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Case No. SC95464

IN THE SUPREME COURT OF MISSOURI

KRISTINE SMOTHERMAN AND BRIAN SMOTHERMAN,

Plaintiffs-Appellants,

vs

CASS REGIONAL MEDICAL CENTER,

Defendant-Respondent.

SUBSTITUTE BRIEF OF RESPONDENT CASS REGIONAL MEDICAL CENTER

Appeal from the Circuit Court of Cass County, Missouri
The Honorable William B. Collins

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CASS REGIONAL MEDICAL CENTER

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JURISDICTIONAL STATEMENT

Respondent is satisfied with the Jurisdictional Statements in the Appellants' Brief.

STATEMENT OF FACTS

I. Introduction to the Case

Defendant Cass Regional Medical Center is a hospital that has sovereign immunity. (Legal File, p. 316). Plaintiffs therefore had the burden of proving as part of their case-in-chief at trial that Defendant had waived its sovereign immunity. R.S.Mo 537.600.1(2); *Maune* ex rel. *Maune v. City of Rolla*, 23 S.W.3d 802, 804 (Mo.App. S.D. 2006). Plaintiffs' sole theory of liability to meet their burden was that soap on the floor of the hospital bathroom caused Plaintiff Kristine Smotherman to fall. (*Infra, pp. 1-2*).

During opening statement, Plaintiffs' counsel informed the jury that Plaintiffs were claiming the positioning of an allegedly leaking soap dispenser caused the fall. (Tr., 260:3-8, 270:1-5).[1] In closing, Plaintiffs' counsel continued to argue that "soap on the floor" was the dangerous condition that caused the fall and gave rise to liability. (Tr., 584:14-17; 589:7-9).[2] The verdict director offered by Plaintiffs and used by the trial

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[1]In opening, the defense asked the jury to keenly listen to Plaintiffs' evidence to determine whether it established soap on the floor had caused the fall. (Tr., 277:5-10).

[2]The defense argued there was no competent evidence establishing that the soap dispenser was "continually dripping and draining" (Tr., 612:18-20) or that there was any soap on the bathroom floor at the time of the fall whatsoever, as Plaintiff Kristine Smotherman had admitted that she had no idea what caused her to fall. (Tr. 607-631).

court clearly allowed a percentage of fault to be assessed to the Defendant only if the jury believed "there was soap on the bathroom floor." (Tr., 579:13-16).[3] Plaintiffs' counsel reiterated at a post-trial evidentiary hearing that "plaintiffs' claim was that she slipped and fell on soap." (Tr. 657:7-8).

After the jury returned a verdict for the defendant, Plaintiffs filed a motion for new trial on the basis of juror misconduct in looking up the weather forecast on the internet for the day of the fall. (Legal File, p. 682, *et seq.*). After holding an evidentiary hearing at which he heard juror testimony, the Honorable William B. Collins overruled Plaintiffs' motion, finding the presumption of prejudice resulting from juror misconduct had been rebutted. (Legal File, p. 764, *et seq.*). The issue on this appeal is whether Judge Collins' decision was so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration such that he can be said to have abused his discretion in finding that one juror's misconduct and isolated comment regarding snow on the day of the fall was immaterial given the context of the trial over which he presided, and did not prejudice the verdict in this case. (*Infra*, Argument, §§I & II, pp. 20-24).

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[3]The fall occurred during an electrical outage caused by a truck hitting a telephone pole which knocked out power to half of the City of Harrisonville. The light in the bathroom in which the fall occurred was being operated by emergency power, and although Plaintiff testified she fell when that bathroom light went out, Plaintiffs did not submit poor lighting as a cause of the fall. (Tr., 43:24-44:3; 385:8-12; 483:24-484:3).

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II. The Relevant Evidence at Trial.

A. The evidence offered by Plaintiffs to support their theory that soap from a leaky soap dispenser was on the bathroom floor and caused Plaintiff Kristine Smotherman to fall was disputed at trial.

The Statement of Facts in Plaintiffs-Appellants' Brief inaccurately portrays some of their contentions as undisputed facts. For example, Plaintiffs' conclusory averment that the "soap dispenser dripped soap," (Appellants' Brief, page 4), is based on their characterization of the following cited testimony of Bailee Schlotzhauer, who worked in housekeeping at the hospital:

> Q You know, don't you, that the soap dispenser drips?
>
> A It would if somebody were to like dispense it and then take a hand over to the sink. If it did, a lot of times it hit the side of the sink. I would have to clean it off the side of the sink a lot.

(Tr., 336:20-337-1). Plaintiffs then suggested that a rust stripe on a vent under the soap dispenser must have been caused by continually dripping soap, though Ms. Schlotzhauer testified "I don't recall ever seeing soap on that vent. I recall seeing it on the side of the sink …" (Tr., 339:8-10).

Another potential cause of the rust on the vent was proffered at trial: splashing or dripping water from years of people using the soap dispenser while washing their hands. (Tr. 628:23-630:18). This apparent cause is suggested by the presence of water spots on the wall paper all around the sink and under the soap dispenser that are visible in the photograph on page 5 of Appellants' brief. (*Ibid*; Pl.'s Ex. 30, Pl's Appendix A16).

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Plaintiffs then state that Ms. Schlotzhauer testified that she had found soap on the floor of "this bathroom," (Appellant's Brief, page 4), citing her response to the question of whether she had "seen soap on the floor of a bathroom at Cass Regional Medical Center." (Tr. 339:17-20). Though Ms. Schlotzhauer responded that she had had "seen soap on the floor of a bathroom" "a couple of times," she testified that she "never had to clean [soap] off of the floor or anything like that. It was on the sink." (Tr. 359:19-23).

In addition to challenging whether the dispenser was continuously leaking soap so as to create a hazard, the defense also presented evidence that any soap dripping from that dispenser would not have landed in a place where anyone using the bathroom would have stepped. (Tr. 275:19-276:7). The soap dispenser was positioned in approximately the middle of the sink, about three to four inches back from its front edge, as opposed to being out in front of the sink. (Exs. 153A & 153B; Appendix A1-2; Tr., 397:18-24; 352:15-19). The recessed position of the soap dispenser is clearly visible in a picture submitted in evidence as Exhibit 153B. (Ex. 153B; Appendix A2). The distance between the side of the sink and the wall to which the soap dispenser was affixed was roughly four to five inches, not enough space to fit anyone the size of Mrs. Smotherman. (Tr. 354:20-355:11; *see also* Pl.'s Ex. 30 at Appendix A16 & Appellants' Brief, p. 5).

As such, given the recessed positioning of the soap dispenser, if soap were to fall from the dispenser, miss the side of the sink, and land on the floor, Mrs. Smotherman would have had to awkwardly place her foot a number of inches under the sink to reach the area where soap could have landed on the floor, which was highly unlikely. (Tr., 398:14-20; 358:18-25). However, Mrs. Smotherman testified she was standing upright as

she entered the bathroom, (Tr. 485:4-15), so there was no reasonable inference to be made that she put her foot several inches under the sink as would be necessary for her to step in the area where dripping soap could have landed before she made her way to the toilet on the other side of the bathroom. (Tr. 484-499).

B. The Credibility of Plaintiffs' Evidence that Soap on the Floor Caused Her Fall.

The credibility of Plaintiff's evidence that dripping soap caused her fall was the contested issue at trial. (Tr., 664:15-17). Challenges to the credibility of Plaintiffs' case included evidence regarding Kristine Smotherman's criminal history (about which she had inaccurately answered interrogatories and deposition questions) and further evidence demonstrating that she had continually changed her explanation as to why she had fallen both before and after the lawsuit was filed. (Tr., 473-499).

On cross-examination at trial, Mrs. Smotherman was challenged about her failure to accurately answer discovery regarding her criminal record. (Tr., 475-481). Her answer to interrogatory 16, which asked if she had pled guilty to or been convicted of any felonies or misdemeanors, stated only "Passing bad check" in "Hickory County, Missouri." (Tr., 475:18-24; Ex. 164; A5). At trial, she acknowledged that answer was incomplete, (Tr., 475:25-476:3), as she had actually been convicted of or pled guilty "six or seven" times. (Tr., 476:4-9).

She was also cross-examined with her deposition, in which she testified that she had been convicted of a felony or misdemeanor "once." (Tr., 476:14-477:4). At trial, she admitted that sworn deposition testimony had been inaccurate, as she had multiple

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convictions for passing bad checks in several counties, including a felony conviction for forgery. (Tr., 476:14-477:4 *et seq. through* 481:5).

Mrs. Smotherman was then cross-examined about the basis of her claim that she had fallen due to soap being on the bathroom floor. (Tr. 481-499). She admitted that she had seen nothing amiss on or unusual about the floor either when she entered the bathroom or while she was sitting on the toilet before the lights went out. (Tr., 485:16-486:3). She testified that her feet flew out from underneath her when the lights in the bathroom went out as she was standing up after using the toilet. (Tr. 488:3-9). The evidence at trial established that, for dripping soap to reach the floor in front of the toilet, where the Plaintiff's feet were when she stood up, the soap would have had to drop at an impossibly sharp angle. (Tr. 399:14-19).

Mrs. Smotherman testified that, after her fall, she did not feel around the floor to determine what had caused her to fall. (Tr., 489:4-7). She did not recall seeing anything on the bathroom floor that caused her to fall. (Tr. 489:8-13). Nor did she have any stains on her clothes thereafter to suggest why she fell. (Tr. 489:13-17). She admitted at trial that it was fair to state she could not say what, if anything, was on the floor at the time of her fall. (Tr. 489:18-23).

The only evidence Plaintiffs offered to support their claim that soap on the floor of the bathroom caused the fall was a single comment that Kristine Smotherman attributed to a nurse in the Emergency Room ("ER") shortly thereafter. (Tr., 489:18-23). In her deposition, Plaintiff testified unequivocally that the nurse who took her to the ER after the fall had stated Mrs. Smotherman slipped on soap on the bathroom floor. (Tr., 490:3-

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11; 491:7-10). However, Plaintiff had also admitted during her deposition that nurse had no opportunity to know whether soap had been on the bathroom floor when she allegedly made that statement. (Tr. 490:12-491:6). At trial, after that nurse testified that she never made any statement about soap being on the floor, and could not have known if there was soap on the floor at the time she took Mrs. Smotherman to the ER, (Tr., 283), Plaintiff retracted her previous sworn testimony identifying that nurse as the person who said soap was on the floor. (Tr., 448:16-449:14; 490:3-10; 491:7-10; 492:12-23).

Plaintiff then admitted to the jury that she had no first-hand knowledge of anyone from Cass Regional Medical Center who knew soap was on the floor of the bathroom before she fell. (Tr., 491:11-16). She admitted that she did not know of anyone from the hospital who was in the bathroom before she used it. (Tr., 491:24-492:1). Though she maintained at trial that she heard a conversation in the ER about soap being on the bathroom floor (even though she was no longer certain it was Jill Herrig, R.N .), (Tr., 492:12-23), Plaintiff acknowledged that she was not telling the jury that someone from Cass Regional said they knew soap was on the floor before she fell. (Tr., 491:17-23).

Mrs. Smotherman was then cross-examined with her answer to interrogatory 24, which asked her to "describe the condition that you allege caused your fall, such as whether it was a foreign substance or condition of the floor/ground." (Tr. 492:24-493-13). Mrs. Smotherman's sworn interrogatory answer stated "Plaintiff could only say that it was dark and there was a slippery substance on the floor." (Tr., 493:9-17). At trial, Plaintiff admitted that interrogatory answer, which she had prepared with her attorneys and had sworn was true and accurate on November 16, 2011, said nothing about soap

being on the bathroom floor. (Tr., 493:18-21). The evidence at trial established that the first time Plaintiff ever mentioned soap as being the cause of her fall during the litigation was well into her deposition, and she changed that testimony at trial. (Tr., 489-493).

Plaintiff was then cross-examined about inconsistent statements regarding the cause of her fall that had been attributed to her by her treating physicians in the medical records. (Tr. 494-498). She first agreed that the medical record from her ER visit immediately after her fall on February 26, 2009, did not mention the word "soap." (Tr., 494:24-495:6; Ex. 175). She then confirmed that Dr. James Queenan, in his medical record of March 6, 2009, (Ex. 50), reported "The patient states that she slipped on some soap in the floor." (Tr., 495:8-496:11, quote at 495:21-23). However, she acknowledged that the day before, Dr. Thomas Hafer, in his medical record of March 5, 2009, (Ex. 108), recorded "The patient says ... she stumbled and maybe slipped on some water or something on the floor and fell." (Tr., 496:12-497:21, quote at 497:13-16). Thus, Plaintiff admitted that she had reported two different causes of her fall to two different physicians within the period of one week after the fall. (Tr., 497:22-498:11). Plaintiff then admitted that the reason for these inconsistencies was that she truly does not know what caused her fall:

Q. The reality is, from a firsthand knowledge perspective, you don't know if you slipped on soap, water or anything different?

A. Firsthand knowledge, no, I do not know.

Q. You don't know what the condition was for whatever happened, so as to cause you to fall on February 26, 2009, true?

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A. Firsthand knowledge, no, I do not.

(Tr., 498:12-18). Finally, Mrs. Smotherman admitted that she had previously suffered several other falls, some of which had resulted in injuries, explaining she had been struggling with her knees since she was 12 years old. (Tr. 498:20-499:8).

Thus, the evidence at trial demonstrated that Plaintiff had changed her explanation as to what had caused her to fall several times. (Tr. 619:14-622:11). Before filing this lawsuit, she had told one doctor that she "stumbled, maybe slipped on some water or something," but within one day she told another doctor that "she slipped on soap." (Tr. 495:8-498:18). She admitted at trial that the reality was that she did not know if she slipped on soap or water, and in fact did not know what had caused her to fall whatsoever. (Tr. 498:12-19). This is reflected in her answer to an interrogatory at the beginning of the lawsuit, in which Plaintiff stated she could "only say it was dark and there was a slippery substance on the floor." (Tr. 492:24-493:21). However, at her deposition, Plaintiff testified that the nurse who took her to the ER after the fall told the ER doctor that the patient had slipped on soap, despite the fact Plaintiff immediately admitted after making that statement that she "had no idea" how that nurse could possibly have known what had caused the fall. (Tr. 489:24-491:6). Finally, at trial, after that nurse had testified, Plaintiff recanted her deposition testimony, stating it was not that nurse, but "somebody" mentioned that she slipped and fell on soap. (Tr. 448:12-449:14; 489:24-490:11).

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C. The Jury Instructions Required the Jury to Find Soap on the Floor Caused the Fall, and Closing Arguments Focused on the Credibility of Plaintiffs' Evidence Regarding that Necessary Proposition.

The verdict director offered by Plaintiffs and given by the Court as Jury Instruction 7 stated:

> In your verdict you must assess a percentage of fault to the defendant if you believe, first, *there was soap on the bathroom floor*, and as a result, the defendant's bathroom was not reasonably safe; and second, defendant knew or by using ordinary care could have known of this condition in time to remedy such condition; and third, defendant failed to use ordinary care to remedy such condition; and fourth, such failure to use ordinary care directly caused or directly contributed to cause damage to the plaintiff.

(Tr., 560-61; 579:13-24) (*emphasis added*). During closing arguments, Plaintiffs' counsel emphasized that "soap on the floor" was the dangerous condition giving rise to liability. (Tr., 584:14-17).

Defendant's closing argument stressed that Plaintiffs had not met their burden of proving that soap on the bathroom floor had caused the fall. (Tr., 607:16-19). Defense counsel emphasized Mrs. Smotherman's changing and ever-evolving explanation as to why she fell. (Tr. 620-22). Within a week of the fall and long before the lawsuit was filed, she had reported to Dr. Hafer that "she stumbled, maybe slipped on something, some water or something on the floor." (Tr., 620:4-8) The next day, she told Dr. Queenan that she "slipped on some soap on the floor." (Tr., 620:9-11). After the lawsuit

was filed, in response to an interrogatory asking what she contended caused her to fall, Plaintiff's sworn answer said nothing about soap, stating that she "could only say it was dark and there was a slippery substance on the floor." (Tr., 620:13-20). After filing suit, she first mentioned "soap" as a possible cause of her fall during her deposition, when she claimed a specific nurse said she had fallen on soap, despite acknowledging that nurse could not possibly have known soap on the bathroom floor had caused the fall. (Tr., 620:20-621:3-13). At trial, Plaintiff not only admitted to the improbability of that evidence, the only evidence she had ever offered to suggest that soap caused her fall, (Tr., 621:14-17), she recanted that testimony after observing that nurse's denial of ever having said anything about soap being the cause of the fall. (Tr., 621:18-622:11; 627:17-628:11).

Thus, highlighting that Kristine Smotherman once again changed her continually evolving story at trial, the defense argued that Plaintiffs had not presented sufficient credible evidence to meet their burden of proving soap on the hospital's bathroom floor had caused the fall (as required to waive the Defendant's sovereign immunity). (*Supra*). Just over an hour after the jury was dismissed to deliberate, it returned a verdict signed by eleven jurors, assessing no fault in the case. (Tr., 639:7-640:6).

III. The Post-Trial Hearing on the Motion for New Trial.

Plaintiffs filed a Motion for New Trial based on juror misconduct, alleging that one juror had inappropriately conducted internet research to obtain weather data during the trial. (Legal File, p. 682). The Honorable William B. Collins held an evidentiary hearing to determine whether the juror had gathered extraneous evidence and, if so,

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whether the defendant could rebut the resulting presumption of prejudice by showing the extraneous evidence was immaterial. (Tr. 642:5, *et seq.*).

Plaintiffs initially called juror Jennifer Moehlman. (Tr., 644). She testified "There was a brief comment during deliberations made by -- I didn't remember his name but you identified him as Mr. Jacobs -- said he investigated the weather on the day of the accident back in 2009, February I believe, and that was the extent of the comment. Nobody really paid much attention to it or it was not further discussed." (Tr., 645:17-24). She testified "There were no additional conversations" by any other jurors regarding it one way or the other. (Tr., 646:14-23). She was not aware of any other juror taking steps to gather information outside of the courtroom. (Tr. 646:24-647:11).

On cross-examination, Ms. Moehlman confirmed that one juror made an offhand comment about the weather and that there was no further discussion about it whatsoever. (Tr. 648:12-16). When asked why that comment was not discussed further, Ms. Moehlman responded "Because the weather was not relevant to the case. The case was about whether Ms. Smotherman slipped on soap in the bathroom." (Tr., 647:21-25). She testified that what Mr. Jacobs had said was not relevant and had no impact on her decision whatsoever because it was "absolutely" immaterial to the issue the jury was to decide. (Tr. 648:17-649:17).

Thereafter, Plaintiffs called juror Robert Jacobs. (Tr. 656). He acknowledged that he had Googled the weather forecast for the day in question, which had called for snow, adding that he did not know how much it had snowed that day, if at all. (Tr. 659:4-8). He explained his action by saying his curiosity got to him as to why he had not heard

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about the lights going out in Harrisonville on the day in question. (Tr., 658:7-660:20). When Plaintiff's counsel suggested snow on the ground could be a possible explanation for water on the floor of the bathroom, Mr. Jacobs responded that he did not know if it had snowed or how much, though he acknowledged "I guess you could say that, but she was – she went to see her doctor." (Tr. 663:7-15).[4]

Mr. Jacobs confirmed that Mrs. Smotherman had made several different comments at various points in time regarding why she fell, testifying there were "big credibility" issues with her story throughout the trial. (Tr., 664:11-17). He felt the Plaintiffs had rated "about a zero on the credibility" scale and had not proven their point about soap on the floor. (Tr., 664:18-665:6). He testified that the weather information he obtained played no role in his decision, and he had looked at the weather because he was curious and "is just a weather person." (Tr., 665:7-24).

Plaintiffs offered no further evidence. (Tr. 667:6-8). The Defendant thereafter called several additional jurors. (Tr. 667 *et seq.*).

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[4]Plaintiff had testified that she did not enter the bathroom inside the hospital until after her appointment with her doctor had concluded, which took "twenty minutes maybe." (Tr., 435:6-8). Thereafter, she asked a nurse for the closest restroom, and was led to a bathroom near the chapel, but since its lights were not working, she was then taken down a hallway to the bathroom at issue, which did have lights. (Tr., 435:13-436:3). Thus, the evidence showed she had been in the hospital for some time.

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Juror Marcia Beck testified that she had no memory of any juror, including Robert Jacobs, saying that he Googled information about the case or what the weather was like on the day of the fall. (Tr., 668:16-23; 671:17-672:4). She had no memory of any discussion about the weather whatsoever. (Tr. 669:15-17; 672:3-4). As such, weather "was not one of the components" that affected her verdict, and had nothing to do with her decision to vote for a defense verdict, as it was immaterial. (Tr., 668:24-669:17; 672:17-25, quote at 672:21-22). She acknowledged evidence at trial established that Mrs. Smotherman had made different statements at various times regarding why she fell, questioning the credibility of her claim. (Tr., 672: 9-16). Ms. Beck testified that she based her verdict decision on whether there was soap on the floor as she was directed to do by the verdict director. (Tr. 673:8-13).

Juror Mary Laffoon testified she had no recollection of any juror talking about Googling weather during deliberations. (Tr. 675:13-17). She did not recall Mr. Jacobs saying anything about weather in her presence. (Tr., 675:13-676:1). When asked if weather had anything to do with her verdict, she testified "absolutely not," (Tr., 676:2-5), as she "did not hear any comment at all about weather," one way or the other. (Tr., 676:25-677:8). She testified the jury was "looking at the evidence about soap. We did not have any evidence that there was soap on the floor," and the jury did not discuss if something else caused her to fall. (Tr., 677:20-678:1). She acknowledged that Mrs. Smotherman had offered several different reasons for why she had fallen over the course of time. (Tr. 678:20-25). She acknowledged that Mrs. Smotherman's credibility and the credibility of her story were at issue because she made inconsistent statements as to why

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she had fallen. (Tr. 679:1-6). She testified the weather had no effect on her verdict whatsoever as it was "totally irrelevant." (Tr., 679:24-680:10).

Juror Norman Lawson, the one juror who did not join the verdict, had no memory of any juror saying that he Googled information regarding the weather. (Tr., 681:10-19). In his mind, the weather had nothing to do with what he was asked to decide and was immaterial. (Tr., 681:20-682:1). He was not aware of another juror having Googled weather information during the case, or that being mentioned one way or the other during deliberations. (Tr., 683:1-13).

Juror Larry Boucher, who was elected as the jury's foreperson, testified that the jury's deliberations focused on whether soap on the bathroom floor made it unreasonably dangerous so as to contribute to cause the fall. (Tr. 684:2-685:18). He testified that what the weather might have been outside on the day of the fall had nothing to do with the issues they were asked to decide. (Tr., 685:24-686:4). He testified that he did not render his verdict based on what the weather might have been on that date because it was "absolutely" irrelevant and immaterial to the pending issue. (Tr., 685:19-686:7). Though he did recall hearing one juror say that he had found something about the weather some place, he "didn't even comment on it because I thought it was just frivolous because, you know, ... that doesn't amount to anything anyway..." (Tr. 686:8-19). When asked if the information the other juror said mattered at all, he replied "No, less than not. It was kind of like the sun come up this morning. It was of no value at all, it was just something he'd done." (Tr., 686:20-24). He testified that other than that single comment by one juror, weather was not further discussed at all during the course of deliberations. (Tr. 686:25-

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687:3; 689:5-12). When asked if that comment had anything to do with the reason he rendered the verdict he did, he responded "Absolutely not." (Tr., 687:4-7).

Juror Debra McDowell testified that she had no memory of any juror talking about having Googled information about the weather. (Tr., 690:23-691:4). She had no recollection of Juror Jacobs saying he looked up the weather and it was supposed to snow on the day of the fall. (Tr., 691:5-9). She testified that what the weather may or may not have been played no role whatsoever in the verdict she rendered. (Tr. 691:10-13). She felt the weather was immaterial and inconsequential to her decision, and played no role whatsoever in her verdict. (Tr., 691:21-692:2).

Juror Denise MacMillan also testified that the weather on the day of the incident played no role whatsoever in her verdict. (Tr., 693:11-15). She likewise did not hear any juror indicate during deliberations that he Googled information regarding what the weather may have been on the day in question. (Tr., 693:16-21). She did recall an automobile hit a light pole to cause the lights to go out, but had no recollection of anyone saying they Googled anything. (Tr., 694:1-9). She testified the weather had nothing to do with the Plaintiff's fall and played no role in her verdict. (Tr., 694:20-695:9).

Juror Helen Stafford testified that she recalled a single, solitary comment about snow on the ground, but stated there was no discussion by the rest of the jury panel thereafter in response to that. (Tr., 697:9-18). Other than that one single, solitary comment, weather was never discussed. (Tr., 697:19-23). She testified "the weather was immaterial" and in her mind had nothing to do with the verdict that she was supposed to render one way or the other. (Tr., 697:5-8; 697:24-698:7).

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Defense counsel then offered affidavits from three jurors who could not appear at the hearing.[5] (Tr., 700). Each juror's affidavit said they had no memory of any comment about the weather made by Juror Jacobs. (Tr., 700:18-20; Affidavits of Karen Anderson, Rebecca McCorn and Warren Brixey A8-A13). Plaintiffs objected to the affidavits, and Judge Collins did not receive them. (Tr. 701).

Thus, at the post-trial hearing, nine jurors testified in person and affidavits were offered from the remaining jurors who were not available. (*Supra*). Eight of the jurors heard nothing about weather during their deliberations, while the others heard one juror make a single, isolated comment about weather during deliberations. (*Supra*). All of the non-offending jurors testified that, to the extent they heard that comment, they ignored it, as it was irrelevant to the issue in the case and immaterial given the evidence they had heard during trial. (*Supra*). All of the jurors testified the weather had no impact on their verdict. (*Supra*). Many of the jurors, after being released after they testified at the post-trial hearing, asked to re-enter the courtroom. (Tr., 701:18-20, *et seq.*). Judge Collins allowed them to do so, and then heard arguments from counsel. (*Ibid.*).

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[5]Karen Anderson was out of town for a previously planned vacation. (Tr. 700:4-7; Affidavit of Karen Anderson, A8-9). Rebecca McCorn was a teacher who was served late and did not have time to get a substitute teacher for her class. (Tr. 700:8-13; Affidavit of Rebecca McCorn, A10-11). Warren Brixey was out of town on a previously scheduled business trip. (Tr. 700:13-17; Affidavit of Warren Brixey, A12-13).

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After hearing arguments, Judge Collins indicated that he had observed the testimony of the juror witnesses who had testified in his courtroom and had judged their credibility. (Tr. 717:17-24). Though he had little doubt that Juror Jacobs had done something he was instructed not to do, Judge Collins believed the extraneous information he had interjected was immaterial, as the jury verdict director was focused entirely on the bathroom having soap on the floor, and that was the issue. (Tr., 718:5-11). Despite acknowledging the presumption of prejudice was "quite strong" in his written ruling, Judge Collins denied Plaintiffs' Motion for New Trial. (Legal File, 764, *et seq.*). He concluded the extraneous weather information was not material based on several factors, including his firsthand observation of the credibility of the juror witnesses who had testified at the post-trial hearing, the nature of the extrinsic evidence that had been introduced by the juror misconduct, consideration of all of the evidence from the trial over which he had just presided including the "dubious" and "underwhelming" nature of the Plaintiff's evidence that soap on the floor had caused her fall, and finally the Plaintiffs' verdict director, which had focused solely on soap being on the bathroom floor to establish liability. (Legal File, 766-67; Tr. 717:17-719:4).

Plaintiff appealed. (Legal File, 770). The Western District remanded for a new trial, holding "mandatory authority requires that … the opposing party must show something more than the jurors' bare assertions that their deliberations were not affected or the relative weakness of a plaintiff's case to overcome the presumption of prejudice." (*Smotherman v. Cass Regional Medical Center,* WD78111, November 10, 2015, p. 11 [hereinafter "Slip Op."]).

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POINT RELIED ON

The trial court was well within its discretion to deny the Plaintiffs' Motion for New Trial on the basis that the Defendant rebutted the presumption of prejudice resulting from one juror having Googled the weather forecast and making a single, isolated comment about potential snowfall on the day of the fall during the jury's deliberations, a comment that was not heard by most jurors and appropriately disregarded by those who did hear it, as that extraneous evidence was shown to be immaterial based not only on competent juror testimony adjudged to be credible by the trial court, but also given the underwhelming and inconsistent evidence Plaintiffs had offered to meet their burden of proving soap on the bathroom floor constituted a dangerous condition that caused the fall at issue so as to waive the Defendant's sovereign immunity.

State v. Stephens, 88 S.W.3d 876 (Mo.App. W.D. 2002)

State v. Herndon, 224 S.W.3d 97 (Mo.App. W.D. 2007)

U.S. v. Davis, 393 F.3d 540 (5th Cir. 2004)

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ARGUMENT

I. Introduction - The Extraneous Evidence Was Not Material.

The trial court was well within its discretion to deny the Plaintiffs' Motion for New Trial on the basis that the Defendant rebutted the presumption of prejudice resulting from one juror having Googled the weather forecast and making a single, isolated comment about potential snowfall on the day of the fall during the jury's deliberations, a comment that was not heard by most jurors and appropriately disregarded by those who did hear it, as that extraneous evidence was shown to be immaterial based not only on competent juror testimony adjudged to be credible by the trial court, but also given the underwhelming and inconsistent evidence Plaintiffs had offered to meet their burden of proving soap on the bathroom floor constituted a dangerous condition that caused the fall at issue so as to waive the Defendant's sovereign immunity.

"While every party is entitled to a fair trial, as a practical matter, our jury system cannot guarantee every party a *perfect* trial." *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 87 (Mo.banc 2010). "Courts should not overturn a jury verdict lightly. Trials are costly - for the litigants, the jurors and taxpayers." *Matlock v. St. John's Clinic, Inc.*, 368 S.W.3d 269, 277 (Mo.App. S.D. 2002). This Court should not lightly

disregard the diligent service of eleven jurors simply because a twelfth juror made a poor, yet inconsequential, decision to act in contravention of the trial court's instructions.

Nor should this Court disregard the Honorable William B. Collins' finding that the jury was not "subjected to improper influence in the form of extraneous weather data for the day of the fall" as contended by Plaintiffs. (Appellants' Brief, p. 22). Judge Collins' ruling should be afforded the deference it deserves, as he appropriately applied the applicable legal standards and judiciously considered all of the competent evidence before determining the extraneous information was immaterial and did not prejudice the jury's verdict in this case.

Although Juror Jacobs Googled a weather forecast calling for snow on the date of the fall, thereby creating a presumption of prejudice, it was clearly established that most of the jurors did not hear his single, isolated comment about his conduct during deliberations, and that those who did hear it appropriately ignored it. (*Statement of Facts*, §III, at pp. 11-17). Judge Collins was convinced as to the credibility of those jurors who faithfully executed their civic duty when they testified that the single, isolated improper comment, to the extent it was heard, had no relevance or impact on their individual decisions, as it was irrelevant and immaterial. (Tr., 717:22-718:4; Order Denying Plaintiffs' Motion for New Trial, ¶¶1 & 4, Legal File 765-66).

Judge Collins did not base his decision solely on their testimony, however, he also determined himself that the extraneous weather information was immaterial to the consequential facts and critical issue in the trial over which he had just presided. (Tr., 717:17-718:4; Order Denying Plaintiffs' Motion for New Trial, ¶5, Legal File 766). He

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knew well that the issue presented to the jury by the verdict director was solely whether soap on the bathroom floor constituted a dangerous condition that caused Kristine Smotherman to fall, and that the credibility of the evidence Plaintiffs offered to meet their burden of proof was underwhelming. (Tr., 718:5-11; Order Denying Plaintiffs' Motion for New Trial, ¶¶5 & 7, Legal File 766-67).

Based on these factors, Judge Collins ruled the evidence as a whole, not only the juror testimony at the post-trial hearing but also the evidence from the entire course of the trial proceedings, demonstrated there was no improper influence that prejudiced the jury's verdict, as the extraneous information was immaterial. (Tr., 718:5-6; Order Denying Plaintiffs' Motion for New Trial, ¶¶5, Legal File 766). His ruling was in accord with Missouri law.

"The mere proof of juror misconduct in obtaining extraneous evidence … does not automatically entitle a movant to a new trial. *State v. Stephens,* 88 S.W.3d 876, 883 (Mo.App. W.D. 2002). Though it raises a presumption of prejudice, the trial judge is to decide whether the non-movant has shown the jurors were not subject to improper influence as a result of the misconduct so as to prejudice the verdict. *Id.* "[A] court must find that the juror misconduct prejudiced a party before it may … order a new trial. *Stotts v. Meyer*, 822 S.W.2d 887, 890 (Mo.App. E.D. 1991). An important factor in determining whether prejudice resulted from the juror misconduct is whether the evidence was "material." *Stephens,* 88 S.W.3d at 883.

Clearly, Judge Collins is in the best position to determine whether the juror misconduct in this case was material so as to have prejudiced the verdict. He not only

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presided over the trial of this case, but also heard testimony from several jurors that the improper, isolated remark of one juror was not heard by most of them and had no impact on any of their deliberations. This Court should defer to his decision that the single comment about the possibility of snow on the day of the fall was not material in the overall context of this case and did not prejudice the verdict rendered by the jury.

Appellants' desperate effort to argue the weather had some logical connection to the consequential facts of this case does not mandate a conclusion of materiality or prejudice. Contrary to their contention, the defense did not claim that water as opposed to soap on the floor was the cause of Mrs. Smotherman's fall. Rather, the defense demonstrated that Mrs. Smotherman herself had been quite inconsistent about the cause of her fall, culminating in her critical admission at trial that she truly did not know what caused her to fall. (Tr. 498:12-19). Thus, the necessary evidentiary premise of the Plaintiffs' theory of the liability in this case -- that soap on the bathroom floor caused her to fall -- was not established, as the Plaintiffs' case inherently lacked credibility given Mrs. Smotherman's own conflicting statements and ever-changing explanations.

Plaintiffs had the burden of proving in their case-in-chief that Defendant had waived its sovereign immunity because Mrs. Smotherman's injury resulted from a "dangerous condition of public property" per R.S.Mo 537.600.1(2). (Legal File, p. 316). To meet this burden, Plaintiffs relied solely on the argument that soap on the bathroom floor caused the fall. (*Supra,* §I, pp. 1-2). Thus, the critical issue at trial was whether Plaintiffs had met their burden of proving that soap on the floor of the bathroom inside the hospital had caused her fall. Judge Collins' ruling that the offending juror's

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extraneous comment regarding the possibility of snow on the day of the fall was not material to that question was not only well within his discretion, it was spot-on. Whether or not the Appellants' agree is immaterial, as Judge Collins' decision simply cannot be said to be "so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration" or that it "offends the logic of the circumstances," as is required for appellate reversal. *Williams v. Daus*, 114 S.W.3d 351, 365-66 (Mo.App. S.D. 2003).

II. Standard of Review

"A motion for new trial, based on a juror's acquisition of extraneous evidence, is left to the sound discretion of the trial court." *Williams*, 114 S.W.3d at 365. "A trial court's ruling on a motion for new trial based on juror misconduct is given great weight, and the appellate court may reverse that ruling only 'if it appears that the trial court abused its discretion in ruling on the issue of extraneous evidence or the issue of prejudice.'" *Id.* "This is for the reason that … the trial judge participated in the trial, and knew what took place, much of which cannot be preserved in any bill of exceptions or record." *Aeolian Co. of Mo. v. Boyd*, 138 S.W.2d 692, 695 (Mo.App. 1940). "Since this determination is vested in the discretion of the trial court it is reviewed under the abuse of discretion standard of review." *Williams*, 114 S.W.3d at 366. "Abuse of discretion occurs 'when the ruling offends the logic of the circumstances or was so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration." *Id.* at 365-66. "If reasonable persons can differ about the propriety of the

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action taken by the trial court, then it cannot be said that the trial court abused its discretion." *Id.* at 366.

III. Arguments and Authorities

"The mere proof of juror misconduct in obtaining extraneous evidence … does not automatically entitle a movant to a new trial." *Stephens,* 88 S.W.3d at 883. "[E]ven when juror testimony is competent to impeach a verdict, it is incumbent upon the trial judge to decide whether the juror misconduct complained of prejudiced the verdict." *Williams*, 114 S.W.3d at 366. "In determining whether prejudice resulted from alleged juror misconduct due to a juror's obtaining extraneous evidence, an important factor is the materiality of that evidence. Immaterial evidence is not prejudicial. To be 'material,' evidence must '[h]av[e] some logical connection with the consequential facts.'" *Stephens,* 88 S.W.3d. at 883-84 (citations omitted). When assessing whether extrinsic evidence was material and could improperly influence the jury, courts should consider the content of the material, the manner in which it was brought to the jury's attention, and the weight of the evidence supporting the verdict. *See U.S. v. Davis*, 393 F.3d 540, 549 (5th Cir. 2004).

A. Judge Collins Did Not Abuse His Discretion When Finding the Extraneous Evidence Was Immaterial.

As will be discussed hereafter, Missouri case law supports appellate reversal of a trial court's order regarding juror misconduct when the trial court failed to properly apply the law or when there is an insufficient factual record to provide a basis for the judge's decision. The record in this case demonstrates that Judge Collins' Order Denying

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Plaintiff's Motion for New Trial (hereinafter "Order", Legal File, 764, *et seq.*) suffers from neither infirmity.

Judge Collins' Order clearly reflects that he understood the applicable law. After he found that Juror Jacobs had wrongly consulted the internet during the trial to inquire as to the weather on the date of the fall, Judge Collins stated the burden shifted to the Defendant to overcome a rebuttable presumption of prejudice, which he recognized was "quite strong" per *Travis v. Stone*, 66 S.W.3d 1, 4, 6 (Mo.banc 2002). (Order, ¶1, Legal File, 765-66). Although he received Juror Jacobs' testimony to establish that he had obtained extrinsic evidence, Judge Collins gave no weight to Mr. Jacobs' testimony that his action did not affect his decision to support the verdict, citing *Middleton v. Kansas City Public Service Co.*, 152 S.W.2d 154, 158 (Mo. 1941) and *Travis*, 66 S.W.3d at 4. (Order, ¶3, Legal File, 765-66).

Judge Collins' Order further reflects that his decision regarding whether Juror Jacobs' actions prejudiced the verdict was far from arbitrary, as he clearly based his decision on an analysis of the evidence presented not only from the jurors at the post-trial hearing, but also in consideration of all the evidence presented at trial. (Order, ¶¶ 4-7, Legal File, 766-67). After concluding that Plaintiffs established Juror Jacobs had made a single, isolated comment regarding his internet investigation of the weather during jury deliberations, Judge Collins found testimony from the other jurors that they either did not hear Juror Jacobs' improper comment or appropriately paid no attention to it was credible. (Order, ¶¶ 4 & 6, Legal File, 766, 767). Judge Collins further found the non-offending juror testimony that Juror Jacobs' comment was not further discussed during

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deliberations because it was immaterial to the case was credible, based not only on his observation of their testimony at hearing, but also given his knowledge of the evidence that had been presented at the trial over which he had presided. (Order, ¶ 4, Legal File, 766).

Thus, it is clear that Judge Collins did not commit error by improperly applying the law, such as by placing the burden on the moving party to show prejudice, as the trial court had incorrectly done in *Middleton*, 152 S.W.2d at 158. Nor did he merely enter an order overruling the motion for new trial without indicating the basis for his ruling as the trial courts had improperly done in *McBride v. Farley*, 154 S.W.3d 404, 410 (Mo.App.S.D. 2004), *Travis*, 66 S.W.3d at 2, and *Middleton*, 152 S.W.2d at 158. It is clear that Judge Collins' conclusion that there was no prejudice was not improperly based solely on the testimony of the offending juror, as the trial court had improperly done in error in *Travis*. 66 S.W.3d at 2. Finally, Judge Collins did not simply deny the motion without having developed facts from sufficient interrogation of the jury, as the trial court had failed to do after an allegation of misconduct was levied against a third party in *Fitzpatrick v. St. Louis-San Francisco Railway Company*, 327 S.W.2d 801, 808 (Mo. 1959) (a case which did not involve juror misconduct).

To the contrary, Judge Collins conscientiously exercised his discretion by considering not only the jurors' testimony, but also the consequential facts from the evidence proffered at the trial over which he had presided as a whole. (Order, ¶5, Legal File, 766; Tr., 717-18). He determined that the critical issue in the case was whether or not there was soap on the floor of the bathroom that constituted a dangerous condition

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and caused Kristine Smotherman to fall. (Order, ¶5, n.2, Legal File, 766). He considered the Plaintiffs' verdict director, which required a finding of soap being on the bathroom floor in order to hold the Defendant at fault, noting even the Plaintiffs' Motion for New Trial stated that was the "critical" issue at trial. (Order, ¶5, n.2, Legal File, 766 – *citing* Plaintiffs' Motion for New Trial, p. 8, Legal File, 689). His written Order clearly reflects that, after carefully considering the evidence as a whole, he logically and reasonably concluded that Juror Jacobs' wrongful action and isolated comment regarding the potential of snow on the date of the fall was not material to the consequential facts in the case impacting the issue of whether or not Plaintiffs had met their burden of proving soap on the bathroom floor constituted a dangerous condition and caused the fall.

Judge Collins supported his conclusion in part by observing it was uncontested that Plaintiff Kristine Smotherman had been inside the hospital for some time prior to falling in the bathroom at issue, which was located in the interior of the hospital building, obviously reducing the possibility of snow falling outside having a material relation to the fall. (Order, ¶5, Legal File, 766). He further noted that other possible causes of the fall had been suggested or referenced in evidence that had properly been received during the course of the trial. (*Ibid*). He logically concluded that any reasonable inferences from the duly received evidence rendered Juror Jacobs' isolated interjection of possible snowfall on the day of the fall to be not only immaterial, but also cumulative to any consequential fact at the trial, thereby negating any reasonable conclusion that the extraneous evidence could have prejudiced the verdict. (*Ibid*).

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When making his decision, Judge Collins analyzed three factors (the content of the material, the manner in which it was brought to the jury's attention, and the weight of the evidence supporting the verdict) to assess whether the extrinsic evidence improperly influenced the jury per *U.S. v. Davis*, 393 F.3d at 549. (Order, ¶¶ 6 & 7, Legal File, 767). Based on his previous findings, he concluded that "neither the content of the extraneous material nor the manner in which it was presented to the jury supports ordering a new trial." (Order, ¶ 6, Legal File, 767). He held the third factor for consideration, the weight of the evidence supporting the verdict, also favored denying the motion for new trial, as Plaintiffs' evidence that soap on the bathroom floor had caused the fall was "underwhelming," and the weight of the evidence supported the verdict rendered by the jury. (Order, ¶ 7, Legal File, 767). Although the propriety of considering the third factor was questioned by the Western District given this Court's ruling in *Travis* [Slip Op. 9], it should be noted that the weight of the evidence element has been recognized in Missouri as a valid factor for consideration. *See Ullom v. Griffith*, 263 S.W 879, 880 (Mo.App. 1924) (concluding its decision on the prejudice issue by stating "this is especially so where the evidence offered on the part of plaintiff was so meager, as in the instant case").

Thus, Judge Collins' Order clearly demonstrates his conclusion that the extraneous evidence was immaterial and did not prejudice the verdict was based on the appropriate application of the law of Missouri and careful consideration of the case as a whole, materially distinguishing it from the cases relied upon by Appellants. As it is readily apparent that Judge Collins' denial of the Plaintiffs' Motion for New Trial was far from arbitrary, this Court should affirm his decision and allow the verdict to stand.

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B. Trial Courts Can and Should Consider Evidence from Non-Offending Jurors When Evaluating Materiality and Prejudice.

Appellants argue that the presumption of prejudice is so strong that it cannot be overcome by the testimony of any juror, even those who were not guilty of any misconduct. (Appellants' Brief, p. 32 *et seq.*). The Western District of the Court of Appeals agreed, remanding this for a new trial despite Judge Collins' findings by holding that "mandatory authority requires that … the opposing party must show something more than the jurors' bare assertions that their deliberations were not affected or the relative weakness of a plaintiff's case to overcome the presumption of prejudice." [Slip Op. 11].

Defendant would first comment that, as a matter of public policy, it seems reprehensible to automatically presume citizens who dutifully executed their civic responsibilities as jurors, and were by no means guilty of misconduct, should be given no opportunity to demonstrate not only the diligence of their service, but also the propriety of their verdict. Fortunately, Missouri case law does not so hold. Rather, it clearly contemplates the ability of a trial judge to receive testimony from jurors in cases in cases of juror misconduct. *See, e.g., Williams*, 114 S.W.3d at 68-69; *Fitzpatrick*, 327 S.W.2d at 808.

The cases cited by Appellants to support their argument do not mandate the harsh result they desire. They first cite *Middleton*, (Appellants' Brief, p. 24), in which this Court observed:

> Of course, if from the facts in the record, this court on appeal can affirmatively say that no prejudice resulted to defendant from the

misconduct shown, a reversal might be unnecessary, even though it appears that the trial court did not exercise a sound judicial discretion or rule the motion on its merits, as to prejudice or no prejudice, because of the error of law.

152 S.W.2d at 160. This quotation clearly reflects that this Supreme Court recognized in *Middleton* that courts had the ability to hold extraneous evidence was immaterial when that conclusion is supported by appropriate facts in the record. Thus, *Middleton* actually supports the ability of a trial court to find there was no prejudice, as Judge Collins did in this case, and does not *per se* disqualify considering testimony from non-offending jurors when making that determination.

Middleton is materially distinguishable from this case for several reasons. First and foremost, the trial court in *Middleton* did not rely on credible testimony from jurors when determining the issue of prejudice, but rather was presented only with nine affidavits "written in the same form." 152 S.W.2d at 160. Conversely, Judge Collins heard live testimony from and evaluated the credibility of several non-offending jurors in the light of all evidence from the recent trial when making his decision. Second, and perhaps most significantly, the trial court in *Middleton* committed legal error by placing the burden of proving prejudice on the wrong party. 152 S.W.2d at 158. (*Supra*, p. 27). Unlike the trial court in *Middleton,* Judge Collins appropriately shifted the burden of proving that no prejudice occurred to the non-moving party. Third, not only did the trial court in *Middleton* misapply the law, there "was no finding by the court that the misconduct shown did not influence the verdict, nor that defendant was not prejudiced

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thereby, unless such may be inferred, under the circumstances here, from the fact that the court overruled the motion." 152 S.W.2d at 158. In other words, the trial court in *Middleton* did not provide a record supporting the sufficiency of its investigation before determining there was no prejudice. (*Supra*, p. 27). Conversely, Judge Collins issued a well-reasoned written order that expressly explained the basis for his decision that the extraneous evidence was immaterial and no prejudice resulted from the proven juror misconduct. These material factors that caused this Court to hold the trial court in *Middleton* had not exercised sound discretion and simply not present in this case. 152 S.W.2d at 158-59.

Appellants next cite *Travis v. Stone*, (Appellants' Brief, p. 34), in which this Court discussed the presumption of prejudice arising from juror misconduct. 66 S.W.3d 1 (Mo.banc 2002). This Court reversed the trial court in *Travis* "[b]ecause the only evidence offered to rebut the presumption of prejudice was the testimony of [the offending] juror and … such testimony was insufficient to rebut the presumption of prejudice." *Id.* at 2. This Court reasoned that "little weight [should] be given to the offending juror's assessment of the effect" of his misconduct, citing *Middleton. Id.* at 4. This Court concluded "the most important factor in determining prejudice is the materiality of the evidence," and since the extraneous evidence in that case pertained directly to the critical issue (the disputed "line of sight" distance of one driver), this Court held the trial court "abused its discretion in denying the motion for new trial." *Id* at 6.

Thus, *Travis* did not hold that even credible testimony from non-offending jurors was insufficient to overcome the presumption of prejudice. Because no such testimony

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was offered in that case, the statement on which Appellants rely is appropriately characterized as non-binding *dicta*.

In its opinion, the *Travis* Court stated that it had held in *Middleton* that the jurors' affidavits had 'little probative value' because of the common tendency of jurors to minimize the effect of misconduct." *Id.* at 5 (*citing Middleton*, 152 S.W.2d at 158) (emphasis added). In *Middleton*, the only evidence offered to overcome the presumption of prejudice were affidavits "written on the same form" from nine jurors. 152 S.W.2d at 157, 160. In that context, this Court held in *Middleton* that those affidavits "had 'little probative value' because of the common tendency of jurors to minimize the effect of misconduct." *Id.* at 158. The *Travis* Court's statement that "the presumption of prejudice was quite strong" and "can rarely be overcome by statements of the juror tending to minimize the effect of this conduct," 66 S.W.3d at 6, effectively enlarged *Middleton's* holding to encompass any and all juror testimony, not just affidavits, even though *Travis* involved only the offending juror's testimony. Since this statement was not essential to the *Travis* Court's decision, it has no controlling effect on the decision in this case.

"A judicial opinion should be read in light of the facts pertinent to that case, it being improper to give permanent and controlling effect to statements outside the scope of the real inquiry of the case." *McKinney v. State Farm Mut. Ins.*, 123 S.W.3d 242, 248 (Mo.App. W.D. 2003). "Obiter dicta, by definition, is a gratuitous opinion. Statements are obiter dicta if they are not essential to the court's decision of the issue before it." *Husch & Eppenberger, LLC v. Eisenberg*, 213 S.W.2d 124, 133 (Mo.App. E.D. 2006).

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Travis is materially distinguishable from the case at bar for a number of reasons. Chiefly, Judge Collins actually heard testimony from non-offending jurors that he adjudged to be credible, as opposed to hearing only from the offending juror. Second, as opposed to denying the motion for new trial "without comment" or "explanation," 66 S.W.3d at 2-3, Judge Collins issued a written order explaining his decision that the presumption of prejudice had been rebutted and overcome. (Legal File, p. 764). Finally, Judge Collins also independently determined the "extrinsic evidence" was not material to the consequential facts in light of the issue at trial and all of the evidence that had been presented during trial.

The final case relied upon by appellants, *Dorsey v. State*, (Appellant's Brief, p. 34), involved a criminal defendant's motion for new trial based on ineffective assistance of counsel in failing to present evidence of juror misconduct. 156 S.W.3d 825, 829-33 (Mo.App.W.D. 2005). As such, it clearly did not involve a trial court relying, in part, on testimony of non-offending jurors to find there was no prejudice because the extraneous information was immaterial.

Thus, Missouri precedent does not prevent trial courts from considering even credible testimony from non-offending jurors to establish a lack of prejudice as Appellants would have this Court believe. The Missouri Supreme Court did not hold in either *Middleton* or *Travis* that testimony from non-offending jurors was incompetent to rebut the presumption of prejudice, and the Western District's conclusion that "nothing in the record establish[ed] that Smotherman was not prejudiced by juror misconduct" was improperly premised on a mischaracterization of Missouri law. [Slip Op. 11].

The practical effect of allowing the Western District's Opinion to stand would be to make the "presumption of prejudice" virtually irrefutable. The mere fact that a future juror may go to the trouble of looking up an extrinsic matter likely establishes its importance to at least that juror, regardless of how irrelevant or silly it may actually be to all of the other jurors in a particular case. If the testimony of those jurors can be given no weight, then there is effectively no way to demonstrate that one juror's malfeasance actually had no impact on the jury's deliberations and resulting verdict, even if all of the non-offending jurors completely ignored the extrinsic material because it was wholly irrelevant and immaterial to the case. The Western District's Opinion essentially renders the "rebuttable presumption of prejudice" a façade, as one juror looking up extrinsic evidence would all but conclusively establish prejudice and mandate retrial, which is inconsistent with Missouri law.

Missouri precedent supports consideration of such testimony, not the *per se* rejection of it. Missouri law allows trial courts to consider juror testimony when assessing the materiality of extrinsic evidence in light of all the evidence at trial to determine if it was material and resulted in prejudice. Missouri law recognizes that it is impertinent to assume jurors who faithfully executed their civic duties cannot be trusted to testify truthfully regarding what, if any, impact an offending juror's misadventure may have had on their deliberations. As with any witness, such jurors are subject to examination as to the basis for their testimony, and the trial court is in an excellent position to judge their credibility, not only through observation, but also by considering the context of the evidence at trial as a whole. That is why Missouri precedent supports

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consideration of such testimony and affords deference to the trial court's decision regarding the materiality of extrinsic evidence.

In *State v. Herndon*, after a criminal conviction, it was shown there had been juror misconduct consisting of an improper phone call during deliberations between a juror and an excused alternate, thereby resulting in a presumption of prejudice. 224 S.W.3d 97, 102 (Mo.App.W.D. 2007). Testimony from twelve jurors and two alternates established that most of the jurors had not been aware of the improper call, and all of them testified their deliberation was not influenced by anyone outside the jury. *Id.* Despite the presumption of prejudice, the appellate court affirmed the trial court's finding that there was no prejudice, stating the State's "evidence established that the jury's deliberation was not affected by these calls." *Id.* Again, that evidence constituted "the testimony of all 12 jurors and the two alternates." *Id.* at 101.

The appellate court, when responding to an argument regarding "deferring to the jurors' testimonies," stated "once juror misconduct has been alleged, **the circuit court may take evidence from jurors to prove that the verdict was not improperly influenced by any alleged jury misconduct**." *Id.* at 103 (**emphasis added**) (*quoting State v. Underwood*, 57 Mo. 40, 52 (1874) ("[J]urors may testify in support of their verdict, that no disturbing influence was brought to bear upon them …")). The *Herndon* Court ruled, "Consistent with *Underwood*, the jurors in this case testified in support of their verdict and stated they were not influenced by a non-juror." *Id.*

While it is true that the *Herndon* Court added that the unanimous guilty verdict in that case further supported the finding of no prejudice (since the outside influence was

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arguing for a not guilty verdict), it nonetheless shows that juror testimony is competent evidence on the issues of materiality and prejudice. It stands to reason that, if juror testimony can be appropriately received by a trial court, then it must be competent to support a finding that no prejudice resulted from juror misconduct.

C. *State v. Stephens* Supports Judge Collins' Conclusion that the Extraneous Evidence Was Immaterial and Did Not Prejudice the Verdict.

In appropriate cases, Missouri law clearly allows for jury verdicts to stand, despite juror misconduct that interjected extraneous evidence, when that extraneous evidence is immaterial to the case. For example, in *State v. Stephens*, a juror improperly conducted an independent investigation during an overnight recess by going to a park. 88 S.W.3d at 879. The victim of the crime had regained consciousness in that park after being raped and knocked unconscious, only to be strangled by the defendant until she passed out once again. *Id.* The defendant argued the juror's "evidence-gathering safari at the park" improperly provided the jury extraneous evidence concerning the remoteness of the park, which was central to the issue of guilt or innocence. *Id.* at 884. The defendant argued that evidence of park's remoteness was critical to whether the jury believed his claim that he had stopped at the park trying to find a hospital for the victim and was lost, per his testimony at trial, or if he had driven there to "dump" the victim's body, which the State argued demonstrated a consciousness of guilt. *Id.* The Court held that any extraneous evidence the juror may have obtained at the park was immaterial to the jury's deliberation and subsequent conviction of the defendant because the presumption of prejudice had

been rebutted. *Id.* at 883-84. The Court held that even if the remoteness of the park's location was critical to the defendant's case, the issue of remoteness was not an issue at trial. *Id.* at 884.

Similarly, the weather forecast of snowfall interjected by Juror Jacobs' misconduct was not material to any issue at trial, even though it could be construed to have some tangential relationship to the case. In *Stephens*, the "remoteness" of the park *per se* may not have been disputed, but it was logically connected to the case in that it related to an issue at trial – whether the defendant's actions displayed a "consciousness of guilt." Nonetheless, as the remoteness of the park was never truly in dispute, the extraneous evidence was held to be immaterial. *Id.* at 884-85. It was neither a "consequential fact" nor was it significant to bear on the consequential facts of the case.

In the same fashion, the forecast of snow was never a discussion at trial. Given the length of time Mrs. Smotherman had been inside the hospital before she fell, and given the fact this bathroom was located well within the interior of the hospital, the weather conditions outside were known to be immaterial to all parties involved in the case, as well as Judge Collins. As such, there was clearly a rational basis for all of the other jurors, as well as Judge Collins, to find the extraneous evidence was immaterial.

Moreover, there was evidence at trial that Mrs. Smotherman once suggested water on the floor caused her fall; specifically, she had told one of her physicians, just after the event and long before the litigation, that she had "stumbled and maybe slipped on some water or something on the floor and fell." (Tr., 496:12-497:21). Thus, as Plaintiffs' action introduced testimony as to water on the floor being another possible cause of the

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fall, any remote inference that could be drawn from the weather forecast of snow being tracked into this interior bathroom so as to cause the fall is not only remote but cumulative, thereby further demonstrating its lack of materiality.

The defense did not advocate to the jury at trial that it should find something other than soap caused the fall, but rather argued the Plaintiffs had failed to present any cogent evidence that soap on the floor of the bathroom – the only potential source of liability per Plaintiffs' verdict director – caused Mrs. Smotherman's fall. Mrs. Smotherman in fact acknowledged the lack of any such evidence at trial, admitting that she did not know whether she slipped on "soap, water, or anything different" and that she did not know what the condition was that caused her to fall. (Tr., 498:12-19; 497:11-21). As such, Plaintiffs' argument that the possibility of snow on the day of the fall undermined the "credibility [of] her testimony that she slipped on soap on the floor," (Appellants' Brief, p. 52), is a fallacy. Defendant never argued water on the floor caused the fall, and whether there was water versus soap on the floor was not a disputed issue at trial. Rather, the dispute at trial was whether Plaintiffs had proffered satisfactory evidence to support their claim that Mrs. Smotherman fell because there was soap on the floor (which was the only theory of liability Plaintiffs chose to submit to the jury).

Finally, it must be noted that Plaintiffs' effort to distinguish *Stephens* on the basis that it applied a different standard of review, (Appellants' Brief, p. 40 n.1), is of no consequence. Although the procedural background of that case called for a plain error review, the Court stated "the State contends that the record indicates that the presumption of prejudice … was clearly rebutted such that the trial court did not commit error, plain or

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otherwise, in overruling the appellant's motion for a new trial. We agree." 88 S.W.2d at 883 (emphasis added). Thus, the *Stephens* Court indicated there was no error whatsoever, and clearly would have affirmed the trial court's denial of the motion for new trial under an abuse of discretion standard.

As such, the case at bar is a "classic case" like *Stephens*, where a party is stuck with a fact in a lawsuit and has no viable way to refute it, despite trying to put a different spin on the case. *See* 88 S.W.3d at 885. Kristine Smotherman was the only witness to her fall, and therefore was the only person who could know what caused her to fall. She unambiguously admitted that she had no idea what caused her to fall, (Tr., 498:12-19), so despite their speculative theories, arguments, inferences, and mischaracterizations of answers elicited on cross-examination, Plaintiffs cannot bootstrap their lack of evidence regarding soap being on the bathroom floor and causing Kristine Smotherman to fall into a submissible case. Their evidence fell woefully short of meeting their burden of proving that Defendant waived its sovereign immunity by virtue there being a dangerous condition of the property in the hospital bathroom, and it is clear that the extraneous information submitted by Juror Jacobs regarding snow (which was only heard by only a few jurors during deliberation) was not material to the disputed issues in this case and does not justify a new trial.

D. The Post-Trial Record Supports Judge Collins' Ruling.

Appellants complain that only eight of ten jurors who signed the verdict testified at the hearing, arguing that is an insufficient number that should prevent finding the

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Defendant rebutted the presumption of prejudice. (Appellants' Brief, p. 38).[6] The Court should reject this contention. Missouri precedent does not mandate a formulistic presentation of testimony regarding their view of materiality from a requisite number of jurors to support the trial judge's decision. Rather, the law provides trial courts discretion to determine whether the extraneous evidence was material so as to prejudice the verdict on a case-by-case basis.

Judge Collins had more than a sufficient basis from which he could determine what significance, if any, to give to the extraneous evidence. He presided over the trial and observed the evidence first-hand. He heard the cross-examination of Mrs. Smotherman, which revealed that she had cited different potential causes of the fall at various points in time, culminating in her admission that she in fact had no idea what actually had caused her to fall, demonstrating that the Plaintiffs' theory of liability lacked credibility. He knew the entire focus of the trial was whether soap on the floor had caused the fall. Thus, his knowledge of the evidence at trial is a significant factor justifying his finding of immateriality and lack of prejudice.

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[6]One of the twelve jurors did not sign the verdict. Appellants argue the offending juror's testimony as to the impact of the extraneous evidence on his own verdict should not be considered per *Travis v. Stone*, 66 S.W.3d. at 6. For purposes of this portion of the argument, Defendant will accept that assertion, but does note that Judge Collins gave no weight to Juror Jacobs' testimony that his action did not affect his decision to support the verdict. (Order, ¶ 3, Legal File, p. 765-766).

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The evidence presented at the post-trial hearing further supported his ruling. It clearly apprised him of the content of the extraneous material: a single comment regarding an irrelevant, or at best highly tangential, matter uttered by one juror. He heard credible testimony demonstrating that utterance had not heard by the majority of jurors, and those that did hear it emphatically testified it had no impact on their deliberations, one stating it was "frivolous" and "of no value at all." (Tr. 686:8-24). Finally, he evaluated the extraneous evidence in light of the evidence received at the trial as a whole to determine whether it was material. In the overall context of this case, Judge Collins had more than a sufficient basis to determine the isolated comment by one juror providing an irrelevant piece of extraneous evidence, that barely registered if it was heard at all by the other jurors, was immaterial and did not prejudice the verdict.

The fact that three of the jurors did not physically testify at the hearing should not change this analysis. Judge Collins was provided affidavits from each of these jurors, and those affidavits established that they (like several of the jurors who did testify) did not hear the extraneous comment uttered by Juror Jacobs during deliberations. (Tr., 700:18-20; A8 -13). Though Judge Collins chose not consider those affidavits following an objection from Plaintiffs' counsel, it would have been well within his discretion to consider them, as evidence from affidavits alone has been sufficient to support the granting of a new trial for juror misconduct. *See, e.g., Middleton*, 152 S.W.2d at 111. As such, it would be appropriate for this Court to consider the affidavits.

Regardless, any verbal testimony from those jurors would have been cumulative of that provided by nine jurors who did testify. Thus, though the offered affidavits were

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unnecessary, they were more than sufficient to supplement the testimony of other jurors, especially when those jurors had legitimate conflicts which interfered with their availability to appear at trial. *See footnote 5.*[7]

In short, it was not necessary for these three jurors to testify, but this Court can consider the content of the affidavits from the three jurors, as Judge Collins clearly had the discretion to do so. Alternatively, if this Court were to feel that the testimony of one of the three jurors who were unable to be present at the hearing is necessary to have verbal evidence from nine jurors in support the denial of the Motion for New Trial, then the appropriate ruling for judicial economy would be to remand the case for an additional hearing so Judge Collins can receive and consider their testimony, as opposed to granting a new trial.

E. *State v. Cook* Does Not Mandate a New Trial.

Appellants argue *State v. Cook*, 676 S.W.2d 915 (Mo.App. E.D. 1984), is analogous to the case at bar because the extraneous evidence in that case also involved weather. (Appellants' Brief, 25-30). However, *Cook* is materially distinguishable.

Cook involved the criminal conviction of a defendant for first degree robbery. 676 S.W.2d at 916. The only evidence linking the defendant to the crime was the getaway car, which was registered to him. *Id.* The defendant claimed he was not involved in the

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[7]Defense counsel felt those jurors, who had honorably completed their jury duty, should not be further inconvenienced by being forced to return from previously scheduled travel or to abandon their classroom after having received the subpoena just before the hearing.

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robbery, relying on alibi witnesses. *Id.* The credibility of these witnesses was challenged due to conflicting testimony as to whether or not it had been raining on the day of the robbery. *Id.* One juror called a university's meteorology department to determine if it had rained on that date. *Id.* That juror misconduct was held to be material because the extraneous weather information had a direct bearing on the credibility of the criminal defendant's alibi witnesses, who were obviously critical to the central issue of guilt or innocence. *Id.* at 917. A new trial was therefore mandated in that case because the State could not prove the information did not adversely affect the credibility of the defendant's alibi witnesses. *Id.* ("The receipt by a juror or jury of possibly prejudicial information during the trial of a felony case requires that the verdict be set aside unless the harmlessness of the information be shown.").[8]

Cook is distinguishable from the case at bar because the extraneous weather information obtained by Juror Jacobs was not critical to the credibility of any witness or to the central issue in the case -- whether there was soap on the floor of the interior bathroom that constituted a dangerous condition and caused the Plaintiff's fall. The potential of snowfall outside the hospital obviously had no bearing on whether or not there was soap on the floor of this interior bathroom. At best, the possibility of snowfall

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[8]It is noteworthy that, even though the record in *Cook* was not complete, the opinion as a whole clearly acknowledges that a trial court can find juror misconduct is not prejudicial when the record contains sufficient evidence from which that conclusion can be logically deduced.

perhaps leading to water being on the bathroom floor was cumulative of evidence that was duly received at trial regarding another potential cause of the fall – water on the floor - that Mrs. Smotherman herself had suggested before the litigation had started, as she acknowledged at trial. Moreover, any potential inference linking snowfall to water on the floor is highly speculative since Mrs. Smotherman had been in the hospital building long before she fell, and given the evidence regarding the interior location of this bathroom within the hospital structure.

Cook is also distinguishable because that trial court questioned only the offending juror about the extraneous evidence, despite at least one other juror knowing of it. 676 S.W.2d at 917. As such, the appellate court felt the potential harmlessness of the juror misconduct could not be shown on the record before it. *Id.* Conversely, Judge Collins was offered evidence from all of the jurors, including testimony from the majority of them. He had more than a sufficient record to support his conclusion that the jurors who were not accused of misconduct either did not hear Mr. Jacobs' comment regarding the weather, or appropriately disregarded it as immaterial to their determination.

F. More Scrutiny is Not Justified Because the Motion for New Trial Was Denied.

Finally, Appellants argue "the revision of the appellate court will be exercised more freely than where a new trial has been granted." (Appellants' Brief, p. 25, citing

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McBride v. Farley, 154 S.W.3d 404, 411 (Mo.App.S.D. 2004).[9] The Western District's Opinion also quoted this phrase from *McBride*, but neither the Opinion nor *McBride* offered any explanation as to why the "abuse of discretion" standard should be applied differently when a new trial has been denied as opposed to when it was granted.

When tracing back the legal citations in support of this statement, the most recent case postulating any rationale was *Aeolian Co. of Mo. v. Boyd*:

> Generally, the trial court has a wide discretion in ruling upon a motion for a new trial, and the reviewing court will be more liberal in upholding the trial court's action in sustaining a motion for a new trial than its action in denying it. This is for the reason that the power of the trial court to grant a new trial is an exercise of its judicial discretion which may be based upon matters known to the court, often said to be in the breast of the court, because the trial judge participated in the trial, and knew what took place, much of which cannot be preserved in any bill of exceptions or record."

138 S.W.2d 692, 695 (Mo.App. 1940). This "rationale" is entirely unsatisfying, as the trial court is in a superior position to rule whether it grants or denies the motion. As such, Respondent respectfully suggests that phrase should not be a consideration in any determination of whether a trial court abused its discretion.

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[9] Like the other cases relied upon by Appellants, *McBride* is factually distinguishable, as it involved a trial court's denial of a motion for new trial, without explanation, where the non-moving party did nothing to try to overcome the presumption. 154 S.W.3d at 410.

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CONCLUSION

Judge Collins did not arbitrarily exercise his discretion when ruling that Juror Jacobs' comment as to the potential of snow on the day of the fall was immaterial and did not prejudice the verdict in this case. Once the juror misconduct came to light, Judge Collins appropriately received testimony from all of the jurors to determine whether the extraneous evidence had a prejudicial impact by considering not only the credibility of the jurors, but also the case as a whole, which demonstrated the extraneous weather information was completely irrelevant to any contested issue in this case and had no deleterious impact on the verdict.

The critical issue in the case was whether Plaintiffs could overcome the Defendant's sovereign immunity by proving "there was soap on the bathroom floor, and as a result the defendant's bathroom not reasonably safe." (Instruction No. 7, Tr., 579:13-24). The weather information allegedly obtained by Juror Jacobs was wholly immaterial to that issue, especially given the paucity of evidence Plaintiffs had offered in support of their case. Kristine Smotherman admitted at trial that she had no knowledge of what caused her to fall. In short, the jurors had several reasons to disbelieve that Plaintiff's trial contention that she fell because there was soap on the floor given the credibility of Plaintiffs' evidence.

The Defendant argued that Plaintiffs had not met her burden of proof, and the bottom line is that Plaintiffs' liability theory at trial - blaming the positioning of the soap dispenser as the cause of Kristine Smotherman's fall - was neither credible nor believable. There simply was no evidence to establish that there was soap on the floor on

the day of the fall. Frankly, the evidence at trial made it quite apparent that the Plaintiffs' theory was concocted after the lawsuit was filed, and the resulting defense verdict was wholly justified.

"While every party is entitled to a fair trial, as a practical matter, our jury system cannot guarantee every party a *perfect* trial." *Fleshner,* 304 S.W.3d at 87 (*emphasis in original*). "Courts should not overturn a jury verdict lightly. Trials are costly - for the litigants, the jurors and taxpayers." *Matlock*, 368 S.W.3d at 277. Missouri law clearly recognizes the judge who presided over the trial is in the best position to determine the issue of prejudice, not only from observing the interrogation of the involved jurors as to their perceptions of materiality, but also from calling upon knowledge gained while presiding over the trial. *See Aeolian*, 138 S.W.2d at 695 ("This is for the reason that the power of the trial court to grant a new trial is an exercise of its judicial discretion which may be based upon matters known to the court, often said to be in the breast of the court, because the trial judge participated in the trial, and knew what took place, much of which cannot be preserved in any bill of exceptions or record."). For these reasons, discretion is afforded to the trial court's determination, and it is clear that Judge Collins did not arbitrarily exercise his discretion in this case.

Given the propriety of the procedural actions taken by Judge Collins when denying the Plaintiffs' Motion for New Trial, and the rational basis apparent from the record supporting his finding that the extraneous evidence was immaterial and did not prejudice the verdict in this case, this Court should affirm Judge Collins' denial of the

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Plaintiffs' Motion for New Trial, as there is no basis to conclude his decision was an arbitrary abuse of discretion.

WHEREFORE, Respondent Cass Regional Medical Center respectfully requests that this Court affirm Judge Collins' Denial of Plaintiffs' Motion for New Trial.

Respectfully submitted,

ADAM & McDONALD, P.A.

Dated: April 15, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 2016, I electronically filed the foregoing document on the CM/ECF system, which will send a notice of electronic filing to counsel of record, and served the foregoing document via electronic mail upon all counsel of record as follows:

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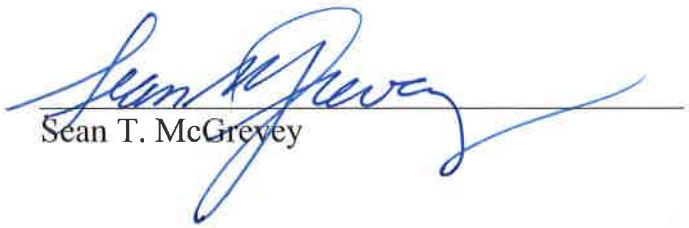
CERTIFICATION AS TO WORD COUNT

Pursuant to Rule 84.06(b), Respondent hereby certifies that the word count herein, as calculated by the word count system employed, is 13,897 words and does not exceed the word limit provided by the rules.



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