

FILED
Court of Appeals
Division II
State of Washington
9/23/2019 3:15 PM

No. 52271-3-II

**COURT OF APPEALS,
DIVISION II
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 PAMILA 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; and BRITTANY POWELL, individually,

Respondents.

APPELLANT’S AMENDED RELY BRIEF

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I. REPLY ARGUMENT

A. **Under the Terms Of RCW 4.22.070(b)(1) Judgment Should Have Been Entered Jointly And Severally In This Case – The Plaintiff Was Fault Free And Judgment Was Taken Against Multiple Defendants – Nothing More Needs To Be Established.**

It is undisputed that the plaintiff was "fault free" with respect to all the accidents at issue in this case. It is also undisputed that judgments on a jury verdict were entered against multiple defendants and there were no immune parties nor "empty chairs" in this case. (CP 2559-62; 2731-41)

As explored below, when addressing this issue, it appears that one or more of the defendants have a pronounced misunderstanding of RCW 4.22.070(b)(1). As this question involves a matter of statutory construction, the Court is invited to review, as a construction aid, the authoritative Law Review article authored by Gregory C. Sisk which can be found at 16 U. Puget Sound L. Rev (1992), under the title, *"Interpretation of the Statutory Modifications to Joint and Several Liability: Resisting the Deconstruction of Tort Reform"*. This scholarly and in-depth law review article has been cited by our Supreme Court and

in our appellate courts in a number of instances when addressing and interpreting RCW 4.22.070.¹

As observed in Professor Sisk's article at, pages 13 and 14 the entire purpose of the "Tort Reform Act of 1986", which RCW 4.22.070 was a part of, was to modify the common law as it related to joint and several liability in cases "where the plaintiff is also at fault". The entire purpose of the Act was to change the common law, which, prior to its passage was reflected in many of the cases relied upon in Defendant Prather and Knauer's respondent's brief.²

Professor Sisk at Page 14 of his influential article provided:

Under this new approach, codified in RCW 4.22.070, a defendant's liability is several only, **unless (1) the plaintiff was not at fault;** (2) the defendant was acting in concert with another person; (3) the person at fault was acting as an agent of the defendant; or (4) the case falls within one of the three exceptions to the statute.³ (Emphasis added)

¹ See, for example, *Kottler v. State* 136 Wn.2d 437, 444n7, 963 P.2d 834 (1998); *Barton v. DOT*, 178 Wn.2d 193, 204, 308 P.3d, 597 (2013); *Young Tao v. Heng Bin Li*, 140 Wn.App. 825, 832, 166 P.3d, 1263 (2007).

² See, *Phennah v. Wahlen*, 28 Wn.App. 19, 621 P.2d, 1304 (1980) and *Seattle First National Bank v. Shoreline Concrete*, 91 Wn.2d 230, 588 P.2d, 1238 (1978). (Respondent Prather and Knauer's brief Page 18.) Tellingly, these defendants do not cite to a **single case** decided after the passage of the 1986 Tort Reform Act. Defendant Barker cites post 1986 cases only for the most generic of propositions. (Barker's Respondent Brief p.3).

³ The exceptions referenced in subsection (4) of the above-referenced quote are set forth in RCW 4.22.070(2) and relate to; (1) liability for hazardous waste; (2) causes of action relating to tortious interference with contracts or business relationships and (3) products liability – none of these three exceptions have any relationship to the facts of this case.

Professor Sisk's interpretation that RCW 4.22.070(1)(b) provides for joint and several liability where a plaintiff is "not at fault" is supported by the statutory language of RCW 4.22.070(1)(b).

It is well established that when interpreting a statute, the Court's roll is to discern and implement legislative intent. See *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The starting point when interpreting a statute is the statutory language itself and if the statute's language is plain and unambiguous the legislative intent is apparent, and a court will not construe the statute otherwise. *Id.* A court cannot add or delete language from a statute which is otherwise unambiguous, and a statute must be interpreted and construed so that all language used is given effect, with no portion rendered meaningless or superfluous. *Id.*, citing to, *Davis v. Department of Licensing*, 137 Wn.2d 937, 963, 977 P.2d 554 (1999).

There is nothing within the statutory language of RCW 4.22.070(1)(b) which in any suggests that in order for there to be joint and several liability that there must be a determination that "the defendants against whom judgment is entered" have contributed to an "indivisible injury". No such language exists, and the Court should not add such language in the guise of construction and/or interpretation.

If anything, the existence of RCW 4.22.030, which addresses the common law principle of "indivisible injury," provides yet another

exception to "several liability" above and beyond that provided under the terms of RCW 4.22.070. RCW 4.22.030 provides:

"Except as otherwise provided in RCW 4.22.070, if more than one person is liable to claimant on an indivisible claim for the same injury, death or harm, the liability of such persons shall be joint and several."⁴

Clearly, Professor Sisk, viewed the language in RCW 4.22.030 as creating another exception to several liability only, and an additional basis for joint and several liability, and not a limitation on the joint and several liability provided for in RCW 4.22.070(b)(1). Professor Sisk provided at Page 172:

Indeed, RCW 4.22.070 expressly contemplates a continuing role for joint and several liability in a number of contexts including, when the plaintiff is innocent [fault free] of any contributory fault or when a case falls within certain general exceptions for cases involving hazardous waste, generic products, or certain business torts. Indeed, RCW 4.22.030 directs that 'Except as other provided in RCW 4.22.070', liability of tortfeasors on an indivisible claim shall be joint and several. Accordingly, statutory tort reform sets a more subtle, yet nevertheless significant message for the common low courts. (Bracketed material added for clarity)

Also stated at Page 172 of the Sisk article, the purpose of the 1986 Tort Reform Act was to adopt "new principles of equitable treatment

⁴ The "Except as otherwise provided in RCW 4.22.070" language in RCW 4.22.030 was amended into the statute as part of the 1986 Act. According to Professor Sisk given such modifying language, RCW 4.22.070 "takes precedence". *Id.*

among parties to liability actions..." Thus, it is not surprising that the cases relied upon by the defendants, Prather and Knauer, which predated the 1986 reforms, make no reference to the "fault free" status of the plaintiff as a basis for joint and several liability, and provide little if any guidance, on the interpretation of RCW 4.22.070(b)(1) which at the time, (1986), was something new.

It is also a well-established rule of statutory construction that when and where possible, provisions within an Act should be harmonized to ensure the proper construction of each. See in re *Dependency of J.W.H.*, 106 Wn.App. 714, 722, 24 P.3d 1105 (2001). Here, RCW 4.22.030 and RCW 4.22.070(b)(1) can easily be harmonized by recognizing that **both provide for an exception to several liability only and provide for joint and several liability when (1) there is indivisible injury or (2) when there is a fault-free plaintiff and judgment is entered against multiple potentially liable entities.**⁵ To fail to recognize as such, would render

⁵ The "except as otherwise provided RCW 4.22.070" language within RCW 4.22.030 is easily explainable. The language was intended to address situations where the plaintiff fails to bring suit against all responsible defendants (empty chair scenario) or a claim against a potentially responsible party is otherwise barred by an "immunity". See RCW 4.22.070(1); *Anderson v. City of Seattle*, 123 Wn.2d 847, 873 P.2d 489 (1994) (no joint and several liability if judgment is entered against a single defendant if there is a "empty chair"); *Hume v. Fritz Cos.* 125 Wn.App. 477, 105 P.3d 1000 (2005) (immunity). Under the terms of RCW 4.22.070(1) even in the case of an "indivisible injury," there is only several liability in such scenarios.

either or both RCW 4.22.030 and RCW 4.22.070(b)(1), at least in part, meaningless and superfluous.

Under the above analysis, and as discussed at pages 30 to 32 of Appellants Opening Brief, it was plainly error for the trial judge to not enter judgment on the jury verdict, jointly and severally as mandated by RCW 4.22.070(b)(1).

B. The Trial Court Committed Reversible Error by Manufacturing and Submitting a Verdict Form Which Included As An "Entity" Potentially At "Fault" A Party (Brittany Powell) Who The Court Had Previously Dismissed Finding That She Was Not Negligent As A Matter of Law.

The Respondents have barely touched on this issue and instead of addressing it, have confusingly conflated "indivisible injury" and "fault-free plaintiff" principles. This is likely because there is no question that the trial court erred by adding Brittany Powell, (the accident of March 22, 2014) to that portion of the verdict form which asked the jury to allocate fault. It is not a close question.

Relatively early on, it was recognized that in order for a party to be allocated "fault," under the fault-based allocation regime, created by RCW 4.22.070, there must be some proof that an entity toward whom allocation

is being sought, engaged in some act constituting "fault," within the meaning of the statutory scheme. See, *Adcox v. Children's Orthopedic Hosp. and Medical Ctr.*, 123 Wn. 2d., 24-26, 864 P. 2d., 921 (1993). It cannot be reasonably disputed that when determining what the term "fault" means, as used in RCW 4.22.070, the definition of "fault" set forth in RCW 4.22.015 applies. RCW 4.22.015 provides in its pertinent part;

"Fault" includes acts or omissions, including misuse of product, **that are in any measure negligent or reckless toward the person or property of the actor or others**, or that subject a person to strict tort liability or liability on a product liability claim. The term also includes breach of warranty, unreasonable assumption of risk, and unreasonable failure to avoid injury or to mitigate damages. Legal requirements of causal relation apply both to fault as a basis for liability and to contributory fault. (Emphasis added.)

If it is determined, as here, that a party was not negligent as a matter of law, or when there is insufficient proof presented on that issue, "fault" **cannot be allocated under this statutory scheme**. See, *Joyce v. State Dept. Corr.*, 116 Wn. App. 569, 594, 75 P. 3d 548 (2003), reversed in part on other grounds, 155 Wn. 2d 306, 119 P 3d 825 (2005). As stated by the court of appeals in *Joyce* "...a judge cannot submit the issue of allocation to a jury without evidence of another party's fault."

As recent case law has clarified, a party cannot engage in "fault," for allocation purposes under RCW 4.22.070, absent a determination that

they breached a duty owed to the plaintiff. The Supreme Court in *Smelser v. Paul*, 188 Wn. 2d 648, 657, 398 P. 3d 1086 (2017) succinctly stated, "where no tort exists, no legal duty can be breached and no fault attributed or apportioned under RCW 4.22.070(1);" see also, *DOT v. Mullen Trucking 2005, Ltd*, 5 Wn. App. 2d 787, 797, 428 P. 3d, 401 (2018) (determining that due to the operation of RCW 46.44.020, the state cannot be liable and/or allocated fault under RCW 4.22.070 because that statute narrowed the scope of the duty it owed).

Here, the trial court determined as a matter of law that Brittany Powell was not negligent, thus engaged in no "fault," as defined by RCW 4.22.015, which could expose her to an allocation of fault under RCW 4.22.070. The *Adcox*, *Joyce*, and *Smelser* cases drive home the point that absent a breach of a duty, (negligence), a court **cannot allocate fault to an entity that did not breach a duty.**

As shown by the *Smelser* opinion, this is so even when the actions of a non-negligent individual was a "proximate cause" of the plaintiff's claimed injury and/or damages. In *Smelser*, the jury was erroneously allowed to consider a father's negligence in a case involving an injury to his son; and allocated 50 percent responsibility to the father for his failure to supervise his child. See, *Smelser v. Paul*, 188 Wn. 2d. at 651. The Supreme Court found that the jury should never have been allowed to

consider the father's alleged "negligent supervision" because no actionable duty exists between a parent and child mandating parents be non-negligent in the supervision of their own children. *Id.* It did so despite the fact that the jury found the father to be 50 percent responsible for the injuries. Yet despite the fact that arguably, the father's actions were "a proximate cause" of his child's injuries, his actions breached no duty, thus, he could not be subject to a fault allegation under RCW 4.22.070. Under such circumstances, the Supreme Court reversed and remanded to the trial court, and instructed it to enter judgment against *Paul*, the at fault driver, for the entire amount of the damages awarded by the jury.⁶

In other words, under the allocation scheme created by RCW 4.22.070, the issue is "fault," i.e. negligence (or breach of duty), and not causation standing alone.

Here however, the jury was permitted to allocate fault against a non-negligent-dismissed party within the court's revised verdict form. The trial Court permitted allocation on a "fault" or "collisions" basis and specifically, included the collision of "March 22, 2014," in the percentage

⁶ See, *Cox v Spangler*, 141 Wn. 2d 431, 446, 5 P.3d 1265 (2000), (Under the terms of RCW 4.22.070 you cannot allocate fault to an employer immune from suit under RCW 51.04.010 even in a case where a plaintiff's injuries in part were proximately caused by a car accident, where absent such immunity, the employer and a co-worker would be responsible.)

of fault section of the verdict form.⁷ (CP 2559-62) (Appellant's Opening Brief Appendices No. 4). Although Brittany Powell is not named in the allocation portion of the revised verdict form, obviously by referencing the accident she was involved in, (due to no fault of her own), the trial court was treating her as an "entity" who could be subject to an allocation of fault, when under the law, she clearly was not. This is so, even if her non-negligent actions, were a "proximate cause" of plaintiff's injuries or damages.

It was clear error for the trial court to revise the verdict form in a manner which permitted a fault allocation to a non-negligent party.

Finally, on this topic, it cannot be seriously disputed that the trial court was well aware that plaintiff was objecting/excepting to its mid-deliberation modification of the verdict form. (RP February 20, 2018 at 18). Prather's and Knauer's position that such exception was waived by a pleantry directed toward the trial court is argument without authority that should be disregarded. See, *Schmidt v Cornerstone Invest.*, 115 Wn. 2d 148, 795 p. 2d 1143 (1990) (Without adequate, cogent argument, citation to authority and briefing an appellate court should not consider an issue); See also, RAP 10.3(a)(5)&(6).

⁷ The revised verdict form used the term "fault" so Respondent Baker's contention that it was solely a damage allocation is incorrect. (Barker brief p.7)

As it is, one of the few things all parties agreed on below was the following proposition clearly stated by Mr. Coats, one of Prather and Knauer's trial counsel, "[t]he law doesn't allow the jury to allocate to a non-party, a non-negligent party." (RP p. 4187) (Emphasis added)

The only one that failed to grasp this concept was the trial court, who violated this fundamental proposition when it *sua sponte* revised the verdict form on February 20, 2018.

Here, how the inclusion of an impermissible fault allocation affected the jury deliberations and its verdict, including the amount of damages awarded, is unknowable. Under such circumstances a plenary new trial is the only effective remedy. At a minimum, this case should be remanded to the trial court for entry of a judgment in plaintiff's favor for the full amount of the verdict, without a 20% reduction.

C. Under the Terms of CR 59(a)(2) the Trial Court Erred by Failing to Grant Plaintiff's Motion for a New Trial Due to Juror Misconduct.

On addressing this topic, it is initially noted that Respondent's Prather and Knauer at Page 36 of their brief erroneously assert that the juror declarations submitted in support of plaintiff's Motion for a New Trial constitute "inadmissible" hearsay. That is not true. It is well recognized that use of such affidavits, in order to bring to the court's

attention the existence of juror misconduct, is permissible. See *McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 760n.9 260 P. 3d 967 (2011). As discussed in Footnote 9 of the *McCoy* opinion, citing to *Dalton v. State*, 115 Wn. App. 703, 76 P. 3d 847 (2013), even a statement from counsel containing hearsay statements made by jurors during post-trial interviews are an admissible and an appropriate vehicle to bring to a trial court's attention the existence of juror misconduct. See also, *Robinson v. Safeway Stores, Inc.*, 113 Wn. 2d 154, 776 P. 2d 676 (1989).

Respondents also assert the declaration of jurors Coalman and Wiebe "inhere" in the verdict and as a result the Court cannot consider them. (CP 2758-2766; 3024-31) (Appellant's Opening Brief Appendices No. 2 and 3) Something will "inhere" in the verdict, if (1), if it is unrelated to the mental processes by which the individual jurors arrived at the verdict and (2) relate to facts which can be rebutted by testimony without examining any jurors' mental processes. See *Long v. Brusco Tug and Barge, Inc.*, 185 Wn. 2d 127, 131 - 32 368 P. 3d 478 (2016); see also, *Gardner v. Malone*, 60 Wn. 2d 836, 841, 376 P. 2d 651 (1962).

When a juror's affidavit contains a mixture of matters which inhere in the verdict and those which do not, the Court can disregard those facts which tend to impeach the verdict of the jury, and consider those facts which relate to the misconduct of jurors, which in no way inhere in the

verdict itself. See, *Richards v. Overlake Hosp. Medical Ctr.*, 59 Wn. App. 266, 272, 796 P. 2d 737 (1990), citing, *State v. Parker*, 25 Wn.2d, 405, 415, 65 P. 776 (1901).

It is well recognized that a juror's derogatory comments about a party and/or their counsel can constitute misconduct and such statements do not "inhere in the verdict". See *Turner v. Stime*, 153 Wn. App. 581, 588 - 590, 222 P. 3d 1243 (2009); *State v. Berhe*, 193 Wn. 2d 647, - P. 3d - (2019); *Seattle v. Jackson*, 70 Wn. 2d 733, 738 - 39, 425 P. 2d 385 (1967). It was also well recognized as misconduct, (which does not inhere in the verdict), for jurors to interject extrinsic evidence and/or matters into their deliberations. See *Loeffelholz v. C.L.E.A.N.*, 119 Wn. App. 665, 680 - 682, 82 P. 3d 1199 (2004); *Halverson v. Anderson*, 82 Wn. 2d 846, 852, 513 P. 2d 847 (1973); *Fritsch v. J.J. Newberry's, Inc.*, 43 Wn. App. 904, 907, 72 P. 2d 845 (1986).

The Respondents do not dispute that it was juror misconduct when jurors used the internet and conducted independent research regarding the content of plaintiff's Facebook page. See generally, at *State v. DeLeon*, 185 Wn. App. 171, 218 - 19, 341 P. 3d 315 (2014), affirmed and reversed on other grounds, 185 Wn. 2d 478, 374 P. 3d 95 (2016), see generally, *United States v. Fumo*, 655 F. 3d 288 (3rd Cir. 2011).

It is well established that it is misconduct for a juror to interject evidence outside of the record during juror deliberations, particularly when it relates a material issue in the case. See *Fritsch v. J.J. Newberry's, Inc.*, 43 Wn. App. at 907. Ultimately it is for the Court to decide what effect, if any, juror misconduct may have had. *Id. Halverson*, at 749. If it cannot be said with reasonable certainty that the misconduct was not prejudicial, then any doubt that the misconduct affected the verdict should be resolved in favor of granting a new trial. *Id.*

Simply because a party receives a verdict in their favor does not establish that jury misconduct did not prejudicially impact the verdict. See *Kuhn & Schnall*, 155 Wn. App. 560, 575 - 77, 228 P. 3d 828 (2010). This is because, here, such misconduct potentially could affect matters such as the amount of damages awarded, or how they were allocated. *Id.*

While it is true that jurors are allowed to bring their life experience to bear during the course of deliberations, the use of one's life experience does not permit or involve the introduction of extrinsic, (outside of the evidence), facts during the course of deliberations, particularly if it relates to a material issue. See *Fritsch, supra*; *Kuhn & Schnall, supra*.

Here, materials set forth within plaintiff's Facebook page, at least according to the defendants below, who sought introduction of a portion of its content, constituted relevant evidence regarding plaintiffs' damages.

By reviewing the plaintiff's Facebook, the jurors had access to "comments" which had been deleted from the exhibits admitted at time of trial. (Ex. 324-355); (CP 2760-61). In other words, the offending jurors had access to materials that the trial court had found to be irrelevant and inadmissible during the course of trial.

Jurors go beyond discussing their own life experience when they provide fellow jurors evidence which is not subject to objection, cross-examination, explanation or rebuttal. See *Ryan v. Westgard*, 12 Wn. App., 500, 503, 530 P. 2d 687 (1985). Thus, when a juror introduces into discussions in the jury room unsworn testimony about a matter bearing directly upon the material facts of the case at issue, as opposed to discussing unrelated experiences, which might enlighten the discussions, he or she engages in misconduct by introducing extrinsic facts into the proceedings. *Id.*

Here factual details were provided to jurors regarding the Stanton accident site, that went beyond general life experience. (CP 2761; 3029).

When, as here, jurors had an opportunity to view inadmissible evidence,(materials deleted from the Facebook exhibits submitted into evidence in this case), if there is a reasonable doubt whether the improper conduct affected **the amount of the verdict or the decision on any matters at issue**, then a verdict should be set aside. See *Board of Regents*

v. Frederick and Nelsons, 90 Wn. 2d 82, 87, 579 P. 2d 346 (1978). (The presence in the jury room of evidentiary materials which had not been admitted into evidence will cause a verdict to be set aside if there is a reasonable doubt as to whether or not such material affected the verdict.)

Not only was there inappropriate consideration of extrinsic evidence, but also strong indication that the jurors' verdict was based on impermissible biases and prejudices. Under such circumstances, the Court should be mindful of an admonishment set forth in *Lyberg v. Holz*, 145 Wn. 316, 321, 259 P. 1087 (1927) when considering whether or not the trial court abused its discretion by failing to grant the plaintiff a new trial due to jury misconduct:

The determinative rule, or principal, of law are plain and well established. If upon consideration of the whole of the pertinent record, it is reasonably doubtful whether or not the improper conduct affected the amount of the verdict or the decision of any other material fact, the verdict should be set aside by the trial judge; if, in such a case, a new trial is not granted, there is abuse of discretion by the trial judge, a reversal becomes the duty of the appellate court. It may be clear that 11 (or a lessor number) of the jurors were not, to any degree, influenced by the improper conduct; yet if it remains reasonably doubtful whether one (or a larger number) was, or was not, influenced, the vice remains and the verdict must be set aside, because each juror could rightly agree to the verdict only when guided solely by the instructions of the trial judge and the evidence heard in open court. **A proper corollary is that, when misconduct once shown, there is a reasonable doubt as to its affect, that doubt must be resolved against the verdict. Faithful adherence to these principals is essential to the due and orderly administration of the law; infidelity here makes**

justice doubtful and invites correction at its source. To the extent that verdicts may be affected or controlled by external or extraneous influence projected into jury rooms, due process of law is mocked, even though its form be meticulously observed, and government is subverted through the most dangerous and insidious of processes." Emphasis added. (Cited submitted.)

It is suggested it is a mockery of due process of law, for the plaintiff to have received a jury trial in which one of the jurors, even before any evidence was placed before the jury, labeled her an "ambulance chaser". (CP 2762; 3030). It also makes a mockery of justice that plaintiff's verdict was in all probability affected by the male jurors' views as to who was more attractive, plaintiff or Ms. Prather. (CP 2761-64; 3029) Such a proposition reeks of gender stereotyping and sexism. Such allegations were un rebutted below.

If the trial court had any doubt about the veracity of such allegations, it should have immediately called for an evidentiary hearing and/or provided the parties the ability to engage in post-verdict discovery, including the ability to subpoena and depose members of the jury, who otherwise would have no obligation to cooperate with the parties or their attorneys.

As recently discussed by the Supreme Court in *State v. Berhe*, 193 Wn. 2d 647, 649, P. 3d (2019), generally when there are allegations that juror misconduct affected a verdict, trial courts are afforded wide

discretion in determining whether an evidentiary hearing is necessary to address the issue. As noted in *Berhe* at 649, such discretion has its limits, particularly in cases involving racial bias, which deprives a litigant of his or her right to a fair and impartial jury. See also, *Turner v. Stime*, 153 Wn. App. 581, 222 P. 3d 1243 (2009).

Although this case does not involve "racial bias," according to the juror declarations filed below, jury deliberations were infected by sexism, and other inappropriate considerations. Also, considering the fact that it is undisputed that some of the jurors violated the Court's instructions and looked at plaintiff's Facebook page, (and told the other jurors about it), this should have been reviewed by the trial court as another area where the trial court was obligated to investigate the effect the exposure of such information had on the outcome of the trial. See, *United States v. Fumo*, 655 F. 3d 288 (3rd Cir. 2011); see also, McGee, Amanda, *Juror Misconduct in 21st Century: The Prevalence of the Internet and its Effect on American Courtrooms*, 30 Loy. L.A. Ent. LRev 301 (2010).

If the Trial Court had any concern, regarding the "vagueness" of the juror declarations, and/or how such extrinsic information was utilized by the jurors in this matter, it should have, as requested by the plaintiff below, ordered an evidentiary hearing. As it is, there was enough un rebutted information for the Trial Court that a new trial should have

been granted because plaintiff was not provided a constitutionally adequate trial by an unbiased jury who considered only the evidence which was presented before it in Court.

D. The Trial Court Erred by Failing to Give Plaintiff a Loss of Earning Capacity Instruction

Prior to directly addressing this issue, it is respectfully suggested the court should consider a number of basic principles of Washington's law relating to damages. It is well recognized that a wrongdoer is not freed from liability because of a victims' difficulty in establishing a dollar amount of damages. See *Reefer Queen Co. v. Marine Constr. and Design Co.*, 73 Wn. 2d. 774, 781, 440 P. 2d. 448 (1968). As noted in *Reefer Queen Co.*, when damages are somewhat difficult to assess, a plaintiff must produce the best evidence available and if such evidence supports a reasonable basis for estimating a loss, he or she will not be denied a recovery because the amount of damages is incapable of exact discernment. *Id.* While it is true that the fact of damages must be proved with some certainty, such a concern does not apply to the nature and extent, or amount of the damages awarded. See *Christian v. Tohmeh*, 191 Wn. App. 709, 734, 366 P. 3d 16 (2015). Damages are not precluded because they fail to fit a precise formula for measuring them. *Id.*

Further, traditionally courts are reluctant to protect a defendant once damages have been shown, merely because the extent of damages or the amount cannot be determined with mathematical precision. Evidence is sufficient if it affords a reasonable basis for estimating a loss. Typically, the question of whether or not damages have been proved and what amount of damages should be awarded are questions of fact for the jury. See, *Mut. of Enumclaw Ins. Co. v. Gregg Roofing Inc.*, 178 Wn. App. 702, 716, 315 P. 3d. 1143 (2013). Evidence which is "inconclusive" may be considered by a jury when determining whether or not to award damages for loss of earning capacity. See, *Hirst v. Std. Oil Co.*, 145 Wn. 597, 603, 261 P. 405 (1927). When determining damages, the plaintiff must produce the best evidence available under the circumstances, and if there is a reasonable basis for estimating a loss, a defendant's misconduct should not be immunized because there exists a certain level of uncertainty as to amount. See *Jacqueline's Washington, v. Mercantile Stores Co.*, 80 Wn. 2d. 874, 784, 786-87, 498 P. 2d. 870 (1972).

In the area of loss of earning capacity, all that need be established is that an injured party has suffered an impairment to his or her ability to make a living. See *Bartlett v. Hantover*, 9 Wn. App. 614, 619, 513 P. 2d.

844 (1973), affirmed in part, reversed in part 84 Wn. 2d. 426, 526 P. 2d. 1217 (1974).⁸

As discussed in the *Bartlett* case at 620, loss of earning capacity is not measured by the plaintiff's level of earnings prior to injury. Rather, what must be shown is that an injury suffered by the plaintiff has diminished the ability of the plaintiff to earn money -- no more. See *Murray v. Mossman*, 52 Wn. 2d. 885, 889, 329 P. 2d. 1089 (1958). Once that is established, the amount of the loss is a question for the jury. *Id.*

Thus, an elderly unemployed man who has no intentions of returning to work can suffer a loss of earning capacity. See *Riddel v Lyon*, 124 Wn. 2d. 146, 213 P. 487 (1923). A three-year old, or an 11-year old child, with no earning history can be awarded damages for loss of earning capacity. See *Handley v. Anacortes Ice Co.*, 5 Wn. 2d. 384, 105 P. 2d. 505 (1940); In *Sherman v. Seattle*, 57 Wn. 2d. 233, 536 P. 2d. 316 (1960), a minor was entitled to a loss of earning capacity instruction, even though in the past he had never earned anything, and it was unknown as to what he intended to pursue as far as work in the future – under such

⁸ At Page 13 of Respondent Barker's brief, he erroneously asserts that the Supreme Court in *Bartlett* overruled the Court of Appeals' decision as it related to loss of earning capacity. That is not correct. In *Bartlett*, the Supreme Court found that there was insufficient evidence supporting a jury instruction on **lost earnings** or the **present cash value of loss of earning capacity**. Clearly the Court was concerned that no evidence had been provided to the jury on how to determine present cash value. [*Id.* 84 Wn. 2d. at 432], as required by the earlier opinion in *Hinzman v Palmanteer*, 81 Wn. 2d 327, 336, 501 P2d. 1228 (1972).

circumstances, the amount to be awarded is to be left to the "judgment, common experience and enlightened conscience of the jurors, guided by the facts and circumstances in the case." *Id.* 57 Wn. 2d at 245.

The degree of impairment, which can support a loss of earning capacity instruction, is not an inability to work, or, engage in productive pursuits such as education.⁹

In this case, there's substantial evidence from which the jury would have been able to conclude that there was a "loss of earning capacity". It is enough that the accident related injury makes work more difficult. See *Murray v Mossman*, 52 Wn. 2d. 885, at 889-90; *Johnson v Howard*, 45 Wn. 2d. 433, 450, 275 P2d. 736 (1954) (Plaintiff's testimony that he could not work like he did before the accident and that after the accident he was more easily fatigued, was sufficient evidence to support a loss of earning capacity instruction.) Here plaintiff due to her accident related injuries had to abandon a whole field of employment in which she had trained. That should have been viewed as more than enough to support a loss of earning capacity instruction.¹⁰

⁹ Here the plaintiff, due to her accident related conditions, had to abandon her work in the culinary arts, an area she had previously gained a college education. The fact that she sought out another career path through education in epidemiology should not be held against the plaintiff because it was a reasonable effort to mitigate her damages. See *Kubista v Romaine*, 14 Wn. App. 58, 63-64, 538 P2d. 812 (1975).

¹⁰ Contrary to Respondents Prather and Knauer's assertion, this is no evidence that the trial court refused to give a loss of earning capacity instruction as a discovery sanction. (Respondent Prather and Knauer's Brief p. 30). Had it intended to do so, under *Burnet v*

Further, even before obtaining a degree in the Culinary Arts, due to her accident-related conditions, plaintiff abandoned a job as a grocery bagger because her accident-related conditions made it difficult for her to push grocery carts. (RP 3632). After she graduated and went to work in the restaurant industry, the work aggravated her symptoms to such a degree that on her return home she was met by her husband who was ready with her medications, ice and a made bed. *Id.* Such evidence sufficiently supported the giving of a loss of earning capacity instruction and it was reversible error for the trial court to refuse to give such an instruction.

E. The 20% Allocation of Fault to Brittany Powell – the March 22, 2014 Accident Was Unsupported by Substantial Evidence.

As discussed above, it should be beyond question that given the fact that Brittany Powell was determined by the court, as a matter of law, as not being negligent with respect to the March 22, 2014 accident that it was error to include her in any fault and/or damage allocation in this case. That being said, even assuming arguendo that the issue was properly

Spokane Ambulance, 131 Wn. 2d. 484, 933 P 2d. 1036 (1997) and its progeny, it would have been incumbent of the trial court, to weigh on the record the *Burnet* factors, justifying the severe sanction of damages exclusion. See *Blair v TA-Seattle E. No.*, 176, 171 Wn. 2d 342, 348, 254 P 3d. 797 (2011). Here the record is devoid of any *Burnet* analysis.

submitted to the jury (it was not), the 20% allocation of fault was not based on substantial evidence and it was error for the trial court to deny plaintiff's CR59 Motion on this issue.

It is undisputed that under the terms of CR59 (a)(7) a new trial can be granted if a verdict is not supported by "substantial evidence". See *Sommers v. DSHS*, 104 Wn. App. 160, 172, 15 P. 3d 664 (2001). When assessing whether or not a verdict is supported by "substantial evidence" the court looks to whether or not any evidence or reasonable inference from the evidence justifies the verdict. *Id.* In that regard "substantial evidence" means more than "a mere scintilla" of evidence. A verdict cannot be based on conjecture or speculation *Id.* A motion for judgment as a matter of law must be granted if there is insufficient evidence to support a verdict. *Berndt v. Hammer*, 58 Wn. 2d 408, 410, 363 P. 2d 293 (1961).

On a proper analysis of the factual record below, and contrary to Respondent's argumentative assertions, there is no question that a 20% allocation of fault to the March 22, 2014 accident was unsupported by actual facts, and as a result was based on nothing more than mere speculation. Essentially acknowledging the absence of any fact supporting this 20% allocation, Respondents Prather and Knauer gamely attempt to argue that since it was a "big crash" there must have been significant

personal injuries suffered by the plaintiff as a result of this March 22, 2014 accident. (See Respondents Prather and Knauer's brief Page 25). The problem with Respondents' theory is that it is unsupported by facts and is predicated on nothing more than argumentative assertions.

At trial three witnesses testified regarding this event and none of them provided anything but the vaguest amount of information regarding the forces of impact and the amount of actual damage done to the vehicles as a result of this accident. Eyewitness Julie Hanson could not describe the amount of damage to either vehicle involved. (RP 3441). Ms. Powell, the driver of the vehicle involved in the March 22, 2014 accident, indicated that although the accident was caused by a flat tire, there was not a lot of visible damage done to her vehicle and she could not describe in detail any damage to the other car involved. (RP 3847; 3893).

With respect to injuries resulting as a byproduct of the March 22, 2014 accident, while plaintiff's neurologist – headache doctor, Dr. Murinova, testified that headaches can be a byproduct of cumulative trauma, when it actually came to the events of March 2014, on close examination of her testimony, she indicates that Ms. Hart's headaches were the same both before and after that accident. (RP 3211-3214).

Dr. Rappaport, the defendant's own retained neurologist testified that as a byproduct of the March 22, 2014 accident Ms. Hart only suffered

two to three days of soreness. (RP 2910) He further acknowledged that before and after this accident the plaintiff was under the same treatment regime and all treatment occurring immediately after this accident had already been scheduled prior to its occurrence. (RP 2910-15). Indeed another defense neurologist, Dr. Murphy, indicated it was his view that Ms. Hart suffered no injury from this accident other than perhaps a few days of soreness. She underwent the exact same treatment regime both before and after the 2014 accident. He observed that based on his review of the medical records plaintiff actually got slightly better after the fourth accident of March 22, 2014. (RP 3888-3905).

Even if we had some evidence, such as photographs, damage estimates and the like establishing that a "big crash" occurred on March 22, 2014, (we have no such evidence), such evidence alone, without more, would not constitute sufficient evidence to support a jury verdict beyond rank speculation.

Observations within the recently unpublished opinion in *Saunders v. Thore*, LEXIS 1531; WL 2502395 (6/17/19) are helpful in analyzing this issue. In that case, the trial court excluded any testimony regarding the "forces of the impact" and excluded repair estimates and photographs relating to the accident at issue. The trial court's rationale for exclusion of such evidence was that, "they are simply not relevant, because there is no

way for counsel to argue that a small amount of property damage to a vehicle can be related to the physical injuries suffered to a particular individual absent some expert testimony on that." (*Id.* at Page 28). The appellate court in *Saunders* approved of the trial court's rationale, concluding that under neither ER701 and ER702 were any of the lay witnesses qualified to testify regarding the force of the impact involved and how they related to the injuries sustained. *Id.* at 32. Thus, the appellate court concluded, "[t]he trial court did not abuse its discretion excluding *Thore's* testimony regarding the collision, the photographs, and the repair estimates".

In this matter we have no evidence regarding the repair estimates, nor any photographs of property damage, or anything but the sketchiest of descriptions of the forces to and/or the damage to the vehicles involved in the March 22, 2014 collision. As *Saunders's* suggests, there is no magic formula that equates the size of a crash to an amount of injury.

Thus, there is no evidence, beyond the rankest of speculation that the accident in question caused plaintiff any kind of significant injuries, particularly since her medical records are to the exact contrary and there was absolutely no expert testimony establishing anything but minimal injuries. While Dr. Murinova did indicate that such injuries are potentially cumulative, such vague testimony certainly should not be viewed as

sufficient to support a qualitative and quantitative calculation of a 20% attribution of injury to this otherwise relatively insignificant event.

As it is, such discussion is largely academic given the fact that the trial court **never should have permitted the jury to allocate fault to Ms. Powell under the circumstances of this case.**

F. There Was Insufficient Evidence To Support The Jury Verdicts In Favor Of Defendant Nelson And A New Trial Should Have Been Granted With Respect To Plaintiff's Claims Against Him Pursuant To The Terms Of CR 59(a)(7).

The standards applicable to granting a new trial pursuant to CR 59(a)(7) are discussed above. By its terms, CR 59(a)(7) permits a trial court to grant a new trial if "...there is no evidence or reasonable inference from the evidence to justify the verdict...".¹¹ The jury found in plaintiff's favor on Mr. Nelson's negligence, but found that such negligence was not

¹¹ In this case, during the course of trial plaintiff moved for judgment as a matter of law on the issue regarding defendant Nelson's negligence. (RP 4067-4081). The trial court denied this motion. *Id.* The jury ultimately found that Mr. Nelson was negligent, but that his negligence was not a proximate cause of the December 22, 2009 accident. (CP 2559, 2562). Thus, plaintiff did not renew her CR 50 motion post-verdict because she had prevailed before of the jury on that issue. See generally, *Millies v. Land America Transnation*, 185 Wn. 2d 302, 372 P. 3d 111 (2016) (In order to preserve on appeal the propriety of a trial court's denial of the CR 50 motion such a motion first must be made before the close of the evidence and renewed post-verdict). Thus, in moving for a new trial plaintiff after the verdict relied on the terms of CR 59 (a)(7) which, by its terms permits a trial court to make a determination as to whether or not a jury verdict is supported by substantial evidence. (CP 2871, 2906).

a "proximate cause" of the December 22, 2009 accident. It is suggested that in this case, in order to make a determination of proximate cause and the sufficiency of the evidence on that subject matter, the analysis cannot be devoid and/or divorced from an analysis of what made Mr. Nelson's conduct negligent in the first instance. In that regard, appellant's counsel cannot improve upon, or add anything more than that which has been previously stated in her opening brief at Pages 48 through 56. This is even though part of that discussion relates to the propriety of giving court's Instructions No. 23 and 24; and is not expressly addressed to the question of whether or not sufficient evidence supported the verdict of "no proximate cause" in defendant Nelson's favor.¹²

On this issue, the key facts are not what Mr. Nelson intended when engaging what the jury found to be negligent driving, (if not in fact reckless), but rather how the other participants in the pursuit/chase perceived his behavior.

¹² Having an opportunity to once again review the record, Appellant concedes that Court's Instruction No. 24 was not subject to exception at time of trial, thus she withdraws the issue of the propriety of giving that instruction from these appellate proceedings. Appellant's counsel apologizes for any confusion on this issue but notes that this case **does have** a lengthy and complex trial record. However, it is noted that none of the Respondents effectively addressed the propriety of giving two redundant intervening/superseding cause instructions by the trial court. (Court's Instructions No. 23 and 24). This issue is discussed at Page 47 of Appellant's Opening Brief. Given the lack of any effective response on this issue by any of the Respondents, the Court should view the error of giving redundant instructions as being a conceded point in this appeal.

It is undisputed that both Mr. Stanton and Ms. Hart, who were being, for lack of better terms "aggressively followed" for a significant period of time by Mr. Nelson, believed that they were being pursued by Mr. Nelson even after he allegedly discontinued the pursuit. Mr. Stanton testified that he was scared of Mr. Nelson and was trying to drive fast enough to get separation from Mr. Nelson at the time the accident occurred. (RP 1565-1573). The plaintiff also had the same perceptions. (RP 3304-3306).

As discussed in Appellant's Opening Brief, at pages 50 to 51, the same facts which placed Mr. Nelson in the position of breaching a duty owed to the plaintiff are the same facts which establish that his actions were a proximate cause of the single car Stanton collision. The whole point of plaintiff's theory of the case was that Mr. Nelson's undisputed and admitted conduct "encouraged" and/or "enticed" Mr. Stanton to continue to drive in a reckless manner and that Mr. Stanton was still under the "spell" or influence of Mr. Nelson's behavior when the single car collision occurred.

In response, defendant Nelson has pointed out a number of facts which the Court should view as inconsequential on this issue given the fact that both Stanton and the plaintiff testified that at the time of the accident they still believed and/or were reacting to the fact that Mr. Nelson

had previously been aggressively pursuing them. The fact that Mr. Stanton slowed his vehicle to 30 miles an hour in order to take a turn onto Artondale Drive, as discussed at Page 27 of respondent Nelson's brief, is certainly not a fact favoring Mr. Nelson's position. A Court can take notice that attempting to take a right-hand turn, at or around 30 miles per hour is, in and of itself, dangerous and that on average a reasonable driver will normally take a right-hand turn somewhere between 10 to 20 miles per hour. Had he taken the curve any faster, it is likely he would have flipped his pickup truck prior to the location where he did. It is undisputed once Mr. Stanton took the Artondale curve he rapidly accelerated. (RP 1719)

What is noticeably absent from any analysis provided by defendant Nelson is any event or fact which would serve to break the chain of causation created by defendant Nelson's negligent conduct. There is no indication that Mr. Stanton no longer believed that he was being pursued and simply was "joy riding" or driving fast for its own sake.¹³

¹³ Even if we assume, arguendo, that Mr. Nelson ceased pursuing the Stanton vehicle at East Bay Drive, it is gross overstatement to state that the accident occurred miles from that location. (Respondent Nielson's Brief p.7) The accident occurred on Artondale Drive at a location which as a matter of undisputable fact, was not "miles" away from East Bay Drive. Further, given the speeds involved, the better analysis is to look at the time which would have transpired between Mr. Nelson's alleged discontinuation of the pursuit and the accident, as opposed to distance. At best, the accident occurred within a minute or two of Mr. Nelson's alleged discontinuation of the pursuit and insufficient time in which a reasonable person would have concluded that Mr. Nelson was no longer in pursuit, thus ending the incentive to continue to drive at an unlawful and dangerous speed.

Mr. Nelson's behavior was clearly egregious and only generously can be characterized as negligent given the highly dangerous nature of his behavior and its potential to cause great harm.

The very facts which made Mr. Nelson's conduct negligent are the same facts which support the proposition that his actions were a proximate cause of the collision. The trial court should have found such as a matter of law, even construing the facts in a light most favorable to defendant Nelson, and it was error for the trial court not to do so.

II. CONCLUSION

At a minimum, this case should be remanded to the trial court for entry of judgment jointly and severally, without the unlawful 20% deduction erroneously imposed by the trial court.

The failure of the Court to instruct on loss of earning capacity warrants, at least a new trial on the issue of damages.

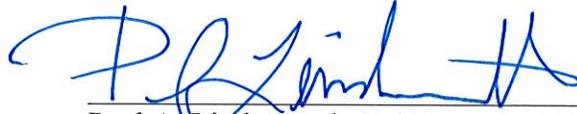
Mr. Nelson's clear negligence should have been found as a matter of law to be a proximate cause of the December 22, 2009 accident. Jury misconduct warrants remand for a full new trial, against the defendants the jury found liable **and Mr. Nelson.**

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Dated this 19th day of September, 2019.



Paul A. Lindenmuth, WSBA No. 15817
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CERTIFICATE OF SERVICE

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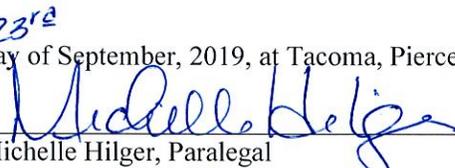
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September 23, 2019 - 3:15 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52271-3
Appellate Court Case Title: Rebekah L. Hart, Appellant v. Emily Prather et al., Respondent
Superior Court Case Number: 12-2-14762-6

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