IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JONE R. GARCIA, individually and as the personal representative of the Estate of FELICIA R. GARCIA, deceased, Appellants, v. STRONG TRUCKING, INC., a domestic corporation; and JACOB L. YANEZ, Respondents.	)	No. 66743-2-I DIVISION ONE UNPUBLISHED OPINION FILED: July 16, 2012

Appelwick, J. — Jone Garcia, as personal representative for his mother's estate, appeals from the trial court's judgment awarding him and his sister $75,000 each for their wrongful death claim against the defendants responsible for their mother's death. He argues, contrary to established law, that adult children should be entitled to recover for grief, mental anguish and suffering as wrongful death beneficiaries, and that the low award reflects juror passion or prejudice. He also argues that there was juror misconduct meriting a new trial. Because a juror presented prejudicial extrinsic evidence during deliberations and because there is a reasonable doubt as to whether

that misconduct affected the verdict, we reverse and remand for a new trial.

FACTS

Felicia Garcia was killed when her vehicle collided with a truck driven by Jacob Yanez. Yanez was working for Strong Trucking, Inc. at the time of the accident. Garcia was 78 years old when she died and had a life expectancy of 10.5 years. Her husband passed away in 1985. She is survived by her two children, Jone and Marie, both of whom are in their mid to late forties and lived independently. When Jone sued as the personal representative of Garcia's estate, the defendants admitted liability and trial proceeded solely on the issue of damages. During closing, plaintiff's counsel requested $2,500,000 for each child on the wrongful death claim, while defense counsel asked the jury to award between $50,000 to $100,000 per child. The jury awarded each child $75,000.

Jone moved for a new trial based in part on evidence of juror misconduct. One juror allegedly told the jury that families of soldiers who die in Afghanistan get $100,000, and that no one should receive more for the death of a family member. The trial court found that this constituted improper extrinsic evidence, but that it was not prejudicial. It denied the motion for a new trial. Jone appeals.

DISCUSSION

I. Admissibility of Jone and Marie's Grief

In response to Strong Trucking's motion in limine, the trial court ruled that evidence of Jone and Marie's grief was inadmissible, and it ultimately gave jury instructions on damages that did not allow the jury to consider grief as a factor. Jone argues this constitutes an error of law and that the jury should have been entitled to

consider his and Marie's grief, mental anguish, and suffering.

Causes of action for wrongful death are provided for statutorily, rather than in the common law of Washington. Philippides v. Bernard, 151 Wn.2d 376, 390, 88 P.3d 939 (2004). The general wrongful death statute provides:

> Every such 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, 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.*

RCW 4.20.020 (emphasis added). While Jone argues that adult children should be entitled to recover for their grief, mental anguish, or suffering, he can cite no case that has so held. Indeed, at trial, his counsel explicitly admitted that RCW 4.20.020 does not allow for such a recovery, stating: "[T]here's no question that's the law, but I'd like to see it overturned."

In Walker v. McNeil, 17 Wash. 582, 593-94, 50 P. 518 (1897), over a century ago, the Washington State Supreme Court expressly construed the wrongful death statute as not allowing for recovery for grief: "[T]he jury cannot allow anything as a solace for the grief and anguish of the plaintiffs." Id. In the intervening years, this holding has been relied upon and reaffirmed. See e.g., Davis v. N. Coast Transp. Co., 160 Wash 576, 584, 295 P. 921 (1931) ("'[D]amages by way of solace to the affections of a wife or children cannot be allowed.'") (quoting Walker v. McNeill, 17 Wash. 582, 593, 50 P. 518 (1897))); Pancratz v. Turon, 3 Wn. App. 182, 188-89 n.5, 473 P.2d 409

(1970); Bowers v. Fibreboard Corp, 66 Wn. App. 454, 460, 832 P.2d 523 (1992); Chapple v. Ganger, 851 F. Supp. 1481, 1487 (1994).

We adhere to that longstanding interpretation of RCW 4.20.020. In the intervening century, the legislature has had ample opportunity to change the statute if it intended adult children to be able to recover for grief in a wrongful death case, or if it believed the courts had reached the wrong conclusion. The legislature's silence signals its support for the current interpretation of RCW 4.20.020. See, e.g., Tipsworth v. Dept. of Labor & Indus., 52 Wn.2d 79, 83, 323 P.2d 9 (1958) ("[T]he case was decided in 1946 and has been consistently followed since then. The legislature has convened in six regular and two extraordinary sessions since . . . and has not seen fit to correct the interpretation. Therefore, we must assume that it was in accord with the legislative intent." (citing D'Amico v. Conguista, 24 Wn.2d 674, 167 P.2d 157 (1958))).

Jone compares RCW 4.20.020 with a similar statute, RCW 4.24.010, which provides, in relevant part, for an action by a parent for the wrongful death of a child. In a 1967 amendment to RCW 4.24.010, the legislature added the following language, which remains in effect today:

> 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.

Laws of 1967, Ex. Sess., ch. 81, § 1. Following that amendment, the Washington State Supreme Court interpreted RCW 4.24.010 to allow recovery by a parent for grief and mental anguish resulting from the loss of a child. Wilson v. Lund, 80 Wn.2d 91, 99, 491 P.2d 1287 (1971). Jone argues that courts' interpretation of RCW 4.24.010 (and

what parents may recover for the loss of a child) necessitates the same interpretation of RCW 4.20.020 here (and what adult children may recover for the loss of a parent).

While the jury instruction given by the trial court in Jone's case did not provide for the award of damages for Jone or Marie's grief, mental anguish, or suffering, it did provide that the jury should consider the loss of their mother's "love, care, companionship, and guidance." Other cases applying RCW 4.20.020 have given similar instructions. See Kramer v. Portland-Seattle Auto Freight, Inc., 43 Wn.2d 386, 397, 261 P.2d 692 (1953); Pancratz, 3 Wn. App. at 188 n.5 (instructing jurors to consider the support, love, care, guidance, training, instruction, and protection that a parent would have provided to a child); Bowers, 66 Wn. App. at 460. Jone argues that the inclusion of "love" as a factor in the instruction provides the jury the opportunity to consider damages for grief, mental anguish and suffering, despite the longstanding interpretation to the contrary.

We reject Jone's argument. While the reference to "love" appears in the jury instruction, it is not contained in the statutory language of RCW 4.20.020, as it is in RCW 4.24.010, following the 1967 amendment. The legislature could have amended both statutes at the same time, but declined to do so, indicating its intent to allow for differing recoveries in the differing scenarios. Again, the fact that the legislature has not changed RCW 4.20.020 demonstrates that it is satisfied with the longstanding construction of that statute as precluding recovery for grief. To the extent that Jone makes policy arguments for why RCW 4.20.020 should provide for recovery for grief, those arguments are a matter for the legislature to address. We decline to overturn the longstanding interpretation of that statute.

II. Passion or Prejudice

Jone next argues that the jury's award to him and his sister Marie is so unmistakably low that it indicates the jury was motivated by passion or prejudice, warranting a new trial. At trial, he requested an award of $2,500,000 to each of the wrongful death beneficiaries. Strong Trucking requested an award between $50,000 to $100,000 for each of the beneficiaries. The jury ultimately awarded $75,000 each, for Jone and Marie.

Juries have considerable latitude in assessing damages, and a damage award will not be lightly overturned. Palmer v. Jensen, 132 Wn.2d 193, 197, 937 P.2d 597 (1997). Although courts have discretion to grant a motion for a new trial if a damage award is not based on, or is at odds with, the evidence, the motion must be denied if the verdict is within the range of the credible evidence. Robinson v. Safeway Stores, Inc., 113 Wn.2d 154, 161, 776 P.2d 676 (1989); Wooldridge v. Woolett, 96 Wn.2d 659, 668, 638 P.2d 566 (1981). In reviewing a court's exercise of discretion on such motions, we view the evidence in the light most favorable to the verdict. See Palmer, 132 Wn.2d at 197-98.

An award for loss of love, care, companionship, and guidance is extremely subjective and difficult to calculate with any certainty. Here, the award of $75,000 to each beneficiary is the midpoint in the range proposed by Strong Trucking's counsel at trial, and that figure is within the range of the evidence presented. Accordingly, Jone cannot overcome the presumption that the jury's award was valid. We hold that the award does not independently indicate the jury was motivated by passion or prejudice.

III. Juror Misconduct

Jone argues the trial court abused its discretion by denying his motion for a new trial, despite the fact that a juror introduced improper extrinsic evidence into the jury's deliberations.

The grant or denial of a new trial is a matter within the trial court's discretion. State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989). The court's decision will be disturbed only for a clear abuse of that discretion or when it is predicated on an erroneous interpretation of the law. Id. A court abuses its discretion when its decision is "'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" Breckenridge v. Valley Gen. Hosp., 150 Wn.2d 197, 203-04, 75 P.3d 944 (2003) (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). Greater deference is owed to the decision to grant a new trial than to the decision to deny a new trial. Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 271, 796 P.2d 737 (1990).

It is misconduct for a juror to introduce extrinsic evidence into deliberations. Kuhn v. Schnall, 155 Wn. App. 560, 575, 228 P.3d 828, review denied, 169 Wn.2d 1024, 238 P.3d 503 (2010). Such misconduct will entitle a party to a new trial if there are reasonable grounds to believe the party has been prejudiced. Id. The court must make an objective inquiry into whether the extrinsic evidence could have affected the jury's determination, not a subjective inquiry into the actual effect of the evidence on the jury. Id. Any doubt that the misconduct affected the verdict must be resolved against the verdict. Id.; Richards, 59 Wn. App. at 272. Extrinsic evidence is "'information that is outside all the evidence admitted at trial, either orally or by document.'" Kuhn, 155 Wn. App. at 575-76 (quoting Richards, 59 Wn. App. at 270).

In his motion for a new trial, Jone presented evidence from declarations of two jurors, Raymond Albright and Loyal Brown, indicating they both recalled juror 4 stating that families of United States soldiers killed in Afghanistan receive $100,000. The trial court issued an order concluding, in part:

> The averment in the juror declarations that juror #4 stated as fact that soldiers who die in Afghanistan get $100,000, if proven, is extrinsic evidence that would not inhere in the verdict.

The trial court ruled that the parties were entitled to contact jurors to question them on the limited issue of what, if anything, was said during deliberations regarding families of soldiers who die in Afghanistan getting $100,000. The jurors' declarations all recalled juror 4 making a statement to that effect, though they differed greatly about what context he made the statement in and how many times he made it. For example, Albright stated:

> I specifically recall that at least three times during the deliberations, jurors made comments about a $100,000 death benefit for a soldier's death in Afghanistan. Juror #4 brought it up within the first half hour of deliberations and said that "nobody's life was worth more than a soldier dying in Afghanistan and that the families received $100,000." He was so adamant and sure of himself that no one questioned him.

(Boldface omitted.) Brown similarly stated:

> Juror #4, John Barna, said that "if a soldier goes to war and dies in a war, they get $100,000 and this person shouldn't get this much because they are not as valuable as a soldier." This was said closer to the end of deliberations.

(Bodface omitted.)

By contrast, Strong Trucking points to the declaration of juror 4, John Barna, where he testified:

> 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. 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.

(Bold face omitted.) Strong Trucking also points to presiding juror Terri Gordon's declaration:

> [O]n 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.

After considering the parties' briefs and the jurors' declarations, the trial court found that juror 4's statement constituted improper extrinsic evidence. Nonetheless, it concluded that there were not reasonable grounds to believe that the plaintiffs were prejudiced thereby, and it denied Jone's motion for a new trial. Jone argues that, especially in light of the trial court's finding that the evidence was improper and extrinsic, it was error for the trial court to conclude there was no prejudice. Strong Trucking, by contrast, argues that the trial court reached the right conclusion in denying Jone's motion for a new trial. Strong Trucking also contends that the trial court should have ruled that juror 4's testimony was not extrinsic, but inhered in the verdict.[1]

[1] Strong Trucking did not cross appeal the trial court's finding that the statement was extrinsic evidence, but asserted at oral argument that it was not required to do so, relying on Burt v. Heikkala. 44 Wn.2d 52, 54, 265 P.2d 280 (1954) ("Plaintiff still adheres to this theory of the case in support of the judgment, although the trial court decided the case upon a different ground. Plaintiff may urge the error of a theory or finding of the trial court, in support of a judgment, without cross-appealing.")

> Evidence that "inheres in the verdict" includes:
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> > 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*.

Cox v. Charles Wright Acad., Inc., 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967) (emphasis added). The evidence introduced at trial did not include amounts paid to families of deceased soldiers. Whether expressed as absolute fact or mere belief that it was fact, juror 4's statement was clearly extrinsic evidence, not merely an opinion. The trial court properly found it to be extrinsic evidence that did not inhere in the verdict.

We turn finally to the matter of prejudice. "'[A] new trial must be granted unless 'it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict.'" State v. Briggs, 55 Wn. App. 44, 56, 776 P.2d 1347 (1989) (alteration in original) (internal quotation marks omitted) (quoting United States v. Bagley, 641 F.2d 1235, 1242 (9th Cir. 1981)). Any such doubt must be resolved against the verdict. Kuhn, 155 Wn. App. at 575. The juror's statement here was not only extrinsic, but also contained an inherent appeal to patriotism. Two of the jurors' declarations describe juror 4's statement as an explicit comparative tool, for weighing the value of a soldier's life against the value of Garcia's. Even juror 4's declaration about his statement makes clear he invoked the death of soldiers serving the United States abroad and suggested that the government has made an explicit, formalized calculation about the "value" of such a life to the surviving families. Appeals to patriotism are prejudicial and forbidden. See State v. Perez-Mejia, 134 Wn. App. 907,

916, 143 P.3d 838 (2006). We cannot know whether the jury had a higher number in mind and reduced it as a result of the comment or whether it disregarded the comment. We do not need to reach that question. It is sufficient that in an objective assessment of the juror's misconduct, we are in doubt about how, and whether, it affected the verdict. Resolving that doubt against the verdict, we conclude that this extrinsic evidence could have affected the jury's determination. We hold that the trial court abused its discretion by concluding that Jone and Marie were not prejudiced and by denying Jone's motion for a new trial.

We reverse and remand for a new trial.

WE CONCUR: