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No. 63091-1

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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

Appellants,

v.

ALAN NANESS,

Appellee.

2009 AUG 29 PM 2:29  
COURT OF APPEALS  
STATE OF WASHINGTON  
FILED

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OPENING BRIEF OF CANTERBURY SHORES APARTMENT  
OWNERS ASSOCIATION, *et al.*

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ORIGINAL

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## **I. SUMMARY OF THE MATTERS ON APPEAL**

The jury returned a defense verdict in this case.<sup>1</sup> The trial court entered judgment on the verdict.<sup>2</sup> The plaintiff moved for a new trial because of alleged "juror misconduct." The plaintiff's motion relied on a brief and uncorroborated Declaration from a single juror, Janey Hamilton, who claimed that the jury had considered "extrinsic evidence."<sup>3</sup> The trial court granted a new trial.<sup>4</sup>

The Defendants/Appellants, the Canterbury Shores Apartment Owners' Association and the individual Association Board member defendants (collectively "the Association"), ask this Court to reinstate the verdict because the jurors properly relied on their own training, experience and beliefs; did not consider any "extrinsic evidence" that was outside all of the evidence in the record; and did not engage in any "misconduct." Instead, the matters addressed in the Hamilton declaration inhered in the verdict and were inadmissible to impeach the verdict. The trial court erred in granting a new trial, based solely on the contents of the Hamilton declaration.

In 1998, Alan Naness remodeled and physically combined two Canterbury Shores condominium apartment units into a single residential

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<sup>1</sup> CP 169-171.

<sup>2</sup> CP 118-120.

<sup>3</sup> CP 99-111; 156-179.

<sup>4</sup> CP 199-201.

space. Although the remodeled space presented as a single residence, the two units, still numbered units 407 and 408, remained in the public record as two separate tax parcels, with two separate legal descriptions.

In January 2005, Dr. Frank agreed to buy what he apparently thought to be a single residential property, contingent on his obtaining bank financing for 75% of the \$1.475 million sales price *and on being able to close the deal in nine calendar days*. As it turned out, the deal was "doomed from the beginning" because it could never have been closed on that tight schedule.

Dr. Frank's mortgage lender obtained a title report which showed that the property was recorded as two separate tax parcels, comprised of two separate units, with two separate legal descriptions, and with separate mortgage liens recorded against each of the units by different lenders.<sup>5</sup> Based on the title report, the bank declined to provide a loan because it would not loan against two separate tax parcels. Dr. Frank walked away from the deal because his own advisors told him it would take months to have the properties legally combined, obtain a loan and close the deal.<sup>6</sup>

Mr. Naness sued the Association for negligently causing the sale to fall through. He claimed that the Association had failed to advise him on the

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<sup>5</sup> Excerpt of Proceedings, November 6, 2008, Testimony of Jack Hagen at p. 7, ll. 7 - 17; Excerpt of Proceedings, November 10, 2008, Testimony of Kay Lynch ("Lynch Testimony") at p. 8, l. 8 - p. 9, l. 14.

<sup>6</sup> Videotaped Deposition of George Frank, M.D. ("Frank Depo.") at p. 15, l. 6 - p. 16, l. 4; p. 19, l. 9 - p. 20, l. 8; p. 20, l. 25 - p. 222, l. 4; p. 27, l. - p. 28, l. 9; p. 37, ll. 11 - 16.

proper way to legally combine the units back in 1998.<sup>7</sup> At trial, that claim was dismissed as a matter of law at the end of Mr. Naness' case, after Mr. Naness had conceded the claim should not go to the jury.<sup>8</sup>

Mr. Naness also claimed that a "Resale Certificate," prepared by Tracy Bates of CDC Management on behalf of the Association, had caused the deal to fail, because the Certificate erroneously reported that the two units had not been properly combined.<sup>9</sup> At trial, Mr. Naness tried to prove that the Certificate, and other comments made by Ms. Bates about legally combining the units, had prevented him from completing the sale to Dr. Frank.

However, Dr. Frank himself testified he did not recall seeing the Resale Certificate or discussing it when he chose not to close the sale.<sup>10</sup> He did recall that his bank had declined financing because "I think it was the title company that told us that these were not a single unit, but were two separate legal units."<sup>11</sup> Dr. Frank was "trying to make this transaction come together relatively quickly," because he had to move out of a house he had already sold in connection with his recent divorce.<sup>12</sup>

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<sup>7</sup> CP 13 - 19.

<sup>8</sup> CP 115 - 116.

<sup>9</sup> CP 13 - 19.

<sup>10</sup> Frank Depo. at p. 27, ll. 8 - 17.

<sup>11</sup> *Id.* at p. 37, ll. 11-16.

<sup>12</sup> *Id.* at p. 15, l. 24 - p. 16, l. 4.

Dr. Frank's personal banker, Kay Lynch, testified that under her bank's rules, "a single family residence needs to have one tax parcel and one legal description for the property on which the home itself sits." When the title report showed Dr. Frank was seeking a loan on two units recorded as two tax parcels, with existing encumbrances against each of the two units, the bank would not extend a loan to Dr. Frank.<sup>13</sup> Dr. Frank sought legal advice to determine how long it would take to combine the units to satisfy the lender. When Dr. Frank found it could take months, the proposed sale did not meet Dr. Frank's needs.<sup>14</sup>

After hearing this evidence, the jury returned a verdict for the Association because there was no "negligence by any of the defendants which was a proximate cause of injury or damage to the plaintiff."<sup>15</sup>

Mr. Naness moved for a new trial. The sole basis for his motion was "juror misconduct"<sup>16</sup> The only evidence of "misconduct" was the Declaration of Janey Hamilton, who claimed that "some jurors said there was no way the deal could have closed in 9 days." The Declaration also stated that two jurors "held themselves out as real estate experts" and said "the deal was doomed to

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<sup>13</sup> Lynch Testimony at p. 7, l. 5 - p. 9, l. 14.

<sup>14</sup> Frank Depo. at p. 27, l. 8 - p. 30, l. 25.

<sup>15</sup> CP 169-171.

<sup>16</sup> CP 99 - 105.

fail from the beginning; that it is impossible to close a real estate deal in that short of time [sic]."<sup>17</sup>

The trial court granted the motion for new trial based on the remarks allegedly made by these two jurors, reasoning that there was "no testimony from any witness at trial concerning the 'impossibility' of closing the sale in nine days" and that "the jurors' statements to this effect constituted extrinsic evidence and juror misconduct."<sup>18</sup>

In this appeal, the Association asks the Court to reinstate the jury's verdict because there was, in fact, *ample* testimony from which the jury could conclude this sale could not be closed in the nine calendar days permitted under the purchase and sale agreement -- for reasons independent of any alleged misstatements made in the "Resale Certificate." Furthermore, there is no evidence that any juror was asked about and failed to disclose her own real estate training or experience during *voir dire*.

If one or more jurors came to the deliberations with a belief, based on personal experience, that trying to close a somewhat complicated \$1.475 million real estate deal in nine calendar days, contingent on 75% financing, was extremely ambitious and likely to fail no matter what, that is what jurors are *supposed* to do. That is not "extrinsic evidence" -- it is common sense. It

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<sup>17</sup> CP 108 - 111.

<sup>18</sup> CP 199 - 201.

was never a proper basis, standing alone, for overturning a jury verdict after a lengthy and fair trial in which there was no other alleged error.

## **II. ASSIGNMENT OF ERROR**

The trial court erred by entering an order granting a new trial on the basis of "juror misconduct." (CP 199-201).

## **III. ISSUES RELATED TO ASSIGNMENT OF ERROR**

1. In the absence of any showing that the jurors improperly failed to disclose their real estate experience during *voir dire*, was the stated reasoning of two jurors, based on the evidence and their training and experience with real estate transactions, "extrinsic evidence" that was "outside all the evidence admitted at trial," under *Breckenridge v. Valley General Hospital*, 150 Wn.2d 197, 75 P.3d 944 (2003) and *Richards v. Overlake Hospital Medical Center*, 59 Wn.App. 266, 796 P.2d 737 (1990), *review denied*, 116 Wn.2d 1014, 807 P.2d 883 (1991)?

Short answer: No, there is no proof that extrinsic evidence was considered during the jury's deliberations.

2. Did the trial court err by granting a new trial, because all of the matters addressed in the Hamilton declaration relate to the jurors' individual and collective experience, beliefs, motives and thought processes leading to the verdict; inhere in the verdict; and did not provide the strong affirmative showing of misconduct that is necessary to overcome the policy favoring certain verdicts and the secret, frank and free discussion of the evidence by the jury?

Short answer: Yes, the trial court erred by improperly granting a new trial on the basis of testimony concerning the personal experience, beliefs, motives and reasoning that led to the jury's verdict -- all matters that inhere in the verdict and that may not be used to impeach it.

#### **IV. STATEMENT OF THE CASE**

- 1. The evidence supported the jury's conclusion that there was no negligence on the part of the Association that was a proximate cause of Mr. Naness' inability to close a sale of Units 407 and 408 to Dr. Frank within the nine calendar days allowed under their purchase and sale agreement.**

Alan Naness owned two Canterbury Shores apartment units, numbered 407 and 408. In 1998, he physically combined these contiguous units into one living space. However, the property still remained legally recorded in the public record as two units, 407 and 408, identified as two tax parcels, with two legal descriptions and with mortgage liens separately recorded against each of the two parcels by different lenders.<sup>19</sup>

Mr. Naness tried for two years to sell units 407 and 408 for \$2.8 million. As Mr. Naness readily admits, he had "no takers at that price."<sup>20</sup>

Although units 407 and 408 were not listed for sale in January 2005, real estate agent Kathryn Hinds suggested to her client, Dr. George Frank, that he might make an offer to buy them from Mr. Naness. Dr. Frank was in the middle of a divorce, had already sold his home and needed to move. He wanted to make a deal come together quickly.<sup>21</sup>

Dr. Frank offered to pay \$1.475 million for Units 407 and 408. Mr. Naness accepted the offer. However, the offer was contingent on Dr. Frank

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<sup>19</sup> Lynch Testimony at p. 8, ll. 8 - 25.

<sup>20</sup> CP 36; *see also* Frank Depo. at p. 20, ll. 9 - 19.

<sup>21</sup> Frank Depo. at p. 11, ll. 15 - 25; p. 15, l. 24 - p. 16, l. 4.

obtaining financing for 75% of the purchase price *and on getting this \$1.475 million real estate deal closed in nine calendar days*. The written purchase and sale agreement was signed and dated January 19, 2005. It recited that the sale must close by January 28, 2005. The deal did not close by January 28 because shortly before the closing date, Dr. Frank learned he could not obtain the \$1.1 million loan he needed to buy the property. Dr. Frank understood this was a result of the information obtained from the public record and contained in the title report provided to his lender.<sup>22</sup>

More than a year later, Mr. Naness sold the units for \$1.285 million -- after he had gone through the process of having the units combined into a single property in the public records. He subsequently sued the Association for the difference between Dr. Frank's \$1.475 million offer and the \$1.285 million sale price; his carrying costs for the property between the time the sale to Dr. Frank was scheduled to close on January 28, 2005 and the eventual sale on November 30, 2006; and other alleged consequential damages.<sup>23</sup>

Mr. Naness had two theories why the Association should be liable for Dr. Frank's decision not to buy the property in January 2005.

*First*, Mr. Naness alleged that the Association had a duty to advise him, back in 1998, of the steps that would be required to have the two units

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<sup>22</sup> Frank Depo. at p. 11, ll. 15 - 25; p. 12, l. 15 - p. 13, l. 5; p. 15, l. 24 - p. 16, l. 4; p. 18, l. 13 - p. 20, l. 8; p. 21, l. 16 - p. 23, l. 2.

<sup>23</sup> CP 13-19. Mr. Naness' various liability theories also are set forth in detail in his trial brief, CP 33-42.

"legally combined" in the public record.<sup>24</sup> The trial court dismissed this claim as a matter of law at trial, at the close of plaintiff's case, without objection from Mr. Naness.<sup>25</sup>

*Second*, Mr. Naness alleged that a "Resale Certificate," prepared by Tracy Bates on behalf of the Association, shortly after Dr. Frank made his offer in January 2005, had caused the deal to fall through. The Certificate included a handwritten notation that:

It does not appear that the combining of units 407 & 408 was officially amended and recorded. Owner may be responsible for costs associated with this if it has not been properly done.<sup>26</sup>

2. ***The evidence showed that Dr. Frank could not obtain the financing he needed to close the purchase of Mr. Naness' property within nine calendar days because of the contents of the public record, the title report and loan underwriting criteria, not because of statements made in the "Resale Certificate."***

There was a fatal flaw in Mr. Naness' claim that information contained in the Resale Certificate or otherwise provided by Ms. Bates or the Association was erroneous, much less that the Association had caused Dr. Frank to walk away from the deal. Dr. Frank's purchase was contingent on his ability to obtain bank financing for 75% of the \$1.475 million purchase price within the scant nine calendar day window provided in the purchase and sale

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<sup>24</sup> CP 18.

<sup>25</sup> CP 115-117.

<sup>26</sup> Trial exhibit 3 (attached to Frank Depo.), also quoted in Amended Complaint, paragraph 2.9 at CP 15.

agreement. The evidence at trial showed that Dr. Frank could not obtain that \$1.1 million loan because of the information contained in the public real property records and in the title report provided to Dr. Frank's lender, Wells Fargo Bank, not because of allegedly incorrect information contained in the Resale Certificate or otherwise provided by Ms. Bates on behalf of the Association.

Dr. Frank looked to his private banker, Kay Lynch of Wells Fargo Bank, to arrange the financing for him. Ms. Lynch testified that she obtained a title report from Ticor Title Company when Dr. Frank asked her to process the loan for the Nanness units. The title report showed that Dr. Frank was trying to obtain financing for real property that appeared in the public records as *two separate tax parcels with two distinct legal descriptions*. The Ticor title report also showed that there were already a number of outstanding mortgage liens against each of the two separately recorded parcels, in favor of multiple lenders.<sup>27</sup>

When Ms. Lynch provided this information to her loan underwriters, she was advised the deal could not be done because it did not meet the Bank's underwriting criteria. Ms. Lynch wrote at the time:

While we are happy to provide financing to you on a home of your choice, ***we will not be able to provide a loan on this home as it currently exists.***<sup>28</sup>

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<sup>27</sup> Lynch Testimony at p. 17, l. 21 - p. 18, l. 17 (emphasis added).

<sup>28</sup> *Id.* at p. 16, ll. 12 - 18 (emphasis added).

At trial, Ms. Lynch made clear that when she said she could not provide a loan on the Naness property "as it currently exists," she meant *as reflected in the title report and the public record on which the title report was based*:

Q. And "as it currently exists," does that have a referral back up to above about the units not having been legally combined?

A. ***Primarily, it's referencing the issue with the title report.***

Q. The title report just said that there is two units, right?

A. ***It had two units, two tax parcel numbers, separate financing, and the underwriters indicated that as a result of that, they could not approve the loan.***<sup>29</sup>

The importance of this testimony did not escape the jury's attention. In fact, Judge Darvas asked Ms. Lynch this question at the jury's request:

THE COURT: Ms. Lynch, the question is, do you know why the underwriters would not approve a loan on these two parcels, in this case?

THE WITNESS: The explanation given to me by the underwriters was that there were two tax parcels, two tax lot numbers and that they couldn't have that in a single residence.<sup>30</sup>

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<sup>29</sup> *Id.* at p. 15, l. 16 - p. 17, l. 3.

<sup>30</sup> *Id.* at p. 21, ll. 13 - 19.

3. *The evidence showed that Dr. Frank had imposed tight time constraints on the purchase and sale agreement.*

Dr. Frank himself acknowledged that by allowing only nine calendar days from the date of the purchase and sale agreement and closing, he was "trying to make this transaction come together relatively quickly":

Q. And why did you propose a closing date nine days after the offer, do you recall?

A. I think this again relates to the matter that I had to move out of the house that we had sold, that I was renting it back from the previous buyers, and so we were trying to make this transaction come together relatively quickly.<sup>31</sup>

Dr. Frank also testified that while he might have been able to buy the property without bank financing, he would have had to sell other assets to do so -- something he probably could not have accomplished given the time constraints in the purchase and sale agreement:

Q. [I]n order to make this purchase, were you going to have to have financing, or did you have the money to just go out and buy it on your own without financing?

A. That's actually a very complicated question. ***I probably could have purchased it without financing, but it would have required selling other assets, and there probably would not have been time to do that.***

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<sup>31</sup> Frank Depo. at p. 15, l. 24 - p. 16, l. 4.

Q. [I]s it fair to say, then, in order for you to purchase this place, you needed the financing -- to do financing?

A. Yes.<sup>32</sup>

4. **The evidence showed that Dr. Frank himself did not see or rely on the Resale Certificate; and instead relied on the information obtained from the public record, the title report, his private banker and his own advisors to determine that he would not be able to close the purchase of Mr. Naness' property within his tight time constraints.**

Finally, and most damaging to Mr. Naness' claim that statements Ms. Bates made in the "Resale Certificate" caused Dr. Frank to walk away from the deal, Dr. Frank confirmed his understanding that it was the title report, and word from Wells Fargo that it would not provide financing for the property because of the title report, that made it impossible for him to close the deal in the short time frame he required. *Dr. Frank had no memory of ever seeing or discussing the "Resale Certificate" that supposedly caused the deal to fail:*

Q. And in terms of this purchase going through in your mind, were you only going to go through with it if it was one unit?

A. ***It became infinitely more complicated when we discovered that it was not legally one unit. If I remember correctly, the mortgage company from Wells Fargo was reluctant to lend based upon two separate units, and felt that it would have to be a purchase, a legal purchase of two units in order for them to loan on each of the units, as opposed to a***

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<sup>32</sup> *Id.* at p. 19, l. 21 - p. 20, l. 8 (emphasis added).

**single mortgage, although you could certainly check with them. ...**<sup>33</sup>

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**Q. Do you recall receiving or taking a look at a Resale Certificate in regard to this unit?**

**A. No, I do not.**

Q. If you will look at Exhibit No. 3 to this deposition [the Resale Certificate] -- it's in front of you -- do you see that? Have you seen that before, Dr. Frank?

A. I don't recall seeing this.

**Q. All right. Did I [sic] discuss a Resale Certificate with Ms. Hinds?**

**A. I can't recall.**<sup>34</sup>

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Q. Did she [Ms. Lynch of Wells Fargo] ever tell you on this particular transaction that they were approving financing?

**A. They were not going to approve the financing of this particular transaction once we received the report. I think it was the title company that told us these were not a single legal unit, but were two separate legal units.**<sup>35</sup>

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<sup>33</sup> *Id.* at p. 21, l. 16 - p. 22, l. 1 (emphasis added).

<sup>34</sup> *Id.* at p. 27, ll. 11 - 17.

<sup>35</sup> *Id.* at p. 37, ll. 11 - 16 (emphasis added).

When Dr. Frank learned he could not obtain financing because the property consisted of two separately recorded parcels, he consulted an attorney. The attorney advised that combining the units could take months. Dr. Frank also learned that the deal would require approval of "the mortgage lenders for all of the units" who "also had to approve this in some percentage."<sup>36</sup>

In sum, there was ample evidence that regardless what the Resale Certificate or Tracy Bates may have said about the legal combination of the units, this deal could not have been closed within the tight time constraints that Dr. Frank had imposed on the deal.

Indeed, the evidence showed deal was "doomed to fail from the beginning." When Dr. Frank and Mr. Naness signed their purchase and sale agreement, the property was publicly recorded as two tax parcels with two legal descriptions and multiple liens from multiple lenders against them. Because of that fact alone, Dr. Frank could not obtain financing without additional time and expense. It would have taken (and eventually did take) months to convert the two separate tax parcels and legal descriptions into one. Even if Dr. Frank had wanted to try to buy the property without bank financing, he probably could not have marshaled the personal assets to do so in a mere nine calendar days. Dr. Frank needed to "make this deal come together relatively quickly" -- and he was not going to be able to do so.

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<sup>36</sup> *Id.* at p. 28, l. 1 - p. 30, l. 17.

5. **The jury concluded that the Association's negligence, if any, was not a proximate cause of Mr. Naness' claimed damages.**

The jury returned a verdict for the Association by answering the following question in the negative:

QUESTION 1: Was there negligence by any of the Defendants which was a proximate cause of injury or damage to the Plaintiff?

ANSWER (yes or no): NO.<sup>37</sup>

To reach this verdict, the jury did not have to rely on any "extrinsic evidence" obtained outside the record. The verdict was well supported by the evidence in the record at trial and now in the excerpts of record on review.<sup>38</sup>

6. **The Hamilton declaration addressed her own motives, beliefs and thought processes, as well as those expressed by two of her fellow jurors, not facts or evidence that the jury obtained from sources outside of the evidence or the courtroom.**

After trial and entry of judgment on the verdict,<sup>39</sup> Mr. Naness moved for a new trial. He did not assert that there had been any error in the trial court's rulings of law, evidentiary rulings or instructions to the jury that called for a new trial. The sole basis for his motion for new trial was alleged "juror

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<sup>37</sup> CP 169.

<sup>38</sup> "We have presented the evidence most favorable to [the Association] because the jury had a right to believe that version. We are of the opinion the trial court erroneously disregarded this evidence and in this respect substituted its judgment for that of the jury." *Hendrickson v. Konopaski*, 14 Wn.App. 390, 396, 541 P.2d 1001 (1975).

<sup>39</sup> CP 118-120.

misconduct." The sole evidence of the alleged misconduct was the Declaration of a single disaffected juror, Janey Hamilton.<sup>40</sup>

Ms. Hamilton professed to be "disturbed by events that occurred in the jury room" and believed that "statements were made in deliberations that were not consistent with the instructions from the Judge and went beyond the evidence."<sup>41</sup> According to Ms. Hamilton, "there were many of us jurors who did in fact think that the Resale Certificate prepared by Defendants' Management Company had a negative effect and spooked the Dr. Frank [sic] from closing the Purchase and Sale Agreement..." According to Ms. Hamilton, "[t]here were at least 5 to 6 people who felt very strongly that Tracy Bates contributed to the failure of the deal because of her comments."<sup>42</sup>

After a full day of deliberations, "some jurors said there was no way that the deal could have closed in 9 days." When Ms. Hamilton stated her disagreement with them, she "was told by other jurors that you don't know the real estate business." Ms. Hamilton conceded they were right. "I do not know the real estate business. I am no expert."<sup>43</sup>

Ms. Hamilton stated that she eventually voted with the jurors who believed the deal was not affected by comments made by Tracy Bates, the

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<sup>40</sup> CP 99-105; 108-111.

<sup>41</sup> CP 108.

<sup>42</sup> CP 108 - 109.

<sup>43</sup> CP 109.

author of the Resale Certificate, even though she had "been strongly in favor of Mr. Naness winning his case all along." She affirmed her verdict for the Association when the jury was polled only because "I did not think I had the right during the poll to change my vote. I wish now that I had."<sup>44</sup>

Ms. Hamilton then explained how, in her view, the jurors had been swayed by "misconduct":

One of the jurors, whose first name was **Joyce, had made a list overnight of her reasons that she would not find for the Plaintiff.** Her number one reason was that the deal was doomed to fail from the beginning; that it is impossible to close a real estate deal in that short of time [sic]. Joyce and another juror by the name of Brian held themselves out as real estate business experts. **Brian echoed the thinking of Joyce** and said that there was no way that the deal could close that fast.<sup>45</sup>

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**I believe that if the jurors who said they knew real estate transactions could convince me of the impossibility to close in 9 days, others were also convinced based upon their experience and statements.** I never heard any witness in Court say that it was impossible to close a deal in 9 days, but they convinced me that that was so.<sup>46</sup>

In sum, juror "Joyce" had written a list of reasons why she could not find for Mr. Naness. We do not know what that list of reasons contained, as Ms. Hamilton shared only one of them with counsel and the trial court. However, "number one" among those reasons reportedly was Joyce's belief,

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<sup>44</sup> CP 109.

<sup>45</sup> CP 109 at paragraph 7 (emphasis added).

<sup>46</sup> CP 108-109 at paragraph 10 (emphasis added).

based on her own experience with real estate transactions, that it was not possible to close a deal like this in nine days under the best of circumstances. Another juror, "Brian," reportedly also agreed "the deal could not close that fast," for reasons that are not articulated in the Hamilton declaration. Ms. Hamilton said she changed her own verdict because of the strongly held views of Joyce and Brian, and speculated that other jurors may have done so as well. Ms. Hamilton expressed regret that she did not stick to her guns in the jury room or change her position when the jury was polled.

No one brought any documents to the jury room other than the admitted Exhibits. No one performed any experiments or did any research inside or outside the jury room. No one brought in a statement of the law obtained from a source outside of the court's instructions to the jury. No one has alleged or shown that "Joyce" or "Brian" concealed they had real estate training or experience with real estate transactions during *voir dire*. The only "extrinsic evidence" before the jury consisted of the opinions and beliefs of two of the jurors, apparently based on their own training and experience in handling real estate transactions and applied to the evidence in the record.

7. ***The trial court granted a new trial solely on "juror misconduct" grounds, with the Hamilton declaration providing the only evidence of that "misconduct."***

Based solely on Ms. Hamilton's declaration, Judge Darvas vacated the judgment entered on the jury's verdict and ordered a new trial.

Here, Ms. Hamilton's declaration establishes that two jurors stated categorically that it was "impossible to close a real estate deal" in the nine days specified in Mr. Naness' purchase and sale agreement with his buyer, and that these two jurors "held themselves out as real estate business experts." ... ***There was no testimony from any witness at trial concerning the "impossibility" of closing the sale in the nine days specified in the purchase and sale agreement.*** Therefore, the juror's statement to this effect constituted extrinsic evidence and juror misconduct. This Court cannot conclude that it is unlikely that such misconduct affected the verdict in this case.<sup>47</sup>

In reaching its decision, the trial court cited this Court's decision in *Richards v. Overlake Hospital Medical Center* as controlling authority.<sup>48</sup>

#### **V. SYNOPSIS OF GROUNDS FOR REVERSAL**

The trial court was wrong on the facts and wrong on the law when it granted a new trial based solely on the Hamilton declaration.

The court was wrong on the facts because the record contains ample evidence "concerning the impossibility of closing the sale in the nine days specified in the purchase and sale agreement," independent of the Resale Certificate and any other comments allegedly made by Ms. Bates. Dr. Frank's purchase was contingent on his ability to obtain financing for 75% of the \$1.475 million purchase price -- a \$1.1 million loan. On the day Mr. Naness and Dr. Frank signed the purchase and sale agreement, the public record for the property identified two separate tax parcels with two legal descriptions and

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<sup>47</sup> CP 200 (emphasis added). Judge Darvas acknowledged that "much of the rest of Ms. Hamilton's declaration references matters that inhered in the verdict and will not be considered by this Court." CP 201.

<sup>48</sup> CP 199-200.

with mortgage liens in favor of different lenders against each of the separate parcels. When Dr. Frank's bank learned of this -- from the title report, not from Ms. Bates -- it rejected the proposed loan and would make the loan only if the properties were legally combined. This was a process that could never have been completed within nine days. Thus, the deal was, indeed, "doomed to fail from the beginning."

The trial court was wrong on the law, because the trial court misapplied *Richards*, which held that when a juror expresses a belief or opinion during jury deliberations, by applying her own knowledge and experience to the evidence in the record, that is neither "extrinsic evidence" nor "juror misconduct" that can justify a new trial -- unless the juror concealed her knowledge and experience in response to direct questions about them during *voir dire*.

Instead, under *Breckenridge v. Valley General Hospital*, the matters addressed in the Hamilton declaration all inhere in the verdict. The declaration is no more than one disgruntled juror's hearsay report of comments allegedly made by other jurors regarding their reasoning, motives, intent and beliefs, together with inadmissible testimony about Ms. Hamilton's own beliefs, motives, mental processes, changes of heart, misgivings and discontents before and after the verdict was reached and the jury was polled.

The trial court erred by granting a new trial, when the Hamilton declaration was the only proof offered to support the claim of "juror misconduct."

## **VI. ARGUMENT AND AUTHORITIES**

### **I. Standard of review**

The decision to grant or deny a motion for new trial based on juror misconduct is generally a matter this Court reviews for an abuse of discretion.<sup>49</sup> However, to the extent that an order granting a new trial is predicated on a ruling of law, there is no element of discretion involved.<sup>50</sup>

A trial court abuses its discretion when its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. Greater deference is given to a decision to grant a new trial than a decision to deny a new trial.<sup>51</sup>

To counterbalance this deferential standard of review, juror misconduct must be demonstrated with *objective proof* and without probing the jurors' mental processes.<sup>52</sup> Furthermore, the party asserting juror misconduct bears the burden of showing that it occurred.<sup>53</sup>

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<sup>49</sup> *Allyn v. Boe*, 87 Wn. App. 722, 729, 943 P.2d 364, *review denied*, 134 Wn.2d 1020 (1998).

<sup>50</sup> *Coleman v. George*, 62 Wn.2d 840, 384 P.2d 871 (1963).

<sup>51</sup> *State v. Balisok*, 123 Wn.2d 114, 177, 866 P.2d 631 (1994).

<sup>52</sup> *Richards*, 59 Wn. App. at 271.

<sup>53</sup> *State v. Kell*, 101 Wn. App. 619, 621, 5 P.3d 47 (2000).

In addition, a strong affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.<sup>54</sup>

It is misconduct for a jury to consider extrinsic evidence. Extrinsic evidence is narrowly defined as "information that is *outside all the evidence admitted at trial*, either orally or by document."<sup>55</sup> On the other hand, jurors may and are expected to use common sense and to bring their own training and life experiences into the jury deliberations in reaching a verdict.<sup>56</sup>

So long as a juror has not concealed her relevant beliefs, training, knowledge or experience when asked about it during *voir dire*, a juror may properly use her specialized background to review and comment on the evidence during jury deliberations. Even when the standard of care, breach and causation must be established by expert testimony, as in a medical malpractice case, a juror may properly use her own training and experience to reach her own conclusions based on the documents and testimony in the case.<sup>57</sup>

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<sup>54</sup> *Balisok*, 123 Wn.2d at 117-18, 866 P.2d 631.

<sup>55</sup> *Breckenridge*, 150 Wn.2d at 199 n.3 (emphasis added).

<sup>56</sup> *Johnson v. Carbon*, 63 Wn. App. 294, 302, 818 P.2d 603 (1991), *review denied*, 120 Wn.2d 1022 (1993).

<sup>57</sup> *Breckenridge*, 150 Wn.2d at 203-204; *Richards*, 59 Wn.App. at 274-275.

2. *The trial court improperly concluded that the jurors considered "extrinsic evidence" in reaching their verdict.*

Ms. Hamilton's uncorroborated declaration claimed that her fellow juror, "Joyce," stated the belief that Mr. Naness' sale of his \$1.475 million condo property, contingent on 75% bank financing, was "doomed from the beginning" because "it is impossible to close a real estate deal in that short of time." She also claimed that juror "Brian" "echoed the thinking of Joyce" and said "there was no way that the deal could close that fast." Ms. Hamilton also claims that Joyce and Brian "held themselves out as real estate business experts." Under the controlling principles outlined in this Court's decision in *Richards* and in the Supreme Court's decision in *Breckenridge*, the Hamilton declaration did not establish that the jury considered "extrinsic evidence" at all. The trial court misapplied the law by concluding that it did.<sup>58</sup>

"Novel or extrinsic evidence is defined as information that is *outside all the evidence admitted at trial*, either orally or by document."<sup>59</sup> "Jurors may, however, rely on their personal life experience to evaluate the evidence

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<sup>58</sup> Indeed, the trial court should not have considered the hearsay contained in the Hamilton affidavit. "The present rule (formerly RCW 4.76.020) has long been construed to prohibit a juror from impeaching the verdict by affidavit. ... *There is no proof as to what transpired in the jury room except hearsay statements in affidavits as to what jurors had said. Such affidavits cannot be considered.*" *Johnston v. Sound Transfer Co.*, 53 Wn.2d 630, 631, 335 P.2d 598 (1959) (emphasis added, citation omitted).

<sup>59</sup> *Richards*, 59 Wn. App. at 270 (emphasis added).

presented at trial during deliberations."<sup>60</sup> This "personal life experience" can and should include any relevant training, experience and beliefs the juror may bring to the trial, so long as the juror has not concealed her background when asked to disclose it during *voir dire*.<sup>61</sup>

a. **The trial court's order granting a new trial is inconsistent with this Court's decision in Richards v. Overlake Hospital.**

This Court's decision in *Richards v. Overlake Hospital Medical Center* provides the template for analysis of our own case. In *Richards*, juror Geisler was an occupational therapist who had some medical training. The plaintiffs' medical experts theorized that she had suffered neurological damage as a result of the defendants' negligent misdiagnosis and "maltreatment of hypoglycemia." The defendants' experts theorized the plaintiff suffered from congenital brain defects.<sup>62</sup> Juror Geisler independently concluded, using her "quasi-medical" background to review the medical records, that the plaintiff's birth defects were the probable result of the mother having had the flu 20 weeks into gestation, and not the negligence of the health care providers. It appears that none of experts had ever testified about this theory of causation. Geisler shared her opinions with other jurors. The jury returned a defense verdict. The plaintiff moved for a new trial based on

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<sup>60</sup> *Breckenridge*, 150 Wn.2d at 199, quoting *Richards*, 59 Wn. App. at 274.

<sup>61</sup> *Richards*, 59 Wn. App. at 273.

<sup>62</sup> *Id.*, 59 Wn. App. at 269.

the jury's use of this alleged "extrinsic evidence in the nature of expert testimony which was wholly without support in the record."<sup>63</sup> The trial court denied a new trial.

This Court affirmed. Even though the juror's theory of causation was based on her own specialized training and was not consistent with the expert opinions offered at trial, this Court held that juror Geisler had not injected "extrinsic evidence" into the jury deliberations at all. Geisler had, instead, properly used her own personal training, experience and beliefs to draw her own conclusions from the evidence. So long as she had not concealed her background during *voir dire*, there was no misconduct.<sup>64</sup>

[I]n our opinion, a review of the affidavits of the jurors does not establish the introduction of new or novel evidence.... Juror Geisler's background was known to the parties at the time of *voir dire* and her "medical" knowledge was something she naturally brought in with her to the deliberations, and this was known by all the parties after *voir dire*. The medical records were introduced into evidence and sent to the jury room... ***There was no extrinsic evidence brought into this case and thus there was no juror misconduct.***<sup>65</sup>

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*, 59 Wn. App. at 274-75

<sup>65</sup> *Richard s*, 59 Wn. App. at 274 (emphasis added). The *Richards* Court also distinguished *State v. Briggs*, 55 Wn. App. 44, 776 P.2d 1347 (1989), in which one of the jurors brought his experience with speech defects to the deliberations. *Briggs'* holding that the juror had committed misconduct requiring a new trial was uniquely dependant on his failure to disclose his experience in response to direct questions during *voir dire*. *Naness* never attempted to show that "Joyce" and "Brian" were asked about and concealed their real estate experience during the jury selection process; and the trial court did not mention or rely on concealment as grounds for its order granting a new trial.

The holding in *Richards* is particularly compelling, because in a medical malpractice case, competent and specialized expert testimony is *required* to establish the standard of care, breach of the standard of care and medical causation.<sup>66</sup> Nevertheless, the *Richards* Court held that it was proper for a juror to independently consider the testimony and documentary evidence; draw her own quasi-expert opinions concerning causation based on that evidence; and share those opinions with her fellow jurors.

In our own case, there is no Washington authority that required Naness or the Association to put on expert testimony on the standard of care, breach and causation. All of the jurors had the right to rely on their own beliefs, training and experience with the purchase and sale of real estate, common sense and the evidence in the record to determine whether it was realistic to assume this particular real estate transaction, or *any* residential real estate transaction subject to bank approval of over \$1 million in financing, could realistically be expected to close within nine calendar days.<sup>67</sup>

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<sup>66</sup> *Reese v. Stroh*, 128 Wn.2d 300, 308, 907 P.2d 282 (1995).

<sup>67</sup> *Richards* noted that while the juror's medical training and experience might have been "outside the realm of a typical juror's general life experience and would not usually be introduced into the jury's deliberations," use of that experience and background was not improper so long as it had not been concealed during jury selection. *Richards*, 59 Wn.App. at 274-75. Here, experience with real estate transactions was not "outside the realm of a typical juror's general life experience" at all. The average adult has bought or sold one or more homes, and whether she professes to be "expert" at it or not, will have her own idea how realistic or unrealistic it is to expect to close a \$1.475 million deal, contingent on financing and complicated by an issue with the title report, in fewer than ten calendar days.

Where, as here, there was a major stumbling block to financing -- without regard to Ms. Bates comments about the legal combination of the Nanness units -- it was not "extrinsic evidence" for a juror to comment that the deal was "doomed to fail at the beginning." This was not "extrinsic evidence in the nature of expert testimony" -- it was merely an expression of opinion based on the juror's experience, common sense, and uncontroverted evidence in the record.

***b. The trial court's order granting a new trial is inconsistent with the Supreme Court's decision in Breckenridge v. Valley General Hospital.***

The Supreme Court adopted *Richards'* reasoning when the Court decided *Breckenridge v. Valley General Hospital* in 2003. In *Breckenridge*, the plaintiff went to the emergency room to be treated for a severe migraine headache. She later suffered a brain aneurysm. The plaintiff claimed the emergency room physician had committed malpractice because he should have ordered a CT scan to rule out the onset of a devastating rupture of a blood vessel in her brain. The jury returned a defense verdict.

The *Breckenridge* plaintiff moved for a new trial, based on numerous juror declarations which showed that jurors had brought their own experiences with medical treatment for migraine headaches into the deliberations. One juror, a Mr. Corson, related that he had taken his wife to an emergency room with severe migraine headaches on a number of occasions and that she had never been given a CT scan. From this Corson concluded

that the standard of care did not require a doctor to recommend or perform a CT scan when a patient has a history of migraines and visits an emergency room complaining of a migraine headache. Corson shared his experience and his conclusions with the jury. The trial court granted a new trial on the basis of Corson's "extrinsic evidence" and "juror misconduct."

Despite the deferential standard of review that applies to an order granting a new trial, this Court *reversed* and reinstated the jury verdict.<sup>68</sup> The *Breckenridge* panel held that the jurors had simply and properly viewed the expert testimony and other evidence on the standard of care in light of their own life experiences to reach their verdict.

The Supreme Court granted review and affirmed this Court's decision, opining: (1) that Corson's statements were not extrinsic evidence; *and*, (2) that such statements were not a proper basis for a new trial, because they inhered in the verdict. In so doing, the Supreme Court's unanimous decision repeatedly cited this Court's earlier decision in *Richards* with approval, as well as this Court's unpublished decision in *Breckenridge* itself.

Comparing Corson's conduct to that of the juror in *Richards*, the Court of Appeals below found that Corson's comments had "less potential for injecting extrinsic evidence into the deliberations" than those of the *Richards* juror. *Breckenridge*, slip op. at 10. In *Richards*, the juror disclosed during voir dire that she was an occupational therapist who had medical training. *Richards*, 59 Wn.App. at 269, 796 P.2d 737. During the jury deliberations, she used her medical knowledge to analyze whether the plaintiff's birth defects were caused by the mother's illness during the pregnancy rather than by

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<sup>68</sup> *Breckenridge v. Valley General Hospital*, 2002 WL 31743000 (Wash.App.Div.1).

medical malpractice. Upholding the trial court's refusal to grant a new trial, the *Richards* court held there was no extrinsic evidence and thus no misconduct. *Id.* at 273, 796 P.2d 737. Similarly, the Court of Appeals below found that "[Corson's] statements during deliberations merely detailed the life experiences he discussed during voir dire." *Breckenridge*, slip op. at 10.<sup>69</sup>

As *Richards* and *Breckenridge* demonstrate, our courts have permitted wide latitude to jurors to rely on their personal experiences and beliefs, to use their specialized training, and to rely on plain old common sense to weigh and comment on the evidence during jury deliberations. So long as a juror has not concealed her relevant experience, training and beliefs in response to direct questions about them in *voir dire*, the juror does not commit "misconduct" by bringing her background to the jury room, sharing it with others, and relying on it to reach a verdict.

Here, other than her varied statements of regret and self-recrimination over her own verdict, Ms. Hamilton's declaration offered just a few sentences of bare hearsay which showed, at most, that two jurors had reviewed the evidence in light of their own experience with real estate transactions.<sup>70</sup>

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<sup>69</sup> *Breckenridge*, 150 Wn.2d at 204 n. 11.

<sup>70</sup> Compare the Hamilton declaration with the facts in *Arthur v. Washington Iron Works, Inc.*, 22 Wn. App. 61, 587 P.2d 626 (1979) (jury foreman performed outside research and related the results to the jurors); *Gardner v. Malone*, 60 Wn.2d 836, 376 P.2d 651 (1963) (jury made an unauthorized visit to the accident scene); and *Halvorsen v. Anderson*, 82 Wn.2d 746, 513 P.2d 827 (1973) (juror provided statistics on earning capacity of pilots and surveyors, the jury awarded damages for loss of earning capacity based on those statistics, even though the parties had agreed there was no evidence to support such damages and the trial court's instructions did not ask the jury to award them.

The record showed that before Dr. Frank and Mr. Nanness signed their purchase and sale agreement, the Nanness property was recorded as two separate tax parcels, with two separate legal descriptions and with loan encumbrances, in favor of different lenders, against each of the two parcels. The evidence showed that when Mr. Nanness and Dr. Frank signed their purchase and sale agreement, the closing date was a mere nine calendar days away.

Dr. Frank himself testified that he was trying to close the deal in a hurry and that he needed prompt bank approval for a loan of over \$1 million if he was going to buy the property in that short amount of time. Dr. Frank's personal banker, Kay Lynch, testified that when the Bank found out, from the title report, what had been in the public record when the deal was first signed, she could not provide financing until the public record was corrected. Dr. Frank confirmed this was what happened; and further testified that when he consulted with an attorney, he determined this issue would take months to resolve.

On those facts, the juror "Joyce" did not inject "extrinsic evidence in the nature of an expert opinion" into the deliberations when she said the deal was "doomed to fail from the beginning" -- because the evidence showed that it *was* doomed to fail. The juror "Brian" did not bring "extrinsic evidence" or an "expert opinion" to the jury room when he "echoed the thinking of Joyce and said that there was no way that the deal could close that fast" -- because

that thinking was well supported by the record. These jurors applied their own experience and a dose of common sense to the evidence to reject Mr. Naness' improbable claim that, in spite of all of these insurmountable hurdles, Tracy Bates' comment that "the combining of Units 407 and 408 has not been officially amended and recorded," and her advice that doing so could take considerable time, was a "but for" proximate cause of Dr. Frank's decision not to complete the purchase.

If nothing more than a single juror's uncorroborated, hearsay testimony concerning the stated opinions of other jurors, of the type described in the Hamilton declaration, can provide the basis for a new trial because of "juror misconduct," it would "destroy any idea of finality which is essential to our judicial system."<sup>71</sup> The trial court erred by granting a new trial on the basis of alleged juror comments that reflected the jurors' personal beliefs, training and experience and the reasoning behind their verdict. The jurors' comments and their verdict had a sound basis in the evidence of record.

The judgment on the verdict in favor of the Association should not have been disturbed on the basis of "extrinsic evidence" in the jury room -- because there was no "extrinsic evidence" as defined under controlling law.<sup>72</sup>

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<sup>71</sup> *Hendrickson v. Konopaski*, 14 Wn.App. 390, 393, 541 P.2d 1001 (1975).

<sup>72</sup> See also, *Johnson v. Carbon*, 63 Wn. App. 294, 302, 818 P.2d 603 (1991) (jurors' discussion of relevant personal experiences are insufficient to show misconduct); *Ryan v. Westgard*, 12 Wn. App. 500, 530 P.2d 687 (1975) (juror's discussion of his own experience could not be used to impeach verdict when there had been consistent testimony at trial).

3. *The trial court improperly based its order granting a new trial on matters addressed in the Hamilton declaration that inhere in the verdict.*

Our courts should not inquire into the internal process by which the jury reaches its verdict. The individual and collective thought processes leading to a verdict "inhere in the verdict" and cannot be used to impeach the jury's verdict. Thus, a juror's postverdict statements regarding the way in which the jury reached its verdict *cannot be used to support a motion for a new trial.*<sup>73</sup>

The 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, are all factors inhering in the jury's process in arriving at its verdict, and, therefore, inhere in the verdict itself, and averments concerning them are inadmissible to impeach the verdict.*<sup>74</sup>

Allowing courts to inquire into the jurors' motives, beliefs and mental processes "would inevitably open nearly all verdicts to attack by the losing party and thwart the courts in achieving a long held and cherished ambition, the rendering of final and definitive judgments."<sup>75</sup>

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<sup>73</sup> *Breckenridge*, 150 Wn.2d at 204-205, citing *Gardner v. Malone*, 60 Wn.2d at 840-41.

<sup>74</sup> *Cox v. Charles Wright Academy, Inc.*, 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967) (citations omitted, emphasis added).

<sup>75</sup> *Id.*, 70 Wn.2d at 180.

The Hamilton declaration addresses nothing *but* "the jurors' motives, beliefs and mental processes" -- her own and those of other jurors. Ms. Hamilton's testimony states what she believed and how she reached her verdict; and the effect she thinks the stated beliefs and opinions of jurors "Joyce" and "Brian" had on other jurors. She advises that "Joyce" thought this sale was "doomed to fail from the beginning" -- a "belief" and "mental process" Joyce allegedly shared with other jurors, not a statement of fact obtained from a source outside the courtroom. There was ample evidence in the record to support Joyce's belief.

"Brian" allegedly "echoed the thinking of Joyce" and "said there was no way that the deal could close that fast." This was not a statement of fact, obtained from a source outside the courtroom -- it was a statement of Brian's opinion. The only way to determine what this supposed statement by Brian meant, or how he reached his conclusion, would be to delve into his beliefs, thoughts and mental processes to see how he got there. That is the classic definition of "evidence of misconduct" that inheres in the verdict and that *may not be used to impeach the verdict*.<sup>76</sup>

The opinion that Joyce and Brian shared with the jury -- if that is indeed what happened -- was not a matter that required specialized knowledge and competent expert testimony to be established at trial. Indeed, as Naness admitted, no experts were asked to opine whether nine days was a realistic or

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<sup>76</sup> *Breckenridge*, 150 Wn.2d at 204-05, citing *Gardner v. Malone*, 60 Wn.2d at 841.

an unrealistic timetable for a real estate closing of this type, whether in general or under the specific circumstances surrounding Dr. Frank's effort to finance the purchase of the Naness property.<sup>77</sup> Those were among the questions for the jurors to decide -- and decide them they did.

The Supreme Court's opinion in *Breckenridge* is particularly instructive here. As discussed above, in *Breckenridge* juror Corson had discussed with other jurors his wife's own emergency room treatment for severe migraines. Corson concluded that the standard of care did not require the defendants to perform a CT scan to rule out an impending "brain bleed" when the plaintiff went to the emergency room with migraine symptoms, because his wife had never been given a CT scan during her own trips to the ER. Juror Temple submitted his own declaration, like the Hamilton declaration in our case, describing how Corson had related his thought processes to other jurors. The Supreme Court held that all of juror Temple's testimony inhered in the verdict, and that the trial court had erred by considering the following statement from Temple's declaration to impeach the verdict:

[Corson] argued that the other emergency room doctors would have behaved in the very same fashion as Dr. Nowak and supported his position from personal experience.... Mr. Corson told the jury that his wife had gone to emergency rooms

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<sup>77</sup> Compare *Briggs*, 55 Wn. App. at 47, where the Court concluded that a juror's concealed knowledge of speech disorders was "highly specialized, as evidenced by the fact that the topic was the subject of expert testimony by a prosecution witness."

several times with symptoms similar to those experienced by Lynda Breckenridge... and that never was a CT scan ever discussed or done on his wife. He used that experience to argue that, since other doctors behaved in that fashion in similar circumstances with his wife, Dr. Nowak must have met the standard of care. He made reference to this argument three times and, upon repeating his statements, prefaced his remarks, "Again I keep coming back to my wife's experiences," or substantially similar language.<sup>78</sup>

The *Breckenridge* holding could not be clearer:

When considering a motion for a new trial, the trial court may not consider a juror's postverdict statements that explain the reasoning behind the jury's verdict as such statements inhere in the verdict. Temple's declaration contained comments made by Corson during deliberations that explained Corson's reasons for believing that Nowak was not liable. Because this statement inhered in the verdict, the trial court abused its discretion when it granted a new trial. We affirm the Court of Appeals.<sup>79</sup>

This Court should reverse the trial court's order granting a new trial, just as the Division I panel did in *Breckenridge*, with the Supreme Court's unanimous approval.

Just as in *Breckenridge*, the only evidence of juror misconduct here was the uncorroborated Hamilton declaration, which contained nothing more than testimony about her own motives, beliefs and reasoning; hearsay about comments other jurors made about their own motives, beliefs and reasoning; and speculation about how other jurors made up their own minds.

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<sup>78</sup> *Breckenridge*, 150 Wn.2d at 206.

<sup>79</sup> *Id.*, 150 Wn.2d at 206-07.

Just as in *Breckenridge*, the only evidence of "juror misconduct" in this case did nothing more than relate the reasoning that other jurors had given for believing that the Association was not liable.

And finally, just as in *Breckenridge*, those other jurors based their decision on the facts in the record, viewed through the lenses of their own personal motives, training, experiences and beliefs. The evidence in this record included the *fact* that Dr. Frank needed to obtain over \$1 million in financing to close the sale, which was made contingent on financing. It included the *fact* that Dr. Frank wanted to close the sale in nine calendar days. And above all, it included the *fact* that when the purchase and sale agreement was signed, the property was recorded as two legally separate tax parcels with mortgage liens against each of them. This meant, in *fact*, that Dr. Frank's lender would not give him a loan until the properties were legally joined, a process Dr. Frank's own advisors told him would take months to complete.

There was no misconduct here. The jury reached a verdict that is well supported by the facts in evidence. When Mr. Naness moved for a new trial, he did not identify a single error in the court's evidentiary rulings, instructions to the jury, or other error in the conduct of the trial. His motion was based entirely on alleged "juror misconduct," based in turn on the uncorroborated, largely hearsay testimony of a single juror, contained in a brief, conclusory declaration. All of that testimony inhered in the verdict and never should have been considered to impeach the verdict and grant a new trial.

The trial court erred by granting a new trial, on grounds of juror misconduct, based solely on the Hamilton declaration.

**VII. CONCLUSION**

For the reasons stated above, the Association asks this Court to reverse the trial court's order granting a new trial; and to reinstate the judgment on the jury's verdict in favor of the Association.

DATED and respectfully submitted this 24th day of August, 2009.

By

A handwritten signature in black ink, appearing to read "David M. Jacobi", written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington that on the below date I caused the foregoing document to be filed with the State of Washington, Court of Appeals, Division One, and served on the following:

Attorney for Plaintiff

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SIGNED this 24<sup>th</sup> day of August, 2009, at Seattle, Washington.

  
Betty J. Dobbins

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