

COMMONWEALTH OF KENTUCKY  
24<sup>TH</sup> JUDICIAL CIRCUIT  
LAWRENCE CIRCUIT COURT  
CIVIL ACTION NO. 10-CI-00269

SELENA RUSSELL, Individually and as  
Personal Representative of the Estate of  
CHANDLER BLAKE RUSSELL, Deceased

PLAINTIFF

vs.

**DEFENDANT'S NOTICE AND MOTION  
FOR MISTRIAL AND A NEW TRIAL**

HOSPITAL OF LOUISA, INC.  
d/b/a THREE RIVERS MEDICAL CENTER

DEFENDANT

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**NOTICE**

Please take notice that on **Thursday, December 29, 2011, at 9:00 a.m.**, the undersigned will make the following motion and tender the attached order.

**MOTION FOR MISTRIAL AND NEW TRIAL**

Comes the Defendant, Hospital of Louisa, Inc. d/b/a Three Rivers Medical Center ("Three Rivers"), by counsel, and pursuant to CR 59.01 moves this Court for a mistrial based upon juror misconduct, and specifically for entry of an Order: (1) vacating the Judgment entered in this action on December 7, 2011; and (2) ordering that a new trial be conducted. In support of this motion, defendant states as follows:

1. Juror misconduct clearly occurred during the trial of this action. Specifically, multiple members of the jury engaged in conversations with others concerning the case and articulated conclusions prior to the beginning of their deliberations. These communications violated Kentucky law and the Court's daily admonitions. KRS 29A.310.

This improper conduct completely tainted the jury's verdict and prejudiced the rights of both parties to an impartial jury verdict. A mistrial is therefore required pursuant to the clear case law authorities of Dalby v. Cook, 434 S.W.2d 35 (Ky. 1968) and Doyle v. Marymount Hosp. Inc., 762 S.W.2d 813 (Ky. App. 1989).

2. In the Dalby case, Kentucky's Highest Court dealt squarely with the issue of juror misconduct in the context of a juror's violation of the trial court's admonition against communicating with others during trial. There, the Court declared as follows:

The admonition to juries, as prescribed by KRS 29.302, was given on more than one occasion during the course of the trial. That admonition includes the instruction that the members of the jury are "not to converse with, nor suffer themselves to be addressed by, any other person on any subject of the trial; and that, during the trial, it is their duty not to form or express an opinion thereon, until the case is finally submitted to them." The obvious purpose of the admonition is a salutary one. Violations of the admonition by jurors may not be tolerated nor may verdicts be permitted to stand when rendered by juries which have violated the admonition.

(Dalby, supra at 38; emphasis added).

The Dalby Court further announced:

What we are holding is that the good name of the jury system requires that jury trials be conducted free from outside influences in fact and that such trials must be so conducted as to leave no question of complete regularity.

Id.

The Dalby ruling was more recently reaffirmed in Doyle v. Marymount Hosp. Inc., 762 S.W.2d 813 (Ky. App. 1989). Like this case, Doyle was a medical malpractice case. As in this case, there was clear evidence that one of the jurors had communicated

concerning the case during the trial with a non-juror in violation of the trial court's admonition. A new trial motion based upon that misconduct was denied. That denial was reversed on appeal as an abuse of discretion. The appellate court reversed, even though the appellate court specifically noted that it understood "the reluctance of an overworked trial court to grant a new trial, which would most likely take another eight days, wherein the question addressed is a close call. For busy trial courts, the granting of new trials is akin to a self-inflicting a wound." Doyle, supra at 815.

In the Doyle case, it was undisputed that the juror violated the trial court's admonition. Importantly, the appellate court did not need to reach a determination that the juror had actually decided the case early in the trial, but only that the juror's misconduct in "intentionally and with disregard of the court's warning acted in such a way as to deprive the appellant of a fair trial." Doyle, supra at 816.

The Doyle Court then held that the case was squarely controlled by the decision in Dalby v. Cook. The Doyle Court found that the Dalby decision "recognized both the necessity to disapprove any juror's conduct which tends to diminish the confidence in our system of jurisprudence and the prejudice inherent from such misconduct." Doyle, supra at 816-17. Thus, the Doyle Court concluded, "pursuant to the mandate in Dalby v. Cook, and our notions of the right to a fair trial, a new trial" was necessary to obviate the error which occurred in the case. Doyle, supra at 817; see also Deemer v. Finger, 817 S.W.2d 435, 437 (Ky. 1991)(evidence that juror allowed husband to address her concerning case in violation of juror's oath and the court's admonitions

mandates mistrial because Supreme Court “must hold that the cause was not tried by a fair and impartial jury”).

3. Pursuant to the mandate set forth in the Dalby and Doyle cases just discussed, a mistrial must be declared, as that is the only appropriate remedy for the juror misconduct which without question occurred in this case. In the alternative, a hearing should be conducted during which the jury should be examined concerning this misconduct.

4. The evidence in this case fits squarely into the situation in both Dalby and Doyle. Face Book entries reflecting inappropriate communications by the jurors are attached hereto as Exhibit 1. The Affidavit of Mike Sprowl, IT consultant, is attached hereto as Exhibit 2; the Affidavit confirms that the Facebook pages attached hereto as Exhibit 1 are Facebook pages of the jurors in question.

The Court’s attention is directed in particular to the Facebook page of juror Tommy Ratliff. On November 15, 2011 at 10:52 p.m. (after the second day of trial) , Mr. Ratliff posted “Day 3 of jury duty tomorrow, god help me.” Then the following exchange occurred:

**Mark Lemaster: “They’re guilty...whatever it is, they’re guilty!!”**

**(posted on 11/15/11 at 10:59 p.m.)**

**Tommy Ratliff: “Starting to feel that way.”**

**(posted on 11/15/11 at 11:00 p.m.)**

The next morning another post was made to Tommy Ratliff's Facebook page in response to the exchange the night before between Mr. Ratliff and his Facebook friend Mark Lemaster. Another Facebook friend of Mr. Ratliff's, Jimmy Vanhooose advised Mr. Ratliff as follows:

**Jimmy Vanhooose: "fry them with hotsauce."**

**(posted on 11/16/11 at 10:39 p.m.)**

5. These comments demonstrate conclusively that Mr. Ratliff was openly and repeatedly violating the Court's admonition, just like the offending jurors in Dalby and Doyle. Juror Ratliff's Facebook comments indicate that he was formulating conclusions about the case, prior to the beginning of deliberations. However, under Dalby and Doyle, it is not even necessary for the Court to make a determination that Juror Ratliff actually did pre-judge the case. Under Dalby and Doyle, the plain violation of the admonition, standing alone, mandates mistrial. Here, Juror Ratliff was repeatedly violating the admonition, with the encouragement of his Facebook friends, prior to the completion of the proof and before the defendant had any opportunity to present any evidence. This is precisely why the Court was so careful to admonish the jury not to discuss the case with anyone at all in any way during the trial. This is precisely what Dalby and Doyle prohibit, and is exactly the kind of misconduct that those decisions declare must lead to mistrial.

6. As the Court can see, Mr. Ratliff made a number of other posts on the internet on Facebook concerning the case, all in clear violation of the Court's admonition.

These were made on Mr. Ratliff's Facebook "public wall" page and were available for the entire world to see, including the other jurors in this case.

7. Tommy Ratliff was one of nine jurors who signed the liability instruction. Without the vote of this tainted juror, there would have been no verdict. His vote must be disregarded altogether, and a mistrial should be declared.

8. Further, it is impossible to rule out that Tommy Ratliff had an improper influence on the deliberations of other jurors who signed the liability instruction. Once again, this dictates that a mistrial be declared.

9. Other jurors became Facebook friends during the trial. In particular, jurors Donnie Shapaka and Jennifer Burns and Jennifer Sparks all became Facebook friends. Mr. Shapaka and Ms. Burns were clearly discussing the case on Facebook as is reflected by their exchange around 9:08 a.m. on the morning of November 23, 2011 (after five days of trial). This leads to the inevitable conclusion that at least two or three other jurors were also discussing the case between themselves prior to the beginning of deliberations, in violation of the Court's admonition.

For the foregoing reasons, and under the clear authority of the decisions in Dalby and Doyle, a mistrial should be declared in this action and a new trial ordered.

Respectfully submitted,

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Sean Ragland

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Louisa, Kentucky 41230-0606

*Counsel for Defendant, Hospital of Louisa, Inc. d/b/a  
Three Rivers Medical Center*

**CERTIFICATE OF SERVICE**

It is hereby certified that a true and exact copy of the foregoing was, on this     day  
of December, 2011, forwarded U.S. Mail, postage prepaid, to the following:

Richard W. Hay, Esq.  
Sarah Hay Knight, Esq.  
LAW OFFICE OF RICHARD HAY  
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\_\_\_\_\_  
Sean Ragland

COMMONWEALTH OF KENTUCKY  
24<sup>TH</sup> JUDICIAL CIRCUIT  
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SELENA RUSSELL, Individually and as  
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PLAINTIFF

vs.

ORDER

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HOSPITAL OF LOUISA, INC.  
d/b/a THREE RIVERS MEDICAL CENTER

DEFENDANT

\* \* \* \* \*

Upon motion pursuant to CR 59.02 of the Defendant, Hospital of Louisa, Inc.  
d/b/a Three Rivers Medical Center, by counsel, for entry of an Order declaring a mistrial  
based upon juror misconduct, and the Court having considered the matter and being  
otherwise duly and sufficiently advised;

IT IS HEREBY ORDERED AND ADJUDGED that the Defendant's motion for  
Mistrial is GRANTED and the jury's verdict in this matter be and is hereby declared void.

A new trial shall be conducted on the \_\_\_\_ day of \_\_\_\_\_, 2012.

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JUDGE, LAWRENCE CIRCUIT COURT

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DATE

**Clerk's Certificate:**

Copies mailed to:

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Eldred E. Adams, Jr.  
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P.O. Box 606  
Louisa, Kentucky 41230

This the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

**LAWRENCE CIRCUIT COURT**

**BY: \_\_\_\_\_, D.C.**