

IN THE SUPREME COURT OF OHIO

07-1292

JOHN C. GRUNDY, Administrator of)
 the Estate of Susanne Cheryl Sumner,)
 deceased)
)
 Appellee)
)
 v.)
)
 JAGPRIT SINGH DHILLON, M.D., et al.)
)
 Appellants)

On Appeal from Trumbull County
 Court of Appeals, Eleventh Appellate
 District
 Court of Appeals
 Case No. 2006-T-0007

**MEMORANDUM IN SUPPORT OF JURISDICTION
 OF APPELLANT JAGPRIT SINGH DHILLON, M.D., and
 EMERGENCY PROFESSIONAL SERVICES, INC.**

William E. Pfau, III #0006474
 Pfau, Pfau & Marando
 P. O. Box 9070
 Youngstown, Ohio 44513
 Telephone: 330/702-9700
 Facsimile: 330/702-9704
 E-mail: ppm@ppmlegal.com
 ATTORNEYS FOR APPELLANTS
 JAGPRIT SINGH DHILLON, M.D. and
 EMERGENCY PROFESSIONAL SERVICES,
 INC.

Martin F. White #0009584
 James Crisan #0065642
 Martin F. White Co., L.P.A.
 156 Park Ave., N.E. - P.O. Box 1150
 Warren, Ohio 44482-1150
 Telephone: 330/394-8589
 Facsimile: 330/394-8589
 ATTORNEYS FOR APPELLEE
 JOHN C. GRUNDY,
 ADMINISTRATOR OF THE ESTATE
 OF SUSANNE CHERYL SUMNER,
 DECEASED.

FILED
 JUL 17 2007
 CLERK OF COURT
 SUPREME COURT OF OHIO

TABLE OF CONTENTS

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....3

STATEMENT OF THE CASE AND FACTS.....6

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....11

Proposition of Law No. I: To obtain a new trial in a case where a juror has not disclosed information during voir dire, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and must, second, demonstrate that a correct response would have provided a valid basis for a challenge for cause.....11

Proposition of Law No. II: In determining whether a juror was untruthful during voir dire, and whether such non-disclosure was a ground for a challenge for cause, an appellate court may not substitute its judgment for that of the trial court unless it appears from the record that the trial court’s attitude was unreasonable, arbitrary or unconscionable..... 15

Proposition of Law No. III: Rule 606 (B) of the Ohio Rules of Evidence precludes the consideration of any testimony of a juror to the effect of anything upon the juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict, and the trial court properly disregards those matters concerning the juror’s mental processes in connection with the verdict..... 16

CONCLUSION.....17

PROOF OF SERVICE.....18

APPENDIX

Opinion of the Trumbull County Court of Appeals (June 4, 2007)..... 1

Judgment Entry of the Trumbull County Court of Appeals (June 4, 2007)..... 28

Judgment Entry of the Trumbull County Court of Common Pleas (Dec. 15, 2005)..... 29

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT
GENERAL INTEREST

This case presents issues of great importance to the just and effective administration of the jury trial system in the State of Ohio. The decision of the court of appeals is a substantial threat to the integrity of the jury system.

Judge Trapp in her dissenting opinion articulates not only the error of the majority opinion with respect to the particular facts and law of the case, but also notes the public policy concerns the decision bodes for the future. The expansive view and liberal grant of new trial of the majority opinion encourages juror harassment by defeated parties, frequent evidentiary hearings to probe juror responses, and ultimately the discouraging of jury service by putting jurors through procedures that require them to defend against accusations of misconduct. Just as important is the loss of finality of verdicts and the sanctity of jury deliberations and the jury process.

The concerns expressed by this Court in *Pearson v. Gardner Cartage Co.* (1947), 148 Ohio St. 425, 76 N.E.2d 67 with respect to the insidious practice of accosting jurors after an adverse verdict, with the goal of finding anything with which to impeach the verdict is no less valid today than it was sixty years ago. The opinion of the court of appeals in a case such as this is likely to cascade this post-trial process.

Is it now incumbent upon counsel in a major case after an adverse verdict to depose all of the jurors in hopes of turning up some perceived lack of disclosure that occurred several weeks earlier in the voir dire process? Can a lawyer with a rambling style ask a general question, get an answer from one juror, launch into a lengthy speech ending with two or three different questions, and thus lay the foundation for inadvertent potential nondisclosures by

jurors? As Judge Trapp suggests in her dissent, will investigative services market themselves as specializing in post-verdict investigations to uncover information not disclosed during voir dire?

The United States Supreme Court in *McDonough Power Equip., Inc. v. Greenwood* (1984), 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 set forth a two part test for determining when juror misconduct for nondisclosure during voir dire gives rise to a right to new trial. The United States Supreme Court held that to obtain a new trial, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. Prior to *McDonough*, the courts have followed varying directions. Some courts have followed the line that a new trial is required where there has been a failure on the part of a juror to disclose information regardless of the juror's good faith, if the information would have been significant evidence of the juror's probable bias. See for example, *Greenwood v. McDonough Power Equip., Inc.* (10 C.A., 1982), 687 F.2d 338, rev'd. 464 U.S. 548, 104 S.Ct. 845, 78 L.E.2d 663 (1984) and *Cleveland Ry. Co. v. Myers* (1935), 50 Ohio App.224, 197 N.E. 803.

Other courts had attempted to apply a more stringent test, the "presumed bias" doctrine. In such cases, courts have found a presumed bias when a juror deliberately concealed information, or purposefully gave an incorrect answer. See for example, *McCoy v. Goldston* (6 C.A., 1981), 652 Fed.2d 654, 658.

A review of the Ohio cases indicates that the standard for dealing with these cases prior to *McDonough* ranged from requiring intentional concealment, *Pearson v. Gardner Cartage Co.* (1947), 148 Ohio St. 425, 446, to a direct right to new trial for completely

inadvertent nondisclosure on the part of the juror. *Cleveland Ry. Co. v. Myers* (1935), 50 Ohio App. 224, 197 N.E. 803.

The Supreme Court in *McDonough* has set a clear standard and is particular with respect to the requirement of dishonesty. The concurring opinion of Justice Blackmun would create an exception where dishonesty is not required if actual bias is shown and even allow bias to be inferred in “exceptional circumstances.” *Id.*, 464 U.S. at 556. Nonetheless, the *McDonough* standard should be adopted and applied in a restrictive sense, as such a holding will serve the integrity of the jury process. While the majority of the court of appeals appears to at least recognize *McDonough*, it clearly does not correctly apply *McDonough* to the facts of this case.

The court of appeals cites to no portion in the record which could possibly be a basis to find dishonest or deliberate withholding of information on the part of the juror in question. The trial court made an express fact finding to the contrary. If the court of appeal’s opinion stands as a correct application of the standard of *McDonough*, the degradation of the jury system anticipated in Judge Trapp’s dissent is a real concern.

Courts in Ohio which have applied *McDonough* seem to have followed two lines of thought. The first are those which appear to have followed the holding in *McDonough* and applied the two-pronged test directly to the facts. See *Dedmon v. Mack*, Lucas App. No. L-05-1108, 2006-Ohio-2113; *State v. Presley*, Franklin Ans. No. 02AP-1354, 2003-Ohio-6069.

Other Ohio courts which have cited *McDonough* appear to focus less direct attention on the holding, and some, as the majority in the case before this court, simply revert to a determination of whether or not the failure to disclose denied the party a right to an impartial jury. See *State v. Mathias*, (Mar. 31, 1994), Gallia App. No. 91CA31; *Mullett v. Wheeling*

& *Lake Erie Ry. Co.*, Cuyahoga App. No. 81688, 2003-Ohio-3347; *State v. Jeffers*, Franklin App. No. 06AP - 358, 2007-Ohio-3213.

Still other courts have apparently disregarded *McDonough* and focused on the issue of inferred or presumed bias as it relates to deliberate concealment. See *State v. Hughes*, Mahoning App. No. 02 CA 15, 2003-Ohio-6094; *Swayze v. Scher*, (Jan. 18, 1995), Montgomery App. No. 14310.

Finally, federal courts have not been consistent in exactly what *McDonough* requires. See for example *Zerka v. Green* (6 C.A., 1995), 49 F.3d 1181, 1186, applying *McDonough* but suggesting that Justice Blackmun's concurrence may not foreclose a new trial based upon a juror's honest but mistaken response.

The issue of *McDonough* and its application to cases of peremptory challenge has been discussed at length by Crump, *Peremptory Challenges After McDonough Power Equipment, Inc. v. Greenwood: A Problem of Fairness, Finality and Falsehood* (1990), 69 *Oregon Law Review* 741.

This case presents a unique opportunity for this Court to review the aged but frequently cited opinion in the *Pearson* case, and to place it in context with the United States Supreme Court's decision in *McDonough*, and to set a clear foundation and direction for the courts of Ohio aimed at preserving and fostering a fair and efficient jury trial process in this state.

STATEMENT OF THE CASE AND FACTS

The case arises from emergency medical care provided by defendant Jagprit Dhillon,

M.D. (Dr. Dhillon) to Susanne Sumner October 26, 2000. Ms. Sumner was twenty-two years of age, single, living with her mother and son. At 12:32p.m. she walked into the emergency room at Trumbull Memorial Hospital with a chief complaint of tooth and jaw pain. Her vital signs were taken by the triage nurse and she was directed to the non-urgent care side of the unit.

At 12:50p.m. she was seen by Dr. Dhillon, who received his undergraduate and medical degrees from Case Western Reserve University, and was Board Certified in internal medicine.

He examined the patient, finding poor dentition, teeth numbers one and thirty two tender, and some redness at the gumline. She was given pain medication and medication for nausea at 1:05p.m.

These medications did not resolve her nausea and she was transferred by Dr. Dhillon to the emergent care side of the facility. She was gowned, labs were ordered, and an IV was started. She was reported by the nurse to have had several episodes of vomiting but did not look that ill. She was then followed by nurse Melissa Mellot who provided an additional dose of anti-nausea medication which helped, the patient at 2:55p.m. was noted not to have chills, and her nausea seemed improved.

Dr. Dhillon visited with and reassessed the patient again during nurse Mellot's shift. Vital signs continued to improve.

Nurse Wilson came on at 3:00p.m. The patient continued to have some vomiting but began insisting to go home. Nurse Wilson testified at deposition that she knew Dr. Dhillon went back into the room with the patient prior to discharge, but she was unsure about this on her direct testimony at trial.

The patient was discharged at 4:52p.m. with instructions and prescriptions, still insisting to go home.

The patient returned to the emergency room by ambulance at 2:47a.m. the next morning. At that time she had developed an obvious rash, diagnostic for meningococemia.

She was seen and diagnosed by Dr. Costarella in the emergency room and transferred to Cleveland Clinic Foundation where she subsequently expired.

Plaintiff produced the testimony of an emergency medicine specialist, an infectious disease specialist and on rebuttal, a pediatric infectious disease specialist. Defendant produced the testimony of an emergency medicine specialist, an infectious disease specialist and a specialist in pediatric infectious disease and critical care. Plaintiff's experts testified that Dr. Dhillon fell below the standard of care in discharging this patient without recognizing the potential that she may have a serious infection, and that earlier treatment would potentially have changed the patient's outcome. Defendants' experts testified that standard of care was met by Dr. Dhillon, that a reasonable physician would not believe this patient was subject to injury or death from a serious infection, and further, that earlier intervention would not have, with probability changed her outcome. No one testified that Dr. Dhillon should have diagnosed meningococemia.

Plaintiff, John C. Grundy, Administrator of the Estate of Susanne Cheryl Sumner, filed a complaint for wrongful death and a survival action February 19, 2002. While Forum Health, dba Trumbull Memorial Hospital was initially named in the complaint, the hospital was voluntarily dismissed December 18, 2003.

Jury trial began April 19, 2004, and on May 3, 2004 the jury found by interrogatory that Dr. Dhillon was not negligent, and returned a general verdict in favor of the defendants,

Dr. Dhillon and Emergency Professional Services, Inc. Plaintiff had withdrawn the survival action at the close of plaintiff's case.

Post-verdict the trial court entered judgment May 14, 2004. Plaintiff filed a motion for a new trial May 28, 2004, alleging misconduct of the jury under Civ.R. 59(A)(2), and that the judgment was not sustained by the weight of the evidence under Civ.R. 59(A)(6). Plaintiff's misconduct allegation was based upon an issue of nondisclosure during voir dire.

The voir dire discussion that took place in part reads as follows:

Mr. White: "How about members of your family? Have you ever taken a member of your family to the emergency room? ". Juror: "Yes". Mr. White: "About that, any experiences that you think will influence your decision making on this case? You were talking about going to the emergency room in 1970 when I was a kid growing up...(21 lines later) While we are on the emergency room topic, how many of you know that Trumbull Memorial Hospital does not run its own emergency room? It sublets its emergency room to an outside group. Did anybody know that? I didn't know that before I was a lawyer and started learning about cases...and those doctors run the emergency room using the hospital equipment, and they tell the nurses they are in charge, and they tell the nurses, who are Trumbull Memorial Hospital nurses, how to do and what to do and they run the show. Any of you know that?"

Not only did plaintiff's counsel not explore the question with the juror who answered yes, he never came back to the question with other jurors but rather, had changed to a different subject by the end of his soliloquy.

Plaintiff argued on motion for a new trial that the misconduct of the jury was the failure of one juror in response to the above quoted question to disclose the fact that he had taken a child to the emergency room at Trumbull Memorial Hospital several years prior.

On October 6, 2004 the trial court held a hearing on the motion for a new trial, and thereafter the entire voir dire transcript was ordered by the court. At the hearing plaintiff

presented evidence including the testimony from juror Krusely who stated that several years prior he had in fact taken his son to the emergency room at Trumbull Memorial Hospital, that based on his recollection he had answered all of the questions which were asked of him, that he absolutely did not deliberately or knowingly conceal any information during the jury selection process and made his best efforts to answer all questions, and that nothing about a prior experience colored his opinion or his ability to follow the court's instructions.

On December 15, 2005 the trial court entered an order denying plaintiff's motion for a new trial. Plaintiff filed an appeal to the Eleventh District Court of Appeals January 12, 2006. On June 4, 2007 the Eleventh District Court of Appeals, Trumbull County, Ohio filed its opinion. The court found plaintiff's first assignment of error had merit, holding that there was juror misconduct, and that the misconduct was prejudicial, resulting in an impartial jury.

The court found the second assignment of error to be moot and entered judgment reversing the trial court, and remanding the case to the trial court for a new trial. Judge Mary Jane Trapp filed a dissenting opinion.

The majority of the court of appeals erred in finding that the trial court abused its discretion in the denial of plaintiff's motion for new trial, and substituted its own opinion. The court failed to apply the appropriate standard set forth in *McDonough Power Equipment, Inc. v. Greenwood* (1984), 464 U.S. 548, 104 S.Ct.845, 78 L.Ed.2d 663, and found juror misconduct even though there was no evidence to support any dishonesty on the part of the juror in question, and further, ignored the requirement of a finding that disclosure by the juror of his prior visit to Trumbull Memorial Hospital would have constituted a basis for challenge for cause. In support of its position on these issues, Appellant presents the following argument.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: To obtain a new trial in a case where a juror has not disclosed information during voir dire, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and must, second, demonstrate that a correct response would have provided a valid basis for a challenge for cause.

The applicable standard to be applied in cases where the question of a juror's misconduct for failure to disclose information during the voir dire process, raised for the first time post-verdict in a motion for a new trial, has not been dealt with by the Ohio Supreme Court since the decision of the United States Supreme Court in *McDonough Power Equipment, Inc. v. Greenwood* (1984), 464 U.S. 548, 104 S.Ct.845, 78L.Ed.2d 663. The holding of the United States Supreme Court in *McDonough* was "We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." Id. at 556.

This Court has dealt with the issue of nondisclosure by a juror during voir dire in several cases between 1940 and 1950. In *Petro v. Donner* (1940), 137 Ohio St. 168, 28 N.E.2d 503 this Court held that it is essential that the prospective juror examined search his memory and give frank and truthful answers to the questions propounded. This Court held that where facts undisclosed or denied were such as to be indicative of a mind which it is reasonable to believe is biased or prejudiced, or such as would disqualify the prospective juror in the first instance, the granting of a new trial under such circumstances is not an abuse of discretion.

In the subsequent case of *Steiner v. Custer* (1940), 137 Ohio St. 448, 31 N.E.2d 855,

post verdict depositions disclosed that several jurors had failed to disclose prior accidents involving themselves or their relatives. The trial court granted a new trial and the court of appeals reversed. This Court reinstated the trial court's grant of new trial discussing mainly the meaning of "abuse of discretion" and giving deference to the trial judge's decision. Nonetheless, this Court noted its agreement with the general tenor of the court of appeals, that attempts to impeach verdicts in this manner should be examined with care, and treated with discernment. *Id.* at 451.

This Court then addressed the issue directly in *Pearson v. Gardner Cartage Co., Inc.* (1947), 148 Ohio St. 425, 76 N.E.2d 67.

Paragraph two of this Court's syllabus reads:

"Where prospective jurors on voir dire examination in a personal injury case remain silent on the subject of accidents or claims when inquiry is made as to whether any prospective juror or any relative or any member of his family had been involved in an accident or had made any claim in respect of an accident, whether a party is prejudiced by the fact that such juror sat in the trial of the case without disclosure, is a question to be determined according to the sound discretion of the trial court when the propriety of the participation by such person is properly raised. Whether the trial court has abused such discretion is to be determined by a reviewing court in accordance with the terms of Section 11364, General Code."

In so holding this Court reversed the appellate court's grant of a new trial, and reinstated the trial court's judgment in favor of the defendant. Of particular significance in the *Pearson* decision is the court's endorsement of the trial court's disfavor of the post-verdict practice of juror impeachment.

The standard, however, set forth in *Pearson* and subsequently followed by this Court in *Maggio v. City of Cleveland*, (1949) 151 Ohio St. 136, 144, 84 N.E.2d 912, has simply been to revert to "whether substantial justice has been done" without establishing any

guideline to reach that conclusion.

There are subsequent cases prior to, or otherwise not relying on *McDonough*, which appear to have ruled on similar issues with no more guidance than a review of the abuse of discretion standard applicable to the trial court. *City of Columbus v. Earnest*, (Dec. 20, 1984) Franklin App. Nos. 84 AP-182 & 84 AP-183; *State v. Gilliam*, (Feb. 28, 1980), Montgomery App. No. 6187 holding denial of a new trial was not an abuse of discretion where there was no “clear and convincing evidence that there was juror misconduct”; *State v. Getz* (March 17, 1975), Portage App. No. 581, ordering new trial where jury panelists were untruthful on voir dire.; *Fiorelli v. Yellow Cab Co. of Cleveland, Inc.*, (App. 1963), 93 Ohio Law Abs. 101, 30 O.O.2d 232, 190 N.E.2d 58; *Firestone v. Freiling* (C.P. 1963), 91 Ohio Law Abs. 1, 22 O.O.2d 356, 188 N.E.2d 91; *Mann v. East Ohio Gas Co.* (App. 1959), 84 Ohio Law Abs. 600, 172 N.E. 2d 325; *Sutfin v. Burton* (1951), 91 Ohio App. 177, 104 N.E.2d 53.

Common topics which come up in the above cited cases are deference to the trial court and the abuse of discretion standard, concealment versus inadvertence, and substantial justice or prejudice.

Subsequent to The United States Supreme Court’s decision in *McDonough*, Ohio courts have cited *McDonough* yet appear to have struggled with “implied bias”, “presumed bias”, and the need to establish intentional concealment. *State v. Stein*, Richland App. No. 05-CA-103, 2007-Ohio-1153; *Dedmon v. Mack*, Lucas App. No. L-05-1108, 2006-Ohio-2113; *State v. Vasquez*, Franklin App. No. 03AP-460, 2004-Ohio-3880.

Cases such as *State v. Presley*, Franklin App. No. 02AP-1354, 2003-Ohio-6069 have expressly applied the holding of *McDonough* that a juror give a dishonest answer and that

the juror could have been successfully challenged for cause. See also *Mullett v. Wheeling & Lake Erie Ry. Co.*, Cuyahoga App. No. 81688, 2003-Ohio-3347.

In the case before this Court it was determined by the trial court that there was no evidence that juror Krusely gave false information to questions put to him, but rather he did not volunteer all information that he may have if other specific questions were asked.

The majority opinion from the court of appeals, acknowledged that “when viewing this question in isolation, as it appears in the transcript, it is arguably susceptible to multiple interpretations.” The majority then goes on to intuit the correct interpretation from its own review of the transcript, and substitutes the majority’s opinion for the trial court’s factual determination. At no time, however, does the majority determine that any failure to respond by juror Krusely was due to dishonesty. While the majority cites *McDonough*, the majority does not apply that standard. Rather, the majority seems to apply the standard applied by the Tenth Circuit Court of Appeals prior to the United States Supreme Court’s reversal. *Greenwood v. McDonough Power Equipment, Inc.* (C.A.10, 1982), 687 F.2d 338. The Tenth Circuit held that a party would be entitled to a new trial because of the prejudice to a right of peremptory challenge, even assuming the juror had good intentions and would not be disqualified for cause. *Id.* at 341.

In the case before this Court, with no showing whatsoever of lack of honesty, the majority finds juror misconduct, giving lip service to *McDonough*, but not applying its standards.

Further, the court’s discussion relating to prejudice does not even mention challenge for cause. The court simply finds that Krusely was not “impartial”.

Judge Trapp in her dissent correctly points out that, while the majority claims to rest

its decision on *McDonough*, its application ignores the lack of evidence, and does not place the burden on the complaining party to show that the juror gave a dishonest answer, and that the answer would have provided a valid basis for challenge for cause.

Proposition of Law No. II: In determining whether a juror was untruthful during voir dire, and whether such non-disclosure was a ground for a challenge for cause, an appellate court may not substitute its judgment for that of the trial court unless it appears from the record that the trial court's attitude was unreasonable, arbitrary or unconscionable.

The determination of the truthfulness of a person before the court is fundamentally something for the sound discretion of the trial court.

The law requires that deference be given to the trial court's determination on matters that occur when the trial court is best situated to determine the credibility of persons appearing before the court. See, e.g. *State v. Brandon* (1997), 119 Ohio App.3d 594, 695 N.E.2d 1195, (Trial court is best situated to determine the credibility of witnesses at a suppression hearing); *State v. Powers* (1993), 92 Ohio App.3d 400, 406 635 N.E.2d 1298 (Prosecutor's motives for exercising a peremptory challenge).

With respect to juror misconduct, courts have routinely deferred to the discretion of the trial court. *Pearson v. Gardner Cartage Co.* (1947), 148 Ohio St. 425, 76 N.E.2d 167.

In the case before this court, there can be no question that the trial judge was the person best situated to determine the issue of juror Krusely's honesty and to determine what the probability of prejudice to the plaintiff from lack of disclosure would be.

The appellate court simply substituted its opinion for that of the trial court announcing that the trial court "abused its discretion" without pointing to the unreasonable,

arbitrary or unconscionable conduct. Rather, the appellate court only explains why its interpretation of the record leads to different factual conclusions than those reached by the trial court.

Proposition of Law No. III: Rule 606 (B) of the Ohio Rules of Evidence precludes the consideration of any testimony of a juror to the effect of anything upon the juror's mind or emotions as influencing the juror to assent to or dissent from the verdict, and the trial court properly disregards those matters concerning the juror's mental processes in connection with the verdict.

In the case before this Court, juror Krusely and others had a conversation with plaintiff's counsel and staff on the courthouse steps following the verdict. This is a classic circumstance that occurs post-verdict when counsel for the non-prevailing party discusses the case with jurors. Generally speaking, citizens who serve as jurors following a verdict go out of their way to make some explanation to the non-prevailing party that the juror believes may be a satisfactory explanation for the verdict. At the hearing on motion for new trial plaintiff's counsel proffered evidence over objection that in his conversation on the courthouse steps post-verdict, juror Krusely had said that he believed the standard at Trumbull Memorial Hospital was low, that he had a negative impression of Dr. Dhillon, that he felt if this patient was as sick as plaintiff described they should have gone to another hospital.

All of this post-verdict discussion is barred by Evid.R. 606(B): the juror's impression of the defendant doctor, the juror's impression of the credibility of the plaintiff's description of Ms. Sumner's illness, and the juror's impression of standard of care. The trial

court correctly excluded these matters based upon Evid.R. 606(B) and proceeded to consider only questions asked on voir dire, and whether there was a failure to disclose in response which was prejudicial.

The majority of the appellate court, stating that the trial court erred in applying the aliunde rule, does not take into consideration the evidence presented to the trial court during the motion for new trial process. The trial court properly excluded such statements from consideration and went on to separately address the issue of misconduct on voir dire. The court of appeals erred in its finding that these comments did not violate Evid. R. 606(B).

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest, critical to the just and efficient administration of the jury trial system in the State of Ohio. Appellants' request that this Court accept jurisdiction of this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



William E. Pfaff, III
COUNSEL FOR APPELLANTS

Certificate of Service

A copy of the foregoing Memorandum has been sent by regular mail this 16th day of July, 2007 to MARTIN F. WHITE, 156 Park Avenue, N.E., P.O. Box 1150, Warren, Ohio 44482-1150.

William E. Pfau, III
COUNSEL FOR APPELLANTS
JAGPRIT SINGH DHILLON, M.D.,
AND EMERGENCY
PROFESSIONAL SERVICES, INC.

APPENDIX

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO

FILED
COURT OF APPEALS

JUN 04 2007

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

JOHN C. GRUNDY, ADMINISTRATOR : **OPINION**
OF THE ESTATE OF SUSANNE CHERYL :
SUMNER, DECEASED, :
 :
Plaintiff-Appellant, :
 :
- vs - : **CASE NO. 2006-T-0007**
 :
JAGPRIT SINGH DHILLON, M.D., et al., :
 :
Defendants-Appellees. :

Civil Appeal from the Court of Common Pleas, Case No. 02 CV 414.

Judgment: Reversed and remanded.

Martin F. White and James J. Crisan, 156 Park Avenue, N.E., P.O. Box 1150, Warren, OH 44482 (For Plaintiff-Appellant).

William E. Pfau, III, P.O. Box 9070, Youngstown, OH 44513 (For Defendants-Appellees).

WILLIAM M. O'NEILL, J.

{¶1} Appellant, John C. Grundy, Administrator of the Estate of Susanne Cheryl Sumner, deceased, appeals the judgments entered by the Trumbull County Court of Common Pleas. Following a jury trial, the trial court entered judgment in favor of appellees, Dr. Jagprit Singh Dhillon and Emergency Professional Services, Inc. Thereafter, the trial court denied Grundy's Civ.R. 59 motion for a new trial.

{¶2} On the morning of October 26, 2000, 22-year-old Susanne Sumner was not feeling well. She called her mother at work and indicated she felt a lump behind her ear and had a splitting headache. Her mother advised her to take Tylenol. At 11:30 a.m., Sumner again called her mother and told her the Tylenol had not helped and that she was vomiting. Her mother left work to take her to the hospital. On the way to the hospital, Sumner vomited again.

{¶3} Sumner arrived at the Trumbull Memorial Hospital emergency room at 12:32 p.m. At that time, she was crying, hyperventilating, and complained of mouth and jaw pain. Sumner's vital signs were taken at a triage station, and she was directed to the "ED-2" section of the emergency room, a section for patients with less serious conditions.

{¶4} At 12:50 p.m., Sumner was seen by Dr. Dhillon. Dr. Dhillon diagnosed Sumner's problem as severe tooth pain and noted that she had poor dentation. Dr. Dhillon ordered an injection for the pain and a medication for Sumner's vomiting. Despite the medicine, Sumner continued to vomit.

{¶5} About 1:50 p.m., Sumner was transferred to the "ED-1" section of the emergency room, a section for patients with more serious conditions. There, she was given more medication for vomiting and an I.V. to prevent dehydration. Also, Dr. Dhillon ordered lab tests done on a blood sample.

{¶6} About 3:15 p.m., some of the test results of the lab work were completed. They revealed Sumner had a high white-blood count with a "left shift," indicating an infection. Further, her bicarbonate levels were low, which is also indicative of an infection.

{¶7} About 4:10 p.m., a nurse noted that Sumner continued to vomit and “dry heave.” Shortly thereafter, Sumner insisted on going home. The nurse was not sure whether Dr. Dhillon saw Sumner prior to her discharge, and there was nothing in Sumner’s chart to indicate he had. Dr. Dhillon did not order a “PO” test, which is used to ascertain whether a patient is able to keep fluids down, prior to Sumner’s discharge.

{¶8} Dr. Dhillon ordered Sumner discharged, and Sumner left the emergency room at 4:52 p.m. Sumner was given various instructions and several prescriptions. She was also told to see a dentist as soon as possible.

{¶9} Sumner filled the prescriptions about 7:00 p.m. That evening, Sumner continued to vomit, but declined to go back to the hospital. In the early morning hours of the following day, Sumner woke her mother and asked her to call 9-1-1. Sumner reported that she could not feel her fingers or feet. Her mother called 9-1-1, and Sumner was transported to the Trumbull Memorial Hospital emergency room, where she arrived at 2:47 a.m.

{¶10} Sumner was seen by Dr. Costarella, who quickly diagnosed her with meningococemia. Sumner was given antibiotics and steroids. She was eventually transferred to the Cleveland Clinic, where she died on October 28, 2000.

{¶11} Forum Health does business as Trumbull Memorial Hospital. Dr. Dhillon worked for a group of doctors known as Emergency Professional Services, Inc. Emergency Professional Services, Inc. had a contractual relationship with Forum Health to provide doctors to work at the Trumbull Memorial Hospital emergency room.

{¶12} In February 2002, Grundy, the administrator of Sumner’s estate, filed the instant action against appellees and Forum Health. Forum Health was later dismissed.

The complaint asserted, among other claims, that appellees were responsible for the wrongful death of Sumner due to Dr. Dhillon's negligence. The matter proceeded to a jury trial in April 2004.

{¶13} During the voir dire examination, the potential jurors were asked about their experiences with the Trumbull Memorial Hospital emergency room. In addition, they were specifically asked whether they had taken any of their family members to the Trumbull Memorial Hospital emergency room. Prospective juror Anthony Krusely did not respond to the question regarding family members. Krusely was seated on the jury.

{¶14} The jury trial lasted several days. In addition to the factual witnesses, multiple expert witnesses testified for each side regarding their respective opinions as to whether Dr. Dhillon met the applicable standard of care. At the end of the trial, interrogatories were submitted to the jury. In response to the first interrogatory, the jury found that Dr. Dhillon was not negligent in his care of Sumner. Accordingly, the jury returned a verdict in favor of appellees. The trial court entered judgment on the verdict in favor of appellees.

{¶15} Following the trial, Attorney Martin White, counsel for Grundy, interviewed several jurors on the sidewalk outside of the Trumbull County Courthouse. During this interview, Juror Krusely revealed that he had taken one of his sons to the Trumbull Memorial Hospital emergency room on a prior occasion. He further stated that he believed the standard of care at Trumbull Memorial Hospital is low.

{¶16} Two weeks after judgment was entered in favor of appellees, Grundy filed a motion for a new trial, pursuant to Civ.R. 59. The basis of this motion was twofold. First, Grundy asserted a new trial was appropriate due to the misconduct of Juror

Krusely. Second, Grundy argued a new trial was necessary because the jury's verdict in favor of appellees was not sustained by the weight of the evidence. Appellees filed a brief in opposition and a supplemental memorandum in opposition to Grundy's motion for a new trial.

{¶17} The trial court held a hearing on Grundy's motion for a new trial. At the hearing, Krusely testified that (1) he had taken his son to the Trumbull Memorial Hospital emergency room on a prior occasion, (2) that Trumbull Memorial Hospital released his son without an affirmative diagnosis, (3) that he was not satisfied with that answer, so he took his son to North Side hospital, where the son was diagnosed with mononucleosis, and (4) that he believed the standard of care at Trumbull Memorial Hospital was low. Juror Rhonda Noel also testified at the hearing. She was one of the jurors interviewed outside the courthouse and heard Krusely's responses. She testified that during the interview, Krusely stated the standard of care at Trumbull Memorial Hospital was "rotten;" he also stated that he would not let Dr. Dhillon treat him for a paper cut. Finally, Attorney White testified at the hearing. He testified that he also heard Krusely's comments about the low standard of care at Trumbull Memorial Hospital and the paper-cut hypothetical. Also, he testified that Krusely told him that Sumner's mother and boyfriend should not have relied on the diagnosis from Trumbull Memorial Hospital; rather, they should have sought additional treatment at another facility. Attorney White testified that had Krusely revealed the incident with his son during voir dire, he would have sought to have him removed for cause and, if that failed, he would have exercised a peremptory challenge to ensure Krusely did not sit on the jury.

{¶18} Following the hearing, the trial court denied Grundy's motion for a new trial.

{¶19} On appeal, Grundy raises two assignments of error. His first assignment of error is:

{¶20} "The trial court abused its discretion by denying plaintiff's motion for new trial pursuant to Civ.R. 59(A)(2) on the ground of misconduct of the jury."

{¶21} A trial court's decision denying a motion for a new trial should not be reversed unless the trial court abused its discretion.¹ "The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable."²

{¶22} The trial court partially based its decision to deny Grundy's motion for a new trial on Evid.R. 606(B), which provides, in part:

{¶23} "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith."

1. (Citations omitted.) *Apaydin v. Cleveland Clinic Found.* (1995), 105 Ohio App.3d 149, 152.

2. (Citations omitted.) *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶24} Evid.R. 606(B) is the formal adoption of the common law rule known as the evidence aliunde rule.³ The purpose of this rule is to protect the sanctity and integrity of the jury process by preventing inquiry into the jury's deliberative process.⁴ However, "[t]he aliunde rule is not applicable to prevent evidence of a juror's failure to disclose facts on voir dire examination."⁵

{¶25} The trial court erred by applying Evid.R. 606(B) to Krusely's comments following the trial and to his testimony at the post-trial hearing. These comments and testimony did not concern the jury's deliberative process but, rather, concerned the issue of whether Krusely failed to disclose certain information on voir dire. Therefore, Krusely's testimony and comments did not violate Evid.R. 606(B).⁶

{¶26} Appellees note that juror misconduct is not a ground for reversing a judgment unless prejudice is demonstrated.⁷ Regarding a juror's failure to disclose information in response to a question on voir dire, the prejudice is determined by whether the complaining party was denied his or her right to an impartial jury.⁸

{¶27} The Supreme Court of the United States has held:

3. *Farley v. Mayfield* (June 30, 1986), 10th Dist. No. 86AP-19, 1986 Ohio App. LEXIS 7481, at *3.

4. *Dedmon v. Mack*, 6th Dist. No. L-05-1108, 2006-Ohio-2113, at ¶18.

5. *Farley v. Mayfield*, 1986 Ohio App. LEXIS 7481, at *3.

6. *Id.*

7. See *Bentley v. Kremchek*, 1st Dist. No. C-040721, 2005-Ohio-3038, at ¶8, citing *Koch v. Rist* (2000), 89 Ohio St.3d 250, 251-252.

8. *McDonough Power Equipment, Inc. v. Greenwood* (1984), 464 U.S. 548, 556.

{¶28} “One touchstone of a fair trial is an impartial trier of fact - - ‘a jury capable and willing to decide the case solely on the evidence before it.’⁹ *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’s 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.”¹⁰

{¶29} In *McDonough Power Equipment, Inc. v. Greenwood*, the Supreme Court set forth the following standard to be applied when determining whether a new trial is appropriate when it is alleged that juror misconduct occurred in a situation like this:

{¶30} “[T]o obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror’s impartiality can truly be said to affect the fairness of a trial.”¹¹

9. *Smith v. Phillips* (1982), 455 U.S. 209, 217.

10. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. at 554.

11. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. at 556.

{¶31} Thus, there are two fundamental questions to be answered in this matter. First, did Krusely commit misconduct by failing to disclose the incident with his son and, second, did Krusely's subsequent participation in the jury process affect the impartiality of the jury?

{¶32} During voir dire, Attorney White asked the jurors if any of them had been patients at Trumbull Memorial Hospital. Several jurors gave their experiences, including Krusely, who stated he was at the Trumbull Memorial Hospital emergency room for a few hours following a car accident. Attorney White then asked if anyone else had an experience with the Trumbull Memorial Hospital emergency room. An unidentified potential juror stated his story about an emergency room visit. Thereafter, Attorney White posed the following question to the prospective jurors:

{¶33} "How about members of your family? Have you ever taken members of your family to the Trumbull Memorial emergency room?"

{¶34} An unidentified potential juror responded yes to this question, without explanation. Juror Krusely did not respond to this question.

{¶35} The following colloquy occurred at the hearing on Grundy's motion for a new trial:

{¶36} "Q. [By Attorney White] I'm asking you about before the trial. Before the trial. When you were outside, let me tell you what I remember you telling me. What I remember you telling me is that you had an episode where you took one of your children to Trumbull Memorial Hospital, and that your child was released from the hospital, and you weren't satisfied with the care you got there?"

{¶37} "A. Yes, that was my oldest son, yes.

{¶38} "Q. Your oldest son?

{¶39} "A. I ended taking him to North Side Hospital."

{¶40} This testimony demonstrates that Krusely did, in fact, take one of his family members, his son, to the Trumbull Memorial Hospital emergency room.

{¶41} Appellee argues that the transcript does not indicate the question about family members going to the emergency room was posed to all members of the jury. Rather, appellee argues that the question could have only been posed to an unidentified prospective juror who had just responded to a previous question. When viewing this question in isolation, as it appears in the transcript, it is arguably susceptible to multiple interpretations. Depending on Attorney White's voice inflection and body language, the question could have been posed to a single prospective juror or to the entire panel of prospective jurors. However, when the question at issue is viewed in the context of the entire voir dire, it is clear that the question was posed to the entire panel of prospective jurors. While conducting his voir dire, Attorney White asked the group of prospective jurors the following questions:

{¶42} "Does anyone know my family?; *** Have I ever represented members of your family?; *** What are your thoughts about lawyers in general?; *** Is there anyone here who works at Trumbull Memorial Hospital or who has family members or very close friends who work at Trumbull Memorial Hospital?; *** What do you think about frivolous lawsuits?; *** Anyone with medical training in your background?; *** Anyone who has a family member who has a medical background in training?; *** Who thinks doctors walk on water?; *** How many people have been a patient at Trumbull Memorial

Hospital?; *** Anybody else with any experiences at the emergency room at Trumbull Memorial Hospital?"

{¶43} Some of the questions produced no response. However, others produced significant answers from the panel of prospective jurors. When an individual would affirmatively answer one of the questions posed to the group, Attorney White would individually question that prospective juror regarding his or her individual experience. This process would continue with each prospective juror who responded to the general question. Thereafter, Attorney White would change the topic by asking the entire group another question. Prior to asking about family members, Attorney White asked, "Anybody else with any experiences at the emergency room at Trumbull Memorial Hospital?" This question stimulated several responses. When those responses concluded, Attorney White asked the question "How about members of your family? Have you ever taken members of your family to the Trumbull Memorial emergency room?" After reviewing the context in which this final question was placed, it is apparent it was addressed to all of the prospective jurors. As such, Krusley should have answered it.

{¶44} Appellees cite *Swayze v. Scher*, in support of their assertion that a juror has no duty to volunteer information during voir dire.¹² In *Swayze*, the juror answered all questions that were asked of her, but she did not provide additional information.¹³ The Sixth Appellate District has similarly held that a potential juror did not commit misconduct when she accurately and honestly answered all of the voir dire questions.¹⁴ In the instant matter, Krusely failed to answer a question regarding whether he had taken a family member to the Trumbull Memorial Hospital emergency room.

{¶45} The facts of *McDonough Power Equipment, Inc. v. Greenwood* are as follows. The plaintiff was injured by his neighbor's riding lawnmower.¹⁵ One of the jurors remained silent during the voir dire when the prospective jurors were asked whether they or any members of their immediate family had sustained any "severe injury."¹⁶ In fact, that juror's son suffered a broken leg as a result of a tire explosion. The facts of the instant case present a more significant level of juror misconduct than those in the *McDonough Power Equipment, Inc. v. Greenwood* case. The question in *McDonough Power Equipment, Inc. v. Greenwood* was somewhat ambiguous, in that different individuals have different definitions of what a "severe" injury is.¹⁷ In this case, the question posed to the jurors, "have you ever taken a member of your family to the Trumbull Memorial [Hospital] emergency room," was more straightforward. It required a yes or no answer, and was not susceptible to multiple interpretations.

12. *Swayze v. Scher* (Jan. 18, 1995), 2d Dist. No. 14310, 1995 Ohio App. LEXIS 97, at *20.

13. *Id.*

14. *Dedmon v. Mack*, 2006-Ohio-2113, at ¶21.

15. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. at 449.

16. *Id.* at 550.

17. *Id.* at 555.

{¶46} Krusely testified at the post-trial hearing that he had taken his son to the Trumbull Memorial Hospital emergency room. Krusely remained silent when he was specifically asked about this topic during voir dire. Moreover, at no time during the entire trial did Krusely reveal that he had taken his son to the Trumbull Memorial Hospital emergency room, yet he relayed this information to Attorney White moments after the trial ended. Such conduct reveals that his failure to disclose his son's experience with the Trumbull Memorial Hospital emergency room was a failure to honestly answer a yes or no question on voir dire. Krusely committed juror misconduct by failing to affirmatively respond to the voir dire question as to whether he had taken a family member to the Trumbull Memorial Hospital emergency room.

{¶47} We next turn to whether the jury remained impartial in light of the juror misconduct.

{¶48} At the hearing on Grundy's motion for a new trial, the following exchange occurred:

{¶49} "Q. [by Attorney White] Am I correct, Mr. Krusely, that you indicated to me, you pointed your hand down towards the ground and you said that the standard of care at Trumbull Memorial Hospital is low?

{¶50} "A. I said in my opinion it was low. As far as what the standard is for the hospital, I have no idea what they consider the standard. In my opinion, my personal opinion as a layman, yes, I think it is."

{¶51} Later, Krusely was questioned on this issue by the trial court:

{¶52} "THE COURT: Let me ask you this one last thing. Do you agree that you made the comment to counsel of [Grundy] after the trial, that you didn't think that the expectation with Trumbull would be as high as North Side?

{¶53} "[Krusely]: No. What I said was, 'I believe it has a low standard of care.' However, if the doctor wasn't able to help my kid, I decided to seek a different doctor. It wasn't that I thought North Side was better. I thought it was different. Simply a second opinion. If my kid is sick, I need to seek more help. Is that the best available? I have no idea. Maybe I should have taken him to [the] Cleveland Clinic. My point is, if I felt this particular facility wasn't providing the service I needed, maybe I better find a different facility."

{¶54} Krusely's testimony and statements regarding his opinion about the standard of care at Trumbull Memorial Hospital clearly demonstrate his partiality. It is patently unfair for a juror to have preconceived ideas regarding the quality of health care rendered by a medical facility and, then, be asked to decide whether that same medical facility provided appropriate medical care in a wrongful death case.

{¶55} Moreover, we note the similarity between the incidents involving Sumner and Krusely's son. While the two medical conditions were significantly different, both incidents involved the patient presenting at the Trumbull Memorial Hospital emergency room with an unknown illness and the hospital's alleged misdiagnosis of the actual condition. This similarity can be emphasized by reviewing other cases concerning undisclosed information during voir dire.

{¶56} In *McDonough Power Equipment, Inc. v. Greenwood*, we note the undisclosed incident concerned an accident that resulted from an automobile tire

explosion, to which the defendant, a manufacturer of riding lawn mowers, had no connection or involvement. The potential for bias was relatively minimal, in that the prior undisclosed incident had no connection with the present case before the juror. In the instant matter, the undisclosed past incident concerned the misdiagnosis of a medical condition by the Trumbull Memorial Hospital emergency room, which was the exact same allegation, against the exact entity, as Krusely was asked to decide in the case before him.

{¶57} In *Apaydin v. Cleveland Clinic Found.*, a potential juror remained silent when the prospective jurors were asked whether they believed that Turkish citizens should be able to sue for damages in Cleveland. However, later in the trial, that juror disclosed to other jurors that he believed people from Turkey should not be permitted to sue the Cleveland Clinic.¹⁸ The trial court removed the biased juror and sat an alternate juror in his place. On appeal, the plaintiff argued that the trial court should have granted his motion for a new trial. The Eighth Appellate District disagreed, holding that the remaining jurors, who had merely heard the biased juror's comments, indicated they could remain impartial.¹⁹ The primary distinction between the *Apaydin v. Cleveland Clinic Found.* case and the matter sub judice is that Krusely actually participated in the jury deliberations and verdict, while the biased juror in the *Apaydin* case was replaced with an alternate.

18. *Apaydin v. Cleveland Clinic Found.*, 105 Ohio App.3d at 151.

19. *Id.* at 156.

{¶58} Another case relying on the authority of the *McDonough Power Equipment, Inc. v. Greenwood* holding is *Mullett v. Wheeling & Lake Erie Ry. Co.*²⁰ In *Mullett*, an attorney served on the jury. During voir dire, he remained silent when a question was asked if any of the potential jurors had previously encountered anyone from the law firm of defendant's counsel. In fact, the juror-attorney had tried a case five years prior against a defendant who was represented by a different attorney from that same firm.²¹ The Eighth District upheld the trial court's denial of a motion for a new trial, finding there was no evidence that the attorney-juror was not impartial.²² The case sub judice is distinguishable from the *Mullett* case on two important points. First, the attorney-juror in *Mullett* had a prior dealing with another member of the firm of the defendant's counsel. He did not have a prior dealing with the defendant or even the defendant's counsel.²³ In the instant matter, Krusely had a prior dealing with an actual defendant, involving a similar issue to that which was the subject of the jury trial. Failing to disclose a prior interaction with an attorney, who happens to belong to the same firm as an attorney for one of the parties, is much less significant than failing to disclose an interaction with a party in the litigation, especially when that interaction was similar to the facts the juror is asked to decide. Secondly, the attorney-juror in *Mullett* demonstrated that he acted impartially.²⁴ The same cannot be said of Krusely, who testified, under oath, that he believes Trumbull Memorial Hospital has a low standard of care.

20. *Mullett v. Wheeling & Lake Erie Ry. Co.*, 8th Dist. No. 81688, 2003-Ohio-3347.

21. *Id.* at ¶39.

22. *Id.* at ¶41.

23. *Id.* at ¶39-41.

24. *Id.*

{¶59} In this matter, juror misconduct occurred by Krusely's failure to disclose the incident regarding his son's experience at the Trumbull Memorial Hospital emergency room. Further, Grundy was prejudiced by this misconduct, in that an impartial jury was not seated in this matter. Thus, the trial court abused its discretion by failing to grant Grundy's motion for a new trial.

{¶60} Grundy's first assignment of error has merit.

{¶61} Grundy's second assignment of error is:

{¶62} "The jury verdict is against the manifest weight of the evidence."

{¶63} Due to our analysis of Grundy's first assignment of error, Grundy's second assignment of error is moot.²⁵

{¶64} The judgment of the trial court is reversed. This matter is remanded to the trial court for a new trial.

COLLEEN MARY O'TOOLE, J., concurs,

MARY JANE TRAPP, J., dissents with Dissenting Opinion.

MARY JANE TRAPP, J., dissents with Dissenting Opinion.

{¶65} I must respectfully dissent inasmuch as there is insufficient evidence to establish juror misconduct and insufficient evidence to establish that the plaintiff was denied a right to an impartial jury.

25. See App.R. 12(A)(1)(c).

{¶66} While the majority correctly rests its decision on the United States Supreme Court holding in *McDonough Power Equip., Inc. v. Greenwood* (1984), 464 U.S. 548, they fail to consider the true import of those Ohio cases decided subsequent to *McDonough* that hold that the *burden of proof* is on the complaining party to show that the juror gave a dishonest answer and that the answer would have provided a valid basis for a challenge for cause. *Dedmon v. Mack*, 6th Dist. No. L-05-1108, 2006-Ohio-2113, at ¶20. (Emphasis added.)

{¶67} In the instant case, there is no evidence in the record to establish that Juror Krusely gave a dishonest answer. During voir dire, appellant's counsel posed the following question to the venire: "How about members of your family? Have you ever taken a member of your family to Trumbull Memorial emergency room?" To which another juror answered, "yes." Appellant's counsel continued by asking, "[a]bout that, any experiences that you think will influence your decision making on this case? ***" Appellant's counsel immediately followed that question with an explanation of the two different divisions within the emergency department and an explanation of the process of hospitals subletting the emergency department to an outside group. This discussion led the juror who had initially responded affirmatively to the original question posed to shift the discussion to billing practices of emergency departments. Then appellant's counsel posed three new questions at once: "Do you believe it is reasonable to expect that Emergency Professional Services, Inc., if they are going to sublet the emergency room in our community hospital, would hire qualified doctors to handle the emergency room? You think that is a reasonable expectation? What do you expect from an

emergency room doctor? Anthony [Juror Krusely], what do you expect?" This colloquy followed as Juror Krusely answered the question posed directly to him.

{¶68} A: "I don't like the idea of it being a primary care *** I think the emergency room has an obligation to save your life, to not make it any worse, to not necessarily cure you, but at least get you on the road to where maybe I need to send you to a professional tomorrow. I'll make an appointment with a bone specialist or whatever you happen to need."

{¶69} Q: "Sort of, what is going on?"

{¶70} A: "Yes."

{¶71} Q: "And not necessarily cure you, but at least identify what the problem is?"

{¶72} A: "Certainly. I don't think everything can be cured in the emergency room setting."

{¶73} Q: "I agree, is that a reasonable expectation?"

{¶74} A: "Yes."

{¶75} Q: "Anybody else? Yes, sir?"

{¶76} And with that question appellant's attorney moved on to another juror.

{¶77} Later in voir dire, appellant's attorney returned to Mr. Krusely and asked, "Have you heard anything so far that makes you feel that you couldn't be fair?" To which Mr. Krusely replied, "No."

{¶78} After a question about Mr. Krusely's military time in Germany and his prior jury experience, this question was posed to Mr. Krusely. "Do you think you can be fair

to both sides and decide the case on the evidence?" To which he answered, "Yes, absolutely."

{¶79} Mr. Krusely was not under a duty to volunteer information. See *Swayze v. Scher* (Jan. 18, 1995), 2d Dist. No. 14310, 1995 Ohio App. LEXIS 97, at 19-20. Indeed, the question regarding family experience with the Trumbull Memorial emergency room was posed as a general question to the venire. Another prospective juror answered the question first, but instead of posing the same question to the other potential jurors, appellant's counsel chose to move the discussion to another area and chose another question to pose directly to Mr. Krusely.

{¶80} In *Dedmon*, the appellant alleged that there was juror misconduct because a juror failed to disclose that she was a patient of the defendant clinic. The court found no misconduct because the juror "answered all the voir dire questions asked of her accurately and honestly." *Dedmon* at ¶21. The record before us demonstrates that Mr. Krusely answered accurately and honestly the direct questions that were posed to him. The majority finds misconduct in the fact that Mr. Krusely failed to disclose his son's experience in the Trumbull Memorial emergency room, but that question was not directly posed to him, and in fact, as Mr. Krusely testified at the hearing on the motion for new trial, it was only after he had heard all of the evidence presented during a two and one-half week trial that he recalled the incident.

{¶81} The line of voir dire questioning clearly had moved from the experience of any family members in the Trumbull Memorial emergency room to the question of expectations of an emergency room. Mr. Krusely answered those questions fully and candidly giving his opinion as to his expectations of an emergency room doctor. Then

at the close of voir dire, when asked whether he could be fair to both sides and decide the case on the evidence, (the “bullet” question that must be asked when challenging a potential juror for cause), Mr. Krusely said that he could.

{¶82} In *State v. Hughes*, 7th Dist. No. 02 CA 15, 2003-Ohio-6094, the defendant argued that he was entitled to a new trial because a juror had failed to inform the court that he had been convicted of a felony. The court held that “where, as here a claim of jury misconduct involves a juror’s concealment of information, the defendant must demonstrate that the jury member was not impartial. *** *A court may infer bias if it finds deliberate concealment, however, if the concealment was unintentional, the defendant must show that the juror was actually biased.*” *Id.* at ¶11. (Emphasis added.)

{¶83} The court in *Zerka v. Green* (6th Cir. 1995), 49 F.3d 1181, 1186, fn. 7, reiterated the fact that “[i]n the absence of intentional concealment, only extreme circumstances justify a new trial.” (Emphasis added.) The Sixth Circuit looked to Justice Blackmun’s concurring opinion in *McDonough*, in which he stressed that although it is “possible to find juror partiality regardless of whether a juror answers questions honestly or dishonestly, absent actual bias, a new trial should be ordered “in exceptional circumstances, *** [where] bias is to be inferred.” *Id.*

{¶84} There is no evidence in the record that Mr. Krusely intentionally concealed any information from which one may infer bias, nor had appellant met his burden of proof as to actual bias.

{¶85} The majority declares that an impartial jury was not seated in this matter, arriving at this conclusion based upon testimony as to Mr. Krusely’s opinions voiced *after* he had heard the evidence and *after* he had deliberated with his fellow jurors and

reached a verdict. There is no evidence before this court as to the opinion held by Mr. Krusely at the time of voir dire or prior to instruction and deliberation, and it is at each of these points in time that we must evaluate any partiality or bias *via á vis* the failure to disclose information. (Emphasis added.)

{¶86} When Mr. Krusely was placed under oath and examined during the hearing on the motion for new trial, the trial court first asked, "what the attorneys are trying to determine is whether or not looking back through this whole series that you would have discussed that incident with your son, if asked or when asked, on the voir dire." Mr. Krusely responded, "Do I remember everything I have ever done? No, sir. But I certainly *** did not try to hide anything, and I certainly answered everything honestly. Quite frankly, I believe in two and a half weeks of hearing about this case and this 22 year old girl, made me remember about my son who happens to be 22 years old. Had I been reminded of it earlier, I would have certainly relayed that incident."

{¶87} The trial court then asked whether his opinion that Trumbull Memorial emergency room has a "low standard of care" (which he related to appellant's counsel on the courthouse steps after hearing the evidence, after the verdict was announced, and after the jury was discharged) colored his acceptance of the jury instructions that "there is a standard of care, and that it had to be applied to Trumbull, the same [as] it would to Cleveland Clinic or anywhere else." Mr. Krusely replied, "It did not color my opinion or my ability to follow your instructions at all." (Emphasis added.)

{¶88} Assuming, *arguendo*, that Mr. Krusely had held and voiced this "low standard of care" opinion on voir dire, the challenge for cause and the peremptory challenge would have been exercised by the defense, not the plaintiff.

{¶89} The law does not require that every juror be free of bias. The law does require that a juror be able to put aside that bias in order to listen to the evidence presented by both sides and in order to follow the instructions of law and decide the case on the law and the evidence presented.

{¶90} Mr. Krusely was questioned on the courthouse steps, and he recalled the experience with his son at the same emergency room and voiced his opinions *after* he had heard the evidence. There is no evidence in the record to demonstrate that he recalled the incident with his son during *voir dire* and deliberately withheld the information when directly asked (which he was not) or that he had formed opinions which could not be put aside *prior* to hearing the evidence and deliberating with his fellow jurors from which one may infer that he was not impartial. (Emphasis added.)

{¶91} Ultimately, as the majority correctly notes, the decision to deny appellant's motion for new trial premised upon juror misconduct must be reviewed under an abuse of discretion standard. As the Supreme Court of Ohio recognized in *Pearson v. Gardner Cartage Co.* (1947), 148 Ohio St. 425, "**** the real question for a reviewing court is whether substantial justice has been done. Whether substantial justice has been done in a cause such as we have before us is a question in the first instance for the trial court in passing upon a motion for a new trial. In other words, the answer rests in the sound discretion of the trial court and where the record discloses no abuse of such discretion, the decision of the trial court should be upheld." *Id.* at 449.

{¶92} The opinions concerning the hospital and the doctor were revealed after trial, and there is no evidence that these opinions exhibited the quantity and quality of bias that would have provided a basis for a challenge for cause. The trial judge in this

case was in the best position to evaluate this juror as he was able to observe him throughout all phases of the trial and during examination in the hearing on the motion for new trial.

{¶93} Appellant has not demonstrated that the trial court's decision was unreasonable, unconscionable, or arbitrary. "An abuse of discretion is more than an error in judgment or law; it implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable." *State v. Sebring*, 11th Dist. No. 2006-L-211, 2007-Ohio-1637, at ¶10, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. "Further, when applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court." *Id.* citing *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶94} Finally, I fear that the majority's opinion opens a door which was closed by the Supreme Court of Ohio in its decision in *Pearson* and its progeny and by the adoption of the "Aliunde" rule. The court in *Pearson* found the explanation of the trial judge persuasive, and the reasoning is still valid today.

{¶95} The trial judge in *Pearson* wrote: "When jurors are being impaneled in a case many of them are enjoying that experience for the first time and they are not as collected and calm sitting in the jury box as they might be under different conditions, and it would be hard for anyone to conceive that these jurors deliberately fail to remember and disclose these accidents. The ultimate question is whether the parties to the lawsuit have been in any way prejudiced by the failure of jurors to recall accidents***." *Pearson* at 446-447.

{¶96} The insidious practice of accosting jurors after an adverse verdict with the goal of finding anything with which to impeach the verdict was directly addressed by the trial judge in *Pearson*, as he wrote:

{¶97} "It has become a new form of indoor sport for plaintiffs, and, or, defendants after the rendering of an adverse verdict to them to start on a quiet search in an effort to discover some failure upon the part of one or more of the jurors to disclose a prior accident which has grown very hazy in their memory.

{¶98} "It has reached the point where jurors are hauled in before a notary public and forced to testify, or where immediately following the verdict one or more of the jurors will be interrogated by counsel even before their service in the court is ended. I have been called at my home by a number of jurors who have asked me whether or not it is necessary for them to talk to counsel following the rendition of their verdict.

{¶99} "Jurors are summoned to this court to perform one of the most important but somewhat burdensome duties of their citizenship. The vast majority of jurors come to this court in good faith, perform their jury duty fairly and conscientiously, and when their term of service is over, unless they have been guilty of something more than forgetting they fell out of a tree when they were twelve years old, or had a fender on their car scraped years before, they should be left alone and not be harassed and subjected to embarrassment and annoyance. I can testify that by reason of the several calls I have had from jurors that it is doing the jury system much harm by these practices. Somewhere the practice should be stopped and jurors, many of whom make sacrifices to serve as jurors, should be let alone." *Id.* at 447.

{¶100} The reasons for restricting the right to new trials under these circumstances are arguably the same as the reasons given for the Aliunde rule. The Aliunde rule "is intended to preserve the integrity of the jury process and the privacy of deliberations, to protect the finality of the verdict, and to insulate jurors from harassment by dissatisfied or defeated parties, by prohibiting a court from questioning a juror about what occurred during deliberations, or about anything else that may have affected the juror's mind or emotions in the deliberations process once a final verdict is rendered." *Hughes* at ¶22, citing *State v. Scheibel* (1990), 55 Ohio St.3d 71, 75.

{¶101} The Aliunde rule "is vital not only to protect jurors from harassment by defeated parties, but to ensure finality of verdicts and preserve the 'sanctity of the jury room and the deliberations therein.'" *Wittman v. Akron*, 9th Dist. No. C.A. 21375, 2003-Ohio-5617, at ¶10, citing *State v. Hessler* (2000), 90 Ohio St.3d 108, 123.

{¶102} As stated by one commentator: "a generous standard for new trials would lead to frequent evidentiary hearings to probe juror responses, with several disadvantageous consequences. First, because controversies over responses such as those in *McDonough* are common, one could expect them to occupy efforts of judges that otherwise would be used to try more jury trials, and this preemption of court effort would occur in cases in which the outcome is unlikely to change. Second, and perhaps more importantly, it is undesirable to discourage jury service by routinely putting jurors through procedures that require them to defend against accusations of misconduct." Crump, *Peremptory Challenges after McDonough Power Equipment, Inc. v. Greenwood: A Problem of Fairness, Finality and Falsehood* (1990), 69 Or. L. Rev. 741, 770.

{¶103} Appellant's counsel's discussion was a chance meeting on the courthouse steps, and there was nothing improper about the discussion with Mr. Krusely. But, with so much information readily available on the internet, one can envision a new cottage industry developing and marketed as a method of mining for juror data that could be used to impeach a verdict. Jurors would be interviewed, deposed, and harassed in the hope of getting them to say something that would form the basis for a new trial. Those litigants with ample resources would be at a distinct advantage in the quest for information that could possibly afford them a new trial.

{¶104} Moreover, studies have documented that "**** perceived insensitivity to the privacy concerns of prospective jurors is one cause of dissatisfaction with jury service." See Hannaford, *Making the Case for Juror Privacy: A New Framework for Court Policies and Procedures*, State Justice Institute. Because of these privacy concerns, some citizens refuse to register to vote, ignore a jury summons, or fail to fully answer questions posed to them on voir dire.

{¶105} The American jury system is a fundamental component of our democracy. Alexis De Tocqueville in *Democracy in America* observed that "[t]he jury is that portion of the nation to which the execution of the laws is entrusted, as the legislature is that part of the nation which makes the laws." It is incumbent upon the courts to protect jurors so that our courtrooms remain open and our jury boxes full.

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

JOHN C. GRUNDY, ADMINISTRATOR
OF THE ESTATE OF SUSANNE CHERYL
SUMNER, DECEASED,

Plaintiff-Appellant,

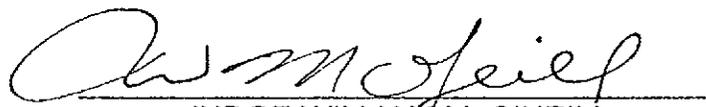
- vs -

JAGPRIT SINGH DHILLON, M.D., et al.,
Defendants-Appellees.

JUDGMENT ENTRY

CASE NO. 2006-T-0007

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the trial court is reversed. The matter is hereby remanded to the trial court for further proceedings consistent with the opinion.


JUDGE WILLIAM M. O'NEILL

COLLEEN MARY O'TOOLE, J., concurs,

MARY JANE TRAPP, J., dissents with Dissenting Opinion.

FILED
COURT OF APPEALS
JUN 04 2007
TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO
CASE NO. 02-CV-414

JOHN C. GRUNDY, ADMR., et al.,)

Plaintiff(s))

vs.)

JUDGMENT ENTRY

JAGPRIT SINGH DHILLON, et al.,)

Defendant(s))

This matter is before the Court on Plaintiff's Motion for a New Trial. The motion is based on two grounds: 1) Misconduct of the Jury; and 2) the Judgment is not sustained by the weight of the evidence.

On the question of misconduct, the argument is made by Plaintiff that comments made by one of the jurors, Anthony Krusely, in an informal interview by Plaintiff's attorney outside the Courthouse after the verdict was returned, illustrates improper conduct on behalf of the juror. To use such testimony would be contra to the aliunde rule as codified in Evidence Rule 606(B).

Furthermore, a review of the transcript on voir dire, it is not evident that Juror Krusely gave false information to questions put to him, but rather that he did not volunteer all information that he may have if other specific questions were asked.

In addition, there is no evidence in the record that Juror Krusely actually had a remembrance of the subject events at the time he was questioned during voir dire. His testimony during the hearing on the post-trial Motion for New Trial suggests otherwise.

Defendant raises a valid point that if Plaintiff on voir dire had asked Juror Krusely whether he thought the hospital maintained inadequate standards and received the answer "yes," Defendant would probably have removed the juror. It is not reasonable to think that any lawyer upon receiving the "yes" answer above would ask the question, "Well, if you believe their standards are not acceptable, then you would not hold them to the standard the judge will tell you must be applied by this jury." Such a potential juror providing such a response during voir dire would seem to be more favorable to the Plaintiff.

Plaintiff's first ground for New Trial is therefore denied.

The second claim for a New Trial filed by Plaintiff is that the judgment is not sustained by the weight of the evidence.

The standard applicable to a trial court reviewing a Motion for New Trial based upon a claim that the judgment is

not sustained by the evidence requires that the trial court:

[M]ust weigh the evidence and pass upon the credibility of the witness, not in the substantially unlimited sense that such weight and credibility are passed on originally by the jury, but in the more restricted sense of whether it appears to the trial court that manifest injustice has been done and that verdict is against the manifest weight of the evidence.

Rohde v. Farmer (1970), 23 Ohio St.2d 82, syllabus 3. This standard has been adopted and further explained by the Eleventh District Court of Appeals in the case of Kitchen v. Wickliffe Country Place, 2001 WL 799750 (Ohio App. 11 Dist., July 13, 2001) which said:

...Thus, a new trial will not be granted where the verdict is supported by competent, substantial and credible evidence. ...However, where the evidence is susceptible to more than one construction, a reviewing court is bound to give the evidence the interpretation most consistent with the verdict and judgment.

The Plaintiff presented witnesses who testified that in their opinion Dr. Dhillon's care fell below the standard of care. Defendant presented expert opinion that Defendant's actions were within the standard of care.

As stated in the Kitchen case:

The court may not set aside a verdict on the weight of the evidence simply because its opinion differs from the jury's opinion. ...It follows that a trial court 'does not undertake to judge the credibility of the evidence, but only to judge whether it has

the semblance of credibility...

This Court finds that there was competent, substantial and credible evidence presented by both the Plaintiff and Defendant. As such, the jury made their decision by accepting the Defendant's theory of the case.

Plaintiff's Motion for a New Trial is denied. This Court further finds no basis to set aside the jury's verdict on the basis of misconduct.

There is no just cause for delay of appeal of this matter.

12/13/05

DATE

John M. Stuard

JUDGE JOHN M. STUARD

TO THE CLERK OF COURTS: YOU ARE ORDERED TO SERVE COPIES OF THIS JUDGMENT ON ALL COUNSEL OF RECORD OR UPON THE PARTIES WHO ARE UNREPRESENTED FORTH WITH BY ORDINARY MAIL

JUDGE

John M. Stuard

TRUMBULL COUNTY
CLERK OF COURTS

2005 DEC 15 A 9:58

STEPHEN ALLEN
CLERK OF COURTS
TRUMBULL COUNTY