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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Appellant,

vs.

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

Respondents.

RESPONDENTS' BRIEF

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I. Factual Statement

On April 23, 2007, Decedent was killed instantly when her vehicle collided with a truck driven by Respondent, Jacob Yanez. Mr. Yanez was working for Respondent Strong Trucking, Inc. at the time of the accident.

Decedent was 78 years old when she died, and had a life expectancy of 10 years.¹ Decedent suffered from high cholesterol², high blood pressure³, and pre-diabetes.⁴ Her husband passed away 22 years earlier in 1985 and she lived alone.⁵ She was survived by her two adult children, Jone and Marie. Both children were in their mid-40s,⁶ were married, and had lived independently of their mother since the mid to late 1980s.⁷ Decedent was not dependent upon her children for support, and her children were not dependent upon Decedent for their support.

The Appellant (Personal Representative of the Estate) sued Respondents alleging both survivorship and wrongful death causes of

¹ CP 164.

² 7/1 RP 44-58.

³ 7/1 RP 59-68.

⁴ 7/1 RP 68-72.

⁵ 7/8 RP 84.

⁶ 7/8 RP 80

⁷ 7/8 RP 88-89; 7/13 RP 70.

action.⁸ Respondents admitted liability and the trial proceeded on the issue of damages. The damages for wrongful death consisted of only the loss of love, care, companionship, and guidance Decedent provided her two children.⁹

The trial lasted approximately two weeks. During his closing argument, Appellant's attorney asked the jury to award each child \$2,500,000 on the wrongful death claim,¹⁰ while the Respondents' attorney asked the jury to award each child between \$50,000 and \$100,000 on this claim.¹¹ The jury obviously agreed with Respondents' value of the claim as it awarded each child \$75,000 for a total of \$150,000.¹² The vote was 10 to 2.¹³

II. PROCEDURAL STATEMENT

A. GRIEF.

Respondents brought a motion in limine to exclude any evidence of Decedent's children's grief, mental anguish, and suffering.¹⁴ Judge Hill, following over 100 years of precedent, granted the motion, and later refused to give Appellant's proposed jury instruction which allowed the

⁸ CP 50. The wrongful death action was premised on RCW 4.20.020.

⁹ CP 565.

¹⁰ CP 143.

¹¹ CP 403.

¹² CP 166-7.

¹³ 7/14 RP 3-5.

¹⁴ CP 510-512. Hereinafter grief, mental anguish and suffering will be referred to as "grief."

jury to consider grief in deciding the amount of damages for wrongful death.¹⁵

B. MOTION FOR A NEW TRIAL.

Appellant, unhappy with the amount of the jury's award, filed a motion for a new trial on the basis of alleged jury misconduct.¹⁶ Appellant claimed that six jurors committed misconduct during voir dire, and four jurors interjected improper extrinsic evidence into the deliberations.¹⁷ Appellant submitted the two dissenting jurors' declarations in support of his motion.¹⁸

Judge Hill initially had the parties brief the issue of whether the two jurors' declarations inhered in the verdict and therefore could not be considered.¹⁹ After reviewing these briefs, Judge Hill ruled that there was no jury misconduct during voir dire, and that all of the alleged extrinsic evidence inhered in the verdict, except for the statement by Juror No. 4 that a soldier's family received \$100,000 if the soldier dies in Afghanistan.²⁰ Judge Hill allowed the parties to contact other jurors on this issue and requested additional briefing.²¹ After considering this

¹⁵ CP 544-6; CP 565; 7/12 RP 9-10.

¹⁶ CP 140-167.

¹⁷ CP 140-167.

¹⁸ CP 175-7; CP 133-7

¹⁹ CP 188-9.

²⁰ CP 365-9.

²¹ CP 365-9.

additional information, Judge Hill determined that there were no reasonable grounds to believe that Appellant had been prejudiced by this statement by Juror No. 4 and denied Appellant's new trial motion.²² Judge Hill subsequently denied Appellant's motion for reconsideration.²³

III. ARGUMENT

A. FOR OVER 100 YEARS, THE COURTS HAVE CONSTRUED RCW 4.20.020 AS NOT ALLOWING RECOVERY FOR GRIEF. APPELLANT IS ASKING THE COURT TO LEGISLATE FROM THE BENCH BY CHANGING THE MEANING OF 4.20.020 TO ALLOW RECOVERY FOR GRIEF.

1. The Recovery For Wrongful Death Is Statutory Only.

The common law does not recognize a cause of action for wrongful death, and recovery from it is strictly statutory:

The courts of this state have long and repeatedly held, causes of action for wrongful death are strictly a matter of legislative grace and are not recognized in the common law.²⁴

RCW 4.20.020 is the general wrongful death statute, and provides:

Wrongful Death – Beneficiaries of Action.
Every action shall be for the benefit of the wife, husband, state registered domestic partner, child or children, including stepchildren, of the person whose death shall have been so caused. If there be no wife,

²² CP 483-4.

²³ CP 496-7.

²⁴ *Philippides v. Bernard*, 151 Wn.2d 376, 390, 88 P.3d 939 (2004), quoting from *Tait v. Wahl*, 97 Wash. App. 765, 771, 987 P.2d 127 (1999).

husband, state registered domestic partner, or such child or children, such action may be maintained for the benefit of the parents, sisters, or brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his or her death.

In every such action, the jury may give such damages as, under all circumstances of the case, may to them seem just.
(Emphasis added).

The last sentence of this statute allows for the recovery of damages. In *Walker v. McNeil*,²⁵ the Supreme Court construed this wrongful death statute and held that it did not allow recovery for grief. In the 113 years since *Walker* was decided, the court has repeatedly held that this wrongful death statute does not allow recovery for grief.²⁶ Indeed, Appellant's attorney admitted to Judge Hill that this statute does not allow recovery for grief.²⁷

2. **Appellant Conflates The Court's Role In Interpreting The Common Law And Construing The Meaning Of A Statute.**

²⁵ 17 Wash. 582, 50 P. 518 (1897).

²⁶ *David v. North Coast Transportation Co.*, 160 Wash. 576, 295 P. 921 (1931); *Pearson v. Picht*, 184 Wash. 607, 52 P. 314 (1935); *Kramer v. Portland-Seattle Auto Freight, Inc.*, 43 Wn.2d 386, 261 P.2d 692 (1953); *Pancratz v. Turon*, 3 Wash. App. 182, 473 P.2d 409 (1970); *Penoza v. Northern Pacific Railway Co.*, 215 F. 200 (1914); *Pike v. U.S.*, 652 F.2d 31 (9th Cir. 1981); *Chappel v. Ganger*, 851 F. Supp. 1481 (E.D. Wash. 1994).

²⁷ See Appellant's attorney's colloquy with the court on pp. 5-7 of Appellant's Brief.

Appellant's argument is premised on the proposition that the court is interpreting the common law when it construes the meaning of RCW 4.20.020 and therefore the court can alter the statute's meaning. This premise is simply wrong, and shows that the Appellant does not understand the difference between interpreting the common law and construing a statute.

The common law consists of court-made rules, and the court has the authority to change them:

It is fundamental that the rules of common law which are court-made rules, can be changed by the court when it becomes convinced that the policies upon which they are based have lost their validity or were mistakenly conceived.²⁸

The court also construes the meaning of statutes, and does so by ascertaining the intent of the legislature.²⁹ Once the court construes the meaning of a statute, it is not at liberty to alter that construction at a later date. As explained in *Anderson v. Seattle, supra*, at p. 202:

It is neither the function nor the prerogative of courts to modify legislative enactments. The proper objective of all statutory construction is to ascertain and give effect to the legislative intent where that intent is not made explicit in the statute itself.

²⁸ *Spokane Methodist Homes, Inc. v. Dept. of L&I*, 81 Wn.2d 283, 286, 501 P.2d 589 (1972).

²⁹ *Anderson v. Seattle*, 78 Wn.2d 201, 471 P.2d 87 (1970).

In other words, the court cannot legislate from the bench, and use the common law to change the meaning of legislation. This principal is aptly set forth in *Spokane Methodist Homes, Inc. v. Dept. of L&I, surpa*. In 1932, the Supreme Court construed the L&I statute as excluding coverage for workers of charitable organizations.³⁰ The common law at that time provided immunity for the negligence of a charitable organization. In 1964, the Supreme Court abrogated this immunity.

In 1967, the plaintiff was injured while working for a charitable organization, and he sought L&I benefits. The plaintiff contended that because the court had judicially abandoned the common law immunity for charitable organizations, the court should change its interpretation of the L&I statute to allow coverage for workers of charitable organizations.

The Supreme Court rejected this argument, finding that the legislature had agreed with the court's construction of the L&I statute excluding charitable organizations because it did not change the statute until 1971. On pp. 287-8, the court explains:

Consequently, the court must recognize that the legislature accepted its interpretation, rendered in 1932, as a correct reading of the act. It is the theory of the petitioner that if the court makes a change in the common law, any statute which was enacted with the

³⁰ The legislature in 1971 changed the statute so as to cover workers of charitable organizations.

existing rule of common law in mind, is automatically amended to conform to the new rule adopted by the court. He has cited no authority for this proposition, and we think that none exist. The legislature may change the common law. However, it is not the prerogative of the courts to amend the acts of the legislature.

In the present case, Appellant is absolutely wrong in asserting that the court can change its longstanding construction of RCW 4.20.020 by common law. The court has no such authority. The court has already construed the meaning of this statute, and has followed that construction for over a century. It cannot now change that construction because of the “evolution of common law.”

3. **The Legislature Agrees With The Supreme Court’s Construction Of The Wrongful Death Statute Because It Has Not Changed The Language In The Statute Providing For Damages In Over A Century.**

The court’s objective in construing a statute is to give effect to the legislative intent.³¹ If the court construes the meaning of a statute and the legislature does not alter that construction, then the legislature has acquiesced in the court’s construction, and that court cannot later alter it.³²

³¹ *Matter of Eaton*, 110 Wn.2d 897, 757 P.2d 961 (1988).

³² *Tipsworth v. Dept. of Labor & Industries*, 52 Wn.2d 79, 323 P.2d 9 (1958); *Nyland v. Dept. of L&I*, 41 Wn.2d 511, 250 P.2d 551 (1952); *Spokane Methodist Homes, Inc. v. Dept. of L&I*, 81 Wn.2d 283, 501 P.2d 589 (1972); *Lowman and Hanford Co. v. Ervin*, 157 Wash. 649, 290 P.2d 221 (1930).

Tipsworth v. Dept. of L&I, supra, is an excellent example of this principal. In 1946, the Supreme Court construed the meaning of RCW 51.08.180 in *De'Amico v. Conguista*³³ and held that it excluded from L&I coverage a worker who was injured during his lunch break, on the basis that he was not in the course of his employment. Several years later, the plaintiff, an employee of the state highway department, was injured when he contacted a high voltage cable while crossing the street to eat lunch on a worksite. Plaintiff appealed his denial of L&I benefits.

The Supreme Court expressed its belief that its construction of the statute in *De'Amico* was too narrow. Nonetheless, the court was bound by its original construction of the statute because the legislature had not changed the statute in the years following the *De'Amico* decision, and therefore, agreed with the court's construction. The court explains on pp. 82-3:

It seems to us that the construction which the court in *De'Amico v. Conguista, supra*, placed upon RCW 51.08.180 (designating that, in order to be eligible for benefits of this act, a workman must be in the course of his employment), was much too narrow, and that an interpretation of the statute which extends its benefits to a workman, the nature of whose employment requires him to eat his lunch in the vicinity of his job and incur the

³³ 24 Wn.2d 674, 167 P.2d 157 (1946).

hazards which exist there, would be more in accord with the spirit of the act. ... **However, the case was decided in 1946 and has been consistently followed since then. The legislature has convened in six regular and two extraordinary sessions since the four conditions were first enunciated and has not seen fit to correct the interpretation. Therefore, we must assume that it was in accord with the legislative intent.** (Emphasis added).

In the present case, the Supreme Court construed the wrongful death statute as precluding recovery for grief 113 years ago. The legislature has not changed that portion of the statute in the intervening 113 years, and the only reasonable conclusion is that the legislature agrees with the court's construction. Since the court's role in construing a statute is to ascertain the legislative intent, and the legislative intent is to exclude recovery for grief in the wrongful death statute, the court has no authority to alter the meaning of the statute. Only the legislature can now amend the statute to allow for recovery for grief.

4. The Legislative Amendment To RCW 4.24.010 Confirms That The Legislature Did Not Intend To Allow Recovery For Grief In RCW 4.20.020.

Appellant contends that the legislative amendment to RCW 4.24.010 in 1967 is a basis for allowing recovery for grief in RCW 4.20.020. In fact, the legislative change to RCW 4.24.010 confirms that

the legislature did not intend to allow recovery for grief under RCW 4.20.020.

Prior to 1967, RCW 4.24.010 allowed a parent to recover damages for the injury or death of a minor, but the statute did not set forth what damages could be recovered. The court, in construing the statute, held that one could not recover for grief.³⁴ In 1967, the legislature amended the statute and added a provision for damages.³⁵

In *Wilson v. Lund*,³⁶ the court construed this added language as allowing recovery for grief. Specifically, the court held:³⁷

We construe the language ‘loss of love ... and ... injury to or destruction of the parent-child relationship to provide recovery for parental grief, mental anguish and suffering as an element of damages intended by the legislature to be recoverable under appropriate circumstances in cases involving the wrongful death or injury to a child.

³⁴ *Lockhart v. Besel*, 71 Wn.2d 112, 426 P.2d 605 (1967).

³⁵ The legislature added the following to the statute:

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

³⁶ 80 Wn.2d 91, 491 P.2d 1287 (1971).

³⁷ *Id.* at 96.

The legislature did not, and has not since, changed the damage provision of RCW 4.20.020. The only reasonable conclusion one can draw is that the legislature, aware that the court has construed this statute as precluding recovery for grief, was satisfied with that construction, and did not want to change it. Otherwise, the legislature would have amended RCW 4.20.020 at the same time it amended RCW 4.24.010.

5. **There Is A Rational Basis For Precluding Recovery For Grief In An Adult Child, And Allowing Such Recovery For A Minor Child.**

Appellant contends that this court should construe RCW 4.20.020 as allowing for grief so that it is consistent with the damages recoverable under RCW 4.24.010. This contention ignores the fact that the words used in the two statutes for the recovery of damages are very different, expressing a legislative intent that they allow for different recoveries.

Moreover, there is a rational basis for allowing recovery for grief for some beneficiaries, but not others. In *Philippides v. Bernard, supra*, the court allowed parents of a minor child to recover for grief, but did not allow parents of an adult child to make such a recovery. As explained by the court on p. 392:

Obviously, 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. As to

distinguishing the parents of minor children from the parents of adult children, the need for love and guidance, as well as financial support, is a generational characteristic of minor children. Different considerations apply to adult children. Therefore, there is a reasonable basis for the classification.

This same rational basis applies for not allowing adult children to recover for grief from a parent.

6. **Appellant's Policy Argument Should Be Made To The Legislature, Not The Court.**

Appellant makes numerous policy arguments why this court should construe RCW 4.20.020 as allowing recovery for grief. These arguments should be made to the legislature, not the court. The court's role is not to legislate, but to construe the meaning of a statute. Once the court has determined the legislative intent it cannot later change that intent; only the legislature can.³⁸

7. **The Addition Of The Word "Love" To The Wrongful Death Damage Instruction Does Not Allow Recovery For Grief.**

WPI 31.03.01, the wrongful death pattern damage instruction, provides in relevant part:

In addition, you should consider the following items:

³⁸ *Philippides v. Bernard, supra; Anderson v. Seattle, supra.*

...

(2) Noneconomic Damages:

You should also consider what [decedent] reasonably would have been expected to contribute to [his/her children] in the way of **love**, care, companionship, and guidance. (Emphasis added).

Appellant argues that the court specifically approved the inclusion of the word “love” to the jury instruction in *Kramer v. Portland-Seattle Auto Freight, Inc.*, *supra*, and this court should interpret the word “love” as including grief. This argument is meritless.

a. The Court In *Kramer* Did Not Approve The Inclusion Of “Love” To The Wrongful Death Jury Instruction.

Appellant is wrong in asserting that the Supreme Court in *Kramer* approved a damage instruction for wrongful death which included recovery for “loss of love.” In fact, the court did not approve any damage instruction. Instead, no exception was taken to the proposed damage instruction, and it became the law of the case.³⁹ The court did not address the issue of whether “loss of love” was proper in the instruction. The issue before the court was whether the jury’s verdict was a result of passion or prejudice.

//

b. The Court Does Not Construe The Meaning Of Jury Instructions.

Appellant's argument is that the court in *Wilson v. Lund, supra*, construed the addition of the word "love" in a **statute** as allowing recovery for grief, and therefore this court should construe the word "love" in the **jury instruction** as also allowing for recovery of grief.

Again, Appellant misunderstands the court's role. The court construes the meaning of statutes, not jury instructions. A jury instruction is a statement of the law which is derived from either the common law or statute. While the court will determine whether a jury instruction sets forth the correct statement of the law, it does not interpret the meaning of the words used in a jury instruction to determine if those words allow for further recovery of damages.

Not surprising, Appellant cites no authority for his proposition because none exists.

In the present case, the inclusion of the word "love," in the instruction, if proper, is derived from RCW 4.20.020. Regardless of what "love" means, the court has repeatedly held that this statute does not allow recovery for grief.⁴⁰

³⁹ *Id.* at p. 393.

⁴⁰ *See* cases cited in Footnote 26.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL BASED UPON JUROR MISCONDUCT.

1. Judge Hill Carefully Reviewed And Analyzed Appellant's Motion For A New Trial Before Denying It.

Appellant filed a motion for a new trial with the trial court, alleging juror misconduct during voir dire and during deliberations. Appellant supported his motion with declarations by the two dissenting jurors.

Judge Hill initially inquired as to what portions of the two declarations inhaled in the verdict, and had the parties brief this issue. Following review of this briefing, Judge Hill determined that there was no jury misconduct during voir dire, and that all of the statements of alleged juror misconduct during deliberations inhaled in the verdict except one - Juror No. 4's statement that a soldier's family received \$100,000 if the soldier dies in Afghanistan.

Judge Hill then allowed the parties to contact other jurors on this issue and requested briefing on whether this extrinsic evidence required a new trial. Judge Hill, after reviewing the additional juror declarations and briefing, concluded that there was no reasonable grounds to believe that the verdict had been affected by Juror No. 4's statement and denied Plaintiff's new trial motion.

2. **The Standard of Review is Abuse of Discretion.**

This court reviews Judge Hill's decision denying Appellant's motion for a new trial using the abuse of discretion standard.⁴¹ This deference is given because the trial judge has observed all the witnesses and the trial proceedings, and knows the evidence which was presented.⁴²

3. **Plaintiff Must Present Strong Evidence of Juror Misconduct to Overcome the Presumption That the Jury's Verdict Was Properly Rendered.**

The law gives a strong presumption that a jury's verdict was properly rendered.⁴³ The party asserting jury misconduct bears the burden of establishing that it occurred⁴⁴:

A strong, affirmative showing of juror misconduct is required to impeach a verdict. Verdicts should be upheld and the free, frank and secret deliberations upon which they are based held sacrosanct unless (1) the affidavits of the jurors allege facts showing misconduct and (2) those facts support a determination that the misconduct affected the verdict.⁴⁵

⁴¹ *Richards v. Overlake Hospital Medical Center*, 59 Wash. App. 266, 272, 796 P.2d 737 (1990).

⁴² *Id.* at 272

⁴³ *Cox v. Charles Wright Academy*, *supra* at 176.

⁴⁴ *State v. Kell*, 101 Wash. App. 619, 621, 5 P.3d 47, *review denied*, 142 Wn.2d 1013 (2000).

⁴⁵ *Richards v. Overlake Hospital Medical Center*, *supra* at pp. 271-2.

4. **Judge Hill Applied A Three-Step Analysis In Determining Whether The Alleged Juror Misconduct Overcomes The Strong Presumption Of A Valid Verdict.**

The court utilizes a three-step analysis in deciding whether a juror's alleged misconduct adversely affected the verdict. First, the court decides whether the evidence of the alleged juror misconduct inheres in the verdict. If it does, then the court cannot consider it.⁴⁶

If the alleged misconduct does not inhere in the verdict, then the court decides whether it in fact occurred and whether it constitutes extrinsic evidence.⁴⁷

If the court determines that extrinsic evidence was interjected into the jury deliberations, then it must decide whether that evidence adversely affected the verdict.⁴⁸ The existence of a mere possibility of prejudice is insufficient to set aside a verdict.⁴⁹

5. **Appellant Has Waived All Claims Of Juror Misconduct Except For Juror No. 4's Statement Because He Failed To Support Other Claims With Argument.**

While Appellant set forth several alleged instances of juror misconduct in his Assignment of Error No. 3,⁵⁰ he argues only that Juror No. 4's statement of compensation for a soldier killed in Afghanistan was extrinsic evidence that adversely affected the verdict.⁵¹

⁴⁶ *Cox v. Charles Wright Academy, supra.*

⁴⁷ *State v. Kell, supra.*

⁴⁸ *Richards v. Overlake Hospital Medical Center, supra. Chiappetta v. Bahr*, 111 Wash. App. 536, 543, 46 P.3d 997 (2002);.

⁴⁹ *Hammel v. Rife*, 37 Wash. App. 577, 682 P.2d 949 (1984)

⁵⁰ Page 3 of Appellant's Brief

⁵¹ Pages 30-36 of Appellant's Brief.

The court will not consider assignments of error unless they are supported by legal arguments. *Howell v. Spokane and Inland Empire Blood Bank*, 114 Wn.2d 42, 46, 785 P.2d 815 (1990). Since Appellant has supported only the alleged misconduct by Juror No. 4 with legal argument, this is the only issue this court can consider.

6. **Juror No. 4's Alleged Misconduct Inheres In The Verdict.**

In *Cox v. Charles Wright Academy*,⁵² the court sets forth what evidence inheres in the verdict:

Thus, courts may consider only such facts asserted in the affidavit of jurors which relate to the claimed misconduct of the jury and do not inhere in the verdict itself. **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 the jury's processes in arriving at its verdict, and therefore, inhere in the verdict itself, and averments concerning them are inadmissible to impeach the verdict.** (Emphasis added).

⁵² 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967).

The court goes on to explain the reason for this rule at p. 180:

A different rule, one permitting jurors to impugn the verdicts which they have returned by asserting matters derogatory to the mental processes, motivations and purposes of other jurors or purporting to explain how and why a jury voted as he did in arriving at his verdict, 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.

Juror affidavits are not admissible to impeach a verdict when they assert facts that “purport to divulge considerations entered into a juror’s deliberation or controlled his action in arriving at the verdict”⁵³ described the arguments of a juror⁵⁴ or divulge the “individual points of view of a jury as to why they give more weight or less weight” to certain evidence, because such points of view are part of the deliberative function of the jury.⁵⁵

These principles are applied in *Breckenridge v. Valley General Hospital*.⁵⁶ In *Breckenridge*, the plaintiff sued Dr. Nowak because he failed to order a CT scan when plaintiff complained of a severe headache while in the emergency room, and she later suffered a massive brain

⁵³ *Hendrickson v. Conopask*, 14 Wash. App. 390, 939, 541 P.2d 1001 (1975)

⁵⁴ *State v. McKenzie*, 56 Wn.2d 897-900, 355 P.2d 834 (1960)

⁵⁵ *Levea v. G.A. Gray Corp.*, 17 Wash. App. 214, 227-28, 562 P.2d 1276, review denied 89 Wn.2d 1010 (1977).

aneurysm. The plaintiff moved for a new trial after a defense verdict, alleging that Juror Corson improperly introduced extrinsic evidence during deliberations. The trial court granted a new trial after considering the following from Juror Temple's Declaration:

[Corson] argued that other emergency room doctors would have behaved in the very same fashion as Dr. Nowak had and supported his position from personal experience. During deliberations he cited the experiences of his wife, who suffers from migraines. Mr. Corson told the jury that his wife had gone to emergency rooms several times with symptoms similar to those experienced by Linda Breckenridge on November 19, 1996, 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. He made reference to this argument at least three times and, upon repeating his statements, prefaced his remark 'again, I keep coming back to my wife's experiences,' or substantial language.⁵⁷

The Court of Appeals reversed, finding that the trial court abused its discretion in granting a new trial. The Supreme Court affirmed, holding that the above quoted statement from Juror Temple's Declaration

⁵⁶ 150 Wash.2d 197, 204-5, 75 P.3d 944 (2003)

⁵⁷ *Id* at 206.

inhered in the verdict and could not be considered. The court reasoned on pp. 206-7:

This statement explains Corson's reasons for weighing the evidence in the case the way that he did and for believing that Nowak was not liable. ... As in *Cox*, the statement attributed to Corson explains this juror's mental process in reaching his conclusion, a factor inhering in the jury's process in arriving at its verdict.

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 statement inhere in the verdict. Temple's declarations contain comments made by Corson during deliberation that explain Corson's reasons for believing that Nowak was not liable. Because this statement inheres in the verdict, the trial court abused its discretion when it granted a new trial. We affirm the Court of Appeals.

The circumstances of the present case are indistinguishable from *Breckenridge*. According to the Declarations submitted by Plaintiff,⁵⁸ Juror No. 4 made statements to explain why he believed that the award to the two adult children should not exceed \$100,000.⁵⁹ These statements go directly to Juror No. 4's motive or belief and explain his thought

⁵⁸ Plaintiff submitted the Declarations of the two dissenting jurors, Loyal Brown and Raymond Albright. CP 133-7, CP 175-7.

⁵⁹ CP 135.

processes. They therefore inhere in the verdict and the court cannot consider them.

7. **Even If One Assumes That Juror No. 4 Interjected Extrinsic Evidence Into The Deliberations, The Trial Court Did Not Abuse Her Discretion In Determining That It Did Not Affect The Verdict.**

Assuming that Juror No. 4's statement did not inhere in the verdict, the issue is whether Judge Hill abused her discretion in deciding that the extrinsic evidence did not affect the verdict.⁶⁰

a. **Juror No. 4 Only Commented On the Amount of the Death Benefit For a Soldier Killed In Action. He Did Not Compare Ms. Garcia's Life With That Of A Soldier.**

Juror No. 4's statement was that he was not sure, but believed that the family of a soldier killed in battle would receive \$100,000. John Barna, Juror No. 4, tells us in his declaration⁶¹:

During the course of our deliberations, we jurors were discussing the value of a life in a general sense. During this discussion, I commented that, while I was not sure, I believed that if a soldier was killed in battle his family would receive \$100,000. I made this comment only one time.

⁶⁰ *Richards v. Overlake Hospital Medical Center*, *supra* at 272.

⁶¹ CP 424-5.

Juror No. 4 did not compare the value of a soldier's life with that of Ms. Garcia. Indeed, he specifically denies making any such statement. He states in his declaration⁶²:

I never attempted to equate or compare the amount of money a deceased soldier's family received with what the Garcia children should recover for their mother's death. I **never** stated that the Garcia children should receive \$50,000 each because that totaled \$100,000, which was equal to what a soldier's family who was killed in Afghanistan received.

The declarations of other jurors confirm that Juror No. 4 did not make such a comparison. Juror Diane Beaupain states⁶³:

2. During jury deliberations, we were discussing, generally, how much a life is worth. One juror made a comment about people dying in a war and not getting very much money. I do not recall whether the person gave a specific amount of money, or saying that it was what a soldier's family received who was killed in Afghanistan. I heard the comment only one time.

3. **I recall that this statement was made as a comment about death in general, and not as an argument for how much money the Garcia children should receive. I never heard anyone make such an argument.** (Emphasis added).

⁶² CP 425.

⁶³ CP 427-8.

Presiding Juror Terri Gordon states in her declaration⁶⁴:

During deliberations, we were discussing, generally, the value of a human life. I recall that during this discussion, on one occasion, a juror made a comment that a soldier who died in battle received a certain amount of money, the amount of which I do not recall. **It was stated only as a comment and was not made as a comparison between the value of Ms. Garcia's life and a soldier's life.** I heard this remark only one time, and nothing more was said about it. **It was not used as a basis for anyone arguing that the Garcia children should receive a certain amount of money.** (Emphasis added).

Juror Betty Thomas' declaration reads⁶⁵:

I do not recall any juror arguing that Ms. Garcia's children were entitled to only a certain amount of money because of what a deceased soldier's family would receive in benefits as a result of that soldier's death.

b. The Trial Court Properly Made An Objective Inquiry Into Whether There Were Reasonable Grounds To Believe That Extrinsic Evidence Affected The Verdict.

The applicable standard is whether there are reasonable grounds to believe that a party has been prejudiced by the extrinsic evidence.

The court must make an *objective* inquiry into whether the extraneous evidence, if indeed any existed, could have affected the jury's

⁶⁴ CP 430-1.

⁶⁵ CP 434-5.

determination and *not a subjective* inquiry into the actual effect of the evidence on the jury, because the actual effect of the evidence inheres in the verdict. *State v. Briggs*, 55 Wash. App. at 55, 776 P.2d 1347. **Juror misconduct involving the use of extraneous evidence during deliberations will entitle a party to a new trial if there are reasonable grounds to believe the party has been prejudiced.** See *State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968)(a criminal case where the ‘party’ is a defendant). Any doubt that the misconduct affected the verdict must be resolved against the verdict. (Emphasis added)⁶⁶.

In other words:

The ‘existence’ of a mere possibility or remote possibility of prejudice, without more, is not enough to set aside the verdict.⁶⁷

In *Richards*, the court cited as authority *State v. Lemieux, supra*. In *Lemieux*, at p. 91, the court quoted from *State v. Rinke*⁶⁸ in setting forth the following rule for determining whether extrinsic evidence affected the verdict:

Before a verdict will be vitiated because a jury considered material not properly before it, there must be a showing of reasonable grounds to believe that a defendant has been prejudiced.

⁶⁶ *Id.* at 273.

⁶⁷ *Hammel v. Rife*, 37 Wash. App. 577, 585, 682 P.2d 949 (1984).

⁶⁸ 70 Wn.2d 844, 425 P.2d 658 (1967).

c. **Extrinsic Evidence Does Not Adversely Affect The Verdict If The Award Is Within The Range Of The Evidence.**

When the jury's verdict is within the range of the evidence presented, then there are no reasonable grounds to believe that the verdict was prejudicially affected by the extrinsic evidence.⁶⁹

An excellent example of this principle is found in *Meerdink v. Krieger, supra*. In this case, the plaintiffs (purchasers) sued the defendant (realtor) and others alleging non-disclosure of a dual agency relationship. At trial, the parties presented expert testimony on damages. The jury found for the plaintiffs and awarded \$19,000. The defendants moved for a new trial on the basis that the jury's award was based on extrinsic evidence.

They presented the jury foreman's declaration stating that the jury computed the damages based upon the foreman's knowledge of the cost of construction.⁷⁰

⁶⁹ *Meerdink v. Krieger*, 15 Wash. App. 540, 555 P.2d 42 (1976); *Williams v. Andreson*, 63 Wn.2d 645, 388 P.2d 725 (1964); *Johnson v. Carbon*, 63 Wash. App. 294, 818 P.2d 603 (1991).

⁷⁰ The jury foreman's affidavit states in part:

We computed the reasonable cost of construction of the Folsom Avenue Apartments plus 10% to 15% Reasonable profit of Johnson, based on the square foot floor area of the building, namely approximately 6,300 square feet. The jury did not add to it, but disallowed the \$10,000 or any other amount for real estate commission paid to the defendants or other selling costs. **This determination was based largely on my personal knowledge of construction costs per square foot.** In this manner we concluded that the value of the apartment house property was approximately \$96,000. Deducting this from the \$115,000 purchase price showed damages in the sum of approximately \$19,000. (Emphasis added). *Id.* at 545-6.

The trial court denied the new trial motion which was affirmed by the Court of Appeals on the basis that no prejudice was established. The Appellate Court explained on p. 546:

The amount of damages ultimately found by the jury was well within the testimony presented at trial. There is no indication in the affidavit that the jury did not consider the experts' evaluation testimony. Implicit in the trial court's denial of the motion for a new trial is the conclusion that the information contained in the affidavit had no prejudicial effect upon the verdict.

Similarly, in *Williams v. Andreson, supra*, the defendants moved for a new trial based on the fact that the jury's verdict was influenced by learning that the defendants were insured. The trial court denied the motion and the Court of Appeals affirmed. The Appellate Court held that there was no evidence establishing that the jury's verdict was changed because of the insurance information, stating on p. 649:

The denial of defendants' motion was also justified by the fact that there was no contention made that the amount of the verdict was excessive. It is evident, therefore, that the jurors' knowledge that the defendants were insured did not influence their verdict.

In the present case, there is no evidence that Juror No. 4's statement about the amount of the death benefit resulted in a verdict outside the range of the evidence. The majority of the jurors' declarations

establish that Juror No. 4's statement was a passing comment when the jurors were discussing the value of a life in general.⁷¹ The amount of the death benefit was not used to either compare Decedent's life to that of a soldier, or to compute the amount of damages.⁷²

More importantly, there is no objective evidence establishing reasonable grounds to believe that this comment affected the jury's verdict. The facts establish that \$150,000 was a reasonable award for Appellant's loss of consortium claim.⁷³ Decedent was 78 years old at her death and her children were in their mid 40s. During closing arguments, Defendants' attorney reviewed the evidence and recommended an award of between \$50,000 to \$100,000 per child. The jury's award was the mid point of that recommendation.

If the jury had been prejudicially affected by Juror No. 4's comment, then the jury would have awarded no more than \$100,000 for both children.

Judge Hill presided over the trial, observed the jury, the witnesses, and the evidence presented. After Appellant made his motion for a new trial, she carefully reviewed the declaration of the jurors and concluded

⁷¹ See Declarations of jurors Diana Beaupain, Terri Gordon, and John Barna. Betty Thomas does not recall the statement being made. CP 424-5, CP 427-8, CP 430-1, CP 424-5.

⁷² See Declarations of jurors Diane Beaupain, Terri Gordon, John Barna, and Betty Thomas.

⁷³ See Section B, *supra*.

objectively that there were no reasonable grounds to believe that the verdict was affected by Juror No. 4's comment in light of all the other evidence.⁷⁴ She did not abuse her discretion in reaching this conclusion, and her decision must be affirmed.

8. The Cases Granting A New Trial Based On Extrinsic Evidence Are Those Where The Jurors Specifically Used The Extrinsic Evidence To Calculate A Dollar Amount In Damages.

The appellate cases in which a new trial has been allowed for jury misconduct based on extrinsic evidence are those where the jury has used the extrinsic evidence to calculate a specific award.⁷⁵ These cases establish that the party seeking a new trial must establish that the extrinsic evidence led to the specific jury action. As explained in *Johnson v. Carbon*:⁷⁶

Next, Mr. Johnson contends the trial court erred in denying his motion for a new trial based on juror misconduct. Mr. Johnson first contends the jurors brought in outside evidence when they speculated why Mr. Johnson kept a separate house. **Even if the discussion took place, that fact is not significant unless it is tied to specific**

⁷⁴ Plaintiffs, in an attempt to obtain an award in the millions of dollars, argued that the decedent led an exemplary life. Plaintiffs' problem with this argument is that the jury does not award damages on the basis of an exemplary life. Instead, it was instructed to award damages for loss of love, care, companionship, and guidance from decedent. \$150,000 for this loss is a fair and reasonable amount and well within the evidence.

⁷⁵ *Halverson v. Anderson, supra*; *Loeffelholz v. C.L.E.A.N.*, 119 Wash. App. 665, 82 P.3d 1199 (2004); *Fritch v. J.J. Newberrys, Inc.*, 43 Wash. App. 904, 720 P.2d 845 (1986).

⁷⁶ 63 Wash. App. 294, 301, 818 P.2d 603 (1991). e

action by the jury. Here the affidavits show neither a specific action by the jury nor a preexisting bias or prejudice.
(Emphasis added).

For example, in *Halverson v. Anderson*,⁷⁷ the plaintiff, a teenager, suffered injuries in an automobile accident. The plaintiff wanted to become an airline pilot, but he could not apply for a summer aviation job because of the injuries.⁷⁸ By the time of trial, the plaintiff was studying to become a surveyor. The trial judge did not allow a jury instruction for lost earning capacity, but did allow the plaintiff's attorney to argue that the plaintiff's lost opportunity to apply for the aviation job was part of his general damages. The jury awarded plaintiff \$20,500. Subsequently, the defendants presented four juror affidavits stating that the award included \$18,000 for future lost income. During deliberations, one of the jurors gave the salaries of an airline pilot and a surveyor, and the jury used these amounts to calculate the future lost income.

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⁷⁷ 82 Wn.2d 746, 513 P.2d 837 (1973).

⁷⁸ The injury later resolved and plaintiff was cleared for flying.

The Supreme Court found that jury used extrinsic evidence to establish the salary of a pilot and surveyor to calculate a specific amount for damages. It therefore granted a new trial.

In *Loeffelholz v. C.L.E.A.N.*,⁷⁹ a case factually similar to *Halverson*, the plaintiff sued the defendant for defamation and the jury was instructed to consider elements of damage for defamation.⁸⁰ The jury was not instructed on loss of earning capacity or lost income. Despite this, a juror opined that plaintiff earned \$30,000 a year. The jury then gave the plaintiff two years of salary (i.e., the length of time the case had been ongoing) and multiplied that amount by the four defendants and awarded a total of \$240,000.

The Appellate Court upheld the trial court's granting of a new trial based on juror misconduct. As in *Halverson*, the jury reached an amount of damage which was calculated specifically from extrinsic evidence.

The same occurred in *Fritz v. Newberry, surpa*. In *Fritz*, the jury awarded plaintiff \$260,300, less 20% contributory negligence, after he slipped and fell. Following trial, the defendant submitted a juror's declaration establishing that the jury calculated the plaintiff's pain and

⁷⁹ 119 Wash. App. 665, 82 P.3d 1199 (2004).

⁸⁰ The trial court instructed the jury to consider loss of reputation, shame, mortification, impairment of standing in the community, embarrassment, personal humiliation, injuries to feeling and mental anguish and suffering. *Loeffelholz v. C.L.E.A.N., supra*, at 683.

suffering based upon one juror who related that a lawyer had told him that \$1,000 was a reasonable sum for one month's pain and suffering from an injury. The jury then calculated the plaintiff's pain and suffering by multiplying \$1,000 by the number of months plaintiff would have lived according to the mortality tables. From this, the jurors added and subtracted other amounts to reach the \$260,300 amount.

The Appellate Court granted a new trial based on juror misconduct. It found that the misconduct was prejudicial because the jury used the extrinsic evidence to calculate the amount of the award.

Halverson, Loeffelholz, e and Fritch are all distinguishable from the present case. In these three cases, the jury used extrinsic evidence as a basis to calculate a specific award for the plaintiff. In each case, the extrinsic evidence was tied to a specific action by the jury, resulting in prejudice to the other party.

In the present case, there is no evidence that the jury took the \$100,000 amount expressed by Juror No. 4 and used it as a basis to calculate the award. This is a critical distinction, because without such evidence, the court cannot reasonably conclude that the verdict was affected by the comment. At most, it was simply a comment made by

Juror No. 4 which possibly could have affected the verdict. However, a mere possibility is insufficient to set aside the verdict.⁸¹

9. **As A Practical Matter, It Would Be Impossible To Prevent A Juror From Disclosing What Juror No. 4 Knew.**

Jurors are not blank slates or un-programmed computers, nor should they be. They are expected to bring “opinions, insights, common sense, and everyday life experiences into deliberations.”⁸² In this case, Juror No. 4 shared his knowledge of the amount of a death benefit for a deceased serviceman during a discussion about the value of life. It would be virtually impossible to prevent a juror from sharing this knowledge during such a discussion.

This comment, if it did not inhere in the verdict, did not result in prejudice to Appellant. There is no evidence that the jurors used this amount of the death benefit to calculate the award, and the amount of the award was within the range of evidence. Judge Hill did not abuse her discretion in denying Appellant’s motion for a new trial.

⁸¹ *Hammel v. Rife, supra.*

⁸² *State v. Carlson*, 61 Wash. App. 865, 878, 812 P.2d 536 (1991) *review denied* 120 Wn.2d 1022 (1993).

C. **THE JURY'S AWARD OF \$150,000 TO DECEDENT'S CHILDREN WAS WELL WITHIN THE RANGE OF EVIDENCE AND NOT THE RESULT OF PASSION OR PREJUDICE.**

1. **The Standard Of Review Is Abuse Of Discretion.**

The Appellate Court uses an abuse of discretion standard in determining whether the trial court erred in denying a motion for new trial on the grounds that the award was inadequate because of passion or prejudice.⁸³ An abuse of discretion occurs only if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons.⁸⁴

2. **There Is A Strong Presumption That The Jury's Award Is Valid.**

Juries have great latitude in determining the amount to award for damages, and courts are very reluctant to interfere with a jury's damage award.⁸⁵ Indeed, there is a strong presumption that the jury's damage award is valid.⁸⁶

In order to overcome the strong presumption, Appellant must establish that the damages award is flagrantly outrageous. In *Kramer v.*

⁸³ *Woolridge v. Woollett*, 96 Wn.2d 659, 668, 638 P.2d 566 (1981).

⁸⁴ *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995).

⁸⁵ *Herriman v. May*, 142 Wash. App. 226, 174 P.3d 156 (2007).

⁸⁶ RCW 4.76.030; *Cox v. Charles Wright Academy*, 70 Wn.2d 173, 176, 422 P.2d 515 (1967); *Anderson v. Dalton*, 40 Wn.2d 894, 246 P.2d 853 (1952).

Portland-Seattle Auto Freight,⁸⁷ the Supreme Court quoted from *Chancellor Kent* on this issue:

The question of damages was the proper and peculiar province of the jury. It rested in their sound discretion, under all the circumstances of the case, and unless the damages are so outrageous as to strike everyone with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from prejudice, partiality or corruption, we cannot, consistent with the precedence, interfere with the verdict. It is not enough to say, that in the opinion of the court, the damages are too high, and that we would have given much less. It is the judgment of the jury, and not the judgment of the court, which is to assess the damages in actions for personal torts and injuries. ... The damages, therefore, must be so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line; for they have no standard by which to ascertain the excess.

⁸⁷ *Id.* at 395.

3. **If A Jury's Award Is Within The Range Of Evidence, Then It Is Not A Result Of Passion Or Prejudice.**

In *Herriman v. May*⁸⁸, the court set forth the following test to determine whether a jury's award was the result of passion or prejudice:

We evaluate whether substantial evidence supports the jury's verdict, viewing the evidence in a light most favorable to the nonmoving party. If there is any justifiable evidence upon which reasonable minds might reach conclusions that sustain the verdict, the question is for the jury. A trial court has no discretion to disturb a verdict within the range of evidence. (Citations omitted).

See also Woolridge v. Woollett, supra (if the damages are within the range of evidence, they will not be found to have been motivated by passion or prejudice).⁸⁹

4. **The Jury's Award Of \$150,000 Is Well Within The Range Of Evidence.**

By its very nature, any award for loss of love, care, companionship, and guidance is extremely subjective and cannot be calculated with any certainty. As stated by the Supreme Court in a case addressing the very same issue:

The subject matter being difficult of proof, it cannot be fixed with mathematical certainty by the proof. Once the determination is

⁸⁸ *Id.* at 232.

⁸⁹ *Woolridge v. Woollett, supra* at p. 668.

made, an appellant court will give great weight to, and is reluctant to interfere with, the jury's verdict.⁹⁰

The decedent was 78 years old when she died, was widowed, and suffered from hypertension, high cholesterol, and was pre-diabetic. Her two children were in their mid-40s, and had lived independently of Decedent since the 1980s. Both children lived with their respective families. The jury could easily conclude that the decedent had already given her children any guidance she may have. Moreover, the jury could reasonably conclude that as decedent aged, she would have less to offer in way of companionship and care.

During his closing, Respondents' attorney recommended that the jury award each child between \$50,000 and \$100,000.⁹¹ The jury awarded each child \$75,000, the midpoint of this recommendation for a total award of \$150,000. This award is clearly within the range of the evidence presented, and not the result of passion or prejudice.⁹² This award is certainly not flagrantly outrageous as to strike everyone with its injustice, which is required to establish passion or prejudice. Appellant cannot overcome the strong presumption that the jury's award is valid, and Judge

⁹⁰ *Kramer v. Portland-Seattle Auto Freight*, *supra* at p. 396.

⁹¹ CP 403, 413.

⁹² *Woolridge v. Woolett*, *supra*.

Hill did not abuse her discretion in denying Appellant's motion for a new trial.

IV. CONCLUSION

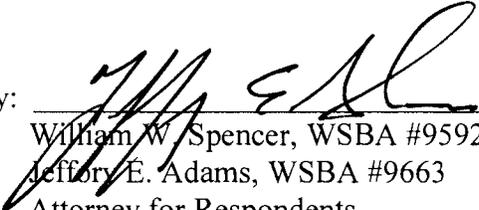
For over a century, this court has construed RCW 4.20.020 as precluding recovery for grief. This court cannot legislate and change the recoverable damages under this statute. This court should affirm the trial court's refusal to allow Appellant to introduce evidence of grief of the Decedent's two children.

Judge Hill did not abuse her discretion in denying Appellant's motion for a new trial. She carefully analyzed the issue, reviewed the evidence and law, and properly concluded that any extrinsic evidence did not adversely affect the verdict. The amount of the award was within the range of the evidence, and not the result of passion or prejudice.

This court should affirm the trial court and deny Appellant's motion for a new trial.

RESPECTFULLY SUBMITTED this 14 day of October, 2011.

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