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 REPLY BRIEF

Respectfully Submitted,

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Summary of the Reply Argument

Ms. Ross-Paige's Substitute Respondent's Brief presents the following issues:

1. Under Rule 70.03, did the Board preserve its objection to the "disability claim" submission, when the motion for new trial itself did not specifically mention the argument, but when the Board (1) stated at the instruction conference that there was no evidence to support the submission because "the defendants have no authority or control over plaintiff's disability"; and (2) reasserted that argument in its timely-filed legal memorandum in support of the motion for new trial?

The answer is "yes." The Board's objection at trial was sufficient because it specifically objected to the "disability claim" submission, and it explained why. The Board's argument in the legal memorandum in support of the motion for new trial was sufficient because it was timely filed, and it fully set out the argument. The form of raising the argument—whether in the motion or the legal memorandum—does not matter, so long as the issued is timely-raised.

2. Can Ms. Ross-Paige be heard to say that Instruction 8 was referring to "long-term disability benefits," when she (1) testified about an

unpaid disability *only* in the context of her claim made to the Police Retirement System; and (2) explicitly told the trial court that Instruction 8's "disability claim" submission referred to the claim she made to Police Retirement System?

The answer is "no." The Court reads trial testimony in context, and, so read, Ms. Ross-Paige's testimony about her unpaid "disability claim" was referring to her claim made to the Police Retirement System. Even if that were not the case, Ms. Ross-Paige would be bound by her representation to the trial court that Instruction 8 was referring to "her application for disability to the 'The Police Retirement System.'" (LF 388-89).

3. The juror misconduct issues are straightforward: "Googling" legal terms is not something that is "inherent to the verdict," and it would be dangerous to hold otherwise. The Wikipedia page was not consistent with Missouri Approved Instructions, and even if it were, consistency would speak to whether a presumption of prejudice can be rebutted, not whether it applies. And, despite Ms. Ross-Paige's suggestion to the contrary, the trial court did not apply the "strong presumption of prejudice," nor could that presumption be overcome in this case.

I. The Board preserved its objection to Instruction 8 because it raised the relevant point—that it could not have refused the "disability claim" because it could not legally do so—both during and after trial.

Ms. Ross-Paige urges the Court not to review Instruction 8's "disability claim" submission, even though the Board specifically objected to it *both* at the instruction conference *and* in its post-trial legal memorandum. She argues that a legal memorandum in support of a motion for a new trial is not sufficient to "raise" an issue because such issues must be raised in a motion, not a legal memorandum in support of a motion. (Respondent's Substitute Brief at 29; and 27-28 (ignoring the arguments made in the Memorandum)). That argument highlights a key weakness of Ms. Ross-Paige's position: there was no competent evidence to support the "disability claim" submission. She cannot avoid the effect of that omission by appealing to a preservation problem that does not exist.

a. At the instruction conference, the Board objected to Instruction 8 and specifically pointed out why: there was no evidence to support the "disability claim" submission because a different entity controlled the claim.

Lawyers are not required to recite an entire brief when objecting at an instruction conference. Rather, when one part of an instruction is challenged for lack of substantial evidence, lawyers are required to "direct[] the trial court's attention to a specific element in [the] proffered multi-element instruction which [they] claim[] is not supported by evidence in the record and why in the context of the evidence presented during the trial the specified element is not supported by the evidence." *Sparkman v. Columbia Mut. Ins. Co.*, 271 S.W.3d 619, 625 (Mo. App. S.D. 2008) (holding that the objection failed because counsel did not do that).

That is what the Board did. "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, which was shown on the record, and this claim would be correctly asserted against a defendant not ... in this claim." (Tr. 861:13-19).

Thus, the Board specifically objected to the lack of evidence to support the "disability claim" submission, *see* Rule 70.03, and it alerted the trial court as to "why[,] in the context of the evidence presented during the trial," the submission was unsupported by the evidence: the Board has no authority or control over the referenced "disability claim," so Ms. Ross-Paige she could correctly assert that claim *only* against some other entity (the Police Retirement System). *Sparkman*, 271 S.W.3d at 625. *See also Porta-Fab Corp. v. Young Sales Corp.*, 943 S.W.2d 686, 691 (Mo. App. E.D. 1997) (finding Rule 70.03's "specific objection[]" requirement met when the defendant merely cited the correct MAI and then followed up in the motion for new trial).

Despite the simplicity of the rule—object to the theory submitted and explain why there is no evidence to support it—Ms. Ross-Paige attempts to complicate it. Ms. Ross-Paige erroneously believes that the Board was required to "make specific reference ... to the failure-to-prove-both-sides-of-the-disjunctive" [sic]. (Respondent's Substitute Brief

at 30). That is not the law: the trial court well-knows that *each* alternative submission must be supported by substantial evidence, *Powderly v. S. Cnty. Anesthesia Assocs., Ltd.*, 245 S.W.3d 267, 276 (Mo. App. E.D. 2008); *Griffin v. Kansas City S. Ry. Co.*, 965 S.W.2d 458, 460 (Mo. App. W.D. 1998), and specifically objecting to each submission (and explaining why) is sufficient to preserve the point. Rule 70.03.

Ms. Ross-Paige position, that "specific reference ... to the failure-to-prove-both-sides-of-the-disjunctive" (Respondent's Substitute Brief at 30) was required, does not find support in the law. For example, in *Powderly*—a disjunctive submission case—the objection was far less specific than the one at issue here, yet the point was preserved for appeal. At issue there was the disjunctive nature of a comparative fault submission. *Powderly*, 245 S.W.3d at 276-77. The plaintiffs argued on appeal that *one* of several comparative acts submitted—that the doctor operated with a suboptimal MRI— was unsupported by substantial evidence. *Id.* The defendant argued that the plaintiffs had failed to preserve that point. *Id.* at 277. Here is the in-trial objection that the *Powderly* plaintiffs had made:

> There's no evidence that the Doctor—the Plaintiff does not believe that there is evidence to support the second and third elements, ordered/instructed him to do it and perform the surgery with a suboptimal MRI. I don't think there is any evidence that the lack of an optimal MRI contributed to cause the injuries.

Id. Despite the allegedly general nature of this objection, plaintiffs argued that, because they had specifically objected to "the second and third elements," they had preserved their argument that the there was no substantial evidence to support the theory that the MRI was suboptimal. *Id.* at 277. The appellate court agreed that the point was preserved (note that no mention of the word "disjunctive" was used at trial), and it held that the trial court erred in submitting the theory. *Id.* at 277-78.

The same result should follow here. Even more so than the attorneys did in *Powderly*, trial counsel here specifically objected to the lack of evidence to support the submission, and she explained why: not exercising control over the disability claim, the Board could not have "refused" it. That preserved the Board's right to argue the point. Rule 70.03.

Thus, because the Board distinctly stated (1) the matter objected to (the disability claim submission); and (2) the grounds for the objection (it had no legal authority over the disability claim), it satisfied Rule 70.03's requirement that a specific objection be made at trial.

b. In its post-trial filings, the Board laid out in further detail its argument regarding the "disability claim" instruction, and Ms. Ross-Paige's argument to the contrary amounts to quibbling with the title of the filing.

So too did the Board satisfy Rule 70.03's requirement that the objection be "raised" in a motion for new trial. The Board's post-trial argument is excerpted on pages 41-42 of its Substitute Appellant's Brief (*see also* LF 262-65), and no one would seriously argue that the briefing on pages 262-265 of the legal file was insufficient to "raise" the issue under Rule 70.03. Indeed, Ms. Ross-Paige does not argue that the arguments themselves were deficient—just that the manner of presenting them was.[1] In essence, Ms. Ross-Paige's argument is that, because the docu-

[1] Ms. Ross-Paige also argues (once again) that the Memorandum—and Point 1—argue something different from the objection at trial be-

ment containing its post-trial "disability claim" argument was entitled "Defendant's *Memorandum in Support of its* Motion for New Trial" instead of simply "Motion for New Trial," the argument does not count for the purposes of Rule 70.03. *See* LF 252. (Respondent's Substitute Brief at 29; and 27-28 (ignoring the arguments made in the Memorandum)).

But she is wrong. Ms. Ross-Paige cites authority for the rule that a memorandum in support of a new trial motion does not "count" as "rais[ing]" an issue under Rule 70.03 *if the memorandum is untimely filed*. But, here, the memorandum *was* timely filed. (LF 252).

In support of her argument, Ms. Ross-Paige cites *Greco v. Robinson*, quoting that court as stating that a "party may not add a new point to a motion for a new trial under the guise of making 'Suggestions.'" 747 S.W.2d 730, 734 (Mo. App. E.D. 1988). (Respondent's Substitute Brief at 29). She neglects to point out, however, that the court in *Greco*, in the next two sentences, clarified that its ruling applied to *untimely-filed*

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cause they argue the disjunctive nature of Instruction 8's submission, whereas the objection at trial did not use the word "disjunctive." (Respondent's Substitute Brief at 30). That argument is addressed above at pgs. 3-5.

suggestions. "A motion for new trial may not be amended [under the guise of suggestions] to add a new point *after* the expiration of the time provided by court rule. … [A]ny amendment filed *out of time* is a nullity." *Id.* (emphasis added) (internal citation omitted).

The court made this distinction clear in *Pruitt v. Community Tire Co.*, 678 S.W.2d 424, 429 (Mo. App. W.D. 1984). There, the court held that suggestions "'submitted with' the motion for new trial, [would raise] *no issue* of the timeliness of any *new grounds raised* by the memorandum *that did not appear* in the after-trial motion." *Id.* (emphasis added). In that case, however, the "specific ground raised on appeal did not appear in the motion for new trial, nor was it *otherwise timely brought* to the attention of the trial court," and therefore the point was waived. *Id.* (Emphasis in original.)

Here, there was no question that the Board's Memorandum in Support of its Motion for New Trial was timely-filed and "submitted with" the motion itself (LF 247, 252), "thus raising no issue of the timeliness of *any new grounds* raised by the memorandum that did not appear in the after-trial motion." *Pruitt*, 678 S.W.2d at 429 (emphasis added).

If the Board had simply omitted the first six words of the title of the document appearing at LF 252, would Ms. Ross-Paige still find fault with preservation? Of course not, because the document was timely-filed, and it fully lays out the Board's position. (LF 252, 262-65). Thus, to accept Ms. Ross-Paige's argument would be to elevate form over substance to an absurd degree. The Board "raised" the issue at LF 252, 262-65, and entitling that post-trial filing "Memorandum in Support" did not vitiate preservation.

II. The evidence and Ms. Ross-Paige's trial argument were consistent: Instruction 8's "disability claim" theory posited that the Board refused the Police Retirement Disability claim; that position binds Ms. Ross-Paige on appeal, yet she abandons it.

On appeal, Ms. Ross-Paige does not argue that the Board refused her disability claim that she made to the Police Retirement System, nor could she credibly do so, given that the Board has no authority to decide such claims. *See* Appellant's Substitute Brief at 33-35; *cf.* Respondent's

Substitute Brief at 37 (acknowledging that "disability pension" is "the retirement system's responsibility").

Rather, she attempts to change theories: now she claims that Instruction 8's "disability claim" instruction was referring to her "long-term disability," provided through the Board's insurance. (Respondent's Substitute Brief at 33-39). But, in response to the Board's objection to Instruction 8's "disability claim" submission, Ms. Ross-Paige specifically told the trial court that Instruction 8 was referring to "her application for disability to the 'The Police Retirement System of St. Louis.'" (LF 388-89). The position that Ms. Ross-Paige took with the trial court binds her on appeal. And even if Ms. Ross-Paige were not stuck with the argument she made below, the record would not support her new one: the evidence of an unpaid disability claim came from Ms. Ross-Paige's testimony, and her own words and exhibits establish that she was testifying about the disability claim that she made to the Police Retirement System.

Because Ms. Ross-Paige no longer even argues that substantial evidence supports the theory she advanced to the jury and the trial court, a new trial is warranted.

a. Ms. Ross-Paige testified about her "disability claim" being refused in the context of Exhibits 48, 86, and 87—i.e., her claim that was made to the Police Retirement System.

Testimony regarding a *denied* disability claim appears on page 329 of the transcript, and there only. Preceding that testimony (Tr. 324-28), Ms. Ross-Paige discussed that "disability claim," and she referred to Exhibit 48, Exhibit 86, and Exhibit 87. 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 disability. (Tr. 324-29). Ms. Ross-Paige mentioned *nothing* about "long-term disability" being denied, and thus her contention on appeal that she was actually referring to "long term disability," is wholly unsupported by the record.[2]

[2] The only evidence of long-term disability was that it had *not* been refused, a point that Ms. Ross-Paige was willing to stipulate to. (Tr. 794-98); (Exhibit Z).

The following is the context in which Ms. Ross-Paige testified that she had not received a single cent of disability.

- Page 324: she discusses a letter that was "related to her disability claim." (lines 13-14). The letter is Exhibit 87 (lines 2-4), which was sent to the Police Retirement System. (Trial Exhibits at 15-19).
- Page 325: she discusses a letter that was "related to her disability claim." (lines 18-19). The letter is Exhibit 86 (lines 11-13), which was sent to Mr. Olish (who was "over the police retirement" (line 22)), and it is addressed to the Police Retirement System. (Trial Exhibits at 5).
- Page 326: she discusses Exhibit 48 (lines 18-25), which is her application for Disability Retirement, made to the Police Retirement System (Trial Exhibits at 2).
- Page 327: she continues to discuss Exhibit 48, her application to the Police Retirement System. (lines 1-25). Ms. Ross-Paige's counsel reads from Exhibit 48, describing her injury. (lines 13-17).

- Page 327: Ms. Ross-Paige's counsel asks "Was it your understanding that if it was established that this injury was work related and that you were disabled that you would receive disability from the department?" and she answers "yes." (lines 19-23).
- Page 327-28: Ms. Ross-Paige testifies that her understanding that was that her "disability would amount to" 75% of her income for the remainder of her life. (line 24 of pg. 327 through line15 of pg. 328).
- Page 329: Ms. Ross-Paige testifies that, despite a hearing on the matter, she had heard nothing from the Board and that she had not received a single cent of disability from it. (lines 2-8).

Ms. Ross-Paige's argument now hinges on the untenable notion that, on page 329 of the transcript, she was ***not*** testifying about her application to the Police Retirement System. Indeed, conceding that the Board had no authority over the application made to the Police Retirement System, Ms. Ross-Paige takes great pains to argue that, when she testified that she had received not a single cent of disability, she was referring to long-term disability benefits. (Respondent's Substitute Brief at 34-35).

But Ms. Ross-Paige's argument—that, at page 329 of the record, she was actually referring to long-term disability benefits—finds no support in the record. For example, she argues that Exhibits 48, 86, and 87 refer to "long-term disability benefits." (Respondent's Substitute Brief at 34). But even a cursory review of those documents reveals that they are referring to Ms. Ross-Paige's claim with the Police Retirement System. (Trial Exhibits at 2-11, 15-19). Ms. Ross-Paige also cites Exhibit 47 as evidence that she was referring to "long-term disability." (Respondent's Substitute Brief at 34). But she never mentioned Exhibit 47 in her testimony about her disability claim (Tr. 324-29), and, even if she had, Exhibit 47 informed Ms. Ross-Paige about her right to file a claim *with the Police Retirement System*, and it explained that it would file that claim for her if she did not (which it did—Exhibit 48).[3] Ms. Ross-Paige also claims that she testified on page 317, lines 19-23, of the transcript about "long-term disability benefits." (Respondent's Substitute Brief at 34). That is simply not true. (Tr. 317:19-23). She then cites Exhibit 45

[3] As discussed in the Appellant's Substitute Brief, the Board had the duty to initiate the claim with the Police Retirement System, but it had no authority to "refuse" it. (Appellant's Substitute Brief at 34-35).

(her dismissal letter) (Respondent's Substitute Brief at 34), which does obliquely mention long-term disability benefits, but she fails to cite any evidence that she applied for those long-term disability benefits but was then denied.

Ms. Ross-Paige wants this Court to credit her words about disability in isolation. But this Court reads trial testimony in context. *See*, *e.g.*, *Koman v. Morrissey*, 517 S.W.2d 929, 933 (Mo. 1974); *Haase v. Garfinkel*, 418 S.W.2d 108, 113 (Mo. 1967). So read, Ms. Ross-Paige's testimony that she had not received a single cent of disability was referring to the application she made to the Police Retirement System. (Tr. 324-29). Indeed, her calculation of what was owed—75% of her income for life—is a calculation based on the disability retirement pension, which is something that Ms. Ross-Paige acknowledges even on appeal. *See* Respondent's Substitute Brief at 34 ("The St. Louis Retirement System makes decisions regarding 'disability pension.' If approved, an applicant is entitled to 75% of her salary for life.").

Thus, Ms. Ross-Paige's testimony that she had received no payment from her disability claim was referring to the claim she made to the Police Retirement System, and that testimony was not competent to estab-

lish that the Board "refused her disability claim." Merely claiming that she "testified about the Board's failure to pay her disability claim" (Respondent's Substitute Brief at 37) does not make it so. She does not and cannot dispute that, as a matter of law, the Board had no power to refuse the claim that she and Exhibits 48, 86, and 87 were referring to when she so testified. (Appellant's Substitute Brief at 33-34); *State ex rel. Cook v. Glassco*, 161 S.W.2d 438, 440 (Mo. App. Stl. 1942).

b. In her argument to the trial court, Ms. Ross-Paige explicitly stated that Instruction 8 referred to the claim made to the Police Retirement System, and, on appeal, she is bound by that position.

If the evidence on this point were not clear enough (and it is), Ms. Ross-Paige's argument to the trial court would settle the issue of what Instruction 8 meant by "disability claim." The law does not permit Ms. Ross-Paige to argue on appeal that "disability claim" meant something completely different from what she argued to the trial court, and therefore it is a settled issue that Instruction 8 was referring to the claim made to the Police Retirement System.

In her suggestions in opposition to the Board's motion for a new trial, Ms. Ross-Paige argued that Instruction 8 was supported by substantial evidence in that "Plaintiff submitted her application for disability to 'The Police Retirement System of St. Louis,'" and "a reasonable jury could conclude that the Police Retirement System of St. Louis and the Metropolitan Police Department are one in the same and/or work together to determine the status of applicants." (LF 388-89).[4]

"A party is bound on appeal by the position [she] took in the trial court." *Canania v. Dir. of Revenue*, 918 S.W.2d 310, 315 (Mo. App. S.D. 1996). That rule applies equally to respondents and appellants. *Porta-Fab*, 943 S.W.2d at 690 ("Despite [respondent's] new explanation on appeal, it is bound by the position it took in the trial court.").

For example, in *Porta-Fab*, the Court refused to let a respondent change its theory as to what its jury instruction meant. There, the respondent conceded on appeal that its instruction should have been patterned after MAI 26.06, not MAI 26.02. 943 S.W.2d at 690. But the re-

[4] That Ms. Ross-Paige responded in this way also informs the preservation "issue": if the Board did not make this point below, then why did Ms. Ross-Paige respond to it?

spondent maintained that—despite its argument to the trial court that MAI 26.02 was proper—the instruction it submitted was actually a modified version of MAI 26.06. *Id.* at 689. Writing for the court of appeals, Judge Rhodes Russell did not permit the respondent to change arguments as to what the instruction meant:

> Porta–Fab's explanation on appeal that Instruction Number 7 was a modified version of MAI 26.06 is especially curious in light of its memorandum in opposition to Young's motion for a new trial. Therein, Porta–Fab stated that Instruction Number 7 was the proper verdict director to submit because it was based upon MAI 26.02. ... Despite Porta–Fab's new explanation on appeal, it is bound by the position it took in the trial court.

Id. at 690.

Like the respondent in *Porta-Fab*, Ms. Ross-Paige here attempts to change her argument about what her own jury instruction meant. But Porta-Fab was bound by the position it took in its memorandum in support of the motion for new trial, and so should Ms. Ross-Paige be.

Because, on appeal, it is not disputed that the Board had no authority "to determine the status of applicants" for "disability to the Police Retirement System of St. Louis" (Ms. Ross-Paige's argument at LF 388-89), it follows that Instruction 8 was improper, irrespective of Ms. Ross-Paige's current effort to change positions at to what Instruction 8 meant.

c. By not arguing it on appeal, Ms. Ross-Paige has abandoned the theory that the Board refused the disability claim that she made to the Police Retirement Sys-tem.

As discussed in the Appellant's Substitute Brief, the Board had no authority to refuse Ms. Ross-Paige's claim to the Police Retirement System. (Appellant's Substitute Brief at 33-34). On appeal, Ms. Ross-Paige does not dispute the point, acknowledging that "the retirement system" has responsibility for Ms. Ross-Paige's "disability pension." (Respondent's Brief at 37).

Gone, then, is Ms. Ross-Paige's argument that "Plaintiff submitted her application for disability to 'The Police Retirement System of St. Louis,'" and "the Police Retirement System of St. Louis and the Metro-

politan Police Department are one in the same and/or work together to determine the status of applicants." (LF 388-89). By not making this argument in her substitute brief, Ms. Ross-Paige has abandoned it. Rule 83.08(b).

It is not legally possible that the Board refused Ms. Ross-Paige's claim to the Police Retirement System, *State ex rel. Police Ret. Sys. of City of St. Louis v. Murphy*, 224 S.W.2d 68, 71 (Mo. banc 1949), and that theory should never have been submitted to the jury in a case against the Board. The proposition is so evident that Ms. Ross-Paige no longer contests it. Thus, should the Court conclude that Instruction 8 was referring to the claim made to the Police Retirement System—and the evidence and argument below justify no other conclusion—then reversal becomes a straightforward proposition.

III. The Court should reject Ms. Ross-Paige's invitation to hold that "Google" searches of legal terms are "inherent to the verdict."

Ms. Ross-Paige argues that the trial court should have turned a blind eye to Juror Hink's misconduct—and that this Court should now do so—because juror testimony is inadmissible when it concerns matters "inherent to the verdict." (Respondent's Substitute Brief at 43-44) (*citing Baumle v. Smith*, 420 S.W.2d 341, 348 (Mo. 1967); *and Ledure v. BNSF Ry. Co.*, 351 S.W.3d 13, 24 (Mo. App. S.D. 2011). But a juror's mid-deliberations Wikipedia search into "where do punitive damages go" is not a matter inherent to the verdict, and thus the trial court properly received evidence on the misconduct.

When jurors "gathered evidence independent to that presented at trial," such evidence is admissible to determine whether "extrinsic evidence prejudiced the verdict." *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 88 (Mo. 2010). A "quest for independent information for the purpose of enabling [a juror] to arrive at a decision, and communication of his impressions to the other jurors during deliberations, influence[s]

the verdict to the appellant's prejudice." *Stotts v. Meyer*, 822 S.W.2d 887, 891 (Mo. App. E.D. 1991).

The term "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 map into the jury room also constitutes extrinsic evidence, and testimony that such an event occurred should be permitted. *State ex rel. Koster*, 340 S.W.3d at 255.

a. Evidence was properly received regarding Juror Hink's Wikipedia search because he went outside the trial to investigate where punitive damages go.

Here, "an independent investigation," *see id.*, amounting to consideration of "extrinsic evidence," was brought to the trial court's attention, so it was proper for the trial court to receive evidence on the subject. *Fleshner*, 304 S.W.3d at 88. Juror Hink informed defense counsel that

he did an internet search for "where do punitive damages go"; read from the Wikipedia page on punitive damages; and told other jurors what the Wikipedia page contained. (LF 271-72) (Hearing Exhibit A).

Reading the Wikipedia article is no different from bringing a map or a newspaper into the jury room, and therefore it is proper to accept evidence to determine whether that occurred. *State ex rel. Koster*, 340 S.W.3d at 255. Indeed, it is difficult to imagine modern jurors consulting a hard-copy newspaper or map. They would, in all likelihood, do just what Juror Hink did: consult the internet. Accordingly, it makes no sense to hold that this is not an "independent investigation" or "extrinsic evidence" case.

Regardless, Juror Hink's testimony and Hearing Exhibit A were admitted into evidence without objection (Hearing Tr. 5-11), and therefore admissibility has been waived. *Thorn v. Cross*, 201 S.W.2d 492, 497 (Mo. App. Stl. 1947).

> With respect to the objection that a jury's verdict cannot be impeached by a juror's statement or admission, which objection might have been made by plaintiffs herein (but was not), the rule is that, although a verdict cannot be impeached

> by evidence or testimony of a juror, nevertheless, where such evidence is received without objection, the party who should have objected but fails to do so waives all right to complain against the court's consideration of such evidence and it is to be given its natural probative value.

Id. Indeed, when evidence of juror misconduct is received without objection, the burden shifts to the proponent of the verdict to disprove prejudice. *Id*. at 498.

Thus, this is not a case where the misconduct was "inherent to the verdict," because it involved a Wikipedia search, which is the modern equivalent of searching a newspaper, *cf*. *Neighbors v. Wolfson*, 926 S.W.2d at 37, or a map, *cf*. *State ex rel. Koster*, 340 S.W.3d at 255. That the evidence of misconduct was received without objection only underlines the point that the trial court should have applied a presumption of prejudice after it heard evidence of the misconduct. *Thorn*, 201 S.W.2d at 497.

b. There is no law/fact distinction for juror research into extraneous information.

Ms. Ross-Paige also suggests that the strong presumption of prejudice applies to extraneous investigations of fact but that it does not apply to extraneous investigations of law. (Respondent's Substitute Brief at 49-50). There is no authority for that distinction, and it should not be adopted.

There appears to be no Missouri case discussing Ms. Ross-Paige's proffered distinction, but the general policy of Missouri strongly suggests that no exception to the *Travis* presumption should be made for extraneous investigations of law as opposed to fact.

"'In Missouri, the jury is to obtain the law *only* from approved jury instructions.'" *Kline v. City of Kansas City*, 334 S.W.3d 632, 645 (Mo. App. W.D. 2011) (*quoting Eckelkamp v. Burlington N. Santa Fe Ry. Co.*, 298 S.W.3d 546, 552 (Mo. App. E.D. 2009)) (emphasis added). *See also Barker v. Pool*, 6 Mo. 260, 263 (1840) ("[B]ecause that court permitted the law books to be sent to the jury its judgment is reversed and the cause remanded.").

Indeed, the Missouri Approved Instructions tell lawyers: "[y]ou may have the ability to improve an instruction in MAI but you do not have the authority to do it. Do not do it." MAI, How to Use this Book, page LI.

Here, Juror Hink "felt inadequately informed" about punitive damages, and he "wanted to at least know better of what [an award of punitive damages] was supposed to do." (Hearing Tr. 8:19-22). Accordingly, he "Googled" the question: "where do punitive damages go?" and clicked on the Wikipedia article regarding the subject. (Hearing Transcript A).

As discussed in the Appellant's Substitute Brief, the rule in other jurisdictions is that outside research into the definitions of legal terms creates a presumption of prejudice. (Appellant's Brief at 53-57). If the legal search is done on Wikipedia, that only compounds the problem. *United States v. Lawson*, 677 F.3d 629, 646 (4th Cir 2012) ("[In the present case, the content of the extrinsic influence is of particularly great concern, because the Wikipedia definition of the term 'sponsor' addressed an element of the animal fighting offenses for which the defendants were on trial.").

And, given how jealously Missouri courts safeguard their approved legal instructions, it beggars reason to suggest that Missouri should apply a different rule to extraneous investigations of law. That would put Missouri in the minority, when there is every reason to believe that Missouri would apply the sternest rule to outside glosses on the Missouri Approved Instructions. *See* MAI, How to Use this Book, page LI ("*Do not do it*.") (emphasis added).

Indeed, if the trial court submitted an instruction that added the Wikipedia language to MAI 10.01, there is little doubt that this Court would reverse. Does Missouri law allow Juror Hink to add language that it would prevent the trial court from adding?

IV. The information that Juror Hink obtained was not consistent with the Court's instructions, and, in any case, consistency does not negate the presumption of prejudice—it speaks to whether the presumption can be rebutted.

In urging the Court to forgo a strong presumption of prejudice, Ms. Ross-Paige relies heavily on the notion that Wikipedia was consistent with the trial court's instructions, but that argument fails for two reasons. *First*, the trial court's instructions did not suggest—as Wikipedia did—that some portion of the punitive damages award could go elsewhere. *Second*, this Court has made clear that it is the intent in going outside the trial, and not the content of the information received, that triggers the presumption of prejudice.

The Wikipedia search was not consistent with the trial court's instructions. Juror Hink read that "[a]lthough the purpose of punitive damages is not to compensate the plaintiff, the plaintiff will receive all or some portion of the punitive damage award." (Hearing Tr. 7:13-25). Another link, visible from the search in large type, posed the question: "Should society get a share of punitive damages awards?" (Hearing Ex-

hibit A).[5] By contrast, the trial court's instructions did not tell the jurors that "the purpose of punitive damages is not to compensate the plaintiff," nor did it suggest that some portion of the award would, in fact, go elsewhere. (LF 165-68). Nor did the trial court suggest that society would possibly "get a share of punitive damages awards." (LF 165-68).

Thus, the very premise of Ms. Ross-Paige's argument—that Wikipedia was consistent with MAI—fails. Because her premise fails, so does her conclusion.

But even if Wikipedia were consistent with MAI (and it is not), consistency speaks to whether the presumption of prejudice can be rebutted, not whether it applies in the first place. *See Mayhue v. St. Francis Hosp. of Wichita, Inc.*, 969 F.2d 919, 924 (10th Cir. 1992) (applying a presumption of prejudice and noting that the extent to which the definition conflicted with the jury instruction was a factor to consider in de-

[5] Ms. Ross-Paige argues that there is no evidence that Juror Hink looked at that link or that he "Googled" "where do punitive damages go"? (Respondent's Substitute Brief at 57). That argument ignores the exhibit that Juror Hink himself handed to the trial court. (Hearing Exhibit A).

termining whether the presumption could be rebutted). Indeed, in both *Middleton* and *Travis*, the jurors gained no new evidence by conducting their investigations. *Travis v. Stone*, 66 S.W.3d 1, 5 (Mo. 2002); *Middleton v. Kansas City Pub. Serv. Co.*, 152 S.W.2d 154, 160 (Mo. 1941). Even so, the presumption of prejudice applied, and the Court ordered new trials 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").

The reason a presumption of prejudice applies is that seemingly little things—like the "some portion" language here or the difference between 1930 and a 1931 Chevrolet in *Middleton*—can go a long way to influence a juror. Indeed, it is common for attorneys to argue vigorously over the most minute deviations from MAI. If, despite the court's instructions, a juror forms the intent to go outside the trial, there must be a reason. There was a reason here: Juror Hink "felt that [he] so poorly

understood the concept that … [he] wanted to at least know better of what it was supposed to do. And [he] guess[ed he] felt inadequately informed to render that kind of an opinion." Hearing Transcript at pg. 8. When he acted on that intent by consulting Wikipedia, he triggered a strong presumption of prejudice. *Travis*, 66 S.W.3d at 6; *Middleton*, 152 S.W.2d at 160. Whether Wikipedia is consistent with Missouri law matters only in deciding whether the presumption is rebutted.

V. The trial court did not apply a strong presumption of prejudice, nor could such a presumption be overcome.

The trial court expressly stated that it did not "believe that it should indulge a strong presumption of prejudice" (LF 420), and it engaged in lengthy analysis as to why it thought that it was so (LF 413-421). Despite that statement and that legal analysis, Ms. Ross-Paige suggests that the trial court *did* apply a presumption of prejudice. (Respondent's Substitute Brief at 41 (arguing that the trial did not "*expressly* state that had presumed prejudice and shifted the burden")). The Court should reject any implication that the trial court applied a strong presumption of prejudice and exercised its discretion under the proper

standard. In fact, the trial court "expressly state[d]" that it *should not* "indulge" a strong presumption of prejudice, and—if the court was, in fact, applying it—there would have been no point in explaining in detail why such a presumption should not apply.

For the reasons stated in the Appellant's Substitute Brief (58-60), the strong presumption of prejudice cannot be overcome. That presumption gives little to no weight to Juror Hink's attempt to minimize the effect of his misconduct. *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."). Even more telling are the facts themselves: Juror Hink himself had to come up quite a bit, and, after he read the Wikipedia article, the jury adopted his suggestion of $7 million or $7.2 million. (Hearing Tr. 8-11). A "strong presumption of prejudice" would not live up to its name if these facts could overcome it.

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.

Respectfully Submitted,

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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 7,169 words, as determined by 2010 Microsoft Word; and

That a copy of the foregoing Appellant's Substitute Reply Brief was sent electronically via the Missouri E-Filing system to: Jeremy Daniel Hollingshead, John Michael Eccher, Edward. D. Robertson, Jr., Jonathan Eccher, Ryan Paulus, and James P. Frickleton on this 25th day of January, 2016.

/s/ P. Benjamin Cox
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