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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CRYSTAL BEAR, by and through
her Guardian Ad Litem, Gary
N. Bloom,

Plaintiff,

v.

FORD MOTOR COMPANY, a
Delaware corporation; and
MARLA BEAR MOTTESHARD, a
single person,

Defendants.

NO. CV-05-253-EFS

**ORDER ENTERING THE COURT'S
ORAL RULINGS FROM HEARING ON
MAY 22, 2008**

A hearing was held in the above-captioned matter on May 22, 2008, in Spokane, Washington. Richard C. Eymann and Raymond F. Thomas appeared on behalf of Plaintiff Crystal Bear; Caryn G. Jorgensen and Donald H. Dawson¹ appeared on behalf of Defendant Ford Motor Company; and Patrick G. McMahon appeared on behalf of Defendant Marla Bear Motteshard. Barbara Van Dyke, a juror from the trial, appeared without counsel and testified. Before the Court were Defendant Ford's oral motion to strike

¹Mr. Dawson appeared via video conference.

1 the Declaration of Richard M. Leland and Plaintiff's Motion for New
2 Trial. (Ct. Rec. 501.) After reviewing the submitted material and
3 relevant authority, listening to Ms. Van Dyke's testimony, and hearing
4 oral argument, the Court is fully informed. The Court grants Defendant
5 Ford's oral motion to strike and denies Plaintiff's new trial motion.
6 This Order serves to memorialize and supplement the Court's oral rulings.

7 **I. Background**

8 On February 19, 2008, a fifteen-day jury trial began in the above-
9 captioned matter. (Ct. Rec. 387.) Before jury selection, the Clerk's
10 Office mailed two questionnaires to all prospective jurors. The first
11 questionnaire is the standard three-page Federal Juror Questionnaire
12 ("FJQ"). FJQ questions twenty-four (24) and twenty-five (25) read as
13 follows:

14 24. Other than divorce or child custody cases, have you or
any member of your family ever filed a lawsuit?

15 25. Have you or any family member ever had a lawsuit filed
16 against you?

17 The FJQ requires prospective jurors to swear or affirm that their answers
18 are truthful. Ms. Van Dyke, a prospective juror who was eventually
19 empaneled, answered "no" to both questions.

20 The second questionnaire was a unique twelve-page Supplemental Juror
21 Questionnaire ("SJQ") created by the parties that addressed several
22 topics including, *inter alia*, vehicle ownership. The SJQ did not contain
23 any relevant questions relating to litigation history.

24 The Court distributed a third and more informal questionnaire during
25 jury selection. This one-page questionnaire addressed topics ranging
26 from favorite television programs to whether the prospective juror

1 recognized any other prospective juror. This informal questionnaire did
2 not contain any relevant questions relating to litigation history.

3 On March 11, 2008, the jury returned a verdict for Plaintiff against
4 Defendant Motteshard in the following amounts:

5 Past Economic Damages: \$344,488.42

6 Future Economic Damages: \$5,555,511.58

7 Non-economic Damages: \$115,200.00

8 (Ct. Rec. 470). The jury also determined that Defendant Ford was not
9 liable for Plaintiff's injuries and damages. (Ct. Rec. 468.) On March
10 25, 2008, Plaintiff filed the new trial motion now before the Court.
11 (Ct. Rec. 501.)

12 II. Discussion

13 A. Waiver of Right to Object

14 Defendant Ford argues that Plaintiff waived her right to object to
15 Ms. Van Dyke as a juror because her alleged grounds for disqualification
16 were easily discoverable and Plaintiff neglected to raise them until now.
17 (Ct. Rec. 533 at 14.) Plaintiff counters that 1) she properly relied on
18 Ms. Van Dyke's voir dire answers, 2) the case was demanding and should
19 not require thorough independent investigation of each juror, and 3)
20 Defendant Ford also had the onus to discover any juror irregularities.
21 (Ct. Rec. 542 at 6.)

22 "A [juror] disqualification which by reasonable diligence could have
23 been discovered before verdict, may not afterwards be made the subject
24 of an attack upon a verdict." *Spivey v. United States*, 109 F.2d 181, 186
25 (5th Cir. 1940).

26 Here, the Court declines to find that Plaintiff waived her right to
object to Ms. Van Dyke. His curiosity aroused by the jury verdict, Mr.

1 Eymann searched Washington Court's website for the seated jurors'
2 litigation history - he did not locate any records for Ms. Van Dyke. Mr.
3 Eymann then searched through Spokane County Superior Court's physical
4 archives and located several tax warrants and a previous product
5 liability suit.

6 In contrast, Linda McIntosh Wheeler, the legal assistant for
7 Defendant Ford's defense counsel, located Ms. Van Dyke's litigation
8 history on the Washington Courts' website in less than sixty (60)
9 seconds. (Ct. Rec. 535.) Regardless, waiver did not occur. It is not
10 counsels' duty to discover if a juror is telling the truth during *voir*
11 *dire*; it is the juror's duty to tell the truth during *voir dire*. *Voir*
12 *dire*, after all, is French for "to speak the truth." See BLACK'S LAW
13 DICTIONARY 1569 (7th ed. 1999).

14 **B. New Trial Based on Juror Misconduct**

15 **1. Standard**

16 A motion for a new trial based on juror dishonesty during *voir dire*
17 requires a showing that 1) a juror failed to answer honestly a material
18 question; and 2) a correct answer would have provided a valid basis for
19 a challenge for cause. *Price v. Kramer*, 200 F.3d 1237, 1254 (9th Cir.
20 2000) (citing *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548,
21 556 (1984)). "The motives for concealing information may vary, but only
22 those reasons that affect a juror's impartiality can truly be said to
23 affect the fairness of a trial." *McDonough*, 464 U.S. at 556. A district
24 court's ruling on a motion for new trial under Federal Rule of Civil
25 Procedure 59(a) is reviewed for an abuse of discretion. *Dorn v.*
26 *Burlington N. Sante Fe R.R.*, 397 F.3d 1183, 1189 (9th Cir. 2005).

2. Failure to Honestly Answer a Material Question

1 Plaintiff argues that Ms. Van Dyke's FJQ and voir dire answers were
2 dishonest because she failed disclose 1) her involvement in two lawsuits
3 brought by the Washington Department of Revenue; and 2) her involvement
4 as one of three plaintiffs in a product liability action brought by Mr.
5 Eymann's former law firm. (Ct. Rec. 502 at 4.)² Defendant Ford
6 responds that Plaintiff cannot demonstrate Ms. Van Dyke's FJQ and voir
7 dire answers were dishonest and motivated by a lack of impartiality.
8 (Ct. Rec. 533 at 4.)
9

10 As stated, *McDonough's* first requirement for a new trial is that a
11 juror failed to honestly answer a material question. 464 U.S. at 556.
12 There is no formula for identifying juror dishonesty. The Ninth Circuit
13 has, however, provided guidance as to what does not constitute
14 dishonesty. For example, forgetfulness and misunderstanding do not
15 constitute dishonesty. See *Dyer v. Calderon*, 151 F.3d 970, 973 (9th
16 Cir. 1998); *Price*, 200 F.3d at 1254-55. Importantly, the Ninth Circuit
17 encourages tolerance when evaluating voir dire answers because "jurors
18 may forget incidents long buried in their minds, misunderstand a question
19 or bend the truth a bit to avoid embarrassment." *Dyer*, 151 F.3d at 973.
20

21 ²Defendant Motteshard filed briefing asserting that Ms. Van Dyke's
22 FJQ and voir dire answers were dishonest and that juror misconduct
23 occurred. (Ct. Rec. 536.) Despite these assertions, Defendant
24 Motteshard does not demand a new trial; rather, she will abide by the
25 Court's decision. Because Defendant Motteshard takes no position on
26 whether a new trial is warranted, the Court will focus on Plaintiff and
Defendant Ford's arguments, citing to Defendant Motteshard as needed.

1 The underlying concern is whether the allegedly dishonest answer
2 indicates a lack of impartiality. *Id.* (citations omitted).

3 With these principles in mind, the Court now addresses Ms. Van
4 Dyke's allegedly dishonest FJQ and voir dire answers.

5 **i. Question No. 24 - Have You Ever Filed a Lawsuit?**

6 Plaintiff insists that Ms. Van Dyke's failure to disclose her
7 involvement in a previous product liability action brought by attorneys
8 from Mr. Eymann's former law firm constitutes dishonesty.
9 (Ct. Rec. 502 at 4.) Defendant Ford counters that Plaintiff cannot
10 demonstrate that Ms. Van Dyke's answers were either dishonest or
11 motivated by bias. (Ct. Rec. 533 at 6.)

12 In February 1994, a projection television owned by Ms. Van Dyke's
13 tenants overheated, caught fire, and damaged both her rental unit and the
14 tenants' personal property. Safeco Insurance, Ms. Van Dyke's insurer,
15 examined the claim and made a \$30,000.00 cash payout. In June 1995, Ms.
16 Van Dyke, along with two other plaintiffs, initiated a product liability
17 case against Philips Electronics, the projection television's
18 manufacturer, alleging that the fire caused \$53,250.00 in damages to Ms.
19 Van Dyke's rental unit and the property therein. (Ct. Rec. 505-4 at 55.)
20 Ms. Van Dyke was represented by Richard C. Feltman and Richard M. Leland,
21 two attorneys from Mr. Eymann's former law firm, Feltman, Gebhardt,
22 Eymann & Jones, P.S. The parties conducted discovery, which included an
23 engineer's report, interrogatories, and depositions. Ms. Van Dyke was
24 deposed in April 1996. The case was dismissed in September 1997 - Ms.
25 Van Dyke received \$1,000.00 in settlement proceeds.

26 Plaintiff argues that Ms. Van Dyke remembers the lawsuit, remembers
her insignificant settlement, and remembers Mr. Eymann as an attorney

1 from the firm that poorly represented her interests. This, Plaintiff
2 argues, creates bias.

3 Given Plaintiff's allegations, the Court determined an evidentiary
4 hearing to inquire into juror bias was appropriate. See *Williams v.*
5 *Taylor*, 529 U.S. 420 (2000) (finding evidentiary hearing to determine
6 partiality required where a juror's response to *voir dire* query was not
7 forthcoming and another was factually misleading); see also *Fields v.*
8 *Woodford*, 309 F.3d 1095 (9th Cir. 2002) (finding an evidentiary hearing
9 to assess credibility and determine partiality appropriate where juror
10 provided a misleading response to *voir dire* query). The Court subpoenaed
11 Ms. Van Dyke and questioned her in open court. When asked about the
12 lawsuit, Ms. Van Dyke stated that she did not remember the case. The
13 Court finds Ms. Van Dyke's testimony credible as to tone, manner, and
14 substance and that her forgetfulness is supported by the following
15 factual findings:

- 16 1) Timing. The lawsuit began thirteen (13) years ago and
17 concluded eleven (11) years ago. This significant time passage
18 lends credibility to Ms. Van Dyke's statement that she neither
19 remembered the lawsuit nor the law firm that represented her
20 interests;
- 21 2) Type of Damages. The 1995 lawsuit was for very modest property
22 damage, not bodily injury;
- 23 3) Representation. Mr. Eymann did not represent Ms. Van Dyke;
24 rather, she was represented by two of his former law partners.
25 The only connection between Mr. Eymann and Ms. Van Dyke is that
26 his name appeared in the former firm's letterhead - a feeble
connection. The possibility that Ms. Van Dyke remembered or

1 recognized Mr. Eymann as a member of his former law firm is
2 even more remote considering she did not remember either the
3 attorneys or the law firm that previously represented her
4 interests; and

- 5 4) Interests. Ms. Van Dyke testified that the lawsuit was of
6 little importance because Safeco Insurance Company previously
7 paid out \$30,000.00 to cover her rental unit's property damage
8 - this covered her losses. The unit's renters, however, lacked
9 insurance and were looking for avenues to cover their property
10 losses. When asked why she appeared as a plaintiff in the
11 lawsuit, Ms. Van Dyke was allegedly informed that, as the
12 rental unit's owner, she needed to be a named plaintiff for the
13 action to proceed.

14 These facts, taken together, demonstrate that Ms. Van Dyke's voir dire
15 and FJQ answers were, as she stated, a product of forgetfulness and
16 misunderstanding rather than dishonesty.

17 Plaintiff emphasizes that the Court's repeated admonitions to
18 prospective jurors about the importance of full disclosure makes her
19 forgetfulness inconceivable. For support, Plaintiff submitted the
20 Declaration of Richard M. Leland. (Ct. Rec. 543.) Mr. Leland was Mr.
21 Eymann's former law partner and represented Ms. Van Dyke in the 1995
22 product liability action. Mr. Leland states, *inter alia*, that Ms. Van
23 Dyke actively participated in the previous litigation from the outset,
24 sought compensation beyond her insurance payout, and expressed
25 disappointment in the results. *Id.* at 5.

26 Mr. Leland's statements, and Mr. Eymann's use of Mr. Leland's
statements and the former firm's time sheets labeled in the names of the

1 other two plaintiffs, are troubling considering Washington Rules of
2 Professional Conduct ("RPC") 1.6 and 1.9, which state, in pertinent part:

3 1.6 - Confidentiality of Information

4 (a) A lawyer shall not reveal information relating to the
5 representation of a client unless the client gives informed
6 consent, the disclosure is impliedly authorized in order to
7 carry out the representation or the disclosure is permitted by
8 paragraph (b);

9

10 1.9 - Duties to Former Clients

11 (c) A lawyer who has formerly represented a client in a matter
12 or whose present or former firm has formerly represented a
13 client in a matter shall not thereafter . . . reveal
14 information relating to the representation except as these
15 Rules would permit or require with respect to a client.

16 WASH. RULES OF PROF'L. CONDUCT R. 1.6(a) and 1.9(c) (2008). Neither Mr.
17 Eymann nor Mr. Leland obtained informed consent from their former client,
18 Ms. Van Dyke, to disclose the confidences set forth in Mr. Leland's
19 declaration. Nor did they obtain the informed consent from the other two
20 plaintiffs, also former clients, to use the time sheets. At the hearing,
21 Plaintiff argued RPC 1.6(b)(3) and (b)(7) justified introducing
22 Mr. Leland's disclosure, either by themselves, or as an exception to RPC
23 1.9. RPC 1.6(b)(3) and (b)(7) state:

24 (b) A lawyer to the extent the lawyer reasonably believes
25 necessary:

26 (3) may reveal information relating to the representation
of a client to prevent, mitigate, or rectify substantial
injury to the financial interests or property of another
that is reasonably certain to result or has resulted from
the client's commission of a crime or fraud in
furtherance of which the client has used the lawyer's
services;

. . . .

1 (7) may reveal information relating to the representation
2 of a client to inform a tribunal about any client's
3 breach of fiduciary responsibility when the client is
4 serving as a court-appointed fiduciary such as a
guardian, personal representative, or receiver.

5 RPC 1.6(b). With respect to RPC 1.6(b)(7), Plaintiff did not cite, and
6 the Court cannot find, any authority that identifies prospective jurors
7 as "court-appointed fiduciaries" within the meaning of RPC 1.6(b)(7).
8 Accordingly, RPC 1.6(b)(7) was not a permissible basis for Mr. Leland to
9 disclose Ms. Van Dyke's attorney-client confidences.

10 With respect to RPC 1.6(b)(3), Plaintiff emphasized that disclosure
11 was appropriate in order to prevent financial injury to her interests due
12 to fraud. Again, Plaintiff did not cite, and the Court cannot find, any
13 authority that RPC 1.6(b)(3)'s "crime-fraud" exception applies to these
14 facts. The attorney-client privilege is one of the oldest recognized
15 privileges for confidential communications. *Upjohn Co. v. United States*,
16 449 U.S. 383, 389 (1981). The privilege is intended to encourage "full
17 and frank communication between attorneys and their clients and thereby
18 promote broader public interests in the observance of law and the
19 administration of justice." *Id.* While the Court recognizes that
20 confidentiality is not absolute (Rule 1.6 contains many exceptions), the
21 exceptions are just that - exceptions. The standard is that lawyers
22 shall not reveal information relating to client representation because
23 confidentiality is essential to a proper working adversarial justice
24 system.

25 The Court finds RPC 1.6's exceptions did not permit disclosure of
26 attorney-client confidences and that the proper remedy is to strike the

1 Declaration of Richard M. Leland and its attached time record exhibits.
2 (Ct. Rec. 543.) Defendant Ford's oral motion to strike is granted.

3 Setting aside Mr. Leland's declaration, the Court finds Ms. Van
4 Dyke's forgetfulness is credible. In Ms. Van Dyke's mind, the previous
5 product liability action was forgettable. She did not file the products
6 liability suit against Philips Electronics; rather, her tenants did, and
7 she remembers becoming involved after being informed that her tenants
8 would not otherwise be able to recover for their personal property
9 losses. Ms. Van Dyke's insurance payout, and Safeco's statements that
10 she would be compensated for any repairs that exceeded the \$30,000.00
11 payout, lend merit to her testimony that her own losses were covered and
12 that she had little or no investment in the product liability action.
13 (Ct. Rec. 534, Ex. C at 17.) Accordingly, Plaintiff cannot satisfy
14 *McDonough's* first requirement because the Court finds that Ms. Van Dyke's
15 failure to disclose her involvement in prior litigation was the product
16 of forgetfulness and misunderstanding, not dishonesty. *See McDonough*,
17 464 U.S. at 556. The Court would make the same findings even with Mr.
18 Leland's declaration and its attached time record exhibits.

19 **ii. Question No. 25 - Ever Had a Lawsuit Filed Against You?**

20 Plaintiff argues that Ms. Van Dyke improperly withheld that she was
21 a defendant in two lawsuits brought by the Washington Department of
22 Revenue. (Ct. Rec. 502 at 4.) Defendant Ford responds that tax warrants
23 are not lawsuits and that Ms. Van Dyke correctly did not list the
24 warrants when answering Question No. 25. (Ct. Rec. 533 at 3.)

25 Revised Code of Washington 82.32.210 authorizes the Department of
26 Revenue ("DOR") to issue warrants for overdue fees, taxes, increases, and
penalties. RCW 82.32.210 (2008). The warrant, when filed with the

1 superior court clerk, becomes "a lien upon the title to and interest in
2 all other real and personal property of the taxpayer against whom it is
3 issued the same as a judgment in a civil case duly docketed in the office
4 of the clerk." *Id.* This tax liability and collection procedure does not
5 follow conventional judicial procedure, including the right to a jury
6 trial. *See Peters v. Sjolholm*, 25 Wn. App. 39, 44 (1979).

7 Here, Ms. Van Dyke properly did not list the tax warrants when
8 answering Question No. 25. Tax warrants are not lawsuits and there is
9 no dishonesty in failing to disclose their existence. The tax warrants
10 in question were filed in Spokane County Superior Court and provided
11 identifying cause numbers and names - nothing more. RCW 82.32.210's tax
12 collection procedure does not involve a summons, a complaint, an answer,
13 or any other pleadings usually associated with the conventional judicial
14 process. Tax warrants are simply a means for the Department of Revenue
15 to record liens against defaulting taxpayers. Accordingly, Ms. Van Dyke
16 honestly answered Question No. 25.³ Moreover, Plaintiff's exhibit
17 introduced at the hearing showing other tax warrants does not impeach Ms.
18 Van Dyke's credibility. She candidly admitted the facts of her situation
19 leading to these tax warrants and her explanation was inclusive.

20 **3. Juror's Truthful Answer Creates a Valid Challenge for Cause**

21 Plaintiff contends there is little doubt that Ms. Van Dyke would
22 have been excused for cause if she had disclosed her previous litigation
23 experience. (Ct. Rec. 502 at 6.) Defendant Ford answers that there is
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26 ³Plaintiff's reply brief did not respond to Defendant Ford's
position that the tax warrants do not qualify as law suits.

1 no evidence that Ms. Van Dyke's previous litigation experience makes her
2 biased against Plaintiff. (Ct. Rec. 533 at 11.)

3 *McDonough's* second requirement for a new trial is that the juror's
4 truthful answer would have provided a valid basis for a challenge for
5 cause. 464 U.S. at 556. Juror challenges in civil cases are governed
6 by 28 U.S.C. § 1870. Section 1870 leaves the ultimate decision on
7 challenges for cause, as well as the process, to the district court's
8 discretion. 28 U.S.C. § 1870 (2008); *Nathan v. Boeing Co.*, 116 F.3d 422,
9 424 (9th Cir. 1997).

10 Challenges for cause must be based on a narrowly specified,
11 provable, and legally cognizable basis of partiality. *Darbin v. Nourse*,
12 664 F.2d 1109, 1113 (9th Cir. 1981). Moreover, there must be a showing
13 of actual bias, which involves "an inability to act impartially or a
14 refusal to weigh the evidence properly." *Image Tech. Servs. v. Eastman*
15 *Kodak Co.*, 125 F.3d 1195, 1220 (9th Cir. 1997).

16 Here, there is no evidence that Ms. Van Dyke's previous litigation
17 experience creates a valid basis for a challenge for cause. This is true
18 even if the Court accepted Mr. Leland's statements about Ms. Van Dyke's
19 involvement in the previous product liability action. The reason is
20 simple - nothing about Ms. Van Dyke's previous litigation experience
21 demonstrates bias against Plaintiff or Mr. Eymann.⁴

22 _____
23 ⁴The verdict supports this conclusion. The jury returned a multi-
24 million dollar verdict in Plaintiff's favor against Defendant Motteshard.
25 While this verdict may not be practically recoverable, there is nothing
26 to suggest that the jury knew this; further, it diminishes the
possibility of bias by showing that the jury (including Ms. Van Dyke) had

1 Even if Ms. Van Dyke was disappointed with her results in the
2 previous product liability action, her disappointment lies with Mr.
3 Leland, not Mr. Eymann. And as discussed, there is no evidence in the
4 record that she connected Mr. Eymann with Mr. Leland.

5 Plaintiff and Defendant Motteshard insist that, because the Court
6 excused Juror No. 36 for cause for merely contacting Plaintiff's
7 counsel's firm about representing her recently injured husband, there is
8 no question that the Court would have excused Ms. Van Dyke for cause.
9 (Ct. Recs. 502 at 4; 536 at 9.) Not so. Juror No. 36 was excused for
10 cause because:

- 11 1) she conducted independent research on the Bronco II's high
12 center of gravity after filling out the FJQ;
- 13 2) her brother was involved in an automobile rollover involving
14 the Bronco II;⁵ and
- 15 3) she was openly biased against Defendant Ford for designing an
16 unsafe vehicle that injured her brother.

17 Juror No. 36's contact with Mr. Eymann's law firm played little role in
18 the Court's decision. In fact, the Court explicitly asked Juror No. 36
19 if she remembered the lawyers she contacted regarding her husband's
20

21 _____
22 no problem fashioning a multi-million dollar verdict for Plaintiff.

23 ⁵Juror No. 36's brother's involvement in a Bronco II rollover is
24 also grounds for exclusion under presumed or implied bias. See *Coughlin*
25 *v. Tailhook Ass'n*, 112 F.3d 1052, 1062 (9th Cir. 1997) (finding implied
26 bias may exist where a juror or her close relative was personally
involved in a situation involving a similar fact pattern).

1 injuries - her answer, tellingly, was that the accident happened almost
2 ten years ago and that "[she] had no idea." (Ct. Rec. 534, Ex. D at 45.)

3 Every case involving a new trial based on juror dishonesty during
4 voir dire shares a common thread - a partial juror. See *McDonough*, 464
5 U.S. at 556 (finding that "only reasons that affect a juror's
6 impartiality can truly be said to affect the fairness of a trial"); *Dyer*,
7 151 F.3d at 973 ("even an intentionally dishonest answer by a juror is
8 not fatal, so long as the falsehood does not bespeak a lack of
9 impartiality.")

10 Here, Plaintiff cannot demonstrate that Ms. Van Dyke's forgetful and
11 mistaken FJQ and voir dire answers affected her ability to be impartial.
12 Trials are costly. "To invalidate a 3-week trial because of a juror's
13 mistaken, though honest, response to a question is to insist on something
14 closer to perfection than our judicial system can be expected to give."
15 *McDonough*, 464 U.S. at 555. Litigants are entitled to fair trials, but
16 not perfect ones, for there are no perfect trials. *Id.* at 553 (citations
17 omitted). While it is regrettable that Ms. Van Dyke's answers made this
18 hearing necessary, there is no demonstrated bias and a new trial is
19 neither required nor appropriate.

20 **C. Implied Bias**

21 Plaintiff suggests in her reply brief that implied bias may also be
22 grounds for a new trial.⁶ (Ct. Rec. 542 at 8.) Implied bias can serve
23 as a basis for a new trial only in "extraordinary" or "extreme"
24 circumstances. See *Smith v. Phillips*, 455 U.S. 209, 222 (1982). The
25
26

⁶Plaintiff also raised this issue at the new trial hearing.

1 Ninth Circuit has recognized four (4) factual scenarios where implied
2 bias may exist:

- 3 1) where the juror is apprised of such prejudicial information
4 about the defendant that the court deems it highly unlikely
5 that he can exercise independent judgment even if the juror
6 states he will;
- 7 2) the existence of certain relationships between the juror and
8 the defendant;
- 9 3) where a juror or his close relatives have been personally
10 involved in a situation involving a similar fact pattern; and
- 11 4) where it is revealed that the juror is an actual employee of
12 the prosecuting agency, that the juror is a close relative of
13 one of the trial participants, or that the juror was a witness
14 or somehow involved in the underlying transaction.

15 *Tinsley v. Borg*, 895 F.2d 520, 528 (9th Cir. 1990) (internal quotations
16 omitted). The Court need not consider implied bias because none of the
17 four (4) factual scenarios apply and Plaintiff raised this argument for
18 the first time in her reply. See *United States v. Romm*, 455 F.3d 990,
19 997 (9th Cir. 2006) (finding arguments not raised by a party in its
20 opening brief are deemed waived); *Bazuaye v. INS*, 79 F.3d 118, 120 (9th
21 Cir. 1996) ("Issues raised for the first time in the reply brief are
22 waived.")

23 **D. New Trial Based on Inadequacy of Damages**

24 Plaintiff also seeks a new trial because the jury's damages award
25 was inadequate. (Ct. Rec. 502 at 6.) Defendant Ford responds that there
26 is no basis for overturning the jury's verdict because the damages award
does not go against the great weight of the evidence.

1 (Ct. Rec. 533 at 16.) Defendant Motteshard orally agreed at the hearing
2 that the verdict was not the result of passion or prejudice and that a
3 new trial on these grounds was not warranted.

4 "The trial court may grant a new trial only if the verdict is
5 contrary to the clear weight of the evidence, is based upon false or
6 perjurious evidence, or to prevent a miscarriage of justice." *Passantino*
7 *v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 510 n.15 (9th
8 Cir. 2000). A new trial is also appropriate if passion and prejudice
9 tainted the jury's verdict. *Pershing Park Villas Homeowners Ass'n v.*
10 *United Pac. Ins. Co.*, 219 F.3d 895, 905 (9th Cir. 2000).

11 **1. Jury's Liability Finding**

12 Plaintiff insists that the jury's inadequate damages award also
13 justifies a new trial on liability because the "apparent cold-heartedness
14 of the jury verdict brings into question whether the entire
15 verdict . . . was fatally tainted" (Ct. Rec. 502 at 8.)
16 Defendant Ford counters that Plaintiff cannot demonstrate that the jury's
17 allegedly improper damages award affects its liability finding.
18 (Ct. Rec. 533 at 17.)

19 The Ninth Circuit has routinely held that, if a court finds a jury's
20 damages amount is based on passion and prejudice, a new trial on
21 liability is not appropriate unless that finding was also based on
22 passion and prejudice. *Pershing Park*, 219 F.3d at 905.

23 Here, Plaintiff's cursory allegation that the jury was insensitive,
24 without more, is insufficient to grant a new trial on liability.
25 Defendant Ford presented extensive expert testimony from, among others,
26 Lee Carr and Kenneth Snodgrass, that the Bronco II was reasonably safe
as designed with respect to its stability and handling and rear seat

1 restraint systems. Apparently the jury accepted this evidence, which
2 unquestionably supports its finding on Defendant Ford's non-liability.
3 Additionally, the jury determined that Defendant Motteshard's negligence
4 was the sole proximate cause of Plaintiff's injuries, an appropriate
5 finding considering Defendant Motteshard admitted she negligently drove
6 the Bronco II. A jury allegedly motivated by passion and prejudice would
7 not award a multi-million dollar verdict for Plaintiff against Defendant
8 Motteshard. No inference of passion or prejudice can be drawn from this
9 verdict.

10 **2. Jury's Damages Finding**

11 A plaintiff's path towards a new trial based on inadequate damages
12 is feasible, but formidable. See *Mekdeci v. Merrell Nat'l Labs.*, 711
13 F.2d 1510, 1513 (11th Cir. 1983); *Wagenmann v. Adams*, 829 F.2d 196, 215
14 (1st Cir. 1987). This is because "[t]ranslating legal damage into money
15 damages is a matter peculiarly within a jury's ken, especially in cases
16 involving intangible, non-economic losses. *Smith v. Kmart Corp.*, 177
17 F.3d 19, 30 (1st Cir. 1999) (internal citations omitted).⁷

18 Here, the jury awarded Plaintiff \$6,015,200.00 in damages for her
19 injuries. Plaintiff emphasizes that the jury's non-economic damage award
20 is inconceivable considering her non-economic damages evidence was
21 largely unrefuted. Defendant Ford suggests that the smaller non-economic
22 damages figure may be explained by, *inter alia*, the overwhelming evidence

23
24 ⁷This Court has awarded other clients of Mr. Eymann a new trial on
25 non-economic damages based on findings of passion or prejudice. See
26 *Rebman v. Kadlec Medical Center*, CV-04-5064-EFS. That case settled
before the new trial.

1 of Plaintiff's tremendous recovery and positive attitude. It is not
2 clear whether Plaintiff's considerable recovery and positive courtroom
3 demeanor impacted the jury to Plaintiff's disadvantage. What is clear
4 is that the jury returned a large award for future economic damages
5 (\$5,555,511.58), the stipulated amount for past economic damages
6 (\$344,488.42), and a smaller figure for non-economic damages
7 (\$115,200.00). Mixed verdicts suggest that the jury rationally evaluated
8 the evidence during deliberations. *See United States v. Aramony*, 88 F.3d
9 1369, 1378-79 (4th Cir. 1996).

10 It is also important to remember the subtle undercurrents present
11 throughout this trial. From the outset, it was apparent that the parties
12 were between Scylla and Charybdis.⁸ Plaintiff was required to name her
13 sister as a defendant even though the case was designed and tried to
14 obtain a verdict against Defendant Ford. Defendant Ford avoided explicit
15 condemnation of Defendant Motteshard lest it alienate the jury, with
16 Defendant Ford's counsel even going as far in final argument to ask the
17 jury not to punish Defendant Motteshard, even if it is at the expense of
18 Defendant Ford.

19 In fact, at several points throughout the trial, including closing
20 argument, the sisters sat beside each other in the gallery, occasionally
21 holding hands. The jury was acutely aware of the delicate situation and
22 responded with a verdict that adequately compensated Plaintiff for her
23 economic damages considering Defendant Motteshard's admitted negligence,
24 but modestly compensated Plaintiff with a non-economic damage award that

25
26 ⁸Wikipedia, http://en.wikipedia.org/Scylla_and_Charybdis (last
visited May 27, 2008).

1 would not burden Defendant Motteshard with overwhelming psychological
2 guilt for Plaintiff's plight. In sum, the jury did precisely what
3 counsel asked of them concerning preserving the sisters' already fragile
4 bond.

5 The jury's damages award was neither against the great weight of the
6 evidence nor motivated by passion or prejudice. Instead, the jury's
7 damages award is within the "universe of possible awards that are
8 supported by the evidence in this case." *Clark v. Taylor*, 710 F.2d 4,
9 14 (1st Cir. 1983).

10 Accordingly, **IT IS HEREBY ORDERED:**

11 1. For the reasons articulated on the record and in this Order,
12 Defendant Ford's oral motion to strike the Declaration of Richard M.
13 Leland (**Ct. Rec. 543**) is **GRANTED**.

14 2. For the reasons articulated on the record and in this Order,
15 Plaintiff's Motion for New Trial (**Ct. Rec. 501**) is **DENIED**.

16 **IT IS SO ORDERED.** The District Court Executive is directed to
17 enter this Order and distribute copies to counsel.

18 **DATED** this 28th day of May 2008.

19
20 _____
S/ Edward F. Shea

EDWARD F. SHEA

United States District Judge

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