STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA MAYS,

Plaintiff-Appellee,

v

GERALD SCHELL, M.D., and SAGINAW VALLEY NEUROSURGERY, P.C.,

Defendants-Appellants,

and

ST. MARY'S MEDICAL CENTER OF SAGINAW,

Defendant.

FOR PUBLICATION
October 13, 2005
9:20 a. m.

No. 253816
Saginaw Circuit Court
LC No. 00-034067-NH

Official Reported Version

Before: Cooper, P.J., and Bandstra and Kelly, JJ.

COOPER, P.J. (*dissenting*).

I must respectfully dissent from the majority opinion of my colleagues. The jury room is sacrosanct,[1] and the trial court properly determined that this invasion entitled plaintiff to a new trial. I would, therefore, affirm.

"'[I]t is perfectly plain that the jury room must be kept free of evidence not received during trial and that its presence, if prejudicial, will vitiate the verdict.'"[2] If a jury considers extraneous information not introduced into evidence, the parties are denied their constitutionally protected rights of confrontation, cross-examination, and the effective assistance of counsel.[3]

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[1] *People v Freeman*, 57 Mich App 90, 92; 225 NW2d 171 (1974).

[2] *People v Keith*, 63 Mich App 589, 593; 234 NW2d 717 (1975), quoting *Dallago v United States*, 138 US App DC 276, 283-284; 427 F2d 546 (1969).

[3] *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997), writ of habeas corpus gtd *Nevers v Killinger*, 990 F Supp 844 (ED Mich, 1997).

The moving party must establish "that the jury was exposed to extraneous influences" and that there was "a real and substantial *possibility* that [those influences] *could have affected* the jury's verdict."[4] In making this determination, a court may consider

> "(1) whether the material was actually received, and if so how; (2) the length of time it was available to the jury; (3) the extent to which the [jury] discussed and considered it; (4) whether the material was introduced before a verdict was reached, and if so at what point in the deliberations; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict."[5]

It is undisputed in this case that, based completely on trial court error, the jury was given an entire banker's box of information never admitted at trial, including inadmissible evidence and defense counsel's personal notes on the case. Several of the documents directly attacked the credibility of plaintiff's expert witness. The information was available to the jury for several hours while it deliberated.[6] Moreover, this error was not discovered until two days after the jury had rendered its verdict and the jurors had been formally dismissed from service. It is undisputed that, when the information was retrieved from the jury room, several exhibits were discovered intermingled with these inadmissible and privileged documents. It was obvious "'from an examination of the objectionable article itself . . . that such article must have been, in the nature of the case, or in point of fact was, considered by the jury in arriving at the conclusion reached by their verdict.'"[7] Based on the large volume of information that was improperly and erroneously sent into the jury room, and the fact that this information was intermingled with exhibits that had been placed before the jury, further inquiry into the prejudicial effect on the jury's verdict was unnecessary. Contrary to the majority opinion, it does not matter which exhibits were intermingled. What matters is that these trial exhibits were found intermingled with the defense attorney's personal notes. This was highly improper and blatant error. There was more than a real and substantial possibility that the inappropriate material in the banker's box affected the outcome of this case.

Under the circumstances, the trial court's decision to order a new trial was "a valid exercise of discretion" and this Court is duty-bound to affirm.[8] "An abuse of discretion involves far more than a difference in judicial opinion."[9]

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[4] *Id.* at 88-89 (emphasis added).

[5] *Id.* at 89 n 11, quoting *Marino v Vasquez*, 812 F2d 499, 506 (CA 9, 1987).

[6] See *Eley v Turner*, 155 Mich App 195, 199; 399 NW2d 28 (1986) (noting the strong likelihood that the jurors would be tainted by the receipt of evidence not admitted at trial as they are "able to view it and review it as often they like[] during the course of their deliberations").

[7] *People v McCrea*, 303 Mich 213, 266; 6 NW2d 489 (1942) (citation omitted).

[8] *Alken-Zeigler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999).

> "To warrant this Court in [sic] interfering in matters so entirely in the sound discretion of the circuit court as the granting or refusing of a new trial, the abuse of discretion ought to be so plain that, upon consideration of the facts upon which the court acted, an unprejudiced person can say that there was no justification or excuse for the ruling."[10]

The trial court's decision to order a new trial was based on the submission to the jury of highly prejudicial information not presented at trial. This determination was in no way "palpably and grossly violative of fact and logic . . . ."[11] My colleagues in the majority have inappropriately substituted their judgments for that of the trial court.[12] I would defer to the trial court's sound judgment and affirm.

/s/ Jessica R. Cooper

(…continued)

[9] *Id.*

[10] *Id.* at 228, quoting *Detroit Tug & Wrecking Co v Gartner*, 75 Mich 360, 361; 42 NW 968 (1889).

[11] *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

[12] *Alken-Zeigler, supra* at 228.