

**Summary of SC90401, *Phil Johnson v. J. Edward McCullough, M.D., and Mid-America Gastro-Intestinal Consultants, P.C.***

Appeal from the Jackson County circuit court, Judge Gary D. Witt  
Argued and submitted Jan. 28, 2010; opinion issued March 9, 2010

**Attorneys:** McCullough and Mid-America were represented by Jonathan P. Kiefer, Brandon D. Henry and Adam S. Davis of Wagstaff & Cartmell LLP in Kansas City, (816) 701-1100; and Johnson was represented by Laurie L. Del Percio and Douglas R. Horn of The Horn Law Firm PC in Independence, (816) 795-7500. The Missouri Association of Trial Attorneys, which submitted a brief as a friend of the Court, was represented by Leland F. Dempsey and Ashley L. Baird of Dempsey & Kingsland PC in Kansas City, (816) 421-6868.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** Defendants sued for medical malpractice appeal the trial court's grant of a new trial based on a juror's failure to disclose her extensive and recent prior litigation history. In a unanimous per curiam decision that cannot be attributed to any particular judge, the Supreme Court of Missouri affirms the trial court's judgment. The trial court correctly determined that the prior-litigation question asked of potential jurors was reasonably clear and that the juror's failure to disclose her litigation experience was material and intentional, warranting a new trial. In future cases, to preserve the issue of a juror's nondisclosure, litigants must use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and must present relevant information to the court before trial. Courts must ensure litigants have the opportunity to make such searches and objections.

**Facts:** Phil Johnson sued Dr. J. Edward McCullough and Mid-America Gastro-Intestinal Consultants for medical malpractice, alleging they provided him with negligent medical treatment for a throat condition, resulting in permanent throat injuries. During jury selection, Johnson's counsel asked prospective jurors: "Now not including family law, has anyone ever been a plaintiff or a defendant in a suit before?" Although numerous prospective jurors responded affirmatively – prompting Johnson's counsel to ask each one merely whether the experience would affect the prospective juror's ability to serve fairly and impartially in Johnson's case – prospective juror Mims did not respond to the question and eventually was chosen to sit on the jury. After 40 minutes of deliberation following a six-day trial, the jury returned a verdict in favor of the doctor and Mid-America. Mims signed the verdict form. Johnson's counsel subsequently investigated Mims' litigation history using Missouri's online case-record service, Case.net, and discovered that Mims had been a defendant in multiple debt-collection cases and one personal-injury case and that three of these lawsuits had been filed within the previous two years. Johnson then filed a motion for a new trial, alleging Mims intentionally failed to disclose her prior litigation experience when asked during jury selection. Following a hearing, the trial court granted Johnson's motion and ordered a new trial, inferring prejudice from Mims' intentional concealment of her litigation history. The doctor and Mid-America appeal.

## **AFFIRMED.**

**Court en banc holds:** (1) The trial court correctly determined that counsel's question was reasonably clear. After a clear question has been asked, a prospective juror has the duty to give a full, fair and truthful answer to the question. In reviewing the grant of a motion for new trial based on a claim of juror nondisclosure, this Court first must determine – from the objective standpoint of whether a reasonable prospective juror would have understood what counsel intended – whether the question asked of the prospective juror was sufficiently clear in context to have elicited the undisclosed information. Here, the total applicable context does not render counsel's inquiry unclear. The question generally asked about prior litigation experience, specifically excluded any litigation involving domestic relations, and was not rendered confusing or ambiguous by follow-up questions or other surrounding context. From the standpoint of a reasonable prospective juror, debt-collection and personal-injury lawsuits are not “family law” disputes, which counsel's question excluded. So narrowed, the question unequivocally triggered Mims' duty to disclose, and her failure to answer a clear question constitutes a nondisclosure.

(2) The trial court did not abuse its discretion in finding Mims' nondisclosure was intentional and in ordering a new trial. Once this Court objectively determines a nondisclosure to a clear question occurred, it must determine whether the disclosure was intentional or unintentional. If the nondisclosure was unintentional, a new trial is not warranted unless prejudice resulted, whereas bias and prejudice is presumed if a juror intentionally withholds material information. Questions and answers pertaining to a prospective juror's prior litigation experience are material. Here, although Johnson did not provide the trial court with direct evidence explaining why Mims failed to answer the prior-litigation question, the record establishes that Mims' involvement in prior litigation is both extensive and recent, as demonstrated by the records Johnson's counsel found via Case.net and submitted to the court. There is no dispute that Mims was the person involved in that prior litigation. As such, there was no reason Mims would have been unable to understand the question or would have forgotten her litigation experiences.

(3) The trial court did not err in determining that Johnson's argument of juror nondisclosure was timely. While the court of appeals has encouraged counsel to make challenges to potential jurors before the case is submitted to the jury, *McBurney v. Cameron*, 248 S.W.3d 36, 41 (Mo. App. 2008), it was not error for the trial court here to follow the law in existence at the time of trial. Further, there was no evidence it was practicable for the attorneys in this case to have investigated the litigation histories of all the selected jurors before the jury was empanelled. In light of technology advances allowing greater access to information about the past litigation history of potential jurors, litigants should not be allowed to wait until a verdict has been rendered to search for prior litigation history. Until this Court can promulgate a rule to provide specific direction, to preserve the issue of a juror's nondisclosure in future cases, a party must use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and, before trial, present to the trial court any relevant information. To facilitate this search, trial courts are directed to ensure the parties have an opportunity to make a timely search before the jury is empanelled and shall provide the means to do so if counsel indicates that such means otherwise are not reasonably available.