COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

NO. 41105-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TOM P. MCCOY and KATHLEEN A. MCCOY,

Plaintiffs/Respondents.

v.

KENT NURSERY, INC., a Washington corporation doing business in Pierce County, STEVE MAURITSEN and "JANE DOE" MAURITSEN, husband and wife and the marital community comprised thereof, RICHARD MAURITSEN and PHYLLIS MAURITSEN, individually, and husband and wife and the marital community comprised thereof,

Defendants/Appellants,

BRIEF OF APPELLANTS
KENT NURSERY, INC., AND MAURITSEN

Joseph M. Diaz, WSBA #16170
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c. The trial court erred in entering findings of facts in the Order on Plaintiffs' Motion for Judgment as a Matter of Law and/or In the Alternative for a New Trial Under CR 50 and CR 59, that were not supported by the evidence presented at trial or in post-trial pleadings, regarding juror misconduct during voir dire and jury 26

consideration of extrinsic evidence.

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ASSIGNMENTS OF ERROR

1. The trial court erred in granting Plaintiffs' CR 59 motion for new trial after the jury returned a verdict in favor of the Defendants when it relied upon inadmissible evidence in granting Plaintiffs' motion for a new trial

2. The trial court erred in granting Plaintiffs' CR 59 motion for new trial after the jury returned a verdict in favor of the Defendants when it failed to strike the Declaration/Affidavit of Juror Tina M. Britton pursuant to CR 59(a) and CR 59(c).

3. The trial court erred in making the following findings of facts contained in the Order on Plaintiff's Motion for Judgment as a Matter of Law and/or In the Alternative for a New Trial Under CR 50 and CR 59, which were not supported by the evidence presented at trial and in post-trial motions:

   Finding of Fact 1: Juror Two/foreperson failed to disclose in voir-dire that her home was damaged as a result of flooding from old drainage pipes, that she felt Pierce County was responsible for her damage and that she and her husband felt they took ownership and paid for the damage to the home despite feeling Pierce County was responsible for the damage.

   Finding of Fact 2: Juror Two/foreperson also failed to disclose in voir-dire her prior specialized real estate experience and details of her real estate experience.

   Finding of Fact 3: Juror Eleven failed to disclose in voir-dire his prior specialized experience relating to jet-rodding clay tile pipes.

   Finding of Fact 4: Juror Eleven failed to disclose in voir-dire his prior specialized experience relating to weight displacement and the effect that heavy equipment would have while traveling on clay tile pipe buried beneath the ground.

   Finding of Fact 5: Juror Two/foreperson injected extrinsic evidence during jury deliberation. This extrinsic evidence consisted of outside information relating to damage to her home from drainage pipes involving Pierce County, and outside

information relating to other real estate transactions and knowledge derived from her specialized prior real estate experience. Juror Two/foreperson drew direct comparisons of this extrinsic evidence with the evidence presented at trial during jury deliberations.

Finding of Fact 6: Juror Eleven injected extrinsic evidence during jury deliberation. This extrinsic evidence consisted of outside information relating to his prior specialized experience relating to jet-rodding clay tile pipes and outside information relating to weight displacement and the effect that heavy equipment would have while traveling on clay tile pipes buried beneath the ground. This information was directly contradicted by plaintiffs' expert during trial.

Finding of Fact 7: Juror Ten, Tina M. Britton's declaration confirms the injections of extrinsic evidence by Juror Two/foreperson. The declaration stated that Juror Two/foreperson during deliberations "discussed her experience with the County and compared her problems to what was going on in the case." The declaration stated that Juror Two/foreperson admitted that "she used to sell real estate . . . and informed the jurors that a document is not legal unless it has two signatures on it . . . her opinion was stated as a fact based on her real estate experience."

Finding of Fact 8: Juror Ten, Tina M. Britton's declaration confirms the injection of extrinsic evidence by Juror Eleven. The declaration states that Juror Eleven "admitted to working with pipe through his job in Kansas . . .and stated that in his experience, jet-rodding did not harm the clay pip or undermine the soil."

Finding of Fact 9: The great weight of evidence presented at trial established water trespass by defendant nurseries and their respective owners. Kent Nursery Inc.'s president Steve Mauritsen admitted during trial that water originating from Kent Nursery's property was coming onto plaintiffs' property without the permission of the plaintiffs. Fir Run LLC's president Michael Fenimore admitted during trial that water originating from Kent Nursery's property was coming onto plaintiffs' property without the permission of the plaintiffs. The water adversely affected the plaintiffs' right to the exclusive use and possession of their property. It was also established during trial the defendants

nurseries knew their water was coming on plaintiffs' but did not block their water. Mr. Mauritsen's and Mr. Fenimore's respective response to a jury question of why they did nothing to block the water from coming on plaintiffs' property after plaintiff told them he did not want their water on his property was "I don't know." The jury's verdict was contrary to the great weight of evidence establishing defendants' trespass.

Finding of Fact 10: The jury's verdict shocked the conscience of the court and shocked all the litigants including defendants' counsel.

4. The trial court abused its discretion in concluding that there was non-disclosure during voir-dire by juror Two which would have provided a basis for a challenge for cause and/or peremptory challenge.

5. The trial court abused its discretion in concluding that there was non-disclosure during voir-dire by juror Eleven which would have provided a basis for a challenge for cause and/or peremptory challenge.

6. The trial court abused its discretion in concluding that juror Two injected evidence to fellow jurors which was outside the recorded evidence of the trial and which influenced the jury's verdict.

7. The trial court abused its discretion in concluding that juror Eleven injected evidence to fellow jurors which was outside the recorded evidence of the trial and which influenced the jury's verdict.

8. The trial court abused its discretion in concluding that the great weight of evidence presented at trial established water trespass by defendant nurseries and their respective owners, and that the verdict was contrary to the clear weight of evidence presented during trial.

9. The trial abused its discretion in denying Defendants' motion for reconsideration of the order granting a new trial.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

After sixteen (16) days in trial, the twelve person jury panel returned a unanimous verdict for the respective Defendants, dismissing all claims alleged by the Plaintiffs against the Defendants. Did the trial court err in setting aside the jury verdict and granting the Plaintiffs' motion for new trial? [Assignments of Error 1, 2]

In reaching its decision that a new trial was warranted, the trial court relied upon the hearsay declaration of Plaintiff's counsel, and the declaration of one juror which was submitted the day before the hearing, in violation of CR 59(c). Defendants objected to this evidence and moved to strike. Did the trial court error in considering inadmissible evidence regarding the Plaintiffs' motion for a new trial? [Assignments of Error 1, 2]

Did the evidence presented at trial support the findings of fact and conclusions of law proposed by Plaintiffs' counsel and ultimately adopted by the trial court? [Assignment of Error 3, 4, 5, 6, 7, 8]

The litigants waived recording of the voir dire process during jury selection. Plaintiffs' counsel now contends that jurors ultimately impaneled to hear the case did not volunteer facts that Plaintiffs' counsel now believes were relevant. Did the trial court abuse its discretion in finding jury misconduct during voir dire when the trial court conducted no fact finding regarding this alleged misconduct? [Assignments of Error 4, and 5]

The Plaintiffs' attorney claims that during the post-trial debriefing with the jury panel involving all of the trial attorneys for all of the parties, two jurors mentioned that they had introduced extrinsic evidence into the jury deliberations. The Plaintiffs' attorney then submitted her own declaration in support of the Plaintiffs' motion for new trial relating these hearsay statements. The afternoon before the hearing, Plaintiffs' counsel also submitted a declaration from one juror. Did the trial court abuse its discretion in finding jury misconduct based upon the claim that two jurors injected extrinsic evidence into the jury deliberations when the trial court conducted no fact finding regarding this alleged misconduct? [Assignments of Error 6 and 7]

Evidence produced at trial indicated that the de-watering clay tile groundwater drainage system followed the natural drainage course from the Defendants' farmland across the Plaintiffs' property to Horse Haven Creek and had been in existence since at least 1931. The nursery Defendants testified that at no time since the Plaintiffs' purchase of their property in 1995 had the nursery Defendants sought permission to drain their groundwater through the clay tile drainage system to Horse Haven Creek. Did the trial court err by finding that the nursery Defendants made an admission of trespass? [Assignment of Error 8]

Counsel for the Defendants and counterclaimants moved the trial court for reconsideration of the court's granting of a new trial for the Plaintiffs. They submitted declarations of ten (10) jurors attesting that no jury misconduct had occurred during the jury deliberations. Did the trial court err by denying the Defendants/ Counterclaimants' motion for reconsideration and by not reinstating the jury verdict? [Assignment of Error 9]

STATEMENT OF THE CASE

Procedural History:

On October 27, 2008, Plaintiffs filed suit against Kent Nursery, Inc., Steve and "Jane Doe" Mauritsen, Richard and Phyllis Mauritsen, as well as neighboring Fir Run Nursery and Michael and Gayla Fenimore, for intentional trespass of water, negligence, nuisance, and waste. Plaintiffs further alleged that the individually named Defendants, Mauritsens and Fenimores, were liable because they "operate and/or assist in the operation of" their nurseries. Kent Nursery is a wholesale nursery that primarily grows trees and shrubs.[1] Defendants Kent Nursery and Fir Run Nursery

[1] Testimony of Steve Mauritsen, RP 1497, ln 25 – RP 1498, ln 3.

filed counterclaims against Plaintiffs for damages arising from the Plaintiffs blocking the drainage course.[2]

Trial began on March 10, 2010 and continued for 16 days with Judge Frederick W. Fleming presiding. On March 25, 2010, at the close of Plaintiffs' case in chief, Defendants Mauritsen moved pursuant CR 50 for dismissal of Plaintiffs' claims against them individually, on the grounds that there had been no evidence presented that warranted piercing the corporate veil to reach the individual defendants.[3] During argument on the Defendants' motion defense counsel for Defendants Mauritsen objected to the Plaintiffs' attorney referral to facts and information never produced during the Plaintiffs' case-in-chief. (RP 880:7 – RP 885:10). The court's bias in this case against the Defendants became apparent with the court's comments made while denying the motion. Although no facts had been produced during trial to that point time about access to the Kent Nursery property, the court in denying Defendant Mauritsens' motion stated the following:

> Over the years, the individual defendants had to drive by that property in rainy weather day after day after day after day, and, nothing, did nothing. They, in my mind, can't hide behind a corporate veil, and I'm going to deny the motion that they are not individually also responsible.[4]

Trial then continued with closing arguments made on April 8, 2010.

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[2] CP 888 – 895.
[3] Testimony of Tom McCoy, RP 491:8 – RP 492:25; RP 493:1 – 15; CP 475 - 476; RP 879:15 – RP 886:21.
[4] RP 885, ln 11 – 16.

On April 12, 2010, the jury returned a defense verdict on all claims.[5] The jury further found Plaintiff Tom McCoy liable to Defendants Kent Nursery and Fir Run Nursery on their counterclaims and awarded damages to both Kent Nursery, Inc. and Fir Run Nursery, LLC.[6] The jury was polled, and the verdict was unanimous.[7]

On April 21, 2010, Plaintiffs filed a Motion for Judgment as a Matter of Law and/or In the Alternative For New Trial under CR 50 and CR 59.[8] Plaintiffs' cited CR 59(a)(1),(2),(3),(5),(6),(7),(8), and (9) in support of their motion. As part of the motion, the Plaintiffs alleged jury misconduct and also that the verdict was contrary to the clear weight of the evidence.[9] The only affidavits or declarations filed by the Plaintiffs in support of their motion were the declarations of Plaintiffs' attorney Sarah Lee and a last-minute declaration from one juror, Juror No. 10 Tina Britton. The Defendants filed their opposition briefs on April 28, 2010. (CP 638 – 647; CP 652 – 660; CP 665 – 667; CP 668 – 676).

Ms. Britton's declaration was served upon the Defendants on April 29, 2010, the day prior to the hearing date on the Plaintiffs' motions. Although defense counsel objected and moved to strike the declaration of

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[5] CP 588 – 589; CP 592 – 594; CP 596.
[6] CP 590 – 592; CP 595; RP 2039:15 – 20.
[7] RP 2040:16 – RP 2042:19.
[8] CP 597 – 625.
[9] CP 626 – 628.

Juror Tina Britton, Judge Fleming considered the declaration and granted the motion for new trial.[10]

During the course of oral argument in opposition to the Plaintiffs' Motion for New Trial the following colloquy occurred between the court and defense counsel for Defendants Kent Nursery and the Mauritsens:

12 MR. DIAZ: Thank you.
13 Now, moving on to plaintiffs' motion for new
14 trial under Civil Rule 59(a) --
15 THE COURT: And I should add that the pleadings
16 are complete, and anybody looking at it can decide whether
17 that is a lawful ruling or not, but I don't think we need
18 to go through the whole thing again. I'm denying the
19 motion to overturn the verdict.
20 The only issue we have now is whether or not
21 there should be a new trial.
22 MR. DIAZ: Thank you, Your Honor.
23 If it please the Court.
24 THE COURT: And I've read your briefs there. So,
25 somebody said -- they're thorough and they're put together

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1 appropriately. So, I would make a suggestion -- and I
2 understand, I gave the plaintiff, because they have the
3 heavy oar, I didn't interrupt and gave them time, but your
4 pleadings say what they say. And there are four of you.
5 And the record is there. So, there you go.
6 MR. DIAZ: Thank you, Your Honor. With that in
7 mind, I will be very brief.
8 First, I have to say for the record, this is the
9 first case that I've been involved in where an opposing
10 party has brought a CR 59(a) motion and claimed every
11 element, one through nine -- although Counsel today has

[10] Verbatim Record of Proceedings of April 30, 2010, 31:19 – 32:12; 48:14 – 49:15; Verbatim Record of Proceedings of May 14, 2010, 9:16 – 10:14; CP 661 – 664; CP 682 – 692; CP 693 – 698.

12 said number four may not apply -- in a case.
13 As the Court sat through a 16-day trial, the
14 Court is well aware of the proceedings. And this trial
15 was, to all parties, in my mind, was fair. But, to claim
16 now total misconduct and error being committed by the
17 jurors, to defense counsel, to the Court, I think is
18 disingenuous, Your Honor.
19 I think that, going back -- and I have to put on
20 the record, we move to strike the Declaration Affidavit of
21 Juror No. 11 -- or No. 10, Juror No. 10, Tina Britton.
22 That document was not served on us until yesterday, Your
23 Honor. And the timing of bringing the plaintiffs' motions
24 was their decision. Those motions did not have to be made
25 until after a judgment was entered in this case, which

1 we're hoping to get presented to the Court today and have
2 entered. Judgment has not been entered. They chose the
3 timing. The only information that the defendants had to go
4 on was the hearsay declaration of counsel in preparing our
5 response to their motions.
6 And then, after we filed our responses, then
7 we're served with a juror declaration, which, if the Court
8 reviews over that declaration, if you consider it, doesn't
9 say anything. What it goes into is the impressions, which
10 the plaintiff is asking that the Court invade the
11 deliberations of the jury, which inheres in the verdict,
12 and the Court should not be doing that.
13 As far as any misconduct that is alleged on two
14 of the jurors, counsel is now asking the Court to do their
15 work in voir dire. Those jurors answered every question
16 that was posed to them. And if there were issues that the
17 plaintiffs felt were important, it was their duty, on
18 behalf of their client, to raise those questions during
19 voir dire.
20 You have seen the declarations from all of the
21 defense counsel from our notes regarding those questions.
22 And there was nothing that was kept from any of us, from
23 any of the jurors. And if we would have --
24 THE COURT: Now, Mr. Diaz, that's not true.

25 Number 2, the presiding juror, she had a precise same set

1 of circumstances that she personally went through. That's
2 according to an officer of the court. Not something that
3 might be related, or whatever. And she never disclosed
4 that in the voir dire.
5 And, if you look at the questions that were
6 asked, it was incumbent upon her, in my mind, to have
7 disclosed the set of circumstances that she herself went
8 through.
9 MR. DIAZ: Now, Your Honor, I'm not certain what
10 circumstances you are referring to right now.
11 THE COURT: Well, she had the same kind of a
12 damage issue on her property regarding flooding, and she
13 took care of it herself and thought that the plaintiffs
14 should have taken care of it themselves, and never
15 disclosed that to either side.
16 MR. DIAZ: I take exception to that, Your Honor,
17 because she did.
18 THE COURT: Tell me, what did she do?
19 MR. DIAZ: She told us about the flooding on her
20 property, the wetlands that exist on her property, the
21 subdivision of the property, that there's a buffer of
22 wetlands on the property, and that she had to repair a home
23 that's a rental home on her property. Now, if exploration
24 of further questions would have gone on, then she may have
25 addressed it even further.

1 She never mentioned the clay tile system on her
2 property. She was never asked about a clay tile system on
3 her property. She did volunteer the fact, when I asked her
4 about her farming experience, that she was raised on a
5 dairy farm, 150 acres, that they drained that field and
6 that that field was drained through a culvert and it ran
7 into a creek. That's what she said.

Verbatim Record of Proceedings, April 30, 2010, 31:12 – 34:7.

On May 14, 2010, during presentment of the Plaintiffs' proposed order granting the motion for a new trial, all of the Defendants objected to the proposed order, lodging objections to each of the individual proposed findings of fact and conclusions of law.[11] Nonetheless, Judge Fleming signed the order as it was presented by Plaintiffs' counsel. Just before the order was handed up to the judge, Plaintiffs' counsel asked if she could write in that a verbatim report of proceedings had been one of the items considered by the court in making its ruling.[12] Despite the fact that this transcript had not been previously submitted, and the judge did not look at it before signing the order, Judge Fleming allowed counsel to add it to the order, saying, "What ever you want to do."[13]

The findings of fact and conclusions of law were prepared by Plaintiffs' counsel. Although the Defendants are disputing all of the Findings of Fact listed in the Plaintiffs' Order for New Trial, two of the most egregious findings are Findings of Fact Numbers 9 and 10.

Finding of Fact Number 9 claims that the great weight of evidence presented at trial established water trespass by Defendant nurseries and

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[11] CP 704 – 707.
[12] Verbatim Record of Proceedings of May 14, 2010, 15:1 – 17:4.
[13] Verbatim Record of Proceedings of May 14, 2010, 16:18 – 17:4.

their respective owners.[14] The Defendants objected to this finding but the trial court entered the finding as proposed.[15]

Then, in addition, Finding of Fact Number 10 stated that "The jury's verdict shocked the conscience of the court and shocked all the litigants including Defendants' counsel." (CP 866, ¶ 10). All of the defense counsel stated affirmatively on the record that they were in no way shocked by the verdict.[16] Yet Judge Fleming signed the order with no changes, not even to Finding of Fact Number 10.

The Defendants each moved for reconsideration of the order granting a new trial.[17] In support of this motion, Defendants submitted declaration/affidavits from ten of the twelve jurors. These jurors disputed what had been alleged by the one earlier juror.[18] These declarations specifically deny the earlier Findings of Fact submitted by Plaintiffs' counsel and signed by the court. Judge Fleming denied the motion for reconsideration and "confirmed" the order for new trial.[19]

Property & Relevant Factual History:

Kent Nursery, Inc. ("Kent Nursery"), is a regular, for-profit

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[14] CP 245 – 258.
[15] CP 652 – 660; CP 704 – 707; CP 708 – 710; Verbatim Record of Proceedings, May 14, 2010, 5:4 – 22.
[16] CP 704 – 707; Verbatim Record of Proceedings, May 14, 2010, 10:19 – 25, 11:20 – 13:25, 14:25 – 15:15.
[17] CP 303 – 317; CP 723 – 725; CP 717 – 722.
[18] CP 273 – 275; CP 276 – 278; CP 279 – 280; CP 281 – 283; CP 284 – 287; CP 288 – 289; CP 290 – 293; CP 294 – 297; CP 298 – 299; CP 326 – 329.
[19] CP 421 – 424.

Washington corporation.[20] In the Summer of 1990, Kent Nursery, Inc. purchased 56 acres of farmland from Harold Louderback.[21] The farmland is located adjacent to 176th Street East and 150th Avenue East in unincorporated Pierce County, near the Puyallup River and the city of Orting, Washington. The Defendants access to their property is from 176th Street, they do not have access from 150th Avenue East.[22] In 2006, Defendant Kent Nursery sold 20 acres of the property to Defendant Fir Run Nursery.[23]

Mr. Louderback owned and farmed about 70 acres he had purchased in 1961.[24] Prior to Mr. Louderback, the property was owned and farmed by John McLean and the McLean Bulb Farm.[25]

The McLean farm had a clay tile de-watering system used to collect and drain groundwater to help dry out the upper layers of the soil for farming purposes.[26] The de-watering system consisted of clay tile pipes that collected groundwater and then directed it along the natural drainage swale course down to Horse Haven Creek. Portions of the property on both sides of 150th Avenue East that encompass the Defendants and Plaintiffs' properties lie within a historic creek bed for

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[20] Testimony of Richard Mauritsen, RP 1019:15 – 19; RP 1020:4 – 7; Testimony of Steve Mauritsen, RP 1497:5 – 24.
[21] Testimony of Richard Mauritsen, RP 1026:8 – 12; 1034:21 – 23; Testimony of Steve Mauritsen, RP 1499:4 – 8; RP 1501:15 – 1502:22.
[22] Testimony of Steve Mauritsen, RP 1499:9 – 1500:22; EX 118.
[23] Testimony of Steve Mauritsen, RP 1548:1 – 2; Testimony of Michael Fenimore, RP 1611: 9 – 15.
[24] Testimony of Harold Louderback, RP 891: 9 – 13, 17 - 25; RP 899:10 – 20.
[25] Testimony of Harold Louderback, RP 891:17 – 892:5.
[26] Testimony of Harold Louderback, RP 894:4 - 22; RP 895:2 – 25; Testimony of William Creveling, RP 759:6 – 13.

Horse Haven Creek. (Ex 123).

Mr. Louderback testified that a clay tile de-watering system was in place when he bought the farm in 1961.[27] During Mr. Louderback's ownership, he increased the clay tile de-watering system in order to help dry out more acreage for farming purposes. The U.S. Department of Agriculture, Soil Conservation Service, assisted Mr. Louderback with the planning, design, and construction of the clay tile system.[28] When Kent Nursery purchased the 56 acres from Mr. Louderback, the nursery was advised that a clay tile de-watering system existed on the property.[29] Kent Nursery has not added to the de-watering system.[30] At the time that Kent Nursery purchased their property the de-watering system served portions of both the Kent Nursery acreage and also a portion of the property still owned by Mr. Louderback. With the sale of 20 acres to Fir Run Nursery in 2006, Fir Run Nursery now has a portion of their property that is served by the de-watering drainage system.[31]

Evidence presented during trial indicates that the de-watering system has been in use and draining water along the same drainage course down to Horse Haven Creek for at least 8 decades, since at least 1931.[32]

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[27] Testimony of Harold Louderback, RP 932:5 – 933:25; Ex. 67 bates stamp page KENT 00039, Ex 68.
[28] Testimony of Harold Louderback, RP 902:9 – 907:8; Ex 67, Ex 68, Ex 73.
[29] Testimony of Richard Mauritsen, RP 1025:11 – 22; RP 1034:21 – 23; Testimony of Steve Mauritsen, RP 1501:15 – 1502:22; RP 1503:14 – 17; RP 1504:6 – 1506:5.
[30] Testimony of Richard Mauritsen, RP 1026:17 – 20; Testimony of William Creveling, RP 800:6 – 11.
[31] Testimony of Steve Mauritsen, RP 1547:1 – 1548:5; Ex 73.
[32] Testimony of William Creveling, RP 1263:6 – 1264:10; Testimony of Dennis Dixon, RP 1232:2 – 16; Testimony of Owen Reese, RP 1373:18 – 1375:2; RP 1429:24 – 1430:16; RP 1446:11 – 22; RP 1456:9 – 18; Testimony of Cindy Hahn, RP 1059:18 – 1060:4; Ex 123; Ex 124.

The drainage course follows a route to Horse Haven Creek through natural drainage swales that exist or once existed across the Plaintiffs' property.[33] The Louderback/Kent Nursery/Fir Run Nursery property lies at a higher elevation than the McCoy property to the West.[34] The McCoy property also lies in the natural low spot for the local topography as swales continue down to the lower elevation of Horse Haven Creek to the Southwest of the McCoy property.[35]

Harold Louderback testified that when he purchased the farm in 1961, a clay tile de-watering drainage system existed that served both the McLean property and also the current McCoy property. The McLean groundwater drained through a culvert under 150th Avenue East to the west on its way to Horse Haven Creek.[36] The outlet for the de-watering system in 1961 was into a swale and open ditch in the area of the McCoy's current garage/shop. In 1961, a milking barn existed near the drainage outlet and an open ditch ran from the area of the current McCoy property through a swale down to Horse Haven Creek.[37]

In the mid-1960's, one of the Plaintiffs' predecessors in interest, Harold Hahn, increased the number of acres on the west side of 150th

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[33] Testimony of William Creveling, RP 759:6 – 13; Testimony of Dennis Dixon, RP 1149: 21 – 1150:8; RP 1152:22 – 1153:8; RP 1154:5 – 22; RP 1162:22 – 1165:19; RP 1166:11 – 18; Testimony of Owen Reese, RP 1384:2 – 7; Ex 123; Ex 124.
[34] Testimony of William Creveling, RP 732:22 – 733:7.
[35] Testimony of Owen Reese, RP 1430:1 – 16; RP 1443:11 – 19; RP 1446:11 – 22; RP 1454:9 – 24; RP 1481:5 – 1482:5; Testimony of Dennis Dixon, RP 1226:18 – 1228:7; RP 1233:19 – 1234:24; Testimony of William Creveling, RP 764:8 – 24; Ex 71; Ex 123; Ex 124.
[36] Testimony of Harold Louderback, RP 893:17 – 894:5; RP 895:2 – 896:4; RP 897:3 – 15, 24 – 25; RP 898:1 – 17; RP 921:1 – 923:21; RP 927:20 – 929:13; Ex 73.
[37] Testimony of Harold Louderback, RP 895:1 – 896:15; PR 897:1 – 15, ln 24 – 25; RP 898:1 - 5.

Avenue East that were de-watered through the clay tile down to Horse Haven Creek.[38] After increasing the amount of clay tile drainage pipes to de-water the current McCoy property, and also to de-water other sections of his property, including property currently owned by Gary Edwards, Mr. Hahn filled in low spots and potholes eliminating much of the natural swales in this area. [39]

Mr. Hahn also eliminated the drainage ditch that the de-watering system outlet into by filling in the ditch and much of the natural drainage swale from the current McCoy property down to Horse Haven Creek.[40] Prior to filling in the drainage ditch and swale, Mr. Hahn first extended the clay tile drainage system by installing about seven hundred (700) feet of new clay pipe from the former outlet at the ditch/drainage swale down to a new outlet in Horse Haven Creek.[41]

Although the general area of the swale was filled in by Harold Hahn during the mid-1960's, the area is still wet and has been designated as "wetland" by Pierce County and requires a buffer area around it.[42] The flow of groundwater in the area historically drained from the east to the west to Horse Haven Creek for an outlet.[43]

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[38] Testimony of Harold Louderback, RP 952:12 – 953:15; PR 954:8 – 957:16; RP 968:22 – 969:25; RP 970:13 – 971:23; Ex 73; Ex 118.
[39] Testimony of Harold Louderback, RP 953:3 – 955:22; RP 956:2 – 957:16; RP 968:22 – 970:22; RP 971:6 – 972:12; RP 984:22 – 987:20; RP 989:1 – 9; Ex 73; Ex 118.
[40] Testimony of Cindy Hahn, RP 1059:18 – 1060:3; Testimony of Harold Louderback, RP 954:2 – 957:16; RP 968:22 – 969:25; RP 970:13 – 971:23; EX 118.
[41] Testimony of Damon DeRosa, PE, RP 607:15 – 610:12.
[42] Testimony of Rolland Hartstrom, RP 231:12 – 234:6; Testimony of Damon DeRosa, RP 610:3 – 12; Testimony of Owen Reese, RP 1389:14 – 25; RP 1390:6 – 24; RP 1480:23 – 1482:14; Ex 70, p 2 of 2.
[43] Testimony of Owen Reese, RP 1486:12 – 25.

The Plaintiffs' geological expert, William Creveling testified that the placement of the drainage pipe into Horse Haven Creek is a likely cause for the system failure and current problems being experienced on or about the Plaintiffs' property. (RP 728:24 – 730:16; RP 1757:11 – 1758:1). Defendant Kent Nursery's engineering expert Owen Reese, P.E., also testified that a blockage in the clay tile pipe buried between Horse Haven Creek and the McCoys' property could cause sink holes and settling of structures to occur upstream. (RP 1425:14 – 1426:25; EX 118). When Mr. Reese was asked by the jury whether the pipe being submerged could have an effect on the drainage system, Mr. Reese stated that the pipe being submerged could have an effect. (RP 1483:9 – 18).

During his ownership Mr. Hahn constructed large buildings over the top of the clay tile drainage pipes.[44] Areas of construction included locations where the Plaintiffs now claim that settling has occurred. According to Harold Louderback, the construction by Mr. Hahn damaged sections of the clay tile pipe lying below the surface, on property now owned by the Plaintiffs.[45]

Although approximately 20 acres of the current Kent Nursery property is being served by the de-watering system, Kent Nursery since they purchased their property in 1990 have never agreed to maintain, repair, or replace any drainage tiles or pipes on the Plaintiffs' property or

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[44] Testimony of Harold Louderback, RP 972:13 – 974:5; RP 975:17 – 22; RP 988:22 – 989:4.
[45] Testimony of Harold Louderback, RP 1007:18 – 1009:1 – 4, 11 – 16.

any property west of 150th Avenue East.[46] Nor has Kent Nursery ever sought permission from the down stream property owners to drain the groundwater to Horse Haven Creek.[47]

The Plaintiffs own two adjacent lots that abut the west side of 150th Avenue East and lie west of Kent Nursery. (Ex 73). In 1993, Rolland and Linda Hartstrom purchased 13 acres from Harold and Esther Hahn.[48] The Hartstroms then had the property short platted into 4 lots.[49] The plaintiffs purchased their first lot, Lot 4 of short plat number 9501130603, in March of 1995 from Rolland and Linda Hartstrom.[50] Lot 4 contains the McCoys' house and also a large shop/garage building constructed by Harold Hahn during his prior ownership.[51] The house was built on top of an old concrete foundation originally constructed for a milking parlor.[52] The McCoys then purchased their second lot, Lot 3 of the short plat, in February of 1998.

By late 1995 the Hartstroms had sold 3 of the 4 lots, with only Lot

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[46] Testimony of Steve Mauritsen, RP 1509:7 – 15; RP 1517:18 – 1518:7; Testimony of Richard Mauritsen, RP 1025:23 – 1026:7; Testimony of Harold Louderback, RP 976:1 – 9; Testimony of Tom McCoy, RP 490:1 – 9; Testimony of Owen Reese, RP 1382:17 – 1383:4; RP 1451:12 – 16.

[47] Testimony of Richard Mauritsen, RP 1030:6 – 15; Testimony of Rolland Hartstrom, RP 249:20 – 250:3; Testimony of Gary Edwards, RP 211:15 – 212:1.

[48] Testimony of Rolland Hartstrom, RP 218:12 – 22.

[49] Testimony of Rolland Hartstrom, RP 218:23 – 219:11; RP 226:4 – 228:4; Ex 70, p 2 of 2.

[50] Testimony of Rolland Hartstrom, RP 227:24 – 25.

[51] Testimony of Harold Louderback, RP 972:13 – 22; RP 973:2 – 20; RP 974:2 – 14, 23 - 25; RP 975:1 – 22; Testimony of Rolland Hartstrom, RP 228:1 – 4; RP 252:1- 13; Testimony of Cindy Hahn, RP 1058:15 – 1061:5; RP 1074:2 – 13; RP 1088:13 – 20; Ex 118.

[52] Testimony of Cindy Hahn, RP 1058:3 – 10.

3 remaining unsold.[53] Rolland Hartstrom claims that in late 1995 or early 1996 he discovered water bubbling up to the surface in Lot 3 from what he believed to be an underground pipe.[54] In 1996, the Hartstroms sued Harold and Esther Hahn for not disclosing to them the de-watering drainage system existing under what are Lots 1, 3, and 4 of the short plat.[55] Rolland Hartstrom claimed no prior knowledge of the clay tile de-watering system on the property, the purpose of the system, or the fact that it de-waters the property he bought from the Hahns.[56] In settlement of the lawsuit, the Hartstroms sold Lot 3 back to Esther Hahn by quit claim deed on September 22, 1997.[57]

Esther Hahn then sold Lot 3 to the Plaintiffs by quit claim deed on February 26, 1998. The Plaintiffs executed a Hold Harmless Agreement on February 25, 1998 that relieved Esther Hahn, her heirs and assigns from any liability for loss of property value or any damages related to the de-watering drainage system that lies beneath the property.[58]

Evidence presented during the course of the trial established that damage had been caused to the clay tile de-watering drainage system during the time period of construction on and around the current McCoy property while still owned by the Hahns. Both the house and large

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[53] Testimony of Gary Edwards, RP 203:7 – 15; RP 206:21 – 208:6; RP 212:2 – 5; Testimony of Rolland Hartstrom, RP 219:12 – 17.
[54] Testimony of Rolland Hartstrom, RP 236:9 – 25;
[55] Testimony of Rolland Hartstrom, RP 220:22 – 24; RP 229:10 – 230:16; RP 233:12 – 16; RP 248:2 – 4.
[56] Testimony of Rolland Hartstrom, RP 240:11 – 25; Testimony of Owen Reese, RP 1383:5 – 15.
[57] Testimony of Rolland Hartstrom, RP 234:1 – 6; RP 235:20 - 23;
[58] Testimony of Tom McCoy, RP 496:12 – 497:1 – 5, ln 16 - 25; RP 498:1 – 18; Ex 92.

garage/shop building on Lot 4 had sign of cracking and settling prior to the Hahns selling the property to the Hartstroms in 1993.[59]

In or about early 2006 the plaintiffs noticed two sink holes that had developed on Lot 3 of their property. Tom McCoy claims that clay tile pipe on Lot 3 became exposed and that it appeared one or more sections of pipe had become misplaced, were missing, or were broken. Mr. McCoy did not repair or replace the missing clay tile pipe, he instead filled in the voids created by the sink holes with dirt. According to Owen Reese, P.E., a professional civil engineer with a masters degree in civil engineering and specializing in hydrology, the filling in of the sink holes without assuring that the drainage pipes were clear caused the drainage system to then back up and surcharge onto the nursery properties, causing damage to the nursery property during periods of heavy precipitation.[60]

According to the Plaintiffs they have performed no inspections to determine what has caused the clay tile system to become defective on their property. However, Plaintiff Tom McCoy was fully aware as early as 1999 that the drainage system between his property and Horse Haven Creek may being having drainage issues. Mr. McCoy observed a section of clay tile pipe being removed and replaced on the Edwards property in close proximately to the McCoys' garage/shop building.[61] At no time prior to mid 2006 did the plaintiffs contact any representative of Kent

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[59] Testimony of Harold Louderback, RP 976:10 – 979:5; Testimony of Cindy Hahn, RP 1056:21 – 1059:17; RP 1072:20 – 1073:17; RP 1083:3 – 15; RP 1084:3 – 20; RP 1086:5 – 24.
[60] Testimony of Owen Reese, RP 1360:4 – 23; RP 1361:12 – 1364:3.
[61] Testimony of Gary Edwards, RP 208:7 – 211:14.

Nursery to discuss any drainage issues.[62]

During periods of heavy precipitation surface water can filter down from the surface and can enter the drainage system. Although the clay tile drainage system is not designed as a storm drainage system, once surface water leeches several feet below the surface it becomes groundwater and can then enter the clay tile system.

When Mr. McCoy discovered the two sink holes on his property, he observed exposed clay tile pipe and chose to fill in the sink holes without repairing or replacing the clay tile. Now, the water draining through the de-watering system backs up and collects in a catch basin located on the east side of 150th Avenue East on the Kent Nursery side of the county road. Once the catch basin fills up, the pressure of the water causes it to surcharge onto the surrounding surface.

If the precipitation is heavy enough, the water will collect to a depth were it will then cover the county road, 150th Avenue East. Once the water crests the county road it flows along the surface following the natural topography and low spots along the west side of 150th Avenue East across the Plaintiffs' property, the Smiths' property, and the Edwards' property down to Horse Haven Creek. The McCoys admit that the surface water that collects during times of heavy precipitation and then flows on the surface does cross their property as the water drains to Horse

[62] Testimony of Tom McCoy, RP 464:16 – 465:3; RP 468:8 – 469:9; RP 479:6 – 9; RP 498:19 – 23; Testimony of Kathleen McCoy, RP 697:18 – 698:12.

Haven Creek.[63]

Since 2006, the water now backs up through the drainage system during periods of heavy precipitation and has collected on the Kent Nursery property has killed trees being grown by the nursery and made the cultivation of trees on several more acres impossible, causing damages to the nursery business.[64]

ARGUMENT

1. The trial court erred in granting Plaintiffs' CR 59 motion for new trial after the jury returned a verdict in favor of the Defendants.

a. The trial court relied upon inadmissible evidence in granting Plaintiff's motion for a new trial.

The trial court granted Plaintiffs' CR 59 motion for new trial based entirely upon the declarations of counsel Sarah Lee (CP 154-156) and juror Tina M. Britton (CP 192-195). Ms. Lee's declaration contained nothing but inadmissible hearsay. Ms. Britton's declaration also contained hearsay, and it was not submitted in accordance with the court rules. The trial court should not have considered any of this evidence, and the verdict should be reinstated.

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[63] Testimony of Tom McCoy, RP 484:16 – 485:4; Ex 54-D; Ex 54-E; Ex 54-F; Ex 56-B; Ex 56-C.

[64] Testimony of Steve Mauritsen, RP 1523:20 – 1534:9.

Sarah Lee's declaration (CP 154-156), filed with the Plaintiffs' motion for new trial on April 21, 2010, outlines what Ms. Lee allegedly heard jurors state during a post trial interview. Paragraphs 3 through 7 of Ms. Lee's declaration each deal with something Ms. Lee thinks she heard various jurors say.[65] These statements are clearly hearsay under ER 801(c) and do not fall within any of the hearsay exceptions of ER 803. They were not admissible under ER 802, and the trial court should not have considered them in making its ruling. During oral argument it was pointed out to the court that the only evidence that the Defendants were allowed to respond to regarding jury misconduct was Ms. Lee's declaration. (Verbatim Record of Proceedings, April 30, 2010, 32:3 – 5). Objection to the hearsay in Ms. Lee's declaration was made but the trial court failed to exclude the hearsay of counsel, and in fact referred to them in making its ruling. (Verbatim Record of Proceedings, April 30, 2010, 45:21 – 25, 49:18 – 50:1). This was improper.

b. The trial court erred in failing to strike the Declaration/Affidavit of Juror Tina M. Britton pursuant to CR 59(a) and CR 59(c).

[65] For example, paragraph 3 begins "That juror and foreman Carolynn J. Harkins stated during the post-trial interview that her home was damaged as a result of a clay tile system on her property and flooding and that she personally incurred costs for the repair of her home. . . ." Paragraph 5 begins "That during the post-verdict interview, juror number 11, Ellis Faulkner disclosed that according to his professional experience with replacing broken pipe when the ground gets wet and soggy, any type of heavy equipment would crush clay tile pipes buried underneath "like eggshells".

On April 21, 2010, the Plaintiffs' filed their Motion for Judgment as a Matter of Law and/or In the Alternative for a New Trial Under CR 50 and CR 59. The motion was noted for hearing on April 30, 2010. The day prior to the hearing, April 28, 2010, the Plaintiffs' had filed the two page declaration of Juror Tina M. Britton. (CP 192 – 195).

Ms. Britton was one of the twelve jurors (juror number 10) who had deliberated the verdict in this case and who indicated when the jurors were polled by the court that the verdict was her verdict and the verdict of the jury. (CP 491; Verbatim Record of Proceedings, 2042:2 – 5).

It was improper, however, for the trial court to consider the declaration as it did. Under CR 59(c) the Plaintiffs should have served the Britton declaration when they filed their motion on April 21, 2010 and then should have allowed at least 10 days for the Defendants to serve opposing affidavits. Both the Plaintiffs and the trial court failed to comply with CR 59(c). CR 59(c) governs the submissions of affidavits in connection with a motion for new trial. CR 59(c) provides in pertinent part as follows:

> **Time for Serving Affidavits.** *When a motion for new trial is based upon affidavits* they shall be served with the motion. *The opposing party has 10 days after such service within which to serve opposing affidavits . . . .*

(Emphasis added).

On April 30, 2010 during the oral argument before the court, defense counsel objected to the submission and the consideration of the declaration received the day before the hearing. Defense counsel moved to strike the declaration. (Verbatim Record of Proceedings, April 30, 2010, 32:9 – 33:5). However, Judge Fleming allowed the declaration and the Plaintiffs' counsel's to argue that the Britton declaration supported the Plaintiffs' claim of jury misconduct. The trial court then granted the motion for new trial based upon his finding of jury misconduct.[66]

The Defendants contend it was error for the trial court to fail to rule on the motion to strike, and it was error pursuant to CR 59(c) for the court to consider the declaration of Juror Tina M. Britton. It is obvious that this declaration served as a basis for the trial court's granting of a new trial. The Findings of Facts, findings 7 and 8, entered by the trial court cite the Britton Declaration in support of the court's grant of a new trial. (CP 245 – 258)

Ms. Britton's declaration also contains blatant hearsay, reporting similar statements of other jurors, just as Ms. Lee's did. For the same reasons, it is inadmissible. The trial court erred by allowing the

[66] Verbatim Record of Proceedings, April 30, 2010, 31:19 – 32:12; 48:14 – 49:15; Verbatim Record of Proceedings, May 14, 2010, 9:16 – 10:14; CP 661 – 664; CP 682 – 692; CP 693 – 698.

Declaration of Tina M. Britton to be considered without full compliance with CR 59(c).

c. The trial court erred in entering findings of facts in the Order on Plaintiffs' Motion for Judgment as a Matter of Law and/or In the Alternative for a New Trial Under CR 50 and CR 59, that were not supported by the evidence presented at trial or in post-trial pleadings, regarding juror misconduct during voir dire and jury consideration of extrinsic evidence.

As noted above, the trial court entered findings of fact regarding alleged juror misconduct on the parts of jurors Two and Eleven during voir dire, as well as their alleged insertion of extrinsic evidence into jury deliberations which impermissibly affected the verdict. (CP 247 – 248 Findings of Fact 1 through 6).

The trial court failed to conduct any type of fact finding in order to determine (1) whether any alleged jury misconduct existed and (2) whether the alleged conduct was prejudicial and affected the verdict. *See Richards v. Overlake Hosp. Med. Ctr.,* 59 Wn.App. 266, 270-71, 796 P.2d 737 (1990), *review denied,* 116 Wn.2d 1014, 807 P.2d 883 (1991). In *Richards, supra.,* the alleged misconduct was that a juror's outside experience and expertise in a quasi-medical capacity, which the juror imparted to the jury, along with alleged outside evidence prejudiced the jury. The trial court's review of the affidavits of the jurors, however, did not establish the introduction of any new or novel evidence into the jury

deliberations or any evidence not already presented during the course of the trial. *Id.* at 274.

Of note, it is important that the trial court make an *objective* inquiry into whether the extraneous evidence, if indeed any existed, could have affected the jury's determination and *not a subjective* inquiry into the actual effect of the evidence on the jury. *Id.* at 273. A strong affirmative showing of juror misconduct is required to impeach a verdict. *Id.* at 271.

In our instant case, the court's Findings of Facts, findings 1 through 6 listed in the Order on Plaintiffs' Motion for Judgment as a Matter of Law and/or in the Alternative for New Trial under CR 50 and CR 59, found misconduct on the part of two jurors, Juror Two and Juror Eleven. (CP 245 – 258). Although the trial court found that the Plaintiffs were prejudiced by the alleged misconduct of these two jurors, the court did not conduct any objective inquiry into these allegations other than accepting pure hearsay statements of the Plaintiffs' attorney and one juror's declaration.

While it was error for the court to consider this inadmissible evidence, a review of what was actually provided in the Britton declaration does not support any argument whatsoever that improper extrinsic evidence was brought into the jury deliberations. Throughout the Britton Declaration she merely refers to experiences shared by jurors

Two and Eleven. Nothing more than the jurors' own life experiences. (CP 693 – 698). Experiences divulged by both jurors two and eleven during the voir dire process. (CP 179 – 182; CP 208 – 212; CP 230 – 232; CP 657 - 660).

It has long been recognized that jurors may rely on their personal life experience to evaluate evidence presented at trial during the deliberations. *Richards, supra* at 274. In determining whether a juror's comments constitute extrinsic evidence rather than personal life experience, courts examine whether the comments impart the kind of specialized knowledge that is provided by experts at trial. *Breckenridge v. Valley General Hospital,* 150 Wn.2d 197, 199, 75 P.3d 944 (2003). A statement derived from the "personal life experiences" of a juror does not constitute extrinsic evidence. *Id.* at 204.

In *Halverson v. Anderson,* 82 Wn.2d 746, 513 P.2d 827 (1973), the Court acknowledged the long standing policy favoring stable and certain verdicts and the necessity of maintaining the secrecy of deliberation and frank and free discussion by all jurors except where (1) affidavits of the jurors allege facts showing misconduct, and (2) those facts are sufficient to justify making a determination that the misconduct affected the verdict. *Id.* at 750, citing *Gardner v. Malone,* 60 Wn.2d 836, 376 P.2d 651 (1962).

In the instant circumstances, the Plaintiffs failed to provide sufficient facts to support their claim that juror misconduct occurred or that extrinsic evidence was inserted into the jury deliberations. But, as the court is fully aware, the thought processes of the jurors inhere in the verdict and cannot be used to impeach it. *Allyn v. Boe,* 87 Wn.App. 722, 732, 943 P.2d 364 (1997). The court may not use affidavits to challenge the thought processes involved in reaching a verdict. *Id.* Jurors may rely on their personal life experience to evaluate the evidence presented at trial during the deliberations. *Richards, supra* at 274.

In determining whether a juror's comments constitute extrinsic evidence rather than personal life experience, courts examine whether the comments impart the kind of specialized knowledge that is provided by experts at trial. *Breckenridge v. Valley General Hospital,* 150 Wn.2d 197, 199, 75 P.3d 944 (2003). Here in the instant circumstances there was no evidence provided by the Plaintiffs to support that jurors Harkins and/or Faulkner influenced anyone in the jury room let alone that they even shared their past experiences with the jurors. Thus, the trial court was left to **speculate** on the jury deliberations based upon nothing more than the Plaintiffs' attorney's declaration. **Pure speculation** to attack the jury verdict. The Court has repeatedly held as follows:

> The mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors' intentions and beliefs, are all factors inhering in the jury's processes in arriving at its verdict, and, therefore inhere in the verdict itself, and averments concerning them are inadmissible to impeach the verdict.

Breckenridge, supra. at 205, citing *Cox v. Charles Wright Academy, Inc.,* 70 Wn.2d 173, 179-80, 442 P.2d 515 (1967).

What is certain is that the Plaintiffs had every opportunity during voir dire to question these jurors on relevant topics that the Plaintiffs believe important. To now blame the jurors for the Plaintiffs' failures is disingenuous. No basis exists for a new trial based upon jury misconduct.

It is difficult to determine precisely what the trial court found to justify the grant of a new trial. It is clear that the trial court accepted anything that the Plaintiffs' counsel wanted to present as bases for a new trial. However, this was not supported by the evidence.

2. The trial court abused its discretion in concluding that the great weight of evidence presented at trial established water trespass by defendant nurseries and their respective owners, and that the verdict was contrary to the clear weight of evidence presented during trial.

Plaintiffs' Motion for Judgment as a Matter of Law and/or In the Alternative for a New Trial Under CR 50 and CR 59 requested the following specific relief:

> 1) Enter judgment notwithstanding the verdict and hold as a matter of law that defendant Kent Nursery, Inc., trespassed on plaintiffs' land and negligently failed to maintain their drainage easement/system on plaintiffs' land; and enter judgment for the plaintiffs in the total amount of $950,000; or
>
> 2) In the alternative, order a new trial on the issues of whether defendants nurseries' trespass and defendants Kent Nursery, Fir Run Nursery and Pierce County's failure to maintain their drainage system caused injury to plaintiffs and the amount of damages plaintiffs sustained as a result.

CP 125 -126, *Plaintiffs' Motion*, p. 2.

The trial judge denied Plaintiffs' motion for judgment as a matter of law. The issue before the appellate court is whether the trial court erred in granting a new trial under CR 59(a) subsections 1, 2, 3, 5, 6, or 9.

The trial court agreed with all of the findings of fact proposed by Plaintiffs' counsel Sarah Lee in the order granting a new trial. None of these findings of fact were supported by substantial evidence, however, and in fact they were actually controverted by the evidence.

The Court will normally review the grant or denial of a new trial for an abuse of discretion, but the Court's review is de novo if the motion for a new trial is based on an allegation of legal error. *Edwards v. Le Duc,*

157 Wn.App. 455, 459, __ P.3d __ (2010), citing *Marvik v. Winkelman,* 126 Wn.App. 655, 661, 109 P.3d 47 (2005); *see State v. Jackman,* 113 Wn.2d 772, 777, 783 P.2d 580 (1989); *Schneider v. City of Seattle,* 24 Wn.App. 251, 255, 600 P.2d 666 (1979). A trial court abuses its discretion when its decision is manifestly unreasonable, is exercised for untenable reasons, or is based on untenable grounds. *Le Duc, supra.* at 459; *Lian v. Stalick,* 106 Wn.App. 811, 824, 25 P.3d 467 (2001).

Although the trial court has broad discretion, however, it is not without limits:

> It is also well established that discretion does not permit the trial court to weigh the evidence and substitute its judgment for that of the jury simply because it disagrees with the verdict. *Bunnell v. Barr*, supra; *Knecht v. Marzano*, 65 Wn.2d 290, 292-93, 396 P.2d 782 (1964). Cases dealing with this issue repeatedly emphasize that:
>
>> It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, what this court believes after reading the record, is immaterial. **The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final**. *Rettinger v. Bresnahan*, 42 Wn.2d 631, 633-34, 257 P.2d 633 (1953), *quoted in Bunnell v. Barr*, supra at 777. See also *State v. Franks*, 74 Wn.2d

> 413, 417-18, 445 P.2d 200 (1968), and cases cited therein.
>
> Further, it has been said that [t]o warrant and justify the exercise of the permitted discretion, the verdict must be **so manifestly inconsistent and irreconcilable with the total evidentiary composition** -- viewed in the favorable light required -- as to compel the conclusion that the moving party has been deprived of a fair trial. *State v. Hall*, 74 Wn.2d 726, 727, 446 P.2d 323 (1968); *Alpine Indus., Inc. v. Gohl*, 30 Wn. App. 750, 756, 637 P.2d 998, 645 P.2d 737 (1981).

Thompson v. Grays Harbor Cmty. Hosp., 36 Wn.App. 300, 307 (1983)(Emphasis added).

> It is axiomatic that we, as is the trial court, are bound to the rule that in considering the issues raised by a motion for new trial the evidence of the nonmoving party must be accepted as true and, together with all reasonable inferences that may be drawn therefrom, be interpreted in a light most favorable to that party. *Davis v. Early Constr. Co.*, 63 Wn.2d 252, 386 P.2d 958 (1963). Likewise, we are cognizant of the principle that, except where questions of law are involved, the trial court is invested with broad discretion in granting or denying motions for new trial, and that the trial court's determination will not be disturbed on appeal absent an abuse of discretion. *Cyrus v. Martin*, 64 Wn.2d 810, 394 P.2d 369 (1964); *Sargent v. Safeway Stores, Inc.*, 67 Wn.2d 941, 410 P.2d 918 (1966). **This latter principle, however, does not constitute a license for the trial court to weigh the evidence and substitute its judgment for that of the jury, simply because the trial court disagrees with the verdict.** *Knecht v. Marzano*, 65 Wn.2d 290, 396 P.2d 782 (1964).

Bunnell v. Barr, 68 Wn.2d 771, 775 (1966)(emphasis added).

In the instant case, Judge Frederick W. Fleming made no bones about his disagreement with the outcome of the sixteen (16) day jury trial and the verdict rendered for the defendants and also against plaintiff Tom McCoy on defendants Kent Nursery, Inc. and Fir Run Nursery, LLC's counterclaims for damages. In granting the Plaintiffs' motion for new trial the judge in ruling said as follows:

> Aside from the briefs, my notes indicate Mauritsens' admissions regarding water going on the property of McCoy, and that the pipes failed, there was no permission that the water go there. The specialized experience was, at least with 2, the presiding juror, she and No. 11, is contrary to the expert witnesses' testimony; and, failures to disclose in voir dire regarding similar circumstances personally experienced in No. 2 and in No. 11. The question, "Could this have possibly affected the verdict?" I think anybody listening to this trial for the 16 days was stunned, including the defense, when this came back the way it did. ***In looking at the totality of the circumstances, and the evidence in this case, I think it cries out for a new trial, and that will be the order of the Court.***

(Verbatim Record of Proceedings from April 30, 2010, 48:14 –49:4) (Emphasis added).

While the Defendants are left to guess as to the facts supporting the legal basis for the trial court's grant of a new trial related to the issue trespass, CR 59(a)(7) does permit a new trial when "there is no evidence or reasonable inference from the evidence to justify the verdict." When the proponent of a new trial argues that the verdict was not based on the evidence, the court reviews the record to determine whether there was

sufficient evidence to support the verdict. *Palmer v. Jensen,* 132 Wn.2d 193, 197-98, 937 P.2d 597 (1997). All evidence must be viewed in the light most favorable to the party against whom the motion is made. *Hojem v. Kelly,* 93 Wn.2d 143, 145, 606 P.2d 275 (1980). There must be "substantial evidence" as distinguished from a "mere scintilla" of evidence, to support the verdict--i.e., evidence of a character "which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." *Id.* A verdict cannot be founded on mere theory or speculation. *Id., accord Campbell v. ITE Imperial Corp.,* 107 Wn.2d 807, 817-18, 733 P.2d 969 (1987).

The grant of a motion for a new trial is appropriate if, viewing the evidence in the light most favorable to the nonmoving party, the court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain the verdict for the nonmoving party. The requirement of substantial evidence necessitates that the evidence be such that it would convince an unprejudiced, thinking mind of the truth of a declared premise. *Kohfeld v. United Pac. Ins. Co.,* 85 Wn.App. 34, 931 P.2d 911 (1997).

Here in this case the facts produced at trial provided substantial evidence that groundwater had been flowing through the same drainage course for at least 77 years at the time that the time that the Plaintiffs filed

their lawsuit. (RP 1263:6 – 1264:10; RP 1232:2 – 16; Ex 123). At a minimum, the groundwater has been draining through the same drainage course since 1961. (RP 932:5 – 933:25). The evidence presented indicated that the Defendants had done nothing to make the drainage system fail, unlike the Plaintiffs and their predecessors. Moreover, the Plaintiffs total failure to take any responsibility for the drainage system that has served their property for decades and continues to serve their property, and the fact that Tom McCoy caused a blockage to occur which has damaged the Defendants was evidence to be weighed by the jury. (RP 208:7 – 211:14).

In particular, the jury received evidence of Tom McCoy's knowledge that a simple replacement of pipe would once again allow water to flow through the system were factors presented to the jury that jurors could rely upon to reach their verdict. Evidence produced at trial was more than sufficient to support the jury verdict in favor of the Defendants. The court's mere statement that the court had a feeling that justice was miscarried does not justify grant of new trial. *See Reiboldt v. Bedient,* 17 Wn.App. 339, 562 P.2d 991 (1977), review denied, 89 Wn.2d 1017 (1978).

Moreover, substantial evidence to support the jury verdict in favor of the Defendants existed. The evidence presented to the jury by the

Defendants' engineering expert Owen Reese, P.E. showed that the clay tile drainage system complained of by the Plaintiffs, in addition to being the drainage route for the current Defendants farmland groundwater the drainage system also served the Plaintiffs' property and the other properties previously owned and under the control of the Plaintiffs' predecessor in interest, Harold Hahn. (RP 952:12 – 953:15; RP 954:8 – 957:16). The Plaintiffs' own expert, William Creveling, admitted that is would be reasonable to place a clay tile drainage system on the property in order to dry a wet area of land. (RP 1758:5 – 20).

The evidence presented at trial through witnesses Harold Lauderback and Cindy Hahn indicated that Harold Hahn had not only increased the amount of land being served by his expansion of the clay tile drainage system, but he also eliminated the natural swale and a historic drainage ditch that was part of the natural drainage for the local farmers. Then, in the mid-1960's Mr. Hahn buried more than 600 hundred feet of clay tile pipe from the former outlet at the ditch to a point with a new outlet in Horse Haven Creek. (RP 953:3 – 957:16; RP 968:22 – 972:12; 984:22 – 989:9; Ex 73).

A de-watering system under the director control of Harold Hahn, who also took it upon himself to construct large building structures with concrete foundations over the top of the clay tile pipes serving his land.

(RP 972:13 – 974:5; RP 975:17 – 22; RP 988:22 – 989:4). Which clay tile drainage system was damaged in several locations requiring pipes to be replaced. (RP 976:10 – 979:5; RP 1007:18 – 1009:16).

According to Cindy Hahn's testimony she personally observed the effects of settling and cracking of foundations in the early 1990's in the areas where the construction over the clay tile drainage system ran and where the large garage/shop building structure, the paved driveway leading to the garage/shop building and large cracks in the foundation of the house all during the time period that the Hahns still lived on the property in the early 1990's. (RP 1056:21 – 1059:17; RP 1072:20 – 1073:17; RP 1083:3 – 1084:20; RP 1086:5 – 24).

The jury heard testimony from Tom McCoy that Plaintiffs performed no inspection of any kind to learn what was causing the drainage system to backup or was causing the sink holes Tom McCoy observed as early as 1999 on the current Edwards property, some 35 feet from his garage/shop building. Nor did Mr. McCoy perform any inspection to determine what was causing the sink holes to develop on his Lot 3. Instead, Mr. McCoy filled in the two sink holes on Lot 3 which then more than likely became a plug blocking the flow of the groundwater draining down stream from the Defendants' properties.

The jury heard testimony that after the sink holes on Lot 3 were plugged and during times of heavy precipitation the water now backs up the drainage system to a catch basin adjacent to Defendant Kent Nursery's property and then at times will surcharge and overflow the catch basin causing a large pond or pool of water to develop killing trees and making the land too wet for the growing of trees. All of this to the damage of the respective nursery defendants. (RP 1523:10 – 1534:9).

Although the Plaintiffs continue to posture that their case as one of trespass, the Plaintiffs ignore the facts by claiming that the clay tile drainage system is the sole responsibility of the Defendants. The facts produced during trial do not support that position. The uncontroverted evidence indicates that the ground and surface waters from the east side of 150th Avenue East have been draining across the properties to the west for many decades, and that since at least 1931 ground water has also been draining in part through clay tile pipes across the properties west of 150th Avenue East. Based upon these facts alone, the jury was free to find that Defendants Kent Nursery and Fir Run Nursery have a right to drain ground water from their properties through the drainage course that has existed since the 1930's.

Then, in addition, the uncontroverted facts show that during the 1960's the Plaintiffs' predecessors in interest, the Hahns, expanded for

their own purposes the clay tile drainage system by adding hundreds of feet of additional 12" clay tile pipe out to an outlet in Horse Haven Creek. The Plaintiffs' own experts opined during trial that this particular section of the drainage system between the Plaintiffs' property and Horse Haven Creek was probably the source and the cause of the present defects being complained of by the Plaintiffs. (RP 728:2 – 730:16). A design and extension of the clay drainage system put into place by the Plaintiffs' predecessor.

Moreover, the facts produced in trial also supported the Defendants' position that construction of buildings caused damage to the drainage system. Construction done by others, not by the Defendants. The Plaintiffs' total failure to investigate or to determine the actual cause of the system failure did not bode well for them.

The clay tile de-watering drainage system serving the Defendant's farmland and the drainage system serving the Plaintiffs' property are a natural drainage course that burden the property. Artificially altered watercourses become "natural' because of its antiquity and/or its longtime acquiescence of riparian owners. *Wilber v. Western Properties,* 14 Wn.App. 169, 172, 540 P.2d 470 (1975).

In *Wilber, supra*, the Court held that based upon the uncontroverted evidence that a ditch had been the drainway for more than

30 years, the trial court was justified in determining that the ditch became the "natural" channel and land along its route acquired legally recognizable burdens and benefits. *Id.* The Court further recognized a property owner's right to substitute pipeline drainage for an open ditch on the property, but in doing so must allow the waters to flow without obstruction in normal conditions and in times of recurrent floods. *Id.*, at 173, citing *Turner v. Smith*, 217 Ark. 441, 231 S.W.2d 110 (1950).

The law recognizes that a watercourse does not need a continuous flow. *Alexander v. Muenscher,* 7 Wn.2d 557, 559-60, 110 P.2d 625 (1941). In *Miller v. Eastern Ry. & Lumber Co.,* 84 Wash. 31, 146 P. 171 (1915), the court held that although a swamp or swale is not ordinarily a watercourse, it may be a watercourse "[w]here there is a spreading of a stream which still moves by natural gravitation in a certain direction to a common or defined channel . . .". *Id.* at 34. In contrast, the Court defined surface water as

> water on the surface of the ground, the source of which is so temporary or limited as not to be able to maintain for any considerable time a stream or body of water having a well defined and substantial existence."

Id. at 35, quoting 1 C. Kinney, *Irrigation* § 318 (1912). *Accord, Hastie v. Jenkins,* 53 Wash. 21, 101 P. 495 (1909).

A narrow definition of watercourse was never applied in Washington. *Island County v. Mackie,* 36 Wn.App. 385, 390, 675 P.2d 607 (1984); *see also* Comment, *Toward a Unified Reasonable Use Approach to Water Drainage in Washington*, 59 Wash. L. Rev. 61, 68 n.34 (1983).

Moreover, the Court has long recognized the right of a property owner to divert groundwater from their property in order to make a reasonable use of the property. *Evans v. Seattle,* 182 Wash. 450, 453, 47 P.2d 984 (1935). The court has recognized that as a general rule loss or inconvenience caused by interference with the natural movement of groundwater which results from lawful and proper usês of, or operations upon, the containing land is ***damnum absque injuria*** unless liability has been created by statute. 56 Am. Jur. *Waters* § 120 (1947). This rule applies only under circumstances where damage results from no more than a rightful appropriation or diversion of the groundwaters.

The freedom to interfere with groundwater in the lawful and reasonable use of one's property was recognized but deemed inapplicable in *State v. Ponten,* 77 Wn.2d 463, 463 P.2d 150 (1969). The Court there held that the state, as condemnor, was not simply a landowner making a proper and reasonable use of its land when, in building a highway, it

diverted and disposed of groundwater to the damage of nearby owners. The Court said:

> If the state were just another property owner making proper and reasonable use of its own property, and if that use occasioned a diversion of percolating water on nearby property, it would be damnum absque injuria, and the trial court should be affirmed.

Id. at 468.

In *Evans, supra.,* the Court found the facts established the appellant city was making a reasonable use of its own property, and that the draining of the gravel pit was for the reasonable and proper purpose of extracting the gravel for use. *Id.* at 459. The gravel pit property was valuable for no other purpose than that of producing gravel and the city, being the owner, had under the reasonable use and correlative rights doctrine, a legal right to drain the gravel pit as to make the product thereof available for use without thereby incurring any liability to others. *Id.* at 459-60.

Defendant Kent Nursery had briefed the court on the issues of drainage courses and had proposed jury instructions on these issues, but the court declined to submit the proposed instructions to the jury. (CP 476-480). Defense counsel made objections to the court's failure to

instruct the jury on the law regarding water courses and diversion of groundwater. (RP 1857:8 – 19; 1858:21 – 1860:12).

3. The trial court abused its discretion in denying Defendants' motion for reconsideration of the order granting a new trial.

After the trial court wrongly considered the declarations of counsel Sarah Lee and juror Tina M. Britton and granted Plaintiffs' motion for a new trial, Defendants each moved for reconsideration of that ruling. They submitted affidavits from ten of the remaining eleven jurors denying that there had been any juror misconduct or that they had been unduly influenced by extrinsic evidence. (CP 726 – 728; CP 729 – 731; CP 732 – 733; CP 734 – 736; CP 737 – 740; CP 741 – 742; CP 743 – 746; CP 747 – 750; CP 751 – 752). Despite the weight of this evidence, however, Judge Fleming denied the motion for reconsideration. Several of the jurors were interested enough in the proceedings to be present in the court for the motion for reconsideration. Yet their presence only seemed to offend Judge Fleming:

> 21 And I will tell Your Honor that seven of the
> 22 jurors are here in the courtroom today. Seven of the
> 23 jurors that have filed the declarations with the Court have
> 24 returned to the court and are here as part of the process.
> 25 And the reason I mention that to the Court --
>
> 1 THE COURT: I'm curious. Why would you mention
> 2 that?
>
> 3 MR. MacPHERSON: Because it shows you that they

4 care enough about the system, that they have enough
5 invested in this case, that they want to hear the
6 ultimate --

7 THE COURT: Is that supposed to impact me one way
8 or the other?

9 MR. MacPHERSON: Oh, no, no, Your Honor. The
10 declarations are theirs.

11 THE COURT: Because it won't.

12 MR. MacPHERSON: Okay. I understand that. But,
13 I will make that comment. They asked that we make that
14 comment.

Verbatim Record of Proceedings, July 23, 2010, 16:21 – 17:14.

The trial court ultimately was presented with no admissible evidence to support any claim of juror misconduct of any kind, and overwhelming evidence from ten of the remaining jurors showing the absence of any misconduct. Even if there had been some ground for entry of the original order for new trial, at the motion for reconsideration Judge Fleming was presented with overwhelming evidence proving that there was "no evidence or reasonable inference from the evidence to justify" his earlier granting of a new trial. CR 59(a)(7). Yet he refused to reverse himself. Defendants respectfully request that the Court of Appeals now do so.

JOINDER IN OTHER DEFENDANTS' ARGUMENTS

Defendants Kent Nursery, Inc., and Mauritsen hereby join in each of the arguments raised by the co-Appellants in their individual briefs.

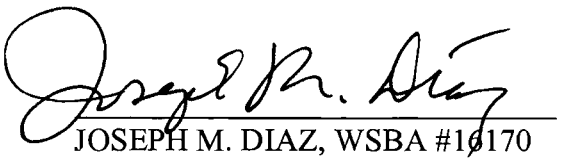
CONCLUSION

For the reasons set forth above, Defendants Kent Nursery, Inc., and Mauritsen respectfully request that the trial court's Order on Plaintiffs' Motion for Judgment as a Matter of Law and/or in the Alternative for New Trial under CR 50 and CR 59 be reversed and that the jury's verdict of April 12, 2010 in favor of Defendants be reinstated.

Appellants also request their reasonable costs and attorney fees under RAP 14.3.

Respectfully submitted this 4th day of March, 2011.

DAVIES PEARSON, P.C.



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Attorneys for Defendants/Appellants
Kent Nursery, Inc., and Mauritsen

NO. 41105-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TOM P. MCCOY and KATHLEEN A. MCCOY,

Plaintiffs/Respondents.

v.

KENT NURSERY, INC., a Washington corporation doing business in Pierce County, STEVE MAURITSEN and "JANE DOE" MAURITSEN, husband and wife and the marital community comprised thereof, RICHARD MAURITSEN and PHYLLIS MAURITSEN, individually, and husband and wife and the marital community comprised thereof,

Defendants/Appellants,

Proof of Service of Brief of Appellants Kent Nursery, Inc., and Mauritsen

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Joseph M. Diaz, WSBA #16170
DAVIES PEARSON, P.C.
920 Fawcett Ave.
Tacoma, WA 98402
253-620-1500

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY_____
DEPUTY

CERTIFICATE OF SERVICE

STATE OF WASHINGTON)
) ss.
County of Pierce)

SHANNA SWALESON, being first duly sworn on oath, deposes and says:

That on the 4th day of March, 2011, I delivered a true and correct copy of the Brief of Appellants Kent Nursery, Inc., and Mauritsen to Legal Messengers, Inc. for delivery to the following attorneys of record:

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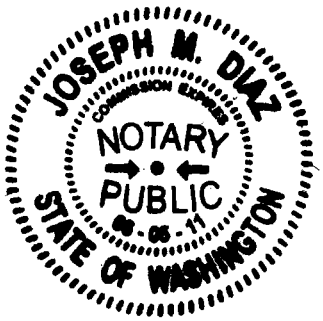
and a copy of the Verbatim Report of Proceedings is being delivered to Respondents' Attorney, Sarah L. Lee only.

SHANNA SWALESON

SIGNED AND SWORN to before me this 4th day of March, 2011 by Shanna Swaleson.



Print Name: Joseph M. Diaz
NOTARY PUBLIC in and for the State of Washington. My commission expires: 6-5-11