

**THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

PEPOSE VISION INSTITUTE, P.C.

Defendant-Appellant,

v.

MICHELLE FLESHNER,

Plaintiff-Respondent.

No. ED 90853

**Appeal from the Circuit Court of St. Louis County
The Honorable Mark D. Seigel, Circuit Judge**

**BRIEF OF AMICUS CURIAE
ANTI-DEFAMATION LEAGUE**

**BRYAN CAVE LLP
J. Bennett Clark
Emma Harty
James M. Weiss
211 N. Broadway, Suite 3600
St. Louis, MO 63102
(314) 259-2000
(314) 259-2020 (fax)**

**Attorneys for Amicus Curiae
Anti-Defamation League**

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF AMICUS CURIAE	1
STATEMENT OF JURISDICTION AND STATEMENT OF FACTS	2
ARGUMENT	3
I. PVI Was Denied Its Constitutional Right to a Fair and Impartial Jury	6
II. Missouri Law Permits the Introduction of Juror Testimony Where, as Here, A Litigant’s Right to a Fair Trial is Jeopardized by Racial or Religious Prejudice or Bias in Jury Deliberations	14
A. Other States Have Applied the Extraneous Evidence Rule to Fact Patterns Similar to the One Presented Here	15
B. Missouri Law Provides an Analogous Extraneous Evidence Rule that Permits Juror Testimony	21

III. Missouri Law Provides for Setting Aside a Verdict Where, as
Here, Passion, Prejudice or Misconduct on the Part of the Jury
Affects a Trial Issue25

CONCLUSION27

TABLE OF AUTHORITIES

FEDERAL CASES

<u>Frank v. Mangum</u> , 237 U.S. 309 (1915).....	3
<u>Jorgensen v. York Ice Machinery Corp.</u> , 160 F.2d 432 (2d Cir. 1947)	7
<u>Mattox v. United States</u> , 146 U.S. 140 (1892)	15, 22
<u>McDonald v. Pless</u> , 238 U.S. 264 (1915).....	7, 8
<u>Tobias v. Smith</u> , 468 F. Supp. 1287 (W.D. N.Y. 1979).....	12
<u>United States v. Booker</u> , 480 F.2d 1310 (7th Cir. 1973).....	17
<u>United States v. Crosby</u> , 294 F.2d 928 (2d Cir. 1961).....	18
<u>United States v. Eagle</u> , 539 F.2d 1166 (8th Cir. 1976)	7
<u>United States v. Heller</u> , 785 F.2d 1524 (11th Cir. 1986)	8, 9, 18, 19, 23
<u>United States v. Rouse</u> , 100 F.3d 560 (8th Cir. 1996)	10
<u>United States v. Rouse</u> , 111 F.3d 561 (8th Cir. 1997)	10
<u>Wright v. United States</u> , 559 F. Supp. 1139 (E.D.N.Y. 1983).....	8

STATE CASES

<u>After Hour Welding, Inc. v. Laneil Management Co.</u> , 324 N.W.2d 686 (Wis. 1982)	15, 16, 17
<u>Artstein v. Pallo</u> , 388 S.W.2d 877 (Mo. 1965).....	25, 26
<u>Baptist Hosp. of Miami, Inc. v. Maler</u> , 579 So. 2d 97 (Fla. 1991)	12

<u>Baumle v. Smith</u> , 420 S.W.2d 341 (Mo. 1967).....	21
<u>Boschert v. Eye</u> , 349 S.W.2d 64 (Mo. 1961)	26
<u>Brown v. Moore</u> , 248 S.W.2d 553 (Mo. 1952)	26
<u>Commonwealth v. McCowen</u> , No. 2005-00109 (Barnstable County, Mass. June 8, 2007).....	20
<u>Davis v. City of Mountain View</u> , 247 S.W.2d 539 (Mo. App. 1952).....	26
<u>Davis v. Lutheran S. High Sch. Ass’n. of St. Louis</u> , 200 S.W.3d 163 (Mo. App. 2006).....	15
<u>Evans v. Galbraith-Foxworth Lumber Co.</u> , 31 S.W.2d 496 (Tex. Civ. App. 1929)	10, 11
<u>Green v. Ralston Purina Co.</u> , 376 S.W.2d 119 (Mo. 1964).....	13
<u>Lee v. Baltimore Hotel Co.</u> , 136 S.W.2d 695 (Mo. 1939)	13
<u>McBride v. Farley</u> , 154 S.W.3d 404 (Mo. App. 2004)	22
<u>McNally v. Walkowski</u> , 462 P.2d 1016 (Nev. 1969).....	15, 20
<u>Means v. Sears, Roebuck & Co.</u> , 550 S.W.2d 780 (Mo. 1977)	25, 26
<u>Neighbors v. Wolfson</u> , 926 S.W.2d 35 (Mo. App. 1996)	15, 22
<u>Piehler v. Kansas City Public Serv. Co.</u> , 211 S.W.2d 459 (Mo. 1948).....	12
<u>Powell v. Allstate Insurance Co.</u> , 652 So. 2d 354 (Fla. 1995)	12, 15, 18, 19, 24
<u>Sansone v. St. Louis County</u> , 838 S.W.2d 16 (Mo. App. 1992)	25

<u>State v. Hamilton</u> , 574 So. 2d 124 (Fla. 1991).....	18
<u>State v. Hunter</u> , 463 S.E.2d 314 (S.C. 1995).....	7, 8
<u>People v. Leonti</u> , 262 N.Y. 256 (N.Y. 1933).....	11
<u>State v. Levitt</u> , 176 A.2d 465 (N.J. 1961).....	11
<u>Stotts v. Meyer</u> , 822 S.W.2d 887 (Mo. App. 1991)	14, 21
<u>Taylor v. St. Louis Public Service Co.</u> , 303 S.W.2d 608 (Mo. 1957).....	26
<u>Travis v. Stone</u> , 66 S.W.3d 1 (Mo. 2002).	23
<u>Turner v. Stime</u> , No. 05-2-05374-1 (Spokane County, Wash. March 28, 2008)	20, 23
<u>Wright v. CTL Distrib., Inc.</u> , 650 So. 2d 641 (Fla. App. 1995).....	11, 12, 24

FEDERAL STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. VI.....	7
U.S. CONST. amend. VII	10, 19
U.S. CONST. amend. XIV	7, 10, 19

STATE STATUTES AND CONSTITUTIONAL PROVISIONS

FLA. CONST. art. I, § 22.....19

MO. CONST. art. I, § 22(a).....7, 10

TEXAS CONST. art. I § 1511

Wis. Stat. § 906.06(2) (2000)16

MISCELLANEOUS

Comments, Impeachment of Jury Verdicts, 25 U. CHI. L. REV. 360
(1957).....21

George C. Thomas, Bigotry, Jury Failures, and the Supreme Court's
Feeble Response, 55 BUFF. L. REV. 947 (2007)3

Harold E. Quinley & Charles Y. Glock, Anti-Semitism in America
(2d ed. 1983).....4

Jennifer M. Pendleton, Destructive Messages: How Hate Speech
Paves The Way For Harmful Social Movements, 16 HARV. HUM.
RIGHTS J. 312 (2003) (book note).....6

Jerry Kang, Trojan Horses of Race, 118 HARV. L. REV. 1489, 1566
(2005).....4

Kenneth L. Marcus, <u>Higher Education, Harassment, and First Amendment Opportunism</u> , 16 WM. & MARY BILL OF RIGHTS J. 1025 (2008)	3, 6
Ryken Grattet & Valerie Jenness, <u>Examining the Boundaries of Hate Crime Law: Disabilities and the “Dilemma of Difference”</u> , 91 J. CRIM. L. & CRIMINOLOGY 653 (2001)	5
U.S. Comm'n. on Civil Rights, <u>Campus Anti-Semitism: Briefing Report</u> (2006).....	3, 4
U.S. Dept. of State, <u>Report on Global Anti-Semitism</u> (2004).....	4
<u>Vaise v. Delaval</u> , 99 Eng. Rep. 944 (K.B. 1785)	21

STATEMENT OF INTEREST OF AMICUS CURIAE

The Anti-Defamation League (“ADL”) was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to secure justice for, and fair treatment of, all citizens. Today, it is one of the world’s leading civil and human rights organizations fighting hatred, bigotry, discrimination, and anti-Semitism. This mission is particularly apt in this case, where a litigant was denied a fair trial due to one or more jurors’ perpetuation of pernicious stereotypes of individuals of the Jewish faith.

We write in support of Appellant Pepose Vision Institute, P.C. (“PVI”) and urge this Court to reverse the trial court’s determination that PVI was not entitled to a new trial based on the misconduct by jurors in this case; to order an evidentiary hearing to examine that misconduct; and to direct the trial court that, upon a finding that the allegations of bias are credible, a new trial should be conducted on all issues.

STATEMENT OF JURISDICTION AND STATEMENT OF FACTS

We adopt and incorporate by reference the jurisdictional statement and statement of facts set forth in Appellant's brief.

ARGUMENT

The American judicial system is no stranger to anti-Semitism. The Anti-Defamation League was founded in the wake of such a case. In 1913, Leo Frank, an Atlanta businessman, was convicted of raping and murdering a 13-year-old girl. See Frank v. Mangum, 237 U.S. 309 (1915). His conviction was handed down in the midst of a mob so anti-Semitic that the defendant was advised not to be present in the courtroom when the jury's verdict was read. Id. at 312. As Justice Holmes wrote, "mob law does not become due process of law by securing the assent of a terrorized jury." Id. at 347 (Holmes, J., dissenting). After the Supreme Court rejected Frank's final appeal, his death sentence was commuted to life in prison. Frank did not serve out his sentence. Instead, he was taken from prison and lynched. George C. Thomas, Bigotry, Jury Failures, and the Supreme Court's Feeble Response, 55 BUFF. L. REV. 947, 953-55 (2007).

Anti-Semitism is vile, shocks the conscience, and has no place in our system of justice. Sadly, it may be observed with surprising frequency in America, even today. See e.g., Kenneth L. Marcus, Higher Education, Harassment, and First Amendment Opportunism, 16 WM. & MARY BILL OF RIGHTS J. 1025 (2008) (describing recent incidents of campus anti-Semitism).¹ This case involves not

¹ See also U.S. Comm'n. on Civil Rights, Campus Anti-Semitism: Briefing Report, 66-67 (2006), available at

only the religious and ethnic animus typically associated with anti-Semitism, but also the perpetuation of dangerous stereotypes of those of the Jewish faith as stingy or cheap. See Jerry Kang, Trojan Horses of Race, 118 HARV. L. REV. 1489, 1566 (2005); Harold E. Quinley & Charles Y. Glock, Anti-Semitism in America 2-10 (2d ed. 1983) (describing stereotypes of Jews as “monied” and “power hungry”);

<http://www.usccr.gov/pubs/081506campusantibrief07.pdf> (last visited June 26, 2008) (according to recent reports, Jewish students have faced an increase in hostility and intimidation on college campuses). As a recent State Department report found:

Anti-Semitism has plagued the world for centuries. Taken to its most far-reaching and violent extreme, the Holocaust, anti-Semitism resulted in the deaths of millions of Jews and the suffering of countless others. Subtler, less vile forms of anti-Semitism have disrupted lives, decimated religious communities, created social and political cleavages, and complicated relations between countries as well as the work of international organizations. For an increasingly interdependent world, anti-Semitism is an intolerable burden.

U.S. Dept. of State, Report on Global Anti-Semitism (2004), available at <http://www.state.gov/g/drl/rls/40258.htm> (last visited June 26, 2008).

Ryken Grattet & Valerie Jenness, Examining the Boundaries of Hate Crime Law: Disabilities and the “Dilemma of Difference”, 91 J. CRIM. L. & CRIMINOLOGY 653, 687 (2001) (describing stereotype that Jews have more money than non-Jews, and hence are more frequent targets of physical assaults because thieves think they will have more money).

In this case, a trial was held, a jury deliberated, and a verdict rendered. After the verdict was announced, two separate jurors advised PVI’s counsel that other jurors had made anti-Semitic remarks during deliberations. One juror indicated that she heard the following comments made by another jury member about PVI’s corporate secretary and a key witness: “She is a Jewish witch;” “She is a Jewish bitch;” “She is a penny-pinching Jew;” and “She was such a cheap Jew that she did not want to pay Plaintiff unemployment compensation” (LF 0539). Another comment was made referring to the owner and President of PVI (also a key witness), that “the Jew, Pepose, makes \$5 million per year and should pay money to the Plaintiff in this case” (LF 0540). These comments were not limited to a single juror; anti-Semitic remarks were made by other jurors as well (LF 0540). A second juror confirmed that anti-Semitic remarks were made during deliberations and that conversations during deliberations became “heated and personal” (A3).

A trial court should investigate such allegations of juror misconduct, especially those involving extreme religious or ethnic prejudice.² The trial judge here erred in not holding an evidentiary hearing to evaluate the two jurors' contentions that anti-Semitic remarks were made by one or more other jurors (see A1). This Court should remand the case to the trial court with instructions to hold an evidentiary hearing to examine the allegations of juror misconduct and, upon finding those remarks credible, to order a new trial.

I. PVI Was Denied Its Constitutional Right to a Fair and Impartial Jury

This case presents an issue of first impression in Missouri: whether a verdict should be overturned based upon expressed anti-Semitic prejudice among the jury members during deliberations. In view of the extreme prejudice evidenced by the reported comments, there is a high potential that the verdict reflects fundamental

² As one commentator noted, anti-Semitism has morphed over time from being a primarily religious animus in the 19th Century into one that, in the early 20th Century, became primarily racially based. Marcus, Higher Education, at 1040-41. In fact, the etymology of the phrase “anti-Semitism” demonstrates this shift, as earlier discrimination was referred to as “anti-Judaism.” See Jennifer M. Pendleton, Destructive Messages: How Hate Speech Paves The Way For Harmful Social Movements, 16 HARV. HUM. RIGHTS J. 312 (2003) (book note).

unfairness in the judicial process. As a matter of law, this Court should hold that allegations of such nature require an evidentiary hearing by the trial court.

The United States and Missouri Constitutions recognize the critical nature of a fair and impartial jury in our judicial system. U.S. CONST. amends. VI, XIV, § 1; MO. CONST. art. I § 22(a). Cases interpreting these rights sometimes couch them in the language of the “plainest principles of justice” or “fundamental fair play,” but the essence is the same – every litigant in the American justice system is entitled to a trial by jury that is fair, impartial, and unblemished by bias.

Expressions of bias in the jury room undermine “principles of fundamental fairness.” State v. Hunter, 463 S.E.2d 314, 316 (S.C. 1995). Although there are policy reasons to preserve the sanctity of jury deliberations,³ these must be weighed against the principles of fairness that credible allegations of racial and religious prejudice implicate. Thus, there are situations where testimony regarding jury deliberations is admissible to protect and safeguard this fundamental right to a

³ These include the prevention of jury harassment, encouragement of free and open jury deliberations, promotion of finality of verdicts, and reduction of the incentive for jury tampering. McDonald v. Pless, 238 U.S. 264, 267-68 (1915); Jorgensen v. York Ice Machinery Corp., 160 F.2d 432, 435 (2d Cir. 1947); United States v. Eagle, 539 F.2d 1166, 1170 (8th Cir. 1976).

fair trial. For example, the U.S. Supreme Court has recognized that there “might be instances in which such testimony [by jurors of misconduct in the jury room] could not be excluded without violating the plainest principles of justice.” McDonald v. Pless, 238 U.S. 264, 269 (1915) (no inflexible rule on accepting juror testimony); see also Hunter, 463 S.E.2d at 315 (juror testimony regarding prejudiced comments made by jury members was found competent when necessary to ensure due process and fundamental fairness in the judicial system).

Statements reflecting prejudice made by members of a jury should be analyzed on a case-by-case basis. Wright v. United States, 559 F. Supp. 1139, 1151 (E.D.N.Y. 1983) (“...courts faced with the difficult issue of whether to consider evidence that a criminal defendant was prejudiced by racial bias in the jury room have hesitated to apply the rule [that jurors cannot testify about their deliberations] dogmatically”). This is because such evidence cannot be ignored “without trampling the Sixth Amendment’s guarantee to a fair trial and impartial jury.” Id.

For example, the Eleventh Circuit recognizes that anti-Semitic comments “prevent the impartial decision-making that both the Sixth Amendment and fundamental fair play require.” United States v. Heller, 785 F.2d 1524 (11th Cir. 1986). In Heller, the defendant, a Jewish trial attorney, was convicted of tax evasion. Id. at 1525. The defendant challenged his conviction on the grounds that

the jurors displayed rampant anti-Semitism, saying things like “Well, the fellow we are trying is a Jew. I say, ‘Let’s hang him.’” Id. at 1526.

The Eleventh Circuit noted the slow evolution of society’s attitudes:

The bigotry displayed in this case is reminiscent of another less civilized era when anti-Semitic and racist sentiments were unfortunately considered acceptable even in polite society. We conclude that we must act in the only way open to us to ensure that prejudice plays no role in the functioning of our judicial system.

Id. at 1528. The court awarded Heller a new trial to vindicate his Sixth Amendment rights, stating that the bigotry on display “clearly denied the defendant Heller the fair and impartial jury that the Constitution mandates.” Id. at 1527.

Heller recognized that, when a juror displays prejudice towards a specific race or religion, the sanctity of the jury system is imperiled. “A racially or religiously biased individual harbors certain negative stereotypes which, despite his protestations to the contrary, may well prevent him or her from making decisions based solely on the facts and law that our jury system requires.” Id. at 1527.

Similarly, the Eighth Circuit is on record as stating that “[r]acial prejudice in the jury room cannot and will not be tolerated or condoned” and “[t]he law

requires that [the defendant] receive a fair trial without the impact of racial bias.” United States v. Rouse, 100 F.3d 560, 578 (8th Cir. 1996). Rouse involved allegations against four Native American men of aggravated sexual abuse of children. There was evidence that several jurors made racial jokes about Native Americans to other jurors, and that one juror had previously exhibited bias against Native Americans. Id. at 577. The district court “held a number of hearings and heard testimony from a number of witnesses” about the alleged misconduct. Id. The Eighth Circuit stated that, while it did not “quarrel” with the district court’s credibility determinations (which led the trial judge to reject the charges against the allegedly biased juror), the evidence raised “a matter of grave concern.” Id. at 578.⁴

The right to an impartial jury extends to civil cases as well. See U.S. CONST. amends. VII, XIV, § 1; MO. CONST. art. I, § 22(a). The case law is replete with examples of juries in civil trials being improperly influenced by prejudice, as in this case. For example, in Evans v. Galbraith-Foxworth Lumber Co., a juror undertook to incite racial prejudice in other jurors by reminding them that the

⁴ The Eighth Circuit reversed and remanded for a new trial on the ground that the trial court improperly excluded defense evidence of suggestibility related to child witnesses. 100 F. 3d at 578. This decision was reversed on rehearing. United States v. Rouse, 111 F.3d 561, 572-73 (8th Cir. 1997).

plaintiff was Jewish. 31 S.W.2d 496, 499 (Tex. Civ. App. 1929) (the court stating that “a fair and impartial trial by jury is a right under the law accorded to all litigants...”). The Texas Court of Appeals granted a new trial, based on Texas statutes, including one requiring that “any [juror] who has a bias or prejudice in favor of or against either of the parties” shall be disqualified from service. Id. at 500; see also State v. Levitt, 176 A.2d 465, 466-67 (N.J. 1961) (order of new trial affirmed because “basic right to an impartial jury” was imperiled when at least one member of the jury panel was affected by one or more other jurors’ comments about defendant’s Jewish faith). The Evans court also premised its decision on the state constitutional guarantee of a fair trial. Evans, 31 S.W.2d at 500 (citing TEXAS CONST. art. I § 15: “The right of trial by jury shall remain inviolate”).

Likewise, in People v. Leonti, a new trial was ordered when, after the verdict was rendered, a juror stated that “I wouldn’t believe a Sicilian under oath, and none of the jurors would Until the defendant took the stand I had some doubts, but when he took the stand and I found out that he was a Sicilian, I no longer had any doubts.” 262 N.Y. 256, 258 (N.Y. 1933). The court grounded its ruling in the belief that the interests of justice required a new trial. Id.

In Wright v. CTL Distribution, Inc., 650 So.2d 641, 643 (Fla. App. 1995), the court remanded for an evidentiary hearing into the credibility of allegations that a juror asserted the plaintiff was not entitled to recovery because she was “a fat

black woman on welfare.” The Wright court held that it was an abuse of discretion for the trial court to refuse to declare a mistrial upon learning of juror misconduct. Id. (citing Powell v. Allstate Ins. Co., 652 So.2d 354 (Fla. 1995) and Baptist Hosp. of Miami, Inc. v. Maler, 579 So.2d 97, 99 (Fla. 1991));⁵ see also Tobias v. Smith, 468 F. Supp. 1287, 1290 (W.D. N.Y. 1979) (court ordered an evidentiary hearing to determine existence of racial prejudice in view of juror affidavit averring that another juror said, “[Y]ou can’t tell one black from another. They all look alike”).

Missouri recognizes that all litigants have a constitutional right to trial by a fair and impartial jury. Piehler v. Kansas City Pub. Serv. Co., 211 S.W.2d 459

⁵ Wright may be the case closest to the procedural posture presented here. The alleged racial slurs and derogatory comments made by jurors in that case were not explored at the trial court level. Wright, 650 So.2d at 643. The appellate court found that, at the very least, the trial court was required to investigate the charges made in the affidavit of a juror in that case who stated that several members of the jury “did not want to award anything to Wright because she was a fat black woman on welfare who would simply blow the money on liquor, cigarettes, jai alai, bingo, or the dog track.” Id. at 642. The failure to hold a jury interview was held to be an abuse of discretion, and the case was remanded for such an interview. The trial court was directed that, if a juror or bailiff was unavailable for the interview, the appellants would be entitled to a new trial. Id. at 643.

(Mo. 1948). This right extends to civil cases; even though such cases may be decided by a non-unanimous vote, a party has a right to a decision based on the deliberations of an entirely impartial jury. Lee v. Baltimore Hotel Co., 136 S.W.2d 695, 698 (Mo. 1939).⁶ While it is expected that people may come to the jury room with certain biases or preconceived notions, these attitudes should not be tolerated if they manifest themselves in the form of religious, ethnic, or racial slurs during deliberations, or when the jury is otherwise assembled.

In this case, two jurors indicated that anti-Semitic remarks were made (LF 0539-40, A2-3). One of the jurors was so disturbed by the comments that she took it upon herself to approach defense counsel following announcement of the jury verdict (id.). Jurors disparaged two of PVI's witnesses (Dr. Pepose, the founder of PVI, and his wife, Susan Feigenbaum, also a PVI officer) based on their religion, even though religion was never mentioned at trial and did not have any relationship to the facts of the case (id.). The jurors brought the stereotype of the "cheap Jew" into the jury room, claiming that Dr. Pepose made "\$5 million a year" and that Feigenbaum was "such a cheap Jew that she did not want to pay Plaintiff unemployment compensation" (LF 0539-40).

⁶ This constitutional right extends to individuals and corporations. See Green v. Ralston Purina Co., 376 S.W.2d 119, 127 (Mo. 1964).

The trial court in this case did not investigate these allegations. Instead, it decided that, as a matter of law, even if it found the affidavits credible, it was not permitted to order a new trial (A1). Respectfully, this was an abuse of discretion. The allegations in those affidavits raise the specter of a gross violation of due process that the trial judge was obliged to investigate. If, upon remand, the trial judge finds the evidence of bias credible, a new trial should be ordered.

II. Missouri Law Permits the Introduction of Juror Testimony Where, as Here, a Litigant’s Right to a Fair Trial is Jeopardized by Racial or Religious Prejudice Manifested in Jury Deliberations

Under Missouri law, a juror’s testimony is admissible when it reveals that extraneous evidence was interjected into the jury’s deliberations. While Missouri has yet to address the issue, other state courts have recognized that racially or religiously biased remarks by jurors fit within their extraneous evidence frameworks.

A juror’s testimony or affidavit is normally prohibited from being used to impeach the verdict. Stotts v. Meyer, 822 S.W.2d 887, 888-889 (Mo. App. 1991). This is known as the “Mansfield rule.”⁷ However, Missouri recognizes an

⁷ The Mansfield rule and its exceptions are discussed in more detail in part II.B, infra.

exception to this rule when extraneous evidence is obtained by one or more jurors; for example, when a juror goes to investigate the scene of an accident. Neighbors v. Wolfson, 926 S.W.2d 35, 37 (Mo. App. 1996) (“[a] verdict can certainly be attacked on the ground that juror misconduct occurred during the juror’s deliberations”); see also Mattox v. United States, 146 U.S. 140, 149 (1892). The alleged anti-Semitic remarks and juror misconduct at the heart of this case are properly viewed as extraneous evidence interjected into jury deliberations, under the law of this state.

A. Other States Have Applied the Extraneous Evidence Rule to Fact Patterns Similar to the One Presented Here

When addressing an issue of first impression, this Court often looks to the case law of other jurisdictions. E.g., Davis v. Lutheran S. High Sch. Ass’n. of St. Louis, 200 S.W.3d 163, 166 (Mo. App. 2006). Other state courts have recognized that statements of prejudice made during deliberations fall within an extraneous evidence exception, and have remanded for hearings or new trials. Powell v. Allstate Insurance Company, 652 So.2d 354 (Fla. 1995); After Hour Welding, Inc. v. Laneil Management Co., 324 N.W.2d 686 (Wis. 1982); McNally v. Walkowski, 462 P.2d 1016 (Nev. 1969).

The Wisconsin Supreme Court analyzed whether an affidavit regarding anti-Semitic comments made during deliberations could be used to impeach a verdict.

After Hour Welding, 324 N.W.2d at 689-691. The court required the trial judge to conduct a hearing when such prejudiced statements were brought to the judge's attention. Id. At the hearing, the judge was required to determine whether (1) the evidence in support of the impeachment was competent; (2) the evidence demonstrated substantive grounds sufficient to overturn the verdict, and (3) the evidence showed resulting prejudice. Id. at 689.

With respect to the first of these elements, the Wisconsin Supreme Court considered whether a juror affidavit was legally competent under the relevant evidentiary rule, Wis. Stat. § 906.06(2). The rule states in pertinent part: "a juror may testify on the question whether **extraneous prejudicial information** was improperly brought to the jury's attention." After Hour Welding, 324 N.W.2d at 689 (emphasis added). Thus, this evidentiary rule, like Missouri's judicial doctrine, recognizes an exception for extraneous prejudicial information.

The Wisconsin court determined that the juror's comments fell within the exception to that state's evidentiary rule, and that the juror affidavit regarding the untoward comments was competent. "The concern for fairness to the parties and monitoring the integrity of the judicial system leads us to conclude that a trial court may, in appropriate circumstances, consider allegations that **extraneous prejudicial remarks** were made to jurors which were not a part of the judicially guarded evidence they received." After Hour Welding, 324 N.W.2d at 690

(emphasis added). The court remanded the case to the trial court with instructions to conduct a hearing, emphasizing that consideration of such allegations is crucial to the judicial process, “for even if only one member of a jury harbors a material prejudice, the right to a trial by an impartial jury is impaired.” Id. (citing United States v. Booker, 480 F.2d 1310 (7th Cir. 1973)).

The After Hour Welding court gave guidance on how the trial judge should consider the evidence of biased statements. Id. at 691-92. It stated that the judge should consider whether the statements were in fact made, when they were made, the circumstances under which they were made, who made the statements, whether any jurors were present when the statements were made, or whether the jurors were informed of the statements after the fact. Id. at 692. As a safeguard against violating the sanctity of jury deliberations, however, the After Hour Welding court instructed the judge to not inquire into the “jurors’ mental processes, including the effect such remarks had.” Id. at 690; see also id. at 691 (“the trial court should examine the juror under oath only as to the circumstances under which the statements were made and not as to what effect they had, if made, on himself as a juror or on the other jurors”).

Regarding the second part of the test—whether the evidence demonstrated substantive grounds sufficient to overturn the verdict—the court noted that this determination is a question of law, and that the clear and convincing standard

should be applied. Id. at 690. Finally, with respect to the prejudicial effect of the evidence, the court held that the proper determination was whether prejudice resulted “on the basis of the nature of the matter and its probable effect on a hypothetical average jury.” Id. at 691 (quoting United States v. Crosby, 294 F.2d 928, 950 (2d Cir. 1961)).

Similarly, the Supreme Court of Florida held that biased statements by jurors fall within the exception to Florida’s rule regarding impeachment of a verdict by juror testimony. Powell, 652 So.2d at 357. In Powell, there was evidence that racial comments were made during deliberations in a civil case. Similar to Missouri and Wisconsin, Florida only permits jurors to testify about “overt acts which might have prejudicially affected the jury in reaching their own verdict.” Id. at 356 (quoting State v. Hamilton, 574 So.2d 124, 128 (Fla. 1991)). Powell held that alleged prejudiced statements made by some of the jurors constituted “overt acts” sufficient to allow judicial inquiry by the trial court. Id. at 357.

In explaining its decision, the court noted that “[t]he issue of racial, ethnic, and religious bias in the courts is not simply a matter of ‘political correctness’ to be brushed aside by a thick-skinned judiciary.” Id. at 358. The court went on to quote the Eleventh Circuit’s opinion in Heller:

Despite longstanding and continual efforts, both by legislative enactments and by judicial decisions to purge our society of the

scourge of racial and religious prejudice, both racism and anti-Semitism remain ugly malignancies sapping the strength of our body politic. The judiciary, as an institution given a constitutional mandate to ensure equality and fairness in the affairs of our country when called on to act in litigated cases, must remain ever vigilant in its responsibility A racially or religiously biased individual harbors certain negative stereotypes which, despite his protestations to the contrary, may well prevent him or her from making decisions based solely on the facts and law that our jury system requires. The religious prejudice displayed by the jurors in the case presently before us is so shocking to the conscience and potentially so damaging to public confidence in the equity of our system of justice, that we must act decisively to correct any possible harmful effects on this appellant.

Powell, 652 So.2d at 358 (quoting Heller, 785 F.2d at 1527.)

The Florida court distinguished cases involving bigotry from those involving other types of juror misconduct: “We also find the conduct alleged herein, if established, to be violative of the guarantees of both the federal and state constitutions which ensures [sic] all litigants a fair and impartial jury and equal protection of the law.” Id. at 358 (citing U.S. CONST. amends. VII, XIV, § 1; FLA. CONST. art. I, § 22). The Powell court went on to criticize the alleged prejudiced

conduct of the jurors, holding that, if the trial court determined that such statements were made, a new trial should be ordered (i.e., without further inquiry as to whether the conduct affected the verdict). Id. at 358.

Nevada has an extraneous evidence exception for instances where the misconduct is so extreme that “it would be impossible to refuse jurors’ statements without violating the ‘plainest principles of justice.’” McNally v. Walkowski, 462 P.2d 1016, 1017 (Nev. 1969) (citation omitted). In McNally, juror affidavits indicated that several jury members thought the plaintiff should not be entitled to damages resulting from being a passenger in a car, because the accident in question occurred on a trip back from a house of prostitution. Id. The Nevada Supreme Court remanded the case for inspection of jurors’ affidavits to determine whether jurors concealed their bias during *voir dire*. Id.

Recently, two state trial judges ordered a new trial or evidentiary hearing when faced with similar allegations. In Massachusetts, a trial judge ordered an evidentiary hearing at which the entire jury testified concerning allegations that one juror said that bruises on the victim could have happened “when a big black guy beats up on a small woman.” Commonwealth v. McCowen, No. 2005-00109 (Barnstable County, Mass. June 8, 2007) (A4-6).

A Washington state trial judge ordered a new trial in a civil case because jurors referred to a Japanese-American attorney as “Mr. Kamikaze,” and one juror

commented that delivering the verdict on December 7 was “almost appropriate.” Turner v. Stime, No. 05-2-05374-1 (Spokane County, Wash. March 28, 2008) (A7-13). The judge declined to first hold an evidentiary hearing because he felt the suspected jurors were unlikely to admit they were racist (A10).

B. Missouri Law Provides an Analogous Extraneous Evidence Rule that Permits Juror Testimony

This Court should similarly interpret Missouri’s extraneous evidence rule. Missouri’s Mansfield rule generally prohibits a juror’s testimony or affidavit from being used to impeach the verdict.⁸ Stotts, 822 S.W.2d at 888-889. The Supreme Court of Missouri has interpreted the Mansfield rule to mean that a verdict may not be impeached by testimony or affidavits as to “matters inherent in the verdict.” Baumle v. Smith, 420 S.W.2d 341, 348 (Mo. 1967). Such “matters inherent in the verdict” include:

. . . that the juror did not understand the law as contained in the court’s instructions, or that he did not join in the verdict, or that he voted a certain way due to a misconception of the evidence, or misunderstood

⁸ The Mansfield rule dates back to Lord Mansfield’s opinion in Vaise v. Delaval, 99 Eng. Rep. 944 (K.B. 1785). See generally Comments, Impeachment of Jury Verdicts, 25 U. CHI. L. REV. 360 (1957).

the statements of a witness, or was mistaken in his calculations, or other matters ‘resting alone in the juror's breast.’ A juror who has reached his conclusions on the basis of evidence presented for his consideration may not have his mental processes and innermost thoughts put on a slide for examination under the judicial microscope.

Id. (internal citations omitted). While there are valid reasons for the rule against impeachment of a jury verdict, these reasons may be outweighed by the potential for manifest injustice.

One such injustice recognized by Missouri courts is when a juror has shared extraneous evidence with fellow members of an impaneled jury. This “extraneous evidence exception” falls outside of the Mansfield rule. Neighbors, 926 S.W.2d at 37; see also Mattox v. United States, 146 U.S. 140, 149 (1892) (“a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence”). In such situations, the verdict can be impeached by juror testimony that alleges that “extrinsic evidentiary facts . . . were interjected into the jury’s deliberations.” Neighbors, 926 S.W.2d at 37.

The Missouri Court of Appeals recently examined the application of the extraneous evidence rule in McBride v. Farley. In that case, the plaintiff produced affidavits and testimony from three jurors regarding a court official’s statements to the jury that the case had previously been tried and resulted in a hung jury. 154

S.W.3d 404, 405-406 (Mo. App. 2004). The court remanded the case for a new trial because the defendant failed to rebut **“the presumption of prejudice”** established by the testimony and affidavits. Id. at 409 (emphasis added). While the statements in McBride originated from outside of the jury, they had the potential to inappropriately influence the jury’s decision; so, too, do the statements here.

In Missouri, a motion for new trial based on the jury’s acquisition of extraneous evidence is left to the sound discretion of the trial court. Travis v. Stone, 66 S.W.3d 1, 3 (Mo. 2002). The denial of a new trial may be reversed by the appellate court if it appears that the trial court abused its discretion in ruling on the issue of extraneous evidence or the issue of prejudice. Id. This Court should act consistently with the Wisconsin, Florida, and Nevada courts, and permit consideration of evidence of juror bias at an evidentiary hearing. The statements of prejudice made here descend to at least the same base level as those in the cases from those states.

The Court could well conclude that a new trial is warranted solely upon the record to date, given the unlikelihood that the accused jurors will ever admit to anti-Semitism. Turner (A10); see also Heller, 785 F.2d at 1527 (“[a] racially or religiously biased individual harbors certain negative stereotypes which, despite his protestations to the contrary, may well prevent him or her from making

decisions based solely on the facts and law that our jury system requires”). However, PVI’s jury trial right seemingly can be vindicated if the trial court is directed to consider the assertions of prejudice made here and, if they are found to be credible, to order a new trial. See Powell, 652 So.2d at 358 (“if the trial court determines that such [racial] statements were made, it shall order a new trial”); Wright, 650 So.2d at 644 (“if the appellants are able to establish misconduct, they must be given a new trial”).

In addition to the probable impact that these remarks had on liability, they likely played into the jury’s determination of damages. At trial, the jury awarded the plaintiff \$30,000 in actual damages, as well as \$95,000 in punitive damages. In determining whether to award punitive damages, the jurors were given the following instruction: “[I]f you believe the conduct of defendant . . . was outrageous because of defendant’s . . . evil motive or reckless indifference to the rights of others, then . . . you may find that defendant . . . is liable for punitive damages” (LF 0468). Because the issue of punitive damages turned on PVI’s motives, any negative extraneous personal information about Dr. Pepose or Mrs. Feigenbaum was highly relevant to this aspect of the case as well.

The jurors’ alleged anti-Semitic remarks effectively constituted extraneous character evidence about two key witnesses (both with ties to the corporate defendant PVI), which was unfairly injected into the deliberations. Such evidence

meets the Mansfield rule exception, and should be considered by the trial court upon remand.

III. Missouri Law Provides for Setting Aside a Verdict Where, as Here, Passion, Prejudice, or Misconduct on the Part of the Jury Affects a Trial Issue

Another strand of Missouri case law recognizes that “a verdict resulting from the bias or prejudice of the jury cannot stand.” Sansone v. St. Louis County, 838 S.W.2d 16, 17 (Mo. App. 1992); see also Means v. Sears, Roebuck & Co., 550 S.W.2d 780, 788 (Mo. 1977); Artstein v. Pallo, 388 S.W.2d 877, 882 (Mo. 1965). “A verdict which is so ‘grossly excessive’ so as to indicate bias and prejudice is one in which the jury was guilty of misconduct by fixing an excessive figure as a result of bias and prejudice engendered during the course of trial.” Means, 550 S.W.2d at 788.

In Artstein, plaintiff sued to recover damages for injuries she sustained in a car accident. At trial, the jury found for respondent, but awarded her nominal damages far less than those actually incurred. During written and oral argument, respondent’s counsel stated that the jurors might have awarded the respondent such a small judgment because respondent came from a wealthy family, attended an Eastern college and had been at a country club on the night of the accident. Id. at 881. The Missouri Supreme Court did not opine on these comments, but did state

that “[a]n award of grossly inadequate damages has been held to be convincing evidence that the jury was actuated by bias, prejudice or other misconduct.” Id. at 882 (citing Boschert v. Eye, 349 S.W.2d 64, 66-67 (Mo. 1961); Taylor v. St. Louis Public Service Co., 303 S.W.2d 608, 611-612 (Mo. 1957); Brown v. Moore, 248 S.W.2d 553, 558-560 (Mo. 1952); Davis v. City of Mountain View, 247 S.W.2d 539, 541 (Mo. App. 1952)).

The court went on to note that “the verdict does not bespeak a proper determination of liability and also an award of adequate damages,” and found jury misconduct justifying a new trial on all issues. Artstein, 388 S.W.2d at 882. While the trial court in Artstein found that plaintiff was entitled to a new trial on damages, the Missouri Supreme Court remanded the case for a new trial on liability as well: “[w]here passion, prejudice or misconduct on the part of the jury affects the trial of one issue, the judgment and verdict must be set aside entirely and a new trial granted on all issues. . . .” Id. at 882; see also Means, 550 S.W.2d at 588 (verdict indicating bias and prejudice must “in its entirety be set aside”).

Here, the award of punitive damages over three times the amount of compensatory damages, against the backdrop of anti-Semitic remarks in the jury room, suggests that the verdict resulted from “bias, prejudice or other misconduct.” As such, the Court should order a new trial on both liability and damages issues.

CONCLUSION

We urge the Court to reverse the denial of PVI's motion for a new trial; to remand this case to the trial court with instructions to hold an evidentiary hearing to examine the allegations of juror misconduct; and to direct that, if the trial judge finds those allegations credible, a new trial should be conducted on all issues.

Respectfully submitted,

BRYAN CAVE LLP

By: /s/ James M. Weiss

J. Bennett Clark, # 30907

Emma Harty, # 58188

James M. Weiss, # 57385

211 N. Broadway, Suite 3600

St. Louis, MO 63102

(314) 259-2000

(314) 259-2020 (fax)

Attorneys for Amicus Curiae Anti-
Defamation League

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Rule 84.06(c) of the Missouri Rules of Appellate Procedure, that this Brief for Amicus Anti-Defamation League in the above-captioned case was prepared using Microsoft Word, and that it contains 5,390 words, from the Statement of Interest of Amicus Curiae through the Conclusion, as determined by the Microsoft Word word-counting system in compliance with Rule 84.06(b) and Local Rule 360(c). I also certify that the CD-ROM of the brief and appendix filed with the Court and served on all parties has been scanned for viruses and are virus-free.

/s/ James Weiss

CERTIFICATE OF SERVICE

I certify that two hard copies of this brief and separate appendix and one copy of the brief and separate appendix on a CD-ROM filed pursuant to Local Rule 362 were served on each of the counsel identified below via U.S. Mail, postage prepaid, on July 22, 2008:

James M. Paul
Joshua D. Bortnick
Ogletree Deakins Nash Smoak & Stewart, P.C.
7700 Bonhomme, Suite 650
Clayton, Missouri 63105

Mark E. Goodman
Capes, Sokol, Goodman & Sarachan, P.C.
7701 Forsyth Boulevard, Twelfth Floor
Clayton, Missouri 63105

Attorneys for Appellant

Jerome J. Dobson
Weinhaus, Dobson, Goldberg & Moreland
906 Olive Street, Suite 900
St. Louis, Missouri 63101

Attorney for Respondent

/s/ James Weiss