MEMORANDUM

TO: Law Review, Executive Board
Cassandra L. Feeney, Executive Comment and Note Editor
Geoffrey C. Westbrook, Comment and Note Editor
Andrew Sabino, “Satellite” Comment and Note Editor

FROM: [Name], Associate Member

DATE: August 12, 2010

RE: Topic Proposal #1

Case Background:

Michelle Fleshner (“Fleshner”) sued her former employer, Pepose Vision Institute, P.C. (“PVI”), for damages resulting from her wrongful termination at the hands PVI. PVI is a refractive surgery practice. During Fleshner’s time at PVI, the United States Department of Labor engaged in an investigation of PVI to determine whether PVI was complying with the requirement that it pay overtime compensation to workers working more than 40 hours a week. As part of that investigation, Fleshner was contacted by the Department of Labor seeking background information about PVI. Fleshner provided information to the Department regarding how many hours PVI employees worked. The next day she informed her supervisor about the Department’s questions and that she had provided the relevant information. Shortly thereafter Fleshner was terminated from her position.

Following a jury award of $125,000 in Fleshner’s favor, PVI filed an appeal challenging, among other things, the trial court’s denial of PVI’s motion for a new trial on the basis of juror misconduct. Specifically, after the jury was dismissed, one of the jurors approached PVI’s attorneys and informed them that another juror had made a series of anti-Semitic remarks during jury deliberation. The juror’s affidavit indicates that another juror made the following comments
about a witness for the defense: “She is a Jewish witch.” “She is a Jewish bitch.” “She is a penny-pinching Jew.” “She was such a cheap Jew that she did not want to pay Plaintiff unemployment compensation.”

Notwithstanding these alleged comments, the trial judge denied PVI’s motion for a new trial. In so doing, the trial judge concluded that the alleged comments did not constitute the kind of jury misconduct that would allow the trial court to set aside the verdict and order a new trial. Moreover, the court’s decision was influenced by the general rule that jury deliberations are sacrosanct and that a juror’s mental processes are not open for judicial interpretation. Juror testimony regarding impropriety during the deliberative process is inappropriate if it alleges that jurors acted on “improper motives, reasons, beliefs or mental operations, also known as ‘matters inherent in the verdict’”\(^1\) In Missouri this rule is known as the Mansfield rule. PVI appealed the ruling to the Missouri Supreme Court.

Upon review, the Missouri Supreme Court determined that a juror’s right to deliberative privacy is outweighed by the plaintiff’s right to a fair and impartial tribunal pursuant to both the United States Constitution and the Missouri Constitution. As such, the Court held that in cases involving allegations of racial and/or religious juror bias, the trial court is required to hold an evidentiary hearing to vet the allegations and that juror testimony regarding the allegations is permissible. Moreover, the Court’s holding limits juror testimony at the evidentiary hearing to matters not inherent in the verdict, and if the trial court determines that any biased or prejudicial statements were actually made, the moving party’s motion for new trial must be granted. Ultimately, the Court held that such a display by a juryperson deprives the parties of their right to a trial by twelve fair and impartial jurors.

\(^1\) Id. at 87.
**Argument/Thesis:**

Based on the foregoing, this case comment will argue that the Missouri Supreme Court’s holding in *Fleshner v. Pepose Vision Institute* wrongly created an exception to the Mansfield Rule by requiring evidentiary hearings in cases involving allegations of racial and/or ethnic juror bias. Specifically, the comment will argue that the Court betrays a legally formalistic disposition towards the matter of race by limiting the required evidentiary hearing to only matters not inherent in the verdict, and automatically mandating a new trial if it determines prejudicial statements have merely been made.\(^2\) In so holding, the court effectively creates a per se rule against statements touching on race and ethnicity and divorces itself from the possibility that such comments may not actually have had a prejudicial effect on other jurors. Such a holding elevates form over substance by drawing an artificial line in the sand regarding what types of inquiries into the deliberation process are permissible and which ones are not. This in turn threatens the continued viability of the jury process by inviting future challenges - *reductio ad absurdum* - regarding other potential per se rules against juror bias. Ultimately, this comment will argue that the Court’s decision not only opens the door to the jury deliberation room by disemboweling the Mansfield Rule but it is effectively the first step in removing the door from its hinges entirely.

As part of its analysis, the comment will deconstruct the allegedly bias statements and compare them to other allegedly prejudicial statements made by jurors in past cases, but which the Missouri court’s rejected on the basis of the Mansfield Rule. The analysis will focus on similarities between the statements and contrast those similarities with the differing results. In so doing, the article will highlight the apparent paradox the Court’s new exception creates: it is

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\(^2\) Presumably this means that the trial court will receive juror testimony only on whether the alleged comments were made, not whether they had a prejudicial effect.
impossible to mandate a per se rule against racial and/or ethnic comments without drawing an artificial distinction between “types” of bias and their relative merit. Accordingly, the comment will argue that all bias is prejudicial, notwithstanding the court’s position that some is apparently more prejudicial than others. Through the process of deconstruction the comment’s thesis will be born out.

**Preemption Check:**

In order to determine whether this comment is preempted, the author took the following steps:

1. KeyCited *Fleshner v. Pepose Vision Institute*, 304 S.W.3d 81 (2010). The results of the search turned up mostly supplements. There was one secondary source from the Journal of the Missouri Bar, which discusses the law of jury selection generally and briefly synopsizes the Fleshner case at the end without going into any depth of analysis.

2. Ran a “Terms and Connectors” search in the law review and secondary resources database of Westlaw: "juror bias" /p racial comments and/or ethnic comments /p "jury deliberation." The search returned 18 documents, none of which spoke directly on this case or any case in Missouri. Some of the articles did speak on the issue of jury bias, but not in the context of judicial formalism.

3. Researched the main cases relied upon by the majority in Fleshner (“After Hour Welding,” “Powell,” and “Evans”) and KeyCited each. The results for each case turned up several secondary sources that dealt with this topic but they do not preempt this article because (1) many of the articles are over a decade old, (2) many of the articles speak on criminal cases whereas this is a civil case, (3) none of the articles speak to this case specifically, and (4)
many of the articles take the opposite stance (i.e. judicial inspection into the jury deliberation process is a good thing).

**Sources:**

1. Baumle v. Smith, 420 S.W.2d 341 (Mo. 1967). This source is relevant because…
2. Powell v. Allstate Ins. Co., 652 So.2d 354 (Fla. 1995). This source is relevant because…
3. After Hour Welding Inc. v. Laneil Management Co., 324 N.W.2d 686 (Wis. 1982). This source is relevant because…
4. Evans v. Galbraith-Foxworth Lumber Co., 31 S.W.2d 496 (Tex. Civ. App. 1929). This source is relevant because…
6. Victor Gold, *Juror Competency to Testify that a Verdict was the Product of Racial Bias*, 9 ST. JOHN’S J. LEGAL COMMEM. 125 (1993). This source is relevant because…
7. Robert E. Shumaker, Racial *Stunts by Jurors as Grounds for Impeaching a Jury’s Verdict*, 1985 Wis. L. Rev. 1481 (1985). This source is relevant because…
9. Craig B. Willis, *Balancing the Need for Secret Deliberations with the Right to a Fair and Impartial Trial*, 72 FLA. B. J. 20 (1998). This source is relevant because…