No. 13-517

In the Supreme Court of the United States

GREGORY P. WARGER,
Petitioner,

v.

RANDY D. SHAUERS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This case arises out of a motor vehicle accident that occurred at the intersection of Sheridan Lake Road and Highway 385 in Pennington County, South Dakota on August 4, 2006. Pet. App. at 13a; Resp. C.A. Br. 2. Petitioner failed to yield to oncoming traffic and pulled in front of an oncoming pickup truck and 28-foot camper trailer driven by respondent. Despite respondent's attempts to avoid the accident, his vehicle clipped petitioner's motorcycle. Petitioner suffered serious injuries, including the loss of his left leg. Pet. App. at 13a; Resp. C.A. Br. 2, 5.

Petitioner subsequently filed suit against respondent, asserting a claim of negligence and seeking to recover for property damage, loss of enjoyment of life, permanent disability, present and future medical expenses, pain and suffering, and prejudgment interest. Pet. App. at 13a.

The case was tried twice before a jury. The first jury trial commenced on July 20, 2010, but ended on the fourth day of trial when the district court declared a mistrial for a violation of its *in limine* order. The second trial commenced on September 20, 2010. Pet. App. at 13a-14a.

During lengthy voir dire for the second trial, petitioner's counsel asked prospective jurors, as is relevant here, general, nonspecific questions such as: whether they had any problems with awarding damages for medical expenses, future medical expenses, and pain and suffering, as well as whether they could be a fair and impartial juror on this kind of case. Affirmative responses were given by all the

empaneled jurors as to questions on damages; none of the jurors voiced a response to the fair and impartial question. Resp. App. at 32-48.

The case proceeded to trial with a twelve person jury. On September 29, 2010, the jury returned a unanimous 12-0 verdict in favor of respondent.

After the jury was released from further jury duty, one of the jurors, Juror Titus, contacted petitioner's counsel and expressed his concern about what had been discussed during deliberations, specifically by Juror Whipple, the jury foreperson. Juror Titus signed an affidavit in which he alleged that during deliberations, Juror Whipple spoke about her experience with a serious automobile accident. Juror Whipple allegedly expressed to the jurors that her daughter had been at fault in a fatal automobile accident and had her daughter been sued for damages caused by the accident, her daughter's life would have been ruined. According to Juror Titus's affidavit, Juror Whipple's past experience, "and not the facts, evidence, and law that was presented" influenced her decision, as well as the other jurors' decision, to return a verdict for respondent. At no time did Juror Titus allege or accuse Juror Whipple of being dishonest during voir dire. Pet. App. 3a, 40a-41a.

Armed only with Juror Titus' affidavit,[1] petitioner moved for new trial based on several grounds,

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[1] Petitioner did not produce affidavits from the other jurors that Juror Titus claimed were influenced by the alleged juror misconduct, nor did petitioner produce an affidavit from Juror Whipple. Resp. App. at 3-18.

including Juror Whipple's alleged misconduct.[2] The district court denied the motion, and as to the alleged juror misconduct, concluded that Federal Rule of Evidence 606(b) barred the admission of Juror Titus's affidavit. The district court, relying on *United States v. Benally,* 546 F.3d 1230 (10th Cir. 2008) reh'g denied, 560 F.3d 1151 (10th Cir. 2009), cert. denied, 558 U.S. 1051 (2009) and *Williams v. Price,* 343 F.3d 223 (3d Cir. 2003), explained "[t]o allow statements made during jury deliberations to be used to challenge a juror's conduct during voir dire would undermine the purpose of Rule 606(b) and runs counter to its direction." The district court also held that Juror Titus's affidavit was inadmissible under any of the exceptions in Rule 606(b)(2). Pet. App. 28a-38a.

The Eighth Circuit affirmed the district court's order denying a new trial. While acknowledging a split among the circuits as to whether testimony showing juror dishonesty may be used to challenge a verdict, the court of appeals found the reasoning of the Tenth and Third Circuits to be "persuasive." The court explained,

> Congress when drafting Rule 606(b), made no exception for the admittance of such evidence. 'The legislative history demonstrates with uncommon clarity that Congress specifically understood, considered, and rejected a version of

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[2] Contrary to petitioner's contention (Pet. Br. 3, 5), the issue was framed as "juror misconduct" in petitioner's motion and brief for new trial. There were no allegations of dishonesty in petitioner's brief and reply brief in support of his motion. Instead, petitioner argued that Juror Whipple's statement constituted "extraneous prejudicial information." Resp. App. at 1, 12-15, 24-26.

> Rule 606(b) that would have allowed jurors to testify on juror conduct during deliberations . . . .'" (quoting *Tanner v. United States,* 484 U.S. 107 (1987). We decline to create an exception to the rule here. In order to achieve finality in the litigation process and avoid relentless post-verdict scrutiny and second guessing, occasional inappropriate jury deliberations must be allowed to go unremedied.

The court of appeals also agreed with the district court that Juror Titus's affidavit did not fall within the "extraneous information" exception of Rule 606(b)(2)(A), explaining that although Juror Whipple's comments "upon first blush" seem to fall within that category, "[j]uror's personal experiences do not constitute extraneous information; it is unavoidable they will bring such innate experiences into the jury room." Pet. App. at 6a-10a.[3]

REASONS FOR DENYING THE PETITION

I. This case does not deepen the divide among the courts of appeal.

Although there is a recognized split among the circuits, contrary to petitioner's contention (Pet. Br. 8-16) this case does not deepen the divide among the courts of appeal on the admissibility of juror testimony

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[3] It must be noted that on appeal to the Eighth Circuit, petitioner did not allege juror misconduct as an issue. Pet. C.A. Br. ii. Instead, petitioner argued Juror Whipple's comments showed that the judgment was against the weight of the evidence. *Id.* at 31-33. Notably, petitioner conceded that Juror Titus's affidavit was not admissible to show juror misconduct. *Id.* at 33.

about statements made during deliberations that tend to show juror dishonesty during voir dire. None of the decisions cited by petitioner (Pet. Br. 9-16) supports the remarkable notion that juror testimony may be introduced to show juror dishonesty during voir dire when the alleged dishonest answers were to general, nonspecific questions during voir dire. Instead, unlike this case, each of the decisions relied upon by Petitioner (on both sides of the divide) involve specific, material questions and nonresponsive or dishonest answers by jurors.

For example, in *Hard v. Burlington Northern Railroad,* 812 F.2d 482 (9th Cir. 1987), Juror Fraser was asked several, specific and material questions during voir dire which were intended to reveal any prior contacts between the defendant and himself. *Id.* at 484. Juror Fraser was asked specifically if he had ever been employed by the defendant, had any kind of relationship with the defendant, or had any kind of dealing with the defendant. *Id.* at 484, n. 1. Juror Fraser "either failed to respond or answered in a manner which indicated that he had no significant prior contacts with [the defendant]." *Id.* at 484.

After the trial, however, three jurors came forward with affidavits stating that Juror Fraser made statements during deliberations regarding, among other things, his prior employment with the defendant or its predecessor, Northern Pacific Railroad. *Id.* at 483. The plaintiff moved for new trial alleging, as is most relevant here, juror dishonesty, and sought to introduce the juror affidavits in support of his motion. *Id.* The trial court refused to consider the affidavits,

finding that they were excluded by Rule 606(b), and denied the motion for new trial. *Id.*

On appeal, citing and relying on dicta from the Fifth Circuit's decision in *Maldonado v. Missouri Pacific Ry. Co.,* 798 F.2d 764, 770 (5th Cir. 1986) – which offers no rule of evidence or court decision in support of its conclusion that such testimony is admissible – the Ninth Circuit held that "statements which tend to show deceit during voir dire are not barred by [Rule 606(b)]." *Id.* at 485 (citing *Maldonado,* 798 F.2d at 770, for the proposition that "the district court can receive testimony or grant a new trial *only* if the voluntary disclosure relates to . . . false information (or withholding) given on voire [sic] dire."). The case was thus remanded to hold a "hearing to investigate the allegation that Fraser failed to answer honestly a material question during voir dire." *Id.* (citing *McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. 548, 556, 104 S.Ct. 845, 850, 78 L.Ed.2d 663 (1984)).

Likewise, in *United States v. Henley,* 238 F.3d 1111 (9th Cir. 2001), the jury was asked the following three specific race-related questions in a juror questionnaire: "what their overall views were of interracial dating, whether they had ever had a bad experience with a person of a different race, and whether race would influence their decisions in any way." *Id*. at 1114. Juror O'Reilly answered in the negative to all three questions. *Id.* at 1114, n. 5. However, after the trial it came to light that Juror O'Reilly allegedly made racist remarks while carpooling with other jurors to and from the trial but *before* deliberations had begun and *outside* the jury room. *Id.* at 1112-13. Quoting *Hard* for the proposition that "[s]tatements which tend to show

deceit during voir dire are not barred by Rule 606(b)", the Ninth Circuit reasoned:

> Where, as here, a juror has been asked *direct questions* about racial bias during voir dire, and has sworn that racial bias would play no part in his deliberations, evidence of that juror's alleged racial bias is indisputably admissible for the purpose of determining whether a juror's responses were truthful.

Id. at 1121 (citing *Hard,* 812 F.2d at 485) (emphasis added).

In *United States v. Boney,* 68 F.3d 497 (D.C. Cir. 1995), the jurors were also asked specific questions regarding whether they had ever been convicted of a state or federal crime. Juror J answered "no" on both the questionnaire and at voir dire. *Id.* at 498-99. After the trial it was revealed that Juror J was in fact a convicted felon. *Id.* at 499. The District of Columbia Circuit initially ordered that an evidentiary hearing be held to "determine whether [Juror J's] failure to disclose his felon status resulted in actual bias to the defendant." *Id*. At the evidentiary hearing on remand, the trial court conducted a limited examination about Juror J's potential bias but refused to inquire into what happened during jury deliberations, specifically whether his felon status or criminal history ever came up, on the grounds that such inquiry violated Rule 606(b). *Id.* at 500, 503. On appeal for the second time, the District of Columbia Circuit notably held that the "extraneous prejudicial information" exception of Rule 606(b) did not prohibit further questioning of Juror J because "*he had no right whatsoever to even serve on*

the jury." *Id.* at 503 (emphasis added). The District of Columbia Circuit reasoned:

> [I]t does not seem inappropriate to inquire of him whether his felon status ever came up during deliberations, and if so, the circumstances surrounding that disclosure. Although it is expected that jurors will bring their various life experiences into the jury room, [Juror J's] experience as a felon is the one matter that should not have been before the jury at all because no ex-felons should have been on the panel. Therefore, any discussion of [Juror J's] felon status during deliberations would surely seem to be 'extraneous' and possibly 'prejudicial' as well.

Id. at 503 (emphasis added). The court declined to address the issue of whether other jurors on the panel should have been questioned regarding their contacts with Juror J. *Id.*

Petitioner contends that like the Ninth Circuit, the District of Columbia Circuit in *Boney* also allowed jury testimony about statements made during deliberations to prove juror dishonesty during voir dire. Pet. Br. 12. However, it is clear that the District of Columbia Circuit reached its holding because the alleged dishonest juror "had no right whatsoever to even serve on the jury" because he was a convicted felon. *Id.* at 503. Therefore, *Boney* does not support petitioner's argument and should not be considered for the proposition that Juror Titus's affidavit would be admissible under the Rule 606(b) or its exception. Pet. Br. 12.

Although, specific and material questions were asked in *United States v. Benally,* 546 F.3d 1230, 1231 (10th Cir. 2008), the Tenth Circuit reached the opposite conclusion. In *Benally,* the jurors were questioned during voir dire about potential biases against Native Americans. *Id.* at 1231. Specifically, the jurors were asked: "would the fact that the defendant [was] a Native American affect your evaluation of the case; have you ever had a negative experience with any individuals of Native American descent; and if so, would that experience affect your evaluation of the facts of this case?" *Id.* After the trial, Juror K.C. approached defense counsel, claiming that two jurors had made racist remarks during deliberations. *Id.* The defendant subsequently moved for new trial on the grounds that jurors had lied during voir dire. *Id.* at 1232. The district court admitted juror testimony by affidavit under the exceptions in Rule 606(b) and granted a new trial. *Id.*

On appeal, the Tenth Circuit reviewed the history and purpose of Rule 606(b) and reversed, concluding that the affidavits were inadmissible under Rule 606(b). *Id.* at 1233-36. The Tenth Circuit explained:

> Although the immediate purpose of introducing the testimony may have been to show that the two jurors failed to answer honestly during voir dire, the sole point of this showing was to support a motion to vacate the verdict, and for a new trial. That is a challenge to the validity of the verdict.
> . . .
>
> [A]llowing juror testimony through the backdoor of a voir dire challenge risks swallowing the

> rule. A broad question during voir dire could then justify the admission of any number of jury statements that would now be re-characterized as challenges to voir dire rather than challenges to the verdict. Given the importance that Rule 606(b) places on protecting jury deliberations from judicial review, we cannot read it to justify as large a loophole as [defendant] requests.

Id. at 1235-36.

However, despite the split between the Ninth and Tenth circuits, the facts of the instant case are entirely different than the cases cited above. Unlike the cases discussed above, petitioner has never alleged until now that Juror Whipple was dishonest – let alone that she failed to answer honestly a material question during voir dire. *See* Resp. App. at 1, 12-15, 24-26; Pet. C.A. Br. 31-33. Instead, the allegation has always been that Juror Whipple injected her personal experiences into the jury deliberations. *Id.*

In addition, unlike the specific questions asked in the cases above, the questions upon which petitioner bases his claim of juror dishonesty in this case were general, nonspecific, nonmaterial questions. At no time was Juror Whipple (nor the entire jury panel) asked, whether she or any of her close family members or friends had ever been involved in a serious motor vehicle accident where someone was severely injured or killed. Such a question would have been "reasonably calculated to require an affirmative response," *Hard,* 812 F.2d at 484, from Juror Whipple or "put her on notice that a particular answer was required." *Robinson v. Monsanto Co.,* 758 F.2d 331 (8th Cir. 1985). But petitioner's counsel never asked that

question. Instead, petitioner's counsel asked the jury as a whole, general, nonspecific questions about whether the jurors could be fair and impartial and whether they could award future medical expenses and/or pain and suffering if petitioner proved his case. Pet. Br. 4. Nothing in the record establishes that Juror Whipple deceived the court or counsel by answering affirmatively to these general questions or that her answers were untruthful. Petitioner's allegations of dishonesty are simply not true.

This case is, however, factually similar to *Maldonado v. Missouri Pacific Railway Co.,* 798 F.2d 764 (5th Cir. 1986), which is the case that the Ninth Circuit relied on in *Hard* and *Henley* in reaching the conclusion that "[s]tatements which tend to show deceit during voir dire are not barred by Rule 606(b)." *See Hard,* 812 F.2d at 485; *Henley,* 238 F.3d at 1121.

In *Maldonado,* the jurors were asked a nonspecific question during voir dire about their ability to treat the defendant (a corporation) like any other individual. 798 F.2d at 770. After the trial, Juror Valdez contacted defense counsel and disclosed that "the jury had substantial discussions concerning defendant's wealth and about giving the benefit of the doubt to the plaintiff." *Id.* at 769. The defendant subsequently requested leave of the court to obtain Juror Valdez's affidavit or testimony in support of its motion for new trial. *Id.* The district court denied the defendant leave and its motion for new trial. *Id.*

The Fifth Circuit affirmed, holding that the testimony sought by the defendant was shielded by Rule 606(b), as such testimony was sought to examine the jurors' subjective thoughts and feelings during

deliberations. *Id.* at 770. Acknowledging in dicta – without citing to a rule of evidence or court decision – that a court "can receive testimony or grant a new trial *only* if the voluntary disclosure relates to . . . false information (or withholding) given on voire [sic] dire," the Fifth Circuit explained this was not such a case:

> [D]efendant's motion *did not indicate to the district court that any juror had concealed information during voir dire*. . . . In the present case, Missouri Pacific sought to examine the jurors about their subjective thoughts during deliberations. *Its motion did not indicate that any juror believed he or she would be unable to treat Missouri Pacific fairly but concealed that fact during voir dire*. The testimony sought by Missouri Pacific clearly concerned matters shielded from inquiry by Rule 606(b).

Id. (emphasis added).

As in *Maldonado,* neither Petitioner's motion for new trial, briefs in support thereof, nor Juror Titus's affidavit indicate that Juror Whipple believed that she would be unable to treat petitioner fairly and concealed that fact during voir dire. Pet. App. at 40a-41a; Resp. App. at 1, 12-15, 24-26. Petitioner's motion for new trial framed the issue as juror misconduct. *Id.* There were no allegations of dishonesty. *Id.* Instead, the focus of petitioner's allegation was that Juror Whipple "injected her personal story into the deliberations" which prevented the jury from discussing the facts and law of the case. Resp. App. p. 15. Therefore, like the defendant in *Maldonado,* petitioner seeks to examine the jurors about their subjective thoughts during deliberations through Juror Titus's affidavit. The

circuits, including the Fifth, Eighth, Tenth, and even the Ninth, have uniformly agreed that such inquiry is shielded by Rule 606(b). *See Maldonado,* 798 F.2d at 770; *U.S. v. Duzac,* 622 F.2d 911, 913 (5th Cir. 1980) (holding "although the jury is obligated to decide the case solely on the evidence, its verdict may not be disturbed if it is later learned that personal prejudices were not put aside during deliberations"); *Warger v. Shauers,* 721 F.3d 606, 611 (8th Cir. 2013) (explaining juror personal experiences are within the protection of Rule 606(b); "it is unavoidable they will bring such innate experiences into the jury room.") (citing *U.S. v. Krall,* 835 F.2d 711, 716 (8th Cir. 1987) (same)); *Benally,* 546 F.3d at 1236; *Hard v. Burlington Northern R. Co.,* 870 F.2d 1454, 1461 (9th Cir. 1989) (*Hard II*) (explaining that "general knowledge, opinions, feelings, and bias that every juror carries into the jury room," are protected by Rule 606(b) and that "[i]t is expected that jurors will bring their life experiences to bear on the facts of the case"); *Morgan v. Woessner,* 997 F.2d 1244 (9th Cir. 1993) (holding subjective thoughts and beliefs are beyond the scope of inquiry for new trial under Rule 606(b)).[4]

Therefore, even with a split among the circuits, this case can be reconciled with the Ninth Circuit's decisions holding admissible, under Rule 606(b), juror testimony showing dishonesty during voir dire – warranting no further review by this Court.

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[4] The jury was instructed in the instant case, without objection, that they had "a right to consider the common knowledge possessed by all of [them], together with the ordinary experiences and observations in [their] daily affairs of life." D. Ct. Dkt. 160; Tr. 1550, D. Ct. Dkt. 204 (Sept. 28, 29, 2010).

II. Even if this Court grants certiorari, remand for an evidentiary hearing is unjustified because petitioner cannot meet his burden under *McDonough* and petitioner has furthermore waived his right to such a hearing.

Even if this Court were to grant certiorari and agree with the Ninth Circuit that Juror Titus's affidavit is admissible under Rule 606(b), petitioner is not automatically entitled to a new trial. Petitioner must still make a showing under this Court's rule set forth in *McDonough*, that Juror Whipple "failed to answer honestly a material question on voir dire, and . . . that a correct response would have provided a valid basis for a challenge for cause. *McDonough,* 464 U.S. at 556, 104 S.Ct. at 850. Petitioner cannot make that showing and has furthermore waived his right to an evidentiary hearing on the issue.

Until this petition for writ of certiorari, petitioner has never alleged that Juror Whipple was dishonest – let alone that she failed to answer honestly a material question on voir dire. *See* Resp. App. at 1, 12-15, 24-26; Pet. C.A. Br. 31-33. The only evidence petitioner has produced on the record, and upon which petitioner bases his claim, is an affidavit from one juror. However, this affidavit does not, on its face, remotely allege that Juror Whipple failed to answer honestly a material question on voir dire. Pet. App. 40a-41a. Instead, Juror Titus's affidavit merely alleges that Juror Whipple injected her personal experiences to the jury deliberations which prevented the other jurors from considering the evidence. *Id.*

But even assuming *arguendo* that Juror Titus's affidavit does allege dishonesty, the questions upon

which petitioner bases his claim that Juror Whipple answered dishonestly were general, nonspecific questions asked to the jury as a whole – none of which were material. The jury was never asked whether they or a close family member or friend had been in a serious motor vehicle accident. A failure to answer such a material question would undeniably be an intentional concealment of the truth by Juror Whipple. However, no such question was asked and "we cannot put upon the jury the duty to respond to questions not posed." *United States v. Kerr,* 778 F.2d 690, 694 (11th Cir. 1985). "Furthermore, the right to challenge a juror is waived by failure to object at the time the jury is empaneled if the basis for objection might have been discovered during voir dire." *Robinson*, 758 F.2d at 335. Petitioner simply cannot make a particularized showing that Juror Whipple failed to answer honestly a material question on voir dire.

Nor is petitioner entitled to an evidentiary hearing to establish that he is entitled to a new trial under *McDonough* because petitioner waived that right. Petitioner never requested an evidentiary hearing, nor did Petitioner ever allege the district court abused its discretion in failing to hold an evidentiary hearing. Therefore, this issue has not been preserved for appeal.

However, even assuming that this issue was preserved, the district court did not abuse its discretion in not conducting an evidentiary hearing to investigate whether Juror Whipple failed to honestly answer a material question during voir dire. "An evidentiary hearing is not mandated *every* time there is an allegation of jury misconduct or bias." *United States v. Angulo,* 4 F.3d 843, 847 (9th Cir. 1993). *See also*

United States v. Moses, 15 F.3d 774, 778 (8th Cir. 1994) ("Not every allegation . . . requires an evidentiary hearing."). "The district court has broad discretion in handling allegations that jurors have not answered voir dire questions honestly, and we defer to its discretion in deciding whether a post-trial hearing is necessary." *United States v. Tucker,* 137 F.3d 1016, 1026 (citing *United States v. Williams,* 77 F.3d 1098, 1100 (8th Cir. 1996)); *see also United States v. Wiley,* 997 F.2d 378, 383 (8th Cir. 1993) (same); *McDonough,* 464 U.S. at 556, 104 S.Ct. at 850 (indicating that the decision to conduct a post-trial hearing remains within the "trial court's option").

In this case, the district court, in addition to its own observations from presiding over the trial, had before it petitioner's motion for new trial, briefs in support thereof, Juror Titus's affidavit, and the transcript of voir dire in determining whether to conduct an evidentiary hearing. On this record, which has been discussed in detail above, the district court concluded that petitioner failed to make a sufficient showing to entitle him to a hearing and findings of fact on this issue because there were simply no allegations of dishonesty asserted.

III. This case is not an optimal vehicle for consideration and resolution of the question presented.

While the question presented is one that may warrant the Court's review at some point, this case is not an optimal vehicle for consideration and resolution of the question. Pet. Br. 17-19. Contrary to Petitioners contention that this case presents the Court with a "cleaner vehicle" in which to resolve the conflict (Pet.

Br. 19), this case is rife with facts that could undermine the jury process itself and make motions and appeals on this basis commonplace.

"This Court has long held that 'a litigant is entitled to a fair trial but not a perfect one' for there are no perfect trials." *McDonough,* 464 U.S. at 552, 104 S.Ct. at 848 (quoting *Brown v. United States,* 411 U.S. 223, 231-232, 93 S.Ct. 1565, 1570-1571, 36 L.Ed.2d 208 (1972)) (additional citations and quotation marks omitted). "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury[,]" *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220, 66 S. Ct. 984, 985, 90 L. Ed. 1181 (1946), "a jury capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips,* 455 U.S. 209, 217, 102 S.Ct. 940, 946, 71 L.Ed.2d 78 (1982).

> *Voir dire* examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on *voir dire* may result in a juror being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.

McDonough, at 554, 104 S.Ct. at 849. However, "jurors are not necessarily experts in English usage. Called as they are from all walks of life, many may be uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges." *Id.* at 555, 104

S.Ct. at 849. And "[f]ailure to ask the questions necessary to expose bias at voir dire can result in waiver of objections to a juror." *United States v. Tucker*, 137 F.3d 1016, 1029 (8th Cir. 1998) (citations omitted).

In this case, the jury as a whole was asked general, nonspecific questions about their abilities to be fair and impartial and to award future medical expenses and/or pain and suffering if petitioner proved his case. Petitioner's counsel failed to ask any direct questions regarding whether they, their family members, or their close friends had ever been involved in a serious motor vehicle accident – let alone if they or a close family member or friend had been involved in an accident. If Petitioner was interested in this topic, he had an obligation to ask more probing questions during voir dire to ferret out this type of sensitive and specific information. We will never know the meaning Juror Whipple attributed to the phrase "fair and impartial" and it is wholly unreasonable to conclude that such general questions required the response petitioner now contends was due from Juror Whipple. It was petitioner's duty to ask the necessary questions to expose any bias the jurors may have had in this case – he failed to do so.

The American jury system is the best in the world. It "is grounded on the conviction, borne out by experience, that decisions by ordinary citizens are likely, over time and in the great majority of cases, to approximate justice more closely than more transparently law-bound decisions by professional jurists." *Benally*, 546 F.3d at 1233.

> Jury decision-making is designed to be a black box: the inputs (evidence and argument) are carefully regulated by law and the output (the verdict) is publicly announced, but the inner workings and deliberation of the jury are deliberately insulated from subsequent review. Judges instruct the jury as to the law, but have no way of knowing whether the jurors follow those instructions. Judges and lawyers speak to the jury about how to evaluate the evidence, but cannot tell how the jurors decide among conflicting testimony or facts. Juries are told to put aside their prejudices and preconceptions, but no one knows whether they do so. Juries provide no reasons, only verdicts.

Id. "The rule makes it difficult and in some cases impossible to ensure that jury verdicts are based on evidence and law rather than bias or caprice." *Id*. But "the proper time to discover this type of influence is when the jury is selected and peremptory challenges are available to the attorney." *Krall,* 835 F.2d at 716 (citations omitted).

To grant review of this case and address the question presented would endorse and permit post-trial inquiry in every case. Allowing such broad questions during voir dire to be used to allege juror dishonesty and attack the verdict would incorrectly burden jurors with the responsibility of being able to infer what information, no matter how remote, is relevant, as opposed to requiring counsel to solicit the information pertinent to the case. Jurors would no longer be protected from harassment by counsel seeking to nullify a verdict, free and frank jury discussions would

be chilled, and the "community's trust in the system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny." *Tanner v. United States,* 483 U.S. 107, 121, (1987).

Petitioner had every opportunity to ask the necessary questions that would have elicited the response he contends Juror Whipple withheld during voir dire. Petitioner failed to do so, making this not the "optimal vehicle" for this Court's review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully Submitted,

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APPENDIX

APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

Civ No. 08-5092-JLV

[Filed October 25, 2010]

GREGORY P. WARGER,
Plaintiff,
v.
RANDY D. SHAUERS,
Defendant.

MOTION FOR JUDGMENT AS A MATTER OF LAW OR NEW TRIAL

Plaintiff Gregory P. Warger, by and through his attorneys of record, respectfully submits his Motion for Judgment as a Matter of Law pursuant to Federal Rule of Civil Procedure 50 or, in the alternative, Motion for New Trial pursuant to Federal Rule of Civil Procedure 59. Warger moves the Court to set aside the verdict of the jury and enter judgment as a matter of law in favor of Warger in accordance with Warger's prior motion for judgment as a matter of law or if the foregoing motion be denied to set aside the verdict and the judgment entered thereon and grant Warger a new trial for the following reasons:

1. The verdict is against the weight of the evidence and not sustained by the sufficiency of the evidence.

2. The verdict was the product of misconduct on behalf of Defendant's counsel who violated the Court's Order on Motions in Limine.

3. The verdict was the product of juror misconduct.

WHEREFORE, Warger requests that this Court enter judgment in his favor, or, in the. alternative, that it set aside the jury verdict and order a new trial in this case.

Respectfully submitted this 25th day of October, 2010.

BEARDSLEY, JENSEN & VON WALD, Prof. L.L.C.

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* * *

[Certificate of Service Omitted for Purposes of this Appendix]

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

Civ No. 08-5092-JLV

[Filed October 25, 2010]

GREGORY P. WARGER,

Plaintiff,

v.

RANDY D. SHAUERS,

Defendant.

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR NEW TRIAL

Plaintiff Gregory P. Warger, by and through his attorneys of record, respectfully submits this Brief in Support of Plaintiff's Motion for Judgment as a Matter of Law or New Trial.

PRELIMINARY STATEMENT

Pursuant to Federal Rules of Civil Procedure 50 and 59 Plaintiff moves the Court to set aside the verdict of the jury and enter judgment as a matter of law in favor of Plaintiff in accordance with Plaintiffs prior motion for judgment as a matter of law or if the foregoing

motion be denied to set aside the verdict and the judgment entered thereon and grant Plaintiff a new trial.

Plaintiffs motion is based upon (1) the overwhelming weight of the evidence which does not support the verdict for Defendant; (2) Defendant's counsel's violation of the Court's Order regarding the admission of certain testimony which resulted in prejudice to the Plaintiff that could not be overcome, and (3) the verdict was the product of juror misconduct. As evidenced below the court should enter judgment in favor of the Plaintiff, or in the alternative set the verdict aside and grant Plaintiff a new trial.

ARGUMENT

1. The verdict is against the weight of the evidence and a new trial should be granted pursuant to Rule 59.

"In determining whether a verdict is against the weight of the evidence, the trial court can rely on its own reading of the evidence-it can 'weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict.' " White v. Pence, 961 F.2d 776, 780 (8th Cir. 1992)(citing *Ryan v. McDonough Power Equip.,* 734 F.2d 385, 387 (8th Cir.1984) (citation omitted)). *See also Brown v. Syntex Lab., Inc.,* 755 F.2d 668, 673 (8th Cir.1985) (internal citation omitted)); *Slatton v. Martin K. Eby Constr.* Co., 506 F.2d 505, 508 n. 4 (8th Cir.1974), *cert. denied,* 421 U.S. 931, 95 S.Ct. 1657, 44 L.Ed.2d 88 (1975); and *Bates v. Hensley,* 414 F.2d 1006, 1011 (8th

Cir.1969). In this case it is clear that the verdict is against the great weight of the evidence and a new trial should be granted.

The overwhelming weight of the evidence demonstrates that the Defendant was negligent and his negligence was the legal cause of the collision and of the Plaintiff's injuries.

There were two opposite claims of the actions of the plaintiff in the moments leading up to the collision. The difference between the Defendant's claims and Clint Elmore, an independent eyewitness, were significant. As the Court is aware the Defendant claims that the Plaintiff pulled from the south exit of this Y-intersection onto highway 385 basically making a U-turn back into the south exit when the collision occurred. Defendant's expert, Jubal Hamernik, diagramed Defendant's version of how the accident occurred which was offered to the jury as Defendant's exhibit 219.

Clint Elmore, the independent eyewitness, testified that the Plaintiff was stopped at the north leg of the intersection that he observed the Plaintiff pull onto highway 385 drive a few feet turn his blinker on indicating a turn left or east into the south leg of the intersection. Mr. Elmore testified that he observed the Plaintiff do these things as he traveled north on Highway 385. Mr. Elmore testified that he passed the Plaintiff, as the Plaintiff was slowing near the north end of the south exit and setting up to stop to turn left. Defendant's expert diagramed the north scenario as well; said diagram being marked as Defendant's Exhibit 218.

The differences between the two scenarios are striking. The north exit scenario has the plaintiff traveling 100 feet on Highway 385, while the south version has the defendant traveling north for a distance, then making a u-turn back into the south exit. Not only are the physical paths and the actions of the Plaintiff significantly different in the two versions but so too is the time that the Plaintiff would have been on highway 385 before the collision. Plaintiffs expert and Defendant's expert agreed that it would take between 7 to 9 seconds for a motorcycle to drive from the north exit to the area of impact where the collision occurred. The time the motorcycle was on the highway and its direction of travel is significant because it demonstrates Defendant's negligence in failing to observe Plaintiff.

The only person who believes that the Plaintiff entered from the south exit is the Defendant. Even defendant's expert testified that he believed it was more likely that Warger entered the highway from the north leg of the intersection as opposed to the south as claimed by the Defendant. This is significant because both experts agree that it would take between 7 and 9 seconds for Warger to drive from North exit to the area of impact. That means at a minimum the Plaintiff was between 500 and 650 north of the north leg of the intersection as Warger pulled onto Highway 385[1]. Of course this does not account for the time and distance that it would have taken for Mr. Elmore, who witnessed Warger pull from the stop sign, travel south on 385 and slow to a stop, to travel past the

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[1] 50 m.p.h. equates to 73.3 feet per second. 7 x 73.3 = 513ft. 9 x 73.3 = 659ft.

intersection. Elmore had to be north of the intersection at the time of the collision because he was not involved in the collision and both experts agree that the Defendant's truck and trailer were almost entirely within the north bound lane at the time of the collision. Had Mr. Elmore been in the north bound lane of highway 385 and not been north of the intersection he would have been involved in the collision.

There was no dispute between the experts that it would have taken between 2 to 3 seconds for Mr. Elmore to travel past the intersection going between 35 and 45 miles per hour so as not to be involved in the collision. Adding that 2 to 3 seconds into the equation puts Mr. Shauers another 140 to 210 feet north of the intersection and allows Shauers that much more time to observe what is happening on the highway in front of him and properly slow his vehicle. Without even including the final piece of the analysis, of the time and distance the laws of physics say it takes a vehicle to make a lane change, Mr. Warger would have been on Highway 385 between 9 and 12 seconds before the collision. Thus the overwhelming weight of the evidence supports Plaintiff entering highway 385 from the north exit when the Defendant was more than 900 feet north of the north exit more than 12 seconds away!

The undisputed facts established that Plaintiff would have been on the highway for more than 12 seconds yet the Defendant testified he did not see Plaintiff until he was 100 feet away. Evidence is overwhelming that Shauers failed to keep a proper lookout and control of his vehicle, failed to use ordinary care to avoid putting others in dangers, failed to anticipate the presence on the highway of other

persons and vehicles, was driving at a speed that was greater than reasonable under the conditions. When he realized his negligence and attempted to react to the situation he failed to drive within his lane of travel, improperly attempted to overtake and pass in a no-passing zone and improperly drove on the left side of the roadway at an intersection. As a result of his negligence the collision occurred and Plaintiff incurred significant and permanent injuries.

The court is also permitted to makes its own determination as to the credibility of the witnesses. *White at 780, supra.* Here an examination of Shauers' testimony regarding the moments leading up to the collision demonstrates that his story of what happened continually changed. Originally, Defendant told investigators that he did not see Warger until the motorcycle was entering his lane of traffic. At his deposition Defendant's sworn testimony changed claiming Warger ran the stop sign entering highway 385. When confronted at trial with the question of how he could claim that Warger ran the stop sign if he did not see him until he entered his lane of travel, Defendant then admitted that he just assumed that Warger ran the stop sign.

Likewise at trial Shauers' for the first time claimed that there was a pickup truck with a slide in camper 3 to 4 seconds ahead of him also traveling south. There simply is no way that a truck could have been 3 or 4 seconds ahead of Mr. Shauers as he claimed for the first time at trial. If that had been the case then that truck and not Mr. Shauers would have struck Warger because both experts testified that it would have taken Warger between 7 to 9 seconds to travel from the north

exit to the area of impact. Not even Defendant's expert ever made mention of this truck anywhere in his report or his testimony before the jury. Why? Because the truck did not exist and it could not have happened.

The most telling piece of evidence that suggests Mr. Shauers simply made up the presence of the truck at the trial is Dr. Hamernik's diagrams of the north and south fork scenarios. (Defendant's exhibit 218 and 219) First, neither exhibit shows a truck ahead of Shauers. Dr. Hamernik explained that in his diagrams the positions of the truck and the motorcycle were relative to one another, meaning the first truck and trailer (furthest north) corresponded to the position of the first motorcycle in each scenario. Likewise the second truck corresponded to the second motorcycle etc. If you imagine the pickup truck that Shauers claimed was in front of him in place of the second position of the Shauers truck as they travel south, it is apparent that the phantom pickup would have stuck Warger under either scenario as diagramed by Defendant's expert.

This is yet another example which demonstrates the lack of credibility and plausibility of Defendant's testimony. It is apparent from the evidence that the Defendant was willing to say whatever he felt it took to avoid responsibility for his negligence. But for Defendant's testimony, that is rife with inconsistencies and not even supported by his own expert, there is no support whatsoever for Defendant's claims of negligence on the part of Warger.

"In determining whether a verdict is against the weight of the evidence, the trial court can rely on its own reading of the evidence-it can 'weigh the evidence, disbelieve witnesses, and grant a new trial even where

there is substantial evidence to sustain the verdict.' " White v. Pence, *supra* at 780. The only person suggesting Warger ran the stop sign was the defendant. The only person claiming that Warger entered from the south fork of the intersection was the defendant. The only person claiming that Warger made a U-turn in the middle of the highway is the defendant. It would be a miscarriage of justice to allow Defendant to prevail and the verdict to stand based upon Defendant's unsupported and untruthful version of the events leading up to the collision. Both experts agreed that Warger would have been on the highway for approximately 12 seconds if he entered from the north exit. The Defendant would have been more than 3 football fields away as Warger entered the highway. The evidence of Defendant's negligence in failing to observe Plaintiff is overwhelming. Plaintiff respectfully requests the Court enter and Order granting Plaintiff a New Trial.

2. The verdict was the product of misconduct on behalf of Defendant's counsel who again violated the Court's Order on Motions in Limine which precluded any testimony regarding legal opinions or violations of rules of the road.

The court is well aware of the hours that counsel have devoted to the issue of whether any witness could offer testimony that either of the parties violated a legal duty or the rules of the road. The discussion was part of the *Daubert* hearings conducted by the court of the accident reconstruction experts, it was briefed by both sides following that hearing at the request of the court, and it was the topic of numerous conferences

with counsel during both trials. Defendant counsel again, without reason or excuse, violated this Court's Order preventing any witness from testifying or addressing legal duties of an individual operating a motor vehicle or the rules of the road during his examination of Plaintiff's expert Brad Booth.

Defendant's counsel during his examination of Brad Booth stated in one of his questions that Mr. Warger had to yield the right-of-way to any traffic coming down that highway in front of him. Mr. Kappelman's question, like the question of Mr. Booth in the prior trial that resulted in a mistrial, could not have been a more clear violation of the Court's Order. Once again, Mr. Kappelman did not even frame the question where it provoked an innocent answer by the witness. Instead, like his impermissible question in the last trial, the question asked by Mr. Kappelman presented the prohibited evidence to the jury. It did not matter what answer Mr. Booth may have given, Mr. Kappelman accomplished what he wanted and created in the mind of the jury very early on in the proceedings that Mr. Warger had a duty to yield to Defendant. That question prejudiced the verdict and the Plaintiff because Plaintiff was unable to present any evidence or testimony by Mr. Booth or any other witness to cure the prejudice that Mr. Kappelman already had caused.

"A violation of an order granting a motion in limine may only serve as a basis for a new trial when the order is specific in its prohibition and the violation is clear." Black v. Shultz, 530 F.3d 702, 706 (8th Cir. 2008)(citation omitted). "A party is entitled to a new trial only where the violation constitutes prejudicial error or results in the denial of a fair trial." *Id.* (citation

omitted). "Prejudicial error is error which in all probability produced some effect on the jury's verdict and is harmful to the substantial rights of the party assigning it." *Id.* (citations omitted).

Here there can be no dispute that counsel's question violated this Court's Order. The prejudice to the Plaintiff is obvious from the verdict returned by the jury against the Plaintiff. As noted above, Plaintiff did not have the opportunity to address the prejudice that Mr. Kappelman caused. Moreover, Mr. Kappelman in his closing argument to the jury suggested that there was no dispute that Plaintiff had a duty to yield to traffic coming down the hill. Plaintiff was not able to overcome that argument or the prejudice caused by the question. Defendant's counsel should not be rewarded by again intentionally violating this Court's Order. The fact of the matter is that this very topic had been addressed at least a dozen different times prior to Mr. Kappelman intentionally violating the Order, Mr. Kappelman knew the question was impermissible yet he chose to try and slip it by to place the seed in the mind of the jury during Plaintiff's case in chief. This tactic should not be rewarded. Asking question was an intentional violation of the Court's Order, It caused prejudice to Plaintiff and the Court should set the verdict aside and grant Plaintiff a new trial.

3. The verdict was the product of juror misconduct.

Less than one week after the jury returned its verdict one of the jurors, Mr. Stacey Titus, stopped by the law office of Plaintiff's counsel and asked to speak to either Mr. Beardsley or Mr. Jones. When Mr. Beardsley was summoned to the lobby he immediately

recognized Mr. Titus as one of the jurors from the case and advised Mr. Titus that he could not visit with him about the case because local rules prohibit speaking with jurors until their term of service is completed. The Court, at post trial hearings, released all of the jurors who served on the case from further juror duty and permitted counsel to contact any juror as they saw fit.

Thereafter Mr. Beardsley and Mr. Jones met with Mr. Titus. Mr. Titus advised Plaintiff's counsel that the reason he had stopped by and wanted to visit with counsel is that he did not feel that Plaintiff was given a fair chance in deliberations. One of the jurors, who happened to be the foreperson, focused not on the facts of the case and fault, but rather on how this case related to a similar automobile accident that involved her daughter. (See Affidavit of Stacy Titus, Exhibit 1).

Mr. Titus advised he was concerned because he did not believe that juror was willing to consider any of the facts or evidence of the case presented to the jury. This juror was more concerned about the effect on her daughter if she had been sued. This juror stated a lawsuit would have ruined her daughter's life like it would ruin the defendant and his family. For that reason she could not return a verdict for the Plaintiff.

Mr. Titus advised he was concerned with the position that the juror was taking in deliberations in contrast with the answers she provided during jury selection. Mr. Titus advised us that his concern rose to the level that following the verdict in an effort to deal with the dilemma he sought advice from one of the City Attorneys regarding whether he had an obligation to report this impropriety to the Court. Thereafter Mr. Titus stopped by counsels' law offices.

According to Mr. Titus, the juror, Mrs. Whipple, indicated to him and others that she could not vote in favor of the Plaintiff because it would ruin the lives of the Defendant and his family and the same thing would have happened to her daughter had her daughter been sued for the accident she caused. Mr. Titus was concerned that other juror also picked up on the foreperson's position because other jurors also expressed their concern about returning a verdict for the Plaintiff and ruining the Shauers' lives as they were a young couple.

It is apparent from the verdict that the foreperson's comments prejudiced the Plaintiff and resulted in a verdict for the Defendant. During voir dire, the members of the panel were questioned whether they would have any difficulty returning a substantial award in favor of the Plaintiff if the damages supported such an award. Mrs. Whipple did not indicate that she would be unable to return a verdict in favor of the Plaintiff. She made no mention regarding the serious accident that her daughter had been involved in or her strong feelings that a lawsuit such as this would ruin the Defendant's life. Nor did she state that she would not be able to set her feelings aside and render a verdict on the evidence and law as instructed by the Court. The jury instructions given to the jurors demanded that "Neither sympathy nor prejudice should influence you. Your verdict must be based on evidence and not upon speculation, guess or conjecture. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I gave it to you." (Final Instruction No. 1).

Here there is evidence that the jury allowed sympathy to direct the verdict and prevented the jury from discussing the facts and the law of the case. Here the foreperson injected her personal story into the deliberations. It was apparent to Mr. Titus that other jurors bought into the foreperson's perspective, that being that a verdict for the plaintiff would ruin the lives of the defendant's family. Given the fact that it was the foreperson who injected discussion of her daughter's experience and suggested that the lawsuit would destroy the Defendant's family, it was particularly prejudicial to the Plaintiff. A vote against the Defendant would also have been a vote against the foreperson of the jury.

WHEREFORE, Warger requests that this Court enter judgment in his favor, or, in the alternative, that it set aside the jury verdict and order a new trial in this case.

Respectfully submitted this 25th day of October, 2010.

BEARDSLEY, JENSEN & VON WALD, Prof. L.L.C.

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[Certificate of Service Omitted for Purposes of this Appendix]

STATE OF SOUTH DAKOTA)
)ss.
COUNTY OF PENNINGTON)

AFFIDAVIT OF STACEY TITUS

Stacey Titus, being first duly sworn, deposes and states as follows:

1. My name is Stacey Titus. I am a Civil Engineer, employed by the City of Rapid City.

2. I served as a juror on the Greg Warger v. Randy Shauers trial.

3. Following the jury trial, which lasted approximately eight days, I was concerned about what had transpired in deliberations and stopped at the offices of Beardsley, Jensen & Von Wald, to visit with Steve Beardsley or Travis Jones.

4. The biggest concern I had during jury deliberations was the attitude and comments by some of the jurors to not consider the facts and evidence of the case. It was evident to me that one juror, who ended up being the foreman, was influenced by her own daughter's experience, and not the facts, evidence, and law that was presented to us.

5. The juror, who ended up being the foreperson, during deliberations spoke about her daughter's experience, which included a motor vehicle collision in which her daughter was at fault for the collision and a man died. She related that if her daughter had been sued, it would have ruined her life. She further indicated that her daughter sat down and visited with the family of the deceased person and gave them flowers at the 5 year anniversary of the collision.

6. It is obvious that this juror was more concerned about the issues involving her daughter than she was the facts, evidence, and law presented by this Court and counsel. It was apparent that this comment may have been made to and influenced other jurors because other jurors also expressed their concern about ruining the Shauers' life as they were a young couple.

7. Following the verdict I was concerned about the dilemma of the juror ignoring the dictates of the Court and the law. I sought advice from one of the City Attorneys regarding this matter and regarding whether I had an obligation to report to the Court the impropriety I observed.

8. I am still concerned regarding the bias expressed by this juror. I am concerned that the juror influenced other jurors by stating that her daughter's life would have been ruined if a lawsuit had been filed against her in her collision.

Further your affiant sayeth not.

Dated this 25 day of October, 2010.

/s/ Stacey Titus
Stacey Titus

Subscribed and sworn to before me this 25th of October, 2010.

/s/ Travis B. Jones
Notary Public
My Commission Expires:

Travis B. Jones, Notary Public
My Commission Expires
March 24, 2011

[Seal]

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

Civ No. 08-5092-JLV

[Filed November 26, 2010]

GREGORY P. WARGER,

Plaintiff,

v.

RANDY D. SHAUERS,

Defendant,

PLAINTIFF'S REPLY TO DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR A NEW TRIAL

Plaintiff Gregory P. Warger, by and through his attorneys of record, respectfully submits this Reply Brief to Defendant's Brief in Opposition to Plaintiff's Motion for Judgment as a Matter of Law or New Trial.

1. The verdict is against the weight of the evidence and a new trial should be granted.

"In determining whether a verdict is against the weight of the evidence, the trial court can rely on its own reading of the evidence-it can 'weigh the evidence,

disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict,' " White v. Pence, 961 F.2d 776, 780 (8th Cir. 1992)(citing *Ryan v. McDonough Power Equip.,* 734 F.2d 385, 387 (8th Cir.1984) (citation omitted)). See *also Brown v. Syntex Lab., Inc.,* 755 F.2d 668, 673 (8th Cir.1985) (internal citation omitted)); *Slatton v. Martin K. Eby Constr.* Co., 506 F.2d 505, 508 n. 4 (8th Cir.1974), *cert. denied,* 421 U.S. 931, 95 S.Ct. 1657, 44 L.Ed.2d 88 (1975); and *Bates v. Hensley,* 414 F.2d 1006, 1011 (8th Cir.1969). In this case it is clear that the verdict is against the great weight of the evidence and a new trial should be granted. To determine whether the verdict is against the great weight of the evidence and the Defendant's claim of how the accident occurred, the Court need only to examine the Defendant's in court testimony of how the accident occurred and the events leading up to it.

The most telling piece of evidence was Defendant's testimony at trial where for the first time Defendant claimed that there was a pickup truck with a slide in camper 3 to 4 seconds ahead of him also traveling south. Defendant argued that it must have been that truck that Elmore observed and not Shauers. However as explained by Plaintiff in his initial brief there simply is no way that a truck could have been 3 or 4 seconds ahead of Mr. Shauers as he claimed. If that had been the case then that truck and not Mr. Shauers would have struck Warger. It is clear that Mr. Shauer's testimony was not credible. The simple fact of the matter is that he made up the existence of the truck at trial. Defendant's expert never made mention of this other truck anywhere in his report or his testimony before the jury. Nor did Defendant's expert include this

other truck into any of his diagrams of how the accident occurred.

The Court should not have to look any further to determine that a miscarriage of justice occurred. It is apparent from the evidence that the Defendant was willing to say whatever he felt it took to avoid responsibility for his negligence. But for Defendant's testimony, there is no support whatsoever for Defendant's claims of negligence on the part of Warger. "In determining whether a verdict is against the weight of the evidence, the trial court can rely on its own reading of the evidence-it can 'weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict.' " White v. Pence, *supra* at 780.

In this case there is a lack of evidence to support the verdict. As shown above, the Court should disregard Defendant's testimony because it is not supported by the facts and it is apparent from the Defendant's testimony under oath that he was being less than truthful regarding the events leading up to the accident. The only unbiased evidence received by the jury was that of Clint Elmore, a law enforcement officer with more than 30 years in law enforcement. Mr. Elmore's testimony was clear and unequivocal. He observed the Plaintiff stopped at the north fork of the intersection waiting to pull onto highway 385. Elmore observed the Plaintiff pull onto the highway and turn on his blinker indicating a turn back onto Sheridan Lake road. Elmore observed Plaintiff travel down highway 385, near the centerline, and come to almost a complete stop before he passed him. Elmore continued up the hill and then observed Plaintiff

traveling way to fast, coming down the hill. Elmore testified that as he passed Defendant he saw the Defendant with his head turned to the right. Concerned that the Defendant did not see the Plaintiff and that an accident would occur, Elmore looked in his rearview mirror and observed the collision occur.

The overwhelming weight of the evidence supports Elmore's observations and testimony of how the accident occurred. Simply put, but for Defendant's testimony, there was no testimony by any witness that Plaintiff did anything wrong. It is apparent from the facts of the case that Defendant's testimony is not trustworthy and generally lacks credibility. Setting aside Defendant's testimony, there is no evidence upon which reasonable minds could differ. It is clear that a miscarriage of justice has occurred and that the court should grant Plaintiffs Motion for a New Trial.

2. The verdict was the product of misconduct on behalf of Defendant's counsel who again violated the Court's Order on Motions in Limine which precluded any testimony regarding legal opinions or violations of rules of the road.

In their brief Defendant asserts that they did not violate the Court's Order which strictly prohibited inquiring of any witness any testimony regarding legal opinions of the cause of the accident or violations of the rules of the road. Defendant claims that his question of Mr. Booth that gave rise to Plaintiff's objection and motion for mistrial, "[i]n no way, shape, or form violated the spirit or letter of the Court's Order." (Doc. 180, p. 7). The Court, however, was very clear that the question violated the Court's Order. At the time of

Plaintiff's objection, the Court admonished Defendant's counsel and inquired of him "what is it about my ruling that you don't understand?"

Defendant also mistakenly alleges that Plaintiff did not request a curative instruction, thereby waiving any claim that Plaintiff was prejudiced by the question. (Doc. 180, page 7). First, Defendant does not cite any legal authority to support this claim. Moreover, Defendant's allegation ignores the fact that Plaintiff moved for a mistrial. Moreover, over Plaintiff's objection in not granting the mistrial the Court gave an curative instruction to the jury. It is apparent from the verdict that the admonishment was insufficient to cure the prejudice suffered by Plaintiff as a result of Defendant's violation of the Court's Order.

Finally, Defendant's reliance on *Black v. Shultz,* 530 F3d 702, 706 (8th Cir. 2008) is misplaced. The violation of the pretrial order in *Black* is not akin to the violation of the Court's pretrial order in this case. In *Black* the order was violated by an inadvertent answer by a witness. *Id.* In this case, the order was intentionally violated by Defendant's counsel who directly asked an impermissible question seeking an impermissible answer. Here Defendant asserts that there is no error because there was no answer to the question. The fact that Mr. Booth did not answer the question should not provide an excuse for Defendant's intentional violation.

Defendant's argument ignores the fact that the question posed by counsel violated the Court's Order. Moreover, counsel for Defendant had been down this road before and had previously caused a mistrial for which he was sanctioned. Defendant alleges that this violation was not as severe as his previous violation

and should not serve as the basis for a new trial. That should not be a defense or an excuse for granting a new trial for Defendant's counsel's intentional violation of the Court's Order.

Defendant also alleges that Plaintiff has presented no evidence that the violation was prejudicial to Plaintiff. Plaintiff addressed in his initial Brief the fact that Defendant capitalized on his violation of the Order during closing argument when he repeatedly argued to the jury that both Mr. Booth and Mr. Hamernik agreed that Plaintiff had a duty to yield to Defendant. The evidence is clear that Defendant's utilization of his violation of the Order in closing argument, undoubtedly prejudiced Plaintiff and the verdict in violation of the Court's pretrial Order.

3. The verdict was the product of juror misconduct.

Defendant alleges that the Court should strike the affidavit of juror Stacey Titus because it does not strictly comply with the requirements of FRE 606(b). FRE 606(b) provides that a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention (2) whether any outside influence was improperly brought upon any juror or (3) whether there was a mistake in entering the verdict onto the verdict form. Juror Titus' affidavit complies with FRE 606(b) because it contains information regarding extraneous prejudicial information that was brought to the jury's attention by way of another juror. As explained by Titus, the extraneous information was interjected by juror Whipple of how a verdict would ruin the defendant's life and her experience with her daughter and the

accident she was involved in. As explained by Titus, that information shifted the focus away from the evidence presented and onto the effect the verdict would have on the Defendant and his family. This prejudiced Plaintiff because the jury disregarded the evidence of Defendant's negligence in bringing about the accident. Moreover, as explained by Titus in his affidavit, this is not a case where Titus was sought out by counsel after the verdict but rather one where he sought out counsel to share with them his concerns for the verdict and the extraneous information that was brought into the jury room and how it affected the verdict.

Defendant does not challenge the validity of the contents of the affidavit of Titus. Likewise Defendant has failed to submit any opposing affidavits to suggest that what Titus has stated in his affidavit is incorrect. Rather, Defendant simply wants the Court to ignore the affidavit and the improper method in which the jury reached its verdict. The facts of this case and the misconduct of the jury is not analogous to the case of *Banghart v. Origoverken, A.B.,* 49 F3d 1302 (8th Cir. 1995) where the jury conducted an experiment during deliberations. In *Banghart* the jury was testing the validity of the testimony of one of the experts by dropping toothpick and matches into a stove that had been admitted into evidence. *Id.* The court found that neither the toothpicks or matches, nor the experiment conducted by the jurors constituted extraneous evidence. *Id.* The court held that the toothpick and matchers were not evidence but rather merely objects used in scrutinizing the physical nature of the piece of evidence upon which the case turned ... *Id. at 1306.*

Here in this case the jury did not perform any tests to analyze the evidence, rather the jury failed to consider the overwhelming evidence of the Defendant's negligence based upon the statements of Ms. Whipple the foreperson who interjected into the deliberations the affect of a verdict against the defendant and how it would destroy the defendant's life like it would have her daughter had a lawsuit been brought against her in the accident wherein she killed someone.

The fact that the jury was more focused on the effect of the verdict against the defendant than it was in analyzing the evidence shows the prejudicial effect of the foreperson interjecting her daughter's experience into the deliberations. As a result the Plaintiff was prejudiced because the jury neglected to analyze the evidence and return a verdict for the Plaintiff based upon the overwhelming evidence of the defendant's negligence.

WHEREFORE, Warger requests that this Court enter judgment in his favor, or, in the alternative, that it set aside the jury verdict and order a new trial in this case.

Respectfully submitted this 26th day of November, 2010.

BEARDSLEY, JENSEN & VON WALD, Prof. L.L.C.

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* * *

[Certificate of Service Omitted for Purposes of this Appendix]

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CIV NO. 08-5092

[September 20, 2010]

GREGORY P. WARGER,

PLAINTIFF,

vs.

RANDY D. SHAUERS,

DEFENDANT.

SEPTEMBER 20, 2010
RAPID CITY, SOUTH DAKOTA

TRANSCRIPT OF JURY TRIAL
VOIR DIRE EXAMINATION OF THE JURY

BEFORE THE HONORABLE JEFFREY L. VIKEN,
UNITED STATES DISTRICT JUDGE AND A JURY

APPEARANCES:

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[p. 2]

(Following proceedings in open court)

THE COURT: My name is Jeffrey Viken. I am a United States District Judge for the District of South Dakota, and it is my honor and pleasure to work with you as prospective jurors for this civil case.

With us this morning is Judy Thompson, our court reporter. Jeana Holso, our deputy clerk, who will be working with us throughout the course of the trial. And my law clerk, Tamie Sawaged.

Would counsel please introduce yourselves and your clients.

MR. BEARDSLEY: Thank you, Your Honor. My name is Steve Beardsley. I represent Greg Warger along with my partner, Travis Jones. And Wendy Hanken is my assistant, also.

THE COURT: Thank you. Defense, please.

MR. KAPPELMAN: Thank you, Your Honor. My

name is Ron Kappelman. This is my client, Randy Shauers. My partner Greg Strommen and Nick Carda, assistants with our office.

THE COURT: Thank you, gentlemen.

Jeana, would you please swear our panel, please.

(Panel sworn.)

THE COURT: Ladies and gentlemen, 18 of your number have been selected randomly by computer to be called

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into the jury box for the jury selection process. So at this time, Jeana, if you would please call those randomly selected 18 names.

DEPUTY CLERK OF COURT: Judith Abdo, Regina Whipple, Raymond T. Williams.

THE COURT: I have Raymond Reynolds.

DEPUTY CLERK OF COURT: So sorry. Raymond Reynolds. Billie Lee McCamly, Allan Zandstra, Barton Isaac Goodwin, Annette Gilby-Merritt.

The next seven persons will go to the second row beginning in the far right. Debra Simpson, Sheila Smith, Mike Besso, Stacey Titus, Terry Whitmyre, Jason Tripp, Michael Napier-- I'm sorry. Evidently Mr. Napier is not here. The next name on our list is Joan Lemmel.

The next four jurors if you could take a seat in the last row, again, on the far right. Johnnie Boje.

JUROR: Jamie. Johnnie Knapp, David Rubins, and Joan Murphy-- and David Murphy.

THE COURT: Thank you, Jeana.

Ladies and gentlemen, Arnie is the court security officer, the gentleman who is holding the gate open for you so you could come and go. We will have the court security officers with us throughout the trial.

I am going to ask you some questions for those of you who have been called randomly into the jury box for

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jury selection. Those of you who have not been called if you would please listen carefully to my questions and then to the questions asked by the attorneys; in the event one of our jurors is excused for any reason, Jeana will call the next name on the randomly-selected list to replace the person excused, and then you will be asked, if you are replaced in the jury box, if you have any responses to the questions which have already been asked. So your attention to the questions is greatly appreciated and you are a real service to your fellow prospective jurors here because if one of them is excused for cause or for any reason, we will need you to serve. So I appreciate that very much.

I am going to ask you some questions, ladies and gentlemen, to make certain that you are completely objective and free from bias or prejudices of any kind regarding this case. Any citizen may be a proper juror for a particular case, but in this instance, we have a civil case so we are really going to ask questions and help you decide whether for this particular case you are

a fair and impartial juror. You may be a great juror for a criminal case or some other civil case, but not for this case because of your own experiences in life or opinions or beliefs which you hold. So please, the key to this jury selection process is candor and honesty. If you have personal opinions, biases, religious beliefs, notions of

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proof? Is it okay for the plaintiff according to law can recover; they just need to show a little more, more likely than not it occurred?

MS. GILBY-MERRITT: Yes.

MR. BEARDSLEY: That's okay?

MS. GILBY-MERRITT: Uh-huh.

MR. BEARDSLEY: Anybody -- I don't want to call everybody's name -- anybody say, "You know, I think it's got to be more. I think he's got to have it way up here." Anybody feel that way that just kind of has a thought, "No, no, I think it should be more?"

MR. GUTHRIE: Are you talking about the amount or just who?

MR. BEARDSLEY: We are going to get to the amount.

MR. GUTHRIE: I mean, what are you saying? There's three different things you are asking. Are you saying-- I mean, the way you were phrasing it you are saying is it okay to find for your client, yeah, you do only need greater substantial force, or whatever, but as to the amount maybe you mean for both?

MR. BEARDSLEY: Okay. Very good question. Let me break it down and how you feel. Very good question. The law is, as the Judge will instruct, that you have to prove your case by a greater convincing force and there's

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two parts. One part is causation or liability; the other part is the amount of damages that we have proved. So as to liability, yes, it's greater convincing force, it's just a little bit more. More likely than not. You okay with that?

MR. GUTHRIE: Yes.

MR. BEARDSLEY: Now I am going to go to the injuries; we are going to talk about the injuries. Okay. Again, the burden of proof of proving the injuries is still just slightly higher than not proving it. Now, in this instance, we have two doctors that did a whole series of surgeries on this gentleman. There aren't any doctors that say he didn't get injured; that's not an issue. The issue on how much burden of proof is we have the burden of proof; the plaintiff has the burden of proof of proving how much injury he has not only from that day, or that the series of surgeries he had, but how does that affect his life? And we are going to prove that. And then as a group, the 12 of you, if you decide for Mr. Warger, then we'll decide what is fair compensation for his losses and that is a burden, same kind as fair and convincing force. You still look confused.

MR. GUTHRIE: Well–

MR. BEARDSLEY: Am I right?

MR. GUTHRIE: You are asking for a tipping of the

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scales on a graduated curve, right? So are you saying we have got to decide where the scales tilt along this curve?

MR. BEARDSLEY: Let me give you an example. Loss of earning capacity, loss of earnings during the time that he's in the hospital, in the nursing home; you know, if there were some evidence on the other side that said, no, I don't think he lost 15, $16,000; he really only lost 8, then the jury would determine shall we consider loss of earnings and then decide based on greater convincing force. Okay. So they are each part of the damage. Medical expenses are over $367,000. If we prove on tipping the scales that, yeah, this is what he incurred and they are responsible for it, then by law, that's part of what the jury should consider in determining how much damages. Okay. Do you understand that?

MR. GUTHRIE: Yeah. I mean, if you have a black and white amount it's easy to make that kind of decision. Yeah, it's owed. But I don't see how you can balance two, like an amount over the black amount; I mean, black and white amount that's been transacting; or I don't see how you can convert the two.

MR. BEARDSLEY: Let me try the other way. Very good questions. I appreciate your discussion. Hopefully everybody else is listening as well. There are certain things we are going to ask as damages. I am going to ask

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if anybody has any problem with it. One is medical expenses incurred, black and white, $367,000 plus. Okay. Then there's future prosthetics because this leg, he has a leg from here on down, needs to be replaced because it wears out every three to five years. It's extremely expensive. And there would be testimony by us by doctors and by a prosthetic man that it will cost, over his life-expectancy, anywhere from 5 to $800,000 to replace the leg; that's another black and white, but there could be some discussion about it. But it leads me into-- and the Judge will also instruct -- allowing a number for the pain and suffering that he's experienced and will experience the rest of his life. Now, that is a lot less black and white than medical expenses and future medical expenses. Okay? You following me?

MR. GUTHRIE: And I don't think-- I don't know that, that what you are talking about, I don't know that I could-- I don't know that anybody could be instructed on what's right and wrong there. I don't think you can say, hey, this is a formula we are going to plug in. It would be my personal opinion whether-- you know, what I think is right. I don't think anybody can tell me what is right or wrong in that case. I don't think it's possible.

MR. BEARDSLEY: The Judge will give you categories of allowance of damages for injury: medical

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expenses, future medical expenses, pain and suffering, loss of enjoyment of life. And he doesn't tell you to do any of those. He leaves it up to 12 people to get their heads together and talk about it and decide what is fair

compensation. So he's not going to tell you. We are going to talk to you about it; and then you guys, if you get to that issue, will decide what's fair and reasonable compensation. If it's like that, are you comfortable with that concept where 12 people then will get together and look at the options the Judge gives you and make decisions? Are you okay with that?

MR. GUTHRIE: See how it applies to this greater force thing? I mean, then we are just going in with our opinion; we are not really objectively looking at any sort of fact is the way it feels like to me. Feels like we are just going to go in and render our opinion as let's do that, that's cool. I can do that. But I don't see how that applies.

MR. BEARDSLEY: Greater convincing force.

MR. GUTHRIE: Yes.

MR. BEARDSLEY: The burden on the plaintiff if they are going to claim pain and suffering, use your common sense, the burden of the plaintiff is they don't have to prove pain and suffering beyond a reasonable doubt, they only have to prove it in a greater convincing force. Or

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loss of enjoyment of life at a reasonable --beyond a reasonable doubt. Loss of enjoyment of life would be greater convincing force. That's just a burden. You have to take all of this as jurors and come together and make decisions. Okay?

I do want to talk to you about whether or not if we prove our case if you are comfortable of the awarding of

medical expenses if we prove, even though it's a large number, if we prove that medical expenses incurred are $367,000, raise your hand if anybody has a problem with if we prove our case awarding those kind of medical expenses; anybody have a problem?

We are also going to present evidence of future medical expenses: medicine; he takes Neurontin because he has what's known at phantom pain. And the doctors will talk about that, as he will. That even though his leg is gone, the nerves have been cut and it goes all the way down and he feels sensation in his entire leg and has pains and he'll talk to you about that. And so he needs medication for that.

In addition this concept that you have to replace the prosthetic leg, a socket and the leg, between three to five years. You will hear the testimony about that and the future cost of life expectancy is anywhere from $500,000 to $800,000.

I am going to be more specific on this. Ms. Abdo, do you have a concern about future medical expenses like I talked about the medications and the prosthetic device? Can you award that if we prove our case?

MS. ABDO: Yeah, I sure could. I kind have been through a situation with this. My husband was in an accident at work and ended up only living 12 days. And then I got a divorce from that and I really didn't think it was ever going to be enough, I mean, because I couldn't ever get him back, so I really have no problem with that part whatsoever.

MR. BEARDSLEY: Thank you. How about Ms. Whipple, the concept of future medical expenses, any problem with that?

MS. WHIPPLE: No.

MR. BEARDSLEY: If we prove our case. Mr. Guthrie? Depends on this --

MR. GUTHRIE: No. I mean, if it completely wipes him out is it fair? I mean, if it's an accident why should he and his family suffer forever? I don't know what happened.

MR. BEARDSLEY: The duty of the jury is to decide liability and decide what's fair compensation, not the effect of that. Just the numbers. You understand that?

MR. GUTHRIE: Yeah, I understand that. I don't

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know if that is right.

MR. BEARDSLEY: You have a concern. Thank you. Mr. McCamly, how do you feel about future medical expenses? Even though it's a big number, are you comfortable with that if we prove it?

MR. MCCAMLY: If you prove it, I believe he's entitled to it. Has he been -- has there been a guilty – was he in the wrong doing his traffic violation? Was he found guilty of doing something wrong? I don't know the facts of the case yet, but if we are here for medical reasons, if he's entitled to it, and we put our heads together and come up with it, then I have no problem with him being compensated.

MR. BEARDSLEY: Thank you And in half answer to your question, this is a civil case; nobody is going to jail, nobody is going to be found guilty, but

responsible, liable, and the Judge will give instructions on that and determine if the defendant is liable, and then you go on to the damage issue.

Mr. Zandstra, are you comfortable with future medical expenses even though it's a substantial number if we prove it?

MR. ZANDSTRA: As long as you prove it.

MR. BEARDSLEY: Mr. Goodwin.

MR. GOODWIN: Yes.

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MR. BEARDSLEY: Ms. Merritt.

MS. GILBY-MERRITT: As long as you prove it.

MR. BEARDSLEY: Ms. Lemmel.

MS. LEMMEL: As long you prove it.

MR. BEARDSLEY: Mr. Tripp.

MR. TRIPP: Yes.

MR. BEARDSLEY: Ms. Whitmyre.

MS. WHITMYRE: Probably.

COURT REPORTER: I didn't hear what she said.

MR. BEARDSLEY: She said probably and she kind of wrinkled up her nose and nodded.

Mr. Titus.

MR. TITUS: Yes.

MR. BEARDSLEY: Mr. Besso.

MR. BESSO: I am fine with it.

MR. BEARDSLEY: Ms. Smith.

MS. SMITH: Yes.

MR. BEARDSLEY: Ms. Simpson.

MS. SIMPSON: Yes.

MR. BEARDSLEY: Ms. Boje.

MS. BOJE: Yes.

MR. BEARDSLEY: Mr. Knapp.

MR. KNAPP: Yes.

MR. BEARDSLEY: Mr. Rubins.

MR. RUBINS: Yes.

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MR. BEARDSLEY: Mr. Murphy.

MR. MURPHY: Yes.

MR. BEARDSLEY: Now I am going to get to the tough stuff. Some people I know are uncomfortable awarding damages for pain and suffering. Some people have religious beliefs or background beliefs, or whatever, that are just uncomfortable in awarding for pain and suffering. I have friends that don't know. Then some people say, no, somebody went through what he went through, that, yeah, I can award a number; I can award money damages for pain and suffering. And I kind of need to know where people feel about that. Ms. Boje, are you closer to: I can't award for pain and suffering or closer to that you think you can

under the right circumstances?

MS. BOJE: Money is not going to make everything better. I have never had a real attachment to money because it doesn't make me happy, so just because I am hurt and I suffered through this, it's not going to make me feel better about that time. I am not going to be able to-- yeah, I will go buy a car, or whatever; that doesn't make me better about it, so I don't know if I could see that side of things.

MR. BEARDSLEY: You are not sure?

MS. BOJE: No.

MR. BEARDSLEY: Okay. That's fair.

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Ms. Merritt, how do you feel about it? You closer to I can't award for pain and suffering or, yeah, I can award for pain and suffering?

MS. GILBY-MERRlTT: Yeah.

MR. BEARDSLEY: You think you can?

MS. GILBY-MERRlTT: Yes.

MR. BEARDSLEY: Mr. Knapp, how do you feel? Every time I call on you, you just smile at me. What do you think? Closer to I can't do it or closer to yeah, I think there probably is some I could award?

MR. KNAPP: Probably so.

MR. BEARDSLEY: Mr. Rubins, how about you?

MR. RUBINS: Closer to I can.

MR. BEARDSLEY: Mr. Murphy?

MR. MURPHY: Yeah.

MR. BEARDSLEY: Mr. Zandstra.

MR. ZANDSTRA: Some.

MR. BEARDSLEY: Mr. McCamly?

MR. MCCAMLY: I believe some.

MR. BEARDSLEY: Ms. Lemmel?

MS. LEMMEL: Yes.

MR. BEARDSLEY: Mr. Tripp?

MR. TRIPP: Yes.

MR. BEARDSLEY: Ms. Whitmyre. Now this time you are shaking your head no.

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MS. WHITMYRE: No. I just don't see if it was an accident and wasn't something done deliberate you've got to accept some responsibility. I don't feel somebody should have to pay because you just get your life going again. I have had things happen, too. You bite the bullet and get going again.

MR. BEARDSLEY: Does it make a difference to you that when the Court instructs that the cause of the collision doesn't have to be intentional and the cause of the pain and suffering does not have to be intentional that it can be a negligence or a carelessness, would that make a difference to you? Could you follow the law if the Judge said, no, it doesn't have to be intentional to consider pain and suffering?

MS. WHITMYRE: I will follow the law.

MR. BEARDSLEY: That's fair. I understand your feelings. Thank you.

Mr. Titus, how do you feel about pain and suffering? Closer to I can award it or closer to I can't?

MR. TITUS: I could award.

MR. BEARDSLEY: Mr. Besso.

MR. BESSO: I could.

MR. BEARDSLEY: Ms. Smith.

MS. SMITH: I could.

MR. BEARDSLEY: Ms. Simpson.

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MS. SIMPSON: I could.

MR. BEARDSLEY: Ms. Abdo.

MS. ABDO: I could.

MR. BEARDSLEY: Ms. Whipple.

MS. WHIPPLE: Yes.

MR. BEARDSLEY: Mr. Guthrie.

MR. GUTHRIE: Yes.

MR. BEARDSLEY: Now that I tried to mix it up I don't know if I got everybody. Did I miss anybody on that issue?

MR. GOODWIN: Yeah, me.

MR. BEARDSLEY: I'm sorry. And you kind of told me I think earlier, but what do you think about pain and suffering?

MR. GOODWIN: Yeah, I'd pay for it.

MR. BEARDSLEY: Thanks. I'm sorry. Anybody else? Thank you.

This is an important case. It's important for a lot of reasons because it has to do with rules of the road, it has to do with how you drive trucks, how you drive motorcycles, and it will make a difference. And there may be media coverage; there may be, I don't know. There may be coverage because we are asking for a substantial sum. And some people don't want to be put in a spot where they have to make such an important decision. If you would

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raise your hands, all of you, if you are comfortable making this important decision on this case. Can you do that? Mr. Guthrie, Mr. Goodwin, and Ms. Boje. Mr. Goodwin, you are uncomfortable doing this?

MR. GOODWIN: To an extent.

MR. BEARDSLEY: And does it go back to your own experience or something else?

MR. GOODWIN: Goes back to my own experience.

MR. BEARDSLEY: And you just sit here and have concerns for making such an important decision?

MR. GOODWIN: Yes.

MR. BEARDSLEY: Thank you. Mr. Guthrie, did

we talk about it earlier when we were talking about the greater convincing force or is it something else?

MR. GUTHRIE: Pretty much along those lines. I don't believe I am comfortable trying to decide something who is liable.

MR. BEARDSLEY: That's fair. I'm glad you are talking. It's hard to come to a spot where you've never been on a jury and all of a sudden some attorneys are asking you questions and you got to volunteer in front of a whole group. I appreciate your comments. You are speaking from the heart; that's what we need.

Ms. Boje, was it the concern you talked about earlier or is it something else?

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MS. BOJE: No, it's the same with the motorcycle; it's how I feel that it really could be their fault, motorcycle's fault; and in this instance, at least with the facts that I was given so far.

MR. BEARDSLEY: And that's your concern because it's an important case and you're just not sure yet?

MS. BOJE: Yeah.

MR. BEARDSLEY: Thank you.

THE COURT: Mr. Beardsley, we are going to take a 10-minute recess. If you are serving as jurors in the case -- we will work through this together -- we will take a break about every hour and a half. Our court reporter has an intense job following the testimony and writing down every word, but also just to get a stretch

and to clear your minds and to take a break, I think it's important and good for everyone to have that opportunity.

Now, those of you who are in the gallery and not sitting in the jury box, any one of you could be selected as a juror in this case. So the instruction I am about to give applies to you as well as to you folks in the jury box. And you will hear me give this instruction repeatedly if you sit on this jury.

You don't know anything about the case other than what you have heard this morning, and so it would be very inappropriate to form any opinions; to have any conclusions

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at all about the case. And so this is a kind of recess instruction that you will hear regularly during the course of the case, but it applies to you now. Everyone has taken the oath to participate in jury selection and to fairly answer these questions. So during this recess, you must not discuss this case with anyone, including other jurors. You cannot talk to members of your family, people involved in this trial, or anyone else. If anyone tries to talk to you about this case during this recess, please let me know about it immediately. I know that many of you use cell phones, e-mail, I-phones, text messaging, Twitter, Blackberries, the Internet, and other tools of technology including social networking tools like Facebook, MySpace, U-Tube. You must not talk to anyone about the case or use any of these tools of technology to communicate electronically with anyone else during this recess. Do not read, watch, or listen to any media or information during our

break. Do not conduct any research about the case or anything that you heard so far. And please keep an open mind until all the evidence has been received and you have heard the views of your fellow jurors, if you are selected as a juror in the case.

So at this point we will take a 10-minute recess. And during that time make yourselves comfortable. And again, please do not discuss the case with anyone in any

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MR. BEARDSLEY: Mr. Knapp, can you do that, too? Were you nodding?

MR. KNAPP: Yes.

MR. BEARDSLEY: Thank you. There's a natural sympathy when somebody gets hurt. And we are not here about sympathy, we are here about fair compensation and so that needs to be understood. Mr. Warger is a fighter; he's fighting a comeback. And is everyone comfortable we are not awarding damages because of sympathy, we are awarding damages because of fair compensation that's required. Everyone is kind of nodding with me on that?

Ladies and gentlemen, I know you are going to find this hard to believe, but I can stand up here all day and ask you questions. Here is the bottom line, then I am going to sit down. The bottom line is is there anything that's come up, is there any topic that you thought of since we started, other than the one we talked about, that you now have concluded, you know, I don't think

I could be a fair and impartial juror on this kind of case. I know it's kind of a general question, but this is your time to raise your hand and say, "I just don't think I can do this." Other than what we have talked about, anybody here have anything that you are sitting here going, "Geez, I just don't think I could be fair"? Thank you. Thank you very much.

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Your Honor, I would pass this jury for cause.

THE COURT: Very well, Mr. Beardsley. Mr. Kappelman, are you conducting voir dire?

MR. KAPPELMAN: Yes, Your Honor.

THE COURT: You may begin, sir.

VOIR DIRE EXAMINATION

MR. KAPPELMAN: Good morning, ladies and gentlemen. I am Ron Kappelman. I was previously introduced to you. I want to thank you very much for being here and for being willing to take the amount of time that's necessary to decide this. You have heard a little bit about this. This lawsuit involves an accident that happened up on the intersection of Highway 385 and Sheridan Lake Road and happened on August 4, 2006. My client, Mr. Shauers, was driving a pickup pulling a 28-foot travel trailer. He was going south on Highway 385. Mr. Warger was driving a Harley Davidson motorcycle; he was making a left turn from Sheridan Lake Road on to 385. Then he was going to turn back on to 385 --excuse me. He made a left-hand turn from Sheridan Lake Road on to 385, then he was going to turn right back on to Sheridan Lake Road

where he just pulled out from. Does any of that jog your memory about every hearing about an accident like that?

Each party -- that would be Mr. Warger and Mr. Shauers -- claims that the other person caused the

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accident. That is what your job is going to be here; that is why we are here is to determine what caused this accident. Does anybody not understand that that's what this lawsuit is about, at this point?

Mr. Beardsley talked a lot about the damages, a lot about prosthetic legs; but do you all understand that this case is about who caused this accident? Is there anybody here that would have any problem in rendering a decision about who caused the accident?

Mr. Beardsley asked you if you'd have a problem in returning a verdict for a substantial sum of money for Mr. Warger, and most of you said I wouldn't be adverse to that. But on the other hand, I want to ask this question: if you determined Mr. Warger caused the accident, not my client, Randy Shauers, if you determined that Mr. Warger caused the accident by pulling on to 385 as Randy was coming down the highway and that Mr. Warger failed to yield for Randy Shauers and caused the accident, would any of you have a problem in finding for my client, Randy Shauers, in telling Mr. Warger he's not entitled to any damages? Ms. Abdo, how do you feel about that? Let me explain before I start asking you all this particular question.

Lawsuits are in two phases. Okay. First of all, there's the issue of liability; who caused the accident. All right. You never get to how much a person gets for

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damages until you answer the first question: who caused the accident? So in this particular case, the largest and greatest issue for you to decide is who caused the accident, and if you decide Mr. Shauers did not cause the accident, it was caused by Mr. Warger, then you never get to how much money the man gets, so we never get to the idea of pain and suffering, loss of enjoyment of life, future medical expenses, past medical expenses. Do you understand that, Ms. Abdo, that that's what's going on here and do you have a problem with that?

MS. ABDO: No, I don't.

MR. KAPPELMAN: Would you, first of all, make Mr. Warger prove that Mr. Shauers actually caused the accident before you are going to make a jump to: I am going to give Mr. Warger money. Would you make him prove that Randy Shauers, my client, actually caused the accident before you make the jump to: I am going to talk about money? And obviously that's very important in this case. Do you see what I am saying? One could assume for Mr. Beardsley's examination, and we are not even talking about who caused the accident, but we are talking about who caused the accident; that's why we are here. We are not arguing Mr. Warger didn't lose his leg; that's obvious; he did lose his leg. He had serious injuries. We are not here to argue about that. We are here to argue about and

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