

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES.....	iii-vi
STATEMENT OF FACTS.....	1
ARGUMENT.....	6

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..... 6

Proposition of Law No. II:

In determining whether a juror was untruthful during voir dire, and whether such nondisclosure 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. 19

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.....21

CONCLUSION.....	24
PROOF OF SERVICE.....	25

APPENDIX

Appx. Page

Notice of Appeal to the Ohio Supreme Court (July 17, 2007).....	1
--	----------

Judgment Entry of the Trumbull County Court of Appeals (June 4, 2007).....	3
3	
Opinion of the Trumbull County Court of Appeals (June 4, 2007).....	4
4	
Judgment Entry of the Trumbull County Court of Common Pleas (December 15, 2005).....	31
31	
Evid. R. 606	35
35	
R.C. 2313.42	36

TABLE OF AUTHORITIES

Page(s)

CASES:

<i>Adkins v. Com.</i> (Ky. 2003), 96 S.W.3d 779, 796.....	14
<i>Amirault v. Fair</i> (C.A.1, 1992), 968 Fed.2d 1404, 1405.....	10
<i>Bank Atlantic v. Blythe Eastman Paine Webber, Inc.</i> (C.A.11, 1992), 955 F.2d 1467, 1473.....	13
<i>Blevins v. Com.</i> (2004), 267 Va. 291, 296, 59 S.E.2d 365, 368.....	14
<i>Bynum v. ESAB Group, Inc.</i> (2002), 467 Mich. 280, 287, 651 N.W.2d 383, 387.....	14
<i>Cameron v. Alba Ski & Sport Hut, Inc.</i> (August 7, 1986), 10th Dist. No. 85 AP-1018.....	24
<i>Comm. v. Emerson</i> (1999), 430 Mass. 378, 384, 719 N.E.2d 494, 499.....	14
<i>Dedmon v. Mack</i> , 6th Dist. No. L-05-1108, 2006-Ohio-2113.....	10,17,23
<i>Farley v. Mayfield</i> (June 30, 1986), 10th Dist. No. 86AP-19.....	23
<i>Fields v. Brown</i> (C.A.9, 2007), 503 F.3d 755, 766-770.....	12
<i>Franklin v. State</i> (Tex. Crim. App. 2004), 138 S.W.2d 351.....	15
<i>Gainesville Radiology Group v. Hummel</i> (1993), 263 Ga. 91, 428 S.E.2d 786.....	14
<i>Huffman v. Hair Surgeon, Inc.</i> (1985) 19 Ohio St.3d 83, 87, 482 N.E.2d 1248.....	19
<i>In Re Nash</i> (1991), 158 Vt. 458, 466, 614 A.2d 367, 371.....	14
<i>In Re Personal Restraint Petition of Elmore</i> (Wash. 2007), ---P.3d---, ¶72, 2007 WL 4126468.....	14
<i>Johnson v. Luoma</i> (C.A.6, 2005), 425 Fed.3d 318, 326.....	12

<i>Lee v. State</i> (Ind. S.Ct. 2000) 735 N.E.2d 1112.....	14
<i>Maggio v. City of Cleveland</i> (1949), 151 Ohio St. 136, 144, 84 N.E.2d 912.....	9
<i>McDonough Power Equipment, Inc. v. Greenwood</i> (1984), 464 US 548, 104 S.Ct. 845, 78 L.Ed.2d 663.....	6,7,8,9,10,11,12,13, 14,15,16,18,19,24,25
<i>McNeill v. Polk</i> (C.A.4, 2007), 476 Fed.3d 206, 224.....	10
<i>Montoya v. Scott</i> (C.A.5, 1995), 65 Fed.3d 405, 418.....	11
<i>Mullett v. Wheeling and Lake Erie Railway Co.</i> , Cuyahoga App. No. 81688, 2003-Ohio-3347.....	10
<i>Pearson v. Gardner Cartage co., Inc.</i> (1947), 148 Ohio St. 425, 76 N.E.2d 67.....	8,9,19
<i>People v. Olinger</i> (1997), 176 Ill.2d 326, 680 N.E.2d 321.....	14
<i>People v. Rodriguez</i> (N.Y. 2003) 100 N.Y.2d 30, 790 N.E.2d 247.....	14
<i>Petro v. Donner</i> (1940), 137 Ohio St. 168, 28 N.E.2d 503.....	8
<i>Pineview Farms, Inc. v. A.O. Smith Harvestore, Inc.</i> (1989) 298 Ark. 78, 88, 765 S.W.2d 924, 930.....	14
<i>Sathren v. Behm Propane, Inc.</i> (N.D. 1989), 444 N.W.2d 696, 697.....	15
<i>Shamburger v. Behrens</i> (S.D. 1988), 418 N.W.2d 299.....	15
<i>State v. Adams</i> (1943), 141 Ohio St. 423, 48 N.E.2d 861.....	22
<i>State v. Adams</i> (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.....	19
<i>State v. Bianco</i> (2007), 391 N.J. Super 509, 520, 918 A.2d 720.....	15
<i>State v. Buckom</i> (1997), 126 N.C. App. 368, 485 S.E.2d 319, 326.....	15
<i>State v. Chesnel</i> (Me. 1999), 734 A2d 1131, 1140.....	14
<i>State v. Cross</i> (1986), 128 N.H. 732, 738, 519 A.2d 272, 276.....	14
<i>State v. Dennis</i> (2004), 216 W.Va. 331, 349, 607 S.E.2d 437, 455.....	14

<i>State v. Keith</i> , 79 Ohio St.3d 514, 526, 1997-Ohio-0367.....	19
<i>State v. McKnight</i> , 107 Ohio St.3d 101, 837 N.E.2d 315, 2005-Ohio-6046.....	19
<i>State v. Maske</i> (2004), 358 N.C.40, 47, 591 S.E.2d 521, 526.....	15
<i>State v. Messelt</i> (1994), 185 Wis.2d 254, 518 N.W.2d 232.....	15
<i>State v. Myers</i> (1998), 244 Conn. 683, 711 A.2d 704.....	15
<i>State v. Pierce</i> (1990), 109 N.M. 596, 599, 788 P.2d 352, 355.....	14
<i>State v. Presley</i> , Franklin App. No. 02 AP 1354, 2003-Ohio-6069.....	10
<i>State v. Scher</i> (1994), 278 N.J. Super. 249, 265, 650 A.2d 1012, 1019.....	15
<i>State v. Stein</i> , Richland App. No. 05-CA-103, 2007-Ohio-1153.....	10
<i>State v. Thomas</i> (Utah, 1989), 777 P.2d 445, 451.....	14
<i>State v. Tolman</i> (1992) 121 Idaho 899, 902, 828 P.2d 1304, 1307.....	14
<i>State v. Vasquez</i> , Franklin App. No. 03 AP-460, 2004-Ohio- 3880.....	10
<i>Steiner v. Custer</i> (1940), 137 Ohio St. 448, 31 N.E.2d 855.....	8
<i>Swayze v. Scher</i> (January 18, 1995), 2d Dist. No. 14310.....	10
<i>U.S. v. Ghilarducci</i> (C.A.7, 2007), 480 F.3d 542, 547.....	12
<i>U.S. v. North</i> (C.A.D.C., 1990), 910 F.2d 843, 904, 285 U.S. App. D.C. 343.....	13
<i>U.S. v. Richards</i> (C.A.3, 2001), 241 F.3d 335, 344.....	10
<i>U.S. v. Ruiz</i> (C.A.8, 2006), 446 F.3d 762, 770.....	12
<i>United States v. Shaoul</i> (C.A.2, 1994), 41 F.3d 811, 815.....	10
<i>U.S. v. White</i> (C.A.D.C. 1997), 116 F.3d 903, 930, 325 U.S. App. D.C. 282.....	13

<i>Williams V. State</i> (2006), 394 Md. 98, 904 A.2d 534.....	15
<i>Zerka v. Green</i> (C.A.6, 1995), 49 Fed.3d 1181.....	11

CONSTITUTIONAL PROVISIONS; STATUTES; RULES

Civ.R. 59(A)(2)	3
Civ. R. 59(A)(6)	3
Fed.Evid. R. 606(b)	22
Evid.R. 606(B).....	6,17,18,21,22,23,24,25
Evid. R. 606.....	22
R.C. 2313.42(J).....	18

STATEMENT OF FACTS

This case arises from emergency medical care provided by Appellant Jagprit Singh Dhillon, M.D. (Dr. Dhillon) to Susanne Sumner, October 26, 2000. Ms. Sumner walked into the emergency room on that date at 12:32p.m. with a chief complaint of tooth and jaw pain. (Joint Exhibit 1.) She provided the triage nurse, Rebecca Van Cleave, a history of complaint of mouth pain and jaw pain, and that she had not been to a dentist in years. She was crying, hyperventilating and retching in the triage area. Her vital signs revealed a blood pressure of 90/56, a pulse of 115 and respirations of 24. She had a temperature of 97.2 degrees. Her status was non-urgent, and she was admitted to the portion of the emergency room called ED-2 for non-urgent care patients. (Joint Exhibit 1.)

At 12:50p.m. she was seen by Dr. Dhillon. (Tr. 428.) The patient described that she could not eat, and if the area was bumped it hurt, it was painful and that she had vomited and symptoms had begun about 10:00a.m. (Tr. 1260-1261.) Dr. Dhillon's initial findings were poor dentition, teeth numbers 1 and 32 were tender, and there was some redness around the gumline, but no abscess. (Tr. 1264.)

Dr. Dhillon initially ordered an injection of Demerol and Phenergan for pain and nausea which was administered at 1:05p.m. (Joint Exhibit 1, Tr. 1266.) Subsequent to these medications Ms. Sumner had another episode of vomiting and was sent from the non-urgent care side to the emergent care side of the facility known as ED - 1. (Tr. 1268-1269.)

Prior to the patient transferring to ED - 1 she was followed by nurse Vicki Hall in ED - 2, and while the patient reported episodes of vomiting, the patient did not look that ill to nurse Hall. (Tr. 457.)

In ED - 1 the patient was initially followed by nurse Melissa Mellott who administered per Dr. Dhillon's order another dose of Phenergan which gave the patient relief. (Tr. 494.) At 2:55p.m. nurse Mellott noted that the Phenergan had helped, the patient was not vomiting, was not having chills and her nausea seemed better. (Tr. 494-495.) The patient's only complaint during nurse Mellott's shift was some slight nausea. (Tr. 507-508.)

During nurse Mellott's coverage of the patient Dr. Dhillon did reassess the patient. (Tr. 509.) Nurse Mellott went off shift between 3:00p.m. and 3:30p.m. but testified that after 3:30p.m. according to the chart the patient's vital signs continued to improve. (Tr. 516.)

Nurse Cacia Wilson took over nursing coverage between 3:00pm and 3:30p.m. and reported that the patient had additional vomiting but continued to insist to go home. (Joint Exhibit 1.) The patient was discharged at 4:52p.m. with instructions and prescriptions with nurse Wilson noting again the patient was insisting to go home. (Joint Exhibit 1.)

Ms. Sumner returned to the emergency room via ambulance at 2:47a.m. the next morning. (Depos. Costarella, p.27.) At that time she had a rash over her entire upper body and was diagnosed by Dr. Costarella with acute meningococemia, purpura fulminans disseminated. (Depos. Costarella, pp.29, 33.) She was transferred to Cleveland Clinic Foundation where she subsequently expired.

Appellee produced the testimony of an emergency medicine specialist, an infectious disease specialist and on rebuttal, a pediatric infectious disease specialist. (Tr. 605, 848, 1545.) Appellants produced the testimony of an emergency medicine specialist, an infectious disease specialist and a specialist in pediatric infectious disease and critical care. (Tr. 1170, 1320, 1505.) Appellee'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, (Tr. 672, 882.) and that earlier

treatment would potentially have changed the patient's outcome. (Tr. 894.) Appellants' experts testified that standard of care was met by Dr. Dhillon (Tr. 1181, 1369.) that a reasonable physician would not believe that this patient was subject to injury or death from a serious infection (Tr. 1358.) and that earlier intervention would not have, with probability changed her outcome. (Tr. 1186, Radetsky Depos. p.26.)

Appellee 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 appellants.

Appellee did withdraw his survival action at the close of plaintiff's evidence. (Tr. 1164.)

The trial court entered judgment on the verdict May 14, 2004. Appellee 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). Appellee's misconduct allegation was based upon a claim of nondisclosure by a juror, Anthony Krusely. During voir dire, appellee's counsel asked "How many people have been a patient at Trumbull Memorial Hospital?" (Supp. 87, Tr. 45.) Juror Krusely responded that he had been seen as a patient at Trumbull Memorial regarding an auto accident, that he had been sent home and did well. (Supp. 89-90, Tr. 47-48.) Appellee's counsel then discussed the emergency room visit of another juror and then asked "Anybody else with any experiences at the emergency room at Trumbull Memorial Hospital. Yes sir?" (Supp. 90, Tr. 48.) Appellee's counsel then discussed with another juror that juror's visit to Trumbull Memorial Hospital emergency for a back injury, and also for a check

regarding a heart attack.

Appellee's counsel then asked following that juror's comments, "How about members of your family? Have you ever taken a member of your family to the Trumbull Memorial emergency room?" to which a juror answered "Yes" and in response appellee's counsel stated "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. The only way my parents would take me to the emergency room was if I had two broken legs. But the emergency room was for really serious stuff. Over the years, the emergency room and how it functions in our community has changed. Many of you are probably aware of it, there are a lot of people that use it as actually a primary care facility. In Trumbull Memorial Hospital's emergency room, they have two divisions, ED - 1. You will hear this in the evidence. ED - 1 is for the more serious type things that might require an admission or serious intervention. And then they have ED - 2, emergency department two. And that is for non urgent type situations for somebody that is going to go home.

So in this case, you are going to find from the evidence that Susanne had been to this emergency room several times as kind of a primary care source of treatment, and I don't know if any of you knew that there were changes in how emergency rooms work in the year 2000 as opposed to back when we were growing up. 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 I started learning about cases. They lease the space to a group called Emergency Professional Services, Inc., and that is a Defendant in this case. And then Emergency Professionals, Inc. hire doctors, and they put the doctors in the emergency room. 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?

Juror: When did this take place?" (Supp. 91-93 ,Tr. 49-51.)

Appellee's counsel then asked "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? Do you think that is a reasonable expectation? What do you expect from an emergency room doctor? Anthony, what do you expect?" (Supp. 94, Tr. 52.)

In response to this question put directly to Mr. Krusely, Mr. Krusely gives a detailed response. (Supp. 94,Tr. 52.)

Appellee argued on motion for new trial that the misconduct of the jury was the failure of Krusely to provide information in response to the above quoted question "How about members of your family? Have you ever taken a member of your family to the emergency room?"

On October 6, 2004 the trial court held an evidentiary hearing on the motion for new trial (Supp. 1-42.) At the time of the evidentiary hearing on the motion for new trial, only the excerpts of voir dire examination of Anthony Krusely were available to the court and counsel (Trial Court Record Item 120.) Appellee presented testimony from juror Krusely and juror Noel at the hearing. Subsequent thereto, the complete voir dire transcript was prepared and filed with the court December 7, 2004. (Trial Court Record Item 121.)

On December 15, 2005 the trial court filed its judgment entry denying appellee's motion for a new trial finding that the evidence did not support 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 had been asked, and that the evidence did not support that the juror was biased towards appellee. (Appx. 31-32.) The trial court also held that testimony about the interview by Appellee's counsel outside the courthouse post-verdict would be contra to Evid.R. 606(B). (Appx. 31.) The trial court further found competent substantial and credible evidence to support the verdict and denied appellee's request for new trial based upon the weight of the evidence. (Appx. 34.)

On January 12, 2006 appellee filed a notice of appeal to the Eleventh District Court of Appeals, Trumbull County. The matter was briefed and argued and the Eleventh District Court of Appeals entered its judgment and filed its opinion June 4, 2007 reversing the judgment of the trial court and remanding the matter for a new trial.

The Appellate Court's decision was based upon appellee's first assignment of error arguing juror misconduct.

Appellants filed their notice of appeal to The Supreme Court of Ohio on July 17, 2007. (Appx. 1.) On October 31, 2007 the Supreme Court granted jurisdiction to hear the case and accepted the appeal.

ARGUMENT

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.

A. *McDonough Power Equipment, Inc. v. Greenwood* (1984), 464 US 548, 104 S.Ct. 845, 78 L.Ed.2d 663.

The *McDonough* case was a products liability claim arising out of an injury sustained by Billy Greenwood when his feet came in contact with the blades of a riding lawnmower. The trial court entered judgment for the defendant manufacturer upon a jury verdict and denied the plaintiff's motion for a new trial. The Tenth Circuit Court of Appeals reversed and ordered a new trial holding that the failure of a juror to respond affirmatively to a question on voir dire seeking to elicit information about previous injuries to a member of the juror's immediate family had prejudiced the plaintiff's right of peremptory challenge.

The United States Supreme Court granted certiorari, and reversed the judgment of the court of appeals.

The United States Supreme Court held 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.

Justice Blackmun, with Justice Stevens and Justice O'Connor, concurred, noting that while honesty or dishonesty may be significant, it is for the trial court to determine whether the movant post-trial has demonstrated actual bias, and that in exceptional circumstances bias might be inferred. *Id.* at 556.

Likewise, the concurring opinion of Justice Brennan joined by Justice Marshall would leave more discretion in the trial court than the legal standard set by the court. *Id.* at 557-558.

The opinion of the court, however, appears to have expressly taken issue with the Tenth Circuit Court of Appeals reference to prejudice of the right of peremptory challenge noting that

“it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on voir dire examination.” *Id.* at 555. Thus, the holding enunciated by the court in *McDonough* established a two pronged test of (1) failure of the juror to answer honestly a material question, and (2) a showing that a correct response would have provided a valid basis for a challenge for cause.

B. Ohio law prior to *McDonough*.

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 examine, 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. *Id.* at 175.

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. Finding that there was no final appealable order, this Court reinstated the trial court’s grant of new trial. 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 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 strong endorsement of the trial court's disfavor of the post verdict practice of juror impeachment. (Dissenting opinion Judge Trapp, Appx. 27-28).

This Court dealt with an issue of juror nondisclosure yet again in *Maggio v. City of Cleveland* (1949), 151 Ohio St. 136, 144, 84 N.E.2d 912, finding that "the real question for a reviewing court is whether substantial justice has been done." Id. at 144.

Other than expressing general displeasure with the impeachment of jurors through this process, these prior opinions have not established a standard beyond "substantial justice" and a deference to the trial court's discretion in reaching factual findings with respect to whether misconduct occurred and whether it resulted in actual bias.

C. Ohio law post *McDonough*.

Subsequent to the United States Supreme Court's decision in *McDonough*, some Ohio courts

have required dishonesty or an intentional concealment without referencing *McDonough*. *Swayze v. Scher* (January 18, 1995), 2d Dist. No. 14310. Other cases have appeared to follow the holding in *McDonough* without significant further comment. *Dedmon v. Mack*, Lucas App. No. L-05-1108, 2006-Ohio-2113 at ¶20; *State v. Presley*, Franklin App. No. 02 AP 1354, 2003-Ohio-6069 at ¶77; *Mullett v. Wheeling and Lake Erie Railway Co.*, Cuyahoga App. No. 81688, 2003-Ohio-3347 at ¶40. Still others have referenced *McDonough* citing general language regarding the purpose of voir dire examination, *State v. Vasquez*, Franklin App. No. 03 AP-460, 2004-Ohio-3880 at ¶13, or language from Justice Brennan's concurrence, *State v. Stein*, Richland App. No. 05-CA-103, 2007-Ohio-1153 at ¶13 without referencing the *McDonough* court's statement of the legal standard.

D. Federal Cases post *McDonough*.

Various federal circuits have applied the holding of the *McDonough* court in general, albeit occasionally broadening the holding by reference to the concurring opinions.

The First Circuit in *Amirault v. Fair* (C.A.1, 1992), 968 F.2d 1404, 1405, applied a broader view of *McDonough* considering the majority vote as requiring further determination on the question of juror bias even where the juror has been found to have been honest. However, finding no exceptional or extreme circumstance, the court found that the situation was not the type of rare circumstance discussed by Justice Blackmun in his concurring opinion.

The Second Circuit Court of Appeals has adopted and followed *McDonough* in *United States v. Shaoul* (C.A.2, 1994), 41 F.3d 811, 815.

The Third Circuit adopted the holding of *McDonough* in *U.S. v. Richards* (C.A. 3, 2001), 241 F.3d 335, 344.

The Fourth Circuit has adopted and followed *McDonough*. In *McNeill v. Polk* (C.A.4,

2007), 476 F.3d 206, 224, the court found that the defendant claiming juror misconduct for failure of a juror to disclose the murder of a family member, required a showing that the juror failed to answer honestly a material question, and that had a response been given by the juror, it would have provided a valid basis for a challenge for cause. The court then discussed what it viewed to be a third prong of the *McDonough* test which would require, upon showing of satisfaction of the first two prongs, that the juror's partiality could truly be said to affect the fairness of the trial.

The Fifth Circuit applied the holding in *McDonough* to a petition for a writ of habeas corpus in *Montoya v. Scott* (C.A.5, 1995), 65 Fed.3d 405, 418. While the court suggested that its prior application of *McDonough* to federal convictions did not necessarily mean the same standard would be applied to a habeas case, the court went on to essentially apply *McDonough's* holding and find that the record did not support satisfaction of either prong of the *McDonough* test. The court noted that no juror responded to the question asked to the jury pool as to whether anyone knew the victim, the evidence suggested that the juror in question may have only realized her knowledge of the victim during the trial, and therefore did not establish her knowledge at the time the question was asked.

The court further noted that under Texas law where the state case had proceeded, knowledge by a juror of the victim would not form a basis for a challenge for cause. Thus the court held that the allegations failed to establish a prima facie case under *McDonough*, and the trial court's denial of the defendant's request for discovery and an evidentiary hearing was appropriate.

The Sixth Circuit discussed *McDonough* at length in a civil rights action in *Zerka v. Green* (C.A.6, 1995), 49 F.3d 1181. In that case a juror admittedly withheld information on voir dire for the purpose of being chosen to serve. The trial court, following a verdict for the defendant police officer, found the juror had deliberately and intentionally concealed relationships with police

officers, but further found that a true answer would not have provided grounds for a challenge for cause.

The Sixth Circuit analyzed the case in light of the *McDonough* decision, and rejected the plaintiff's suggestion that prejudice arose as a result of interference with plaintiff's right to use his peremptory challenge. *Id.* at 1186.

The Sixth Circuit has also discussed the second prong of *McDonough* and the need to show actual bias barring an extreme or exceptional case. *Johnson v. Luoma* (C.A.6, 2005), 425 F.3d 318, 326. Note that the *Johnson* court questioned the validity of the implied - bias doctrine, and the unlikelihood of an extreme or exceptional case existing when the juror has made an unqualified statement that his or her experience would not influence the ability to deliberate. *Id.*

The Seventh Circuit has accepted and applied the *McDonough* standard. *U.S. v. Ghilarducci* (C.A.7, 2007), 480 F.3d 542, 547.

The Eighth Circuit Court of Appeals has held that *McDonough* requires that a party seeking a new trial on the basis of concealed juror bias must prove three things: (1) That the juror answered dishonestly, not just inaccurately; (2) That the juror was motivated by partiality; and (3) That the true facts, if known, would have supported striking the juror for cause. *U.S. v. Ruiz* (C.A.8, 2006), 446 F.3d 762, 770.

The Ninth Circuit Court of Appeals has applied the *McDonough* test in a habeas case, holding the trial court's finding of honesty dispositive, yet discussing the potential to apply implied bias in extreme situations. *Fields v. Brown* (C.A.9, 2007), 503 F.3d 755, 766 - 770.

The Tenth Circuit has discussed and applied *McDonough* in a civil personal injury case. Subsequent to a verdict in favor of the defendant, plaintiff discovered that the foreperson had been

named a party in several prior lawsuits. During voir dire the district court had asked the following question: "Have any of you - all, or members of your immediate family, ever participated in a lawsuit, either as a party or in some other capacity such as a witness?" No member of the panel responded. Upon these facts, plaintiff moved for a new trial and requested an evidentiary hearing.

The district court conducted the hearing at which the juror in question, Van Zandt, admitted having been a party to at least nine lawsuits, but denied that he understood the question. The district court found that Van Zandt had been intentionally dishonest. The court however found that plaintiff had failed to show that Van Zandt was actually or impliedly biased and denied the new trial.

The court then went on to cite and apply the two pronged test of *McDonough*. Proof of intentional concealment did not satisfy the second prong of the *McDonough* test that the juror would have been subject to a challenge for cause. The court found no evidence of actual bias. The court further found that bias would not be implied notwithstanding the intentional concealment, as to do so would reduce the *McDonough* inquiry to the sole question of whether the jurors response was honest or dishonest.

The Eleventh District has followed the holding in *McDonough* in *Bank Atlantic v. Blythe Eastman Paine Webber, Inc.* (C.A.11, 1992), 955 F.2d 1467, 1473.

The District of Columbia Circuit Court has adopted and followed *McDonough*. In *U.S. v. North* (C.A.D.C. 1990), 910 F.2d 843, 904, 285 U.S. App. D.C. 343, the court analyzed *McDonough* in a situation where a juror was found to have lied during voir dire. The court's opinion was clear that even if the jurors concealment was deliberate, satisfying the first prong of *McDonough*, a new trial was warranted only if the second prong was satisfied, which required a showing of actual bias. See also, *U.S. v. White* (C.A.D.C. 1997), 116 F.3d 903, 930, 325 U.S. App. D.C. 282.

As can be seen from the cases cited above, the federal circuits have generally adopted and applied the holding of *McDonough*. In general, the failure to meet the first prong by showing dishonesty has been fatal to a claim for a new trial. Further the courts have consistently applied the “challenge for cause” requirement, although a few courts have blurred this with the showing of actual bias or implied bias. It remains clear however that the mere fact of some impairment in the use of a peremptory challenge does not form a basis for a right to a new trial.

E. Non-Ohio State Law

A majority of state high courts that have considered the Supreme Court’s decision in *McDonough* have adopted or followed the holding of that case. *In Re Personal Restraint Petition of Elmore* (Wash. 2007), --- P.3d ---, ¶72, 2007 WL 4126468; *Blevins v. Com.* (2004), 267 Va. 291, 296, 59 S.E.2d 365, 368; *State v. Dennis* (2004), 216 W.Va. 331, 349, 607 S.E.2d 437, 455; *Adkins v. Com.* (Ky. 2003), 96 S.W.3d 779, 796; *People v. Rodriguez* (N.Y. 2003) 100 N.Y.2d 30, 790 N.E.2d 247; *Bynum v. ESAB Group, Inc.* (2002), 467 Mich. 280, 287, 651 N.W.2d 383, 387; *Lee v. State* (Ind. S.Ct. 2000) 735 N.E.2d 1112; *Comm. v. Emerson* (1999), 430 Mass. 378, 384, 719 N.E.2d 494, 499; *State v. Chesnel* (Me. 1999), 734 A.2d 1131, 1140; *People v. Olinger* (1997), 176 Ill.2d 326, 680 N.E.2d 321; *Gainesville Radiology Group v. Hummel* (1993), 263 Ga. 91, 428 S.E.2d 786; *State v. Tolman* (1992) 121 Idaho 899, 902, 828 P.2d 1304, 1307; *In Re Nash* (1991), 158 Vt. 458, 466, 614 A.2d 367, 371; *State v. Pierce* (1990), 109 N.M. 596, 599, 788 P.2d 352, 355; *Pineview Farms, Inc. v. A.O. Smith Harvestore, Inc.* (1989) 298 Ark. 78, 88, 765 S.W.2d 924, 930; *State v. Thomas* (Utah, 1989), 777 P.2d 445, 451; *State v. Cross* (1986), 128 N.H. 732, 738, 519 A.2d 272, 276.

Other states that have considered *McDonough* but have declined to follow the Supreme

Court's holding include *Williams v. State* (2006), 394 Md. 98, 904 A.2d 534; *Franklin v. State* (Tex. Crim. App. 2004), 138 S.W.2d 351; *State v. Maske* (2004), 358 N.C.40, 47, 591 S.E.2d 521, 526; *State v. Myers* (1998), 244 Conn. 683, 711 A.2d 704; *State v. Messelt* (1994), 185 Wis.2d 254, 518 N.W.2d 232; *Sathren v. Behm Propane, Inc.* (N.D. 1989), 444 N.W.2d 696, 697; *Shamburger v. Behrens* (S.D. 1988), 418 N.W.2d 299.

Even those states which have considered the *McDonough* holding but failed to follow or adopt it have faced strong dissenting opinions, *Williams v. State* and *Franklin v. State, supra*, have required actual bias, *State v. Myers, supra*, or adopted modified forms of the test, *State v. Maske, supra*.

In addition to the holding of *McDonough* a number of states have also required a showing on the part of the moving party that it exercised due diligence during the voir dire to uncover information. *State v. Buckom* (1997), 126 N.C. App. 368, 485 S.E.2d 319, 326.

While appellee has previously cited *State v. Scher* (1994), 278 N.J. Super. 249, 265, 650 A.2d 1012, 1019, for the proposition that some courts have not adopted the *McDonough* holding, a subsequent New Jersey appellate case is factually closer to the case before this Court. In *State v. Bianco* (2007), 391 N.J. Super 509, 520, 918 A.2d 720, the New Jersey appellate court distinguished *Scher* and noted the trial courts finding that in fact the information omitted during jury selection suggested that the juror might be biased in favor of the moving party. This is essentially the same finding that the trial court made in the case before this Court. If the law of the appellate court of New Jersey were in fact applied to the facts of this case, the result in *Bianco* affirming the verdict would apply. In all events it appears that very few if any other jurisdictions have allowed the claimed impairment of a peremptory challenge as a basis for new trial. The majority opinion in

McDonough rejected the claim of prejudice to a party's exercise of peremptory challenge, (*McDonough* at 555.) and the concurring opinions did not disagree with this holding.

F. The opinion of the court of appeals.

The majority opinion of the court of appeals, recognizing that the transcript of the voir dire proceedings was susceptible to multiple interpretations as to how the general question relating to family members going to the emergency room was posed, claimed to be able to deduce that the question was addressed to all of the prospective jurors, and found that as such, juror Krusely should have answered it. (Appx. 14, App. Op. ¶43.) The majority then went on to bolster its factual finding with the statement "Krusely remained silent when he was specifically asked about this topic during voir dire." (Appx. 16, App. Op. ¶46.)

In fact, the voir dire transcript does reflect that appellee's counsel asked a question about family members taken to the emergency room. (Supp. 91, Tr. 49.) Even if construed in appellee's favor as being a question to the panel, what is disconcerting about the majority's analysis is well expressed by Judge Trapp's dissent. (Appx. 21, App. Op. ¶67.) If this was a question to the panel, when appellee got the response "yes" from one juror, the only follow up was "About that, any experiences that you think will influence your decision making in this case?", to which there is no response with appellee's counsel immediately going into a long discussion ending in multiple questions on different topics, and finally a question on a different topic directed expressly to juror Krusely, which prompted discussion on issues unrelated to the question about family members. (Supp. 91-94, Tr. 49-52.) It is not surprising that none of the jurors on the panel sitting at the time appellee's counsel posed the question made any response after the one response indicated in the transcript.

Whether juror Krusely did not remember the prior visit to the hospital, or whether he did not perceive the question being asked of him, either way, the majority's factual finding of misconduct arising out of failure to answer the question is in error. The trial court found that there was no evidence that 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. (Appx. 31.) The trial court further found no evidence that juror Krusely had actual remembrance of the incident at the time he was questioned at voir dire, and in fact, noted that the only evidence was to the contrary.(Appx. 32.) Judge Trapp in her dissent notes the above points, and correctly noted 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, citing *Dedmon v. Mack*, 6th Dist. No. L-05-1108, 2006-Ohio-2113, at ¶20. (Appx. 21, App. Op.¶66.)

Finally, the majority in the court of appeals found that 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. (Appx. 10, App. Op.¶25.) However, the appellate court majority overlooks the fact that, other than the juror's statement that he had taken his son to the emergency room previously, juror Krusely's comments are based upon opinions formed as a result of the evidence presented during the trial. Juror Krusely's opinion with respect to Dr. Dhillon, his thoughts that, if Ms. Sumner appeared as ill as claimed by the plaintiffs, the common sense thing would have been to go to another care provider upon discharge, and his statements with respect to the hospital standard of care were made after the trial.

While appellee had the right to present evidence of alleged juror misconduct by trying to show that a question was asked of a juror which was not answered honestly, and that had that

question been answered the answer would have demonstrated a basis for a challenge for cause, the court correctly referenced Evid.R. 606(B) as a basis for excluding the majority of juror Krusely's testimony, and the majority of juror Krusely's conversation with counsel and other jurors on the courthouse steps. While the trial court referenced to the aliunde rule as excluding such testimony, the trial court properly went on to consider the issue of juror misconduct as well as bias and found evidence of neither.

G. The *McDonough* standard should be followed.

The holding in *McDonough* sets a fair balance between the quest for an impartial jury and the practical necessities of judicial management. *McDonough* at 556. Most federal circuit courts have continued to apply the holding of the *McDonough* majority. A majority of states that have considered the issue have accepted the *McDonough* holding.

The trial judge who listened to the interrogation of this juror during the trial and at the post trial evidentiary hearing, and who reviewed the voir dire transcript, and who himself questioned the juror, found no evidence that juror Krusely was dishonest. The record reflects no evidence of dishonesty.

Just as significantly, there is no evidence that an answer to the question would have been a basis for a challenge for cause. Under R.C. 2313.42(J) a juror may be removed upon a challenge for cause when "he discloses by his answers that he cannot be a fair and impartial juror, or will not follow the law as given to him by the court." If juror Krusely had perceived that the question was asked of him, and had recalled the prior incident, and had made it known in response by answering yes to the question, there is nothing whatsoever in the record to suggest that that answer would have subjected juror Krusely to a challenge for cause. In fact many jurors themselves had been patients

in the emergency room including juror Krusely, and remained on the panel. (Supp. 87, 91, 123, 229, 257, 281, 292, Tr. 45, 49, 81, 187, 215, 239, 250.) None were challenged for cause on this basis.

It is respectfully submitted that this Court should follow the majority of states who have considered the issue and adopt the holding of *McDonough*.

Proposition of Law No. 2: In determining whether a juror was untruthful during voir dire, and whether such nondisclosure 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.

It is well established that the trial judge is in the best position to determine the nature of alleged jury misconduct, and the appropriate remedies for any demonstrated misconduct. *State v. McKnight*, 107 Ohio St.3d 101, 837 N.E.2d 315, 2005-Ohio-6046 at ¶184.

Trial courts are given broad discretion when dealing with allegations of juror misconduct. *State v. Keith*, 79 Ohio St.3d 514, 526, 1997-Ohio-0367. The trial court's decision when faced with allegations of juror misconduct must be reviewed for an abuse of discretion. *Id.* at 528. The term abuse of discretion connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

In a case dealing with an allegation of juror misconduct for nondisclosure during voir dire the question in the first instance is for the trial court in passing upon a motion for a new trial, and rests in the sound discretion of the trial court where the record discloses no abuse of discretion. *Pearson v. Gardner Cartage Co.* (1947), 148 Ohio St. 425, 449, 76 N.E.2d 67. An abuse of discretion involves far more than a difference in opinion. *Huffman v. Hair Surgeon, Inc.* (1985) 19

Ohio St.3d 83, 87, 482 N.E.2d 1248. In order to have an “abuse” in reaching a determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. Id.

The record before the trial court clearly supports the trial court’s decision that juror Krusely did not give false information during voir dire, that he did not appear to have remembrance of events at the time of voir dire, and that at best it could be said that juror Krusely did not volunteer information which he might have provided if other specific questions were asked of him. (Appx. 31.) There is no evidence in the record to suggest that the trial court’s failure to find juror misconduct was an abuse of discretion.

Further, the transcript from the hearing on motion for a new trial makes it clear that the trial court himself conducted specific inquiry of juror Krusely on the issue of bias. (Supp. 27.) Rather than revealing that the trial court’s attitude was unreasonable, arbitrary or unconscionable, the record fully supports the trial court’s determination and the denial of new trial.

Of some importance is the fact that the trial court noted that the issue of concern to appellee seemed to be juror Krusely’s post-trial statements that the hospital had a “low standard of care.” However, the trial court noted that while that question was never asked of juror Krusely, even if it had been asked of juror Krusely it was unclear how that would show a bias adverse to the appellee. (Appx. 32.)

In contrast, the majority of the appellate court focused heavily on this post-trial comment of juror Krusely that Trumbull Memorial Hospital has a low standard of care. (Appx. 16-18, App. Op. ¶50, ¶52, ¶58.) Somehow the majority of the appellate court seemed to adopt appellee’s

argument that Krusely's failure to disclose the taking of his son to Trumbull Memorial Hospital is equivalent to Krusely's failure to discuss his post-trial opinion that Trumbull Memorial Hospital had a "low standard of care." The trial court correctly discerned that appellee had not asked that question on voir dire, and further, that if it had been asked, the answer would not demonstrate bias towards the appellee. This fully supports the rationale for the trial court's decision, and is not an abuse of discretion.

Finally, the trial court had every opportunity to observe this juror and it was within the trial court's discretion to believe the juror when he said that he believed he had not concealed or deliberately withheld any information, that he believed he had answered all questions and that any thoughts he had about care at Trumbull Memorial Hospital did not color his opinions or ability to follow the court's instruction. (Supp. 26, 30.) Further, juror Krusely testified towards the end of his voir dire that he could be fair to both sides and decide the case on the evidence (Supp. 130, 131, Tr. 88, 89.)

The majority of the court of appeals, while citing the abuse of discretion standard (Appx. 9, App. Op. ¶21.) simply reviewed the evidence and substituted its own opinion that misconduct had occurred and that appellee was prejudiced as a result thereof. (Appx. 20, App. Op. ¶59.)

Proposition of Law No. 3: 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 appellee's

counsel and staff on the courthouse steps following the verdict. At the hearing on motion for new trial, appellee's counsel proffered evidence over objection that in his conversation on the courthouse steps, juror Krusely had said that he believed the standard at Trumbull Memorial Hospital was low, that he had a negative impression of Dr. Dhillon, and that he felt if this patient was as sick as appellee described they should have gone to another hospital. (Supp. 21-23.)

Prior to the formal adoption of Evid. R. 606 this Court addressed the common law version of the rule and discussed its history in *State v. Adams* (1943), 141 Ohio St. 423, 48 N.E.2d 861. It is noteworthy that many of the concerns about the rule noted by the court in *Adams* were excepted in the codification of the rule which does not require outside evidence in cases involving threats, bribes or improprieties of an officer of the court.

The Ohio rule is nonetheless more restrictive than its federal counterpart, Fed. R. Evid. 606 (b). The Ohio rule includes the requirement in the second sentence of Evid. R. 606(B) that a juror may testify on an outside influence "only after some outside evidence of that act or event has been presented."

Evidence with respect to juror misconduct for concealment of information during voir dire is not in conflict with Evid. R. 606(B) since the rule applies only to testimony by jurors as to matters or statements occurring during the course of the jury's deliberations, or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.

To the extent appellee's evidence was limited to what occurred during voir dire, it was not precluded by Evid. R. 606(B). Appellee introduced evidence that Juror Krusely had taken a child

to the emergency room. In fact, the issue was never in contention. Juror Krusely freely admitted that he had taken one son to the emergency room approximately four years earlier. (Supp. 25.)

The issues for the trial court's determination then became, was the question in fact posed to juror Krusely, if so, was he dishonest in his response, if so, would the correct response have formed a valid basis for a challenge for cause. However, the testimony proffered by appellee at the hearing on the motion for new trial went well beyond whether the question was asked and answered. Appellee's counsel went on to elicit testimony about juror Krusely's mental process, about the explanation juror Krusely allegedly made post-trial to appellee's counsel with regard to juror Krusely's opinion of Dr. Dhillon, (something this juror could not possibly have had prior to trial), and about juror Krusely's post-trial statements about his opinions of the Trumbull Memorial Hospital standard of care. Both of these topics post-trial in explanation of the verdict are clearly the type of mental processes in connection with the trial and the jurors' verdict that are precluded under Evid. R. 606(B) without evidence from an outside source as foundation for further inquiry. Thus, the trial court was correct in his decision to apply Evid. R. 606(B) to limit the testimony under his consideration to the question and answer on voir dire, and the potential prejudicial effect of a dishonest answer.

The Tenth District Court of Appeals has held that the aliunde rule is not applicable to prevent evidence of a juror's failure to disclose facts on voir dire examination. *Farley v. Mayfield* (June 30, 1986), 10th Dist. No. 86AP-19.

In *Dedmon v. Mack*, 6th Dist. No. L-05-1108, 2006-Ohio-2113, the court was faced with a juror affidavit alleging four instances of juror misconduct. The court eliminated all of the instances of misconduct alleged to have occurred during deliberations as violating the aliunde rule,

since no evidence from an outside source was brought before the court. However, the court went on to consider the affidavit of a juror who acknowledged that she was a current patient of the defendant clinic. Although the court, applying *McDonough*, found no grounds for a new trial, it did treat the issue of nondisclosure on voir dire as outside the aliunde rule.

The aliunde rule and Evid. R. 606(B) were discussed at some length in *Cameron v. Alba Ski & Sport Hut, Inc.* (August 7, 1986), 10th Dist. No. 85 AP-1018. The result of the application of the rule has been that, barring evidence from an outside source of misconduct, jurors cannot testify about their own misconduct or the misconduct of other jurors. The trial court recognized this and prefaced his opinion with an understanding that Evid. R. 606(B) in general would prevent consideration of the testimony about the informal post-verdict discussion between counsel and jurors. However, the court went on to specifically consider the issue of nondisclosure on voir dire, and the testimony proffered with respect to that issue.

CONCLUSION

The court of appeals erred not in referencing the majority holding of *McDonough*, but in its application. The holding of *McDonough* should be adopted and a party moving for a new trial post verdict where a juror has not disclosed information on voir dire, should have the burden of proving that a juror failed to answer honestly a material question on voir dire and that a correct response would have provided a valid basis for challenge for cause. The moving party should also be required to establish that due diligence was exercised in the voir dire process to uncover the

undisclosed information as a preliminary step to the *McDonough* inquiry. The record reflects that appellee has not established any of these elements.

The court of appeals failed to give due deference to the trial court's finding of fact that no intentional disclosure occurred and that there was no evidence that the juror was biased against the moving party.

The trial court properly excluded testimony of jurors which went beyond the scope of what was asked and answered during voir dire as violating Evid. R. 606(B).

It is respectfully requested that the judgment of the court of appeals be reversed and the judgment of the trial court be reinstated.

Respectfully submitted,



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Certificate of Service

A copy of the foregoing Merit Brief has been forwarded by regular mail this 20th day of December, 2007, to MARTIN F. WHITE and JAMES J. CRISAN, 156 Park Ave., N.E., P.O. Box 1150, Warren, Ohio 44482-1150, attorneys for appellee.



PFAU, PFAU AND MARANDO
WILLIAM E. PFAU, III

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

**NOTICE OF APPEAL OF APPELLANTS JAGPRIT SINGH DHILLON, M.D.
and EMERGENCY PROFESSIONAL SERVICES, INC.**

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CHERYL SUMNER, DECEASED.

FILED
JUL 17 2007
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Appeal of Appellants Jagprit Singh Dhillon, M.D. and Emergency
Professional Services, Inc.

Appellants Jagprit Singh Dhillon, M.D. and Emergency Professional Services, Inc. hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Trumbull County Court of Appeals, Eleventh Appellate District, entered in Court of Appeals case No. 2006-T-2007, June 4, 2007.

This case is one of public or great general interest.

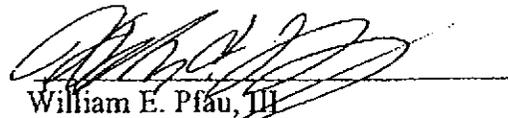
Respectfully submitted,



William E. Pfau, III
COUNSEL FOR APPELLANTS
JAGPRIT SINGH DHILLON, M.D.
AND EMERGENCY
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Certificate of Service

A copy of the foregoing Notice 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.



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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

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, :

CASE NO. 2006-T-0007

- vs - :

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 jury 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 subject 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 vis à 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.

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

12/16/05
Copies:
M White
W P for
T Wilson

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.

John M. Stuard

JUDGE

TRAVELERS COUNTY

2005 DEC 15 A 9:57

COURT CLERK ALLEN
TRAVELERS COUNTY

Evid. R. Rule 606

Baldwin's Ohio Revised Code Annotated Currentness
Ohio Rules of Evidence (Refs & Annos)

Article VI. Witnesses

→ **Evid R 606 Competency of juror as witness**

(A) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(B) Inquiry into validity of verdict or indictment. 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 that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, only after some outside evidence of that act or event has been presented. However a juror may testify without the presentation of any outside evidence concerning any threat, any bribe, any attempted threat or bribe, or any improprieties of any officer of the court. A juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying will not be received for these purposes.

(Adopted eff. 7-1-80; amended eff. 7-1-07)

STAFF NOTES

Westlaw.

Page 1

R.C. § 2313.42

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BALDWIN'S OHIO REVISED CODE ANNOTATED
 TITLE XXIII. COURTS--COMMON PLEAS
 CHAPTER 2313. COMMISSIONERS OF JURORS
 VOIR DIRE AND CHALLENGES

→2313.42 Examination of jurors; causes for challenge

Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications. A person is qualified to serve as a juror if he is an elector of the county and has been certified by the board of elections pursuant to section 2313.06 of the Revised Code. A person also is qualified to serve as a juror if he is eighteen years of age or older, is a resident of the county, would be an elector if he were registered to vote, regardless of whether he actually is registered to vote, and has been certified by the registrar of motor vehicles pursuant to section 2313.06 of the Revised Code or otherwise as having a valid and current driver's or commercial driver's license.

The following are good causes for challenge to any person called as a juror:

- (A) That he has been convicted of a crime which by law renders him disqualified to serve on a jury;
- (B) That he has an interest in the cause;
- (C) That he has an action pending between him and either party;
- (D) That he formerly was a juror in the same cause;
- (E) That he is the employer, the employee, or the spouse, parent, son, or daughter of the employer or employee, counselor, agent, steward, or attorney of either party;
- (F) That he is subpoenaed in good faith as a witness in the cause;
- (G) That he is akin by consanguinity or affinity within the fourth degree, to either party, or to the attorney of either party;
- (H) That he or his spouse, parent, son, or daughter is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against him;
- (I) That he, not being a regular juror of the term, has already served as a talesman in the trial of any cause, in any court of record in the county within the preceding twelve months;
- (J) That he discloses by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court.

Each challenge listed in this section shall be considered as a principal challenge, and its validity tried by the court.

Current through 2007 File 36 of the 127th GA (2007-2008),
 apv. by 12/14/07, and filed with the Secretary of State by 12/14/07.

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- APPX 36 -