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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

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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., a Washington Corporation,  
Respondents

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REPLY BRIEF OF APPELLANT

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1. **Despite the abuse of discretion standard applied to CR 59 Motions for a New Trial, whether jury conduct “inheres in the verdict” is a question of law, reviewed de novo, and a de novo review of the trial Court’s finding warrants granting Oliveros a new trial.**

In his response, Romm focused this Court’s attention exclusively on the abuse of discretion standard he contends wholly governs this appeal.

Romm is correct in only one sense: the standard of review for the denial of a Motion for New Trial pursuant to CR 59 is abuse of discretion. *Turner v. Stime*, 153 Wn.App. 581, 588, 222 P.3d 1243 (Div. III 2009). However, a Trial Court’s determination as to whether conduct “inheres in the verdict” is a question of law, reviewed de novo. *Turner v. Stime*, 153 Wn.App. at 589, citing *Ayers v. Johnson & Johnson Baby Prods. Co*, 117 Wash.2d 747, 768, 818 P.2d 1337 (1991); See *Robinson v. Safeway Stores, Inc.*, 113 Wash.2d 154, 158, 776 P.2d 676 (1989): “When such an order, however, is predicated upon rulings of law, no element of discretion is present.”

Stated differently:

“ “[a]n order granting or denying a new trial will not be reversed except for an abuse of discretion; this principle *being subject to the limitation that*, to the extent that such an order is predicated upon rulings as to the law, no element of discretion is involved’ ”. *Robinson v. Safeway Stores, Inc.*, 113 Wash.2d 154, 158, 776 P.2d 676 (1989) (quoting *Coleman v. George*, 62 Wash.2d 840, 841, 384 P.2d 871 (1963)(Emphasis ours)). *Ayers*, 117 Wash.2d at 1348.

As in *Ayers*, in *Oliveros v. Romm*, “the trial court’s order... involves the questions whether the jury’s voting procedure inheres in the verdict, and whether the polling of the jury in open court cured whatever irregularities there may have been in that procedure. These questions are questions of law. Therefore, the deference this court ordinarily gives a trial court’s granting of a new trial does not apply in this case.” *Id.*

In the case at bar, the ordinary deference the appellate court gives a trial court’s decision regarding a new trial should equally *not apply*. The statements by Mr. Parsons are extrinsic evidence and do not “inhere in the verdict.”

By definition, the injection of information by a juror to fellow jurors, which is outside the recorded evidence of the trial and not subject to the protections and limitations of open court proceedings, constitutes juror misconduct. *Richards v. Overlake Hosp. Medical Center*, 59 Wn.App. 266, 270, 796 P.2d 737 (1990). Novel or extrinsic evidence is defined as information that is outside all the evidence admitted at trial, either orally or by document. *Id.*

The uncontroverted evidence submitted to the trial court regarding jury misconduct originates in Juror #21, Doreen Kasselder’s declaration. Specifically, in paragraph six of her declaration, Kasselder asserts that the

Presiding Juror, Brian Parsons testified to the jury that "he knew how the Hanford area worked and whenever an incident happened, it was well documented." (Both Oliveros and Parsons worked for Four Hanford, a large employer on the Hanford Nuclear reservation). He went on to state that, based on his alleged knowledge of the entire Hanford area's policies regarding reporting of automobile accidents, that Oliveros "should have more documentation to prove every fact dealing with his employment at Flour Hanford" and intimated that his injury did not occur at work based on the lack of evidence introduced at trial. (See CP 56-59)

The question before this Court is whether the testimony of Mr. Parsons is extrinsic, or whether it is a statement indicative only of Mr. Parsons thought processes, which would inhere in the verdict. Again, this is an issue of law to be reviewed de novo. *Turner v. Stime*, 153 Wn.App. at 589.

In analyzing whether this testimony is extrinsic, this Court must take the uncontroverted Declaration of Ms. Kasselder at face value. No evidence has ever been introduced or proffered by the Defendant to rebut the fact that Mr. Parson's made these statements, despite the trial court inviting discovery in this regard. (See generally, RP 1224) In fact, despite the invitation to Romm by the Court to produce jury declarations that may

contradict Ms. Kasselder's Declaration, the Defense failed to do so. As Counsel for Romm indicated, not doing so, "maybe that was an error." (RP 1224)

In fact, *Lyberg v. Holz* requires that uncontroverted affidavits of jurors privy to the jury conduct in question must be accepted as true by a reviewing court in determining whether the trial court erred in refusing a new trial or reconsideration. *Lyberg* at 317. See also *Allison v. Department of Labor and Industries*, 66 Wash.2d 263, 401 P.2d 982 (1965) "No controverting affidavits were filed, nor was there any rebutting testimony offered by the respondent..." *Allison* at 265. The failure to produce this contradictory evidence in the present case left the trial court with no facts to weigh, Ms. Kasselder's Declaration standing alone as the sole evidence regarding jury misconduct.

Therefore, in so analyzing Parsons' uncontradicted testimony to the jury, several things are clear. First, Parsons specifically testified to the jury during deliberations that the "Hanford area" required that "incidents" be "well documented." (CP 56-59) This is testimony that cannot be impeached through cross examination. Clearly, this statement was an "injection of information by a fellow juror outside the recorded evidence" as discussed in *Richards*, 59 Wn. App. At 270.

Parsons also stated that, based on Hanford policy he was allegedly familiar with, Oliveros "should have had more documentation to prove every fact dealing with his employment at Flour Hanford." This is, again, testimony, extrinsic from that introduced at trial, that amounted to a statement to the jury as to what documentation is required for an automobile accident occurring in the Hanford area.

Third, Mr. Parsons suggested to the jury that because of these perceived deficiencies in the documentary evidence presented by Oliveros, that Oliveros was likely not to have been injured at work at all. (CP 56-59) These three statements are not statements about "life experiences" as the Trial Court found (RP 1240) and as Romm argues on appeal. They are extrinsic facts offered by a juror during deliberations to contradict or defend against the Plaintiff's case.

This Court— as the trial court should have done— must especially consider the unique factual circumstances of this case. Mr. Oliveros was, in fact, injured on the job. (RP 234-238) Mr. Oliveros made a claim for that on the job injury through Washington State Labor and Industries, which was documented extensively, and in fact, Labor and Industries concluded that Mr. Oliveros was disabled as a result of the injuries he received in the 2002 auto accident with Mr. Romm. (See generally, RP 1234) While

volumes of evidence, in fact, existed detailing this 2002 accident with Mr. Romm, that documentation, primarily produced through Labor and Industries, was disallowed at trial, citing the "collateral source rule." (See RP 289, RP 390-391) The policy of the collateral source rule is no mystery to either counsel and is well-rooted in the common law.

The context of the testimony by Mr. Parsons during deliberation results in obvious prejudice to Oliveros and had or could have had an obvious effect on the jury's verdict. In essence, Mr. Parsons introduced evidence that the trial court, for policy reasons concerning collateral sources, routinely excludes and did exclude in this case. While Oliveros might very well have wanted to demonstrate through his Labor and Industries file that his injuries flowed from the 2002 accident and that a full disability as a result of that accident was paid out by the state, thereby assisting the jury in finding Romm responsible for those injuries, the policy behind the collateral source rule restricted Oliveros from introducing evidence of this nature.

Apparently, Parsons didn't agree with the collateral source rule, and inserted his own testimony regarding the documentation of accident related on the job injury required at the "Hanford Area", which, if Plaintiff had offered in court, the trial judge would have excluded. In fact, Parsons

wholly disregarded the Courts second jury instruction, which prohibited discussion on this topic. (See RP 1105)

Unfortunately, Mr. Parson's testified to the jury that these documents exist, and that because Oliveros did not produce them in his case, that his injury either didn't exist, was minimal, or did not occur at work at all. This is precisely the type of extrinsic evidence that inappropriately influences a jury verdict, and does not "inhere in it." As such, the trial court committed an error of law when, knowing that the parties were precluded from discussing the Labor and Industries disability or the myriad documents that supported that work-related claim- coupled with Parsons' statement about what documentation is required for on-the-job injuries at "Hanford", contended this testimony "inhered in the verdict".

First, this Court must review the uncontradicted statements of Mr. Parsons and make a de novo determination as to whether this testimony "inheres in the verdict" or whether it is "extensive" and thereby constitutes juror misconduct. If indeed, as Oliveros contends, the Court finds on de novo review that these testimonial statements do not "inhere in the verdict" and constitute misconduct, then the only determination left for this Court is whether "there is a reasonable doubt as to whether the [statements] affected

the verdict and denied the [Plaintiffs] a fair trial." *Turner v. Stime*, 153 Wn.App. 581, 593, 222 P.3d 1243 (Div. III 2009).

Reasonable doubt has been defined a number of ways, including "one for which a reason exists and may arise from the evidence or lack of evidence." WPIC 4.01. In fact, reasonable doubt has also been discussed in terms of whether there is a "real possibility." See *State v. Bennett*, 161 Wash.2d 303, 165 P.3d 1241 (2007). Further "reasonable doubt" has been considered to be different from and less burdensome than "substantial doubt." *Id.* Statements made by Mr. Parsons in the jury room, bringing extrinsic evidence of alleged employment practices that were specifically excluded at trial under the rule of "collateral source" are clearly the type of testimony raising a reasonable doubt as to whether they affected the jury proceedings and the verdict. As such, the Trial Court's decision should be reversed and a new trial granted.

Romm's general theme in his Response Brief, is that everything and anything that Mr. Parsons testified to during jury deliberations simply "inheres in the verdict" attempting an end-run around the de novo aspect of this appeal. Indeed, the Court's have held that appellate courts will generally not inquire into the internal process by which the jury reaches its verdict. *Gardner v. Malone*, 60 Wash.2d 836, (1962). But when a juror's

affidavit establishes misconduct of the jury by facts or circumstances that do not inhere in the verdict, the facts *must* be considered. *Dibley v. Peters*, 200 Wash. 100, 93 P.2d 720 (1939) (Emphasis ours). In fact, "affidavits of jurors *should* be considered in so far as they stated the facts showing misconduct but not as showing the effect of such misconduct on the verdict, the latter being for the court to determine from the facts." *Gardner* at 842, quoting *Maryland Casualty Co. v. Seattle Electric Co.*, 75 Wash. 430, 134 P. 1097 (Emphasis ours)(1913).

Washington Courts have routinely considered overturning verdicts where "external" evidence has been introduced into the deliberation process. (See, inter alia, *Lyberg v. Holz*, 145 Wash. 316, 259 P. 1087 (1927), "one of the jurors stated to the others that the plaintiff had refused an offer of settlement for an ulterior purpose, and the injection of this 'evidence' was held to be misconduct warranting a new trial"; See also *State v. Burke*, 124 Wash. 632, 215 P. 31 (1923), *Woodruff v. Ewald*, 127 Wash. 61, 219 P. 851 (1923), and *Bouton-Perkins Lbr. Co. v. Huston*, 81 Wash. 678, 143 P. 146 (1914), in each of which a new trial was found justified on a showing that jurors had taken evidence dehors the record; *Halverson v. Anderson*, 82 Wash.2d 746, 513 P.2d 827 (1973)).

The test, as set out by *Gardner*, 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 process."

*Gardner*, 60 Wash.2d at 841.

Applying the *Gardner* analysis to the case at bar, the question becomes: Can the statements by Brian Parson's— that accidents at the Hanford area get well documented, that every fact dealing with employment at Hanford be presented, and that because of these presumed deficiencies in the evidence Oliveros was likely not even injured at work— be rebutted by other testimony without probing the juror's mental processes? See *Gardner* at 841. The answer is yes. Without probing the mental process of any juror, the testimony of Mr. Parsons could have easily been rebutted, cross examined, and overwhelmingly contradicted if Romm would have added Parsons as a defense witness and would have testified at trial, as opposed to his secret testimony in the jury room. However, because this evidence was introduced during jury deliberation, Oliveros was incapable of rebutting it.

And indeed, reviewing Parson's testimony as if it were introduced at trial is not novel— see *Gardner* at 846, where the Court concluded the misconduct "had the same prejudicial effect as if it had been introduced at

the trial.”

If this defense were raised by Romm, Romm would have begged-on a violation of the pretrial order which disallowed testimony or documentary evidence concerning the Labor and Industries claim. Further, any evidence the Defense would have attempted to introduce to support this testimony would have been subject to cross examination and rebuttal witnesses that would wholly discredit this defense.

Unfortunately Mr. Romm did not bring this testimony to light during trial; Mr. Parsons brought this testimony before the jury unilaterally and inappropriately during closed deliberations. This testimony undermined Mr. Oliveros case, prejudiced the verdict, and warrants a new trial.

As the *Gardner* Court opined, citing *Lyberg v. Holz*, 145 Wash. 316, 259 P. 1087 (1972):

The determinative rules or principles of law are plain and well established. If, upon a consideration of the whole of the pertinent record, it is reasonably doubtful whether or not the improper conduct affected the amount of the verdict or the decision of any other material issue, the verdict should be set aside by the trial judge; if, in such a case, a new trial is not granted, there is an abuse of discretion by the trial judge, and reversal becomes the duty of appellate courts. \* \* \* A proper corollary is that, when misconduct is once shown, and there is reasonable doubt as to its effect, that doubt must be resolved against the verdict. \* \* \*” (p. 320 of 200 Wash. page 1088 of 259 P.) (Italics ours.)

*Gardner* at 846; See also *Halverson v. Anderson*, 82 Wash.2d 746, 513 P.2d 827 (1973).

To summarize Mr. Oliveros' claim of jury misconduct, the

*Halverson* Court couldn't have been more on point:

"Here, one juror stated to the other jurors certain matters of fact for which he vouched and which had not been introduced in the trial. His statement was an act capable of objective proof without probing the juror's mental processes. Any juror could testify to the fact of his making the statement, and another juror could deny that he made it, and it would then become a question of deciding which juror or jurors was worthy of belief.

Here, all of the jurors from whom affidavits were obtained told the same story."

*Halverson v. Anderson* 82 Wash.2d 746, 751, 513 P.2d 827 (1973).

Mr. Oliveros' claim of jury misconduct is typical of that found in the *Halverson* case. Misconduct existed there, as it did here. Furthermore, that misconduct grants doubt as to the veracity of the verdict, and if there is doubt, it must be resolved in favor of a new trial. *Id.*

**2. Presiding Juror Parsons was biased and inappropriately influenced the jury's deliberation by introducing his bias.**

The right to trial by jury includes the right to an unbiased and unprejudiced jury. A trial by a jury, one or more of whose members are biased or prejudiced, is not a constitutional trial. See *Gardner v. Malone*, 60 Wash.2d 836, 376 P.2d 651, 379 P.2d 918; *Mathisen v. Norton*, 187 Wash.

240, 60 P.2d 1 (Wash. 1936); *Alexson v. Pierce County*, 186 Wash. 188, 57 P.2d 318 (Wash. 1936); *Heasley v. Nichols*, 38 Wash. 485, 80 P. 769 (Wash. 1905).

In the case at bar, despite initially taking an oath of impartiality, Parsons made it clear during deliberations that he was both biased and prejudiced against Lou Oliveros. His comments, including “that would just ruin an innocent guy (Romm) who made a mistake,” or “I sure don’t want this to be a mistrial and some other jury come in here and take two million dollars from Mr. Romm and award it to Mr. Oliveros,” and that “if (Oliveros) was any sort of church person he would have forgiven Romm”, as well as his comments about Oliveros’ religion, make it clear that Parsons acted in a manner consistent with defending Romm’s position even when the evidence and jury instructions required otherwise.

In fact, the Courts have granted new trials on a showing of less bias. In *Robinson v. Safeway Stores, Inc.*, 113 Wash.2d 154, 776 P.2d 676 (1989), the court held that a juror's failure to disclose his bias against California residents, and his perception of their role in the legal process, constituted juror misconduct because the plaintiff was from California. *Robinson*, 113 Wash.2d at 158-59. In *Allison v. Department of Labor & Indus.*, 66 Wash.2d 263, 265, 401 P.2d 982 (1965), the court held that the

trial court should have granted a new trial when a juror also failed to disclose bias during voir dire. The juror stated that, although he had appealed his workers' compensation claim three times, he could be fair and impartial. *Allison*, 66 Wash.2d at 264-65, 401 P.2d 982. Juror affidavits, however, established that during deliberations the juror said "*anyone claiming against the state should get everything they can.*" *Allison*, 66 Wash.2d at 265, 401 P.2d 982. (emphasis ours) See also, *Allyn v. Boe*, 87 Wash.App. 722, 943 P.2d 364 (1997):

"Here, the juror said that she knew Taylor, but then said nothing when asked if that would prevent her from giving both sides a fair trial. During deliberations, however, the juror then attacked Taylor's credibility: "he would testify to anything." This attack was not based on what she had heard or seen in the courtroom, but rather on information outside the trial record: she "knew him." Furthermore, the statement dealt with a material issue—the credibility of an expert on the land's value. Boe maintained throughout the trial that any claimed loss in excess of the value of the underlying property would not be reasonable. If the jury accepted the realtor juror's opinion that the property was worth \$125,000, rather than \$35,000, an award of \$75,000 would conform with Boe's argument. Although the juror's statement may not be as serious as those found in other cases, the trial court ruled that the statement constituted juror misconduct and, therefore, was grounds for a new trial. Because we cannot conclude that the trial court abused its discretion, we affirm the granting of a new trial based on juror misconduct.

*Allyn*, 87 Wash.App. at 730-31.

What's more, in light of *Allyn*, supra, Parsons' assertion to the jurors

that he was a “statistics man at his [Flour Hanford] job, and that he deals in statistics “all day long”, thereby supplying the jury with expert defense testimony to rebut Dr. Barnes economic evaluation, is yet another demonstration of bias and misconduct which does not “inhere in the verdict”. This issue was addressed squarely in *Allyn*.

Here, Parsons disregarded his obligation to be fair and impartial and served as Defense Counsel in deliberation, both introducing extrinsic evidence and clearly demonstrating his bias and disregard for the instructions from the Court. The combination of uncontradicted evidence presented to this Court through Ms. Kasselder’s declaration clearly allows this Court to “make an objective inquiry into whether the extraneous evidence could have affected the jury's verdict, not a subjective inquiry into the actual effect. *Richards*, 59 Wash.App. at 273. This bias on the part of Presiding Juror Parsons warrants reversal of the trial courts order denying a new trial.

#### CONCLUSION

Jury misconduct often involves a “totality of the circumstances” analysis when reviewed by the Court. Often, a simple statement of fact or opinion in isolation will not move a reviewing court to overturn a verdict, noting that our system of jurisprudence requires certain and stable verdicts.

However, in the case at bar, the un rebutted and uncontested testimony of Presiding Juror Parsons as a whole demonstrates both bias and the introduction of extrinsic evidence at trial that did not "inhere in the verdict." The statements clearly raise a reasonable doubt as to whether or not Mr. Oliveros received a fair verdict. This Court should grant Mr. Oliveros a new trial.

RESPECTFULLY SUBMITTED this 12 day of January, 2011.

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