

IN THE
SUPREME COURT OF MISSOURI

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

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

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

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JURISDICTIONAL STATEMENT

This appeal arises from the trial court's post-trial Order of June 2, 2008, sustaining Plaintiff-Respondent's Motion for New Trial. "L.F." at 439, 895; App'x at A10.

On February 11, 2008, following a civil trial in the Circuit Court of Jackson County, a jury rendered a verdict in favor of Defendant-Appellant. L.F. at 22; App'x at A1. On April 1, 2008, the trial court entered judgment in favor of Appellant. L.F. at 324; App'x at A5. On April 3, the circuit court filed an amended judgment that did not change the disposition. L.F. at 327; App'x at A8. After the trial court's order of June 2, 2008, Appellant filed a motion to reconsider and vacate the order on June 11. L.F. at 452-724. Appellants filed timely notice of appeal that same day. L.F. at 725-29; *see also* Mo. R. Civ. P. 81.04(a). By order of June 19, 2008, the Court overruled Appellant's motion and entered judgment granting a new trial. L.F. at 895; App'x at A13-A14.

The Court of Appeals Western District, by opinion issued on June 30, 2009, affirmed the circuit court's grant of a new trial. The Court of Appeals then denied Appellant's motion for reconsideration or Transfer. Appellant then filed a Motion for Transfer in this Court, pursuant to Rule 83.04, and this Court sustained that motion on October 6, 2009. Thereby, the Supreme Court of Missouri properly asserted its jurisdiction over this matter. *See* Mo. Const. Art. V, § 10.

STATEMENT OF FACTS

Background Facts

This medical malpractice case involves a dispute over the treatment of Plaintiff-Respondent Phil Johnson's dysphagia, or swallowing difficulty. Mr. Johnson claimed that Defendant-Appellant J. Edward McCullough, M.D. (hereinafter "Dr. McCullough"), a gastroenterologist in the Kansas City area, deviated from the standard of care by performing an esophageal dilatation in plaintiff on August 20, 1999. Tr. at 502-03; 1697-1701. At some point during or shortly after the esophageal dilatation by Dr. McCullough, a perforation developed in Mr. Johnson's esophagus. Mr. Johnson was required to undergo a repair procedure called a thoracotomy to repair the perforation. Tr. at 1023-24. Mr. Johnson claimed residual, lifestyle-altering pain and discomfort occurred as a result of the thoracotomy. L.F. at 15-16. At trial, plaintiff sought total damages in the amount of \$339,311.55, which was itemized for the jury as follows: past economic damages in the amount of \$47,311.55, past noneconomic damages of \$90,000, future economic damages in the amount of \$2,000 and future noneconomic damages of \$200,000. Tr. at 1711-21.

During the afternoon of August 20, 1999, Mr. Johnson presented to Saint Luke's Hospital Northland for treatment by Dr. McCullough. Tr. at 1551-52. After having a discussion with Mr. Johnson and his wife regarding Mr. Johnson's complaints and medical issues, Dr. McCullough discussed with Mr. Johnson that he intended to perform an esophagogastroduodenoscopy ("EGD"). Tr. at 1551-55. Dr. McCullough also discussed with Mr. Johnson the possibility that he might also perform an esophageal

dilatation. Tr. at 1551; 1567. Dr. McCullough raised the possibility of an esophageal dilatation because the procedure would be necessary in the event that he encountered a stricture in the esophagus during the EGD that was a result of the patient's gastroesophageal reflux disease ("GERD"). Tr. at 1555. It was likely that an esophageal spasm was also present and if so, the spasm could be treated and improved by an esophageal dilatation. Tr. at 1655. During the pre-procedure discussion with Mr. and Mrs. Johnson, Dr. McCullough explained the potential risks and complications of the EGD and dilatation procedures, including esophageal perforation. Tr. at 1555-57. Following the discussion of potential risks and complications, Mr. Johnson agreed to proceed with the procedures. Tr. at 1557. At no point during their pre-procedure discussion did Mr. Johnson ever mention the symptom of a dry mouth to Dr. McCullough. Tr. at 1564-65.

At some point during the EGD, Dr. McCullough decided that an empiric esophageal dilatation should be performed. Tr. at 1585-86; 1588-89. An empiric dilatation involves the gentle stretching of the patient's esophagus in order to address the symptoms complained of by the patient, which were consistent with GERD and which were likely to be improved through the performance of said procedure. Tr. at 952-53. That procedure dilates an esophageal narrowing that is unappreciable on EGD and/or addresses inflammation and edema found at the gastroesophageal junction. Tr. at 1586. Dr. McCullough decided to perform the procedure because he thought it would improve the patient's swallowing difficulties. Tr. at 1584-85. The dilatation also was expected to improve the patient's swallowing by potentially stopping an esophageal spasm

abnormality. Tr. at 1588-89. At the conclusion of the procedures, Dr. McCullough believed and noted that Mr. Johnson was suffering from GERD with intermittent esophageal spasm, which accounted for the patient's swallowing difficulties. Tr. at 1587. Dr. McCullough made a change to Mr. Johnson's medication regimen to address ongoing acid reflux. Tr. at 1588. If Mr. Johnson's swallowing problems did not resolve after two to three months, additional tests would be conducted and a video swallowgram would be performed. Tr. at 1587-88.

Following the procedure, Mr. Johnson was taken to the recovery room, where he remained for one and one-half hours. Tr. at 1595-97. At that point, Dr. McCullough believed that the procedures and Mr. Johnson's tolerance thereof and recovery therefrom had gone as planned. Tr. at 1595.

During the evening on August 20, 1999, Mr. Johnson felt pain in his chest, nausea and shortness of breath. Tr. at 739-41. The pain and other issues persisted, and Mr. Johnson also had a fever. Tr. at 740-41. Mr. Johnson's wife took him to the emergency room at Saint Luke's Hospital Northland. Tr. at 742. Based upon a CT scan, a perforation of the esophagus was suspected; thus, Mr. Johnson was transferred to Saint Luke's Hospital of Kansas City. Tr. at 526-27; 1023. Mr. Johnson and his wife were met at Saint Luke's Hospital of Kansas City by Mark Allen, M.D. ("Dr. Allen"), Dr. McCullough's partner who was on duty, and Michael Gorton, M.D. ("Dr. Gorton"). Tr. at 528-29, 1022.

Upon Mr. Johnson's arrival at Saint Luke's Hospital of Kansas City, he underwent a barium swallow study. Tr. at 1023. The results of that test confirmed the presence of

an esophageal tear, which required surgical repair. Tr. at 1023. Dr. Gorton decided to perform surgery, called a thoracotomy, because, if left untreated, the esophageal tear could become infected and Mr. Johnson could experience additional complications. Tr. at 1024. Dr. Gorton testified at trial that while the surgical procedure performed on Mr. Johnson was not insignificant, he fully expected that Mr. Johnson would tolerate the surgery well and go on to have an event-free recovery. Tr. at 1025.

History of the Case

Respondent's sole claim of negligence was that Dr. McCullough should not have proceeded with the esophageal dilatation after finding no definite stricture during the EGD. Tr. at 502-03, 1697-1701. Respondent claimed that the procedure was not indicated because Mr. Johnson suffered from medication-induced xerostomia (dry mouth), a condition for which a dilatation is not indicated. Tr. at 1703-04. Respondent claimed that as a result of the thoracotomy procedure, he experienced continuing and permanent pain and discomfort along the incision line from the thoracotomy, and that this discomfort has caused him to lead a more sedentary lifestyle and suffer damages. Tr. at 780-88, 798-99.

Appellants contended that Mr. Johnson did not suffer from medication-induced xerostomia at the time he saw Dr. McCullough on August 20, 1999. Tr. at 1264. In fact, it was explained to the jury at trial that not a single medical record of Mr. Johnson's at any point prior to Dr. McCullough's involvement with patient indicated that xerostomia was present in Mr. Johnson. Tr. at 1264-65. Appellants established at trial that the occurrence of a perforation is a known potential complication of an esophageal dilatation

procedure, which can and does occur without negligence. Tr. at 1344. Respondent did not dispute this fact through his evidence.

Finally, Appellants presented evidence through the treating physicians of Mr. Johnson, including Dr. Gorton, to establish that long-term, lifestyle altering pain and discomfort, such as that complained of by Mr. Johnson at trial, was very uncommon and would not be expected to occur, particularly when the thoracotomy and the patient's immediate post-operative course went very well and proceeded without complication, as was true in this case. Tr. at 1104-05; 1107-08.

The only opinion regarding an alleged deviation from the standard of care by Dr. McCullough was offered by Robert Zarranz, an otolaryngologist from Florida whose testimony was presented by videotape to the jury at trial. Tr. at 502-03. Plaintiff also offered expert testimony from Terry Tyler Martinez, Ph. D., a toxicologist from Saint Louis, Missouri, who testified regarding the medication-related aspects of Respondent's claims. Tr. at 565-716.

Appellants offered expert testimony from Terrence Coleman, M.D., a local gastroenterologist, who testified that Dr. McCullough met and exceeded the standard of care throughout his care and treatment of Mr. Johnson. Tr. at 1402. Appellants also offered the expert testimony of Robert Barkin, M.B.A., Pharm. D. ("Dr. Barkin"), a doctor of pharmacology from Chicago. Tr. at 1201-1304. Dr. Barkin testified that a patient would not be likely to exhibit a symptom of a dry mouth associated with Serzone and amitriptyline, drugs that Mr. Johnson was taking, after the Serzone had been a part of the medication regimen for twenty months, and after the amitriptyline had been used for

nine months, as was the case with Mr. Johnson. Tr. at 1262. Dr. Barkin stated that as of August 20, 1999 there was no indication in the medical records that Mr. Johnson complained of or suffered from medication-induced xerostomia. Tr. at 1263-64.

The trial of this case lasted six trial days. L.F. at 23-25. After a forty-minute deliberation, the jury returned a unanimous verdict in favor of Appellants. Tr. at 1760, 1768-70; L.F. at 22-25, 324, 327; App'x at A1-A4, A5-A9. The verdict was rendered on February 11, 2008. Tr. at 1760; 1768-70; L.F. at 22-25; 324; 327; App'x at A1-A4; A5-A9. On April 1, 2008, the trial court entered judgment on the jury's verdict in favor of Appellants. L.F. at 324; App'x at A5. An amended judgment was entered on April 3, 2008. L.F. at 327; App'x at A8-A9.

Respondent filed a Motion for New Trial and Suggestions in Support Thereof on March 17, 2008. L.F. at 26-311. That motion was deemed filed by the trial court on April 1, 2008. L.F. at 325; App'x at A6-A7. In his Motion for New Trial, Respondent contended, inter alia, that Juror Maxine Mims failed to disclose that she had been a defendant in prior lawsuits. L.F. at 30-32.

Appellants filed their Response in Opposition to Respondent's Motion for New Trial with exhibits on April 21, 2008. L.F. at 329-67. Appellants opposed all alleged grounds for a new trial offered by plaintiff. L.F. at 329-67. Appellants argued that Respondent's Motion for New Trial failed to set forth sufficient information to establish that Juror Mims even knew of the lawsuits that plaintiff claimed were not disclosed during jury selection. L.F. at 333-34. In addition, Appellants pointed out that Respondent's counsel accessed the Case.Net information pertaining to Juror Mims within

forty-eight hours of the jury's verdict and sent the same to Appellant's counsel. L.F. at 333-34; 361-64. Appellants argued that Respondent's counsel could have just as easily run the Case.Net search regarding Juror Mims and the other jurors during the trial and prior to the time the jury deliberated, and should not have waited until after the adverse verdict to complain of the alleged nondisclosure. L.F. at 333-34.

A hearing on Respondent's Motion for New Trial took place on June 2, 2008. *See* Hrg. Tr. at 2-63. During the hearing, Respondent's counsel argued that a new trial was warranted because Juror Mims had failed to disclose that she had been a defendant in prior lawsuits, in response to this question from Respondent's counsel: "[n]ow, not including family law, has anyone ever been a plaintiff or a defendant in a lawsuit before?" Hrg. Tr. at 9-13. Juror Mims was not present and was not questioned during the post-trial hearing, and Respondent's counsel presented no testimony from Juror Mims either by deposition or by affidavit. *See* Hrg. Tr. 2-63. Appellants therefore argued that the absence of testimony from Juror Mims precluded a finding that her alleged nondisclosure was intentional. Hrg. Tr. at 46-47.

Ultimately, the trial court sustained Respondent's Motion for New Trial, based on Juror Mims's nondisclosure. Hrg. Tr. at 61-62; L.F. at 439, 895; App'x at A10-A14. On June 11, 2008, Appellants filed their Motion to Reconsider and Vacate Order Granting New Trial with exhibits. L.F. at 452-724. Appellants raised several issues with regard to the alleged juror nondisclosure by Juror Mims. Appellants argued that the question posed by Respondent's counsel during voir dire was ambiguous because of the prefatory phrase, "[n]ow not including family law." L.F. at 453-58. Thus, Appellants argued, the question

did not trigger in Ms. Mims a duty to respond. *Id.* Appellants also presented evidence that a number of venire members who had litigation history had failed to respond to counsel's question, further demonstrating that the question was unclear. L.F. at 457-58; 460-724.

Appellants also contended that Respondent failed to timely raise the issue of an alleged juror nondisclosure by waiting until after an adverse verdict, when a Case.Net search could have easily been run by Respondent's counsel during the trial, and prior to the jury's deliberations. L.F. at 458.

Respondent opposed Appellants' Motion to Reconsider and Vacate Order Granting New Trial and his Suggestions in Opposition Thereto, which were filed on June 14, 2008. L.F. at 730-894. The court overruled Appellants' Motion to Reconsider and Vacate Order Granting New Trial, and on June 19, 2008, the court entered an order and judgment in which a new trial was ordered based upon juror nondisclosure. L.F. at 895-96; App'x at A13-A14. Appellants timely filed their Notice of Appeal. L.F. at 725-29.

POINTS RELIED ON

I. The trial court erred in granting Plaintiff-Respondent's post-trial Motion for New Trial, because Respondent waived his right to complain of this issue, in that the claim of intentional juror nondisclosure was not timely raised by Respondent, who instead waited until after an adverse verdict to raise the issue when the issue could have been raised by Respondent prior to the commencement of jury deliberations, which occurred at the conclusion of a trial that lasted six trial days.

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

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

Heitner v. Gill, 973 S.W.2d 98 (Mo. App. 1998)

Doyle v. Kennedy Heating & Serv., Inc., 33 S.W.3d 199 (Mo. App. 2000)

II. The trial court erred in granting Respondent's post-trial Motion for New Trial, because Juror Maxine Mims did not make intentional nondisclosures during jury selection, in that the question asked of the venire panel by counsel for Respondent regarding the panel members' respective prior litigation experience was unclear and did not trigger in Juror Mims a duty to respond with the entirety of her litigation experience.

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

Keltner v. K-Mart Corp., 42 S.W.3d 716 (Mo. App. 2001)

Grab ex rel. Grab v. Dillon, 103 S.W.3d 228 (Mo. App. 2003)

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

III. The trial court erred in granting Respondent’s post-trial Motion for New Trial, because Juror Maxine Mims did not make intentional nondisclosures during jury selection, in that Juror Mims’s nondisclosures were, at most, unintentional, and no prejudice resulted to Respondent from Juror Mims’s service on the jury or from her unintentional nondisclosure.

State v. Miller, 250 S.W.3d 736 (Mo. App. 2008)

Williams by and through Wilford v. Barnes Hosp., 736 S.W.2d 33 (Mo. banc 1987)

Tobb v. Menorah Medical Center, 825 S.W.2d 638 (Mo. App. 1992)

Dick v. Children’s Mercy Hosp., 140 S.W.3d 131 (Mo. App. 2004)

ARGUMENT

I. The trial court erred in granting Plaintiff-Respondent’s post-trial Motion for New Trial, because Respondent waived his right to complain of this issue, in that the claim of intentional juror nondisclosure was not timely raised by Respondent, who instead waited until after an adverse verdict to raise the issue when the issue could have been raised by Respondent prior to the commencement of jury deliberations, which occurred at the conclusion of a trial that lasted six trial days.

Standard of Review

The waiver issue presented by this argument is purely a question of law. A *de novo* standard of review applies to questions of law, with no deference given to the trial court’s conclusions. See *Psychiatric Healthcare Corp. of Mo. v. Dep’t of Social Servs.*, 100 S.W.3d 891, 899 (Mo. App. 2003).

Argument and Authorities

The Supreme Court of Missouri should reverse the trial court because the trial court held as timely Respondent’s post-verdict discovery of information that was readily available during trial. Specifically, Respondent based his new trial motion on Juror Maxine Mims’s failure to disclose prior litigation – a nondisclosure that Respondent easily could have discovered during trial via Case.Net. This Court should hold that attorneys who fail to raise an issue of juror nondisclosure with respect to information that is available on Case.Net before alternate jurors have been excused have waived their right to raise the issue post-trial.

Such a rule is consistent with Missouri case law, which dictates that attorneys who possess information about a juror and do not raise the issue during trial have waived that issue. *Brines by and through Harlan v. Cibis*, 882 S.W.2d 138, 140 (Mo. banc 1994). In *Brines*, the trial court overruled a motion for a new trial based on juror nondisclosure. *Id.* at 139. This Court reversed that decision and remanded for a new trial. *Id.* at 140. One of the respondent's arguments was that the appellant should be barred from asserting juror nondisclosure because the appellant had not exercised "due diligence" in investigating jurors' responses during the trial. *Id.* The Court rejected that argument, citing "the delays and logistical difficulties in imposing a duty to investigate every juror's answers" *Id.* However, the Court noted that litigants cannot move for new trials based on jurors' nondisclosures if they were "privy to" the information during the trial. *Id.* This Court should hold that information on Case.Net is within the universe of information that attorneys possess, and therefore attorneys who choose to ignore that information during trial have waived the issue of a juror's nondisclosure of prior litigation.¹

That holding would save substantial judicial resources; would avoid wasted time spent by citizens serving on juries; would prevent the harm that juror nondisclosure rules attempt to prevent; would avoid the untenable situation in which two cases, presenting substantially the same evidence and testimony, produce different results; and would

¹ As will be set out more thoroughly later in Appellant's brief, the Court could allow for an exception to this rule in unusual circumstances.

respond to concerns expressed by lower courts in Missouri. Such a holding also would recognize that technology has changed since this Court decided *Brines*, and that the Court should therefore update its *Brines* holding. In the alternative, if this Court does not agree that such a rule is harmonious with *Brines*, then the Court should over-rule *Brines*.

A. Requiring Attorneys to Raise Juror Non-disclosure Issues During Trial Would Save Substantial Judicial Resources While Achieving Other Policy Goals

1. *Preservation of Judicial Resources*

Under the trial court's decision, post-verdict motions for a new trial based on juror nondisclosure of prior litigation are considered timely. Because courts have interpreted the rule of *Brines* in that manner, cases frequently must be re-tried simply because a particular juror did not disclose prior litigation experience. In addition, this issue leads to a large number of appeals. While it is difficult to quantify the number of retrials, numerous appellate opinions have granted a new trial or have otherwise reviewed a juror's nondisclosure of prior litigation. *See, e.g., Spiece v. Garland*, 197 S.W.3d 594, 596-97 (Mo. banc 2006) (reversing grant of new trial); *Brines*, 882 S.W.2d at 140 (remand for new trial); *Williams by and through Wilford v. Barnes Hosp.*, 736 S.W.2d 33, 34-35 (Mo. banc 1987) (remand for new trial); *State ex rel. Mo. Highways and Transp. Comm'n v. Greenwood*, 269 S.W.3d 449, 455 (Mo. App. 2008) (affirming denial of new trial); *McBurney v. Cameron*, 248 S.W.3d 36, 47 (Mo. App. 2008) (affirming denial of new trial); *Byers v. Cheng*, 238 S.W.3d 717, 725 (Mo. App. 2007) (affirming denial of new trial); *Massey v. Carter*, 238 S.W.3d 198, 202 (Mo. App. 2007) (remand for new trial); *Campise v. Borcharding*, 224 S.W.3d 91, 96-97 (Mo. App. 2007) (remand for

evidentiary hearing); *Hatfield v. Griffin*, 147 S.W.3d 115, 120 (Mo. App. 2004) (remand for new trial); *Nadolski v. Ahmed*, 142 S.W.3d 755, 768 (Mo. App. 2004) (remand for new trial); *Keltner v. K-Mart Corp.*, 42 S.W.3d 716, 727 (Mo. App. 2001) (reversing grant of new trial); *Schultz v. Heartland Health System, Inc.*, 16 S.W.3d 625, 627 (Mo. App. 2000) (remand for new trial). That list of mostly recent cases offers only a sampling of trials that have spawned appellate opinions on this issue. In addition, this issue likely has presented itself in many cases that did not produce published opinions.

Both the *McBurney* court and the dissenting judge in *Brines* recognized the strain that an insufficient waiver doctrine places on the judicial system. The *McBurney* court wrote that “timeliness in a juror challenge is important in view of the expense and burden to parties and taxpayers of conducting another jury trial.” *McBurney*, 248 S.W.3d at 41. In *Brines*, Judge Holstein wrote, “A new trial subjects the courts, defendant and taxpayer to substantial cost. The egregiousness of invading a party’s potential right to exercise peremptory challenge for obscure reasons pales when compared to the substantial burdens of a new trial order when no prejudice occurred.” *Brines*, 882 S.W.2d at 143 (Holstein, J., dissenting).

This case presents an opportunity for the Court to assist the Missouri court system in operating efficiently. All too frequently, judges, attorneys, clients, court personnel, and jurors spend days or even weeks trying a case, only to have the verdict overturned due to a juror’s nondisclosure of prior litigation. The burden on the taxpayers of appeals and retrials is substantial. *McBurney*, 248 S.W.3d at 41. The burden on the other eleven jurors is also significant. They have given up time at their job and with their families to

serve on a jury, and when a case must be re-tried, their effort has been wasted. *See id.* (noting the “collateral damage to innocent jurors who have already donated a significant amount of time to the matter”). The retrial then delays another case, frustrating the administration of justice. All of this, in turn, damages the public’s faith in the operation of the court system. This Court should hold that parties who raise a juror’s nondisclosure of prior litigation after trial, when the information was available on Case.Net, have waived the issue. That holding would reduce the burden that retrials place on the Missouri court system.

2. *Addressing Immediately Potential Problems with the Jury*

The underlying rule at issue states that prejudice is presumed when a juror intentionally fails to disclose information. *Brines*, 882 S.W.2d at 140. As a result, a finding of prejudice is “tantamount to a per se rule mandating a new trial.” *Id.* That rule demonstrates that this Court prefers juries on which all jurors have fully answered voir dire questions to juries on which at least one juror has withheld information. A holding that attorneys waive a juror’s nondisclosure of prior litigation by failing to raise it during trial would further the goal of populating juries with jurors who have fully disclosed relevant information.

Under the present interpretation of *Brines*, counsel for both sides have incentive to approach the juror nondisclosure issue with willful blindness. The *Brines* opinion addressed this “sandbagging” concern, stating that counsel who are “privy to” information about a juror’s incorrect response and fail to raise the issue timely have waived the issue. *Brines*, 882 S.W.2d at 140. Later decisions have interpreted *Brines* as

dictating that post-trial motions for a new trial are timely, without inquiry into whether the information was available on Case.Net. *See McBurney*, 248 S.W.3d at 41. Knowing of this interpretation, attorneys might, as a matter of strategy, stay away from Case.Net during trial. Then, if the attorney loses, he or she can use Case.Net to determine whether grounds exist for a new trial motion. A less scrupulous attorney might even do the Case.Net search during trial and then feign surprise upon “discovering” the issue after a disappointing verdict.

In either scenario, a potential problem goes undiscovered because attorneys have incentive not to discover and reveal the information. Anytime a jury includes a juror who did not disclose information during voir dire, the best result for the system is that the nondisclosure be discovered as quickly as possible. If the case goes forward without the juror being challenged, only two results are possible. Either the losing party will be granted a new trial based on the nondisclosure, or the verdict will stand, and the nondisclosure will go unaddressed. Both scenarios are problematic, in light of the many financial and practical difficulties associated with a new trial, as well as the system’s disfavor of juries that include members who have failed to disclose information. An interpretation of Missouri law that encourages attorneys to search Case.Net during trials will lead to earlier discovery of juror nondisclosures. The waiver doctrine proposed by Appellant would achieve that result.

3. Avoiding Contradictory Results

When a case must be re-tried as a result of juror nondisclosure, there are two possible results, both of which are negative for the court system. One possibility is that

the second trial will yield the same result as the first. In that case, the second trial has used the taxpayers' money, the court's time, the jurors' time, and the attorneys' time, only to reinstate the original verdict. The second possibility is that the new trial produces a different result. Conceptually, the Court could view the new result as being a "better" result, if achieved without an issue of juror nondisclosure. However, such inconsistent results damage the public's trust in the judicial system.

In Missouri, and presumably everywhere, maintaining the public's trust in the judicial system is considered an important goal. *See Osborne v. Purdome*, 244 S.W.2d 1005, 1016-17 (Mo. banc 1951) (discussing the importance of maintaining public confidence in the judiciary). In discussing the doctrine of stare decisis, the U.S. Supreme Court listed one of the rationales as "the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). If different results from two cases presenting similar issues will shake the public's confidence in the judicial system, then conflicting verdicts from the same case, based on substantially the same evidence and testimony, surely will shake the public's confidence. In the case of a retrial based on juror nondisclosure, an entire trial is eradicated despite the attorneys, clients, and judge having committed no wrong. The need for the second trial may be difficult for a layperson to understand in those circumstances. This Court, therefore, should require attorneys to do Case.Net searches during trial to preserve the nondisclosure issue, thereby limiting new trials and preserving public confidence in the system.

4. *Concerns expressed by lower courts*

Finally, this Court should hold that Case.Net searches are within the scope of the *Brines* waiver rule because lower courts in Missouri have expressed concern about this issue, and also about overloaded dockets. Years ago, the Court of Appeals Eastern District expressed concern about an increase in new trial motions based on juror nondisclosure. *See Doyle v. Kennedy Heating & Serv., Inc.*, 33 S.W.3d 199 (Mo. App. 2000). Although it affirmed the trial court's grant of a new trial, the court wrote that "granting a motion for new trial in these types of situations [is] not favored, especially when the lawyers could have prevented this by bringing forth their allegations prior to jury deliberation" *Id.* at 201. The court expressed concern about "sandbagging by losing parties," and then "strongly encourage[d] parties who have information about possible allegations of juror's intentional nondisclosure prior to jury deliberation to bring it forth before the case is given to the jury." *Id.* at 202.

In *McBurney*, the Court of Appeals Western District raised sua sponte the issue of whether a post-verdict motion for a new trial, based on a juror's nondisclosure of prior litigation, should be considered timely. *See McBurney*, 248 S.W.2d at 41-42. The Western District acknowledged that this Court had addressed the waiver issue in *Brines* but opined that "the issue may not necessarily be settled forever in view of the technological advances in the thirteen years since *Brines*." *Id.* at 41. The court then "commend[ed] consideration of this matter to the attention of counsel trying future cases." *Id.* at 42. The Court of Appeals Southern District, in a case addressing a different issue, noted how the Missouri court system is overloaded. *See Branson Hills*

Assocs., L.P. v. First Am. Title Ins. Co., 258 S.W.3d 568, 574-75 (Mo. App. 2008). In discussing the importance of controlling dockets, the court wrote that “[i]t is well known that the volume of cases filed has become such that if courts do not dispose of cases with reasonable dispatch, the backlog will be such that many persons will not be able to have their cases heard within a reasonable time” *Id.* Certainly, any retrial adds to the backlog for trial courts.

The circuit courts are most burdened by new trials, and circuit judges have also spoken out regarding the need for a stronger waiver rule. The circuit judge in this case stated that juror nondisclosure “has probably been the bane of trial judges’ existence as well as trial lawyers” Hrg. Tr. at 61-62. In a case that is also before the Court on this issue, a circuit court judge denied the defendant’s motion for a new trial based on juror nondisclosure. *Overlap, Inc. v. A.G. Edwards & Sons, Inc.*, No. 03CV201858 (Mo. 16th Cir. Ct., Div. 70, May 14, 2008 order); App’x at A15-A19.² The circuit judge praised the court in *McBurney* for “recogniz[ing] that in this modern environment, it is unfair to the parties, the jurors, and the taxpayers to wait until after an unfavorable verdict to raise potential nondisclosures that are available on Case.net.” *Id.* at A17. *See*

² Appellant recognizes that circuit court cases are not precedent, and that citation of trial court orders outside of the case at bar is unusual. However, Appellant believes the waiver issue is of particular importance to Missouri circuit courts, and thus Appellant cites two other circuit court opinions for the persuasive value of presenting circuit judges’ concerns about this issue.

also *Rinehart v. Shelter Gen. Ins. Co.*, No. 03CV225804 (Mo. 16th Cir. Ct., Div. 2, March 27, 2006 order); App'x at A20-A33. The judge in *Rinehart* suggested “placing the burden on a party who claimed nondisclosure to demonstrate that he or she made reasonable efforts to obtain the litigation history of a venireperson who failed to disclose such history and that such history was not readily retrievable.” *Id.* at A32. As of June 12, 2009, Jackson County has adopted a local rule with language similar to that suggested by the court in *Rinehart*. See Mo. 16th Cir. Ct. Loc. R. 52.2.³

³ The rule reads:

Because of the expense of litigation and the burden on judicial resources occasioned by retrials necessitated by juror nondisclosure of litigation history, parties in jury trials shall search Casenet for the names of all jurors before the presentation of evidence in the trial. In the event that the search indicates that a juror may have failed to reveal information relevant to an inquiry about litigation history during voir dire, the party discovering such information shall immediately bring that information to the attention of the court and the other parties to the action. A party claiming nondisclosure of litigation history in a motion for new trial shall have the burden of demonstrating that the identity of any juror failing to disclose litigation history was not reasonably available by Casenet search before the presentation of evidence unless otherwise directed by the Court.

These judicial statements further support the argument that the Court's interpretation of *Brines* should be clarified. This Court should hold that attorneys who fail to raise a juror's nondisclosure of prior litigation during trial have waived the right to do so post-trial, if the information was available on Case.Net. Such a rule would force attorneys to perform Case.Net searches during trial and would greatly benefit the Missouri court system.

B. *Brines* Did Not Endorse Willful Blindness, and This Court Should Apply the Waiver Rule of *Brines* When an Attorney Fails to Access Information Readily Available on Case.Net; In the Alternative, the Court Should Over-rule *Brines*

If this Court agrees that attorneys who fail to execute a Case.Net search during trial have waived the issue of juror nondisclosure of prior litigation, the Court must address the relationship between that holding and *Brines*. The world has changed since 1994, when this Court decided *Brines*, and in particular the advent of Case.Net technology should cause the Court to view this issue through a slightly different lens. However, the central thesis of *Brines* remains valid, and the Court can implement Appellant's proposed waiver rule without over-ruling *Brines*. In the alternative, if the Court disagrees with that conception, then the Court should over-rule *Brines*.

Mo. 16th Cir. Ct. Loc. R. 52.2, available at

http://www.16thcircuit.org/Orders/orders_localrules.asp (last visited Oct. 22, 2009).

1. *Applying the Waiver Rule to Case.Net is Harmonious With Brines*

A primary rationale for the *Brines* court's holding was its desire to avoid imposing an undue burden on attorneys. Specifically, the Court wrote, "the delays and logistical difficulties in imposing a duty to investigate every juror's answers outweigh the benefits derived from that duty." *Brines*, 882 S.W.2d at 140. The *Brines* court also noted the "sandbagging" concern that Appellant has raised, stating that the Court "already has fashioned a rule that adequately addresses that concern. 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." *Id.* Other Missouri decisions have clarified that, under *Brines*, an attorney waives the right to seek a new trial based on juror nondisclosure "when counsel had actual knowledge of the nondisclosed information or when that information was within materials in counsel's possession." *Heitner v. Gill*, 973 S.W.2d 98, 106 (Mo. App. 1998) (citing *Rodenhauser v. Lashly*, 481 S.W.2d 231, 235 (Mo. 1972)) (emphasis added).

The *Brines* court, therefore, did not endorse willful blindness, and its waiver rule extends beyond an attorney's actual knowledge. The rule encompasses the idea of constructive notice by imputing to the attorney knowledge of information within the attorney's possession. Attorneys who possess information about a juror's nondisclosure and either fail to review the information or choose to ignore it waive the right to raise that nondisclosure issue post-trial. *See id.* Finding information about a juror through Case.Net is no more difficult than reading through a stack of files; in fact, it is simpler because of the electronic searching function. This Court, therefore, should hold that the

information available on Case.Net is “information ... within materials in counsel’s possession.” See *Heitner*, 973 S.W.2d at 106. As a result, counsel should be deemed to have waived the right to file post-trial motions based on information that was available on Case.Net during the trial.

The *Brines* court was concerned about the burden of placing any affirmative obligation on counsel to “investigate” a juror’s answers. *Brines*, 882 S.W.2d at 140. The waiver doctrine proposed by Appellant, however, does not require an “investigation”; it simply requires that attorneys view readily available information, rather than choosing to ignore it. Because of Case.Net, requiring attorneys to verify jurors’ answers about litigation history does not impose a significant burden. As the *McBurney* court recognized, “[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, rather than waiting until after an adverse verdict to do so.” *McBurney*, 248 S.W.3d at 41.

Case.Net “can be readily accessed by any computer at any time.” *McBurney*, 248 S.W.3d at 41. All the attorney needs is access to the Internet. See *Your Missouri Courts: Missouri Case.Net*, <https://www.courts.mo.gov/casenet> (last visited Oct. 22, 2009). From Case.Net’s home page, an attorney can simply click on “Litigant Name Search,” type in the juror’s name, and hit the “Find” button. See *id.* At that point, the results, if any,

appear for the named juror.⁴ *See id.* One need not be a lawyer or an expert in Internet searching to execute a search on Case.Net. In this case, Respondent's counsel apparently had no trouble finding the information about Juror Mims after the trial. Within forty-eight hours of the verdict, Respondent's counsel sent correspondence to Appellants' counsel regarding the alleged nondisclosure. L.F. at 362-64.

The central message of *Brines* was that the Court was drawing a line between information that would be difficult for an attorney to obtain and information that was either known by the attorney or readily available. *See Brines*, 882 S.W.2d at 140; *Heitner*, 973 S.W.2d at 106. This Court, therefore, can easily harmonize Appellant's position with *Brines* by endorsing a small and logical clarification of *Brines*, in light of technological advances. If the Court determines that the information on Case.Net is

⁴ In some instances, a juror may have a common name that leaves doubt as to whether a particular action involved the juror. Addresses assist in the inquiry, but Appellant does not intend to impose an obligation on counsel to investigate case files. When a Case.Net search reveals potentially undisclosed litigation involving jury members, the court should simply ask the implicated jurors whether they were involved in the actions on the Case.Net report.

While the court would again be relying on the responses of jurors, the court is far more likely to get accurate information by asking an individual juror whether he or she was involved in a specific action than by posing a general question about litigation to all members of the venire panel.

“within materials in counsel’s possession,” it follows that an attorney who fails to raise during trial a juror’s nondisclosure of prior litigation has waived the issue. Because the information on Case.Net is so easily accessed, the Court should deem that information to be within counsel’s possession, and should apply the *Brines* waiver rule to that information.

The interpretation of *Brines* that Appellant proposes is far from radical. Cases and statutes frequently impute either notice or possession to a party based on logic and fairness, through the doctrines of constructive notice and constructive possession. *See, e.g.,* Mo. Rev. Stat. § 195.010(34) (defining “constructive possession” in the context of controlled substances); *Sutton Funding, LLC v. Mueller*, 278 S.W.3d 702, 706-07 (Mo. App. 2009) (noting that a party would have “constructive notice” if a mortgage was recorded); *Phelps v. City of Kansas City*, 272 S.W.3d 918, 920 (Mo. App. 2009) (addressing whether a public entity had “constructive notice” of a dangerous condition on the property); *Thomason Investments, L.L.C. v. Call*, 229 S.W.3d 297, 302 (Mo. App. 2007) (noting that a party claiming adverse possession had to prove “actual or constructive possession” of the real estate); *Mason v. Wal-Mart Stores, Inc.*, 91 S.W.3d 738, 743 (Mo. App. 2002) (addressing whether an employer had “constructive notice” in the context of a sexual harassment claim). By interpreting *Brines* to require Case.Net searches during trial, the Court would simply be acknowledging that the law does not always limit possession to actual possession, or notice to actual notice. In the context of Case.Net searches, the Court should deem attorneys to have constructive notice or constructive possession of the information readily available in Case.Net’s database.

Such a rule is consistent with *Brines*, it achieves the policy goals previously discussed, and it also allows for flexibility in unusual circumstances. Normally, an attorney filing a post-verdict motion for a new trial based on juror nondisclosure should be deemed to have waived the issue if the information was available on Case.Net. However, the Court could allow attorneys the opportunity to demonstrate that the Court should apply an exception to the waiver rule. In a short trial, in which voir dire and submission of the case occur on the same day, an attorney may never have the opportunity to view Case.Net. An exception could also apply in the unlikely event that an attorney had no Internet access until after the verdict. Conceptually, an exception would dictate that, under the circumstances, the attorney did not have constructive notice or possession of the information on Case.Net. In practice, the rule should presume that an attorney filing a post-trial motion for a new trial, based on a juror's nondisclosure of prior litigation, has waived the issue. The attorney could defeat the presumption by demonstrating that the information was not reasonably available on Case.Net during trial, or that it would have been impracticable for the attorney to have accessed the information.

In this case, the Court should hold, as a matter of law, that Mr. Johnson's attorney had constructive notice of, or constructive possession of, the information available on Case.Net. The trial lasted six business days, plus a two-day break for the weekend. L.F. at 23-25. Opposing counsel informed Appellant's counsel of the alleged nondisclosure less than forty-eight hours after the jury had announced its verdict. L.F. at 362-64. It is abundantly clear, therefore, that opposing counsel had the time and the opportunity to

execute a Case.Net search and discover Juror Mims's litigation history during trial. This Court should hold that Mr. Johnson waived the juror nondisclosure issue, and the Court should reinstate the defense verdict.

2. *In the Alternative, the Court Should Over-rule Brines*

If this Court reads *Brines* as irreconcilable with Appellant's proposed waiver rule, then the Court should over-rule *Brines*. If the Court reads the waiver rule of *Brines* as applying only when counsel has actual notice or physical possession of information about a juror's nondisclosure, then the doctrine of *Brines* is outdated.

While the Court generally adheres to previous decisions under stare decisis, the doctrine "is not absolute, and the passage of time and the experience of enforcing a purportedly incorrect precedent may demonstrate a compelling case for changing course." *Independence-Nat. Educ. Ass'n v. Independence Sch. Dist.*, 223 S.W.3d 131, 137 (Mo. banc 2007). "Courts are not infallible. Nor is the law, as was formerly considered, the emanation of pure reason. It is a process, an evolution, growing out of the demands and needs of a constantly changing and developing social order." *State ex rel. Meininger v. Breuer*, 264 S.W. 1, 15 (Mo. banc 1924). This case presents a scenario in which society has evolved, and the law should evolve with it. If the Court determines that the waiver rule of *Brines* does not apply to information on Case.Net, then the Court should over-rule precedent due to changed circumstances.

The *Brines* court's reluctance to require attorneys to investigate jurors' litigation history was logical based on the technology of 1994. At the time, Case.Net was not available. *McBurney*, 248 S.W.3d at 41. Determining the litigation histories of a dozen

jurors was truly a burdensome task. *See Brines*, 882 S.W.2d at 140. Now, information about jurors' litigation histories is easily available through Case.Net. In 2009, the benefit to the court system of a waiver rule greatly outweighs the burden on attorneys. As described above, the benefits include saving substantial judicial resources; avoiding wasted time spent by citizens serving on juries; preventing the harm that juror nondisclosure rules attempt to prevent; avoiding situations in which two cases, presenting substantially the same evidence and testimony, produce different results; and responding to concerns expressed by lower courts in Missouri. The burden to attorneys, on the other hand, is minimal. Therefore, if the Court believes it cannot harmonize Appellant's proposed waiver rule with *Brines*, the Court should over-rule *Brines*.

While the resulting doctrine would be the same, the Court's conception as to whether to over-rule *Brines* is relevant to this case. If the Court construes the Case.Net waiver rule as following the *Brines* dictate, then there is no issue about whether to apply the waiver rule in this case. If Respondent is deemed to have possessed the information about Juror Mims, then Respondent waived the right to challenge Juror Mims by failing to do so during trial. *See Brines*, 882 S.W.2d at 140. However, if the Court creates a "new rule," then it must decide whether to apply the rule prospectively or retroactively.

Generally, this Court applies new law retroactively, but the Court has the authority to decide, based on the merits of an individual case, whether to apply a new law prospectively or retroactively. *Sumners v. Sumners*, 701 S.W.2d 720, 723 (Mo. banc 1985). Missouri courts generally do not apply changes to the law retroactively if the

change is procedural as opposed to substantive. *Id.* If the law is substantive, then courts apply a three-part test to determine whether to apply the law prospectively only.

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).

The rule proposed by Appellant implicates the doctrines of waiver and estoppel, which are substantive doctrines. *See Century Fire Sprinklers, Inc. v. CNA/Transp. Ins. Co.*, 87 S.W.3d 408, 415-16 (Mo. App. 2002) (referring to “the substantive concepts of estoppel and waiver”). Applying the three-part test, a new law would not over-rule clear precedent. This specific issue, as to whether an attorney’s failure to perform a Case.Net search waives the issue of a juror’s nondisclosure of prior litigation, has not been brought before the Court. Second, the purpose of the waiver rule would be enhanced by applying it in this case, because a new trial would be avoided. Third, the balancing of interests favors Appellant. The Appellant lost the benefit of a unanimous jury verdict, rendered after only forty minutes of deliberations. Tr. at 1760, 1768-70; L.F. at 22-25, 324, 327.

To the extent Respondent relied on the previous rule by waiting until after trial to perform the Case.Net search, Respondent engaged in the type of willful blindness that this Court should discourage.

As argued above, this Court does not need to reach this issue, because the Court should interpret *Brines* as dictating that Respondent waived the right to move for a new trial after the verdict. However, if the Court decides it must over-rule *Brines* to create a waiver rule based on Case.Net, then it should apply that rule retroactively.

II. The trial court erred in granting Respondent’s post-trial Motion for New Trial, because Juror Maxine Mims did not make intentional nondisclosures during jury selection, in that the question asked of the venire panel by counsel for Respondent regarding the panel members’ respective prior litigation experience was unclear and did not trigger in Juror Mims a duty to respond with the entirety of her litigation experience.

Standard of Review

Appellate courts review the clarity of voir dire questions *de novo*, and the standard for clarity is whether “a lay person *would* reasonably conclude that the undisclosed information was solicited by the question.” *McBurney*, 248 S.W.3d at 42.

Argument and Authorities

Even if this Court disagrees that Respondent waived the nondisclosure issue, the Court should reinstate the verdict because the ambiguous question posed by Respondent’s counsel did not trigger Juror Mims’s duty to respond. The trial court erroneously concluded that the question was sufficiently clear that Juror Mims had a duty to respond, describing her litigation experience.

When juror nondisclosure is raised, the court must first determine whether the question to the juror was sufficiently clear to trigger the juror’s duty to respond. *See Massey*, 238 S.W.3d at 201 (“The duty to disclose is triggered only after a clear question has been asked.”); *see also Keltner*, 42 S.W.3d at 723 (noting that “[c]ourts will not permit attorneys to take advantage of ... ambiguous questions to impeach a verdict they dislike”). The Court must determine whether the question, in context, was unambiguous.

McBurney, 248 S.W.3d at 42. A court will only find nondisclosure by a juror “after a clear question posed to the jury panel unequivocally triggers a duty to respond.” *Grab ex rel. Grab v. Dillon*, 103 S.W.3d 228, 241 (Mo. App. 2003) (emphasis added).

When assessing the clarity of the question, the Court does not evaluate whether an attorney would understand it, but rather, whether “a lay person *would* reasonably conclude that the undisclosed information was solicited by the question.” *McBurney*, 248 S.W.3d at 42. The party seeking a new trial bears the burden of demonstrating that the question was unambiguous, “especially when that party’s counsel was the one who framed the question in the first place.” *Id.* Thus, Respondent bears a substantial burden in this case, as the party who framed the question and who now seeks a new trial.

Respondent’s counsel posed the following question to the panel during voir dire: “Now not including family law, has anyone ever been a plaintiff or a defendant in a lawsuit before?” L.F. at 30-32; Tr. at 195. Only ten venire members responded affirmatively. Tr. at 195-201. The question posed by Respondent’s counsel was ambiguous, and therefore it did not trigger a duty for Juror Mims to respond with her litigation experience.

The question’s prefatory phrase, “now not including family law,” was particularly ambiguous to laypersons. That phrase alone, without further explanation, made the question fatally defective. The phrase “not including family law” was ambiguous to a layperson because it invited venire members to guess as to which legal matters might fall under the heading of “family law.” Even for attorneys, “family law” is not a clearly defined body of law. For instance, the Missouri Revised Statutes do not contain a section

entitled “Family Law.” *See generally* Mo. Rev. Stat. The American Jurisprudence legal encyclopedia does not have a section entitled “Family Law.” *See generally* Am. Jur. 2d. “Wills” and “Family Law” are separate units on the Missouri bar exam, but surely family lawyers assist with the wills of clients going through a divorce. Attorneys, therefore, might disagree as to whether wills are part of “family law.” The Black’s Law Dictionary defines “family law” as “the body of law dealing with marriage, divorce, adoption, child custody and support, and other domestic-relations issues.” BLACK’S LAW DICTIONARY 491 (7th ed. 2000). The American Bar Association’s Section of Family Law states on its website that its “members are dedicated to serving in the field of family law in areas such as adoption, divorce, custody, military law, alternative families, and elder law.” ABA: Section of Family Law, <http://www.abanet.org/family/home.html?ptc=aztopics> (last visited Oct. 22, 2009). The Black’s definition names two areas not covered by the ABA’s statement – marriage and child support – and the ABA’s statement names three areas not covered by the Black’s definition – military law, alternative families, and elder law.

For a layperson, the risk of confusion is greater because of the nature of the phrase. For instance, a layperson might consider any legal matter involving a family member to fall into the category of “family law.” And, even if a layperson understands that “family law” is a particular type of law, that person may have little knowledge of the areas that “family law” comprises. As a result, counsel’s question excluding family law matters was not clear enough to “unequivocally trigger” Juror Mims’ duty to respond. *See Grab*, 103 S.W.3d at 241.

In addition, counsel failed to follow up with information that would have helped venire members to better understand the question. In that sense, this case is analogous to *McBurney*. In *McBurney*, counsel first asked whether jury members had made a claim based on an injury, but after other questions, counsel expanded the inquiry to ask whether “anyone else ever had ... been a defendant in a claim or lawsuit or members of your immediate family other than what we just talked about?” *McBurney*, 248 S.W.3d at 42, 43. In holding that a jury member who had been a defendant did not have a duty to disclose that litigation, the court noted counsel’s failure to clear up any ambiguity that resulted from this line of questioning. *Id.* at 46. The court stated that counsel should have given examples, “such as specifying that he meant to include, for instance, domestic, contract, business, credit card, landlord-tenant, small claims, and neighborhood disputes” *Id.* In this case, Respondent’s counsel could have clarified the ambiguity by defining the term “family law.” Counsel could have given examples, such as divorce, adoptions, and other matters falling within counsel’s conception of that phrase. However, counsel’s silence left the definition of that phrase to each juror, and therefore the question was fatally ambiguous. Because the question was ambiguous, Juror Mims had no duty to disclose her litigation history, and her failure to do so did not constitute a “nondisclosure.” *See id.* at 42 (“There is no issue of nondisclosure when the question does not trigger a duty to respond.”).

This case is distinguishable from *Massey*, a case in which the Court of Appeals stated that the absence of follow-up questions added clarity. *Massey*, 238 S.W.3d at 201-02. The initial questions in *Massey* were significantly different from the question in this

case because they were unlimited. In *Massey*, counsel asked the venire panel, “have any of you ever filed a lawsuit?” *Id.* at 201. After receiving a response, counsel asked, “have any of you ever been sued?” *Id.* Counsel in *Massey* did not exclude “family law,” or any other subset of law. In the absence of subsequent questions, therefore, counsel’s initial question “remained a general question.” *Id.* In this case, however, the question was never a purely general question. The question omitted a subset of cases, defined only by the amorphous phrase “family law.” Because of the uncertainty presented by counsel’s question, the absence of further clarification preserved the ambiguity, rather than preserving the clarity. Counsel should have further defined “family law” to assist venire members in understanding the types of cases counsel intended to exclude.

In addition, Juror Mims was not alone in her apparent misunderstanding of the question. Appellants provided the trial court with evidence suggesting that the question was unclear and ambiguous to many venire members. As is set forth in the exhibits to Appellant’s Motion to Reconsider and Vacate Order Granting New Trial, a number of venire members failed to disclose the entirety of their litigation experiences in response to questions from Plaintiff’s counsel. L.F. at 460-724. While the nature of counsel’s question makes it difficult to determine how many of those silent members should have disclosed prior litigation, many panel members did not disclose matters that likely fell outside the “family law” exception stated in counsel’s question. Tr. at 101-424 (voir dire); L.F. at 460-724 (information about undisclosed litigation). This empirical evidence further supports the argument that the question was ambiguous as a matter of law, and thus Juror Mims was under no duty to respond.

In the post-trial hearing, the trial judge noted that Juror Mims had not disclosed a personal injury claim, and that several jurors had disclosed personal injury claims in response to counsel's question. Hrg. Tr. at 37-39. However, the law is clear that "[t]he duty of counsel to show that the question was clear is not satisfied when some venire members could reasonably think one thing, and some other venire members could reasonably think the opposite." *McBurney*, 248 S.W.3d at 46. Moreover, counsel never specifically inquired of the venire panel concerning litigation related to personal injury claims. *See* L.F. at 101-424. Thus, the trial court's focus on that issue was misplaced. The venire panel's response, taken as a whole, suggests that reasonable minds could differ as to the appropriate interpretation of counsel's question. The question, therefore, was ambiguous.

For the foregoing reasons, this Court should hold that counsel for Respondent's question to the venire members was ambiguous as a matter of law, and therefore Juror Mims had no duty to disclose her litigation history. As a result, there was no nondisclosure, and this Court should reinstate the defense verdict. *See Keltner*, 42 S.W.3d at 723 ("[N]on-disclosure can occur only after a clear question on *voir dire* unequivocally triggers the venierperson's duty to respond.").

III. The trial court erred in granting Respondent’s post-trial Motion for New Trial, because Juror Maxine Mims did not make intentional nondisclosures during jury selection, in that Juror Mims’s nondisclosures were, at most, unintentional, and no prejudice resulted to Respondent from Juror Mims’s service on the jury or from her unintentional nondisclosure.

Standard of Review

A trial court’s ruling as to whether a juror’s nondisclosure was intentional or unintentional is reviewed for abuse of discretion. *State v. Miller*, 250 S.W.3d 736, 743 (Mo. App. 2008).

Argument and Authorities

If this Court determines that Respondent did not waive the nondisclosure issue, and that the question asked of the venire members was unambiguous, the Court must determine whether Juror Mims’s nondisclosure was intentional or unintentional. *See Williams*, 736 S.W.2d at 36-37. The trial court erroneously determined that Juror Mims intentionally failed to disclose her prior litigation. This Court should reverse that decision because it is contrary to established Missouri law, which dictates that a party must support a claim of juror misconduct with evidence.

Under Missouri law, the distinction between an intentional and an unintentional nondisclosure is crucial. When a juror intentionally fails to disclose material information, “bias and prejudice are inferred from such concealment.” *Williams*, 736 S.W.2d at 37. However, an unintentional nondisclosure “may or may not demand a new trial.” *Id.* If a juror unintentionally fails to disclose information, “a new trial is not warranted unless the

party can show the nondisclosure may have influenced the verdict" *Miller*, 250 S.W.3d at 743.

While a trial court has discretion in deciding whether a juror's nondisclosure was intentional or unintentional, a trial court abuses that discretion when it erroneously applies the law. *See Dick v. Children's Mercy Hosp.*, 140 S.W.3d 131, 137 (Mo. App. 2004) ("[A] trial court has no discretion when ruling on an issue of law in a motion for new trial.") (quotations omitted); *see also Emery v. Hunt*, 272 F.3d 1042, 1046 (8th Cir. 2001) ("A district court abuses its discretion if it commits an error of law."); *Sparkman v. Wabash R.R. Co.*, 177 S.W. 703, 705 (Mo. App. 1915) ("While trial courts are vested with a wide discretion in the matter of granting new trials, where, as here, a motion for new trial is sustained through a pure mistake of law ... the court's action will be reversed on appeal").

In this case, the trial court made a mistake of law by finding that Juror Mims's nondisclosure was intentional, despite Respondent having presented neither an affidavit nor testimony in support of that conclusion. *See Hrg. Tr.* at 46-47. In determining whether a juror's nondisclosure was intentional, Missouri courts apply a two-part test, as laid out in *Williams*. 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." *Williams*, 736 S.W.2d at 36. As the Court of Appeals recently explained, "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.” *Miller*, 250 S.W.3d at 743 (citing *State v. Mayes*, 63 S.W.3d 615, 626 (Mo. banc 2001)) (emphasis added).⁵ The *Miller* court held that the defendant had

⁵ *Miller* and *Mayes* both addressed nondisclosures of information other than prior litigation. However, both cases applied the *Williams* test in determining whether the disclosure was intentional. See *Miller*, 250 S.W.3d at 743; *Mayes*, 63 S.W.3d at 625. In addition, other cases have laid out this evidentiary requirement in cases where the issue was nondisclosure of prior litigation.

In *Portis v. Crenshaw*, 38 S.W.3d 436 (Mo. App. 2001), the defendant filed a new trial motion, asserting that a juror had failed to disclose litigation history. *Id.* at 443. The Court of Appeals noted that the defendant had supported the allegation with only an affidavit by his attorney. *Id.* at 444-45. The court concluded that “[w]hen defendant alleges juror misconduct, he is responsible for presenting evidence through testimony or affidavits of any juror, or other witness either at trial or at the hearing on his motion for new trial.” *Id.* at 445.

A case with similar facts to this one is *Tobb v. Menorah Medical Center*, 825 S.W.2d 638 (Mo. App. 1992). After a defense verdict in favor of a physician, the plaintiff appealed, arguing, inter alia, that the jury foreman had failed to disclose prior litigation. *Id.* at 642. The court noted that there was no testimony from the juror and “no evidence presented as to why Juror Groves did not disclose the previous lawsuit. Plaintiff presented only the affidavit of an attorney setting forth the details of the

failed to meet his burden of proof “as he did not present testimony or an affidavit from [the juror in question].” *Id.* The court added that the defendant could not be entitled to a new trial based on an unintentional nondisclosure because “he has failed in his burden to demonstrate that the nondisclosure influenced the jury’s verdict.” *Id.*

The law, as stated in *Miller*, is abundantly clear. The trial court committed reversible error in holding that Juror Mims’s nondisclosure was intentional despite the absence of testimony, in any form, from Juror Mims. Respondent may argue that interviewing the juror was unnecessary because *Williams* presented an “objective,” rather than a “subjective” standard. However, as explained, that argument is contrary to settled Missouri law. In addition, the *Williams* standard is not purely objective, as it blends both objective and subjective components. As noted above, courts should find a nondisclosure to be 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.” *Williams*, 736 S.W.2d at 36. The first part of that standard is objective, as it tests the reasonableness of any juror misunderstanding the question. However, the second part considers both the juror’s subjective memory – whether “the prospective juror actually remembers” – and, if applicable, the reasonableness of the juror’s lack of memory. Thus, the reasonableness

undisclosed lawsuit.” *Id.* The court then concluded that the trial court had not erred in denying the plaintiff’s new trial motion. *Id.* at 644.

question is tied directly to the juror's actual memory. The Court needs to know precisely what the juror remembered to determine whether "his purported forgetfulness is unreasonable." *See id.*

In virtually every case in which a court must decide whether a juror's nondisclosure was intentional, the juror is interviewed. *See Tobb v. Menorah Medical Center*, 825 S.W.2d 638, 643 (Mo. App. 1992) ("Every case that this court has reviewed concerning juror nondisclosure has delved, post-trial, into the reasons for nondisclosure, and the credulity of the juror's actions."). *See also, e.g., Brines*, 882 S.W.2d at 139; *McBurney*, 248 S.W.3d at 44; *Byers*, 238 S.W.3d at 725; *Bradford v. BJC Corp. Health Servs.*, 200 S.W.3d 173, 182 (Mo. App. 2006); *Nadolski*, 142 S.W.3d at 767; *Bell v. Sabates*, 90 S.W.3d 116, 122-23 (Mo. App. 2002); *Schultz*, 16 S.W.3d at 627.

In his brief to the Court of Appeals, Respondent relied on only one published case for the proposition that a court can find an intentional nondisclosure in the absence of testimony from the juror. *See generally Hatfield v. Griffin*, 147 S.W.3d 115 (Mo. App. 2004). It is telling, then, that in *Hatfield* the court held a post-trial hearing in which jurors were asked about their alleged nondisclosures. *Id.* at 119. Missouri law simply does not support the approach taken by the trial court in this case. To the contrary, Missouri law mandates that, in a case of alleged juror nondisclosure, the party seeking the new trial must either have the juror testify at the post-trial hearing or obtain an affidavit from the juror. Because Respondent failed to meet his evidentiary burden, this Court should hold, as a matter of law, that Juror Mims's nondisclosure was unintentional. *See Miller*, 250 S.W.3d at 743.

If the Court holds that Juror Mims's nondisclosure was unintentional, then it should hold that her nondisclosure was not prejudicial. *See id.* Where a nondisclosure is unintentional, there is no inference of prejudice, and the party seeking the new trial has the burden of demonstrating prejudice. *Id.* Respondent did not demonstrate actual prejudice in the post-trial hearing. *See generally* Hrg. Tr. at 2-63. The trial court presumed prejudice based on the conclusion that Juror Mims had intentionally failed to disclose her prior litigation. *See* App'x at A10. Thus, if this Court determines that there was no presumption of prejudice, then Respondent has failed to meet his burden to demonstrate prejudice.

The facts further support a finding of no prejudice. A review of the Case.Net information provided by Respondent shows that a majority of the cases in which "Maxine Mims" was identified as a party appear to have been collection actions. L.F. at 180-97. Such actions were entirely different from the medical malpractice claims that the jury in this case ruled upon. In addition, more than half of the cases listed in the exhibit to Respondent's Motion for New Trial were filed four or more years prior to the trial in this case. *See id.* The only cases that appear to have been filed in the four years preceding the trial in this case consist of breach of contract/promissory note (collection) actions, a traffic citation, and a "transcript judgment." *See id.* Thus, none of the recent cases that appear to have involved Juror Mims were similar to the claims and issues presented in this case. Only one case in Juror Mims's litigation history is even arguably similar. That case was *Cecil Mims, et al. v. Carl Larabee, et al.* L.F. at 180. That case was filed in 1990, more than seventeen years prior to the trial in this case. The case did not proceed

to trial and was disposed of in 1993. Case.Net does not positively identify Juror Mims as a party to that action. It appears that the injured party was Cecil Mims, and she was at most a loss of consortium plaintiff. *See id.* And even if Juror Mims was involved in that case, she would have been a plaintiff to that proceeding. *See id.* In this case, she was part of a unanimous verdict for the defendant, *see* App'x at A1, and she was not the foreperson. Comparing Juror Mims's vote to her litigation history provides no basis for determining that she was prejudiced by her experience, or that she prejudiced the jury's decision in this case.

This Court should hold that Respondent did not demonstrate that Juror Mims intentionally failed to disclose her litigation history, and that Respondent did not prove that Juror Mims prejudiced the jury. Thus, even if Respondent prevails on the prior two issues in this appeal, this Court should reinstate the jury's defense verdict.

IV. Conclusion

Appellants respectfully request that this Court reverse the circuit court's order granting a new trial, and that the Court reinstate the jury verdict in favor of Appellants on any or all of the following grounds: that Respondent waived the right to file a post-verdict motion for a new trial based on a juror's failure to disclose litigation history, when Respondent did not raise the issue during trial; that counsel for Respondent's question to the venire panel regarding litigation history was ambiguous, and therefore Juror Mims's silence did not constitute a "nondisclosure"; and that, because of Respondent's failure to present testimony from Juror Mims, the court abused its discretion in finding that Juror Mims's nondisclosure was intentional and thereby presuming prejudice.

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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 10,907 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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IN THE SUPREME COURT OF MISSOURI

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

CERTIFICATE OF SERVICE

COMES NOW Defendants/Appellants and hereby certify that two copies of the above and foregoing Brief of Appellants, along with a virus-free diskette, were mailed, postage prepaid, in the United States mail, on this 26th day of October, 2009, to:

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