Case No. SC95214

IN THE
SUPREME COURT OF MISSOURI

TANISHA ROSS-PAIGE,
Plaintiff/Respondent,
v.
ST. LOUIS METROPOLITAN POLICE DEPARTMENT, *et. al.*,
Defendant/Appellants.

APPEAL FROM THE CIRCUIT COURT
OF ST. LOUIS COUNTY, MISSOURI
THE HONORABLE TIMOTHY WILSON, JUDGE

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Appellants' Statement of Facts does not recite facts that support submissibility or the verdict.

In approximately 2007 or 2008, Sergeant Steven Gori began supervising Ms. Ross-Paige in the Sixth District of the St. Louis Metropolitan Police Department. (Tr. 212:1-24; 225:23-25; 225:1-10). Sergeant Gori would make inappropriate comments just about every time he saw Ms. Ross-Paige. (Tr. 227:9-19). Ms. Ross-Paige testified that, on one occasion, Sergeant Gori touched her back, commented on her "behind," told her "how he can drive his vroom vroom up in [her] vroom vroom" and asked her to take her bullet proof vest off, so "he can see what [she] is really working with." (Tr. 226:15-25; 227:1-14). On another occasion, Ms. Ross-Paige testified that she was eating a hot dog with mayonnaise on it. (Tr. 227:20-25; 228:1-25; 229:1-9). Sergeant Gori stated, "I can put something better between that bun…" and "the liquids that come out would be the same color as that…" (Tr. 227:20-25; 228:1-25; 229:1-9). Meanwhile, Ms. Ross-Paige testified that Sergeant Gori asked her on a date several times. (Tr. 245:25; 246:1-6). On each occasion, Ms. Ross-Paige declined Sergeant Gori's request. (Tr. 245:25; 246:1-9).

While in the Sixth District, Sergeant Gori "always" made Ms. Ross-Paige feel uncomfortable. (Tr. 323:8-11). Ms. Ross-Paige testified that Sergeant Gori commented on the size of her breasts, and stated, "…anything more than a mouthful was a waste…" (Tr. 232:12-19). Sergeant Gori told Ms. Ross-Paige that he loved her mouth and asked her if she swallows. (Tr. 232:15-25; 233:1-10). When Ms. Ross-Paige confronted Sergeant Gori about his inappropriate comments, he laughed, and he informed Ms. Ross-Paige that

she "was in a man's position and [she] needed to deal with it." (Tr. 233:21-25; 234:1-7). During this time, Sergeant Gori continued to ask Ms. Ross-Paige on dates. (Tr. 245:25; 246:1-18).

Eventually, Ms. Ross-Paige was transferred to the Canine Unit. (Tr. 234:8-12). Since Sergeant Gori initially remained in the Sixth District, Ms. Ross-Paige testified that she was hoping the situation would improve. (Tr. 237:22-24). However, due to the nature of the Canine Unit (i.e. there were only two officers on duty at a time); Ms. Ross-Paige continued to have interactions with Sergeant Gori. (Tr. 237:25; 238:1-25; 239:1-25; 240:1-8). According to Ms. Ross-Paige, Sergeant Gori continued to make inappropriate comments. (Tr. 240:9-13).

On one occasion, Sergeant Gori handed Ms. Ross-Paige a fake "wanted" poster with her drivers' license picture on it. (Tr. 230:17-25; 231:1-22). The poster contained the following information: "Ross-Paige Ross/Paige – aka 'Apple Bottom' … Subject wanted for having the "BADDEST BODY" in the St. Louis area. Use extreme caution when approaching the subject. Approach this subject from behind for your own safety." (P.Ex.9). Ms. Ross-Paige testified that Sergeant Gori approached her patrol car in the "north patrol lot," and asked her if she had received his email. (Tr. 240:19-25; 241:1-6). When she said no, he handed her a manila envelope containing the "wanted poster," laughed and walked away (Tr. 240:19-25; 241:1-13). An internal affairs investigation eventually determined that the "wanted poster" had been sent from Sergeant Gori's work email address to Ms. Ross-Paige's personal email account. (Tr. 424:18-25; 425:1-19).

Ms. Ross-Paige was in the Canine Unit for approximately a year and a half when Sergeant Gori was transferred to the Canine Unit and was again her direct supervisor. (Tr. 241:17-22). Ms. Ross-Paige testified that Sergeant Gori asked her to go skinny dipping in his pool. (Tr. 246:10-18). Ms. Ross-Paige declined Sergeant Gori's request. (Tr. 253:22-24). She also testified that Sergeant Gori told her that he can "push everything off his desk and just have his way with [her] on his desk." (Tr. 246:19-24; 249:16-25; 250:1-12; 251:6-12). On another occasion, Ms. Ross-Paige testified that an openly gay, female officer walked by and asked to meet with Ms. Ross-Paige. (Tr. 251:13-25; 252:1-22). After the officer walked away, Sergeant Gori asked Ms. Ross-Paige if she had "switched teams on him." (Tr. 251:13-25; 252:1-22). She testified that he stated he guessed her firefighter husband wasn't "putting out his fires like he used to" and that Sergeant Gori "can handle that…" (Tr. 251:13-25; 252:1-22).

While in the Canine Unit together, Ms. Ross-Paige testified that Sergeant Gori threatened her if she didn't give in to his sexual advances. (Tr. 253:25; 254:1-8). Ms. Ross-Paige testified that she felt uncomfortable reporting Sergeant Gori's advances, because she was aware of retaliation against other officers who complained. (Tr. 254:9-16). Specifically, Ms. Ross-Paige testified that she was present when Lieutenant Deeba (her commanding officer) threatened other officers for stepping out of line. (Tr. 255:1-25; 256:1-6). According to Ms. Ross-Paige, Lieutenant Deeba sent an April 25, 2011 email telling all Canine officers that he would not tolerate officers "throw[ing] each other under the bus." (Tr. 257:3-8; P.Ex.16; App-8). The email went on to say that, "[f]or a few of you this email might hit home, and I hope that we can strive together as a team for

camaraderie, loyalty and teamwork together" and "[i]f I have to address this issue again, the recipient that it touches home with no longer will be with our team no matter who they are or what they contribute to the unit." (Tr. 257:15-21; P.Ex.16; App-8).

During this time, Ms. Ross-Paige testified that she became eligible to take the sergeant's exam. (Tr. 271:11-25; 272:1-25; 273:1-14). Ms. Ross-Paige testified that she was informed by another sergeant that a study group was being put together to tutor any eligible officer, and she needed to go to human resources to pick up a packet. (Tr. 269:2-25; 270:1-8). When Ms. Ross-Paige arrived at human resources, she was informed that she had signed a waiver declining to sit for the exam, and the deadline to correct the mistake had passed. (Tr. 269:2-25; 270:1-5). Ms. Ross-Paige further testified that her signature was forged on a waiver form thereby waiving her right to sit for the exam. (Tr. 267:19-25; 268:1-25; 269:1-25; 270:1-17).

Upon learning of the issue, Ms. Ross-Paige testified that she contacted Sergeant Gori who informed her that he didn't think she wanted to take the exam, because her position in Canine was "cush." (Tr. 270:6-25; 271:1-2). According to Ms. Ross-Paige, Sergeant Gori informed her that he had another officer sign her name on the waiver, because he didn't think she wanted to take the test. (Tr. 270:6-25; 271:1-2). Had Ms. Ross-Paige passed the test, she testified that she most likely would have been transferred out of Canine and, thus, out from under the control of Sergeant Gori. (271:3-10; 490:9-16).

Ms. Ross-Paige testified that, around June 2, 2011, her shift was abruptly changed, and she attributed the shift change to rejecting Sergeant Gori's repeated advances. (Tr.

258:1-25; 259:1-25; 260:1-25; 261:1-25; 262:1-11). Ms. Ross-Paige testified that, prior to the June 2, 2011 incident, Sergeant Gori told her "that if [she] didn't do what it is that…he wanted [her] to do, that he was going to have [her] kicked out of Canine." (Tr. 262:12-19). He told her that "he was going to take [her] dog and have [her] kicked out of Canine." (Tr. 262:12-19). When Sergeant Gori informed Ms. Ross-Paige about the schedule change, she testified that he told her, "…all gloves are off now." (Tr. 263:7-20). Ms. Ross-Paige interpreted this statement as the end of her opportunities at Canine. (Tr. 263:7-25; 264:1-4).

As a result of the June 2, 2011 incident, Ms. Ross-Paige testified that she filed an EEO complaint against Sergeant Gori with human resources on June 3, 2011. (Tr. 264:15-25; 265:1-3). According to Ms. Ross-Paige, she was asked to formalize her complaint in a memorandum. (Tr. 267:5-12). On June 6, 2011, Ms. Ross-Paige was written up in relation to the June 2, 2011 incident. (Tr. 273:19-25; 274:1-23). On the same day, Ms. Ross-Paige testified that she received an email from Lieutenant Deeba informing her that "it's not a subordinate's job to question an order" and "[a] subordinate should not be disrespectfully insubordinate and act irrational." (Tr. 275:18-25; 276:1-6; P.Ex.19; App-11). Ms. Ross-Paige testified that, prior to filing a complaint against Sergeant Gori, she had never been disciplined. (Tr. 276:14-16). Additionally, she had never received any negative reviews. (Tr. 276:17-19).

On June 7, 2011, Lieutenant Deeba sent Ms. Ross-Paige an email stating that he does things differently "than most commanders," and he tries his best "to run this like a Marine Corps unit." (Tr. 278:4-15; P.Ex.21; App-13). He further said, "[a]s I have told

you and the rest in the past, and you should know me by now, I bark the orders, say my piece, then we move on as a team." (Tr. 278:4-15; P.Ex.19; App-11). The email also referenced that Ms. Ross-Paige has "other issues." (Tr. 279: 1-21; P.Ex.19; App-11). Ms. Ross-Paige testified that she interpreted this email as retaliation for filing a complaint against Sergeant Gori. (Tr. 278:4-25; 279:2-19). Specifically, she interpreted the "other issues" as her complaint against Sergeant Gori. (Tr. 279:1-21).

On September 1, 2011, Lieutenant Deeba sent an email to Captain Spicer and courtesy copied the entire Canine Unit. (Tr. 268: 6-20; P.Ex.22; App-14). The email stated, "[o]fficer Ross-Paige initiated a complaint against me and Sergeant Gori. The findings of this complaint have been returned to both of us by the EEOC consultant, Mrs. Marti Bloodsaw. The findings for sexual harassment and retaliation complaint were determined to be 'without merit.'" (P.Ex.22; App-14). The email went on to say, "[a]s you are aware, since the beginning of this erroneous complaint to the completion of this investigation, this officer has disrupted the operations of both SWAT and Canine. Further I have been approached by every member of the Canine Unit, who feel unsafe and do not trust this officer and do not want to work with her." (P.Ex.22; App-14). It concluded by stating, "I request that Officer Ross-Paige be transferred immediately and I post this critical position." (P.Ex.22; App-14).

On September 19, 2011, Lieutenant Deeba sent another email to his superior, Captain Spicer. (Tr. 281:9-25; 282:1-24; P.Ex.24; App-15). In the email, Lieutenant Deeba referenced Ms. Ross-Paige's EEO complaint and stated, "[f]urther, it will be my recommendation, which I will submit in writing this week to you, that due to Paige's

insubordination and poor work ethic, she be removed from the canine unit." (Tr. 283:2-25; 284:1-5; P.Ex.24; App-15). Ms. Ross-Paige testified that, prior to filing her complaint against Sergeant Gori; she was never accused of "poor work ethic" or "insubordination." (Tr. 285:12-17). She testified that prior to filing her complaint; nobody had ever recommended her removal from the Canine Unit. (Tr. 285:7-11). Ms. Ross-Paige testified that, prior to filing her complaint; she got along with her co-workers. (Tr. 286:10-16). However, after filing the complaint, "nobody talked to [her]." (Tr. 286: 17-25; 287:1). In the same September 19, 2011 email, Lieutenant Deeba recommended that Ms. Ross-Paige be sent for remedial training, because she couldn't control her dog (Tr. 287:15-19; P.Ex.24; App-15). Ms. Ross-Paige testified that, prior to filing her complaint; she had never been accused of failing to control her dog. (Tr. 287: 15-25; 288: 1-5).

Shortly thereafter, Ms. Ross-Paige began remedial training. (Tr. 290:14-25; 293:1-4). The training was supposed to last eight to twelve weeks, but Ms. Ross-Paige was only trained for approximately a month. (Tr. 291:1-8; 294:6-9). According to the lead trainer, Carol Seithel, Ms. Ross-Paige attended remedial training, because she had been out of work for three months due to injury. (Tr. 564:12-16; 547:20-24). However, Officer Seithel also testified that "remedial training would be training after the fact that you've already gone through training, and we have to go back through training to strengthen our weaknesses." (Tr. 565:15-20). Ms. Ross-Paige testified that she was aware of other officers that had been off work for a period of time, but none of them were required to attend remedial training. (Tr. 291:21-25; 292:1).

St. Louis Police Department street trainer, Joseph Dobbs, testified it is required that canine handlers do street training twice a month. Tr.588-590. Dobbs told jurors that if an officer misses training, the officer should make it up the next month. Tr.588-0589. Lieutenant Ross, one of Respondent's supervisors, testified that street training is absolutely crucial. Specifically, he testified:

> She had to go through – every month or very so often they had to go through officer street training and I made sure that she was – it was important to have. It was a part of what every Canine officer was supposed to do. It was beneficial for her and her canine – her canine to get it, and it was going to help with the liability of the department. So, I made sure that --- that she was going to go through the training – as well, with the other Canine officers."

Tr.374.

Initially, Lt. Ross couldn't recall if Ms. Ross-Paige had missed any street training. Tr.734. Upon further prompting by the Defendant's counsel, he then testified that Ms. Ross-Paige was required to take street training on January 4, 2012, because she had missed training. Tr.738. Lt. Deeba further testified that missing two months of street training is "absolutely unacceptable." Tr.825-826.

According to Dobbs, it is the responsibility of the head trainer (Carol Seithel) to schedule street training. Tr.595. The street trainer in charge of Ms. Ross-Paige's January

4, 2012 training claimed that he didn't know who scheduled Ross-Page's training for January. Tr.616. Ms. Ross-Paige was never scheduled for street training in November and December 2011. Tr.595. It is not acceptable for an officer to miss training for two months. Tr.595. According to Defendant's Exhibit A, Ross-Paige was never scheduled for training in November and December 2011. Contrary to Dobbs' testimony, Officer Seithel testified that Ross-Paige scheduled her own training on January 4, 2012. Tr.549. She acknowledged, though, that no training was scheduled for Ross-Paige following the completion of her remedial training on October 18, 2011. Tr.549. This is confirmed in an email, portions of which are set out here:

> From: Wiedemann, Katheryn A [Actually from Carol Seithel]
>
> Sent: Thu "4/5/2012 9:40 AM
>
> To: Roth, Michael J; Robertson, Michael K; Siebum, James W; Seithel, Carol A
>
> Subject: FW: Canine Unit
>
> April 5, 2012
>
> ***
>
> PO Ross-Paige was absent for 3 consecutive months last year and went through a remedial course to get back to street worthiness with her K9. She finished this course October 18, 2011. I recommended maintenance training for them for at least twice a

month to keep up their skills after returning to the street. She never scheduled nor contacted me about scheduling training last year.

***

Respectfully Submitted,

PO Carol Seithel DSN 3981

P.Ex.94. Bates 2064; App-35

Again, Dobbs, a trainer, testified that it is the responsibility of the head trainer (Carol Seithel) to schedule street training. Tr.595. According to Seithel's email, Ms. Ross-Paige never contacted her about scheduling any training after October 18, 2011. Specifically, she testified that, if any training was conducted at all, "[i]t was not through us…" Tr.549. The jury had every right to infer that Seithel set up Ross-Paige by not scheduling training, then claiming that it was Ross-Paige's fault.

Indeed, Seithel had previously demonstrated animus toward Respondent by her own admission, and her credibility with the jury was seriously compromised by multiple impeachments of her testimony. The April 5, 2012, cited above, also found Seithel recommending to Lt. Deeba that Ms. Ross-Paige be transferred out of canine.

I believe it is time to-transfer PO Ross-Paige also. I do not believe she is an asset to this unit. Respectfully Submitted, PO Carol Seithel DSN 3981
P.Ex.94, Bates 2064; App-35

In her email, Seithel also stated, "[f]or the past year we have had nothing but drama within this unit because of PO Ross-Paige and Sgt. Gori." (P.Ex.94, Bates 2064; App-35).

Seithel initially testified that Deeba never asked her to write Exhibit 94. Tr.558. Rather, she claimed that she did it out of frustration. *Id*. Reluctantly, on cross-examination, Seithel admitted the truth: that she testified in her deposition that she sent the email, because, "[she was] asked by Lieutenant Deeba what we thought about the unit." Tr.562. Seithel was impeached again regarding the reason for remedial training. She testified during direct that Ms. Ross-Paige went through retraining, because "[s]he and her dog were off the street for three months and had not received any training at the time, during that time." Tr.547. On cross, she admitted that she had previously testified that "remedial training would be training after the fact that you've already gone through training, and we have to go back through training to strengthen our weaknesses." Tr.565. On September 19, 2011, Lt. Deeba sent an email to his superior stating, "[Ross-Paige] will also need 4 to

6 weeks of remedial training at the school due to the poor upkeep of her canine by her. **This is per my lead canine trainer**." (P.Ex.24, Bates 16; App-15 (Emphasis Added)).

Ms. Ross-Paige was injured in a training accident on January 4, 2012. (Tr. 302:11-21). As a result of Ms. Ross-Paige's injury, she testified that she was entitled to long-term disability. (Tr. 317:19-23). She further testified that she met all of the requirements for long-term disability. (Tr. 327:19-23; P.Ex.'s 86 and 87; App-21 and App-30). Specifically, Ms. Ross-Paige testified it was her understanding that if she established that her injury was work related then she was entitled to disability. (Tr. 317:19-23). Ms. Ross-Paige was sent to three doctors. (Tr. 327:19-23). Two of the three doctors agreed that her injury was work related and permanently disabling. (Tr. 327:19-23).

On October 5, 2011, the St. Louis Metropolitan Police Department sent Ms. Ross-Paige a letter on department letterhead advising her that she has "a maximum of 15 working days from the receipt of this letter to file for a Disability Pension." (P.Ex.47; App-19). The letter goes on to say, "[i]f you have not filed for a Disability Pension by the end of the 15 working days, the Department will file on your behalf." (P.Ex.47). The letter was signed by James Buntin, Assistant Director of Human Resources for the department. (P.Ex.47).

On November 21, 2012, the department sent Ms. Ross-Paige a letter formally dismissing her from the police department, and informing her to contact the Police Retirement System with regard to her pension and the Benefits Section of the department (i.e. Monica Green) regarding "long term disability." (P.Ex.45). Ms. Ross-Paige filed an

"Application for Retirement" on December 1, 2012. (P.Ex.48). The application was signed by Monica Green and Mark Lawson, the St. Louis Board of Police Commissioner's Secretary. (P.Ex.48). Ms. Ross-Paige testified that she filed the application for disability pension with the department. (Tr. 318:16-22; 318:19-23).

Ms. Ross-Paige testified that she had a hearing in 2013 to determine her eligibility for disability pension. (Tr. 328:16-18; 328:23-25; 329:1-5). However, according to Ms. Ross-Paige, as of the date of trial, she had not received any decision regarding her disability pension. (Tr. 329:3-8). According to Ms. Ross-Paige, the disability application was filed with the department. (Tr. 318:16-22). She further testified that it was her understanding that the department was responsible for paying disability. (Tr. 327:19-25; 328:8-12).

Ms. Green testified that long-term disability is handled by the department. (Tr. 804:3-7; 804:11-17). She further testified that she believed Ms. Ross-Paige began receiving long-term disability on July 2, 2012. (Tr. 805:20-22; 806:3-8). Ms. Ross-Paige was required to wait six months from the date of her accident to obtain long-term disability from the department. (805:20-25; 806:1-2). Ms. Green testified that although she was not sure, she believed Ms. Ross-Paige was still receiving long-term disability as of the date of trial. (Tr. 807:9-11; 806:3-11). As to whether Ms. Ross-Paige was still receiving long-term disability from the department, Ms. Green testified that "[t]o my knowledge she is." (Tr. 807:9-11).

As evidence that Ms. Ross-Paige had been paid long-term disability, Ms. Green referenced Defendant's Exhibit Z which purported to show that Ms. Ross-Paige received long-term disability in the year 2013. (Tr. 805:1-19; 806:3-8; D.Ex.Z). However, Ms.

Ross-Paige testified that, as of the date of trial, she had not received "a single cent" from the department in disability. (Tr. 329:6-8).

The jury returned a verdict at trial in favor of the Board on Ms. Ross-Paige's hostile work environment claim. On the retaliation claim, the jury found for Ms. Ross-Paige, awarded her actual damages of $300,000 and $7.2 million in punitive damages. The trial court amended the verdict to reflect the statutory cap on punitive damages and awarded attorney's fees for work through the trial court's jurisdiction.

This appeal by the Board followed.

ARGUMENT

Introduction

Ross-Paige began her relevant work at the St. Louis Police Department in early 2005. Tr. 211. After she had worked in the Sixth District for approximately a year and a half, Sergeant Gori became her supervisor. Gori published a campaign of sexual remarks directed at Officer Ross-Paige, "just about every time he saw her." Tr.227. His words were sexually explicit and left little to either subtlety or the imagination. Gori created a "wanted poster" featuring Ross-Paige, and describing her as having the "BADDEST BODY" in the St. Louis area." P.Ex.9. Ross-Paige did not file a complaint about this behavior because she feared retaliation. Tr.244.

Officer Ross-Paige transferred to the Canine Unit approximately a year and a half later, leaving Sgt. Gori behind, and believing that what he had done to her would end because of the lack of proximity. Tr.234. But approximately a year and a half later, Sgt. Gori was transferred to the Canine Unit. Tr.241. Gori took up right where he left off, inviting Ross-Paige to skinny dip at his pool. He told her he could "push everything off his desk and just have his way with me." Tr.246. When Ross-Paige had a conversation with a gay, female officer, Gori asks if she "has switched teams on me." Tr. 252. In every instance, Ross-Paige just walked away. Tr. 252.

The Canine Unit is a tight circle of specialized officers. Lt. Deeba, who commands the unit, wanted to run it like a Marine Corps unit. Tr.278. Lt. Deeba called together the other members of the unit to describe what he was going to do to a particular officer in the unit who was causing issues within the unit. Deeba told the unit members:

> I'm going to make it a living hell. If it's the last thing I do, he's getting kicked out of Canine. I'm going to have him sent back through re-training, through my lead trainer…and I'm going to guarantee that she [the lead trainer Carol Seithel] make it my business that he would not graduate….[C]onsider him history.

Tr.255-56. That officer got kicked out of the Canine Unit. Tr.256. Deeba also sent an email encouraging teamwork, loyalty, and comradery. And "[i]f I have to address this issue again, the recipient that it touches home with no longer will be with our team no matter who they are or what they contribute to the unit." Tr.257; P.Ex.16; App-8.

Apparently emboldened and feeling protected even further by Lt. Deeba's email, Gori told Ross-Paige that if she didn't stop refusing him "he'll have me terminated, have my dog taken, kicked out of Canine and make my life a living hell." Tr.253;262. "This is a man's world, and we get what we want," Gori told Ross-Paige. Gori promised Ross-Paige that "…all gloves are off now." (Tr. 263:7-20).

Ross-Paige reached her limit and filed a complaint with the EEOC in June, 2011. P.Ex.10; App-7. Gori/Deeba retaliated. Gori's promise that "he'll have me terminated, have my dog taken, kicked out of Canine and make my life a living hell" came true. And the promise that Deeba made to the unit when Ross-Paige was inside the huddle – that if anyone became disloyal to the unit – they would find their life a living hell and ultimately be removed from the unit – were visited upon Officer Ross-Paige. But Ross-Paige would not go away of her own accord, despite suddenly negative reviews, unexplainable shift

changes, denied training and a forged document indicating that she was not interested in taking the sergeant's exam. Tr.257. The jury could infer that Deeba/Gori had one last plan.

On January 4, 2012, Ross-Paige and another Canine Unit Officer, under the supervision of a trainer, Siebum, undertook training exercises in Forest Park. Tr.303. Ross-Paige ran her dog through its routine. Then the other officer wanted to run his dog through the same training exercise. The other officer's dog broke loose, then attacked, Ross-Paige. The dog returned to his officer and then re-engaged, that is, ran back and attacked Ross-Paige again. Tr.304. The re-engagement is curious, given that the first attack was broken off, the dog returned to his master's/officer's side, then re-attacked. The jury could infer that this was done in response to a command, particularly when a trainer was on the scene. These highly trained dogs just don't act this way on their own.

Ross-Paige injured her knee in the attack and became unable to perform her work as a police officer.

Ross-Paige broke rank with the Unit by filing the EEOC complaint. As Deeba had promised if anyone broke rank within the Canine Unit: "If it's the last thing I do, [s]he's getting kicked out of Canine." The retaliation continued through Ms. Ross-Paige's not seeing a "single cent" in disability payments as of the trial.

Point I.A. There Is Nothing For This Court to Review in Appellant's Point I.

A. Introduction

Appellant failed to preserve the point on which it now relies.

B. Standard of Review

"In order to preserve a point for appellate review the point raised on appeal must be based upon the theory of the objection as made at the trial and as preserved in the motion for new trial." *State v. Ball*, 622 S.W.2d 285, 291 (Mo.App.1981)(emphasis added). *See also Khan v. Gutsgell*, 55 S.W.3d 440, 442 (Mo.App.2001) ("Assuming a proper objection is made, the party must then set forth ***the same*** objection in their motion for new trial and in their appellate brief.").

Richter v. Kirkwood, 111 S.W.3d 504, 510 (Mo.App. 2003)(emphasis added).

The Court amended Rule 70.03 in 1994. It now reads:

Counsel shall make specific objections to instructions considered erroneous. No party may assign as error the giving or failure to give instructions unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Counsel need not repeat objections already made on the record prior to delivery of the instructions. **The objections must also be raised in the motion for new trial in accordance with Rule 78.07.**

Id. (emphasis added). Prior to that amendment, appellate courts took a lenient course in the application of Rule 70.03's predecessor. "The former rule allowed review where the specific objection was made in the motion for new trial even if it had not been raised at trial." *Seidel v. Gordon A. Gundaker Real Estate Co.*, 904 S.W.2d 357, 364 (Mo.App.E.D.1995). With the advent of the new Rule 70.03, appellate review is limited to *specific* objections made at trial, *repeated* in a motion for new trial and *repeated* again in a Point Relied On. That is the teaching of *Kahn v. Gutsgell*, 55 S.W.3d 440, 442 (Mo. App.E.D.2001). Indeed, "[i]t is a fundamental rule that contentions not put before the trial court will not be considered by the appellate court; an appellate court will not convict a trial court of error on an issue which was not put before it to decide." *Strunk v. Hahn*, 797 S.W.2d 536, 549 (Mo.App.1990).

As to Instruction 8, the Board made this objection at the instruction conference in the trial court:

> Instruction 8, again, I'll read it. Our objection in the entirety, ["]or gave plaintiff a negative write-up or assigned plaintiff unfavorable shifts or denied plaintiff paid time off or attend training [sic] or failed to allow plaintiff to apply for the sergeant's exam, as there's no evidence of those allegations, and they're not tangible employment actions.
>
> ***In addition, we object to the phrase, ["]or unjustly refused or delayed plaintiff's disability claim["], as, again, there's no evidence of this.*** [Note the singular.] ***It's not a tangible employment action. In fact, defendants***

have no authority or control over plaintiff's disability, which was shown on the record, and this claim would be correctly asserted against a defendant not in this party, or in this claim.

Tr.861. (Emphasis added).

The objection at trial did *not* assert that the evidence failed to support both sides of the disjunctive "refused or delayed plaintiff's disability claim." The objection treated the phrase "refused or delayed" as being a single alternative theory of recovery among the seven theories listed in the disjunctive in the instruction.[1] This was as intended. The words "refused or delayed" were submitted as a single explanation for Ms. Ross-Paige's failure to receive a "single cent" from the Board for disability. Indeed, the focus of the objection when read in context was *not* that there was no evidence of delay or refusal to pay but that there was *no evidence that the Board had a responsibility to pay at all*. The objection was explained by the Board in this way: "[D]efendants [the Board] have no authority or control over plaintiff's disability…." Additionally, the objection stated that even if there was

[1] Instruction 8 listed seven disjunctive acts by the Board that the jury could find constituted retaliation: (1) discharged plaintiff or (2) gave plaintiff a negative write up or (3) assigned plaintiff unfavorable shifts or (4) denied plaintiff paid time off to attend training or (5) failed to allow the plaintiff to apply for the sergeant's exam or (6) unjustly refused or delayed plaintiff's disability claim or (7) created a severe and pervasive hostile work environment for the plaintiff. LF161

evidence, delay or refusal to pay was not a "tangible employment action" for which the law would give any relief, no matter what the evidence.

Appellant's Motion for New Trial raised three issues ostensibly related to Instruction 8.

> 1. The court should grant defendant a new trial on plaintiff's claim of unlawful retaliation because the verdict director, instruction no. 8, misstated Missouri law on retaliation and constituted a roving commission. As such the Court erred in giving the verdict director, and the prejudicial effect of it necessitates a new trial.
>
> 2. The court should grant defendant a new trial on plaintiff's retaliation claim ***because the verdict director, instruction no. 8, included purported acts by defendant which were not actionable retaliatory adverse employment actions by defendant. Since the verdict director on plaintiff's retaliation claim was not limited to evidence relating to actionable conduct of defendant it was a roving commission.*** As such the court erred in giving the verdict director on retaliation, and the prejudicial effect necessitates a new trial.
>
> 3. The court should grant defendant a new trial on plaintiff's retaliation claim because the given verdict director failed to include the required element that the plaintiff engaged in protected activity. The failure to include this predicate element allowed the jury to find retaliation for actions that occurred before plaintiff made a complaint of sexual harassment. As such

> the court erred in giving the verdict director on retaliation, and the prejudicial effect necessitate a new trial.

LF248-49. (Emphasis added).

Read as broadly as possible, item 2 of the motion for new trial focuses on the acts of the defendant and asserts that these acts by the defendant are not actionable in a retaliation claim. Specifically the second ground for new trial complains that Instruction 8 "included purported acts by defendant which were not actionable retaliatory adverse employment actions by defendant…" LF249. Thus, the gravamen of the new trial motion is that even if there was evidence beyond a reasonable doubt that the Board delayed or denied Ms. Ross-Paige's receipt of retirement benefits, that would not be actionable in a retaliation claim.

As with the objection at trial, there is nothing in the motion for new trial that even a generous court could consider as raising a submissibility issue regarding a failure to prove both sides of the disjunctive "refused or delayed." Indeed, read in context, the second basis for a new trial is instructional error – that Instruction 8 was a roving commission – does not raise submissibility at all.

The trial court rejected the Board's motion for new trial on instructional grounds because:

> Rule 70.03 requires that specific objections to instructions considered erroneous must be made before the jury retires to consider its verdict and no party may claim as error the giving of an instruction unless the party objected

> before the jury retired to deliberate. Defendant failed to object that the instruction constituted a roving commission.

LF422. The trial court did not believe that the Board had raised a submissibility issue concerning the instructions in ruling the motion for new trial. Thus, the trial court only considered instructional error in its ruling. (The trial court denied the defendants' post-trial JNOV motion concluding that the plaintiff had made a submissible case.)

On transfer here, the Board's Point I abandons the claim of instructional error it raised in the Court of Appeals and now asserts a claim that Ross-Paige failed to make a submissible case on a single element of Instruction 8. The Board's Point I states there was "no competent evidence that the Board 'refused or delayed plaintiff's disability claim.'" (App.Br.26)

The Board's Point I can be read two ways: First, it can mean that the even if there was substantial evidence that Ross-Paige's disability claim was refused or delayed, it was not the Board that caused or was responsible for the refusal or delay. Second, and alternatively, it can mean that there was no substantial evidence that the Board, which was responsible, caused both a refusal and a delay in Ms. Ross-Paige's disability claim.

The Board asserts that its Suggestions filed with the Motion for New Trial raise the submissibility issue and preserve it for appellate review. The Motion for New Trial does not incorporate Defendant/Appellant's suggestions. "A party may not add a new point to a motion for new trial under the guise of making 'Suggestions.'" *Greco v. Robinson*, 747 S.W.2d 730, 734 (Mo.App.E.D.1988).

Implicitly, the Board concedes this flaw in its preservation-for-appeal efforts by quoting its Suggestions, while ignoring the Motion for New Trial. If the Court concludes that the Suggestions can independently assert a ground for a new trial not addressed in the Motion for New Trial, the Suggestions nevertheless offer a different ground than did the Board's objection at trial. The failure-to-prove-both-sides-of-the-disjunctive argument is expressly articulated for the first time in the Suggestions. It is settled law that the motion for new trial cannot assert grounds not raised by specific objection at the trial court. *Strunk*, 79 S.W.2d at 549.

Turning first to the Suggestions' claim that the evidence failed to prove both sides of the refused-or-delayed disjunctive, the Board necessarily concedes that if there was evidence of both a refused and delayed claim, the Board would be liable. But the trial objections did not inform the trial court that that was the Board's position. The objection made no specific reference at all to the failure-to-prove-both-sides-of-the-disjunctive the Board now makes. Instead, the trial court objection said that no facts could result in liability for the Board in this case. That issue is thus not preserved for appellate review.

The Suggestions next address the Board-cannot-be-liable argument that the trial objection addressed.

> Specifically, the verdict director allowed a finding for plaintiff if defendant 'unjustly refused or delayed plaintiff's disability claim…. There was not a scintilla of evidence that defendant had any authority or control over the determination of plaintiff's disability application. Here, the jury was

improperly instructed that they could find damages against the defendant … based on the action of a separate and distinct legal entity.

LF265. At least this explanation attempts to match up with the trial objection. But if the Suggestions cannot add a new ground, there is nothing for the Court to review in Point I.

If this Court allows the Suggestions to add a ground for a new trial not contained in the Motion for New Trial, the section following explains why the trial court did not err in overruling the motion because there was substantial evidence that the Board had a hand in delaying or denying the decision on Ms. Ross-Paige's disability claim.

Point I.B. The Plaintiff Made a Submissible Case That The Board Delayed Or Denied The *Disability* Claim Of Officer Ross-Paige

A. Standard of Review

A submissible case exists where the Plaintiff has presented substantial evidence for every fact essential to liability. *Love v. Hardee's Food Sys., Inc*., 16 S.W.3d 739, 742 (Mo. App. 2000). "Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of facts can reasonably decide the case." *Id*., (quoting *Hurlock v. Park Lane Med. Ctr*., 709 S.W.2d 872, 880 (Mo.App.W.D.1985)). Whether evidence is substantial and whether any inferences drawn are reasonable is a question of law. *Id*. The jury's verdict must stand unless there is a complete absence of probative facts to support it. *Id*.

Southwestern Bell Yellow Pages v. Robbins, 865 S.W.2d 361, 365-66 (Mo.App.E.D.1993) expresses the standard of review for a claim of insufficient evidence to support a jury submission.

> In determining whether the trial court should have directed a verdict [for the moving party] or granted a judgment notwithstanding the verdict, this court must view the evidence in the light most favorable to [the adverse party] giving it the benefit of all reasonable inferences, and ignoring [the moving party's] contrary evidence except to the extent it aids [the adverse party]. Withdrawing a case from the jury is a drastic measure which should not be taken unless there is no room for reasonable minds to differ on the issues, in the exercise of a fair and impartial judgment. A jury's verdict must not be set aside unless there is a complete absence of probative facts to support the jury's verdict.

Id. (citations omitted).

In determining if an instruction is supported by the evidence, an appellate court must view the evidence in the light most favorable to the party offering the instruction, giving that party the benefit of all favorable inferences reasonably drawn from the evidence and disregarding all evidence to the contrary. *Manufacturers American Bank v. Stamatis*, 719 S.W.2d 64, 67 (Mo.App.1986).

B. There Was Substantial And Un-Objected-To Evidence That The Board Contributed To Cause A Delay/Deny Ms. Ross-Paige's Receipt Of Disability Benefits.

The Board's freshly-minted-on-transfer point seems to argue that no matter what evidence there was regarding the Board of Police Commissioner's efforts to delay/ deny Ms. Ross-Paige *retirement* benefits, it did not matter because that Board does not finally determine eligibility for *retirement* benefits. As will be shown, there is a distinction between *disability* benefits, to which Instruction 8 refers, and *retirement* benefits, about which the Board argues on appeal.

C. **The Disjunctive Issue**

If the Court grants *ex gratia* review of the disjunctive issue…

First, the Board's claim that the instruction was in the disjunctive ("refused or delayed plaintiff's disability claim") and that there was no substantial evidence to support both sides of the disjunctive, fails when the evidence supporting the verdict is considered.

Importantly, there are two types of disability offered to disabled metropolitan police officers. First, there is what the department refers to as "long-term disability." This *disability* benefit is provided *through the department* and continues automatically for two years after a work-related disability occurs. "Long-term disability" decisions are made by an insurance company, and the coverage allegedly begins six month after the event triggering the disability.

The second type of disability is the "disability pension." According to the department, "disability pension" is entirely handled by the St. Louis Retirement System, *as opposed to the department*. The St. Louis Retirement System makes decisions regarding "disability pension." If approved, an applicant is entitled to 75% of salary for life.

Ms. Ross-Paige testified that she was entitled to long-term disability *from the department*. (Tr. 317:19-23). She further testified that she met all of the requirements for long-term disability. (Tr. 327:19-23; P.Ex.'s 86 and 87). Specifically, Ms. Ross-Paige testified it was her understanding that if she established that her injury was work related then she was entitled to disability. (Tr. 317:19-23). Ms. Ross-Paige was sent to three doctors. (Tr. 327:19-23). Two of the three doctors agreed that her injury was work related and permanently disabling. (Tr. 327:19-23).

On October 5, 2011, the St. Louis Metropolitan Police Department sent Ms. Ross-Paige a letter on department letterhead advising her that she has "a maximum of 15 working days from the receipt of this letter to file for a Disability Pension." (P.Ex.47). The letter goes on to say, "[i]f you have not filed for a Disability Pension by the end of the 15 working days, the Department will file on your behalf." (P.Ex.47). The letter was signed by James Buntin, Assistant Director of Human Resources *for the department*. (P.Ex.47).

On November 21, 2012, the department sent Ms. Ross-Paige a letter formally dismissing her, and informing her to *contact* the Police Retirement System with regard to her pension and the *Benefits Section of the department* regarding "long term disability." (P.Ex.45; App-17). Monica Green ran that section *of the police department*.

Ms. Ross-Paige filed an "Application for Retirement" on December 1, 2012. (P.Ex.48; App-20). The application was signed by Monica Green and Mark Lawson, the St. Louis Board of Police Commissioner's Secretary. (P.Ex.48; App-20). Ms. Ross-Paige testified that she filed the application for disability pension *with the department*. (Tr. 318:16-22; 318:19-23). Ms. Ross-Paige further testified that it was her understanding that *the department was responsible for paying the disability she sought*. (Tr. 327:19-25; 328:8-12).

Ms. Ross-Paige testified that she had a hearing in 2013 to determine her eligibility for disability pension. (Tr. 328:16-18; 328:23-25; 329:1-5). However, according to Ms. Ross-Paige, as of the date of trial (March, 2014), she had not received any decision regarding her disability pension. (Tr. 329:3-8).

Ms. Green testified for the Board that *long-term disability is handled by the department*. (Tr. 804:3-7; 804:11-17). She further testified that Ms. Ross-Paige was required to wait *six months* from the date of her accident to obtain long-term disability *from the department*. (805:20-25; 806:1-2). Ms. Green testified that she believed Ms. Ross-Paige was still receiving long-term disability as of the date of trial, but was not sure. (Tr. 807:9-11; 806:3-11). Ms. Ross-Paige testified that, as of the date of trial, she had not received "a single cent" from the department in disability. (Tr. 329:6-8).

From this evidence, the jury could (and did) conclude based on substantial evidence that: (1) Ms. Ross-Paige should have begun receiving long-term benefits disability *from the department* within 6 months of her January, 2012, attack by the officer-controlled

canine. (2) Ms. Ross-Paige had not received a single cent of disability benefits from the Board nearly two years later.

Delay and refusal are not alternatives in a scenario where there has never been a payment and the time for expected payment has been far exceeded. *Refusal* to decide/pay necessarily includes *delay* in payment. Clearly six months had gone by – a delay; and just as clearly, well more than 6 months had elapsed since the injury. Given the expected 6 months for decision/payment to which Ms. Green testified (as the Board's witness), the jury could reasonably infer that delay had occurred and had ripened into refusal. Indeed, the Board understood this and expressed its specific objection at trial as though they were not alternatives.

This is substantial evidence. This evidence and the reasonable inferences that flow from the evidence cover both sides: delay and refusal.

D. Retirement Benefits are not the same as Disability Benefits

Next is the Board's assertion that the benefits about which Ms. Ross-Paige testified were not disability benefits, but retirement benefits.

First, Ms. Ross-Paige's counsel expressly did not agree that the benefits about which Ms. Ross-Paige testified were retirement benefits.

> MS. TUCKER: Right. Right. The disability that she was talking about is -- has nothing to do with the St. Louis Board of Police Commissioners, so it's very misleading to the jury. It's -- that's through the police retirement system, that has nothing to do with the board.

MR. HOLLINGSHEAD: I think they're one and the same….

Tr.795-96. There is thus no agreement on the record that the benefits Ms. Ross-Paige sought were the retirement benefits that the Board says they are.

The Board's brief loses sight of "long term disability" (the Board's responsibility), instead focusing entirely on the "disability pension" (the retirement system's responsibility). Ms. Ross-Paige testified about *the Board's* failure to pay her disability claim. Reduced to its essence, what the Board is now seeking is a declaration of law that Ms. Ross-Paige's evidence must be discredited altogether.

If anything, the Board's argument is a testament to the Board's failure to offer/explain the evidence that supports its position. However, the Board never asked the trial court or this Court to make such a declaration. It was incumbent on the Board to produce evidence and cogent argument both to draw and explain the distinction it now wants the Court to make for it. But this was a disputed fact question, *not* a question of law.

Indeed, on closing argument, this issue was of such diminished consequence that the Board did not even argue the issue it now raises on appeal. The only thing Appellant argued about the Board to the jury was this:

> Let's talk about the Board of Police Commissioners. The Board of Police Commissioners had in place policies and procedures. They expect their officers to know those policies and procedures. They expect their officers to comply with those policies and procedures, and if you don't report

> harassment, how on earth can the board do anything about it? How on earth can the police department do anything about anything that's not reported? It can't, ladies and gentlemen. Plaintiff's counsel stood here and told you believability, credibility. Absolutely.

Tr.887.

Second, the Board implies that Ms. Ross-Paige agreed to stipulate to the disability benefits she had received. The record suggests a different conclusion.

Here is the transcript exchange, the net result of which is that *the Board* would not stipulate to anything, there was no agreement as to the payment of any benefits and the Board's evidence was rejected by the jury.

> MR. PAULUS [for Ms. Ross-Paige]: Can we just skip the witness because we've been here for so long and stipulate to what she received [here the Board's brief adds "long-term disability" to aid its argument] in twenty-four weeks?
>
> MS. TUCKER [for the Board]: No, we cannot because you have that in evidence….

Tr. 798; App.Br.32. The Board thus implicitly agrees that Ms. Ross-Paige's evidence was contrary to the evidence she intended to offer on the subject. Ms. Ross-Paige's testimony could only be contrary to what the Board intended to offer if it addressed the same issue – Board paid disability benefits -- in a different way. Because there was a dispute on whether

Ms. Ross-Paige had received Board paid disability benefits, resolution of the dispute was entrusted to the jury.

The bulk of the Board's argument relating to the Police Board and the Police Retirement Board states only the evidence that was put before the jury by the defendants, and ignores Officer Ross-Paige's testimony.

Here Ms. Ross-Paige's testimony supports the jury instruction, was probative on the subject of retaliation, was evidence on a disputed point that the jury credited in her favor, and provided the jury with substantial evidence of the Board's delay and refusal to pay for her disability at all.

The judgment of the trial court should be affirmed.

Point II. Allegations of Juror Misconduct Are Limited to the Punitive Damages Verdict.

A. 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." *Travis v. Stone*, 66 S.W.3d 1, 3 (Mo. banc 2002). 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." *Williams v. Daus*, 114 S.W.3d 351, 365 (Mo.App.S.D. 2003), quoting *Travis*, 66 S.W.3d at 3; *see also Alcorn v. Union Pacific R.R. Co.*, 50 S.W.3d 226, 246 (Mo. banc 2001).

Trial court rulings on such matters "will not be disturbed on appeal absent a clear showing of abuse of discretion, which 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." *Portis v. Greenhaw*, 38 S.W.3d 436, 443 (Mo.App.W.D.2001). "[I]f reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *Anglim v. Missouri Pacific R.R. Co.*, 832 S.W.2d 298, 303 (Mo. banc 1992); *Richardson v. State Hwy. & Transp. Comm'n*, 863 S.W.2d 876, 881 (Mo. banc 1993).

B. Introduction

The Board's argument here is that the trial court failed to shift the burden to Ms. Ross-Paige to show that no prejudice occurred to the Board as a result of Juror Hink's Google inquiry. This is the only ground on which the Board sought transfer.

It is presumptuous to speculate as to the reasons this Court granted transfer. But if one can be forgiven for making a guess, it seems that two issues suggest this Court's interest in this area. The first is whether a Google search in the confines of jury deliberations is tantamount to a juror obtaining extrinsic evidence outside the courtroom or falls within the general proscription against impeaching a verdict with information about the internal deliberations of the jury. The second question is this: If Google searches in the confines of jury deliberations are tantamount to the gathering of extrinsic evidence, whether the shift in the burden that follows that conclusion permits a trial court to deny a motion for new trial based on an independent finding of no prejudice after a full hearing, even though the trial court did not expressly state that it had presumed prejudice and shifted the burden.

Ms. Ross-Paige believes that the proper result is to treat a Google search that results in *information that is consistent with the trial court's instructions* as a matter internal to the jury's deliberations and not available to impeach the verdict. Ms. Ross-Paige holds this view because the trial court found that the specific information obtained by Juror Hink was consistent with the instructions previously given by the trial court in the case and thus not extrinsic at all. If the Court reaches a different conclusion, it may announce its new preferred rule and nevertheless affirm because of the trial court's express finding that it found no prejudice to the Board because the Google information was consistent with the trial court's instructions.

C. A Juror May Not Impeach A Verdict With Testimony About The Internal Deliberation Of The Jury.

"The general rule in Missouri is that a juror's testimony about jury misconduct allegedly affecting deliberations may not be used to impeach the jury's verdict." *Travis,* 66 S.W.3d at 4. "It is a 'well-founded and long-established rule, based on sound public policy, … that the affidavit or testimony of a juror is inadmissible and is not to be received in evidence for the purpose of impeaching the verdict of a jury.'" *Wingate by Carlisle v. Lester E. Cox Medical Center,* 853 S.W.2d 912, 916 (Mo. banc 1993) (quoting *Smugala v. Campana,* 404 S.W.2d 713, 717 (Mo.1966)). Generally, "jurors may only speak through their verdict ... [and] cannot speak of any partiality or misconduct that transpired in the jury room nor of the motives which induced or operated to produce the verdict." *State v. Taylor,* 917 S.W.2d 222, 225 (Mo.App.W.D.1996).

"The firmly entrenched rule in Missouri is the *Mansfield* rule which is that a juror's testimony or affidavit may not be used to impeach the verdict as to misconduct inside or outside the jury room whether before or after the jury is discharged." *Kemp v. Burlington Northern R.R. Co.,* 930 S.W.2d 10, 13 (Mo.App.E.D.1996). "[T]his is true whether the juror concurred in or dissented from the verdict." *Reed v. Sale Memorial Hospital and Clinic,* 741 S.W.2d 819, 824 (Mo.App.S.D.1987); *see also Wingate,* 853 S.W.2d at 916; *Smugala,* 404 S.W.2d at 717.

The Mansfield rule, "adopted in most jurisdictions, is based on public policy grounds that jurors speak through their verdict." *Stotts v. Meyer,* 822 S.W.2d 887, 889

(Mo.App.E.D.1991). "It is infinitely better that the irregularities, which undoubtedly sometimes occur in the jury room, should be tolerated rather than throw open the doors and allow every disappointed party to penetrate its secrets." *State v. Fox*, 79 Mo. 109, 112 (1883).

> No one is competent to impeach a verdict by the making of an affidavit as to matters inherent in the verdict, such as that the juror did not understand the law as contained in the court's instructions, or that he did not join in the verdict, or that he voted a certain way due to a misconception of the evidence, or misunderstood the statements of a witness, or was mistaken in his calculations, or other matters 'resting alone in the juror's breast.' A juror who has reached his conclusions on the basis of evidence presented for his consideration may not have his mental processes and innermost thoughts put on a slide for examination under the judicial microscope. 'Proof of such a fact is excluded for at least two reasons: first, because there would be no end to litigation if verdicts could be set aside because one juror did not correctly understand the law or accurately weigh the evidence; second, the proof of his mental process is locked in the breast of the juror, and is not capable of refutation or corroboration.'

Baumle v. Smith, 420 S.W.2d 341, 348 (Mo. 1967)(citations omitted).

Courts recognize an exception to this general rule, however, and allow a party to attack a verdict on the ground that juror misconduct occurred outside the courtroom, such

as when a juror gathers factual evidence extrinsic to the trial. *Williams*, 114 S.W.3d at 365. The juror testimony must allege:

> that extrinsic evidentiary facts (i.e., facts bearing on trial issues but not properly introduced at trial) were interjected into the jury's deliberations, [and not merely allege] that jurors acted on improper motives, reasoning, beliefs or mental operations (the latter type of juror testimony is said to concern 'matters inherent in the verdict.'). Extrinsic evidentiary facts enter a jury's deliberations when, for example a juror visits an accident scene without the court's authorization and then shares his observations with his fellow jurors.

Id., citing *Neighbors v. Wolfson*, 926 S.W.2d 35, 37 (Mo.App.E.D.1996)(citations omitted in original). "Extrinsic evidentiary facts" differ from "matters inherent in the verdict." The former is something obtained outside the controlled-by-the-court, hermetically-sealed evidentiary environment of a trial. As to the latter, "improper motives, reasoning, beliefs or mental operations are matters inherent in the verdict." *Ledure v. BNSF Railway Co.*,351 S.W.3d 13, 24 (Mo.App.S.D.2011), citing *Williams*, at 368.

D. The Information Obtained By Juror Hink During Deliberations

At the hearing conducted by the trial court on the motion for new trial, the trial court took testimony from Juror Hink. In his testimony, Mr. Hink stated that he used his cell phone one time during the deliberations on punitive damages. Specifically, the court asked:

> 14 During jury deliberations, did you use any
> 15 electronic device to access any information?

16 MR. HINK: I used my phone that one time during
17 the deliberations for the punitive damage, yes.
18 THE COURT: All right. Did you use them in the
19 first stage of deliberations?
20 MR. HINK: No.
21 THE COURT: What exactly did you do?
22 MR. HINK: I Googled what a punitive damage was.

Transcript, June 9, 2015, p. 6

The Wikipedia answer that resulted from Mr. Hink's inquiry was read into the record. Wikipedia stated that punitive damages:

14 or exemplary damages are damages intended to reform or deter
15 the defendant and others from engaging in conduct similar to
16 that which form the basis of the lawsuit. Although the
17 purpose of punitive damages is not to compensate the
18 plaintiff, the plaintiff will receive some or – all or some
19 portion of the punitive damage award.

Post-Trial Evidentiary Hearing transcript, June 9, 2015, p. 7

The trial court asked Mr. Hink if he read anything from this to the other jurors. Mr. Hink responded, "what I recall doing was reading this to myself." Post-Trial Evidentiary Hearing transcript, June 9, 2015, p.7.

The court inquired further of Mr. Hink regarding the course of the deliberations on punitive damages:

How soon after you Googled did the jury arrive at the seven point two million dollar figure?

MR. HINK: Not – not – not soon, I don't think. I think I did that fairly early and I don't think anybody really knew I was doing it.

***

THE COURT: I have one additional question. Did you suggest the seven point two million dollar figure to the other jurors?

MR. HINK: I think I was the one that made the final suggestion of seven. I don't remember if it was seven or seven point two.

THE COURT: Did it flow from what you Googled?

MR. HINK: No. No. I was – I had to come up quite a bit from where I was originally at in my – in my mind….

Transcript, June 9, 2015, p. 10-11.

E. Is the Wikipedia Information Extrinsic Evidence or Information Internal to the Jury's Deliberations?

"Extrinsic" in this context means different from and gathered outside the trial/courtroom setting. Thus, extrinsic evidence is evidence that is received/obtained outside the courtroom setting that is different from evidence received in the trial. One way

to determine which standard applies – the extrinsic evidence standard versus the internal-to-the-deliberations standard – is to consider whether the information the juror received was consistent with evidence/instructions already given at the trial.

Assuming for argument's sake alone that a legal definition is evidence (and not just information), it follows that if information that is obtained outside the courtroom setting is essentially identical to information first received in the courtroom setting, the information is not extrinsic because it was first received in and is consistent with the information previously presented in the controlled courtroom environment.

This is-it-new test requires a hearing, in the usual case, to determine whether evidence is extrinsic (the juror learned something that was new, different from or inconsistent with what the juror learned in the courtroom) or whether the juror already had the information that he/she later simply confirmed. If the information is new/inconsistent, prejudice is presumed and the burden shifts; if not, the information is intrinsic to the trial deliberations and, if it occurs during jury deliberations, is internal to the jury's decisional process and not subject to employment as a tool of impeachment.

In this case, the trial court conducted a hearing and determined that Juror Hink learned something during jury deliberations that was entirely consistent with the trial court's instructions previously given. Under this circumstance, the burden does not shift. Rather, because the new information had no capacity to alter an outcome and was obtained during the jury's internal deliberative process, it cannot be used to impeach the verdict. The trial court could reasonably have concluded that the information obtained was the same as if Juror Hink had simply read the instructions again in the jury room.

The Board argues that Mr. Hink's inquiry on punitive damages is the same as gathering extrinsic evidence concerning matters under deliberation. However, extrinsic evidence as used in the cases upon which the Board relies relates solely to issues of *fact*, not definitions of legal terms that are consistent with the trial court's instructions.

The Board cites *Travis* for the proposition that juror misconduct always raises a strong presumption of prejudice. But not all improper acts by jurors rise to the level of misconduct that requires a strong presumption of prejudice and a shift in the burden. Here, the trial court specifically found that Juror Hink's conduct, while wrong, was not of the nature of misconduct to which a strong presumption of prejudice should attach precisely because what Juror Hink learned was consistent with the information and instructions provided by the trial court.

The Board is correct in stating that *Travis*, in accord with the earlier holding in *Middleton v. Kansas City Public Service Co.*, 152 S.W.2d 154 (Mo. 1941), holds that 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 and that little weight be given to the offending juror's assessment of the effect of this conduct. However, a careful reading of the precedent reveals that the facts here differ significantly from those in *Travis* and *Middleton* and that the holdings there depend on those differences.

In *Travis*, the critical factual issue in the case was the defendant's sight distance – whether he could see the first collision in order to avoid the second collision. Competing expert testimony on the issue was presented at trial. A juror visited the scene of the accident

to observe sight distances and other factors involved in an attempt to reconcile the testimony of the two competing experts.

Likewise, in *Middleton* a collision between a streetcar and an automobile occurred. There was a conflict in the evidence as to whether the streetcar struck the automobile, or vice versa. The critical issue in the case was whether any part of the auto could go under the body of the streetcar. A juror visited several automobile establishments during the trial to measure the height of the rear fender of the vehicle model involved in the accident. He also found a streetcar similar to the one in the accident and measured it. This was extrinsic factual evidence.

Travis notes that prejudice can be presumed "in such case" and that this type of misconduct – visiting an accident scene to investigate facts involved in the case – is distinguishable from other types of juror misconduct. *Travis,* 66 S.W.3d at 5. The Court stated that it is "not an abuse of discretion to deny a motion for new trial where the juror did not obtain any 'new, different or conflicting evidence' from visiting an accident scene." *Id.*, citing *Rogers v. Steuermann,* 552 S.W.2d 293, 295 (Mo.App. 1977). This is essentially an extrinsic/intrinsic analysis the outcome of which depends on whether the evidence becomes extrinsic because, but only because, it is different from the trial evidence. The Court went on to say: "The important factor in determining prejudice is the materiality of the evidence" and whether "the evidence gathered pertained to a critical issue in the case." *Travis,* 66 S.W.3d at 6.

Unlike the present case, the offending jurors in both *Travis* and *Middleton* gathered extrinsic factual evidence on a disputed critical issue in the case. Here, Juror Hink did not

gather factual evidence on a disputed critical liability issue. Rather, he obtained information on Wikipedia to explain a legal term and learned what the trial court had already informed him.

Further, the Board's contention that there is always a strong presumption of prejudice when there is a finding of juror misconduct is also misplaced. *Rogers* is instructive. There, a motion for new trial was denied following a finding of juror misconduct because the jury foreman prepared a drawing of the accident scene and a chart translating miles per hour into feet per second. The Court of Appeals affirmed, noting the distinction between the type of juror misconduct in *Middleton* and misconduct where there is "no evidence that the jurors obtained any new, different, or conflicting evidence." *Rogers*, 552 S.W.2d at 295. This is tantamount to a finding that the evidence was not extrinsic evidence. For this reason, *Rogers* explains:

> Essentially, trial courts must exercise a sound discretion in considering the prejudicial effect of juror misconduct. Appellate courts must defer to those findings unless it substantially appears that a trial court has erred in finding there was or was not misconduct or was or was not prejudice.

Id.

The Google information here was not an extrinsic fact that Juror Hink obtained on a contested material issue in the case; rather, Hink asked a question about the meaning of a legal term and learned what the trial court had already told him and the other jurors.

F. The Trial Court Found That Juror Hink's Conduct Was Wrong, But Not Prejudicial

In its Order of July 11, 2014, the trial court found that Mr. Hink's conduct was clearly wrong because it violated the court's repeated instructions and admonishments to refrain from any discussion or investigation about the case and its prohibitions on the use of electronic devices or Internet research tools for purposes related to the case. However, the trial court also found that the juror's conduct did not result in prejudice. Specifically, "[t]he Wikipedia information read by the juror is not legally incorrect, and is not inconsistent with the instructions provided to the jury on punitive damages at both the first and second stages of the trial in this case." LF420; Order, June 11, 2014, p. 11.

In reaching its conclusion, the court related the circumstances in this case to those in *Yannacopoulos v. General Dynamics Corporation*, 75 F.3d 1298, (8th Cir. 1996), and *United States v. Cheyenne*, 855 F.2d 566 (8th Cir. 1988), in which jurors consulted a dictionary during deliberations in order to understand the meaning of words used in the case. In *Cheyenne*, jurors looked up the definitions of "callous" and "wanton" which, as here, are words not used in everyday conversation but are unique to legal parlance.

The trial court found the reasoning in *Cheyenne* instructive, in that:

> [t]he definition of a legal term should not be equated with evidence relating to the facts under deliberation. The Court said the case did not involve the jury's improper consideration of material bearing on the defendant or the acts alleged in the indictment. "Definitions of words like 'callous' and 'wanton' are not presented through witnesses at trial, nor are they factual assertions subject to cross-examination. This distinction between evidence of fact and definition of law reflects the distinct functions of jury and judge in criminal

> trials." The Court said the District Court properly conducted a hearing to determine the effect that the dictionary had on the jury's deliberations. The jury had simply supplemented the court's instructions of law with definitions and it was within the province of the judge to determine whether the conduct was prejudicial.

LF416-17; Order, July11, 2014, p. 7-8.

The Wikipedia answer Mr. Hink received was consistent with the instruction to the jury and with Missouri law. Both are founded on the notion that the jury was awarding damages to Ms. Ross-Paige. It follows, therefore, that far from creating a prejudicial result, the Wikipedia adventure merely confirmed what the trial court told the jury in its instruction regarding damages. "If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained as a direct result of the occurrences mentioned in the evidence." Instruction 11.

G. Finding That No Prejudice Occurred From Juror Hink's Conduct Was Within The Trial Court's Sound Discretion.

A court must find that the juror misconduct prejudiced a party before it may declare a mistrial or order a new trial. *Yoon v. Consol. Freightways, Inc.*, 726 S.W.2d 721, 723 (Mo. banc 1987). Prejudice is ordinarily presumed if it is established that a juror has gathered evidence extraneous to the trial and the burden is on the respondent to overcome the presumption. *Travis*, 66 S.W.3d at 3. "However, 'even where 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, citing *Neighbors*, 926 S.W.2d at 38. Since "[t]his determination is vested in the discretion of the trial court [it is] reviewed under the abuse of discretion standard of review." *Id.*

The Board argues that the trial court should have found prejudice for three reasons. **First**, the Board contends that *Cheyenne* represents a minority view. This conclusion does not withstand careful scrutiny. The ruling of the trial court is consistent with rulings from other jurisdictions on the non-prejudicial effect of jurors obtaining definitions of legal terms. See, *Lintz v. American General Finance, Inc*., 76 F. Supp. 2d 1200 (D. Kan. 1999)(Plaintiff in sexual harassment action was not entitled to hearing on issue of whether two jurors were improperly exposed to extraneous prejudicial information during trial; although jurors consulted dictionary for definitions of terms "malice" and "reckless" while deliberating issue of punitive damages, jurors did not share information with other jurors, and neither court nor parties could inquire as to effect of information obtained by two jurors); *Cooper Tire & Rubber Co., v. Mendez*, 155 S.W.3d 382 (Tex. App. 2004)(Juror's conduct of consulting a dictionary at her home, copying dictionary definition of legal term, and sharing it with other jurors in deliberations did not constitute an "outside influence" as would permit jurors to give testimony impeaching verdict on motion for new trial); *Desmond v Nassau Hosp*. 157 A.D.2d 828, 550 N.Y.S.2d 730 (1990)(In medical malpractice action for wrongful death based on alleged failure to diagnose bacterial meningitis, court denied plaintiff's motion to set aside verdict on ground that one juror had researched meningitis and brought research materials into deliberations with her where (1) research material consisted of definition of meningitis taken from medical dictionary, (2)

definition of meningitis was not material, (3) juror did not read definition through, or use it as basis for her deliberations, and (4) juror never circulated definition to other jurors).

The Board relies on a number of additional cases to support its argument, all of which are distinguishable. In *State v. Aguilar*, 230 P.3d 358, 358-59 (Ariz. App. 2010), two jurors conducted Internet research on the legal definitions of terms in the court's final instructions, communicated their research to other jurors, and three additional jurors considered the research before joining the other jurors in unanimously convicting Aguilar of attempted first degree murder. Arizona law found that because the State bore the burden to prove beyond a reasonable doubt the jurors' misconduct in this case did not taint the conviction. That burden of proof is different than would be applied in a civil case.

But more important, *Aguilar* turned on the fact that the internet research provided a different definition of a critical word that appeared in the trial court's criminal instructions. "In contrast with our supreme court's carefully crafted instruction concerning premeditation and description of reflection, the foreman's Internet definition of first degree murder did not speak of reflection and did not acknowledge any distinction between a planned or deliberated killing and a killing caused by a "snap decision made in the heat of passion." *Id.* at 363. The Court concluded that "the significant differences between the Internet definitions and the court's were of critical importance in this case." *Id*. at 364. The definitions were thus treated as extrinsic because they were inconsistent with the instructions.

In contrast, here the trial court expressly found that the information received from Google was consistent with the trial court's instructions.

Aguilar relied on *State v. Cornell,* 845 P.2d 1094, 1096 (Ariz. App.1992). There the court noted that "reference to outside sources, including dictionaries, usually has been found to be harmless error." It was because the "dictionary definitions of the words "aggravate" and "assault," … [were] not fully congruous with the instructions that the *Cornell* court required reversal. *Id.* at 1097.

United States v. Steele, 785 F.2d 743, 746 (9th Cir. 1986) states the rule in a manner consistent with the trial court's order here. "The jurors' improper use of the dictionary to determine the precise definition of several words does not require reversal unless there is a reasonable possibility that the extrinsic material could have affected the verdict." This view is consistent with *State v. Suschank,* 595 S.W.2d 295, 298 (Mo. Ct. App. 1979), which concluded that "[i]t is apparent from the judge's questioning of the jury that the jurors found no definition of "reasonable" in the dictionary which differed from their knowledge of the ordinary usage of the term and therefore the court's determination that the defendant was not prejudiced by the use of the dictionary was not an abuse of discretion." *Id.*

"The real danger of a jury's dictionary use is that 'jurors will use the dictionary to construct their own definitions of *legal terms* which do not accurately or fairly reflect applicable law.' [citation omitted]. There is no such danger where the word defined is not a legal term, but is one taken as a matter of common knowledge which the jury is supposed to possess." *State v. Viviano,* 882 S.W.2d 748, 752 (Mo. App. 1994). Likewise, where the information is consistent with the trial court's instructions, there is no real danger of prejudice.

Finally, *Stebner v. Associated Materials, Inc. (AMI)*, 2010 MT 138, ¶¶ 18-19, 234 P.3d 94, 97-98, on which the Board relies, concludes that "the internet definition matched the jury instruction. The presumption of prejudice is rebutted by the evidence in the record."

Second, the Board argues that a dictionary is not analogous to an iPhone. However, the trial court's ruling is consistent with authority from other jurisdictions on the effects of obtaining information from the internet. In *Armstrong v. Gynecology & Obstetrics of Dekalb, P.C.*, 761 S.E.2d 133 (Ga. App. 2014), a closely analogous case, the court found that parents of a stillborn child were not entitled to a new trial on claims of medical malpractice against physicians based on juror misconduct in using cellular telephones during deliberations to obtain definition of terms used in instructions sent out with the jury. All jurors were summoned before the court and testimony was presented that one or more jurors sought definitions of four words: "causation," "proximate cause," "requisite," and "decedent." The court found that although several jurors improperly used their phones to search for definitions of words, their conduct had no effect on the verdict and denied the motion for new trial. The court of appeals affirmed, finding no abuse of discretion because no showing was made that the information obtained differed from the jury instructions and no prejudice. Similarly, see, *Cooch v. S & D River Island, LLC*, 85 A.3d 888 (Md. Ct. Spec. App. 2014)(evidence of juror misconduct that was presumptively prejudicial in criminal case did not apply to former residential tenant's motion for new trial on claims against landlord and property manager for personal injury and property damage due to juror misconduct for having conducted research on Internet on issue related to case.); *Com. v.*

Szakal, 50 A.3d 210 (2012)(juror's admission that he had had his daughter conduct internet research on his behalf regarding various definitions of murder did not establish prejudice to defendant warranting new trial, where defendant did not meet his burden of proving that definitions were emotional or inflammatory in nature, and information provided by defendant's daughter was not new, given that jury was properly instructed as to definitions of first and second degree murder at trial); *Brooks v. State*, 420 S.W.3d 337 (Tex. App. Texarkana 2014)(juror's action in doing research specific to case on his phone during voir dire in murder prosecution did not warrant mistrial, where juror stated that only matter addressed by article involved victim, that article would not affect his ability to consider only evidence presented at trial, and that he had not mentioned his brief research to other jurors, information was essentially same sort of evidence elicited at trial about victim, and nothing in article discussed defendant.)

Third, the Board argues that Juror Hink obtained more than just a definition in his internet search. The Board makes the assertion that Mr. Hink "was not trying to supplement the instruction by finding the definition of a word; rather, he wanted the answer to a question: where do punitive damages go?" This alleges facts and assumes thought processes of Mr. Hink that are unsupported by his sworn testimony. *See* Transcript of Proceedings, June 9, 2014. The Board also notes that the Wikipedia article contained a link to another article. However, there is no evidence that Mr. Hink ever looked at the link or the article to which it led.

Here, the trial court conducted a hearing, elicited testimony from Juror Hink, and determined that the information obtained was not extrinsic evidence and that there was no prejudice to the Board warranting a new trial. There was no abuse of discretion.

H. A New Trial On Punitive Damages Is Not Warranted Under The Trial Court's Analysis.

Finally, the Board argues that Officer Ross-Paige could not overcome a presumption of prejudice because Juror Hink's testimony is not credible.

Even if the Court believes that the burden ought to shift under these circumstances, the Board's argument overlooks the trial court's role in exercising its discretion in ruling on the issue of prejudice. "[E]ven where 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. 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.

> Essentially, trial courts must exercise a sound discretion in considering the prejudicial effect of juror misconduct. Appellate courts must defer to those findings unless it substantially appears that a trial court has erred in finding there was or was not misconduct or was or was not prejudice.

Rogers, 552 S.W.2d at 295.

Juror Hink's visit to Wikipedia in an effort to try to understand the meaning of a legal term is not factual evidence that was extraneous to the trial, nor does it pertain to a contested critical issue in the case. Juror Hink did not obtain any "new, different or

conflicting evidence." *Id.* Rather, it was information in the nature of "matters inherent in the verdict." *Williams*, 114 S.W.3d at 367. The trial court conducted a hearing, obtained and reviewed the evidence of Juror Hink's conduct and issued a well-reasoned opinion finding that there was no prejudice to warrant a new trial. Even if the burden had shifted, the finding of no prejudice is a finding that Ms. Ross-Paige met the burden.

There was no abuse of discretion.

CONCLUSION

For the reasons contained herein, Respondent respectfully asks this Court to affirm the verdict of the trial court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

The undersigned hereby certifies that this brief complies with Rule 84.06(c) in that it does not exceed the number of words set by Rule 84.06(b) (i.e., it does not exceed 27,900 words for a Respondent's brief). This brief contains 13,897 words. The word count was derived from Microsoft Word, using the Word Count process, with "including footnotes" selected.

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CERTIFICATE OF SERVICE

I certify that in filing this document with the Supreme Court of Missouri through the electronic filing system an electronic copy of this document and attached Appendix was served on counsel named below on this 22nd day of December, 2015.

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