IN THE MISSOURI SUPREME COURT

MARK SPIECE,
Plaintiff/Respondent,

v.

MELODY GARLAND,
Defendant/Appellant

SC No. 87369

SUBSTITUTE ANSWER BRIEF FILED BY APPELLANT MELODY GARLAND

Appeal from the Circuit Court of Jackson County, Missouri
Honorable Marco Roldan
Circuit Court Case No. 02CV208248

DOUGHERTY, MODIN & HOLLOWAY
Richard F. Modin, MO 27719
Theodore A. Kardis, MO 44142
10100 Ambassador Drive, Suite 220
Kansas City, MO 64153
(816) 891-9990
FAX: (816) 891-9905

ATTORNEYS FOR MELODY GARLAND

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

JURISDICTIONAL STATEMENT

This is an appeal from the June 28, 2004, Order of The Honorable Marco A. Roldan entered in the Circuit Court of Jackson County, Missouri. Following a jury trial, Judge Roldan entered an Order sustaining plaintiff's Motion for New Trial. The Order failed to specify the grounds for a new trial. Thereafter, Appellant filed her Notice of Appeal, thereby depriving the trial court of jurisdiction.

Thus, the issue presented on appeal involves the determination of whether the trial court erred in granting plaintiff's Motion for New Trial without specifying any grounds for the grant of the new trial. This Court granted transfer of this appeal on January 31, 2006, from the Missouri Court of Appeals, Western District. This Court's jurisdiction is based upon MO. CONST. art. V, § 10; and Supreme Court Rule 83.04.

STATEMENT OF FACTS

This is an action for personal injury arising out of a motor vehicle accident. Following a trial of this action between Plaintiff Mark Spiece and Defendant Melody C. Garland to a jury of twelve persons, the jury assessed the damages of plaintiff for personal injuries at $75,000.00. (L.F. 22). The trial court entered an amended judgment entry on March 10, 2004, which reflected the jury's verdict. (L.F. 22-23). Thereafter, plaintiff filed his Motion for New Trial and/or Additur with Suggestions in Support Thereof on April 9, 2004. (L.F. 43). Defendant Melody Garland filed her Suggestions in Opposition to Plaintiff's Motion for New Trial and/or Additur on April 29, 2004. (L.F. 102). The trial court did not hold a hearing on plaintiff's Motion for New Trial prior to issuing its ruling thereon. The trial court issued its Order sustaining plaintiff's Motion for New Trial "for good cause shown" on June 28, 2004. (L.F. 114). Melody Garland filed her Notice of Appeal on June 30, 2004. (L.F. 115).

Following motion practice at both the Missouri Court of Appeals, Western District, and this Court, in the form of an extraordinary writ, the case was finally briefed, argued and submitted to the Missouri Court of Appeals, Western District. On November 15, 2005, the Court of Appeals handed down its opinion in this matter. Therein, the Court held that: (1) the June 28, 2004, order granting the new trial was appealable under the express language of § 512.020, RSMo; (2) Respondent Spiece had failed to meet his burden of demonstrating a non-discretionary ground for the new trial; and (3) in any event the record did not

support allegations of juror misconduct and thus the Circuit Court did not have good cause to grant a new trial. Accordingly, the Court of Appeals reversed the order granting a new trial and remanded the case to the trial court for entry of judgment on the jury's verdict. Subsequently, this Court granted transfer.

Following a joint motion to clarify the briefing schedule, this Court ordered Respondent Mark Spiece to file the first substitute brief and substitute reply brief, and Appellant Melody Garland to file the second substitute brief. Because Respondent filed the first substitute brief with a light blue cover page, Appellant has followed suit and used a cream/buff cover page for this second substitute brief in an effort to avoid confusion.

POINT RELIED ON

I. The trial court erred in granting Plaintiff's Motion for New Trial because it failed to specify any ground for the grant of the new trial, in that the trial court's June 28, 2004, appealable order stated only that the motion was sustained "for good cause shown."

Pretti v. Herre, 403 S.W.2d 568 (Mo. 1966)

Hammond v. Crown Coach Co., 263 S.W.2d 362 (Mo. 1954)

Bishop v. Carper, 81 S.W.3d 616 (Mo. App. W.D. 2002)

Rodman v. Schrimpf, 18 S.W.3d 570 (Mo. App. W.D. 2000)

Missouri Supreme Court Rule 84.05 (c) and (d)

§ 512.020, RSMo.

ARGUMENT

I. The trial court erred in granting Plaintiff's Motion for New Trial because it failed to specify any ground for the grant of the new trial, in that the trial court's June 28, 2004, appealable order stated only that the motion was sustained "for good cause shown."

A. STANDARD OF REVIEW

Rule 78.03 states that "[e]very order allowing a new trial shall specify of record the ground or grounds on which said new trial is granted." On appeal, "[w]hen a trial court grants a new trial without specifying of record the ground or grounds on which the new trial is granted, the presumption shall be that the trial court erroneously granted the motion for new trial and the burden of supporting such action is placed on the respondent." Rule 84.05(c).

Rule 84.05(d) states: "[i]f the trial court grants a new trial without specifying discretionary grounds, it shall never be presumed that the new trial was granted on any discretionary grounds." Where the trial court does not specify any grounds for a new trial, the action of the trial court cannot be sustained on a discretionary ground and the new trial order must be vacated. *Pretti v. Herre*, 403 S.W.2d 568, 569 (Mo. 1966); *see also McCarthy v. Halloran*, 435 S.W.2d 339, 341 (Mo.1968) (holding that a reviewing court may not presume the granting of a

new trial on a discretionary ground where no such ground is stated in the order).

1. The Trial Court's June 28, 2004, Order was appealable.

The reason that this Court's review is limited in this fashion, as opposed to the abuse of discretion standard incorrectly suggested by Respondent, is that the trial court's June 28, 2004, order was appealable. Respondent raises, yet again, the argument that the June 28, 2004, order was not appealable. This Court rejected this argument when it denied Respondent's petition for writ of mandamus or alternatively, prohibition. Nevertheless, Appellant shall again respond to the argument.

Respondent's citation of *Brooks v. Brooks*, 98 S.W.3d 530, 531 (Mo. en banc 2003) is not on point. In *Brooks*, this court was construing only one of the several exceptions to the final judgment rule laid out in § 512.020, RSMo, the "special order after final judgment in the cause" exception, now codified as "(5)" of five categories of exceptions. Moreover, *Brooks* did not concern a new trial order, but rather a Qualified Domestic Relations Order (QDRO). The holding of *Brooks* was that a QDRO, as a "special order after final judgment," has to be denominated a judgment or decree to be appealable. *Brooks*, 98 S.W.3d at 532. This holding must be considered not only in its own context, but also in the context of the case which gave rise to the "denomination" requirement, *City of St. Louis v. Hughes*, 950 S.W.2d 850 (Mo. banc 1997). *Hughes* began its reasoning by quoting the statute, and then observing:

> Absent one of the exceptions expressly set out in § 512.020, RSMo 1994, "[a] prerequisite to appellate review is that there be a final judgment. If the order of the trial court was not a final judgment, this Court lacks jurisdiction and the appeal must be dismissed. An appealable judgment disposes of all issues in a case, leaving nothing for future determination." *Boley v. Knowles*, 905 S.W.2d 86, 88 (Mo. banc 1995) (citations omitted). The legislature has defined a "judgment" as "the final determination of the right of the parties in an action." § 512.020, RSMo 1994.

Id. at 852-53.

The *Hughes* court was faced with a situation in which no fewer than five orders had been issued by the trial court after each of several hearings, four of which were contended to be appealable, and none of the § 512.020 exceptions were present. Therefore, it asked the question, “when is a judgment a judgment?” The “bright line” answer, from Rule 74.01 (a), is when it is denominated as such: “Thus, the written judgment must be signed by the judge and must be designated a ‘judgment.’” *Id.* at 853. The rationale of this bright line rule is an attempt to assist the litigants and the appellate courts by clearly distinguishing between orders and rulings of the trial court that are intended to be final and appealable and when the trial court seeks to retain jurisdiction over the issue. *Id.* That is not a problem faced by litigants and the appellate courts when a new trial is granted.

In *Brooks*, the court faced the same problem which confronted the *Hughes* court, was the QDRO a "special order after final judgment" intended by the trial court to be final, appealable, and to divest it of jurisdiction? This exception is too generic, too subject to interpretation to ascertain whether a particular order after a final judgment is a "special order." Again, because there was no way to tell without using the *Hughes* bright line test, that test was adopted for that particular exception to the final judgment rule. *Brooks*, 98 S.W.3d at 532. Thus, there is a powerful reason for requiring denomination of such orders as "judgments," since the underlying judgment has already become final. Otherwise, there would be considerable confusion over which post final judgment orders are appealable and which are not.

Here, there is no potential for such confusion. None of the difficult questions faced by the *Hughes* and *Brooks* courts are presented by an order granting a new trial. When a new trial is granted via order, there is no question that it falls directly within the exception stated by § 512.020(1). This exception is specific, not general, like § 512.020(5). Moreover, there is no question that the trial court intends to hold a new trial, which will render the original final judgment void. *See, e.g., Rogers v. Bond*, 839 S.W.2d 292, 293 (Mo. banc 1992)(holding that re-trial before appeal is taken waives any error that could have been alleged, because an order granting a new trial is appealable). Further, Missouri courts have long adhered to the general rule that a trial court loses jurisdiction over a case once it rules on a motion for new trial. *See, e.g., State ex rel. Stickelber v. Nixon*, 54

S.W.3d 219, 223 (Mo. App. W.D. 2001) (an appeal from the grant of a new trial). Thus, where there is an order granting a new trial, there can be no confusion over whether such an order is intended to be final and appealable and whether the trial court seeks to retain jurisdiction over the issue.

Recognizing the elementary principle that decisions of the Courts of Appeals are not binding upon the Supreme Court, Appellant urges this Court to consider the Western District opinion in *Duckett vs. Troester*, 996 S.W.2d 641 (Mo. App. W.D. 1999). [1] In *Duckett*, it was claimed that an order granting a new trial was not final and appealable in that no written document denominated a "judgment" was ever filed as required by Rule 74.01 and *City of St. Louis v. Hughes*, 950 S.W.2d 850 (Mo. banc 1997). As the *Duckett* court pointed out, an appeal from an order granting a new trial is expressly contemplated by the statute and the rule. *Duckett*, 996 S.W.2d at 646. As the *Duckett* court concluded, "the trial court was not required to enter a final 'judgment,' denominated as such, before the appellant had a right to appeal the trial court's grant of a new trial." *Id.*

Furthermore, it is worth noting that the Western District apparently agreed with and applied the foregoing analysis in its opinion which preceded the transfer

[1] Respondent suggests that this Court consider an unpublished opinion of the Eastern District Court of Appeals, *Godefroid v. Kiesel Company*, 2003 WL 22399710 (Mo. App. E.D. 2003). The Eastern District would not recognize its own unpublished opinion as having any precedential value. *Gerlach v. Missouri*

of this case to this Court. The Court held that the *Brooks* rationale applies only to special orders entered after final judgment, and should not be extended to orders granting new trials. *Spiece v. Garland*, 2005 WL 3038817 (Mo. App. W.D. 2005), at *2.

2. The July 2, 2004, Judgment/Order is a nullity and should not even be considered.

Respondent acknowledges that if the order granting a new trial is appealable, then the Circuit Court violated Rule 78.03, and further acknowledges that a presumption arises that the grant of the new trial was error. However, Respondent suggests that this presumption may be rebutted where the ground upon which the motion is granted clearly appears from the record citing *Hightower v. Hightower*, 590 S.W.2d 99 (Mo. App. W.D. 1979).

However, the *Hightower* court drew a conclusion that was contrary to the precedent that it cited, and ignored a controlling precedent of this Court. The *Hightower* court should have looked to *Hammond v. Crown Coach Co.*, 263 S.W.2d 362 (Mo. 1954), prior to relying on *Ponyard v. Drexel*, 205 S.W.2d 267 (Mo. App. E.D. 1947). The *Hammond* court as much as overruled *Ponyard*, stating:

> With deference to the experience and contrary views of others Ponyard v. Drexel . . . it is submitted that the memorandum involved here and the variety of problems created by their use in the cases

---

Commission on Human Rights, 980 S.W.2d 589, 594 (Mo. App. E.D. 1998).

> previously noted plainly demonstrate the futility of "memorandums" as an aid or substitute for the very simple requirement that "Every order allowing a new trial shall specify of record the ground or grounds on which said new trial is granted."

Hammond, 263 S.W.2d at 366.

In fact, the reasoning of *Hightower,* as well as Respondent here, is based on the premise that such extraneous memoranda or oral statements of a judge can be considered for the purpose of explaining or supporting a record entry, but not to oppose or contradict it. However, the *Hammond* court explicitly decided that where the order does not specify the ground or grounds on which it was granted, extraneous matter does oppose or contradict it. The Court held:

> The order is unambiguous, it plainly grants a new trial without specification of grounds, and resort to the memorandum for the purposes urged by the respondent would not "support" or "explain" the order but would "countervail" or "dispute" the order.

Hammond, 263 S.W.2d at 366-67. The Court plainly states that it will not look to extraneous material to interpret an unambiguous order that simply does not specify grounds. Here, the July 2, 2004, Judgment/Order cannot be considered to "support" or "explain" the Order which failed to specify grounds. Under *Hammond,* the Judgment/Order would "countervail" or "dispute" the original order.

While neither Respondent nor the "Judgment/Order" itself assert that it is a nunc pro tunc order, an examination of the rationale for prohibiting amendment of an order that fails to specify grounds is instructive in light of Respondent's citation to *Hightower*. In *Brock v. Steward*, 519 S.W.2d 365 (Mo. App. E.D. 1975), the court found that the trial court had no jurisdiction to amend its original order sustaining a motion for new trial to state the grounds therefore. *Id.* at 367. The court held that a court memorandum which was filed subsequent to a notice of appeal was ineffective because the court lacked jurisdiction over the cause at that time for the purpose of effecting such an amendment. *Id*. The court further explained that the trial court lost jurisdiction of the cause insofar as the exercise of any judicial functions were concerned at the time of the filing of the notice of appeal. *Id.* As in this case, the purported amendment did not pretend to be a nunc pro tunc order, but even so the court observed that a nunc pro tunc order can never be invoked to correct a judicial misprision or oversight, which the court concluded was what was attempted. *Id*. at 367-68. The court found that the memorandum which the court filed subsequent to the filing of the notice of appeal was null and void.

Here, because Appellant's Notice of Appeal, filed June 30, 2004, precedes the July 2, 2004, Judgment/Order, the July 2, 2004, entry is a nullity. The trial court's order granting the motion for new trial became final upon entry. *See Clayton v. Clayton*, 679 S.W. 2d 431 (Mo. App. E.D. 1984). A notice of appeal must be filed ten (10) days after the judgment or order appealed from becomes

final. Rule 81.04(a). Appellant filed her Notice of Appeal on June 30, 2004. This action immediately deprived the trial court of jurisdiction.

Again, *Stickelber* states the general rule that a trial court loses jurisdiction over a case once a notice of appeal is filed. *Stickelber*, 54 S.W.3d at 223. Moreover, the appellate courts have directly considered the question of whether a trial court has jurisdiction to amend an order granting a new trial where there is an intervening notice of appeal after the initial order or judgment granting a new trial, in *Rodman v. Schrimpf*, 18 S.W.3d 570, 572 (Mo. App. W.D. 2000). *See also Brock v. Steward*, 519 S.W.2d 365, 367 (Mo. App. E.D. 1975).

In *Rodman*, the trial court granted a motion for new trial "for good cause shown" without specifying reasons or grounds for sustaining the new trial motion in the order. *Rodman*, 18 S.W.3d at 572. Next, a notice of appeal was filed, appealing that order. *Rodman*, 18 S.W.3d at 572. After the filing of the notice of appeal, a motion to amend the judgment granting a new trial was filed and sustained by the trial court and the trial court specified specific reasons therein. *Rodman*, 18 S.W.3d at 572. The Western District ruled that the trial court's attempt to modify the initial judgment or order granting the new trial was without jurisdiction, and that the reason for such was the intervening filing of the notice of appeal. *Rodman*, 18 S.W.3d at 572. The Western District followed well-established precedent that the filing of a notice of appeal cuts off the trial court's jurisdiction to exercise any judicial function in the case and vests jurisdiction in the appellate court. *Rodman*, 18 S.W.3d at 572. The Western District held that

the granting of the motion to amend the judgment as well as the amended judgment itself were both entered without jurisdiction. *Rodman*, 18 S.W.3d at 572. Therefore, the Western District reviewed the original judgment granting the new trial without specifying the grounds upon which it was granted. *Rodman*, 18 S.W.3d at 572.

Here, given that the trial court's June 28, 2004, order granting a new trial was appealable, Appellant's intervening filing of a Notice of Appeal was not premature and deprived the trial court of jurisdiction; thus the trial court was without jurisdiction to enter its Judgment/Order of July 2, 2004, which is a nullity. This Court should not even consider the July 2, 2004, Judgment/Order. Appellant did not include it in the Legal File because it is not material to the questions presented for determination. Respondent asks this Court to review the wrong order under the wrong standard. This Court should not conduct its review under an abuse of discretion standard, and should review the Order which granted the new trial without specifying grounds.

3. The appropriate standard of review is under Rule 84.05.

Because the trial court's order granting Respondent's motion for new trial was an appealable order and the court should not look to extraneous matter that would countervail or dispute that order, there is a presumption that the trial court's ruling was erroneous, and Respondent has the burden of overcoming that presumption. *See* Supreme Court Rule 84.05. The standard of review pertaining

to this case may be found in Supreme Court Rule 84.05(c) and (d). The full text of the Rule may be found in the Appendix, at A-4.

4. Rule 84.05 has been judicially interpreted already by this Court.

Respondent cites *State ex rel Streeter v. Mauer*, 985 S.W.2d 954 (Mo. App. W.D. 1999), for the proposition that the intent of a Supreme Court rule is to be determined by the plain and ordinary meaning of the words used in the rule. However, as the Western District later further explained in a case in which it cited and expanded upon *Mauer*, that principle applies when the Courts of Appeals are attempting to ascertain the intent of the Supreme Court where the Supreme Court has not expressed its intent. *In re A.S.O.*, 75 S.W.3d 905, 910 (Mo. App. W.D. 2002). In other words, if a term is not defined in the rule and has not been judicially interpreted, then the Courts of Appeals are free to give the term its plain and ordinary meaning. *Id*. Here, however, Rule 84.05(c) and (d) have been judicially interpreted by the Supreme Court.

In *Pretti v. Herre*, 403 S.W.2d 568 (Mo. 1966), the Supreme Court considered what was then enumerated rule 83.06. Subparagraph (b) of that rule contains the identical language which is considered here in the present Rule 84.05(c). Likewise, former Rule 83.06(c) contains the exact same language as the present rule 84.05(d). After quoting this language, the court stated:

> Since the trial court did not specify any ground in its order, and since we are precluded by the court rule from presuming that the new trial

> was granted on the assignment plaintiffs rely on, it is apparent that the action of the trial court cannot be sustained on that ground.

Id. at 569. The court further stated:

> Since the only point relied upon by plaintiff to support the granting of the new trial is one which we are precluded from considering, it follows that the action of the trial court cannot be sustained.

Id.

Respondent does not discuss the *Pretti* case in his brief, perhaps unintentionally implying that only the Courts of Appeals have interpreted the rule in such a manner. Because the Supreme Court has explicitly stated that appellate courts may not consider discretionary grounds, an interpretation of the rule by the court which adopted it already exists. As the Western District put it in *Bishop v. Carper*, 81 S.W.3d 616 (Mo. App. W.D. 2002), this rule construction issue has long since been settled by the body who promulgated these rules, the Supreme Court of Missouri. *Id*. at 621 (citing *McCarthy*, 435 S.W.2d at 340-41; *Pretti*, 403 S.W.2d at 569).

5. The Supreme Court has not promulgated an absurd and unjust rule in adopting Rule 84.05.

While the Supreme Court may be too modest to say so, the Courts of Appeal have observed that it is presumed that the Missouri Supreme Court would not enact a rule that would render an absurd result. *Dynamic Computer Solutions*,

Inc. v. Midwest Marketing Insurance Agency, LLC, 91 S.W.3d 708, 714 (Mo. App. W.D. 2002).

Respondent refers to the case of *King v. Kansas City Life Insurance Company*, 164 S.W.2d 465 (Mo. banc 1942), as his primary authority for his conclusion that present case law interprets the rule in a manner which is absurd or unjust. However, the *King* case was decided by the Supreme Court before it promulgated what is now known as Rule 84.05(c) and (d). See *Bishop*, 81 S.W.3d at 622, fn. 10. The *Bishop* court reasoned:

> [i]t only seems logical that these rules, and their subsequent interpretation in the Court's case law, was a codification of a new approach to this "vexatious problem" by the Supreme Court in response to difficulties presented by *King* sixty years ago.

Id.

This reasoning of the *Bishop* court reflects an elementary principle of rule construction. There is a presumption that the Supreme Court, in establishing the civil rules, was acquainted with the history of all prior civil codes enacted by the general assembly, prior rules of the Supreme Court, as well as the decisions construing those codes and rules. *State ex rel. R. 1 School Dist. of Putnam County v. Ewing*, 404 S.W.2d 433, 437 (Mo. App. W.D. 1966). Put another way, when the Supreme Court adopts a rule, it must be held to have done so with the previous judicial interpretations of the language contained therein clearly in mind. *Curtis v. Tozer*, 374 S.W.2d 557, 575-76 (Mo. App. E.D. 1964).

Thus, as can be seen from an examination of *King*, the *King* decision was rendered in light of only the modern subparagraph (c) language, not (d). In fact, it predated the 1945 Missouri Constitutiowhich authorized this Court to promulgate rules. *See* Rule 41.02. The *King* case considered statutory language analogous only to the modern subparagraph (c) language. However, by the time the Supreme Court decided the *Hammond* case, discussed *supra*, decided in 1954, the Court had adopted Supreme Court Rule 1.10, which contains the language of both modern Rule 84.05(c) and (d). Thus, it must be presumed that the Supreme Court had the *King* decision in mind when it promulgated what was then referred to as Supreme Court Rule 1.10, and then when it interpreted it in a different manner than *King* in the *Hammond* case. Specifically, the Supreme Court even justified its new approach with the following statement:

> It may appear harsh to litigants to insist upon technical compliance with the statutory requirement, but compliance certainly avoids confusion. In this case, compliance with the statute would have simplified the appeal, and it might have obviated an appeal at all.

Hammond, 263 S.W.2d at 366. Thus, it can be seen that the Supreme Court weighed the policy concerns advanced here by Respondent and elected to interpret the rule in a manner that promotes clarity and judicial economy.

6. The Supreme Court has not interpreted Rule 84.05(c) or (d) in a manner contrary to the Missouri Constitution.

Indeed, MO. CONST. art. V, § 5, provides that the rules established by the Supreme Court "shall not change . . . the right of appeal." Respondent's argument that the Supreme Court's present interpretation of the rule is unconstitutional proceeds from the premise that under § 512.020, RSMo, a party aggrieved by a final judgment has a right to appeal. However, Respondent can proceed no farther than this premise because it is not Respondent who had the right of appeal under §512.020. Appellant Melody Garland took her appeal from the Court's Order granting a new trial, under the authority of §512.020(1). As the Supreme Court has observed, the term "appeal" simply "means the removal of a suit . . . from an inferior to superior court." *State v. Getty*, 273 S.W.2d 170, 172 (Mo. 1954). Further, the Court observed that §5 of Article V did not prohibit this Court from changing the *mode* of review, but only the *right*. Rule 84.05(c) and (d), as presently interpreted by this Court in *Pretti*, changes only the mode of review, not the right. While it may limit appellate review, it does not preclude it. It cannot be said that there was no appellate review in *Bishop* or *Pretti*, or here for that matter, it can only be said that appellate review was bounded by the standard of review. For example, the abuse of discretion standard suggested by Respondent greatly limits appellate review. Indeed, the standard of review shapes every appeal and litigants are never entitled to appellate review of matters which fall outside the standard of review.

7. The rule fulfills its intended purposes and does not need to be rewritten.

As Respondent observes, the appellate courts have recently confirmed the purpose behind Rule 84.05(c) and (d) as illuminated by the *Hammond* court: compliance avoids confusion and simplifies the appellate process. *Hammond*, 263 S.W.2d at 366. Respondent contends that the rule fails to fulfill the intended purposes as stated in these recent appellate decisions. However, an examination of those purposes reveals that the rule does fulfill them.

The first purpose discussed by Respondent is "to protect the party appealing from an order granting a new trial from the necessity of showing an absence of merit in each assignment of error set forth in the motion." *Rodman v. Schrimpf*, 18 S.W.3d 570, 574 (Mo. App. W.D. 2000). Here, the purpose of the rule is to protect the party appealing from an order granting a new trial (Appellant Melody Garland) from the necessity of showing an absence of merit in each assignment of error set forth in the motion (filed by Respondent Mark Spiece). Here, Respondent Mark Spiece raised 18 meritless assignments of error in his Motion for New Trial and/or Additur in separately numbered paragraphs. The purpose of the rule has been satisfied in that the standard of review defined by the rule has protected Appellant from the necessity of pursuing an appeal with 18 separate points relied on, each of which showing how the trial court would have erred had it based its grant of the new trial on that particular assignment of error. Furthermore, Respondent mistakes the means for the end in identifying the

purpose of the rule as "to identify the specific issues which are relied upon to support the order." *Rodman*, 18 S.W.3d at 574. Here, the *Rodman* court was simply stating that the purpose of the rule was achieved by placing the burden on respondent.

The second purpose discussed by Respondent is fully reproduced here:

> The purpose of this rule is clearly to define and limit the issues cognizable on appeal, at least initially, and thus conserve judicial and legal time and promote clarity and establish reasonable limits to the scope of judicial decisions by confining the appeal to specific issues. This purpose is entirely proper and salutary.

Hightower, 590 S.W.2d at 103. Actually, this statement was meant by the *Hightower* court to apply specifically to Rule 78.03, but given that the entire text of that rule is: "[e]very order allowing a new trial shall specify of record the ground or grounds on which said new trial is granted [,]" the stated purpose seems equally applicable to Rule 84.05(c) and (d). The rule certainly achieves this purpose by confining the scope of appellate review to the review of non-discretionary grounds. Any other interpretation would simply throw open the door to a review of all grounds raised in the new trial motion, here, for instance, constituting 18 separate grounds of alleged error.

Respondent also asks the question "Why not just ask the Court who entered the Order?" This Court has already answered that question in the *Hammond* case.

Resorting to extraneous pronouncements of the trial court which are outside of the four corners of an order does not support or explain the order, but instead countervails or disputes it. *Hammond*, 263 S.W.2d at 366-67.

Notwithstanding that the interpretation or revision of the rule urged by Respondent would run contrary to existing Supreme Court precedent, it would trade clarity for confusion. Moreover, it would contradict the statutory right of appeal in §512.020(1), RSMo. An example of the ensuing confusion can be found in Rule 81.05(a). What if an order granting a new trial is issued within the 90 days prescribed by 81.05(a)(2)(A), but it fails to specify the ground or grounds on which it is granted? Is it deemed overruled if 90 days pass and still no grounds have been specified? An order granting a new trial, whether or not it states any grounds, must remain immediately appealable. Otherwise, if a party cannot appeal such an order, the trial court will proceed to begin the new trial. Surely extraordinary writs cannot be preferred to a rule which functions efficiently without them.

There is no reason to repeal Rule 84.05(c) and (d) in favor of a new rule that would run contrary to the right of appeal as defined by statute and which would embark on a confusing and uncertain new scheme. Since the present rule achieves its stated purposes, it should not be reformed as suggested by Respondent.

B. THE GRANT OF THE NEW TRIAL CANNOT BE SUSTAINED ON THE DISCRETIONARY GROUND URGED BY RESPONDENT.

1. The Court is precluded from considering the discretionary juror misconduct ground alleged by Respondent.

It is elementary that an Order sustaining a Motion for New Trial "for good cause shown" does not satisfy the requirement of Rule 78.03 that the Order shall specify the ground or grounds on which a new trial is granted. *McCarthy*, 435 S.W.2d at 340; *Rodman*, 18 S.W.3d at 572; *cf.* Rule 78.01 and Rule 78.03. Again, reviewing courts are precluded by Rule 84.05(c) and (d) from considering a discretionary ground and sustaining the trial court's granting of a new trial on said ground. *Pretti*, 403 S.W.2d at 569. Respondent has the burden of demonstrating affirmatively in his brief that there was some adequate, non-discretionary ground for a new trial. *McCarthy*, 435 S.W.2d at 340. Respondent has only briefed one ground to support the new trial Order, that a juror intentionally failed to disclose that she was involved in a personal injury lawsuit. However, this is a discretionary ground, not a non-discretionary one as suggested by Respondent. As this Court has stated: "It has been consistently and uniformly held in this state that the granting of a new trial on the grounds of juror misconduct lies within the sound discretion of the trial court." *Berry v. Allgood*, 762 S.W.2d 74, 78 (Mo. banc 1984); *See also Portis v. Greenhaw*, 38 S.W.3d 436, 443 (Mo. App. W.D. 2001). Respondent suggests, based on the case of *Williams v. Barnes Hospital*, 736 S.W.2d 33 (Mo. banc 1987), that because intentional non-disclosure mandates a

new trial, this must be a non-discretionary ground. However, the court must exercise its discretion to reach the conclusion that intentional non-disclosure has occurred, which then mandates a new trial. The Court of Appeals has defined the distinction between discretionary and non-discretionary grounds as follows: "The trial court's power to grant a new trial is discretionary only as to questions of fact and matters affecting the determination of the issues of fact. There is no discretion in the law of a case." *Bishop*, 81 S.W.3d at 619 (quoting *Curtis v. Curtis*, 491 S.W.2d 29, 33 (Mo. App. 1973)). To state it another way, this court has also said that "discretionary grounds relate to issues of fact and non-discretionary grounds relate to matters of law." *Rodman*, 18 S.W.3d at 574.

Granting a new trial on the basis of intentional non-disclosure of a juror is a discretionary ground. A finding of intentional non-disclosure is a multi-step process which involves the court's discretion at multiple stages. The threshold determination is whether a clear question was asked on voir dire. *Brines, By and Through Harlen v. Cibis*, 882 S.W.2d 138, 139 (Mo. banc 1994). If the question was clear, then the court has to make the factual determination of whether a non-disclosure has occurred. *Brines*, 882 S.W.2d at 139. The final determination in finding intentional non-disclosure is whether or not the disclosure was intentional or unintentional. This is a factual finding of the trial court which is given great weight and will not be disturbed on appeal unless the trial court abused its discretion. *Brines*, 882 S.W.2d at 139. The appellate court reviews such findings to see if the evidence supports them. *Brines*, 882 S.W.2d at 139.

Therefore, because a finding of intentional non-disclosure is a discretionary ground for the grant of a new trial, and because it is the only ground asserted by Respondent, the action of the trial court cannot be sustained.

Respondent attempts to argue in the alternative that if the court finds that an intentional non-disclosure is a discretionary ground for granting a new trial, then the trial court must have sustained its motion on a discretionary ground because all the grounds in plaintiff's new trial motion were discretionary. Respondent attempts to draw an analogy to cases where only one ground is stated in the motion for new trial. However, the only conclusion to be drawn from that analogy is an absurd one, i.e., that if the trial court failed to specify any of the 18 grounds set forth by Respondent in his Motion for New Trial, it must have sustained Respondent's motion on all of them. Obviously, that interpretation runs counter to this court's interpretation of the rule in *Pretti*.

2. The record does not even support the discretionary ground suggested by Respondent.

A response to Respondent's argument that intentional non-disclosure by a juror supports the grant of a new trial is a purely academic exercise, given that the trial court's Order granting a new trial cannot be sustained on this discretionary ground. Nevertheless, Appellant will demonstrate that the record does not support such a finding in any event.

Respondent relies entirely on an affidavit which purports to be from juror Martha Teodori. The affidavit was attached to Respondent's Motion for New

Trial. (L.F. 100-01). Appellant stated her objection to the admissibility of this affidavit at the first possible opportunity, stating several objections, including hearsay, in her Suggestions in Opposition to the Motion. (L.F. 112). No hearing was ever held on Respondent's Motion for New Trial and as a result, juror Teodori never testified and was never cross-examined under oath and on the record. Thus, it would have been improper for the trial court to consider the affidavit.

Regardless, it was premature to even consider the question of whether juror Teodori's alleged non-disclosure was intentional because neither plaintiff nor the court ever addressed the requisite threshold determination: was the question clear? *See Heinen v. Healthline Management, Inc.*, 982 S.W.2d 244, 249 (Mo. banc 1998). Only after there has been a ruling that the voir dire question is clear, may the court hear evidence to determine whether the disclosure was intentional or unintentional. *Keltner v. K-Mart Corp.*, 42 S.W.3d 716, 723 (Mo. App. E.D. 2001). The trial court never made such a ruling.

Furthermore, a comparison of the question asked by Respondent's counsel to juror Teodori's inadmissible affidavit does not even support a conclusion of non-disclosure on the face of the affidavit.

Respondent complains that juror Teodori did not respond to the following set of questions:

> Is there anybody on the jury who you or a family member has ever been a plaintiff in a lawsuit for personal injury? You or a family member has filed a lawsuit where you are seeking money damages

> for an injury? Okay. I'm not talking about divorce cases or a landlord/tenant case, or a suit on a contract. Okay? You or a family member filed a lawsuit for a personal injury? Anyone up here?

(Tr. 69-70) (emphasis added).

Because Respondent does not include a direct quotation from juror Teodori's purported affidavit, Appellant offers it here for the court's comparison:

> 7. I failed to disclose that I was at fault in a slip and fall accident in which I received a settlement from Safeco Insurance Company. In my slip and fall case, I retained an attorney. I also failed to disclose that I had a car accident. I made a claim for my property damage.

(Tr. 100) (emphasis added).

Plaintiff's counsel's voir dire questions only sought to elicit information about lawsuits, even going so far as to explain what he meant by that--litigation, matters which had been filed in a court of law. Juror Teodori's affidavit does not indicate that she failed to disclose any lawsuits. Settlements, cases, and claims do not necessarily indicate that litigation was instituted and a lawsuit was filed. Respondent cites *Brines* for the proposition that the question "Do we have anyone on the jury panel who is now or has been a defendant in a lawsuit?" unequivocally triggered the prospective jurors' duty to disclose previous lawsuits against them. *Brines*, 882 S.W.2d at 139. Here, the question asked by plaintiff's counsel likewise unequivocally triggered jury Teodori's duty to disclose prior lawsuits she

had filed, but it did not trigger a duty to disclose settlements, cases, or claims which were resolved out of court. As the proponent of the affidavit, plaintiff certainly could have elicited the information as to whether any of these matters progressed to the point where a lawsuit was filed. Plaintiff chose not to do so. Thus, the question is not so much whether Ms. Teodori was reasonably able to comprehend the information solicited by the question, the issue is whether the question even solicited the information which the plaintiff now claims is a non-disclosure. Clearly the question fails in that regard.

Thus, the threshold determination of whether or not the question was clear has not even been met and therefore there is no need to delve into the elements of intentional non-disclosure.

Moreover, juror Teodori's affidavit does not support a conclusion that the alleged failure to disclose was intentional. Respondent urges that there is no evidence that the juror misunderstood the question, forgot her previous involvement in her slip and fall case, or that her case was remote in time. Keeping in mind that this claim must be viewed through the prism of an inadmissible affidavit proffered by Respondent, neither is there any evidence that she understood the question, remembered the information, or that her case was not remote in time. Perhaps it was last year, perhaps it was 30 years ago. There is no explanation whatsoever for the alleged non-disclosure. Accordingly, there are no facts which could support a discretionary finding by the court that this alleged non-disclosure was intentional.

Finally, Respondent's argument for the materiality of the information sought simply underscores the inadequacy of questioning to elicit the response which is now alleged to be an intentional non-disclosure. While Respondent cites *Brines* again for the proposition that questions and answers pertaining to prospective jurors' prior litigation experience are material, Respondent's conclusion that the juror failed to disclose her involvement in prior litigation is not supported by the record. Juror Teodori's affidavit does not reveal that she was involved in prior litigation. Rather, Respondent is faulting the juror for failing to answer a question that was never asked.

C. THE INSUFFICIENCY OF THE RECORD IS A PRODUCT OF RESPONDENT'S FAILURE TO CARRY HIS BURDEN OF PROOF, NOT AN INDICATION FOR REMAND.

Respondent's request for this Court to remand the matter and direct the trial court to hold a hearing on Plaintiff's Motion for New Trial to allow for the presentation of additional evidence and argument presumes that this Court has elected to consider the ground of juror misconduct put forth by Respondent. It further presumes that in so doing, the Court has agreed with both Appellant and the Western District Court of Appeals that Respondent's juror affidavit does not support a finding of intentional non-disclosure. From this point of departure, Respondent suggests that it would be appropriate for this Court to remand the matter to the trial court for further proceedings, including an evidentiary hearing which would give Respondent an opportunity to present additional evidence. Such

a second bite at the apple would not be a just result. Should the court disagree and chose to remand the matter to the trial court for the presentation of additional evidence and argument, Appellant suggests that this court should limit the trial court's further consideration of Respondent's Motion for New Trial to this sole issue pursued on appeal rather than throwing the matter wide open to further consideration of the balance of the 18 assignments of error set forth by Respondent in that motion.

Respondent filed his Motion for New Trial and/or Additur on April 9, 2004. Appellant Melody Garland filed her suggestions in opposition promptly on April 29, 2004. Certainly Respondent was free to request an evidentiary hearing to present additional evidence and argument including oral testimony at any time thereafter. Plaintiff cites a trio of cases in favor of remand that have no application here. All three cases concern the situation where a plaintiff has obtained a verdict or judgment, but an appellate court has determined that there was a failure of proof on an essential element of the plaintiff's cause of action. That is not this case. Rather, the case of *Portis v. Greenhaw*, 38 S.W.3d 436 (Mo. App. W.D. 2001), is on point. *Portis* actually concerns the insufficiency of evidence to support a claim of juror misconduct. In *Portis*, the defendant alleged juror misconduct in the form of intentional non-disclosure. *Id*. at 444. In *Portis*, the court actually held a hearing on the defendant's motion for new trial. *Id*. The defendant had supported his motion with only an attorney affidavit, and at the hearing orally moved the court to hold a hearing to examine the juror, which the

court denied. *Id*. The Court of Appeals agreed that the defendant had ample opportunity to present evidence of juror non-disclosure at the hearing for the motion of new trial. *Id*. Further, the court agreed that the defendant could have subpoenaed the juror as a witness, but failed to do so. *Id*. Most significantly, the court agreed that since the defendant had failed to present substantial evidence on the issue of juror misconduct at the hearing for the motion for new trial, the trial court properly denied his request for another hearing to present evidence on that issue. *Id*. The court held that when a party alleges juror misconduct, that party is responsible for presenting evidence through testimony or affidavits of any juror, or other witness, either at trial or at the hearing on the motion for new trial. *Id*. at 445. The court further held that the proponent of the motion for new trial has the burden of proving their allegations. *Id.* Further, the court observed that Rule 78.05 provides counsel guidance when preparing for after-trial motion hearings. *Id.* at 444. Indeed, the rule presently provides that "depositions and oral testimony may be presented in connection with after-trial motions." Rule 78.05.

Here, Respondent was content to allow nearly two months to pass after his motion for new trial was fully briefed. In fact, by the time the court issued its order granting a new trial on June 28, 2004, only ten of the 90 days prescribed by Rule 81.05(a)(2)(A) remained, at which time the motion would have been deemed overruled had it not been ruled.

Furthermore, the case of *Peth v. Heidbrier*, 789 S.W.2d 859 (Mo. App. E.D. 1990), shows that while the proponent of a new trial motion is entitled to an

evidentiary hearing under Rule 78.05, it is up to that party to request one. *Id*. at 862. The burden to request an evidentiary hearing rested squarely on Respondent's shoulders. Respondent cannot now complain that the record is insufficient to support a finding of juror misconduct.

CONCLUSION

Because the trial court failed to specify a ground for ordering a new trial, its Order was erroneous. Even if this Court should choose to re-write Rule 84.05, it should have no practical effort on the outcome of this case. The record does not support a finding of juror misconduct and Respondent should not be permitted a second opportunity to attempt to prove it. Accordingly, Appellant respectfully requests that this court vacate the trial court's Order sustaining plaintiff's Motion for New Trial, and reinstate the amended Judgment Entry of March 10, 2004.

DOUGHERTY, MODIN & HOLLOWAY

By_____
Richard F. Modin, MO#27719
Theodore A. Kardis, MO#44142
10100 Ambassador Drive, Suite 220
Kansas City, MO 64153
(816) 891-9990
FAX: (816) 891-9905

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one (1) copy of the foregoing together with a disc was duly mailed, postage prepaid this _____ day of March, 2006, to:

Christopher P. Sweeny
TURNER & SWEENY
10401 Holmes Road, Suite 450
Kansas City, MO 64131
ATTORNEYS FOR RESPONDENT

and a courtesy copy to:

Andrew J. Gelbach
Attorney at Law
109 E. Market Street
P.O. Box 375
Warrensburg, MO 64093

_____
Richard F. Modin
Theodore A. Kardis

CERTIFICATION PURSUANT TO RULE 84.06

1. Appellant's Attorneys: Richard F. Modin, Missouri Bar No. 27719, Theodore A. Kardis, Missouri Bar No. 44142, 10100 Ambassador Drive, Suite 220, Kansas City, Missouri 64153.

2. This brief contains 8,624 words in compliance with Rule 84.06(b).

3. This brief contains 840 lines.

4. The disc has been scanned and is virus free.

_____
Richard F. Modin
Theodore A. Kardis