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NO. 66743-2-I

IN THE COURT OF APPEALS DIV. I
OF THE STATE OF WASHINGTON

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

Appellant,

v.

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

Respondents.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. THE APPROPRIATE STATUTORY CONSTRUCTION OF THE WRONGFUL DEATH DAMAGES CLAUSE SHOULD PERMIT THE JURY TO CONSIDER EVIDENCE OF GRIEF, MENTAL ANGUISH AND SUFFERING

1. The Wrongful Death Damages Clause Has Materially Changed Since *Walker v. McNeil* Was Decided in 1897.

A more careful reading of the Supreme Court's 1897 decision in *Walker v. McNeil* reveals that a specific clause, limiting the damages that could be awarded by a jury for the wrongful death of a spouse or parent, was part of the wrongful death statute as it existed at that time:[1]

> In every such action the jury may give such damages, **pecuniary or exemplary,** as under all circumstances of the case may to them seem just.[2]

"Legislative inclusion of certain items in a category implies that other items in that category are intended to be excluded."[3] Therefore, the only elements of damages that could be considered at the time the *Walker* case was decided were "pecuniary or exemplary" damages. The Supreme Court in *Walker* cited the definition of the word "pecuniary" from the treatise, Tiffany on Death by Wrongful Act, §160 in support of its

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[1] *Walker v. McNeil,* 17 Wash. 582, 593, 60 Pac. 518 (1897).
[2] 2 Hill's Code, §138. See, *Walker,* 17 Wash. at 593 (emphasis supplied).
[3] *Bour v. Johnson,* 122 Wn.2d 829, 836, 864 P.2d 380 (1993); *see also State v. Kelly,* 168 Wn.2d 72, 83, 226 P.3d 773 (2010); *Weyerhaeuser Co. v. Tri,* 117 Wn.2d 128, 134, 814 P.2d 629 (1991).

determination that "damages by way of solace to the affections of a wife or children cannot be allowed."[4]

The limiting clause with respect to damages, "pecuniary or exemplary," was eliminated by the Legislature no later than 1917, and now reads as follow:

> In every such action the jury may give damages as, under all circumstances of the case, may to them seem just.[5]

Nonetheless, the Supreme Court continued to quote the definition of "pecuniary" from the 1897 decision in *Walker* as not including damages for "solace" for the surviving wife and children in cases dating back to the 1930's.[6] There is no recognition in these cases that the language of the damages clause in the wrongful death statute had changed since *Walker* was decided.

2. Rules of Statutory Construction Lead to the Conclusion that Consideration of Damages for Loss of "Love" Should Include Damages for Grief, Mental Anguish and Suffering for the Death of a Spouse or Parent.

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[4] *Walker,* 17 Wash. at 593.
[5] RCW 4.20.020. RRS §183-1; *see also, Kramer v. Portland-Seattle Auto Freight, Inc.,* 43 Wn.2d 386, 391, 261 P.2d 692 (1953).
[6] *David v. North Coast Transp. Co.,* 160 Wash. 576, 584, 295 P. 921 (1931); *Pearson v. Picht,* 184 Wash. 607, 613, 52 P. 314 (1935).

Issues of statutory construction are reviewed de novo.[7] The purpose is to determine the intent of the Legislature.[8] Where the meaning of statutory language is plain on its face, we must give effect to that plain meaning as an expression of Legislative intent.[9] In discerning the plain meaning of a provision, we consider the entire statute in which the provision is found, **as well as related statutes** or other provisions in the same act that disclose legislative intent.[10]

Therefore, an analysis of decisions of our Supreme Court and Appellate Courts interpreting the legislative intent of the damages clause of the wrongful death act for the death of a spouse or parent, RCW 4.20.020, as well as the damages clause of a related statute, the wrongful death act for the death of a child, RCW 4.24.010, are germane to the issue of whether damages for loss of "love" include concomittant grief, mental anguish and suffering.

a. Evolution of the statutory construction of the damages clause of RCW 4.20.020.

The first case interpreting what appears to be Washington's original wrongful death statute for the death of a spouse or parent, 2 Hill's

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[7] *State v. Alvarado,* 164 Wn.2d 556, 561-62, 192 P.3d 345 (2008); *Tingley v. Haisch,* 159 Wn.2d 652, 657, 152 P.3d 1020 (2007).
[8] *City of Spokane v. Spokane County,* 158 Wn.2d 666, 673, 146 P.3d 893 (2006).
[9] *Id.* at 673.
[10] *Id.* at 673 (emphasis supplied); *Skamania County v. Columbia River Gorge Comm'n,* 144 Wn.2d 30, 45, 26 P.3d 241 (2001).

Code §138, was written in 1897.[11] The court noted that this is a "very liberal rule" and in its interpretation of the term "pecuniary," provided that damages were not limited to the lost wages of the decedent, but could also include the "loss of nurture, of the intellectual, moral and physical training which only a parent can give to children."[12]

In 1931 our Court held that damages for the death of a parent were not limited to minor children.[13] The elements that could be considered by the jury for the death of a spouse or parent were expanded by our court in 1935 in *Pearson* to include not only the "wage earning ability of the deceased, but also the value of his daily services, attention and care bestowed upon his family, and the loss of comforts, conveniences and education suffered by minor children."[14]

The Court in *Kramer* in 1953 expanded the elements that the jury could take into account while awarding damages for the loss of a spouse or parent to the loss of "love, care, protection, services, guidance and moral and intellectual training and instruction."[15] Div. I in 1986 and Div. II in 1992 referred to the damages clause from RCW 4.20.020 as including

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[11] *Walker,* 17 Wash. at 593.
[12] *Walker,* 17 Wash. at 593-94.
[13] *Lund v. Seattle,* 163 Wash. 254, 1 P.2d 301 (1931).
[14] *Pearson,* 184 Wash. at 613.
[15] *Kramer*, 43 Wn.2d at 397; *see also Myers v. Harter,* 76 Wn.2d 772, 782, 459 P.2d 25 (1969).

consideration of compensation for loss of "love, affection, care, companionship, security and consortium."[16] In neither of those cases is there any reference back to the old language from *Walker* stating that there cannot be any consideration of damages for "solace" or, as would be expressed in more modern language, grief, mental anguish or suffering.

It does not appear that any Washington Supreme Court or Appellate Court cases in the last half century have construed the damages clause of RCW 4.20.020 as excluding the consideration of the wrongful death beneficiaries' grief, mental anguish and suffering as part of their damages for the loss of their spouse's or parent's "love." The only cases in the last half century that reference this exclusionary language that originated in the 1897 *Walker* opinion construing the damages clause that included the limitation to "pecuniary or exemplary " damages are federal cases citing language from older Washington decisions.[17] One federal opinion (authored by a federal magistrate) cited by the Respondent that references "no damages for grief or bereavement" incorrectly cites the

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[16] *Parrish v. Jones,* 44 Wn. App. 449, 453, 772 P.2d 878 (1986); *Bowers v. Fibreboard,* 66 Wn. App. 454, 460, 832 P.2d 523 (1992).

[17] *See, e.g., Pike v. U.S.,* 652 F.2d 31 (9th Cir. 1981). *Pike* cites language from the 1935 *Pearson* opinion, and also incorrectly suggests that this opinion is supported by Div. II's opinion in *Pancratz v. Turon,* 3 Wn. App. 182, 189 fn 5, 473 P.2d 49 (1970) in which the language in a jury instruction given by a Clark County Judge providing no damages for "grief or sorrow" was not the subject of the appellate court decision.

Bowers opinion as the source for this language.[18] Respondent incorrectly asserts that a Federal District Court judge in 1914 held that the jury may not consider evidence of grief, mental anguish or suffering for the death of a parent.[19]

b. Evolution of the statutory construction of the damages clause of a related statute, RCW 4.24.010, is instructive.

The original statute setting forth a cause of action for the death of a child was passed in 1869 and read as follows:

> A father, or in case of the death or desertion of his family, the mother may maintain an action as plaintiff for the injury or death of a child, and a guardian for the injury or death of his ward.[20]

This statute was interpreted by our Supreme Court in 1892 as providing damages only for the "value of the child's services until the age of majority."[21] The language of the statute was slightly modified in a 1927,[22] but it has been noted that this change had no impact on the damages that could be awarded by the death of a child.[23]

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[18] *Chappel v. Ganger,* 851 F. Supp. 1481, 1487 (E.D. Wash. 1994).
[19] *Penoza v. Northern Pac. Ry. Co.,* 215, F. 200. (1914). Case involved the death of a child; not a parent or spouse.
[20] Laws of 1869, ch. 1, §9. See also, *Wilson v. Lund,* 80 Wn.2d 91, 102, 491 P.2d 1287 (1971) (Judge Wright concurring).
[21] *Hedrick v. Ilwaco Ry. & Nav. Co.,* 4 Wash. 400, 404, 30 P. 714 (1892).
[22] Laws of 1927, ch. 191 Sec. 9. See also, *Wilson*, 80 Wn.2d at 103 (Justice Wright concurring).
[23] Laws of 1927, ch. 191 §9. See also, *Wilson*, 80 Wn.2d at 103 (Judge Wright concurring).

Our Supreme Court in 1967, prior to the amendment of RCW 4.24.010 later that same year, modified its construction of this statute:

> We adhere to our prior construction of the statute, RCW 4.24.010, *supra,* that the Legislature intended that recovery for more than nominal damages should be allowed in these cases: [citations omitted]. However, to give effect to this legislative intent, the measure of damages which we have heretofore allowed under RCW 4.24.010, *supra,* must be extended. We hold that the measure of damages under RCW 4.24.010, *supra,* should be extended to include the loss of companionship of a minor child during his minority without giving any consideration for grief, mental anguish or suffering of the parents by reason of such child's wrongful death.[24]

It is clear from the *Lockhart* opinion that the judicial determination of legislative intent may evolve with time.

Lockhart construed the pre-1967 version of RCW 4.24.010 as allowing jurors to consider compensation for "loss of companionship" in addition to the economic value of lost services. However, it did not provide compensation for loss of love or associated feelings of grief, mental anguish or suffering. Shortly after *Lockhart* was decided, the Legislature amended RCW 4.24.010 to add a damages clause that reads as follows:

> In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for the loss of love and

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[24] *Lockhart v. Besel,* 71 Wn.2d 112, 117, 426 P.2d 605 (1967).

> companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just.[25]

Our Supreme Court concluded that providing compensation for loss of love and injury to or destruction of the parent-child relationship "by elemental definition, involves *intangible emotional reactions and responses.*"[26] The court specifically held that this meant the jury could consider parental grief, mental anguish and suffering as elements of damages for the death of a minor child.[27]

In his concurring opinion, Justice Wright noted that the statute provides for compensation "in such amount as, under all the circumstances of the case, may be just."[28] He held that on account of this language the trial court's instruction not to consider any grief, mental anguish or suffering of the parents was improper:

> The language of the statute is clear. The jury is required by the statute to fix the damages, "in such amount as, under all the circumstances of the case, may be just." The limitation placed upon the jury by other words, "you should not consider any grief, mental anguish or suffering of the parents" is error.[29]

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[25] Laws of 1967, ex.s. ch. 81 §1. RCW 4.24.010.
[26] *Wilson,* 80 Wn.2d at 99 (emphasis in original); *see also Hinzman v. Palmanteer,* 81 Wn.2d 327, 329, 501 P.2d 1228 (1972).
[27] *Wilson,* 80 Wn.2d at 101.
[28] *Wilson,* 80 Wn.2d at 105 (Justice Wright concurring).
[29] *Wilson,* 80 Wn.2d at 105

The clause from RCW 4.24.010 referenced by Justice Wright, "in such amount as, under all the circumstances of the case, may be just" is almost identical to the damages clause in RCW 4.20.020.[30]

Courts may resort to the common law for definitions of terms not defined by statute.[31] The common law may serve to fill interstices that legislative enactments do not cover.[32] Review of the construction of identical clauses in related statutes is also instructive.[33] Finally, two statutes must be read together "to give each effect and to harmonize with each other."[34]

There is absolutely no reason that the loss of "love," caused by the death of a spouse or parent, should not include attendant grief, mental anguish and suffering, just as evidence of these emotions may be considered by a jury for the parents of a child as part of their lost "love." This is precisely the type of irrational inconsistency decried by our Supreme Court in *Wilson* in its construction of RCW 4.24.010, as amended in 1967:

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[30] RCW 4.20.020. "In every such action the jury may give such damages as, under all the circumstances of the case, may to them seem just."
[31] *State v. Engel,* 166 Wn.2d 572, 578-79, 210P.3d 1007 (2009); *State v. Byrd,* 125 Wn.2d 707, 712, 887 P.2d 316 (1995).
[32] *In re Parentage of LB,* 155 Wn.2d 679, 688, 172 P.3d 161 (2005), (*quoting DSHS v. Personnel Bd.,* 61Wn. App. 778, 783-84, 812 P.2d 500 (1991))
[33] *City of Spokane v. Spokane County,* supra.
[34] *Bour v. Johnson,* supra at p. 835; *Dryer Machine Works Inc. v. Department of Natural Resources,* 117 Wn.2d 306, 313, 815 P.2d 770 (1991).

> Judicial decisions regarding the definition and measurement of various elements of damage have often fallen short of producing consistent, rational and definitive standards. The area of tort damages, in particular, has produced myriad conflicting standards for allowing recovery of damages. Much of the confusion is unnecessary and could easily be obviated if legislatures and courts were to adopt and apply a more rational model for evaluating such damages.[35]

Now that our courts have concluded that jurors may consider the loss of a spouse's or parent's "love" as an element of damages under the wrongful death statute, RCW 4.20.020, it is time for this court to recognize that it is inappropriate to exclude evidence of the grief, mental anguish and suffering that is so much a consequence of the loss of a spouse's or parent's love.

c. Respondents' reliance on the Supreme Court's decision in Philippides is misplaced.

Respondent argues that the Supreme Court's decision in *Philippides v. Bernard*[36] supports its contention that there is a rational basis for allowing recovery for grief for parents of a deceased child, but apparently not for the husband or wife of a deceased spouse, or a child of any age for his or her deceased parent. [37] Respondents' reliance is misplaced. The Court in *Philippides* had to decide whether a parent of an

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[35] *Wilson*, 80 Wn.2d at 97.
[36] *Philippides v. Vernard*, 151 Wn.2d 376, 88 P.3d 393 (2004).
[37] Respondents' Brief, pp. 12-13.

adult child who died without being survived by a spouse or child has a cause of action under RCW 4.20.020 if they are not financially dependent upon the adult child for support, but can demonstrate evidence of "emotional" dependence. The court held that the support must be financial.[38]

As part of the opinion the court noted that a parent who is "dependent on a child for material well-being and the basic physical necessities of life is impacted in a way unlike an independent parent," holding that this distinction in RCW 4.20.020 is rational and, therefore, constitutional.[39] The constitutional analysis in *Philippides* has nothing to do with this issue in the case at bar; namely the appropriate statutory construction of the damages clause in RCW 4.20.020.

d. The current inconsistency in the construction of RCW 4.20.020 and RCW 4.24.010 creates confusion for juries and trial judges.

The inconsistencies inherent in Judge Hill's ruling granting the defendant's Motion in Limine, precluding or greatly limiting evidence of the wrongful death beneficiaries' grief, mental anguish and suffering incurred as a result of the wrongful death of their mother and the loss of her love, would be more obvious in a case involving the death of both a

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[38] *Philippides, supra.*
[39] *Philippides,* 151 Wn.2d at 392.

minor child and a wife. In such case, there would apparently be conflicting and inconsistent instructions concerning both the evidence that could be submitted and how the jury could consider that evidence.

For example, evidence of the wrongful death beneficiary's "grief as a father" could be presented, but not his "grief as a husband." Exactly how is the trial judge supposed to separate these two emotions? How is the jury supposed to view evidence of grief? How will a jury decide whether it is grief over the loss of a child or the loss of a wife? How is the trial judge supposed to instruct the jury concerning this patently inconsistent dichotomy?

The inherent inconsistency in what evidence the jury is allowed to consider to measure the "loss of love" for the death of a child compared to the evidence the jury is allowed to consider for the "loss of love" for the death of a spouse creates a minefield for trial judges.

e. This is a Matter of First Impression

This Court should interpret, as a matter of first impression, how the inclusion of the loss of a parent's or spouse's "love" as an element of damages that both parties admit in this case can be considered under RCW 4.20.020, impacts introduction of evidence of grief, mental anguish and suffering of the wrongful death beneficiaries. This artificial distinction has greatly outlived its shelf life and should be discarded. Blind adherence to

the language of an 1897 decision interpreting a wrongful death damages clause limited to "pecuniary and exemplary" damages has no place in 21st century jurisprudence.

B. THE PROVEN AND CUMULATIVE JURY MISCONDUCT IN THIS CASE REQUIRES REVERSAL AND A NEW TRIAL.

Less appellate deference is owed to a decision to deny a new trial than a decision to grant one.[40] A trial court abuses its discretion "if it * * * applies the wrong legal standard, or bases its ruling on an erroneous view of the law."[41]

Respondents' jury misconduct argument suffers from *exactly* the same failure as the trial court's reasoning in denying a new trial: it relies on the wrong legal standard. Like the trial court, respondents never even mention "beyond a reasonable doubt." This failure is critical because application of the correct standard, with the burden of proof properly assigned to the respondents on this issue, requires a new trial.

1. Respondents Dispute Trial Court Decisions to Which They Have Not Assigned Error and Have Not Cross-Appealed.

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[40] *See State v. Cummings,* 31 Wn. App.. 427, 430, 642 P.2d 415 (1982).
[41] *State v. Hudson,* 150 Wn. App. 646, 652, 208 P.3d 1236 (2009) (emphasis supplied); *see also State v. Brown,* 132 Wn.2d 529, 572, 940 P.2d 546 (1997); *T.S. v. Boy Scouts of America*, 157 Wn.2d 416, 423-24, 138 P.3d 1053 (2006); *State v. Rohrich,* 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

Under Washington law the vast majority of cases involving allegations of juror misconduct will not result in a new trial because the evidence used to support the claim "inheres" in the verdict or because the alleged misconduct cannot be proven at all. This case is one of the rare exceptions, as the evidence clearly satisfied these first two hurdles.

The trial court error here occurred *after* it decided the alleged misconduct did not "inhere in the verdict" and *after* it decided juror misconduct in fact occurred during jury deliberations. These are the first two steps of the three-step analysis required under *Gardner v. Malone*[42] and its progeny.[43] While the respondents devote a significant portion of their brief to the first two steps,[44] neither party has assigned error on appeal to those two decisions. A *respondent's* failure assign error make the trial court findings verities on appeal.[45] While respondents have cross-

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[42] *Gardner v. Malone*, 60 Wn.2d 836, 376 P.2d 651 (1962)
[43] *See* Respondents' Brief, pp. 18-23 (*citing Cox v. Charles Wright Academy*, 70 Wn.2d 173, 422 P.2d 515 (1967) and *State v. Kell*, 101 Wn. App. 619, 5 P.3d 47 (2000)). Respondents acknowledge the three-step process, but misstate the third step. *See* Respondents' Brief, p. 18. The third step will be accurately discussed below.
[44] *See* Respondents' Brief, pp. 18-23
[45] *See Yousoufian v. King County Executive,* 152 Wn.2d 421, 440, 98 P.3d 463 (2004) (holding that the Court of Appeals correctly refused to consider a challenge to the findings where the respondent failed to assign error to the finding at issue); *State v. Graffius*, 75 Wn. App. 23, 27 n.1, 871 P.2d 1115 (1994) (noting that a respondent may assign error to a trial court's finding and failing to do so meant the finding must be treated as a verity on appeal) (*citing Burt v. Heikkala,* 44 Wn.2d 52, 54, 265 P.2d 280 (1954) and *Mayo v. Jones*, 8 Wn. App. 140, 147-48, 505 P.2d 157 (1972)); *see also See Brewer v. Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999); *State v. O'Neill,* 148 Wash.2d 564, 571, 62 P.3d 489 (2003); *Hagemann v. Worth,* 56 Wn.App. 85, 89, 782 P.2d 1072 (1989).

appealed several of the trial court's pretrial rulings, they do not appeal any decision related to the jury misconduct issue.[46]

2. The Extraneous Evidence Injected Into These Jury Deliberations Requires a New Trial Because it *Could Have* Affected the Jury's Verdict and Was Therefore Not Harmless Beyond a Reasonable Doubt.

Where juror discussion of extraneous evidence "was not harmless beyond a reasonable doubt and *could have* affected the jury's verdict" then there is "no tenable basis for the trial court's refusal" to grant a new trial based on juror misconduct.[47] Under *State v. Briggs*[48] and the *Gardner v. Malone* line of cases this is by definition an abuse of discretion requiring reversal.[49] This standard has its origins at least as far back as the Washington Supreme Court's 1927 decision in *Lyberg v. Holz*[50] which, in turn, was the basis of the Supreme Court's decisions in *Gardner* (1962), *Halverson v. Anderson*[51] (1973), and *State v. Balisok*[52] (1994).

The required standard of proof is arguably more stringent than the familiar "beyond a reasonable doubt" criminal law standard. Washington appellate courts, including the Supreme Court and the Court of Appeals,

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[46] *See* Respondents' Notice of Cross Appeal to Court of Appeals, Div. I, dated March 7th, 2011.
[47] *State v. Briggs*, 55 Wn. App. 44, 61, 776 P.2d 1247 (1989) (emphasis supplied).
[48] *Briggs*, 55 Wn. App. at 56.
[49] *Briggs*, 55 Wn. App. at 60-61.
[50] *Lyberg v. Holz*, 145 Wash. 316, 320-21, 259 P. 1087 (1927).
[51] *Halverson v. Anderson*, 82 Wn.2d 746, 513 P.2d 827 (1973)
[52] *State v. Balisok*, 123 Wn.2d 114, 118, 866 P.2d 631 (1994).

Div. I, have repeatedly stated that "*any doubt* that the misconduct affected the verdict must be resolved against the verdict."[53]

The significance of this standard is reflected in the burden of proof with which it is applied in Washington. "Once juror misconduct is established, prejudice is *presumed*."[54] While a party alleging juror misconduct bears the initial burden of showing it occurred,[55] where that showing has been made -- a verity on appeal in the present case – it raises a "presumption of prejudice" and the burden shifts to the other party to prove *beyond a reasonable doubt* that the misconduct was harmless.[56]

This burden shifting procedure applies equally to criminal and civil cases and to cases of juror misconduct involving extraneous evidence.[57] Further, the fact that the jury awarded plaintiffs damages does not change the required analysis and burden of proof.[58]

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[53] *See Richards v. Overlake Hospital*, 59 Wn. App. 266, 796 P.2d 737 (Div. I, 1990) (emphasis supplied); *see also Halverson*, 82 Wn.2d at 752 ("[i]f the trial court *had any doubt* that the misconduct affected the verdict, it was obliged to resolve that doubt in favor of granting a new trial"); *Kuhn v. Schnall,* 155 Wn. App. 560, 575, 228 P.3d 828 (Div. I, 2010).
[54] *State v. Boling*, 131 Wn. App. 329, 127 P.3d 740 (emphasis supplied). *See also State v. Brenner*, 53 Wn. App. 367, 372, 768 P.2d 509 (1989), *overruled on other grounds by State v. Wentz*, 149 Wn.2d 342, 68 P.3d 282 (2003); *State v. Rose*, 43 Wn.2d 553, 557, 262 P.2d 195 (1953) ("[t]he burden was upon the state to show that no prejudice actually resulted"); *State v. Murphy*, 44 Wn. App. 290, 296, 721 P.2d 30 (1986).
[55] *State v. Kell*, 101 Wn. App. 619, 621, 5 P.3d 47 (2000).
[56] *See State v. Kell*, 101 Wn. App. 619, 621, 5 P.3d 47 (2000).
[57] *See State v. Boling*, 131 Wn. App. 329, 127 P.3d 740 (2006) (relying in part on *Gardner, supra* and *Briggs, supra*).
[58] *Kuhn*, 155 Wn. App. at 572 (interpreting CR 59).

In the present case, the trial court engaged in none of this required analysis. It failed to apply the correct legal standard – beyond a reasonable doubt – and failed to correctly assign the burden of proof on this issue to the respondents.[59]

The nature of the extraneous evidence injected into the jury deliberations, alone, requires a new trial because it is objectively impossible for any court to conclude that information of this nature could not have affected the verdict. With the power of the federal government apparently behind the alleged (though incorrect) determination of $100,000 is an appropriate death benefit for a soldier killed in Afghanistan and with the undeniable element of "patriotism" associated with the issue of soldiers killed in battle, it is difficult to conceive of more prejudicial extrinsic evidence in a general damages case. "Patritism" is a subject the Court of Appeals, Div. I, in 2006 described as one of "the most problematic types of prejudice that the law essays to exclude from juror consideration."[60] Clearly, this extraneous evidence *could have* served as a

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[59] *See* CP 495, 497 where the trial court states there are "not reasonable grounds to believe the plaintiffs' were prejudiced by" the "extrinsic evidence" of "soldiers' death benefits."

[60] *See State v.Perez-Mejia*, 134 Wn. App. 907, 919, 143 P.3d 838 (2006) (discussing prosecutorial misconduct).

benchmark during deliberations in this case and *could have* been introduced into deliberations for that very purpose.[61]

3. The Potential Prejudice of an Alleged $100,000 U.S. Soldier Death Benefit was Compounded by Additional Juror Misconduct in this Case.

It is significant here that the $100,000 soldier death benefit was by no means the only extraneous evidence and juror misconduct involved in this jury's deliberations. Washington cases reflect that, where multiple acts of misconduct occur, a new trial is required.[62] A trial court *must* consider the combined effects of juror misconduct.[63] The trial court failed to do so here.

The harm done in this case was compounded by the material nondisclosure of several jurors with regard to their philosophical predispositions against awarding damages for the loss of love and

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[61] *Turner v. Stime* 153 Wn. App. 581, 584, 222 P.3d 1243 (2009), a medical malpractice case, involved similar juror misconduct requiring a new trial. The plaintiff's counsel was of Japanese ancestry. Post-trial evidence established that during deliberations several jurors referred to plaintiffs' counsel by racially derogatory names and one juror stated that the defense verdict was "'almost appropriate' given that it was delivered on December 7, a reference to the Japanese attack on Pearl Harbor in 1941." Applying the "beyond a reasonable doubt" standard under *Gardner*, the *Turner* court found that there was a reasonable doubt that the plaintiffs received a fair trial.

[62] Examples include *Kuhn, supra,* (material nondisclosure by jurors and consideration of extrinsic evidence); *Gardner, supra,* (unauthorized view of the scene and consideration of extrinsic evidence); *Briggs, supra,* (material nondisclosure and consideration of extrinsic evidence).

[63] *State v. Johnson*, 137 Wn. App. 862, 868-69, 155 P.3d 183 (2007) ("[w]hen a juror withholds material information during voir dire and then later injects that information into deliberations, the court must inquire into the prejudicial effect of the combined, as well as the individual, aspect of the juror's misconduct") (*citing Briggs*, 55 Wn. App. at 53).

companionship[64] and further compounded by their speculation during deliberations that there had been a pretrial "insurance settlement."[65] Juror #4 calculated his "lifetime earnings" from his own Social Security Statement and used this to reinforce the other benchmark he introduced based on the soldier death benefit.[66] There was juror speculation that a significant verdict would "bankrupt" the defendant company. [67] In this context, Juror #11's discussed her own case having been "thrown out" of court, undisclosed during voir dire.[68]

Introduction of the $100,000 soldier death benefit is sufficient grounds to require a new trial. The compounding and cumulative impact of the additional misconduct leaves no doubt that a new trial is the only appropriate remedy here.

4. Respondents' argument requires a subjective inquiry into the actual effect of the evidence on the jury prohibited by Gardner v. Malone.

This Court should decline respondents' invitation to confuse different aspects of the "three-step" process under *Gardner* and similar

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[64] CP 134, 176.
[65] CP 133-37, 170, 175-77.
[66] CP 135, 170, 176.
[67] CP 135, 170, 176.
[68] CP 169-70, 176. Respondents argue that appellants have somehow waived their "assignments of error" involving these additional acts of jury misconduct. This is incorrect, as the assignment of error in this case is broad: "The trial court erred by refusing to grant appellant's motion for a new trial on the basis of jury misconduct." Appellant's Brief at 1.

cases. The trial court's decision that the extraneous evidence considered by the jury does not inhere in the verdict is a verity in this appeal, as is the *fact* that such evidence was injected into jury deliberations. Most of respondents' argument ignores this circumstance where it is convenient for them to do so. Further, the respondents' position relies on arguments that do, indeed, require consideration of matters that inhere in the verdict, thereby ignoring the specific legal standard and burden of proof required on this issue.

For instance, respondents attempt to minimize the obvious harm created by introduction of the alleged $100,000 U.S. soldier death benefit by arguing that the offending juror "did not compare Ms. Garcia's life with that of a soldier."[69] Respondents further argue that "the amount of the death benefit was not used * * * to compute the amount of damages."[70] Respondents then suggest that "the party seeking a new trial must establish that the extrinsic evidence led to the specific jury action."[71] There is no holding in any Washington case that supports this assertion, and the authority discussed above establishes just the opposite.

Johnson v. Carbon,[72] offers no support for respondents' and their

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[69] Respondents' Brief, pp. 23-24.
[70] Respondents' Brief, p. 29.
[71] Respondents' Brief, p. 30.
[72] *Johnson v. Carbon*, 63 Wn. App. 294, 818 P.2d 603 (1991).

out-of-context quotation of that case reflects an attempt to confuse the analysis here. The *Johnson* decision involved only the initial steps under *Gardner* and established as verities in this case: "[t]he trial court found that issues raised by the affidavits inhered in the verdict and were not sufficient to show misconduct."[73] The error in the present case occurred after the trial court ruled on those two steps in the process.

Respondents reliance on *Williams v. Andreson*[74] is similarly misplaced and quoted out of context. The *Williams* case does not discuss *Gardner* or any of the *Gardner* line of cases. Instead, the *Williams* decision involved the standard for a mistrial in the event of an inadvertent disclosure of insurance information and in the absence of attorney misconduct – issues not involved in the case at bar.[75] The *Williams* court's reference to the amount of that verdict not being "excessive" is *dicta* and is irrelevant here as the appellants contend in this case that the verdict was inadequate.[76]

Finally, the *Meerdink v. Krieger*[77] decision relied on by respondents is easily distinguished from this case and the difference

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[73] *Johnson*, 63 Wn. App. at 302.
[74] *Williams v. Andresen*, 63 Wn.2d 645, 388 P.2d 725 (1964).
[75] *Williams*, 63 Wn.2d at 649.
[76] *See, e.g., Byerly v. Madsen*, 41 Wn. App. 495, 501 n.3, 704 P.2d 1236 (1985) (a juror misconduct / extraneous evidence case involving juror discussion of a settlement and distinguishing *Williams* on the basis that (a) *Williams* focused on the issue of misconduct of counsel and (b) on the basis that the amount of the verdict in *Byerly* was at issue).
[77] *See Meerdink v. Krieger*, 15 Wn. App. 540, 550 P.2d 42 (1976).

between the damages at issue in that case and the case before this Court demonstrate the harm and corresponding error here. *Meerdink* involved a claim by plaintiff real estate purchasers against their realtor alleging nondisclosure of a dual agency relationship.[78] The case involved only economic damages.[79] Expert witnesses testified on that issue.[80] Applying *Gardner* and clearly recognizing that much of the post-trial juror affidavit contained comments inhering in that verdict, the *Meerdink* court noted that "[i]t is not for the juror to say what effect the remarks may have had upon his verdict." The *Meerdink* court then concluded that "[t]here is no indication in the affidavit that the jury did not consider the experts' valuation testimony" and supported this conclusion by reference to the verdict.[81]

By comparison, in *Kuhn v. Schnall,*[82] this Court recently recognized the distinction between economic damage cases and cases, as here, involving primarily general damage claims: "Nothing in the language of CR 59 requires the court to find inadequate damages resulting from prejudice before granting a new trial on other grounds, <u>and such a reading of the rule is especially problematic where the award consists</u>

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[78] *Meerdink*, 15 Wn. App. at 541.
[79] *See Meerdink*, 15 Wn. App. at 545.
[80] *See Meerdink*, 15 Wn. App. at 546.
[81] *See Meerdink*, 15 Wn. App. at 546.
[82] *Kuhn,* 155 Wn. App. at 575.

largely of general damages."[83] In the present case, as recognized by the *Kuhn* court, the highly emotional and "patriotic" benchmark of $100,000 injected into the jury deliberations of the general damage award "was not harmless beyond a reasonable doubt and *could have* affected the jury's verdict" and there was, therefore, "no tenable basis for the trial court's refusal" to grant a new trial based on juror misconduct.[84] This, under *Briggs* and the *Gardner* line of cases is by definition an abuse of discretion requiring reversal and a new trial.[85]

5. The Juror Declarations at Issue Do Not Inhere in the Verdict

Even if respondents had appealed and properly assigned error to the trial court's decision that the alleged juror misconduct did not "inhere in the verdict," the trial court was correct on this issue. This is the first step of the three-step analysis under *Gardner* and was thoroughly briefed before the trial court, resulting in separate preliminary rulings not appealed here.[86] Washington has for a century drawn a distinction between the substance of juror affidavits proving the *fact* of misconduct

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[83] *Kuhn,* 155 Wn. App. at 572 (emphasis supplied)
[84] *Briggs*, 55 Wn. App. at 61 (emphasis supplied)
[85] *Briggs*, 55 Wn. App. at 60-61.
[86] *See* CP 204-305, 359-484, 487-497. The trial court first focused on whether the declarations inhered in the verdict. CP 188-189, 365-369.

and the substance involving the *effect* of misconduct.[87] The test here, properly applied by the trial court in this case, is whether the juror's oral or written testimony can be rebutted by other testimony without probing the juror's mental processes."[88]

As in *Fritsch v. Newberry's, Inc.*,[89] *Halverson v. Anderson,*[90] and *Loeffelhoz v. Citizen for Leaders with Ethics and Accountability,*[91] the juror declarations considered by the trial court state the objective *fact* that specific, highly prejudicial extrinsic evidence was introduced into these deliberations. The facts were "wholly outside the evidence and not subject to scrutiny by either party." It is beyond dispute that none of this evidence was admitted in court, nor would it be if offered. The facts relied on by the trial court did not involve probing the jurors' mental processes, did not require the trial court to link this information to any juror's "motive, intent, or belief," did not "describe their effect on" any juror, did not require the trial court to probe any juror's "mental processes" and therefore

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[87] *See Maryland Casualty Co. v. Seattle Electric Co.*, 75 Wash. 430, 435-36, 134 P. 1097 (1913). *Lyberg, supra*; *Hamilton v. Snyder*, 182 Wash. 688, 48 P.2d 245 (1935), *State v. Knapp*, 194 Wash. 286, 77 P.2d 985 (1938), *O'Brien v. Seattle,* 52 Wash.2d 543, 327 P.2d 433 (1958), and *Fritsch v. J.J. Newberry's, Inc.* 42 Wn. App. 904, 720 P.2d 845 (1986), all distinguishing between evidence of the *fact* of misconduct and testimony as to the *effect* of misconduct.
[88] *Fritsch,* 42 Wn. App. at 906 (*quoting Gardner,* 60 Wn.2d at 846).
[89] 42 Wn. App. 904, 720 P.2d 845 (1986).
[90] 82 Wn.2d 746, 513 P.2d 827 (1973)
[91] *Loeffelhoz v. Citizen for Leaders with Ethics and Accountability* , 119 Wn. App. 665, 82 P.3d 1199 (2004).

did not inhere in the verdict.

II. CONCLUSION

Appellants respectfully request that this matter be reversed and remanded for a new trial, with instructions that the jury may consider evidence of grief, mental anguish and suffering when assessing damages for the wrongful death beneficiaries.

RESPECTFULLY SUBMITTED this 16th day of November, 2011.

SWANSON ❖ GARDNER, P.L.L.C.

By_____

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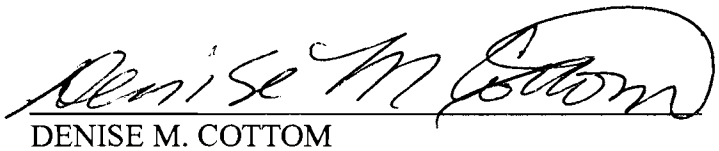
PROOF OF SERVICE

I certify that on the 16th day of November, 2011, I sent for service a copy of APPELLANT'S REPLY BRIEF, to be served by the method indicated below, and addressed to the following:

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



DENISE M. COTTOM