IN THE
SUPREME COURT OF MISSOURI

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

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

SUBSTITUTE REPLY BRIEF OF APPELLANTS J. EDWARD McCULLOUGH, M.D. AND MID-AMERICA GASTRO-INTESTINAL CONSULTANTS, P.C.

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ARGUMENT

In this Reply Brief, Defendants-Appellants address certain arguments made by Plaintiff-Respondent, grouped into three sections based on Appellants' "Points Relied On" in their Opening Brief. Appellants' fourth section explains why this Court should not rely on certain arguments and authorities in Respondent's brief. Where Appellants do not address an argument made by Respondent, Appellants stand on the arguments in their Opening Brief.

I. Reply to Arguments Addressing Appellants' First Point Relied On, Which Argues That Attorneys Who Fail to Raise a Juror's Nondisclosure of Prior Litigation During Trial Waive the Issue

A. Standard of Review

Respondent correctly states that trial courts have discretion in granting a new trial. *See* Response Brief ("Resp. Br.") at 8. However, the specific issue of whether a party that fails to raise juror nondisclosure during trial thereby waives the right to do so post-trial is purely a question of law. That issue, therefore, is reviewed de novo. *See Psychiatric Healthcare Corp. of Mo. v. Dep't of Social Servs.*, 100 S.W.3d 891, 899 (Mo. App. 2003) ("In cases involving questions of law, this court reviews the trial court's determination independently, without deference to that court's conclusions.") (quotations omitted).

Respondent also cites *Rodenhauser v. Lashly*, 481 S.W.2d 231 (Mo. 1972), for the proposition that appellate courts are "more liberal" in affirming the grant of

a new trial than the denial of one. *See* Resp. Br. at 8 (citing *Rodenhauser*, 481 S.W.2d at 234). While *Rodenhauser* does use that language, the rationale is telling, given the facts of this case. After making that statement, the Court explained that the trial judge "heard both the voir dire examination and the jurors' testimony at the post-trial hearing. He was able to observe the attitude and demeanor of the jurors on both occasions and was in an advantageous position to determine if the concealments were intentional and prejudicial." *Rodenhauser*, 481 S.W.2d at 234. As discussed in Section III, Juror Maxine Mims, whose alleged nondisclosure is at issue, did not appear at the post-trial hearing. Thus, this Court's review of the trial court's holding should be less deferential than the Court's review in *Rodenhauser*.

B. The Holding of *Rodenhauser*

Respondent also cites *Rodenhauser* for its conclusion that a party did not waive a juror's nondisclosure of prior litigation by failing to use a Claims Indexing Bureau to discover the information during trial. *Id.* at 235. Nothing in *Rodenhauser* contradicts either of Appellants' alternative waiver arguments.

Appellants have primarily argued that their proposed waiver doctrine is harmonious with prior Missouri cases such as *Brines by and through Harlan v. Cibis*, 882 S.W.2d 138 (Mo. banc 1994). *See* Appellant's Opening Brief ("Op. Br.") at 23. *Brines* stated that a party could not raise a juror's nondisclosure after trial if that party was "privy to information" about the nondisclosure during trial. *Brines*, 882 S.W.2d at 140. Another case explained that information possessed by

an attorney falls within the *Brines* waiver rule. *Heitner v. Gill*, 973 S.W.2d 98, 106 (Mo. App. 1998). *Rodenhauser* actually supports Appellants' position because this Court distinguished that case from cases that "concern situations where there was actual knowledge, or where the records of the claims were in the files of the complaining party or his counsel." *Id.* at 235. That holding is consistent with Appellants' argument that information within counsel's possession implicates the waiver rule of *Brines*. The information at issue in *Rodenhauser* took forty-eight hours to access, *see id.*, presumably counsel had to leave the office to access it, and presumably it was not free of charge.

In contrast, the information on Case.Net is immediately and universally accessible, at no cost, for any attorney with access to the Internet. Therefore, *Rodenhauser* does not refute Appellants' argument that the information on Case.Net should be deemed within counsel's possession, and a party that fails to raise a juror's nondisclosure of prior litigation waives the issue if the information was available on Case.Net during trial.

In the alternative, Appellants have argued that if this Court disagrees with that conception, then it should overrule *Brines*. *See* Op. Br. at 28. It would be an unremarkable extension of that holding to also overrule *Rodenhauser*. Like *Brines*, *Rodenhauser* was based on the technology of its time. As we approach the year 2010, this Court should assess the appropriate scope of a waiver rule in the context of readily available Case.Net technology.

C. The Scope of the Waiver Doctrine

Respondent makes a slippery slope argument, stating that a waiver rule could extend beyond Case.Net into other databases. *See* Resp. Br. at 11. This Court, of course, can control of the scope of its rulings. Appellants advocate a waiver doctrine that is specific to Case.Net, and no more. The crux of Appellants' argument is that any Missouri lawyer can easily and freely access that system from any computer connected to the Internet. Therefore, a requirement to search Case.Net does not impose the type of "burden" that the *Brines* court did not want to impose on attorneys. *See Brines*, 882 S.W.2d at 140. That argument does not apply to PACER. PACER is not free, and thus the information on PACER is less readily available than information in an attorney's physical files. *See* Pacer Overview, http://pacer.psc.uscourts.gov/pacerdesc.html (last visited Nov. 23, 2009) (discussing the costs associated with PACER). A duty to search other states' databases would clearly fall outside the scope of what *Brines* permits the Court to impose on attorneys. Appellants are advocating a narrow rule extension of *Brines* that is specifically tied to information on Case.Net.

That limitation could allow some nondisclosures to go unnoticed, but a limited waiver doctrine provides the proper balance between addressing the harm presented by numerous retrials over juror nondisclosures and not imposing an undue burden on attorneys trying cases. The Court of Appeals expressed a similar sentiment in *McBurney v. Cameron*, 248 S.W.3d 36 (Mo. App. 2008). The court addressed Case.Net specifically in raising the issue of timeliness sua sponte. *Id.* at

41. The court's focus on Case.Net in addressing the issue suggests the court felt a rule focused specifically on Case.Net would adequately address the problem of jurors' nondisclosures being raised for the first time after trial. *See id.* at 41-42.

D. Alleged Delays As a Result of Searching

Respondent asserts that Appellants' conception of the *Brines* waiver rule would cause delays at trial by extending voir dire, by necessitating hearings during the trial, and by creating mistrials. Resp. Br. at 12. That argument fails for several reasons. First, all of those potential harms are better results than having to redo an entire trial. Clearly, an extension of voir dire or a hearing during the trial is worth the time to avoid an entire second trial (and possibly a third or fourth if the problem repeats itself). A mistrial is an undesirable result, but starting over after completing some of a trial is better than starting over after completing all of a trial. The Jackson County judiciary presumably weighed those issues before passing Local Rule 52.2, which dictates that in ordinary circumstances, a party asserting a juror's nondisclosure of prior litigation for the first time after trial has waived the issue. *See* Mo. 16th Cir. Ct. Loc. R. 52.2, *available at* http://www.16thcircuit.org/Orders/orders_localrules.asp (last visited Nov. 23, 2009).

Second, circuit courts likely would develop effective practices through implementation of the Case.Net waiver doctrine. Perhaps the venire panel could be cut to a manageable number, and then the parties would be given time to search Case.Net and raise any nondisclosure issues before the jury is sworn. Perhaps

time could be set aside after the first trial day to take up any juror nondisclosure issues the parties wish to raise. This Court does not need to establish policies with that level of detail. However, if any of the harms suggested by Respondent did occur, there would be effective ways to address those issues.

Finally, the number of mistrials is unlikely to be high, for two reasons. First, many juror nondisclosure cases focus on only one juror, and an alternate can replace one juror. In this case, Respondent raised the issue only with Juror Mims. *See* L.F. at 31 (motion for new trial p.6). *See also, e.g.*, *Brines*, 882 S.W.2d at 139; *McBurney*, 248 S.W.3d at 40; *Massey v. Carter*, 238 S.W.3d 198, 200 (Mo. App. 2007); *Doyle v. Kennedy Heating & Serv., Inc.*, 33 S.W.3d 199, 200 (Mo. App. 2000). There were two alternates on the panel. *See* Tr. at 423. Thus, one of them could have replaced Juror Mims if necessary, had that issue been raised during the trial. Second, if the parties discovered multiple nondisclosures during trial, then once that information was fully vetted, the parties and the court potentially could agree that the litigation experience of certain jurors was not prejudicial, and that those jurors could remain on the panel.

E. Case.Net Availability

Respondent argues that access to Case.Net is not universal, and that a waiver rule would favor large firms over small firms. Resp. Br. at 11. Respondents assert, with no evidence, that many trial attorneys have no access to a computer or do not know how to use one. While Appellants doubt the accuracy of

that assertion, such attorneys presumably would not discover the information on Case.Net after trial, and thus this issue does not affect them.

Case.Net is easily accessible, and searching the database is not difficult. As the *McBurney* court wrote, "[i]t would be realistic for an attorney to send a member of his or her clerical staff to any computer, at any time of day or night, to research the civil litigation records before submission of the case … ." *McBurney*, 248 S.W.3d at 41. Respondent's attorney does not work for a large firm. The firm's website lists only two attorneys under the heading of "Attorney Profiles." *See* HornLaw: Attorney Profiles, http://www.hornlaw.com/lawyer-attorney-1306792.html (last visited Nov. 23, 2009). Despite this fact, Respondent revealed the alleged nondisclosure to Appellants less than forty-eight hours after the jury's verdict. L.F. at 362-64. The proposed waiver doctrine does not favor large firms or small firms, or plaintiffs or defendants. Its only favoritism is given to parties who have prevailed in a jury trial.

Finally, Appellants have acknowledged that the interpretation of the waiver rule that they propose must account for the exceptional case. *See* Op. Br. at 27. If an attorney can demonstrate that he or she had no reasonable access to Case.Net during trial, or that the information was not reasonably available on Case.Net, then a party's ability to raise a juror's nondisclosure of prior litigation should not be deemed waived.

F. Retrospective Application of the Waiver Rule

Respondent asserts that if this Court agrees with Appellants' position on the waiver issue, it should not apply the doctrine retroactively to this case. *See* Resp. Br. at 13-15. Appellants largely stand on the analysis of that issue in their Opening Brief, *see* Op. Br. at 29-31, but will make one quick point. Respondents did not refute Appellants' primary argument on that issue, which is that the proposed waiver doctrine is an updated interpretation of *Brines*, rather than a new rule, and therefore it clearly applies to this case.

II. Reply to Arguments Addressing Appellants' Second Point Relied On, Which Argues the Question Asked of Juror Mims Was Not Clear, and Thus It Did Not Trigger a Duty for Her to Disclose Prior Litigation

A. Cases referencing "domestic relations" and "divorce proceedings"

In addressing Appellants' assertion that the question asked of the venire panel was ambiguous, Respondent claims that similar questions were determined to be clear in two cases. In this case, Respondent's counsel asked, "Now not including family law, has anyone ever been a plaintiff or a defendant in a lawsuit before?" L.F. at 31; Tr. at 195. Appellants contend that the phrase "[n]ow not including family law" causes the question to be fatally ambiguous. Respondent points to *Williams by and through Wilford v. Barnes Hospital*, 736 S.W. 2d 33 (Mo. banc 1987), and *Wemott v. Tonkens*, 26 S.W.3d 303, 308 (Mo. App. 2000),

for evidence that counsel's question was clear. See Resp. Br. at 18-19. However, neither case supports Respondent's position.

Respondent notes that in *Williams*, the venire panel was asked, "Have any of you folks ever been sued? I'm not talking about domestic relations. Other than that." *See* Resp. Br. at 18-19 (quoting *Williams*, 736 S.W.2d at 34-35). However, counsel asked several additional questions after asking the question that excluded domestic relations. *Williams*, 736 S.W.2d at 35. Most important, the *Williams* court never analyzed the effect of the words "domestic relations"; in fact, the court did not even discuss the clarity of the question. *See generally id.* The court's juror nondisclosure analysis focused on whether three jurors' nondisclosures were intentional or unintentional. *Id.* at 37-38. The non-responses of two of those three jurors were found to be reasonable and unintentional, due to the confusing nature of the questioning. *Id.* at 37.

Wemott is equally unhelpful to Respondent. Respondent points to this question asked of the venire panel: "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?" Resp. Br. at 19 (quoting *Wemott*, 26 S.W.3d at 305). Respondent asserts that the phrase "other than a divorce proceeding" is evidence that his counsel's question excluding "family law" was clear. *Id.* at 18-19. The question excluding "divorce proceedings," however, had no bearing on the court's analysis. The court determined that the juror's nondisclosure was intentional because the juror had

had his license suspended, and counsel had asked, "Has anyone ever had your driver's license suspended or revoked for any reason?" *Id.* at 305, 308. Plus, even if a court did find "divorce proceeding" to be a clear phrase, that phrase is far different from "family law." Presumably, a layperson has a basic idea of what constitutes a "divorce proceeding." However, the phrase "family law" has an unclear meaning, and the cases cited by Respondent do nothing to resolve that ambiguity.

B. The Question's Clarity as to Juror Mims

Respondent also argues that any general ambiguity in the question was irrelevant because Juror Mims's prior litigation had nothing to do with "family law." Resp. Br. at 19. First and foremost, that argument is premised on the wrong inquiry. The inquiry into the clarity of the question is "an objective inquiry that looks to whether … there exists no reasonable inability to comprehend the information solicited by the question." *McBurney*, 248 S.W.3d at 42 (quotations omitted). "The issue is whether a reasonable venire member *would* have understood what counsel intended." *Id.* In other words, the issue is the general clarity of the question. The inquiry asks whether "a reasonable venire member" would have understood the question, not whether a particular venire member *actually* understood the question, or *should have* understood the question based on personal experience. Respondent has cited no authority – and Appellants are not aware of any – for the notion that a voir dire question could be clear to some

venire members and unclear to others. The question is either clear or unclear, and the question asked by Respondent's counsel was unclear.

Even assuming, *arguendo*, that Juror Mims's personal experience is relevant to the clarity of the question, it is understandable that a layperson such as Ms. Mims would have been confused. Respondent states that Ms. Mims was a party to several debt collections and a personal injury suit. Resp. Br. at 19. While judges and lawyers clearly understand what it means to be a plaintiff or a defendant, a layperson may not understand that a debt collection against her made her a defendant in a lawsuit. In addition, the personal injury suit was filed in 1990 by her husband at the time, Cecil Mims. L.F. 480. Juror Mims was involved only as a loss of consortium plaintiff. L.F. at 499-500. To a layperson with no legal background, the phrase "family law" could include a lawsuit filed by a family member. Thus, it is not unreasonable to conclude that the question would have been confusing to Ms. Mims.

However, as previously noted, the law does not ask whether the question was clear to Juror Mims. The law asks whether the question was so clear that it "unequivocally trigger[d]" venire members' duty to respond. *Grab ex rel. Grab v. Dillon*, 103 S.W.3d 228, 241 (Mo. App. 2003). When the question is not clear, there is no duty to respond. *McBurney*, 248 S.W.3d at 42. Because counsel's question to the venire panel was not clear, Juror Mims had no duty to respond, and her silence did not constitute a nondisclosure. *See id.*

III. Reply to Arguments Addressing Appellants' Third Point Relied On, Which Argues That the Trial Court Abused Its Discretion by Holding That the Nondisclosure Was Intentional, in the Absence of Testimony

A. Respondent's Absence of Authority

Appellants assert that the trial judge abused his discretion by holding that Juror Mims's nondisclosure was intentional, in the absence of either oral or written testimony from Ms. Mims. Respondent asserts that "well-established" Missouri law dictates that no testimony is needed, but the two cases that Respondent cites for that proposition do not support that statement.

One of Respondent's cases, *Godefroid v. Kiesel Co.*, is an unpublished Court of Appeals opinion in a case that was transferred to this Court; therefore, it has no value as either precedential or persuasive authority. *See discussion* Sec. IV, Part A. Respondent also cites *Hatfield v. Griffin*, 147 S.W.3d 115 (Mo. App. 2004). In *Hatfield*, the court never stated that testimony from the juror was unnecessary, and in fact *the juror testified* about the nondisclosure. *See id.* at 120 (noting that the juror stated that the lawsuit "did not enter her mind").

Respondent relies on a passage from *Hatfield* that describes the inquiry as objective. *See* Resp. Br. at 26 (quoting *Hatfield*, 147 S.W.3d at 119). The inquiry, however, is not entirely objective. Under the two-part test required by Missouri courts, a nondisclosure is intentional "(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 purported forgetfulness is unreasonable." *Hatfield*, 147 S.W.3d at 119 (quoting *Williams*, 736 S.W.2d at 36) (emphasis added). The first part of the inquiry is objective. The second part clearly blends objective and subjective elements. The first issue is whether the juror "actually remembers the experience," which can only be determined by the juror's testimony. If the juror does not remember, the issue then becomes whether that forgetfulness is reasonable. While that inquiry is objective, the starting point is subjective. The court needs to hear the juror's explanation to assess the juror's reasonableness.

Hatfield demonstrates how the inquiry should work. First, the court strongly implied that the juror's testimony was essential. The court wrote, "A trial court's acceptance or rejection of the juror's explanation is not lightly overturned on appeal." *Hatfield*, 147 S.W.3d at 119 (emphasis added). Clearly, the court was using the juror's subjective answer as a baseline for analyzing the reasonableness of her nondisclosure. In its analysis, the court first determined that a reasonable person would have understood the question. *Id.* at 120. Next, the court tested the reasonableness of the juror's answer as to why she did not respond. *Id.* Upon determining that she did not have a good explanation, the court held that her explanation was unreasonable. *Id.* Therefore, in *Hatfield*, the juror's testimony was essential to the analysis.

Additionally, that interpretation is logical. "Intention is the purpose or design with which an act is done." Black's Law Dictionary 883 (9th ed. 2009)

(quoting John Salmond, *Jurisprudence* 378 (10th ed. 1947)). The court's objective, therefore, is to determine whether a particular juror had a purpose or design in failing to disclose information. The most effective way to determine whether somebody's action was based on a purpose or design is to hear from the person, through oral or written testimony. Even when a juror's lack of response seems clearly unreasonable, an explanation could change the outlook. For instance, a juror could reveal a traumatic event that occurred contemporaneously with the forgotten suit, or could reveal that the juror has a memory defect. Simply put, a court cannot adequately assess the objective reasonableness of a juror's nondisclosure without the juror's testimony.

B. Respondent's Attempt to Distinguish Appellants' Cases

Missouri courts agree that allegations of juror nondisclosure must be supported by written or oral testimony. *See, e.g.*, *State v. Mayes*, 63 S.W.3d 615, 626 (Mo. banc 2001); *State v. Miller*, 250 S.W.3d 736, 743 (Mo. App. 2008); *Portis v. Crenshaw*, 38 S.W.3d 436, 445 (Mo. App. 2001); *Tobb v. Menorah Med. Ctr.*, 825 S.W.2d 639, 642-44 (Mo. App. 1992). Respondent attempts to distinguish those cases by claiming that the parties to those cases did not make disclosures pursuant to Mo. Rev. Stat. § 490.130. Resp. Br. at 27. That provision states the unremarkable proposition that certified court records are evidence. Mo. Rev. Stat. § 490.130. None of the four cases listed above – all of which Respondent attempted to distinguish – made any reference to Mo. Rev. Stat. § 490.130. The absence of any mention reveals that Mo. Rev. Stat. § 490.130 is

irrelevant to the analysis as to whether juror testimony is necessary in evaluating an alleged nondisclosure. If that provision was important, then surely at least one of those courts would have noted the presence or the absence of such evidence.

Respondent did cite one relevant case: *Groves v. Ketcherside*, 939 S.W.2d 393 (Mo. App. 1996). In *Groves*, the court determined that a juror's nondisclosure was prejudicial without testimony from the juror. *Id.* at 396. *Groves*, however, was an exceptional case that is distinguishable for two reasons. First, the facts were egregious, and it was clear that the juror would have understood the question and remembered the prior suit. The juror had watched his wife die during childbirth. *Id.* at 394. He had sued the doctor for wrongful death and negligent infliction of emotional distress and had proceeded to trial, and the jury had ruled against him on both claims. *Id.* *Groves*, the case on which the juror sat, was a medical malpractice case. *Id.* The plaintiff's attorney asked several questions, including whether anyone "feels that you or a member of your immediate family has been a victim of extreme or excessive medical treatment by a physician?" *Id.* at 395. On those very specific facts, the Court of Appeals concluded that the juror's failure to respond "amounts to an intentional nondisclosure." *Id.* at 396.

Second, based on the unusual facts of *Groves*, the court found that the juror's presence likely influenced the verdict. *Id.* Specifically, the court wrote that "because receiving a zero verdict in a wrongful death action could have a significant bearing on the venire person's ability to fairly evaluate the evidence, we reverse and remand for a new trial." *Id.* That statement is significant because,

in Missouri, there are two ways in which a juror's nondisclosure could be considered prejudicial. One is that an intentional, material nondisclosure is per se prejudicial. *Brines*, 882 S.W.2d at 140. The second is that an unintentional nondisclosure is prejudicial when the juror's presence on the panel "did or may have influenced the verdict so as to prejudice the party seeking a new trial." *Williams*, 736 S.W.2d at 37. In stating that the juror's presence had a "significant bearing on the venire person's ability to fairly evaluate the evidence," *Groves*, 939 S.W.2d at 396, the court clearly determined that the juror's presence "did or may have influenced the verdict." *See Williams*, 736 S.W.2d at 37. The question of intentionality, therefore, was not dispositive on the issue of prejudice. Because the juror's presence likely influenced the verdict, the nondisclosure was deemed prejudicial, regardless of whether or not it was intentional.

More recent cases have clearly stated that a juror's testimony is essential when juror nondisclosure is alleged. *See Mayes*, 63 S.W.3d at 626; *Miller*, 250 S.W.3d at 743; *Portis*, 38 S.W.3d at 445. In *Miller*, the most recent of those cases, the language is particularly clear. The issue was whether a juror had failed to disclose a relationship with a member of the victim's family. *Miller*, 250 S.W.3d at 743. The court laid out the two-part *Williams* test, and then wrote, "To prove intentional juror concealment, a defendant must make that allegation in his motion for a new trial and factually support it with an affidavit or testimony from the non-disclosing juror." *Id.* The court noted that because of the absence of testimony, the defendant could not "meet the threshold proof requirements of intentional

nondisclosure." *Id.* The defendant also failed to demonstrate that the juror's nondisclosure influenced the verdict. *Id.* As a result, the defendant was unable to prove prejudice, and the court rejected his argument. *Id.*

Thus, the most recent pronouncement of Missouri law states that a juror's nondisclosure cannot be deemed intentional unless the juror has testified. Consequently, *Groves* would appear to be limited to its very specific and unusual facts. At most, *Groves* stands for the proposition that when the documentary evidence is so strong and unequivocal that it can be determined that a juror "did or may have influenced the verdict," a hearing regarding the intentionality of the juror's nondisclosure is unnecessary. In this case, there is no evidence that Juror Mims did or may have influenced the verdict. Juror Mims was part of a unanimous verdict that jurors reached in less than forty-five minutes. L.F. at 22, 25; Tr. at 1760, 1768-69. Her prior litigation experience had nothing to do with medical malpractice. L.F. at 180-81. Her only involvement in a tort claim was as a loss of consortium plaintiff, in a case filed approximately seventeen years before the trial in this case. L.F. at 480, 499-500. Respondent's only evidence in support of his motion for a new trial that related to Juror Mims was the information on Case.Net. *See* L.F. at 180-97. The trial court made no mention whatsoever of the *Williams* two-part test, nor did it provide any analysis as to why it had determined the alleged nondisclosure to be intentional. *See* Hrg. Tr. at 62 (App'x at A1); App'x at A2 (order granting new trial). The court failed to follow the law and simply presumed prejudice based on its unsupported conclusion that Juror Mims's

nondisclosure was intentional. *See id.* Without more, this Court has no basis for finding that Juror Mims's alleged nondisclosure was either intentional or influential to the verdict. Therefore, this Court should hold that the trial court abused its discretion by failing to follow the law in holding that Juror Mims's nondisclosure was intentional and prejudicial, in the absence of any testimony from Ms. Mims.

IV. Certain Arguments and Authorities Cited in Respondent's Brief Are Irrelevant and Should Not Inform This Court's Analysis of the Issues

A. Court of Appeals Cases That Were Transferred to This Court

Respondent relies heavily on *Godefroid v. Kiesel Co.*, 2003 WL 22399710 (Mo. App. Oct. 21, 2003). *See* Resp. Br. at 8, 9, 12-13, 15, 22, 26-27, 29. *Godefroid* is an unpublished case, and it is red-flagged on Westlaw. The information on Westlaw indicates that the case was transferred to this Court on February 24, 2004, and then was dismissed by this Court on May 4, 2004.[1] In Missouri, when the Supreme Court accepts transfer, the Supreme Court's action replaces that of the Court of Appeals. *See* Mo. R. Civ. P. 83.08 (stating that when a case is transferred to the Supreme Court, the parties "retain the same position as appellant and respondent as in the court of appeals"). Once an opinion has been

[1] The date of dismissal is noted on the main page of the opinion. The date of transfer appears after one clicks on the red flag.

superseded, it no longer carries any weight as precedent or as persuasive authority. *See State Employees' Retirement Sys. v. Jackson County*, 738 S.W.2d 118, 122 n.3 ("The withdrawn opinions … adduced by the state, are not a part of the case law of the state, even though they became public records when initially handed down. They should not be cited in briefs."). The same rule applies to Respondent's citation to the Court of Appeals opinion in this case. *See* Resp. Br. at 28.

B. The Statement that the Trial Court "Granted" a Mistrial

Respondent asserts that the trial court "granted Respondent's Motion for Mistrial." Resp. Br. at 4 n.1. That assertion is both factually incorrect and irrelevant. Respondent's counsel at trial stated that she was moving for a mistrial, "for the record." Tr. at 1662. The court then inquired of Respondent's counsel as to whether a mistrial was what she truly wanted. Tr. 1663. Upon realizing that her motion might actually be granted, Respondent's counsel backed off, and the parties eventually agreed to a limiting instruction. *See* Tr. at 1663-76. The court never granted a mistrial, and Respondent's counsel made it clear that she did not want a mistrial. Regardless, the point has no bearing on the issues before this Court, and this Court should not consider it as part of the analysis.

V. Conclusion

For all of the foregoing reasons, as well as the reasons expressed in Appellants' Opening Brief, this Court should reverse the circuit court's grant of

Respondent's motion for a new trial and reinstate the verdict in favor of Appellants.

Respectfully submitted,

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RULE 84.06(C) CERTIFICATE

The undersigned counsel for Defendants/Appellants certifies that this brief:

(1) Includes the information required by Rule 55.03; and

(2) complies with the limitations contained in Rule 84.06(b); and

(3) contains 5,338 words.

The undersigned has relied upon Microsoft Word in preparing this word count.

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RULE 84.06(G) CERTIFICATE

The undersigned counsel for Defendants/Appellants certifies that the disk submitted to the Court and sent to counsel for Respondent, which contains the Brief of Appellants, has been scanned for viruses and is virus-free, in compliance with Rule 84.06(g).

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

CERTIFICATE OF SERVICE

COMES NOW Defendants/Appellants and hereby certify that two copies of the above and foregoing Substitute Reply Brief of Appellants, along with a virus-free diskette, were mailed, postage prepaid, in the United States mail, on this 24th day of November, 2009, to:

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APPENDIX
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