Buker v. King, No. 523-11-05 Wrcv (Eaton, J., Aug. 5, 2009)

STATE OF VERMONT
WINDSOR COUNTY

ROBIN L. BUKER	)	
	)	**Windsor Superior Court**
v.	)	**Docket No. 523-11-05 Wrcv**
	)	
RICHARD JOHNSTON KING,	)	
Special Administrator of the	)	
Estate of Joseph Brouillard	)	

DECISION
Defendant's Motion for New Trial

Plaintiff Robin Buker was injured in a 2003 automobile accident that she claims was caused by the negligence of Joseph Brouillard. It was undisputed at trial that Mr. Brouillard was a diabetic who experienced a hypoglycemic blackout at the time of the accident. The central issue was whether the hypoglycemic event was a sudden and unforeseeable medical emergency that should excuse Mr. Brouillard from liability. In a special verdict, the jury found that Mr. Brouillard breached a duty of care to Ms. Buker, that his breach was not excused by a sudden and unforeseen medical event, and that the breach was the proximate cause of her injuries. The jury awarded compensatory damages to Ms. Buker in the amount of $876,264.

The present matter before the court is a motion for new trial filed by defendant Richard Johnston King as special administrator for the Estate of Joseph Brouillard. Mr. King asserts that the jury verdict should be vacated, and a new trial ordered, because of the cumulative effects of five separate and very serious allegations of juror misconduct and irregularities during the trial.

The first allegation of juror misconduct is that at least seven of the panel members failed to respond accurately to important questions presented in a written questionnaire circulated prior to *voir dire*. Mr. King argues that he was prejudiced during juror selection by the withholding of accurate information, and contends that the overall lack of candor on the part of the panel members shows that the jury was not impartial.

The second and third allegations of juror misconduct involve events that occurred in the jury room during deliberations. Mr. King presented an affidavit from one juror who felt that she had been coerced by her fellow jurors into surrendering her true

convictions and agreeing to the verdict. She also asserted that the jurors had considered extraneous evidence in the jury room.

The fourth allegation of juror misconduct involves an unusual off-the-record meeting held in the courthouse immediately following the announcement of the verdict. The informal gathering was attended by the judge, the attorneys, the parties, and some (but not all) of the jurors. On the way to the informal meeting, the foreperson allegedly physically embraced the plaintiff and said something to the effect that she, the foreperson, had once been a plaintiff herself and that she wanted to "return the favor." Mr. King alleges that this exchange shows actual bias on the part of the foreperson.

The fifth claim of error is that the trial judge permitted the jurors to ask questions directly from the jury box during the trial. In other words, the jurors directly questioned the witnesses without the questions first being screened by the court. Mr. King did not object to this procedure during trial, and he concedes in his motion that neither the questions nor the answers themselves rise to the level of reversible error. He maintains, however, that the procedure was "illustrative of the overall irregularity of the proceeding," and contends that a new trial should be ordered in light of the cumulative effects of these irregularities.

Mr. King also argues that a new trial should be awarded for the reason that certain evidentiary rulings were erroneous and unduly prejudicial to the defense. Finally, he contends that the size of the jury verdict reflects passion or prejudice on the part of the jury.

It must be noted at the outset that the undersigned did not preside over the jury trial. The trial judge recused himself from the case after the motion for new trial was filed, explaining on the record that he had been "privy to certain events that occurred post verdict," and that as a result of those events, he had "personally formed some reactions and impressions that have been of such a nature and such a live nature with me that it would make it difficult for me to maintain impartiality in looking at this and assessing the post-verdict contentions of either party."

The undersigned held an evidentiary hearing on the motion for new trial on April 27, 2009. The court heard testimony from foreperson Kelly Depalo and juror Tracey White on the allegations of juror misconduct. The parties also presented oral argument on the other issues raised by the motion for new trial. Ms. Buker was present at the hearing and was represented by attorneys David Cullenberg and Jeffrey Behm. Mr. King was represented at the hearing by attorneys Robert Rachlin and Eric Poehlmann. The following findings of fact and conclusions of law are based on the record and the evidence presented at the hearing.

Findings of Fact

Each of the prospective jurors was asked to complete a written questionnaire prior to jury draw. In pertinent part, the questionnaire asked prospective panel members to identify whether they had ever been involved in any prior civil or criminal lawsuits.

Of the panel members who were ultimately selected and seated, seven did not answer this question accurately or completely. Some of the jurors failed to disclose their prior involvement in various civil lawsuits such as small claims actions, foreclosure actions, and collections cases. Several others did not report prior misdemeanor convictions for unlawful trespass, petit larceny, or driving under the influence. Accurate answers were not ascertained until after the jury verdict had been returned.

Some of the undisclosed civil actions were recent in nature. Each of the undisclosed criminal convictions, however, were very remote in time from the date of the jury draw. One juror was convicted for unlawful trespass and petit larceny 26 years ago, when he was nineteen years old. Another juror was convicted for driving under the influence sixteen years ago. A third juror was convicted for DUI nine years ago.

During the trial, the jurors were permitted to question the witnesses directly. The procedure employed by the trial court was that the jurors would raise their hand during the questioning of witnesses and, once recognized, ask questions directly from the jury box. The questions were not submitted in writing to the court for prior screening.

Mr. King did not submit any transcripts of the juror questions as evidence in connection with the motion for a new trial. He concedes that none of the questions in and of themselves prejudiced his defense in a manner that requires a new trial. Nevertheless, since Mr. King has argued that the juror questions were "illustrative of the overall irregularity of the proceeding," the court reproduces the following juror question as an example of the type of juror questioning that occurred during the trial.

The question was asked just after Attorney Cullenberg finished cross-examining Dr. Muriel Nathan. Dr. Nathan had been testifying about hypoglycemic events and blood sugar fluctuations in general and specifically about Mr. Brouillard's blood sugar levels on the date of the accident.

> JUROR 11: Question.
>
> THE COURT: Yes.
>
> JUROR 11: When you said that his sugar was twenty-nine, who did his blood sugar at this accident?
>
> MR. CULLENBERG: The medics.
>
> JUROR 11: Okay. Do you know—

THE COURT: Hang on, you can't testify, but we need to point somewhere on the record where that exists.

DR. NATHAN: It's this, this sixteen exhibit, page two, on the bottom line, FSBS twenty-nine. The only thing—am I supposed to—

THE COURT: The question was who did it.

DR. NATHAN: Okay. The only thing I don't know how he did it. I don't know if he actually drew the blood and analyzed it, or who, he had a meter.

JUROR 11: The only thing, the question I have is, okay, this gentleman was hurt in the accident, he was laying on the side of the road, the way it was told, for fifteen minutes with his body in trauma. Okay. From being hurt in the accident. Don't you think that that's going to fluctuate that diabetes, that sugar blood level?

THE COURT: Okay.

JUROR 11: It's, it's stress on a diabetic.

THE COURT: We'll note the question. If you'd like to have the witness answer that, we can have her answer that.

MR. CULLENBERG: Go ahead.

DR. NATHAN: Yeah, well, that was my concern that I voiced earlier, I didn't know how quickly they got to the gentleman, Mr. Brouillard, I don't know. You know, again, I've had people with lots of stress where their blood sugar plummets, but again, that's speculation. You know, it may have been twenty-nine at the wheel, it may have been sixty-nine at the wheel. It may be a hundred ten. I have no way of knowing.

JUROR 11: Sugar fluctuates awfully quickly. He's on the side of the road in the cold, in trauma, for fifteen minutes, before he's even checked.

THE COURT: Hang on. I don't know if that's a question. Or a statement of position. So, in asking the questions, the jury should have in mind that your questions

> are to find out information. There's a line between being a juror, a judge of the facts, and being an investigator, so to speak, and I'm not saying that's what Ms. White is engaging in, but the best practice is to let the lawyers ask their questions. When the lawyers are done with their questions, jot down your questions to see if that's something that has been answered as the lawyers go along on that. Okay. So proceed.

Juror #11 is the same juror (Ms. White) who has since alleged that she was coerced by her fellow jurors into surrendering her true convictions.

Ms. White testified during the evidentiary hearing. She explained that although she manifested assent with the verdict in the jury room and in open court, she now disagreed with the verdict. She stated that there had been heated discussions in the jury room, that she felt pressured by the other jurors to agree to the verdict, and that she ultimately decided to agree with the verdict in order to end her involvement in what had been a difficult and unpleasant process for her.

There was nothing in Ms. White's testimony, however, to suggest that her experience was different from that of many other jurors who find themselves in the minority opinion during deliberations. All of her reasons for feeling pressured by the other jurors related to interpersonal relationships and factors that were part of the internal deliberations of the jury. In the final analysis, she could have held out during the deliberations or told the judge in open court that she did not agree with the verdict when it was returned. She did not. Instead, for her own personal reasons, she agreed with the jury verdict both in the jury room and in open court.

After the verdict, defense counsel requested an opportunity to meet with the jurors—apparently as a professional learning opportunity. The request was granted by the trial judge, who subsequently invited the jurors to meet with him, the attorney, and the parties in the courthouse jury room. Some (but not all) of the jurors attended the informal post-trial meeting. The meeting was not on the record, and there were no ground rules governing the conduct of any of the participants. On the way to this meeting, foreperson Kelly Depalo physically embraced the plaintiff and said something to the effect that she, the foreperson, had once been a plaintiff herself and wanted to "return the favor."

Ms. Depalo testified about this event at the evidentiary hearing. She acknowledged that she may have hugged Ms. Buker as they were going into the post-trial reception. However, she testified that she had previously been a plaintiff in a civil case that lasted for several weeks and resulted in a hung jury. She was grateful to that jury for their diligence in considering her case, even though they did not reach a verdict. She attempted to thank the jurors after her trial, but was reprimanded by the trial judge for doing so. Here, on the other hand, post-trial contact between the jurors and the plaintiff was invited. Ms. Depalo testified that her statement about wanting to return the favor

was her expression of her desire to be as diligent in considering this case as she felt the jury had been in her case. The court finds this explanation to be credible.

The court also does not find that the physical embrace revealed any bias on the part of the foreperson. The jury had just participated in four days of trial, during which they heard evidence of Ms. Buker's injuries, which they found to be significant. The jury was then invited by the judge to meet with the plaintiff and the other trial participants in the courthouse under informal and friendly circumstances. Some (but not all) of the jurors accepted the invitation. The foreperson and the plaintiff found themselves walking together to the meeting. A brief physical embrace under these circumstances does not cross the line from normal human compassion into bias.

Ms. Depalo was then permitted, at her request, to take her juror notes home with her. She credibly testified that her intent was to use the information contained in the notes for reference as to her boyfriend's diabetic condition. The notes were subsequently returned to the court and remain under seal. Although the court finds this handling of the notes to be improper, the court does not find that it shows bias on the part of Ms. Depalo.

In making these findings, the undersigned is aware that the trial judge recused himself on the basis of something that transpired at the informal post-verdict meeting. The undersigned's ability to ascertain exactly what happened at that meeting, however, is severely handicapped by the absence of any contemporaneous record. The findings are therefore based on the testimony and evidence presented at the evidentiary hearing on the motion for new trial. As detailed above, the credible evidence presented does not show bias on the part of the foreperson.

Finally, the court turns to the allegations that the jurors improperly considered extraneous materials during deliberations. The court considered this allegation to be extremely serious. For that reason, the court granted considerable latitude under V.R.E. 606(b) during the evidentiary hearing in order to ensure the development of any testimony showing improper influences. Both Ms. White and Ms. Depalo gave testimony on the issue at the evidentiary hearing.

Ms. White explained that the jurors considered the evidence in the case. They also discussed their own life experiences with diabetes for the purpose of evaluating the credibility and weight to be afforded the evidence.

Ms. Depalo testified that both she and other jurors had life experiences with diabetes, and that the jurors discussed their life experiences during the course of the deliberations for the purpose of determining the credibility to be afforded the testimony of the expert witnesses.

Both of these explanations were consistent with the jury instructions, which instructed the jurors that their principal task was to determine the weight to be afforded the testimony of each of the witnesses, including the expert witnesses, based upon their "own knowledge, experience, and common sense gained from day-to-day living." In

short, there was no credible evidence presented at the evidentiary hearing to show that the jury verdict was based upon anything other than the evidence in the case and the jurors' evaluation of that evidence.

Conclusions of Law

The present matter before the court is a motion for a new trial based on numerous allegations of juror misconduct and irregularities in the course of the trial. Motions for a new trial are within the sound discretion of the trial court. *Cooper v. Myer*, 2007 VT 131, ¶ 12, 183 Vt. 561 (mem.). The trial court reviews all of the evidence in the light most favorable to the jury verdict because "it is the protected duty of the jury to render a verdict, and a judge may not disturb that verdict unless it is clearly wrong." *Hardy v. Berisha*, 144 Vt. 130, 133–34 (1984) (citations omitted). "Only after the evidence is so viewed, and the verdict is shown to be clearly wrong and unjust because the jury disregarded the reasonable and substantial evidence, or found against it, because of passion, prejudice, or some misconception of the matter, can the court exercise its discretion to set aside the verdict." *Pirdair v. Medical Ctr. Hosp.*, 173 Vt. 411, 416 (2002) (quoting *Gregory v. Vt. Traveler, Inc.*, 140 Vt. 119, 121 (1981)). See also *State v. Highway Bd. v. Jamac Corp.*, 131 Vt. 510, 515–16 (1973) (explaining that motions for new trial are "directed at preventing a miscarriage of justice and allowing corrective action to the end to be taken promptly at the trial court level before review").

Mr. King has advanced multiple allegations of irregularities and juror misconduct of an extremely serious nature. As the issues were framed in the pleadings, it appeared very likely to the court that the evidence would show fundamental problems with the proceedings that amounted to a miscarriage of justice. It also appeared very likely that a new trial would be required as a corrective measure.

After carefully evaluating all of the evidence presented at the hearing, however, the court has determined that the most serious allegations of misconduct were not proven by a preponderance of the evidence. Other irregularities or instances of misconduct certainly occurred, but do not require a new trial under the applicable standards of review. Finally, after further careful review, the court has determined that the "overall irregularity" of the proceedings does not require the court to set aside the jury verdict and order a new trial. For the following reasons, therefore, the motion for new trial is denied.

Issue #1: Lack of Juror Candor in Responding to Questionnaires

The first issue is whether a new trial must be ordered because seven jurors did not respond accurately to a written questionnaire asking whether they had been involved in any prior civil or criminal lawsuits.

The court does not agree with Ms. Buker's threshold suggestion that juror responses to written questionnaires are not held to the same standards of honesty and accuracy as verbal answers given during *voir dire*. There is no reason why written answers should be treated any differently than verbal answers—both are an integral part

of the same jury selection process, *Arreola v. Choudry*, 533 F.3d 601, 603 (7th Cir. 2008), and both formats oblige prospective jurors to answer questions honestly and forthrightly.

Moreover, it would not make sense to require attorneys to repeat questions in open court in order to ensure that the written answers are complete and accurate. Written questionnaires offer jurors an opportunity to contemplate and reflect before answering questions that may touch upon sensitive or embarrassing topics. If anything, written answers should be *more* reliable than verbal answers given in open court because they are presumably more contemplative. Both parties should be entitled to rely on the truthfulness and accuracy of the written questionnaires.

The court also does not agree with the suggestion that the questionnaire was overly vague or confusing. The jurors were asked to state whether they had been involved in any prior civil or criminal lawsuits. They should have so stated. There is nothing confusing about whether or not small claims actions or foreclosure actions are lawsuits. The jurors either filed the complaints with the court themselves or were served with a court summons. The court is persuaded that the average juror understands that these court proceedings were lawsuits. To the extent that the juror answers did not disclose the lawsuits, the answers were inaccurate.

Given this, Mr. King contends that it is "well settled" that juror failure to answer questions accurately and honestly during *voir dire* is error requiring a new trial. He argues that trial counsel must be armed with full and complete information about each of the prospective jurors in order to intelligently exercise the right of peremptory challenge. Therefore, according to Mr. King, the failure to a juror to honestly and accurately answer the questions presented is reversible error because it has "the capability of prejudicing the verdict." *Bellows Falls Village Corp. v. State Highway Bd.*, 123 Vt. 408, 414 (1963). Mr. King also relies on authorities from other jurisdictions holding that new trials are required where incorrect juror answers are given because "the harm lies in the falsity of the information." *Dominion Bank of Middle Tennessee v. Masterson*, 928 P.2d 291, 293–94 (Okla. 1996); *Robinson v. Safeway Stores, Inc.*, 776 P.2d 676, 679 (Wash. 1989) (en banc); *Wright v. Bernstein*, 129 A.2d 19, 24–25 (N.J. 1957).

The court does not find the aforementioned authorities to be an accurate statement of the legal standard applicable in Vermont. In *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 553–55 (1984), the Supreme Court of the United States explained that the above-mentioned approach is inconsistent with the harmless error rule—the principle that courts must disregard errors or defects that do not affect the essential fairness of the trial. The Supreme Court further reasoned that jury trials represent an important investment of time and money on the part of the parties, the jurors who are asked to perform their civic duties, and court staff, and that invalidating the result of a trial merely because of an inaccurate juror response during *voir dire* was "to insist on something closer to perfection than our judicial system can be expected to give." *Id*. at 555.

The *McDonough* court therefore held that, in order to obtain a new trial on the grounds that a juror failed to answer a question accurately, "a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Id*. at 556. This standard makes sense because a juror may have any number of innocuous reasons for failing to disclose information during *voir dire* (forgetfulness, embarrassment, etc.) that do not affect the fairness of the trial. It is only when the concealed information directly impacts upon the juror's impartiality that the fairness of the trial is called into question.

The Vermont Supreme Court expressly adopted this standard of review in *State v. Mayo*, 2008 VT 2, ¶ 23, 183 Vt. 113. This court therefore concludes that, in order to obtain a new trial based on a claim of inaccurate juror answers during voir dire, Mr. King must show that (1) a juror failed to honestly answer a material question on *voir dire*, and (2) a correct response would have provided a valid basis for a challenge for cause.[1]

Here, Mr. King has met his burden of proving that seven of the jurors failed to honestly answer a material question at *voir dire* regarding whether or not they had been involved in prior civil or criminal lawsuits. However, he has not met his burden of showing that correct answers would have provided a valid basis for a challenge for cause. The undisclosed lawsuits were either unrelated civil actions or criminal convictions for misdemeanor offenses that were substantially removed in time from the date of jury

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[1] Defendant argues that this court should not follow *McDonough* because it is a "controversial" plurality opinion. The court does not find this characterization to be accurate or persuasive. The majority opinion in *McDonough* was expressly joined by seven justices. See 464 U.S. at 556 (Blackmun, J., concurring) (joining the majority opinion on behalf of himself and Justices Stevens and O'Connor, and writing separately only to note their understanding that the *McDonough* holding did not foreclose claims of actual bias). Moreover, all nine justices agreed that "a finding that less-than-complete information was available to counsel conducting *voir dire* does not by itself require a new trial." 464 U.S. at 557 (Brennan, J., concurring in the judgment). Therefore, the position asserted here by Mr. King has been unanimously rejected both by the Supreme Court of the United States and the Vermont Supreme Court. *Mayo*, 2008 VT 2, ¶ 23.

Mr. King also argues that this court should not follow *Mayo* because the Vermont Supreme Court there held in the alternative that the defendant's claims of juror bias based on inaccurate *voir dire* responses were not preserved where he failed to raise the issue until his motion for new trial. 2008 VT 2, ¶ 27; *In re Nash*, 158 Vt. 458, 467 (1991). However, the presence of an alternative rationale for the decision does nothing to lessen the import of the *Mayo* court's express adoption of the *McDonough* standard. This court can discern no principled basis for refusing to apply the *McDonough/Mayo* standard in this case.

With that said, the court does not rely on the *Nash* waiver doctrine under the circumstances presented here. The written questionnaire asked a routine question about whether prospective jurors had ever been involved in prior litigation. In the court's view, the attorneys were entitled to rely on the written answers. Applying the waiver rule here would require the attorneys to perform independent investigations into the lives of prospective jurors prior to the jury draw or risk forever losing a claim of bias. Background checks and private detectives may be the stuff of novels and movies, but they are not customary practice in Vermont. It does not make sense to apply the waiver doctrine in a manner that results in new and unwelcome intrusions into the private lives of the Vermont citizens who are asked to perform their civic duties. Thus, the court concludes that while *Nash* applies to issues that counsel reasonably should have discovered at jury draw, the question at issue here does not fall into that category.

draw. Although the jurors should have answered the questionnaire correctly, there is nothing about the omitted responses that showed that the jurors would have trouble putting aside their prejudices, making decisions based on the evidence, or applying the burden of proof. *State v. Sharrow*, 2008 VT 24, ¶¶ 7–8, 183 Vt. 306. Nor is there anything about the omitted responses that suggested that the jurors harbored some other state of mind inconsistent with deciding the case fairly or that the jurors held some relationship to the case from which bias should be inferred. *Id*.; *State v. Kelly*, 131 Vt. 358, 360–61 (1973). A challenge for cause based on the omitted responses would not have been successful.

For this reason, the court concludes that Mr. King has not shown entitlement to a new trial based on inaccurate juror responses under the standard set forth by *McDonough* and *Mayo*.

Issue #2: Jurors Considered Life Experiences During Deliberations

The second issue is whether a new trial is warranted because the jurors discussed their own life experiences during the deliberations. It appears from the testimony that several jurors had life experiences with diabetes, and that they discussed their experiences in the context of determining the weight and credibility to be afforded some of the testimony in the case—including expert testimony regarding the foreseeability of Mr. Brouillard's hypoglycemic event. Mr. King argues that these discussions amounted to extraneous influences that corrupted the jury and had "the capacity to influence jury deliberations." *State v. Schwanda*, 146 Vt. 230, 232 (1985).

Vermont Rule of Evidence 606(b) generally prohibits jurors from testifying "as to any matter or statement occurring during the course of the jury's deliberations." The exception is 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." *Id*. The exception to Rule 606(b) normally involves situations where the jury has been exposed to prejudicial information from some extrinsic source—such as a newspaper editorial bitterly denouncing one of the trial participants, *Bellows Falls Village Corp.*, 123 Vt. at 409, or the court officer introducing additional evidence into the proceedings by pacing off for the jury, during deliberations, "the distance from which the defendant allegedly shot the victim." *State v. Corey*, 151 Vt. 325, 326–27 (1989).

Numerous courts and authorities have held that the exception to Rule 606(b) does not apply to claims that jurors considered and discussed their own life experiences during deliberations. E.g., 27 Wright & Gold, Federal Practice and Procedure: Evidence 2d § 6075; *Arreola*, 533 F.3d at 606; *Marquez v. City of Albuquerque*, 399 F.3d 1216, 1223 (10th Cir. 2005). This makes sense because jurors are not blank slates. We do not ask jurors to set aside their life experiences, common sense, or familiarity with particular subjects when they listen to evidence and engage in deliberations with their fellow jurors.

Instead, we generally acknowledge that "humans make decisions by drawing upon their accumulated background knowledge and experience." 27 Federal Practice and Procedure, *supra*, at § 6075. We expect jurors to do the same. The jury instructions in this case told the jurors that their "principal task" was to determine the weight to be afforded the evidence based upon their "own knowledge, experience, and common sense gained from day-to-day living." This does not mean that jurors should go beyond the record to develop their own evidence specific to the case, but jurors are permitted "to evaluate the evidence presented at trial in light of their own experience." *Arreola*, 533 F.3d at 606. This necessarily entails discussion of life experiences during deliberations. See 27 Federal Practice and Procedure, *supra*, at § 6075 ("Jurors are not only permitted to make decisions in this manner, it is expected of them.").

Here, it appears that the jurors referenced their life experiences when discussing whether it was foreseeable for Mr. Brouillard to experience a hypoglycemic event while driving. Diabetes is a common condition, and the regulation of blood-sugar levels is one of its most important daily challenges. It is neither unusual nor unexpected that a number of jurors would have some personal experiences with diabetes, and the attorneys should have recognized that such experience is commonplace.

The mere fact that the jurors discussed commonplace personal experiences unrelated to the case does not constitute the introduction of impermissible extrinsic evidence into the case. *Arreola*, 533 F.3d at 606; see also *Caldararo v. Vanderbilt Univ.*, 794 S.W.2d 738, 743–44 (Tenn. Ct. App. 1990) (holding that juror's discussion of personal experiences with diabetes was "not the type of extraneous information that requires us to overturn a verdict"). The jurors would have personally considered their experiences in forming their own individual opinions even if they had not discussed the experiences out loud during deliberations.

Moreover, the attorneys had full opportunity during *voir dire* to ascertain whether the jurors had any personal life experiences with diabetes—and if so, whether the jurors had been influenced by those experiences. The parties also had full opportunity to challenge any jurors (either for cause or via peremptory challenges) whose life experiences with diabetes were problematic for some reason. Although some jurors did not accurately answer the question about prior litigation, there has been no suggestion that any jurors withheld information about their prior experiences with diabetes. For these reasons, the court concludes that Mr. King has not proven his claim of juror bias based on extraneous influences during deliberations.

Issue #3: Whether Juror #11 Surrendered Her True Convictions

The next issue is whether a new trial should be ordered based on the testimony that Juror White surrendered her true convictions when agreeing to the jury verdict. Defendant argues that this testimony shows that the verdict should be set aside as an improper "compromise verdict." *Kerr v. Rollins*, 128 Vt. 507, 509–10 (1970).

The court is not persuaded that the testimony of Juror White is admissible under Rule 606(b). The rule prohibits jurors from testifying as to "any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict." Numerous courts and authorities have concluded that Rule 606(b) prohibits jurors from testifying about internal jury influences such as intimidation, harassment of one juror by another, or one juror's testimony amounting to misgivings about the verdict. 27 Federal Practice and Procedure, *supra*, at § 6075; *United States v. Logan*, 250 F.3d 350, 380 (6th Cir. 2001); see also *United States v. Barber*, 668 F.2d 778, 786–87 (4th Cir. 1982) (holding that Rule 606 prohibits testimony from juror that another juror threatened her and "scared her to death"). This prohibition makes sense. It would be extremely unfair to the parties and to the policies of finality if a juror were able to agree with a verdict during deliberations and in open court, but then later (perhaps on the basis of extraneous influences) assert misgivings that cause the verdict to be vacated.

Moreover, even considering the testimony presented by Juror White on the merits, there was nothing to suggest that her experience was markedly different from that of other jurors who find themselves in the minority opinion during juror deliberations. In the end, she could have held out in deliberations or told the judge that she did not agree with the verdict when it was returned. She did not, but rather agreed with the verdict. Based on the evidence presented, the court is not persuaded that a new trial should be ordered based on this juror's misgivings.

Issue #4: Actual Bias Demonstrated by Foreperson

The next issue is whether Foreperson Depalo demonstrated actual bias or partiality at the post-trial reception by physically embracing the plaintiff and telling her that she had once been a plaintiff in a personal injury action and that she wanted to "return the favor." For the reasons explained in the findings of fact, the court concludes that the incident does not show actual bias. Ms. Depalo was expressing her desire to be as diligent as possible in considering the evidence presented in the case, and the physical embrace did not cross the line from human compassion into a manifestation of bias.

The situation could have been avoided. There are no rules authorizing off-the-record post-trial contact inside the courthouse between trial participants and some (but not all) jurors. See *Peterson v. Wilson*, 141 F.3d 573, 577–78 (5th Cir. 1998) (describing off-the-record post-trial contact between jurors and the trial judge as "highly irregular if not absolutely impermissible"). It is important for lawyers to grow as professionals, but whatever educational opportunities were afforded by the informal post-verdict gathering are far outweighed by the risks that the informal gathering posed to the integrity of the trial process. It is foreseeable that off-the-record interactions between trial participants and jurors immediately following the emotionally-charged return of the jury verdict could result in statements or actions that give the impression that something about the trial was not fair. Such post-trial interactions are best avoided for that reason. *Id.* In this case, the informal gathering provided not only professional learning opportunities but also the grounds for an extensive and time-consuming motion for new trial.

In addition, the court is not persuaded that Ms. Depalo demonstrated bias or partiality by taking her juror notes home with her after the trial ended. Her testimony at the evidentiary hearing established that she took the notes home because she wanted to consult them with respect to her boyfriend's diabetic condition. Although she should not have been allowed to take her notes home under V.R.C.P. 39(e)—which requires the collection and prompt destruction of juror notes by the court officer after the jury has rendered its verdict—the court is persuaded that the incident does not show any bias or prejudice, and that any error here was harmless within the meaning of Rule 61. The court is also persuaded that the testimony that some jurors were doodling during the presentation of evidence does not show bias or prejudice requiring reversal and a new trial.

The incident with the juror notes may serve as a reminder that trial courts have discretion to determine whether or not juror note-taking should be permitted under V.R.C.P. 39(e). The undersigned does not ordinarily permit it. Juror note-taking was prohibited at common law out of concern that jurors who took copious notes might tend to dominate deliberations. *People v. Hues*, 704 N.E.2d 546, 548–50 (N.Y. 1998); *State v. Fuller*, 660 A.2d 915, 917 (Me. 1994). Other risks of juror note-taking include the possibility that jurors may become distracted from the proceedings while taking notes, that jurors might take stenographic notes on irrelevant testimony rather than focusing on the evidence and the demeanor of witnesses, and that jurors may place more significance on their notes (or the notes of other jurors) than on their own independent recollections. *Hues*, 704 N.E.2d at 549. Sometimes it is the subtle juror observation—the tell-tale indentation of eyeglasses on the bridge of a supposed eyewitness's nose—that makes all the difference. It is for these reasons that note-taking should be reserved as an option to be exercised in unusually complex cases rather than permitted as the norm. Accord V.R.C.P. 39(e)—Reporter's Notes.

Issue #5: Juror Questioning of Witnesses

The final discrete issue involving juror irregularities is whether a new trial is required for the reason that jurors were permitted to ask questions directly of the witnesses without prior screening by the court.

The questioning procedure employed by the trial judge in this case was erroneous under *State v. Doleszny*, 2004 VT 9, 176 Vt. 203. Although *Doleszny* generally approves the discretionary practice of permitting jurors to submit questions in writing to the judge, it prescribes a procedure for the implementation of that practice: (1) jurors must submit the proposed questions in writing to the judge, who must then put the questions into the record, (2) the judge must disclose the proposed questions to the parties and permit them an opportunity either to object or to request that the question be narrowed or rephrased, (3) the judge must rule on each proposed question on the record, and finally (4) the judge

must ask the question. *Id.*, ¶ 34. This procedure represents a specific application of the traditional power of judges to question witnesses.[2] *Id.*, ¶ 19; V.R.E. 614(b).

The excerpt reproduced in the findings of fact shows that none of these procedural safeguards were followed in this case. The court considers the error to be a serious one—especially because the deviation from normal trial practice resulted in a juror stating adversarial and argumentative positions on the record in the middle of a jury trial. It is the role of the juror to listen to and evaluate the evidence. It is not the role of the juror to develop the evidence or to argue the inferences to be drawn from the evidence during the middle of a trial. The procedure prescribed by *Doleszny* was not followed in this case. Nevertheless, Mr. King has conceded that the deviation from normal trial practice was harmless and therefore does not require a new trial.

Issue #6: Whether Erroneous Legal Rulings Require a New Trial

Mr. King argues next that a new trial is required because certain legal rulings made by the trial judge were erroneous. He points in particular to the granting of Plaintiff's Motion in Limine #7, which excluded evidence that Ms. Buker was convicted in 2007 of her third D.U.I. offense, and that as a result, her driver's license was suspended and her status was that of a convicted felon. Mr. King argues that this evidence was highly relevant to rebutting Ms. Buker's claim for lost future income, since it is difficult for convicted felons to obtain employment in Vermont, especially when they cannot drive.

There are two reasons why the ruling does not require a new trial even if the court assumes for the purposes of argument that the ruling was erroneous. First, Ms. Buker was employed at the time of her accident even though she was, at that time, a convicted felon who could not drive. Her criminal and driving status did not prevent her from obtaining or keeping that job. The argument propounded by the defendant is therefore irrelevant to the extent that Ms. Buker could have kept her existing job absent the accident.

Second, and more importantly, the trial judge expressly left open the possibility that the admissibility of the conviction and driving record could be revisited at trial. He explained that he recognized the relevance of the evidence on the issue of damages, but that he wanted the benefit of "further evidentiary development before making a ruling on the place of suspension as [it] concerns damages." He further explained that trial circumstances might open the door to the receipt of such evidence, and that he was only granting the motion in limine "at this juncture."

Mr. King did not attempt to introduce any evidence pertaining to the driving suspension or conviction at trial despite the judge's willingness to revisit the issue of its

[2] *Doleszny* holds that the above procedure "gives discretion to the judge to determine whether to solicit juror questions and to ask a particular question proposed by a juror." The availability of a discretionary procedure for juror questioning necessarily invites contemplation as to whether, when, and under what circumstances courts should exercise their discretion to permit juror questions.

admissibility. For this reason, the court is not persuaded that his objections to the court's ruling are preserved at this time. The court therefore concludes that a new trial is not warranted even assuming *arguendo* that the trial court's ruling on the motion in limine was wrong.

Issue #7: Size of Jury Verdict and Cumulative Effects of Errors at Trial

Mr. King argues that the cumulative effect of the individual errors show irregularities in the proceedings that fundamentally undermined the fairness of the trial. In making this argument, it is clear that Mr. King relies heavily on the size of the jury verdict as evidence of the unfairness and bias that must have crept into the proceedings. In particular, Mr. King contends that the $876,000 verdict is "clearly unsupported by the evidence presented at trial, and is plainly an aberrant verdict." He also argues that the amount awarded by the jury is "so out-of-line with the verdicts in similar cases that it is patently the product of juror misconduct and/or passion and prejudice."

Before addressing the cumulative effect of the trial errors, therefore, the court addresses the question of whether the damages were excessive. The general rule is that the verdict must stand unless the amounts awarded are not supported by the evidence, or are grossly excessive where the action does not permit precise calculation of damages. *Cooper*, 2007 VT 131, ¶ 12; *Sunday v. Stratton Corp.*, 136 Vt. 293, 309 (1978). The verdict may not be set aside "merely because the judge might have awarded a different amount of damages." 11 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2807. Remittitur or a new trial may be required, however, "if the verdict, in light of the evidence, is so unreasonable that it would be unconscionable to permit it to stand." *Id*. The power of the court to set aside a verdict as excessive represents a special application of the court's general power to set aside verdicts that are unsupported by the evidence. *Id*.

Here, the jury issued a special verdict in the following amounts:

Past Medical Expenses	$41,861
Future Medical Expenses	$33,286
Past Lost Earnings	$84,352
Future Lost Earnings	$246,765
Past Pain and Suffering	$70,000
Future Pain and Suffering	$400,000
Total:	**$876,264**

Mr. King argues that these awards are not supported by the evidence. However, he has not presented any information (whether in the form of evidentiary submissions or arguments pointing to specific portions of the trial record) demonstrating that the awards are not supported by the evidence. The undersigned did not preside over the trial, and therefore cannot rely on his own recollection as to the evidentiary support for the award. Since Mr. King bears the burden of proof on the motion for new trial, the court cannot

say that the verdict is larger than what a jury might have rationally found without being inflamed by passion or prejudice. 11 Federal Practice and Procedure, *supra*, at § 2807.

Furthermore, even if the court were to undertake its own search of the record, it would not provide the court with all of the information that was available to the jury. The undersigned did not have an opportunity to observe the demeanor of the witnesses or form any impressions as to their credibility. Jurors may base their decisions not only on the spoken words which appear in the transcript but also on how the trial participants act in the courtroom. See *Simpson v. Rood*, 2003 VT 39, ¶ 8, 175 Vt. 546 (mem.) (explaining that telephone testimony is not permitted for this reason). Jurors may also disregard testimony entirely. Therefore, even scouring the record would not necessarily provide the answer as to how the jurors reached their conclusions—especially with respect to elements of damages such as pain and suffering.

Mr. King also argues that the size of the verdict is out-of-line with similar cases in Vermont. He has not presented any comparative evidence, however, to show the size of those verdicts or their facts. Even if he had, the court would note that comparison of jury verdicts represents only those cases that have gone all the way to verdict, and does not necessarily encapsulate the value of similar cases settled out of court. *Sunday*, 136 Vt. at 309.

Finally, more than half (54%) of the amount of damages awarded here involved either past or future pain and suffering—an amount that is not susceptible to precise calculation. The normal rule under these circumstances is that the jury has discretion to determine an amount representing fair compensation to the plaintiff for her pain and suffering. *Lent v. Huntoon*, 143 Vt. 539, 553 (1983). The amount awarded in this case for pain and suffering was not an obvious abuse of discretion—Ms. Buker is a young woman, and the jury determined that she is permanently disabled as the result of the ankle injuries she suffered in the automobile accident. It is fair to infer from the jury's determination that she suffers pain and that she will not be able to participate in many of the physical activities she enjoyed prior to the accident. The amount of the award is not impermissibly large under these circumstances.

To be fair, on one hand, the size of the verdict raises eyebrows. $876,000 is a very substantial sum of money for a plaintiff to recover in a personal injury action based on ankle injuries. On the other hand, it is apparent that the jury viewed this case as one involving a permanent disability to a young woman. Once the verdict is viewed through that lens, the total amount becomes less surprising. It is important to keep in mind that the verdict represents more than thirty years of anticipated suffering based upon anticipated life expectancy and also lost wages.

Therefore, the credible evidence establishes that the amount of the verdict was large (but not excessive) and that several errors crept into the proceedings. None of the errors individually require reversal under the applicable standard of review. And even though it is likely that the cumulative effect of the minor errors had some negative impact on the proceedings, they do not bear any obvious connection to the size of the jury

verdict or otherwise show that the jury verdict was tainted by passion or prejudice. The court concludes that the cumulative impact of the errors was harmless and does not require a new trial.

The court has reflected on the outcome of this motion for a long time. Consideration was made more difficult by the need to separate the serious misconduct that was alleged in the motion for new trial from what was actually proven at the evidentiary hearing. In the end, there were errors during the trial, and although some of them could have been avoided, none were beyond the pale. After viewing all of the evidence in the light most favorable to the verdict, the court cannot conclude that the verdict was "clearly wrong and unjust." *Pirdair*, 173 Vt. at 416. The motion for new trial is accordingly denied.

ORDER

For the foregoing reasons, Defendant's Motion for New Trial or Remittitur (MPR #40) is ***denied***.

Dated at Woodstock, Vermont this ____ day of August, 2009.

_____
Hon. Harold E. Eaton, Jr.
Presiding Judge