IN THE CIRCUIT COURT OF THE COUNTY
OF JEFFERSON STATE OF MISSOURI

CN, et al.	)	
	)	
Plaintiffs,	)	
	)	Case No
	)	
	)	Division 2
MERCY HOSPITAL JEFFERSON, et al.,	)	
	)	
Defendants.	)	

ORDER DENYING THE REQUEST OF PLAINTIFFS TO SUBPOENA JURORS TO TESTIFY AT HEARING ON THE MOTION FOR NEW TRIAL

This case involves a medical negligence claim that was tried for almost 4 weeks in the Circuit Court of the County of Jefferson, State of Missouri, during the weeks of August 15, 2017 through September 6, 2017, when the jury returned a verdict in favor of defendants. During the trial, Counsel for Plaintiffs reported to the Court that they had witnessed the Defendant Physician conversing with some of the jurors in the hallway outside the courtroom during a break. The court conducted an inquiry of the jurors that were identified by counsel. Attached is the transcript of the juror questioning regarding Dr. M's discussions with them outside the courtroom. The only relief that Counsel for Plaintiffs sought at the time was to strike juror N which was conditionally denied. As an alternate, N ultimately did not sit on the jury to consider the verdict. The court gave all counsel an opportunity to question the jurors at the time the issue was raised during trial but they all declined.

Plaintiffs now contend that they were deprived a fair trial because the Court committed plain error in not questioning all of the jurors and alternates on this issue even though no request was made by the 4 attorneys representing Plaintiffs during the course of the remainder of the trial. In ***State v. Johnson***, 207 S.W.3d 24, 34 (Mo. banc 2006) (Johnson I), the Court stated that

prejudice exists when there is a "reasonable probability that the trial court's error affected the outcome of the trial" and "the error was so prejudicial that the defendant was deprived of a fair trial." *Id.* *See also* ***State v. Johnson***, 284 S.W.3d 561, 568 (Mo. Banc 2009). Issues that are not preserved by counsel during trial may be reviewed for plain error. *Id.* Such error, however, must have "resulted in manifest injustice or a miscarriage of justice." *Id.* When reviewing for plain error "evidence is reviewed in the light most favorable to the verdict and is reviewed for abuse of discretion. ***State v. Johns***, 34 S.W.3d 93, 103 (Mo. banc 2000).

In the case at bar, the Court recognizes the high bar set for reversal on the plain error doctrine. Moreover, the Court acknowledges that the attorneys representing Plaintiffs are highly seasoned trial attorneys who are not prone to overlooking instances constituting "manifest injustice or a miscarriage of justice" during the course of any trial. The fact that Counsel for Plaintiffs did not deem the inquiry of the jurors involved deficient in any respect or otherwise seek any other relief from the Court at the time of trial speaks volumes as to whether there was, in fact, a "reasonable probability" that any post-trial allegation of error on the part of the trial court "affected the outcome of the trial" or that any general allegation of error "was so prejudicial that the [Plaintiffs were] deprived of a fair trial."

The Missouri Supreme court in ***Berry v. Allgood***, 672 S.W.2d 74 (1984), addressed an almost identical situation. In ***Berry*** the court emphasized that "the conversation here had no connection with the case." Id. at 78. Moreover, the court concluded that there was no basis to establish that there was any "improper motive or design by anyone." Similarly, this Court concluded, after inquiry of the doctor and jurors identified by Counsel for Plaintiffs, that the conversation that Dr. M had with the jurors did not involve the case and that both of the jurors questioned denied that they had any undue sympathy for the doctor. More importantly, the

jurors assured the court that they could give both sides a fair and impartial trial. As a result, this Court concluded that there was no misconduct on the part of the Defendant Doctor or the jurors but admonished all to not engage in any future conversations of any nature.

The ***Berry*** opinion pointed out that:

> "because the trial court did not find misconduct, the ***burden rested upon plaintiffs to establish prejudice*** to them from the conversation between the juror and defendants. They have failed to do so. The prejudice which they advance is based solely on speculation, conjecture and suspicion without evidentiary base. A finding of prejudice under such circumstances is not permissible, certainly not by an appellate court. The trial court found neither misconduct nor prejudice and we find no abuse of its discretion." *Id.* at 78.

Likewise in the case at bar, the Plaintiffs have failed to even allege, much more establish, any semblance of prejudice. Rather, Counsel for Plaintiffs want to embark on a fishing expedition hoping to unearth something by subpoenaing the 11 jurors who were not questioned and not even implicated in the contact between the doctor and the jurors. This will obviously constitute a personal imposition on the remaining jurors who have already served for almost 4 weeks without any good cause to believe that they were even involved in the contact in question. Had Counsel for Plaintiffs requested additional questioning of the remaining jurors at the time of trial it would have been readily accomplished, but nothing was even suggested to the Court that anyone suspected any contact between the doctor and the remaining 11 jurors. Now Plaintiffs want to put the toothpaste back into the tube in a desperate attempt to challenge the verdict.

In ***Neighbors v. Wolfson***, 926 S.W.2d 35, 37-38 (E.D. Mo. 1996), the court stated that:

> The precedents of this state are legion which recite the rule that "the affidavit or testimony of a juror is inadmissible and is not to be received in evidence for the

purpose of impeaching the verdict of a jury" of which the juror was a member. ***Smugala v. Campana***, 404 S.W.2d 713, 717 (Mo.1966); ***Wingate v. Lester E. Cox Medical Center***, 853 S.W.2d 912, 916 (Mo. banc 1993); ***Reaves v. Kramer,*** 97 S.W.2d 136, 145 (Mo.App.W.D.1936). This formulation of the rule might be slightly misleading, however. A verdict can certainly be attacked on the ground that juror misconduct occurred during the juror's deliberations. ***Green v. Lutheran Charities Ass'n.***, 746 S.W.2d 154, 157 (Mo.App.E.D.1988); ***Berry v. Allgood,*** 672 S.W.2d 74, 78 (Mo. banc 1984). However, the testimony of a juror only provides a competent evidentiary basis for such an attack when two conditions are met. First, the party in whose favor the verdict was returned must acquiesce in the proposition that the juror is competent to give such testimony; such acquiescence exists when a party fails to object to admission of both the affidavits containing the juror statements and to the juror testimony offered in court. ***Stotts v. Meyer***, 822 S.W.2d 887, 890 (Mo.App.E.D.1991); ***Gantz v. Leibovich***, 569 S.W.2d 373, 374 (Mo.App.E.D.1978); ***Green***, at 157. Second, the juror testimony must allege that extrinsic evidentiary facts (i.e., facts bearing on trial issues but not properly introduced at trial) were interjected into the jury's deliberations, rather than merely that jurors acted on improper motives, reasoning, beliefs or mental operations (the latter type of juror testimony is said to concern "matters inherent in the verdict"). ***Baumle v. Smith***, 420 S.W.2d 341, 348 (Mo.1967); ***Stotts***, at 889–890. Extrinsic evidentiary facts enter a jury's deliberations when, for example, a juror visits an accident scene without the court's authorization and then shares his observations with his fellow jurors, See ***Stotts***, at 890–891, or when a juror brings a newspaper into the jury room and reads an article from it to the venire. See ***U.S. v. Thomas***, 463 F.2d 1061 (7th Cir.1972).

Appellants argue fervently that the juror testimony offered in this case, wherein four jurors state that a booklet containing *38 statements bearing on a central issue in the case was viewed and discussed by the jury, unquestionably alleges that extrinsic evidentiary facts infiltrated the jury's deliberation. We agree. See ***Gantz***, at 374 (evidence that jury had read and discussed a book on stopping

> distances in an auto accident case held inadmissible because proper objection interposed, not because it inhered in verdict). However, it is also beyond dispute that respondents properly objected to the juror testimony, thereby rendering the jurors incompetent to give testimony tending to impeach their verdict. Whatever logical or policy defects may exist in this rule, it is the established law in Missouri, and we are bound by it. *Id.*

Here both of the defendants have jointly filed a Motion for Protective Order and Motion to Quash as to Plaintiffs' proposed issuance of the subpoenas directed to jurors. Consequently, they are objecting to the competency of the jurors to testify concerning their verdict. Additionally, the Plaintiffs are not alleging that the jury considered extrinsic evidence but are merely suggesting that they may have "acted on improper motives, ***reasoning***, beliefs or mental operations." *Id.* For both reasons, the opinion in ***Neighbors*** precludes the Court from conducting an evidentiary hearing consisting of testimony from the remaining 11 jurors who deliberated in this case.

For the foregoing reasons, the trial court grants the Motion for Protective Order and Motion to Quash as to Plaintiffs' proposed issuance of the subpoenas directed to jurors filed by the Defendants and denies the request of Plaintiffs to subpoena the jurors for an evidentiary hearing on their Motion for New Trial.

Accordingly, the hearing on the Motion for New Trial will be conducted in Division 17 in St. Louis County Circuit Court, on December 8, 2017 at 9:00 a.m.

SO ORDERED

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JUDGE Joseph L. Walsh III, Div. 17 **DATE**