FIRM REPRESENTS CLIENT IN ALLEGED BIAS IN JURY DELIBERATION CASE

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Tags: Mark Goodman, Sheila Greenbaum

The Missouri Court of Appeals will hear a case this month that could establish a juror misconduct exception to the long-standing Mansfield rule, which protects the private nature of jury discussions.

The issue began last year shortly after a jury on a 9-3 vote determined that Dr. Jay Pepose, an ophthalmologist and owner of Pepose Vision Institute, had unjustly fired an employee for cooperating with a Department of Labor investigation into Pepose's business practices.

James M. Paul, now with Ogletree Deakins in St. Louis, represented Pepose. He said one of the three dissenting jurors, identified as Juror No. 9, approached him just after St. Louis County Judge Mark D. Seigel dismissed the jury.

The juror asked whether Paul and his fellow defense attorney, Scott J. Dickenson, of Lathrop & Gage, would step into the hall to privately discuss what she said took place during jury deliberations.

Juror No. 9 said another juror, unnamed in court records, allegedly had referred to Pepose's wife and business associate, Susan Feigenbaum, as a "Jewish witch," "Jewish bitch" and "penny-pinching Jew" who was so cheap "she did not want to pay plaintiff unemployment compensation."

The allegations have set the stage for oral arguments on Nov. 13 in the case of *Michelle Fleshner v. Pepose Vision Institute* in the Court of Appeals Eastern District in St. Louis.

The appellants say they will argue that the juror's anti-Semitic remarks denied the defendant a fair trial. The respondents say they will claim that the sanctity of jury deliberations outweighs any guarantee of a fair trial.

A juror comes forward

> *"I think it was telling that she approached me right away," said Paul when he was contacted for this story. "I can say that she was visibly concerned and upset about it."*

Juror No. 9 alleged that the other juror had openly used anti-Semitic slurs during deliberations to characterize Pepose and Feigenbaum. Both are Jewish, although both sides say religion was never mentioned in the courtroom.

According to the affidavit, in open jury discussion the juror allegedly said: "The Jew, Pepose, makes $5 million per year and should pay money to the plaintiff in this case."

The Pepose case, characterized by the Anti-Defamation League in its amicus brief as one of first impression in Missouri, was tried in October 2007. Seigel presided over the weeklong trial.

The jury in Seigel's court sided with Michelle Fleshner, an ophthalmologist and Pepose's former employee. Nine of the 12 jurors agreed with Fleshner's claim that she was wrongfully terminated for cooperating with a Department of Labor investigation into Pepose's business practices.

Jurors awarded her $30,000 in compensatory damages and an additional $95,000 in punitive damages.

Paul said he will argue that the juror's alleged religious prejudice poisoned jury deliberations, thereby denying Pepose his constitutional right to a fair trial. The remarks were blatant enough, he said, to persuade Juror No. 9 to come forward and divulge them.

> *"I think she was struck by the ultimate unfairness of those comments," Paul said.*

A second member of the jury, identified only as Juror No. 12, later contacted Paul by telephone and confirmed hearing the anti-Semitic remarks but declined to be further involved in the case. Paul has attested to Juror No. 12's remarks in a separate, sealed affidavit.

In arguing the appeals case, Paul will be joined by attorneys Mark E. Goodman and Sheila Greenbaum, both with the St. Louis firm Capes, Sokol, Goodman & Sarachan. A fourth attorney, James Weiss, of Bryan Cave, filed the Anti-Defamation League amicus brief on Pepose's behalf.

According to Weiss' amicus brief, the appeal's central issue is the Mansfield rule versus a citizen's right to a fair trial.

The Mansfield rule dates to a 1785 ruling in England by Lord Mansfield. It provides a guarantee of privacy in a jury's discussions, one that gives jurors the confidence to speak freely without fear of retribution.

The attorneys hope to convince the judges that Seigel erred in the post-verdict phase of the case by turning down a defense request for a hearing on the alleged misconduct and motion for a new trial.

Seigel declined on both counts, saying the law gave him no authority to consent to either request.

The sanctity of jury discussions

Not everyone agrees that the alleged anti-Semitic comments were made or, if they were, that there

are grounds to invade the sanctity of jury deliberations.

Jerome Dobson, attorney for Fleshner, said the law is clear on the sanctity of jury discussions.

> *"We think the issue is very clear-cut that you can't challenge the decision of a jury," said Dobson, a member in the St. Louis law firm Weinhaus, Dobson, Goldberg & Moreland.*

It's especially the case when the allegations come from what Dobson characterizes as a disgruntled juror. To do so, he said, would start an endless parade of allegations, second-guessing and jury challenges.

> *"I think it's a matter of well-settled law that a juror internally cannot allege misconduct in the jury room," said Dobson, whose brief cites a number of cases resting on the traditional authority of the Mansfield rule. "Every time there was a conviction, that conviction could be challenged by a juror claiming alleged racial bias in the jury's deliberation."*

To side with Pepose on appeal and order a hearing on the allegations of juror misconduct would negatively impact a well-established practice, Dobson said, and inject "disturbing implications for the jury system." Dobson's brief quotes a U.S. Supreme Court ruling in McDonald v. Pless, in which a justice raised the possibility of jurors being "harassed and beset by the defeated party" to establish misconduct after a verdict is reached.

> *"If evidence thus secured could thus be used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation — to the destruction of all frankness and freedom of discussion and conference," the court wrote.*

Dobson also cites voir dire as a traditional means of weeding out jurors with racial or religious bias. Voir dire "works very well," Dobson said in a telephone interview. According to his appeals brief, Pepose's attorneys failed to raise questions of religious prejudice in pretrial juror interviews and cannot raise voir dire "what ifs" after the fact.

> *"(Pepose's) suggestion not only departs from clearly established law but would open a Pandora's box and allow every jury verdict to be questioned on the possible biases of every juror, whether a party raised questions about that bias during voir dire or not," Dobson said.*

Prejudice: Common or uncommon?

St. Louis jury consultant Bob Gerchen has learned to sense bias in a juror, even when a religious or racial slant isn't as pronounced as is alleged in Pepose.

Body language, word choice, tone of voice and profiled positions on issues and testimony can be a

dead giveaway to an experienced observer, Gerchen said. "It's not that common that they will state a bias that openly , but if you listen to juries in mock trials long enough, you can tell where a juror is coming from," said Gerchen, of Litigation Insights.

But prejudiced comments such as those alleged in Fleshner v. Pepose are rare, Gerchen said.

> *"A couple of racial comments have bubbled up but never where anyone was talking that overtly," he said. "It's not common, but it does happen, and typically these complaints fall into one of two categories: Either the juror didn't feel they had a voice in the jury room, or they become a whistleblower because they've heard something they felt was actionable."*

From Dobson's point of view, the alleged anti-Semitic remarks in Pepose were reported by a disgruntled juror and fall into Gerchen's first category.

But Weiss, who wrote the amicus brief, sees it differently.

> *"No matter how the case ends up, this is just the sort of evidence in 2008 that anti-Semitism is not a thing of the past," Weiss said in a telephone interview.*

Weiss supports the Pepose argument that the overt religious comments alleged by Juror No. 9 equate to juror misconduct that supports impeaching the verdict.

He said the Anti-Defamation League, founded in 1913 following the conviction and subsequent mob lynching of Jewish businessman Leo Frank, exists to root out just the attitudes alleged in Pepose.

> *"This mission is particularly apt in this case," Weiss wrote in his brief, "where a litigant was denied a fair trial due to one or more jurors' perpetuation of pernicious stereotypes of individuals of the Jewish faith."*

From a legal standpoint, Weiss argued that "the extreme prejudice" reported in Juror No. 9's affidavit "reflects fundamental unfairness in the judicial process" and is reason enough to throw out the verdict.

Weiss cites State v. Hunter, a 1995 South Carolina case in which bias expressed in the jury room drew the court's attention.

> *"Although there are policy reasons to preserve the sanctity of jury deliberations, these must be weighed against the principles of fairness that credible allegations of racial and religious prejudice implicate," the court wrote. "Thus, there are situations where testimony regarding jury deliberations is admissible to protect and safeguard this fundamental right to a fair trial."*

Taking exception

In his brief to the appeals court, Goodman cites Federal Rules of Evidence Section 606, which he interprets as providing some latitude for exception from the Mansfield rule.

Because the alleged anti-Semitic remarks were reportedly made openly among jurors, Goodman argued, they lie outside both "the mental processes and innermost thoughts" of the jurors and the content of the Pepose verdict.

> *"Instead, appeals to anti-Semitism were made openly among the jurors and constituted overt acts of misconduct," Goodman noted.*

Goodman concluded that comments made during deliberations "in order to sway the vote of other jurors" may be thought of "as the functional equivalent of information." He wrote that the alleged anti-Semitic comments reported in Pepose would fall under the heading of "extraneous prejudicial information," something a juror or other person brings into the jury room.

That, too, would be an exception to Mansfield, Goodman wrote in the brief.

He cited a parallel in After Hour Welding, Inc. v. Laneil Management Co., a Wisconsin case in which a circuit court denied the defendants' motion for a new trial, despite an affidavit similar to the one filed in Pepose by Juror No. 9.

In the Wisconsin case, a juror reported that a fellow juror referred to a party in the lawsuit as "a cheap Jew." On appeal, the case was remanded for an evidentiary hearing similar to the one sought by Pepose. The court reasoned that "even if one member of a jury harbors a material prejudice, the right to a trial by jury is impaired."

Similarly, in Evans v. Galbraith-Foxworth Lumber Co., a 1929 Texas case, a juror used the term "Jew" pejoratively in reference to one of the plaintiffs and to a fellow juror who sided with the Jewish plaintiff.

Even if no proof exists that other jurors were influenced by the prejudicial comments, the court wrote, "the vice remains and the verdict must be set aside because each juror can rightly agree to the verdict only when guided solely by the instructions of the trial judge and the evidence heard in open court."

Mansfield vs. fair-trial guarantees

Dobson, the attorney for Fleshner, stands behind Mansfield, the sanctity of jury deliberations and the finality that the common law tradition provides for verdicts.

Support is found in Travis v. Stone, a Missouri case whose conclusion Dobson summarizes: "A motion for (a) new trial based on allegations of juror misconduct is left to the sound discretion of the trial court."

Dobson cites Missouri Surpreme Court decision Baumie v. Smith and several other cases in concluding, “The action of a trial court in ruling on a motion for a new trial based on the ground of juror misconduct will not be interfered with on appeal absent a showing of an abuse of that discretion.”

According to Dobson, the trial judge in Pepose correctly decided that under existing Missouri law a juror’s affidavit alleging jury misconduct isn’t itself grounds to overthrow a verdict.

A “juror’s testimony or affidavit may not be used to impeach the verdict as to misconduct inside or outside the jury room whether before or after the jury is discharged,” Dobson wrote in citing Stuart Stotts v. Melissa Meyer, a 1991 Missouri case.