

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
Response to Appellee’s Argument contra Proposition of Law No. 1	1
Response to Appellee’s Argument contra Proposition of Law No. 2	6
Response to Appellee’s Argument contra Proposition of Law No. 3	7
CONCLUSION	10
PROOF OF SERVICE	12

TABLE OF AUTHORITIES

	Page
<i>Berk v. Matthews</i> (1990), 53 Ohio St. 3d 161, 168, 559 N.E.2d 1301	5
<i>Farley v. Mayfield</i> (June 30, 1986), 10 th Dist. No. 86AP-19	9,10
<i>Hall v. Banc One Mgt. Corp.</i> , 114 Ohio St. 3d 484, 873 N.E.2d 290, 2007- Ohio- 4640	5
<i>Mazzora v. H. Meyer Dairy Co.</i> (March 15, 1999), 12 th Dist. App. No. CA 98-02-025	7
<i>McDonough Power Equipment, Inc. v. Greenwood</i> (1984), 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed. 2d 663	1,2,3,5,6,7,10
<i>Pearson v. Gardner Cartage Co., Inc.</i> (1947), 148 Ohio St. 425, 76 N.E.2d 67	2,6,7
<i>Petro v. Donner</i> (1940), 137 Ohio St. 168, 28 N.E.2d 503	2
<i>Pons v. Ohio State Med. Bd.</i> (1993), 66 Ohio St. 3d 619, 621, 614 N.E.2d 748	7
<i>State v. Adams</i> (1980), 62 Ohio St. 2d 151, 157, 404 N.E.2d 144	6
<i>State v. Hessler</i> (2000), 90 Ohio St. 3d 108, 123, 734 N.E.2d 1237	8
<i>State v. Roberts</i> , 110 Ohio St. 3d 21, 850 N.E.2d 1168, 2006-Ohio-3665	5
<i>Steiner v. Custer</i> (1940), 137 Ohio St. 448, 38 N.E.2d 855	2

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

R.C. 2313.42	5
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CONSTITUTIONAL PROVISIONS, STATUTES AND RULES (Con't.)

	Page
R.C. 2313.43	5
Evid. R. 606(B)	7,8,9,10

Argument

I. Proposition of Law No. 1

Appellee acknowledges and accepts the holding in *McDonough Power Equipment, Inc. v. Greenwood* (1984), 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed. 2d 663 as the applicable and controlling law. Appellee argues that the court of appeals applied the holding in *McDonough* to this case.

Appellee then emphasizes the factual finding made by the court of appeals that juror Krusely's failure to disclose his son's experience with Trumbull Memorial Hospital emergency room was a failure to honestly answer a yes or no question on voir dire. (Appellee Brief 14). Appellee references the portion of the court of appeals opinion in which the appellate court found that, since juror Krusely remained silent when he was specifically asked about this topic during voir dire, and since he relayed the information to plaintiff's counsel two and a half weeks later at the conclusion of the trial, these facts reveal dishonesty on the part of the juror. This simply ignores the fact findings of the trial court, who not only had the voir dire transcript, but was present himself during voir dire, and present during the evidentiary hearing, and in fact personally questioned the juror at some length at the time of the evidentiary hearing. The finding of the trial court was that there was not evidence that the juror gave false information to questions put to him, but only that the juror did not volunteer all information he may have if other specific questions were asked. The trial court further found that there was no evidence that the juror actually had a remembrance of the subject events at the time he was questioned during voir dire, and the juror's testimony was that he did not remember.

It is respectfully submitted that appellee's counsel on voir dire presented questions in

such a fashion as to present a record that is less than clear on just what was asked of juror Krusely. Even the majority of the court of appeals noted that “the record was arguably susceptible to multiple interpretations.” (Appendix 13).

While it is not clear from the transcript whether the question with respect to having taken family members to Trumbull Memorial Hospital emergency was even asked of juror Krusely, assuming that it was, the trial court correctly found that there was no evidence to support a finding that juror Krusely failed to answer such question out of a lack of honesty. The appellate court majority’s finding that the first prong of *McDonough* was met because a specific question was asked of juror Krusely, and juror Krusely was dishonest in his response is simply not consistent with the trial court’s finding, nor is it apparent from the record. As Judge Trapp noted in her dissent, and contrary to the fact findings of the majority, “There is no evidence in the record to establish that juror Krusely gave a dishonest answer.” (Appendix 21)

The first prong of the *McDonough* test was not met. The finding that the juror gave no false information and did not have remembrance of the event at the time of voir dire establishes a failure to meet the first prong of the *McDonough* test as was appellee’s burden.

While appellee appears to accept the holding in *McDonough*, appellee relies upon and cites seven cases, six of which precede *McDonough*, and five of which precede this Court’s decision in *Pearson v. Gardner Cartage Co., Inc.* (1947), 148 Ohio St. 425, 76 N.E.2d 67. This reliance by appellee upon these older cases appears to be an attack upon the second prong of *McDonough*. Thus appellee’s lengthy discussion of *Petro v. Donner* (1940), 137 Ohio St. 168, 28 N.E.2d 503, and *Steiner v. Custer* (1940), 137 Ohio St. 448, 38 N.E.2d 855 both reference the impact upon the opportunity to exercise a peremptory challenge. As the Supreme Court noted in

McDonough, “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.” *McDonough* at 555.

Even if the first prong under *McDonough* were met, on the issue of actual bias giving rise to a basis for a challenge for cause, the record is devoid of any supporting evidence. Factually, appellee emphasizes that three jurors were excused for cause based upon their disclosure of experiences at Trumbull Memorial Hospital. (Appellee Brief 12). However, each of these jurors made statements to the court that they would not be impartial. Juror Hall stated “I am pretty sure I would be prejudiced one way”. (Supplement 20. Transcript 160). Juror Stere stated “I don’t feel like I could be on this jury because I had a bad experience at Trumbull.” (Supplement 203. Transcript 161). Juror Logan stated “ I am afraid I would be too partial to one side. I couldn’t be fair.” (Supplement 207. Transcript 165).

Appellee references a fourth juror in this context. (Appellee Brief 12). It is of note that this fourth juror referenced by appellee related that her mother had a lawsuit against the Cleveland Clinic, and that she had a bad experience at Trumbull Memorial emergency with her four year old daughter. (Supplement 314 -315. Transcript 272 - 273). This juror nonetheless stated that she believed that she could be fair and impartial, and this juror was not challenged for cause, nor peremptorily by appellee. (Supplement 322 - 323. Transcript 280 -281).

Note that all of the above cited questioning on voir dire occurred after the questioning of the panel of which juror Krusely was a member had been completed, and involved only one on one discussions with individual jurors replacing members of the panel as they were excused.

Unlike the jurors excused for cause, juror Krusely testified towards the end of his voir

dire questioning that he could be fair to both sides, and decide the case on the evidence.

(Supplement 130 - 131. Transcript 88 - 89).

Appellee's discussion focuses on comments made by Krusely post-trial about Trumbull Memorial Hospital and its "low" standard of care. The appellate majority found significant the fact that Krusely testified "under oath, that he believes Trumbull Memorial Hospital has a low standard of care." (Appendix 19). Yet such a question was never asked of Krusely nor any of the jurors during voir dire. Appellee, like the appellate majority, seems to assume that an affirmative answer to a yes or no question about family members who were patients at Trumbull Memorial Hospital would have led to a long line of subsequent questions and answers that would have served to disqualify this juror for cause. It is pure speculation on the part of the appellate court and appellee to conclude that an answer of yes to the question about taking family members to the emergency room would have led to a question about standard of care, and a juror's opinion that standard of care was low. Further, there is no evidence to establish that this juror's opinion at the time of voir dire was the same as at the time of the discussion on the courthouse steps after trial.

Of note is the transcript of the question which is at the core of the initial appeal. When asked by appellee's counsel, "Have you ever taken a member of your family to the Trumbull Memorial emergency room?", a juror responded "yes", and there was no further comment by the answering juror. The only follow up questioning to that juror was appellee's counsel asking "About that, any experiences that you think will influence your decision making on this case?". (Supplement 91. Transcript 49). No response from the juror is reflected in the record. Without any follow up to any of the other jurors, appellee's counsel then embarked on a lengthy

discussion of unrelated issues and never returned to that topic.

Unless a challenge to a prospective juror for cause is one of those listed in R.C. 2313.42(A) through (I) the challenge is not conclusively presumed. *Hall v. Banc One Mgt. Corp.*, 114 Ohio St. 3d 484, 873 N.E.2d 290, 2007- Ohio- 4640. R.C.2313.42 places a challenge to a juror for cause under (J) for impartiality within the discretion of the trial court. *Berk v. Matthews* (1990), 53 Ohio St. 3d 161, 168, 559 N.E.2d 1301.

Appellee's reference to R.C. 2313.43 does not serve to diminish the trial court's discretion. This statute contemplates that "good cause" exists when the prospective juror discloses that he cannot be a fair and impartial juror or will not follow the law as given to him by the court. *State v. Roberts*, 110 Ohio St. 3d 21, ¶105, 850 N.E.2d 1168, 2006-Ohio-3665. Under R.C. 2313.43 trial courts have discretion in determining a juror's ability to be impartial and such a ruling will not be disturbed on appeal unless it is manifestly arbitrary, so as to constitute an abuse of discretion. *State v. Roberts*, Id. at ¶106. As the trial court noted, had the question on standard of care been posed to juror Krusely, and had he answered yes, this would hardly constitute a valid challenge for cause on the basis of actual prejudice against appellee. (Appendix 32). In fact, juror Krusely in the evidentiary hearing expressly testified under oath "It did not color my opinion or my ability to follow your instructions at all." (Supplement 30. Transcript 30).

The second prong of *McDonough* is not supported by the record. There is no evidence that an affirmative answer to the question of whether or not the juror had taken a family member to Trumbull Memorial emergency room would form a basis for challenge for cause.

The spirit of the Supreme Court's decision in *McDonough* prevents a party from

undermining the decision of a jury by presenting evidence of innocent and harmless misstatements or omissions by jurors during the voir dire process. Unless it can be shown that the juror lacked honesty, and intended to conceal information, and further, that the information if not concealed would be a basis of a challenge for cause, the decision of the jury should stand. A lesser standard opens the door to endless scrutiny of juror voir dire by the non-prevailing party post-verdict, and subjects jurors to the type of potential harassment, embarrassment and annoyance which this Court has said should be avoided. *Pearson* at 447.

II. Proposition of Law No. 2

Much of the previous discussion is relevant to Proposition No. 2. The standard with respect to a trial court's role on a motion for new trial for jury misconduct does not appear to be in dispute. It is more than an error of law or judgment, it is an attitude that is unreasonable, arbitrary or unconscionable. *State v. Adams* (1980), 62 Ohio St. 2d 151, 157, 404 N.E.2d 144. Appellee argues that the court of appeals majority clearly applied the correct standard because it stated "The trial court abused its discretion by failing to grant [plaintiff-appellee's] motion for new trial." (Appellee Brief 22). The fact that the appellate court majority cites the correct standard is not dispositive with respect to a determination that the appellate majority correctly applied that standard. With respect to the finding of dishonesty made by the appellate majority, the appellate court nowhere in its opinion points out how the trial court's finding that juror Krusely did not give false information, and that there was no evidence of concealment, was a finding which evidenced an attitude that was unreasonable, arbitrary or unconscionable. Likewise, with respect to the *McDonough* second prong, the appellate court fails to demonstrate

a showing that the trial court acted with an unreasonable, arbitrary or unconscionable attitude.

Appellant relies upon *Mazzora v. H. Meyer Dairy Co.* (March 15, 1999), 12 th Dist. App. No. CA 98-02-025. Of note is the finding of the court of appeals in that case that “This court is not in a position to act as trier of fact, to resolve the question of whether Chip Jones was untruthful, either in his statements or by his omission of statements during voir dire, and based his decision on factors other than the evidence presented at trial.” Rather than make factual findings from the record before it, the appellate court in *Mazzora* remanded the matter to the trial court for the purpose of conducting an evidentiary hearing.

In the case before this Court, the trial court conducted an evidentiary hearing, made factual findings that the juror had not acted with dishonesty, and that there did not appear to be evidence of prejudice to the appellee. The appellate court made its own analysis of the evidence from reviewing the transcript, and reached different conclusions. Appellants concur with appellee’s statement that it is axiomatic that in determining whether the trial court abused its discretion, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St. 3d 619, 621, 614 N.E.2d 748. (Appellee Brief 22).

Once again it is of note that appellee in support of his argument contra to appellant’s Proposition of Law No. 2 relies on three appellate cases which predate *McDonough*, two of which predate this Court’s decision in *Pearson*. Appellee’s authority is inconsistent with appellee’s assertion that the appellate court relied upon and correctly applied the Supreme Court’s holding in *McDonough*.

III. Proposition of Law No. 3

The court of appeals took exception to the trial court’s reference to Evid. R. 606(B).

However, the trial court's reference simply indicates that the use of statements of a juror post-deliberations made to an attorney on the courthouse steps to illustrate improper conduct of the juror is contra to the aliunde rule as codified in Evid. R. 606(B). The purpose of the aliunde rule is to maintain the sanctity of the jury room and deliberations therein and to insure the finality of jury verdicts, and to protect jurors from being harassed by defeated parties. *State v. Hessler* (2000), 90 Ohio St. 3d 108, 123, 734 N.E.2d 1237.

Other than the fact that juror Krusely testified that he had taken a family member to Trumbull Memorial Hospital emergency in the past, none of the statements made by juror Krusely would reflect upon whether he failed to answer a question put to him during voir dire. As mentioned above, there was never any question put to any of the jurors about the standard of care at Trumbull Memorial Hospital. While there were questions as to the jurors' knowledge of the parties during voir dire, it is not disputed that juror Krusely had no knowledge or opinion of appellant Dhillon until after having heard the evidence presented at trial. Juror Krusely's post-trial statements about Dr. Dhillon could not be considered by the trial court, as they did not establish any juror misconduct, but simply reflect the juror's post trial explanations to appellee's counsel. Post trial, juror Krusely was confronted by appellee's counsel and staff in front of the courthouse. Appellee's counsel on the courthouse steps after trial "was asking you [juror Krusely] about what your considerations were in making the decision that you made in this case." (Supplement 19. Transcript 19). The context of the conversation is one in which the non-prevailing party's counsel, displeased with the verdict, wanted an explanation. Juror Krusely expressed his explanation of the verdict. The trial court was correct that this discussion cannot be used to establish juror misconduct. For example, an issue of contention throughout the trial was the condition of Ms. Sumner at the time of her discharge from the emergency room. Appellee painted a picture of a very ill patient, while appellants presented evidence of a patient with improved status. With

respect to that issue Krusely indicated that if the girl was as sick as she was they should have taken her to another facility. (Supplement 23. Transcript 23). This entire discussion is clearly barred on an evidentiary basis by Evid. R. 606(B). This juror listened to days of testimony about whether this patient appeared to be so sick that she should not have been discharged. The family members testified about how sick she appeared. The juror, in explaining his deliberations, stated that if one believed the girl was as sick as the family claimed, one would expect them to seek other medical attention. Such rationalization by the juror post-trial suggests that he did not believe the family's assertions. Regardless, the juror's thought process, reasonable, unreasonable, arbitrary or otherwise, is not a basis to impeach a jury, and is not evidence upon which misconduct of the juror may be based.

Such courthouse steps discussions are properly excluded.

Appellee cites *Farley v. Mayfield* (June 30, 1986), 10th Dist. No. 86AP-19 for the proposition that Evid. R. 606(B) does not prevent evidence of a juror's failure to disclose facts on voir dire examination. Thus, it may have been appropriate for the trial court to allow counsel for appellee to question juror Krusely with respect to statements made by juror Krusely after the trial, that would evidence a failure on the part of juror Krusely to answer questions during voir dire. However, as noted by the court in *Farley*, Evid. R. 606(B) precludes statements by jurors about their thought processes or feelings. While juror Krusely's statement that he had taken a family member to Trumbull Memorial Hospital emergency room is not barred by Evid. R. 606(B) for the purpose of proving that fact, other statements about Krusely's opinion of defendant Dr. Dhillon and the hospital's standard of care which were articulated by Krusely in an attempt to explain the verdict to appellee's counsel, are clearly an intrusion into the juror's mental processes post-trial. These items were not responsive to any question on voir dire. Nor were they evidence of a failure on the part of juror Krusely to honestly answer a material question.

The court in *Farley* was correct in stating that Evid. R. 606(B) has limited application, and is meant to prevent jurors from testifying concerning juror deliberations. However, this does not mean as appellee would claim in the case before this Court, that any statements made by the juror post-trial in a conversation admittedly begun by appellee's counsel to obtain an explanation of the verdict are admissible to show juror misconduct during voir dire. The trial court correctly applied Evid. R. 606(B) and went on to make specific factual findings with respect to whether the juror failed to answer a question on voir dire, and whether such conduct would have been prejudicial to the appellee.

IV. Conclusion

Was the first prong of *McDonough* met by a showing that juror Krusely failed to answer honestly a material question on voir dire?

While the record reflects that counsel may have asked a question to the panel, "Have you ever taken a member of your family to the Trumbull Memorial emergency room?", the sole juror responding yes was silent to a general follow up to that juror, and appellee's counsel immediately directed the conversation elsewhere, never coming back to that topic. While it is unclear whether that question was ever put to the entire panel or juror Krusely, what is clear from the record is that the question's importance was diminished by the lack of follow up by appellee's counsel, and turn of the discussion to other matters. There is no evidence in the record which establishes that juror Krusely was dishonest or concealed information during voir dire. The trial court correctly found that the juror was not untruthful.

If the question was asked of juror Krusely, and if he in fact did conceal a yes answer, was the second prong of *McDonough* met by evidence which establishes that a yes answer would have formed a basis for challenge for cause? There is no evidence whatsoever to suggest that such an answer would have established a basis for a challenge for cause to the appellee. The trial court correctly found that

even if the speculated follow up questions were asked the evidence did not establish prejudice to appellee.

The majority of the court of appeals improperly substituted its factual findings for those of the trial court.

The judgment of the court of appeals should be reversed and the judgment of the trial court reinstated.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'William E. Pfaus III', is written over a horizontal line.

PFAU, PFAU & MARANDO
WILLIAM E. PFAU III (No. 0006474)
P.O. Box 9070
Youngstown, OH 44513
Telephone (330) 702-9700 / Fax (330) 702-9704
E-mail: ppm@ppmlegal.com
ATTORNEYS FOR APPELLANTS

CERTIFICATION

I hereby certify that a copy of the foregoing Reply Brief *of Appellants* was sent this 11th
day of *March*, 2008 by regular mail to:

MARTIN F. WHITE #0009584
JAMES J. CRISAN #0065642
Martin F. White Co., L.P.A.
156 Park Ave., N.E. - P.O. Box 1150
Warren, Ohio 44482-1150
Telephone: 330/394-9692
Facsimile: 330/394-8589
Attorneys for Appellee


WILLIAM E. PFAU, III
PFAU, PFAU & MARANDO