IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

JOHN D. BEST, *Plaintiff*, vs. **JOHN W. BENDER and BETH BENDER,** *Defendants*.	Case No. CV- 2001-7786 **MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR NEW TRIAL**

I. BACKGROUND.

On September 23, 2003, nine members of the jury in this case returned a verdict in favor of the plaintiff John Best in the amount of $11,078.15 for medical expenses (this amount was stipulated and the jury was given no choice on the verdict form but to award that amount and nothing more or less) reasonably incurred as a result of this motor vehicle accident. The nine jurors also awarded $10,000.00 for physical pain and mental anguish, and $0 for loss of enjoyment of life and usual activities as a result of this accident. Defendant John Bender admitted his negligence caused the accident. Accordingly, liability was not an issue.

On October 6, 2003, Best filed a motion for additur or new trial pursuant to I.R.C.P. 59(a)(1), (2) and (5). Oral argument was held on October 21, 2003. At that hearing, the Court ruled on the record that the motion for additur or new trial pursuant to I.R.C.P. 59(a)(5) was denied, as the amount of the award while low, did not "shock" the court's conscience. *Dineen v. Finch,* 100 Idaho 620, 603 P.2d 575 (1979). The Court notes that Best's testimony regarding his pain and how pain increased at work as a concrete finisher and how he can no longer do certain of his recreational activities, was very credible and completely uncontradicted by the defense.

However, Best made no claim for lost wages or diminished earning capacity in the future, and since his pain was not slowing him down at work, that may explain why the amount awarded for physical pain and mental anguish was low. Again, while the amount awarded for physical pain and mental anguish was low, it was not so low as to "shock the conscience" of the Court.

The Court indicated at that October 21, 2003 hearing that it did not feel comfortable ruling on the I.R.C.P. 59(a)(1) and (2) issues absent a transcript of the *voir dire* examination. The parties were allowed to file supplemental briefing after the transcript was filed, and both parties filed additional pleadings, the most recent by defendants was filed November 12, 2003. At the October 21, 2003 hearing, the Court indicated that after the transcript and the briefing the parties could re-notice the matter for additional hearing. No such request for re-hearing has occurred. Accordingly, the matter is now at issue.

II. ANALYSIS.

Best argues: "…the Affidavit of jury foreperson George Sparling makes clear that several of the jurors in this case committed misconduct when they refused to answer questions in voir dire that would likely have resulted in their being excused for cause, or at least the subject of a peremptory strike by Plaintiff." Plaintiff's Memorandum in Support of Motion for Additur or New Trial, pp. 4-5. Best realizes that I.R.E. 606(b) provides that a juror may not testify (which Sparling has via his affidavit) "as to any matter or statement occurring during the course of the jury's deliberations." Statement made during deliberations is exactly what Sparling is testifying about in paragraphs 4, 5 and 6 of his affidavit:

4. That while the jurors were deliberating towards a verdict, several of the jurors stated that they could not award any money for pain and suffering or loss of activities because they also had serious injuries which bothered them while they performed their jobs, and people with injuries just have to learn to work through the pain and should not be compensated for those injuries.
5. From the very outset of the deliberations, at least seven (7) jurors felt that they could not award compensation for pain and suffering and loss of activities because they had

serious injuries which bothered them at work and no one was compensating them. These jurors stated that they did not feel that they could ever award compensation to an injured person that would be in excess of the medical expenses incurred as a result of the accident.

6. In particular, Juror No. 50 stated from the outset of the deliberations that he had suffered from a lot of pain from prior injuries and he just had to tough it out at work. He stated that he felt that the Plaintiff should "just get over it" and "just find some way to work around his pain." He also stated that he could not award compensation for pain and suffering and loss of activities against the Defendant, because the injuries occurred as a result of an accident and the Defendant did not intend to cause the injuries. Juror No. 50 was quite vocal and he did not sign the jury verdict form, as he was adamant that the Plaintiff should not receive any compensation for pain and suffering and loss of activities.

Affidavit of George Sparling, p. 2, ¶ ¶ 4, 5 and 6.

The first issue then is whether Sparling's affidavit "as to any matter or statement occurring during the course of the jury's deliberations" can be used to impeach this jury's verdict in this case, contrary to I.R.E. 606(b). Best argues: "an affidavit alleging information which calls into question a juror's responses to questions during voir dire does not fall within the limitations of I.R.E. 606(b)", citing *Levinger v. Mercy Medical Center,* 2003 Opinion No. 92, 03.16 ISCR 702, 703-04 (July 24, 2003), *citing State v. Tolman,* 121 Idaho 899, 828 P.2d 1304 (1992); *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 556 (1964); and *U.S. v. Henley,* 238 F.3d 1111, 1121 (9th Cir. 2001). Plaintiff's Memorandum in Support of Motion for Additur or New Trial, p. 5. The Idaho Supreme Court in *Levinger* stated: "An affidavit alleging information which calls into question a juror's responses to questions during voir dire does not fall within the limitations of I.R.E. 606(b)", and held "Today we make clear that I.R.E. 606(b) does not bar the introduction of juror affidavits revealing dishonesty during voir dire." 03.16 ISCR at 704. The Idaho Supreme Court noted in *Levinger*, that in *Henley*, "Where… 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 [racially biased remarks to other jurors] is indisputably admissible for the purpose of determining whether the juror's responses were truthful." *Id.* The Idaho Supreme Court makes it clear that the party

challenging the jury's verdict must "point to a material question that the juror failed to answer honestly on voir dire, or show that a correct answer to that question would have provided a basis for a challenge for cause." *Id.*

The next issue is whether Best's attorney asked a direct and material question, to which jurors lied or failed to tell the truth. *Henley* tells us that the attorney must have asked a "**direct question**", to which a juror lied. Obviously, failing to respond to a direct question during *voir dire* is a failure to tell the truth, the equivalent of a lie. *Levinger* tells us the question must also be a "material" question. 03.16 ISCR at 704. Indeed, that was the downfall to the challenge in *Levinger* as the Idaho Supreme Court held: "He did not point to a material question that the juror failed to answer honestly on voir dire, or show that a correct answer to that question would have provided a basis for a challenge for cause." *Id.* Levinger, a physician suing a hospital, claimed that the comment by a juror "We are just going to fry this guy and roll him out of here" was misconduct, but the Idaho Supreme Court held that no material questions were elicited during *voir dire* to which that the juror failed to answer honestly.

The one "direct question" and "material question" asked by Best's attorney Mr. Beck, was: "**Do we have anyone in the jury or in this panel, I should say, that has experience, personal experience in dealing with long-lasting, chronic pain.**" Tr. p. 44, Ll. 4-6. Mr. Beck then followed up on the responses to that question (Tr. p. 44, L. 7 – p. 53, L. 6.), which resulted in one challenge for cause, which was granted (Tr. p. 47, Ll. 18-22), affirmative responses by jurors number 61, 43, 57, and 3 seated in the jury box (jurors 61 and 57 remained on the jury, plaintiff use peremptory challenges on jurors 43 and 3), and by jurors 25, 60, 15 and 41 seated in the back of the room (none of whom were empanelled). Tr. p. 48, L. 18 – p. 53, L. 6. Juror 57 really can't be included in Sparling's statement of seven jurors, as he only had tendonitis that resolved with only massage. Tr. p. 50, L. 20 - p. 51, L. 1. Juror 61 had chronic pain, and thus, could be one of the seven jurors, but the only one of those seven jurors who responded truthfully.

Sparling's affidavit shows that at least seven of the twelve jurors claimed to have pain from serious injuries which bothered them at work which caused them to feel that they could not award money for pain and suffering. Since juror 61 was the only one of the empanelled jurors to have responded to Mr. Beck's direct material question, at least six of the empanelled jurors failed to tell the truth on *voir dire*.

It could be argued that even though juror number 50 held out and would not sign the verdict form because even a relatively low amount for physical pain and mental anguish was being awarded, and two other jurors did not sign the verdict form (presumably because of the award for physical pain and mental anguish), that accounts for three of the seven jurors who lied through their silence during *voir dire*. The argument then would be the remaining four jurors who lied during *voir dire* obviously set aside their feelings later articulated during deliberations (that no one should be awarded damages for pain and suffering) because four of those who lied must have signed the verdict which awarded $10,000.00 for physical pain and mental anguish. However, that is not the question to be answered by the Court.

In *Levinger*, the Idaho Supreme Court made it clear the question is whether the party challenging the jury's verdict has shown "a material question that the juror failed to answer honestly on voir dire, or show[n] that a correct answer to that question would have provided a basis for a challenge for cause." 03.16 ISCR at 704. In the present case, Best has shown both. Best has shown that seven jurors who sat on the jury lied through their silence when asked a direct question on *voir dire* about long-lasting or chronic pain. Best has shown that a correct or truthful answer to the question his attorney asked about whether anyone on the panel had chronic pain, if responded to truthfully would have led to a follow up questions as to how that would impact their deliberations. If answered truthfully, that subsequent question would have produced the response that at least six of the sitting jurors would have difficulty awarding any damages for pain and suffering due to their own personal circumstance (chronic pain), which would have

provided a basis for a challenge for cause. Nothing in the briefing submitted by Benders challenges the Court's analysis of Sparling's affidavit in light of *Levinger*.

It is noted that the Idaho Supreme Court in *Levinger* stated that a correct or truthful answer would only have to provide a **basis** for a challenge for cause. The Supreme Court did not hold that a truthful answer would create a successful challenge for cause. Benders' counsel makes that argument that plaintiffs need to prove a truthful answer would create a successful challenge for cause, citing I.C. § 19-2019, the statute discussing when a juror is subject to removal for cause. Defendants' Memorandum in Opposition of Plaintiff's Rule 59 Motion, p. 3. *Levinger* clearly does not require the moving party to prove that a challenge for cause would have actually been granted. Indeed, it seems impossible for the moving party to prove such, unless the dishonest answer itself would have established a challenge for cause. An example of that would be a dishonest answer to: "Do any of you refuse to follow the Court's instructions?" *Levinger* requires that a correct or truthful answer would have provided a **basis** for a challenge for cause. What Best and his attorney wanted to know was whether anyone, because of their chronic pain, would hesitate or refuse to award damages for pain and suffering, even if those elements of damage were proven, which they were in this case, by uncontradicted evidence. At least six of the sitting jurors remained silent on the question of chronic pain when they should have answered truthfully. Because they remained silent on that question, Best and his attorney were denied the opportunity to ask the follow-up question whether as a result of that chronic pain, they would hesitate or refuse to award damages for pain and suffering.

Before the entire panel was asked the question about chronic pain, the entire panel was told by the Court, in its stock preamble to the jury explaining *voir dire*:

> This part of the case is known as voir dire examination, and it just touches on your qualifications to serve as a juror in this particular case. It's for the purpose of determining if your decision in this case would in any way be influenced by opinions which you now hold or **by some personal experience** or special knowledge which you may have concerning the subject matter to be tried. The object is to obtain twelve persons who will **impartially** try

> the issues of this case **upon the evidence presented in this courtroom <u>without being influenced by any other factors</u>.**

Tr. p. 13, L. 20 – p. 14, L. 6. (emphasis added). The jury panel, and these six jurors in particular, knew why it was important to be honest about their answers.

Because Best has shown "a material question that the juror failed to answer honestly on voir dire", **and** because Best has "show[n] that a correct answer to that question would have provided a basis for a challenge for cause", Best has shown he is entitled to a new trial under *Levinger* and I.R.C.P. 59(a)(1) and (2). An important distinction here is *Levinger* concerned misconduct of **one** juror. In the present case, Sparling's affidavit shows at least **six** jurors, **half of the empanelled jury,** did not tell the truth about chronic pain.

The Court is not granting a new trial on the basis of failure to give damages in a negligence case where no "intent" is proven. Best has also argued that Sparling's affidavit ¶¶ 7-8 shows that some of the empanelled jurors (Juror number 13 and 49) felt that other than medical expenses, no compensation should be awarded in an "accident" for pain and suffering because the defendant did not "intend" to injure the plaintiff. That discussion did come up with **certain** jurors in *voir dire*, and while such feelings are contrary to the law (Instruction No. 12 as given, IDJI 901 and IDJI 910), such feelings are not uncommon to those who do not understand the law of negligence. There is a fatal problem with Best's argument that some of the empanelled jurors did not disclose their feelings that pain and suffering should not be awarded in an "accident" unless "intent" is proven. The problem is that Best's attorney asked these questions of **certain** jurors, and not the entire panel. Tr. p. 64, L. 17 – p. 69, L. 23. Thus, there was no "direct" question to these empanelled jurors as specifically required by *Henley* and required by a fair reading of *Levinger,* because that question was not asked to the panel as a whole.

The final issue is whether Best has proven juror misconduct to the requisite standard. Juror misconduct must be shown by clear and convincing evidence. *State v. Reutzel,* 130 Idaho

88, 96, 936 P.2d 1330, 1338 (Ct.App. 1997). Sparling's uncontradicted affidavit is clear and convincing evidence and provides proof far beyond a preponderance of the evidence. *Idaho State Bar v. Topp,* 129 Idaho 414, 415-16, 925 P.2d 1113, 1114-15 (1996). If Sparling was mistaken or lying, Benders' counsel could have discovered such through simple phone calls to any of the other eleven jurors. In that phone interview, had any of those eleven jurors expressed any impeachment of Sparling's affidavit, we would have seen affidavits of one or more jurors. It has been over three months since Sparling's affidavit was filed, and no evidence has been offered to rebut the same.

This Court appreciates this issue is a matter committed to the Court's discretion, and this Court is mindful of the sanctity of jury verdicts, and that such motions should ordinarily be denied. *Luther v. Howland,* 101 Idaho 373, 613 P.2d 666 (1980). However, Sparling's affidavit proves by clear and convincing evidence that at least six jurors failed to tell the truth when asked about chronic pain, and Best has proven that such failure to tell the truth would have provided a basis for a challenge for cause. For those reasons, Best's motion for a new trial is GRANTED under I.R.C.P. 59(a)(1) and (2) and *Levinger.*

When cognizable grounds for a new trial have been established, the district court has two options; the court may grant a new trial as requested, or it may condition the grant upon the nonmoving party's rejection of a suggestion reduction in, or addition to, the damages awarded, in conformity with the court's view of the evidence. *Young v. Scott,* 108 Idaho 506, 700 P.2d 128 (Ct.App. 1985). As stated above, this Court finds that while the amount awarded for physical pain and mental anguish was low, it was not so low as to "shock the conscience" of the Court. For that reason, a new trial is granted without a suggested addition to the awarded damages.

III. ORDER.

IT IS HEREBY ORDERED plaintiff's motion for new trial is **GRANTED.** The Court will issue an order scheduling this matter for another jury trial.

DATED this 15th day of January, 2004.

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John T. Mitchell, District Judge