DIVISION ONE
FILED: 12/20/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MARIA E. VASQUEZ SONANES,	)	1 CA-CV 10-0796
	)	
Plaintiff/Appellant,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
CORE CONSTRUCTION SERVICES OF ARIZONA, INC., dba CORE CONSTRUCTION, an Arizona corporation; L.R. BORELLI, INC., dba PARTITIONS & ACCESSORIES, CO., an Arizona corporation,	)	Rule 28, Arizona Rules of Civil Appellate Procedure)
	)	
Defendants/Appellees.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-090796

The Honorable Karen A. Potts, Judge

AFFIRMED

Koglmeier Smith, P.L.C. — Mesa
By John M. Alston and Kenneth P. Smith
Attorneys for Plaintiff/Appellant

Righi Hernandez, P.L.L.C. — Phoenix
By Richard L. Righi, Chris H. Begeman, and Jalana Commerford
Attorneys for Defendant/Appellee Core Construction

O'Connor & Campbell, P.C. — Phoenix
By J. Daniel Campbell and Shane Dyet
Attorneys for Defendant/Appellee Partitions & Accessories, Co.

K E S S L E R, Judge

¶1 Maria E. Vasquez Sonanes ("Sonanes") appeals from the trial court's denial of her motion for additur or new trial based upon an alleged jury mistake. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Sonanes was injured at a construction site when several bathroom stall partitions collapsed and knocked her off of a ladder. She sustained serious injuries to her right knee and required three surgeries.

¶3 Sonanes and her spouse, Ricardo Puerta ("Puerta"), filed a negligence suit against (1) Core Construction Services of Arizona, Inc., dba Core Construction ("Core Construction"), the general contractor on the construction site, and (2) L.R. Borelli, Inc., dba Partitions & Accessories Co. ("Partitions"), the subcontractor responsible for installing the partitions.[1] Sonanes sought $127,094.65 in medical expenses, as well as compensation for lost wages, permanent injuries, and pain and suffering.

¶4 During deliberations, the jury submitted the following question to the trial court: "Is there a correlation between the dollar amount awarded vs. the percentages of fault listed below the dollar amount? (on the verdict form)." After conferring

[1] The parties later stipulated to dismiss Puerta's claims.

with counsel, and receiving no objection, the trial court responded: "This question is answered in your final jury instructions." The relevant instructions provided:

> On Defendant Core Construction and/or Defendant Partitions claim that . . . Sonanes was at fault, you must decide whether Defendant Core Construction and/or Defendant Partitions has proved that . . . Sonanes was at fault and, under all the circumstances of this case, whether any such fault should reduce . . . Sonanes' full damages. These decisions are left to your sole discretion.
>
> If you decide that . . . Sonanes' fault should reduce . . . Sonanes' full damages, the court will later reduce those damages by the percentage of fault you have assigned to . . . Sonanes.

¶5 The jury reached a unanimous verdict awarding Sonanes $150,000 in damages. The verdict also provided that Sonanes was 90% at fault for her injuries, Core was 10% at fault, and both Partitions and non-party Executive Detailing (Sonanes's employer) were not at fault. The jurors were excused after the parties elected not to poll them.

¶6 Counsel for Sonanes later spoke with jurors who claimed that the $150,000 award already incorporated the 90% reduction for fault. Sonanes then moved for additur based upon insufficient damages. Alternatively, Sonanes requested that the trial court reconvene the jury to ascertain their intent, or

order a new trial in accordance with Arizona Rules of Civil Procedure 59(a)(5) and (8).

¶7 Following responses by Partitions and Core Construction, Sonanes filed a reply and attached three affidavits. The affidavits were from her counsel, recounting conversations with jurors who asserted their intent to award Sonanes 10% of $1,500,000 or $150,000.

¶8 The trial court denied the motion, stating that Sonanes had filed an untimely reply. In addition, the trial court found that the evidence presented was sufficient to support a $150,000 damage award. Sonanes moved for reconsideration. The trial court denied the motion, explaining that neither the affidavits nor an unauthenticated letter from Juror No. 8 entitled her to the relief she requested. Sonanes appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21 (2003) and 12-2101(A)(1) (Supp. 2011).

DISCUSSION

¶9 Sonanes claims that the trial court abused its discretion by: (1) failing to correct the jury's alleged mistake on the verdict form to reflect its true intent or to reassemble the jury to determine its intent; (2) refusing to grant Sonanes's motion for additur or new trial; and (3) failing to

consider Sonanes's reply to the motion for additur and the attached affidavits.

I. REASSEMBLING THE JURY

¶10 Sonanes first claims that she is entitled to a corrected verdict because the jury unanimously intended to award her 10% of $1,500,000, not 10% of $150,000. Because the jury allegedly made a mistake on the verdict form, she argues that the trial court abused its discretion in failing to reassemble the jury to confirm its true intent. We disagree.[2]

¶11 Sonanes relies on *State v. Miller* to support her argument. 178 Ariz. 555, 875 P.2d 788 (1994). In *Miller*, the Arizona Supreme Court held that the trial court erred in refusing to hold an evidentiary hearing to determine whether improper communications with a juror affected the verdict. *Id.* at 557, 875 P.2d at 790. While delay may render a productive hearing improbable, "the lower court is in the best position to determine if the jurors can be reassembled and whether their memories are sufficiently reliable to ensure that [the] defendant received a fair trial." *Id.* at 558, 875 P.2d at 791. In reversing the order denying the hearing, the Court held that

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[2] Sonanes argues that the trial court also erred in failing to correct a clerical mistake made by the jury pursuant to Arizona Rule of Civil Procedure 60(a). As counsel for Sonanes conceded at oral argument that the mistake was not a clerical error but a misunderstanding of the jury instructions, we decline to address the argument further.

"juror misconduct warrants a new trial if the defense shows actual prejudice *or if prejudice may be fairly presumed from the facts*." *Id.*

¶12 The conduct in *Miller* is factually distinguishable from what occurred here. The record presents no evidence of juror misconduct, tampering, or influence that might have tainted the verdict. Consequently, we find the trial court did not abuse its discretion in refusing to reassemble the jury to conduct a hearing on their deliberations. *See State v. Snowden*, 138 Ariz. 402, 404, 675 P.2d 289, 291 (App. 1983) ("Neither the trial court nor this court is permitted to consider any inquiry into the subjective motives or mental processes leading a jury to assent or dissent from the verdict."); *Commonwealth v. Pytou Heang*, 942 N.E.2d 927, 952 (Mass. 2011) ("Even where an evidentiary hearing is appropriate, 'evidence concerning the subjective mental processes of jurors, such as the reasons for their decisions,' is inadmissible to impeach a verdict." (quoting *Commonwealth v. Fidler*, 385 N.E.2d 513, 517 (Mass. 1979))).

II. IMPEACHING THE VERDICT WITH JUROR STATEMENTS

¶13 Alternatively, Sonanes argues that a new trial or additur was required to correct the jury mistake. In support of this argument, Sonanes relies on conversations between her attorneys and multiple jury members in which they claimed that

they intended to award Sonanes $150,000 *after* factoring in degrees of fault. We review a denial of a new trial or additur for an abuse of discretion. *Delbridge v. Salt River Project Agric. Improvement & Power Dist.*, 182 Ariz. 46, 53, 893 P.2d 46, 53 (App. 1994) ("The trial court has considerable discretion in the grant or denial of a motion for new trial, and we will not overturn that decision absent a clear abuse of discretion."); *Bustamante v. City of Tucson*, 145 Ariz. 365, 366, 701 P.2d 861, 862 (App. 1985) ("[T]he question of additur is left to the greatest possible discretion of the trial court, and its decision will not be disturbed on appeal except for a case of clear abuse.").

¶14 "The proper evidence of the decision of the jury is the verdict returned by them upon oath and affirmed in open court; it is essential to the freedom and independence of their deliberations that their discussions in the jury room should be kept secret and inviolable . . . ." *Fidler*, 385 N.E.2d at 516. To admit juror testimony as to what occurred "would create distrust, embarrassment and uncertainty." *Id.* "Arizona follows the long established rule that testimony from or affidavits of jurors will not be admitted to impeach a verdict unless they involve matters that are not inherent in the verdict." *Brooks v. Zahn*, 170 Ariz. 545, 549, 826 P.2d 1171, 1175 (App. 1991).

Exceptions to this rule are found in Arizona Rule of Evidence 606(b):

> Upon an inquiry into the validity of a verdict in a civil action, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict, or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether *extraneous prejudicial information* was improperly brought to the jury's attention or whether any *outside influence* was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror, concerning a matter about which the juror would be precluded from testifying, be received for these purposes.

(Emphasis added.) If the "information does not come within a recognized exception to Rule 606(b), the information is not admissible and cannot be considered." *Richtmyre v. State*, 175 Ariz. 489, 493, 858 P.2d 322, 326 (App. 1993). *Compare State v. Pearson*, 98 Ariz. 133, 136, 402 P.2d 557, 559 (1965) (stating juror affidavits can be considered to show third party misconduct), *Kirby v. Rosell*, 133 Ariz. 42, 43, 46-47, 648 P.2d 1048, 1049, 1052-53 (App. 1982) (holding the court properly considered a juror affidavit alleging the jury's use of a business law textbook), *and Bd. of Trustees Eloy Elementary Sch. Dist. v. McEwen*, 6 Ariz. App. 148, 154-55, 430 P.2d 727, 733-34

(1967) (holding the court properly considered a juror's own affidavit disclosing failure to reveal prejudice on voir dire), *with Martinez v. Schneider Enters., Inc.*, 178 Ariz. 346, 347, 348-49, 873 P.2d 684, 685, 686-87 (App. 1994) (stating the trial court could not consider an affidavit stating that the jury did not include certain expenses based on assumed insurance coverage), *Johnson v. Harris*, 23 Ariz. App. 103, 106, 530 P.2d 1136, 1139 (1975) (stating the court could not impeach the judgment with an affidavit alleging that the verdict was the result of sympathy or a desire to avoid a mistrial), *Swinehart v. Baker*, 6 Ariz. App. 30, 31-32, 429 P.2d 522, 523-24 (1967) (holding the verdict could not be impeached by an affidavit stating a juror had visited the accident scene), *and Dover Corp. v. Dean*, 473 So. 2d 710, 712 (Fla. Dist. Ct. App. 1985) ("[A] motion alleging a juror thought her verdict would bring about a different result or that she miscalculated the damage, or did not understand the judge's instruction on certain matters alleges matters inhering in the verdict. They are not adequate grounds for granting a jury interview.").

¶15 Despite the above, Sonanes argues that Rule 606(b) does not preclude the use of juror testimony to show an error in the verdict. She relies on dicta in *Brooks*:

> Rule 606(b) does not prohibit all testimony related to jury verdicts; some narrow exceptions apply to the general rule

> prohibiting testimony to impeach a verdict. *A juror's testimony is admissible to show an error in the judgment as not conforming to the jury's findings* . . . .

170 Ariz. at 550, 826 P.2d at 1176 (emphasis added). The quoted language relied solely on *Kirby*, 133 Ariz. at 43, 648 P.2d at 1049, which stated that "[a]ffidavits of jurors have been considered in Arizona to show an error or mistake in the judgment entered as not conforming to the findings of the jury." *Kirby*, in turn relied solely on *Southern Pacific Railroad Co. v. Mitchell*, 80 Ariz. 50, 292 P.2d 827 (1956).

¶16 We find that none of the above three cases supports admission of affidavits here because the stated exception was either dicta or involved matters not inherent in the verdict itself. Thus, the statements in *Brooks* and *Kirby* were merely dicta. In *Brooks*, this court held that juror affidavits were inadmissible to show another juror's failure to disclose bias and prejudice on voir dire because the affidavits were based on knowledge gained during jury deliberations. 170 Ariz. at 550, 826 P.2d at 1176.

¶17 In *Kirby*, we held juror affidavits were admissible under Rule 606(b) to show a juror had relied on a business law textbook and had read to the jury certain legal definitions from the textbook. 133 Ariz. at 43, 47, 648 P.2d at 1049, 1053. We noted that juror affidavits are inadmissible "to impeach a

verdict where the facts sought to be shown are such as inhere in the verdict" itself. *Id.* at 43, 648 P.2d at 1049 (internal quotation marks omitted). However, we also stated that exceptions to the general rule barring such affidavits existed when the affidavits were used "to show an error or mistake in the judgment entered as not conforming to the findings of the jury," *Id.* (citing *Southern Pacific Railroad*, 80 Ariz. at 66, 292 P.2d at 837), because such an exception did not involve a matter inherent in the verdict itself. *Id.*

¶18 Thus, the question becomes whether the use of juror affidavits to impeach the verdict involved matters inherent in the verdict itself. Two cases guide our conclusion that the use of affidavits here involves a matter inherent in the verdict: *Southern Pacific Railroad* and *Valley National Bank of Arizona v. Haney*, 27 Ariz. App. 692, 558 P.2d 720 (1977). In *Southern Pacific Railroad*, the jury signed two verdict forms in favor of the plaintiff, entering damages at $35,000 for count one against one defendant, but leaving the amount blank on the verdict form for count two as against a second defendant. 80 Ariz. at 65, 292 P.2d at 837. The court had instructed the jury that if it found negligence in the operation of the railroad, it should return a verdict for the plaintiff on count one, if it found negligence by a related defendant in the maintenance of the crossing, it should return a verdict for the plaintiff on count

two, and if it found negligence on both counts, it should return a verdict for the plaintiff on both counts. *Id.* at 64-65, 292 P.2d at 836-37. The trial court received affidavits from jurors showing it intended to award an aggregate of $35,000 on both counts and accordingly amended count two to insert the $35,000 award. *Id.* at 65, 292 P.2d at 837. We found no error noting first that "[m]anifestly [the jury] found plaintiff's damages at $35,000" because of the award on count one. *Id.* We then continued and noted that jury affidavits can be used to show that the verdicts as received did not embody the jury's true finding by reason of mistake and that the defendants were not prejudiced by the amendment because the amount of recovery was not increased. *Id.* at 66, 292 P.2d at 837.

¶19 In contrast, in *Valley National Bank*, the jury returned a verdict for the plaintiff arising from an automobile accident. 27 Ariz. App. at 693, 292 P.2d at 721. The defendants contended that the $80,000 verdict should have been set aside in part because two juror affidavits attached to a motion for new trial showed that the verdict was based in part on damages for the death of the plaintiff's parents. *Id.* We affirmed the denial of the motion to set the verdict aside, holding the affidavits inadmissible because they inhered in the verdict itself. *Id.* at 694, 558 P.2d at 722. After discussing *Southern Pacific Railroad*, we stated that the error or mistake

in the verdict there did not "inhere in the verdict as they occurred separate and apart from jury deliberations." *Id.* at 693, 558 P.2d at 721. We then explained that a matter inherent in the verdict that cannot be impeached by juror affidavit "extends to [*a*]*ll* matters discussed by the jury in arriving at the verdict whether proper or not" and that affidavits are inadmissible as to "any matter discussed by the jurors in the sanctity of the jury room during the course of their deliberations." *Id.* at 694, 558 P.2d at 722 (emphasis added). As we concluded:

> To permit the attack attempted here, would subject jurors to harassment by a defeated party in an effort to secure evidence of improper deliberations sufficient to set aside a verdict. We dare not open what, in the appellee's words, would be a "Pandora's Box of slithering affidavits."

Id.

¶20 The facts here are more like the facts in *Valley National Bank* than *Southern Pacific Railroad*. In the latter case, the jury had merely omitted the amount of damages it intended to award to the plaintiff against one defendant arising from a single accident caused by the concurrent negligence of two defendants. The verdict as to count two was incomplete on its face and the jury affidavits were meant to confirm what they had intended. Thus, the jury affidavits were not used to impeach the verdict by showing the jury deliberations, but were

merely used to complete a verdict form. Here, as in *Valley National Bank*, the appellant desires to use affidavits to peek into the deliberations of the jury to show what the jury might have meant to award to Sonanes and to impeach what appears to be an otherwise complete and proper jury verdict. *Nat'l*, 27 Ariz. App. at 694, 558 P.2d at 722. Clearly, such a use of affidavits is an attempt to pierce the sanctity of jury deliberations. We will not open that Pandora's box of slithering affidavits.

¶21 Accordingly, the trial court did not abuse its discretion in failing to consider juror statements to impeach the verdict. To hold otherwise would "make what was intended to be a private deliberation, the constant subject of public investigation . . . to the destruction of all frankness and freedom of discussion and conference." *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915).

III. MOTION FOR ADDITUR OR NEW TRIAL

¶22 Sonanes argues that the trial court abused its discretion in failing to grant her motion for additur or new trial based on insufficient damages. "Like the jury, [the trial judge] has had the opportunity to observe the witnesses' demeanor on the stand, and his ruling on additur, remittitur, and new trial, because of an inadequate or excessive verdict, will generally be affirmed, because it will nearly always be more soundly based than ours can be." *Creamer v. Troiano*, 108

Ariz. 573, 575, 503 P.2d 794, 796 (1972). Thus, the trial court has "the greatest possible discretion" with regard to additur, and its decision will not be reversed absent a clear abuse of discretion. *Bond v. Cartwright Little League, Inc.*, 112 Ariz. 9, 16, 536 P.2d 697, 704 (1975).

¶23 "A party is responsible for making certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised on appeal. When a party fails to include necessary items, we assume they would support the court's findings and conclusions." *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995) (citations omitted); ARCAP 11. As Sonanes failed to provide us with the transcripts of the three-day jury trial, we assume the record supports the trial court's ruling. *Kohler v. Kohler*, 211 Ariz. 106, 108 n.1, ¶ 8, 188 P.3d 621, 623 n.1 (App. 2005); *Johnson v. Elson*, 192 Ariz. 486, 489, ¶ 11, 967 P.2d 1022, 1025 (App. 1998). Therefore, we find the trial court did not abuse its discretion in refusing to grant an additur or new trial based on insufficient damages.[3]

[3] On appeal, Sonanes argues for the first time that she is also entitled to relief pursuant to Arizona Rules of Civil Procedure 59(a)(1) and (3). Because she failed to raise these grounds in her trial court briefing, we decline to address them on appeal. *See Winters v. Ariz. Bd. of Educ.*, 207 Ariz. 173, 177, ¶ 13, 83 P.3d 1114, 1118 (App. 2004).

IV. REPLY IN SUPPORT OF MOTION FOR ADDITUR

¶24 Sonanes argues that the trial court erred in disregarding her reply to the motion for additur and attached affidavits. Arizona Rule of Civil Procedure 59(b) provides a trial court with "broad discretion to act in the interests of justice." *McCutchen v. Hill*, 147 Ariz. 401, 406, 710 P.2d 1056, 1061 (1985). "Accordingly, a trial court's decision not to accept additional evidence must be upheld on appeal unless there is a clear showing that there was no reasonable basis within the range of discretion for the action taken." *Flying Diamond Airpark, L.L.C. v. Meienberg*, 215 Ariz. 44, 50, ¶ 24, 156 P.3d 1149, 1155 (App. 2007) (internal quotation marks omitted).

¶25 Sonanes filed her Motion for Additur on May 26, 2010. Core Construction and Partitions filed their responses on June 15, 2010, and June 16, 2010, respectively. Sonanes, therefore, had until June 28, 2010 to file her reply. *See* Ariz. R. Civ. P. 7.1(a) (moving party has five days to reply to a response); Ariz. R. Civ. P. 6(a) (excluding "intermediate Saturdays, Sundays and legal holidays" when the time period allowed is less than eleven days); Ariz. R. Civ. P. 6(e) (providing an additional five calendar days when documents are served by mail). As Sonanes filed her reply on June 30, 2010, the trial court did not abuse its discretion in finding it untimely.

CONCLUSION

¶26 For the foregoing reasons, we affirm the trial court's decision in all respects, and award Core Construction and Partitions their costs on appeal. *See* A.R.S. § 12-342(B) (2003).

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Presiding Judge

/s/
PETER B. SWANN, Judge