

FILED

NOV 08 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
BY \_\_\_\_\_

No. 286045

THE COURT OF APPEALS  
STATE OF WASHINGTON, DIVISION III

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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., Washington Corporation,

Respondents.

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BRIEF OF RESPONDENT

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## **I. COUNTER-STATEMENT OF ISSUES**

1. Whether the trial court properly denied Oliveros' motion for a new trial or additur on the basis of juror misconduct, when no misconduct was established, and even the alleged misconduct would not have prejudiced Oliveros?

2. Whether the trial court properly denied Oliveros' motion for a new trial or additur when the jury's verdict was consistent with the evidence presented at trial and did not represent an amount so small as to prove it was the result of passion or prejudice?

## **II. STATEMENT OF THE CASE**

This case arises from a motor vehicle accident that occurred August 12, 2002, in Richland, Washington. On that date, a vehicle driven by Respondent David Romm struck the driver's side of a vehicle driven by Appellant Lou Oliveros. Romm admitted liability for the accident, and accordingly, causation and damages were the sole issues for trial. Appellant Lynette Oliveros

was not involved in the accident, and thus her claim was for her interest in any economic loss to the marital community, and alleged loss of consortium.

At trial, the evidence established that the subject automobile accident occurred while Oliveros was in the course of his employment as an Expediter for Fluor Hanford, which primarily involved driving a vehicle and delivering documents. After the accident, Oliveros called his employer, a representative of which then came to the scene. Oliveros did not go to the hospital to be evaluated after the accident, but rather was examined and cleared to return to work by Hanford Environmental Health Foundation (HEHF), then the on-site medical provider for the Hanford Reservation contractors and their employees. (RP 63) Indeed, after getting checked out at HEHF, Oliveros drove himself home, stopping several times along the way to make job-related deliveries of papers. (CP 219)

On February 24, 2005, Oliveros was involved in a single-car accident that was more significant than the 2002 accident, and which again occurred while Oliveros was working. (CP 396-97) Specifically, Oliveros' wallet slipped to the floor while he was driving, and when he reached down to pick it up, he accidentally hit the gas pedal instead of the brake pedal. His vehicle sped forward, and the front of his vehicle struck a cement slab from an old building. (RP 55) Oliveros hit his head on the steering wheel with impact. (RP 56) A co-employee of Oliveros, Richard Silvey, testified that he went to the scene of the 2005 motor vehicle accident and observed Oliveros with lacerations to his head and nose, and he observed that Oliveros was "shook up." Oliveros left the accident scene via ambulance for the hospital. (RP 1068-69) Silvey went to the hospital as well, and he testified that Oliveros called his attorney, Patrick Roach, from the emergency room. (RP 1070) Later that same day, Oliveros returned to the scene of the accident with his wife and son, and Oliveros told Silvey that he

wanted to show his wife and son the scene of the accident. (RP 1071)

Oliveros claimed a number of injuries from the 2002 accident. Although he mentioned minimal physical injuries, he claimed significant psychological and mental injuries, allegedly making him unable to work. His primary complaints were of anxiety and sexual dysfunction. He also claimed that because of the 2002 accident, he disassociated himself from his church, where he had previously been very active in leadership positions. He denied that the 2005 accident caused or impacted any of his symptoms and/or his alleged disability.

When asked to describe his injuries on direct examination, Oliveros testified that as a result of the 2002 accident, he sustained memory loss, severe depression, panic attacks, distorted vision, and ringing in the ears. (RP 77) He did not testify to ongoing physical complaints. Oliveros' focus was on depression and

anxiety, the side effects of psychotropic medication, and sexual dysfunction.

A number of health care providers and experts testified at trial. Shortly after the 2002 accident, Oliveros presented to his primary care physician, Dr. Jennifer Brindle. Dr. Brindle testified that cervical x-rays were normal, as was a head MRI scan. Dr. Brindle noted that even at that time, and unrelated to the accident, Oliveros' job was an ongoing source of stress, and Oliveros was not sure how much longer he could continue to work there. (RP 367, 382)

Dr. C. D. Washington, a neurologist, evaluated Oliveros approximately five weeks after the 2002 accident, and Oliveros' physical examination at that time was completely normal. (RP 497-98) Specifically, Oliveros' head and neck examinations were normal, his mental status examination was normal, and awake and asleep EEG brain wave studies were normal. (RP 537-40, 552-53) On cross-examination, Dr. Washington testified that only ten

percent of people who sustain mild concussions have permanent disabilities as a result. Additionally, litigation itself is a stressor, and can prolong symptomatology. (RP 502, 551-52)

Dr. Dillon, a psychiatrist, first evaluated Oliveros on August 15, 2003, at the request of the Department of Labor and Industries. (RP 96) Dr. Dillon testified that Oliveros explained that he had a very stressful job environment, even before the 2002 motor vehicle accident. Dr. Dillon diagnosed depression, panic disorder, pain disorder, and post traumatic stress disorder. He noted that Oliveros “might” have had a brain injury from a concussion. (RP 101-03)

Interestingly, subsequent to the IME, Dr. Dillon became Oliveros’ treating psychiatrist. Dr. Dillon testified that the treatments did not help Oliveros’ symptoms. (RP 124-25)

On cross-examination, Dr. Dillon testified that he places “tremendous reliance” on what patients tell him, and thus does not independently investigate the veracity of their statements. He

gives patients the benefit of the doubt. (RP 131) Dr. Dillon testified that the onset of Oliveros' panic disorder and depression and its temporal relationship to the 2002 accident, could be purely coincidental. (RP 153-55) Further, although Dr. Dillon testified that Oliveros' medical expenses were reasonable and necessary, he did not testify that those expenses were related to the 2002 accident. (RP 139) Furthermore, Dr. Dillon could not relate Oliveros' alleged sexual dysfunction to the 2002 motor vehicle accident. (RP 158)

With regard to his employment, Oliveros retired shortly after the 2005 accident. Oliveros stated that he had thought about leaving his job before the 2005 motor vehicle accident, but he had made no decision to leave the job. Indeed, prior to the 2005 motor vehicle accident, Oliveros believed he was fully capable of doing his job. (RP 49-50) He did note, however, that his attorney, Mr. Roach, had encouraged him to leave his job prior to the 2005 motor vehicle accident. (RP 49-50)

Dr. Wendell Robinson, a cardiologist, testified that Oliveros had told him that his employment position would be eliminated at the end of 2004. (RP 644) Indeed, the Expediter position held by Oliveros was not filled after Oliveros retired. (RP 1063)

Oliveros testified his job performance suffered because of memory problems after the 2002 accident. Gordon Beecher, Director of Human Resources, testified that there were some complaints regarding Oliveros' driving activities after the 2002 accident and before Oliveros' retirement in 2005. Most of those complaints involved driving too fast or not obeying traffic rules, and occurred in the 2003 to 2004 time frame, with more of them in 2004—well after the 2002 accident. None of these driving issues involved memory or cognitive issues. Beecher noted that in that same time frame, Oliveros seemed more stressed out and more concerned about everything. (RP 1040-46)

At the request of Romm, Oliveros underwent a neurological IME with Dr. Linda Wray. Dr. Wray testified she reviewed

Oliveros' medical records and noted documentation of neck complaints prior to the 2002 motor vehicle accident. All objective tests, including neurological exams, EEGs, MRI, and the like, were unremarkable, indicating there was no significant brain injury. Dr. Wray's physical examination of Oliveros revealed absolutely no evidence of brain or neurological injury. Further, any motor-vehicle-accident-related injuries had resolved. (CP 223-32) Dr. Wray determined that there was no physical basis for any of Oliveros' continuing complaints. Indeed, Dr. Wray noted that Dr. Philip Barnard, a psychologist, had evaluated Oliveros and diagnosed Somatoform Pain Disorder, which Dr. Wray testified meant that Oliveros' alleged pain had more of an emotional or psychological basis, as opposed to a physical basis. (CP 226)

Dr. Wray testified that Oliveros did not sustain any significant injuries in the 2002 motor vehicle accident, and to the extent he sustained minor injuries, they had resolved. There was

no need for any treatment based on physical residuals or a neurological problem. Any injuries that were sustained by Oliveros would have resolved on their own and without any treatment whatsoever. (CP 235)

With regard to a claimed brain injury, Dr. Wray testified that in addition to the absence of physical findings of such an injury, Oliveros' actions after the motor vehicle accident belied any significant brain injury, including that he was immediately cleared to return to work, drove a vehicle, and made additional deliveries that day. She also noted that a panic disorder is not a common aftermath of a brain injury. (CP 234-36)

Also at the request of Romm, Oliveros was evaluated by Dr. Ronald Klein, Ph.D., who was asked to determine whether Oliveros sustained any psychological or neuropsychological injuries as a result of the 2002 accident. (CP 100-01) Dr. Klein testified that Oliveros reported significant work stress *unrelated to* the motor vehicle accident. Indeed, a new manager who started

in 2001 caused a much more difficult work environment, due to an absence of backing and support. (CP 124-27, 174-75) The 2002 motor vehicle accident caused a temporary increase in anxiety and difficulties coping with stress and conflict. (CP 173)

After completing his evaluation, Dr. Klein determined that the 2002 motor vehicle accident did *not* render Oliveros physically or psychologically disabled, and Dr. Klein noted that Oliveros continued to work full time in his regular occupation for an additional three years before retiring. Further, Oliveros knew that after the 2005 accident, he was out of a job on a political basis alone. Dr. Klein testified that Oliveros does not have post traumatic stress disorder because he does not meet the diagnostic criteria for that disorder, Oliveros did not suffer a traumatic brain injury, and Oliveros has no psychological diagnoses that were caused by the 2002 motor vehicle accident, as opposed to other stressors in Oliveros' life. (CP 146-54)

Shortly after the 2005 accident, Oliveros filed suit against Romm, seeking compensation for injuries and damages allegedly caused by the 2002 accident. (CP 450-53) Romm admitted liability for the accident, but disputed the nature and extent of the injuries and damages Oliveros claimed flowed from that accident. Beginning April 22, 2009, the case was tried to a Benton County Superior Court jury. On May 4, 2009, the jury returned its verdict, awarding \$61,000 for past and future non-economic damages, and awarding “\$Ø” for past economic damages, present value of future economic damages, and Lynette Oliveros’ loss of consortium. (CP 64) The jury was polled, and all indicated that this represented their verdict and the verdict of the jury. On June 26, 2009, judgment on the verdict was entered. (CP 60-61)

On July 6, 2009, Oliveros filed a motion for a new trial or, alternatively, for additur. (CP 53-55) The parties submitted briefing, and the court heard oral argument of counsel. The trial court denied plaintiffs’ motion for a new trial or additur, and an

Order Denying Plaintiffs' Motion for Judgment NOV or For Additur was entered on October 15, 2009. (CP 9-10) On November 13, 2009, Oliveros filed a notice of appeal. (CP 4-8)

### **III. ARGUMENT**

Oliveros moved for a new trial or additur based on alleged juror misconduct, and because the amount of the verdict was disappointing. The trial court denied Oliveros' motion and Oliveros argues the trial court abused its discretion in doing so. The trial court's rulings were proper and within its discretion, and should be affirmed.

#### **A. The Trial Court Did Not Abuse Its Discretion In Denying a New Trial or Additur.**

CR 59 governs motions for a new trial, and provides in pertinent part as follows:

- (a) Grounds for new trial or reconsideration.** On the motion of the party aggrieved, a verdict may be vacated and new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and

reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

- (1) Irregularity in the proceedings of the court, jury or adverse party, or any other order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;
- (2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;

\* \* \*

- (5) Damages too excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;

\* \* \*

- (9) That substantial justice has not been done.

Additionally, RCW 4.76.030 permits a trial court, as an alternative to a new trial, to increase or decrease the jury's award if the court determines that the award is so excessive or inadequate as *unmistakably* to indicate that the amount must have been the result of passion or prejudice.

A trial court has broad discretion in determining whether to grant a motion for a new trial. A trial court's ruling in that regard will not be disturbed absent showing of a manifest abuse of discretion. *E.g., Bohnsack v. Kirkham*, 72 Wn.2d 183, 186, 432 P.2d 554 (1967). In *Bombardi v. Pochel's Appliance & TV Co.*, 9 Wn. App. 797, 515 P.2d 540 (1973), the court stated:

[Motions for a new trial] admit the truth of the opponent's evidence and all inferences which can reasonably be drawn therefrom; require that the evidence be interpreted most strongly against the moving party and in a light most favorable to the non-moving party; and can be granted only when the court can say, as a matter of law, that there is no substantial evidence to support the non-moving party's claim.

*Id.* at 799. A trial court abuses its discretion when ruling on a motion for a new trial, when its decision is “manifestly unreasonable, exercised on untenable grounds, or for untenable reasons.” *E.g., Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 203-04, 75 P.3d 944 (2003).

Thus, in deciding whether to grant Oliveros a new trial, the court must construe all evidence and reasonable inferences therefrom in favor of Romm. Here, the evidence supports the conclusion that the 2002 accident caused at most short-term, minimal physical discomfort, which did not require medical treatment, and the accident did not cause a traumatic brain injury or the psychological problems and allegedly related disability of which Oliveros complained.

**B. The Trial Court Correctly Ruled That Oliveros Did Not Prove Juror Misconduct or Prejudice.**

Oliveros asserts he is entitled to a new trial based on a number of instances of alleged juror misconduct, focusing on the presiding juror, Brian Parsons. Specifically, Oliveros submitted

the Declaration of Doreen Kasselder (Juror #21) in support of his assertion of juror misconduct. In her declaration, Ms. Kasselder claims that Parsons (1) stated that he works for Fluor Hanford, the same company for which Oliveros worked, and typically, on-the-job accidents would generate more documentation than that produced at trial by Oliveros; (2) stated that he is a “statistics man,” and the economic loss testimony of Dr. Clarence Barnes was inaccurate; (3) opined that Romm made a mistake, and he did not want to see Romm’s life ruined with a \$2,000,000 verdict in favor of Oliveros; (4) commented that he felt “browbeaten” by the large number of church people Oliveros had testify on his behalf; (5) asked each juror to write down a number that he or she thought was an appropriate verdict, and then used a calculator to average those numbers; and (6) “bullied” the other jurors by not allowing sufficient discussion and/or review of the evidence. (CP 56-59) Of note, Ms. Kasselder does *not* say that the jury agreed in advance to determine their verdict by averaging their respective figures. Ms. Kasselder’s declaration is conclusory in nature, and

provides very few factual details to support her conclusory statements. Further, Ms. Kasselder admits that she responded positively when the jury was polled, now claiming after the fact that she did not understand the purpose of the polling, despite the trial court's instructions at the time. (CP 56-59)

The parameters for evaluating a motion for a new trial on the basis of alleged juror misconduct were well set forth by the *Breckenridge* court:

Deciding whether juror misconduct occurred and whether it affected the verdict are matters for the discretion of the trial court, and will not be reversed on appeal unless the trial court abused its discretion. A strong affirmative showing of juror misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank, and free discussion of the evidence by the jury. A court abuses its discretion when its decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.”

\* \* \*

[A] trial court may not consider post-verdict juror statements that inhere in the verdict when ruling on a new trial motion, [and] the trial court abused its discretion by granting a new trial.

Appellate courts will generally not inquire into the internal process by which the jury reaches its verdict. The individual or collective thought processes leading to a verdict inhere in the verdict and cannot be used to impeach a jury verdict. Thus, a juror's post-verdict statements regarding the way in which the jury reached its verdict cannot be used to support a motion for a new trial. In *Gardner*, this court set forth the test for determining whether evidence of misconduct inheres in the verdict: One test is whether the facts alleged are linked to the juror's motive, intent, or belief, or describe their effect upon him.... Another test is whether that to which the juror testifies can be rebutted by other testimony without probing the juror's mental processes.

\* \* \*

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

150 Wn.2d at 203-05 (citations omitted) (underline added).

In cases where alleged juror misconduct is based on a juror purportedly introducing or injecting extrinsic evidence into the

deliberations, a court analyzes whether the alleged information actually constituted misconduct, and if misconduct did occur, whether it affected the verdict. *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 270, 796 P.2d 737 (1990). The trial court will review the alleged extrinsic evidence and determine whether the jurors' remarks probably had a prejudicial effect on the minds of the other jurors. The court then has discretion whether to grant a new trial, which decision will not be overturned absent an abuse of discretion. *Id.* at 270-71. If misconduct is found, great deference is due the trial court's determination that no prejudice occurred. *Id.* at 271. As stated by the *Richards* court:

In considering the affidavits filed, we entirely discard those portions which may tend to impeach the verdict of the jurors, and consider only those facts stated in relation to misconduct of the juror, and which in no way inhere in the verdict itself. It is not for the juror to say what effect the remarks may have had upon his verdict, but he may state facts, and from them the court will determine what was the probable effect upon the verdict. It is for the court to say whether the remarks made by the juror in this case probably had a prejudicial effect upon the minds of the other jurors. . . . ultimately the determination of whether juror misconduct in interjecting evidence

outside of the record affected the verdict is within the discretion of the trial court.

\* \* \*

The court must make an *objective* inquiry into whether the extraneous evidence, if indeed any existed, could have affected the jury's determination and *not a subjective* inquiry into the actual effect of the evidence on the jury, because the actual effect of the evidence inheres in the verdict. Juror misconduct involving the use of extraneous evidence during deliberations will entitle a party to a new trial if there are reasonable grounds to believe the party has been prejudiced.

*Id.* at 742-43.

Thus, Oliveros must make a strong, affirmative showing of juror misconduct, that caused him prejudice, and that does not inhere in the verdict. Each of Oliveros' allegations of juror misconduct, which focus solely and entirely on Parsons, are addressed, below.

1. **The Presiding Juror Was Not Biased Against Oliveros.**

Oliveros alleges that Parsons was "biased" against Oliveros because Parsons allegedly expressed an opinion that Romm's life

should not be ruined by a \$2,000,000 verdict because of a mistake (namely, running a stop sign). Additionally, Oliveros complains that Parsons did not disclose such bias during *voir dire*.

Oliveros' argument fails to distinguish between biases and opinions. Each juror brings life experiences and opinions with him or her to a case. In this matter, the alleged "biases" or opinions complained of by Oliveros as expressed by Parsons dealt with this case in particular, as opposed to general biases. For example, Parsons allegedly stated that he did not believe that Romm's life should be ruined by a \$2,000,000 verdict in this case. Parsons did not state that he would never, in any case, believe a \$2,000,000 verdict is appropriate, nor did he state that he would never award a plaintiff a large amount of money. Because most drivers have, at least at one time or another, accidentally committed a traffic infraction, it is not surprising that a juror might sympathize with Romm's situation, for which Romm took full responsibility. Moreover, Parsons' alleged comment simply

discloses a desire not to punish Romm, something which Washington law does not allow in any event.

Further, the statements of “bias” attributed to Parsons represent his thought processes and beliefs, and inhere in the verdict. Finally, it is highly improbable that such a statement by Parsons prejudiced Oliveros because Oliveros’ claim was not for \$2,000,000, and clearly did not have a value in that range.

**2. Extrinsic Evidence Was Not Inserted Into Deliberations.**

Next, Oliveros complains that Parsons injected extrinsic evidence into the juror deliberations, and that he was prejudiced thereby. Oliveros asserts that Parsons stated that he works for the same employer for whom Oliveros worked, and typically, on-the-job accidents are well documented. Oliveros claims that such statements cast in doubt both whether Oliveros’ accident occurred on the job, and the fault of Romm. This assertion is patently ridiculous in light of the fact that it was never disputed that

Oliveros' accident occurred on the job, and liability was admitted.

Romm's culpability was never an issue for the jury.

Oliveros also complains that Parsons allegedly stated that he is "a statistics man," and thought the economic analysis presented by Oliveros was inaccurate. Calling oneself a "statistics man," does not imply expertise or introduce expert testimony or extrinsic evidence into juror deliberations. Parsons' alleged statement is no different than a juror saying that he or she is an "athlete," "an artist," or a "craft person." At no time did Parsons claim that he had any specialized training or education in economic analysis, or that he was an expert in such analyses. He simply expressed his opinion that he was comfortable working with numbers and apparently disbelieved some or all of Dr. Clarence Barnes' testimony. Disbelieving a witnesses, whether lay or expert, is the right and prerogative of each and every juror. Indeed, they are instructed accordingly. (CP 67-70, 73) Further, Romm's position at trial was that the *assumptions* upon which Dr. Barnes based his opinion were flawed; namely, the assumptions

that Oliveros is disabled from working and that the 2002 accident caused that disability.

Additionally, this alleged statement by Parsons is not the type of novel or extrinsic evidence with which courts have been concerned. Instead, some specific fact outside of the evidence has been introduced by a juror. *See, e.g., Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 265, 744 P.2d 605 (1987) (juror investigated defendants on the stock exchange and then told other jurors those defendants could well afford to pay damages); *Loeffelholz v. Citizens for Leaders With Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 679, 82 P.3d 1199 (2004) (juror introduced evidence regarding salary that was not introduced at trial). Moreover, any statement by a juror to the effect that he disbelieved the economist or that the economist's computations were inaccurate, is the very type of individual thought processes, and implications of the weight the juror gave a certain piece of evidence, that inhere in the verdict and cannot be the basis for a new trial.

Finally, Oliveros claims that Parsons indicated an “anti-religious” bias toward Oliveros because he commented upon the large number of witnesses from Oliveros’ church who testified on behalf of Oliveros. A review of the Report of Proceedings reveals that there was significant repetitious, cumulative testimony about Oliveros’ role in his church, the changes in that role, disassociation from church acquaintances and friends, and the like. Indeed, every single lay witness called by Oliveros knew him through his church. A juror could reasonably have believed that Oliveros was over-emphasizing and/or highlighting his church affiliation in an effort to suggest that because he is a church-going person, he is honest and should be believed. In any event, Oliveros made the decision to present the witnesses he did. The fact that a juror believed the testimony was cumulative and overdone is irrelevant, does not constitute an anti-religious bias, and would not have an impact on the other jurors’ opinions or verdicts. Further, any such statements reflect Parson’s beliefs and thought processes and inhere in the verdict.

### 3. The Jury Considered All The Evidence.

Oliveros claims that the jury did not follow the court's instructions to consider all of the evidence, because it did not award any amounts for past economic damages, future economic damages, or loss of consortium. Oliveros confuses a failure to consider with a decision not to award. Each line of the verdict form is filled in with a number, albeit that number is zero in some cases. It appears the jury simply did not believe Oliveros' claims. Further, a jury's failure to follow the court's instructions inheres in the verdict and, thus, cannot be the basis for a new trial. *E.g., Chiapetta v. Bahr*, 111 Wn. App. 536, 542, 46 P.2d 797 (2002).

Oliveros contends that the jury *had* to award past medical expenses incurred by Oliveros. Indeed, on five occasions in his appellate brief, Oliveros erroneously states that Romm stipulated to past medical expenses, Brief of Appellant, pp. 3, 7, 11, 20 and 28, and thus those expenses must be awarded. A review of the citations to the record, however, reveals that Romm *did not* stipulate to the recovery of any medical expenses whatsoever.

Instead, Romm stipulated to the *amount* of medical expenses incurred by Oliveros between the 2002 and 2005 motor vehicle accidents, and agreed that a summary of those expenses could go back with the jury to the jury room. (CP 19) (RP 1216) At no time did Romm stipulate that the medical expenses claimed by Oliveros were reasonably and necessarily incurred as a result of the 2002 accident. Indeed, Romm disputed that fact.

Further, Dr. Wray testified that the minimal injuries Oliveros sustained in the accident would have resolved even without any medical treatment. Finally, Oliveros made no attempt to distinguish medical expenses incurred for alleged physical injuries from those incurred for alleged psychological injuries. As a result, if the jury believed Oliveros sustained some minimal physical injury in the accident, but disbelieved his claim of a traumatic brain injury, the jury would not have had the tools to determine the amount of past medical expenses to award. This was the trial strategy chosen by Oliveros. The jury's decision to

award zero dollars for medical expenses is consistent with the evidence at trial.

Similarly, Dr. Wray testified that any minimal injuries sustained by Oliveros in the 2002 accident had resolved prior to the time she evaluated him. Oliveros downplayed any physical injuries during his testimony, and during the testimony of his other witnesses. Instead, they focused entirely on his psychological problems. Thus, it was within the evidence for the jury to decide not to award any amounts for future medical expenses.

With regard to Oliveros' income loss claim, and related damages, Oliveros testified that his inability to work was due to psychological and cognitive consequences of a traumatic brain injury sustained by him in the 2002 accident. The evidence revealed that all imaging studies, including MRIs, x-rays and EEG studies were normal. Dr. Klein testified that Oliveros did not sustain any psychological injury or brain injury in the 2002 accident. The evidence showed that Oliveros did not go to the

hospital after the 2002 accident, drove himself home, and continued working on the way home. Oliveros did not stop working shortly after the 2002 accident, but rather continued working in his same job for approximately three years after the 2002 accident, and he did not actually retire until after the 2005 accident. Accordingly, it was within the evidence for the jury to determine Oliveros did not sustain a brain injury in the 2002 accident, and that no income loss was tied to the 2002 accident, when none of it was incurred for three years.

Oliveros seems to suggest that because Dr. Barnes' testimony was not disputed by another economist, it was not considered. Again, the jurors are instructed that they are the sole judges of the credibility of the witnesses, and are free to disregard testimony by an expert, as well as by lay witnesses. Further, as stated above, Romm disputed the underlying assumptions of Dr. Barnes' analysis. If the jury determined that Oliveros' psychological and mental complaints, and allegedly related

disability, were not caused by the 2002 accident, Dr. Barnes' opinion became irrelevant.

Similarly, if the jury disbelieved Oliveros' brain injury claim, and did not find that Oliveros' alleged psychological problems were caused by the 2002 accident, then the award of zero dollars for loss of consortium would follow. The jury certainly considered the claim, having filled in the verdict form with "\$Ø."

#### **4. The Verdict Was Proper.**

Oliveros complains that the verdict should be vacated because it was either an improper quotient verdict, or the verdict of Parsons only. For a quotient verdict to exist, the jurors must agree **in advance** to abide by the quotient verdict. *See, e.g., Oliver v. Taylor*, 119 Wn. 190, 193, 205 P. 746 (1922). There is no misconduct if the jurors have not first agreed to be bound by the quotient calculation, and thus, not grounds for a new trial. *Sorenson v. Raymark Industries, Inc.*, 51 Wn. App. 954, 959, 756 P.2d 740 (1988).

Here, juror Kasselder stated that Parsons asked each juror to write down what he or she thought was the proper verdict amount, and then he could “arrange it.” Parsons allegedly used a calculator to determine the award and wrote that number on the verdict form, without oversight or involvement of the others. Ms. Kasselder does not state that there was agreement in advance to render a quotient verdict. Indeed, Oliveros concedes “the other jurors did not know what [Parsons] was doing.” Brief of Appellant, p. 23. Thus, the jury’s verdict was not a quotient verdict.

Alternatively, Oliveros claims that Parsons devised the \$61,000 verdict on his own, excluding the other jurors, thus rendering a verdict of one. Even if these allegations were true, they would not be grounds for a new trial because they go directly to the individual and collective thought processes that lead to the verdict, and thus would inhere in the verdict. Post-verdict statements regarding how the verdict was reached cannot be used to impeach that verdict. *Breckenridge*, 150 Wn.2d at 203-05.

Further, Oliveros' assertion is belied by the fact that the jury was polled, and all agreed that the verdict represented the verdict of the jury.

**C. Substantial Justice Was Done.**

Oliveros contends that the jury's award of \$61,000 was shockingly low, and that substantial justice was not done.

Determination of the amount of damages is within the province of the jury, and courts are reluctant to interfere with a jury's damage award when fairly made. Denial of a new trial on grounds of inadequate damages will be reversed only where the trial court abuses its discretion.

\* \* \*

Where the proponent of a new trial argues the verdict was not based upon the evidence, appellate courts will look to the record to determine whether there was sufficient evidence to support the verdict. Where sufficient evidence exists to support the verdict, it is an abuse of discretion to grant a new trial.

*Palmer v. Jensen*, 132 Wn.2d 193, 197-98, 937 P.2d 597 (1997).

Here, sufficient evidence exists to support the jury's verdict. Throughout the trial, Oliveros all but ignored physical

complaints from the 2002 accident, and instead focused on the psychological ramifications and sexual dysfunction resulting from either the psychological ramifications or the medications used to treat those problems. The jury heard testimony and reviewed evidence establishing that there was no objective evidence of injury in the initial weeks and months after the 2002 accident, that imaging studies were normal, that Oliveros continued to work not only the day of the accident, but for three years consistently after the accident, that there were no physical findings to support or explain Oliveros' continuing complaints, that Oliveros' job was likely to end regardless of the accident, that Oliveros suffered from anxiety and other psychological problems unrelated to the 2002 accident, and that Oliveros did not sustain any injury in the 2002 accident that required medical treatment or caused him to be disabled. Additionally, the evidence showed a more significant accident in 2005 that involved Oliveros striking his head, and Oliveros did not terminate his employment until after that accident.

Jurors are instructed that they are the sole judges of the credibility of witnesses, and a jury is free to believe or disbelieve any witness. Credibility determinations cannot be reviewed on appeal. *See, e.g., Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). The jury apparently did not believe Oliveros regarding the 2002 accident being the cause of his psychological anxiety and stress. The jury apparently believed the medical evidence presented by Romm, and not that presented by Oliveros. The jury apparently did not believe that any medical treatment was required as a result of the 2002 accident, disbelieved the permanent disability claim, and thus, awarded no economic damages past, or future. The jury did, however, award \$61,000 in general damages, presumably to compensate Oliveros for his unusual reaction to the accident. There is nothing “shocking” about this amount. It is consistent with the evidence presented at trial. Thus, the trial court correctly ruled that additur is not appropriate and no basis exists for a new trial.

#### IV. CONCLUSION

For the reasons set forth above, the trial court's rulings should be affirmed.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of  
November, 2010.

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