***ARIZONA SUPREME COURT***
***ORAL ARGUMENT CASE SUMMARY***

**AMERICAN POWER PRODUCTS, INC., ET AL. v. CSK AUTO**
**CV-14-0261-PR**

**PARTIES:**

*Petitioner/Appellee/Defendant:* CSK Auto, Inc. ("CSK")

*Respondents/Appellants/Plaintiffs:* American Power Products, Inc. and LFMG/APP, LLC (collectively "American")

**FACTUAL AND PROCEDURAL HISTORY:**

In 2003, American and CSK entered into a contract under which American agreed to sell electric scooters and other items to CSK on an open account. In December 2005, American sued CSK for breach of contract and negligent misrepresentation. American sought more than $5,000,000 in damages. CSK answered, asserted various affirmative defenses and counterclaims, and sought damages in excess of $950,000. During trial, the parties made a number of concessions regarding the status of the open account and stipulated that the "starting point" for the jury's computation of damages would be $10,733 in favor of American.

During 12 trial days over three weeks, the parties introduced 164 exhibits into evidence (one of which was 4,000 pages long), and 24 witnesses testified. Trial scheduling was apparently an issue. During voir dire and again midway through trial, the superior court informed the jury the trial would be completed "October 6th, perhaps the 10th." On the seventh day of trial, a juror asked the court, "By taking off Thursday Sept. 29th – will this cause the trial to run past the original completion date?" In response, the court advised the jury it had "[told] counsel they need to get this case in on time. . . . The 6th is a Thursday and we [will] let you deliberate on Friday." The court instructed the jury on Friday morning starting at 10:25 a.m. Counsel then presented closing arguments, working through the noon hour and recessing for lunch at 1:43 p.m. After apparently deliberating between one and two hours on a Friday afternoon before a three-day weekend, the jury returned a 6-2 verdict at 4:13 p.m. in favor of American. The jury awarded American $10,733.

After the verdict, American hired a private investigator to interview several jurors. The investigator spoke with at least three of the jurors and obtained affidavits from the two dissenting jurors. As relevant here, Juror H.T.'s affidavit stated that the bailiff entered the jury room at one point, and in response to a question from a juror about how long deliberations typically lasted, said "an hour or two should be plenty." Both affidavits stated that the deliberations were not fair, most of the jurors refused to consider the evidence and just wanted to go home, and other jurors felt pressured to go along.

American moved for a new trial. Relying in part on the affidavits, it argued that at a minimum it was entitled to an evidentiary hearing to inquire into whether the bailiff's statement

that one or two hours were enough improperly curtailed deliberations. CSK did not dispute the bailiff had communicated with the jury or the content of the communication as reported in H.T.'s affidavit. After briefing and oral argument, the superior court denied the motion without holding an evidentiary hearing.

Both sides appealed. American argued the superior court abused its discretion in denying its motion for new trial without first holding an evidentiary hearing.

The court of appeals remanded with instructions. The majority framed the dispositive issue as whether the superior court should have denied American's motion for new trial without first holding an evidentiary hearing to determine whether the communication between the bailiff and the jury was improper and prejudicial. Relying primarily on Ariz. R. Evid. 606(b)(2)(A) and *Perez ex rel. Perez v. Cmty. Hosp. of Chandler, Inc*., 187 Ariz. 355, 356, 929 P.2d 1303, 1304 (1997), the majority held that "[b]ecause the court did not have the necessary facts to decide the effect of the communication on the jury, it should not have ruled on American's motion without first holding such a hearing." Op. ¶¶ 1, 8.

The majority first observed that the juror affidavits contained both admissible and inadmissible statements. Under Rule 606(b), "the only juror statement the superior court may properly consider—and that we may consider on appeal—is H.T.'s statement regarding the bailiff communication." *Id*. ¶ 8. The majority further observed that a court may abuse its discretion in denying a new trial motion without first holding an evidentiary hearing when it does not have the facts necessary to determine whether a bailiff's communication with the jury was improper and prejudicial. *See Perez*, 187 Ariz. at 357 n.3, 929 P.2d at 1305 (superior court abused discretion in limiting evidentiary hearing to exclude facts necessary to determining prejudice). Thus, the court should have held a hearing to determine and evaluate the circumstances surrounding the communication, including what was said, how it was said, and when it occurred. Op. ¶ 10.

Next, the majority purported to apply the two-prong inquiry set forth in *Perez*—first, whether the communication was improper, and second, whether the communication was prejudicial. 187 Ariz. at 356, 929 P.2d at 1304. To address these questions, the Court in *Perez* identified several relevant considerations: "(1) whether the communication was improper or simply involved an 'administrative detail,' (2) whether the communication, despite its impropriety, concerned an innocuous matter, (3) whether the substantive response accurately answered the question posed, (4) whether an essential right was violated, and (5) whether the nature of the communication prevents ascertainment of prejudice." *Id*. (Citation omitted.).

Because there was no dispute that the subject bailiff communication was improper, the majority turned to the contested issues of whether the communication was prejudicial and whether an evidentiary hearing was required. The majority noted that the jury could have interpreted the communication in one of two ways:

> On one hand, the juror's question was phrased in general terms and the bailiff's response did not directly comment on the law, facts, or evidence in this case. Thus, the communication could have been interpreted by H.T. and any other juror who heard it as having no bearing on the case or their deliberations. On the other hand, the bailiff's response was not phrased in general terms and, instead,

> could have been construed as being specifically directed to the jury's deliberation in this case – "an hour or two *should be* plenty." (Emphasis added.) The bailiff's response, thus, could have been interpreted by H.T. and any other juror who heard it as an indirect comment on the relative complexity of the evidence and the applicable law. As both interpretations are reasonable, we cannot speculate as to how the jury interpreted the bailiff's response.

*Id*. ¶ 15 (Citations omitted.). The majority concluded that, because the record did not include facts such as when the communication occurred, how many jurors heard the question and the bailiff's response, whether the jurors asked follow-up questions in response to the bailiff's response, or the amount of time that elapsed between the communication and the jury's verdict, the only way to obtain the necessary facts was to hold an evidentiary hearing. *Id*. ¶ 16. Acknowledging the gaps in the record and the passage of time in this case, however, the majority remanded for the superior court to determine whether an evidentiary hearing is feasible. "If it is, the court should conduct the hearing and make appropriate findings, applying the standards set forth in *Perez*, *supra* ¶ 9, and as discussed below. If an evidentiary hearing is not feasible, the court must set aside the verdict and order a new trial." Op. ¶ 19.

Finally, the majority discussed the scope of an evidentiary hearing if such a hearing is feasible. The majority looked to New Mexico, which has a substantially identical rule of evidence, for help with this issue of first impression in Arizona. In *Kilgore v. Fuji Heavy Industries Ltd*., 240 P.3d 648, 656 (N.M. 2010), the New Mexico Supreme Court considered this question in the context of a communication between a juror and a third party. To assess prejudice, the court identified several relevant inquiries:

> 1. The manner in which the extraneous material was received;
> 2. How long the extraneous material was available to the jury;
> 3. Whether the jury received the extraneous material before or after the verdict;
> 4. If received before the verdict, at what point in the deliberations was the material received; and
> 5. Whether it is probable that the extraneous material affected the jury's verdict, given the overall strength of the opposing party's case.

Finding that these inquiries are consistent with the inquiries identified in Arizona decisions that have analyzed prejudice resulting from ex parte communications with the jury in criminal cases, the majority concluded that "on remand, if the court determines an evidentiary hearing is feasible, it should hold such a hearing with these inquiries and the analytical framework and factors identified in *Perez*, *see supra* ¶ 9, in mind." Op. ¶ 23.

J. Cattani, dissenting, would have affirmed because "the trial court acted well within its discretion when it concluded that no evidentiary hearing was necessary and found that the improper comment was innocuous and not prejudicial." Op. ¶ 26. According to the dissent, the bailiff's communication "did not relate to a disputed fact or a disputed legal issue," "introduce extraneous evidence," or "benefit or prejudice either side." *Id*. ¶ 33. The dissent pointed out that

counsel and the court characterized the case as simple, *id*. ¶¶ 34-35, and distinguished the communications at issue in *Perez* and *Kilgore*. *Id*. ¶¶ 36-38. Thus, the dissent concluded:

> Unlike cases involving extraneous evidentiary information or improper substantive advice, cases in which a bailiff improvidently "encouraged" jurors to reach a verdict have been affirmed on the basis that the communication was not prejudicial. *See Boykin v. Leapley*, 28 F.3d 788, 790–91 (8th Cir. 1994) (finding that bailiff's response to a juror's question regarding what would happen in the event of a hung jury—"I think the Judge would make you go back and deliberate some more"—was not on its face coercive or otherwise prejudicial); *United States v. Weiner*, 578 F.2d 757, 765 (9th Cir. 1978) (concluding no prejudice from bailiff allegedly telling a juror that he did not know if the judge "expected" a verdict, but he assumed the judge would "like" a verdict). So too, in this case, the verdict should be upheld on the basis that the communication was not prejudicial.
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> The trial court was better positioned than this court to assess the impact of the bailiff's comment and to determine whether the comment was prejudicial under a reasonable juror standard. Thus, we should defer to the trial court's assessment that the statement at issue was "almost a throwaway question" and that the jurors' relatively short deliberations were not surprising given the nature of the case.

*Id*. ¶¶ 39-40 (Citation omitted.).

In a four-page order, with which the dissent disagreed, the court of appeals denied CSK's motion for reconsideration. CSK filed its petition for review in this Court.

**ISSUE FOR WHICH REVIEW WAS GRANTED:**

> Whether the superior court abused its discretion in denying the motion for new trial without first holding an evidentiary hearing to determine whether an ex parte communication between the bailiff and the jury was improper and prejudicial.