Jury Misconduct – Will the Judge Order a New Trial?

Anyone who has ever been a juror in a civil trial probably remembers the judge's repeated instructions not to talk to anyone about the case prior to deliberations, to avoid communications with parties, witnesses, and attorneys, to report to the bailiff when anyone tries to talk to a juror about the case, to avoid media coverage of the trial, to refrain from doing independent investigation (nope, not even casual Googling), and to base the verdict only on the evidence. The whole point, of course, is to make the trial as fair as possible. But what if a juror goes astray? When can a losing party get relief based on the juror's misdeeds?

Rule 59 of the North Carolina Rules of Civil Procedure sets out nine categories of grounds for a new trial. Among them is Rule 59(a)(2), which in part allows a court to grant a new trial based on "misconduct of the jury." Yesterday in Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc., the Court of Appeals assessed whether the trial judge should have ordered a new trial where, during a break in deliberations, three jurors were heard in the hallway talking with the bailiff about the dangers of animal waste in bodies of water. Part of the trial evidence related to the plaintiff's contamination of a lake with over 147,000 gallons of sewage overflow. (The plaintiff's own liability for that contamination was *not* an issue at trial, but the fact of the contamination was relevant to defendant's counterclaim). The trial judge promptly questioned each juror, gave the attorneys the chance to do so, and confirmed that all jurors could remain fair and impartial. The judge also determined that "the subject matter is of such a nature that it does not directly relate to the [jury] issues" and thus did not create any prejudice to the plaintiff. After taking a close look at the judge's investigation, the Court of Appeals agreed that the jurors' hallway talk did not affect the trial's fairness and concluded that the trial judge did not abuse his discretion.

Abuse of Discretion Standard

Beech Mountain highlights the fundamental rule that a decision to award or deny a new trial for juror misconduct "rests in the sound discretion of the trial judge, [whose] ruling will be upheld on appeal unless it is clearly erroneous." O'Berry v. Perry, 266 N.C. App. 77, 81 (1965); *see, e.g.*, Muse v. Charter Hosp. of Winston-Salem, 117 N.C. App. 468, 481 (affirming denial of new trial where juror failed to disclose facts on voir dire but counsel had adequate notice of problems), aff'd per curiam, 342 N.C. 403 (1995). As in *Beech Mountain*, when a trial judge has *denied* a new trial motion, our appellate courts have put a lot of stock in whether the judge did a thorough investigation to determine the potential prejudice the juror's conduct created. For example, the Court of Appeals affirmed the denial of a new trial in a car accident case where one of the jurors at evening recess conducted his own related traffic experiments. The court concluded that the judge had reviewed the matter with care and had not abused his discretion in deciding that the impropriety of the juror's conduct had not affected the verdict. Brown v. Boren Clay Prods. Co., 5 N.C. App. 418, 421 (1969). Likewise, in *Pinckney v. Van Damme,* 116 N.C. App. 139 (1994), plaintiff sued the martial arts action star Jean-Claude Van Damme for injuries received while filming a fight scene for the movie *Cyborg* in Wilmington. After the jury found for plaintiff, Van Damme

moved for a new trial. He alleged that, during the trial, a juror visited a karate school to research the "crescent kick" that had injured plaintiff, was told that Van Damme should have been able to better control the kick, and then had shared her research with the other jurors. After conducting a thorough examination of every juror, the trial judge determined that the jury was not prejudicially influenced by any of the alleged research. The Court of Appeals, finding no manifest abuse of discretion, affirmed the denial of a new trial.

On the flip side, when a trial court *granted* a new trial based on juror misconduct, the Court of Appeals acted with similar deference toward the decision even where the record did not clearly reflect the prejudicial effects. In a motorcycle accident case, a judge awarded a new trial because four jurors were seen looking at a composite drawing of the alleged driver that had been left sitting out on the defense table after the judge refused to allow it into evidence. The judge made no affirmative findings of prejudice but instead noted on the record that for a juror viewing it, "that picture was, for all intents and purposes, put in evidence." Since the effect of the picture on the jury could not be known, the judge chose to err on the side of caution and not "punish that plaintiff by reason of something that [defense counsel] did." The Court of Appeals declined to second-guess the judge. Elks v. Hannan, 68 N.C. App. 757, 759–60 (1984).

An Evidentiary Limitation: Rule 606(b)

As just discussed, a trial court's discretion under Rule 59(a)(2) is broad. But an evidentiary rule limits how a party can prove juror misconduct occurred in the first place. Rule of Evidence 606(b) prohibits using certain juror testimony about juror deliberations or the jury process. The rule states:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Evidence of jury misconduct must, in short, "come from a source other than the jury," unless it is testimony that the jury was subjected to extraneous prejudicial information or an outside influence. Cummings v. Ortega, 365 N.C. 262, 272 (2011). Allowing a juror to testify regarding the "internal processes of the jury" after the verdict is rendered would "undermine full and frank discussion in the jury room, [the] jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople." *Id*. at 268. A jury's internal influences include such factors as "a juror not assenting to the verdict, a juror misunderstanding the instructions of

the court, a juror being unduly influenced by the statements of his fellow-jurors, or a juror being mistaken in his calculations or judgments." *Id*. at 269. New trials were properly denied, therefore, when the misconduct was based on:

- Juror statements after trial indicating the jury had made a compromise verdict. Smith v. White, 213 N.C. App. 189, 195–96 (2011).
- A juror's statement that the verdict, contrary to court instructions, was based partly on the evidence related to the plaintiff's parents. Fenz v. Davis, 128 N.C. App. 621, 625 (1998).
- Affidavits that jury foreman had told jurors that punitive damages were merely symbolic and not collectable. Berrier v. Thrift, 107 N.C. App. 356, 362–63 (1992).
- Affidavits of two jurors stating that the jury based its verdict on a consideration that was contrary to the court's instructions. McClain v. Otis Elevator Co., Inc., 106 N.C. App. 45, 50 (1992).

Furthermore, the Supreme Court has made clear that the restriction on juror testimony about "internal processes" is not confined to misconduct *during* deliberations; it also encompasses activity *prior to* deliberations. A new trial could not, therefore, be based on juror affidavits stating that a fellow juror had made an early announcement that his mind was made up, that the evidence would not change it, and that "the other jurors could agree with him or they would sit there through the rest of the year." In explaining the policy behind a broad interpretation of Rule 606(b), the court explained that "allowing consideration of affidavits like those at issue could encourage dissatisfied litigants to annoy, embarrass, and harass jurors until some evidence of juror misconduct is uncovered in the hopes of delaying or perhaps undermining implementation of a verdict." *Cummings*, 365 N.C. at 272.

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