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Court of Appeals
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No. 52271-3-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

REBEKAH L. HART, individually,

Appellant,

v.

EMILY PRATHER and "JOHN DOE" PRATHER, individually and the marital community comprised thereof; PARKER J. KNAUER, individually; STEVEN KNAUER and PAMELA KNAUER, individually and the marital community comprised thereof; BRAYDEN STANTON and "JANE DOE" STANTON, individually and the marital community comprised thereof; TODD EVANS and "JANE DOE" EVANS, individually and the marital community comprised thereof; ERIC NELSON and "JANE DOE" NELSON, individually and the marital community comprised thereof; DAVID W. BARKER and "JANE DOE" BARKER, individually and the marital community comprised thereof,

Respondents.

BRIEF OF RESPONDENT BARKER

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I. STATEMENT OF THE CASE

This lawsuit involves four car accidents: March 1, 2009 involving the Prather and Knauer defendants; December 22, 2009 involving the Stanton, Evans, Nelson and Barnes defendants; April 7, 2013 involving this responding defendant, David Barker; and March 22, 2014, involving the Powell defendant.

Plaintiff Hart filed suit for damages from the first two lawsuits in November, 2012. In 2015, she filed a separate lawsuit for damages from the April 7, 2013, accident involving Barker. Later that year, she asked and was allowed to consolidate that lawsuit with the first lawsuit over the first two accidents. Then, in November, 2016, Hart amended her complaint in the consolidated action to seek damages from the fourth, March 22, 2014, accident.

Before trial, the court dismissed Hart's claims against Barnes. Hart's case against the remaining defendants was tried to a jury. Before submitting the case to the jury, the court dismissed Hart's claim against Powell.

The jury found in Nelson's favor. The jury found in Hart's favor and apportioned damages among the remaining defendants. The jury also attributed 20% of her future damages to the last accident for which no one was at fault. Because the jury found that the injuries from the various

accidents were divisible, the court ordered the judgment to be paid severally instead of jointly and severally.

Hart appeals contending the judgment should be joint and several. She also argues a new trial should be ordered because the court erred by allowing the jury to apportion damages to the last accident and by giving certain instructions, and because the jury engaged in misconduct. Barker asks the court to reject these arguments.

II. ARGUMENT

1. The trial court properly imposed several rather than joint liability.

The rule applicable in cases where multiple but separate accidents cause injury was stated in *Smith v. Rodene*, 69 Wn.2d 482, 418 P.2d 741, 423 P.2d 934 (1966). The Court held that defendants are severally but not jointly liable for a plaintiffs' divisible injuries.¹ *Id.* at 483-84. Liability is joint and several only where multiple accidents cause indivisible injuries. *Cox v. Spangler*, 141 Wn.2d 431, 446, 5 P.3d 1265 (2000); See RCW 4.22.030 (“[e]xcept as otherwise provided in RCW 4.22.070, if more than one person is liable to a claimant *on an indivisible claim for the same injury, death or harm*, the liability of such persons shall be joint and

1. This rule is distinct from that pertaining to who bears the burden of establishing divisibility or indivisibility or allocation.

several” (emphasis added)).

Here, the jury found that Hart’s injuries were divisible among the various accidents. (CP 2562) Therefore, liability was properly assessed as several.

Contrary to Hart’s contention, RCW 4.22.070, does not provide otherwise. RCW 4.22.070, is a limitation on joint and several liability, not an expansion. *Kottler v. State*, 136 Wn.2d 437, 443, 963 P.2d 834 (1998). Nothing in it suggests the legislature intended to impose joint and several liability for separate, divisible injuries. Indeed, Washington courts have clearly stated: “RCW 4.22.070 provides that several, or proportionate, liability is now intended to be the general rule.” *Tegman v. Accident & Medical Investigations, Inc.*, 150 Wn.2d 102, 109, 75 P.3d 497 (2003). The rule Hart proposes would make parties liable for injuries they neither caused nor contributed to.

To the extent not addressed herein, respondent Barker also joins in and adopts the arguments made on this issue by respondents Prather/Knauer.

2. The trial court did not err with regard to the verdict form.

Hart contends the trial court improperly allowed the jury to allocate fault to Brittany Powell, the driver in the fourth accident, by sua sponte revising the verdict form. The arguments are without merit.

First, the revised verdict form did not address allocation of fault to Brittany Powell. (See RP 2-20-18 at 13: “I’m not allocating to Brittany Powell. I am asking them to divide damages in accordance with four accidents, regardless of who is at fault.”) The trial court directed a verdict in favor of Powell on Hart’s negligence claim. Therefore, the verdict form specifically stated that Powell was not negligent and bore no fault for the March 22, 2014 accident. (CP 2560) The revision pertained to question 10 on the verdict form, and simply asked the jury to identify Hart’s damages occurring after the fourth accident. CP 2562; see generally RP 2-20-19.

Moreover, if there was error, Hart either invited it or failed to preserve it. Under the invited error doctrine, a party may not set up an alleged error and then complain about the error on appeal. *Angelo Prop. Co. v. Hafiz*, 167 Wn. App. 789, 823, 274 P.3d 1075 (2012). To preserve error when the trial court fails to give a proposed instruction, or gives an improper instruction, the aggrieved party must take exception using the procedure in CR 51(f). *Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn. App. 609, 614, 1 P.3d 579 (2000). This procedure ensures that the court “is sufficiently apprised of any alleged error in the instructions so that the court is afforded an opportunity to correct any mistakes before they are made and thus avoid the inefficiencies of a new trial.” *Goehle*,

100 Wn. App. at 615. ““The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection.”” *Goehle*, 100 Wn. App. at 615 (quoting *Walker v. State*, 121 Wn.2d 214, 217, 848 P.2d 721 (1993)). “The objection must apprise the trial judge of the points of law involved and where it does not so advise the court on any particular point of law, those points will not be considered on appeal.” *Haslund v. City of Seattle*, 86 Wn.2d 607, 614, 547 P.2d 1221 (1976).

Here, the record shows that the revised verdict form was the result of a collaborative effort among counsel and the court to respond to apparent jury confusion. See generally RP 2-20-18. During the discussion of how best to respond, counsel for Hart proposed essentially the same language that was ultimately used. (RP 2-20-18 at 16) Moreover, when Hart objected, it was not because of the revisions. (RP 2-20-18 at 19-21)

Hart seems to contend the court erred by “sua sponte revising the verdict form.” But she has neither argued nor cited authority for the proposition, and therefore waived the issue. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Even if she had, her argument would be in error. Trial judges are not prevented from supplementing or revising instructions even after deliberations have

begun. See *State v. Watkins*, 99 Wn.2d 166, 660 P.2d 1117 (1983)(trial court supplemented instructions with one it proposed after jury said it was deadlocked).

Hart's real argument is that the court erred in allowing the jury to apportion damages to the fourth accident when no one was liable for that accident. It did not. A trial court's decision regarding a special verdict form based on the facts of the case is reviewed for abuse of discretion. *Boyd v. State*, 187 Wn. App. 1, 16, 349 P.3d 864 (2015). At trial, all of Hart's injuries from all four accidents were presented to the jury. Hart argued that the first three accidents caused all of her injuries, none was caused by the fourth, and the injuries were indivisible. RP 4376-77. Defendants, on the other hand, argued that Hart was injured in all four accidents and the injuries were divisible. Both arguments called into question the nature and extent of damages attributable to the fourth accident, if any. (See RP 2-20-18 at 11.) Hart's argument sought to hold the remaining defendants liable for injuries she sustained in the fourth accident. The argument entitled defendants to allocate damages to that accident. See, *Phennah v. Whalen*, 28 Wn. App. 19, 26-27, 621 P.2d 1304 (1980)("[W]hen the harm is indivisible as among successive tortfeasors, the defendants must bear the burden of proving allocation of the damages among themselves.") Therefore, asking the jury to apportion damages

was both reasonable and appropriate.

But, even if it was not, the error was harmless. An erroneous jury instruction is harmless if it is not prejudicial to the substantial rights of the part[ies] ..., and in no way affected the final outcome of the case. *Blaney v. International Association of Machinists And Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 211, 87 P.3d 757 (2004). Here, the jury determined that the injuries from each accident were divisible. That meant that each party was severally liable for the damages he or she caused. The verdict form allowed that. Hart can show no harm from the jury simply apportioning injury to an accident for which no defendant would be liable.

To the extent not addressed herein, respondent Barker also joins in and adopts the arguments made on this issue by respondents Prather/Knauer.

3. Substantial evidence supported the jury's allocation of injury to the fourth accident.

Courts will not disturb a jury's damages award "unless it is outside the range of substantial evidence in the record . . . after viewing the evidence in the light most favorable to the non-moving party. *Collins v. Clark County Fire Dist. No. 5*, 155 Wn. App. 48, 82, 231 P.3d 1211 (2010). Courts "strongly presume the jury's verdict is correct." *Bunch v.*

King County Dep't of Youth Servs., 155 Wn.2d 165, 179, 116 P.3d 381 (2005)(quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 654, 771 P.2d 711, 780 P.2d 260 (1989)).

The evidence showed that the fourth accident involved forces as or more severe than any of the other three. RP 696. Hart's own expert and her treating doctor testified she was injured in the fourth accident. Given the limited damages the jury attributed to the other accidents, CP 2561-62, allocating 20% to the fourth accident was well within the evidence.

To the extent not addressed herein, respondent Barker also joins in and adopts the arguments made on this issue by respondents Prather/Knauer.

4. The trial court did not err in refusing to grant a new trial based on juror misconduct.

After the jury rendered its verdict, the trial court polled it. Unanimously, the jurors agreed it was the verdict of at least ten of them. RP 4437-38. Weeks later, Hart's counsel got declarations from two of the jurors alleging various kinds of misconduct, of course all by other jurors. CP 2755-65 (Kristen Coalman); 3024-27 (Kenneth Wiebe). Hart's counsel did not submit input from any of the allegedly offending jurors, and none were specifically identified. Neither of the accusing jurors raised any issue at the time the alleged events occurred, or at any time

during the trial. Neither of the accusing jurors even said the verdict was not theirs.

Hart contends that the events described show a bias or animus against her that warrants a new trial. Her contention could only address the damages elements of her claim because, despite all the bias and misconduct she alleges, the jury found that every defendant she accused was negligent. CP 2560. And even on damages, the jury gave her a substantial award.

But even if the jury had not made an award fully in her favor, Hart failed to show misconduct by the jury. In 1912, our Supreme Court addressed the danger of juror's post-verdict declarations:

If the jurymen making the affidavit actually believed that the evidence did not justify a verdict of guilty, it was a gross wrong on his part, for any consideration of personal convenience, or any consideration of convenience to the defendant, to compromise with the other members of the jury and agree on a verdict of guilty. The only verdict he could conscientiously render in keeping with his oath was one of not guilty. He therefore violated his oath either in returning the verdict, or in making the affidavit after the return of the verdict. When he so violated it cannot, of course, be ascertained without an inquiry into the privacy of the jury's deliberations. But public policy forbids such inquiries. To permit it would encourage tampering with jurymen after their discharge, would furnish to corrupt litigants a means of destroying the effect of a verdict contrary to their interests, and would weaken the public regard for this ancient method of ascertaining the truth of disputed allegations of fact. But few verdicts are reached in which some jurymen does not yield in some degree his

opinions and convictions to the opinions and convictions of others. And when he does so, even in criminal cases, it is to the interest of the public that he be not permitted thereafter to gainsay his act.

State v. Gay, 82 Wash. 423, 439, 144 P. 711 (1914); quoted in *State v. Reynoldson*, 168 Wn. App. 543, 550, 277 P.3d 700 (2012). In other words, if either accusing juror truly believed the verdict was wrong, he or she should have said something at the time.

The declarations Hart submitted were arrogant and hypocritical. They illustrate well the dangers of post-verdict declarations from jurors. For example, in the same breath that Ms. Coalman describes misogynistic actions by some unidentified jurors, describes why she was too intimidated to simply notify the clerk of her concerns, and that she did not act because she could not find an answer on Google, she also describes why she “knew that if I was not appointed the Presiding juror” other jurors would railroad the verdict. CP 2757. And yet, despite the biases she alleges, those other jurors selected her as the Presiding Juror. Mr. Wiebe joins in Ms. Coalman’s litany of misconduct which, he claims showed intractable bias against Ms. Hart, but then says “absolutely not” to the contention that any of the jurors would have wanted their award discounted. CP 3029 (“I can assure the court that the amounts awarded were meant to be fully paid to her, without any discounting . . .”) Hart

labels these as facts, when they amount to no more than self-serving, subjective opinions about the actions and motives of others.

Even a cursory reading of the accusing jurors' declarations reveals several indisputable facts. Neither juror raised a single concern during the trial. Neither raised a single concern when presenting the verdict. Both agreed the verdict was the verdict of the jury. Even now, neither says it was not their verdict. Neither specifically identifies any of the jurors who allegedly engaged in the misconduct. Neither identifies any specific information that was discussed, let alone whether it was actually considered by any of the jurors, let alone whether it actually influenced any of the jurors. And both declarations are grounded nearly exclusively in the juror's personal interpretations of the actions of others.

In *State v. Spillman*, 110 Wash. 662, 188 P. 915 (1920), the court noted: "Manifestly, the appellant had a perfect right to examine each and every prospective juror as to his qualifications, and if he did not do so, as was the case here, he cannot later take advantage of his failure so to do." *Id.* at 667. In her appeal, Hart does not point to a single false or deceptive answer given by any of the jurors. Instead, the essence of her argument is that, to be valid, a verdict must be rendered by perfect jurors. And, she wants the perspective of one or two jurors to control the determination of "perfect."

That is not the rule. Jurors do not have to be perfect. *Smith v. American Mail Line, Limited*, 58 Wn.2d 361, 368, 363 P.2d 133 (1961)(“The jury system is not perfect; it never was and never will be.) And misconduct isn’t based on the subjective views or interpretations of another juror’s actions. *State v. Aker*, 54 Wash. 342, 345, 103 P. 420 (1909)(holding that discussion among jurors of their agreement to the defendant’s guilt during trial and before deliberation was “not such misconduct as can be shown by the affidavit of a juror”).

The problem for Hart is that she won. Despite all the biases and prejudices, the jury found in her favor and awarded substantial damages. Indeed, if Ms. Coalman and Mr. Wiebe are to be believed, the jury wanted to give her more than the law allowed. She has provided nothing indicating she was deprived of a fair trial, or that any impropriety tainted the decision. The trial court did not err in rejecting her post-verdict challenge to the jury’s decision.

To the extent not addressed herein, respondent Barker also joins in and adopts the arguments made on this issue by respondents Prather/Knauer and Nelson.

5. The trial court did not err by failing to instruct the jury regarding lost of earning capacity.

Respondent Barker joins in and adopts the arguments made on this

issue by respondents Prather/Knauer and Nelson. He adds only the following.

Hart cites the decision in *Bartlett v. Hantover*, 9 Wn. App. 614, 513 P.2d 844 (1973), for the proposition that she was entitled to a lost earning capacity instruction even without evidence of economic loss. Brief of Appellant at 58-59. She fails to inform the court that the decision was reversed on appeal. *Bartlett v. Hantover*, 84 Wn.2d 426, 431-32, 526 P.2d 1217 (1974). In doing so, the Supreme Court held it was error to give a lost earning capacity instruction when “there was no testimony regarding the amount of either earnings lost from the time of the accident or a formula for reducing lost earning capacity to present cash value.” *Id.* at 432.

Here, the only evidence Hart points to in support of a lost earning capacity instruction is her own testimony that headaches caused her to “abandon work within the restaurant industry.” Brief of Appellant at 58. However, she presented no testimony that she lost earning capacity simply because she changed her chosen field. Thus, the trial court did not err in failing to give the instruction.

6. The verdict form is easily comprehensible.

In her sixty-three-page brief, Hart’s final argument is that the jury’s verdict is “contradictory and irreconcilably inconsistent.” Brief of

Appellant at 60. It is not. The jury was asked questions which allowed it to give a decision that allocated damages among the various accidents. It gave specific amounts regarding past loss. It was allowed to and did attribute percentages to future loss. That is precisely the obligation imposed when a plaintiff claims her injuries from multiple accidents are indivisible and the defendants seek allocation of damages among them. See *Cox v. Spangler*, 141 Wn.2d 431, 446, 5 P.3d 1265 (2000). The allocation for those damages would have been joint and several had the jury determined the injuries were indivisible. The allocation turned out to be several when the jury determined the injuries were divisible. Hart's confusion is unfounded.

7. Hart's arguments regarding respondent Nelson.

Hart's arguments regarding instructions 23 and 24, and Nelson's liability, are not relevant to respondent Barker. To the extent Barker needs to respond to those issues, he joins in and adopts the arguments made by respondents Prather/Knauer and Nelson.

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III. CONCLUSION

For the foregoing reasons, and the reasons given by respondents Prather/Knauer and Nelson, respondent Barker asks this court to affirm the trial court and the judgment entered in this matter.

Dated this 24th day of June, 2019.

s/ Timothy R. Gosselin
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CERTIFICATE OF SERVICE

I certify that on the 24th day of June, 2019, I caused a true and correct copy of the foregoing document to be served on the following via ECF Service:

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