89636-4

Court of Appeals, Div. I, No. 68406-0

SUPREME COURT OF THE STATE OF WASHINGTON

FIKRETA CUTUK and SEJFUDIN CUTUK,
Appellants,

v.

JEFFREY BRAY, M.D.,
Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioners Fikreta and Sejfudin Cutuk ask this Court to accept review of the Court of Appeals decision terminating review designated in Part II.

II. COURT OF APPEALS DECISION

The Cuteks seek review of the *Unpublished Opinion* dated October 28, 2013, in *Fikreta Cutuk and Sejfudin Cutuk v. Jeffrey F. Bray, M.D.*, No. 68406-0-I, Division One. *See,* Appendix.

III. ISSUES PRESENTED FOR REVIEW

Pursuant to RAP 13.4(b)(4), this Court should grant review on the following issues:

A. Whether it is an abuse of discretion for a trial court to set aside a jury verdict based on sharply conflicting and material evidence of misconduct without conducting an evidentiary hearing

B. Whether, if a hearing is not held, the reviewing court should defer to the findings the trial court made exclusively on a written record or conduct a *de novo* review.

C. Whether, where misconduct is sufficiently proven, the trial court may presume prejudice where the nature and extent of the misconduct is not known.

IV. STATEMENT OF THE CASE

Fikreta and Sejfudin Cutuk brought a medical malpractice action against Dr. Jeffrey Bray asserting that the physician had failed to properly diagnose an ectopic pregnancy, and, as a result, had removed Mrs. Cutuk's single healthy fallopian tube. The jurors were instructed that:

> An obstetrician/gynecologist has a duty to exercise the degree of skill, care and learning expected of a reasonably prudent obstetrician/gynecologist in the state of Washington acting in the same or similar circumstances at the time of the care or treatment in question. Failure to exercise such skill, care and learning constitutes a breach of the standard of care and is negligence.

Following a seven day trial and two and a half days of jury deliberations, the jury found for Mrs. Cutuk[1], and awarded $71,795.53 in damages.

Shortly after trial, Dr. Bray filed a motion for a new trial. Dr. Bray asserted, *inter alia*, that the jury engaged in jury misconduct by "researching, substituting, and applying the dictionary definition of negligence for the *legal* definition..."[2] In support of his motion, Dr. Bray filed three declarations gathered following post-trial interviews with the jurors. All three of the declarations stated that (1) an unidentified juror stated that he or she looked up the definition of negligence in a dictionary at home, (2) told the definition to at least some of the jurors, and (3) that

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[1] While the Cutuks brought the suit as a marital community, consistent with the *Opinion*, this brief references only Mrs. Cutuk.

[2]Dr. Bray also sought a new trial for an error of law in the jury instructions. The trial court denied that motion, and that ruling was not appealed.

the jurors briefly discussed the definition on the morning of the third day of deliberations.

In response, the Cutuks requested that the court deny the motion for a new trial, or, in the alternative, moved the trial court to empanel the entire jury for a *voir dire* or make other evidentiary inquiries. The Cutuk's motion was denied. Instead, the Cutuks submitted six additional jury declarations.[3] Five of the six jurors affirmed that no dictionary definition was discussed during deliberations. One of the six stated that another juror admitted looking up a definition of negligence and that it was briefly discussed by a couple of jurors.

Not one of the nine jurors admitted actually looking up the word. Nor did any of the jurors report the alleged definition or identify the source from which it supposedly was derived.

Notwithstanding the sharp factual inconsistencies regarding whether or not the incident even took place, and the lack of an evidentiary hearing, the trial court found that juror misconduct occurred. The trial court concluded that the alleged consideration of the definition "in all probability... would affect the verdict" because a dictionary definition of negligence would differ from the definition of negligence in the medical malpractice context.

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[3]The remaining three jurors were unavailable to counsel.

In its *Opinion*, the Court of Appeals affirmed the trial court. The panel applied the abuse of discretion standard even though the decision was based on written submissions, holding that the sharply conflicting declarations supported the trial judge's factual determination that misconduct actually occurred. *Opinion*, pp. 5-6, 11-12. It then concluded that the trial court did not abuse its discretion by failing to hold an evidentiary hearing because CR 59(a)(2) permits proof of misconduct by the affidavits of jurors. *Opinion*, pp. 10-12. Finally, the Court decided that the fact that the trial court did not know the (allegedly) introduced dictionary definition did not vitiate the conclusion that the "juror's misconduct likely affected the jury's verdict." *Opinion*, p. 8.

The Cutuks seek review on the issues relating to the failure to hold an evidentiary hearing, the standard of review, and the quantum of proof required to establish prejudice.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The burden of proof required of a litigant who contends that juror misconduct occurred is a question of substantial public importance. RAP 13.4(b)(4).

"Before a new trial may be granted for misconduct of jurors such misconduct must be shown with certainty." Herndon v. City of Seattle, 11 Wn. 2d 88, 105, 118 P.2d 421 (1941). Without so much as a nod to this standard of proof, the appellate court affirmed the trial court's conclusion

that misconduct had occurred where four jurors out of nine claimed that another juror stated that he had looked up a dictionary definition. *Opinion*, pp. 4-6.

The Court of Appeals then upheld the trial court's finding that the misconduct likely affected the verdict, stating that the trial court made an "objective assessment" that the alleged (and unknown) definition affected the jury. *Opinion*, p. 8. In support, the *Opinion* cites Adkins v. Aluminum Co. of America, 110 Wn.2d 128, 750 P.2d 1257 (1988), in which the trial court (and this Court) compared the actual definitions consulted by the jurors with the jury instructions. Such an analysis did not, and could not, occur in this case because Dr. Bray failed to submit any evidence whatsoever of the nature of the definition.

Therefore, at two critical junctures of review, the Court of Appeals deferred to the trial court's findings of fact and law based on a record replete with conflicting evidence on whether the misconduct occurred, and lacking any information whatsoever which would allow an evaluation of possible prejudice. The efforts of counsel, witnesses, the court and the jury, exerted over the course of many months, were thwarted without objective support.

The errors committed by the Court of Appeals do not affect the Cutuks alone, but rather reflect an unfortunate state of confusion regarding the bases for overturning jury verdicts and the standards of review on

appeal. Both for reasons of judicial economy and to uphold the sanctity of jury verdicts generally, retrials should be disfavored. And yet, the amount of litigation in Washington over the last twenty years relating to jury misconduct has roughly quadrupled compared to the twenty years before.[4]

Three primary sources of uncertainty are reflected by the Cutuk *Opinion*. First, whether or not it is an abuse of discretion for a trial court to set aside a verdict based on conflicting evidence of juror misconduct without conducting an evidentiary hearing. Second, whether, where a hearing is not held, the reviewing court should defer to the findings the trial court made exclusively on a written record. Third, what is the degree of proof required to establish prejudice if misconduct is found.

This case offers the Supreme Court an opportunity to clarify the quanta of proof required to establish jury misconduct and to conclude whether prejudice may have resulted. Substantial public importance dictates that this Court revisit the arena of jury misconduct and lay down clear theoretical and procedural guidelines for the courts below. The need to reinforce the stability of verdicts is particularly urgent in an age in which jurors have instantaneous access to information on their cell phones.

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[4] This estimate was derived as follows: The words "jury misconduct" were placed into the LexisNexis search engine under Washington cases. The number of cases using the phrase between January 1, 1983 and December 31, 1997 is 59, while between January 1, 1998 and December 31, 2012 it is 257.

1. Where affidavits are in conflict, the trial court should hold an evidentiary hearing before making a finding of misconduct

In response to Dr. Bray's motion for a new trial because of alleged juror misconduct, Mrs. Cutuk moved that the court recall the jury. The trial court denied her motion, refusing to allow her to call the jurors to cross-examine them about the alleged incident and inquire into the nature of the dictionary definition that was allegedly discussed. Instead, the trial court simply believed four juror declarations over the other five, and assumed that any dictionary definition would have prejudiced the proceedings against Dr. Bray.

On appeal, Mrs. Cutuk urged that the trial court's refusal to conduct the evidentiary hearing was an abuse of discretion. She noted that in those cases affirming the grant of a new trial based upon juror misconduct set forth in affidavits alone, the affidavits have been unrebutted.[5] The Court of Appeals nonetheless approved the denial of Mrs. Cutuk's motion to recall the jury, holding that the trial court did not abuse its authority when it decided the disputed facts on a written record alone. *Opinion*, p. 12.

A fundamental function of the courts, however, is to judge the

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[5] *See, e.g.*, State v. Parker, 25 Wn. 405, 411, 65 P. 776 (1901), Lyberg v. Holz, 145 Wash. 316, 317, 259 P. 1087 (1927), Halverson v. Anderson, 82 Wn. 2d 746, 748, 513 P.2d 827 (1973), Robinson v. Safeway Stores, 113 Wn. 2d 154, 156, 776 P.2d 676 (1989), and Adkins, 110 Wn. 2d at 131.

credibility of witnesses and afford each litigant the opportunity to engage in cross-examination. "A court may abuse its discretion by failing to hold an evidentiary hearing when affidavits present an issue of fact whose resolution requires a determination of witness credibility." Woodruff v. Spence, 76 Wn. App. 207, 210, 883 P.2d 936 (Div. III, 1994). Cited by Woodruff, Autera v. Robinson, 419 F.2d 1197, 136 U.S. App. D.C. 216, (D.C. Cir. 1969) sets forth the reasons why hearings are required when substantive facts are at issue. In Autera, the trial court found that a settlement had been agreed by the plaintiffs:

> ... Had no factual dispute arisen to plague the parties' substantive rights, we would perceive no difficulty in the judge's acceptance, as a predicate for his action, of the facts represented through statements by members of the bar and affidavits of the parties or others. In this case, however, despite the factual questions developing as the hearing moved along, no opportunity was afforded anyone to test any representation by the chastening process of cross-examination.
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> ... True it is that the [court's] findings were justified by the statement made by appellants' former counsel, but only if the countervailing version set forth in appellants' affidavits was completely rejected. As is evident, that finding was, as it had to be, the product of a selection unbenefited by built-in aids to a discriminating choice. The opportunity to judge credibility was nonexistent as to the absent affiants; the opportunity to probe by cross-examination was completely lacking. Without these twin tools, normal in the trial of factual issues, the factual conclusion was certain to take on an unaccustomed quality of artificiality.
>
> ...In our view, counsel's statements, the affidavits, and the verified motion stood on substantially the same plane as nontestimonial presentations of fact. As such, by legal principles with deep roots in antiquity, neither was an acceptable mode of proof of the facts in issue. We recognize, of course, that trial judges have a discretion

> to hear and determine ordinary motions either on affidavits or oral testimony portraying facts not appearing of record. We note, however, that an attempted resolution of factual disputes on conflicting affidavits alone may pose the question whether the discretion was properly exercised. Much more emphatically do the decisions disapprove factual determinations derived by weighing affidavits when the motion is more than routine.
>
> A motion to enforce a settlement contract is neither ordinary nor routine. It is the modern counterpart of the olden practice involving supplemental pleadings and formal trial or hearing of the issue as thus developed. Its relative simplicity is a concession to the policy favoring settlements, but only to the extent that full and fair opportunities to prove one's point are substantially preserved.

419 F.2d at 1202-1203 (footnotes omitted). The same policy and judicial considerations apply to the case at bar: Factual issues relating to the incident arose, and were strongly contested. The trial court had to completely reject half of the declarations to arrive at its finding that the misconduct occurred. Mrs. Cutuk's substantive rights were implicated, as the right to trial by jury is protected by right to jury trial by the Washington Constitution in Article 1, § 21. The relative simplicity of the procedure permitted by CR 59(a)(2) should not override her opportunity to prove her point.

The Court of Appeals points out that "[i]n many contexts trial courts decide disputed facts on a written record without any evidentiary hearing." *Opinion*, p. 12. However, where significant facts are in dispute, and the court cannot weigh the credibility of witnesses without an evidentiary hearing, it is an abuse of discretion to not hold a hearing. In re Marriage of Maddix, 41 Wn. App. 248, 252, 703 P.2d 1062 (Div. II,

1985). Only "[i]f there are no relevant factual disputes or credibility issues and the record is sufficient to fully inform the court, the case may be properly resolved without a testimonial hearing." Blaine v. Feldstein, 129 Wn. App. 73, 76,117 P.3d 1169 (Div. I, 2005).[6] The finding of misconduct in this case is akin to the granting of a summary judgment motion on the basis of conflicting declarations relating to material facts.

Washington case law, unfortunately, is silent on the point of when it is an abuse of discretion for a trial court to deny a litigant's request for a hearing on a charge of juror misconduct. Turning to the federal courts for guidance,[7] it is observed that "[t]he trial court, upon learning of a possible incident of juror misconduct, must hold an evidentiary hearing to determine the precise nature of the extraneous information." United States v. Bagnariol, 665 F.2d 877, 885 (9th Cir.) *cert. den'd*, 456 U.S. 962, 102 S. Ct. 2040 (1982).

The exception to the rule that evidentiary hearings should be held is in cases where "the court [knows] the exact scope and nature of the extraneous information." United States v. Halbert, 712 F.2d 388, 389 (9th Cir. 1983); *accord,* United States v. Langford, 802 F.2d 1176, 1180 (9th Cir. 1986). It is only "[i]n rare instances, [that] credibility may be

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[6] Cases that hold otherwise usually involve the failure of the appellant to request the hearing at the trial court level. *See, e.g.*, In re Marriage of Rideout, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003).

[7] Bryant v. Joseph Tree, Inc., 119 Wn. 2d 210, 218–19, 829 P.2d 1099 (1992),

determined without an evidentiary hearing where it is possible to 'conclusively' decide the credibility question based on 'documentary testimony and evidence in the record.'" Earp v. Ornoski, 431 F.3d 1158, 1169-70 (9th Cir. 2005) (citing Watts v. United States, 841 F.2d 275, 277 (9th Cir. 1988).

In determining whether a hearing must be held, "the court must consider the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source." United States v. Saya, 247 F.3d 929, 934-5 (9th Cir. 2001). Citing Saya, the Cutuk *Opinion* asserts that the trial court did not abuse its discretion. It concludes that the Saya criteria were satisfied because the trial court noted that the allegation was serious and there was no reason to question the credibility of the three jurors who signed declarations for Dr. Bray. *Opinion*, p. 11.

The *Opinion* turns Saya on its head: The "content" of the allegations, as noted above, were entirely devoid of the crux of the problem because the actual definition was never reported, and therefore the potential prejudicial effect is not measurable. The allegations were certainly "serious," and therefore merited investigation, particularly in light of the fact that they were strongly contested.

Finally, there was no basis to judge the "credibility" of one set of jurors over the others. The Court relied on its conclusion that people

recollect differently, but this is not akin to observation of witnesses under examination. Only through cross-examination and inquiry could the trial court have learned what the alleged definition was, and judge the credibility of the jurors by observing how confident each witness was of his recollection, whether his memory was consistent with other witnesses and the known facts, whether there was bias against (or for) the prevailing party, or even whether there were indicia that the incident was somehow promoted by the losing party's investigating team. *See*, In re Det. of Stout, 159 Wn. 2d 357, 382, 150 P.3d 86 (2007, J. Madsen concurring).

This Court should take this opportunity to address a substantial issue of first impression in this state: Whether, when evidence of juror misconduct is contradicted, a trial court must hold a hearing to determine the scope and nature of the alleged misconduct. In the absence of settled law on the point, disappointed litigants are encouraged to, as Dr. Bray did, contact jury members in the hope of gathering declarations to contest the verdict without bearing the heavy burden of making sufficient showing of misconduct or prejudice.

2. Where affidavits alleging misconduct are in conflict, the reviewing court should apply the *de novo* standard of review.

Assuming, for the purposes of argument only, that a trial court may set aside a jury verdict where conflicting allegations of misconduct are

presented exclusively through written materials, this Court should clarify the standard of review. Generally, the substantial evidence standard is applied when the trial court has the opportunity (unlike the appellate courts) to resolve issues of credibility. Dolan v. King County, 172 Wn.2d 299, 310, 258 P.3d 20 (2011). In cases of juror misconduct, deference is accorded the trial court when the judge has had the opportunity to observe the in-court conduct of the jurors themselves. State v. Jordan, 103 Wn. App. 221, 229, 11 P.3d 866 (Div. II, 2000).

On the other hand, where a trial court makes factual findings based exclusively on affidavits, the standard of review is *de novo* because appellate courts are in as good a position as trial courts to review written submissions. Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 252, 884 P.2d 592 (1994). Nonetheless, the Court of Appeals refused to review the declarations *de novo*, instead deferring to the trial court on the findings that the misconduct happened and that it may have had prejudicial effect. The failure to hold the evidentiary hearing stripped Mrs. Cutuk of the opportunity to cross-examine the hostile witnesses and explore the nature of the alleged definition, and the abuse of discretion deprived her of an independent review by the appellate court.

The case of McCoy v. Kent Nursery, Inc., 163 Wn.App. 744, 759, 260 P.3d 967 (2011) is an example of correct analysis. In that case,

Division II reversed the trial court's order granting a new trial based on a disputed charge of juror misconduct in *voir dire*:

> In considering the McCoys' request for a new trial based on juror misconduct, the trial court did not engage in fact-finding with the accused jurors; it made no written or oral findings of its recollection of voir dire or of credibility or weight accorded the competing declarations to which we can defer. And no record of voir dire exists. Thus, the posttrial affidavits of counsel and jurors and other documentary evidence before us on appeal comprise the basis of the trial court's findings on juror misconduct and the effect on the verdict that we review on appeal. ...
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> ... The threshold issue is whether posttrial declarations supporting a motion for a new trial adequately demonstrate juror misconduct. Based on the lack of supporting evidence in the record... we do not reach whether the alleged misconduct affected the verdict, and we do not defer to the trial court's knowledge of the proceedings...

McCoy v. Kent Nursery, Inc., 163 Wn.App. 744, 759, fn. 8, 260 P.3d 967 (Div. II, 2011). In McCoy, the Court of Appeals examined the declarations and noted that the record was insufficient to support the grant of a new trial. McCoy, 163 Wn.App at 764.

Similarly, had the Court of Appeals applied the *de novo* standard of review in the instant case, it would have, or should have, reversed the trial court. The declarations, sharply in conflict with each other, fall far short of the "strong, affirmative showing of misconduct" required to impeach a verdict. Richards v. Overlake Hosp. Med. Ctr., 59 Wash. App. 266, 271, 796 P.2d 737 (1990). The allegations presented in this case exclusively concern acts that supposedly took place within the private confines of the jury room. The trial court's observations of *voir dire*

before trial, and of the entire trial, were irrelevant with respect to what happened in the jury room. Because there was no hearing, the trial court did not have the opportunity to judge the credibility and motivations of the jury. Its findings, therefore, should not be accorded deference.

This Court should accept review of the *Opinion* in order to establish the rule that where a finding of misconduct is not based upon the trial court's own observations, the standard of review is *de novo*.

3. Where the nature and scope of the misconduct is not established, the trial court should not presume prejudice.

Not every case involving a juror's consultation with a dictionary, or exposure to extrinsic material, requires a new trial. Rather, there must be a showing that the prohibited material could have had a prejudicial effect on the outcome. Although everyone has a right to a fair trial, "it does not follow that a new trial must be granted because of every slight misstep or deviation from the customary rules governing trials." State v. Adamo, 128 Wn. 419, 425, 223 P. 9 (1924).

In Adamo, for example, two jurors learned from a newspaper headline that the defendant had been previously convicted of a killing. Holding that a retrial was not required, Adamo points out that "we must indulge some presumptions in favor of the integrity of the jury." Adamo, 128 Wn. at 422 (citing State v. Pepoon, 62 Wash. 635, 114 Pac. 449, 1911). The standard, as it has developed over the years, is "there must be

a showing of reasonable grounds to believe that a defendant has been prejudiced." State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968), *see also*, State v. Fry, 153 Wn. App. 235, 240, 220 P.3d 1245 (Div. III, 2009) (no showing of prejudice where the court concluded, based on adequate findings of fact, that neither the dictionary nor the juror's use of the dictionary influenced the verdict.)

In the Cutuk case, however, Dr. Bray failed to adduce any evidence whatsoever relating to the content of the dictionary definition that was allegedly relayed to some of the jurors. In support of its affirmance that the unknown definition may have prejudiced the defendant, the *Opinion* cites Adkins v. Aluminum Co. of America, 110 Wn.2d 128. In Adkins, unrebutted testimony established that the jury had taken Black's Law Dictionary (3d ed. 1933) into the jury room and looked up two definitions. Adkins, 110 Wn. 2d at 137.

In Adkins, this Court, and the trial court, undertook a careful examination of the actual definitions consulted by the jury. The Black's Law Dictionary did indeed include many confusing elements that could cause an errant decision. Adkins, 110 Wn. 2d at 138. Therefore this Court held that the trial court "was justified in concluding that it could not reasonably say that the jury was not influenced by the dictionary." Id..

Adkins notes that trial court can only overturn the verdict where "the information supplied to the jury can be ascertained," Adkins, 110 Wn.

2d at 137. "[T]he trial court must review the extrinsic information and decide if it probably had a prejudicial effect on the minds of other jurors. Lockwood v. A C & S, 109 Wn.2d 235, 265, 744 P.2d 605 (1987) (citing Gardner v. Malone, 60 Wn.2d 836, 840, 376 P.2d 651 (1962)). "The court must make an objective inquiry into whether the extraneous evidence, if indeed any existed could have affected the jury's determination..." Richards, 59 Wash. App. at 273.

Here, the required "objective inquiry" regarding prejudice was (and is) impossible because Dr. Bray did not adduce evidence of either the source or the content of the definition. The Court of Appeals asserts that "the typical dictionary of definition of 'negligence,' even relying on a legal dictionary, differs substantially from the negligence definition used in a malpractice action." *Opinion*, p. 8. For several reasons, that conclusion is flawed.

First, and most seriously, in the absence of knowledge of what the definition actually stated, the court is merely engaging in conjecture when it concludes that the definition was both different than the jury instructions and prejudicial.[8] We do not know the source of the definition. We do not

[8] It is notable that there is nothing in this record suggesting that the trial court inferred prejudice because the modest award to the Cutuks was inconsistent with the evidence presented at trial. Smith v. Kent, 11 Wn.App. 439, 449, 523 P.2d 446 (Div. I, 1974, *overruled on other grounds*, State v. Cho, 108 Wn.App. 315, 30 P.3d 496 (2001)) (finding of actual prejudice sustained in jury misconduct case where the court characterized the verdict as one that 'shocked' and 'dumbfounded' him).

know whether the juror, if he indeed looked up "negligence," consulted an on-line, standard, or legal dictionary, or whether he looked up "medical negligence" or some other variant of the term. Rather than presuming that the jury heeded the instructions of the court, the lower courts here have simply assumed that the definition prejudiced Dr. Bray. The courts' speculation is impermissible in light of the longstanding policy of this state favoring the stability of jury verdicts and the presumption that the jury will follow the instructions of the court. State v. Wilson, 71 Wn.2d 895, 895, 431 P.2d 221 (1967), State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982).

Second, dictionary definitions of negligence vary widely. It is unlikely that a definition of negligence in an ordinary dictionary would make it easier for the jury to conclude that a obstetrician/gynecologist was negligent when performing surgery.[9] Travelers Ins. Co. v Carter, 298 SW2d 231, 234 (Tex. 1956) (No new trial where the unauthorized dictionary definitions were more favorable to the losing party than the definitions given by the court). Here, the contrast between this case and Adkins is clear: By reviewing the actual extrinsic definition consulted by

[9] Many standard dictionaries define negligence simply as the "failure to exercise the care that a prudent person usually exercises." Webster's New Collegiate Dictionary, 1973. If such a definition was consulted, it could not have prejudiced Dr. Bray. If, when he removed Mrs. Cutuk's fallopian tube, Dr. Bray fell below the standard of care required of an ordinary prudent person, he surely fell below the higher standard of care required of a physician.

the jury, the court in Adkins was able to establish that the jury could have been misled by terms such as "gross," "ordinary," and "slight." Adkins, 110 Wn.2d at 138.

Third, "negligence" is a generic term, the meaning of which is commonly understood. The definitions of common words, even when a standard dictionary is consulted, are accepted as matters of common knowledge to jurors. Therefore such definitions are not prejudicial. See, e.g., Dulaney v Burns, 218 Ala 493, 497, 119 So 21 (1928); In Re Estate of Cory, 169 NW2d 837, 846 (1969), State v Asherman, 193 Conn 695, 737, 478 A2d 227 (1984).

The Cutuk *Opinion* goes against the great weight of authority nationwide which holds that where it is unknown what definition(s) may have been consulted, a grant of a new trial is improper. Loucks v. Pierce, 341 Ill. App. 253, 260, 93 N.E.2d 372 (1950), Rocky Mountain Trucking Co. v Taylor, 79 Wyo 461, 488, 335 P2d 448 (1959), Kaufman v. Miller, 405 SW.2d 820, 826 (Tex. 1966), *rev'd on other grounds*, 414 SW.2d 164). In Dawson v Hummer, 649 NE. 2d 653, 665 (Ind. App. 1995), the jury consulted a legal dictionary, but the appellate court affirmed the jury verdict, noting that "we do not even know which legal dictionary the jury obtained. We are therefore unable to determine if the definitions it read conflicted with the trial court's instructions." A verdict should not be set aside where an objective analysis of the dictionary definition cannot be

shown to have materially affected the verdict. Jury verdicts should not be so fragile.

Today's jurors live in a world in which information is almost inescapable. Portable telephones and the almost universal access to the internet vastly increase the chances that extraneous material may be received by the jury. In order to preserve the stability and integrity of jury verdicts, trials should not be set aside on conjecture alone. "If we assume that jurors are so quickly forgetful of their duties of citizenship as to stand continually ready to violate their oath on the slightest provocation, we must inevitably conclude that a trial by jury is a farce and our government a failure." State v. Pepoon, 62 Wn. 635, 644, 114 P. 449 (1911).

This Court should accept review of the Cutuk case and clarify that even in instances in which misconduct is proven, the trial court must be informed by sufficient evidence that the misconduct may have actually prejudiced the outcome of the case. See, e.g., Tarabochia v. Johnson Line, Inc., 73 Wn. 2d 751, 757, 440 P.2d 187 (1968)(Jury verdict reinstated where there was no showing that new material facts were discovered by the jury that could have influenced the jury.)

VI. CONCLUSION

This case must be accepted for review, reversed, and remanded to the trial court with instructions to reinstate the verdict of the jury or to hold an evidentiary hearing on the alleged misconduct.

RESPECTFULLY SUBMITTED this 27th day of November, 2013.

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Certificate of Service

I, the undersigned, certify that on the 27h day of November, 2013, I caused a true and correct copy of this pleading to be served, by the method(s) indicated below, to the following person(s):

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FIKRETA CUTUK and SEJFUDIN CUTUK, wife and husband,	)	NO. 68406-0-I
Appellants,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
JEFFREY F. BRAY, M.D.,	)	
Respondent.	)	FILED: October 28, 2013

LEACH, C.J. — In this medical negligence case, Fikreta Cutuk and Sejfudin Cutuk appeal the trial court's order granting Dr. Bray a new trial on all issues based on juror misconduct. Because the court did not abuse its discretion in finding that the juror misconduct likely affected the outcome of the trial, we affirm.

FACTS

Dr. Jeffrey Bray misdiagnosed Fikreta Cutuk's ectopic pregnancy and consequently removed her one healthy fallopian tube. Later, she underwent a second surgery to remove the diseased one. Cutuk sued Bray for medical negligence. A jury found Bray negligent and awarded Cutuk $71,795.53.

After trial, defense counsel interviewed several jurors, and Bray moved for a new trial based upon juror misconduct. Bray supported his motion with the declarations of three jurors, two who had dissented from the verdict and the

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foreperson, who had agreed with the verdict. The declarations each stated that a juror had looked up a definition of "negligence" in a dictionary, reported the definition to the jury, and the definition was discussed during jury deliberations.

In response, Cutuk filed declarations from six additional jurors. Four stated that the alleged incident did not occur, although one of them recalled someone wishing they could use a dictionary. One stated that a juror had looked up the definition of "negligence" and the definition was "discussed briefly by a couple of jurors." And the sixth juror stated, "There was a juror who said he would, or did, look up the word in a dictionary, but there was never a conversation amongst us jurors of any definition of negligence other than the definition provided by the court."

After reviewing the conflicting declarations, the court found "that objective proof has been presented to satisfy the court that in fact a juror did look up the definition of negligence and did discuss, however briefly, that definition with the other jurors." Reasoning that the common definitions of "negligence" generally found in dictionaries would contradict the specialized standard in a medical negligence case, the court concluded that the misconduct would likely affect the jury's verdict. Because the court understood controlling case law to require a new trial if it had any doubt that the misconduct affected the verdict, it granted Bray a new trial. Cutuk appeals.

STANDARD OF REVIEW

The trial court has discretion to decide whether to grant a new trial.[1] We will disturb the trial court's decision only if we find a clear abuse of that discretion or if the decision is based on an erroneous interpretation of the law.[2] A court abuses its discretion when its decision is "'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'"[3] We give greater deference to a decision to grant a new trial than to a decision to deny a new trial.[4]

ANALYSIS

Cutuk contends that the record contains insufficient evidence to support the trial court's finding that the alleged misconduct occurred. Alternatively, she claims that the trial court abused its discretion when it found the misconduct occurred without holding an evidentiary hearing. Finally, she claims that if the misconduct did occur, it did not clearly influence the jury's verdict.

When a party challenges a verdict with evidence of alleged juror misconduct through consideration of extraneous matter, the trial court must consider two questions: (1) whether the court may even consider the evidence

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[1] State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989).

[2] Jackman, 113 Wn.2d at 777.

[3] Breckenridge v. Valley Gen. Hosp., 150 Wn.2d 197, 203-04, 75 P.3d 944 (2003) (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

[4] Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 271, 796 P.2d 737 (1990).

and (2) whether the alleged misconduct warrants a new trial.[5] To answer the first question, the court must decide whether the alleged misconduct "inheres in the verdict."[6] Evidence that describes "[t]he mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors' intentions and beliefs,"[7] inheres in the verdict.

If the misconduct inheres in the verdict, the court may not consider the evidence. If the misconduct does not inhere in the verdict, the court may consider the evidence; but not all misconduct necessitates a new trial. Juror misconduct only warrants a new trial when it causes prejudice.[8] To evaluate potential prejudice, the court makes an objective inquiry into whether the misconduct could have affected the jury's decision, rather than inquiring into its actual effect, because the actual effect inheres in the jury verdict.[9] Due to the great deference an appellate court gives to a trial court's discretionary decision to

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[5] Johnson v. Carbon, 63 Wn. App. 294, 302, 818 P.2d 603 (1991).

[6] Johnson, 63 Wn. App. at 302.

[7] Cox v. Charles Wright Acad., Inc., 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967).

[8] State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968); State v. Briggs, 55 Wn. App. 44, 55, 776 P.2d 1347 (1989); State v. Rempel, 53 Wn. App. 799, 801, 770 P.2d 1058 (1989), rev'd on other grounds, 114 Wn.2d 77, 785 P.2d 1134 (1990).

[9] Richards, 59 Wn. App. at 273.

grant a new trial, Cutuk bears a heavy burden to show that the trial court's exercise of discretion in this case was manifestly unreasonable or based upon untenable grounds.

To support his request for a new trial, Bray presented declarations of three jurors, Jill Lang, Cheryl Jones, and Joanna Satterwhite. Each stated that a juror conducted outside research and reported the results to the jury. In her declaration, Lang stated, "One juror looked up the definition of negligence in a dictionary and reported the definition back to the rest of the jurors. The dictionary definition of negligence was discussed during deliberations."

Jones stated,

> On Tuesday morning, the third day of deliberations, . . . one juror reported to the group that he was struggling with what negligence meant and looked up the definition of negligence in a dictionary. He said he pulled the dictionary off his shelf at his home. He reported the definition back to the rest of the jurors. The dictionary definition of negligence was discussed during deliberations [for] approximately 10 minutes.

And Satterwhite described, "One juror had to look up the definition of negligence in a dictionary and reported the definition back to the rest of the jurors. The dictionary definition of negligence was discussed during deliberations."

In response, Cutuk submitted declarations from six additional jurors, four of whom declared that no one reported consulting a dictionary and the jury did not engage in any discussion of a definition outside the scope of the evidence or

the jury instructions. However, one juror, Eric Wiebusch, stated, "I recall that on the beginning of the last day Juror Number 5, Jerry, stated that he had looked up the definition of negligence in a dictionary the previous evening. I do not recall what that definition was. It was discussed briefly by a couple of jurors."[10]

The trial court considered all nine juror declarations before it ruled on Bray's motion.[11] In his oral ruling, the trial judge stated,

> It doesn't surprise me, given the dynamics of a jury situation, that some jurors will hear some things and other jurors will not hear those same things. . . .
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> . . . .
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> . . . I have at least four jurors who say it did occur. I have a fifth one who says, well, there was something generally like that. And then I have three who say they don't recall it occurring. . . .
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> . . . .
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> So bottom line, the court makes a factual finding that objective proof has been presented to satisfy the court that in fact a juror did look up the definition of negligence and did discuss, however briefly, that definition with the other jurors.

The record amply supports the trial judge's factual determination that Bray met his burden to show the misconduct actually occurred.

The trial court determined that Adkins v. Aluminum Co. of America[12] required that it grant a new trial if doubt existed about whether the misconduct

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[10] Notably, juror number 5, Jerry Patzer, categorically denied having looked up the word "negligence" or sharing any definition of the word with the other jurors.

[11] Three jurors declined to be interviewed.

[12] 110 Wn.2d 128, 137-38, 750 P.2d 1257 (1988).

affected the verdict. Because the trial court concluded that the misconduct likely affected the verdict, it ordered a new trial on all issues.

In Adkins, the court stated,

> Where jury misconduct can be demonstrated by objective proof without probing the jurors' mental processes, the effect the improper information may have had upon the jury is a question properly determined in the sound discretion of the trial court. If the trial court has any doubt about whether the misconduct affected the verdict, it is obliged to grant a new trial.[13]

The Adkins court considered a very similar issue to this case. While deliberating on a personal injury suit, the jury looked up definitions of "negligence" and "proximate cause" in a 1933 edition of Black's Law Dictionary supplied by the court bailiff. The Supreme Court reviewed the trial court's decision to grant a mistrial under the abuse of discretion standard.[14]

The court noted that while the dictionary definitions did not amount to new evidence as such, they constituted extrinsic information that was not admitted as evidence at trial or provided by the trial court. It further noted that the Black's Law Dictionary definitions contained legal premises not applicable to the case.[15] The Supreme Court affirmed the trial court, holding that it did not abuse its

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[13] Adkins, 110 Wn.2d at 137 (citation omitted).
[14] Adkins, 110 Wn.2d at 136-37.
[15] Adkins, 110 Wn.2d at 138.

discretion because it "was justified in concluding that it could not reasonably say that the jury was not influenced by the dictionary."[16]

Here, like in Adkins, the court acknowledged that the jurors' testimony about any effect the discussion had on jury deliberations inhered in the verdict and should not be considered by it when deciding the motion. Instead, the court reasoned that "in all probability the misconduct would affect the verdict" because the typical dictionary definition of "negligence," even relying on a legal dictionary, differs substantially from the negligence definition used in a medical negligence action.

The trial court's decision to grant a new trial accords with Adkins. The trial court did not know exactly what dictionary definition of negligence was reported to the jury or what effect, if any, that report had on the jurors' deliberative process. The trial court made an objective assessment that the juror's misconduct likely affected the jury's verdict and reasonably doubted that the jury considered only the definition of "negligence" provided in the jury instructions. The court applied Adkins correctly when it resolved its doubts against the verdict.

Cutuk, however, contends that Adkins only applies "where the trial court is privy to the nature of the extrinsic material considered by the jury." She argues vigorously that the unknown elements of the jury misconduct should have been

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[16] Adkins, 110 Wn.2d at 138.

fatal to Bray's motion for a new trial. Instead of relying on Adkins, she asks the court to apply Tarabochia v. Johnson Line, Inc.,[17] which she claims dictates a different result. We find Tarabochia distinguishable.

There, our Supreme Court reversed a trial court decision granting a new trial where the jury conducted an experiment inside the jury room trying to recreate the circumstances that led to the respondent's injury. The respondent longshoreman fell into a hole between several bags of urea, a crystalline chemical, while unloading cargo on a ship.[18] The parties presented conflicting evidence about whether urea had spilled from the bags and become wet and slippery, thus creating the hazardous condition that led to the accident.[19] The court admitted into evidence the respondent's shoes, a plastic bag like those used to store the urea, and two samples of urea.[20] The jury used these materials to conduct an experiment, although the jurors' affidavits did not detail the exact nature and results of that experiment. The court noted, "It is not unlikely that the jury thought when it was given the plastic bag, the urea crystals and the shoes, that it was being invited to conduct just such a test as it undertook."[21] The Supreme Court found that because nothing indicated the jurors obtained new

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[17] 73 Wn.2d 751, 440 P.2d 187 (1968).
[18] Tarabochia, 73 Wn.2d at 752.
[19] Tarabochia, 73 Wn.2d at 752.
[20] Tarabochia, 73 Wn.2d at 752.
[21] Tarabochia, 73 Wn.2d at 757 n.2.

material facts through their experimentation, the trial court erred by granting a new trial.[22]

Despite Cutuk's insistence that uncertainty about exactly what took place in the jury room controls the outcome of this case, the court did not decide Tarabochia on that basis. Instead, the court found that the party seeking a new trial had failed to demonstrate the discovery of new material facts "which must have influenced the verdict."[23] Unlike Tarabochia, where the jurors relied only on information already available to them inside the jury room, and like Adkins, the jury here received extrinsic information in the form of a dictionary definition of a legal term critical to the outcome of the case.

Alternatively, Cutuk argues that the court erred by ruling on Bray's motion without conducting a full evidentiary hearing before resolving the disputed facts presented in the jurors' declarations. We disagree. Under CR 59(a)(2), the court may grant a new trial based upon

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

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[22] Tarabochia, 73 Wn.2d at 754.
[23] Tarabochia, 73 Wn.2d at 757.

Cutuk cites the Ninth Circuit's statement in United States v. Saya,[24] a juror misconduct case out of Hawaii, that "'[a]lthough it is usually preferable to hold [an evidentiary] hearing,' it is not necessary where 'the court [knows] the exact scope and nature of the . . . extraneous information.'" Saya does not justify finding that the trial court abused its discretion here. The Saya court stated the current Ninth Circuit rule: "'An evidentiary hearing is not mandated every time there is an allegation of jury misconduct or bias. Rather, in determining whether a hearing must be held, the court must consider the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source.'"[25]

The trial court did that here. In its oral ruling, the court noted the seriousness of the allegations and the potential breach of the jurors' oath. The judge acknowledged that he saw no evidence of juror bias and no reason to question the credibility of the three jurors who signed declarations for Bray and noted that even two of Cutuk's juror declarations contained statements corroborating the misconduct allegations. The court recognized that among any group of twelve jurors, some may hear things differently or focus on different parts of the discussion. Therefore, it found significant objective evidence that the

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[24] 247 F.3d 929, 935 (9th Cir. 2001) (some alterations in original) (quoting United States v. Halbert, 712 F.2d 388, 389 (9th Cir. 1983)).

[25] Saya, 247 F.3d at 934-35 (quoting United States v. Angulo, 4 F.3d 843, 847 (9th Cir. 1993)).

misconduct occurred. Cutuk fails to demonstrate the need for an evidentiary hearing to properly determine the salient facts.

Cutuk acknowledges that "an evidentiary hearing is not mandated every time there is an allegation of jury misconduct," yet she implies that the trial court must conduct one if the parties dispute any of the facts surrounding alleged misconduct. She cites State v. Parker[26] and Halverson v. Anderson.[27] In Parker, the court noted that allegations of jury misconduct must be taken as true if they are not denied. We reject Cutuk's asserted corollary—that if one side disputes the allegations, then the court must conduct an evidentiary hear to resolve the dispute. In many contexts trial courts decide disputed facts on a written record without any evidentiary hearing.

Halverson also involved undisputed evidence of juror misconduct and provides no support for Cutuk's position. Cutuk cites no authority holding that a trial court abused its discretion by resolving factual issues relating to a motion for a new trial without an evidentiary hearing.

CONCLUSION

The court correctly resolved all doubts about the demonstrated juror misconduct in favor of granting a new trial. It did not abuse its discretion by

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[26] 25 Wash. 405, 413, 65 P. 776 (1901).
[27] 82 Wn.2d 746, 752, 513 P.2d 827 (1973).

resolving the request for a new trial without an evidentiary hearing after receiving conflicting evidence of misconduct. We affirm.

Leach, C.J.

WE CONCUR:

Dwyer, J.

COX, J.