STATE OF MICHIGAN

COURT OF APPEALS

CATHLEEN A. LARSEN, Personal Representative of the Estates of Edna Jordan and Raymond Jordan, MICHAEL SIMON and MICHAEL VANJOSKE, Personal Representatives of the Estate of BEVERLY VANJOSKE,

Plaintiffs-Appellees,

v

FORD MOTOR COMPANY,

Defendant-Appellant.

UNPUBLISHED
December 29, 1998

No. 195563
Wayne Circuit Court
LC No. 92-223387 NP

Before: Hood, P.J., and Griffin and Markey, JJ.

PER CURIAM.

Defendant appeals by leave granted an order of the Wayne Circuit Court granting plaintiffs' motion for new trial on the basis of alleged misconduct of an alternate juror. In a footnote in its opinion, the trial court also concluded that a new trial should be granted on the basis that the verdict was against the great weight of evidence. We reverse and reinstate the judgment in favor of defendant.

I

This is a products liability action in which plaintiffs claim that their decedents' deaths were proximately caused by an alleged design defect in an automobile manufactured by defendant. In particular, plaintiffs allege that the automobile caught fire because a screw holding the gasoline filler tank to the chassis failed because of improper selection of anticorrosive coating.

Because a lengthy trial was anticipated, ten jurors were selected to hear the case. At the conclusion of the proofs, four jurors were randomly selected as alternates and excused from deliberating. The six remaining jurors deliberated and rendered a verdict in favor of defendant finding no negligence. The jury was polled and discharged. Thereafter, a judgment in favor of defendant was entered.

Posttrial, plaintiffs' counsel discovered that one of the nondeliberating jurors allegedly committed juror misconduct during the course of trial. In affidavits signed by three other alternate jurors, it was alleged that Darlene Crabtree expressed her bias and prejudice against plaintiffs, plaintiffs' attorney, and plaintiffs' experts during the course of the trial. In connection with plaintiffs' motion for a new trial, the trial court held an evidentiary hearing on the allegations of juror misconduct. At the conclusion of the hearing, the court found the allegations of misconduct to be credible and Mrs. Crabtree's denial not to be credible. However, as to the jurors who actually deliberated on the case, only one vaguely remembered hearing Mrs. Crabtree say anything of an improper nature. There was no testimony presented that Mrs. Crabtree influenced the verdict. Nevertheless, the trial court granted plaintiffs' motion for a new trial on the basis of the misconduct of alternate juror Mrs. Crabtree.

II

Subject to two exceptions, a jury's verdict may not be impeached by allegations of alleged misconduct or mistake. As the Supreme Court stated in *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997)[1]:

> Generally, jurors may not impeach their own verdict by subsequent affidavits showing misconduct in the jury room. *People v Pizzino*, 313 Mich 97, 108; 20 NW2d 824 (1945). See also *Tanner v United States*, 483 US 107; 107 S Ct 2739; 97 L Ed 2d 90 (1987). As the Court of Appeals has previously noted, once a jury has been polled and discharged, its members may not challenge mistakes or misconduct inherent in the verdict. Rather, oral testimony or affidavits may only be received on extraneous or outside errors, such as undue influence by outside parties. See *Hoffman v Monroe Public Schools*, 96 Mich App 256, 257-258; 292 NW2d 542 (1980), citing *Mattox v United States*, 146 US 140; 13 S Ct 50; 36 L Ed 917 (1892). See also *People v Larry Smith*, 106 Mich App 203, 211-212; 307 NW2d 441 (1981).

In *Hoffman v Spartan Stores, Inc*, 197 Mich App 289, 291; 494 NW2d 811 (1992), this Court reaffirmed the holding of *Hoffman v Monroe Public Schools*, 96 Mich App 256, 261; 292 NW2d 542 (1980):

> [T]hat in all cases, whether civil or criminal, once a jury has been polled and discharged, its members may not challenge mistakes or misconduct inherent in the verdict. After that point, oral testimony or affidavits by the jurors may only be received on extraneous or outside errors (such as undue influence by outside parties), or to correct clerical errors or matters of form.

In the present case, plaintiffs do not allege a clerical error. Instead, plaintiffs rely upon the exception of "extraneous or outside errors (such as undue influence by outside parties)." *Id.* We disagree and hold that this exception is not applicable for the reason that Mrs. Crabtree was not an outside party but rather a member of the jury that heard the case. Although she was discharged before deliberations began, Mrs. Crabtree was an intricate part of the trial process. Her alleged misconduct occurred while she was a jury member, not an outside party. Her subsequent discharge from the jury

did not make her an outside party. See, generally, *In re Merriman's Appeal,* 108 Mich 454, 462-464; 66 NW 372 (1896). Under these circumstances, "[w]e will not reward counsel's postdischarge inquiries regarding the internal thought processes of the jurors. The havoc and potential for abuse would be immense if we were to allow counsel to open the jury room door after the jury has been discharged to examine, analyze, and impeach the internal thought processes of the jury." *Hoffman v Spartan Stores, Inc, supra* at 291.

Second, even if impeachment of the verdict were allowed under the present circumstances, plaintiffs have failed to establish prejudice. MCR 2.611(A), MCR 2.613(A). Mrs. Crabtree was not a deliberating juror and there is no evidence that her alleged misconduct affected the verdict. While she expressed a bias during the course of trial, plaintiff's have failed to establish that she was unqualified to serve when selected, or that she could have been successfully challenged for cause. See, generally, *Hunt v CHAD Enterprises, Inc*, 183 Mich App 59, 63-64; 454 NW2d 188 (1990). Because plaintiffs have not established that their substantial rights were materially affected by the alleged juror misconduct, the trial court abused its discretion in setting aside the jury's verdict.

III

In a footnote, the trial court also opined that the jury's verdict was against the great weight of evidence. MCR 2.611(A)(1)(e). We disagree. It is now clear that the trial judge may not sit as the "thirteenth juror." *People v Lemmon,* 456 Mich 625; 576 NW2d 129 (1998). Further, a new trial should not be granted "simply because the court may have drawn different inferences from the evidence, resolved conflicting testimony in a different way, reached a different conclusion on credibility, or even preferred a different decision as between permissible alternatives." *Bosak v Hutchinson,* 422 Mich 712, 740; 375 NW2d 333 (1985).

In the present case, contrary to the recollection of the trial judge, the evidence of defendant's alleged negligence was contested by competent and substantial evidence. In particular, Ford's expert, Dr. Edward Caulfield, testified that the S-2 coating used by Ford was the "best" coating for high strength available when the automobile was designed and built. Further, Ford's engineer, Michael Harrigan, testified that the S-2 coating utilized by defendant was common for the industry at the time of manufacture. Although plaintiffs presented contrary expert testimony, the jury's verdict of no negligence was not against the great weight of evidence. Because sufficient evidence was submitted in support of the jury's verdict, the trial court abused its discretion in granting plaintiffs' motion.

For these reasons, we reverse the order granting a new trial. The judgment in favor of defendant is reinstated.

/s/ Harold Hood
/s/ Richard Allen Griffin
/s/ Jane E. Markey

[1] *Budzyn* has had habeas corpus granted by *Nevers v Killinger,* 990 F Supp 844 (Ed Mich, 1997).