STATE OF RHODE ISLAND
PROVIDENCE, SC

Hearing: May 14, 2018 @ 2 p.m.
SUPERIOR COURT

LMG RHODE ISLAND HOLDINGS, INC. Plaintiff	)	
vs.	)	C.A. PC-2018-2854
RHODE ISLAND SUPERIOR COURT, PROVIDENCE COUNTY, and THE HON. NETTI C. VOGEL, in her official capacity as an Associate Justice of the Superior Court Defendants	)	

REPLY OF AMICI CURIAE TO THE DEFENDANT'S OBJECTION TO PLAINTIFF'S EMERGENCY MOTION FOR PUBLIC ACCESS

Defendant's[1] Objection boils down to two points. First, the card containing the names of the jurors actually seated for the trial is an "administrative" record so it is not subject to a constitutional or common law right of access as a "judicial" record. Second, the Providence Journal's motion for access to the jurors has been mooted by Justice Vogel's April 26th letter to the jurors and her May 7th order vacating her April 6th bench order.

Whether the jury card is an administrative or a judicial record is irrelevant for purposes of the Journal's request; either way it is an accessible record. Further, the April 6th bench order is not moot for two reasons. First, the bench order appears to bar anyone, including members of the general public, from discussing the trial with the jurors and neither the April 26th letter nor the May 7th order address that issue. Second, the bench order indicates it is Justice Vogel's

[1] The Objection indicates that only the Superior Court is objecting to Plaintiff's motion because Justice Vogel has not been served with a summons. (See Objection, p. 11, n. 2). Accordingly, for purposes of this Reply, the Amici Curiae will refer to the Superior Court only as the Defendant.

standard practice to bar the public and the press from speaking with jurors after a trial. If so, it is a matter that is capable of repetition, yet evading review.

I. THE JURY CARD IS AN ACCESSIBLE PUBLIC RECORD REGARDLESS OF WHETHER IT IS A JUDICIAL RECORD OR AN ADMINISTRATIVE RECORD

Defendant acknowledges that the list of potential jurors is a public record. (Defendants' Objection, p. 6). Moreover, Defendant admits that the information respecting the names of the jurors who were seated could be derived from publicly available information: "Any member of the public, including members of the press, could have obtained the names of those seated to deliberate by taking note of the empaneled juror's number and coordinating it with the petit juror pool list kept by the jury commissioner's office." (Objection, p. 7). Alternatively, Defendant postulates that the press or the public could learn the names of the seated jurors by obtaining a copy of the transcript of the trial and comparing it to the petit jury pool list to determine which jurors were seated. (Objection, p. 7).[2] Thus, Defendant essentially agrees that there is nothing private or confidential about the information respecting the seated jurors on the jury card prepared by the clerk.

Accordingly, the only issue is whether that card is a judicial record or a public record to which there is either a common law or constitutional right of access, or a statutory right of access, respectively. The Amici Curiae previously argued in their Memorandum that the card is a judicial record to which there is a common law or constitutional right of access. Defendant argues that the jury card is an administrative record, not a judicial record. (Objection, pp. 7-9).

[2] Nonetheless, as the Court is aware, it can take many days or even weeks to obtain a trial transcript, by which time the identity of the jurors and their views may no longer be news. Similarly, it may not be until a jury is seated or even renders its verdict that a particular trial becomes newsworthy. Accordingly, a reporter often may not attend voir dire.

However, even if the jury card is not a judicial record, it is a "public record" subject to disclosure under the Rhode Island Access to Public Records Act, R.I.Gen.L. §38-2-1, et seq. ("APRA" or "the Act"). The Act states that a "'public record' shall mean all documents…made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." R.I.Gen.L § 38-2-2(4)(i). Defendant states that the card "is prepared by the clerk upon empanelment and turned over to the jury commissioner." (Objection, p. 8). Obviously, this is a document made in connection with official business. Moreover, the Superior Court is an "agency." R.I.Gen.L. § 38-2-2(1) ("'Agency' shall mean any…judicial body of the state…"). Hence, the jury card is a public record.

Furthermore, Defendant's argument that the jury card is an administrative record is unavailing because APRA specifically applies to judicial administrative records. R.I.Gen.L. § 38-2-2(4)(i)(T) ("Judicial bodies are included in the definition [of public records] only in respect to their administrative function provided that records kept pursuant to the provisions of chapter 16 of title 8 [respecting the Commission on Judicial Tenure and Discipline] are exempt from the operation of this chapter."). Thus, even if the jury card is not a judicial record, but an administrative record, it is accessible under APRA. See, Cull v. Cadaro, 68 So.3d 1161 (La.App. 2011) (jury lists are public records accessible under the Louisiana Public Records Act).

The APRA also states that "the burden shall be on the public body to demonstrate that the record in dispute can properly be withheld from public inspection." R.I.Gen.L. § 38-2-10; Pontarelli v. Rhode Island Dept. of Elementary and Secondary Education, 176 A.3d 472, 480 (R.I. 2018). However, Defendant does not attempt to show the jury card can be withheld for any reason set forth in the APRA. Instead, Defendant incorrectly attempts to cast the burden on the Journal to justify the disclosure. (Objection, p. 9). Nonetheless, there is no applicable

exemption or other reason why the jury card is not publicly accessible since the information on it is publicly available, as Defendant acknowledges.

In any event, if Defendant considered the jury card to be an administrative record rather than a judicial record, its response to the Journal's request violated APRA. APRA requires any denial of records to be "in writing giving the specific reasons for the denial . . . and indicating the procedures for appealing the denial." R.I.Gen.L. § 38-2-2(7)(a). The Defendant's one-sentence response to the Journal ("Judge Vogel has denied this request") neither provided any reasons for the denial nor indicated any procedures for appealing the denial. Moreover, it was not accurate.

Further, Defendant's argument that the jury card is not accessible as a "judicial record" is also futile. Defendant agrees that whether there is a constitutional right of access to the jury card as a judicial record depends on the "logic and experience" standard set forth in Press-Enterprise II, 478 U.S. 1 (1986). In turn, the "experience" portion of the "experience and logic" analysis depends on whether "the place and process have been open to the press and the general public." (Objection, p. 8, citing Press-Enterprise II, 478 U.S. 1, 8 (1986)). Contrary to Defendant's arguments, the "place and process" of the creation of the jury card, i.e., jury selection, has historically been open, at least, since the United States Supreme Court and the Rhode Island Supreme Court declared they must be open over thirty years ago. Press-Enterprise I, 464 U.S. 501, 505 (1984); Providence Journal Co. v. Superior Court, 593 A.2d 446 (R.I. 1991) ("Superior Court"); State v. Cianci, 496 A.2d 139 (R.I. 1985) ("Cianci"). Thus, the creation of the jury card meets the "experience" standard.

Defendant argues that the "logic" portion of the analysis depends on whether the jury card will "play[ ] a significant positive role in the functioning of the particular process in question." (Objection, p. 9). Presumably, that is so; otherwise the clerk would not create the

jury card and transmit it to the jury commissioner. Further, the Amici Curiae infer that at least one purpose of the jury card is to ensure that jurors are not mistakenly assigned to multiple juries in different trials. Obviously, that is a significant positive role in the functioning of Superior Court jury trials. Accordingly, the jury card is an accessible judicial record. See, In re Baltimore Sun, 841 F.2d 74, 75 (4th Cir. 1988) ("After a jury has been seated…the names of the jurors are just as much a part of the public record as any other part of the case, and we think so also are their addresses in order to identify them."); In re Disclosure of Juror Names and Addresses, 233 Mich.App. 604, 630, 592 N.W.2d 798, 809 (1999) (holding that the press has a qualified right of post verdict access to juror names and addresses). Indeed, given that the jury was discharged a month ago, the jurors' addresses are critical if the media are to contact them.

Citing non-Rhode Island case law, Defendant argues that there is no public right of access to the jurors' deliberations themselves. (Objection, p. 14-15). To the knowledge of counsel for the Amici Curiae, there are no Rhode Island decisions that the members of a petit jury may not discuss their deliberations with the press or the public. Admittedly, there is Rhode Island law holding that jurors may not testify about some aspects of their deliberations, R.I.R.Evid. 606(b); Moynihan v. Yetra, 648 A.2d 1361 (R.I. 1994), but that is not the issue here.

Moreover, it is clear that in Rhode Island there are some circumstances in which the jurors' views of the evidence and even their deliberations are not secret. As the Amici Curiae pointed out in their Memorandum, there are historical instances of Rhode Island jurors speaking with the media after trials. (Memorandum, p. 11). Also, juror or other related misconduct may be an appropriate basis for a mistrial or a new trial or some other judicial remedy. See, R.I.R.Evid. 606(b) ("a juror may testify whether extraneous prejudicial information was brought to the jury's attention or whether any outside influence was improperly brought to bear upon any

juror."); see also, Amphavannasock v. Simoneau, 861 A.2d 451 (R.I. 2004) (discussing testimony of jury foreman about another juror's actions during deliberations); State v. Hartley, 656 A.2d 954, 961-62 (R.I. 1995) (juror affidavits are admissible for the sole purpose of showing that matters not in evidence reached the jury through outside communications). The Amici Curiae previously highlighted instances in which jurors speaking with the media revealed grounds to vacate criminal convictions. (Memorandum, pp. 19-21).

Clearly, any general prohibition on the jurors speaking with members of the press, the parties, or the public about the trial would be an unconstitutional prior restraint. See, The State ex rel. the Cincinnati Post v. Court of Common Pleas of Hamilton County, 59 Ohio St.3d 103, 107, 570 N.E.2d 1101, 1104-05 (1991); In re State Farm Lloyds, 254 S.W.3d 632, 636 (Tex.App. 2008).

Nonetheless, even in the cases Defendant cites, it is clear that the media, or the general public, can ask individual jurors about their individual views of the evidence, or the arguments of counsel, or even their individual votes. For example, in U.S. v. Hamilton, 713 F.2d 1114 (5th Cir. 1983), the district court issued an order after the defendants were found guilty of the murder of a federal district court judge, which order vacated a prior order barring the media from interviewing the jurors. The second order set forth four restrictions:

1. No juror has any obligation to speak with any person about this case and may refuse all interviews or comment.
2. No person may make repeated requests for interviews or questioning after a juror has expressed his or her desire not to be interviewed.
3. No interviewer may inquire into the specific vote of any juror other than the juror being interviewed.

4. No interview may take place until each juror has received a copy of this order.

Id. At 1116. The circuit court simply affirmed this order as within the trial court's discretion. Id. at 1117.

Moreover, in a subsequent decision, the Fifth Circuit explained that a juror may be interviewed about his own "general reactions to the trial proceedings, and he is prevented only from being interviewed about the private debates and discussions which took place in the jury room during the time leading up to the jury's rendering of its verdict." U.S. v. Cleveland, 128 F.3d 267, 279 (5th Cir. 1997). Nothing in these decisions bars the media or any other person from asking a DePina juror his or her own views of the evidence, including how the individual juror reacted to the defense's theory of the case, (Complaint, ¶ 16), or his or her own vote.

II. JUSTICE VOGEL'S APRIL 6, 2018 BENCH ORDER IS NOT MOOT

Defendants argue that Justice Vogel's April 6th bench order respecting contact with jurors and Plaintiff's motion are moot because on April 26th Justice Vogel sent a letter to the jurors to tell them that they can speak with the press if they wish (and, if so, they should contact her to let her know) and, then, Justice Vogel issued an order dated May 7th vacating her April 6th bench order. However, these actions do not moot the issue, for two reasons. First, as the Amici Curiae pointed out in their Memorandum, the bench order appears to preclude anyone, including members of the general public, from speaking with the jurors. (Memorandum, pp. 22-23). Neither the April 26th letter nor the May 7th order address this issue. The Objection does not address this issue, either.

Second, Justice Vogel indicated in her bench order that barring people, including the media, from speaking with her jurors was her standard practice. If so, then, notwithstanding the May 7th order, it is a matter that is capable of repetition, yet evading review. Preservation

Society of Newport County v. City Council of City of Newport, 155 A.3d 688, 692 n.7 (R.I. 2017) (holding that the vote of the city council respecting a one-year license while acting in a quasi-judicial capacity was a matter capable of repetition, yet evading review, and proceeding to hold that the city council had failed to provide factual findings and legal grounds to support its decision). Accordingly, the Amici Curiae respectfully request that the Court address the validity of the April 6th bench order.[3]

CONCLUSION

The Court should order the disclosure of the list of jurors who deliberated in the DePina case. Also, the Court should declare that the media and members of the public have the right to speak with jurors about their views of a case after the jurors have been discharged.

Amici Curiae, the American Civil Liberties Union of Rhode Island, the New England First Amendment Coalition, Nexstar Media Group, Inc., the Rhode Island Press Association, and Sinclair Broadcast Group, Inc., by their attorneys,

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[3] Moreover, Defendant cites no authority for its position that a trial court can generally limit the press' right of access to jurors by interposing itself between the jurors and the press in the manner done here. The Court's April 26th letter to the jurors referred only to a Providence Journal reporter and not to other reporters. Also, it provided that the jurors must contact the trial justice if they wanted to speak to the Journal reporter. Such a practice could significantly chill the jurors' willingness to indicate that they want to speak with the media about the trial.

CERTIFICATION

I hereby certify that a copy of foregoing was filed electronically through the Superior Court's electronic filing system and served upon all counsel of record on May 14, 2018.

/s/ Rhiannon S. Huffman
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