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## **JURISDICTIONAL STATEMENT**

On December 29, 2000, the Court of Appeals for the Western District of Missouri filed its decision vacating the decision of the Circuit Court of Johnson County and remanding this case for a new trial. Travis v. Stone, No. WD 58152, 2000 Lexis 1953 (Mo. App. December 29, 2000). On May 29, 2001, this Court issued its order transferring this case. This Court has jurisdiction of this cause pursuant to Article V, Section 10 of the Constitution of Missouri and Supreme Court Rule 83.04.

## STATEMENT OF FACTS<sup>1</sup>

This appeal arises from a wrongful death action brought by Paul Travis (“Plaintiff”) against Meredith Lynne Stone (“Defendant Stone”) and Lowell Walter Hulse (“Defendant Hulse”), the drivers of two different vehicles, and Apex Digital TV, Inc. (“Defendant Apex”), the employer of Defendant Hulse. (LF 1). The jury entered a verdict in favor of Plaintiff on his claims against Defendant Stone, but entered verdicts in favor of Defendants Hulse and Apex on Plaintiff’s remaining claims. (LF 20). The circuit court entered its judgment, consistent with the jury’s verdicts, on November 5, 1999. (LF 22-23).

On February 16, 1998, Valorie Travis was operating a 1988 Ford Escort southbound on Missouri Highway 13 near the intersection of Missouri Route 13 and County Road 250 in Johnson County, Missouri. (TR 147). At the same time and location, Defendant Stone was operating a 1986 Ford Thunderbird southbound on Missouri Route 13. (TR 135-36, 147). Also at that time and location, Defendant Hulse was operating a 1995 Ford Ranger northbound on Missouri Route 13. (TR 37, 147).

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<sup>1</sup> Citations to the Legal File and the Transcript are designated by the abbreviations “LF \_\_” and “TR \_\_.”

Defendant Hulse was acting as the agent of his employer, Defendant Apex. (TR 36).

Defendant Hulse also had a passenger in his vehicle, co-employee Mark Wallace. (TR 36).

As Valorie was traveling southbound on Missouri Route 13, she slowed and came to a stop, waiting to make a left turn off of Missouri Route 13. (TR 136). Defendant Stone, who was traveling behind Valorie, had taken her eyes away from the road and did not see that Valorie was stopped. (TR 136). When Defendant Stone looked up and saw that Valorie's vehicle was stopped directly in front of her, she tried to avoid colliding with Valorie's vehicle by swerving to the right, but she was unable to avoid a rear-end collision with Valorie's vehicle. (TR 136).

After being struck by Defendant Stone's vehicle, Valorie's vehicle traveled forward, swerving into the northbound lane. (TR 147). Defendant Hulse, who was traveling in the northbound lane, then struck Valorie's vehicle on the passenger side. (TR 37, 147). Valorie Travis died as a result of the injuries she sustained in this second collision with Defendant Hulse's vehicle. (TR 74-75).

Plaintiff raised numerous claims of negligence against Defendants Hulse and Apex, including the following claims that are directly pertinent to this appeal: (1) Plaintiff claimed that Defendant Hulse, by use of the highest degree of care, should have known that there was a reasonable likelihood of a collision in time to have stopped his vehicle, swerved his vehicle, slackened the speed of his vehicle, or taken some combination of

these actions in order to avoid the collision with Valorie Travis' vehicle; and (2) Plaintiff claimed that Defendant Hulse failed to keep a careful lookout. (LF 6-9). Because these claims of negligence depended upon the ability of Defendant Hulse to see and react to the first collision between Valorie Travis' vehicle and Defendant Stone's vehicle, there was a substantial amount of conflicting testimony at trial regarding the sight distance of Defendant Hulse and the reaction time that was available to Defendant Hulse. (The pertinent testimony is set forth in the resume of testimony following this statement of facts).

After the trial, Plaintiff discovered that one of the jurors, Violet Lorene Zink ("Juror Zink"), made a special trip to the accident scene over the lunch hour, during a break in the testimony of Plaintiff's accident reconstruction expert, Dr. Bruno Schmidt. (TR 57). Juror Zink made this trip to examine the layout of the accident scene, including the incline of the road. (TR 57). Although Juror Zink lived in the northern part of Warrensburg and sometimes drove by the accident scene in the course of her daily travels, she indicated that she did not have a good recollection of the conditions of the road at the location of the accident scene. (TR 56-57). Juror Zink stated that she did not remember there being any incline in the road, as the experts had discussed at trial, and that she wanted to see what incline there was in the road. (TR 57). Juror Zink specifically indicated that one purpose of her visit to the accident scene was to "refresh [her] memory" with regard to the condition of the accident scene. (TR 57).

Juror Zink also indicated that she visited the accident scene because she had questions regarding the sight distance of Defendant Hulse and what Defendant Hulse could see at the scene of the accident. (TR 57). Although Juror Zink stated that she “didn’t make a decision after looking” at the accident scene, she acknowledges that her visit to the scene “helped [her] better to understand all the testimony.” (TR 57-58).

On November 23, 1999, Plaintiff filed a motion for new trial on the basis of Juror Zink’s misconduct. (LF 24). Plaintiff’s motion for new trial specifically alleged that Juror Zink had gone to the scene of the accident to observe the sight distance available to the drivers involved in the collisions, and that this visit to the scene was unauthorized and constituted an attempt to obtain evidence outside of that presented at trial. (LF 28).

Plaintiff also indicated in his motion for new trial that the issue of Defendant Hulse’s sight distance was hotly contested during the trial and was a subject of testimony for both Plaintiff’s expert, Bruno Schmidt, and Defense expert, Robert S. McKinzie. (LF 28).

Plaintiff’s motion for new trial did not contain any affidavit or other statement of Juror Zink. (LF 24-49).

On December 3, 1999, Defendant Hulse filed his suggestions in opposition to Plaintiff’s motion for new trial. (LF 50). In his suggestions, Defendant Hulse argued that Plaintiff’s motion for new trial was not adequately supported because Plaintiff had not provided any affidavit or other statement of Juror Zink. (LF 52). Defendant Hulse also argued that “Plaintiff’s allegation of juror misconduct in the present case is simply an

improper attempt to impeach the jury's verdict." (LF 52). However, Defendant Hulse did not object to Juror Zink's testimony in these suggestions because Plaintiff had not yet offered any testimony of Juror Zink into evidence. (LF 52).

On December 21, 1999, the trial court judge, the Honorable Joseph P. Dandurand, held a hearing on Plaintiff's motion for new trial. (TR 56-61). At this hearing Plaintiff offered the testimony of Juror Zink into evidence for the first time. (LF 56-59). Defendants Hulse and Apex did not make any objection at the time that Plaintiff called Juror Zink as a witness, nor at any time during the course of her testimony. (LF 56-59).

At this hearing, Judge Dandurand found that Juror Zink's visit to the accident scene constituted misconduct, and indicated that he was taking the matter under advisement to determine if this misconduct resulted in prejudice to Plaintiff. (TR 61). On January 7, 2000, Judge Dandurand entered his order denying Plaintiff's motion for new trial without explanation. (LF 55).

### **Resume of Pertinent Witness Testimony**

#### **Cross Examination of Trooper Darewin Clardy.**

17. Trooper, I just have one question.

Did Mr. Hulse tell you, at the scene, that he saw the Stone vehicle hit the Travis vehicle, first impact? Did he tell

you that?

1. Yes, I believe he did.

(TR 35).

**Direct Examination of Plaintiff's Accident Reconstruction Expert, Dr. Bruno Schmidt.**

17. All right. Now, Dr. Schmidt, have you also arrived at an opinion as to whether the second collision between Mr. Hulse and Valorie Travis would have occurred if defendant Hulse had been traveling 45 miles an hour at the second 45 mile-an-hour speed limit sign right before the collision?

(Witness returns to the witness stand)

17. (BY MR. EMISON) First, have you arrived at that opinion?

1. Yes, I have.

17. And would you tell us what that opinion is?

1. Uh, if he was traveling at 45 miles per hour and reacted to the oncoming collision when it was apparent that Stone was going too fast, then he could have stopped before that second collision occurred.

(TR 13).

**Cross Examination of Plaintiff's Accident Reconstruction Expert, Dr. Bruno Schmidt.**

17. Can we agree on this: That as Lowell Hulse is driving

towards that first impact, he's going on an uphill incline?

1. That is correct.

Q. The other lane sits higher than his lane a little bit?

1. That is correct.

17. And you're telling me that he should have seen what was happening behind that other car and reacted to it, even though there hadn't been a collision yet?

1. If you read Mr. Wallace's deposition, that's precisely what he said he saw, and that's precisely what he said to, uh - uh, Mr. Hulse - Hulse before - before the impact occurred.

(TR 22).

**Direct Examination of Defense Expert, Robert S. McKinzie.**

17. Did the slope of the - of the highway in this case affect Lowell Hulse's ability to perceive the first impact in your opinion?

1. Say that again, please, one time.

17. Did the slope and - and the sitting height that Mr. Hulse had, did that affect his ability to perceive the first impact ahead of him?

1. Yes, sir, it did.

17. How?

1. Well, we don't - we have a little different curve here

than we normally think of a curve on a highway. You have horizontal curves as you go around the corner, but in this case we have a vertical curve, we have a crest of a hill, and on the south side of that hill we have an upward grade for Mr. Hulse's direction, and southbound we have an upward grade towards the crest of the hill for the Travis and Stone vehicles. So Mr. Hulse has to, uh - or is at a lower elevation down here, and trying to perceive what happened at a distance some six feet above him.

(TR 45).

17. Tell me as - at this point of impact -

1. Yes.

17. - and as Mr. Hulse is approaching, given the slope of the roadway and your testing out there, could he have seen Stone hit Travis based on where he was on the roadway?

1. No, sir, he could not.

17. Why not?

1. Well, there's several reasons. First of all, in our analysis about when this took place, based upon our analysis of Hulse's speed, he was located at a distance 3.1 to three point feet (sic) below the position of these vehicles on the roadway. That's the first element that has to be contended with. The second element is the shape and

size of the Escort itself.

The impact occurs to this vehicle in the right rear corner by the left front corner of Thunderbird. So a good portion of the Thunderbird is actually hidden from Mr. Hulse's view simply by the presence of the Escort being there.

(TR 46-47).

17. The next area I want to go into is reaction time - perception-reaction time.

Based on your analysis of these accidents, when did the Travis vehicle first become a danger to Hulse in this sequence?

1. Well, the Travis vehicle would first become a danger to the Hulse vehicle as - as it became obvious that the rotation was taking it into the northbound lane, or at the point where it would have crossed the centerline.

17. What is perception-reaction time? What's involved with that?

1. Well, perception-reaction is a process that a driver goes through, and all of us go through it if we operate a vehicle. Perception is, uh, a phase of this process called first detection, an object must be detectable to us or within our field of view. The second thing is that after detection is made, then the operator of a vehicle will make

an identification.

In this case we identify - detect the vehicle, the second thing we do is identify it as a vehicle, and the third thing we do is we assess a threat to it; it to us or us to it. In this case we would initially expect someone to see this vehicle in a southbound direction, identify it as a car, assess a threat of zero; it's not opposing or intruding into my path, nor am I imposing or intruding into its path.

And it's only at the point of time where the rotation begins to enter this northbound lane that another threat assessment would be made that obviously the vehicle is rotating into my path, and assigns a very highest threat level to it. Once the threat level is identified there must be a decision phase that takes place. The operator decides, based upon the threat level, what he needs to do or attempt to do in order to avoid that object. They may decide to swerve, they may decide to brake, they may decide swerve and brake, or a combination of those elements.

Once the decision has been made, then the mind sends a signal to whatever part of the body that attempts that maneuver to either move your foot from the gas to the brake, or turn the steering wheel, and there are time

elements associated with those two processes; perception and reaction.

17. What are those?

1. Typically, uh, it's understood that the reaction part of that process is about three-quarters of a second. It can vary a little bit based upon age and - and, uh, your attentiveness. The second part of that is the perception phase. It's dependent upon the environment that you're in.

In this case we have what would normally be considered to be a simple reaction process - or simple perception process.

We don't have a lot of things - a busy environment like in the city where we have a lot of advertising signs and cars coming and going that we have to deal with simultaneously.

But what we do have that makes this a rather complex situation is this vertical curve to deal with, and obviously the rain. The time element for perception-reaction in day time is normally thought of as one to - three-quarters to one second, and at night it can obviously range up to two-and-a-half to three seconds.

17. In your opinion, once the Travis vehicle began to enter Lowell Hulse's lane, did he have time to react to avoid that collision?

1. Not at 1.43 seconds; no, sir.

(TR 48-49).

**Cross Examination of Defense Expert, Robert S. McKinzie.**

17. Now, Mr. McKinzie, it's your testimony to the jury here today that it was physically impossible for Mr. Hulse to have seen the Stone vehicle hit the Travis vehicle in the first impact; is that right?

1. Yes, sir. He could not have seen the contact between those two vehicles.

17. That's what you're telling us?

1. Yes.

17. Okay. Now, you've seen the - you've seen the accident report, this is Exhibit 20B, and the statement of Mr. Hulse that he told Trooper Clardy that he - that Driver 3, which was Mr. Hulse, stated that he saw No. 2 get hit. You've seen that; is that right?

1. Yes.

17. And did you simply discount or not factor that into your opinions?

1. No. I - I think what he says is - is correct. But what he's - And you'll have to ask him. But I think what he's telling you is he has seen the aftermath of that collision and then deducted that there was a crash. Based

upon the fact – the physical fact of the Escort being there would preclude him from seeing the actual collision.

17. But you don't believe that his statement was true here that he saw – that Hulse saw No. 2 get hit; you don't believe that's true; is that right?

1. I don't think he can see that contact; no.

17. You don't believe that that's true; is that right?

1. No, sir, I don't.

17. Okay. Now, you also believe – or it's your opinion that it was physically impossible for Mark Wallace to have seen the Stone vehicle hit the Travis vehicle on the first impact; is that right?

1. That's correct.

(TR 50).

**Videotaped Deposition Testimony of Mark Wallace.**

17. Now, again, at the point where the blue Ford hits the rear of the black Escort, okay, that's the point that you yell at Mr. Hulse, he slams on the brakes and he puts up his arms; is that right?

1. Right.

17. Now, when the – you saw the blue Ford actually hit the black Escort; is that correct?

1. Yes.

(TR 94).

POINTS RELIED ON

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL BECAUSE PLAINTIFF WAS PREJUDICED BY JUROR MISCONDUCT IN THAT ONE OF THE JURORS VISITED THE SCENE OF THE ACCIDENT DURING THE COURSE OF THE TRIAL

Middleton v. Kansas City Public Service Co., 152 S.W.2d 154  
(Mo. 1941)

Stotts v. Meyer, 822 S.W.2d 887 (Mo. App. 1991)

Douglass v. Missouri Cafeteria, Inc., 532 S.W.2d 811 (Mo.  
App. 1975)

## ARGUMENT

### **THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL BECAUSE PLAINTIFF WAS PREJUDICED BY JUROR MISCONDUCT IN THAT ONE OF THE JURORS VISITED THE SCENE OF THE ACCIDENT DURING THE COURSE OF THE TRIAL**

An appellate court reviews a trial court's decision regarding the prejudicial effect of juror misconduct for abuse of discretion. Mathis v. Jones Store Co., 952 S.W.2d 360, 364 (Mo. App. 1997). The appellate court may reverse the trial court's denial of a motion for new trial if "it substantially appears that the trial court committed error in finding that there was or was not juror misconduct or was or was not prejudicial impact upon the verdict as a result of such misconduct." Stotts v. Meyer, 822 S.W.2d 887, 891 (Mo. App. 1991). "Where the trial court has refused to grant a new trial on account of alleged misconduct, the revision of the appellate court will be exercised more freely than where a new trial has been granted." Fitzpatrick v. St. Louis-San Francisco Railway Co., 327 S.W.2d 801, 808 (Mo. 1959).

The only issue before this Court is whether the trial court erred in finding that Plaintiff was not prejudiced by Juror Zink's misconduct in visiting the scene of the accident during the course of the trial. There is no question before this Court regarding the propriety of the trial court having heard Juror Zink's testimony. Nor is there any question before this Court as to whether Juror Zink's visit to the scene of the accident

constituted misconduct.

1. There Is No Issue in this Case Regarding the Admissibility of Juror Zink's Testimony Because There Was No Objection to Juror Zink's Testimony at the Time it Was Offered into Evidence.

There is no issue in this case regarding the propriety of the trial court having considered Juror Zink's testimony. The general rule in Missouri is that a juror's testimony may not be used to impeach the jury's verdict. Kemp v. Burlington Northern Railroad Co., 930 S.W.2d 10, 13 (Mo. App. 1996). However, Missouri courts have consistently recognized that the prohibition regarding juror testimony is based on a juror's incompetence to impeach a jury's verdict, and that a party who fails to timely and properly object to such testimony waives all right to complain of the consideration of such testimony. See, e.g., Cook v. Kansas City, 214 S.W.2d 430, 434 (Mo. 1948) (Noting that juror testimony is generally inadmissible "unless the [opposing party] failed to timely and properly object to the juror doing so and thereby in turn waived the incompetency of the juror to impeach the verdict."); Stotts v. Meyer, 822 S.W.2d 887, 890 (Mo. App. 1991) ("[W]here the opposing party permits the introduction of a juror's statement or admission as to juror

misconduct, without raising an objection to the same, that party waives all right to complain, and on appeal will not be heard to say it was improper." ).<sup>2</sup>

In this case, there was absolutely no objection to the testimony of Juror Zink. Defendants Hulse and Apex have previously asserted that they stated an objection to Juror Zink's testimony in Defendant Hulse's suggestions in opposition to Plaintiff's motion for new trial, in which they stated: "Plaintiff's allegation of juror misconduct in the present case is simply an improper attempt to impeach the jury's verdict."

(LF 52). This statement is insufficient to constitute an objection to Juror Zink's testimony for two reasons: (1) the statement objects to Plaintiff's allegations, not to Juror

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<sup>2</sup> Numerous other cases have also recognized that a party waives the right to complain of the admission of a juror's testimony if the party fails to make a timely and proper objection to such testimony. See, e.g., Kemp v. Burlington Northern Railroad Co., 930 S.W.2d 10, 13 (Mo. App. 1996); Hale v. American Family Mutual Ins. Co., 927 S.W.2d 522, 528 n.1 (Mo. App. 1996); Neighbors v. Wolfson, 926 S.W.2d 35, 37 (Mo. App. 1996); Edley v. O'Brien, 918 S.W.2d 898, 906 (Mo. App. 1996); State v. Walker, 783 S.W.2d 145, 149 (Mo. App. 1990); Shearin v. Fletcher/Mayo/Associates, Inc., 687 S.W.2d 198, 203 (Mo. App. 1984).

Zink's testimony; and (2) this statement was made before Plaintiff had even attempted to offer Juror Zink's testimony into evidence.

The above-noted statement clearly does not constitute an objection to Juror Zink's testimony in that it does not even mention Juror Zink's testimony. The above-noted statement claims that "Plaintiff's allegation of juror misconduct . . . is . . . improper." The subject of the statement is "Plaintiff's allegation" and not Juror Zink's testimony. Thus, the statement could not possibly constitute an objection to Juror Zink's testimony.

The above-noted statement also fails as an objection to Juror Zink's testimony because Juror Zink's testimony had not been offered into evidence at the time this statement was made. In an analogous situation, this Court has held that motions in limine do not preserve an issue for appeal and that a party must object at the time evidence is offered during a case in order to preserve the issue for appeal. See, e.g., State v. Copeland, 928 S.W.2d 828, 848 (Mo. Banc 1996). While the above-noted statement was made in suggestions in opposition to a motion for new trial, rather than in a motion in limine, the principle is the same. A party cannot preserve an evidentiary issue for appeal merely by objecting to a certain type of evidence before that type of evidence has ever been offered. Rather, in order to preserve an evidentiary issue for appeal, the opposing party must object at the time that the evidence is offered.

It is clear that, at the time Defendant Hulse made the above-noted statement, Plaintiff had not made any attempt to offer Juror Zink's testimony into evidence. Indeed, in his suggestions in opposition, Defendant Hulse specifically stated that Plaintiff had not offered any affidavit or other statement of Juror Zink into evidence. (LF 52). When Plaintiff first offered Juror Zink's testimony as evidence at the hearing on Plaintiff's motion for new trial, Defendants Hulse and Apex made no objection to that testimony. (TR 56-59). By failing to object to Juror Zink's testimony at the time it was offered into evidence, Defendant's Hulse and Apex waived their right to complain regarding the trial court's consideration of that evidence. Cook, 214 S.W.2d at 434; Stotts, 822 S.W.2d at 890; Shearin, 687 S.W.2d at 203.

**II. There Is No Issue in this Case As To Whether Juror Zink's Visit to the Scene of the Accident Constituted Juror Misconduct Because Missouri Law Clearly Holds That a Juror Commits Misconduct by Seeking Extrinsic Evidence and Because the Trial Court Held That Juror Zink's Visit to the Accident Scene Constituted Misconduct.**

This Court has long recognized that an attempt by a juror to secure information other than that adduced at trial constitutes juror misconduct that can warrant setting aside a verdict. Evans v. Klusmeyer, 256 S.W. 1036, 1039 (Mo. 1923). More specifically,

Missouri courts have held that a juror's visit to the scene of an accident constitutes juror misconduct. Stotts v. Meyer, 822 S.W.2d 887, 891 (Mo. App. 1991). In Middleton v. Kansas City Public Service Co., 152 S.W.2d 154 (Mo. 1941), this Court accepted without question the trial court's conclusion that a juror committed misconduct by attempting to obtain evidence other than that adduced at trial. Id. at 157-58. These cases indicate that when a juror visits the scene of an accident, this action will generally be considered juror misconduct, and a trial court's finding that a juror's visit constitutes misconduct will be accepted by the appellate court.

In this case, there is no question that Juror Zink visited the scene of the accident during the course of the trial. Furthermore, the trial court specifically found that Juror Zink's visit to the accident scene constituted misconduct. (TR 61). In light of these facts, there is no issue in the instant case as to whether Juror Zink's visit to the scene of the accident constituted misconduct. As the trial court clearly stated, the only issue to be considered in determining whether to grant Plaintiff's motion for new trial is whether Plaintiff was prejudiced by Juror Zink's misconduct. (TR 61).

### **III. Defendants Hulse and Apex Failed to Meet Their Burden of Establishing That Plaintiff Did Not Suffer Any Prejudice as a Result of Juror Zink's**

## **Misconduct.**

As Plaintiff has explained above, the only issue before this Court is whether Juror Zink's misconduct resulted in prejudice to Plaintiff. This issue breaks down into two primary components: (1) a determination of which party bears the burden of establishing that prejudice does or doesn't exist, and (2) a determination of whether that party has met their burden.

1. Once it has been established that a juror engaged in misconduct by visiting an accident scene, prejudice is presumed and the burden shifts to the opposing party to show that no prejudice resulted from the juror misconduct.

A court must find that a juror's misconduct has prejudiced a party before the court can order a new trial on the basis of juror misconduct. Yoon v. Consolidated Freightways, Inc., 726 S.W.2d 721, 723 (Mo. 1987). However, once a party has established that juror misconduct occurred, the burden shifts to the opposing party to show that no prejudice resulted from the juror misconduct. Middleton v. Kansas City Public Service Co., 152 S.W.2d 154, 158 (Mo. 1941) (Holding that once a party had established that juror misconduct occurred, "[t]he burden of evidence shifted to [the opposing party] to show that there was

in fact no prejudice."); Kennedy v. Bi-State Development Agency, 668 S.W.2d 260, 262-63 (Mo. App. 1984) ("The presence of juror misconduct shifts the burden of proof to [the opposing party] to show there was no prejudice."). Furthermore, this Court has recognized that, when a juror actively seeks information other than that adduced at trial, prejudice must be presumed from such conduct. Middleton, 152 S.W.2d at 158.

The leading case concerning a juror's misconduct in seeking information other than that adduced at trial is Middleton v. Kansas City Public Service Co. The Middleton case involved an action for damages for personal injuries arising from a collision between a street car and an automobile. Id. at 155.

During the course of the trial, one of the jurors visited various used car establishments looking for a vehicle that was similar to the vehicle involved in the collision so he could examine the measurements of that similar vehicle. Id. at 156-57. This Court stated as follows regarding the juror's conduct:

Such conduct has been termed reprehensible conduct. . . . We think the conduct

shown, evidencing a disposition not to be governed by the evidence adduced in

court, was such that prejudice to defendant, the losing party, must be presumed.

. . . It is presumed that error is harmful, unless it is clearly shown to be otherwise.

\* \* \*

Here the juror was actively seeking independent information apparently for the

purpose of enabling him to arrive at a verdict. His conduct discloses an

affirmative purpose to reject the evidence in the record and get information

outside the record. . . . Prima facie such conduct must be presumed to have

influenced the verdict to the prejudice of [the opposing party]. There was,

prima facie, a showing of prejudice.

Id. at 158-60. While the Middleton case involved a juror's search for a similar vehicle rather than a juror's visit to an accident scene, the court in Douglass v. Missouri Cafeteria, Inc., 532 S.W.2d 811 (Mo. App. 1975), held that the Middleton analysis is controlling in a situation in which a juror has visited an accident scene. Id. at 813.

In a more recent case, the court held that a juror's visit to the scene of an accident resulted in prejudice. Stotts v.

Meyer, 822 S.W.2d 887 (Mo. App. 1991). The Stotts case involved an action for personal injuries resulting from an automobile accident. Id. at 888. During the course of the trial, one of the jurors visited the scene of the accident for the purpose of verifying evidence that had been presented at trial. Id. The court acknowledged that several of the other jurors had admitted during voir dire that they were familiar with the accident scene and that the juror in question had only examined the accident scene from a distance. Id. at 891. However, the court concluded that these factors did not mitigate the prejudice that resulted from the juror's purposeful visit to the accident scene to verify information obtained at trial. Id. The court held that the juror's independent search for information resulted in prejudice. Id.

The decisions in Middleton, Stotts, and Douglass establish that a jury's verdict should be based solely on information adduced at trial. As this Court has long recognized, "[t]he legal limit of a jury's information upon which to base their action is the evidence adduced at the trial." Evans v. Klusmeyer, 256 S.W. 1036, 1039 (Mo. 1923). When a juror goes beyond the legal limit, by seeking information other than that adduced at trial, prejudice should be presumed.

Defendants Hulse and Apex have implied, in their

suggestions in opposition to Plaintiff's motion for new trial and in their briefing in the underlying appeal, that the Middleton decision should no longer be considered good law. Plaintiff absolutely disagrees with any such contention. The presumption of prejudice adopted in Middleton is both proper and necessary to protect the integrity of the jury-trial system.

As this Court noted in Middleton, when a juror engages in affirmative misconduct by actively seeking evidence other than that adduced at trial, this conduct shows a disposition of the juror not to be governed by the evidence adduced at trial and prejudice must be presumed. Middleton, 152 S.W.2d at 158-60.

The policy underlying this presumption is self evident. If prejudice were not presumed when a juror actively seeks evidence other than that adduced at trial, it would be almost impossible for the party seeking a new trial to establish the existence of such prejudice. Thus, absent the presumption, even the most egregious juror misconduct would not warrant a new trial. This result is contrary to the fundamental underpinnings of the jury-trial system.

It is also important to remember the serious nature of the misconduct that is at issue in this case. This is not a case where the jurors discussed the evidence that was adduced at

trial at an improper time. Nor is this a case where a juror innocently passed by or through an accident scene in the course of her daily travel. This is a case in which a juror actively sought to obtain evidence other than that adduced at trial.<sup>3</sup> It is undisputed that Juror Zink went to the accident scene during a break in the trial for the distinct purpose of obtaining information that pertained to the testimony she had heard at trial. (TR 57-58). As this Court recognized in Middleton, this type of behavior is among the most egregious juror misconduct because it evinces a disposition of the juror not to be governed by the evidence adduced at trial. Middleton, 152 S.W.2d at 158.

In their motion for transfer, Defendants Hulse and Apex argue that, pursuant to the rule set forth in Middleton, "virtually every visit by a juror to an accident scene during trial, no matter how innocent, would result in a new trial." (Defendant's Application for Transfer, p. 7). The Defendants further argue that "[i]n future lawsuits that are tried in rural counties, where the accident scene is nearby, jurors will almost invariably drive through that scene in the course of their daily routine. Under the [appellate court's] ruling, those trips to

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<sup>3</sup> Juror Zink specifically stated that her visit to the accident scene "helped [her] better to understand all the testimony." (TR 57-58).

the accident scene will create a presumption that prejudicial misconduct has occurred, thereby necessitating a new trial.”

(Defendants’ Application for Transfer, p. 7). These arguments are disingenuous at best.

The obvious response to these arguments is that, in instances in which a juror innocently passes through an accident scene, there can be no prejudice because there is no misconduct. The mere act of driving through an accident scene in the course of a juror’s daily routine would not constitute misconduct and Plaintiff has never alleged that it would. That is not the factual scenario that is at issue in this case. It is undisputed that Juror Zink purposefully went to the accident scene during a lunch break in the course of the trial in order to obtain information pertaining to the testimony that was being presented at the trial. (TR 57-58). This is not a case in which a juror innocently wandered upon the scene of the accident.

Defendants Hulse and Apex have also argued in their motion for transfer that the presumption adopted in the Middleton decision is nearly impossible to overcome. While Plaintiff does not concede that it would be impossible to overcome this presumption, Plaintiff agrees that it would be very difficult to overcome this presumption in this case due to the fact that Juror Zink’s misconduct involved an attempt to obtain outside evidence relating to an issue that was pivotal in the trial. However, Plaintiff contends that the presumption of prejudice should be very difficult to overcome in order to properly protect the integrity of the jury-trial system.

When a juror actively engages in misconduct by seeking evidence other than that adduced at trial, the validity of the jury deliberations and the resulting verdict is highly questionable. It is nearly impossible to prove that the juror's misconduct did or did not actually influence the jury's verdict. Recognizing this dilemma, Missouri courts have consistently held that it is not "necessary that it be conclusively shown that members of the jury were actually influenced for that would seldom be possible." Fitzpatrick, 327 S.W.2d at 807; Kennedy, 668 S.W.2d at 262. The presumption of prejudice recognized in Middleton exists for the very reason that it is extremely difficult, if not impossible, to establish with certainty the influence that juror misconduct has on a jury. It may be that the presumption of prejudice can only rarely be overcome, but this does not mean that the presumption is improper. The presumption serves to protect the integrity of the jury-trial system and it is entirely proper that the presumption is extremely difficult to overcome.

There is no question that Juror Zink actively sought information other than that adduced at trial. In the hearing on Plaintiff's motion for new trial, Juror Zink acknowledged that, in light of the testimony presented at trial, she had questions regarding the sight distance that Defendant Hulse had at the scene of the accident. (TR 57). More specifically, Juror Zink indicated that she wanted to examine the incline of the road because the witnesses at trial had discussed the incline of the road. (TR 57). Juror Zink further indicated that she couldn't remember there being an incline at the scene of the

accident and that going to see the incline of the road helped her to understand the witness testimony. (TR 57-58). Juror Zink stated that she “used [the information from the visit] to understand what [she] was being told,” and that her visit to the scene “helped [her] better to understand all the testimony.” (TR 57-58).

It is understandable that Juror Zink had questions regarding the incline of the road and the effect that this incline had on Defendant Hulse’s sight distance, because this issue was the subject of conflicting testimony at the trial. The following points were addressed in the testimony at trial:

- **Dr. Bruno Schmidt** - Plaintiff’s accident reconstruction expert, Dr. Bruno Schmidt, acknowledged on cross examination that Defendant Hulse was going on an uphill incline as he approached the scene of the accident, but indicated that he believed Defendant Hulse could have seen the first collision in time to have reacted more appropriately to that collision. (TR 22).
- **Robert S. McKinzie** - During direct examination, defense expert Robert S. McKinzie indicated that he believed the slope of the highway affected Defendant Hulse’s ability to perceive the first collision because Mr. Hulse was trying to perceive an event that occurred above him on a vertical curve. (TR 45). Mr. McKinzie stated that Defendant Hulse could not have witnessed the first collision due to the incline of the highway. (TR 46-47). Mr. McKinzie engaged in a fairly

detailed discussion of the perception-reaction process, and concluded that Defendant Hulse did not have sufficient reaction time to avoid the second collision because of the incline of the road. (TR 48-49). On cross examination, Mr. McKinzie further testified that it was physically impossible for either Defendant Hulse, or his passenger Mark Wallace, to have seen the first collision. (TR 50).

- **Mark Wallace** - In his videotaped testimony, Mark Wallace indicated that he saw the first collision occur. (TR 94).
- **Trooper Darewin Clardy** - Trooper Darewin Clardy indicated on cross examination that Defendant Hulse told him at the scene of the accident that he had actually seen the first collision occur. (TR 35).

In light of this conflicting testimony, it is apparent that the question of what effect the incline of the highway had on Defendant Hulse's sight distance was an important issue at trial. Juror Zink visited the accident scene for the specific purpose of obtaining information pertaining to this issue. Thus, Juror Zink was actively seeking information other than that adduced at trial with regard to an issue that was hotly contested at trial. Because Juror Zink's misconduct involved a search for extrinsic information that was closely related to a significant issue that was contested at trial, prejudice should be presumed from her misconduct.

Juror Zink's misconduct in this case is analogous to the juror misconduct considered in Middleton, Stotts, and Douglass, and the analysis from those cases should

be applied in determining if prejudice resulted from Juror Zink's misconduct. The Middleton decision clearly indicates that, once juror misconduct is established, prejudice must be presumed to have resulted from such misconduct. Middleton, 152 S.W.2d at 158. Furthermore, once juror misconduct has been established, the burden shifts to the opposing party to establish that no prejudice resulted from the misconduct. Id. at 158; Kennedy, 668 S.W.2d at 262-63. Defendants Hulse and Apex bear the burden of establishing that no prejudice resulted from Juror Zink's visit to the scene of the accident. As Plaintiff explains below, defendants Hulse and Apex are unable to meet this burden.

**2. Defendants Hulse and Apex have failed to meet their burden of establishing that Plaintiff did not suffer any prejudice as a result of Juror Zink's misconduct.**

In the briefing and hearing before the trial court on Plaintiff's motion for new trial, Defendants Hulse and Apex did not attempt to rebut the presumption of prejudice, but instead argued that there was no misconduct and that Plaintiff had the burden of establishing prejudice. (LF 52) (TR 58-59, 61). While Defendants Hulse and Apex did not attempt to rebut the presumption of prejudice before the trial court, Plaintiff anticipates that Defendants Hulse and Apex will attempt to rebut the presumption of prejudice before this Court by making one or more of the following arguments: (1) the

Defendants may argue that Juror Zink did not acquire any new information from her visit to the accident scene because Juror Zink had prior experience with the accident scene; (2) the Defendants may argue that Juror Zink did not base her decision in this case upon the information that she obtained at the accident scene; and (3) the Defendants may argue that no prejudice resulted because Juror Zink did not tell the other jurors about her visit to the accident scene. As Plaintiff explains below, these arguments are either not supported by the evidence in the record, or are contrary to Missouri law regarding the treatment of juror testimony.

1. The fact that Juror Zink had prior experience with the accident scene is not sufficient to overcome the presumption of prejudice.

Defendants Hulse and Apex emphasize in their motion for transfer that Juror Zink lived near the accident scene and had previously traveled through the accident scene. On the basis of these facts, Defendants argue that Juror Zink's visit to the scene of the accident did not provide her with any new or different information. Defendants then argue that, pursuant to Rogers v. Steuermann, 552 S.W.2d 293 (Mo. App. 1997), a juror's misconduct does not warrant a new trial when the juror does not obtain any new or different information.

In Middleton, this Court recognized the line of cases which hold that prejudice does not arise when juror misconduct does not result in the juror obtaining any new or different evidence. Middleton, 152 S.W.2d at 159. However, this Court indicated that this rule was not applicable in situations in which the juror was actively seeking independent information, and held that prejudice was still presumed under such circumstances. Id. at 159-60. Thus, the rule stated in the Rogers decision is not applicable in the instant case.

Furthermore, even if the rule stated in Rogers was generally applicable in this type of case, that rule would not apply under the facts of this case because Juror Zink acknowledged in her own testimony that she did, in fact, obtain new information from her visit to the accident scene. Specifically, Juror Zink stated that she did not remember there being any incline in the road, as discussed by the experts, and that she went to the accident scene to see what incline was there. (TR 57). Juror Zink also indicated that she went to the accident scene to "refresh [her] memory" with regard to the condition of the road at that location. (TR 57).

If Juror Zink was obtaining information about the incline of the road and the general condition of the road that she did not otherwise recall, then Juror Zink was obtaining new or

different information during the course of her visit to the accident scene. The fact that she may have once known some of that information is not pertinent. The reality is that as Juror Zink heard the evidence in this case, she did not at that time possess independent knowledge regarding the incline of the road and the general condition of the road, and she went to the accident scene with the specific purpose of obtaining that information. Thus, Juror Zink obtained new or different information as a result of her visit to the accident scene, regardless of whether she had prior experience with the scene.

2. The fact that Juror Zink states that she did not base her decision on the information she obtained at the accident scene is not sufficient to overcome the presumption of prejudice.

Defendants Hulse and Apex have noted that, at several points in her testimony, Juror Zink indicated that she did not base her decision on the information that she obtained at the accident scene. However, pursuant to this Court's analysis in Middleton, Juror Zink's opinion that she was not influenced by her visit to the accident scene is not sufficient to overcome the presumption of prejudice that resulted from her misconduct.

In Middleton, the juror who had obtained outside evidence stated that this outside

evidence “did not influence his verdict nor change the result, nor did it affect the verdict of any member of the jury.” Middleton, 152 S.W.2d at 156. Despite these statements of the juror who had obtained outside evidence, the Court concluded that the presumption of prejudice still applied, stating as follows:

There was evidence, also, in support of the verdict, that the measurements made by the juror did not influence his verdict. The affidavits of other jurors were to the effect that any such measurements were not taken into consideration and that only the evidence in the record was considered by the jury in their deliberations. We think these affidavits had little probative value because of the common tendency of jurors to minimize the effect of misconduct.

Id. at 160.

This Court clearly indicated in Middleton that, even when a juror claims that the outside information he obtained did not influence his decision or that of any other jurors, this is not sufficient to overcome the presumption of prejudice. This Court further emphasized this point, stating that “[t]he only evidence in the record to overcome the prima facie case of influence and prejudice was the affidavits of the jurors themselves, which affidavits, as we have seen, have little probative value.” Id.

This Court subsequently discussed this same point in Fitzpatrick v. St. Louis-San Francisco Railway Co., 327 S.W.2d 801 (Mo. 1959), in which this Court stated: “The arousing of sympathy or prejudice is often so subtle that the person affected is the last to

become aware of it or admit its existence. Otherwise, the reaction of the average person would be resentment. It is for the court and not the jurors to say whether they are likely to have been influenced by [the occurrence in question].” Id. at 807. Thus, this Court has clearly indicated in the past that it does not view evidence obtained directly from a juror as sufficient to overcome the presumption of prejudice that results from juror misconduct.

Defendants Hulse and Apex have argued in their motion for transfer and in the briefing below that it is unreasonable to rely on Juror Zink’s testimony for purposes of establishing the existence of misconduct, while at the same time questioning the credibility of Juror Zink’s testimony as to whether her visit to the accident scene influenced her decision-making process. This argument fails to recognize that there is a distinct difference between a juror’s factual testimony and a juror’s opinion testimony. This Court addressed this very distinction in the Middleton case. In Middleton, this Court recognized that, although a juror’s factual testimony is credible to establish the type of misconduct that occurred, the juror’s opinion testimony with regard to whether the juror was influenced by the outside evidence is not credible because of the “common tendency of jurors to minimize the effect of misconduct.” Middleton, at 160. Thus, it is entirely appropriate to rely on Juror Zink’s factual testimony to establish misconduct, while rejecting Juror Zink’s opinion testimony as a basis for overcoming the presumption of prejudice.

Finally, Juror Zink's claim that her visit to the accident scene did not influence her decision is simply inconsistent with her own testimony. Juror Zink acknowledged that her visit to the scene "helped [her] better to understand all the testimony." (TR 58). Juror Zink also testified that she based her decision on "every single person that testified." (TR 59). If Juror Zink based her decision on the testimony presented at trial, and Juror Zink interpreted that testimony in light of the information she obtained at the accident scene, then Juror Zink's visit to the accident scene necessarily influenced her decision.

It is difficult to see how the act of obtaining information not adduced at trial, in order to better understand the evidence presented at trial, does not have an impact on the manner in which the juror assesses the evidence presented at trial. If Juror Zink had claimed that her visit to the scene did not provide her with any useful information, then perhaps an argument could be made that the visit had not influenced her. But, to the contrary, Juror Zink indicated that she did obtain useful information during her visit to the accident scene, and that she used this information in assessing the testimony presented at trial. As Juror Zink stated in her own words: "When you look at something on a piece of paper it just doesn't have the same visual effect as actually driving it and seeing that incline, seeing where the gravel road was, seeing where the signs are. And I went out there to understand what I was being told by all of the experts." (TR 58).

The argument that Juror Zink was not influenced by her visit to the accident scene must fail because there is no credible evidence to support this argument. The only

evidence available in this case is the testimony of Juror Zink. However, as the above-referenced cases recognize, Juror Zink is not competent to assess whether she was influenced by her visit to the accident scene. In fact, as the above-referenced cases recognize, a juror is likely to be unaware of the manner in which she has been improperly influenced and will generally be expected to deny any such influence. Thus, Juror Zink's statement that she was not influenced by her visit to the scene of the accident is not a sufficient basis for overcoming the presumption of prejudice that results from such juror misconduct.

As this Court has recognized, it is basic human nature for a juror to deny that she was influenced by extrinsic information, and such denials are not a sufficient basis for finding that no prejudice resulted from juror misconduct. While Juror Zink may deny being influenced by her visit to the scene of the accident, this denial is not persuasive.

This is especially true in light of the fact that Juror Zink's other testimony clearly indicates that she was, in fact, influenced by her visit to the accident scene.

3. The fact that Juror Zink states that she did not tell the other jurors about her visit to the accident scene is not sufficient to overcome the presumption of prejudice.

Defendants Hulse and Apex may argue that Juror Zink's visit to the accident scene

did not result in prejudice because Juror Zink has indicated that she did not tell the other juror's about her visit to the accident scene. However, this argument fails for two reasons. First, even if Juror Zink didn't directly tell the other juror's about her visit to the accident scene, this does not mean that Juror Zink's visit did not influence the other jurors through the course of Juror Zink's participation in the deliberations. Second, regardless of whether any of the other juror's were influenced by Juror Zink's visit to the accident scene, the fact that Juror Zink was apparently influenced by that visit is sufficient to require a new trial because a party is entitled to a trial by twelve impartial jurors.

While Juror Zink claims that she did not tell the other jurors about her visit to the accident scene, her statements in this regard are not sufficient to overcome the presumption of prejudice that resulted from her visit. This Court faced a similar situation in Middleton, in that the juror who had obtained outside evidence stated that "the jury immediately on retiring to deliberate, and without discussion, voted ten for plaintiff, and that the verdict was wholly and solely based upon the evidence introduced at trial." Middleton, 152 S.W.2d at 156. While the Middleton Court acknowledged the juror's contention that he had not shared outside information with the other jurors and that the jury's verdict was based solely on the evidence introduced at trial, the Court held that this evidence was not sufficient to overcome the presumption of prejudice. Id. at 160.

Pursuant to this Court's analysis in Middleton, Juror Zink's assertion that she did not tell the other jurors about her visit to the accident scene is not sufficient to overcome

the presumption that prejudice resulted from that visit. If anything, this argument is less compelling in this case than it was in the Middleton case because there is no evidence in this case that the jury voted before ever engaging in any discussion as occurred in Middleton. If the jury did engage in discussion prior to voting, there is a much greater possibility that Juror Zink's visit to the accident scene had some influence on the jury's deliberations, even if that influence was indirect.

Regardless of whether Juror Zink's visit to the accident scene influenced any of the other jurors, the mere fact that Juror Zink visited the accident scene in an attempt to obtain evidence other than that adduced at trial is sufficient to support a presumption of prejudice. Missouri courts have consistently recognized that a party is entitled to have his case tried by twelve impartial jurors. Middleton, 152 S.W.2d at 160; Stotts, 822 S.W.2d at 891; Thorn v. Cross, 201 S.W.2d 492, 497 (Mo. App. 1947). As the Stotts court stated when finding that prejudice resulted from a juror's visit to the scene of an accident:

Appellant was entitled to have his case tried by twelve impartial jurors who would base their decision on the evidence presented in court. . . . 'Even though three-fourths of them can decide a civil case, parties are entitled to have that decision, whether for them or against them, based on the honest deliberations of twelve qualified men.'

Stotts, 822 S.W.2d at 891. As these cases recognize, the court must consider the

deliberations of the jury as a whole, and even if an improper influence appears to be limited to a single juror this results in prejudice because a party is entitled to deliberation by twelve impartial jurors.

This Court has also recognized that, in the context of juror misconduct, “not only should influences that actually work evil be guarded against, but also acts that have the appearance of evil, and these the trial judge has the authority to forbid. Not only should courts rightly decide causes, but the trials should be conducted in such a manner that suspicion of wrong will not arise. Confidence in the integrity of the courts is absolutely essential to the maintaining of the state government.” Fitzpatrick, 327 S.W.2d at 807; see also Kennedy, 668 S.W.2d at 261. Thus, when a juror has obtained information other than that adduced at trial, even if the juror denies having shared that information with other members of the jury, the trial court should still guard against the appearance of impropriety by finding that prejudice resulted.

The influence of Juror Zink’s visit on the rest of the jury might well be subtle, but it is improper nonetheless. As this Court stated in Fitzpatrick: “It may well be that the jury would have reached the same result without the presence of [the improper influence], but the courts, as well as the parties, are entitled to have trials conducted without the taint of improper influence.” Fitzpatrick, 327 S.W.2d at 808. In the instant case, Plaintiff had the right to have a trial conducted “without the taint of improper influence,” and Plaintiff was denied this right due to Juror Zink’s visit to the accident

scene.

## **CONCLUSION**

The trial court erred in denying Plaintiff's motion for new trial because Plaintiff was prejudiced by Juror Zink's misconduct in visiting the scene of the accident during the course of the trial. There is no question that Juror Zink visited the accident scene and the trial court found on the record that this visit constituted misconduct. The only basis for the trial court's order denying Plaintiff's motion for new trial is a finding that Plaintiff did not suffer any prejudice as a result of Juror Zink's misconduct. Missouri law clearly states that prejudice should be presumed from juror misconduct of the type at issue in this case, and that the party opposing a motion for new trial bears the burden of establishing that no prejudice resulted from juror misconduct. Defendants Hulse and Apex have failed to establish that no prejudice resulted from Juror Zink's misconduct. Therefore, the trial court erred in denying Plaintiff's motion for new trial on the basis of juror misconduct.

For this reason, the trial court's order should be reversed and this case should be remanded for a new trial.