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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

No. 28604-5-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION III

LOU OLIVEROS and LYNETTE OLIVEROS, husband and wife,
Appellants

v.

DAVID ROMM and JANE DOE ROMM, husband and wife and the
marital community comprised thereof, if any, and ROMM
CONSTRUCTION, INC., a Washington Corporation,
Respondents

BRIEF OF APPELLANT

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TABLE OF CONTENTS

| | |
|--|----|
| I. ASSIGNMENTS OF ERROR | 1 |
| A. Assignments of Error | 1 |
| B. Issues Pertaining to Assignment of Error | 1 |
| II. STATEMENT OF THE CASE | 2 |
| A. Factual Background | 3 |
| B. Procedural Background | 7 |
| III. ARGUMENT | 7 |
| A. <u>Several Instances of Jury Misconduct Took Place During Jury Deliberations, Each of its Own Accord Warranting a New Trial or Additur</u> | 8 |
| i. <u>The Presiding Juror not Wishing to Allow Judgment Against Mr. Romm Showed Improper Bias</u> | 9 |
| ii. <u>The Presiding Juror Inserted Facts During Deliberations That Were Not Given During Presentation of Evidence and Acted as an Expert Witness in Deliberations, Which Was Highly Inappropriate and Resulted in Improper Bias Toward the Oliveroses</u> | 13 |
| iii. <u>The Jury Violated the Jury Instructions by Not Considering All of the Evidence Given During Trial.</u> | 18 |
| iv. <u>The Presiding Juror Calculated Damages Alone, Apparently as a Quotient Verdict.</u> | 22 |

| | |
|---|----|
| B. <u>The Amount of Damages Given in the Jury Verdict Is so Low as to Show Bias Against the Oliveroses</u> | 24 |
| C. <u>Given the Level of Jury Misconduct, the Trial Court Abused its Discretion in Denying Motions in the Alternative for a New Trial or Additur</u> | 30 |
| D. <u>The Present Jury Trial Policy as Given by the Constitution Would be Served with a Ruling in the Oliveros' Favor, While Ruling Against the Oliveroses Would Create Untenable and Unpredictable Legal Standards</u> | 33 |
| IV. CONCLUSION | 34 |

TABLE OF AUTHORITIES

1. CASES

WASHINGTON STATE SUPREME COURT

| | |
|---|-------------|
| <i>Bell v. Butler</i> , 34 Wn. 131, 75 P. 130 (1904)..... | 22 |
| <i>Breckenridge v. Valley General Hosp.</i> , 150 Wn.2d 197, 75 P.3d 944 (2003)..... | 13,14,17,30 |
| <i>Brundridge v. Flour Federal Services, Inc.</i> , 164 Wn.2d 432, 191 P.3d 879 (2008). | 31 |
| <i>Bundy v. Dickinson</i> , 108 Wn. 52, 182 P. 947 (1919)..... | 10 |
| <i>Conover v. Neher-Ross Co.</i> , 38 Wn. 172, 80 P. 281 (1905) | 22 |
| <i>Cyrus v. Martin</i> , 64 Wn.2d 810, 394 P.2d 369 (1964)..... | 19 |
| <i>Dibley v. Peters</i> , 200 Wn. 100, 93 P.2d 720 (1939)..... | 9 |

| | |
|--|-----------|
| <i>Fosbre v. State of Washington</i> , 70 Wn.2d 580, 424 P.2d 901 (1967)..... | 26 |
| <i>Halverson v. Anderson</i> , 82 Wn.2d 746, 513 P.2d 827 (1973)..... | 14,16, 31 |
| <i>Herndon v. City of Seattle</i> , 11 Wn.2d 88,118 P.2d 42(1941)..... | 8 |
| <i>Hills v. King</i> , 66 Wn.2d 738, 404 P.2d 997 (1965)..... | 32 |
| <i>Lanegan v. Crauford</i> , 49 Wn.2d 562, 304 P.2d 953 (1956)..... | 26 |
| <i>Lockwood v. AC & S, Inc.</i> , 109 Wn.2d 235, 744 P.2d 605 (1987)..... | 14 |
| <i>Loy v. Northern Pac. Ry. Co.</i> , 77 Wn. 25, 137 P. 446 (1913)..... | 22 |
| <i>Lyberg v. Holz</i> , 145 Wn. 316, 259 P. 1087 (1927)..... | 9 |
| <i>Malstrom v. Kalland</i> , 62 Wn.2d 731, 384 P.2d 613 (1963)..... | 26 |
| <i>Mathisen v. Norton</i> , 187 Wn. 240, 60 P.2d 1 (1936)..... | 10 |
| <i>Mullin v. Builders Development & Finance Service, Inc.</i> , 62 Wn.2d 202, 381 P.2d 970 (1963)..... | 30 |
| <i>Palmer v. Jensen</i> , 132 Wn.2d 193, 937 P.2d 597 (1997).. | 19, 21 |
| <i>Robinson v. Safeway Stores, Inc.</i> , 113 Wn.2d 154, 776 P.2d 676 (1989)..... | 25 |

| | |
|---|----------|
| <i>Sears v. Int’l. Broth. of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local No. 524</i> , 8 Wn.2d 447, 112 P.2d 850 (1941)..... | 22 |
| <i>Shaw v. Browning</i> , 59 Wn.2d 133, 367 P.2d 17 (1967)... | 19, 26 |
| <i>Smelser v. Barnes</i> , 125 Wn. 126, 215 P. 369 (1923)..... | 8 |
| <i>Smith v. Ernst Hardware Co.</i> , 61 Wn.2d 75, 377 P.2d 258 (1962)..... | 10 |
| <i>Stanley v. Stanley</i> , 32 Wn. 489, 73 P. 596 (1903)..... | 23 |
| <i>United Iron Works v. Wagner</i> , 98 Wn. 453, 167 P. 1107 (1917)..... | 23 |
| <i>Wiles v. Northern Pac. Ry. Co.</i> , 66 Wn. 337, 119 P. 810 (1911)..... | 8,22 |
| <u>WASHINGTON STATE COURT OF APPEALS</u> | |
| <i>Allyn v. Boe</i> , 87 Wn. App. 722, 943 P.2d 364 (1997)..... | 9,14,33 |
| <i>Baltzelle v. Doces Sixth Ave., Inc.</i> , 5 Wn. App 771, 490 P.2d 1331 (1971)..... | 26 |
| <i>DeYoung v. Cenex Ltd.</i> , 100 Wn. App. 885, 1 P.3d 587 (2000)..... | 30 |
| <i>Hammel v. Rife</i> , 37 Wn. App. 577, 682 P.2d 949 (1984).. | 8 |
| <i>Herriman v. May</i> , 142 Wn. App. 226, 174 P.3d 156 (2007) | 25,27 |
| <i>Jaeger v. Cleaver Const., Inc.</i> , 148 Wn. App. 698, 201 P.3d 1028 (2009)..... | 32 |
| <i>Kuhn v. Schall</i> , 155 Wn. App. 560, 228 P.3d 828 (2010).. | 13,15,24 |

| | |
|--|-------------------|
| <i>Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)</i> , 119 Wn. App 665, 82 P.3d 1199 (2004)..... | 13,14 |
| <i>Nichols v. Lackie</i> , Wn. App. 904, 795 P.2d 722 (1990)... | 18 |
| <i>Richards v. Overlake Hosp. Medical Center</i> , 59 Wn. App. 266, 796 P.2d 737(1990)..... | 14,30 |
| <i>Rowley v. Group Health Co-op.</i> , 16 Wn. App. 373, 556 P.2d 250 (1976)..... | 8 |
| <i>Sorenson v. Raymark Industries, Inc.</i> , 51 Wn. App. 954, 756 P.2d 740 (1988)..... | 23 |
| <i>State v. Cho</i> , 108 Wn. App. 315, 30 P.3d 496 (2001)..... | 10 |
| <i>State v. Jackson</i> , 75 Wn. App. 537, 879 P.2d 307 (1994).. | 10 |
| <i>State v. Johnson</i> , 137 Wn. App. 862,155 P.3d 183 (2007) | 9 |
| <i>Stevens v. Gordon</i> , 118 Wn. App. 43, 74 P.3d 653 (2003) | 25 |
| <i>Thogerson v. Heiner</i> , 66 Wn. App. 466, 832 P.2d 508 (1992)..... | 30 |
| <i>Usher v. Leach</i> , 3 Wn. App. 344, 541 P.2d 932 (1970)... | 32 |
| 2. STATUTES | |
| RCW 4.44.170 | 9 |
| RCW 4.76.030..... | 25,31 |
| 3. RULES | |
| CR 59..... | 8,15,25,27, 30 |

I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in not finding jury misconduct while the jury was in deliberations.
2. The trial court erred in refusing to grant Oliveros' motion for a new trial or alternatively Oliveros' motion requesting additur.

B. Issues Pertaining to Assignment of Error

1. Should the court grant a JNOV motion for a new trial or additur on the basis of jury misconduct when a presiding juror shared with the jury his bias against a plaintiff for the simple reason that he did not believe Mr. Romm should have to pay damages for a "mistake," despite the fact that Romm admitted full liability and that the particular juror swore at voir dire to award damages corresponding to the evidence proved? (Assignment of Error No. 1, 2)
2. Should the court grant a JNOV motion for a new trial or additur when: (1) a presiding juror inserted additional factual information about the plaintiff's employer's procedural policies that contradicted what was otherwise uncontested witness testimony given at trial, regardless of the truth of the juror's information, or; (2) a lone juror presented himself as an expert by claiming his

statistics background gave him more accuracy as to damages than the statistician expert witness? (Assignment of Error No. 1, 2)

3. Should the court grant a JNOV motion for a new trial or additur when the jury does not review or even address every piece of evidence that the court directs them during jury instructions to consider? (Assignment of Error No. 1, 2)
4. Should the court grant a JNOV motion for a new trial or additur when a lone presiding juror calculated the damages and presented them as the entire jury's verdict, disregarding the proper verdict form protocol completely and returning with what is apparently a quotient verdict? (Assignment of Error No. 1, 2)
5. Should the court grant a JNOV motion for a new trial or additur when the jury verdict's damage award is so low as to show significant bias? (Assignment of Error No. 1, 2)
6. Does a trial court abuse its discretion by denying a JNOV motion for new trial or additur due to jury misconduct when all of the above separate instances amass during a single jury trial deliberation? (Assignment of Error No. 1, 2)

II. STATEMENT OF THE CASE

An automobile accident on August 12, 2002 in which Appellant Lou Oliveros (hereinafter "Oliveros") was seriously injured gives rise to

this lawsuit now on appeal. At issue is the trial court's refusal to grant a motion of JNOV for either a new trial or alternatively additur, in the presence of several instances of jury misconduct.

A. Factual Background

On or around August 12, 2002, David Romm (hereinafter "Romm") negligently ran a stop sign, t-boning Oliveros with his Ford F-450 truck. (CP 396; 453). As a result of this collision, Oliveros brought this action claiming physical disability and pain, emotional trauma, medical expenses, loss of earnings and earning capacity, and other damages. (CP 453). A second automobile accident involving Mr. Oliveros occurred in February 24, 2005, to which Romm attributes many of the damages pled by Oliveros. (CP 396-397). Prior to trial, Romm agreed to stipulate to past medical bills for the first accident in the amount of \$28,912, which was submitted to the jury at trial. (CP 19). During the course of trial all four treating doctors (a family doctor - Dr. Brindle; (RP 367; 385-386; 395) a neurologist - Dr. Washington (RP 496; 501; 504; 521); a cardiologist -Dr. Robinson (RP 621-622); and a psychiatrist - Dr. Dillon (RP 281; 293; 296- 300) testified that the subject accident was the cause of Defendants injuries, including mild brain injury, and the nature and extent of the injuries, which were significant, as well as the nature and extent of his treatment. (CP 19).

He was diagnosed with cognitive disorder (RP 275), post traumatic stress disorder (RP 276), pain disorder (RP 276), panic disorder (RP 277) and severe or major depression (RP 277), resulting from the 2002 accident, diagnoses by Dr. Dillon which didn't change since 2002 to the time of testimony at trial (RP 293). Shortly after the 2002 accident, Dr. Brindle treated Mr. Oliveros for blurred vision, headache, neck stiffness, dizziness, extreme fatigue (RP 366), sexual dysfunction (RP 372), hypertension and atrial fibrillation (RP 385). Dr. Washington diagnosed and treated Oliveros for closed head injuries resulting in post concussive syndrome (RP 501-502) as well as post traumatic stress disorder and panic attacks. (RP 501-505). In addition to all of the above, Dr. Robinson maintained ongoing medical treatment of Mr. Oliveros in combination with Drs. Brindle, Washington and Dillon for chest discomfort and panic attacks stemming from the 2002 accident (RP 586, 590; 609-610; 617-619), and that as a result of the 2002 accident, he would not be able to retrain to go back to work (RP 621-623; 630-631).

Mr. Oliveros was relieved from work at the request of his 4 treating doctors. (RP 386; 394; 395; 383; 504; 507; 520-521; 621; 622; 630; 631). Three of the doctors had made that request of Oliveros prior to the second accident. (CP 19). Only Dr. Dillon saw Mr. Oliveros for the first time after the second accident, but concurred he should not be

working as a result of the subject '02 accident. (RP 300; 297). Defendant Romm presented no evidence that the Plaintiff's major injuries were caused by the second collision occurring in 2005. (CP 19). Additionally, an expert economist, Dr. Barnes of Gonzaga University, presented extensive testimony of his method of calculation of "Past and Future Economic Losses" in the amount of \$836,818.00. (CP 249-280). Mr. Romm presented no opposing economist expert witness to counter those figures or methodology of calculation, and they stood as uncontroverted evidence. (CP 19; RP 1122). After a very brief deliberation, the jury returned a verdict of \$61,000, a figure thought to be shockingly low by the Oliveros family and counsel. (CP 18).

The day after the verdict, Doreen Kasselder, Juror #12, called Oliveros' attorney, Patrick Roach. Mr. Roach did not seek out Ms. Kasselder; She called him volitionally. (CP 19, CP 56-58). To Mr. Roach, she expressed that "she was extremely upset with what she described as an unjust jury award, improper deliberation and a bully as the presiding juror." (CP 56-58). In her declaration, Ms. Kasselder made several very serious allegations about the jury deliberations, and in particular about one juror, Juror #5, named Brian Parsons (hereinafter "Parsons") who was selected as presiding juror. (CP 56-58). Ms. Kasselder stated that the presiding juror was biased in favor of Mr. Romm and prejudiced against

Mr. Oliveros, as shown by many statements he made during deliberations. These statements directly contradicted Parsons' sworn duties in voir dire, when he agreed he had no bias or prejudice, and was not biased against awarding large verdicts based on the evidence presented at trial. (RP 62-63; 67).

To add insult to injury, Parsons did not allow the other jurors to review all of the evidence presented or discuss testimony of each of the five expert witnesses or the lay witnesses produced by Oliveros. (CP 57). Instead, he openly opposed the testimony of the lone expert witness economist, claiming that he knew better than the economist how damages should be calculated. (CP 57). It should be noted that Mr. Parsons was not an economist, but was an employee of Fluor Hanford working as a radiological code enforcement officer. In Voir Dire he identified his job as a health physics technician for a laboratory. (RP 114-116). Parsons also inserted facts into the jury deliberations about the record keeping of accidents in the work place at Fluor Hanford, which cast Mr. Oliveros' entire case (including the admitted negligence of Romm) into doubt (CP 57), when Parsons Hanford employment experience was in the area of radiological incidents (RP 116), not auto accidents.

As another irregular act, Parsons went around the jury room and collected a damage value from each juror, which he privately calculated

into a final number. (CP 57). Parsons said he would “take care of it,” and wrote onto the jury form without conferring with any other jurors. (CP 57). In doing so, Parsons wrote the \$61,000 value on the line marked “For Past and Future Noneconomic Damages” while placing zeros in the lines marked “For Past Economic Damages,” “For Present Value of Future Economic Damages,” and “For Plaintiff Lynette Oliveros’ Loss of Consortium”. (CP 64). This erroneously completed form was the final product returned as the jury’s verdict. (CP 64).

B. Procedural Background

Oliveros initiated this lawsuit in March 2005 against David Romm, Jane Doe Romm, and Romm Construction, asserting a claim of negligence. (CP 452-453). In answer, Romm admitted liability for the accident, but reserved several affirmative defenses for trial, ie. failure to state a claim, contributory negligence fault of others, lack of proximate causation, failure to mitigate, nonrecoverable speculative damages and reservation of right to assert additional affirmative defense. (CP 446-449). At trial, the medical bills of \$28,912 were stipulated into evidence. Following trial, the irregular jury deliberations occurred, leading to a post-trial CR 59 motion for Judgment notwithstanding the Verdict seeking additur or a new trial. (CP 18-23; 51-59). The trial court entered judgment denying these motions on August 21, 2009. (CP 9-10). Oliveros timely

filed his notice of appeal on November 13, 2009, from which the current appeal proceeds. (CP 4-8).

III. ARGUMENT

A. Several Instances of Jury Misconduct Took Place During Jury Deliberations, Each of Its Own Accord Warranting a New Trial or Additur.

Pursuant to Washington Court Rule 59(a), a party to any civil lawsuit may seek by motion a new trial or reconsideration of a verdict for reason of irregularity or misconduct of the jury. CR 59(a). Generally, the burden rests on the movant for a new trial or additur to show misconduct of the jury where it is alleged. *See Wiles v. Northern Pac. Ry. Co.*, 66 Wn. 337, 119 P. 810 (1911). According to the opinion *Herndon v. City of Seattle*, “before a new trial may be granted for misconduct of jurors, such misconduct must be shown with certainty.” *Herndon v. City of Seattle*, 11 Wn.2d 88, 105, 118 P.2d 421 (1941); *Smelser v. Barnes*, 125 Wn. 126, 215 P. 369 (1923). A Washington Appeals Court explained this idea, stating that the “existence of mere possibility or remote possibility of prejudice, without more, was not enough to set aside verdict in favor of [a party].” *Rowley v. Group Health Co-op.*, 16 Wn. App. 373, 377, 556 P.2d 250 (1976), as quoted by *Hammel v. Rife*, 37 Wn. App. 577, 585, 682 P.2d 949 (1984). As far as evidence proving misconduct to more than a mere

possibility, an affidavit of any competent person showing facts relating to the misconduct may suffice. *See Dibley v. Peters*, 200 Wn. 100, 110, 93 P.2d 720 (1939). However, “juror affidavits may not be used to challenge thought processes involved in reaching the verdict.” *Allyn v. Boe*, 87 Wn. App. 722, 731, 943 P.2d 364 (1997). More pertinent to this appeal, *Lyberg v. Holz* states that any facts given by uncontroverted affidavits of jurors privy to the jury conduct in question must be accepted as true by a reviewing court in determining whether trial court erred in refusing a new trial or reconsideration. *Lyberg v. Holz*, 145 Wn. 316, 317, 259 P. 1087 (1927).

With these general rules in mind and based on the following reasons, the Appellant now appeals the lower court’s decision to deny alternative motions for a new trial or additur on the basis of jury misconduct.

i. The Presiding Juror not Wishing to Allow Judgment against Mr. Romm Showed Improper Bias.

The purpose of voir dire is to expose possibly biases in jurors, thereby protecting the right to an impartial jury. *State v. Johnson*, 137 Wn. App. 862, 868, 155 P.3d 183 (2007). Concerning bias in jurors, RCW 4.44.170 provides that in deciding whether actual bias exists, a court must examine whether the juror’s state of mind is such that he can try a case

impartially and without prejudice to a party. *State v. Jackson*, 75 Wn. App. 537, 542, 879 P.2d 307 (1994); *See generally* RCW 4.44.170(2). Any doubts as to bias must be resolved against the particular juror in question. *State v. Cho*, 108 Wn. App. 315, 330, 30 P.3d 496 (2001). In Washington, to prove bias using the above criteria, statements in affidavits by co-jurors have played integral parts in showing the biases in jurors. *See Smith v. Ernst Hardware Co.*, 61 Wn.2d 75, 377 P.2d 258 (1962). In *Bundy v. Dickinson*, 108 Wn. 52, 182 P. 947 (1919), held that when two or more affidavits on these issues conflicted, the trial court had sound discretion in disallowing a new trial. In the instant case, there are no conflicting affidavits of jurors, in spite of the Trial Courts invitation to counsel to obtain such. (RP 1208-1211). Finally,

when a party moves for new trial on ground of misconduct or disqualification of juror resulting from juror's prejudice, party must show that, at time juror was accepted and sworn for trial, neither movant nor his counsel knew, or by exercise of reasonable diligence could have learned, of such misconduct or disqualification.

Mathisen v. Norton, 187 Wn. 240, 247, 60 P.2d 1 (1936).

In the Voir Dire of Juror #5, Mr. Parsons, no questions by the Court, by Plaintiff's counsel, nor by Defense counsel raised any flags of concern of prejudice of Mr. Parsons, as to any of the issues raised in this appeal.

In this case, Romm admitted liability by negligently running a stop sign, resulting in Mr. Oliveros' injuries. (CP 446-449 & RP 117; 187).

Romm also stipulated to over \$28,000 in past medical bills incurred by Oliveros after the '05 collision, which by law the jury must award to the Plaintiff. (CP 1122). In spite of the admission and stipulation, and the uncontroverted testimony of Oliveros' economist, and four treating doctors, the presiding juror refused to follow the Courts instructions on the law.

Doreen Kasselder, Juror #21, came forward after trial to indicate the vocal biases of Juror Brian Parsons during deliberations. (CP 56-57).

During the deliberations, Mr. Parsons stated

I sure don't want this to be a mistrial and some other jury to come in and take 2 million dollars from Mr. Romm and award it to Mr. Oliveros . . . That would just ruin an innocent guy (Romm) who made a mistake. [Romm] doesn't deserve to have his whole life ruined . . . Mr. Romm made a mistake and ran a stop sign. Should his life be taken away because he made a mistake?

(CP 57). This alludes to the fact that Mr. Parsons was not looking at the evidence to decide what the damage amount should be. Instead, he was deciding based on what he felt was emotionally appropriate, based on personal standard that jurors are asked many times to disregard in the jury process. In fact, in the voir dire, Oliveros' attorney Mr. Roach asked a question to the jury pool inquiring "does the fact that we're going to be talking about a big number for his wage loss, for his economic loss, does that concept of talking about big numbers have any – is there anybody that

has a concern about that, that doesn't want to deal in numbers that we present of that magnitude? If there's anybody that has any concerns, if you could just let me know. Raise your hand. I'll write down your number, and then we can talk about it individually." (RP 62). Parsons did not raise his hand to indicate that he could not put aside his personal notions of monetary "fairness" and rule according to the evidence. (RP 62) By not raising his hand, Parsons swore with the rest of the jury to obey the jury instructions and find damages based on the evidence, not what he personally felt about the size of an award in general.

Mr. Roach further questioned the entire jury panel, "those numbers we're going to present are \$838,000, I believe or \$836,000. In any event, it is a fairly large number for most people when they think about economic loss..... This is a substantial case that we are talking about. So the question I really want to get a feeling from the jury, anybody that's uncomfortable dealing with that type of case, I want to know who you are now so we can talk about it a little." (RP 63).

Yet when faced with the ultimate question of damages, his bias was slanted against an award that is large (CP 56-58), but consistent with the evidence. This constitutes withholding his personal bias in the voir dire, which disallowed Mr. Roach to challenge Parsons' sitting on the jury and ensure his client was given an impartial and unbiased trial. There is no

doubt as to Parsons' inappropriate bias against Oliveros in light of the discrepancy between Parsons nondisclosures in voir dire and his expressed bias in deliberations, as well as his failure to carry on discussions on all of the witnesses and evidence as presented. Even if there is doubt, the law states that that doubt must be resolved in favor of a new trial. Accordingly, this Court should grant a new trial to allow a valid verdict.

- ii. The Presiding Juror Inserted Facts During Deliberations That Were Not Given During Presentation of Evidence and Acted as an Expert Witness in Deliberations, Which Was Highly Inappropriate and Resulted in Improper Bias Toward the Oliveroses.

According to *Breckenridge v. Valley General Hosp.*, 150 Wn.2d 197, 75 P.3d 944 (2003), any information other than that admitted at trial, orally or otherwise, qualifies as “extrinsic evidence” which is wrong to “interject at jury deliberations [since it] is not subject to objection, cross-examination, explanation, or rebuttal.” *Breckenridge v. Valley General Hosp.*, 150 Wn.2d at 199; *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 82 P.3d 1199 (2004). “Juror misconduct of introducing extrinsic evidence into deliberations will entitle a party to a new trial if there are reasonable grounds to believe the party has been prejudiced.” *Kuhn v. Schall*, 155 Wn. App. 560, 574, 228 P.3d 828 (2010). To decide whether a new trial should be granted in light of juror misconduct in interjecting evidence

outside record, influencing the verdict to the point that a new trial is warranted, a court must objectively inquire into the question of whether the evidence could have effected the verdict, not subjectively if it actually did. *Allyn v. Boe*, 87 Wn. App. 722, 943 P.2d 364 (1997). Doing so means that the court looks at two things: (1.) whether alleged information actually constituted misconduct, and; (2.) if behavior was misconduct, if it affected the verdict. *Richards v. Overlake Hosp. Medical Center*, 59 Wn. App. 266, 271, 796 P.2d 737 (1990); *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987). Any doubt as to the effect of jury misconduct on the verdict must be resolved in favor of overturning the verdict. *Id.* Something as simple as a juror inserting extrinsic oral evidence of the plaintiff's salary has sufficed to allow a new trial, since it prejudiced the jury's verdict. *See Halverson v. Anderson*, 82 Wn.2d 746, 513 P.2d 827 (1973). "In determining whether a juror's comments constitute extrinsic evidence rather than life experiences, courts examine whether the comments import the kind of specialized knowledge that is provided by experts at trial." *Breckenridge v. Valley General Hosp.*, 150 Wn.2d 197, 75 P.3d 944 (2003). However, a court cannot look at that which inheres in the verdict, that is, those things which disclose "the thought [processes] of a juror individually or of the jurors collectively" in the final decision. *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now*

(*C.L.E.A.N.*), 119 Wn. App 665, 670, 82 P.3d 1199 (2004). Lastly, in *Kuhn*, the trial court was permitted to grant a new trial on misconduct and reserve judgment on the motion for new trial on inadequate damages, since the two are “separate and independent grounds for ruling.” *Kuhn v. Schall*, 155 Wn. App. 560, 574, 228 P.3d 828 (2010); *See* CR 59.

In the case at hand, juror Parsons added information to jury deliberation in two ways. First, he added facts about the circumstances of the case when he asserted that he was also an employee of Fluor Hanford. In doing so, Juror Parsons claimed that he “knew how the Hanford area worked, and whenever an accident happened, it was well-documented.” (CP 57). He subsequently “testified” in jury deliberation that Mr. Oliveros should have had more information pertaining to the accident, such as documentation about his employment and the accident – all of which intimated that the injury did not happen at work, despite the evidence to the contrary. (CP 57). By contradicting the evidence openly and adding factual information about Hanford procedure – whether or not the information was true – Parsons overstepped his bounds as a juror. No attorney or judge was present to cross-examine, object to, explain, or rebut the information Parsons supplied to the jury. Inserting facts that change the way the fact-finders do their job, especially when those facts cast significant doubt on the evidence the plaintiff has presented, are

objectively bound to affect the jury in one way or another. This was not a simple insertion of facts about the salary of Mr. Oliveros, as in *Halverson*. It was information about the employers standard practices on automobile accident reporting (not radiological accident reporting), information gathering and accident investigation in Oliveros' workplace that undermines not the amount of money involved, but Mr. Romm's culpability altogether. Casting Romm's culpability into doubt by bringing in personal extrinsic facts into the jury room (that are not subject to cross examination) clearly oversteps the province of the jury. Accordingly, the insertion of this information clearly constituted juror misconduct, and alone is grounds for a trial court to grant a new trial.

A second instance of Mr. Parsons inserting information warrants a grant of new trial. Mr. Parsons presented himself as an expert witness by opposing Oliveros' economic expert witness, saying "[I am] a statistics man" and that the "Economic Loss" testimony of witness Dr. Barnes was not accurate. (CP 57). Dr. Barnes' testimony alleged \$836,818 in past and future economic damages, which was a figure uncontested by any defense expert. Certainly, the jury is allowed to question the weight of evidence presented to it. The jury instructions even provide for such skepticism:

You [the juror] are not, however, required to accept [the expert witness'] opinion. In determine [sic] the credibility and weight to be given to this type of evidence, you may consider, among other

things, the education, training, experience, knowledge, and ability of that witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

(CP 73). However, this does not mean that the witness' testimony should be disregarded in full based upon the presiding jurors claim of specialized knowledge in the expert field of an economist. Furthermore, in this case, there was no economic expert to testify contrary to Dr. Barnes. The insertion of a juror into the realm of expert testimony is improper, since jurors are finders of fact and not subject to cross-examination, rebuttal, objection, or explanation as witnesses are. Parsons claimed a sort of specialized knowledge in the field of statistics, the exact circumstance which the case law warns against. (See *Breckenridge* id). Accordingly, on this issue, the trial court should have granted a new trial.

A third reason for granting a new trial also arose during deliberations. Mr. Parsons made several statements that sought to discredit the entire case displayed by the plaintiff, on terms of the religious belief of Mr. Oliveros – an issue not appropriate in any way. The Court gave no jury instruction advising the jury that religion was a consideration in deliberation. Parsons said: “Why did they bring in all of {Mr. Oliveros’] church people? . . . If he was any sort of a church person, he would have

forgiven Romm,” also stating that he felt “brow beaten by the church people that came in to testify.” (CP 57). Parsons’ personal bias against witnesses professing that they belong to a religion has no place in deliberation. These are not simple words calling the weight of evidence into question. These are words used to impeach the witnesses and the character and religious beliefs of Mr. Oliveros, in a way that steps beyond the province of the jury. Not only are the statements not subject to the usual examinations by the attorneys as they would be if given by a witness in trial, they suggest an anti-religious bias that was improperly injected into the deliberations by the lead juror. Such an attack on Lou Oliveros’ religious association or his witnesses religious affiliations should not be tolerated.

The above reasons each independently show jury misconduct and are each a basis for a new trial. Not with standing jury misconduct, the issue of inadequate damages is a separate and independent ground for reversal of the trial court and a new trial.

iii. The Jury Violated the Jury Instructions by Not Considering All of the Evidence Given During Trial.

“Where a verdict indicates that a jury disregarded the court’s instructions, a new trial is proper.” *Nichols v. Lackie*, Wn. App. 904, 907, 795 P.2d 722 (1990). This includes consideration of all of the relevant

evidence, if so provided in the jury instructions. *See generally Cyrus v. Martin*, 64 Wn.2d 810, 394 P.2d 369 (1964). For example, when the jury forgot or chose to ignore evidence as to one element of the damages in the case *Cyrus v. Martin*, and the verdict was thus affected, the court held that granting a new trial was proper. *See Id.* The Supreme Court of Washington held in *Shaw v. Browning*, 59 Wn.2d 133, 367 P.2d 17 (1967), that the trial court could not substitute an additur for a new trial where a jury did not give damages for pain and suffering, when it was “very clear that the jury did not intend to compensate her for them.” *Shaw v. Browning*, 59 Wn.2d at 135. The Court there required a new trial instead of additur because each piece of evidence had not been addressed fully by the jury, despite the fact that the additional damages had been proved more likely than not. *See Id.* Finally, an award of special damages without an award of general damages is misconduct on the part of the jury, and should not stand. *Palmer v. Jensen*, 132 Wn.2d 193, 937 P.2d 597 (1997).

Here, the jury did not consider all of the evidence, nor did they return a verdict concerning the evidence attesting to past economic damages, present value of future economic damages, or loss of consortium. (CP 57-58, 64). As far as actual evidence is concerned, the jury was presented with extensive testimony on “Past and Future Economic Loss” by Dr. Barnes of Gonzaga University for \$836,818.00.

(CP 19; RP 1122). There was no economist presented by Mr. Romm to dispute those figures. (CP 19). The failure to consider this uncontroverted evidence violated the jury instructions, which explicitly required them to examine the testimonial evidence and return a verdict in the form given by the verdict sheet. (CP 77-78). The issue of insufficient damages lies partly in the fact that the jury form was not filled out correctly or fully. The jury was instructed, per Jury Instruction 8, to

consider past economic damages elements ([including] the reasonable value of necessary medical care, treatment, and services received to the present time, the reasonable value of earnings, employment, salaries lost to the present time, [and] the reasonable value of necessary domestic services that have been required to the present time), future economic damages elements ([including] the reasonable value of necessary medical care, treatment, and services with reasonable probability to be required in the future, the reasonable value of earnings, salaries, employment with reasonable probability to be lost in the future, [and] the reasonable value of necessary domestic services that will be required with reasonable probability in the future.), [and] noneconomic damages elements ([including] the nature and extent of the injuries, the disability, loss of enjoyment of life experienced and with reasonable probability to be experienced in the future, [and] the pain and suffering, both mental and physical, and loss of society and companionship, loss of consortium, experienced and with reasonable probability to be experienced in the future).

(CP 77-78). The jury did not address each of these elements, as shown by the zero's in the verdict form. (CP 64). The jury did list \$61,000 in past and future noneconomic damages. Among the past economic loss, a stipulation was entered of \$28,912 for medical bills. (CP 64; CP 19). That

should have been awarded as part of past economic damages, but was not. (CP 64). That space on the verdict form was zero. Defendant Romm admitted that medical bills should be awarded for “temporary pain” for which he received appropriate treatment. (RP 186-187) None was awarded. Besides, no future economic damages being awarded, no damages were awarded for the loss of consortium to Mrs. Oliveros. (CP 64). Per *Palmer*, failure to address each individual element of damages separately is misconduct on the part of the jury, and warrants reversal. The jury did not consider each of the lines on the verdict form. (CP 64).

Mr. Romm’s defense relied on the second car crash, which he attests was the cause of the injuries Mr. Oliveros sustained. (CP 179-181; 187; 396-397). However, Defendant Romm presented no evidence whatsoever that the Plaintiff’s head injuries were caused by the second collision which occurred in ’05 several years after the subject collision (’02). (CP 19). No doctor, accident reconstructionist, or police officer testified as to the nature and effect of any alleged injuries by the second accident. (CP 19). Nor did the Defense develop any causation of the second accident to the ongoing head injury problems that caused Mr. Oliveros to go to Drs Washington, Robinson, Brindle and Dillon. (CP 19). The second accident could not have been the cause of the extensive injuries under any reasonable jury’s review, because a substantial portion

(over 100) of the appointments with the named doctors occurred before the second accident (before '05). (CP 19; RP 1160). Furthermore, Ms. Kasselder's affidavit states that Mr. Parsons did not allow the remaining jurors time to go through the testimony of the five expert witnesses, nor allow time to talk about each of them. (CP 57). The jury did not adequately examine the evidence presented, and because of this, this Court should grant Oliveros a new trial.

iv. The Presiding Juror Calculated Damages Alone, Apparently as a Quotient Verdict.

A quotient verdict, as an arrival at verdict by lot or chance, is not an acceptable practice of a jury attempting to reach a verdict and is grounds for a mistrial where a jury has agreed before computation to be bound by the average of a sum. *Wiles v. Northern Pac. Ry. Co.*, 66 Wn. 337, 344, 119 P. 810 (1911); *Conover v. Neher-Ross Co.*, 38 Wn. 172, 80 P. 281 (1905), *See Sears v. Int'l. Broth. of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local No. 524*, 8 Wn.2d 447, 112 P.2d 850 (1941). If the jurors do not agree to be bound by the quotient before each submitting their own number, the quotient can serve as a basis of discussion and thought experiment to arrive a step closer to a final verdict, and is therefore acceptable. *Loy v. Northern Pac. Ry. Co.*, 77 Wn. 25, 30, 137 P. 446 (1913); *Bell v. Butler*, 34 Wn. 131, 75 P. 130 (1904). Even if a verdict

is simply near a number previously devised by quotient, there are no grounds for mistrial. *Stanley v. Stanley*, 32 Wn. 489, 73 P. 596 (1903). If there is no evidence that the jury agreed to be bound by the results of a quotient calculation, a court cannot find misconduct. *Sorenson v. Raymark Industries, Inc.*, 51 Wn. App. 954, 959, 756 P.2d 740 (1988). Still, in *United Iron Works v. Wagner*, 98 Wn. 453, 167 P. 1107 (1917), an affidavit showed

plain[ly] that the jury did agree in advance to abide by the result that should be obtained by each juror writing upon a slip of paper the amount he thought the verdict should be for and dividing this sum by 12 . . . was a quotient verdict, and, under the authorities above cited, cannot be sustained.

United Iron Works v. Wagner, 98 Wn. at 455.

The present case poses a quotient verdict problem. According to the uncontroverted declaration of Ms. Kasselder, each juror submitted a number to Mr. Parsons, who did the calculations. (CP 57). Mr. Parsons told the jury “Let’s go around the table and give an amount and then I can arrange it.” (CP 57). It was not mentioned to the bailiff when he sought a calculator that Parsons was going to add the jurors’ numbers and then divide by 12. (CP 57). In fact, Parsons took the process upon himself, and did it in a manner in which the other jurors did not know what he was doing. (CP 57). There was no discussion of damages among the jury. (CP 57). This leads to two conclusions: either Parsons calculated a quotient

verdict that he bound the jury to by writing the \$61,000 on the verdict form, or Parsons devised his own number altogether, since none were there to oversee what he was doing. In the former situation, the quotient verdict was not done as a means of facilitating further discussion about a final verdict. It was done as a final move that bound this jury to a number gathered by lot or chance, which common law forbids. In the latter situation, Parsons as a single juror calculated an amount which he thought to be appropriate to the claims presented at trial. Excluding the other jurors in this manner defeats the purpose of having a jury in the first place. Nor did the jury altogether decide what damage was to go on what line on the jury form. (CP 58; CP 64). This behavior demands of itself a new trial.

Each of the above circumstances alone justifies the grant of a new trial by the Court. All taken together, the circumstances require some sort of remedy that the trial court did not provide. Accordingly, for the aforementioned jury misconduct, this Court should grant a new trial.

B. The Amount of Damages Given in the Jury Verdict Is So Low as to Show Bias Against the Oliveroses.

In the very recent case *Kuhn v. Schall*, a Washington State Court of Appeals held that a plaintiff seeking a new trial based on jury misconduct was not prevented from also seeking a new trial based on inadequate damages, since the two are considered separate and independent grounds

for ruling. *Kuhn v. Schall*, 155 Wn. App. 560, 228 P.3d 828 (2010).

Accordingly, Washington Court Rule 59 provides that one can move for a new trial or reconsideration if the “[d]amages [are] so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice” or “there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law” or finally, that “substantial justice has not been done.” CR 59(a)(5), 59(a)(7), 59(a)(9). Washington state law corresponds with this remedial procedure, specifically statute RCW 4.76.030:

If the trial court shall . . . find the damages awarded by a jury to be so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice, the trial court may order a new trial or may enter an order providing for a new trial unless the party adversely affected shall consent to a reduction or increase of such verdict

This Court, in *Herriman v. May*, applied this statute to mean that an increase in damages is only warranted when the verdict is so inadequate as to clearly show a jury prejudice or passion. *Herriman v. May*, 142 Wn. App. 226, 174 P.3d 156 (2007); *See also Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 776 P.2d 676 (1989). Simply, a verdict should be presumed valid by the court, unless no substantial evidence supports the damages returned by the jury. *Stevens v. Gordon*, 118 Wn. App. 43, 74 P.3d 653 (2003). For the Court of Appeals to reconsider a verdict for jury

misconduct, “it is not prerequisite to interference that the court-tried case award be the product of passion and prejudice. It is enough [to interfere with the award and apply the doctrine of additur] if the award would ‘shock the sense of justice and sound judgment’ of the appellate court. *Baltzelle v. Doces Sixth Ave., Inc.*, 5 Wn. App 771, 779, 490 P.2d 1331 (1971); *Malstrom v. Kalland*, 62 Wn.2d 731, 738, 384 P.2d 613 (1963); *Fosbre v. State of Washington*, 70 Wn.2d 580, 587, 424 P.2d 901 (1967).

A factual examination of three cases perhaps serves to illustrate previous verdict reconsiderations. As stated above, in *Shaw* the trial court could not substitute an additur for a new trial where a jury did not give damages for pain and suffering, when it was “very clear that the jury did not intend to compensate her for them.” *Shaw v. Browning*, 59 Wn.2d 133, 367 P.2d 17 (1967). In that case, the inadequacy of the verdict amounted to at least \$400 or \$500, less than 1/2 to 5/8 of the total award of ~\$813 (over \$5,100 adjusted for present value) actually given. *Id.* A second case in the same era was similarly decided: the Supreme Court objectively examined comparable personal injury cases and found that in comparison, the damages awarded by the jury in that case were so small as to beg for relief. *See Lanegan v. Crauford*, 49 Wn.2d 562, 568, 304 P.2d 953 (1956). Specifically, after deducting proved items of special damage, there remained only \$381 (over \$2,900 adjusted for present value) to

compensate plaintiff for pain and suffering, a year's temporary partial disability, and six days' hospitalization followed by six weeks' house confinement. The amount was low enough to render a verdict of \$1,500 (over \$11,000 adjusted for present value) so inadequate as to call for judicial intervention by additur or new trial. *See Lanegan v. Crauford*, 49 Wn.2d at 568. Furthermore, even though the plaintiff alleged \$6,000 in damages would be compensatory (over \$46,000 adjusted for present value, or 4 times the amount returned by verdict in the original action), the Court remanded the case for a jury determination of legitimate damages consistent with the evidence. *See Id.*

The third illustrative case, *Herriman v. May*, consisted of a plaintiff alleging damages of around \$386,000 and the jury only awarding \$29,000 (7.5% of alleged damages). *Herriman v. May*, 142 Wn. App. 226, 174 P.3d 156 (2007). The trial court granted a CR 59 motion for additur, giving the plaintiff \$138,000. *Id.* On appeal, this Court found that the Defense's particular expert witness testimony allowed a finding of the \$29,000 value, given the fact that the jury has a wide deference to the weight given contraverted evidence. *See Id.* In other words, where evidence is given by both sides, the jury has considerable latitude in the weight given to each side's testimonial evidence, and any finding within that evidence will be acceptable, thus disallowing new trial or additur. *See*

Id.

The Oliveroses expert witness and economist, Dr Barnes, testified to over \$800,000 in damages, which was a summation of the “Past and Future Economic Loss” of Mr. Oliveros. (CP 249-278). This testimony was not controverted by defendant, as they provided no defense economic expert. (CP 19). The jury returned with a \$61,000 verdict. (CP 18; CP 64). This value is equivalent to around 7.5% of the economic damages asserted and uncontested by any defense expert at trial, as given in testimony by Dr. Barnes. The \$61,000 from the jury which was placed on the past and future non economic line in the verdict form; if meant to represent “all damages” it is wholly inadequate. In that case, it would represent compensation for years of pain and suffering, mental instability and family stress, past and future medical bills for over four specialist physicians and psychologists, loss of consortium with his wife, loss of future earnings or employment with Fluor, and lost social aspects of Mr. Oliveros’ life. Subtract the \$28,912.42 stipulated by Mr. Romm, and only \$32,087.58 remains to account for all of the above affected areas of Mr. Oliveros’ life. (CP 18-19; CP 64; RP 1122). However, one cannot assume \$61,000 represented all of Oliveros’s damages, and cannot assume it was therefore mistakenly misplaced on the verdict form.

To put the award in perspective, Oliveros was making over \$69,000 a year for a 40-hour workweek – and he often worked overtime. (RP 743). He likely would have been able to work for years more if the 2002 accident did not take place.

As a naked figure, \$61,000 does not sound like an exceedingly low verdict. But that amount, reduced by the stipulated figure of approximately \$28,900 for past medical bills, results in around \$32,000 to compensate him for all present and future economic damages, past and future non economic damages and loss of consortium. The figure is a result of bias and prejudice. This can be seen most clearly by examining a breakdown of Dr. Barnes' \$836,000 figure. Mr. Oliveros was put out of work in 2005 as a result of this accident, according to his four treating doctors, which at around \$69,000 a year until the date of trial is \$319,797. (CP 303). He was expected to work another 4.5 years, which would add another \$385,187. (CP 303). These two figures accounted for most of the total value Dr. Barnes testified at trial. (CP 303). Oliveros also lost his health care coverage when his job was prematurely ended, totaling a loss of around \$70,000. (CP 303). Adding in his "401K" and "Household Services" losses for the ~10 years he was precluded from working, the total reaches the \$836,818.00 value. (CP 303). In light of the past and future employment salary and benefits Oliveros lost, the \$32,000 balance

(after deducting the stipulated medical bills) is quite meager. Also, unlike *Herriman*, there was no opposing testimony to refute the economist's data here, which means no evidence existed to cast doubt upon Dr. Barnes' testimony. (CP 19). It becomes obvious there was a prejudicial effect at work in deliberations. This conclusion, paired with the above statements and actions of Mr. Parsons, leads to the reasonable deduction that passion or prejudice led to the \$61,000 figure given by the jury.

C. Given the Level of Jury Misconduct, the Trial Court Abused Its Discretion in Denying Motions in the Alternative for a New Trial or Additur.

A trial court abuses its discretion when it fails to grant a new trial or amend a judgment when the damage award is contrary to the evidence. *See* CR 59(a); *Breckenridge v. Valley General Hosp.*, 150 Wn.2d 197, 75 P.3d 944 (2003); *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 1 P.3d 587 (2000); *Thogerson v. Heiner*, 66 Wn. App. 466, 832 P.2d 508 (1992); *Mullin v. Builders Development & Finance Service, Inc.*, 62 Wn.2d 202, 381 P.2d 970 (1963). This, of course, means that the court has discretion to grant all motions for a new trial or additur that are reasonably supported by evidence given at trial. *See Id.*; *Richards v. Overlake Hosp. Medical Center*, 59 Wn. App. 266, 796 P.2d 737 (1990).

As far as jury misconduct is concerned, to grant a new trial or additur, "a strong, affirmative showing of misconduct is necessary . . . to

overcome the policy favoring stable and certain verdicts, and the secret, frank, and free discussion of the evidence by the jury.” *DeYoung v. Cenex, Ltd.*, 100 Wn. App. 885, 897, 1 P.3d 587 (2000). As stated *Supra* in *Halverson v. Anderson*, 82 Wn.2d 746, 513 P.2d 827 (1973), on a motion for a new trial the trial court must decide whether juror's misconduct affected the verdict, and **if the court had any doubt, such doubt was to be resolved in favor of granting new trial.** *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 191 P.3d 879 (2008). According to RCW 4.76.030:

If the trial court shall, upon a motion for new trial, find the damages awarded by a jury to be *so excessive or inadequate* as unmistakably to indicate that the amount thereof *must have been the result of passion or prejudice*, the trial court may order a new trial or may enter an order providing for a new trial unless the party adversely affected shall consent to . . . or increase of such verdict, and if such party shall file such consent and the opposite party shall thereafter appeal from the judgment entered, the party who shall have filed such consent shall not be bound thereby, but upon such appeal the court of appeals or the supreme court shall, without the necessity of a formal cross-appeal, review de novo the action of the trial court in requiring such reduction or increase, and there shall be a presumption that the amount of damages awarded by the verdict of the jury was correct and such amount shall prevail, unless the court of appeals or the supreme court shall find from the record that the damages awarded in such verdict by the jury were so excessive or so inadequate as unmistakably to indicate that the amount of the verdict must have been the result of passion or prejudice.

RCW 4.76.030 (emphasis added). In other words, on the trial court level, at its discretion a court may grant a new trial when the verdict is so small

as to suggest some sort of passion or prejudice on behalf of the jury. *Hills v. King*, 66 Wn.2d 738, 744, 404 P.2d 997 (1965). Alternatively, a trial court should grant a motion for additur when

(1) the trial court finds that a new trial would be appropriate because the damages are so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice, and (2) the adversely affected party consents to an increase in the verdict as an alternative to a new trial.

Jaeger v. Cleaver Const., Inc., 148 Wn. App. 698, 201 P.3d 1028 (2009).

This is a preferable alternative to granting a new trial because it achieves a just result while avoiding the cost of multiple trials and is encouraged with the sound discretion of courts. *See Usher v. Leach*, 3 Wn. App. 344, 541 P.2d 932 (1970).

Applying this case law to the present circumstances, Mr. Oliveros assigns error to the ruling of the lower court in denying a new trial or additur. Under the circumstances heretofore discussed, especially in concert and having such effect on the verdict, it was unreasonable for the trial court to deny a new trial or additur. Mr. Romm alleges that if Mr. Parsons' behavior truly was egregious, Ms. Kasselder would have brought up the incident during post-trial jury polling. (CP 38). However Ms. Kasselder was not aware of the jury polling procedure or what that meant in terms of an opportunity for her to speak up about these circumstances

involving Mr. Parsons. (CP 57). She was uncertain as to what “polling the jury” meant, and accordingly kept silent until seeking out Attorney Pat Roach on her own volition. (CP 57).

The low number suggesting bias is only one of several grounds given by Mr. Oliveros for seeking a new trial or additur. (CP 18-21). More important than the inadequate amount, as *Allyn* states, is the objective chance that the jury verdict was affected by the jury misconduct. In this case, the jury conduct, when taken as a whole, was flagrant enough that to refuse a new trial or additur was patently unreasonable. Per case law, any doubt as to that misconduct should be resolved in favor of granting a new trial. In failing to do so, the trial court abused its discretion, and should be overturned.

D. The Present Jury Trial Policy as Given by the Constitution Would be Served with a Ruling in the Oliveros’ Favor, While Ruling Against the Oliveroses Would Create Untenable and Unpredictable Legal Standards.

Always pertinent to the appeal process is the policy that will result from the appellate court decision. The policy ramifications of the particular issues posed by this jury misconduct question are no different. In holding that these circumstances amounted to an occasion of jury misconduct, this Court will remain consistent with previous precedent favorable to Oliveros’ position.

In Mr. Oliveros' case, one wildly outspoken juror, Mr. Parsons, ensured that eleven others did not partake in distributing justice to a man severely injured in a car wreck. Refusing to grant an impartial trial will undermine the very policy that the 6th Amendment enshrined in our Constitution: a jury of *at least six* peers deciding each case based on the facts and evidence presented at trial, nothing more, and most certainly, nothing less. One juror taking control so thoroughly endangers the very notion of fairness here and everywhere. Accordingly, the Appellant respectfully asks this Court to reverse the trial court's decision denying the motions in the alternative for a new trial or additur.

IV. CONCLUSION

The Oliveros family seeks a new trial or additur to the verdict in order to mend several instances of jury misconduct. First, the presiding juror disregarded the evidence of damages presented in trial, and instead, stated that he disliked punishing the Respondent for a "mistake." His biases were inappropriate and tainted the way the jury was supposed to function. Second, the presiding juror inserted facts in deliberation about the circumstances of Mr. Oliveros' employment and accident, as well as openly asserting himself as an expert in economics, contradicting the testimony of an expert witness. Both of these insertions are in violation of the Courts instructions regarding rendering a verdict based upon the

witness's testimony and the exhibits and evidence, and each undermines the policy of all parties having a fair and unbiased jury to examine their claims. Third, during deliberations the jury did not consider all of the evidence presented at trial, per jury instructions given them by the trial court. Not only were the damages listed incorrectly, but it is apparent that the testimony of all of the expert witnesses were ignored and not discussed or considered. Fourth, the presiding juror took it upon himself to calculate and return damages alone, either as a quotient verdict or as his own formulation without oversight by any other jurors. Fifth, the amount of damages listed by the presiding juror are shockingly low and insufficient to stating the full extent of the injury Mr. Oliveros sustained, especially in light of evidence presented on the matter. Finally, the inclusion of all of the above incidents into a single trial circumstance renders the trial court's decision to deny JNOV for a new trial or additur as unreasonable and unsupported by evidence. This abuse of discretion constitutes a ruling that the appeals court should overturn.

For the aforementioned reasons, the Court of Appeals should vacate the judgment entered by the trial court, grant the motion for a new trial or alternatively the motion for additur, and remand for further proceedings consistent with its opinion.

RESPECTFULLY SUBMITTED this 10th day of September, 2010.

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