

**In the
Indiana Supreme Court**

No. 49S02-____-CV-____

SUSANA HENRI,

Appellant (Plaintiff below),

v.

STEPHEN CURTO,

Appellee (Defendant below).

On Petition to Transfer from the Indiana
Court of Appeals, No. 49A02-0709-CV-
00777

Appeal from the Final Judgment of the
Marion Superior Court
Cause No. 49D02-0412-CT-002275

The Honorable Kenneth H. Johnson,
Judge

APPELLEE'S REPLY IN SUPPORT OF PETITION TO TRANSFER

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ARGUMENT

With the frequency of Indiana civil jury trials precipitously dropping, this case presents an opportunity to clarify Indiana's rule on impeaching jury verdicts. Specifically, whether a trial judge can consider evidence besides a juror's affidavit to uphold a verdict is an important, unsettled legal issue that may not soon arise again. Yet, what is undisputed after Curto v. Henri, 891 N.E.2d 135 (Ind.Ct.App. 2008)("Opinion") is that the Court of Appeals disagrees on this question in the only case addressing it.

According to Chief Judge Baker, Judge Johnson could consider all evidence or "circumstances" before him. According to Judges Riley and Robb, Judge Johnson could only consider the juror's affidavit. This is confusing and transfer is warranted to clarify it for all Indiana trial judges and practitioners.

I. Curto's "Affidavit-Only" Rule Is Bad for Indiana

Indiana's settled practice of giving "great deference on appeal" to trial judges "to gauge surrounding circumstances" in determining mistrials conflicts with Curto's rule that an uncontroverted affidavit alone controls. Compare Hernandez v. State, 761 N.E.2d 845, 851 (Ind.2002)("the trial judge...is in the best position to gauge surrounding circumstances of an event and its impact on the jury"), with Opinion at 145 ("The law does not support weighing the allegations in a juror's affidavit against the juror's conduct at trial..."), and (Transfer Opp. 7: "The [majority] correctly limited its consideration to the affidavits."). Specifically, Kirk's uncontroverted affidavit only established "what was said to the jury." Id. at 141; see Indiana

Evid.R. 606(b). The affidavit, surely penned by Henri's attorney, said nothing about the "surrounding circumstances," Hernandez, 761 N.E.2d at 851, which undergirded Judge Johnson's order. (Transfer.Add.Tab#1).

The majority's *de novo* analysis first undermines Judge Johnson's order as one that "did not acknowledge the statement from the bailiff to the jury as recounted in Kirks' affidavit." Opinion at 141. According to the majority, "the trial court relied upon what it had instructed the bailiff to tell the jury" in overruling Henri's motion. Id. But that plainly misreads the order. (Transfer.Add.Tab#1).

The judge read Kirk's affidavit, specifically, "Paragraph 6" where the judge acknowledged that "she [had] asked the bailiff if the decision would have to be unanimous." (App. 7.) In that same paragraph, Kirk told Judge Johnson what his bailiff had said to the jury. (App. 46-47.) Judge Johnson felt it did not warrant a new trial because he had just given Final Instruction #15. (App. 7.) That the majority never acknowledged Judge Johnson's reasoning is error, especially since the appellate oral argument focused on this issue.

The balance of the majority's analysis finds that the bailiff's statement "was a misstatement of Indiana law" and requires reversal when analyzed through the lens of a 9th Circuit opinion. Opinion at 141-42. That is all the majority needed to justify the "radical act" of reversing the jury's verdict, and sending these two families back to endure another grueling civil rape trial.

The majority erroneously disregarded Judge Johnson's consideration of the "surrounding circumstances," including his own observations of Kirk and the jury

polling evidence, (App.9); his discussion of Final Instruction #15, which told Ms. Kirk “that a unanimous verdict was required,” (App. 7); and his consideration of the timing of the juror’s question, which arrived about “twenty minutes into deliberations,” Opinion at 145, and which happened to be “a very short period of time after [the jury] was charged” and it “had been clearly instructed about the need for a unanimous verdict.” Curto’s restrictive “affidavit-only” rule cannot stand.

II. There Was No Sudden Turn of Events and Other Instructions Rebutted Any Presumed Harm

Like Curto himself, the majority read Judge Johnson’s order and determined that the juror’s question occurred “twenty minutes into deliberations.” Opinion at 141. This statement, along with Henri’s statement on appeal that the jury deliberated “for over two hours,” (Appellant’s Br. 42), leads to only one conclusion: there was no 5 or 10 minute “sudden turn of events” warranting a new trial. Rogers v. R.J. Reynolds Tobacco Co., 745 N.E.2d 793, 795 (Ind.2001). Henri’s interpretation that “the trial court reported that the entire deliberation lasted only twenty minutes” (Transfer Resp. 6) misread the judge’s order.

Noticeably absent from Henri’s brief opposing transfer is any discussion of Curto’s argument that Final Instruction #15 adequately explained and rebutted the majority’s concern. (Petition 8-10.) For example, the majority wrote:

[T]he statement by the bailiff [to “keep deliberating until [you] reach a unanimous verdict”] conveys that jurors in the minority would face the daunting task of swaying all the other jurors if they are to stick to their convictions ... a task that could be overwhelming in real life for the average juror.

Opinion at 142. Yet, Final Instruction #15 (Pattern Instr. 3.17) told the jury:

INSTRUCTION NO. **15**

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with the goal of reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you are convinced it is erroneous. Do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

You are the judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

(Add.Tab#3.) Therefore, the majority's concern only matters under "circumstances" without Instruction #15. But Kirk heard it, and Judge Johnson knew it, as well as that Kirk had "served on a criminal jury in the past," which she knew could "result in a hung jury." (App.47.) The majority ignored each of these "circumstances."

III. The Evidence Supporting the Verdict Is an Important "Circumstance"

Another important "circumstance" qualifies for judicial deference. Hernandez v. State, 761 N.E.2d at 851. The majority ignores every fact supporting the verdict. Henri's transfer "facts" are those most unfavorable to the verdict. Simply put, this case was not close on this record. No reasonable juror would find the evidence supported a rape count, and nobody has ever prosecuted Curto. (Appellee's.Add.#1.) Also, any clear-thinking juror would have awarded Curto some amount for his coun-

terclaim under Instruction #14. See Drollinger v. State, 274 Ind. 5, 24 (Ind.1980)(no mistrial in “the face of overwhelming direct evidence”); Willard v. State, 272 Ind. 589, 599 (Ind.1980)(same).

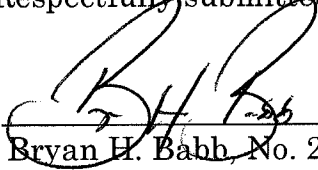
Finally, Curto’s “affidavit-only” rule—where other “circumstances” do not matter—encourages parties to produce countervailing “one-on-one” juror affidavits when jurors “should be permitted to resume their lives unbothered by disgruntled litigants.” Williams v. State, 793 N.E.2d 1019, 1032 (Ind.2003) (Boehm,J., agreeing with majority).

CONCLUSION

This Court should grant transfer.

Respectfully submitted,

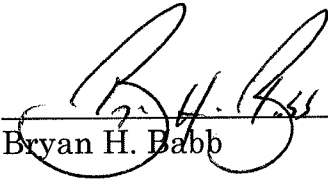
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CERTIFICATE OF WORD COUNT

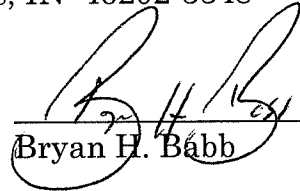
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Bryan H. Babb

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following by
First-Class United States mail, postage prepaid, this 8th day of October, 2008:

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(App. 6-10: numbers handwritten by undersigned counsel)
- Tab 2** Final Instruction No. 15 (June 21, 2007)
- Tab 3** Pattern Final Jury Instruction No. 3.17 - Jury Deliberations

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT
CAUSE NO. 49D02-0412-CT-002275

SUSANA HENRI,)
)
Plaintiff,)
)
vs.)
)
STEPEHEN CURTO,)
)
Defendant.)

FILED

AUG 14 2007


JAMES R. JOHNSON
JUDGE, MARION COUNTY SUPERIOR COURT 2

COURT'S ENTRY ON PLAINTIFF'S MOTION TO CORRECT ERRORS

The above captioned case was tried before a jury of six persons qualified by statute to serve as jurors in the Superior Courts of Marion County wherein the jury returned a verdict for the Defendant on Plaintiff's Complaint for damages and for the Defendant on his counterclaim and awarded him the sum of \$45,000.

Plaintiff now files her Motion to Correct Errors alleging as a basis for relief, juror misconduct and supports her motion with an affidavit from one of the jurors, a Ms. Barbara Kirk. The court finds that Plaintiff fails to demonstrate juror misconduct that would justify the relief that the Plaintiff seeks.

First, Ms. Kirk states in Paragraph 3 of her affidavit that jurors were instructed that they could discuss the case during breaks in the trial, so long as all jurors were present and the discussions were in the jury room. In fact the jurors were instructed pursuant to the Indiana Jury Rules, more specifically, Jury Rule 20(a)(8) which provides that "**jurors** are permitted to discuss the **evidence** among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence." (See Preliminary Instruction No. 1). (Emphasis supplied)

There is no admonition in the rule that alternate jurors cannot take part in these discussions within the guidelines set forth. The rule says "jurors" are permitted to discuss the "evidence", not the "case" as Ms. Kirk states. The difference in the two words is more than mere semantics in the mind of this jurist, as discussing the "case"

might be interpreted as allowing a discussion of the final judgment to be reached in the cause, not limited to the "evidence" as the rule is careful to point out.

Next, in Paragraph 4, Ms. Kirk, states she asked the bailiff the statute of limitations for bringing criminal charges for rape. Ms. Kirk admits, "She (the bailiff) never told me the answer to that question." It is inconceivable how the Plaintiff can predicate error on information never given.

Next, in Paragraph 6 Ms. Kirk states that she asked the bailiff if the decision would have to be unanimous. This statement is somewhat perplexing because Ms. Kirk had in her possession Final Instruction No. 15, which stated in writing that the verdict did, indeed, have to be unanimous and sat in the jury box while the court read this instruction telling her that a unanimous verdict was required.

A very short period of time after this panel was charged, the bailiff did convey to me that a juror had a question about the requirement that a verdict had to be unanimous. As they had only been deliberating a short while and that they had been clearly instructed about the need for a unanimous verdict I instructed the bailiff to simply tell the jury to continue their deliberations.

I have no knowledge about this juror requesting to get off the jury, but even if I had, the time they had spent in deliberations was so brief, approximately 20 minutes, that to consider a jury to have been "hopelessly deadlocked" in such a short time would not have been seriously considered and such request would not have been granted.

The court would point out to Plaintiff's counsel, Indiana Rules of Evidence 606 (b) which states:

"Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent or to dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify (1) to drug or alcohol use by any juror, (2) on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or (3) whether any outside influence was improperly brought to bear upon any juror. A juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying may not be received for these purposes."

Even if the court were to receive the affidavit of this juror in violation of this rule of evidence, her detailed account of the conduct of the alternate may describe annoying behavior but falls far short of misconduct.

Ms. Kirk also apparently has an objection to allowing jurors to keep their cell phone to call their families and make personal arrangement with their families as deliberations were occurring after normal business hours. She describes an incident where a juror received a call and told the caller that “she would get to class as soon as she could.” She describes another juror as stating she was leaving on vacation and “needed to finish the trial quickly.” Nothing about these events comprise misconduct in any form.

These jurors were admonished upon every separation from the courtroom that they were not to discuss this case with anyone or permit it to be discussed with them by anyone except their fellow jurors during deliberations. At the end of the first day of trial, the court entered into a very detailed description that the admonition extended to everyone including their wives, husbands, children, friends and neighbors and that the dynamics of the deliberative process were unique. The court went even further to ask each of them to protect the deliberative process by adhering strictly to this admonition. (See Partial Trans. p. 16 and 17, attached hereto.)

Note also that the Jury Rule 29(a) states that “The court, in its discretion may permit the jury in civil cases to separate during deliberations. However, before the jurors are permitted to separate, the court shall inform them that while they are separated, they shall not:

- “(1) talk about the case among yourselves or with anyone else;
- (2) talk to the attorneys, parties or witnesses;
- (3) express any opinion about the case; and
- (4) listen to or read any outside or media accounts of the trial” ...”

This was done accordingly. (See Final Instruction No. 16.)

Having been properly admonished and the court having the discretion to even allow the panel to go to their homes overnight, allowing jurors to keep their cell phones during deliberations is not misconduct. In addition, Ms. Kirk having seen, heard, and recalled so many details of this jury’s deliberations, sets forth nothing that would constitute even a hint of impropriety of her fellow jurors. The fact that jurors have other

responsibilities and plans after deliberations are concluded is hardly a circumstance unique to this jury nor a basis for which misconduct can be found.

I met Ms. Kirk in the hallway as she was departing the court environs and she stated that this was a difficult verdict. Considering the issues raised by the pleadings in this case, who could possibly disagree with that. At no time, however, did she convey to me any problems or objections she may have had about the verdict to which she agreed nor how the verdict was reached. As a matter of fact, when the jury was polled by Plaintiff's counsel, Ms. Kirk, responded that yes, this was her verdict.

At page 18 of the Partial Transcript attached hereto, when asked by the court whether Mr. Bowes, Plaintiff's counsel, wished to poll the jury he responded in the affirmative. The transcript reveals that in the polling, each juror stated, in response to counsel's questions that they agreed with the verdict.

And even further, at page 19 of the Partial Transcript, Mr. Bowes requested and was granted permission from the court to ask what he called a "confirmatory question of the alternate. MR. BOWES: And alternate juror, did you participate in the discussions of the deliberations" and the alternate juror replied, "No."

Moreover, it should be noted that Ms. Kirk not only voted to find against the Plaintiff on Plaintiff's Complaint alleging the Defendant raped her but she also voted to find for the Defendant on his Counterclaim and awarded him a \$45,000 judgment against the Plaintiff.

This was a "tough" case and the court expressed that fact as shown in the Partial Transcript. It was a "tough" decision because of the emotions a rape case invokes in the hearts and minds of all persons who are called upon to deal with such issues. Additionally, emotions may well have been exacerbated by the fact that the Duke University rape case had been so prevalent in the news just before this trial.

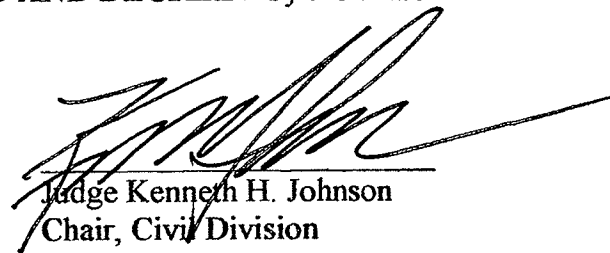
The emotional impact these kinds of trials can have upon jurors was very recently reported in the Indiana Lawyer, the July 25-August 7, 2007 edition. The Editorial page recounted how our judicial system is not being sufficiently responsive to the juror stress that results from traumatic trials. Although the case under discussion there involved multiple homicides of children, there can be little doubt that allegations and evidence of rape can produce the similar stress upon any jury.

Another article in the same edition entitled, "Dealing With Troubling Trials" explores in great depth the fact that jurors, attorneys and judges do not have an organized protocol for coping with graphic cases. Again, this article deals with heinous events at trial, and again, the principles discussed are as applicable in rape cases.

This appears to be a case of a caring juror, who after going through the deliberative process and stating publicly, in open court, that she agreed with the verdict finding against this Plaintiff and awarding the Defendant a \$45,000 judgment, has had second thoughts afterward. There is much evidence in studies and anecdotally that this does happen in emotionally charged cases. It is the vote upon the verdict at the close of the evidence, however, that the law relies upon.

Plaintiff's Motions to Correct Errors and to Supplement the Record, for all the reasons enumerated above, are hereby, in all things, DENIED.

ALL OF WHICH IS ORDERED, ADJUDGED AND DECREED by the court at Indianapolis, Indiana, this 14th day of August, 2007.



Judge Kenneth H. Johnson
Chair, Civil Division
Marion Superior Court
Civil Division Room 2

DISTRIBUTION:
Mr. Gregory Bowes
Mr. Ralph W. Staples, Jr.

INSTRUCTION NO. **15**

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with the goal of reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you are convinced it is erroneous. Do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

You are the judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

Instruction No. 3.17. Jury Deliberations**INSTRUCTION —**

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with the goal of reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you are convinced it is erroneous. Do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

You are judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

Given: _____
Modified: _____
Refused: _____

Comments

Effective January 1, 2003, the Indiana Supreme Court adopted a set of jury rules for Indiana trial courts. Ind. Jury Rules 28-30, which address jury deliberation procedures, are set out below:

Rule 28 Assisting Jurors at an Impasse

If the jury advises the court that it has reached an impasse in its deliberations, the court may, but only in the presence of counsel, and, in a criminal case the parties, inquire of the jurors to determine whether and how the court and counsel can assist them in their deliberative process. After receiving the jurors' response, if any, the court, after consultation with counsel, may direct that further proceedings occur as appropriate.

Rule 29 Separation During Deliberation

(a) The court, in its discretion may permit the jury in civil cases to separate during deliberations. However, before the jurors are permitted to separate, the court shall instruct them that while they are separated, they shall:

- (1) not discuss the case among themselves or with anyone else;
- (2) not talk to the attorneys, parties or witnesses;
- (3) not express any opinion about the case; and
- (4) not listen to or read any outside or media accounts of the trial.

(b) The court shall not permit the jury to separate during deliberations in criminal cases unless all parties consent to the separation and the instructions found in section "a" of this rule are given.

Rule 30 Judge to Read the Verdict

When the jury has agreed upon its verdict, the foreman shall sign the appropriate verdict form.

When returned into court, the judge shall read the verdict. The court or either party may poll the jury. If a juror dissents from the verdict, the jury shall again be sent out to deliberate.

For a discussion on options trial courts can employ to provide assistance to enable a deliberating jury to resolve difficulties, see, *Tincher v. Davidson*, 762 N.E.2d 1221 (Ind. 2002) where the trial court believed it was limited to communicating to the jury that the verdict and calculation forms were inconsistent, directed them to re-read the instructions and to complete a new set of verdict/calculations forms, and ultimately declared a mistrial after repeated calculation inconsistencies in verdict forms returned by the jury. In *Tincher*, the Indiana Supreme Court concluded trial courts are not so limited and encouraged trial courts to employ other and creative approaches to assist and enable juries to resolve difficulties pursuant to Ind. Code § 34-36-1-6 and new Indiana Jury Rule 28. Under appropriate circumstances and with advance consultation with parties and opportunity to voice objections, a trial court, for example:

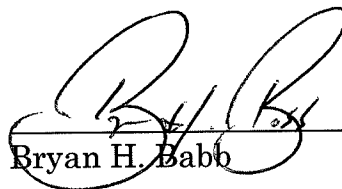
1. may directly seek further information or clarification from the jury regarding its concerns;
2. may directly answer the jury's question (either with or without directing the jury to reread the other instructions);
3. may allow counsel to briefly address the jury's question in short supplemental arguments to the jury; or
4. may employ other approaches or a combination thereof.

Tincher, 762 N.E.2d at 1224. The opinion also noted that under the Comparative Fault Act, Ind. Code § 34-51-2-13, a trial court must at least assist juries in resolving inconsistencies between the verdict and the determination of total damages and percentage of fault by informing them of the inconsistencies directing the jury to resume deliberation to correct the inconsistencies, and instructing the jury it may change any portion or portions

of the verdict to correct the inconsistencies. On the other hand, the statute does not supersede or limit the available alternatives previously noted in *Tincher*, 762 N.E.2d at 1225-1226.

CERTIFICATE OF PAGE COUNT

I certify that this Addendum to the Appellee's Reply in Support of Petition to Transfer, excluding the cover page, the Table of Contents, this Certificate of Page Count, the Certificate of Service, and the numbered tabs, does not contain more than the fifty (50) pages allowed by Indiana Appellate Rule 46(H).

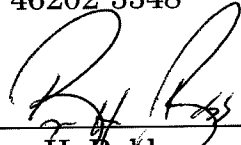

Bryan H. Babb

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following by

First-Class United States mail, postage prepaid, this 8th day of October, 2008:

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Bryan H. Babb