IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

KRISTINE SMOTHERMAN AND BRIAN SMOTHERMAN	)	
Appellant	)	
v.	)	Western District Appeal No. WD 78111
CASS REGIONAL MEDICAL CENTER	)	
Respondent	)	

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This case arose out of Plaintiff Kristine Smotherman's fall at Respondent Cass Regional Medical Center's ("CRMC") premises on February 26, 2009. The jury trial of this case began on Wednesday, August 6, 2014. **LF 667; Appendix A2.** The jury began deliberations on Friday, August 8, 2014, and the jury returned a verdict that assessed zero percent fault against Respondent CRMC and zero percent fault to Plaintiff. **LF 668; Appendix A3.**

On August 12, 2014, the trial court accepted the verdict of the jury and entered judgment in favor of Respondent CRMC. **LF 667-68; Appendix A2-A3.** On September 8, 2014, Appellants filed their Motion for New Trial. **LF 682-715.** On November 6, 2014, the trial court denied the Appellants' Motion for New Trial. **LF 764-68; Appendix A9-A13.** The Notice of Appeal was timely filed by Appellants on November 13, 2014. **LF 770-73.**

None of the issues to be raised on appeal are within the exclusive jurisdiction of the Missouri Supreme Court. Accordingly, this Court has jurisdiction of the appeal pursuant to its general appellate jurisdiction, as more particularly set forth in Article V, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

This appeal is based upon the prejudice that Appellants claim resulted from a juror conducting independent research and obtaining information from the Internet about the weather on the date of Appellant Kristine Smotherman's fall. ***See*** **TR TR 660:3-19; 662:9-663:1; LF 682-93.** During the trial, Juror Robert Jacobs checked the weather forecast for the day of the fall and found that the forecast was for eight to ten inches of snow. **TR 660:3-19; 662:9-663:1.** This extraneous weather information was provided to the jury during deliberations. **TR 653:15-654:12; TR 644:22-646:13.** Below is a description of the trial and the testimony provided at the Motion for New Trial hearing.

I. THE TRIAL

A. Introduction to the Case and the Evidence

This case arose out of Plaintiff Kristine Smotherman's fall at Respondent Cass Regional Medical Center's ("CRMC") premises ("Hospital") on February 26, 2009. **TR 439:14-448:21; TR 272:2-275:12.** The Hospital was suffering from a power outage; thus, it was operating off of backup generators, and not all of the lights were receiving power. **TR 272:12-27317; TR 431:25-432:7.** Mrs. Smotherman was at the hospital for a follow-up visit with her doctor six weeks after a knee surgery. **TR 430:15-431:12.** After Mrs. Smotherman's doctor visit, she had to use the bathroom, so she went to the nurses' station and asked for the location of the closest bathroom. **TR 435:13-18.**

A CRMC nurse offered to show Mrs. Smotherman to the bathroom. **TR 435:13-20.** The first bathroom they came upon did not have any lights working; accordingly, the nurse took Mrs. Smotherman to a different bathroom that had emergency lighting. **TR 435:13-436:8.** This bathroom was very small, measuring approximately 34 inches wide and 82 inches long. **TR 366:15-18.** When Mrs. Smotherman was in the process of getting up after using the restroom, the emergency lights went out. **TR 439:14-23.**

After the lights went out, Mrs. Smotherman slipped and fell. **TR 439:23-440:19, 448:12-21.** After this fall, Mrs. Smotherman was found by a nurse in the hallway outside the bathroom and taken to the emergency room. **TR 444:25-445:8.** She sustained injuries in the fall, including a cut which became infected, and she was required to undergo several procedures and surgeries to treat the subsequent infections that resulted from her fall. **TR 450:19-451:24, 456:6-460:16; 461:22-462:3 LF 698; Pls.' Ex. 48A; TR 515:7-10.**

B. Evidence Regarding Soap or Water on the Floor

1. The size and configuration of the bathroom

The parties stipulated that the bathroom was approximately 34 inches wide and 82 inches long. **TR 366:15-18.** The bathroom had no windows. **TR 439:21-22.** There is a heating unit running along the floor of the far wall opposite the entrance to this bathroom. **TR 337:5-15, 367:4-12.** The size of this bathroom and the heating unit can be seen in Exhibits 27 and 28, which were admitted into evidence at trial:

Pls.' Ex. 28; Appendix A15; Pls.' Ex. 27; Appendix A14; TR 334:19-22; TR 343:6-11.

The bathroom had a soap dispenser placed on the wall to the side of the sink. **TR 336:7-15; TR 368:18-24; Pls.' Ex. 30; Appendix A16.** The soap dispenser dripped soap. **TR 336:20-337:1.** There was a rust stripe on the heating element beneath the soap dispenser. **TR 337:23-338:1; TR 368:18-24.** The positioning of the soap dispenser and the rust stripe are shown in Exhibit 30, which was admitted into evidence at trial:

Pl.'s Ex. 30; Appendix A16; TR 343:6-11.

Bailee Schlozthauer worked in "housekeeping," which is also called "environmental services" by CRMC, in 2009. **TR 333:16-22.** Housekeeping was responsible for cleaning the entire hospital. **TR 333:23-334:3.** Ms. Schlozhauer testified at trial that she "would think" that the rust stripe shows that soap had been dripping from the soap dispenser onto the heating unit and down to the floor. **TR 337:23-338:7.** She testified that she had found soap on the floor of this bathroom. **TR 339:17-20.**

Roger Keefer was the director of plant operations at the Hospital in February 2009. **TR 362:24-363:5.** Mr. Keefer testified as follows at trial:

> **Q.** There is a soap dispenser to the right of [the] picture [in Exhibit 30]?
>
> **A.** Yes, sir.

Q. Then beneath the soap dispenser, there is a rust line down the front of that heating unit that we talked about, correct?

A. Yes, sir.

. . . .

Q. Now, I ask you, as the director of plant operations, seeing a rust stripe down that heating element immediately below the soap dispenser, does that tell you that soap from the soap dispenser has dripped on that and caused it to rust?

A. It's possible.

Q. Is there some other possibility for what would have dripped there and caused it to rust?

A. I don't know.

Q. Now, if soap is dripping from that soap dispenser and dripping down and running down the front of that heating element to the floor, you would agree, wouldn't you, that soap on the floor could be slippery?

A. Yes.

. . . .

Q. Somebody gets that soap on their shoe or steps in the soap, or somebody else tracks the soap around the bathroom that somebody steps in, that's going to be a potential hazard, right?

A. Correct.

Q. Somebody could slip and fall, right?

A. Yes.

TR 368:18-370:11.

He also testified that he would have been concerned if he saw the subject soap dispenser and the rust stripe:

Q. Now, if you had seen this soap dispenser and the rust down the front of this heating element, would that have been a concern to you?

A. Yes, it would.

Q. And would that have been something that you would have thought, had you noticed it, we ought to do something about that?

A. Yes.

Q. Because it indicates to you that you're potentially going to end up with soap on the floor that could be a danger, right?

A. Right.

TR 371:8-19.

2. Appellant Kristine Smotherman provided evidence that she slipped on soap on the floor

Plaintiff Kristine Smotherman described slipping and falling in this way:

Q. The lights go out. You are just getting up. Then what?

A. My feet just went completely out from underneath me.

. . . .

A. Yes. Well, no. . . . The lights had went out, and so in a panic, you know, I hurried up and finished; and as I stood the rest of the way up to finish what I was doing, I just -- like I was on roller skates.

Q. Well, describe -- tell me what you mean by that. Was there a rolling sensation, a slipping sensation?

A. It was a slipping sensation but, I mean, that's how fast it was.

TR 439:23-440:19.

When Kristine Smotherman was in the emergency room after her fall, she overheard a nurse talking about the fall:

Q. Was there anything that you overheard while you were there at the emergency room, by anyone, related to the incident of your fall in the bathroom?

A. I did hear somebody talking to either another nurse or doctor, and I believe it was another nurse, stating, we found her in the hallway, she slipped and fell in the hall bathroom on soap. . . .

TR 448:12-20.

Dr. James Queenan was the first surgeon to see Mrs. Smotherman concerning the problems developing in her hand after her fall. **TR 451:7-453:22.** On March 6, 2009, Dr.

Queenan took a history of the subject fall from Mrs. Smotherman. **TR 452:24-453:7.** Dr. Queenan's history states the following:

> Ms. Smotherman is a 37-year-old white female, right-hand dominant, who fell in a dark bathroom at Cass Regional Medical Center in February 26, [2009] on her right upper extremity. This is during a power out. The patient states that she slipped on some soap on the floor. There had been a power outage. That particular bathroom had lighting and then that lighting went out. . . .

Pl.'s Ex. 50; Appendix A17-A18; TR 453:23-454:21.

3. Respondent CRMC provided evidence that Kristine Smotherman slipped on water on the floor

CRMC questioned Mrs. Smotherman about a March 5, 2009 medical record from a Dr. Hafer who admitted Mrs. Smotherman into the hospital before she was treated by Dr. Queenan. **TR 496:17-497:10; TR 451:7-453:22.** Dr. Hafer's patient history stated the following:

> **Q.** Dr. Hafer, in his history of present illness, in other words, the story that he got from the patient, he says that, "The patient says there was a power outage and the electricity was off, and she stumbled and maybe slipped on some water or something on the floor and fell." Is that something that you told Dr. Hafer?

A. If that's what he said I told him? I don't have anything to argue about that. I don't -- I don't know. If that's what he says I said, then that's what I said.

TR 497:11-21. CRMC highlighted the difference between these medical records:

Q. The bottom line, it looks like we have two different medical records in the same institution by two different physicians that are both saying the patient fell, and there is some indication as to why, and they're a little bit different?

A. A little bit, yes.

Q. In Dr. Queenan's, the word "soap" appears?

A. Yes.

Q. And in Dr. Hafer's, the word[s] . . . "stumbled and maybe slipped on some water or something," appears?

A. Yes.

TR 497:22-498:11.

C. Respondent CRMC's Closing Argument

During closing arguments, CRMC's counsel argued to the jury that soap was not on the floor and that it needed to find that soap was on the floor to enter a verdict for Mrs. Smotherman:

[T]hey have not proven more likely than not, that any soap on the floor caused harm to plaintiff and caused her to fall . . . .

TR 607:16-19.

> To assess fault, a percentage of fault to defendant, you must first find that there was soap on the bathroom floor. . . .

TR 612:4-6.

> There is no evidence that there was soap on the floor when she fell. . . .

TR 613:4-5; *see also* TR 623:15-24. CRMC's counsel provided the theory that Mrs. Smotherman slipped on water, rather than soap:

> Before this lawsuit happened, she went to see a doctor, and the doctor states, this is Dr. Hafer, Exhibit 108, you see that the patient states she stumbled, maybe slipped on something, some water or something on the floor and fell. The next day, the exhibits they talked about, Dr. Queenan states, well, the patient states she slipped on some soap on the floor. What is her evidence of soap on the floor?

TR 620:4-12.

D. Jury Instructions

The jury received MAI 2.01(8). It provides the following:

> (8) PROHIBITION OF JUROR RESEARCH OR COMMUNICATION ABOUT THIS CASE

Your deliberations and verdict must be based only on the evidence and information presented to you in the proceedings in this courtroom. Rules of evidence and procedure have developed over many years to make sure that all parties in all cases are treated fairly and in the same way and to make sure that all jurors make a decision in this case based only on evidence allowed under those rules and which you hear or see in this courtroom. It would be unfair to the parties to have any juror influenced by information that has not been allowed into evidence in accordance with those rules of evidence and procedure, or to have a juror influenced through the opinion of someone who has not been sworn as a juror in this case and heard evidence properly presented here.

Therefore, you must not conduct your own research or investigation into any issues in this case. You must not visit the scene of any of the incidents described in this case. You must not conduct any independent research or obtain any information of any type by reference to any person, textbooks, dictionaries, magazines, the use of the Internet, or any other means about any issues in this case, or any witnesses, parties, lawyers, medical or scientific terminology, or evidence that is in any way involved in this trial. . . .

> If any of you break these rules, it may result in a miscarriage of justice and a new trial may be required.

LF 634-35; Appendix A5-A6; LF 650-51; TR 248:4-252:20. The jury also received a verdict director that appeared as follows:

> In your verdict, you must assess a percentage of fault to 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 plaintiff.

LF 642; Appendix A8; LF 657; TR 579.

The jury trial of this case began on Wednesday, August 6, 2014. **LF 667; Appendix A2.** The jury began deliberations on Friday, August 8, 2014, and the jury returned a verdict that assessed zero percent fault against Respondent CRMC and zero percent fault to Plaintiff. **LF 668; Appendix A3.**

II. MOTION FOR NEW TRIAL HEARING AND JUROR TESTIMONY

A. Juror Robert Jacobs

Juror Robert Jacobs testified as follows:

> **Q.** All right. In any event, you went and you did your research for the day of Ms. Smotherman's fall, correct?
>
> **A.** Yeah.
>
> **Q.** You Googled the date what happened in Harrisonville, something like that?
>
> **A.** Well, what the weather forecast was . . . .
>
> **Q.** So you checked into the weather on that date?
>
> **A.** Yes.
>
> **Q.** And found that the forecast was for significant snow fall?
>
> **A.** Well, that's what the forecast was. . . .

TR 660:3-19.

Mr. Jacobs also testified as follows regarding being questioned about the verdict along with Juror Jennifer Moehlman after the trial:

> **Q.** And Ms. Moehlam said, well, we didn't feel like you could prove more likely than not that there was soap on the floor in the bathroom, right? Do you recall that?
>
> **A.** I think I recall that, yes.

Q. And you recall that after she said that, you agreed with that and said, you know, you had these pictures of the soap dispenser and the rust, that could have happened at any time, that hospital had been there since 1963. Do you recall that?

A. I do recall that. I asked how many soap dispensers. Normally you can't prove that.

Q. And right after you said that about the soap dispensers, you said, and I checked the weather for that day and the forecast was for eight to ten inches of snow, right?

A. Yes.

TR 662:9-663:1.

Mr. Jacobs agreed that snow present on the day of this incident provided an explanation for how water could have been in the bathroom:

Q. And can we agree that if there was snow on the ground that day, that might form a possible explanation for how water would be on the floor in the bathroom where somebody slipped and fell?

A. I don't know if it was snow, if it snowed one inch or 20 inches.

Q. I understand that. I am just asking you if there was snow on the ground and there was water on the floor in the bathroom, the snow on the ground is one possible explanation for that, right?

A. I guess you could say that, but she was -- she went to see her doctor.

TR 663:2-15.

B. Ashlie Brown

Ashlie Brown was present when Juror Robert Jacobs was questioned following the trial. **TR 653:9-16, 661:6-662:3.** Ms. Brown is a paralegal that works for Appellants' counsel. **TR 654:23-655:3.** She testified about this experience at the hearing on the Motion for New Trial:

A. Mr. Jacobs had mentioned that he had done some weather research.

Q. Do you recall if he mentioned how he went about doing that?

A. He had gotten on the Internet and ran a weather report.

Q. For what day did he look up the weather information via the Internet?

A. For the date of Ms. Smotherman's accident.

Q. The date Ms. Smotherman fell?

A. Yes.

Q. What, if anything, did he say about what he learned?

A. He had wondered if maybe some of the water from it snowing that day had been tracked into the bathroom.

Q. Was there any conversation on whether or not that had been mentioned during the jury deliberations?

A. He had mentioned it.

Q. During the jury deliberations?

A. Yes.

TR 653:15-654:12.

C. Juror Jennifer Moehlman

Juror Jennifer Moehlman testified that she remembered Mr. Jacobs providing the jury extraneous information regarding the weather:

Q. Now, in August of this year did you sit as a juror in a case that was called Kristine and Brian Smotherman versus Cass Regional Medical Center?

A. I did.

. . . .

Q. And then it was submitted to the jury for deliberations on August 8, 2014?

A. Yes.

Q. And during that time, do you recall any comment by any other juror of any investigation or seeking out of information that another juror did outside of the courtroom or the presence of the jury.

A. 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 . . . .

Q. And it was your understanding that what he said was that he had, outside of the courtroom, conducted an investigation to try to determine what the weather was like on the day that Ms. Smotherman fell; is that right?

A. Yes.

. . . .

Q. And was the result of his gathering of information that it had been snowing on that day?

A. I believe so, yes.

TR 644:22-646:13.

D. Other Jurors Also Recalled Being Informed About Extraneous Weather Data

At least two other jurors remember Mr. Jacobs conveying information about the weather during deliberations. Juror Larry Boucher testified as follows:

Q. Do you have memory of someone talking about the weather at any point in time during the course of the trial?

A. It was a situation where someone in the evening, they had looked on the Internet or on their telephone or some place and found something about weather . . . .

TR 686:8-19. Juror Helen Stafford testified as follows regarding her memory:

Q. Do you have memory of anyone discussing weather or having Googled what the weather may or may not have been during the course of the trial on the day of the fall?

A. Someone came in and said there was snow on the ground at that time.

TR 697:9-14.

Juror Denise MacMillan remembers the issue that the day of Mrs. Smotherman's fall was "a snowy day:"

Q. So with regard to whether or not it was or was not snowing on the day of the fall, you don't know that, and you don't remember that being discussed at all during deliberations?

A. I do remember the issue that it was a snowy day, but I just thought that was what was presented to us because they talked about the automobile hitting a pole and making the lights go out, it's why the lights went out in the hospital, but that may have been something we were told after it was over with. But I don't know any -- I mean, no one said they Googled anything. That didn't come up.

TR 693:22-694:9.

E. Only Eight Jurors that Joined the Verdict Testified at the Motion for New Trial Hearing

At the hearing on the Motion for New Trial nine (9) jurors testified. **TR 644:5-699:20.** The Appellant called the first two jurors that testified at the hearing: (1) Jennifer Moehlman and (2) Robert Jacobs. **TR 644:5-667:8.** The Respondent called seven additional jurors to testify: (3) Marcia Beck, (4) Mary Laffoon, (5) Norman Lawson, (6) Larry Boucher, (7) Debra McDowell, (8) Denise MacMillan, and (9) Helen Stafford. **TR 667:9-699:20.** Only eight of the jurors that provided testimony joined the verdict in the case at bar. Norman Lawson did not join the verdict. **TR 681:10-13; LF 622; Appendix A1.**

POINT RELIED ON

I. The trial court erred and abused its discretion by refusing to grant a new trial, because a new trial was required since a juror gathered evidence extraneous to the trial and Respondent did not rebut the strong presumption of prejudice created by such juror misconduct, in that it was established that a juror gathered extraneous weather data by conducting research on the Internet for the issue of how Appellant fell and provided that information to the jury, but the Respondent did not establish that no prejudice resulted from this misconduct.

Travis v. Stone, 66 S.W.3d 1 (Mo. banc 2002)

State v. Cook, 676 S.W.2d 915 (Mo. App. E.D. 1984)

Dorsey v. State, 156 S.W.3d 825 (Mo. App. W.D. 2005)

McBride v. Farley, 154 S.W.3d 404, 410 (Mo. App. S.D. 2004)

SUMMARY OF ARGUMENT

This appeal is based upon the jury being subjected to improper influence in the form of extraneous weather data for the day of the fall and the prejudice that resulted. Juror Jacobs conducted independent research and learned that the forecast for the day of the fall was for eight to ten inches of snow. This weather data was obtained by use of the Internet outside of the courtroom in direct violation of the jury instructions, and it was conveyed to the jury during deliberations.

Once it is established that a juror has gathered evidence extraneous to the trial, prejudice is presumed, and the burden is on the respondent to overcome a very strong presumption of prejudice. In this case, it has been established beyond all doubt that a juror—Juror Robert Jacobs—gathered evidence extraneous to the trial by conducting independent research about weather conditions on the day of Appellant Kristine Smotherman's fall. This extraneous data was provided to the jury by Mr. Jacobs during deliberations. Mr. Jacobs, other jurors, and a witness all testified to this fact at the hearing regarding the Motion for New Trial. Therefore, juror misconduct has been established, prejudice must be presumed, and the burden is on Respondent CRMC to rebut this strong presumption of prejudice.

Statements from jurors claiming that misconduct did not affect their deliberations have very little probative value because of the common tendency of jurors to minimize the effect of misconduct. Thus, juror testimony minimizing the effect of the extraneous

weather data provided by Mr. Jacobs cannot overcome the strong presumption of prejudice.

Furthermore, it cannot be argued that the extraneous weather data obtained by Mr. Jacobs does not have a logical connection with the facts of this case. Mr. Jacobs' reasons for conducting independent research and thoughts after he learned that the forecast called for snow alone establish the materiality of this information. After he learned that the forecast called for snow on the day of this incident, Mr. Jacobs wondered if the water from it snowing could have been tracked into the bathroom. To enter a verdict for the Appellants, the jury had to find that there was soap on the bathroom floor. There was sufficient evidence allowing the jury to reach that conclusion. There was also evidence indicating that water—rather than soap—caused Kristine Smotherman's fall. Mr. Jacobs' extraneous weather data directly supported and strengthened CRMC's claim that water—not soap—caused the fall. Thus, this extraneous information was clearly material and caused substantial prejudice. Accordingly, this Court should conclude that the trial court abused its discretion by denying the motion for a new trial; and this case should be reversed and remanded for a new trial.

ARGUMENT

I. The trial court erred and abused its discretion by refusing to grant a new trial, because a new trial was required since a juror gathered evidence extraneous to the trial and Respondent did not rebut the strong presumption of prejudice created by such juror misconduct, in that it was established that a juror gathered extraneous weather data by conducting research on the Internet for the issue of how Appellant fell and provided that information to the jury, but the Respondent did not establish that no prejudice resulted from this misconduct

A. Standard of review

A motion for new trial, based on a juror's acquisition of extraneous evidence, is left to the discretion of the trial court. An "appellate court may reverse the lower court's denial of a new trial if it appears that the trial court abused its discretion in ruling on the issue of extraneous evidence or the issue of prejudice." *Travis v. Stone*, 66 S.W.3d 1, 3 (Mo. banc 2002) (citing *Middleton v. Kansas City Pub. Serv. Co.*, 152 S.W.2d 154, 159 (Mo. 1941)).

Once it is established that a juror has gathered evidence extraneous to the trial, prejudice is presumed, and the burden is on the respondent in such a case to overcome the presumption of prejudice. *Id.* (citing *Middleton*, 152 S.W.2d at 158-60); *see also McBride v. Farley*, 154 S.W.3d 404, 410 (Mo. App. S.D. 2004). This presumption of prejudice is very strong; in fact the Supreme Court of Missouri has explained that the presumption of

prejudice is "quite strong." *Travis*, 66 S.W.3d at 6. Further, when a trial court refuses to grant a new trial due to alleged misconduct, "'the revision of the appellate court will be exercised more freely than where a new trial has been granted."' *McBride*, 154 S.W.3d at 411 (quoting *Fitzpatrick v. St. Louis-San Francisco Ry. Co.*, 327 S.W.2d 801, 808 (Mo. 1959)).

B. Appellants have established that a juror gathered evidence extraneous to the trial—prejudice must be presumed

First, it is permissible to elicit testimony about juror misconduct that occurred outside the jury room, such as the alleged gathering of extrinsic evidence. *Travis*, 66 S.W.3d at 4 (citing *Stotts v. Meyer*, 822 S.W.2d 887, 889 (Mo. App. E.D. 1991); *see also, McBride*, 154 S.W.3d at 407; *State ex rel. Koster v. McElwain*, 340 S.W.3d 221, 255 (Mo. App. W.D. 2011) ("Misconduct occurring *outside* the jury room, which would include independent investigation . . . can be established by juror testimony.").

In *State v. Cook*, 676 S.W.2d 915 (Mo. App. E.D. 1984), a defendant was convicted of robbery. During the trial, a witness for the state testified that it was sunny on the day of the robbery, but some of the defendant's alibi witnesses testified that it was raining. After the jury returned the verdict, the court learned that a juror called the St. Louis University Meteorology Department to *determine the amount of rainfall* on the day of the robbery. The juror testified that he learned that there was seven one hundredths of

an inch of rain on the subject day, and he told this information to one other juror. *Id.* at 916.

In *Cook*, the court found that "*one of the jurors sought information from an outside source and conveyed it to another juror in violation of [the jury instruction that] tells the jury to determine the facts only from the evidence*." The court held that the receipt of this possibly prejudicial information required the verdict to be set aside unless the harmlessness of the information could be shown, and the burden of proving the harmlessness of the information was on the State. Since the State failed to prove that the information concerning the rainfall was not prejudicial, a new trial was required. *Id.* at 917.

In the case at bar, exactly the same sort of extraneous information obtained in *Cook* was obtained by Juror Jacobs. Mr. Jacobs testified that he conducted independent research and gathered extraneous evidence through use of the Internet. He "Googled" the weather forecast for Harrisonville on the date of the fall. **TR 660:3-19.** Mr. Jacobs also explained that he gathered extraneous weather evidence when he testified about being questioned following the trial. He testified as follows:

> **Q.** And Ms. Moehlman said, well, we didn't feel like you could prove more likely than not that there was soap on the floor in the bathroom, right? Do you recall that?
>
> **A.** I think I recall that, yes.

> **Q.** And you recall that after she said that, you agreed with that and said, you know, you had these pictures of the soap dispenser and the rust, that could have happened at any time, that hospital had been there since 1963. Do you recall that?
>
> **A.** I do recall that. I asked how many soap dispensers. Normally you can't prove that.
>
> **Q.** *And right after* you said that about the soap dispensers, you said, and ***I checked the weather for that day and the forecast was for eight to ten inches of snow****, right?*
>
> **A.** *Yes.*

TR 662:9-663:1 (emphasis added).

When Mr. Jacobs was questioned following the trial, Ashlie Brown heard Mr. Jacobs explain that he conducted independent research and that he conveyed the results of his research to the other jurors. **TR 653:15-654:12.** Further, Juror Jennifer Moehlman testified that she remembers Mr. Jacobs providing the jury extraneous evidence during jury deliberations:

> **Q.** Now, in August of this year did you sit as a juror in a case that was called Kristine and Brian Smotherman versus Cass Regional Medical Center?
>
> **A.** I did.
>
> . . . .

Q. And then it was submitted to the jury for deliberations on August 8, 2014?

A. Yes.

Q. And during that time, do you recall any comment by any other juror of any investigation or seeking out of information that another juror did outside of the courtroom or the presence of the jury.

A. 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 . . . .

Q. And it was your understanding that *what he said was that he had, outside of the courtroom, conducted an investigation to try to determine what the weather was like on the day that Ms. Smotherman fell*; is that right?

A. Yes.

. . . .

Q. And was the result of his gathering of information that it had been snowing on that day?

A. I believe so, yes.

TR 644:22-646:13 (emphasis added).

There were other jurors that remember Mr. Jacobs conveying the extraneous weather evidence he discovered. Juror Larry Boucher testified as follows:

> **Q.** Do you have memory of someone talking about the weather at any point in time during the course of the trial?
>
> **A.** It was a situation where someone in the evening, they had looked on the Internet or on their telephone or some place and found something about weather . . . .

TR 686:8-19. And Juror Helen Stafford testified as follows regarding her memory:

> **Q.** Do you have memory of anyone discussing weather or having Googled what the weather may or may not have been during the course of the trial on the day of the fall?
>
> **A.** Someone came in and said there was snow on the ground at that time.

TR 697:9-14.

Juror Jacobs gathered evidence extraneous to the trial by conducting independent research about the weather conditions on the day of Mrs. Smotherman's fall. He did this in direct violation of Jury Instruction Number 1 provided to the jury in this case, which states the following: "[Y]ou must not conduct your own *research or investigation into any issues* in this case. . . . You *must not conduct any independent research or obtain any information of* ***any type*** *by reference* to . . . *the* ***Internet***, or any other means about any issues in this case . . . ." **LF 634-35 (emphasis added); LF 634-35; Appendix A5-A6;**

LF 650-51; TR 248:4-252:20; *see also,* MAI 2.01. The weather information Juror Jacobs gathered is the exact same type of extrinsic evidence obtained in *Cook*. Further, Juror Moehlman explained that Juror Jacobs conveyed the evidence he obtained through his independent research to the jury members during the jury deliberations. **TR 644:22-646:13.**

The trial court even found that Appellants "established that Juror Jacobs consulted the internet during the course of the trial to determine the weather forecast for Harrisonville, Missouri, on the date of [Appellant] Kristine Smotherman's fall." **LF 764-68, ¶ 1; Appendix A10.** The trial court also, correctly, found that because a "juror obtained extraneous evidence during trial, the burden shift[ed] to [Respondent] to overcome" the presumption of prejudice. *Id.* The Appellants have clearly met their burden of establishing that juror misconduct occurred. Therefore, prejudice must be presumed.

C. A new trial should be granted because the injection of extrinsic weather data prejudiced the Appellants

1. Prejudice must be presumed

A juror obtaining extrinsic evidence constitutes misconduct that creates a rebuttable presumption of prejudice. *See e.g., McBride v. Farley,* 154 S.W.3d 404 (Mo. App. S.D. 2004) (holding that a jury coordinator telling jurors outside the courtroom that a case had previously been tried and resulted in a hung jury was presumptively

prejudicial extraneous evidence warranting a new trial); *Dorsey v. State*, 156 S.W.3d 825, 831 (Mo. App. W.D. 2005) (holding that evidence showing that a juror visited the scene of the incident established that jury misconduct had occurred, and once the misconduct was established prejudice is presumed and the burden shifts to the opponent to show that the misconduct was not prejudicial); *State ex rel. Koster v. McElwain*, 340 S.W.3d 221, 255 (Mo. App. W.D. 2011) (holding that jury misconduct was established when it was shown that a juror obtained a map of unknown origins, which was not admitted into evidence; thus, the opponent had the burden to show that the jurors were not improperly influenced)). Accordingly, once "a party has established that a juror gathered evidence extraneous to the trial, the burden shifts to the opposing party to show that no prejudice resulted from it." *Travis*, 66 S.W.3d at 4 (citing *Middleton v. Kansas City Public Service Co.*, 152 S.W.2d 154 (Mo. 1941)).

Travis v. Stone was a wrongful death case arising out of an automobile collision. At trial there was testimony regarding the sight distance one of the defendants had and his reaction time. Following the trial, the plaintiff discovered that one of the jurors made a trip to the scene of the collision. The juror testified at a hearing that she went to the scene because she was concerned about the sight distance issue. The trial court, however, denied the motion for a new trial. The Supreme Court of Missouri disagreed and held that the plaintiff was entitled to a new trial because the presumption of prejudice from the juror's visit to the accident scene was not overcome. *Id.* at 4-6.

The *Travis* Court relied upon *Middleton v. Kansas City Public Service Co.*, which held that prejudice will be presumed once it is established that a juror has gathered evidence extraneous to the trial, and the burden is on the other party to overcome the presumption of prejudice. *Travis,* 66 S.W.3d at 4-5. The Court also noted that other cases have "*taken a strict view toward the acquisition of extra-trial evidence by jurors.*" *Id.* at 5 (citing *Douglass v. Missouri Cafeteria, Inc.*, 532 S.W.2d 811 (Mo. App. 1975) (upholding the grant of a new trial where jurors visited the scene of a slip-and-fall incident for the purpose of gaining information to help decide the case and then discussed their observations with the other jurors); *Stotts v. Meyer*, 822 S.W.2d 887 (Mo. App. E.D. 1991) (reversing the denial of a motion for new trial when a juror visited the scene of a collision, made observations, and reported his observations to the other jurors)).

Then, in *Travis*, the Court explained that this presumption of prejudice is very strong. The Supreme Court held that when this sort of misconduct occurs the *presumption of prejudice is "quite strong"* and "statements of the jurors minimizing the effect of the misconduct have very little weight." Accordingly, "*the presumption of prejudice is so strong that it can rarely be overcome by statements of the juror tending to minimize the effect*" of his conduct. *Id.* at 6 (emphasis added).

2. Juror testimony minimizing the effect of extraneous evidence cannot overcome the strong presumption of prejudice

Testimony by jurors that the extraneous weather evidence did not affect the verdict cannot overcome the strong presumption of prejudice that exists in this case. This is true regarding the testimony of all the jurors—not just Juror Jacobs.

In *Middleton*, an issue at trial was whether any part of a car would or could go under the body of a streetcar. A juror admitted visiting "automobile establishments" during trial to measure the height of the fender of the vehicle model in question; he also measured a similar streetcar. *Middleton*, 152 S.W.2d at 155-58. This juror asserted that his measurements did not influence his decision and did not affect the verdict of any other juror or the result of the case. *Id.* at 157. There were even affidavits submitted by nine other jurors to the effect that any measurements taken by the errant juror had no effect on the verdict. *Id.* Nevertheless, the Court held that the trial court abused its discretion in denying the motion for new trial because the presumption of prejudice was quite strong, and the statements of *the jurors* minimizing the effect of the misconduct were entitled very little weight. Specifically, the Court stated the following:

> 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 (emphasis added) (citations omitted).

In *Travis v. Stone*, where a juror went to the scene of a car wreck because she was concerned about the available sight distance, the juror stated that "her observations did not enter into the deliberations." But the Supreme Court of Missouri completely rejected this argument:

> [I]t *must be assumed that her visit had an impact on her decision making*, which *in turn influenced her participation in the jury deliberations. This could have subtly affected the outcome of the case*, and it would be virtually impossible for anyone to demonstrate the effect of her interactions on the deliberations, especially given the fact that there is no contemporaneous record of jury deliberations.

Travis, 66 S.W.3d at 5. Ultimately, the court relied upon *Middleton*, which the Court noted as holding that "statements of the *jurors* minimizing the effect of the misconduct were entitled to very little weight," to reject the argument that this juror's statement could overcome the presumption of prejudice. *Id.* at 6.

In *Dorsey v. State*, 156 S.W.3d 825 (Mo. App. W.D. 2005), a juror testified that before returning to court for the last day of deliberations, he went to the scene of the incident, and he got lost. This juror informed the other jurors about his trip and the fact

that he got lost. This juror testified that he "did not think this experience influenced him or the other jurors." *Id.* at 831. The State argued that no prejudice resulted due to the juror's misconduct, but this Court disagreed and stated the following:

> When juror misconduct involves the gathering of extraneous evidence by a juror, the presumption of prejudice is not easily overcome. In disproving prejudice, *jurors' statements that the misconduct did not affect their deliberations "ha[ve] 'little probative value' because of the common tendency of jurors to minimize the effect of the misconduct*."

Id. at 832 (emphasis added) (quoting *Travis,* 66 S.W.3d at 5 (citing *Middleton,* 152 S.W.2d at 158)). This Court went on to explain that the respondent must rebut the presumption of prejudice, and the "*jurors' own protestations in this regard are given little weight, for reasons that are obvious.*" *Id.*

Statements from jurors that juror misconduct did not affect their deliberations should be given very little weight. This rule applies to such statements from both the errant juror and the other jurors. Accordingly, any testimony from jurors involved in this case stating that they do not think Juror Jacobs' extraneous weather data affected their deliberations or they do not think weather data is relevant to the issues in the case should be disregarded.

In *Cook*, the extraneous information communicated to one other juror required a new trial. The court explained that this information could have hurt the defendant. *Cook*,

676 S.W.2d at 917. The court went on to explain that the fact that a juror claimed the information did not prejudice the matter was not sufficient to prove lack of harm:

> The fact that the juror claimed the information did not prejudice the matter is not sufficient to prove lack of harm to the defendant. As the Supreme Court noted in *State v. Malone*, 62 S.W.2d 909, 915 (Mo. 1933) ***a juror may sincerely claim to have been unaffected but have no awareness of the unconscious influence of the information***.

Id. (emphasis added) (citations omitted). This is consistent with the Missouri Supreme Court's explanation in *Travis* that "it *must be assumed that*" the juror misconduct had an impact on the juror's decision making process, which could have influenced her participation in the jury and "*subtly affected the outcome of the case*." *Travis*, 66 S.W.3d at 5.

An example of this exact type of unconscious, subtle influence is provided in the case at bar. Juror Denise MacMillan remembers that the day of Mrs. Smotherman's fall was "a snowy day." Interestingly, however, she believed that this evidence was properly presented to her at trial:

> **A.** I do remember the issue that it was *a snowy day*, but I just thought that was what was presented to us because they talked about the automobile hitting a pole and making the lights go out, it's why

> the lights went out in the hospital, but that may have been something we were told after it was over with. . . .

TR 693:22-694:9 (emphasis added). The jury was, however, never told during the trial that it was snowing on the day of the subject incident; in fact, the jury was not told anything about the weather. **TR 89-639.**

Furthermore, even without this strong caselaw requiring such testimony to be given little weight, Respondent CRMC did not rebut the presumption of prejudice through testimony of the jurors. First, Mr. Jacobs' claim that his research into the weather forecast did not affect his verdict is contradicted by the fact that this information was one of only two points raised by Mr. Jacobs when he was questioned following the trial:

> **Q.** Mr. Jacobs, you said this didn't have anything to do with your verdicts, but I just want to make sure I am clear. When Ms. Moehlman told us about why the verdict was, *there were two pieces of information you volunteered*. And you did volunteer the information you shared with us, right? We didn't ask you if you went and did any investigation[?]
>
> **A.** No, no.
>
> **Q.** You volunteered this?
>
> **A.** That's true.
>
> **Q.** The two pieces of information you volunteered, the first was about the soap dispenser and how it had been there for a long time

and the hospital had been there for a long time, right? Could have been multiple soap dispensers?

A. True.

Q. *And the second was about the weather, right?*

A. *Right.*

TR 666:4-24 (emphasis added).

Second, in *Cook*, after explaining that the belief of jurors that extraneous information did not affect the verdict is insufficient to rebut the presumption of prejudice, this Court went on to explain that the trial court only questioned one juror about the effect of the information. In contrast, the *Cook* Court cited *State v. Suschank*, 595 S.W.2d 295, (Mo. App. 1979), were all twelve jurors testified. *Cook*, 676 S.W.2d at 917, n.1. The Court explained that in *Cook* the effect on other jurors was not shown. The same is true here.

Under RSMo § 494.490, three-fourths or more jurors are required to return a lawful verdict. Further, in all civil actions before a circuit judge, a jury shall consist of twelve persons. *Id.* In the case at bar, the jury did consist of twelve jurors. **LF 668; Appendix A3.** At the hearing on the Motion for New Trial nine (9) jurors testified. **TR 644:5-699:20.** The Appellant called the first two jurors that testified at the hearing: (1) Jennifer Moehlman and (2) Robert Jacobs. **TR 644:5-667:8.** The Respondent called seven additional jurors to testify: (3) Marcia Beck, (4) Mary Laffoon, (5) Norman Lawson, (6) Larry Boucher, (7) Debra McDowell, (8) Denise MacMillan, and (9) Helen

Stafford. **TR 667:9-699:20.** Critically, *only eight of the jurors that provided testimony joined the verdict in the case at bar*. Norman Lawson did not join the verdict. **TR 681:10-13; LF 622; Appendix A1.** Accordingly, Respondent CRMC did not even provide testimony that the extraneous weather data did not affect the deliberations from enough jurors to have lawfully returned a verdict. Hence, CRMC failed to rebut the presumption of prejudice.

3. The extraneous weather data was material: the jury was subjected to improper influence

Because the extraneous weather data was material to issues at trial, the jury was subjected to improper influence; thus, the strong presumption of prejudice cannot be rebutted. The Respondent argues that the extraneous weather data does not have a logical connection with the facts of this case. It, therefore, contends that such information could not have resulted in prejudice. To support this argument, Respondent CRMC relies upon *State v. Stephens*, 88 S.W.3d 876 (Mo. App. W.D. 2002).

The *Stephens* case holds that to "rebut the presumption of prejudice, the non-movant must show that the jurors were not subjected to improper influence as a result of the misconduct." *Id.* at 883. It also explains that materiality of the extraneous evidence is an important factor when determining whether prejudice resulted from juror misconduct because immaterial evidence is not prejudicial. And it explains that "material" evidence

must have "'some logical connection with the consequential facts"' of the case. *Id.* at 883-84 (citations omitted).

In *Stephens*, this Court concluded that the presumption of prejudice was rebutted because it was clear from the record that the extraneous evidence complained about was not material to the jury's deliberations in convicting the appellant of rape, kidnapping, and assault by strangulation. *Id.* at 884.[1] In that case, the appellant raped his victim and subsequently hit her in the face, which rendered her unconscious. She regained consciousness in a dark, wooded area, and she was strangled until she passed out again. Fortunately, she regained consciousness in that area again and her attacker was gone; she then walked to a nearby house and obtained help. *Id.* at 879.

The alleged juror misconduct consisted of a juror going to the park where the victim had regained consciousness. The appellant argued that this juror obtained evidence concerning the remoteness of the park. *Id.* at 884. He then argued that this was material

[1] It should be noted that *Stephens* applied a different standard of review than what must be applied in the case at bar. In that case, the appellant did not raise the juror misconduct issue as a claim of error in his motion for a new trial; hence, this Court's review was limited to plain error review. *Stephens*, 88 S.W.3d at 880. Thus, the prejudice required to grant a new trial was higher than what is necessary in this case. With plain error, the error must have prejudiced the appellant, but such prejudice must rise to the higher level of manifest injustice or a miscarriage of justice. *Id.* at 881.

because it related to whether the jury believed he stopped at the park while trying to find a hospital for the victim rather than driving there to dump the victim's body. But a detailed review of the record revealed that the remoteness of the park was never at issue. This Court explained this very well and thoroughly:

> [T]he actual location of the park, either in absolute terms or in terms comparing it to other known landmarks, was not [in dispute]. The State's evidence clearly demonstrated that the park was in a remote location. The State's evidence in that regard consisted of testimony from one of the residents of the house where the victim went for help after regaining consciousness at the park, and [a] Detective [from] the Grandview Police Department, the first law enforcement officer on the scene, *both of whom testified that the park, and the surrounding area, were extremely remote*. The appellant never introduced any evidence to dispute the location of the park or the fact that, comparatively speaking, it was not located in an area in which a reasonable person would have expected to find a hospital, if lost in his or her search for one. In fact, *the appellant essentially admitted that the park was remote when he testified at trial that he pulled into the park so he would not be seen*. Obviously recognizing and accepting the location of the park and the fact that it was off the beaten path in terms of finding a hospital, the appellant pursued the

> only possible trial strategy available to him in attempting to lessen the adverse impact, if any, of the park's remoteness, which was to introduce evidence, specifically, his own testimony, of an alternative reason for why he ended up with the victim at a remote park, which issue came down to a credibility call for the jury that the appellant apparently lost. *This appears to be a classic case of a defendant being stuck with a fact at trial*, in that there is no viable way to refute it, and simply trying to put a different spin on that fact, in light of the other facts in the case, other than the spin offered by the State.

Id. (emphasis added).

In the case at bar, *Stephens* should be viewed in contrast with *Dorsey v. State*. In that case, the appellant was convicted of forcible sodomy, among other crimes. The victim testified that she got lost and had stopped to ask for directions when she came upon the appellant. The appellant testified that the victim actually stopped to ask about buying some drugs. One of the jurors subsequently traveled to the crime scene and also got lost. This juror told the other jurors about his trip and the fact that he also got lost. *Dorsey*, 156 S.W.3d at 827-28.

In *Dorsey*, this Court explained that the presumption of prejudice cannot be easily overcome, and it explained why the issue of whether the victim was actually lost was important:

> The issue of whether the victim was actually lost at the time she encountered [appellant] was important because the victim's credibility was clearly at issue. Had the victim not actually been lost, it would have undermined her credibility and supported [the appellant's] version of events, which is that she stopped her car in order to buy drugs. The victim's reason for encountering [the appellant] was critical to supporting her version of the events. [The] Juror['s] . . . statement to the other jurors that he also got lost at the same location had the effect of supporting the victim's version of events, endorsing her testimony, and impeaching [the appellant's] testimony.

Id. at 832.

Several other cases that address materiality of extraneous evidence and prejudice resulting from juror misconduct should also be considered. In *Travis v. Stone*, the Supreme Court of Missouri also pointed out that materiality of the evidence is an important factor when evaluating prejudice. Apparently, it was argued that the juror misconduct in the *Middleton* case was more egregious, and the Court responded as follows:

> Furthermore, although the extent of the juror's evidence gathering was greater in *Middleton*, the more important factor in

> determining prejudice is the materiality of the evidence, and in both cases the evidence gathered pertained to a critical issue in the case.

Travis, 66 S.W.3d at 6. In *Travis*, an issue in the case was the defendant's "sight distance" or "whether he could see the first collision in order to avoid the second collision." The Court explained why extraneous evidence regarding the "sight distance" was material:

> ***The jury's factual determination of the issue was essential to a resolution of the case***, but the expert ***testimony on the issue was split***. [A defendant's] expert testified that the slope of the highway prevented [that defendant] from seeing the first collision of the crest of a hill, but [the plaintiff's] expert testified to the contrary. *Under these circumstances, the presumption of prejudice from the juror's visit to the scene was not overcome*.

Id. (emphasis added). Accordingly, it was held that the trial court abused its discretion in denying the motion for a new trial, and the case was reversed and remanded for a new trial. *Id.*

Another example of how extraneous information can be material is provided by *McBride v. Farley*. In that case, the jury coordinator told jurors outside the courtroom that the case had previously been tried and resulted in a hung jury. *McBride*, 154 S.W.3d at 408. The appellant court stated the following with regard to whether this information constituted facts bearing on trial issues:

As to whether the information furnished to this jury constituted facts bearing on trial issues, it is significant that Plaintiff had the burden of proving her claim against Defendants. Defendants' counsel, in his opening statement, informed the jury that Plaintiff had the burden of proof, and must convince them that Defendants "did something wrong and that it caused . . . [Plaintiff] to be injured." Although it is not a part of this record, we assume that the trial court gave MAI 3.01 which is required to be given in every case. That instruction tells the jury that the burden is upon the party who relies upon propositions of fact submitted to them to cause them "to believe that such proposition is more likely to be true than not true." It concludes, "[i]f the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition." In closing argument, Defendants' counsel reiterated that the burden of proof was on Plaintiff and that she could not meet that burden in this case. In short, *the jury was clearly informed that Plaintiff had the burden of proof and that her failure to meet that burden must result in a verdict for Defendants*.

The information provided to the jurors by the jury coordinator *dealt with a trial issue*, i.e., *whether Plaintiff could prove*

> *Defendants' liability for her claimed damages. The fact that there had been an earlier trial resulting in a hung jury effectively communicated to this jury that Plaintiff had been unable to convince at least nine of those jurors that she had met her burden of proof and was entitled to a verdict. . . .*

Id. at 408-409 (emphasis added). The court also explained the materiality of the extraneous information in the context of the respondent failing to rebut the presumption of prejudice:

> As indicated above, the ultimate issues in this case were whether Defendants were negligent in their care and treatment of Plaintiff, and whether she suffered damage as a result. The information provided by the jury coordinator *reflected on those ultimate issues by indicating that, in light of the fact that Plaintiff had the burden of proof, Plaintiff had been unable to persuade at least nine of the jurors in the earlier trial that she had met that burden*. This was an extrinsic evidentiary fact (one bearing on trial issues) that was not properly introduced at trial, and did not concern matters inherent in the verdict. That being the case, there was a presumption of prejudice and the burden shifted to Defendants to overcome that presumption. They did nothing to do so . . . .

Id. at 410 (emphasis added).

In the case at bar, the jury was instructed to assess a percentage of fault to Respondent CRMC in its verdict if it believed the following:

> 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 plaintiff.

LF 642 (emphasis added); **Appendix A8; LF 657; TR 579.** Thus, like whether a driver had an adequate sight distance to see a collision in *Travis*, whether soap was on the floor was a critical issue in the case at bar.

The case at bar, is not similar to *Stephens*. As explained above, in *Stephens* it was clearly established at trial that the subject park was remote. Here, there was evidence supporting the conclusion that soap was on the floor, and there was evidence supporting the conclusion that water was on the floor. Appellant Smotherman established that the bathroom was set up to cause soap to drip on the floor. The bathroom had a soap dispenser placed on the wall to the side of the sink. **TR 336:7-15; TR 368:18-24; Pls.' Ex. 30; Appendix A16.** That soap dispenser dripped soap. **TR 336:20-337:1.** In fact,

there was a rust stripe on the heating element beneath the soap dispenser on the wall. **TR 337:23-338:1; TR 368:18-24.**

Bailee Schlozthauer worked in "housekeeping," which was responsible for cleaning the entire hospital. **TR 333:16-334:3.** Ms. Schlozhauer testified at trial that she "would think" that the rust stripe shows that soap had been dripping from the soap dispenser onto the heating unit and down to the floor. **TR 337:23-338:7.** She even testified that she had prior experiences where she found soap on the floor of the bathroom. **TR 339:17-20.**

Roger Keefer was the director of plant operations at the Hospital in February 2009. **TR 362:24-363:5.** Mr. Keefer agreed that the rust stripe should have notified CRMC that the soap dispenser was dripping, and he agreed that a dripping soap dispenser created a potential safety hazard. **TR 368:18-370:11.**

Further, Plaintiff Kristine Smotherman testified that she slipped. She explained the experience as follows:

> **Q.** The lights go out. You are just getting up. Then what?
>
> **A.** My feet just went completely out from underneath me.
>
> . . . .
>
> **A.** Yes. Well, no. . . . The lights had went out, and so in a panic, you know, I hurried up and finished; and as I stood the rest of the way up to finish what I was doing, I just -- like I was on roller skates.

> **Q.** Well, describe -- tell me what you mean by that. Was there a rolling sensation, a slipping sensation?
>
> **A.** It was a slipping sensation but, I mean, that's how fast it was.

TR 439:23-440:19.

After her fall, Mrs. Smotherman was found by a nurse in the hallway and taken to the emergency room. **TR 444:25-445:8.** When Kristine Smotherman was in the emergency room she overheard a nurse explain that Mr. Smotherman slipped on soap in the bathroom:

> **Q.** Was there anything that you overheard while you were there at the emergency room, by anyone, related to the incident of your fall in the bathroom?
>
> **A.** I did hear somebody talking to either another nurse or doctor, and I believe it was another nurse, stating, we found her in the hallway, *she slipped and fell in the hall bathroom on soap*. . . .

TR 448:12-20 (emphasis added).

Further, Dr. James Queenan was the first surgeon to see Mrs. Smotherman concerning the problems developing in her hand after the fall. **TR 451:7-453:22.** On March 6, 2009, Dr. Queenan took a history of the subject fall from Mrs. Smotherman. **TR 452:24-453:7.** Dr. Queenan's history states the following:

> Ms. Smotherman is a 37-year-old white female, right-hand dominant, who fell in a dark bathroom at Cass Regional Medical

> Center in February 26, [2009] on her right upper extremity. This is during a power out. *The patient states that she slipped on some soap on the floor*. There had been a power outage. That particular bathroom had lighting and then that lighting went out. . . .

Pl.'s Ex. 50 (emphasis added); **Appendix A17-A18; TR 453:23-454:21.**

At the same time, however, Respondent CRMC's primary point during cross-examination of Appellant Kristine Smotherman was that water—or some substance other than soap—was on the floor. CRMC questioned Mrs. Smotherman about a March 5, 2009 medical record from a Dr. Hafer who admitted Mrs. Smotherman into the hospital before she was treated by Dr. Queenan. **TR 496:17-497:10; TR 451:7-453:22.** Dr. Hafer's patient history stated the following:

> **Q.** Dr. Hafer, in his history of present illness, in other words, the story that he got from the patient, he says that, "The patient says there was a power outage and the electricity was off, and *she stumbled and maybe slipped on some water or something on the floor and fell*." Is that something that you told Dr. Hafer?
>
> **A.** If that's what he said I told him? I don't have anything to argue about that. I don't -- I don't know. If that's what he says I said, then that's what I said.

TR 497:11-21 (emphasis added). CRMC went on and made sure the difference between these medical reports was impressed upon the jury:

> **Q.** The bottom line, it looks like we have two different medical records in the same institution by two different physicians that are both saying the patient fell, and there is some indication as to why, and they're a little bit different?
>
> **A.** A little bit, yes.
>
> **Q.** In Dr. Queenan's, the word "soap" appears?
>
> **A.** Yes.
>
> **Q.** And in Dr. Hafer's, the word[s] . . . "stumbled and maybe slipped on some *water* or something," appears?
>
> **A.** Yes.

TR 497:22-498:11 (emphasis added).

The case at bar is *not* a case like *Stephens* where the appellant was "stuck with a fact at trial." To the contrary, there was evidence supporting the conclusion that soap was on the floor and evidence supporting the conclusion that water was on the floor. Juror Jacobs researched weather from the day of Mrs. Smotherman's fall. Once he learned that the forecast called for snow he "wondered if maybe some of the water from it snowing that day had been tracked into the bathroom." **TR 653:15-654:6.** Respondent CRMC repeatedly argued to the jury that the jury needed to conclude that soap was on the floor to enter a verdict for Mrs. Smotherman, and CRMC provided evidence that water was on the floor rather than soap. The extraneous evidence provided by Juror Jacobs makes it

more likely that water was on the floor, rather than soap. Clearly, this information has "some logical connection with the consequential facts" of this case.

This case is more similar to *Dorsey* than *Stephens*. As pointed out by CRMC, the evidence that soap was on the floor of the bathroom all came through Mrs. Smotherman. As explained above, the Respondent entered evidence that water—rather than soap—was on the floor. In fact, CRMC's theory it argued during closing arguments was that water could have been on the floor. In *Dorsey*, whether the victim was actually lost was important because the victim's credibility was at issue; if she was not actually lost, it would have undermined her credibility and supported the appellant's differing version of events. The same logic applies in the case at bar. The extraneous weather data provided by Juror Jacobs supports the conclusion that water—rather than soap—was on the bathroom floor. This undermines Mrs. Smotherman's credibility and her testimony that she slipped on soap on the floor, which was a critical issue in this trial.

The case at bar is exactly like *Travis* and *Middleton* where jurors gathered evidence pertaining to a critical issue in the case. In *Travis*, the court explained that the factual determination of the sight distance issue was essential to a resolution of the case. But, unlike *Stephens*, there was a split with regard to testimony on that issue. Similarly, in this case, there was a split in the evidence regarding whether soap or water was on the floor. Juror Jacobs then gathered evidence from outside the trial that supported and strengthened the conclusion that water was on the floor. Exactly like *Travis*, under such

circumstance, the presumption of prejudice is not overcome, and this case should be reversed and remanded for a new trial.

This case is also similar to *McBride* where the jury learned that the case had previously been tried and resulted in a hung jury. Such information was material because it concerned whether the plaintiff could prove the defendants' liability for the claimed damages. Similarly, here Appellant Smotherman had the burden of proving that soap was on the floor of the subject bathroom. But Juror Jacobs obtained extraneous evidence that supported the conclusion that water—rather than soap—was what was on the floor. Such evidence is clearly material and prejudicial.

In the case at bar, it simply cannot be argued that the extraneous weather data obtained by Mr. Jacobs does not have a logical connection with the facts of this case. Mr. Jacobs' reason for conducting independent research and thoughts after he learned that the forecast called for snow alone establishes the materiality of this information. Ashlie Brown testified about such issues:

> **A.** Mr. Jacobs had mentioned that he had done some weather research.
>
> . . . .
>
> **Q.** What, if anything, did he say about what he learned?
>
> **A.** *He had wondered if maybe some of the water from it snowing that day had been tracked into the bathroom*.

TR 653:15-654:6 (emphasis added). Furthermore, Mr. Jacobs even agreed that his weather data had a logical connection to the case. He agreed that snow present on the day of this incident provided an explanation for how water could have been in the bathroom:

> **Q.** And can we agree that if *there was snow on the ground that day*, that might form a *possible explanation for how water would be on the floor in the bathroom where somebody slipped and fell*?
>
> **A.** I don't know if it was snow, if it snowed one inch or 20 inches.
>
> **Q.** I understand that. *I am just asking you if there was snow on the ground and there was water on the floor in the bathroom, the snow on the ground is one possible explanation for that, right*?
>
> **A.** I guess you could say that, but she was -- she went to see her doctor.

TR 663:2-15 (emphasis added).

Finally, it cannot be forgotten that the weather information was of such importance to Mr. Jacobs that it was one of only two things mentioned when he was questioned following the trial:

> **Q.** Mr. Jacobs, you said this didn't have anything to do with your verdicts, but I just want to make sure I am clear. When Ms. Moehlman told us about why the verdict was, *there were two pieces of information you volunteered*. . . .
>
> . . . .

Q. The two pieces of information you volunteered, the first was about the soap dispenser and how it had been there for a long time and the hospital had been there for a long time, right? Could have been multiple soap dispensers?

A. True.

Q. *And the second was about the weather, right?*

A. *Right.*

TR 666:4-24 (emphasis added).

CONCLUSION

It is clear that juror misconduct occurred in this case. Juror Jacobs conducted independent weather research and obtained evidence extraneous to the trial. He also provided this extrinsic weather data to the other jurors during deliberations. Accordingly, there is a very strong presumption of prejudice. Further, the information he provided about the weather was pertinent to critical issues that the jury had to decide in this case. Since Juror Jacobs' independent weather data was pertinent to critical issues in the case at bar, the injection of this information resulted in prejudice.

The trial court abused its discretion in concluding that extraneous evidence obtained and shared by Juror Jacobs was immaterial. As a result, the Judgment entered in this case must be reversed and a new trial ordered.

Respectfully submitted,

/s/ Joshua A. Sanders

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CERTIFICATE OF COMPLIANCE

Under Missouri Supreme Court Rule 84.06(c), Local Rule 16, and Special Rule 12, I hereby certify that on this 29th day of May, 2015:

1. This brief complies with the requirements of Missouri Supreme Court Rule 55.03, the requirements and limitations set forth in Missouri Supreme Court Rule 84.06(b), and the Special Rules of the Court;

2. This brief contains 11,516 words—excluding the cover, signature block, table of contents, table of authorities, and this certification—as determined by Microsoft word software; and

3. A copy of this brief and the appendix are filed in PDF format with the Missouri Courts e-Filing System.

/s/ Joshua Sanders

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of May 2015, a copy of the foregoing Appellant's Brief was electronically filed, with electronic service to the following:

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