that someone like Anthony Morgan should not be on a boat by law. The point he emphasized the most, and he was very well organized, authoritative was that there were no laws that would have allowed Morgan on board as a deckhand. He was very convincing and had a command of marine safety and the

laws that govern them.

CP 1788. Juror 1 similarly indicated that Wlaschin's deliberations were not an act of misconduct but thoughts drawn from life experience:

[Wlaschin] mentioned that he spent many years in the Navy and is quite familiar with the laws of the organization and stated that there would be no way that the Navy (or other maritime organizations such as the Coast Guard) would have let a man with a prosthetic leg work on the deck of a ship.

...  
[Another juror] agreed and bolstered the point by adding what seemed to be a confirmation about Coast Guard law and then applied his experience in construction . . . .

CP 1791.

In ruling upon Long's motion for a new trial, the trial court recognized that the affidavits addressed the jury's deliberative process:

Most of what has been put before the Court concerns the jury's deliberative process behind closed doors and a proper respect for the jurors and for the jury system precludes the Court from considering it. The one thing that potentially stands out is the assertion that a juror may have inserted into the discussions *a personal belief*, based on *his experience* that Coast Guard regulations would not permit a man with a prosthetic leg to work on a vessel.

CP 1949 (emphasis added). The trial court reasoned that Wlaschin's personal belief related solely to a non-issue:

Regardless of whether one stretches to call this an insertion of outside facts or law into the deliberations, it is clear it only related to the non-issue of whether or not Mr. Morgan was actually discriminated against and not to those matters that were in issue.

*Id.* The trial court concluded “that there was no jury misconduct resulting in outside information being put before the jury and affecting the verdict.” CP 1950. Accordingly, the trial court did not grant a new trial.

Long appealed. The Washington Court of Appeals affirmed Judge Downing’s exercise of discretion in an unpublished opinion.

### III. ARGUMENT AND AUTHORITY

#### A. The information that Long submitted inheres in the verdict and cannot be used to impeach the verdict.

Long’s effort to impeach the verdict failed, with good reason. Parties are not permitted to claim juror misconduct and introduce evidence of jury deliberations, because such evidence generally inheres in the verdict and is inadmissible. *See Gardner v. Malone*, 60 Wn.2d 836, 840–41, 376 P.2d 651 (1962). Put another way, a party cannot use a juror’s post-verdict statements about how the jury reached its verdict to support a motion for a new trial. *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 205, 75 P.3d 944 (2003). This Court has held as follows:

One test is whether the facts alleged are *linked* to the juror’s *motive, intent, or belief*, or describe their effect upon him; *if so, the statements cannot be considered for they inhere in the verdict* and impeach it.

*Gardner*, 60 Wn.2d at 841 (emphasis added).

As this Court has said, “[a]ppellate courts will generally not inquire into the internal process by which the jury reaches its verdict.”

*Breckenridge*, 150 Wn.2d at 204 (citing *Gardner*, 60 Wn.2d at 840). This is due to the interest in the “secret, frank[,] and free discussion of the evidence by the jury[.]” *Breckenridge*, 150 Wn.2d at 203–04 (quoting *State v. Balisok*, 123 Wn.2d 114, 117–18, 866 P.2d 631 (1994)). The individual or collective thought processes that lead to a verdict “inhere in the verdict” and cannot be used to impeach it. *Breckenridge*, 150 Wn.2d at 204–05 (citing *State v. Ng*, 110 Wn.2d 32, 43, 750 P.2d 632 (1988)).<sup>6</sup> To test this, courts examine whether the statements relate to “mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors’ intentions and beliefs[.]” *Cox*, 70 Wn.2d at 179–80.<sup>7</sup>

There are good reasons for this. “Our judicial system rests upon the

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<sup>6</sup> See also *Cox v. Charles Wright Acad., Inc.*, 70 Wn.2d 173, 176–80, 422 P.2d 515 (1967) (holding that juror affidavit regarding the jury’s method for calculating damages inhaled in the verdict); *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 769, 818 P.2d 1337 (1991) (stating that “a verdict may not be affected by the circumstances that some jurors misunderstood the judge’s instructions” and “[a] juror’s failure to follow the court’s instructions inheres in the verdict, and affidavits relating to such alleged misconduct may not be considered.”).

<sup>7</sup> As applied, the tests are non-exclusive (*i.e.*, if one test is met, then the information inheres in the verdict). The question of whether a matter inheres in the verdict is analyzed separately from the question of whether there was juror misconduct. *Breckenridge*, 150 Wn.2d at 204 n.12.

idea of finality in judgments given by the courts.” *Cox*, 70 Wn.2d at 179.<sup>8</sup>

“[T]he courts have long accepted the premise that jurors may not impeach their own verdict.” *Id.* This makes abundant good sense:

A different rule, one permitting jurors to impugn the verdicts which they have returned by asserting matters derogatory to the mental processes, motivations and purposes of other jurors or purporting to explain how and why a juror voted as he did in arriving at his verdict, would inevitably open nearly all verdicts to attack by the losing party and thwart the courts in achieving a long held and cherished ambition, the rendering of final and definitive judgments.

*Id.* at 180.

In *Breckenridge*, the plaintiff alleged medical malpractice from a failure to order a computerized tomography (“CT”) scan. 150 Wn.2d at 198–99. After a defense verdict, the plaintiff claimed that there was jury misconduct about extrinsic experiences pertaining to the standard of care. *Id.* at 199. In an unpublished opinion, the Court of Appeals reversed the trial court’s grant of a new trial, holding that the juror’s statements pertained to his life experiences. *Id.* at 199, 203. This Court agreed with the Court of Appeals but affirmed on other grounds: the juror’s statements inhered in the verdict. *Id.* at 206–07. This Court examined the following statement from a juror declaration:

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<sup>8</sup> “Lacking the principle that every action will one day terminate in a final adjudication, subject no longer to re-examination, the judicial system would likely disappear.” *Cox*, 70 Wn.2d at 179.

[Corson] argued that other emergency room doctors would have behaved in the very same fashion as Dr. Nowak had and supported his position from personal experience. During deliberations he cited the experiences of his wife, who suffers from migraines. Mr. Corson told the jury that his wife had gone to emergency rooms several times with symptoms similar to those experienced by Lynda Breckenridge on November 19, 1996, and that never was a CT scan ever discussed or done on his wife. He used that experience to argue that, since other doctors behaved in that fashion in similar circumstances with his wife, Dr. Nowak must have met the standard of care. He made reference to this argument at least three times and, upon repeating his statements, prefaced his remarks, "Again I keep coming back to my wife's experiences," or substantially similar language.

*Id.* at 206. This Court held that the statement merely explained the juror's reasons for weighing the evidence in the case in the way that he did, believing what he did about how the evidence related to the question of liability and explaining why he concluded that the defendant was not liable. *Id.* This was an explanation of the juror's mental process, a factor that inhered in the jury's process in reaching the verdict. *Id.*

The same is true here. The declarations do not refer to any acts of jury misconduct. There is no evidence that any juror performed outside research, spoke about the trial with someone outside of the courtroom, or visited a location that was pertinent in the case. The declarations merely expressed some jurors' recollections of others' thought processes and reasoning. Wlaschin's discussion was intrinsically linked to his motive,

intent, or belief. Just like the juror in *Breckenridge*, Wlaschin spoke of his life experience and orally expressed his contemplation of that experience when considering the evidence that was presented at trial. Such information inheres in the verdict and cannot impeach it.

Even when a juror's oral deliberations involve issues that relate to that juror's understanding of legal concepts, as learned from prior life experience, such statements inhere in the verdict when they explain the individual juror's thought processes. See *McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 757–68, 260 P.3d 967 (2011), *rev. denied*, 173 Wn.2d 1029, 274 P.3d 1039 (2012). In *McCoy*, juror affidavits detailed the jurors' thinking:

[Juror 2] said that 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. Therefore, she argued that the Permissive Use Agreement was not valid because there was only one signature.

*Id.* at 755 (alteration in original). Analogizing to *Breckenridge*, the *McCoy* court reasoned that the affidavits explained the jurors' thought processes:

Like Corson's statements during deliberations in *Breckenridge*, the statements juror 10 attributes to juror 2, comparing juror 2's previous permitting experiences with Pierce County to the McCoy's circumstances and arguing with juror 10 about the permissive use agreement, *explained juror 2's individual thought processes and reasons for weighing the evidence as she did.*

*Id.* at 767 (emphasis added). The *McCoy* court reasoned that the affidavits

explaining the jurors' thinking could not impeach the verdict:

The statements in juror 10's declaration were inadmissible to impeach the jury's verdict because (1) they clearly speak to matters that either inhere in the verdict, i.e., how jurors 2 and 11 regarded the evidence, their mental processes, and how they and the other jurors considered and discussed the evidence in reaching their verdicts or (2) they speak to a comment by juror 2 after the jury reached its verdict.

Thus, we hold that the trial court abused its discretion in considering juror 10's declaration to support the McCoy's motion for a new trial based on juror misconduct that interjected extrinsic evidence into deliberations.

*Id.* at 768.

Wlaschin's speech was no different. Just like the juror in *McCoy* who discussed her belief about contracts based on her experience in real estate, Wlaschin discussed his beliefs about maritime practices, which he had gleaned from his service in the United States Navy. Each spoke of their background and thought out loud about how they perceived the evidence in the case, viewed through the lens of their life experience. Such discourse inheres in the verdict and cannot impeach it.

Long argues that this case is distinguishable because of one aspect: Wlaschin's use of the word "law." Yet no Washington case has held that the utterance of that three-letter word warrants a new trial when the belief about the law is one that is gleaned from life experience and arguably relied upon in evaluating the evidence adduced at trial.

There is no basis to deviate from existing precedent. Long cites no evidence that Wlaschin conducted any research into outside law, obtained or referenced a legal text, conducted research on the Internet, or spoke with anyone other than his fellow jurors. His oral deliberations were based solely upon his disclosed life experience, not an external source of law. His statements of life experience had no relation to the legal issues in this case. The statements inhaled in the verdict. No new trial was warranted.

**B. Because Wlaschin's maritime background was disclosed in voir dire, his discussion of life experience was not misconduct.**

Even if this Court were to hold that a portion of the juror declarations did not inhere in the verdict, there was no juror misconduct. It is not misconduct to draw upon one's life experience.

Jurors may "rely on their personal life experience to evaluate the evidence presented at trial during the deliberations." *Breckenridge*, 150 Wn.2d at 199 n.3. A juror may not inject information that is "outside the recorded evidence of the trial and not subject to the protections and limitations of open court proceedings . . ." *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 270, 796 P.2d 737 (1990), *rev. denied*, 116 Wn.2d 1014, 807 P.2d 883 (1991). To parse this, courts have sometimes examined whether the juror's comments imparted the kind of specialized knowledge that is provided by experts at trial. *Breckenridge*, 150 Wn.2d at

199 n.3. But when the juror's background is disclosed in voir dire, there is no prohibition on the juror's reference to life experiences, including specialized knowledge:

[W]hether a juror's interjection of specialized knowledge 'outside the realm of a typical juror's general life experience' into deliberations constitutes prejudicial misconduct depends on the questions asked during voir dire; a juror does not commit misconduct by bringing knowledge and experiences known to the parties into deliberations.

*McCoy*, 163 Wn. App. at 761 (citing *Richards*, 59 Wn. App. at 274); see also *Breckenridge*, 150 Wn.2d at 204 n.11.<sup>9</sup>

In *Breckenridge*, a juror discussed his wife's experience with migraine headaches and trips to the hospital. The juror's statements constituted his personal life experiences, not extrinsic evidence.

*Breckenridge*, 150 Wn.2d at 204. Such a use of life experience "to evaluate the evidence presented at trial is what jurors are expected to do during deliberations." *Id.*

In *Richards*, a juror applied her medical knowledge when

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<sup>9</sup> This makes sense. "The purpose of the *voir dire* examination is to enable the parties to learn the state of mind of the prospective juror, and to demonstrate, if possible, that the prospective juror is subject to a challenge for cause." *State v. Beck*, 56 Wn.2d 474, 499, 349 P.2d 387 (1960); see also *Lopez-Stayer v. Pitts*, 122 Wn. App. 45, 51, 93 P.3d 904 (2004) (stating that "[t]he primary purpose of voir dire is to give a litigant an opportunity to explore the potential jurors' attitudes in order to determine whether the jury should be challenged."). Peremptory challenges permit a party to remove a prospective juror without cause: "The purpose of [peremptory] challenges is to get off of the jury the person whose bias a party knows or suspects but can't establish on his *voir dire* examination." *Lopez-Stayer*, 122 Wn. App. at 51.

reviewing documents that had been admitted into evidence. 59 Wn. App. at 274. In affirming the trial court, the appellate court noted that the juror's background was disclosed in voir dire and the plaintiff did not remove her from the jury. *Id.*

Both *Breckenridge* and *Richards* are similar to this case. In voir dire, Wlaschin disclosed that he was retired from the United States Navy and that his activities included boating on the Puget Sound. RP 172. Long chose to not ask any questions to determine the extent of this maritime experience. RP 176–93, 213–29. Long had the chance to seek to challenge Wlaschin for cause or exercise a peremptory challenge to strike Wlaschin from the jury. Long chose not to. In fact, Long used his last peremptory challenge to strike a *different* juror.

Wlaschin's discussion of his disclosed life experience—even if it were characterized as “specialized knowledge”—was not misconduct. Under *Breckenridge* and *Richards*, this Court should affirm.

C. Under existing Washington law, there was no abuse of discretion in concluding that there was no misconduct.

Judge Downing correctly concluded that Long did not meet his burden to show juror misconduct. There was no abuse of discretion. A trial court cannot overturn a verdict based upon juror misconduct unless the party seeking a new trial makes “a strong, affirmative showing of misconduct[.]” *State v. Balisok*, 123 Wn.2d 114, 117–18, 866 P.2d 631

(1994) (citing *Richards*, 59 Wn. App. at 271–72). Moreover, appellate courts do not reverse a trial court’s ruling on a motion for a new trial unless the trial court abused its discretion. *E.g.*, *Hill v. GTE Directories Sales Corp.*, 71 Wn. App. 132, 140, 856 P.2d 746 (1993). Even if misconduct were found, the appellate courts give “great deference” to the trial court’s determination that no prejudice occurred. *Richards*, 59 Wn. App. at 271. There was no strong, affirmative showing of misconduct here, and no abuse of discretion in denying Long’s motion for a new trial.

Washington courts have never held that a juror’s discussion<sup>10</sup> of life experience regarding norms, customs, rules, or even laws warrants a new trial. Case law shows that more is required: there must be a concrete nexus between a source of law and the law involved in the case, and there generally is the use of an outside source of law during trial or deliberations. To determine whether a new trial is warranted, a court must determine (1) whether the juror interjected new or novel extrinsic evidence so as to constitute misconduct and, if so, (2) whether such misconduct affected the verdict. *E.g.*, *id.* at 270.<sup>11</sup>

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<sup>10</sup> Long incorrectly argues that the *Clausing* opinion is pertinent, but that case did not involve any alleged juror misconduct. *State v. Clausing*, 147 Wn.2d 620, 628–30, 56 P.3d 550 (2002).

<sup>11</sup> A juror can also commit misconduct by misrepresenting material facts or by failing to disclose material facts during voir dire. *See McCoy*, 163 Wn. App. at 760. Long has never made such an allegation in this case.

For example, when jurors actually reviewed a law book like *Black's Law Dictionary* and looked up the definitions of “negligence” and “proximate cause”—in a case involving negligence claims for personal injury—it was appropriate to grant a new trial. *Adkins v. ALCOA*, 110 Wn.2d 128, 130–31, 135, 750 P.2d 1257 (1988). Or when a juror brought into the jury room a pamphlet that contained state forest protection laws, and the jurors read and commented upon portions of the pamphlet—in a case involving a sawmill fire—a new trial was appropriate. *Bouton-Perkins Lumber Co. v. Huston*, 81 Wash. 678, 681–84, 143 P. 146 (1914).

This case is unlike *Adkins* and *Bouton-Perkins*. There is no evidence that any juror accessed or reviewed an external source of law. Wlaschin’s alleged statements were references to his own life experiences and had no relation to the law at issue.<sup>12</sup>

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<sup>12</sup> Long incorrectly relies upon the *Halverson*, *Loeffelholz*, and *Fritsch* opinions.

Unlike this case, the juror in *Halverson* brought specific data into the jury room (*i.e.*, salary data for a pilot and a civil surveyor), and there was no indication that the juror knew such information from a life experience disclosed in voir dire. *Halverson v. Anderson*, 82 Wn.2d 746, 747–52, 513 P.2d 827 (1973). The information also had a direct nexus to an issue that the jury was instructed to decide: the amount of damages. Importantly, the *Halverson* court recognized that this information did not prejudice every aspect of the trial, specifically holding that the plaintiff’s separate cause of action should not be retried. *Id.* at 752.

The *Loeffelholz* opinion is distinguishable for the same reason: a juror introduced specific salary and retirement data, and there was no indication that it arose from life experience disclosed in voir dire. *Loeffelholz v. C.L.E.A.N.*, 119 Wn. App. 665, 683, 82 P.3d 1199, *rev. denied*, 152 Wn.2d 1023, 101 P.3d 107 (2004). It also had a direct nexus to an issue that the jury was instructed to decide: the amount of damages.

In *Fritsch*, the juror introduced specific data from a lawyer regarding the value of one

This case is much more similar to those of *Breckenridge* and *Richards*, in which jurors referred to or drew upon their life experience in order to evaluate the evidence that was presented to them at trial. Nothing that was discussed contradicted or pertained to the legal issues in the case.

If this Court were to remand for a new trial based on Long's challenge, the result would undermine trial court discretion and impair the trial courts' functioning by undermining the public's trust in the finality of verdicts. Reversal would create an overwhelming and irresistible incentive for losing trial lawyers to chase down jurors and obtain affidavits from them in an attempt to get a second chance at a more favorable verdict, simply because a juror referred to life experience that had nothing to do with the law in the case. Long has failed to show any reason for this Court to divert from its well-reasoned, established precedent.

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month's pain and suffering, which was outside the scope of what was discussed at trial. *Fritsch v. J.J. Newberry's, Inc.*, 43 Wn. App. 904, 907-08, 720 P.2d 845, *rev. denied*, 107 Wn.2d 1006 (1986). This also had a direct nexus to an issue that the jury was instructed to decide: the amount of damages.

In this case, Wlaschin's discussion merely contemplated and echoed the testimony about the liability that Brusco might be exposed to as the result of hiring Morgan to work on a boat before he passed a physical examination. Unlike the juror in *Fritsch*, Wlaschin referred to his personal experience, not extrinsic evidence, to evaluate information that had been received in court.

The jurors in *Halverson*, *Loeffelholz*, and *Fritsch* provided purportedly material facts that had a direct nexus to an issue that those juries were asked to decide, rather than merely engaging in a discussion that was "a more critical examination" of information produced in court. *Loeffelholz*, 119 Wn. App. at 681 (quoting *Balisok*, 123 Wn.2d at 119). In this case, there is no nexus between the statements attributed to Wlaschin and any issue that the jury was asked to decide. Instead, Wlaschin's discussion was related to a non-issue:

**D. Even if this Court were to conclude that the vague opinions and beliefs expressed by Wlaschin were misconduct, their expression could not have affected the verdict because it is undisputed that they had nothing to do with the law at issue.**

Even if Wlaschin's oral deliberations (1) did not inhere in the verdict, (2) went beyond his personal life experience, and (3) somehow constituted misconduct, Long did not establish prejudice. Washington courts have never impeached a verdict when a juror discussed purported "law" that had no relation to the law applicable to the question before the jury. Long argues that the utterance of the word, "law," alone, forms a basis upon which to impeach the jury's verdict. The only cases in which Washington courts have impeached verdicts based upon the introduction of extrinsic law have been those in which the jury referenced a law book or brought a legal pamphlet into the jury room that directly related to the law in the case. To date, no Washington court has impeached a jury's verdict simply because a single juror referenced a belief about *unrelated* laws, customs, practices, or norms. The Court should not do so here.

It is undisputed that Wlaschin's discussion had no relation to the law in this case. *See* Brief of Appellant at 28; *see also* Petition at 8. Because there was no connection between Wlaschin's discussion of life experience involving maritime law and the law involved in the case, it

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the propriety of *hiring* Morgan in the first place.

cannot be said that there was any reasonable doubt that the verdict was prejudiced. Judge Downing sat through the more than two-week trial, listened to the testimony, saw the witnesses testify, heard the inflections in their voices, and noted the concessions by counsel. He was in the best position to conclude that there was no misconduct affecting the verdict, and in making that decision, he did not abuse his discretion.

#### IV. CONCLUSION

After losing a two-week trial, Long claimed that Wlaschin committed juror misconduct by orally contemplating his naval experience, which had been disclosed in voir dire, while discussing the non-issue of the propriety of hiring a man with a prosthetic leg to serve on a tug boat.

These statements inhered in the verdict and could not impeach it. They referred to disclosed life experience that did not constitute misconduct or affect the verdict. They did not pertain to—let alone contradict—any issue that the jury was asked to decide. Long received a fair trial. He is not entitled to a second. This Court should affirm.

Respectfully submitted on this 4<sup>th</sup> day of May, 2015.

SCHWABE, WILLIAMSON & WYATT, P.C.

By:  34211

Colin Polawn, WSBA #34211  
*Of Attorneys for Respondents*

**CERTIFICATE OF SERVICE**

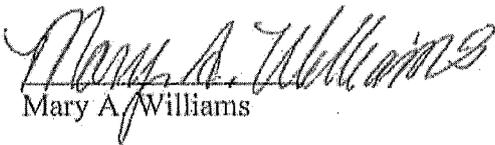
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the 4<sup>th</sup> day of May, 2015, I arranged for service of the foregoing SUPPLEMENTAL BRIEF OF BRUSCO TUG & BARGE, INC., AND BO BRUSCO to the parties to this action as follows:

***SERVED VIA LEGAL MESSENGER***

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Dear Clerk:

Attached please find the following document to be filed with the court:

- Supplemental Brief of Brusco Tug & Barge, Inc., and Bo Brusco

Thank you,

Mary

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