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Case No. 70422-2-1

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

HANNAH JONES,

Appellant,

v.

REGENCY PACIFIC, INC.,

Respondent.

REPLY BRIEF OF APPELLANT

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAY 12 PM 2:56

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Argument

I. HANNAH JONES DID NOT WAIVE HER RIGHT TO CLAIM ERROR.

Regency argues that Ms. Jones waived her right to relief because she did not specifically "request a mistrial or assert juror misconduct" during trial. (Br. of Resp't at 8.) However, Regency's argument is a red-herring and should be disregarded for two reasons. First, the law allows that an error must be apparent before there is an obligation for it to be preserved. And second, the law does not require an incantation of magic words asking for a "mistrial" to lay the foundation for a motion for new trial or an appeal.

A. Hannah Jones Could Not Waive Her Right to Claim Error for Bias or Misconduct She Did Not Know About.

In support of its waiver argument, Regency quotes and relies upon half of the rule applied in *Casey v. Williams*, 47 Wash. 2d 255, 287 P.2d 343 (1955), and *Fleenor v. Erickson*, 35 Wash. 2d 891, 215 P.2d 885 (1950). (Br. of Resp't at 9.) In these cases, it was found that objection was waived because the moving party observed that a juror was asleep during the trial yet failed to ask for relief from the court until after receiving an adverse verdict. *Casey*, 47 Wash. 2d at 256; *Fleenor*, 35 Wash. 2d at 901. Regency argues that the rule from these cases is that objection to juror misconduct is waived unless a specific request for a

"mistrial" is made before an adverse verdict is rendered. However, Regency conveniently omits the other half of the rule that requires a party to have knowledge of the misconduct before the duty to object is imposed.

To explain, Regency quotes the following as the full rule stated in *Casey* and applied in *Fleenor*:

. . . if actual misconduct had occurred, but respondents had a remedy, and it was their duty, if they expected to claim error based upon the alleged misconduct of appellant and the jury, not only to call the matter to the attention of the trial court, *but, also, to claim a mistrial and ask that the jury be discharged and not to wait*, as did respondents in this case, *until an adverse verdict had been rendered*, and then, for the first time, claim error based upon such alleged misconduct.

47 Wash. 2d at 257. Although this quotation is accurate, it conveniently omits the other half of the rule which requires knowledge of the misconduct before the imposition of a duty to object. Specifically, the very next sentence in the opinion states: "**Such conduct of a juror (if prejudicial) is prejudicial when it occurs, and a party with knowledge must seek relief at that time.**" *Casey*, 47 Wash. 2d at 257. Accordingly, a party cannot waive the right to claim an error for bias or misconduct that was not known until after the verdict was rendered.

In this case, as discussed in Brief of Appellant, neither Ms. Jones nor her counsel were aware of the following facts demonstrating the

severity of Juror 11's undisclosed bias and jury misconduct until after the verdict was rendered:

1. Juror 11 told other members of the jury that she was Ms. Lauren's neighbor. CP 348-349, ¶ 2; CP 488, ¶ 13; CP 492, ¶ 6.

2. Juror 11 told other jurors that she was "**shocked it had not made a difference to the Court that Ms. Lauren was [her] neighbor.**" CP 488, ¶ 13.

3. Juror 11 admitted bias by telling other jurors that she "**should not be on this jury.**" CP 348-349, ¶ 2.

4. During the fifth week of trial, Juror 10, warned the bailiff that "**we were on the verge of a mistrial**" because Juror 11 was openly discussing the case and the lawyers with other jurors before deliberations, despite the court's instruction to the contrary. CP 351-352, ¶ 2.

5. Prior to and during the fifth week of trial, despite the court's instruction not to discuss the case, Juror 11 was openly making biased and prejudicial comments about Hannah Jones's case and her lawyers, who were characterized as "out of staters," "rich lawyers," "a suing machine," and other derogatory terms, which are another manifestation of her bias. CP 351-352, ¶ 2; CP 349-350, ¶ 4.

6. Prior to and during the fifth week of trial, despite the court's instruction not to discuss the case, Juror 11 attempted to engage

and recruit other jurors to discuss the case before deliberations. CP 351-352, ¶ 2.

7. After the jury was dismissed on March 21, 2013, Juror 11 asked Ms. Lauren, **“Do you want to ride home together?”** CP 344-345, ¶ 7; CP 346-347, ¶ 6.

8. After the jury was dismissed on March 21, 2013, Juror 11 remained at the courthouse talking to defense counsel long after the other jurors had left. CP 343, ¶ 4.

9. After the jury was dismissed on March 21, 2013, Juror 11 was observed leaving the courthouse with defense counsel. CP 343, ¶ 4; CP 347, ¶ 7.

10. Juror 11's family and the Lauren Family have lived on the same street in homes whose property is only 115 feet apart with only one lot in between. CP 294, ¶ 3(d); CP 354, ¶ 2.

11. On March 21, 2013, after the jury returned its verdict, Juror 11 publically stated that **every morning on her way to this trial she would see (Ms. Lauren’s son) playing and would waive to him.** CP 345, ¶ 7; CP 346-347, ¶ 5.

12. The probability of routine personal contact between Juror 11 and Ms. Lauren over the past five years, and in the future was significantly enhanced by reason of:

- a. The closest route of ingress and egress from Juror 11's home, given the street system in their subdivision in Canterbury Woods and the proximity of their homes, requires Juror 11 to drive directly past Ms. Lauren's home, a fact borne out by the above statement by Juror 11 on March 21, 2013. CP 294-295, ¶ 3(e)-(h); and
- b. Juror 11's and Ms. Lauren's mailboxes are located at the same neighborhood mail drop near the northeast corner of Juror 11's property, thereby increasing the probability of their contact. CP 354-357, ¶¶ 3-5.

13. As homeowners in the platted subdivision of Canterbury Woods Juror 11 and Ms. Lauren were and are not only legally bound by the Protective Covenants of Canterbury Woods for their mutual economic benefit and property interests, but also are co-owners of subdivision common property.¹ These Covenants, which are intended to maintain or enhance the value of the homes in the subdivision, contractually govern the relationship of these neighbors, including how they can use their homes, make improvements to their homes, maintain common easements,

¹ According to a real estate Seller's Disclosure statement dated December 5, 2011, Juror 11 and Ms. Lauren are co-owners and have an undivided interest with other neighbors in common property of the subdivision, to wit: neighborhood signage. CP 396, ¶ 3(l).

keep up their lawns and landscaping, restrict each other from engaging in noxious or offensive activities, use signs, breed pets or livestock, and even store boats or motor homes. CP 395-396, ¶ 3(i)-(l).

14. And, pursuant to Section 24 of the Covenants of Canterbury Woods, every owner of a platted lot in Canterbury Woods is entitled to bring a suit to enforce any Covenant term against another neighbor for the violation or threatened violation of any such provision and to collect attorney fees if they prevail. CP 395-396, ¶ 3(i)-(l).

None of these facts were known or disclosed to Ms. Jones or her counsel until after the jury rendered its verdict. After the verdict, Ms. Jones was alerted to the severity of Juror 11's undisclosed bias by the display of camaraderie when Juror 11 asked Ms. Lauren if she wanted to ride home together—a fact which was accentuated when they actually did leave the courthouse together. CP 343, ¶ 4; CP 344-345, ¶ 7; CP 346-347, ¶¶ 6-7. After observing this display of solidarity, Ms. Jones investigated and discovered additional evidence of Juror 11's bias and jury's misconduct. As such, Ms. Jones did not and could not know the full nature or extent of Juror 11's bias or about the jury's misconduct until after the jury was dismissed. Therefore, Regency's waiver argument lacks merit because Ms. Jones could not waive her right to claim error for juror

bias and misconduct that was not known until after the verdict was rendered.

B. Hannah Jones Properly Preserved Error by Repeatedly Moving to Excuse Juror 11 and Moving for a New Trial.

In addition to omitting the half of the rule from *Casey v. Williams* that requires a party to have knowledge of an error before requiring an objection to preserve error, Regency also misinterprets the rule as establishing a broad, general rule that when misconduct or an irregularity occurs, counsel must always request a mistrial in order to lay a foundation for a later motion for new trial, or an appeal. To the contrary, the law does not require a party to recite an incantation of magic words asking for a "mistrial" in order to lay the foundation for a motion for new trial or an appeal.

Professor Tegland eloquently addresses the very misinterpretation made by Regency in his Washington Practice Series:

In order to lay the foundation for a later motion for new trial, counsel must ordinarily raise an objection or request some relief during the trial. The rule parallels the rule that an appellate court may refuse to review errors that are raised for the first time on appeal. See RAP 2.5. In both situations, the purpose of the rule is to encourage the correction of errors during trial, so that post-trial motions and appeals are unnecessary.

In a 1955 case, a juror fell asleep three times during the trial. Plaintiff did not seek a mistrial. At the conclusion of

the trial, the trial judge granted a motion for a new trial. The Supreme Court reversed, saying that a party knowing of misconduct must seek relief at the time the misconduct occurs; he cannot gamble on the verdict and seek relief thereafter by way of new trial when the verdict is unfavorable to him. *Casey v. Williams*, 47 Wash. 2d 255, 287 P.2d 343 (1955).

The case just described should not be interpreted as establishing a broad, general rule that when misconduct or an irregularity occurs, counsel must always request a mistrial in order to lay a foundation for a later motion for new trial, or an appeal. The broad, general rule is that counsel must request some relief from the court at the time the misconduct or irregularity occurs. Counsel must immediately ask the court to do something—whether it is to exclude inadmissible evidence, to give a cautionary instruction, to grant a mistrial, or some other remedy—rather than waiting for the verdict and then deciding what to do. *See, e.g., State v. Carlson*, 61 Wash. App. 865, 812 P.2d 536 (Div. 1 1991) (objection to evidence was not sufficiently specific).

The same rule applies to errors of law. Ordinarily, at least, the trial court will not consider a claimed error of law raised for the first time in a motion for new trial. In order to lay the foundation for a motion for new trial, counsel must object or otherwise raise the issue during trial, so that the court has the opportunity to correct the error immediately, without the need for post-trial motions or appeals. *See, e.g., Yakima Fruit Growers' Ass'n v. Hall*, 180 Wash. 365, 40 P.2d 123 (1935) (claim that the contract was ultra vires can not be made for the first time on motion for new trial); *Leo Kee v. Wah Sing Chong*, 31 Wash. 678, 72 P. 473 (1903) (claim, not made at the trial, that the action was prematurely brought, will not be heard on motion for new trial).

The objection during trial must be specific enough to allow the court to assess the objection. An objection to a trial ruling is useless unless it points out to the court the specific

ground on which the party objects. *See, e.g., Pacific Northwest Pipeline Corp. v. Myers*, 50 Wash. 2d 288, 311 P.2d 655 (1957); *Corbitt v. Harrington*, 14 Wash. 197, 44 P. 132 (1896).

The courts have occasionally made exceptions to the general rule. It is often said, for example, that an objection during trial is not required if the error or misconduct was so flagrant that no curative measures would have been effective. *Sommer v. Department of Social and Health Services*, 104 Wash. App. 160, 15 P.3d 664, 11 A.D. Cas. (BNA) 694 (Div. 1 2001) (finding improprieties not prejudicial in context of the case).

And of course, no objection during trial is necessary when the motion for new trial is based upon something other than events at trial—newly discovered evidence, juror misconduct during deliberations, error in the assessment of damages, or the like.

4 KARL B. TEGLAND, WASH. PRAC., RULES PRACTICE CR 59, cmt. 5 (6th ed.) (emphasis added). Accordingly, the foundation for a motion for new trial or an appeal is properly laid by bringing the error to the court's attention and requesting relief.

In this case, notwithstanding the lack of information regarding the extent of Juror 11's bias and the jury's misconduct, Ms. Jones repeatedly brought the error to the trial court's attention and requested relief. After the trial court informed Ms. Jones of Juror 11's initial disclosure that she was Ms. Lauren's neighbor and provided her counsel with time to consider the issue, Ms. Jones requested that Juror 11 be excused. RP 2/28/2013, 3:11-7:21. Further, Ms. Jones's counsel repeatedly requested that the court

excuse Juror 11 throughout the remainder of the trial. CP 359-360, ¶ 9; CP 344, ¶ 4; CP 346, ¶ 2. Additionally, after closing statements on March 20, 2013, Hannah Jones's renewed her motion to excuse Juror 11. RP 3/20/2013, 103:25-107:13. Moreover, Ms. Jones investigated and asked for relief again in her motion for new trial after being alerted to the severity of Juror 11's undisclosed bias by her display of camaraderie following the verdict. CP 343, ¶ 4; CP 344-345, ¶ 7; CP 346-347, ¶¶ 6-7.

Clearly, this constant complaint of error and request for a remedy persevered Ms. Jones right to claim error for Juror 11's undisclosed juror bias. Therefore, Regency's argument that Ms. Jones waived her right to claim error lacks merit and should be disregarded in its entirety.

II. REGENCY'S ATTEMPT TO EXPLAIN AWAY THE FALSITY OF JUROR 11'S DECLARATION IS UNAVAILING.

Regency goes to long lengths to explain away the solid evidence in the record of the falsity of Juror 11's declaration.² The falsity at issue centers on when Juror 11 recognized Ms. Lauren. Juror 11's declaration

² Without formal objection, Regency claims Hannah Jones challenges the truthfulness of Juror 11's declaration for the first time on appeal. (Br. of Resp't at 12.) To the contrary, Ms. Jones's challenge to the veracity and accuracy of Juror 11's declaration in the trial court is axiomatic because Ms. Jones grounds for a new trial were based in part on disputed facts from juror declarations. CP 351-353; CP 348-350; CP 485-489. Therefore, the falsity of Juror 11's declaration was at issue before the trial court and Regency's claim is without merit. However, to the extent that Ms. Jones relies on the Verbatim Report of Proceedings, that record was not available until the court reporter completed the transcription as part of this appeal. (Notice of Filing VRP dated 11/13/2013.)

claims that her recognition of Ms. Lauren was triggered by Ms. Andrew's specific reference to her co-counsel as "Ms. Lauren," CP 487, ¶ 11, which the Verbatim Report of Proceedings indicates did not occur until near the end of the day on February 27, 2013. RP 2/27/2013, 135:9-10. To the contrary, the declarations submitted in support of Ms. Jones's motion for new trial emphatically state that Juror 11 disclosed that she was Ms. Lauren's neighbor on February 26, 2013.³ CP 359, ¶ 7; CP 344, ¶ 2. Obviously, Juror 11's declaration is false if she disclosed her relationship to Ms. Lauren on February 26, 2013, but claims her memory of that relationship was triggered by an event that did not occur until the end of the day on February 27, 2013. Such a factual discrepancy would not only call into question Juror 11's credibility, but also suggest that Juror 11 recognized Ms. Lauren when she was introduced during voir dire⁴ and intentionally concealed that fact, which means her bias would be

³ Both parties agree that they were informed of Juror 11's disclosure by the trial court in a side bar discussion held off the record.

⁴ Ms. Lauren was introduced to the venire twice on the first day of voir dire, RP 2/19/2013, 36:1-4; RP 2/19/2013, 79:4, and on the second day of voir dire, Ms. Andrews referred to "Ms. Lauren" when responding to a question from the court. RP 2/20/2013, 42:7. The record is void of any other instance of Ms. Andrew's verbally referring to her co-counsel as "Ms. Lauren" until after Juror 11's February 26, 2013, disclosure.

presumed⁵ entitling Ms. Jones to a new trial. *State v. Cho*, 108 Wash. App. 315, 329, 30 P.3d 496 (2001).

Regency attempts to explain away the factual discrepancy in Juror 11's declaration by manufacturing an attenuated chain of events and suggesting that "Ms. Jones's counsel misremembered the date" on which Juror 11 disclosed she was Ms. Lauren's neighbor.⁶ (Br. of Resp't p. 15.) However, Regency's attempt to justify Juror 11's declaration fails because: (1) despite the importance of the date of Juror 11's disclosure, in the trial court Regency did not contest that Juror 11's disclosure occurred on February 26, 2013;⁷ (2) Regency did not present any evidence in the trial court to refute the date of disclosure stated in the declarations of Ms. Jones's counsel; and (3) Regency's attenuated explanation is beyond the bounds of reasonable possibility.

⁵ Presumed bias cannot be rehabilitated by later protestations of impartiality, however sincere. *State v. Cho*, 108 Wash. App. 315, 329, 30 P.3d 496.

⁶ Of note is the observation that the Brief of Respondent does not specifically aver that Juror 11's disclosure was not made on February 26, 2013. Rather, Regency merely offers a story based on conjecture and supposition that could suggest only an unrealistic possibility that the disclosure came sometime after Ms. Andrew's verbal reference to "Ms. Lauren" on February 27, 2013.

⁷ Contrary to Regency's suggestion that Juror 11's disclosure occurred sometime after Ms. Andrew's verbal reference to "Ms. Lauren" on February 27, 2013, when discussing the event in Brief of Respondent, Regency cites to the Verbatim Report of Proceedings for February 26, 2013. (Br. of Resp't at 13.)

A. In the Trial Court, Regency Did Not Contest or Refute that Juror 11 Disclosed Her Relationship with Ms. Lauren on February 26th.

Regency's attenuated explanation is based solely on a vague dialog between the trial court and the Bailiff about Juror 11 that occurred first thing in the morning on February 28, 2013, right after the trial court had denied Ms. Jones's first motion to excuse Juror 11:

THE COURT: Mary Powell. Did juror speak to you again after the first notice?

THE BAILIFF: Yeah, she spoke to me this morning, and said that she was on her way.

THE COURT: Okay. So that she was aware of that, and it was on her mind.⁸ And what else did she say?

THE BAILIFF: Well, she knows your son's name, and she walks in your neighborhood, and she's seen you with your son.

RP 2/28/13, 8:15-23. Regency claims that this dialog demonstrates that Juror 11's disclosure occurred after Ms. Andrew's verbal reference to "Ms. Lauren" on February 27, 2013, because the declarations from Ms. Jones's counsel say that "within a day of Ms. Cox's disclosure that she was Ms. Lauren's neighbor, the Bailiff informed the Court that Ms. Cox had also reported she knew the name of Ms. Lauren's son." (Br. of Resp't at 14.)

⁸ The fact that Juror 11's relationship and familiarity with Ms. Lauren "were on her mind" also demonstrates Juror 11's conscious awareness of her own bias. RP 2/28/2013, 8:19-20.

Regency's entire premise is based on the conclusory presumption that the vague and ambiguous dialog between the trial court and the Bailiff represents the first time Juror 11 told the Bailiff that she knew the name of Ms. Lauren's son. However, not only is evidence of Regency's presumption absent from the ambiguous dialog, such a presumption disregards the possibility that Juror 11 was merely repeating a fact previously disclosed to the Bailiff while disclosing the additional facts that "she walks in [Juror 11's] neighborhood" and has "seen [Juror 11] with her son."⁹ Thus, Regency's interpretation of the meaning of this ambiguous dialog stands in stark contrast to the clear and unrefuted declarations from Ms. Jones's counsel that state that Juror 11's initial disclosure occurred on February 26, 2013. CP 359, ¶ 7; CP 344, ¶ 2.

B. Regency's Attenuated Explanation is Beyond Reasonable Possibility.

Regency's explanation suggesting that Juror 11 disclosed that she was Ms. Lauren's neighbor sometime after Ms. Andrew's February 27, 2013, verbal reference to "Ms. Lauren" exceeds the bounds of reasonable possibility. In particular, Regency's explanation does not permit an opportunity for the Judge to have notified Ms. Jones of Juror 11's

⁹ Additionally, the court's question, "Did juror speak to you again after the first notice?" could be read as meaning Juror 11 had previously disclosed she knew the name of Ms. Lauren's son. RP 2/28/2013, 8:15-16.

disclosure, which is an event that must have preceded Ms. Jones's motion to excuse Juror 11. Therefore, Regency's attempt to justify the falsity of Juror 11's declaration fails.

To explain, Juror 11 claims she told the Bailiff that she and Ms. Lauren lived in the same neighborhood "at the very next break" after Ms. Andrew's verbal reference to "Ms. Lauren."¹⁰ CP 488, ¶12. However, the record demonstrates the jury took no breaks on February 27, 2013, after Ms. Andrew's reference to "Ms. Lauren." RP 2/27/13, 135:9 -154:3. Rather, following Ms. Andrew's reference to "Ms. Lauren," the testimony of a witness was concluded and the jury was permitted to go home for the day. RP 2/27/13, 153:8-19. Then, following a brief side bar discussion, court was adjourned. RP 2/27/13, 154:3. This means, that earliest opportunity the Bailiff would have had to inform the Judge that Juror 11 disclosed she was Ms. Lauren's neighbor was when the Judge returned to chambers after court was adjourned on February 27, 2013. In turn, the Judge would not have been able to inform the parties of Juror 11's disclosure until court resumed on February 28, 2013. However, the record does not reflect that any such notification or side bar discussion occurred the morning of February 28, 2013.

¹⁰ Please note, Juror 11 did not say she told the Bailiff of her relationship with Ms. Lauren "the next morning" or "on the phone."

To the contrary, the Verbatim Report of Proceedings demonstrates that there were no breaks, notifications or off the record side bar discussions with the Judge on the morning of February 28, 2013, until after Ms. Jones moved to excuse Juror 11. The Report of Proceedings for February 28, 2013, begins with the very first order of business that day, which is marked by everyone rising when the Judge first entered the courtroom. This is evident because the record begins with the Judge saying, "Please be seated." RP 2/28/14, 3:4. Then, the very first order of business was Ms. Jones motion to excuse Juror 11 because of her relationship with Ms. Lauren.¹¹ RP 2/28/13, 3:11-7:21. Obviously, notification of Juror 11's disclosure must have preceded Ms. Jones's motion to have her excused; but, Regency's explanation does not permit an opportunity for this to have happened. Accordingly, Regency's explanation fails because the Judge did not have the opportunity to notify Ms. Jones of Juror 11's disclosure at any time from Ms. Andrew's verbal reference to "Ms. Lauren" near the end of the day on February 27, 2013, until after Ms. Jones's motion to have Juror 11 excused the morning of February 28, 2013. Therefore, Juror 11's declaration is false because her

¹¹ The Report of Proceedings also indicates that the decision to move to excuse Juror 11 was not made on the spot, but rather, was made after "extensive discussions involving a number of people." RP 2/28/2013, 5:11-18. Under Regency's theory, in addition to not being notified of Juror 11's disclosure, Ms. Jones's counsel would have never had the opportunity to conduct these extensive discussions.

memory could not have been triggered by an event that had not yet occurred.

As discussed above and in Brief of Appellant, the record demonstrates that Juror 11's declaration misrepresents the facts and circumstances surrounding her recognition of Ms. Lauren. At a minimum, the factual discrepancies discussed above create a doubt regarding Juror 11's bias and "[d]oubts regarding bias must be resolved against the juror." *Cho*, 108 Wash. App. 315, 330. The factual discrepancy not only calls into question Juror 11's credibility, but also suggests that Juror 11 intentionally concealed her relationship with Ms. Lauren so she could sit on the jury. Therefore, Juror 11's bias is presumed and Ms. Jones is entitled to a new trial. *State v. Cho*, 108 Wash. App. 315, 329, 30 P.3d 496 (2001).

III. REGENCY'S ATTEMPT TO REHABILITATE JUROR 11 INHERES TO THE VERDICT.

The primary thrust of Regency's response to the bias of Juror 11 is an attempt to rehabilitate her with a statement from her declaration.¹² (Br.

¹² In making this argument Regency misconstrues a statement made on the record by Jeffrey Grant, one of Ms. Jones's attorneys. Essentially, Regency claims that Mr. Grant admitted there was no juror misconduct when he said, "Well, first let's make clear what it is not. We are not implying or stating that there is any improper conduct or improper contact." (Br. of Resp't at 17.) As the trial court was told, Regency has taken this statement out of context. CP 511. In context, this statement refers to the fact that based on the information disclosed at that

of Resp't at 21.) More specifically, Regency argues that Juror 11's claim that she was "fair and impartial" during jury deliberations demonstrates she was not bias. (Br. of Resp't at 21 (citing CP 488).) However, Regency's argument fails because the portion of Juror 11's declaration claiming impartiality inheres to the verdict.

The rule for determining whether conduct inheres in the verdict was set out in *Gardner v. Malone*, 60 Wash.2d 836 (1962), and restated in *Turner v. Stime*:

“In considering the affidavits filed, we entirely discard those portions which may tend to impeach the verdict of the jurors, and consider only those facts stated in relation to misconduct of the juror, and which in no way inhere in the verdict itself. It is not for the juror to say what effect the remarks may have had upon his verdict, but he may state facts, and from them the court will determine what was the probable effect upon the verdict. *It is for the court to say whether the remarks made by the juror in this case probably had a prejudicial effect upon the minds of the other jurors.*”

Gardner explains other tests for determining whether a juror's testimony inheres in the verdict:

One test is whether the facts alleged are linked to the juror's motive, intent, or belief, or describe their effect upon him; if so, the statements cannot be considered for they inhere in the verdict and impeach it. If they do not, it then becomes a matter of law for the trial court to decide the effect the

point, Ms. Jones was not accusing Regency's attorneys of misconduct or violation of the Professional Rules of Conduct.

proved misconduct could have had upon the jury. Another test is whether that to which the juror testifies can be rebutted by other testimony without probing a juror's mental processes.

Turner v. Stime, 153 Wash. App. 581, (2009) (emphasis in original) (internal citation omitted). As such, testimony linked to a juror's motive, intent, or belief inheres to the verdict and should not be considered. *See id.*

Clearly, Juror 11's testimony regarding her belief that she was "fair and impartial" is linked to her "motive, intent, or belief," or describes the effect of her relationship with Ms. Lauren. Therefore, that portion of Juror 11's testimony inheres to the verdict and, as discussed in Brief of Appellant, Juror 11's actual, implied and/or presumed bias warranted a challenge for cause.

IV. THE COURT SHOULD DECLINE REGENCY'S INVITATION TO DISREGARD APPLICABLE FEDERAL CASE LAW.

Throughout the Brief of Respondent, Regency invites this Court to disregard the guidance set out in the precedent of our federal courts. However, Regency's invitation overlooks the fact that the very standard it seeks to enforce for addressing undisclosed juror bias was set out in a case from the United States Supreme Court—a federal court. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984). In fact, if this Court were to entirely reject the

federal precedent, this Court's decision would be controlled by the rule set out in *Smith v. Kent*, 11 Wash. App. 439, 441, 443-45, 523 P.2d 446 (1974), and Ms. Jones would be entitled to a new trial because she was denied the opportunity to intelligently exercise a peremptory challenge. Nonetheless, this Court need look no further than Washington precedent to find that Hannah Jones was denied a fair trial because of undisclosed juror bias and Regency's invitation to disregard the instructive value of federal precedent should be declined.

V. THE TRIAL COURT FAILED TO FULFULL ITS STATUTORY DUTY TO ENSURE A FAIR AND IMPARTIAL JURY.

In an attempt to refute the trial court's error in failing to fulfill its statutory duty to ensure a fair and impartial trial, Regency argues the trial court had no duty to develop a record on Ms. Jones's behalf. (Br. of Resp't at 27-31.) In this manner, Regency attempts to justify the trial court's failure to voir dire Juror 11 and its failure to correct or disclose the reported juror misconduct to Ms. Jones's counsel. However, Regency's argument mischaracterizes the errors and disregards the trial court's statutory duty to investigate juror bias and misconduct that is brought to the court's attention.

More specifically, RCW 2.36.110 states:

It shall be the duty of a judge to excuse from further jury

service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with a proper and efficient jury service.

When juror bias is at issue, "the court has the duty to develop the facts fully enough so that it can make an informed judgment on the question of 'actual' bias." *U.S. v. Nell*, 526 F.2d 1223 (5th Cir. 1976); *see also Hughes v. U.S.*, 258 F.3d 453, 457-58 (6th Cir. 2001).

RCW 2.36.110 clearly places the duty to develop the facts on the "judge." Moreover, the trial court acknowledged this duty when it said it would be **"a better practice to -- to have voir dire at such a point."** RP 5/17/2013, 41: 9-10. The trial court's failure to voir dire Juror 11 and its failure to disclose and correct Juror 11's reported misconduct are errors predicated on an erroneous interpretation of the court's lawful duty to investigate and excuse unfit jurors. Therefore, Hannah Jones is entitled to a new trial.

Conclusion

Hannah Jones was denied a fair trial because the court erroneously interpreted the law pertaining to: (1) its lawful duty to investigate and dismiss unfit jurors, and (2) the correct legal standard for the resolution of doubts regarding juror bias. Additionally, the trial court clearly abused its discretion in failing to grant Hannah Jones a new trial because of Juror

11's concealed bias and jury misconduct. Therefore, Hannah Jones is entitled to a new trial.

DATED this 12th day of May, 2014.

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DECLARATION OF SERVICE

Jule Sprenger declares, under penalty of perjury under the laws of the State of Washington, that the following is true:

1. I am employed by Skellenger Bender, P.S., counsel of record for Appellant Hannah Jones in this action; a resident of the State of Washington; over the age of 18 years; and not a party to this action.

2. On May 12th, 2014, I arranged for the filing of Reply Brief of Appellant and this Declaration of Service with the Clerk of the Court of Appeals, Division One, and served Respondent as indicated below:

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STATE OF WASHINGTON
2014 MAY 12 PM 2:36

Jule Sprenger 

Date and Place of Execution 5.12.14 at Seattle, WA