

IN THE SUPREME COURT OF OHIO

JOHN C. GRUNDY, Administrator of)
the Estate of Susanne Cheryl Sumner,)
deceased)

Plaintiff-Appellee)

vs.)

JAGPRIT SINGH DHILLON, M.D., et al.)

Defendants-Appellants)

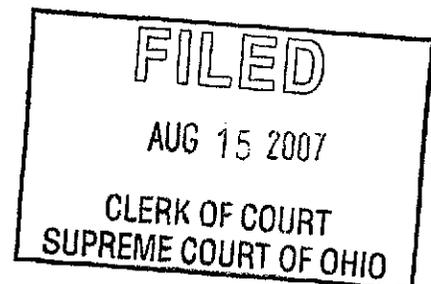
Supreme Court Case No. 2007-1292

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

MEMORANDUM IN OPPOSITION TO JURISDICTION

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APPELLEE'S STATEMENT AS TO WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This appeal arises from the decision of the Eleventh District Court of Appeals remanding this case for a new trial on the basis of juror misconduct during *voir dire*. This is a wrongful death action in which it is alleged that the Defendant-Appellant, Jagprit Dhillon, M.D., an emergency room physician, negligently discharged a 22 year old young woman named Susanne Sumner with symptoms of intractable vomiting, with a diagnosis of "tooth pain" when, in fact, she had meningococcal meningitis, which led to her death the following day. At trial, the jury found that the Defendant-Appellant was not negligent and entered a general verdict in favor of the Defendant-Appellant. Immediately after the trial, the foreperson of the jury, a man named Anthony Krusely, volunteered to a number of persons, including Plaintiff-Appellee's counsel, that he had previously taken his son to the same emergency room, and, unsatisfied with the diagnosis rendered, had taken his son to another hospital for treatment. (Court of Appeals Opinion ¶17) Krusely stated that he wouldn't let Dr. Dhillon treat him for a paper cut but that the standard of care at Trumbull Memorial Hospital was "rotten" and that Susanne's family should not have relied on the diagnosis and should have sought treatment at another facility. (Id. ¶17)

During *voir dire*, Plaintiff-Appellee's counsel had made repeated inquiries as to whether the potential jurors or any of their family members had prior experiences at Trumbull Memorial Hospital. (Id. ¶¶33, 43) Juror Krusely had never revealed the experience with his son during *voir dire* or at any other time during the trial and had remained silent when he was specifically asked about this topic during *voir dire*. (Id. ¶46) Based on what Juror Krusely had revealed moments after the end of the trial,

Plaintiff-Appellee filed a motion for new trial on the basis of juror misconduct. Another member of the jury panel, Juror Rhonda Noel, had been present when Juror Krusely made his post-trial comments, and confirmed his remarks at the hearing on the motion. (Id. ¶17) Counsel for the Plaintiff-Appellee testified at the hearing that, had Juror Krusely answered the relevant *voir dire* questions truthfully and consistent with the attitudes he expressed after trial, he would have challenged him for cause or exercised a peremptory challenge to prevent him from sitting as a juror. (Id. ¶17) The trial court denied the Plaintiff-Appellee's motion for new trial, but the Eleventh District Court of Appeals held that the trial court abused its discretion by failing to grant the motion and remanded the case for a new trial. (Id. ¶¶59,64)

Appellant contends that this Court should accept jurisdiction of this case because it involves issues of public or great general interest. Appellant argues that the Court of Appeals decision is a "substantial threat to the integrity of the jury system." (Memorandum in Support of Jurisdiction at 3) According to the Appellant, the appellate court's decision "encourages juror harassment by defeated parties" which will ultimately discourage jury service. (Id.) The Appellant argues that the Court of Appeals' opinion will "cascade" the "insidious practice of accosting jurors after an adverse verdict." (Id.) In reality, Appellant is attempting to persuade this Court to accept jurisdiction of an extremely fact-specific decision that follows well-established Ohio law. The Eleventh District Court of Appeals correctly held that, under the specific facts of this case, a juror failed to reveal information he should have during *voir dire*, thereby depriving the Plaintiff-Appellee of a fair trial. Principles of public or great general interest are not at stake in this case, and this Court should not accept jurisdiction to hear this appeal.

Whether the issue presented is one of public or great general interest rests within the discretion of this Court. Williamson v. Rubich (1960), 171 Ohio St. 253. Cases that present issues of public or great general interest are **those that involve more than an interest primarily between the parties.** Id. 254. The particular facts and circumstances of the Susanne Sumner's medical care and the similar experience that Juror Krusely failed to reveal are integral elements of the Court of Appeals' decision granting Appellee a new trial. This is clearly an issue involving an interest that lies primarily between the parties, not one of great public or general interest. Fact-specific cases do not meet the threshold test for discretionary appeals of cases of public or great general interest. City of Blue Ash v. Kavanagh (2007), 113 Ohio St.3d 67, ¶31 (Pfeifer, J., dissenting); Manigault v. Ford Motor Company (2002), 96 Ohio St.3d 431, ¶14 (Lundberg Stratton, J., dissenting)

Appellant's dire predictions that to let this decision stand will encourage juror harassment after a verdict should be accorded no weight by this Court because **no such harassment occurred in this case.** There is no evidence in the record that Juror Krusely was "harassed" or "accosted" after the verdict. The evidence of his misconduct came from comments volunteered by Juror Krusely in an informal conversation outside the courthouse. (Court of Appeals Opinion at ¶¶15, 17) There is no evidence of any post-trial interrogation or insidious inquisition of any jurors. There is no evidence that Appellee's counsel conducted any "post-trial investigation" of any juror to uncover information not disclosed during *voir dire*. The suggestion that this decision will open the floodgates to investigative services marketing themselves as specialists in uncovering information not disclosed during *voir dire* exercises is unfounded.

In an attempt to persuade this Court that this is a case of great public or great general interest, Appellant wrongly characterizes this opinion as a sweeping pronouncement of a new standard of law. It is no such thing. The remand for a new trial is based upon unique facts and circumstances presented herein, and the application of long-established Ohio law. This is not a case involving momentous new legal principles with general application to the residents of this state such as those this Court has previously accepted as matters of public or great general interest. Compare, i.e., Steele v. Hamilton Cty. Community Mental Health Bd. (2000), 90 Ohio St. 3d 176 (administration of antipsychotic medication to involuntarily committed mentally ill patients without the patients' consent); DeRolph v. State (1997), 78 Ohio St.3d 193 (constitutionality of Ohio's public school financing system); Danis Clarkco Landfill Co. v. Clark County Solid Waste Management Dist. (1995), 73 Ohio St.3d 59 (construction of statutes governing county competitive bid requirements); Franchise Developers, Inc. v. City of Cincinnati (1987), 30 Ohio St.3d 28 (constitutionality and construction of city zoning ordinances.).

Appellant also contends that this Court should accept jurisdiction of this case as one of public or great general interest in order to clarify the application to Ohio law of the United States Supreme Court's opinion in McDonough Power Equipment, Inc. v. Greenwood (1984), 464 U.S. 548.¹ Appellant provides no compelling reason why the Court of Appeals decision in this case demands such clarification. McDonough provides that, in order to warrant a new trial in a case where a juror fails to completely and honestly answer questions in *voir dire*,:

¹ Notably, although Appellant now claims that the construction of McDonough is so critical as to warrant this Court's intervention, Appellant never even cited McDonough in any of his arguments below.

[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. (Id. At 556)

The Court of Appeals had no trouble applying McDonough to the facts in this case. The Court specifically held that Juror Krusely's "failure to disclose his son's prior experience with the Trumbull Memorial Hospital Emergency Room was a failure to honestly answer a yes or no question on *voir dire*." (Court of Appeals Opinion ¶46) The Court acknowledged that Plaintiff-Appellee's counsel would have challenged Juror Krusely for cause, or, failing that challenge, peremptorily. (Id. ¶17) Finally, the Court of Appeals held:

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 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. (Id. ¶54)

Appellant cites to a number of different court opinions that either pre-date or apply McDonough, claiming that they demonstrate inconsistency. Some of the cases cited are federal circuit court decisions on which this Court's pronouncements on McDonough would have no consequence. The Ohio cases cited do not demonstrate any need for clarification from this Court as to whether or how McDonough should be applied. All of the cases cited, whether applying well-established Ohio law or McDonough, turn on the touchstone principle that if a juror wrongfully withholds material information during *voir dire*, and the result is that the complaining party is deprived of

the right to seat a fair and impartial jury, a new trial should be granted. Appellant is attempting to create an issue of public or great general interest where none exists. This Court should not accept jurisdiction of this appeal to "provide guidance" where none is warranted.

ARGUMENTS IN OPPOSITION TO PROPOSITIONS OF LAW

Proposition of Law No. 1: 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.

In his first Proposition of Law, Appellant would have this Court impose a strained and literal reading of McDonough as the law of Ohio on juror misconduct during *voir dire*. Under the standard urged by Appellant, a new trial would be warranted only when a juror is dishonest in answering a *voir dire* question. The Appellant repeatedly argues that McDonough places the burden on the complaining party to show that a juror gave a dishonest answer. Appellant believes that this Court should adopt a standard that differentiates between "concealment versus inadvertence". (Memorandum in Support p.13, 14) This Court should reject this proposition of law for two reasons: (1) such a standard goes beyond the holding of McDonough; and (2) the standard proposed is contrary to long-established Ohio law.

First, while McDonough holds that a party must demonstrate that a juror **failed to answer honestly** a material question on *voir dire* to be entitled to a new trial, Appellant would engraft the McDonough holding to situations where a juror has instead not **disclosed** information. The potential prejudice imposed by this standard is obvious.

Under Appellant's proposition of law, if a juror remains silent about an unambiguous question that may raise an inference of bias, thereby depriving the parties of a fair and impartial jury, a new trial would not be warranted. This goes beyond the holding of McDonough. In its opinion in this case, the Court of Appeals specifically distinguished McDonough in this situation:

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. 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 interpretation.

* * * * *

Krusely remained silent when he was specifically asked about this topic during voir dire. * * * 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. (Id. ¶¶45,46)

The cramped reading of McDonough that Appellant urges this Court to adopt as syllabus law would eviscerate a court's ability to address the key question raised by juror misconduct in *voir dire*: did the juror's misconduct deprive the party complaining of the right to a fair trial? If the misconduct was a juror's failure to disclose information that raises the inference of bias, such misconduct is clearly just as prejudicial as an outright dishonest answer.

In Appellant's view, as long as a prospective juror avoids dishonest answers, he or she need not answer completely. This is not the law in Ohio. This Court long ago set the standard in Petro v. Donner (1940), 137 Ohio St. 168, syllabus 2:

Where, on voir dire examination, the undisclosed or undenied facts are such as 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.

That same year, in Steiner v. Custer (1940), 137 Ohio St.448, this Court upheld the trial court's decision to grant a new trial based on juror misconduct, even though "[t]here was apparently no studied or deliberate design on the part of the jurors complained of to respond falsely to questions asked". (*Id.* at 450) The Steiner Court relied in part on the opinion in Cleveland Ry. Co. v Myers (1935), 50 Ohio App. 224. That court's opinion succinctly sets forth the rationale for the Ohio rule and demonstrates why Juror Krusely's concealment prejudiced the Appellee. In discussing a party's right to challenge a juror for suspicion of bias or prejudice, the Court held:

If the true facts are not disclosed in response to proper inquiries on voir dire examination, no party ever could exercise his right to challenge on suspicion of prejudice. A party has a right to have all proper and pertinent questions on voir dire examination answered truthfully. The juror might deem the question unimportant and remain silent; the juror might make a false answer or remain silent when he ought to disclose facts pertaining to himself in answer to a proper question. In any of these events the party litigant, in order to protect his rights, is entitled to the information solicited. If the juror remains mute when he should answer, the effect is the same as a false answer. * * * If a truthful answer is not given by the juror, there is no way that a party may determine facts upon which to base a challenge upon suspicion of prejudice, or even peremptorily. *Id.* at 226-227.

Appellant can provide no compelling reason why this Court should abandon these well established principles for its distorted version of the McDonough holding. Appellant claims that confusion exists among Ohio courts as to how to apply McDonough. But

these cases do not demonstrate courts struggling with how to reconcile McDonough with Ohio law. The opinion of the Court of Appeals in this case cites several of the same cases, and correctly asserts that they are distinguishable on their facts, not on the law. See, Opinion ¶44, citing Dedmon v. Mack, Lucas App. No. L-05-1108, 2006-Ohio-2113 (juror accurately and honestly answered all voir dire questions); ¶58, citing Mullett v. Lake Erie Ry. Co., Cuyahoga App. No. 81688, 2003-Ohio-3347 (juror-attorney had prior experience with attorney from same firm, not with one of the parties; juror also demonstrated he acted impartially).

The standards for granting a new trial as enunciated in Petro, Steiner, and Myers, supra, have been followed consistently by Ohio courts for decades and through the present day. To the extent that McDonough applies, it is distinguishable on the facts and is not accurately reflected in Appellant's first Proposition of Law. To the extent, if any, that McDonough sets a different standard for granting a new trial than under current Ohio law, there is no compelling reason for this Court to depart from decades of precedent, and principles of *stare decisis* should be respected. At least one state appellate court has declined an opportunity to adopt McDonough on the grounds that its own state law on the issue was settled. See, State v. Scher (1994), 278 N. J. Super. 249,265, 650 A.2d 1012, 1019. This Court should do the same.

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.

Appellant's second Proposition of Law does not state any new pronouncement of law that requires this Court to accept jurisdiction of this appeal. It is

axiomatic that a motion for new trial on the grounds of juror misconduct is subject to an abuse of discretion standard. See, Steiner, Petro, et al., supra. It is also axiomatic that in determining whether the trial court abused its discretion, an appellate court may not substitute its judgment for that of the trial court. Pons v Ohio State Med. Bd. (1993), 66 Ohio St.3d 619,621.

Appellant's real complaint is that he believes the Court of Appeals did not point to any unreasonable, arbitrary, or unconscionable conduct by the trial court in denying Plaintiff-Appellee's motion for new trial and instead substituted its own judgment. To the contrary, the Court of Appeals specifically followed the abuse of discretion standard. (Court of Appeals Opinion ¶21) The Court first held that the trial court erred by applying Evid. R. 606(B) to preclude consideration of Juror Krusely's post-trial comments. (Id. ¶25) Without considering such evidence, it is logical to conclude that the trial court could not have acted reasonably in considering the motion for new trial. After properly considering all the evidence in the record, the Court found that Juror Krusely's failure to disclose the incident with his son at Trumbull Memorial's emergency room constituted juror misconduct, and that the Plaintiff-Appellee was prejudiced by the misconduct in that an impartial jury was not seated. (Id. ¶59) The Court then specifically held "[T]hus, the trial court abused its discretion by failing to grant [Plaintiff-Appellee]'s motion for new trial." (Id.) The Court of Appeals clearly followed the appropriate standard of review in deciding this case. The fact that the decision is contrary to the Appellant does not mean that the Court "substituted its own judgment". The second Proposition of Law is merely a restatement of black-letter Ohio law and

nothing in the Court of Appeals' opinion merits this Court accepting this appeal to restate the obvious.

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 on the juror's mind or emotions as influencing the juror to assent or dissent from the verdict, and the trial court properly disregards those matters concerning the juror's mental processes in connection with the verdict.

As in the second Proposition of Law, Appellant's third Proposition of Law merely restates axiomatic Ohio law. This proposition is, in essence, the text of Evid. Rule 606(B). Once again, it is not a new pronouncement on the law that Appellant seeks, but, rather, a reversal of its application by the Court of Appeals. Such reversal is unwarranted.

Evid R. 606(B) precludes a juror from testifying:

...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 or dissent from the verdict or indictment or concerning his mental processes in connection therewith. * * *

The statements made by Juror Krusely after the trial about his son's experience at Trumbull Memorial's emergency room, and his opinion that the standard of care there is "low" were not matters or statements occurring during the deliberations, nor was this testimony introduced as evidence influencing him to assent to the verdict. These statements were brought to the trial court's attention for the sole basis of proving that Juror Krusely failed to fully and adequately disclose information during voir dire that had the potential to reflect bias.

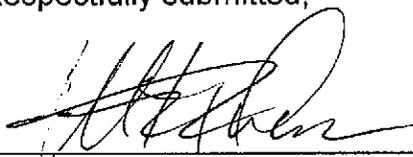
In its opinion, the Court of Appeals held that the trial court erred by applying Evid. R. 606(B) to these statements. The Court correctly held that Evid. R. 606(B) is not applicable to prevent evidence of a juror's failure to disclose facts on voir dire examination, citing Farley v. Mayfield (June 30, 1986), Franklin App. No. 86AP-19. The Court reasoned that "[t]hese 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." (Court of Appeals Opinion ¶25) The Court of Appeals properly refused to apply Evid. R. 606(B) to this testimony, and its decision does not warrant this Court's acceptance of this appeal to propound Proposition of Law No. III.

CONCLUSION

This discretionary appeal does not meet the threshold requirement that the case involve issues of public or great general interest. Instead, the Court of Appeals decision is a well reasoned opinion that applies established law to an extremely fact-specific case. Despite Appellant's argument in his first Proposition of Law that Ohio courts need guidance as to how to apply McDonough, this case and others that have considered it suggest that courts have fully and fairly applied McDonough and harmonized and balanced it with long-standing Ohio law. Appellant's second and third Propositions of Law are regurgitations of black letter law that provide no basis for this Court to accept jurisdiction of this appeal. Appellant's dissatisfaction with the ruling is an insufficient basis for this Court to hear his appeal.

This Court should dismiss this appeal and permit the Plaintiff-Appellee to resume this litigation in a new trial as ordered by the Eleventh District Court of Appeals.

Respectfully submitted,



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CERTIFICATION

I hereby certify that a copy of the foregoing *Memorandum in Opposition to Jurisdiction* was sent this 14th day of August, 2007 by regular U.S. Mail to:

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