Case No. SC95214

IN THE
SUPREME COURT OF MISSOURI

TANISHA ROSS-PAIGE,

Plaintiff/Respondent,

v.

ST. LOUIS METROPOLITAN POLICE DEPARTMENT, *et. al*.,

Defendants/Appellants.

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

APPELLANT'S SUBSTITUTE BRIEF

Respectfully Submitted,

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Jurisdictional Statement

This Court has jurisdiction to hear this appeal pursuant to Article V, section 10 of the Missouri Constitution, which provides that "[c]ases pending in the court of appeals may be transferred to the supreme court ... by order of the supreme court ... after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule." On October 27, 2015, this Court ordered that the case be so transferred.

Statement of Facts

Tanisha Ross-Paige began working for the St. Louis Metropolitan Police Department in December of 2001. (Tr. 208:11-13). In about 2007 or 2008, Sergeant Steven Gori became one of Officer Ross-Paige's supervisors in the Sixth District. (Tr. 212:1-24; 225:23-25; 225:1-10). He remained one of her supervisors for several months, at which time Officer Ross-Paige was transferred to the Canine Unit. (Tr. 213:4-7).

Officer Ross-Paige testified that, while she was in the Sixth District, Sergeant Gori made numerous inappropriate, sexual comments toward her. (Tr. 226:19-25; 227:1-19; 229:1-9; 232:15-19; 233:8-9; 246:22-24; 250:5-10; 252:10-14; 253:12-17). She testified that he asked her out on several dates and inquired as to whether she wanted to go skinny dipping. (Tr. 245:25; 246:1-15). She testified that, when she complained to him, Sergeant Gori would laugh and say that she was in a man's position and that she should get used to it. (Tr. 233:21-24).

She testified that Sergeant Gori handed her a mock "wanted" poster (Tr. 240:19-25; 241:1-13), containing the following information: "Tanisha Ross/Paige - aka 'Apple Bottom' … Subject wanted for having the "BADDEST BODY" in the St. Louis area. Use extreme caution when

approaching this subject. Approach this subject from behind for your own safety." (LF 40). The poster was forwarded from Sergeant Gori's work email account. (Tr. 424:18-25; 425:1-19).

Approximately a year after Officer Ross-Paige transferred to the Canine Unit, Sergeant Gori was himself transferred to the Canine Unit. (Tr. 214:19-25). Officer Ross-Paige testified that Sergeant Gori told her that, if she did not do what he wanted—if she did not stop "being so hard"—he would have her transferred out of the Canine Unit, that she would lose her dog, and that he would make her life a living hell. (Tr. 254:4-8).

While Officer Ross-Paige was in the Canine Unit, Sergeant Gori indicated on a form that she did not want to take an exam that would render her eligible for promotion to the rank of sergeant. (Tr. 267:19-25; 268:4-15; 270:12-25; 271:1-2). In reality, she did want to take the exam. (Tr. 269:22-25; 270:1-5). She testified that she was unable to take the exam because, by the time she made her desire to take the exam be known, the deadline to sign up had passed. (Tr. 269:22-25; 270:1-5).

On June 2, 2011, a "hostage call" was announced via dispatch, and Officer Ross-Paige responded. (Tr. 258:1-4; 260:5-13). She testified that

she immediately informed Sergeant Gori that she was there. (Tr. 261:8-9). She testified that Sergeant Gori then told her that he was going to change her shift from 8:00-3:00 to 3:00-11:00. (Tr. 261:12-20). She testified that this proposed shift change was one of many but that this one came shortly after she had been rejecting some of Sergeant Gori's advances. (Tr. 262:3-11). However, her schedule was never, in fact, changed. (Tr. 373:15-22).

Officer Ross-Paige testified that Sergeant Gori called her later on June 2, 2011, and said that "all gloves are off now." (Tr. 263:8-20). Up until that point, Officer Ross-Paige had not reported Sergeant Gori's conduct to anyone else. (Tr. 363:11-20; 364:9-25; 365:1-10).

But on June 3, 2011, Officer Ross-Paige filed her charge with the Equal Employment Opportunity Commission. (Tr. 264:16-25). In it, she alleged that she had been harassed and retaliated against by Sergeant Gori because she would not accept his advances. (Tr. 264:22-25; 265:1-2).

On June 5, 2011, Officer Ross-Paige received a performance observation form from Sergeant Craig Chromoga. (Tr. 274:1-14). Sergeant Chromoga was the acting commander at the scene of the hostage call.

(Tr. 624:8-9). The performance observation form alleged that, on June 2, 2011, Officer Ross-Paige failed to notify her supervisor on arrival to the hostage call. (Tr. 274:18-19). It alleged further that she was reluctant to accept a duty hour change on June 3, 2011. (Tr. 274:19-23). Sergeant Chromoga testified that, when he filled out the performance evaluation form, he had no knowledge that Officer Ross-Paige had complained about Sergeant Gori. (Tr. 627:10-13).

In conjunction with the performance evaluation form, Officer Ross-Paige received an email from Lieutenant Michael Deeba. (Tr. 275:18-22). Lieutenant Deeba wrote that he expected the performance evaluation form to be signed and returned to Sergeant Chromoga by the next day. (Tr. 275:18-25). The email read further: "it's not a subordinate's job to question an order. It is not a subordinate's job to wonder where the sergeant is. A subordinate should not be disrespectfully insubordinate and act irrational." (Tr. 276:1-6).

Officer Ross-Paige had never been disciplined before the performance evaluation form. (Tr. 276:14-16).

Later in June of 2011, Officer Ross-Paige went on medical leave for a surgical procedure. (Tr. 281:2-13).

Shortly before September 1, 2011, Lieutenant Deeba received information from a third party investigator, stating that the investigation found Officer Ross-Paige's allegations against Sergeant Gori to be without merit. (Tr. 645:6-17). On September 1, 2011, Lieutenant Deeba sent an email to his superiors, noting that her complaint had been determined to be without merit and asking that Officer Ross-Paige be transferred out of the Canine Unit. (Tr. 645:18-25: 646:1-2).

On September 19, 2011, Lieutenant Deeba sent the following email to his superiors, copying the members of the Canine Unit.

> I'm clear on the chief's directive. I spoke to HR today before I received your email, and they advised that in the EEOC recommendation that she indefinitely should not report to Sergeant Gori. That is what Miss Hicks told me from HR, and that it has no restrictions on me. Per HR and the EEOC, I was never the focus of an investigation. I was interviewed as a witness. This officer has several discipline issues pending, a shots fire [sic], and further remedial before she returns to work. I have given all of this to Captain Spicer when I was removed from the chain of command.

> Paige was at the office today attempting to retrieve her car and dog, Officer Wilke called and told me this. I called her and told her this will not happen until she returns to work. She will also need four to six weeks of remedial training at the school due to the poor upkeep of her canine by her. That is per my lead trainer. Further, 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. Could you please find out how long my canine officer will not be under my command? We are extremely short.

(Tr. 281-284). Officer Ross-Paige was never transferred from the Canine Unit. (Tr. 461:1-3; 521:24-25; 522:1).[1]

[1] The trial court ultimately refused that portion of the plaintiff's proposed jury instruction that would have allowed the jury to find for plaintiff based on the fact that the Board "told plaintiff's coworkers that she had filed an erroneous complaint or requested plaintiff be transferred out of the canine unit." (Tr. 857-58).

Officer Ross-Paige returned to work from her medical leave in October of 2011. (Tr. 301:15-17; 381:2-8; 383:8-10). On November 20, 2011, Lieutenant Deeba sent an email to various commanders, copying the Canine Unit. (Tr. 288:16-25; 289:1-9). In it, he requested that Officer Ross-Paige not be given access to the Canine supervisor's office or the supervisor's computer. (Tr. 289:13-25).

On January 4, 2012, Officer Ross-Paige was injured when another officer's canine bit her and she fell. (Tr. 302:11-21; 304:3-21). The injury required surgery. (Tr. 320:20-21).

At some point after her injury, it was determined that Officer Ross-Paige was not going to get any better. (Tr. 315:15-16). On October 5, 2012,[2] the police department sent her a letter, stating that, due to her medical restrictions, she was no longer able to perform the essential functions of a police officer and that she would be dismissed from the rolls of police officers. (Tr. 316:19-25; 317:1-2); (Exhibit 47).

After she received that notice, Officer Ross-Paige applied for disability retirement. (Tr. 318:16-18) (Exhibit 48; App'x 27). She made that

[2] The letter identifies the date as October 5, 2011, but it references events in 2012. The reference to 2011 is a typographical error.

claim to the Police Retirement System of St. Louis, and the claim was signed by Monica Green and Mark Lawson on behalf of the Board. (Exhibit 48; App'x 27).

Plaintiff testified that she never received any disability payments "from this department." (Tr. 329:6-8). In fact, Officer Ross-Paige did receive money from the Board's insurance company for her long term disability. (Tr. 804:03-25; 805-806:1-18) (Exhibit Z). What Officer Ross-Paige was referring to was her application to the Police Retirement System of the City of St. Louis, which, should it ever be approved, would entitle her to 75% of her previous income for life. (Tr. 808:4-25; 805-810; 811:1-11; 813:1-17); (Exhibit 48; App'x 27); (Tr. 327:4-25 (referencing Exhibit 48); 328:8-12).

In conjunction with her application for Disability Retirement, Officer Ross-Paige was evaluated by three doctors. (Tr. 324:15-18). On April 3, 2013, Dr. Russell Cantrell sent a letter the Police Retirement System of St. Louis, attention to Stephen Olish, Administrative Director. (Exhibit 86). In it, the doctor informed the Police Retirement System that the medical board determined that Officer Ross-Paige was "unable to engage in the full unrestricted work activities of a police officer. Her inca-

pacity is anticipated to be permanent and is a proximate result of the injuries sustained on January 4th, 2012." (Tr. 326:5-9) (Exhibit 86).

Officer Ross-Paige attended a hearing on her entitlement to Disability Retirement in May of 2013. (Tr. 328:16-25; 329:1-2). As of the date of trial (March of 2014), Officer Ross-Paige had heard nothing further regarding her application for disability retirement. (Tr. 329:3-5).

Monica Green, an employee of the Board, testified that the Board is a separate entity from the Police Retirement System of the City of St. Louis. (Tr. 809:2-7; 810:21-25; 811:1-8; 813:1-6).

Officer Ross Paige submitted two claims to the jury: discrimination based on sex and retaliation. (LF 159, 161). The jury found for the Board with respect to the discrimination claim but for Officer Ross-Paige with respect to the retaliation claim. (LF 170).

The retaliation instruction reads as follows:

> Your verdict must be for plaintiff and against defendant Saint Louis Board of Police Commissioners on plaintiff's claim of unlawful retaliation if you believe:
>
> *First*, defendant discharged plaintiff or gave plaintiff a negative write up or assigned plaintiff with unfavorable

shifts or denied the plaintiff paid time off to attend training or failed to allow the plaintiff to apply for the sergeants exam or unjustly refused or delayed plaintiff's disability claim or created a severe and pervasive hostile work environment for the plaintiff, and

Second, plaintiff's complaint of sexual harassment or refusal to submit to sexual advances was a contributing factor in such discriminatory acts, and

Third, as a direct result of such conduct, plaintiff sustained damage.

(LF 161).

The Board objected to the retaliation instruction as follows:

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 or failed to allow the 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. It's not a tangible employment action. In fact, the 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. 861:7-19).

The jury found that the Board was liable for punitive damages. (LF 170). The trial was bifurcated, and when the jury retired to assess an amount of punitive damages, Juror Kevin Hink[3] used his phone to conduct a Google search for the question: "Where do punitive damages go?" (Hearing Tr. 6:14-24) (Hearing Exhibit A); (LF 271). He did so because he believed that he was inadequately informed about what punitive damages were supposed to do. (Hearing Tr. 8:12-23).

The Google search led Juror Hink to several links, one of which was a Wikipedia article on the subject. (Hearing Tr. 6:25; 7:1-2). Another

[3] Juror Hink testified at a post-trial hearing. (Hearing Tr. pgs. 5-11).

link, visible from the search in large type, posed the question: "Should society get a share of punitive damages awards?" (Hearing Exhibit A).

Juror Hink read portions of the Wikipedia article, and he speculated that the other jurors could have heard him reading, though he could not say for sure. (Hearing Tr. 7:8; 9:2-13). Juror Hink read that

> punitive damages or exemplary damages are intended to reform or deter the defendant and others from engaging in conduct similar to that which forms the basis of the lawsuit. Although the purpose of punitive damages is not to compensate the plaintiff, the plaintiff will receive all or some portion of the punitive damage award. Punitive damages are often awarded where compensatory damages are deemed an inadequate remedy.

(Hearing Tr. 7:13-25). Juror Hink could not remember whether he read that aloud verbatim or summarized it. (Tr. 7:12-13).

Juror Hink did not have distinct memory of his statements changing the debate, nor did he think that the information he obtained by Googling was "decisive in determining the amount of damages, mainly the seven point two million that the jury ultimately arrived at." (Hearing Tr. 9:18-25; 10:1-3).

Juror Hink characterized the jury room as being animated, with lots of people expressing their opinions at the same time. (Hearing Tr. 9:9-11). He had to "come up quite a bit" from where he initially was in his mind, and he initially felt uncomfortable when the jury "was up over five." (Hearing Tr. 11:17-20).

Juror Hink conducted the internet search because he "felt that [he] so poorly understood the concept that if I was being asked to render, you know, an opinion on what to award, I wanted to at least know better of what it was supposed to do. And I guess I felt inadequately informed to render that kind of an opinion." (Hearing Tr. 8:19-23).

After he read the excerpts from the Wikipedia article on punitive damages, Juror Hink was the one who made the final suggestion of "seven or seven point two." (Hearing Tr. 11:10-15). That number —$7.2 million—is what the jury awarded in punitive damages. (LF 171). Juror Hink testified that that number did not flow from his internet search. (Hearing Tr. 11:16-17).

The Board filed a motion for a new trial, citing, among other things, (1) the lack of evidence to support the allegations contained in Instruction 8; and (2) the misconduct of Juror Hink. (LF 262-67). The trial

court denied the motion for a new trial in all respects. (LF 424). The trial court entered final judgment of $3,065,475.69. (LF 408-09).

Points Relied On

Point I. The trial court erred in submitting the retaliation instruction (Instruction 8) because the instruction submitted alternative theories of recovery, not all of which were supported by substantial evidence, in that there was no competent evidence that the Board "refused or delayed plaintiff's disability claim."

Missouri Approved Instruction 1.02

Brown v. St. Louis Pub. Serv. Co., 421 S.W.2d 255 (Mo. 1967)

Powderly v. S. Cnty. Anesthesia Assocs., Ltd., 245 S.W.3d 267 (Mo. App. E.D. 2008)

Griffin v. Kansas City S. Ry. Co., 965 S.W.2d 458 (Mo. App. W.D. 1998)

Point II. The trial court erred in overruling the Board's motion for a new trial on the issue of punitive damages because a juror conducted an independent, internet investigation into the question "Where do punitive damages go?" and the strong presumption of prejudice that applies was not rebutted in that the offending juror testified that he read the first few lines of the internet article, that the jurors may have heard him, and that, thereafter, the other jurors agreed to award the amount he suggested.

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

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

State ex rel. Koster v. McElwain,

340 S.W.3d 221 (Mo. App. W.D. 2011)

United States v. Lawson, 677 F.3d 629 (4th Cir 2012)

Argument

Point I. The trial court erred in submitting the retaliation instruction (Instruction 8) because the instruction submitted alternative theories of recovery, not all of which were supported by substantial evidence, in that there was no competent evidence that the Board "refused or delayed plaintiff's disability claim."

A. Standard of Review: a new trial is warranted unless *each* theory submitted in Instruction 8 was supported by substantial evidence.

The standard of review is *de novo*. "Whether a jury was instructed properly is a question of law this Court reviews *de novo*. Review is conducted in the light most favorable to the record and, if the instruction is supported by any theory, its submission is proper." *Hervey v. Mo. Dept. of Corrections*, 379 S.W.3d 156, 159 (Mo. 2012) (citation omitted).

"The party challenging the instruction must show that the offending instruction misdirected, misled, or confused the jury, resulting in prejudice to the party challenging the instruction." *Id.*

The Court "review[s] the evidence in the light most favorable to the

party submitting the instruction." *Powderly v. S. Cnty. Anesthesia Assocs., Ltd.*, 245 S.W.3d 267, 276 (Mo. App. E.D. 2008). "An instruction must be supported by substantial evidence." *Id.* "Substantial evidence is evidence which, if true, has probative force upon the issues, and from which the jury can reasonably decide the case." *Hayes v. Price,* 313 S.W.3d 645, 650 (Mo. banc 2010). "[A] mere scintilla of evidence or speculative deductions and conclusions will not suffice." *Powderly*, at 276-77 (citations and quotation marks omitted).

"In the case of a disjunctive instruction, *each* submission must be supported by substantial evidence." *Id.* at 277 (emphasis added). "Where, as here, a disjunctive instruction is submitted to the jury, *each* alternative submitted in the instruction must be supported by evidence which, if true, would support a verdict for the party submitting the instruction." *Griffin v. Kansas City S. Ry. Co.*, 965 S.W.2d 458, 460 (Mo. App. W.D. 1998) (emphasis added). *See also Wright v. Barr*, 62 S.W.3d 509, 526 (Mo. App. W.D. 2001).

"[T]he jury should not be instructed on a theory of recovery or defense not supported by the evidence and that any such submission, whether in the conjunctive or disjunctive, *should be reversible error*. A

theory of recovery or defense should not be submitted unless it can stand alone." MAI 1.02 (emphasis added).

Therefore,

> inasmuch as [an] instruction [is] drawn in the alternative, it [is] necessary that each and every one of the … hypotheses be supported by the evidence, since, with a general verdict returned for plaintiff, the appellate court cannot determine upon which of the theories the jury found, and if it should appear that one or more of the theories was without support in the evidence, then, for all we can say, the jury may have improperly returned its verdict upon that theory.

Whitehead v. Fogelman, 44 S.W.2d 261, 263 (Mo. App. Stl. 1931).

Thus, the question presented is whether *each* of the theories of recovery that the trial court submitted in Instruction 8 was supported substantial, non-speculative evidence. They were not.

B. Instruction 8 submitted the following theory: the jury could find for Officer Ross-Paige if it believed that the Board's "refused ... plaintiff's 'disability claim.'"

The disputed language from the relevant instruction appears in bold type below.

> Your verdict must be for plaintiff and against defendant Saint Louis Board of Police Commissioners on plaintiff's claim of unlawful retaliation if you believe:
>
> *First*, defendant discharged plaintiff or gave plaintiff a negative write up or assigned plaintiff with unfavorable shifts or denied the plaintiff paid time off to attend training or failed to allow the plaintiff to apply for the sergeants exam **or unjustly refused or delayed plaintiff's disability claim** or created a severe and pervasive hostile work environment for the plaintiff, and
>
> *Second*, plaintiff's complaint of sexual harassment or refusal to submit to sexual advances was a contributing factor in such discriminatory acts, and
>
> *Third*, as a direct result of such conduct, plaintiff sustained

damage.

Unless you believe plaintiff in not entitled to recovery by reason of Instruction Number 9.[4]

(LF 161).

C. There is no substantial evidence that the Board "refused ... plaintiff's disability claim" as submitted in Instruction 8.

Here, the trial court violated MAI 1.02 and Missouri case law because it submitted an instruction that contained alternative theories of recovery, when at least one of the submitted theories was not supported by substantial evidence.

There was no substantial evidence that the Board refused Officer Ross-Paige's disability claim. "The term 'substantial evidence' implies and comprehends competent, not incompetent evidence." *State ex rel. Rice v. Pub. Serv. Comm'n*, 220 S.W.2d 61, 64 (Mo. banc 1949). *See also Spencer v. Zobrist*, 323 S.W.3d 391, 399 (Mo. App. W.D. 2010) ("Substantial evidence ... necessarily implies competent evidence.").

Here, there could be no competent evidence to establish that the

[4] The affirmative defense instruction is not at issue here.

Board "refused" Officer Ross-Paige's disability claim because, under Missouri law, exclusive authority over Officer Ross-Paige's Application for Disability Retirement—which is the "disability claim" at issue—lies with the Board of Trustees of the Police Retirement System.

1. The "disability claim" at issue in Instruction 8 was made to the Police Retirement System of St. Louis, not the Board.

The only evidence regarding an ***unpaid*** disability claim stemmed from Exhibit 48, which was Officer Ross-Paige's Application for Disability Retirement. (Tr. 808:4-25; 805-810; 811:1-11; 813:1-17); (Exhibit 48; App'x 27); (Tr. 327:4-25 (referencing Exhibit 48); 328:8-12). That application was made to the Police Retirement System of St. Louis. *See* Exhibit 48. Under the undisputed testimony at trial, the Police Retirement System of St. Louis has an identity distinct from that of the Board of Police Commissioners. (Tr. 809:2-7; 810:21-25; 811:1-8; 813:1-6). The law also provides that the two entities are distinct. *State ex rel. Lambert v. Flynn*, 154 S.W.2d 52, 54 (1941).

When Officer Ross-Paige testified that she had not received any payment from her disability claim, she was referring to that Application

for Disability Retirement. (Tr. 808:4-25; 805-810; 811:1-11; 813:1-17); (Exhibit 48; App'x 27); (Tr. 327:4-25 (referencing Exhibit 48); 328:8-12). Preceding that testimony, Ms. Ross-Paige discussed her "disability claim," and she referred to Exhibit 48, Exhibit 86, and Exhibit 87. (Tr. 324-28). Exhibit 48 is her application to the Police Retirement System. Exhibits 86 and 87 are letters from doctors sent to the Police Retirement System regarding their evaluations of Ms. Ross-Paige's disability. It is in this context that Ms. Ross-Paige testified that she had received no payment from her disability claim. (Tr. 324-29).

Subsequently, the Board presented testimony regarding Officer Ross-Paige's long term disability benefits, which are paid by the Board's insurance company. (Tr. 794-98); (Exhibit Z). The Board's representative testified that those payments were made. (Tr. 794-98); (Exhibit Z). There was no evidence to the contrary: as demonstrated above, Officer Ross-Paige's testimony that she had received no payments from her disability claim referred to her application made to the Police Retirement System. And ***that*** is the only unpaid disability claim that was at issue. *See* Tr. 798 ([COUNSEL FOR PLAINTIFF]: "Can we just ...stipulate to what she received in [long term disability benefits]"?).

Thus, we cannot, as the Court of Appeals did, simply cite the testimonies of Officer Ross-Paige and the Board's representative and claim that the jury was entitled to believe the former: the two witnesses were not testifying about the same things. The testimony regarding an ***unpaid*** disability claim appears on page 329 of the transcript—and there only. As demonstrated, that testimony referred to Officer Ross-Paige's "Application for Disability Retirement," which was made to the Police Retirement System. (Exhibit 48; App'x 27). Thus, Instruction 8 must fail unless there was substantial evidence that the Board refused ***that*** disability claim. Such evidence does not and cannot exist.

2. There was no substantial evidence that the Board refused Officer Ross-Paige's "disability claim" because the Board lacks the power to determine such claims.

The Board has no authority to determine Officer Ross-Paige's Application for Disability Retirement, so there could be no competent evidence that it "refused ... plaintiff's disability claim."

Under Missouri law, the "specific and exclusive authority is granted to the board [of trustees for the Police Retirement System of the City of

St. Louis] for the original determination of all claims." *State ex rel. Police Ret. Sys. of City of St. Louis v. Murphy*, 224 S.W.2d 68, 71 (Mo. banc 1949). Indeed, under section 86.037, "the board of trustees has exclusive original jurisdiction in all matters relating to or affecting the funds herein provided for."[5] "The statute clearly and unequivocally vests in the [Police Retirement System] exclusive original jurisdiction in all matters relating to or affecting the funds herein provided for, including, in addition to all other matters, all claims for annuities, benefits, refunds or pensions under this law." *State ex rel. Cook v. Glassco*, 161 S.W.2d 438, 440 (Mo. App. Stl. 1942). Thus, the Board of Police Commissioners lacks the "power to determine the facts upon which the allowance of benefits depends. That power is vested exclusively in the [Police Retirement System]." *Id*.

The Board had the initial duty to initiate the proceeding, but its authority ended there. "[T]he Board of Police Commissioners, although given the duty to *initiate* the proceeding by making application to the Board of Trustees for accidental disability benefits on behalf of a mem-

[5] Accidental disability retirement benefits are "funds herein proved for," as contemplated by section 86.037. *See* §§ 86.073; 86.077.

ber of the police department, are not given any authority to *determine* whether an applicant is entitled to such benefits." *State ex rel. Eagleton v. Hughes*, 194 S.W.2d 307, 312 (Mo. banc 1946). Here, the Board did initiate Officer Ross-Paige's claim to disability retirement. (Exhibit 48; App'x 27).

Because the Board's power over the "disability claim" extended only to initiating the claim (which it did), there was no evidence, and there could be no evidence, that the Board "refused" the disability claim, whether unjustly or otherwise. Thus, the trial court erred in submitting Instruction 8. MAI 1.02; *Powderly*, 245 S.W.3d at 276-77; *Whitehead*, 44 S.W.2d at 263.

D. The "disability claim" submission prejudiced the Board.

Prejudice is presumed and in fact occurred because, in this case, liability or damages could well have been based—in whole or part—on the "disability claim" theory. The jurors found liability only pursuant to Instruction 8, which as shown above, was an erroneous instruction. We know that the jurors agreed upon at least one of the theories submitted in Instruction 8, but we do not know which one. *Whitehead*, 44 S.W.2d

at 263 ("[T]he appellate court cannot determine upon which of the theories the jury found, and if it should appear that one or more of the theories was without support in the evidence, then, for all we can say, the jury may have improperly returned its verdict upon that theory."). Accordingly, the trial court's error in submitting Instruction 8 caused prejudice.

An erroneous instruction warrants reversal if the instruction materially affected the merits of the action. *Hayes*, 313 S.W.3d at 650. But, because of the inherent confusion caused in submitting theories unsupported by the evidence, a presumption of prejudice generally results in such cases. *Brown v. St. Louis Pub. Serv. Co.*, 421 S.W.2d 255, 258-59 (Mo. 1967). The presumption can be rebutted only if "the proponent of the instruction" makes it "perfectly clear ... that no prejudice could have resulted ...." *Id.* at 259. *See also Griffin*, 965 S.W.2d at 461 (assuming without discussing that reversal was warranted when one of the submitted theories was unsupported by the evidence); *Whitehead*, 44 S.W.2d at 264 ("Because of the lack of evidence to warrant the inclusion in the instruction of the first two alternatives as separate, independent,

and distinct theories or recovery, it follows that it was prejudicial error to have given it.").

Where the evidence did not support one of the theories submitted in the instructions, the defendant does not have to disprove the other theories. *Brown*, 421 S.W.2d at 259. That is because, if the plaintiff, on appeal, could negate prejudice by showing that *one* of the submitted theories was supported by the evidence, she would have effectively nullified the requirement that an instruction include *only* those theories supported by the evidence. *Id.*

And even if a presumption of prejudice does not apply, prejudice is shown here due to the Board's viable defenses against Officer Ross-Paige's other submissions. The Board did not retaliate by discharging Officer Ross-Paige because it is undisputed that, due to her disability, she was no longer capable of being a police officer (Tr. 326:5-9) (Exhibit 86), and the Board simply removed her from the rolls for that reason (Tr. 316:19-25; 317:1-2); (Exhibit 47). It did not retaliate by giving Officer Ross-Paige a negative write up because the only negative write up she received came from a person who had no knowledge of her complaint of discrimination. (Tr. 627:10-13). The Board did not retaliate by

assigning Officer Ross-Paige unfavorable shifts because the only evidence of an attempted shift change occurred before Officer Ross-Paige complained of discrimination, and, in any case, the shift change never took place. (Tr. 373:15-22). It did not retaliate by failing to let Officer Ross-Paige take the sergeant's exam because Officer Ross-Paige was not qualified to take the exam. (Tr. 464:1-5). It did not retaliate by creating a severe and pervasive hostile work environment because that is not a proper retaliation submission in that it does not identify a specific act of retaliation. *Minze v. Mo. Dep't of Pub. Safety*, 437 S.W.3d 271, 277-78 (Mo. App. W.D. 2014). And even if that submission were proper for a retaliation claim, it was the pre-complaint environment (i.e., Sergeant Gori's alleged advances) that meets the "severe and pervasive" standard, not the Board's response to Officer Ross-Paige's complaint of discrimination.

By contrast, the Board's ability to defend itself against the disability claim was severely hampered by the fact that that theory misdirected, misled, and confused the jury. *See Hervey*, 379 S.W.3d at 159. No one would argue that the submission on Officer Ross-Paige's "disability claim" was not confusing. Indeed, Plaintiff's own counsel appeared to be

confused as to who approves and pays an officer's retirement disability benefits. (Tr. 191:1-3). As discussed, the power to decide such "disability claim[s]" lies exclusively with the Board of Trustees for the Police Retirement System. But even though it would have been impossible for the Board to have denied her disability claim, Officer Ross-Paige was permitted to submit an instruction on that theory. The theory thus prejudiced the Board, because it could not explain to the jury why it refused Officer Ross-Paige's disability claim, *in that it did not do that*.

Accordingly, given (1) the presumption of prejudice that applies here; (2) the confusing and misleading nature of the submission, and (3) the likelihood that both liability was affected by the erroneous submissions, prejudice was caused by the trial court's error. The remedy is a new trial on all issues. *Griffin*, 965 S.W.2d at 461.

E. Counsel made a specific objection to the "disability claim" instruction, and the error was preserved in the Memorandum in Support of the Motion for a New Trial.

The Court of Appeals found that the "disability claim" error was not preserved for appellate review, but there is no doubt that Point I has been preserved.

"Counsel shall make specific objections to instructions considered erroneous. … 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." Rule 70.03.

Here is the objection Counsel made at trial: "Instruction No. 8 … we object to the phrase, or unjustly refused or delayed plaintiff's disability claim, as, … there's no evidence of this. … In fact, the defendants have no authority or control over plaintiff's disability." (Tr. 861:13-19). That is a "specific objection" to the relevant point: there was no evidence to support the "disability claim" instruction because "defendants have no authority or control over plaintiff's disability."

Here is the "objection" the Board made to Instruction 8 in its memorandum in support of the motion for a new trial:

> **The Verdict Director Included Actions for Which there was no Substantial Evidence.**
>
> Even if the Court finds all identified actions in the verdict director to be adverse employment actions, "[t]here must be substantial evidence supporting an issue before that issue may be presented to a jury by the giving of an instruction; submitting the instruction despite the lack of such evidence constitutes reversible error." *Hepler v. Caruthersville Supermarket Co.*, 102 S.W.3d 564, 568 . Here, there was not "substantial evidence" that Defendant ... "unjustly refused or delayed plaintiff's disability claim ... ." These allegations, accordingly, should not have been submitted in the retaliation instruction."

"Where an instruction is disjunctive, all submissions must be supported by substantial evidence." *Griffin v. Kansas City S. Ry. Co.*, 965 S.W.2d 458, 462 (Mo. Ct. App. 1998) (quotation omitted). "Where a verdict directing instruction submits

in the disjunctive, the instruction is erroneous unless the evidence is sufficient to support each of the assignments." *Hepler*, 102 S.W.3d at 568. If the Court finds there was not substantial evidence of only one of the listed actions in the retaliation verdict director, defendant is entitled to a new trial for the erroneous instruction.

...

Specifically, the verdict director allowed for 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, let alone that it somehow was refusing or delaying it. Here, the jury was improperly instructed that they could find damages against the defendant, and even punitive damages, based on the actions of a separate and distinct legal entity. The inclusion of that as an alleged adverse action of the defendant, standing alone, mandates a new trial on the retaliation claim.

(LF 262-65).

That "raised" the issue, which is all that Rule 70.03 requires. Thus, Point I is preserved for appellate review.

Point II. The trial court erred in overruling the Board's motion for a new trial on the issue of punitive damages because a juror conducted an independent, internet investigation into the question "Where do punitive damages go?" and the strong presumption of prejudice that applies was not rebutted in that the offending juror testified that he read the first few lines of the internet article, that the jurors may have heard him, and that, thereafter, the other jurors agreed to award the amount he suggested.

A. Standard of Review: a strong presumption of prejudice applies to juror misconduct involving outside investigations.

The standard of review for a ruling on a motion for a new trial based on juror misconduct is abuse of discretion; the 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. 2002).

"[O]nce it is established that a juror has gathered evidence extraneous to the trial, prejudice will ordinarily be presumed, and the burden is on the respondent in such a case to overcome the presumption of prejudice." *Id.*; *See also McBride v. Farley*, 154 S.W.3d 404, 410 (Mo. App. S.D. 2004) ("[T]here was a presumption of prejudice and the burden shifted ….").

If, after juror misconduct has been established, the trial court does not shift the burden to the plaintiff to show prejudice, it has committed reversible error on that basis alone. *Middleton v. Kansas City Pub. Serv. Co.*, 152 S.W.2d 154, 159 (Mo. 1941) ("[T]he record shows the court ruled the motion upon the theory that the burden remained upon defendant to show that the established misconduct of the juror influenced the verdict, even though the misconduct was established and it was such misconduct that prejudice would be presumed.").

B. That juror misconduct occurred is not seriously disputed.

No doubt in an attempt to avoid the strong presumption of prejudice that applies to juror investigations, Officer Ross-Paige took the position that Juror Hink did not, in fact, commit misconduct. (Hearing Tr. 19:3-18). But the testimony on the point is unrefuted, and there is no question that an internet search into "Where do Punitive Damages Go?" constitutes misconduct.

The trial court read the following instruction to the jury, based on MAI 2.01(8).

> 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.

> Therefore, you 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 use of the Internet.

(LF 152) (emphasis added).

The unrefuted testimony is that Juror Hink ignored that instruction by using his cell phone to Google the question: "Where do punitive damages go?" (Hearing Tr. 6:14-24) (Hearing Exhibit A); (LF 271). Accordingly, juror misconduct occurred.

C. The burden shifted to Officer Ross-Paige to show that no prejudice occurred, and she failed to meet that burden.

Again, "once it is established that a juror has gathered evidence extraneous to the trial, prejudice will ordinarily be presumed, and the burden is on the respondent in such a case to overcome the presumption of prejudice." *Travis*, 66 S.W.3d at 3. In such cases, "the burden shifts to [the respondent] to show that no prejudice resulted from" the juror misconduct. *Id.* at 4. Thus, prejudice will be presumed whenever the juror went outside the trial to help him or her "decid[e] the case," *id.* at 5,

which is precisely what happened here. And Ms. Ross-Paige cannot rebut that presumption, so much so that she has never tried. Her argument, both at the trial court and at the Court of Appeals, has been only that no such presumption should apply. But she is wrong.

1. The misconduct involved an independent research for extraneous information, which shifts the burden and triggers the presumption of prejudice.

The investigation here shifts the burden and implicates the strong presumption of prejudice because the juror went outside the evidence—to the world-wide-web, in fact—to answer a question he had regarding punitive damages. *See Travis*, 66 S.W.3d at 3-5 (holding that a the burden shifts and that a strong presumption of prejudice applies "once it is established that a juror has gathered evidence extraneous to the trial").

Extrinsic evidence includes "independent investigation or communications." *State ex rel. Koster v. McElwain*, 340 S.W.3d 221, 255 (Mo. App. W.D. 2011). "Extrinsic evidentiary facts enter a jury's deliberations when, for example, … a juror brings a newspaper into the jury room and reads an article from it to the venire." *Neighbors v. Wolfson*,

926 S.W.2d 35, 37 (Mo. App. E.D. 1996). The delivery of a map into the jury room also constitutes extrinsic evidence. *State ex rel. Koster*, 340 S.W.3d at 255.

Here, "an independent investigation," *see id.*, amounting to consideration of "extrinsic evidence," is at issue. *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 88 (Mo. 2010). Juror Hink did an internet search for "Where do punitive damages go?" Where punitive damages go is not an issue that was submitted into evidence, nor was it submitted in the trial court's instructions. Juror Hinks's conduct therefore involved an independent investigation into extrinsic evidence.

Reading the Wikipedia article is no different from bringing a map, *State ex rel. Koster*, 340 S.W.3d at 255, or a newspaper, *Neighbors*, 926 S.W.2d at 37, into the jury room, and it should be treated no differently. *See Tapanes v. State*, 43 So.3d 159, 162 (Fla. Dist. Ct. App. 4th 2010) ("The court granted a motion to interview jurors and determined, after an evidentiary hearing, that there was juror misconduct based on the fact that the jury foreperson utilized his smart phone to search an internet site … for the definition of 'prudent.'"); *McQuarrie v. State*, 380 S.W.3d 145, 155 (Tex. Crim. App. 2012) ("The trial court abused its dis-

cretion in excluding … the jurors' testimony and affidavits. … The internet research conducted by a juror about the effects of date rape drugs constitutes an 'outside influence.'"). If anything, an internet search of a Wikipedia article is worse than consulting a map, because the internet article is less likely to be reliable.

Thus, conducting an internet search qualifies as an independent search for extraneous information; *the result* of that search speaks to whether the presumption of prejudice can be rebutted, not whether the presumption applies.

a. Searching the internet is far worse than "consulting a dictionary," and the Court should presume that a Wikipedia search revealed prejudicial information.

The trial court's rationale for upholding the verdict does not withstand scrutiny. It ruled that "it should not indulge a strong presumption of prejudice given the nature of the misconduct" (LF 420), which, according to the trial court, was "analogous to consulting a dictionary" (LF 417). But the trial court was wrong to analogize Juror Hink's conducting an internet search to a juror's picking up a dictionary: the former is

more apt to reveal—and did reveal in this case—prejudicial information, so the general rule of presuming prejudice should apply.

In ruling that a presumption of prejudice did not apply, the trial court cited two federal cases. In both cases, the juror allegedly consulted a dictionary. In *Yannacopoulos v. General Dynamics Corp.*, the parties "adduced no evidence that the juror actually ignored the judge's instruction and consulted a dictionary," so that decision does not materially affect the analysis here, where evidence was so adduced. 75 F.3d 1298, 1305 (8th Cir. 1996). In *U.S. v. Cheyenne*, the jurors consulted a dictionary to define the words "callous" and "wanton." 855 F.2d 566, 568 (8th Cir. 1988). The court held that the use of a dictionary did not shift the burden to show prejudice because the jurors' investigation merely supplemented the court's instructions with definitions culled from a dictionary. *Id.*

Applying the rationale of *Cheyenne* to the internet search at issue here is wrong for at least three reasons.

First, *Cheyenne* represents a minority view on whether the use of dictionaries by jurors creates a presumption of prejudice. *United States v. Aguirre*, 108 F.3d 1284, 1288 (10th Cir. 1997); *United States v. Mar-*

tinez, 14 F.3d 543, 550 (11th Cir. 1994); *Marino v. Vasquez*, 812 F.2d 499, 505 (9th Cir. 1987); *Jordan v. Brantley*, 589 So.2d 680 (Ala.1991); *Alvarez v. People*, 653 P.2d 1127, 1130–32 (Colo.1982); *Grissinger v. Griffin*, 186 So.2d 58 (Fla. 4th DCA 1966); *Smith v. State*, 95 So. 2d 525, 528 (Fla. 1957).

Second, a dictionary on a juror's table in 1988 differs substantially from an iphone in juror's hand in 2014. *See Tapanes*, 43 So.3d at 162 (taking a different view of an internet search for the definition of "prudent"). The dictionary in *Cheyenne* was self-contained, and it included standard definitions of words only. By contrast, a vast universe of knowledge and opinions is located on the internet. It would set a dangerous precedent for this court to hold, as the trial court did, that some internet searches result in a presumption of prejudice, but others do not.

For example, the Court in *United States v. Lawson*, held that a juror's resort to Wikipedia created a presumption of prejudice because "an extrinsic influence ha[d] been injected into the trial, the content of which is beyond the trial court's ability to control." 677 F.3d 629, 645 (4th Cir 2012). Courts have instituted safeguards in the form approved

jury instructions—in Missouri, meticulously crafted over decades—and it is inherently prejudicial to allow jurors to circumvent those safeguards with a Wikipedia search. *See id*. Like the court in *Lawson*, this Court should be "greatly concerned about the use of Wikipedia in [the juror deliberation] context," and it should apply a presumption of prejudice to such searches, because a Wikipedia search is inherently different from consulting a hard bound dictionary. *Id*. at 648.

Third, Juror Hink looked for, and in fact obtained, not definitions, but substantive, prejudicial information. Juror 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? And he found out, among other things, that all *or some portion* of the punitive damages award goes to the plaintiff. That information was buttressed by another link produced by the internet search, which posed the question: "Should society get a share of punitive damages awards?" (Hearing Exhibit A). The implication is that the plaintiff will receive some portion of the award, and society will receive the remainder. While true, *see* § 537.675, that information is prejudicial and can-

not be considered by the jury. *See Henderson v. Fields*, 68 S.W.3d 455, 470-71 (Mo. App. W.D. 2001).

Accordingly, this case is no different from cases where jurors obtained outside information by other means, and it should be treated no differently. Indeed, it is hard to imagine a more prejudicial source than Wikipedia for the explanation of legal terms essential to the jury's findings. The strong presumption of prejudice should and does apply, *Travis*, 66 S.W.3d at 6, and the trial court erred in disregarding it.

b. That Juror Hink sought out the answer to a legal question as opposed to a factual one should not affect whether a presumption of prejudice applies.

The Court of Appeals' rationale fares no better. That court held that, unlike juror investigations into the facts, juror investigations into the law create no presumption of prejudice. *Ross-Paige v. Saint Louis Metro. Police Dep't*, No. ED 101747, 2015 WL 3961099, at *11, slip op. at 21, (Mo. App. E.D. June 30, 2015). That is a dangerous precedent and should not be the law.

Nationwide, the general rule is that "juror misconduct raises a presumption of prejudice" with respect to internet searches. *Prejudicial Effect of Juror Misconduct Arising from Internet Usage*, 48 A.L.R.6th 135 (2009, updated weekly). Legal searches are no exception. *Id*. at § 12 (collecting cases where the presumption of prejudice was not overcome) & § 13 (collecting cases where a presumption of prejudice applied but was overcome); *State v. Aguilar*, 224 Ariz. 299, 301, 230 P.3d 358, 360 (Ct. App. 2010) (applying a presumption of prejudice when a juror researched internet definitions of legal terms); *Baird v. Owczarek*, 93 A.3d 1222, 1228-29 (Del. 2014) (holding that "internet research was an improper extraneous influence and was an 'egregious circumstance' that raised a presumption of prejudice"); *Chambers v. State*, 739 S.E.2d 513, 518-19 (Ga. App. 2013) (applying a presumption of prejudice when the juror researched legal definitions and holding that the presumption could not be overcome because a "juror collected extra-judicial 'law' that she found compelling enough to share with fellow jurors"); *Stebner v. Associated Materials, Inc. (AMI)*, 234 P.3d 94, 98 (Mont. 2010) (applying a presumption of prejudiced when a juror researched on the internet what "preponderance" meant, but holding that the presumption was re-

butted because the vote was already 11-1 when the juror did the search).

And, as discussed above, until now, Missouri courts have always applied a presumption of prejudice to the outside investigations of jurors. But the question has arisen only for *factual* searches as opposed to *legal* searches. *Travis*, 66 S.W.3d at 5; *Middleton*, 152 S.W.2d at 160; *State ex rel. Koster*, 340 S.W.3d at 255.

Going contrary to the "factual searches" line of cases, the Court of Appeals took the important step of holding that searches of legal questions create no presumption of prejudice. *Ross-Paige*, 2015 WL 3961099, at *11, slip op. at 21. "The information Juror Hink obtained from Wikipedia defined *the legal term* 'punitive damages' and explained their purpose …. [The court of appeals] therefore conclude[d] that Juror Hink's independent, outside research, while improper, did not reveal extrinsic, *evidentiary facts* creating a presumption of prejudice." *Id.* (emphasis added). No doubt mindful that Wikipedia is a notoriously unreliable source, the court then noted that it "primarily base[d] [its] decision in this case on the information Juror Hink sought and obtained, and not on the specific resource he consulted." *Id.* n.16.

But what information was "sought and obtained" speaks to whether the presumption *can be rebutted*, not whether the presumption should apply. In its own precedents dealing with juror investigations of outside information, this Court could easily have held that a factual search did not give rise to a presumption of prejudice *unless* the information sought and obtained was new or different from that presented at trial. Despite having had opportunity to do so, however, that is not what the Court has held. In both *Middleton* and *Travis*, the "juror did not obtain any new, different or conflicting evidence" when he made an independent factual investigation. *Travis*, 66 S.W.3d at 5. *See also Middleton*, 152 S.W.2d at 160.

Even so, the presumption of prejudice applied, and the Court ordered new trials, not because of the content of the "information sought and obtained," but because of the juror's *intent* in going outside the trial to decide the case. *Travis*, 66 S.W.3d at 6 ("This is a case in which the juror specifically had in mind the purpose of making observations … in order to utilize those observations in deciding the case."); *Middleton*, 152 S.W.2d at 160 (finding dispositive "the active interest and evident attitude of juror Tudor, and his independent search for and acquisition of

facts outside of the record"). That intent was, of course, no less present here. *See* Hearing Transcript at pg. 8 ("JUROR HINK: I felt that I so poorly understood the concept that … I wanted to at least know better of what it was supposed to do. And I guess I felt inadequately informed to render that kind of an opinion.").

Thus, Missouri courts have never before tethered the presumption of prejudice to the content of the "information sought and obtained": it is the *intent* in going outside the trial that creates and, indeed, mandates the presumption of prejudice. And the intent to go beyond the judicial process cannot be more evident when a juror asks the internet, and not the trial court, to define a legal term. *See Kline v. City of Kansas City*, 334 S.W.3d 632, 645 (Mo. App. W.D. 2011) ("In Missouri, the jury is to obtain the law *only* from approved jury instructions.") (emphasis added). To the say the least, a presumption of prejudice should apply when a juror discards the Missouri Approved Instructions and consults Wikipedia instead.

2. Under the proper burden shifting analysis, a new trial on punitive damages is warranted.

Officer Ross-Paige cannot overcome the strong presumption of prejudice, *Travis*, 66 S.W.3d at 6, that applies to Juror Hink's misconduct because his testimony tending to minimize the search's effect is entitled to no little or no weight, and the jury awarded the amount Juror Hink suggested after he conducted the search.

Juror Hink testified that he did not have a distinct memory of his statements changing the debate, nor did he think that the information he obtained by conducting an internet search was "decisive in determining the amount of damages, mainly the $7.2 million that the jury ultimately arrived at." (Hearing Tr. 9:18-25; 10:1-3). However, his testimony does not overcome the presumption of prejudice because it is not credible; it is insufficient as a matter of law; and the fact the jury awarded his proposed amount contradicts his attempt to minimize the effect of his search.

"[T]he presumption of prejudice is so strong [in juror misconduct cases] that it can rarely be overcome by statements of the juror tending to minimize the effect of this conduct." *Travis*, 66 S.W.3d at 6; *see also*

Dorsey v. State, 156 S.W.3d 825, 832 (Mo. App. W.D. 2005) ("The jurors' own protestations in this regard are given little weight, for reasons that are obvious."). Thus, that Juror Hink testified that his search did not have a "decisive effect" or that it "changed the debate" is of no moment, because the law presumes that the juror will tend to minimize the effect of his or her misconduct. *Travis*, 66 S.W.3d at 6.

Further, that the search failed to "have a decisive effect" or "change the debate"—even if that were believed—would not overcome the presumption of prejudice that applies. That is, where millions of dollars in punitive damages are being discussed, juror misconduct does not have to have a *decisive* or *debate-changing* effect to cause prejudice. If the search affected deliberations at all, the effect was prejudicial. Juror Hink clearly thought more information was necessary (Hearing Tr. 8:19-23), and he had to "come up quite a bit" from where he initially was in his mind (Hearing Tr. 11:17-20). That he did come up after he read a Wikipedia article is itself sufficient to preserve the presumption of prejudice.

Perhaps most tellingly, after Juror Hink read the excerpts from the Wikipedia article on punitive damages, it was he who made the final

suggestion of "seven or seven point two." (Hearing Tr. 11:10-15). Thus, the mere fact that Juror Hink was seen or heard reading from the internet affected the deliberations.[6] It is incredible that, after vigorous debate (Hearing Tr. 9:9-11), the jury coincidentally went the exact—or nearly the exact—number suggested by the member who conducted an internet investigation. In the jurors' minds, Juror Hink became the expert on punitive damages because he had consulted the internet, and his conclusion was the one they then adopted. For that reason, the presumption of prejudice cannot be overcome.

[6] By analogy, a juror who visits the scene of an accident may not learn any new information that was not presented at trial, but he or she could then sway the other jurors simply because he or she appears—rightly or wrongly—to have additional information.

Conclusion

For the reasons stated above, the Board of Police Commissioners respectfully requests that the Court reverse the trial court and remand for a new trial on all issues, or, in the alternative, on the limited issue of the amount of punitive damages.

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Certificate of Compliance and Service

I hereby certify:

That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 10,305 words, excluding the cover, certificate of service, signature block, appendix and certification as determined by 2010 Microsoft Word; and

That a copy of the foregoing Appellant's Substitute Brief and Appendix was sent electronically via the Missouri E-Filing system to: Jeremy Daniel Hollingshead, John Michael Eccher, Edward. D. Robertson, Jr., and James P. Frickleton on this 13th day of November, 2015.

/s/ P. Benjamin Cox
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