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NO. 66743-2-I

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

JONE R. GARCIA, as the Personal Representative of the
Estate of FELICIA GARCIA, deceased,

Appellant,

v.

STRONG TRUCKING, INC., a domestic corporation, and
JACOB L. YANEZ,

Respondents.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

Appellant Jone R. Garcia, as the Personal Representative of the Estate of Felicia R. Garcia, deceased, (hereinafter referred to as "Appellant") assigns the following errors:

A. THE TRIAL COURT ERRED BY REFUSING TO ALLOW THE JURY TO CONSIDER AWARDING DAMAGES TO THE WRONGFUL DEATH BENEFICIARIES FOR GRIEF, MENTAL ANGUISH AND SUFFERING, BY:

- 1. Granting The Respondent's Motion In Limine Re: Grief, Precluding Appellant From Presenting Evidence Of The Grief Suffered By Jone Garcia And Marie Crawford, The Children Of Felicia Garcia And The Wrongful Death Beneficiaries; And**
- 2. For Refusing To Give Plaintiff's Proposed Jury Instruction #11 To The Jury.**

Copies of the trial court's Order dated June 25, 2010 and Plaintiff's Proposed Jury Instruction #11 are attached hereto as Appendix A and Appendix B, respectively.

B. THE TRIAL COURT ERRED BY REFUSING TO GRANT APPELLANT'S MOTION FOR A NEW TRIAL ON THE BASIS THAT THE DAMAGES AWARDED WERE SO INADEQUATE THAT THEY MUST HAVE BEEN THE RESULT OF PASSION OR PREJUDICE.

C. THE TRIAL COURT ERRED BY REFUSING TO GRANT APPELLANT'S MOTION FOR A NEW TRIAL ON THE BASIS OF JUROR MISCONDUCT.

II. ISSUES PRESENTED

Assignment of Error No. 1: The trial court erred by refusing to allow the jury to consider awarding damages to the wrongful death beneficiaries for grief, mental anguish and suffering.

Following the amendment in 1967 of RCW 4.24.010 that allows jurors to award damages for loss of love as a result of the wrongful death of a child, this statute has been interpreted as allowing parents to be awarded compensation as grief, mental anguish and suffering. Now that RCW 4.20.020, which allows a jury to award "such damages as, under all circumstances of the case, may to them seem just," has been interpreted as including damages for loss of love, should the interpretation of RCW 4.20.020 be harmonized with RCW 4.24.010 to allow a jury to award to children damages for grief, mental anguish and suffering for the wrongful death of a parent?

Assignment of Error No. 2: The trial court erred by refusing to grant appellant's Motion for a New Trial on the basis that the damages awarded were so inadequate that they must have been the result of passion or prejudice, pursuant to CR 59(a)(5).

In light of the fact that the substantial and uncontradicted evidence demonstrated an incredibly strong bond between Felicia Garcia and her children; a bond extinguished when the defendant's truck admittedly ran a red light and killed Mrs. Garcia on her birthday, did the trial court abuse its discretion by failing to conclude that the award of \$75,000 by the jury

to each of the two children (less than what was suggested by defense counsel) was so inadequate that it must have been the result of passion or prejudice?

Assignment of Error No. 3: The trial court erred by refusing to grant appellant's Motion for a New Trial on the basis of jury misconduct.

Did the trial court abuse its discretion by failing to order a new trial despite evidence of the introduction of extrinsic evidence by jurors into the jury deliberations? Evidence of consideration of extrinsic evidence being interjected into deliberations included a life insurance settlement, juror #4's "lifetime earnings" as set forth in his personal social security statement and, most egregiously, the amount of compensation (juror #4 told the jury it was \$100,000) families of servicemen receive if a family member in the Armed Forces is killed serving our country in Afghanistan? The trial court expressly concluded that the amount families of servicemen and women killed in battle in Afghanistan receive as compensation from the U.S. government did constitute extrinsic evidence that was improperly interjected into deliberations, yet still denied the Motion for a New Trial.

III. STATEMENT OF MATERIAL FACTS

A. INTRODUCTION

Respondents admitted that respondent Jacob Yanez, while acting within the scope and course of his employment as a truck driver for respondent Strong Trucking Inc., was negligent and that his negligence was a proximate cause of the death of Felicia Garcia on April 23, 2007. CP 75. The only issue left to be decided by the jury was damages.

B. JURY CONSIDERATION OF DAMAGES FOR GRIEF, MENTAL ANGUISH AND SUFFERING

Plaintiff's (Appellant's) Proposed Instructions included a damages instruction that specifically allowed the jury to consider damages for grief, mental anguish and suffering. CP 19-46. The specific damages instruction is identified as Plaintiff's Proposed Instruction number 11. CP 36-37. See, Appendix B. Plaintiff's (Appellant's) Trial Brief included a discussion of the law in support of Plaintiff's Proposed Instruction number 11. CP 63-65.

Concurrently, defendants (respondents) filed Motions in Limine that included a motion in limine asking the court to exclude any evidence of grief as a result of decedent's death. CP 510-12. Appellant's response to this particular motion is contained within Plaintiff's Memorandum in Opposition to Defendant's' Motions in Limine. CP 519-26. The trial court

granted Respondent's motion and ordered that "Plaintiff is precluded from presenting evidence for the purpose of proving the grief of plaintiff's....." CP 544-46. See, Appendix A.

The Court's Instructions to the Jury include number 13, which instructed the jury on what could be considered when awarding damages to Jone Garcia and Marie Crawford, the children of decedent Felicia Garcia. CP 550-69. The damages instruction given by the trial court does not include consideration of grief, mental anguish or suffering. CP 565.

In effect, the issue of whether the jury would be permitted to consider damages for grief, mental anguish and suffering, as requested in Plaintiff's Proposed Instruction number 11, was determined by the trial court in the order granting the Defendants' (respondents') Motion in Limine. The discussion of Plaintiff's Proposed Instruction number 11 is set forth in the discussion of jury instructions with the trial court:

"MR. GARDNER: 11 as a matter of, again, making a record, I need to take exception to not being given, because it specifically includes grief and sorrow and –

THE COURT: Was that decided on summary judgment?

MR. GARDNER: It was. It's already been –

THE COURT: Oh.

MR. GARDNER: It's already been decided.

THE COURT: Right.

MR. GARDNER: I am submitting it because if it happened to end up on appeal, I think that that – it is the law.

THE COURT: Okay.

MR. GARDNER: I mean, there's no question that the law, but I'd like to see it overturned." 07/12 RP 9-10

Appellant properly excepted to the failure of the trial court to give his proposed damages instruction number 11, which included consideration of damages for grief, mental anguish and suffering. 07/12 RP 9. In summary, the legal support for giving Plaintiff's Proposed Instruction number 11, including consideration of damages for grief, mental anguish and suffering, was properly presented to the trial court and preserved for appeal. The trial court refused to allow evidence of grief to be presented during trial and declined to give a damages instruction that advised the jury that they could consider the grief, mental anguish and suffering of Felicia Garcia's children when awarding damages pursuant to RCW 4.20.020.

C. THE JURY'S AWARD OF WRONGFUL DEATH DAMAGES IS SO INADEQUATE THAT IT MUST BE THE PRODUCT OF PASSION OR PREJUDICE

Felicia Garcia died as a result of injuries suffered on April 23, 2007 when a truck driven by defendant Jacob Yanez, while acting in the course of his employment for defendant Strong Trucking, ran a red light

and T-boned Mrs. Garcia's vehicle. CP 66. Defendants stipulated to liability. CP 75. Damages were left to be determined by the jury. Plaintiff called thirteen damages witnesses to testify at trial. No witnesses were called by the defense.

Felicia was born in a rural village in the Philippines on April 23, 1929 – 78 years to the day before her fatal accident. 07/08 RP 80. She was the fourth of nine children. Felicia's family had a farm and her father also toiled as a fisherman. 07/08 RP 16. One of her younger brothers, George Refuerzo, testified that he and several of his siblings were still in the process of being raised at home when their father died. 07/08 RP 16. Prior to that time, Felicia had become the first person in her family to graduate from college and was working as a teacher. 07/08 RP 17. Felicia was the only member of the family who had a paycheck to contribute to the family finances and served as a surrogate parent for her younger siblings after their father died. 07/08 RP 16-18.

After Felicia married Johnny Garcia they immigrated to the United States in 1960 where they became U.S. citizens, planted a blueberry farm from scratch, and started a family. 07/12 RP 56, 66. Jone (pronounced "John") was born in 1961 and Marie was born in 1962. 07/07 RP 87; 07/12 RP 66. Felicia continued to financially assist her family in the Philippines after she and her husband had immigrated to the United States.

07/07 RP 106 – 7. She paid for her brother George's education. 07/08 RP 19. She sponsored and financially supported relatives who legally immigrated to the United States, including her brother George, her cousin Juliana Garcia, and Juliana's husband. 07/07 RP 102; 07/08 RP 19. Felicia was the "anchor" in the family. 07/07 RP 105. Felicia continued to support family members, even after she had retired, including paying for the education of two of her nephews in the Philippines. 07/07 RP 92.

In addition to raising Jone and Marie, Felicia attended the University of Puget Sound in order to obtain a teaching certificate that allowed her to teach in United States. She worked as a teacher, later worked for HITCO, assembling airplane parts, and managed the family blueberry farm. 07/07 RP 90. Obviously education was important to Felicia, an attribute she instilled in her children, and both Jone and Marie graduated from WSU. 07/07 RP 87; 07/08 RP 112.

Felicia's husband, Johnny Garcia, died in 1985. 07/12 RP 56-57. Jone moved back to the family home at age 24 to help his mother run the blueberry farm until they were able to lease it to another farmer. 07/12 RP 57. She was still active in the management of her blueberry farm, even after it had been leased to another farmer, up until the time of her death. 07/07 RP 14-19. Felicia remained extremely active during her retirement years. She organized charitable events and served as an officer for the

Filipino-American Women's Society. 07/07 RP 109; 07/08 RP 55. Felicia took care of her own yard, including mowing the lawn. 07/07 RP 22-23, 54-56. She grew enough flowers on her own that many of them were sold, through a vender, at the Pike Place Market. 07/07 RP 57.

Felicia came across as a more energetic, younger individual than one would expect of a 77-year-old woman, according to a wide variety of individuals. For example, her neighbor, Michelle Irvin, described her as someone who had the energy of a 60-year-old, rather than late 70's. 07/07 RP 5. She also recalls hearing Felicia play the piano (full, complicated pieces – not just portions of songs) from her home nearby. 07/07 RP 6. The farmer who leased the blueberry farm, Thomas Maskal, described her as a "vibrant, with-it lady" and as "extremely capable." 07/07 RP 22-23. A number of individuals talked about having watched her exercise and that she had an organized exercise routine she did on a daily basis. 07/07 RP 112; 07/08 RP 25, 32, 43. Even in the last year of her life, she jumped rope and played hopscotch with her granddaughter, Kyla Garcia, and grandson, Jayze Crawford. 07/08 RP 32-33, 42.

Felicia's primary care provider, Dr. Rowena Reyrau, testified that Felicia was "more healthy than most of the women that I know of that age, definitely." 07/01 RP 13. Dr. Reyrau described Felicia as "very, very active" and "independent in her decisions." 07/01 RP 14. She was very

impressed that Felicia exercised on a daily basis and was still mowing her own lawn. 07/01 RP 14. Felicia did not smoke and did not drink. 07/01 RP 17. During the 5 years Dr. Reyrau was Felicia's primary care provider, her weight ranged between 114 and 125. Her BMI was 23, which means it was in the ideal body weight classification for her height. Felicia had reported to her physician that she weighed 120 pounds in college. 07/01 RP 18-19. Dr. Reyrau testified that Felicia was healthier, more independent and more active than the average 78-year-old woman and most likely would have lived longer than average for a 78-year-old woman. 07/01 RP 17.

Felicia and her children, Jone and Marie, remained extremely close, even after they started families of their own. For example, Felicia moved in with Jone and his wife, Kristin, for the first 6 months after their daughter Kyla was born. 07/08 RP 123. It was common for Felicia to babysit Kyla all the way up through the last year of her life. 07/08 RP 124-25. Jone and/or Kristen would routinely call Felicia on a daily basis either before 7:00 PM or after 8:00 PM – so as not to interrupt her two favorite TV shows. 07/08 RP 58. Marie and her husband, Jobe, and son, Jayze, lived very close to her mother and they saw her at least once a week. 07/07 RP 62. Felicia was Jayze's regular, daily babysitter, during the summer, even during the last summer of her life. 07/08 RP 35.

Family activities were often centered at Felicia's home, where she did much of the cooking, including a number of traditional Filipino dishes. 07/08 RP 68-69, 78-79. Felicia joined her family on a number of vacations, including a 2005 trip to Disney World, where she easily kept up with the family, despite starting the day at 7:00 AM and returning to the hotel after dark. 07/07 RP 79.

There was no question, based upon the testimony of the witnesses, that Jone and Marie both had extremely close and loving relationships with their mother, that were cut short by the negligence of the defendants. 07/08 RP 62-63. The impact of Felicia's death was captured by her daughter's testimony. Marie noted that as she was getting older her relationship was evolving and they were becoming closer as friends. Her mother's death left a "big void for me." 07/08 RP 79-80.

D. JUROR MISCONDUCT

Following trial, which included unrebutted testimony establishing an incredibly close and important relationship between Jone and Marie, and their mother, Felicia, the jury awarded only \$75,000 to each of them. CP 118-19. Plaintiff requested wrongful death damages of \$2.5 million, each, and the defense argued for approximately \$100,000 each. CP 143.

Appellant moved for a new trial based, in part, upon evidence of juror misconduct. CP 140-167. Declarations of two of the jurors,

Raymond Albright and Loyal Brown, were submitted in support of the motion. CP 133-37, 175-77.

1. Material Non-Disclosure

Not a single juror during jury selection disagreed with the concept of monetary compensation for the loss of a parent's love, care, companionship and guidance. However, during deliberations, numerous jurors (numbers 3, 4, 5, 10 and 11) argued that there should be no compensation for the loss of love and companionship for philosophical reasons, including the concept that "love is priceless." CP 134, 176.

Juror #9 used to work as a truck driver and had a CDL (commercial driving license) of her own. However, she did not raise her hand when the panel was asked if anyone worked as a truck driver.

2. Extrinsic Evidence

- **Compensation to a family for the death of a serviceman or woman killed while serving in Afghanistan.** Juror #4 repeatedly interjected "evidence" during deliberations that families of US servicemen killed in Afghanistan receive \$100,000. He argued that based upon this clearly extrinsic "evidence," no one should receive more for the death of a family member than what the families of servicemen receive when a family member dies while serving our country in Afghanistan. CP 133-37, 170, 175-77.
- **Insurance settlement.** Jurors #3 and 4 repeatedly argued that Jone and Marie had already received an "insurance settlement" by way of life insurance prior to trial. CP 133-37, 175-77. There was no evidence of any life insurance settlement. Jurors #3 and 4 began discussing the likelihood of a life insurance settlement even before the case had been submitted to the jury. CP 133-37.

- **Juror #4's lifetime earnings.** During deliberations, juror #4 said that he looked at his Social Security statement at home that set forth his "lifetime earnings" of \$1.5-1.6 million. He argued that this extrinsic evidence supported a low award by stating that if he or anyone in the jury ran a red light and killed someone they would be "bankrupted" by a large verdict. CP 135, 170, 176.
- **Juror #11 repeatedly referenced the fact that her claim from injuries caused by a bus accident had been "thrown out," while advocating for a \$0 award.** CP 176. CP 169-70. During jury selection, juror #11 did not disclose that her claim had been "thrown out." Rather, she stated that "I had dropped the claim early," and when asked whether it was a big factor in her life replied, "Not at all." 06/30 RP 112.

The trial court issued an Order directing the parties to provide supplemental briefing on whether the allegations contained in the Declarations of jurors Raymond Albright and Loyal Brown inhere in the verdict. CP 188-89. The trial court issued an order dated November 4, 2010 that concluded, in part, as follows:

"The averment in the juror declarations that juror #4 stated as fact that soldiers who died in Afghanistan get \$100,000, if proven, is extrinsic evidence that would not inhere in the verdict." CP 369.

The trial court further ruled that the parties were entitled to contact jurors to question them on the limited issue of what, if anything, was said during deliberations regarding soldiers who die in Afghanistan getting \$100,000. CP 369.

Appellant submitted four additional juror declarations, including the Second Declaration of Raymond Albright, Second Declaration of Loyal Brown, Declaration of Ellen Barayuga and Declaration of Terri Gordon. CP 395-402. Mr. Albright testified as follows in his Second Declaration:

"I specifically recall that at least 3 times during the deliberations, jurors made comments about a \$100,000 death benefit for a soldier's death in Afghanistan. Juror #4 brought it up within the first half hour of deliberations and said that "**nobody's life was worth more than a soldier dying in Afghanistan and that the families received \$100,000.**" He was so adamant and sure of himself that no one questioned him. I recall that when I was in the service it was \$1000 and knew it had gone up, but did not know how much. The jury instructions said not to do our own research, so I couldn't look it up. Everyone took Juror #4's statement as face value. It concerns me to learn that he was wrong and it is actually over \$400,000. The discussion about this issue was scattered throughout deliberations – coming up at least 3 times that I recall, especially when talking about the value of a mother and her age. Juror #3, #5 and #11 all nodded in agreement with #4 when he would bring up this topic." CP 396. (Emphasis in original).

Mr. Brown testified in his Second Declaration as follows:

"Juror #4, John Barna, said that "**if a soldier goes to war and dies in a war, they get \$100,000 and this person shouldn't get this much because they are not as valuable as a soldier.**" This was said closer to the end of deliberations. Everyone was sitting there all upset and not talking and couldn't agree on the amount – that's when #4 brought this up." CP 398. (Emphasis in original).

Ms. Barayuga testified in her Declaration as follows:

"Towards the end of the first day of deliberations and in the morning of the second day, Juror #4 would interject that military personnel who died in combat received between \$40,000 and \$70,000. I do not recall Juror number 4 ever mentioned a dollar amount as high as \$100,000. Whenever we took a poll he kept coming back to and expressed that military personnel who died in combat got \$40,000-\$70,000. He interjected this at least 3-5 times whenever we took polls to decide an amount for the verdict."

Even Ms. Gordon, the foreperson who was strongly in favor of the verdict and supported of the concept that nothing should be awarded for the loss of love, testified in her Declaration as follows:

"I do recall juror #4, John Barna mentioned during deliberations that the families of soldiers who die in Afghanistan receive \$100,000."

In January, 2011 (there is no exact date in the document) the trial court denied the motion for a new trial. However, the trial judge expressly concluded as follows:

"NOW, IT IS HEREBY FOUND that the statement of Juror #4 regarding soldiers' death benefits constitutes improper extrinsic evidence. There are not reasonable grounds to believe that plaintiffs were prejudiced thereby." CP 494-95. See, Appendix C.

On February 4, 2011 the trial judge denied appellant's motion for reconsideration, concluding "that there are not reasonable grounds to believe that plaintiff was prejudiced by juror misconduct." CP 496-97. See, Appendix D. Appellant contends that this conclusion constitutes an

abuse of discretion and fails to meet the standard set forth by our Supreme Court and Court of Appeals; namely, that the trial court must order a new trial unless an objective evaluation of the extrinsic evidence and the verdict establish beyond a reasonable doubt that it had no effect on the verdict. If the trial court has any doubt as to this conclusion, it must order a new trial.

IV. ARGUMENTS

A. STANDARDS OF REVIEW

A trial court abuses its discretion when a decision is based upon an error of law. *Council House Inc. v. Hawk*, 136 Wn. App. 153, 159, 147 P.3d 1305 (2006). Appellant contends that as a matter of law RCW 4.20.020 should be interpreted as allowing the jury to consider a child's grief, mental anguish and suffering when assessing damages sustained as the result of the wrongful death of a parent. By excluding evidence of the grief suffered by the wrongful death beneficiaries, Jone Garcia and Marie Crawford, and refusing to give a damages instruction that allowed the jury to consider grief, mental anguish and suffering, the trial court committed an error of law.

The standard of review for the grant or denial of a new trial is as follows:

"The grant or denial of a new trial is a matter within the trial court's discretion. 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. Greater deference is owed the decision to grant a new trial than the decision to deny a new trial."
Kuhn v. Schnall, 155 Wn. App. 560, 570-71, 228 P.3d 828 (2010).

Appellant contends that the trial court abused its discretion within the standard set forth in *Kuhn* in denying his motion for a new trial.

B. THE TRIAL COURT ERRED WHEN IT GRANTED RESPONDENTS' MOTION IN LIMINE AND EXCLUDED EVIDENCE OF GRIEF, AND WHEN IT FAILED TO GIVE A DAMAGES INSTRUCTION THAT ALLOWED THE JURY TO CONSIDER DAMAGES FOR THE GRIEF, MENTAL ANGUISH AND SUFFERING OF THE WRONGFUL DEATH BENEFICIARIES, JONE GARCIA AND MARIE CRAWFORD.

Washington law is inconsistent with respect to whether damages for grief, mental anguish and suffering can be awarded for the death of a loved one under Washington's wrongful death statutes, RCW 4.20.020 (wrongful death of a spouse or parent) and RCW 4.24.010 (wrongful death of a child). The evolution of our Supreme Court's interpretation of RCW 4.24.010, and those damages which may be awarded by the jury to the parents for the wrongful death of a child, is instructive.

The right for parents to seek compensation for the wrongful death of a child was provided first by statute in Washington in 1869. 1869 p. 4

§9, RRS §184. Initially this statute was interpreted as only allowing damages to the parents for the value of the child's services from his or her date of death to the age of majority, less what it would have cost the parents to support and maintain that child. See, *Hedrick v. Ilwaco Ry. and Nev. Co.*, 4 Wash. 400, 30 Pac. 714 (1892). In 1967 our Supreme Court concluded that this statute must be construed to include compensation for loss of companionship of the child, but still did not allow for consideration of compensation for loss of love, grief, mental anguish or suffering. *Lockhart v. Besel*, 71 Wn.2d 112, 117, 426 P.2d 605 (1967).

After *Lockhart* was decided, the Legislature amended RCW 4.24.010 by adding a new paragraph to the statute that read (and continues to read) as follows:

"In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just." 1967 ex.s. c 81 § 1.

Our Supreme Court concluded that the intent of our Legislature, by amending the statute to allow the jury to award damages for loss of love and destruction of the parent-child relationship, was to allow the jury to consider damages for grief, mental anguish and suffering. *Hinzman v.*

Palmanteer, 81 Wn.2d 327, 329, 501 P.2d 1228 (1972); *Wilson v. Lund*, 80 Wn.2d 91, 99, 491 P.2d 1287 (1971).

In addition, our Supreme Court also noted that there were other significant and fundamental reasons which compelled a conclusion to allow jurors to consider grief, mental anguish and suffering when assessing the damages suffered as a result of the wrongful death of a child:

"Beyond this, however, we believe there are more fundamental reasons which compelled a conclusion that the amendatory language was intended to expand damage recovery in such cases to include the element of mental suffering.

Judicial decisions regarding the definition and measurement of various elements of damage have often fallen short of producing consistent, rational and definitive standards. The area of tort damages, in particular, has produced myriad conflicting standards for allowing recovery of damages. Much of the confusion is unnecessary and could easily be obviated if legislatures and courts were to adopt and apply a more rational model for evaluating such damages."

Wilson v. Lund, supra at p. 97.

The Washington Pattern Instruction that provides guidance to our trial courts with respect to damages that may be awarded to plaintiffs for the wrongful death of a child now includes consideration of non-economic damages for the grief, mental anguish and suffering of the parents as a result of their child's death. Washington Supreme Court Committee on

Jury Instructions, Washington Practice Volume 6, Washington Pattern Jury Instructions – Civil, WPI 31.06.01, pages 339-40 (5th Ed. 2005).

Although RCW 4.20.020, the statute that provides a cause of action for the children of a deceased parent, has not been specifically amended to add compensation for "love" as an element of damages, our courts' interpretations of the statute have evolved to the point where it has been concluded that the jury may award compensation to a child for the loss of a deceased parent's "love." See, *Kramer v. Portland-Seattle Auto Freight, Inc.*, 43 Wn.2d 386, 397, 261 P.2d 692 (1953). In essence, what was accomplished by way of a statutory amendment of RCW 4.24.010 has been accomplished in the context of RCW 4.20.020 by the evolution of the common law.

RCW 4.20.020 provides broad authority for the jury to award damages:

"In every action the jury may give such damages as, under all circumstances of the case, may to them seem just."
RCW 4.20.020.

This language in RCW 4.20.020 has remained unchanged since the 19th century. Initially, while describing this as a "very liberal rule," our courts interpreted the statute as allowing consideration as damages for a child upon the wrongful death of a parent, in addition to damages for loss of support, the "loss of such comforts, conveniences and also of such

education as the parent might have been expected to bestow upon him." *Walker v. McNeill*, 17 Wash. 582, 593, 50 Pac. 518 (1897). Thirty-eight years later our Supreme Court held that in addition to pecuniary losses the jury may also consider "the value of his [the deceased parent's] value of his daily services, attention and care bestowed on his family, and the loss of comforts, conveniences and of education suffered by minor children." *Pearson v. Picht*, 184 Wash. 607, 613, 52 P.2d 314 (1935). Neither of these cases allowed for compensation for the value of the lost "love" of the parent or for "solace." See, *Walker* at p.593; *Pearson* at p. 613.

In 1953 our Supreme Court approved a jury instruction that allowed the jury to consider the loss of "**love**, care, protection, services, guidance and moral and intellectual training and instruction" suffered as a result of the wrongful death of a parent. *Kramer v. Portland-Seattle Auto Freight, Inc.* supra at p. 397. (Emphasis provided.) This is the first time that our Supreme Court or Court of Appeals held that compensation could be provided to a wrongful death beneficiaries for the loss of "love" of a deceased parent.

More recently, our Supreme Court created a common law cause of action for children for damages for loss of consortium when a parent is injured. *Ueland v. Pengo Hydra-Pull Corp.*, 103 Wn.2d 131, 691 P.2d 190 (1984). The Court specifically noted that a child can be awarded

compensation for loss of consortium in an action arising out of the wrongful death of a parent under RCW 4.20.020 and cited *Kramer* as authority for the right of a child to recover for loss of parental consortium beyond the age of majority. *Ueland v. Pengo Hydra-Pull Corp.*, supra at p. 140.

The issue of whether the evolution of the common law in Washington to allow jurors to consider the loss of "love" of a parent as damages in a wrongful death action under RCW 4.20.020 provides the jury with the opportunity to consider damages for grief, mental anguish and suffering is a matter of first impression for this court. Although there has been a common law evolution of the interpretation of RCW 4.20.020 to include the consideration of lost "love" when compensating children for the wrongful death of a parent, the issue of whether allowing compensation for loss of love includes the right to consider compensation for grief, mental anguish or suffering has never been analyzed.¹

¹ There are US District Court trial judge opinions that reference Washington law as providing compensation for the "loss of love, affection, care, service, companionship, society, training and consortium" for a child of a parent who has died. See, *Rentz v. Spokane County*, 438 F.Supp.2nd 1252, 1258 (E.D. Wash. 2006); *Chapple v. Ganger*, 851 F.Supp. 1481, 1487 (E.D. Wash. 1994); *Marin v. United States*, 814 F.Supp. 1468, 1476 (E.D. Wa. 1992). The trial judge in *Chapple* suggested that our Court of Appeals in *Bowers v. Fibreboard Corporation*, 66 Wn. App. 454, 460, 832.2d 523, review denied, 120 Wn.2d 1017 (1992) held that no damages may be awarded for grief or bereavement, but no such holding is contained anywhere in the *Bowers* opinion.

A jury instruction given by the trial court in 1969 in a Clark County case involving the wrongful death of the plaintiff's mother is set forth in a footnote and includes the clause, "In determining 'pecuniary loss' you are not to consider grief or sorrow of the survivors." *Pancratz v. Turon*, 3 Wn. App. 182, 188-89 fn 5 473 P.2d 409 (1970). However, the issue in that case was not whether the jury should now be able to consider the wrongful death beneficiaries' grief, mental anguish and suffering, but whether an adult child needs to establish dependency in order to pursue a claim (he or she does not) and whether the admission of certain evidence violated the collateral source rule, mandating a new trial on damages.

Significantly, no cases have analyzed whether the change in Washington common-law to include consideration of damages for loss of "love" for the death of a parent should be interpreted the same way the statutory inclusion of damages for lost "love" for the death of a child under RCW 4.24.010 has been interpreted by our Supreme Court. Consistency requires that juries, when evaluating the damages suffered by a child as a result of the death of a parent, be allowed to consider compensation for grief, mental suffering and anguish, just as they are allowed to consider these factors when evaluating damages suffered by a parent as a result of the death of a child. Such a conclusion would be consistent with *Wilson v. Lund*, supra, in which our Supreme Court

expressly criticized the "myriad conflicting standards" and noted that these conflicts could be obviated if the courts took a more rational and consistent approach. *Wilson v. Lund*, supra at p. 97.

Refusing to allow consideration of damages for grief, mental anguish and suffering of the survivors of the death of a parent, yet allowing the same jury to consider the impact on the survivors of the loss of the "love, care, companionship and guidance" of the parent, creates confusion and inconsistency at trial. A review of the Order entered by the trial judge in the case at bar in response to the respondents' Motion in Limine concerning evidence of grief highlights this confusion and inconsistency. CP 544-46. See, Appendix A. This inconsistency forced the trial judge in this case, as in other similar cases, to try and identify what evidence may be relevant as to the nature and extent of the survivors' damages for the loss of their parent's love, care, companionship and guidance, but which were not focused on what is determined to be non-compensable damages for grief, mental anguish and suffering. This Order includes the following language illustrating this problem:

"Plaintiff is precluded from presenting evidence for the purpose of proving the grief of Plaintiffs' and Plaintiffs' family and community. Evidence may be presented to establish loss of love, care, companionship and guidance including about the initial reactions of decedent's surviving children the day they learned of decedent's death and the actions they and family members took in response to the death. Ruling as to the extent of such testimony,

particularly on the part of persons other than the Plaintiffs will be reserved until the time of trial when the Court can make an ongoing assessment as to its probative value versus prejudicial effect on the issues to be determined.

.....
Plaintiff may present evidence regarding decedent's funeral service including about the number and diversity of people present in order to describe and illustrate the extent of the loss for which her surviving children are seeking compensation. Plaintiff will not be permitted to present evidence describing the grief exhibited at the funeral. The Court reserves ruling to the time of trial regarding whether testimony presented is cumulative and/or regarding the assessment of its probative value versus its prejudicial effect." CP 544-45. See, Appendix A.

The incongruity of allowing the jury to consider compensating the children of a deceased parent for damages for the loss of that parent's love, care, companionship and guidance, yet not being able to consider the nature and extent of the survivors' grief, mental anguish and suffering is evident in the language of this Order. Obviously, the nature and extent of a survivor's grief, mental anguish and suffering may be relevant as to the nature and extent of the damages sustained by way of loss of the deceased parent's love, care companionship and guidance. This outdated and strained interpretation of RCW 4.20.020 creates a mine field for the trial judge to attempt to navigate with respect to the admissibility of evidence. For example, how a child reacts at a parent's funeral certainly is evidence of grief and mental anguish, but may also be relevant as to the nature and extent of the damages suffered as a result of the loss of that parent's love.

Interpreting the loss of "love" of a parent as including grief, mental anguish and suffering in the context of RCW 4.20.020 would be consistent with our Supreme Court's interpretation of the loss of "love" of a child in the context of RCW 4.24.010. Eliminating this inconsistency would also simplify the task of the trial judge in cases involving the wrongful death of a spouse or a parent.

Our wrongful death statutes are to be liberally construed.

Schumacher v. Williams, 107 Wn. App. 793, 797, 28 P.3d 793 (2001); *Roe v. Ludtke Trucking Inc.*, 46 Wn. App. 816, 819, 732 P.2d 1021 (1987). It is difficult to comprehend how Washington's wrongful death statute applicable to the death of a parent that provides that the jury may award all damages which "may to them seem just" and that has been interpreted as including non-economic damages such as love, care, companionship, and guidance, should not also be interpreted as allowing the jury to consider damages for grief, mental distress and suffering, when our Supreme Court specifically permits the consideration of those damages when parents lose a child. The Supreme Court in *Wilson* concluded that the statutory change in the law expressly including damages for "love and companionship" in RCW 4.24.010 should be interpreted as also allowing the jury to consider damages for grief, mental distress and suffering. Now that the common-law provides that juries may consider loss of "love and companionship"

when awarding damages to a child for the wrongful death of a parent pursuant to RCW 4.20.020, consistency requires that loss of "love and companionship" include consideration of grief, mental anguish and suffering.

The distinction between the interpretation of the two statutes is artificial, outdated and unrealistic. The respective language of the statutes is too close to rationally support this type of distinction. It is nonsense to suggest that a "liberal construction" of a statute that directs our courts to allow the jury to "give damages as, under all circumstances of the case may to them seem just" prohibits consideration of damages for grief, mental distress and suffering, particularly when this interpretation is in direct conflict with the more modern interpretation of RCW 4.24.010. It is time for our courts to follow the invitation implicit in the Supreme Court's language in *Wilson* and take a "more rational and consistent approach." *Wilson v. Lund*, supra at page 97.

E. GIVEN THE NATURE AND EXTENT OF THE EVIDENCE THAT ESTABLISHED THAT THERE WAS A STRONG AND LOVING RELATIONSHIP BETWEEN FELICIA GARCIA AND HER CHILDREN, JONE AND MARIE, AWARDS OF \$75,000 TO THE WRONGFUL DEATH BENEFICIARIES CAN ONLY BE THE RESULT OF PASSION OR PREJUDICE.

The jury's verdict of \$75,000 each to the wrongful death beneficiaries, lower even than the \$100,000 suggested by defense counsel,

is not supported by the evidence and can only be the result of passion or prejudice. The respondents presented no witnesses, nor presented any evidence whatsoever with respect to the issue of the damages to be awarded for the wrongful death of Felicia Garcia. Appellant's witnesses presented evidence that established that Felicia Garcia was a remarkable woman and incredibly close mother to her son, Jone, and daughter, Marie. As supported in the Statement of Material Facts, Felicia's life is the story of a woman who became the first in her family to graduate from college, supported siblings and the children of siblings from her 20's up to the time of her passing, immigrated to the United States, started a blueberry farm from scratch, and was the emotional center of her family.

Plaintiff requested an award of \$2,500,000 to each of the wrongful death beneficiaries and \$1,000,000 for the estate. During jury selection, none of the jurors in the panel who ended up on the jury indicated that they would not consider a total award of \$6,000,000, depending on the evidence. CP 169. Plaintiff's counsel performed two mock juries prior to trial, and they returned verdicts of \$2,400,000 and \$2,900,000. CP 173.

Remarkably, although the jury was instructed to award compensation for the loss of Felicia's love and jurors concluded that there was a great deal of evidence of loss of love as a result of Felicia's death, several jurors stated that they could not award anything (\$0) for "loss of

love" because "love is priceless." CP 169 170; CP 379; CP 375-76. In addition, the award appears to have been impacted by the introduction of "extrinsic evidence" by Juror #4. This juror claimed that families of soldiers killed in action in Afghanistan receive a total of \$100,000 and referred to this figure in arguing for \$50,000 for Jone and \$50,000 for Marie. CP 135. Clearly, the award in this case is the result of passion or prejudice, and is unsupported by the evidence.

When a verdict is so low as to unmistakably indicate passion or prejudice, a new trial should be ordered. *Wooldridge v. Woolett*, 96 Wn.2d 659, 668, 638 P.2d 566 (1981). If the damages are within the range of evidence, they will not be found to have been motivated by passion or prejudice. *James v. Robeck*, 79 Wn.2d 864, 870-71, 490 P.2d 878 (1971). However, in this case there was no evidence that would support an award that was not even equal to the amount advocated for by defense counsel. Whether it was because the jury was prejudiced by the assertion Juror #4 that families of soldiers killed in Afghanistan receive \$100,000, because the decedent and her family were Filipino immigrants or because a number of jurors were simply unwilling to follow the damages instruction and award damages for loss of love, this award is so low that it must be the result of passion or prejudice.

F. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO ORDER A NEW TRIAL ON THE BASIS OF JUROR MISCONDUCT, PARTICULARLY WHEN IT WAS DETERMINED THAT THE JURY HAD CONSIDERED EXTRINSIC EVIDENCE.

It was concluded by the trial court that Juror #4 introduced improper extrinsic evidence into the jury's deliberations in this matter. CP 494-95. See, Appendix C. However, the trial court committed an abuse of discretion by failing to make a truly objective inquiry into whether the extrinsic evidence *could have* affected the jury's determination of damages in this case. Instead, the trial court conducted what amounted to a subjective inquiry, in that the denial of the motion for a new trial was based on the conclusion "that there are not reasonable grounds to believe the plaintiff was prejudiced by juror misconduct." CP 497. See, Appendix D.

"Extrinsic evidence" is information that is outside all the evidence submitted at trial. *Kuhn v. Schnall*, 155 Wn. App. 560, 575, 228 P.3d 828 (2010); *Richards v. Overlake Hospital*, 59 Wn. App. 266, 270, 796 P.2d 737 (1990). In this case, the primary issue was the value of Felicia Garcia's life (namely, the value of her lost love, care, companionship and guidance) to her children, Jone and Marie. Overwhelming evidence, in the form of seven declarations from five jurors, was submitted establishing that Juror #4 stated during deliberations that families of soldiers who die

serving our country in Afghanistan receive \$100,000. CP 374-398; CP 424-25.²

In determining whether the extrinsic evidence could have affected the jury's determination, our courts have made it very clear that if extrinsic evidence has been introduced, a new trial is required unless it can be concluded "beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict." *State v. Briggs*, 55 Wn. App.44, 56, 776 P.2d 1347 (1990). See, *Gardner v. Malone*, 60 Wn.2d 836, 846, 376 P.2d 651 (1962); *Lyberg v. Holz*, 145 Wash. 316, 320, 259 Pac. 1087 (1927). Other opinions have used similar language, concluding that if there is "any doubt that the misconduct affected the verdict, the court is obliged to resolve that doubt in favor of granting a new trial." *Fritsch v. J.J. Newberry's Inc.*, 43 Wn. App. 904, 907-08, 720 P.2d 845 (1986). See, *Halverson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973). Slightly different language, setting forth the same intense level of scrutiny applied to extrinsic evidence, has been recently set forth by Division I of the Court of Appeals:

² One of those jurors recalled the extrinsic evidence submitted by Juror #4 as a claim that "military personnel who died in combat received between 40,000 and \$70,000" and kept interjecting this range of \$40,000-\$70,000 for military personnel who died in combat whenever polls were taken to decide an amount for the verdict. CP 399-400.

"Any doubt that the misconduct affected the verdict must be resolved against the verdict." *Kuhn v. Schnall*, supra at p. 575; *Richards v. Overlake Hospital*, supra at p. 273.

Instead, it appears that the trial court in this case applied a more subjective standard to the evaluation of the extrinsic evidence and failed to resolve any doubt, from an objective evaluation of the extrinsic evidence, that the misconduct affected the jury in favor of awarding a new trial. In the Order Denying Plaintiff's Motion for New Trial, the trial court concluded:

"Found that the statement of Juror #4 regarding soldiers' death benefits constitutes improper extrinsic evidence. There are not reasonable grounds to believe that plaintiffs were prejudiced thereby." CP 495. See, Appendix C.

In the Order Denying Plaintiff's Motion for Reconsideration, the trial court stated as follows:

"[A] party is entitled to a new trial only if there are reasonable grounds to believe the party was prejudiced. This requires an objective inquiry. *Richards v. Overlake Hospital*, 59 Wn. App. 266, 273 (1990). The existence of a mere or remote possibility of prejudice, without more, is not enough to set aside the verdict. *Himmel(sic) v. Rife*, 37 Wn. App. 577, 585 (1984)." CP 496-97. See Appendix D.

The trial court concluded, "there are not reasonable grounds to believe that plaintiff was prejudice by juror misconduct." CP 497. At no time did the trial court recognize that under the law any doubt that the misconduct affected the verdict must be resolved against the verdict.

Instead, the trial court lifted a quote from *Hammel v. Rife*, supra, out of the respondents' pleadings and applied that standard, even though Plaintiff's Reply correctly pointed out that the standard set forth in *Hammel* is inapplicable to the case at bar because it was a juror bias case, not an extrinsic evidence case. CP 445. In short, it appears that the trial court applied a less stringent standard to the evaluation of the potential impact of the extrinsic evidence on the verdict than is mandated under Washington law.

It is inconceivable that any objective evaluation of this extrinsic evidence would not lead to the conclusion that reasonable doubt exists that this evidence could have affected the jury's verdict in this case. The power of this extrinsic evidence is self-evident. "Evidence" that the families of soldiers killed while serving our country in Afghanistan only receive \$100,000 is cloaked in patriotism and makes it difficult, if not impossible, for jurors to conclude that the families of an immigrant teacher and blueberry farmer should receive more. In essence, contending that the families impacted by the death of Felicia Garcia should receive more than the family of a United States soldier who dies in combat in Afghanistan is all but impossible. Of course, treating compensation for the loss of love, care, companionship and guidance owed by a negligent defendant as equal to death benefits provided by the U.S. Government for the death of the

soldier is mixing apples and oranges and highlights precisely why our courts subject extrinsic evidence interjected into jury deliberations to such intense scrutiny.

It is important that cases in Washington in which extrinsic evidence consisting of numerical evaluations of certain wages, death benefits and other numeric calculations have resulted in conclusions that a new trial is required. In *Fritsch* it was concluded that a juror introduced extrinsic evidence in deliberations by advising fellow jurors that he had consulted an attorney in a case he had and was told that a reasonable sum for pain and suffering was \$1,000 a month. The trial court denied a motion for a new trial. The Court Appeals reversed, holding that there was doubt as to whether this extrinsic evidence impacted the verdict.

Similarly, in *Halverson* the injured plaintiff, who was a teenager, testified that before his accident he wanted to be an airline pilot, but because of his injuries he was studying to be a surveyor. No evidence was offered comparing salaries in the two occupations. Given the fact that lost earning capacity had not been introduced at trial, any facts concerning the salaries of airline pilots or surveyors were outside the evidence admitted at trial. During deliberations, one juror introduced extrinsic evidence suggesting that a pilot makes about \$2,000 per month and a surveyor makes about \$1,500 per month. The trial court ordered a new trial, which

was affirmed by the Supreme Court. *Halverson v. Anderson*, supra at p. 752.

The Court of Appeals decision in *Loeffelholz v. Citizen for Leaders with Ethics and Accountability*, 119 Wn. App. 665, 82 P.3d 1199, review denied, 152 Wn.2d 1023 (2004) is also instructive. This case also involved extrinsic evidence on the issue of damages that provided the jury with a specific number that could have been used by the jury to decide damages. In that case jurors had to determine damages for the defamation of the plaintiff policeman. One juror introduced extrinsic evidence suggesting that public servants, such as police officers, earned a salary of \$30,000. Another juror suggested awarding damages that were double the amount of the \$30,000 salary, because the case had been pending for two years. The trial court ordered a new trial on the basis of this interjection of extrinsic evidence and that decision was affirmed by the Court of Appeals. *Id.*

The primary issue in this case was determining the damages Felicia Garcia's family should receive as result of her death. The interjection of a calculation, allegedly made by the U.S. Government as to the "value" of a U.S. soldier killed in the service of his country in Afghanistan to his or her family, cannot be said to have not had an impact on this verdict "beyond a reasonable doubt." *State v. Briggs*, supra at p. 56. The extrinsic evidence

presented by juror #4 was that families of servicemen and women killed in Afghanistan receive \$100,000. Jone Garcia and Marie Crawford each received \$75,000. It is an abuse of discretion to conclude beyond a reasonable doubt that this extrinsic evidence did not contribute to the verdict. Any doubt that the misconduct affected the verdict must be resolved against the verdict. *Kuhn v. Schnall*, supra at p. 575; *Richards v. Overlake*, supra at p. 273.

Moreover, based upon the wording of the trial court's Orders, it appears that a less stringent standard may have been applied to an objective assessment of the possible impact this powerful and improper extrinsic evidence may have had on the verdict. CP 494-97. A decision by the trial court declining to order a new trial is accorded less deference than a decision to grant a new trial. *Kuhn v. Schall*, supra at p. 570-71.

Appellant respectfully requests that the Court of Appeals conclude that the trial court abused its discretion and order that Appellant is entitled to a new trial on the basis of juror misconduct.

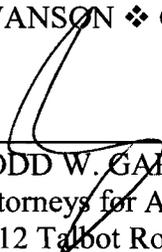
V. CONCLUSION

Appellant respectfully requests that this matter be reversed and remanded for a new trial, with instructions that the jury may consider

evidence of grief, mental anguish and suffering when assessing damages
for the wrongful death beneficiaries.

RESPECTFULLY SUBMITTED this 15th day of August, 2011.

SWANSON ❖ GARDNER, P.L.L.C.

By 
TODD W. GARDNER, WSBA #11034
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PROOF OF SERVICE

I certify that on the 15th day of August, 2011, I sent for service a copy of APPELLANT'S BRIEF, to be served by the method indicated below, and addressed to the following:

NAME: William W. Spencer
[Counsel for Defendants]
ADDRESS: 200 West Thomas Street
Seattle, WA 98109
VIA: Legal Messenger and Facsimile


DENISE M. COTTOM

FILED
COURT OF APPEALS
STATE OF WASHINGTON
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APPENDIX A

HONORABLE HOLLIS HILL

FILED
KING COUNTY, WASHINGTON
JUN 25 2010
SUPERIOR COURT
BY JULIE A. FIELDS
DEPUTY

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

JONE R. GARCIA, as the Personal
Representative of the Estate of FELICIA R.
GARCIA, deceased, et al,

Plaintiffs,

v.

STRONG TRUCKING, INC. a domestic
corporation, et al,

Defendants.

NO. 09-2-02616-5 KNT KNT

ORDER RE: DEFENDANTS'
MOTIONS IN LIMINE TO EXCLUDE
EVIDENCE OF GRIEF, DECEDENT'S
CHARACTER, LOSS OF ENJOYMENT
OF LIFE AND GRANDCHILDREN

This matter came before the Court for hearing on June 17, 2010 before the undersigned judge upon Defendants' Motions in Limine and the Court having reviewed the motions, responses and declarations submitted in support and opposition thereto and having heard oral argument and being fully advised, NOW, THEREFORE,

IT IS ORDERED as follows:

1. Plaintiff is precluded from presenting evidence for the purpose of proving the grief of Plaintiffs' and Plaintiffs' family and community. Evidence may be presented to establish loss of love, care, companionship and guidance including about the initial reactions of decedent's surviving children the day they learned of decedent's death and the actions they and family members took in response to the death. Ruling as to the extent of such testimony, particularly

1 on the part of persons other than Plaintiffs will be reserved until the time of trial when the Court
2 can make an ongoing assessment as to its probative value versus prejudicial effect on the issues
3 to be determined.

4 2. Plaintiff will be permitted to present evidence to show the decedent's vibrancy
5 including her activities insofar as that is relevant to the claims of her surviving children for loss
6 of care, guidance, love and companionship and as relevant to the issue of decedent's life
7 expectancy. The Court reserves to the time of trial the determination of the extent to which such
8 testimony may be cumulative and/or the assessment of its probative value versus its prejudicial
9 effect.

10 3. Plaintiff may present evidence regarding decedent's funeral service including about
11 the number and diversity of people present in order to describe and illustrate the extent of the
12 loss for which her surviving children are seeking compensation. Plaintiff will not be permitted
13 to present evidence describing the grief exhibited at the funeral. The Court reserves ruling to the
14 time of trial regarding whether testimony presented is cumulative and/or regarding the
15 assessment of its probative value versus its prejudicial effect.

16 4. Witnesses will be permitted to testify regarding their personal knowledge of the
17 decedent insofar as that testimony is relevant to the nature and extent of the love, care,
18 companionship and guidance lost by her children as the result of her death. Lay witness opinion
19 testimony will not be permitted as to decedent's character and any lay opinions will be limited
20 per ER 701 to that which is based on rational perceptions of the witnesses. The Court reserves
21 ruling to the time of trial regarding whether testimony presented is cumulative and/or regarding
22 the assessment of its probative value versus its prejudicial effect.

23 5. Rulings regarding which photographs will be admitted as exhibits will be reserved
24 until hearing scheduled for June 29th.

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DONE IN OPEN COURT this 25th day of June, 2010.

Hollis Hill
HONORABLE HOLLIS R. HILL

APPENDIX B

PLAINTIFF'S PROPOSED INSTRUCTION NO. 11

It is the duty of the Court to instruct you as to the measure of damages for the claims of the Estate of Felicia Garcia, Jone Garcia and Marie Crawford, brought on their behalf by Jone Garcia as the Personal Representative of the Estate of Felicia Garcia.

You must determine the amount of money which will reasonably and fairly compensate the Estate of Felicia Garcia, and Jone Garcia and Marie Crawford, individually, for such damages as you find were proximately caused by the death of Felicia Garcia.

In your award for the Estate of Felicia Garcia, your verdict must include \$11,158.92 for funeral expenses. You should also consider the anxiety, emotional distress and fear experienced by Felicia Garcia prior to her death as a result of the defendant's negligence on April 23, 2007.

In your individual awards for Jone Garcia and Marie Crawford, you should consider what Felicia Garcia reasonably would have been expected to contribute to Jone Garcia and Marie Crawford in the way of love, care, companionship and guidance. You may also consider as part of your individual awards to Jone Garcia and Marie Crawford, their grief, mental anguish and suffering.

In making your determinations, you should take into account Felicia Garcia's age, health, life expectancy, occupation and habits. In determining the amount that Felicia Garcia reasonably would have been expected to contribute in the future in the way of love, care, companionship and guidance to Jone Garcia and Marie Crawford, you should take

into account the amount of love, care, companionship and guidance you find that Felicia Garcia customarily contributed to Jone Garcia and Marie Crawford.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess or conjecture.

The law has not furnished us with any fixed standards by which to measure non-economic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case and by these instructions.

APPENDIX C

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SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

JONE R. GARCIA, individually, and as the
Personal Representative of the Estate of
FELICIA R. GARCIA, deceased,

NO. 09-2-02616-5KNT

Plaintiff,

v.

ORDER DENYING PLAINTIFF'S
MOTION FOR A NEW TRIAL
(PROPOSED)

STRONG TRUCKING, INC., a domestic
corporation, and JACOB L. YANEZ,

Defendants.

THIS MATTER having come before the court upon Plaintiff's Motion for a New
Trial, and court having the following evidence, *in addition to briefs previously
filed regarding Plaintiff's Motion for New Trial.*

1. Declaration of Jeffery E. Adams with the attached Declaration of Jurors Diana
Beaupain, Terri Gordon, John Barna, and Betty Thomas;
2. Defendants Brief in Opposition to Plaintiff's Motion for a New Trial;
3. Plaintiff's Reply to Defendant's Brief in Opposition
4. to Plaintiff's Motion for a New Trial and
5. attachments.
6. _____;

ORDER DENYING PLAINTIFF'S MOTION FOR NEW
TRIAL (PROPOSED) -1-

MURRAY, DUNHAM & MURRAY
ATTORNEYS AT LAW
PO BOX 9844
SEATTLE, WASHINGTON 98109
(206) 622-2655, 884-6924 (FAX)

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7. _____;
as well as the records and files herein, and the court having considered the admissible
evidence and otherwise being fully informed in the premises, NOW, THEREFORE, IT IS
HEREBY ^{FOUND that the statement of Juror #4 regarding soldiers' death benefits constitutes improper extrinsic evidence. There are not reasonable grounds to believe that plaintiffs were prejudiced thereby} ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for a New Trial be
and hereby is denied.

DATED this _____ day of January, 2011.

Helli R. Hill
JUDGE

Presented by:
MURRAY, DUNHAM & MURRAY

By: _____
William W. Spencer, WSBA #9592
Jeffory E. Adams, WSBA #9663
Of Attorneys for Defendants

APPENDIX D

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HONORABLE HOLLIS HILL

FILED
KING COUNTY, WASHINGTON
FEB 04 2011
SUPERIOR COURT CLERK
BY JULIE WARFIELD
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

JONE R. GARCIA, as the Personal
Representative of the Estate of FELICIA R.
GARCIA, deceased.

Plaintiff,

v.

STRONG TRUCKING, INC., a domestic
corporation and JACOB L. YANEZ,

Defendants.

NO. 09-2-02616-5 KNT

ORDER DENYING PLAINTIFF'S
MOTION FOR RECONSIDERATION

This matter came before the Court on Plaintiff's Motion for Reconsideration of this Court's denial of Plaintiff's Motion for New Trial and the Court being fully advised, IT IS HEREBY ORDERED that said Motion is DENIED.

This Court carefully considered the briefs, case law and all attachments presented in support of and in opposition to Plaintiff's Motion for New Trial as well as Plaintiff's Motion for Reconsideration. Article I Section 21 of the Constitution of the State of Washington provides that the right to jury trial in this case is inviolate. Accordingly, the law gives a strong presumption of adequacy to the verdict. *Cox v. Charles Wright Academy*, 70 Wn. 2d 173, 176 (1976). A strong affirmative showing of jury misconduct is required to impeach a verdict.

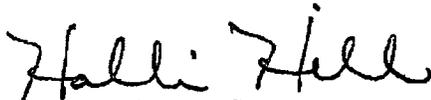
Where juror misconduct occurs by injection of extraneous evidence during deliberations, as in this case with regard only to the comment of juror #4 regarding soldiers' death benefits, a

1 party is entitled to a new trial only if there are reasonable grounds to believe the party was
2 prejudiced. This requires an objective inquiry. *Richards v. Overlake Hospital*, 59 Wn. App.
3 266,273 (1990). The existence of a mere or remote possibility of prejudice, without more, is not
4 enough to set aside the verdict. *Himmel v. Rife*, 37 Wn. App. 577, 585 (1984).

5 *Kuhn v. Schnall*, 155 Wn. App. 560 (2010) cited by Plaintiff is distinguishable from the
6 case before the Court as *Kuhn* pertains to a finding of jury misconduct affecting a verdict where,
7 in addition to other issues, jurors saw newspaper coverage of the very case they were deciding.

8 In this case the Court is convinced based on the evidence and arguments at trial and the
9 affidavits and declarations of jurors insofar as they do not inhere in the verdict that there are not
10 reasonable grounds to believe that plaintiff was prejudiced by juror misconduct.

11 DONE IN OPEN COURT this 4th day of February, 2011.

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15 HONORABLE HOLLIS R. HILL