IN THE MISSOURI SUPREME COURT

MARK SPIECE,
Plaintiff/Respondent,

v.

MELODY GARLAND,
Defendant/Appellant

SC No. 87369

APPELLANT'S SUBSTITUTE BRIEF FILED BY RESPONDENT, MARK SPIECE

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JURISDICTIONAL STATEMENT

This is an appeal from the Judgment of the Honorable Marco Roldan entered in the Circuit Court of Jackson County, Missouri. Following the jury trial, Judge Roldan entered an order granting Plaintiff's Motion For New Trial. Judge Roldan subsequently entered a Judgment/Order granting Plaintiff's Motion For New Trial. In its Judgment, the trial court indicated that it sustained Plaintiff's Motion For New Trial because of juror misconduct.

Thus, the issues presented on appeal involve the determination of whether the trial court's "Order" was a final appealable judgment and whether the trial court properly granted a new trial to Plaintiff based on juror misconduct. This Court granted transfer of this appeal on January 31, 2006, after opinion by the Missouri Court of Appeals, Western District. This Court, therefore, has jurisdiction to hear this appeal. See Article V, Section 10 of the Missouri Constitution and Supreme Court Rule 83.04.

STATEMENT OF FACTS

I. INTRODUCTION

Plaintiff, Mark Spiece, was riding his motorcycle and Defendant Garland pulled out in front of him causing a collision. Defendant Garland admitted that the collision was her fault and that Plaintiff, Mark Spiece, did not have any fault. (Tr. 205). Mr. Spiece incurred $56,786.94 in medical bills. (Tr. 412 and 335-336). While Defendant Garland admitted liability, she did dispute the reasonableness and necessity of Plaintiff's medical bills and the nature and extent of his injuries. (Tr. 295-296 and 203-225).

II. VOIR DIRE

Before the attorneys asked any questions of the venire panel, the trial court instructed the panel as follows:

> It is necessary that you be asked a number of questions during [voir dire]. Your answers to these questions, ladies and gentlemen, will assist the court in determining whether it should excuse you from serving in this case and will also assist the attorneys in making their selection of those who will hear the case.
>
> …
>
> Please listen carefully to all the questions. Take your time in answering all the questions. Some of the questions may require you to recall experiences during your entire lifetime. Therefore, make sure that you search your memory before you answer a question.
>
> …

> Your answers, ladies and gentlemen, must not only be truthful, but they must also be full and complete. … Since this is an important part of the trial, ladies and gentlemen, you are required to be sworn. At this time I would ask you to please stand, raise your right hand, and be sworn. (Tr. 16-18)

After giving those instructions to the panel, the Court swore the panel in. (Tr. 18).

During his questioning of the venire panel, Plaintiff's counsel asked:

> 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).

Seven venire persons responded. (Tr. 70-77). The cases discussed by those seven included workers' compensation claims, car wrecks, cases against the railroad and a case against a hospital. (Tr. 71-77).

Martha Teodori was on the venire panel. (L.F. 100). Although she was injured in a slip and fall accident and had a slip and fall case, she did not respond to Mr. Turner's question. (L.F. 100 and Tr. 70-77).

III. VERDICT, POST TRIAL MOTIONS, AND THE COURT'S JUDGMENT

The jury began its deliberations at 4:42 p.m. and less than an hour later, it reached a verdict. (Tr. 581). The jury found in favor of Plaintiff, Mark Spiece, and awarded him $75,000.00. (Tr. 581).

On March 10, 2004, the trial court entered its judgment consistent with the jury verdict. (L.F. 22-23). Plaintiff, Mark Spiece, filed his Motion for New Trial and/or Additur with Suggestions in Support thereof on April 9, 2004. (L.F. 43-101). In his motion, Mr. Spiece alleged, among other things, that he was entitled to a new trial because of juror Martha Teodori's failure to disclose that she was a plaintiff in a slip and fall case. (L.F. 48). Defendant Garland filed her Suggestions in Opposition to Plaintiff's motion. (L.F. 102-113).

On June 28, 2004, the Court entered an "Order" sustaining Plaintiff's Motion for New Trial. (L.F. 114). On June 30, 2004, Appellant Melody Garland, filed her Notice of Appeal. (L.F. 115-117). On July 2, 2004, the trial court entered its "Judgment/Order" sustaining Plaintiff's Motion for New Trial. In that "Judgment/Order" the Court stated that the motion was sustained because juror number 3, Martha Teodori failed to disclose her involvement in prior civil litigation. (Supp. L.F. at 4).

POINT RELIED ON WITH PRIMARY AUTHORITIES

THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENT, MARK SPIECE'S, MOTION FOR NEW TRIAL BECAUSE JUROR NUMBER 3, MARTHA TEODORI, INTENTIONALLY FAILED TO DISCLOSE HER INVOLVEMENT IN PRIOR CIVIL LITIGATION IN THAT THERE WAS NO REASONABLE INABILITY TO COMPREHEND THE INFORMATION SOLICITED BY COUNSEL'S QUESTION: "IS THERE ANYBODY ON THE JURY WHO YOU OR A FAMILY MEMBER HAS EVER BEEN A PLAINTIFF IN A LAWSUIT FOR PERSONAL INJURY?" AND MS. TEODORI FAILED TO RESPOND EVEN THOUGH SHE REMEMBERED BEING INVOLVED IN A SLIP AND FALL CASE.

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

Brooks v. Brooks, 98 S.W.3d 530, 531 (Mo. En Banc. 2003)

Williams v. Barnes Hospital, 736 S.W.2d 33, 37 (Mo. En Banc. 1987)

Missouri Supreme Court Rule 74.01(a)

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ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENT, MARK SPIECE'S, MOTION FOR NEW TRIAL BECAUSE JUROR NUMBER 3, MARTHA TEODORI, INTENTIONALLY FAILED TO DISCLOSE HER INVOLVEMENT IN PRIOR CIVIL LITIGATION IN THAT THERE WAS NO REASONABLE INABILITY TO COMPREHEND THE INFORMATION SOLICITED BY COUNSEL'S QUESTION: "IS THERE ANYBODY ON THE JURY WHO YOU OR A FAMILY MEMBER HAS EVER BEEN A PLAINTIFF IN A LAWSUIT FOR PERSONAL INJURY?" AND MS. TEODORI FAILED TO RESPOND EVEN THOUGH SHE REMEMBERED BEING INVOLVED IN A SLIP AND FALL CASE.

A. STANDARD OF REVIEW

Appellate courts are more liberal in affirming the grant of a new trial than the denial of a new trial. See Lowdermilk v. Vescovo Building and Realty Co., Inc., 91 S.W.3d 617, 625 (Mo.App. E.D. 2002). And an appellate court should not reverse a trial court's grant of a new trial unless there has been a clear abuse of discretion. Id. A trial court abuses its discretion when its ruling is "clearly against the logic of the circumstances before the court and is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration." See Anderson v. Kohler Company, 170 S.W.3d 19, 23 (Mo.App. E.D. 2005). If reasonable people can disagree about the propriety of the trial court's action, then there was no abuse of discretion. Id.

1. The Trial Court's "Order" Granting A New Trial Was Not An Appealable "Judgment."

Appellant Melody Garland will likely argue that this Court's review is limited because the trial court's "Order" granting Respondent Mark Spiece's Motion for New Trial did not set forth the reasons the Court granted the motion. However, the trial court's "Order" was not an appealable "Judgment." See Missouri Supreme Court Rule 74.01(a) and Brooks v. Brooks, 98 S.W.3d 530, 531 (Mo. En Banc. 2003).

Missouri Supreme Court Rule 74.01(a) provides that "a judgment is entered when a writing signed by the judge and denominated a 'judgment' or 'decree' is filed." Respondent acknowledges that §512.020 RSMo states that an order granting a new trial is appealable. But it can only be appealed if "a writing signed by the judge and denominated 'Judgment' or 'Decree' is filed." See Rule 74.01(a) and Brooks, 98 S.W.3d at 532.

In Brooks, this Court found that the Order appealed from was an appealable Order pursuant to Missouri Revised Statute §512.020. However, the Court noted that the requirement that the judge file a writing denominated a "Judgment" or "Decree" pursuant to Rule 74.01(a) applies to "any order from which an appeal lies." Id. Consequently, to perfect the appeal of an "Order" which is appealable pursuant to §512.020, "it is still necessary to denominate the order as a 'judgment or decree.'" Id.

Likewise, here, even though an order granting a new trial is appealable pursuant to §512.020 RSMo, to perfect the appeal, "it is still necessary to denominate the "order" as a 'judgment or decree.'" Id. The trial court's "Order" granting the new trial was not

denominated a "Judgment" or "Decree," and therefore, it was not appealable. Id. See Godefroid v. Kiesel Co., 2003 W.L. 22399710 (Mo.App. E.D. 2003) where the Court of Appeals for the Eastern District specifically found that an order granting a new trial was not appealable in that it was not denominated a judgment or decree. Id. at *3 citing Brooks.

Four days after it entered its "Order," the trial court entered its "Judgment/Order" sustaining Plaintiff, Mark Spiece's, Motion for New Trial because of juror number three's failure to disclose her prior involvement in civil litigation. (Supp. L.F. 4). This Judgment was entered within ninety days of Plaintiff, Mark Spiece's, April 9, 2004, Motion for New Trial. Between the time the Court entered its "Order" and the time it entered its "Judgment/Order" Appellant Garland filed her Notice of Appeal. (L.F. 115-117). Because a "Judgment" had not been entered, Appellant's Notice of Appeal was premature. Thus, the trial court did not lose jurisdiction when Appellant Garland filed her Notice of Appeal.

A final appealable "Judgment" was not entered until Judge Marco Roldan's Judgment of July 2, 2004. In that Judgment, he specifically articulates the reason for granting Plaintiff's Motion for New Trial. Because this appeal follows from that Judgment rather than the Court's "Order," this Court must review the trial court's Judgment under an abuse of discretion standard.

2. Even If The Trial Court's Order Granting A New Trial Is Deemed Appealable, The Ground Upon Which The Trial Court Granted The Motion For New Trial Is Clear From The Record, And Therefore, The Abuse Of Discretion Standard Applies.

If this Court determines that the trial court's "Order" granting a new trial is appealable, then Respondent acknowledges that the trial court violated Rule 78.03, by failing to specify in its "order" the ground or grounds on which it sustained Respondent's motion for new trial. Respondent further acknowledges that a presumption arises that the new trial was erroneously granted. However, the presumption is rebutted where the ground on which the trial court based its ruling clearly appears from the record. See Hightower v. Hightower, 590 S.W.2d 99, 103 (Mo.App. 1979).

In Hightower, the trial court was presented with a motion for new trial that set forth three grounds in support thereof: 1) the Court erred in the division of marital property; 2) the Court erred in awarding the entire equity in the home to Appellant; and 3) the Court erred in awarding Respondent to pay $300.00 per month in child support. The trial court sustained the Motion for New Trial, but failed to state the grounds on which the motion was granted. Id. at 103. Consequently, the Court of Appeals found that a presumption arose that the new trial was erroneously granted. Id. The Court further found, however, that the presumption is rebutted where the ground upon which the motion is granted clearly appears from the record. Id. citing Ray v. Bartolotta, 408 S.W.2d 838 (Mo. 1966).

In finding that the record before it clearly indicated the ground upon which the new trial was granted, the Court of Appeals noted that the trial court, on two occasions, indicated in the record its conviction that the original decree was "manifestly unfair to the Respondent." Id. at 104. The trial court made this statement once orally at the time the motion for new trial was sustained and again in a nunc pro tunc order which the Court of Appeals found to be invalid. Id.

The Appellant argued that these expressions by the trial court could not be considered in determining why the motion for new trial was granted. Id. The Court of Appeals acknowledged that there was a long line of authority that holds that a trial court speaks only by its records and that such records are "the sole repository for the recital of the ground or grounds which prompted the Court's action." Id. (citation omitted). However, the Court further recognized:

> "While oral statements or memorandum of the judge cannot be used to countervail or impeach what the order of record actually recites, 'it does not follow that an Appellate Court is in all events precluded from considering such memorandum or oral statement in determining precisely why the new trial was allowed. On the contrary, the filing of memorandum opinions is unbearably encouraged and commended; and where the record entry is ambiguous, uncertain, or incomplete, an Appellate Court may properly look to an accompanying memorandum…this is in accord with the principle that extraneous matters may be considered for the purpose of explaining or supporting a record entry, but not to oppose or contradict it.'"

Id. at 104 quoting Ponyard v. Drexel, 205 S.W.2d 267, 270 (Mo.App. 1947). Based on this principle of law and the facts before it, i.e., the trial court's invalid nunc pro tunc order and oral statement, the Hightower Court concluded that the ground upon which the trial court acted was clear, and therefore, the Court reviewed the case pursuant to an abuse of discretion standard. Id.

Here, the trial court's "Order/Judgment" entered within four days of the trial court's "Order" granting a new trial makes it clear that the trial court granted Respondent's motion for new trial on the ground that juror number 3, failed to disclose her prior involvement in civil litigation. (Supp. L.F. 4). Thus, pursuant to the Court's holding in Hightower, the presumption that the trial court's "Order" was erroneous has been rebutted and this Court should review this matter under an abuse of discretion standard. Hightower, 590 S.W.2d at 103-104.

3. The Standard of Review Under Rule 84.05.

In the event this Court concludes that the trial court's "Order" granting Respondent's Motion for New Trial was an appealable order and if this Court concludes that the ground upon which that "Order" was granted is not clear from the record, then there is a presumption that the trial court's ruling was erroneous, and Respondent has the burden of overcoming this presumption. See Supreme Court Rule 84.05(c). In addition, it cannot be presumed that the Motion for New Trial was granted on any discretionary grounds. See Supreme Court Rule 84.05(d).

Specifically, Missouri Supreme Court rule 84.05(c) and (d) state as follows:

(c) Where Trial Court Fails to Specify Grounds for the Granting of a New Trial. When 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. . . .

(d) Where New Trial Is Granted by Trial Court Without Specifying Discretionary Grounds. If 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. (emphasis added).

4. Current Case Law Interpreting Rule 84.05 Fails to Follow the Plain Language of the Rule and Should Not Be Followed.

The Court of Appeals in this case, and numerous others, has interpreted this rule as precluding an Appellate Court from even **considering** discretionary grounds in support of a trial court's order granting a new trial. See e.g., Bishop v. Carper, 81 S.W.3d 616 (Mo.App. W.D. 2002). This interpretation of Rule 85.05(d) is not supported by the plain language of the rule.

The rules of construction for interpreting statutes are also applicable to interpreting Supreme Court Rules. See State ex rel. Streeter v. Mauer, 985 S.W.2d 954 (Mo.App. W.D. 1999). Thus, the intent of the rule is to be determined by the plain and ordinary meaning of the words used in the rule. Id. Furthermore, Courts have no authority to read into the rule an intent contrary to the intent made evident by the plain

language. Boggs ex rel. Boggs v. Lay, 164 S.W.3d 4, 23 (Mo.App. E.D. 2005). Finally, Courts are not to add words by implication to a rule that is clear. Id.

As pointed out by Judge Breckenridge in her concurring opinion in Bishop v. Carper, 81 S.W.3d 616 (Mo.App. W.D. 2002), the plain language of 84.05(d) "prohibits only this Court's *assuming* that the new trial was granted on any discretionary grounds without proof…." (emphasis original). Nothing in the rule states that the Court of Appeals is prohibited from *considering* discretionary grounds stated within the motion for new trial. If this Court intended to prohibit Appellate Courts from considering discretionary grounds, it could have so stated. But it did not. Nonetheless, the Courts interpreting the rule have repeatedly read into the rule a prohibition against even considering discretionary grounds. This construction is contrary to the plain language of the rule, and reads into the rule language which is not there. Thus, Respondent respectfully suggests that existing case law interpreting Rule 84.05(c) and (d) should no longer be followed.

5. Interpretation of Rule 84.05 Under the Current Case Law Leads to an Absurd and Unjust Result, and Therefore, Should Not Be Followed.

Our Courts have repeatedly held that the law favors a construction of statutes and rules which avoids unjust or unreasonable results. See e.g., Maryland Casualty Co. v. General Electric Co., 418 S.W.2d 115 (Mo. 1967) and Dierkes v. Blue Cross and Blue Shield of Mo., 991 S.W.2d 662 (Mo. En Banc. 1991). Respondent respectfully suggests that the existing case laws' interpretation of Rule 84.05(d) leads to an unjust and unreasonable result in this and like cases.

Under the current interpretation of the rule, when the trial court actually sustains a motion for new trial, thereby acknowledging that a party did not receive a fair trial because of some juror misconduct or trial court error, but fails to state the grounds for its order, the victorious party is subjected to a higher standard of review than if the trial court had denied the motion. The party who loses a motion for new trial is entitled to Appellate review of ALL trial court errors; yet, a party who wins a motion for new trial is only entitled to Appellate review of errors involving "non-discretionary" matters. If no non-discretionary grounds were listed in the motion, then there is no review at all. See Bishop, 81 S.W.3d 616.

Subjecting a victorious party to a higher standard of review than if the motion for new trial had been denied is unreasonable and unjust. Punishing a wronged party for the trial court's failure to comply with a rule is equally unreasonable and unjust. Precluding Appellate review of the trial court's errors is also unreasonable and unjust. As noted by Judge Breckenridge in her concurring opinion, eliminating judicial review of the trial court's errors is a result this Court rejected in King v. Kansas City Life Insurance Co., 164 S.W.2d 458, 465 (Mo. En Banc. 1942) because of the prejudice it causes the respondent. This Court could not have intended such an absurd or unjust result, and therefore, the existing case law should no longer be followed and should be overturned.

6. If the Existing Case Has Appropriately Interpreted Rule 84.05(d), then the Rule is Unconstitutional.

Article V, § 5 of the Missouri Constitution which states, "The supreme court may establish rules … which shall have the force and effect of law. **The rules shall not**

change … the right of appeal." (emphasis added). Under §512.020 RSMo. a party aggrieved by a final judgment has a right to appeal. Under the current interpretation of Rule 84.05(d), an appellate court is precluded from even considering discretionary grounds in support of a court's order that sustains a motion for new trial without specifying the grounds. If this interpretation is correct, then there is no appellate review at all in any case where the only grounds stated in the motion for new trial are discretionary grounds. See Bishop v. Carper, 81 S.W.3d 616 (Mo.App. W.D. 2002). Because the rule precludes appellate review, it violates Article V, § 5 of the Missouri Constitution.

7. The Rule Fails to Fulfill Its Intended Purposes.

Our Courts have stated two purposes behind Rule 84.05(c) and (d). One alleged purpose 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. Rather, it is appropriate to require the beneficiary of the new trial **to identify the specific issues which are relied upon to support the order**." Rodman v. Schrimph, 18 S.W.3d 570, 574 (Mo.App. W.D. 2000) (emphasis added). Another alleged purpose is to "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." Hightower, 590 S.W.2d at 103.

If the purpose of the rule is "to identify the specific issues which are relied upon to support the order," why not just ask the Court who entered the Order? This is the

procedure followed when a trial court fails to enter findings of fact and conclusions of law as required by Missouri Rule 73.01(a)(3).

Pursuant to Missouri Supreme Court Rule 73.01(a)(3), a trial court is required to file a brief opinion containing a statement of the grounds for its decision and the method of deciding any damages if requested by a party. Missouri Courts have held that the provisions of Rule 73.01(a)(3) are mandatory where a party prepares and files a request for findings on specified fact issues. See Legacy Homes Partnership v. General Electric Capital Corp., 10 S.W.3d 161, 162 (Mo.App. E.D. 1999). And where a trial court fails to comply with the mandates of Rule 73.01(a)(3), Missouri Courts reverse and remand the trial court's judgment with directions that the trial court enter findings and conclusions as required by the rule.

Likewise, here, the Court could simply reverse and remand the trial court's Order with directions to the trial court to state the grounds upon which it entered its order granting a new trial. Or if the goal is to "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," the most efficient approach would be to simply declare that an order or judgment granting a motion for new trial is not final for purposes of appeal unless or until it specifies the ground or grounds upon which the new trial is granted. Then, the trial court would have to state the grounds in its judgment before the judgment could even be appealed. When the matter reached the appellate court, it would be clear to all what the exact issues on appeal are. This would save the time, expenses and resources of not only the Courts, but also the parties.

Respondent respectfully suggests that Rule 84.05(c) and (d) should be repealed and a new rule adopted that states that a judgment granting a motion for new trial is not final for purposes of appeal unless the judgment specifies the grounds upon which the new trial is granted. Such a rule would achieve the stated purposes of Rule 84.05(c and d) without working a hardship on any of the parties or the courts.

B. JUROR MARTHA TEODORI INTENTIONALLY FAILED TO DISCLOSE THAT SHE WAS INVOLVED IN A PERSONAL INJURY LAWSUIT.

Missouri law is well settled that every citizen has a constitutional right to a trial by a fair and impartial jury. See Banks v. Village Enterprises, Inc., 32 S.W.3d 780, 786 (Mo.App. W.D. 2000). To insure this constitutional right, each juror has the duty to fully, fairly and truthfully answer each question asked during voir dire so that the parties may intelligently exercise their preemptory challenges and challenges for cause. Id. If a juror fails to fulfill this duty and intentionally withholds material information requested during voir dire, "bias and prejudice are inferred." See Williams v. Barnes Hospital, 736 S.W.2d 33, 37 (Mo. En Banc. 1987). Consequently, intentional concealment by a juror as "become tantamount to a per se rule mandating a new trial." Id.

Intentional nondisclosure by juror Martha Teodori was one of the grounds asserted in Respondent's Motion for New Trial. As this Court recognized in Williams, intentional non-disclosure mandates a new trial. In other words, it is a non-discretionary ground in supporting the trial court's order granting a new trial. Thus, even if this Court continues to follow the existing case law's interpretation of Rule 84.05, Respondent has stated an

adequate, non-discretionary ground for this Court to consider in support of the trial court's Order.

In the alternative, if the Court finds that intentional nondisclosure is a discretionary ground for granting a new trial, then all of the grounds stated in Plaintiff's Motion for New Trial were discretionary grounds. (L.F. 43-49). This situation would then be analogous to those cases where only one ground is stated in the Motion For New Trial. In those cases, our Courts have found that "by its very act of sustention, the [Trial] Court specified the ground on which it acted." See Ray v. Bartolotta, 408 S.W.2d 838, 840 (Mo. 1966). Likewise, here, if the Court found that all of the grounds stated in Respondent's Motion for New Trial are discretionary, then by its very act of sustention, the trial court specified that its ruling was based on a discretionary ground. Thus, the Court does not have to **presume** the new trial was granted on a discretionary ground; it knows that is was.

In Williams v. Barnes Hospital, 736 S.W.2d 33, 37 (Mo. En Banc. 1987) this Court stated:

> "If a juror intentionally withholds material information requested on voir dire, bias and prejudice are inferred from such concealment. For this reason, a finding of intentional concealment has 'become tantamount to a per se rule mandating a new trial.'"

See also Brines, by and through Harlan v. Cibis, 882 S.W.2d 138, 140 (Mo. En Banc. 1994). The Brines Court noted that only if a juror's intentional non-disclosure does not

involve a material issue, or if the non-disclosure is unintentional, should the trial court inquire into prejudice. Id. at 140.

The Brines Court defined intentional non-disclosure as follows:

1) Where there exists no reasonable inability to comprehend the information solicited by the question asked 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.

On the other hand, unintentional non-disclosure exists where "the experience forgotten was insignificant or remote in time, or where the venire person reasonably misunderstood the question posed." Id. at 139.

In determining whether a juror's nondisclosure was intentional, the juror's subjective intent is not the issue. See Hatfield v. Griffin, 147 S.W.3d 115, 119 (Mo.App. W.D. 2004). Rather, the issue is whether a reasonable person would have understood that she was being asked to disclose the information sought by the question.

The Hatfield Court went on to explain the test set forth by this Court in Williams v. Barnes Hospital. The Hatfield Court noted that under the first prong, the Court asks "whether or not a reasonable person would have understood what information was being elicited." Id. "If so, under the second prong. the nondisclosure is intentional if the venire person either remembers the lawsuit or his or her forgetting it is unreasonable." Id. at 119-120.

Thus, if 1) there was no reasonable inability to comprehend the information solicited by the question; 2) juror number 3 actually remembered her involvement in a prior slip and fall case; and 3) the information sought by the question was material, then a new trial was mandated. Here, all of these elements are met, and therefore, the trial court did not err in sustaining Plaintiff's Motion for New Trial.

1. There Was No Reasonable Inability To Comprehend The Information Sought By The Question.

In determining whether the juror's non-disclosure was intentional, the Court first determines whether "there exists any reasonable inability to comprehend the information solicited by the question asked." Id. Here, Plaintiff's counsel asked the venire panel:

> 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).

Seven venire persons responded. (Tr. 70-77). The cases discussed by those seven included workers' compensation claims, car wrecks, cases against the railroad and a case against a hospital. (Tr. 71-77).

In Brines, the Supreme Court found that there was no reasonable inability to comprehend the information sought by a question that is almost identical to the question at issue here. 882 S.W.2d at 139. The prospective jurors in Brines were asked, "'Do we

have anyone on the [jury] panel who is now or has been a defendant in a lawsuit?'" Id. This Court found that the question unequivocally triggered the prospective juror's duty to disclose previous lawsuits against him. Id. Likewise, here, counsel's question, "Is there anybody on the jury who you or a family member has ever been a plaintiff in a lawsuit for personal injury?" unequivocally triggered juror Teodori's duty to disclose her previous slip and fall case.

Thus, the first element of intentional non-disclosure was met.

2. The Juror Actually Remembered Her Prior Involvement In A Slip And Fall Case.

The second factor to be considered is whether the juror Teodori actually remembered her involvement in a previous slip and fall case. Brines, 882 S.W.2d at 139. Here, Ms. Teodori specifically stated in her affidavit that she was involved in a personal injury case where she recovered a settlement from Safeco Insurance Company. Thus, Ms. Teodori "actually remember[ed] the experience," and therefore, the second element of "intentional non-disclosure" was met.

There is no evidence that Ms. Teodori misunderstood the question, forgot her previous involvement in her slip and fall case, or that her case was remote in time. Thus, there is nothing to indicate that her non-disclosure was "unintentional."

3. The Information Sought Was Material.

The final factor to be considered in determining whether the trial court properly granted a new trial was whether or not the information sought was material. In Brines, this Court unequivocally stated, "questions and answers pertaining to a prospective

juror's prior litigation experience are material." Id. at 140. Thus, counsel's question regarding the prospective juror's prior litigation experience was material and Ms. Teodori's failure to disclose her involvement in prior litigation mandated the granting of a new trial. Id.

C. IF THIS COURT FINDS THAT THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE TRIAL COURT'S JUDGMENT GRANTING A NEW TRIAL, THEN REMAND IS APPROPRIATE.

Respondent respectfully requests that this Court affirm the trial court's judgment granting a new trial and remand this matter to the trial court for a new trial. In the alternative, if this Court finds that the evidence is insufficient to support the trial court's judgment, then Respondent respectfully requests that this Court remand this 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. See Commerce Bank, N.A. v. Blasdel, 141 S.W.3d 434, 458 (Mo.App. W.D. 2004) where the Court of Appeals stated, "where a plaintiff has by mistake or inadvertence failed to prove up a claim in a situation where the proof seems to have been available, the reviewing Court has no alternative but to reverse the judgment and remand the case for the reception of additional evidence."

In State ex rel., Division of Family Services v. Standridge, 676 S.W.2d 513 (Mo. En Banc. 1984) this Court stated:

> "The furtherance of justice requires [that] a case shall not be reversed without remanding unless the Appellate Court is convinced the facts are such that a recovery cannot be had. 'It is a settled practice of appellate procedure that a case

should not be reversed for failure of proof without remanding, unless the record indicates that the available essential evidence has been fully presented and that no recovery can be had in any event.'" Id. at 517.

See also Frankum v. Hensley, 884 S.W.2d 688, 692 (Mo.App. S.D. 1994). In that case the Court of Appeals stated "it is a settled practice of appellate procedure that a case should not be reversed for failure of proof without remanding unless the records indicates the available essential evidence has been fully presented and no recovery can be had in any event." (citation omitted). Here, nothing in the record indicates that any alleged evidentiary deficiency could not be cured on remand. Consequently, if this Court reverses the trial court, this cause should be remanded for reception of additional evidence and argument regarding Plaintiff's Motion for New Trial.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the trial court's judgment granting a new trial, and remand this case to the trial court for a new trial. In the alternative, Respondent respectfully requests that if this Court is going to reverse the trial court, that it also remand this case with directions that the trial court hold a hearing on Plaintiff's Motion for New Trial to allow for the presentation of additional evidence and argument.

* * *

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) copies of the foregoing together with a disc were duly mailed, postage prepaid this 13th day of March, 2006, to:

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