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No. 63091-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

CANTERBURY SHORES APARTMENT OWNERS ASSOCIATION,
JIM BAILEY, PAMELA PURVIS, JIM MERCER, ED LUTZ, LIBBY
ROGERS, JOHN HANSEN, JOHN HUNT, ALEXIS ELLER, NANCY
VAN RAVENZWAAY, MAUREEN MCGEE, LYNN COOK AND
BILL MUNDY,

Appellants,

v.

ALAN NANESS,

Appellee.

RESPONSE BRIEF OF APPELLEE

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I. INTRODUCTION

The trial court granted a motion for new trial based on juror misconduct. It is undisputed that during deliberations two jurors held themselves out as real estate experts and advised the other jurors that it was “impossible to close a real estate deal”, any real estate deal, within nine days. The record shows that there was no testimony from any witness at trial regarding the impossibility of closing a sale within nine days. The trial court did not abuse its discretion in finding that the two jurors’ alleged expert statements and introduction of extrinsic evidence constituted juror misconduct, which misconduct affected the verdict. The trial court in no way abused its discretion in stating: “the fact that two jurors held themselves out as experts in real estate and injected their ‘expert’ opinions that the sale was impossible to close in time regardless of any wrongdoing by defendants’ agent, compels this Court to grant a new trial.” Accordingly, this Court should give the trial court the deference to which it is entitled and affirm the trial court’s order granting a new trial based on juror misconduct.

II. STATEMENT OF THE CASE

Appellee Alan Naness owned two adjoining units in the Canterbury Shores apartment complex in the Madison Park area of Seattle, Washington. CP 13 ¶ 1.1. Mr. Naness remodeled the interior of the two

units, combining them functionally into one residence. CP 14 ¶ 2.1; CP 15 ¶ 2.7. Before doing so, Mr. Naness sought approval from the Canterbury Shores Board of Directors. CP 14 ¶ 2.1. The Board approved Mr. Naness's request to combine the living spaces of the two units in January 1998. *Id.*

After the Board approved the request to combine the two units, it instructed its property manager to seek an opinion from its attorney, James Strichartz, regarding whether Article 20 of the Condominium Declaration applied to Mr. Naness's combination project. CP 14 ¶ 2.2. That article requires a favorable vote of 67% of the homeowners and 51% of their lenders and other actions to approve legally combining two units into one. CP 14-15 ¶ 2.5. After verbally advising the Board that no homeowner vote was necessary, Mr. Strichartz rendered a formal opinion to the Board reiterating that no vote of the homeowners was necessary and that the units could continue as legally separate although functionally combined. CP 14-15 ¶¶ 2.3-2.5.

On January 19, 2005, Dr. George Frank offered to purchase Mr. Naness's home for \$1,475,000. CP 69. Mr. Naness accepted the offer on January 20, 2005. *Id.* The Purchase and Sale Agreement set a closing date of January 28, 2005. *Id.* Dr. Frank requested a short closing because he had to move out of the home he was renting and wanted to avoid

moving twice. Frank Video Dep. 11:15-25, 15:24-16:4. Dr. Frank intended to pay cash for 25% of the purchase price, and he had a commitment or prequalification from Wells Fargo to fund the remaining 75%. *Id.* at 18:13-22, 19:16-20, 25:12-22. While Dr. Frank planned to obtain financing from Wells Fargo, he “probably could have purchased it without financing, but it would have required selling other assets, and there probably would not have been time to do that.” *Id.* at 19:21-20:2.

As part of the sale transaction, CDC Management, Inc., which was the Association’s property manager and agent, prepared a Condominium Resale Certificate, which Certificate is required by the Washington Condominium Act. *Id.* at Ex. 3. Tracy Bates of CDC wrote in the “comments” to the Resale Certificate:

Note that it does not appear that the combining of units 407 & 408 was officially amended & recorded. Owner may be responsible for costs associated with this if it has not been properly done.

Id. Ms. Bates provided a copy of this Resale Certificate to Dr. Frank’s real estate agent, Kathryn Hinds. Frank Video Dep. 10:22-11:1.

Ms. Bates thereafter expanded on her comments in the Resale Certificate and wrote to Mr. Naness to tell him that the Board did not have the authority to grant him approval in 1998 for his project and that he would have to go through the procedures of Article 20 of the Declaration for a combination of units, including a survey, amendment to the

Declaration, and approval by 67% of the homeowners and 51% of the lenders. Frank Video Dep. Ex. 4; CP 15-16 ¶ 2.10.

Dr. Frank discussed with his real estate agent the subjects of the Resale Certificate and the letter from Ms. Bates. Frank Video Dep. 22:8-23:2, 28:1-16, 29:15-30:2, 35:16-19. Dr. Frank believed that he had to turn the units into one legal unit and that there were “two huge steps” to do so: obtain majority homeowner approval and obtain agreement from the lenders on the other condominium units to legally combine the two units. *Id.* at 22:8-23:2, 29:15-30:2. Dr. Frank was concerned that he would not be able to obtain the approval Ms. Bates said was required. *Id.* at 23:3-9, 30:11-9. Dr. Frank was advised that going through such a process would take six months or more, which would not meet Dr. Frank’s needs. *Id.* at 23:3-9, 30:23-25, 33:18-22. “[O]nce [Dr. Frank] learned of the difficulty legally in combining the units, [he] was no longer interested.” *Id.* at 33:16-17. Because of these hurdles raised by Ms. Bates, purchasing the condominium “was not something that [Dr. Frank] was willing to continue to pursue. Frank Video Dep. 23:1-2. Therefore, the sale never closed. Frank Video Dep. 22:3-4.

At trial, Dr. Frank’s loan officer from Wells Fargo testified that Wells Fargo’s lending guidelines would not allow them to lend on Dr. Frank’s proposed purchase because they could not lend on a single

family residence with two tax parcels. Lynch Testimony 3:19-22, 8:8-9:2. Despite that testimony, the loan officer also admitted that she had previously written a single deed of trust on two parcels. Lynch Testimony 20:16-19. And while Wells Fargo opted not to issue a single loan for two legal units, Mr. Naness in fact already had a \$900,000 loan for which a single deed of trust was recorded against both legal units. Hagen Testimony 8:19-9:5.

After the sale to Dr. Frank collapsed, Mr. Naness followed the direction of Tracy Bates and went through the procedures of Article 20. The Canterbury Shores Homeowners membership officially approved the combining of units 407 and 408, and the Amendment to the Declaration to formally combine the two units was recorded in March 2006. CP 16 ¶ 2.12. In late 2006, Mr. Naness negotiated an offer to sell his home for \$1,285,000. CP 16 ¶ 2.14.

Mr. Naness filed a lawsuit against Canterbury Shoes Apartment Owners Association, and the Association's individual board members, for negligence and breach of duties by directors, seeking the difference in the sale price along with other damages. CP 13-19. Mr. Naness claimed defendants were vicariously liable for the negligent actions of their agent, the property manager for the Association, to whom the Board had delegated the duty of fulfilling the Association's statutory duty to deliver a

“Resale Certificate”. *Id.*

The case proceeded to trial on two theories: 1) that defendants had a duty to advise Mr. Naness in 1998 of the steps required to have his two units legally combined; and 2) negligence in preparing the Resale Certificate which caused the sale to Dr. Frank to fail. Mr. Naness agreed to dismiss the first cause of action at the close of his case during trial. CP 115-17. The second cause of action went to the jury.

None of the testimony at trial, not from Dr. Frank, his loan officer, or anyone else, concerned whether or not a real estate sale could close in nine days, let alone whether this real estate action could have closed in nine days. CP 200; CP 110 ¶ 10.

At the end of the trial, the jury returned a verdict finding no negligence. CP 169. Thereafter, Juror No. 8, Janey Hamilton, disclosed statements made by her fellow jurors during deliberations. Ms. Hamilton submitted a declaration in which she declared under penalty of perjury:

One of the jurors, whose first name was Joyce, had made a list over night of her reasons that she would not find for the Plaintiff. Her number one reason was that the deal was doomed to fail from the beginning; that it was impossible to close a real estate deal in that short of time. Joyce and another juror by the name of Brian held themselves out as real estate business experts. Brian echoed the thinking of Joyce and said that there was no way the deal could close that fast.

CP 109 ¶ 7. Ms. Hamilton also testified that she “never heard any witness in Court say that it was impossible to close a deal in 9 days, but they

convinced me that it was so.” CP 109-10 ¶ 10. Ms. Hamilton changed her vote, to vote against Mr. Naness, “based upon the real estate experts on the jury stating that the deal could not close in 9 days.” CP 109 ¶ 9.

Mr. Naness timely filed a motion for new trial, based on the Declaration of Janey Hamilton. CP 99-105; 108-111. Defendants opposed the motion, claiming Ms. Hamilton’s testimony in the verdict, jurors’ opinions regarding the closing date are not extrinsic evidence, and the jurors’ statements could not have affected the verdict. CP 159-67. Defendants made no argument that the sale could not have closed in nine days. CP 156-67. Despite requesting additional time to respond to the motion for new trial, defendants did not file any evidence from any other juror. CP 134, 153-54, 158 at 3:16-17. Defendants did not contradict Ms. Hamilton’s testimony in any way. CP 156-67.

The trial court entered an Order Granting Plaintiff’s Motion for New Trial. CP 199-201. In its Order, the trial court cited applicable Washington precedent on granting new trials for juror misconduct and found, based on the declaration of Ms. Hamilton and Washington law:

two jurors stated categorically that it was “impossible to close a real estate deal” in the nine days specified in Mr. Naness’ purchase and sale agreement with his buyer, and that these two jurors “held themselves out as real estate business experts.” Hamilton declaration ¶7. There was no testimony from any witness at trial concerning the “impossibility” of closing the sale in the nine days specified in the purchase and sale agreement. Therefore,

the jurors' statements to this effect constituted extrinsic evidence and juror misconduct. This Court cannot conclude that it is unlikely that such misconduct affected the verdict in this case.

...

[T]he fact that two jurors held themselves out as experts in real estate and injected their "expert" opinions that the sale was impossible to close in time regardless of any wrongdoing by defendants' agent, compels this Court to grant a new trial.

CP199-201. The trial court vacated the jury verdict and granted a new trial. CP 201. Defendants appealed to this Court. On appeal, defendants raise for the first time the argument that the sale between Dr. Frank and Mr. Naness could not have closed in nine days. *See* CP 200; Opening Brief.

III. ARGUMENT

A. The applicable standard of review is abuse of discretion and the trial court's decision to order a new trial is subject to extra deference.

Washington courts have long upheld trial court decisions to grant a new trial based on juror misconduct. *E.g., Halverson v. Anderson*, 82 Wn.2d 746, 513 P.2d 827 (1973); *Gardner v. Malone*, 60 Wn.2d 836, 376 P.2d 651 (1963); *Allyn v. Boe*, 87 Wn. App. 722, 943 P.2d 364 (1997), *rev. denied*, 134 Wn.2d 1020 (1998). The trial court has discretion to grant a new trial based on juror misconduct. *Richards v. Overlake Hosp. Med. Center*, 59 Wn. App. 266, 271, 796 P.2d 737 (1990). The trial

court's ruling on a motion for new trial will not be reversed absent the appealing party showing that the trial court abused its discretion. *Id.* “[G]reater weight is owed a decision to grant a new trial than a decision not to grant a new trial.” *Id.* A trial court only abuses its discretion when the decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Id.* “[A] new trial must be granted unless ‘it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict.’” *Id.* at 273 (quoting *United States v. Bagley*, 641 F.2d 1235, 1242 (9th Cir. 1981)). If a trial court has any doubt that the juror misconduct affected the verdict, “it was obligated to resolve that doubt in favor of granting a new trial.” *Halverson*, 82 Wn.2d at 752.

The trial court did not err, let alone abuse its discretion, in granting a new trial based on juror misconduct. As discussed below, the trial court's decision to grant a new trial was not manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. To the contrary. The trial court's decision is well-grounded in Washington law.

Defendants must meet the heavy burden of showing the trial court abused its discretion, but they cannot do so because the record does not support defendants' claim of abuse of discretion. Instead, the record

shows the trial court acted well within its discretion when considering Ms. Hamilton's declaration showing introduction of extrinsic evidence in the jury room, which is misconduct, and when it determined such misconduct affected the verdict. Therefore, this Court should affirm the trial court and find that the trial court properly exercised its discretion to order a new trial.

B. The trial court properly ordered a new trial based on juror misconduct.

Washington State Civil Rule 59(a) states "a verdict may be vacated and a new trial granted" for any one of the following causes of action:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors.

CR 59(a)(1)-(2).

Consideration of novel or extrinsic evidence by a jury during deliberations is misconduct and can be grounds for a new trial. *State v. Balisok*, 123 Wn.2d 114, 118, 866 P.2d 631 (1994); *Chiappetta v. Bahr*, 111 Wn. App. 536, 542, 46 P.3d 797 (2002). Where the juror misconduct

at issue is the injection of new or novel evidence, “the test to determine whether the verdict may be impeached and a new trial warranted is first whether the alleged information actually constituted misconduct and, second, if misconduct did occur whether it affected the verdict.” *Richards*, 59 Wn. App. at 270; *Ryan v. Westgard*, 12 Wn. App. 500, 503, 530 P.2d 687 (1975). As this Court previously stated, the “analysis of affidavits concerning jury misconduct and the resolution of the effect of juror discussion of matters outside the record is the province of the trial judge.” *Ryan*, 12 Wn. App. at 504.

1. The trial court properly exercised its discretion in finding that evidence introduced by two jurors in the deliberation room was extrinsic evidence, not just personal life experiences, thus the jurors committed misconduct.

In considering a motion to grant a new trial, the first step for the trial court is to determine if the affidavits of the jurors show misconduct. *Richards*, 59 Wn. App. at 270; *Ryan*, 12 Wn. App. at 503. Juror misconduct exists if a juror places before her fellow jurors facts which were not subject to objection, cross-examination, explanation or rebuttal. *Arthur v. Washington Iron Works Division of Format Intern., Inc.*, 22 Wn. App. 61, 66, 587 P.2d 626 (1978). “The injection of information by a juror to fellow jurors, *which is outside the recorded evidence of trial* and not subject to the protections and limitations or open court proceedings,

constitutes juror misconduct”. *Richards*, 59 Wn. App. at 270 (emphasis in original). Novel or extrinsic evidence is oral or documentary information outside the evidence admitted at trial. *Chiappetta*, 111 Wn. App. at 542; *Richards*, 59 Wn. App. at 270.

“[W]hen a juror introduces into the discussion in the jury room his own unsworn testimony about matters that bear directly upon the material facts of the case at issue, as opposed to discussing an unrelated experience which might enlighten the discussion, such an act is misconduct.” *Ryan*, 12 Wn. App. at 503-04. However, personal experience within the realm of life experiences that a juror may bring into deliberations, and their effect on the collective thought process during jury deliberations, inhere in the verdict and cannot impeach the verdict. *Chiappetta*, 111 Wn. App. at 543; *Johnson v. Carbon*, 63 Wn. App. 294, 301, 818 P.2d 603 (1991). In determining whether a juror’s comments constitute extrinsic evidence rather than personal life experience, courts consider whether the comments impart the kind of specialized knowledge that is provided by expert witnesses at trial. *Breckenridge v. Valley General Hosp.*, 150 Wn.2d 197, 199 n.3, 75 P.3d 994 (2003).

Defendants’ primary argument to show an abuse of discretion is that the two jurors who held themselves out as real estate experts did not

submit extrinsic evidence to the jury, but just submitted their personal life experiences. This argument is not supported by the record.

Ms. Hamilton submitted an unopposed declaration regarding statements made in the jury room. CP 108-10. Ms. Hamilton declared that jurors Joyce and Brian held themselves out as real estate experts and opined that real estate sales cannot close in nine days, and that the sale from Mr. Naness to Dr. Frank could not have closed in nine days either. CP 108-09.

The record is devoid of any testimony or evidence at trial regarding whether or not it was possible to close this (or any) deal in nine days. CP 110; CP 200. Even the trial court stated “[t]here was no testimony from any witness at trial concerning the ‘impossibility’ of closing the sale in the nine days specified in the purchase and sale agreement.” CP 200.

Defendants argue that neither Joyce nor Brian injected extrinsic evidence because evidence on the record already showed the impossibility of closing a real estate deal in nine days: Opening Brief at 31. This claim, however, is contrary to both the findings by the trial court and the statement by Ms. Hamilton. CP 110, 200. Moreover, while Dr. Frank’s loan officer testified that Wells Fargo’s lending guidelines would not allow her to lend on Dr. Frank’s proposed purchase because it was a single

family residence with two tax parcels, the loan officer also admitted that she had previously written a single deed of trust on two parcels. Lynch Testimony 3:19-22, 8:8-9:2, 20:16-19. Furthermore, the evidence at trial showed that lenders can and did issue a single loan on two legal units, for which a single deed of trust was recorded against both legal units. Hagen Testimony 8:19-9:5. Dr. Frank could have obtained financing from a different bank that would have allowed one loan and one deed of trust for two legal units. *See id.* Accordingly, absent from the record is any evidence that the deal could not close within nine days. The only statements to that effect were from jurors Joyce and Brian.

The timing of real estate closings and the “impossibility” to close the transaction within nine days was not within a lay juror’s understanding. Instead, it required the jurors’ claims of specialized knowledge of real estate transactions in the character of expert testimony to persuade other jurors. Introduction of specialized knowledge crosses the line of jury misconduct. *Breckenridge*, 150 Wn.2d at 199 n.3; ER 702 (which requires a witness to be qualified as an expert to testify to about her specialized knowledge).

During the trial there was no expert testimony on the issue of whether a sale could close in nine days; it was not an issue addressed by the parties in open court. Instead, a number of jurors represented

themselves as experts in real estate and convinced other jurors that Tracy Bates's interference with the transaction did not matter because of the "impossibility" of closing within nine days. The only way one could know that is by being an expert on real estate closings and relating specialized knowledge for the other jurors to consider. There is no evidence that this specialized knowledge was somehow the jurors' personal life experiences. Therefore, it was misconduct for those jurors to go beyond the evidence, opine on real estate closing times, and thereby taint the jury verdict by its relying on an unproven fact through such statements.

2. The trial court's finding that the jurors introduced extrinsic evidence is supported by analogous case law.

The Washington Supreme Court case of *Halverson v. Anderson*, 82 Wn.2d 746, 513 P.2d 827 (1973), is directly on point. In *Halverson*, "one juror stated to the other jurors certain matters of fact for which he vouched and which had not been introduced at trial." *Id.* at 751. The juror introduced personal knowledge of salaries plaintiff could earn in certain occupations. *Id.* at 747. The court found that other jurors could submit declarations disclosing the fact of the juror's statement. *Id.* at 751-52. No doubt was thrown upon the veracity of the declaring jurors. *Id.* at 752. Based on the evidence, the Washington Supreme Court concluded that the

trial court correctly determined that the juror who supplied the jury with extrinsic information “was guilty of misconduct in placing before his fellow jurors evidence which was not subject to objection, cross-examination, explanation, or rebuttal.” *Id.* The effect of the evidence on the jury “was properly determined in the sound discretion of the trial court which had observed all the witnesses and the trial proceedings and had in mind the evidence which had been presented.” *Id.* The Washington Supreme Court found that the trial court properly exercised its discretion in granting a new trial. *Id.*

Just like in *Halverson*, Ms. Hamilton submitted a declaration stating that other jurors advised the jury panel of facts and opinions which had not been introduced at trial. CP 108-10. No one has called Ms. Hamilton’s declaration into doubt. Just like in *Halverson*, the trial court determined the jurors supplying the jury with extrinsic information committed misconduct and awarded a new trial. And just like in *Halverson*, this Court should find that the trial court properly exercised sound discretion, after observing all the witnesses and the trial proceedings and having in mind the evidence which had been presented, and affirm the trial court’s decision to grant a new trial.

Along with *Halverson*, other cases are instructive. For example, the misconduct here is analogous to the jury’s misconduct in *State v.*

Briggs, 55 Wn. App 44, 776 P.2d 1347 (1989). In that case, a juror failed to disclose his personal experience with and knowledge of speech disorders, and presented that knowledge in jury deliberations when a criminal defendant's stutter was central to his defense. The court determined that was sufficient to show misconduct. Similarly, and as cited in *Briggs*, *supra*, the court in *Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532 (8th Cir. 1980) found a new trial was required in a matter where a juror stated he "knew from experience" that trucking companies treated truckers badly when the issue at trial was whether the defendant treated the plaintiff fairly.¹ These cases support the trial court's finding in this case.

Despite these controlling cases, defendants cite two cases to argue that the trial court somehow abused its discretion in determining that jurors Joyce and Brian introduced extrinsic evidence to the jury: *Richards v. Overlake Hospital*, *supra*, and *Breckenridge v. Valley General Hospital*, *supra*. While the courts in both cases found no new trial should be granted, neither set of facts is instructive here.

¹ The *Haley* case also raised the issue of whether a verdict may be vacated when an unseated potential juror participates in deliberations; however, the court found the extrinsic material presented during deliberations was one basis for vacating the verdict.

In *Richards v. Overlake Hospital*, the court affirmed the trial court's decision denying a motion for new trial based on a finding that no extrinsic evidence was brought into the jury room. The claimed extrinsic evidence was evidence from one juror, who had specialized quasi-medical training and background, that neurological damage was caused by the pregnant mother's flu instead of negligent health care providers. The court found that the opinion provided by that juror was not extrinsic evidence because the juror drew on her own personal training, experience, and beliefs to draw her own conclusions from the evidence and that her medical knowledge was known by all parties after voir dire. *Richards*, 59 Wn. App. at 274. Moreover, the information about the pregnant mother's flu was already in the record as part of the medical records through the testimony of one the doctors, through the medical reports, and the medical records were sent in to the jury room for the jury's use in deliberation. *Id.* The court found that because this was not extrinsic evidence, there was no juror misconduct. *Id.*

Contrary to the facts in *Richards*, there was no evidence before the jury about the impossibility of closing a real estate sale in nine days. CP 110, 200. Moreover, the two jurors did not merely express their opinions based on experience and uncontroverted evidence, instead they made statements of fact they declared to be true, based on their expert

experience.

In *Breckenridge v. Valley General Hospital*, the court addressed the situation where two jurors shared their personal experiences with treatment for migraines when deliberating about whether the plaintiff's physician should have ordered a CT scan to detect an oncoming brain aneurysm when the plaintiff went to the emergency room for a severe migraine. One juror had migraines herself and the other went to the emergency room with his wife for her migraine treatments. *Id.* at 201. The court stated that “[i]n 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.” *Id.* at 199 at n.3. The court found the jurors’ experiences were not specialized knowledge but every day life experiences. *Id.* at 204.

The jurors in *Breckenridge* had personal experiences with the evidence they introduced to the other jurors. There is no evidence that the two jurors here, however, have such personal experiences. For example, there is no evidence that either juror Joyce or Brian tried to close a real estate sale in nine days and failed. That would be the type of personal experience not considered extrinsic evidence. Instead, the statements made by the two jurors were based on their knowledge gained by expertise

in the real estate industry and are exactly what the *Breckenridge* court said was extrinsic evidence: comments that “impart the kind of specialized knowledge that is provided by experts at trial.” *Id.* at 199 at n.3. Therefore, *Breckenridge* and *Richards v. Overlake Hospital* do not prove that the trial court in this case abused its discretion. Instead, the cases show that the trial court properly exercised its discretion in finding juror misconduct based on jurors Joyce and Brian injecting extrinsic evidence into the jury deliberations.

3. The trial court properly exercised its discretion in finding that the juror misconduct affected the verdict.

Once the trial court reviews the new or extrinsic evidence and determines juror misconduct exists, it must determine whether the juror’s remarks or the new evidence itself “probably had a prejudicial effect on the minds of other jurors and their verdict.” *Ryan*, 12 Wn. App. at 503; *Richards*, 59 Wn. App. at 270-71. “The trial court then has the discretion to grant or deny a new trial.” *Richards*, 59 Wn. App. at 271. “Juror misconduct involving the use of extraneous evidence during deliberations will entitle a [party] to a new trial if there are reasonable grounds to believe the [party] has been prejudiced. Any doubt that the misconduct affected the verdict must be resolved against the verdict.” *State v. Briggs*, 55 Wn. App. 44, 53, 776 P.2d 1347 (1989) (internal citations omitted)

(ordering a new trial based on juror misconduct). “A new trial must be granted unless ‘it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict.’” *Id.* (quoting *United States v. Bagley*, 641 F.2d 1235, 1242 (9th Cir. 1981)).

The misconduct by jurors Joyce and Brian prejudiced Mr. Naness. Viewing the statements in Ms. Hamilton’s declaration objectively, the issue of the “impossibility” of closing the sale, or any sale, within nine days foreclosed the jurors’ opportunity to consider other reasons for the failure of the sale to close, such as the negligence and misstatements made by Ms. Bates. The trial court stated that it could not conclude “that it is unlikely that such misconduct affected the verdict in this case.” CP 200. Further, Ms. Hamilton’s declaration makes it clear that she changed her vote based on the extrinsic evidence shared by the two jurors and that other jurors who were in favor of a plaintiff verdict considered the timing of the closing as material to their consideration. CP 109. The trial court properly exercised its discretion in finding the jury misconduct affected the verdict and in granting a new trial. Defendants have not proven otherwise. Therefore, this Court should affirm the trial court’s decision to grant a new trial based on jury misconduct affecting the verdict.

C. The trial court properly considered Ms. Hamilton's declaration.

Defendants raise three main issues with regard to Ms. Hamilton's declaration, none of which have merit. Defendants first claim, and claim repeatedly, that Ms. Hamilton's declaration is "uncorroborated". Ms. Hamilton's declaration, however, is sworn under penalty of perjury and defendants submitted no evidence contradicting Ms. Hamilton's statements despite having an additional 20 days to respond to Mr. Naness's motion for new trial. CP 110, 134, 153-54, 158 at 3:16-17. Defendants have not cast any doubt on the veracity of Ms. Hamilton's statements; thus Washington law allows her statements to be taken as true and the trial court could properly exercise its discretion relying on such declaration. *See Halverson*, 82 Wn.2d at 751-52.

Defendants also claim the trial court should not have considered Mr. Hamilton's declaration because it is hearsay. In fact, juror affidavits may be considered for the purpose of determining whether there was misconduct. *Richards*, 59 Wn. App. at 271-72; *see also* ER 802 ("[h]earsay is not admissible except as provided by these rules, by other court rules, or by statute"); CR 59(c); CR 43(e)(1).

Finally, defendants claim the statements in Ms. Hamilton's declaration inhere in the verdict. Internal processes by which the jury

reaches its verdict, along with the jurors' motives, intents, and beliefs, inhere in the verdict. *Breckenridge*, 150 Wn.2d at 204-05. In Ms. Hamilton's declaration, she states two jurors held themselves out as real estate experts. She also relates the substance of their "expert" opinions. These are not mere mental processes but statements of fact, which statements are uncontested. While some of the information in Ms. Hamilton's declaration does concern mental processes and may inhere in the verdict, the statements made regarding the two self-proclaimed "experts" and their extrinsic evidence presented to the jury do not inhere in the verdict and are properly considered when deciding whether to grant a new trial. Moreover, the trial court did not consider all of Ms. Hamilton's declaration, excluding from consideration information about the jurors' mental processes. CP 201. The trial court limited its consideration to "the fact that two jurors held themselves out as experts in real estate and injected their 'expert opinions that the sale was impossible to close in time regardless of any wrongdoing by defendants' agent.'" CP 201. Therefore, the trial court properly considered Ms. Hamilton's declaration and did not abuse its discretion when granting Mr. Naness's motion for new trial.

IV. CONCLUSION

Washington law entitles a trial court's decision to grant a new trial based on juror misconduct great deference. A trial court's decision to grant a new trial is only an abuse of discretion when the decision is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. None of those circumstances exist here. Instead, the trial court properly ordered a new trial based on juror misconduct. Two jurors held themselves out as experts and introduced new, extrinsic evidence outside the recorded evidence of trial, all of which affected the verdict. For all of these reasons, this Court should affirm the trial court's decision to grant a new trial.

RESPECTFULLY SUBMITTED this 24th day of September, 2009.

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DECLARATION OF SERVICE

I declare that on the 24th day of September, 2009, I caused to be served the foregoing document on counsel for Appellants at the following addresses via Messenger:

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Susan Smith

Dated: September 24, 2009

Place: Seattle, WA