

IN THE  
SUPREME COURT OF MISSOURI

PHIL JOHNSON, )  
 )  
 Plaintiff - Respondent, )  
 )  
 vs. ) Case No. SC90401  
 )  
 J. EDWARD McCULLOUGH, M.D., and )  
 MID-AMERICA GASTRO-INTESTINAL )  
 CONSULTANTS, P.C., )  
 )  
 Defendants - Appellants. )

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APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
THE HONORABLE GARY D. WITT, VISITING JUDGE  
CASE NO. 0516-CV28004

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**SUBSTITUTE BRIEF OF PLAINTIFF - RESPONDENT PHIL JOHNSON**

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TABLE OF CONTENTS

	<u>PAGE</u>
<b>TABLE OF CONTENTS</b> .....	<b>i</b>
<b>TABLE OF AUTHORITIES</b> .....	<b>iii-v</b>
<b>JURISDICTIONAL STATEMENT</b> .....	<b>1</b>
<b>STATEMENT OF FACTS</b> .....	<b>2</b>
<b>POINTS RELIED ON</b> .....	<b>6</b>
<b>ARGUMENT</b> .....	<b>8</b>
<b>I. THE TRIAL COURT CORRECTLY GRANTED RESPONDENT’S MOTION FOR NEW TRIAL, BECAUSE THE ISSUE OF JUROR NONDISCLOSURE WAS TIMELY RAISED, IN THAT RESPONDENT HAD NO REASON TO SUSPECT JUROR MISCONDUCT UNTIL THE RETURN OF THE JURY’S VERDICT AFTER A SIX (6) DAY TRIAL WHERE THE JURY TOOK A MERE FORTY (40) MINUTES TO DELIBERATE IN A COMPLEX MEDICAL MALPRACTICE CASE</b> .....	<b>8</b>
<b>A. Applicable Standard of Review</b> .....	<b>8</b>
<b>B. Argument and Authorities.</b> .....	<b>9</b>
<b>II. THE TRIAL COURT CORRECTLY GRANTED RESPONDENT’S MOTION FOR NEW TRIAL, BECAUSE JUROR MAXINE MIMS MADE INTENTIONAL NONDISCLOSURES DURING JURY SELECTION, IN</b>	

**THAT THE QUESTION ASKED OF THE VENIRE PANEL BY COUNSEL  
FOR RESPONDENT REGARDING THE PANEL MEMBERS’ PRIOR  
LITIGATION EXPERIENCE WAS CLEAR AND TRIGGERED IN JUROR  
MIMS A DUTY TO  
RESPOND. . . . . 15**

**A. Applicable Standard of Review . . . . . 15**

**B. Argument and Authorities. . . . . 15**

**III. THE TRIAL COURT CORRECTLY GRANTED RESPONDENT’S MOTION  
FOR NEW TRIAL, BECAUSE JUROR MAXINE MIMS MADE  
INTENTIONAL NONDISCLOSURES DURING JURY SELECTION BY  
FAILING TO DISCLOSE NUMEROUS, CONTEMPORANEOUS LAWSUITS,  
IN THAT INTENTIONAL NONDISCLOSURE RAISES A PRESUMPTION  
OF BIAS AND PREJUDICE SUFFICIENT TO WARRANT A NEW TRIAL. . . . . 22**

**A. Applicable Standard of Review . . . . . 22**

**B. Argument and Authorities . . . . . 23**

**CONCLUSION . . . . . 29**

**CERTIFICATE OF COMPLIANCE AND SERVICE . . . . . 31**

**APPENDIX . . . . . Bound Separately**

**TABLE OF AUTHORITIES**

**Cases**

**Anderson v. Burlington Northern Railroad,**

651 S.W.2d 176 (Mo. Ct. App. 1983) ..... 19, 20

**Brines by and through Harlan v. Cibis,**

882 S.W.2d 138 (Mo. banc 1994) . 9, 10, 11, 12, 14, 15, 16, 17, 18, 21, 23, 25, 26

**Frenette v. Clarkchester Corp.,**

692 S.W.2d 834 (Mo. Ct. App. 1985) ..... 20

**Godefroid v. Kiesel Co.,**

2003 WL 22399710 (Mo. Ct. App. 2004) ..... 8, 9, 12, 13, 15, 22, 26, 27, 29

**Groves v. Ketcherside,**

939 S.W.2d 393 (Mo. Ct. App. 1997) ..... 27, 28

**Hatfield v. Griffin,**

147 S.W.3d 115 (Mo. Ct. App. 2004) ..... 21, 23, 24, 26

**Hoff v. Posten,**

963 S.W.2d 13 (Mo. Ct. App. 1998) ..... 18, 25

**Jackson v. Watson,**

978 S.W.2d 829 (Mo. Ct. App. 1998) ..... 18

**Massey v. Carter,**

238 S.W.3d 198 (Mo. Ct. App. 2007) ..... 15, 16, 17, 18, 25

**McBurney v. Cameron,**

248 S.W.3d 36 (Mo. Ct. App. 2008) ..... 14, 16, 17, 18

**Moore v. Jackson,**

812 S.W.2d 240 (Mo. Ct. App. 1991) ..... 18, 22, 23

**Nabolski v. Ahmed,**

142 S.W.3d 755 (Mo. Ct. App. 2004) ..... 8

**Portis v. Crenshaw,**

38 S.W.3d 436 (Mo. Ct. App. 2001) ..... 27

**Rodenhauser v. Lashly,**

481 S.W.2d 231 (Mo. 1972) ..... 8, 9, 10, 11, 14, 28

**Schultz v. Heartland Health System, Inc.,**

16 S.W.3d 625 (Mo. Ct. App. 2000) ..... 25, 26

**Seaton v. Toma,**

988 S.W.2d 560 (Mo. Ct. App. 1999) ..... 8, 9, 16, 22, 29

**State v. Mayes,**

63 S.W.3d 615 (Mo. banc 2002) ..... 27

**State v. Miller,**

250 S.W.3d 736 (Mo. Ct. App. 2008) ..... 27

**Sumners v. Sumners,**

701 S.W.2d 720 (Mo. banc 1985) ..... 13, 14

**Tobb v. Menorah Medical Center,**

825 S.W.2d 638 (Mo. Ct. App. 1992) ..... 27

**Wemott v. Tonkens,**

26 S.W.3d 303 (Mo. Ct. App. 2000) ..... 19

**Williams v. Barnes Hospital,**

736 S.W.2d 33 (Mo. banc 1987) ..... 18, 19, 23

**Wood v. Kriegshauser,**

851 S.W.2d 574 (Mo. Ct. App. 1993) ..... 25

**Woodworth v. Kansas City Public Service Co.,**

274 S.W.2d 264 (Mo. 1955) ..... 10

**STATUTES, RULES AND CONSTITUTIONAL PROVISIONS**

Article V, § 3 of the Missouri Constitution ..... 1

Mo. Rev. Stat. § 490.130 ..... 26, 27

Mo. 16<sup>th</sup> Cir. Ct. Loc. R. 52.2 ..... 13, 14

**OTHER AUTHORITIES**

Black's Law Dictionary (2<sup>nd</sup> Pocket ed. 2001) ..... 11



## **JURISDICTIONAL STATEMENT**

This action involves the question of whether Judge Witt properly granted Respondent's Motion for New Trial based on juror nondisclosure, a decision affirmed by the Missouri Court of Appeals–Western District on June 30, 2009. Hence, the appeal is within the Court's general appellate jurisdiction, under Article V, § 3 of the Missouri Constitution.

## STATEMENT OF FACTS

This is an action for medical negligence. On Friday afternoon, August 20, 1999, Mr. Johnson, age fifty-seven (57), went to Dr. McCullough, a gastroenterologist at Mid-America Gastro-Intestinal Consultants, P.C. [Transcript (“Tr.”), p. 726 ll. 21-25; p. 727 ll. 1-16; p. 737 ll. 13-14]. He was the last patient of the day. [Tr., p. 1627 ll. 2-10]. Mr. Johnson was referred by Dr. Gilbirds, his family physician, for an endoscopy to rule out a serious medical condition such as a stricture (a narrowing of the esophagus that can be caused by a tumor, anatomical abnormality, etc.). [Tr., p. 726 ll. 21-25; p. 727 ll. 1-25; p. 728 ll. 1-25; p. 729 ll. 1-3 and Legal File (“LF”), p. 234 (Trial Transcript of Video-taped Deposition of Dr. Zarranz, p. 17 ll. 23-25; p. 18 ll. 1-8)].

Mr. Johnson had been experiencing problems swallowing for approximately six (6) to eight (8) months. [Tr., p. 727 ll. 17-23]. Specifically, Mr. Johnson felt like he “just didn’t have sufficient saliva to be able to swallow the food.” [Tr., p. 727 ll. 24-25; p. 728 ll. 1-21]. On August 20, 1999, Mr. Johnson informed Dr. McCullough that he was on both Serzone and Elavil. [Tr., p. 729 ll. 8-25; p. 730 ll. 1-14]. Serzone and Elavil affect the ability of the salivary glands to produce saliva. [Tr., p. 585 ll. 12-25; p. 586 ll. 1-25; p. 587 ll. 1-25; p. 588 ll. 1-9 and LF, pgs. 238-239 (Trial Transcript of Video-taped Deposition of Dr. Zarranz, p. 36 ll. 3-25; p. 37 ll. 1-13)]. Serzone and Elavil taken in combination are known to cause problems swallowing. [Tr., p. 585 ll. 12-25; p. 586 ll. 1-25; p. 587 ll. 1-25; p. 588 ll. 1-9].

On August 20, 1999, Dr. McCullough completed the endoscopy. No stricture was

found. [Tr., p. 1634 ll. 4-25; p. 1635 ll. 1-25; p. 1636 ll. 1-17]. Nonetheless, immediately following the endoscopy, Dr. McCullough dilated Mr. Johnson's esophagus. [Tr., p. 1636 ll. 18-25; p. 1637 ll. 1-10].

The night of August 20, 1999, Mr. Johnson experienced severe pain around his solar plexus and fever. [Tr., p. 740 ll. 20-25; p. 741 ll. 1-25; p. 742 ll. 1-11]. Mr. Johnson went to the emergency room at St. Luke's Northland, where he was diagnosed with a torn esophagus. [Tr., p. 743 ll. 9-25; p. 744 ll. 1-25; p. 745 ll. 1-25; p. 746 ll. 1-25; p. 747 ll. 1-14]. He was transferred by ambulance to St. Luke's Hospital of Kansas City for emergency surgery. [Tr., p. 748 ll. 6-25; p. 749 ll. 1-4]. Specifically, Mr. Johnson underwent an emergency thoracotomy performed by Dr. Gorton. [Tr., p. 532 ll. 3-14]. He was hospitalized for ten (10) days. [Tr., p. 534 ll. 23-25; p. 752 ll. 16-18].

Presently, Mr. Johnson suffers from permanent scarring and nerve damage around the incision as a result of the thoracotomy. [Tr., p. 541 ll. 4-25; p. 542 ll. 1-25; p. 543 ll. 1-25; p. 544 ll. 1-25; p. 545 ll. 1-6 and LF, p. 247 (Trial Transcript of Video-taped Deposition of Dr. Zarranz, p. 70 ll. 7-25; p. 71 ll. 1-16)].

The case was tried before a jury for six (6) days starting on February 4, 2008. [LF, pgs. 23-25]. At trial, Defendant Dr. McCullough was represented by Jonathan Kieffer and Brandon D. Henry; Plaintiff Mr. Johnson was represented by Laurie Del Percio. [Tr., cover page]. Plaintiff presented two (2) expert witnesses at trial, Dr. Zarranz, a board-certified otolaryngologist for over twenty (20) years and Dr. Martinez, a toxicologist and a pharmacologist for over thirty (30) years. [Tr., p. 565 ll. 22-25; p. 566 ll. 1-25; p. 567

ll. 1-22 and LF, p. 231 (Trial Transcript of Video-taped Deposition of Dr. Zarranz, p. 5 ll. 22-25; p. 6 ll.1-25; p.7 ll. 1-6)]. Dr. Zarranz testified that Dr. McCullough failed to use that degree of skill and learning ordinarily used by a doctor under the same or similar circumstances by performing the dilatation on August 20, 1999. [LF, p. 243 (Trial Transcript of Video-taped Deposition of Dr. Zarranz, p. 54 ll. 3-25; p. 55 ll. 1-7)]. Throughout Dr. Zarranz's testimony, he repeatedly explained to a reasonable degree of medical certainty, the effects of the unnecessary dilatation on Mr. Johnson. [LF, p. 245 (Trial Transcript of Video-taped Deposition of Dr. Zarranz, p. 62 ll. 5-25; p. 63 ll. 1-25; p. 64 ll. 1-7)]. The defense presented five (5) expert witnesses at trial. [Tr., pgs. 5-7]. In addition, the defendant testified on his own behalf as the last witness at trial. [Tr., pgs. 5-7].<sup>1</sup> The jury returned a defense verdict after a mere forty (40) minutes of deliberations. [LF, pgs. 23-25].

On June 2, 2008, the trial court granted Plaintiff's Motion for New Trial based on juror nondisclosure because Juror Maxine Mims, who signed the defense verdict, failed to

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<sup>1</sup> During cross-examination, Dr. McCullough improperly injected health insurance into evidence in violation of the Court's prior Motion in Limine ruling. [Tr., p. 1660 ll. 4-25; p. 1661 ll. 1-25; p. 1662 ll. 1-25; p. 1663 ll. 1-12]. The Court **granted** Respondent's Motion for Mistrial. However, in an attempt to salvage the trial, Respondent's counsel agreed to a limiting instruction and the submission of M.A.I. 34.05. [Tr., p. 1660 ll. 4-25- p. 1677 ll. 1-13].

disclose that she “had previously been a defendant in multiple collection cases and had been a party to a personal injury case.” [LF, p. 439]. The Missouri Court of Appeals–Western District affirmed the trial court’s decision on June 30, 2009.

**POINTS RELIED ON**

**I. THE TRIAL COURT CORRECTLY GRANTED RESPONDENT'S MOTION FOR NEW TRIAL, BECAUSE THE ISSUE OF JUROR NONDISCLOSURE WAS TIMELY RAISED, IN THAT RESPONDENT HAD NO REASON TO SUSPECT JUROR MISCONDUCT UNTIL THE RETURN OF THE JURY'S VERDICT AFTER A SIX (6) DAY TRIAL WHERE THE JURY TOOK A MERE FORTY (40) MINUTES TO DELIBERATE IN A COMPLEX MEDICAL MALPRACTICE CASE.**

**Brines by and through Harlan v. Cibis, 882 S.W.2d 138 (Mo. banc 1994)**

**Godefroid v. Kiesel Co., 2003 WL 22399710 (Mo. Ct. App. 2004)**

**McBurney v. Cameron, 248 S.W.3d 36 (Mo. Ct. App. 2008)**

**Rodenhauser v. Lashly, 481 S.W.2d 231 (Mo. 1972)**

**II. THE TRIAL COURT CORRECTLY GRANTED RESPONDENT'S MOTION FOR NEW TRIAL, BECAUSE JUROR MAXINE MIMS MADE INTENTIONAL NONDISCLOSURES DURING JURY SELECTION, IN THAT THE QUESTION ASKED OF THE VENIRE PANEL BY COUNSEL FOR RESPONDENT REGARDING THE PANEL MEMBERS' PRIOR LITIGATION EXPERIENCE WAS CLEAR AND TRIGGERED IN JUROR MIMS A DUTY TO RESPOND.**

**Brines by and through Harlan v. Cibis, 882 S.W.2d 138 (Mo. banc 1994)**

**Godefroid v. Kiesel Co., 2003 WL 22399710 (Mo. Ct. App. 2004)**

**Wemott v. Tonkens, 26 S.W.3d 303 (Mo. Ct. App. 2000)**

**Williams v. Barnes Hospital, 736 S.W.3d 33 (Mo. banc 1987)**

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INTENTIONAL NONDISCLOSURES DURING JURY SELECTION BY  
FAILING TO DISCLOSE NUMEROUS, CONTEMPORANEOUS  
LAWSUITS, IN THAT INTENTIONAL NONDISCLOSURE RAISES A  
PRESUMPTION OF BIAS AND PREJUDICE SUFFICIENT TO  
WARRANT A NEW TRIAL.**

**Brines by and through Harlan v. Cibis, 882 S.W.2d 138 (Mo. banc 1994)**

**Godefroid v. Kiesel Co., 2003 WL 22399710 (Mo. Ct. App. 2004)**

**Hatfield v. Griffin, 147 S.W.3d 115 (Mo. Ct. App. 2004)**

**Massey v. Carter, 238 S.W.3d 198 (Mo. Ct. App. 2007)**

## ARGUMENT

**I. The trial court correctly granted Respondent’s Motion for New Trial, because the issue of juror nondisclosure was timely raised, in that Respondent had no reason to suspect juror misconduct until the return of the jury’s verdict after a six (6) day trial where the jury took a mere forty (40) minutes to deliberate in a complex medical malpractice case.**

**A. Applicable Standard of Review**

Missouri law is well-established that the trial court has great discretion in determining whether to grant a new trial. See Nabolski v. Ahmed, 142 S.W.3d 755, 761 (Mo. Ct. App. 2004). “The parties to a personal injury suit have a constitutional right to a fair and impartial jury composed of twelve qualified jurors.” Id. “Among other things, the right to a fair and impartial jury means that the jurors who hear the case should be unbiased individuals whose experiences, even innocently and reasonably undisclosed, will not prejudice the case.” Id. The standard of review that is applied to the grant of a motion for new trial differs from the standard applied to a denial of a motion for new trial, in that the **appellate court is more liberal in affirming the grant of a new trial than the denial of a new trial.** See Rodenhauser v. Lashly, 481 S.W.2d 231, 234 (Mo. 1972); see also Seaton v. Toma, 988 S.W.2d 560, 561 (Mo. Ct. App. 1999). If the trial court grants a new trial, an appellate court allows all reasonable inferences supporting such a ruling and will not reverse unless there has been a clear abuse of discretion. See

Godefroid v. Kiesel Co., 2003 WL 22399710 \*4 (Mo. Ct. App. 2004). Appellate courts will only find an abuse of discretion in the grant of a new trial where the trial court’s ruling is clearly against the logic of the circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. See id. “If reasonable people can differ about the propriety of the trial court’s ruling, the trial court did not abuse its discretion.” Id.\* 4. See also Seaton v. Toma, 988 S.W.2d 560, 561 (Mo. Ct. App. 1999). Specifically, “[i]n ruling on a motion for new trial based on juror misconduct, the trial court’s findings are given great weight and will not be disturbed on appeal unless there exists an abuse of discretion.” Godefroid, 2003 WL 22399710 at \*4.

**B. Argument and Authorities**

*1. A Created Duty to Investigate Jury Panel Members Would Result in Delays and Logistical Difficulties*

Appellants assert that attorneys should have a duty to search Case.Net during trial and a waiver should result if the issue of a juror’s nondisclosure of prior litigation is not raised before a verdict is reached.<sup>2</sup> The Missouri Supreme Court has explicitly addressed the timeliness of juror nondisclosure and recognized **no** duty to investigate in Brines by

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<sup>2</sup> Notably, though defense counsel had equal access to Case.Net, defense counsel did not raise the issue of juror nondisclosure during the trial of this matter before a verdict was reach which was favorable to them.

and through Harlan v. Cibis, 882 S.W.2d 138, 140 (Mo. banc 1994) and Rodenhauser v. Lashly, 481 S.W.2d 231 (Mo. 1972). Specifically, in Brines, this Court noted:

This ‘due diligence’ proposal, as we perceive it, is designed to prevent ‘sandbagging’ so that litigants cannot reserve objections to errors that are curable during trial. This Court, however, has already fashioned a rule that adequately addresses that concern... The ‘due diligence’ referred to in Woodworth is that required of litigants who actually know of the juror’s nondisclosure or false answers. **In our view, the delays and logistical difficulties in imposing a duty to investigate every juror’s answers outweigh the benefits derived from that duty. The requirement that litigants challenge jurors when the nondisclosure becomes apparent is sufficient to prevent abuse.** Id. at 140 (Emphasis supplied).

In Rodenhauser, defendant was granted a new trial based on three (3) jurors’ failure to disclose prior personal injury claims. 481 S.W.2d 231 (Mo. 1972). Plaintiff’s counsel argued that defendant waived his objection because “the records of prior claims are readily available to counsel within 48 hours through a Claims Indexing Bureau.” Id. at 235. Like Appellants in the present case, Plaintiff’s counsel contended that failure to recognize a waiver “permits counsel to ignore readily available information during trial and thus ‘sandbag’ the court and opposing parties with the hopes of obtaining a favorable verdict.” Id. at 235. Importantly, this Court rejected Plaintiff’s counsel’s arguments and found that no waiver resulted. See id. at 235.

Appellants contend that recognizing a waiver would “preserve judicial resources,” “address immediately potential problems with the jury” and “maintain the public’s trust in the judicial system.” To the contrary, a duty to investigate jurors’ answers during trial would undermine the very foundation of jury selection and be unduly burdensome resulting in the type of delays and logistical difficulties that were the concern in Brines.

To begin, *voir dire* means “to speak the truth.” Black’s Law Dictionary 753 (2<sup>nd</sup> Pocket ed. 2001). Creating a duty for a trial attorney to investigate juror answers during trial runs counter to the very meaning of *voir dire*. Jurors take an oath to tell the truth before answering questions. A trial attorney should reasonably be able to rely on a juror’s oath. If a duty to investigate is created, where does such a duty end? Does this duty only extend to prior litigation history? If so, must a trial attorney search Case.Net or must PACER (a Federal database) and all other state databases be searched as well? Also, does this mean that all trial attorneys must now subscribe to PACER even though they do not practice in Federal court? Does a duty to investigate stop at litigation history or is there a duty to investigate other juror responses? Would Rodenhauser v. Lashly no longer be controlling, thus, requiring trial attorneys to search the Claims Indexing Bureau too? 481 S.W.2d 231, 235 (Mo. 1972). Must all trial attorneys search via Google or other Internet sites? Creating a duty to investigate juror answers results in a slippery-slope. As this Court recognized in Brines, a duty to investigate results in delays and logistical difficulties. 882 S.W.2d 138, 140 (Mo. banc 1994).

Contrary to Appellants’ assertion, Case.Net is not readily available. For example,

many trial attorneys are solo practitioners, try cases out of town with no access to a computer and/or do not even know how to use a computer. Creating a duty to investigate and imputing constructive notice favors large law firms with large staffs. In fact, a duty to investigate depletes judicial resources. For example, there would be lengthy hearings in the middle of trial when the parties discussed information uncovered on jurors with the Court. Would an investigation have to be conducted before the jury was empaneled or could it be done throughout the course of trial even after the jury was empaneled? If investigation had to be conducted **before** the jury was empaneled, much lengthier *voir dire* would take place as venire members were questioned about each electronic entry. For example, *voir dire* already lasted from approximately 2:18 p.m. until 4:45 p.m. on February 4, 2008 and from approximately 9:08 a.m. until 1:27 p.m. on February 5, 2008 in this case. [Tr., p. 82 ll.9-25-pg. 426 ll. 1-11]. Appellants claim that from searching Case.Net thirty-one (31) members of the venire panel did not disclose their respective litigation experiences in response to questioning. How long would *voir dire* have lasted if the venire members were questioned about each entry? If investigation was required **after** the jury was empaneled, there would be multiple mistrials due to inadequate numbers of alternate jurors to replace those stricken. As this Court noted in Brines, “the requirement that litigants challenge jurors when the nondisclosure becomes apparent is sufficient to prevent abuse.” Brines v. Cibis, 882 S.W.2d 138, 140 (Mo. banc 1994).

The case at hand is analogous to Godefroid v. Kiesel Co., 2003 WL 22399710 (Mo. Ct. App. 2003). Like Goderfroid, Respondent’s counsel had no reason to suspect

juror misconduct until the return of the jury's verdict after a six (6) day trial where the jury took a mere forty (40) minutes to deliberate. [LF, pgs. 45-47]. Specifically, in Goderfroid, a wrongful death case, the court granted Plaintiff's Motion for New Trial. The Goderfroid court inferred prejudice noting that jury deliberations, which lasted forty-five (45) minutes, were an unusually short period of time when one considers the amount of evidence presented. Id. at 5. The same rationale holds true in this case given the length of trial and number of experts who testified.

Based on long-standing Missouri law, Respondent timely raised the issue of juror nondisclosure in his Motion for New Trial, which was properly granted by the trial court and affirmed by the Court of Appeals. The trial court's order granting a new trial should be affirmed.

2. *A Created Duty to Investigate Jury Panel Members Would Not Apply to This Case Because Procedural Law Changes Must Be Prospective*

Alternatively, if a duty to investigate is adopted by this Court, the same should be applied prospectively. Missouri law is well-established that courts do **not** apply changes to the law retroactively, if the change is procedural as opposed to substantive. See Sumners v. Sumners, 701 S.W.2d 720, 723 (Mo. banc 1985). In this case, creating a duty to investigate is procedural as evidenced by the 16<sup>th</sup> Circuit's new local rule. See Mo. 16<sup>th</sup> Cir. Ct. Loc. R. 52.2. Moreover, *assuming arguendo* that a duty to investigate could be construed as substantive, then such change should still be applied prospectively. In Sumners, this Court adopted a three-part test when determining whether to apply a

substantive law prospectively only. “[This] exception turns on the issue of fundamental fairness and is often expressed as a question of reliance. If the parties have relied on the state of the decisional law as it existed prior to the change, courts may apply the law prospectively only in order to avoid injustice and unfairness.” Sumners, 701 S.W.2d at 723. Specifically, this Court noted the three-part test as follows:

First, the decision in question must establish a new principle of law by overruling clear past precedent. Second, the Court must determine whether the purpose and effect of the newly announced rule will be enhanced or retarded by retrospective operation. Third, the Court must balance the interests of those who may be affected by the change in the law, weighing the degree to which parties may have relied upon the old rule and the hardship that might result to those parties from the retrospective operation of the new rule against the possible hardship to those parties who would be denied the benefit of the new rule. Id. at 724 (quotations, citations, and alterations omitted).

First, past precedent is clear. For the last thirty-seven (37) years, Rodenhauser has recognized that there is no duty to investigate. 481 S.W.2d at 235; see also Brines by and through Harlan v. Cibis, 882 S.W.2d 138, 140 (Mo. banc 1994). As both the trial court and Court of Appeals noted in the case at hand, McBurney v. Cameron, relied on by the Appellants, is merely dicta. 248 S.W.3d 36 (Mo. Ct. App. 2008). Likewise, Mo. 16<sup>th</sup> Cir. Ct. Loc. R. 52.2 did **not** go into effect until long after this case was tried. Second, the purpose and effect of a new rule would be retarded by retrospective operation as a verdict

would stand when Juror Mims failed to disclose three (3) different lawsuits against her during the last two (2) years when actual judgments were entered and execution commenced. [LF, pgs. 180-197; 479-501; 863-888]. Third, Respondent relied on the well-established law in Brines when trying his case and would be unjustly punished by forever losing his right to a new trial based on a change in long-established precedent. Notably, though defense counsel had equal access to Case.Net, defense counsel did not raise the issue of juror nondisclosure during the trial of this matter before a verdict was reached which was favorable to them. For all the reasons set forth above, the trial court's order granting a new trial and the Court of Appeals' decision upholding the same should be affirmed.

**II. The trial court correctly granted Respondent's Motion for New Trial, because Juror Maxine Mims made intentional nondisclosures during jury selection, in that the question asked of the venire panel by counsel for Respondent regarding the panel members' prior litigation experience was clear and triggered in Juror Mims a duty to respond.**

**B. Applicable Standard of Review**

See Section I.A., incorporated by reference herein, for Applicable Standard of Review concerning the trial court granting a Motion for New Trial. Furthermore, "In determining whether there was juror nondisclosure, the trial court first determines whether the questions asked during *voir dire* were clear." Godefroid v. Kiesel Co., 2003 WL 22399710 \*5 (Mo. Ct. App. 2004). Review of clarity of the question is de novo. See

id.

**B. Argument and Authorities**

Missouri law is well-established that: “A venireperson has a duty to fully, fairly, and truthfully answer all questions asked of him or her specifically, and those asked of the panel generally.” Massey v. Carter, 238 S.W.3d 198, 200-201 (Mo. Ct. App. 2007); see also Seaton v. Toma, 988 S.W.2d 560, 561 (Mo. Ct. App. 1999). “The duty to disclose is triggered only after a clear question has been asked.” Massey, 238 S.W.3d at 201 (citing to Brines by and through Harlan v. Cibis, 882 S.W.2d 138, 139 (Mo. banc 1994)). “The issue is whether a reasonable venire member *would have* understood what counsel intended.” McBurney v. Cameron, 248 S.W.3d 36, 42 (Mo. Ct. App. 2008). “The interpretation depends on the context of the question as well as the wording of the question.” Massey, 238 S.W.3d at 201.

To begin, the Honorable Judge Witt stressed the importance of *voir dire* during his initial remarks to the panel when he stated:

The purpose of this part of the proceedings is to select a fair and impartial jury to hear this case and to reach, through its deliberation, a verdict based upon the evidence presented. In this process we are not determining your qualifications as panel members, but are only determining whether you should sit as a juror on this particular case. In order to make that determination, it is necessary that the Court and the attorneys be given an opportunity to ask you various questions. Your answers will assist the Court in deciding whether it should excuse you from

serving and will assist the attorneys in making their selection of those who will hear this case. [Tr., p. 84 ll. 10-22].

Judge Witt further instructed the panel that “**answers** must not only be truthful, but they **must be full and complete.**” [Tr., p. 86 ll.12-13]. (Emphasis supplied).

During the start of Respondent’s counsel’s *voir dire*, the importance of providing full and complete responses was once again stressed to the panel by stating:

**Now this is such an important part of trial that if something is not disclosed that should have been, then we might have to come back and redo the entire trial.** Now because of this, will anyone have even the slightest problem raising their hand if they think of something that should have been disclosed, even if we’ve already moved on to another question? Let the record reflect that I see no hands. [Tr., p. 102 ll. 9-17]. (Emphasis supplied).

Towards the end of Respondent’s counsel’s *voir dire*, the panel was asked whether any members had ever been a party to a lawsuit. Specifically, the following clear question was asked: “Now not including family law, has anyone ever been a plaintiff or a defendant in a lawsuit before?” [Tr., p. 195 ll.10-12]. Nonetheless, Juror Maxine Mims, did **not** disclose that she has been a Defendant in multiple lawsuits. [LF, pgs. 180-197; 479-501; 863-888]. For example, she has been a Defendant in **three (3) different lawsuits during the last two (2) years alone.** Numerous contemporaneous judgments have been entered against her and garnishment has even proceeded. See id. In addition, she has also been a **party to a personal injury case.** See id.

Appellants assert that McBurney v. Cameron, requires a *voir dire* question to provide specific examples of prior litigation experiences in order for the question to be deemed clear. 248 S.W.3d 36, 46 (Mo. Ct. App. 2008). Such is not the law of McBurney or the State of Missouri. For example, in Brines by and through Harlan v. Cibis, this Court ruled that the *voir dire* question “do we have anyone on the panel who is now or has been a defendant in a lawsuit?” was a clear question unequivocally triggering the prospective jurors’ duty to disclose lawsuits against them warranting a new trial. 882 S.W.2d 138, 139 (Mo. banc 1994). Likewise, in Massey v. Carter, another case cited to by the McBurney court, the Missouri Court of Appeals–Western District ruled that the *voir dire* questions “Have any of you ever filed a lawsuit?” and “Have any of you ever been sued by anyone?” were clear questions warranting a new trial. 238 S.W.3d 198, 201 (Mo. Ct. App. 2007); see also Moore v. Jackson, 812 S.W.2d 240, 242 (Mo. Ct. App. 1991) (where new trial granted based on a *voir dire* question asking whether any of the panel had ever been a defendant or a plaintiff in a civil lawsuit); Jackson v. Watson, 978 S.W.2d 829, 831 (Mo. Ct. App. 1998) (where new trial granted based on *voir dire* question “Have any of you ever been a plaintiff in a civil action, have you ever brought a claim in a court of law against anyone? Have you ever filed suit–?”); Hoff v. Posten, 963 S.W.2d 13 (Mo. Ct. App. 1998) (where new trial granted based on *voir dire* question “Anybody on the panel, or your immediate family, who has ever been sued for anything...?”). Based on the long-standing case law set forth above, a *voir dire* question need not set forth “specific examples” of the types of cases to be disclosed in order to be

deemed clear.

Next, Appellants assert that the phrase “not including family law” makes the subject *voir dire* question “ambiguous and unclear.” To the contrary, the phrase is purposely included in order to narrow the scope of the question and make it clearer. See i.e. Williams v. Barnes Hospital, 736 S.W.2d 33, 34-35 (Mo. banc 1987) (where *voir dire* question “Is there any member of this panel who has-had a lawsuit or a claim brought against him or her? Have any of you folks ever been sued? **I’m not talking about domestic relations. Other than that.** I’m talking about something which would involve an injury to you. Have any of you folks ever had a lawsuit or claim brought against you?” was deemed clear warranting a new trial); Wemott v. Tonkens, 26 S.W.3d 303, 308 (Mo. Ct. App. 2000) (where *voir dire* question “Have any of you ever been a party to a lawsuit, and I’m talking about a civil lawsuit, a civil case like this, not necessarily an accident case, any kind of civil case **other than a divorce proceeding?**” was a clear question).

Importantly, Appellants’ assertion is not even relevant under the facts of this case as Ms. Mims failed to disclose numerous debt collection suits and a personal injury case—none of which have anything to do with family law by either definition cited to by Appellants in their brief. [LF, pgs. 180-197; 479-501; 863-888]. Logically, a lay person would reasonably conclude that the disclosure of multiple contemporaneous debt collection actions and a personal injury suit was solicited by the above question, especially in light of other panel members disclosing previous lawsuits, including

personal injury cases. [Tr., p. 195 ll. 10-25-p. 201 ll. 1-4]. In order to be thorough, Respondent's counsel even asked after there were no further hands up about litigation history, "Now did I miss anyone here? I just want to make sure. No other people that have been, not including family law, a plaintiff or a defendant on any case? Let the record reflect that I see no additional hands." [Tr., p. 200 ll. 24-25; p. 201 ll. 1-7]. Nonetheless, Ms. Mims continued to remain silent. "Honest men do not hesitate to divulge information touching their qualifications as jurors." Anderson v. Burlington Northern Railroad, 651 S.W.2d 176, 181 (Mo. Ct. App. 1983). "A prospective juror is not the judge of his [or her] own qualifications." Frenette v. Clarkchester Corp., 692 S.W.2d 834, 836 (Mo. Ct. App. 1985). As Judge Witt stated at oral argument on the Motion for New Trial:

**I do believe in this case that it was a clear question. I believe that Ms. Mims could not possibly have read the question or heard the question and not believed that it should—that she should have disclosed, not only the personal injury case, but in addition, the multitude of other cases that she has been involved in.** [Appendix, p. A18, Tr. of Oral Argument on Motion for New Trial, p. 62 ll. 12-17]. (Emphasis supplied).

Respondent's counsel's *voir dire* question regarding prior litigation experience was clear triggering a duty to respond in Juror Mims.

Next, Appellants claim that thirty-one (31) members of the venire panel did not disclose their respective litigation experiences in response to questioning. Based on this

assertion, Appellants argue that Respondent's counsel's *voir dire* question was unclear. Appellants' "calculation" is grossly inaccurate for multiple reasons. Appellants' "calculation" includes numerous traffic tickets, back taxes, landlord-tenant complaints, divorces, conservatorships, administrative child support actions, adult abuse stalking charges etc. Interestingly, the Appellants have included family law suits even though Respondent's counsel's *voir dire* question explicitly excluded the same. [Tr., p. 195 ll. 10-12]. Importantly, Appellants' "calculation" includes any notation on Case.Net whether contemporaneous or not. For example, Appellants cite to numerous cases from the 1980s (twenty years before the trial of this matter). In contrast, Juror Maxine Mims, did **not** disclose that she has been a Defendant in multiple lawsuits, including **three (3) different lawsuits during the last two (2) years alone**. [LF, pgs. 180-197; 479-501; 863-888]. Courts look to the date of the suit when determining whether nondisclosure was intentional. See Hatfield v. Griffin, 147 S.W.3d 115, 120 (Mo. Ct. App. 2004); see also Brines by and through Harlan v. Cibis, 882 S.W.2d 138, 140 (Mo. banc 1994).

Appellants' "calculation" is also inaccurate because the efforts to verify whether the actual venire member was a party to the suit listed on Case.Net have not been established. To the contrary, many of the addresses listed on the Juror Questionnaires **do not match** the addresses listed on Case.Net, i.e. Serena Luke, Anna Marie Zehnder, Sandra Roach, Anita Nelson, Robert LaBlance, and Peggy Wiggs. [LF, pgs. 460-724]. Appellants' "calculation" is also inaccurate because it includes suits where no judgment was ever entered or service even obtained. For example, Appellants' claim that Lois

Wallace did not disclose 16CV92-02945, St. Luke's Hospital of Kansas City v. Lois Wallace et al. However, a review of Case.Net reveals that Ms. Wallace was never even served with process. The case was dismissed by the Court within one (1) month of being filed. [LF, pgs. 890-894]. In contrast, Juror Maxine Mims, did **not** disclose that she has been a Defendant in multiple lawsuits, which included **three (3) different lawsuits during the last two (2) years alone.** [LF, pgs. 180-197; 479-501; 863-888]. Logically, when the explicit question "Now not including family law, has anyone ever been a plaintiff or a defendant in a lawsuit before?" has been asked and re-asked just to be thorough, it is difficult to believe that a person would just happen to forget about three (3) different lawsuits against them during the last two (2) years when actual judgments have been entered and execution has commenced. [LF, pgs. 180-197; 479-501; 863-888].

The trial court correctly granted a new trial because Juror Maxine Mims made intentional nondisclosures during jury selection, in that the question asked of the venire panel by counsel for respondent regarding the panel members' prior litigation experience was unequivocally clear and triggered in Juror Mims a duty to respond. If the trial court grants a new trial, an appellate court allows all reasonable inferences supporting such a ruling and will not reverse unless there has been a clear abuse of discretion. See Godefroid v. Kiesel Co., 2003 WL 22399710 \* 4 (Mo. Ct. App. 2004); Seaton v. Toma, 988 S.W.2d 560, 561 (Mo. Ct. App. 1999). The trial court's order granting Respondent's Motion for New Trial and the Court of Appeals' decision upholding the same should be affirmed.

**III. The trial court correctly granted Respondent’s Motion for New Trial, because Juror Maxine Mims made intentional nondisclosures during jury selection by failing to disclose numerous, contemporaneous lawsuits, in that intentional nondisclosure raises a presumption of bias and prejudice sufficient to warrant a new trial.**

**A. Applicable Standard of Review**

See Section I.A., incorporated by reference herein, for Applicable Standard of Review concerning the trial court granting a Motion for New Trial. Furthermore, “The determination that a venire person intentionally or unintentionally failed to disclose matters asked during *voir dire* is **left to the sound discretion of the trial court, only to be disturbed on appeal upon a showing of an abuse of discretion.**” Moore v. Jackson, 812 S.W.2d 240, 243 (Mo. Ct. App. 1991) (Emphasis supplied).

**B. Argument and Authorities**

Missouri law is well-established that: “Intentional nondisclosure occurs: 1) **where there exists no reasonable inability to comprehend the information solicited by the question asked of the prospective juror, and 2) where it develops that the prospective juror actually remembers the experience or that it was of such significance that his [her] purported forgetfulness is unreasonable.**” Brines by and through Harlan v. Cibis, 882 S.W.2d 138, 139 (Mo. banc 1994) (citing to Williams v. Barnes Hospital, 736 S.W.2d 33, 36 (Mo. banc 1987)). (Emphasis supplied). “In other words, under the first prong, we ask whether or not a reasonable person would have understood what

information was being elicited. If so, under the second prong, the nondisclosure is intentional if the venire person either remembers the lawsuit or his or her forgetting it is unreasonable.” Hatfield v. Griffin, 147 S.W.3d 115, 119 (Mo. Ct. App. 2004).

Intentional nondisclosure “**raises a presumption of bias and prejudice sufficient to warrant a new trial.**” Id. at 120. (Emphasis supplied). “The Supreme Court has instructed that a finding of intentional concealment has become tantamount to a **per se rule** mandating a new trial.” Id. (Emphasis supplied).

Appellants claim that the majority of lawsuits that Ms. Mims failed to disclose were collection actions, consequently, no prejudice resulted in a medical malpractice case. To the contrary, there are numerous cases where the Court has ordered a new trial based on nondisclosure of collection actions within the context of a medical malpractice case. Like the case at hand, Hatfield was a medical malpractice case which resulted in a defense verdict. 147 S.W.3d 115 (Mo. Ct. App. 2004). In Hatfield, the Court found intentional nondisclosure and ordered a new trial for Plaintiffs because one (1) juror did not disclose a suit for non-payment of a medical bill. The facts in the case at hand are even more compelling than Hatfield to warrant a new trial as Ms. Mims did not disclose that she has been a Defendant in multiple contemporaneous collection suits-- not just one. [LF, pgs. 180-197; 479-501; 863-888]. In addition, Ms. Mims had even previously been a party to a personal injury suit. See id.

Specifically, the jury questionnaire filled out by Ms. Mims reveals that her address is “2059 Wheeling, Kansas City, Mo. 64126.” [LF, p. 479]. A Case.Net entry from the

case of Ford Motor v. Maxine Mims, in which a judgment in the amount of “\$8,733.35 + interest of \$839, Attys Fees of \$1,310.00 + SPS Fees of \$40.00 + costs” was entered against Ms. Mims and garnishment issued, reveals that Maxine Mims was served at “2059 Wheeling, Kansas City, Mo. 64126”–the same address. [LF, pgs. 186-193; 479; 490-491]. Likewise, a Case.Net entry from the case of Arrowhead Acceptance Corp. v. Maxine Mims, in which a judgment in the amount of “\$1,669.07 + int + costs” was entered against Ms. Mims, reveals that Maxine Mims was served at “2059 Wheeling, Kansas City, Mo. 64126”–the same address. [LF, pgs. 182-185; 479; 492]. Likewise, a Case.Net entry from the 1990 personal injury case of Cecil Mims et al. v. Carl Larabee et al. and the Petition for Damages reveal that Maxine Mims was clearly a party to the suit as she filed a loss of consortium claim. [LF, pgs. 180-181; 479; 493-501]. A Case.Net entry reveals that Maxine Mims divorced Cecil Mims in 1992. [LF, pgs. 180-181]. This is confirmed by Ms. Mims’ juror questionnaire, in the case at hand, which lists her martial status as “divorce.” [LF, pgs. 180-181; 479]. The address listed for the numerous other debt collection actions against Cecil and Maxine Mims, pre-dating their divorce, confirms that they are the same individuals. [LF, pgs. 180-181; 479-501]. Thus, unquestionably Juror Mims had been involved in previous litigation when she remained silent to the clear question, “Now, not including family law, has anyone ever been a plaintiff or a defendant in a lawsuit before?” [Tr., p. 195 ll. 10-12].

Given the shear number of previous suits and contemporaneous nature of many, Ms. Mims’ silence to the explicit question “Now not including family law, has anyone

ever been a plaintiff or a defendant in a lawsuit before?” was clearly intentional. See Brines v. Cibis, 882 S.W.2d 138 (Mo. banc 1994); Wood v. Kriegshauser, 851 S.W.2d 574 (Mo. Ct. App. 1993); Massey v. Carter, 238 S.W.3d 198 (Mo. Ct. App. 2007) (where new trials were granted in medical malpractice cases, which resulted in defense verdicts, because jurors failed to disclose contemporaneous collection lawsuits that they had been parties to). See also Hoff v. Posten, 963 S.W.2d 13 (Mo. Ct. App. 1998) (where new trial was granted in a personal injury suit, after a defense verdict, because juror failed to disclose that she was a judgment debtor in two (2) prior collection actions). Bias and prejudice to a litigant are inferred from a prospective juror’s intentional withholding of material information during *voir dire*. See Schultz v. Heartland Health System, Inc., 16 S.W.3d 625, 627 (Mo. Ct. App. 2000). “Questions and answers pertaining to a prospective juror’s prior litigation experience are material.” Id. (citing to Brines v. Cibis, 882 S.W.2d 138, 140 (Mo. banc 1994)). Based on the above, Ms. Mims’ nondisclosure was intentional raising a presumption of bias and prejudice sufficient to warrant a new trial.

Next, Appellants attempt to establish a requirement that a juror must be present at a hearing on a Motion for New Trial in order to establish intent. To the contrary, Missouri law is well-established that a juror need not testify in open court in order for there to be a sufficient basis for granting a Motion for New Trial based on nondisclosure. As the Court noted in Hatfield:

The issue in determining a prospective juror’s intent in failing to disclose that she

was a defendant in an unrelated lawsuit for nonpayment of medical expenses **was not whether or not the juror subjectively intended not to disclose, but whether or not a reasonable person would have understood that she was being asked to disclose.** Hatfield v. Griffin, 147 S.W.3d 115, 119 (Mo. Ct. App. 2004) (Emphasis supplied).

Likewise, in Godefroid v. Kiesel Co., the Court ordered a new trial, without testimony, stating:

Initially, we note that the litigation abstracts supplied by Godefroid in support of their allegations of juror nondisclosure were sufficient proof of the jurors' involvement in previous litigation. Section 490.130 RSMo 2002 states, ...[r]ecords of proceedings of any court of this state contained within any statewide court automated record-keeping system established by the supreme court shall be received as evidence of the acts or proceedings in any court of this state without further certification of the clerk, provided that the location from which such records are obtained is disclosed to the opposing party. (Section 490.130). Godefroid's use of the litigation abstracts as proof is in compliance with this statute. 2003 WL 22399710 \* 4-5 (Mo. Ct. App. 2004).

The case at hand is analogous to Goderfroid. Like Goderfroid, Respondent's counsel had no reason to suspect juror misconduct until the return of the jury's verdict after a six (6) day trial where the jury took a mere forty (40) minutes to deliberate. [LF, pgs 45-47]. Specifically, in Goderfroid, a wrongful death case, the court granted Plaintiff's Motion

for New Trial. The Goderfroid court inferred prejudice noting that jury deliberations, which lasted forty-five (45) minutes, were an unusually short time when one considers the amount of evidence presented. Id. at \* 5. The same rationale holds true in this case given the length of trial and number of experts who testified.

State v. Mayes, State v. Miller, Portis v. Crenshaw, and Tobb v. Menorah Medical Center, relied on by Appellants, are distinguishable from the facts of this case as no records pursuant to Mo. Rev. Stat. § 490.130 were presented to the Court. See i.e. State v. Mayes, 63 S.W.3d 615 (Mo. banc 2002); State v. Miller, 250 S.W.3d 736 (Mo. Ct. App. 2008); Portis v. Crenshaw, 38 S.W.3d 436 (Mo. Ct. App. 2001); Tobb v. Menorah Medical Center, 825 S.W.2d 638 (Mo. Ct. App. 1992). Compare Groves v. Ketcherside, 939 S.W.2d 393 (Mo. Ct. App. 1997) (where court explicitly noted that an evidentiary hearing was **not** required because court records regarding the subject juror's prior litigation history were submitted with the Motion for New Trial).

As Judge Harold L. Lowenstein noted in his opinion written in the case at hand: "Defendants cite no case law supporting their argument that either an affidavit or testimony is necessary to support a finding of intentional nondisclosure. In this case, the trial court based its findings on the Case.Net litigation records submitted by Johnson, which demonstrate Mims's involvement as a defendant in numerous lawsuits. In addition, Mims's prior litigation is of recent vintage. At least three of the lawsuits against Mims were filed within the previous two years...The trial court properly found that Mims's nondisclosure was intentional." [Appendix, p. 29-30, Opinion of Court of

Appeals, p. 9-10]. Prejudice due to jury misconduct in failing to truthfully answer questions asked on *voir dire* need not be proved by direct evidence but may be inferred from facts and circumstances which reasonably support such finding. See Rodenhauser v. Lashly, 481 S.W.2d 231, 234 (Mo. 1972).

In sum, Juror Maxine Mims, did **not** disclose that she has been a Defendant in multiple lawsuits, including **three (3) different lawsuits during the last two (2) years alone**. [LF, pgs. 180-197; 479-501; 863-888]. Logically, when the explicit question “Now not including family law, has anyone ever been a plaintiff or a defendant in a lawsuit before?” has been asked, and re-asked, it is difficult to believe that a person would just happen to forget about three (3) different lawsuits against them during the last two (2) years when actual judgments have been entered and execution has commenced. The trial court correctly granted Respondent’s Motion for New Trial, because Juror Maxine Mims made intentional nondisclosures during jury selection by failing to respond to a clear question regarding her prior litigation experience, in that intentional nondisclosure raises a presumption of bias and prejudice sufficient to warrant a new trial. If the trial court grants a new trial, an appellate court allows all reasonable inferences supporting such a ruling and will not reverse unless there has been a clear abuse of discretion. See Godefroid v. Kiesel Co., 2003 WL 22399710 \* 4 (Mo. Ct. App. 2004); Seaton v. Toma, 988 S.W.2d 560, 561 (Mo. Ct. App. 1999). The trial court’s order granting Respondent’s Motion for New Trial and the Court of Appeals’ decision upholding the same should be affirmed.

## CONCLUSION

The trial court correctly granted a new trial because the issue of juror nondisclosure was timely raised in that Respondent had no reason to suspect juror misconduct until return of the jury's verdict after a six (6) day trial where the jury took a mere forty (40) minutes to deliberate in a complex medical malpractice case where eight (8) experts testified in total. Moreover, Juror Maxine Mims made intentional nondisclosures during jury selection by remaining silent to the unequivocally clear question "Now not including family law, has anyone ever been a plaintiff or defendant in a lawsuit before?," when in actuality, she had personally been a party to multiple collection cases and a personal injury case--including three (3) different lawsuits in the last two (2) years alone where actual judgments had been entered and execution commenced. As such, Ms. Mims' intentional nondisclosures raised a presumption of bias and prejudice tantamount to a per se rule mandating a new trial. For all the reasons fully briefed, the trial court correctly granted Respondent's Motion for New Trial and the Court of Appeals correctly affirmed the trial court's decision.

Respectfully submitted,  
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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I hereby certify:

That pursuant to Rule 55.03, the information included in this document is warranted by the existing law, are supported by the evidence and are not being raised for any improper purpose, such as to harass or delay the proceedings; and

That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains **7710 words**, excluding the cover, this certification, as determined by WordPerfect 8 software; and

That pursuant to Rule 84.06(a)(6), 13 point Times New Roman font from WordPerfect 8 is used in this document; and

That the disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus free; and

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\_\_\_\_\_ day of November, 2009, to:

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