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COMMONWEALTH OF KENTUCKY
34th JUDICIAL CIRCUIT
WHITLEY CIRCUIT COURT
DIVISION 1
CIVIL ACTION NO. 09-CI-072

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WALTER HOSKINS, as Executor of the
Estate of BESSIE MORGAN, deceased, and
on behalf of the Statutory Wrongful Death
Beneficiaries of BESSIE MORGAN

PLAINTIFF

v.

DEFENDANTS' MOTION TO RECONSIDER

FIRST CORBIN LONG TERM CARE, INC.;
HILLCREST NURSING HOME OF CORBIN, INC.;
MANAGEMENT ADVISORS, INC.; and
UNKNOWN DEFENDANTS

DEFENDANTS

* * * * *

NOTICE

Please take notice that the undersigned counsel will make the following motion on
Monday, July 3, 2023, beginning at 9:00 a.m., or as soon thereafter as counsel may be heard.

MOTION

Come the Defendants, Hillcrest Nursing Home of Corbin, Inc., et al., and hereby move the
Court pursuant to CR 60.02 to reconsider the Order granting Plaintiff's motion for new trial entered
on May 24, 2023. (See, Order, attached hereto as **Exhibit 1**). In support of this motion, Defendant
respectfully states as follows:

PERTINENT FACTS

This nursing home negligence case was tried to a verdict by a Whitley County jury between
January 9, 2023 and January 13, 2023. The jury was impaneled, sworn in, and given the standard
admonition on January 9, 2023.¹ At each break the Court admonished the jury in accordance with

¹ VR 2023-01-09_13.00.52.211 0:03:15 – 0:03:40, and 0:06:30 – 0:06:42.

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the admonition provided in KRS §29A.310, that it is the duty of the jurors not to converse with, nor allow themselves to be addressed by, any other person on any subject of the trial, and during the trial it is the duty of each juror not to form or express an opinion thereon until the case is finally submitted to them. Upon returning from each break the jurors were asked if there were any problems with the admonition. On January 13, 2023, following closing statements by the parties, the previous admonitions were withdrawn by the Judge and the jury was given the jury instructions to begin deliberations.² The Whitley County jury returned a verdict in favor of Defendants. No juror reported an issue with the admonition or concern during deliberations at any point prior to rendering the verdict.

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Plaintiff filed a motion for new trial on January 31, 2023 and a hearing was held on May 23, 2023. In support of this motion Plaintiff submitted a number of post-verdict affidavits from members of the jury recounting events and conversations that took place within the jury deliberation room. Juror, Anna McGlamery, was permitted to testify at the hearing on May 24, 2023, over Defendants' objection.³ Ms. McGlamery testified that she was approached one or two weeks after trial by an individual identified as a private investigator hired by Plaintiff to talk to juror members and determine if anything out of the ordinary occurred during jury deliberations.⁴ Ms. McGlamery then had a video chat with counsel for Plaintiff in which he asked what happened during jury deliberations.⁵ According to Ms. McGlamery, Plaintiff's counsel's focus during this video chat was *what happened during jury deliberations*. Ms. McGlamery stated that during deliberations she had a sick child at home that she needed to return to and care for. She testified

² VR 2023-01-13_16.57.21.296 0:09:12 – 0:09:37

³ VR 2023-05-23_09.30.46.669 0:13:04 – 04:14:03

⁴ VR 2023-05-23_09.30.46.669 0:24:59 – 0:25:52

⁵ VR 2023-05-23_09.30.46.669 0:27:15 – 0:28:03

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that ultimately she changed her vote from Plaintiff to Defendant because of the pressure she felt from another juror member.⁶

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On cross-examination, Ms. McGlamery confirmed that the jury spent an hour talking about the evidence and witness testimony.⁷ They went back and forth with agreements and disagreements regarding the appropriate outcome. She testified that this was a very difficult decision for her and she was very much on the fence about which party to cast her vote.⁸ Ultimately, after an hour of deliberation going back and forth and discussing the evidence Ms. McGlamery made the decision to switch her vote to the Defendant and signed the verdict confirming this was her decision.⁹

INTERROGATORY NO. 1

Do you believe from the evidence that the Defendants failed to comply with their duties as set forth in Instruction No. 3, and that such failure was a substantial factor in causing any injury to Bessie Morgan?

Hillcrest Nursing Home of Corbin, Inc. d/b/a "Hillcrest Health and Rehabilitation Center" ("Hillcrest Nursing Home")

Yes__ No X

Management Advisors, Inc.

Yes__ No X

Haley Abbott
Timothy Smith
Jeffrey Taylor
Krista Lawson
Rebecca Bryant
Scott Elit

Ana McGlamery
Devin Sir
Justin Berry

⁶ VR 2023-05-23_09.30.46.669 0:35:27 – 0:35:34, and VR 2023-05-23_09.30.46.669 0:36:32 – 0:37:11

⁷ VR 2023-05-23_09.30.46.669 0:32:18 – 0:32:28

⁸ VR 2023-05-23_09.30.46.669 0:33:38 – 0:33:56

⁹ VR 2023-05-23_09.30.46.669 0:33:58 – 0:34:15, Verdict Form, attached hereto as **Exhibit 2**.

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Ms. McGlamery did not raise any issue of pressure, concern, or irregularities prior to or at the time of rendering her verdict on January 13, 2023.

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DISCUSSIONS

I. The testimony of Juror Anna McGlamery was not admissible pursuant to Kentucky law and therefore cannot serve as basis for granting a new trial.

First and foremost, juror Anna McGlamery's testimony during the hearing on the motion for new trial was inadmissible evidence from the outset. Testimony of a juror is inadmissible to impeach a jury verdict and establish the necessity of a new trial. Commonwealth v. Abnee, 375 S.W.3d 49, 52 (Ky. 2012), attached hereto as **Exhibit 3**. "A juror cannot be examined to establish a ground for new trial, except to establish that the verdict was made by lot. The rule is firmly rooted in the early years of Kentucky jurisprudence." Id. In fact, the Supreme Court of Kentucky has gone so far as to state:

[T]he testimony of one or more of the jurors, to prove such misconduct of the jury as would invalidate their verdict, or to question the purity of the motives by which they had been influenced in rendering it, or to explain the ground, either of law or fact, which influenced them, with a view to impeach the verdict which they had returned, is inadmissible, according to the whole current of modern decisions, is inadmissible.... *The dangerous tendency of receiving testimony of the jurors, for such a purpose, is too obvious to require comment.* It would open the door so wide, and present temptations so strong, for fraud, corruption and perjury, as greatly to impair the value of, if not eventually to destroy, this inestimable form of trial by jury.

Id., citing Johnson v. Davenport, 26 Ky. 390, 393 (1830) (emphasis added). These dangers have been more specifically described by the United States Supreme Court and upheld for over a century, stating:

But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them

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evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.

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Tanner v. United States, 483 U.S. 107, 119, (1987), citing McDonald v. Pless, 238 U.S. 264, 267–68 (1915), attached hereto as **Exhibit 4**.

The anticipated danger initially cited by the United States Supreme Court and continuously quoted by federal and state courts throughout the nation is *precisely* what has occurred in the present case. Plaintiff, discontented by the jury verdict returned in favor of Defendant, sought to inquire of juror members in the hope of discovering something which might invalidate the finding. Ms. McGlamery testified that she was contacted after the verdict by a private investigator, and later spoke with Plaintiff's counsel, for the sole purpose of learning *what happened during jury deliberations* and whether there was any *questionable conduct by any of the jury members during deliberation*. This is not only impermissible, but inadmissible under long-standing and well-settled principles of law.

Jurors who observe what they perceive to be inappropriate behavior are expected to report it to the judge **before** a verdict is entered. Crawford v. Marshall Emergency Servs. Assocs., PSC, 431 S.W.3d 442, 445 (Ky. App. 2013), n.2, attached hereto as **Exhibit 5**. Ms. McGlamery testified that she based her decision to return a verdict on behalf of Defendants based upon the pressure she felt from another juror member. Kentucky law is very clear that a juror aggressively championing one position as opposed to the other in the jury room does not constitute misconduct or an unfair trial. Doyle By & Through Doyle v. Marymount Hosp., Inc., 762 S.W.2d 813, 815 (Ky. Ct. App. 1988), attached hereto as **Exhibit 6**. In Doyle, the plaintiff filed a motion for new trial based upon allegations of jury misconduct after the jury rendered a 9-3 verdict in favor of defendant. In support of the motion, appellant submitted jury affidavits. One of the affidavits

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claimed that “the initial vote was six jurors in favor of Jason Doyle [plaintiff] and six for the defendants, and that [another juror] ‘yelled and cursed at the jurors who were for Jason Doyle, interrupted them when they tried to disagree, and was very intimidating.’” Id. at 815. The Kentucky Court of Appeals acknowledged that the purpose of the affidavit was of “showing the impact he had on those jurors who switched their position from one side to the other.” Id. The Court went on to state:

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That a juror aggressively champions one position as opposed to the other in the jury room has no bearing on the issue of his misconduct outside the jury room. Thus, even if admissible, which we hold it is not, the Harris affidavit has no real probative value on the issue of whether the appellant is entitled to a new trial.

Id. at 815. The same analysis applies here. The fact that Ms. McGlamery felt pressured by another juror and claims to have changed her vote as a result, does not constitute jury misconduct. Ms. McGlamery’s post-verdict testimony regarding conduct, including that of her own, which occurred inside the jury deliberation room is not proper evidence to consider in a motion for new trial. Therefore, the Order granting Plaintiff’s motion should be reversed.

II. Kentucky law prohibits the impeachment of jury verdicts based on alleged misconduct of jury members occurring inside deliberations.

Plaintiff has failed to come forward with sufficient evidence to impeach the verdict rendered by the Whitley County jury on January 13, 2023. "There is a strong, deeply-rooted policy against subjecting jury verdicts to challenge on the basis of information provided by jurors who have rendered those verdicts... The policy is reflected most directly in a universally recognized principle that broadly prohibits jurors from impeaching the validity of their own verdicts, a prohibition that is firmly embedded in the case law of Kentucky." Robert G. Lawson, THE KENTUCKY EVIDENCE LAW HANDBOOK, § 3.15 p. 152 (3d ed.1993), attached hereto as **Exhibit 7.**

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This ancient common law rule is very deeply imbedded in Kentucky law. Maras v. Commonwealth, 470 S.W.3d 332, 335 (Ky. 2015), attached hereto as **Exhibit 8**. It has been used repeatedly during the last century to justify the exclusion of a wide variety of testimony about jury deliberations and the mental processes of jurors, such as (1) that jurors misunderstood the jury instructions, (2) that a verdict resulted from threats and intimidation, (3) that a juror did not agree with the verdict, (4) that a juror was drunk during trial, (5) that jurors were misled by certain testimony, (6) that jurors agreed to be bound by a vote of majority, among others. Cadle v. McHargue, 60 S.W.2d 973 (Ky. 1933); Salyers v. Commonwealth, 16 S.W.2d 509 (Ky. 1929); Howard v. Commonwealth, 240 S.W.2d 616 (Ky. 1947); Bowling v. Commonwealth, 147 S.W.2d 73 (Ky. 1941); Hollin v. Commonwealth, 199 S.W.2d 624 (Ky. 1947); Barnes v. Lucas, 249 S.W.2d 778 (Ky. 1952), attached collectively as **Exhibit 9**.

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This rule protects the integrity and finality of the jury trial process, shields jurors from post-verdict scrutiny, and prevents jury tampering. Crawford, 431 S.W.3d at 448; Rietze v. Williams, 458 S.W.2d 613, 620 (Ky. 1970), overruled in part on other grounds by Centre College v. Trzop, 127 S.W.3d 562, 566 (Ky. 2003); Maras, 470 S.W.3d at 335.

In support of the motion for new trial, Plaintiff submitted a number of juror affidavits. However, post-trial juror affidavits detailing fellow jurors' comments during deliberations may not be received as evidence of juror misconduct to impeach the verdict. Crawford, 431 S.W.3d at 445. In a factually similar case, the Kentucky Court of Appeals held that the trial court's ruling denying plaintiff's request for an evidentiary hearing and post-verdict motions alleging jury misconduct based upon juror affidavits, was appropriate. Lay v. Adley, No. 2003-CA-001685-MR, 2004 WL 2201192 (Ky. Ct. App. Oct. 1, 2004), attached hereto as **Exhibit 10**. In Lay, the jury returned a 9-3 verdict in favor of the defendant. Id. at *1. Following the verdict, plaintiff's

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counsel approached numerous members of the jury to inquire into the reasoning behind their verdict. Plaintiff subsequently filed a motion for mistrial based on allegations of juror misconduct and in support of their motion submitted affidavits of juror members.

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The allegations of misconduct in the Lay case are jarringly similar to the allegations of misconduct in the present action, including allegations that one or more jurors “did not speak truthfully when polled” and “switched [her] vote to the defense... to get it over with.” Id. at *1. The Kentucky Court of Appeals relied upon the seminal case and reasoning of the United States Supreme Court decision Tanner v. United States, 483 U.S. 107 (1987), which noted:

There is little doubt that post-verdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict seriously disrupt the finality of the process.... Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of post-verdict scrutiny of juror conduct. 483 U.S. at 120-121.

The Kentucky Court of Appeals held that plaintiff failed to come forward with sufficient evidence to warrant a new trial. Lay, No. 2003-CA-001685-MR, 2004 WL 2201192 at *3-4. Ms. McGlamery testified that one of her reasons for finding in favor of Defendant was because she had a sick child at home and needed to return home to care for him. The Court of Appeals has already concluded that a juror switching their vote to “get it over with” does not constitute juror misconduct and is not a sufficient basis to overturn a jury verdict. The Court should apply the same reasoning when reconsidering the present Order granting Plaintiff’s motion for new trial, and reverse the Order.

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CONCLUSION

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There exists an abundance of Kentucky and federal case law prohibiting the actions taken by Plaintiff to invalidate the jury verdict and obtain a new trial. Courts across this Commonwealth and country, alike, have applied the same principle for over a century – jury verdicts may not be impeached by the testimony of jury members. Furthermore, the reasoning for which Ms. McGlamery gave for her decision to change her vote from Plaintiff to Defendant does not constitute juror misconduct or irregularities under applicable Kentucky law. Defendant respectfully moves the Court to reconsider its Order granting Plaintiff’s motion for new trial in a manner consistent with the above-cited case law.

Respectfully submitted,

/s/ Mark E. Hammond

Mark E. Hammond

Pete A. Pullen

Rachel Dalton Dearmond

O’BRYAN, BROWN & TONER, PLLC

401 South Fourth Street, Suite 2200

Louisville, Kentucky 40202

hammondm@obtlaw.com

pullenp@obtlaw.com

dearmondr@obtlaw.com

Counsel for Defendants

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CERTIFICATE OF SERVICE

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I hereby certify that on **June 1, 2023**, the foregoing was filed with the clerk of the court using the KCOJ e-filing system, which will automatically send a notice of electronic filing to the following:

Stephen Garcia
Matthew Coman
GARCIA & ARTIGLIERE
312 S. 4th Street, Suite 700
Louisville, Kentucky 40202
Counsel for Plaintiff

Wesley R. Tipton
TIPTON & TIPTON
P.O. Box 1284
Corbin, Kentucky 40702
Co-Counsel for Defendants

/s/ Mark E. Hammond
Counsel for Defendants