STATE OF MICHIGAN

COURT OF APPEALS

WILBRUN BROWN, a Minor, by his Next Friend WILBRUN WILSON,

Plaintiff-Appellant,

v

DMC, CHILDREN'S HOSPITAL,

Defendant-Appellee.

UNPUBLISHED
January 9, 1998

No. 198225
Wayne Circuit Court
LC No. 94-410669 NH

Before: MacKenzie, P.J., and Hood and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from a jury verdict of no cause for action in this medical malpractice case, contending that the trial court erred in denying its midtrial motion for mistrial based on alleged misconduct of defense counsel in contacting a juror. This appeal is being decided without oral argument pursuant to MCR 7.214(E). We affirm.

To warrant a mistrial or a new trial on this basis, the moving party must affirmatively show prejudice as a result of the claimed misconduct. *Kwaiser v Peters*, 381 Mich 73, 76; 158 NW2d 877 (1968). Here, plaintiff has neither claimed nor proved prejudice, nor referred this Court to any portions of the record that would establish any prejudice. Rather, plaintiff has simply ignored this Michigan authority in favor of foreign authority.

The actual contact came only after the trial court had agreed that, pursuant to the stipulation of counsel for both parties, juror number seven would be dismissed from the case based on financial hardship. This decision occurred on motion day, when the jury was not present. Defense counsel telephoned the juror that evening to solicit her impressions of the case to that point, but on learning that she had not been officially informed by the court of her dismissal, the conversation was terminated. A call the next day by a different attorney from defense counsel's office began with an inquiry as to whether the juror had heard from the court, and, on receiving a negative answer, this conversation was likewise terminated. On the next trial day, the juror was dismissed.

Even the authorities cited by plaintiff from other jurisdictions do not aid plaintiff's position. For example, in *Budoff v Holiday Inns, Inc*, 732 F2d 1523, 1526 (CA 6, 1984), the Court held only that in such circumstances it would indulge a presumption that the contact was not harmless, but it recognized that if the trial court was then satisfied by clear and convincing evidence that the contact was utterly harmless, a new trial would not be warranted. In the *Budoff* case itself, the appellate court did find prejudice, 732 F2d at 1527, but, as already noted, none is claimed nor established in this case. Rather, the trial court here was convinced that the contact was utterly harmless, particularly as the juror never participated in deliberations, and the contact was not designed to influence her but rather to ascertain her evaluation of the possible outcome based on the evidence to which she was privy. The trial court did not abuse its discretion in denying a motion for mistrial on this record.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Harold Hood
/s/ Joel P. Hoekstra