Civil Jury Trials
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Problem #1. Jury deliberations are in progress. After an overnight recess, one of the jurors returns to court with a two page type written document listing facts from the evidence that are in favor of one of the parties. Juror gives his typewritten document to the bailiff and requests the bailiff to make copies and distribute to each juror. Bailiff gives the document to the trial judge. The judge shares it with the attorneys. One attorney alleges juror misconduct and makes a motion for mistrial, a motion for an inquiry into juror misconduct and requests the court not to return the document to the juror who prepared it or to make the copies requested.

What should the judge do?

RULES OF LAW:

1. Once a jury is impaneled, any further challenge to a juror is within the sound discretion of the trial judge.
2. Trial judge's determination on the issue of juror misconduct will be reversed only if there is an abuse of discretion shown because trial judge is in a better position to investigate allegations, questions witnesses and observe their demeanor and make appropriate findings.
3. When jury misconduct is alleged, the trial judge must investigate the matter and make appropriate inquiry but there is no absolute rule that judge must hold a hearing on the issue.
4. An inquiry into possible misconduct is generally required only when there are reports indicating some prejudicial misconduct has taken place.
5. Only when there is substantial reason to fear that the jury has become aware of improper and prejudicial matters does the trial judge have to question the jury as to whether such exposure occurred and, if so, if it was prejudicial.
6. Not every violation of the judge's instructions is such prejudicial misconduct as to require a mistrial.

BEST PRACTICE:

Judge should conduct a voir dire of the juror to determine whether or not there was any misconduct – what was the source of the information (evidence or from a third party), whether or not he consulted with anyone in the preparation of the document or conducted any independent research, when he wrote it and why.

Judge may allow juror to take the notes to the jury room if the judge determines they are simply the juror's individual notes based solely on the evidence. If any misconduct found by the judge, the juror may be discharged and the next alternate selected. Court should make findings of fact about the misconduct.

CASE: *State v. Harris*, 145 N.C.App. 570 (2001). This was a criminal case involving drug offenses. The Court denied the defendant's motions and found the document was a "collection of the juror's thoughts and his recollection of the evidence". The trial court did not conduct a voir dire of the juror.

The Court of Appeals said was in the court's discretion not to conduct the voir dire but a better course of action might have been for a voir dire. No abuse of discretion was shown and no substantial or irreparable harm to the defendant's case resulting from the jurors' notes. No error in letting the juror take his notes to the jury room because jurors may take notes into jury room during deliberations under N.C.Gen.Stat. §15A-1228.

Problem #2.

Trial judge makes the following statements in the presence of the jury in four separate jury trials.

1. Judge tells one of the attorneys that if he asked a particular question again, he would "probably see 13 collective people throwing up."

2. Judge tells an attorney to use his "big boy voice" when addressing the jury.

3. Referred to an attorney several times as "Ally McBeal" after commenting on her physical appearance.

4. Questioned a witness who was describing a weapon, "Was it a Bradley tank? "With you I'm just checking".

Are there any consequences to the trial judge?

Yes, the North Carolina Judicial Standards Commission conducted an investigation and recommended Censure for conduct prejudicial to the administration of justice that brings the judicial office in to disrepute for violations of Canons 1, 2A, 3A(2) and 3(A)(3). The Supreme Court adopted the findings of the Commission and ordered a censure of the judge.

CASE: In Re: Inquiry Concerning A Judge, Evelyn Hill, Respondent, 359 N.C. 308 (2005).

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PROBLEM #3.

After a trial is concluded, it is brought to the attention of the trial judge that one of the jurors, after deliberations had begun, consulted a dictionary for the definitions of "willful and wanton" when the jury was deciding whether or not to award punitive damages against the defendant based on willful and wanton conduct. The jury did not award punitive damages. The plaintiff made a motion for a new trial because the jurors improperly considered dictionary definitions during jury deliberations.

What should the trial judge do?

Rule of Law:

1. Definitions in a standard dictionary are not within the North Carolina Supreme Court's contemplation of "extraneous information" under Rule 606(b).
2. The definition of words in our standard dictionaries have been considered a matter of common knowledge which the jury is supposed to possess.

CASE: *Lindsey v. Boddie-Noell Enters., Inc.*, 147 N.C.App. 166 (2001), rev'd *per curiam*, 355 N.C. 487 (2002). A juror consulted a dictionary on terms "willful" and "wanton" and shared with the other jurors. The jury did not award punitive damages. Plaintiff made a motion for a new trial and the trial court denied the motion. The Court of Appeals reversed finding the plaintiff was prejudiced by the jury misconduct. There was a dissent stating that the use of the dictionary was not prejudicial because those are words considered a matter of common knowledge the jury should possess. The Supreme Court adopted the opinion of the dissent.

State v. Bauberger, No. COA04-1368 March 7, 2006; *per curiam* with no precedential value No. 172A06, Dec. 15, 2006. Juror had gone to library and checked out a dictionary and brought it back to the jury room. Juror read the definitions of "recklessly", "wantonly", "manifest", "utterly", and "regard". It was a criminal case for 2nd degree murder and assault with a deadly weapon inflicting serious injury. The juror misconduct did not violate the defendant's right to confrontation because the information did not discredit defendant's testimony or witnesses, it concerned legal terminology and not evidence developed at trial. Strong dissent in Court of Appeals but Supreme Court was equally divided and decision of the Court of Appeals was left undisturbed and standing without precedential value.

PROBLEM #4.

In a civil case for personal injuries as a result of a motor vehicle accident, the plaintiff offered into evidence the defendant's answers to interrogatories. The interrogatories were received into evidence. The plaintiff asked permission to publish part of the interrogatories to the jury by reading three of the questions and the answers contained in the set of interrogatories.
Later, during the jury deliberations, the jury asks to review the three questions and answers to the interrogatories that were read to them as part of the evidence. The defendant consents to the jury taking the three interrogatories back to the jury room and the plaintiff wants the jury to have the entire document that was submitted into evidence.

How should the judge rule?

RULE OF LAW: It is well established that trial exhibits introduced into evidence can only be submitted to the jury room during deliberations if both parties consent – since the defendant only consented to three of the questions, only three questions can be submitted to the jury during deliberations.

There is no authority to prohibit the court from permitting the jury to view the exhibits in the courtroom in its presence and in the presence of the parties. In that setting, where subject to objections by the parties and supervision by the court, the viewing may aid the fact finding process. (Statute permits this in criminal trials G.S. 15A-1233(a). *Nelson v. Patrick.*

CASES: *Bass v. Johnson*, No. COA01-199 (2002). Trial judge did not err by only submitting the three questions consented to by both parties to the jury.

Watson v. Davis, 52 N.C. 178 (1859). During deliberations the jury asked to see a paper record of an account that the plaintiff testified to but was never offered into evidence and was not admissible in evidence. The Supreme Court held that "the jury ought to make up their verdict upon evidence offered to their senses, i.e., what they see and hear in the presence of the Court and should not be allowed to take papers, which have been received as competent evidence, into the jury room, so as to make a comparison of hand-writing, or draw any other inference, which their imaginations may suggest; because, the opposite party ought to have an opportunity to reply to any suggestion of an inference contrary to what was made in open court."

Nelson v. Patrick, 73 N.C.App. 1 (1985). No error for the trial judge to bring the jury back into the courtroom to look at exhibits individually in presence of court and parties without discussion. Jurors asked to look at the medical bills and one party objected to bills going back to jury room as jurors requested.

PROBLEM #5.

During a wrongful death case, the defendant argues in closing argument that the 18 year old defendant would be "legally obligated to pay every single dollar of the verdict" and that the jury must deal "cautiously and fairly with the estate and the property" of the defendant. Plaintiff objects.

What should the court do?

Rules of Law:

1. Neither the wealth of one party not the poverty of another should be permitted to affect the administration of the law.

2. During the trial of a case, it is improper to mention insurance in either a positive or negative manner.

3. The argument that the defendant would be obligated to pay every single dollar of a damage award may be interpreted by the jury that the defendant was not protected by insurance.

4. The argument is unfair and improper.

CASE: *Scallon v. Hooper*, 58 NC App. 551(1982). The Court of Appeals found the attorney argument had to be considered in light of the issue of whether or not the defendant was the agent of the registered owner of the vehicle the defendant was driving and that created an implication that the jury could reasonably infer that the defendant had no insurance coverage and that the award of any substantial damages would constitute a significant burden on the young defendant. It was not a case of punitive damages. The accuracy of the argument was irrelevant and insurance was not an issue. A new trial was ordered.

PROBLEM #6

After deliberations, the jury returns a verdict. The verdict sheet has inconsistent answers. What should the trial judge do if the answers by the jury are inconsistent?

Rule of Law:

1. Before a verdict is complete, it must be accepted by the court.
2. It is the duty of the trial judge to scrutinize the form and substance of the verdict to prevent insufficient or inconsistent verdicts from becoming a part of the record.
3. If the findings are indefinite or inconsistent, the judge may give additional instructions and direct the jury to retire again to deliberate.
4. The judge may vacate an answer to a particular issue when to do so does not affect or alter the import of the answers to the other issues.
5. Trial judge can resubmit all issues or only the ones that are inconsistent.

Case: *Southern National Bank v. Pocock*, 29 N.C.App. 52 (1976). In the case there were inconsistent answers in the issues that related only to damages. The defendant asked the judge to re-submit all of the questions to the jury arguing the verdict was obviously a "compromise" verdict. The court said there was no indication it was a compromise verdict and submitted to the jury the inconsistent issue. The Court of Appeals ruled that it was in the sound discretion to submit all issues or only on the issues of damages. The Court found there was no abuse of discretion by refusing to submit all issues.

PROBLEM #7

In closing arguments in a medical malpractice case, the plaintiff's lawyer argued that the defendant said during the jury selection that he "probably would call" ten different doctors to testify in the case for the defendant doctor. The defendant's attorney read out the names of the ten doctors. The defendant did not call any of the ten doctors as witnesses during the trial. In closing argument, the plaintiff's lawyer made the statement that if the doctors would have testified favorably for the defendant doctor then certainly the defendant would have called them to testify.

When it was defendant's turn to argue, he said he did not know why the plaintiff's attorney would object to his mentioning the names of the possible witnesses and that the defendant did not need their testimony just to say that the defendant performed the operation correctly. He then argues he would only be bringing the witnesses "here to say what he, himself, had already said".

The defendant's attorney also argued "Don't you know that the nurses at the hospital would have told ...that the bandage was too tight, don't you know that?" Plaintiff objects. What should the trial judge do?

Rules of Law:

1. Counsel may argue all the evidence to the jury with such inferences as may be drawn there from.
2. Counsel may not "travel outside the record" and inject into his argument facts of his own knowledge or other facts not included in the evidence.
3. One counsels remarks may invite responsive or retaliatory remarks from the opposing counsel but that does not give the opposing counsel carte blanch license to travel outside the record or beyond the bounds of proper response and retaliation.
4. When counsel makes an improper argument, it is the duty of the trial judge, upon objection or ex mero motu, to correct the transgression by clear instructions. If timely done, such action will often remove the prejudicial effect of improper argument.

Trial court should have sustained the objection and clearly communicated to the jury that the argument about what witnesses who are not here might or would have said, or any inferences from their absence, should not be considered as evidence.

If no objection, the court should have done it on its own.

CASE: Crutcher v. Noel, 284 N.C. 568 (1974).

PROBLEM # 8

During jury selection in a case involving the defendant, Ford Motor Company, a jury discloses he owns 100 shares of stock in Ford Motor Company.

Plaintiff wants to excuse the juror for cause.

How should the trial judge rule on the request to excuse the juror for cause?

Rule of Law:
The stockholder in a company which is a party to a lawsuit is incompetent to sit as a jury.

The juror should be excused for cause.

Case: *Chestnut v. Ford Motor Company*, 445 F.2d 967(1971). Reversible error not to excuse the juror who owned 100 shares of stock in Ford Motor Company.

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Problem # 9

In a trial in action filed to recover damages for personal injuries, the defense attorney makes the following statements to the jury:

"Can you imagine what a low jury verdict would do to that family?"

The plaintiff objects to "what a verdict would do". The objection is overruled.

The defendant's attorney continues, "Can you imagine what a jury verdict, a low jury verdict, a little one, five thousand dollars, would do to that little family?"

What should the trial court do?

RULES OF LAW:

1. In court, neither the wealth of one party nor the poverty of the other, should be permitted to affect the administration of justice.
2. Attorney argument should not be impaired without good reason but it is not without limitation.
3. It is the duty of the judge to interfere when the attorneys remarks are not warranted by the evidence or the law or are calculated to mislead or prejudice the jury.
4. The trial court has a duty, upon objection, to censure the remarks.
5. if attorney impropriety is gross, it is proper for the trial judge, even in the absence of an objection, to correct the abuse ex mero motu.

CASE: *Watson v. White*, 309 N.C. 498 (1983). The trial court should have sustained the objection to the remarks of counsel because they had no basis in law or fact and were an injection of extraneous considerations concerning the defendant's financial situation so far as their capacity to respond to damages. However, the plaintiff did not show prejudicial error because jury did not reach the issue of damages because they found contributory negligence.

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Problem #10

In a medical malpractice case, the plaintiff testified on cross examination that as far as she knew she did not have cancer. The plaintiff's attorney was trying to establish the point that the cancer free condition was just as likely from natural statistical probabilities as it was from radiation treatments. The plaintiff's attorney asks a poorly worded question to the plaintiff, "If you had not been subjected to the radiation treatments you still would not have the cancer?"

The defendant's attorney objects to the form of the question because it calls for speculation. The objection is overruled and the plaintiff answers that as far as she knew she was cancer free. The plaintiff attempts to explain her answer and the defense counsel objects again. The trial court instructs the plaintiff to only testify to matters within her personal knowledge.

Plaintiff's counsel asks the same question again. The defendant objects and moves to strike the whole answer.

What should the trial court do?

RULES OF LAW:

1. The better procedure, upon a motion to strike, is for the court to instruct the jury to disregard the witness' answer immediately after allowing the motion.
2. The failure to so instruct the jury is not always prejudicial because the jury could only interpret the ruling (objection and motion to strike promptly sustained by the judge in the presence of the jury) as meaning that the answer was not to be regarded as evidence in the case.

CASE: *Nelson v. Patrick*, 73 N.C.App. 1 (1985). The facts of the case were as set forth above in the problem. The Court of Appeals ruled that the error, if any, was harmless.