

**IN THE SUPREME COURT OF MISSOURI**

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**SC 90401**

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**J. EDWARD McCULLOUGH, M.D. AND MID-AMERICA GASTRO-  
INTESTINAL CONSULTANTS, P.C.**

**Defendants - Appellants,**

**vs.**

**PHIL JOHNSON,**

**Plaintiff - Respondent.**

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**APPEAL FROM THE  
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
HONORABLE GARY D. WITT, JUDGE**

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**BRIEF OF *AMICUS CURIAE* MISSOURI ASSOCIATION OF TRIAL  
ATTORNEYS IN SUPPORT OF RESPONDENT**

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## INTEREST OF AMICUS CURIAE

The issues presented by this case are of importance and interest to others besides the immediate parties, including the Missouri Association of Trial Attorneys ("MATA"). MATA is a non-profit, professional organization consisting of approximately 1,400 trial attorneys in Missouri, most of whom represent the citizens of the state of Missouri. For over fifty years, MATA lawyers have vigilantly worked to protect their clients and Missouri citizens from injustice. In doing so, MATA strives to promote the administration of justice, to preserve the adversary system, and to apply its knowledge and experience in the field of law to advance the interests and protect the rights of individuals. MATA's members as well as attorneys across the state of Missouri will be directly affected by the Court's decision in this case.

As a result of its substantial collective experience litigating cases against large corporate defendants, MATA supports Plaintiff-Respondent's position that her motion for new trial was timely and the granting of a new trial based upon juror nondisclosure should be left to the sound discretion of the trial court and no arbitrary "internet search" requirement should be imposed upon the litigants during trial. This requirement would create unjust burden and expense and place claimants represented by smaller firms with lesser resources at a disadvantage. This issue of timely filing of a motion for new trial based upon juror nondisclosure is an issue of considerable interest to MATA and its members.

On behalf of the citizens of the State of Missouri, MATA urges this court to affirm the ruling of the trial court.

### **CONSENT OF THE PARTIES**

MATA has received consent from counsel for Respondent, Phil Johnson, to file this brief. MATA sent a request for consent for the filing of this brief to counsel for the Appellants, J. Edward McCullough, M.D., and Mid-America Gastro-Intestinal Consultants, P.C., on November 10, 2009. Plaintiff asked for consent from the counsel for the Appellant by letter via telefax and U.S. Mail on November 10, 2009; however counsel for the Appellant has not consented to the filing of this brief. Therefore, MATA is seeking an order from this Court pursuant to Rule 84.05(f)(3) granting leave to file this *Amicus Curiae* brief. (See Motion of Missouri Association of Trial Attorneys for Leave to File Brief as Amicus Curiae in Support of Respondent).

**STATEMENT OF FACTS**

MATA hereby adopts the Statement of Facts of Respondent.

## ARGUMENT AND AUTHORITY

### **I. THE GRANTING OF A NEW TRIAL BASED UPON JUROR NONDISCLOSURE IS AN ISSUE OF CRITICAL IMPORTANCE AND SHOULD BE LEFT TO THE DISCRETION OF THE TRIAL COURT AND THE COURT SHOULD NOT IMPOSE AN ARBITRARY “INTERNET SEARCH” REQUIREMENT UPON LITIGANTS DURING TRIAL.**

Missouri litigants should not be charged with an additional duty to discover a juror’s nondisclosure during trial. Imposing an additional duty to investigate every jurors’ answers during trial would undermine the foundation of jury selection and would result in a logistical nightmare comprised of delays, additional and unnecessary costs to all parties, and it would place claimants who are represented by smaller firms with lesser resources at an unjust disadvantage.

First, a juror’s nondisclosure cannot be found with “relative ease” by Missouri litigants. While Missouri provides access to CaseNet to retrieve information concerning causes of action brought in the state of Missouri, a juror’s litigation history is not limited to the state of Missouri. Many jurors may have litigation histories in states other than Missouri, and many of these states do not have a free internet base search akin to CaseNet. For example, if a juror were involved in an accident in California and was then subject to litigation in that state, this information from California would not appear on CaseNet. In addition, other states who do happen to have similar internet searches often charge a fee for access to these web based searches and often also require a special license or login. For example, PACER, a federal database, charges a fee for each inquiry

and many practitioners who do not practice in federal court may not have a subscription to this database. In short, if the Court were to impose a requirement to discover a juror's nondisclosure during trial, firms would be in essence be charged with a duty to subscribe to the federal PACER database as well as the databases of the fifty states for their investigation.

Second, litigants would also be forced to contend with the following factors in their internet database search of a juror's litigation history: common names, maiden names, name change as a result of divorce, etc. For example, if the juror's name is "Carl Smith" or "Bob Jones", counsel would then need to do a deeper search and crosscheck into the juror's birthdate, address, etc. Maiden names and divorced individuals would further complicate these searches. Furthermore, if a duty to investigate is imposed, would this duty extend beyond a juror's litigation history to his or her answers to all other questions of counsel as well? This would create an even greater burden on litigants and their investigation while conducting a trial.

The obstacles resulting from such oppressive search criteria would open a Pandora's box of problems for litigants, particularly claimants who are represented by smaller firms with lesser resources. Meanwhile, corporate parties represented by large firms with greater resources would be at an inherent advantage. Consequently, an investigation of a juror cannot be found with "relative ease," and this would place an especially difficult burden upon claimants who are represented by smaller firms with lesser resources.

Lastly, the Missouri Supreme Court has already adopted a rule which adequately prevents counsel from reserving objections based on juror nondisclosure until there is an

adverse outcome for that party: **“A litigant who is privy to information regarding a prospective juror’s false answer or nondisclosure waives any right to complain after trial by failing to challenge the juror when the information was obtained.”** Brines v. Cibis, 882 S.W.2d 138, 140 (citations omitted). This longstanding Missouri rule does not “require that a litigant investigate whether prospective jurors have answered the questions truthfully unless the litigant had some indication that the answer was false.” Brines at 140. The Missouri Supreme Court previously determined in Brines **“the requirement that litigants challenge jurors when the nondisclosure becomes apparent is sufficient to prevent abuse.”**

## II. THE TRIAL COURT HAS GREAT DISCRETION IN DETERMINING WHETHER TO GRANT A NEW TRIAL BASED UPON JUROR NONDISCLOSURE.

“During *voir dire*, each prospective juror is under a duty to fully, fairly and truthfully answer each question asked so that determination may be made about each juror’s qualifications and counsel may make informed challenges.” McBurney v. Cameron, 248 S.W.3d 36, 41 (Mo. Ct. App. W.D. 2008) (citations omitted). Regardless of which party challenges a juror’s nondisclosure, when the trial court determines “there is intentional nondisclosure of a material matter, prejudice will be presumed, resulting in the necessity of a new trial”. Id. at 41-42.

**“The determination of whether the nondisclosure was intentional or unintentional lies within the sound discretion of the trial court.”** Brines, 882 S.W.2d 138, 141, (Holstein, J., dissenting) (citations omitted). The trial court here found Mims’s

disclosure was intentional, and the trial court's factual finding should be affirmed "absent a showing of an abuse of discretion." Id. The Missouri Supreme Court has defined abuse of discretion as:

"Judicial discretion is abused when a trial court's ruling is clearly against the logic of the circumstances then before the court and is **so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration**; if reasonable men can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion."

Wingate v. Lester E. Cox Medical Center, 853 S.W.2d 912, 917 (Mo. banc 1993).

Here, the Missouri Court of Appeals upheld the trial court's decision, who heard and saw the evidence during a six-day trial, and found: (1) counsel posed a general question during voir dire that was neither confusing nor ambiguous; (2) Mim's nondisclosure of her involvement in prior litigation was intentional and inferred prejudice from her concealment; and (3) Johnson's juror nondisclosure argument was timely because there has been no showing that it was *practicable* for either party to take time out from trial to discover the nondisclosure and reveal it to the court. (Lowenstein, J., Missouri Court of Appeals decision at \*11). Thus, the trial court's finding here should not be disturbed here because it had a "reasonable foundation in fact" and it was based upon "competent evidence in the record or within the knowledge of the trial court."

**CONCLUSION**

For the reasons stated above, the Court should affirm the opinion of the trial court.

Respectfully submitted,

By: \_\_\_\_\_

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**CERTIFICATE OF COMPLIANCE**

The undersigned certifies that a copy of the computer diskette containing the full text of Brief of *Amicus Curiae* Missouri Association of Trial Attorneys In Support of Respondent is attached to the Brief and has been scanned for viruses and is virus-free.

Pursuant to Rule 84.06(c), the undersigned hereby certifies that: (1) this Brief includes the information required by Rule 55.03; (2) this Brief complies with the limitations contained in Rule 84.06(b); and (3) this Brief contains 1,608 words, as calculated by the Microsoft Word software used to prepare this brief.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing was mailed on this 13<sup>th</sup> day of November, 2009, to:

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