

## *Smotherman v. Cass Regional Medical Center*

--- S.W.3d ---, 2016 WL 5109891 (Mo. banc 2016) (No. SC95464)

# Juror misconduct raises presumption of prejudice but doesn't warrant new trial

By JOAN LOCKWOOD

In a 4-3 decision, the Missouri Supreme Court acknowledged that a juror's misconduct - conducting outside research, specifically looking up the weather on the day of the fall - raises a presumption of prejudice. However, because eight jurors testified they were not influenced by the improper research, no new trial was warranted.

### Facts

Kristine Smotherman was at Cass Regional Medical Center for a follow-up medical appointment six weeks after having knee surgery. Following her visit, Smotherman approached a nurses' station and asked where the closest restroom was. Smotherman was directed to the nearest restroom, which they discovered was dark because the Medical Center was operating on emergency generators that did not supply power to every room. The nurse then directed Smotherman to a different restroom that was lit.

Smotherman testified that, as she was about to stand up after using the toilet, the lights went out. She then testified that, as she was getting up, her "feet just went completely out from underneath" her. Smotherman slipped and fell, hitting her head, back, and arm. A nurse found Smotherman on the floor just outside the bathroom and took her to the emergency room.

Smotherman testified at trial that, while in the emergency room, she heard a nurse or doctor state that "she slipped and fell in the hall bathroom on soap." On cross-examination, Smotherman admitted that she did not look to see what she had slipped on, and did not recall seeing anything on the restroom floor. Smotherman received injuries from the fall, including complications due to an infection, which required several surgical procedures.

Smotherman's theory at trial was that the soap dispenser next to the sink in the restroom had been leaking soap on the floor. Smotherman introduced photographs of a strip of rust on the heating element directly below the dispenser and the sink. Smotherman argued that the soap dispenser was located close to the bathroom door such that a person entering the restroom could track the leaked soap onto the floor, causing the floor to be slick.

In its closing argument, the Medical Center focused on Smotherman's credibility, noting her changing account of why she had fallen, multiple criminal convictions, as well as the lack of direct evidence of soap on the floor. The Medical Center argued that the rust on the heating element was more likely from people dripping water when they reached for the soap dispenser with wet hands and that the soap dispenser was recessed toward the back of the sink so any dripping soap would land where no one would have to walk. Further, the Medical Center argued that it was more likely that Smotherman fell due to problems with her "bad knee" and that she had fallen several times before.

The jury was instructed that, to find the Medical Center liable, it must find that "there was soap on the bathroom floor, and as a result [Defendant's] bathroom was not reasonably safe." 2016 WL 5109891 at \*2. The court also gave the jury MAI 2.01(8), which prohibits jurors from communicating with non-jurors during deliberations or conducting any independent investigation or research. The jury returned a verdict assessing no fault against the Medical Center. *Id.*

Following trial, two jurors agreed to speak with Smotherman's attorneys about the trial. One of the jurors offered that he had "googled" the weather on the day of the fall and found that significant snowfall was forecasted for that day.<sup>1</sup>

Smotherman moved for a new trial, alleging juror misconduct, based on the juror's extraneous weather research. Nine jurors, eight of whom signed the verdict, testified at the post-trial hearing on Smotherman's motion.<sup>2</sup>

Five of the jurors, including the juror who had not signed the verdict, testified that they did not remember hearing anyone mention the weather during deliberations. The others testified that they recalled a juror mention that the forecast called for snow on the date in question, and that the comment was made once with no further discussion. The Medical Center offered affidavits of the remaining three jurors, who all testified that they did not hear the comment. All of the jurors testified that the weather was immaterial to their deliberations. 2015 WL 6914974 at \*2.

Following the hearing, the trial court determined that a

juror had engaged in misconduct by looking up the weather forecast for the day of the fall and relaying the information to the jury. The trial court afforded no weight to the offending juror's testimony that the extraneous evidence was not a factor in his decision. The trial court found credible the other jurors' testimony that they had either not heard, or paid no attention to, the googled evidence. The trial court overruled the motion for new trial, holding that "[e]ven if the court were to disregard the offending juror's vote, the verdict would still be supported by ten qualified jurors, who diligently executed their civil duty." 2015 WL 6914974 at \*2.

The Western District disagreed and remanded for a new trial, holding "mandatory authority requires that ... the opposing party must show something more than the jurors' bare assertions that their deliberations were not affected or the relative weakness of a plaintiff's case to overcome the presumption of prejudice." 2015 WL 6914974 at \*6. The Missouri Supreme Court accepted transfer.

In a 4-3 opinion, a narrow majority of the Missouri Supreme Court acknowledged the juror's misconduct and affirmed the jury's defense verdict finding: "[h]ere, the trial court properly applied the law presuming prejudice from misconduct but found the prejudice rebutted by the credible testimony of eight jurors who complied with the court's instruction." 2016 WL 5109891 at \*5.

### Analysis

Missouri follows the Mansfield rule, which provides that a juror's testimony regarding juror misconduct is generally inadmissible to impeach a jury's verdict. However, juror testimony is admissible to establish that a juror committed misconduct by improperly performing extrajudicial research. The majority recognized that while a juror's research in gathering facts or information outside of trial evidence is against the court's instructions it does not automatically warrant a new trial. Rather, such juror misconduct raises a presumption of prejudice that can be rebutted if the extraneous evidence is immaterial to the "consequential facts of the case" such that no prejudice resulted. 2016 WL 5109891 at \*3.

The majority distinguished *Travis v. Stone*, 66 S.W.3d 1, 4 (Mo. banc 2002) where the Missouri Supreme Court reversed the trial court's judgment that denied defendant's motion for new trial without explanation because the only evidence offered to rebut the presumption of prejudice was the testimony of the offending juror. The offending juror in *Travis* visited the accident scene but denied any affect

from her actions. The *Travis* court reasoned that the juror's visit to the accident scene may have impacted her decision-making which may have influenced her participation in the jury deliberations. In *Travis*, there was no evidence from any non-offending jurors as to what impact the action had on them or their deliberations. By contrast, in *Smotherman*, eight non-offending jurors testified post trial that the statement by the offending juror did not affect their deliberations.

Moreover, the trial court in *Smotherman* placed no weight on the testimony of the offending juror, finding it not credible. The *Smotherman* Court placed great weight on the written order of the trial court and its finding that the offending juror's misconduct and "isolated comment regarding potential snowfall on the date of Plaintiff's fall was not material to the consequential facts in the case and did not prejudice the plaintiff." 2016 WL 5109891 at \*4.<sup>3</sup>

The majority also "easily distinguished" this case from *Middleton v. Kansas City Public Service Co.*, 152 S.W.2d 154, 159-60 (Mo. 1941). *Middleton* involved the filing of nine nearly identical "form" affidavits of jurors denying any potential effect of the misconduct. In *Smotherman*, by contrast, the trial court properly presumed prejudice from the misconduct and then heard live testimony from eight nonoffending jurors. "The presence of credible, non-offending juror testimony in support of the verdict and the trial court's detailed, carefully reasoned judgment demonstrating that it correctly applied the law set this case apart from *Travis* and *Middleton*. Because of these material differences, *Travis* and *Middleton* do not control the outcome in this case." 2016 WL 5109891 at \*4.

In distinguishing *Travis* and *Middleton*, two cases decided by the Missouri Supreme Court in 2002 and 1941, the Court placed great emphasis on the deference afforded the trial court which is familiar with the circumstances of a juror's misconduct and is uniquely positioned to determine what effect the conduct had upon the verdict. In distinguishing these cases, the majority rejected plaintiff's argument characterizing it as a "new rule" that non-offending jurors' testimony in support of their verdict should never be accorded any weight. The majority reasoned "[a]s the fact-finder, it is in the trial court's province to determine the credibility of witnesses, and there is no logical reason to treat non-offending jurors as categorically less credible than all other witnesses, such that trial courts cannot be trusted to weigh the veracity of

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their testimony....” 2016 WL 5109891 at \*5.

### **Dissenting Opinion**

Judge Teitelman, joined by Judge Stith and Judge Draper, dissented arguing that the case should be remanded for a new trial. To determine whether prejudice resulted from a juror’s improper independent investigation, the analysis must begin with determining whether the information discovered is material to the case. Here, the dissent took issue with the determination that the extrajudicial information regarding the weather forecast was immaterial to the cause of plaintiff’s slip and fall. This led to the erroneous conclusion that there was no prejudice because immaterial evidence, by definition, cannot be prejudicial.

The dissent went on to question how the fact that eight non-offending jurors testified that the juror misconduct had no impact on their decision is germane to the analysis. The dissent reasoned that where the offending juror admits that his improper independent research influenced his deliberations it must follow that the jury deliberations were compromised even if other jurors testified there was no impact. Citing to Travis, the dissent focused on how extra judicial information can subtly affect an outcome of the case due to the offending juror’s participation in deliberations (noting it is difficult to demonstrate the effect of the offending juror’s research on deliberations because there is no contemporaneous record of deliberations). The dissent went on to question how there could be a finding of no prejudice here where there was focused research on an alternate causation theory that was shared with other jurors: “If the improper general investigation in Travis was prejudicial, then the focused research in this case to test a specific theory of alternate causation should be deemed prejudicial as well.” 2016 WL 5109891, Dissent at \*7.

### **Conclusion**

Juror testimony attempting to minimize the effect of juror misconduct is historically afforded little weight because a juror may sincerely claim to have been unaffected but have no awareness of the unconscious influence of the information, *State v. Cook*, 676 S.W.2d 915, 917 (Mo. App. 1984), and because of the common tendency of jurors to minimize the effect of juror misconduct. *Dorsey v. State*, 156 S.W.3d 825, 832 (Mo. App. W.D. 2005) (quoting *Travis v. Stone*, 66 S.W.3d 1, 5 (Mo. banc 2002) (citing *Middleton v. Kansas City Pub. Serv. Co.*, 152 S.W.2d 154, 158 (Mo. 1941)). This is why there is a presumption of prejudice in the face of juror misconduct. The presumption of prejudice does not necessarily result from any fault or culpability on the other jurors. Instead, the presumption recognizes the natural effect of jurors to minimize misconduct and the natural tendency of other jurors to minimize such effect.

Here, a juror gathered extraneous evidence by conducting independent research about the weather conditions on the day of the fall. The juror did this in direct violation of the court’s written instructions. It is clear that juror misconduct occurred in this case, providing extraneous evidence to other jurors during deliberations. While there is a strong presumption of prejudice, the inquiry is whether the information he provided was pertinent to crucial issues that the jury had to decide. The majority felt that the extraneous weather data was immaterial to the case, while the dissent felt it was material to the cause of the plaintiff’s fall.

Although not addressed by the majority, nine jurors are required to return a proper verdict. RSMo § 494.490. In a civil case, parties are entitled to have the jury’s decision based on the honest deliberations of twelve qualified individuals. *Stotts v. Meyer*, 822 S.W.2d 887, 891 (Mo. App. E.D. 1991). In *Smotherman*, nine jurors, only eight of whom signed the verdict, testified at the post trial hearing. 2015 WL 6914974 at \*4. Although the Medical Center offered affidavits of the three remaining jurors, the trial court “did not receive or consider the affidavits” because the witnesses were “unavailable for cross-examination.” 2015 WL 6914974 at \*3. Here, the Medical Center did not provide testimony that the extraneous weather data did not affect the deliberations from enough jurors to have lawfully returned a verdict.

If faced with improper juror research, the post trial record is now a key determinant for the reviewing court’s consideration. Also, it is important to demonstrate how the extraneous evidence or impermissible research is material to an issue decided by the jury.

### **END NOTES**

<sup>1</sup> When asked what led to their verdict, the first juror indicated that she “didn’t feel like you could prove more likely than not that there was soap on the floor in the bathroom.” The second juror noted that the rust on the heating element “could have happened at any time, that hospital had been there since 1963.” The second juror then offered that he had “checked the weather forecast for th[e] day [of the accident] and the forecast was for eight to ten inches of snow.” 2015 WL 6914974 at \*2.

<sup>2</sup> Eleven jurors signed the verdict assessing zero percent fault to the Medical Center. 2015 WL 6914974 at \*2.

<sup>3</sup> Compare, *Travis* where the trial court denied the motion for new trial without explaining its reasoning.