Appeal No. SC96195

In The
MISSOURI SUPREME COURT

SHERRY SPENCE
Plaintiff/Respondent
vs.
BNSF RAILWAY COMPANY
Defendant/Appellant

Appeal from the Circuit Court of Stoddard County, Missouri
The Honorable Stephen R. Mitchell

SUBSTITUTE BRIEF OF APPELLANT BNSF RAILWAY COMPANY

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Jurisdictional Statement

Sherry Spence ("Spence") filed a wrongful death suit against BNSF Railway Company ("BNSF") for the death of her husband, Scott Spence, who was killed in an accident when the pick-up truck he was driving collided with a BNSF train at a railroad crossing in Pemiscot County, Missouri. The case went to trial on April 20, 2015, and, on April 28, 2015, the jury returned a verdict in the total amount of $20 million assessing 95% of the fault to BNSF and 5% to decedent Scott Spence. That same day, the trial court entered judgment against BNSF in the amount of $19 million, plus court costs and allowable interest at the statutory rate. Upon Spence's Motion to Amend Judgment, the trial court, on May 7, 2015, entered an amended judgment against BNSF in the amount of $19 million plus court costs and interest at the rate of 5.25% per annum.

BNSF timely filed a post-trial motion for new trial. Following an evidentiary hearing on August 20, 2015, the trial court denied BNSF's post-trial motions on August 25, 2015. BNSF timely filed its Notice of Appeal on September 3, 2015. On December 27, 2016, the Missouri Court of Appeals for the Southern District, en banc, issued its opinion reversing the trial court's amended judgment. On January 10, 2017, Spence filed an application for transfer in the appellate court, which was denied on January 18, 2017. On February 2, 2017, Spence filed an application for transfer before this Court, which was granted on April 4, 2017. This Court has jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution.

Statement of Facts

Sherry Spence brought this wrongful death action arising out of a collision involving a pick-up truck driven by her husband, Scott Spence, and a BNSF train at a crossing on County Road 470 in Pemiscot County, Missouri (Crossing 665524Y). (L.F. 64.) Mr. Spence was killed in the collision, and Spence filed a wrongful death action against BNSF and its employees, John D. Wallace and Thomas Schiwitz (the engineer and conductor of the train). (L.F. 63-72; App. A75-A84.) Spence initially asserted two counts: Count I, a wrongful death/negligence action against BNSF and its employees; and Count II, a claim asserting punitive damages (later amended to a claim for "damages for aggravating circumstances"). (L.F. 63-72; App. A75-A84.) Before trial, Spence dismissed Wallace and Schiwitz as named defendants and dismissed Count II as well. (L.F. 939-940, 1095-1096.)

The case went to trial April 20, 2015. On April 28, 2015, the jury returned a verdict in the amount of $20 million, assessing 95% of the fault to BNSF (purportedly under two different claims) and 5% to decedent Scott Spence. (L.F. 1188.) That same day, the trial court entered judgment against BNSF in the amount of $19 million plus court costs and allowable interest at the statutory rate. (L.F. 1189.) Upon Spence's Motion to Amend Judgment, the trial court, on May 7, 2015, entered an amended judgment against BNSF in the amount of $19 million plus court costs and interest at the rate of 5.25% per annum. (L.F. 1190, 1328; App. A1.)

BNSF timely filed a post-trial motion requesting a new trial based on issues relating to intentional nondisclosure by a juror and instructional and evidentiary errors.

(L.F. 52-53, 1499-1569.) Following an evidentiary hearing on August 20, 2015, the trial court denied BNSF's post-trial motions on August 25, 2015. (L.F. 58, 60, 2367; App. A2.) BNSF timely filed its Notice of Appeal on September 3, 2015. (L.F. 61, 2379-2380.)

On December 27, 2016, the Missouri Court of Appeals for the Southern District, en banc, issued its opinion reversing the trial court's amended judgment, holding that 1) a juror intentionally failed to disclose, despite clear voir dire questions, that her son had been killed in an auto accident, and 2) BNSF was prejudiced, in violation of BNSF's constitutional right to a trial by a fair and impartial jury. *Slip. Op*. at *2-4. On January 10, 2017, Spence filed an application for transfer in the appellate court, which was denied on January 18, 2017. On February 2, 2017, Spence filed an application for transfer before this Court, which was granted on April 4, 2017.

Juror Nondisclosure (Points I – III)

A. Juror Questionnaire and Other Materials Distributed Pre-Trial

Before trial, the trial court mailed juror questionnaire forms to each of the prospective jurors for this case, including Juror Kimberly Cornell.[1] (L.F. 1332; App.

[1] The juror questionnaire was approved and authorized to be used by the Stoddard County Missouri Circuit Court and substantially tracks the form approved by this Court and distributed to each circuit clerk pursuant to a 2005 Supreme Court Order. (Exhibits A and B, attached to Appellant's Motion to File Supplemental Legal File, to be taken with the case, per the Court of Appeals' July 19, 2016 Order.)

A23.) The juror questionnaire for Juror Cornell contained a misspelling of Ms. Cornell's name at the top of the form, typed as "Kimberly Ann ***Carnell***." (L.F. 1332; App. A23.)

Question 14 of the juror questionnaire specifically asked: "Have you or any member of your immediate family been a party to any lawsuit (as a plaintiff or defendant, not merely as a witness)?" (L.F. 1332; App. A23.) Juror Cornell responded "No" by marking the box next to the word "No." (L.F. 1332; App. A23.)

Question 15 of the juror questionnaire asked: "Have you ever made a claim or had a claim made against you to obtain or recover money, either for physical injuries or for damage to property?" (L.F. 1332; App. A23.) Juror Cornell responded "No" by marking the box next to the word "No." (L.F. 1332; App. A23.)

Juror Cornell then signed the form attesting as follows: "**I swear/affirm under penalty of perjury these facts are true according to my knowledge and belief.**" (L.F. 1332; App. A23.) (emphasis in original).

Juror Cornell returned the signed form to the trial court without correcting the misspelling of her last name as it was typed ("**Carnell**") at the top of the form.[2] (L.F. 1332; App. A23.) Although Juror Cornell signed the juror questionnaire form, the deputy circuit clerk, Cindy Wheeler ("the deputy clerk"), testified she could not tell from the cursive signature how Juror Cornell spelled her name and, therefore, reasonably relied

[2] Rather, Juror Cornell's initials appear next to the misspelling. (L.F. 1332; App. A23.)

upon the typewritten name as opposed to the cursive signature in preparing documents for distribution to the parties' counsel. (Tr. Vol. 9 at 74-75.)[3]

Twelve days before trial, the circuit clerk's office distributed to counsel the completed juror questionnaires, the Pool Selection Report, and a seating chart. (L.F. 1804; Tr. Vol. 9 at 71-78.) All of these documents contained the same misspelling of Juror Cornell's last name (typed as "**Carnell**"). (L.F. 1333, 1805-1806, 1854-1860; App. A24.) As the Stoddard County deputy clerk later explained, it is important that the information contained within these documents—including the spelling of the juror's names—be accurate. (Tr. Vol. 9 at 77.) That information is provided to trial counsel before the commencement of trial so counsel may rely on and use them to perform a Case.net review to prepare for voir dire and the selection of a fair and impartial jury. (Tr. Vol. 9. at 71-77.)

BNSF's defense counsel performed a Case.net review on the typed names of all of the jurors who appeared in the juror questionnaires, the Pool Selection List, and the seating chart—each of which incorrectly identified Juror Cornell as "Kimberly Ann **Carnell**." (L.F. 1332-1334; App. A23-A25; L.F. 1801-1811, 1854-1860; App. A26-A32.) Their Case.net review revealed no results for "Kimberly Ann **Carnell**." (L.F. 1493.)

[3] The transcript of the August 20, 2015 post-trial evidentiary hearing is located at the end of Volume 9 of the Trial Transcript, hereinafter cited as "Tr. Vol. 9 at __."

B. Clerk's Discovery of Misspelling

The trial transcript is silent about the spelling of Juror Cornell's name at any time before, or during voir dire and trial. However, the deputy clerk testified during an August 20, 2015 evidentiary hearing on BNSF's post-trial motions that she became aware there was an issue with the spelling of Juror Cornell's name on the first morning of trial when the jurors were checking in. (Tr. Vol. 9. at 63-64.) The deputy clerk testified that she never had encountered a misspelling issue like this before. (Tr. Vol. 9 at 81-82.)

According to the deputy clerk, she advised one attorney from each side of the misspelling either before or after the jurors were brought into the courtroom, and she provided a jury list, to be used for strikes, with her hand-written correction of Juror Cornell's name. (Tr. Vol. 9. at 64-68.) However, the deputy clerk could not recall which of the attorneys for each side she actually provided this information to, and BNSF's counsel and paralegal stated under oath that they did not know Juror Cornell's name had been misspelled in the jury materials until after the verdict in this case. (Tr. Vol. 9. at 79, 80, 92-95; L.F. 1804, 2284-2294.) Additionally, the deputy clerk could not recall if any opportunity was given to either side to run additional Case.net searches after the misspelling was revealed. (Tr. Vol. 9. at 82.) Nor did she recall there being any discussions with the judge or counsel about allowing counsel time to run additional searches or investigation based on the misspelling and the record does not reflect any such discussion. (Tr. Vol. 9. at 81 and 84-85.)

Finally, the deputy clerk also testified that she did not believe that she brought any misspelling issue to the attention of the trial judge before voir dire, and she did not know

when during the trial she may have brought that issue to the judge's attention. (Tr. Vol. 9. at 78-79.)

C. Pre-Trial Conference Before Voir Dire

The trial court conducted a short pre-trial conference before voir dire the first morning of trial. (Tr. 8-19.) During that brief pre-trial conference, BNSF's counsel advised the trial court they had discovered that Juror 55, one of the prospective jurors on the list that had previously been circulated to counsel before trial, had been a plaintiff in a wrongful death case involving the death of her husband, and BNSF requested that Juror 55 be stricken for cause. (Tr. 10-11.) BNSF also advised the trial court that its local counsel, Tom Collins, had a partner in his firm who had defended that prospective juror's wrongful death case. (Tr. 12.) The trial court noted BNSF's request, but deferred ruling. (Tr. 12-13.) At the end of voir dire, BNSF's counsel again moved to strike Juror 55 for cause in light of her prior involvement as a plaintiff in a wrongful death case involving the death of her husband. (Tr. 175.) The trial court denied BNSF's motion, but Juror 55 was not reached for purpose of further strikes. (Tr. 180-183.)

D. Voir Dire

At the beginning of voir dire, the judge informed all of the prospective jurors that trial would begin upon the selection of a fair and impartial jury and instructed the panel as follows:

> The failure on your part to follow the rules and instructions I give you may result in a miscarriage of justice, and a new trial may be required. You have been summoned today as prospective jurors for the trial of a civil case.

> Civil cases begin with the selection of a qualified and impartial jury. You will be asked a series of questions to determine if you have any personal interest or knowledge of the case that would make it difficult for you to be fair and impartial. The questions asked are not meant to pry into your personal life. They are simply a necessary part of the process of selecting a jury. Your answers must be truthful and complete. Therefore, please listen to the questions carefully and take your time in answering. If you do not understand a question, raise your hand and it will be clarified. If later in the questioning process, you remember something that you failed to mention earlier, raise your hand and let us know.

(Tr. 22; App. A62.) The clerk then proceeded to swear the panel, and all prospective jurors (including Juror Cornell) swore under oath to "truly answer all questions that may be propounded to [them], touching [their] qualifications to serve as jurors in this cause now pending before the Court[.]" (Tr. 23; App. A63.)

After the panel was sworn, the judge emphasized the importance of knowing a juror's litigation history and specifically admonished and questioned the panel about any information that may not have been previously disclosed on the juror questionnaires:

> Let me remind everyone that under Missouri law, a juror's failure to disclose his or her litigation history is presumed to be prejudicial. So in view of the time and expense involved in preparing for a jury trial and considering the sacrifices that you jurors endure to make this trial possible, we need to know whether any of you have been involved in any prior

> criminal or civil court cases or lawsuits in order to determine whether those might be relevant today in this case. Is there anyone on the panel who has been a party to a criminal or civil court case or lawsuit that you have not already disclosed on the juror questionnaire that was mailed to you ahead of time? If so, indicate. Good.

(Tr. 25-26; App. A65-A66.) No one on the panel, including Juror Cornell, responded to the judge's direct inquiry. (Tr. 26; App. A66.)

In addition to the trial court's direct inquiry into the jurors' litigation history, members of the panel were specifically asked during voir dire if they or any members of their family had been in a motor vehicle accident. (Tr. 149-151; App. A67-A69.) BNSF's counsel asked, **"Anyone else who's been in an automobile accident, a motor vehicle accident, or had a close family member who has?"** (Tr. 149 (emphasis added); App. A67.) Three prospective jurors responded in the affirmative, but Juror Cornell remained silent. (Tr. 149-151; App. A67-A69.) BNSF's trial counsel then followed up by asking, **"Anybody else that I've missed, who's been in an automobile accident that we haven't already talked about, or had a close friend or family member, other than what we've already heard from today?"** (Tr. 151 (emphasis added); App. A69.) At that point another juror responded that her daughter had been in several motor vehicle accidents and had "totaled three cars," but Juror Cornell again remained silent. (Tr. 151-152.) (The entire text of BNSF's auto-accident questioning is attached as part of the appendix; App. A67- A74.)

Juror Cornell was selected and sworn to serve as one of the twelve fair and impartial jurors for the case and ultimately participated in the verdict. (Tr. 183; L.F. 1188.)

E. The Truth about Juror Cornell

After the verdict and following the release of the jury, Justin Murphy, a BNSF representative present to monitor the trial, introduced himself to Juror Cornell to ask about the verdict. (Tr. Vol. 9. at 40-41.) She introduced herself as Kimberly Cornell and agreed to talk to him, but said she first wanted to talk with Mrs. Spence. (Tr. Vol. 9. at 42.)

Mr. Murphy then witnessed Juror Cornell hug Spence and her sons and say "I'm sorry … I can relate because I have lost a son myself and I can relate to what you are going through." (Tr. Vol. 9. at 42.) Juror Cornell subsequently walked with Mr. Murphy outside the courthouse and told him she had an "ex" who had been involved in a near miss involving a train, that a friend of her son had been killed in a train versus vehicle accident, and that she had a son who had passed away in an automobile accident. (Tr. Vol. 9. at 43-44.)

Juror Cornell did, in fact, have a son who had been killed in an automobile accident in October 2006. (Tr. Vol. 9. at 32-35; L.F. 1793.) Additionally, in January 2007, Juror Cornell was the plaintiff in a wrongful death action relating to the death of her son in the motor vehicle accident. (L.F. 1828-1853; App. A35-A60.) As plaintiff in the prior wrongful death suit, Juror Cornell executed an affidavit that specifically referenced the 2006 automobile accident, executed a verified petition to authorize

settlement of claims related thereto, and testified at the hearing for the approval of the wrongful death settlement. (L.F. 1838-1842; App. A45-A49.)

Juror Cornell has also been a party in several other cases, many of which were assigned to Judge Mitchell in the Circuit Court of Stoddard County, Missouri. (L.F. 1495-1496, 1335-1491.) Ms. Cornell's undisputed extensive litigation history offered at the hearing as Exhibits A52 (certified court records of cases), A56 (summary), and A62 (certified court records regarding Cornell's wrongful death action)—is summarized as follows:

CASES INVOLVING KIMBERLY CORNELL A/K/A KIMBERLY MARVEL

CASE NAME/CASE NO., FILING DATE/JUDGE

- *Caden Cornell, a minor (Wanda Sue Marvel, Guardian, v. Kimberly A. Cornell and Steven D. Cornell, Respondents)*/12SD-PR00116, filed 10-04-12/Stephen R. Mitchell
- *Protection Order (Teresa Lynn Zook, Petitioner, vs. Kimberly A. Cornell, Respondent)*/13SD-PN00046, filed 2-26-13/Stephen R. Mitchell
- *Springleaf Financial Services v. Steven Cornell & Kimberly A. Cornell*/ (Promissory Note)/11SD-AC00668, filed 11-21-11/Stephen R. Mitchell
- *Capital One Bank v. Kimberly A. Cornell* (Breach of contract)/11SD-AC00557, filed 9-27-11/Stephen R. Mitchell
- *Michael E. Rhodes et ux v. Steven Cornell, et ux*/7-26-11/Stephen R. Sharp

- *Sandy Lynxwiler v. Steven & Kimberly Cornell* (Breach of contract)/11SD-AC00304, filed 5-23-11/Stephen R. Mitchell
- *Dexter Hospital v. Kimberly Cornell* (Suit on Account)/08SD-AC00575, filed 5-30-08/Stephen R. Mitchell
- ***Kimberly Cornell v. Kendall L. Pullum* (Wrongful Death of Cody Boone)/07SD-CC00005, filed 1-16-07/Stephen R. Sharp**
- *Lewis Furniture Co. v. Steven & Kimberly Cornell* (Suit on Account)/02CV761466, filed 2-21-02/Stephen R. Mitchell

(L.F. 1495-1496.)

F. August 20, 2015 Evidentiary Hearing

1. Juror Cornell's Failure to Appear

Upon BNSF's motion, the trial court scheduled an evidentiary hearing for August 20, 2015 to hear several post-trial motions, including BNSF's motions asserting intentional juror nondisclosure by Juror Cornell. (L.F. 58, 1329-1331.) The trial court summoned Juror Cornell to appear at the August 20, 2015 hearing. (L.F. 57, 2235; Tr. Vol. 9. at 9.) Despite being properly summoned, however, Juror Cornell did not appear.[4] (Tr. Vol. 9. at 6.)

Prior to the scheduled August 20th hearing, Juror Cornell had been summoned to appear at a July 28, 2015 hearing on a motion to recuse Judge Mitchell after BNSF

[44] The August 20th hearing date also had been cleared previously with Juror Cornell and her attorney, James Tweedy. (Tr. Vol. 9 at 9.)

discovered she was listed as a "friend" on Judge Mitchell's Facebook page. (L.F. 56-57, 1812-1816, 2129.) Before Juror Cornell appeared at the July 28 hearing, however, she hired attorney James Tweedy, who moved for a protective order to preclude any questioning by BNSF at that hearing about any issue of juror nondisclosure. (L.F. 56-57, 2126-2128; Supp. L.F. 62-65.) Over BNSF's objection, the protective order was granted, and, when BNSF appeared at the July 28, 2015 hearing, BNSF was precluded from questioning Juror Cornell on any issue of juror nondisclosure.[5] (L.F. 2129, 2131-2132.) After the recusal motion was denied, the trial court scheduled the August 20, 2015 evidentiary hearing and summoned Juror Cornell to appear. (L.F. 57-58, 1329-1331, 2235; Tr. Vol. 9 at 9.)

On August 20, 2015, instead of Juror Cornell appearing at the scheduled hearing, her attorney James Tweedy appeared and represented that Juror Cornell was not available to appear and testify due to a recent hospitalization for some unspecified medical condition. (Tr. Vol. 9. at 6-7.) Mr. Tweedy had no information regarding the nature of her alleged medical emergency or condition, the reason for her alleged hospitalization, or the anticipated length of any hospitalization. (Tr. Vol. 9. at 9-10.) According to Mr. Tweedy, he had not been in contact with Juror Cornell, he had very limited information

[5] The Court of Appeals' dissenting opinion mistakenly stated BNSF failed to appear and that Juror Cornell was available for questioning at the hearing. *Slip. Op.* at 6-7. BNSF did, in fact, appear at that hearing but was prevented by the protective order from questioning Juror Cornell on any issue of nondisclosure. (L.F. 2129, 2131-2132.)

and did not know any of the details of her medical condition, he did not know whether Juror Cornell had the ability to give sworn testimony or a statement, and he did not know when she could be available to do so. (Tr. Vol. 9. at 13-14.)

BNSF's counsel specifically requested an extension of time to obtain Juror Cornell's testimony when she became available. (Tr. Vol. 9 at 17.) The trial court, in turn, directed Mr. Tweedy to notify the trial court in the event Juror Cornell became available before August 25, 2015 (the end of the 90-day period following the filing of BNSF's post-trial motions), and Mr. Tweedy agreed. (Tr. Vol. 9. at 11-12, 16-17.)

The next day, BNSF's counsel followed up with an August 21, 2015 e-mailed letter to Mr. Tweedy requesting that he advise BNSF of Juror Cornell's condition "so that [BNSF could] either arrange to take her sworn statement in the hospital, or have her appear in court before the end of the day on the 25th." (L.F. 2310.) On August 23 and 24, 2015, Mr. Tweedy filed Notices, representing—without any details of his client's medical condition or a sworn statement from her doctor—that although Juror Cornell had been discharged from the hospital, she "was not yet medically cleared/ready to present testimony." (L.F. 2311-2313, 2361.) Mr. Tweedy subsequently filed an unsworn and unauthenticated "medical excuse" representing that Juror Cornell would not be medically cleared to present testimony until September 1, 2015, a date after the expiration of the 90-day period for rulings on the post-trial motions. (L.F. 2375.)

2. Evidence of Juror Cornell's False Answers/Intentional Nondisclosure

At the August 20, 2015 hearing, BNSF's counsel presented undisputed evidence relating to Juror Cornell's intentional nondisclosures (much of which was stipulated to by Spence's counsel) including her son's fatal auto accident as well as her litigation history. (Tr. Vol. 9 at 32.) It is undisputed that Juror Cornell failed to disclose any such facts when she completed, signed, and returned the juror questionnaire, during voir dire, or at any time before she was sworn to serve as one of the twelve fair and impartial jurors in this case. (L.F. 1335-1491, 1495-1496, 1793, 1828-1853; App. A35-A60; Tr. Vol. 9. at 32 and 127.) Specifically, BNSF presented evidence regarding (1) Juror Cornell's false answers to questions 14 and 15 on the juror questionnaire form signed under penalty of perjury. (L.F. 1332; App. A23); (2) Juror Cornell's silence and failure to respond to Judge Mitchell's specific inquiry about litigation history at the beginning of trial, (Tr. 25-26; App. A65-A66); and (3) Juror Cornell's failure to respond to BNSF's counsel's specific questioning as to whether any of the jurors, juror's family members, or friends who had been involved in a motor vehicle accident. (Tr. 149-152; L.F. 1332; App. A23; Tr. Vol. 9. at 19-23.)

3. BNSF's Evidence of Juror Cornell's Statements Immediately After Verdict

Mr. Murphy testified at the August 20, 2015 evidentiary hearing regarding what he observed of Ms. Cornell after the verdict, what he overheard her say, and what she said directly to him. (Tr. Vol. 9 at 41-42.) Specifically, Mr. Murphy testified that,

immediately after the verdict, he witnessed Juror Cornell hug and tell Spence that she could relate to what Spence was going through because she herself had lost a son. (Tr. Vol. 9 at 41-42.) Mr. Murphy also testified that Juror Cornell specifically told him that her son had been killed in an automobile accident. (Tr. Vol. 9. at 41-44.) Spence objected to Mr. Murphy's testimony as hearsay, and the trial court sustained that objection. (Tr. Vol. 9 at 37, 39, 41; L.F. 2367; App. A2.) BNSF's counsel made a record that, given Juror Cornell's absence, the testimony of Mr. Murphy was offered at the August 20, 2015 evidentiary hearing to show Juror Cornell's knowledge and ability to recall and communicate the fact that her son had been killed in an automobile accident. (Tr. Vol. 9. at 38-39, 45.) Spence's counsel did not offer any evidence at the hearing to refute Mr. Murphy's testimony. (Tr. Vol. 9 at 43-44.)

4. BNSF's Evidence of Compliance with Rule 69.025

BNSF presented evidence at the August 20, 2015 hearing that it complied with Rule 69.025 by performing a Case.net review before trial on all of the jurors' names as they had been typed on the juror questionnaire forms, Pool Selection List, and seating chart (all of which had been distributed to counsel before trial for the purpose of performing the Case.net review). (L.F. 1332-1334; App. A23-A25; L.F. 1801-1811, 1854-1860; App. A26-A32; L.F. 2284-2294; Tr. Vol. 9. at 24-27.) The evidence submitted post-trial included a Notice of Compliance and an uncontroverted affidavit from Kellie Mitchem (the paralegal who performed the Case.net review on behalf of BNSF before trial). (L.F. 1801-1811.) It is uncontested that the Case.net review returned no results for "Kimberly Ann Carnell." (L.F. 1493.) BNSF also offered evidence from

its trial counsel (by affidavit, pursuant to Rule 69.025(f),[6] and through the live testimony of Laurel Stevenson) attesting under oath that they had no knowledge of any misspelling of Juror Cornell's name before the verdict in the case. (L.F. 1801-1811, 2284-2294; Tr. Vol. 9. at 24-27, 94-95.) BNSF's evidence also established it had no reasonable grounds to believe, either before the jury was sworn or before the verdict, that Juror Cornell failed to disclose she had been a party to litigation or that she provided false information in her sworn responses to the juror questionnaire or the questions from the bench at the beginning of voir dire.[7] (L.F. 1801-1811, 2284-2294; Tr. Vol. 9. at 24-27, 94.)

Before the August 20, 2015 hearing, Spence filed a "Motion to Determine Defendant BNSF's Entitlement to Seek Post-Trial Relief Based on Alleged Juror

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[6] In addition to the testimony of Ms. Stevenson, BNSF submitted affidavits of Mr. Collins, Mr. Dalgleish, and Mr. Yeretsky, BNSF counsel who were present during voir dire. (L.F. 2287-2294.)

[7] Spence's counsel presented no evidence that they conducted any additional Case.net reviews (or searched for and reviewed specific court documents or pleadings beyond any initial Case.net review) after learning of the misspelling of Juror Cornell's name, nor have they made any representation that they knew Juror Cornell concealed the requested information from the trial court. *See generally* (Tr. Vol. 9 at 127.) Spence's counsel asserted at the August 20, 2015 hearing that even if they had performed additional Case.net searches after learning of the misspelling of Juror Cornell's name, such information would be protected under the attorney/client privilege. (Tr. Vol. 9. at 127.)

Nondisclosure," which challenged BNSF's right to seek post-trial relief based on juror nondisclosure asserting BNSF's waiver for its alleged failure to comply with Rule 69.025. (L.F. 1788-1795.) Spence subsequently argued this motion at the August 20th hearing. (Tr. Vol. 9 at 7, 104-105, 108.) The trial court stated at the August 20th hearing that it would "reserve ruling on Plaintiff's motion to determine entitlement…and then take that up with the other motions pending at the same time after hearing evidence…." (Tr. Vol. 9 at 8.)

G. Trial Court's Ruling on BNSF's Post-Trial Motions and Spence's Motion

On August 25, 2015, the trial court entered an Order Regarding After-Trial Motions ("Order") denying BNSF's post-trial motions and "all other relief requested by any after-trial motions." (L.F. 2367; App. A2.) Specifically, the Order denied BNSF's Motion to Vacate or Modify Judgment and Motion for Judgment Notwithstanding the Verdict, For a New Trial, and/or to Reduce or Remit any Damages Awarded. (L.F. 2367; App. A2.)

After expressly denying "Plaintiff's Motion to Determine Defendant BNSF's Entitlement to Seek Post-Trial Relief Based on Alleged Juror Nondisclosure," the Order stated that the trial court heard evidence "regarding alleged juror nondisclosure of litigation history at a hearing held on August 20, 2015." (L.F. 2367; App. A2.) The Order did not reference any evidence or make any finding regarding Juror Cornell's failure to respond to questions during voir dire regarding her involvement or the involvement of her family members in motor vehicle accidents, nor did the Order

reference the evidence that she did not disclose that her son had been killed in an automobile accident. (L.F. 2367; App. A2.) Additionally, the Order made no specific findings regarding the clarity of the questions (from the trial court or counsel) to which Juror Cornell provided false answers or otherwise failed to respond (both before the commencement of trial and during jury selection).[8] (L.F. 2367; App. A2.) Nor did the trial court make any specific findings as to whether the juror's nondisclosures (which were not disputed at the evidentiary hearing) were intentional or unintentional. (L.F. 2367; App. A2.)

The Order is also silent as to whether the trial court found that an attorney for either party was notified by the clerk of any misspelling of the juror's name. (L.F. 2367; App. A2.) The Order stated only that the court found the testimony of the clerk to be credible. (L.F. 2367; App. A2.) Although the Order included a finding that the testimony of BNSF's counsel Laurel Stevenson was "credible in part and not credible in

[8] After the August 20, 2015 post-trial hearing, Spence submitted a proposed "Order and Judgment on Post-Trial Motions" requesting the trial court to find, *inter alia*, that 1) BNSF's counsel's auto-accident questions during voir dire were unclear and 2) that the trial court's questioning regarding litigation history during voir dire was ambiguous and possibly misunderstood as not being a question at all. (L.F. 2358-2359; App. A88-A89.) The trial court did not enter Spence's proposed order or otherwise make either finding.

part," the Order did not attribute that finding to any specific point of testimony or fact.[9] (L.F. 2367; App. A2.) Moreover, the trial transcript does not reflect any communication by the clerk or by the judge as to any misspelling of Juror Cornell's name at any time before the jury reached its verdict, and there is no reference in the trial transcript or finding in the court's August 25, 2015 Order of the trial court giving the parties an opportunity to conduct a reasonable investigation on any corrected spelling of this juror's name. (L.F. 2367; App. A2.)

Further, the Order made no finding that BNSF failed to comply with Rule 69.025 or otherwise waived its right to seek post-trial relief under Rule 69.025(e). (L.F. 2367; App. A2.) Instead, as noted earlier, the Order specifically denied Spence's Motion to Determine Defendant BNSF's Entitlement to Seek Post-Trial Relief Based on Alleged Juror Nondisclosure, which argued that BNSF failed to comply with Rule 69.025 and challenged BNSF's right to seek post-trial relief based on Juror Cornell's nondisclosure

[9] As noted earlier, in addition to the live testimony at the hearing from BNSF counsel Laurel Stevenson, the other three attorneys for BNSF present for voir dire submitted affidavits at the hearing (pursuant to Rule 69.025(f)) attesting to the fact that they were unaware of the misspelling of Juror Cornell's name until after the verdict and that they had no reasonable grounds to believe that Juror Cornell had failed to disclose that she had been a party to litigation. (L.F. 2284-2294; Tr. Vol. 9 at 27.) Spence's counsel generally objected to the admission of these affidavits, and the trial court subsequently sustained the objection in its August 20, 2015 Order. (Tr. Vol. 9 at 26-27; L.F. 2367; App. A2.)

of her extensive litigation history.[10] (L.F. 1788-1795, 2367; App. A2.) The trial court specifically held that "**PLAINTIFF'S MOTION TO DETERMINE DEFENDANT BNSF'S ENTITLEMENT TO SEEK POST-TRIAL RELIEF BASED ON ALLEGED JUROR NONDISCLOSURE IS DENIED."** (L.F. 2367; App. A2.) (emphasis in original). Spence did not appeal this ruling.

Finally, the Order sustained Spence's hearsay objection to the testimony of Justin Murphy (whose testimony was offered to show Juror Cornell's knowledge and her ability to remember and communicate the fact that her son had been killed in an automobile accident and that she related to what Spence was going through). (L.F. 2367; App. A2; Tr. Vol. 9. at 39-42.)

Spence's Jury Instructions and Verdict Form (Points IV – V)

Over BNSF's objections, the trial court submitted two verdict directors—Instructions 6 and 7—that separately submitted Spence's theories of negligence, failure to stop and inadequate sight distance.how to do

[10] As noted earlier, after the August 20, 2015 post-trial hearing, Spence's counsel submitted a proposed "Order and Judgment on Post-Trial Motions," which, *inter alia*, specifically requested the trial court to find that BNSF failed to comply with Rule 69.025 and to grant "Plaintiff's Motion to Determine BNSF's Entitlement to Seek Post-Trial Relief on the Basis of Alleged Juror Non-disclosure." (L.F. 2355-2360; A85-A90.) The trial court did not enter the proposed Order, and expressly denied Spence's motion.

The verdict directors, Instructions 6 and 7, proposed by Spence and given to the jury stated:

INSTRUCTION 6

In your verdict on Plaintiff's claim against Defendant BNSF for compensatory damages for the wrongful death of her husband Scott Spence based on the condition of the crossing you must assess a percentage of fault to Defendant BNSF, whether or not Scott Spence was partly at fault, if you believe:

First, the crossing was not good and sufficient because it did not afford eastbound motorists adequate sight distance to observe trains approaching from the south, and

Second, Defendant BNSF knew or by using ordinary care could have known of this condition and

Third, Defendant BNSF failed to use ordinary care to warn of such condition, and

Fourth, such failure to exercise ordinary care directly caused or directly contributed to cause the death of Scott Spence.

The phrase "ordinary care" as used in this instruction means that degree of care that an ordinarily careful railroad would use under the same or similar circumstances.

(L.F. 1148; App. A3.)

INSTRUCTION 7

In your verdict on Plaintiff's claim against BNSF for compensatory damages for the wrongful death of her husband Scott Spence based on the conduct of BNSF's train crew you must assess a percentage of fault to Defendant BNSF, whether or not Scott Spence was partly at fault, if you believe:

First, the approach of the Spence vehicle to the crossing was unwavering, and

Second, Defendant BNSF's train crew knew or by using ordinary care could have known that by reason of such unwavering approach a collision was imminent in time thereafter to have slackened the train's speed or to have stopped the train, but Defendant BNSF's train crew failed to do so and

Third, Defendant BNSF's train crew was thereby negligent, and

Fourth, such negligence directly caused or directly contributed to cause the death of Scott Spence.

In assessing any such percentage of fault against Defendant BNSF you must consider the fault of BNSF's train crew to be the fault of BNSF.

The term "negligent" or "negligence" as used in this instruction means the failure to use ordinary care. The phrase "ordinary care" means that degree of care that an ordinarily careful person would use under the same or similar circumstances.

(LF 1149; App. A4.)

At the instruction conference, BNSF objected to Instructions 6 and 7, arguing in part that:

> [I]t is improper to submit two separate verdict directing instructions. It's improper and prejudicial because the jury is going to be read twice. These are – in essence, what we have going on here are disjunctive submissions of negligence and they should be submitted as such. In one verdict directing instruction, I think it's totally contrary to MAI structure procedure to do this separately. (Tr. 1408-1409.)

Also over BNSF's objection, the trial court submitted Instruction 8, a Not-In-MAI instruction proposed by Spence and given to the jury, that read:

INSTRUCTION 8

> An unwavering approach by a vehicle at a railroad crossing, where the crew knew or should have known that a collision was imminent, is a specific, identifiable hazard. Such a hazard requires the train's crew either to slow the train or stop, in addition to any other preventative measures it can take, to avoid the collision.

(LF 1150; App. A5.)

With respect to Instruction 8, BNSF objected on the basis that, *inter alia*, it is "not an MAI instruction. There's no reason to give it. It is not supported by *Alcorn*.[11] It is

[11] *Alcorn v. Union Pacific R.R. Co.*, 50 S.W.3d 226 (Mo. banc 2001).

not – *Alcorn* is not applicable to this case. It is an abstract proposition that's not supported by Missouri law. It's not supported by the facts of this case." (Tr. 1411-1412.)

In addition, BNSF objected to the instruction on the basis of the language in the instruction concerning "other preventative measures" on the grounds that "It's also vague and ambiguous as to what – a roving commission as to what preventative measures could have been taken because there's nothing in the evidence to support that any such preventative measures exists, much less that they could have avoided the collision." (Tr. 1412.)

Spence's counsel acknowledged during the instruction conference that MAI is intended to prevent instructions like Instruction 8, "because the jury is supposed to look at the verdict director. The verdict director tells them the type of conduct that warrants a finding of negligence, and that's all they need to know. These types of instructions, like I said, are exactly what MAI was created to get rid of." (Tr. 1419-1420.)

Finally, verdict form A, also proposed by Spence and given to the jury over BNSF's objection, read:

> On the claim of plaintiff *Sherry Spence* for compensatory damages for the wrongful death of her husband, Scott Spence, we, the undersigned jurors, assess percentages of fault as follows:
>
> VERDICT A

Note:	Complete the following paragraph by filling in the blanks as required by your verdict. If you assess a percentage of fault to any of those

	listed below, write in a percentage not greater than 100%, otherwise write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of Plaintiff *Sherry Spence* for compensatory damages for the wrongful death of her husband, Scott Spence, we, the undersigned jurors, assess percentages of fault as follows:

Defendant	*BNSF on sight distance claim*	_____ % (zero to 100%)
Defendant	*BNSF on failure to stop or slow claim*	_____ % (zero to 100%)
Decedent	*Scott Spence*	_____ % (zero to 100%)
	TOTAL	_____ % (ZERO or 100%)

Note:	Complete the following paragraph if you assessed a percentage of fault to Defendant BNSF:

We, the undersigned jurors, find the total amount of Plaintiff's compensatory damages, disregarding any fault on the part of Decedent Scott Spence, to be $_____ (*stating the amount*).

Note:	The judge will reduce the total amount of Plaintiff's compensatory damages by any percentage of fault you assesses to Decedent Scott Spence.

Note:	All jurors who agree to the above must legibly sign or print their names below.

(L.F. 1158; App. A6.)

With respect to verdict form A, BNSF objected because, *inter alia*, it:

compounds the error [and] prejudice, which we articulated, with regards to the double verdict director Numbers 6 and 7. This is not an MAI instruction. This is in violation of the verdict forms that are used in MAI. It is mathematically and logically flawed in the way that this is posited at the top about the zero to 100 percent blanks could yield massive confusion and error, because you have disjunctive submissions and – [Spence] is wanting to submit this, she could have a verdict on one and not the other. You would have different attributions of fault on one and not the other. And so it's absolutely [violates] the way MAI says verdict forms should look and it's prejudicial and confusing.

(Tr. 1424.)

Then, during deliberations, the jurors submitted the following question to the trial court:

> Does the total of sight distance claim, failure to slow and Scott Spence percent total 100 percent or do we decide on each at 100 percent and not worry about them equaling 100 percent? (Tr. 1502.)

Ultimately, the jury returned a verdict using Verdict A and assessed 80% of fault to "BNSF on sight distance claim," 15% of fault to "BNSF on failure to slow or stop claim," and 5% of fault to Decedent Scott Spence. (L.F. 1188.)

Spence's Withdrawal Before Trial of Allegations of Negligence Regarding Claimed Modifications of BNSF's Engineering Instructions (Point VI)

A. Pre-Trial Procedure and Rulings Regarding Spence's Allegations and Issue of Modifications of BNSF's Traffic Engineering Instructions and BNSF's Designation of Expert on that Issue

On November 24, 2014, BNSF filed a pretrial Motion for Leave to Designate Additional Experts and to Modify First Amended Scheduling Order to allow BNSF to designate additional experts within thirty days of the completion of the deposition of Dr. Kenneth Heathington, Spence's designated traffic engineering expert. (Supp. L.F. 1-10.) As set forth in BNSF's motion, the deposition of Dr. Heathington had not been completed at that time due to Dr. Heathington's failure to produce critical file materials relevant to his opinions. (Supp. L.F. 2.) Following BNSF's motion to compel and the trial court's order sustaining, in part, that motion, additional file materials were produced and

Spence's counsel agreed to produce Dr. Heathington to allow BNSF to complete its deposition in January, 2015. (Supp. L.F. 3.)

Shortly thereafter, on December 10, 2014, Spence's counsel filed Spence's Motion to Reconsider her Previous Motions for Leave to File a First Amended Petition, in which Spence sought to amend her petition to "add an allegation of negligence based upon evidence adduced in the discovery process, specifically, by adding subparagraph (m) to paragraph 11 of Count I and by adding sub-paragraph (n) to paragraph 15 of Count II…," which read as follows:

> 11. Defendant BNSF, by and through its agents, servants and employees, … were negligent in causing injury and death to Decedent Scott A. Spence by their actions and inactions in one or more of the following respects:
>
> . . .
>
> (m) They modified their engineering instructions for crossing design by removing that portion of the instructions which mirrored the industry and governmental standards.
>
> . . .
>
> 15. That at the aforementioned time and place defendant BNSF, by and through its agents, servants and employees, … committed one or more of the following willful and wanton acts or omissions:
>
> . . .

(n) They recklessly and with a conscious disregard for the safety of others modified their engineering instructions for crossing design by removing that portion of the instructions which mirrored the industry and governmental standards.

(Supp. L.F. 11, 16, 18-19, 22.)

Spence's counsel submitted the following in support of Spence's motion for leave to add these proposed amendments:

> With respect to the first requested amendment, [Spence] seeks to add an allegation to both Count I and Count II of her Petition concerning modifications made by BNSF to their engineering instructions for crossing designs. [Spence]'s previous request to amend her Petition to add this allegation was denied based on the proximity of the request to the previous trial date, however, Defendants will suffer no prejudice by allowing this amendment at this time particularly in light of the fact that they were apprised of this potential claim prior to taking the deposition of [Spence's] expert witness, Kenneth W. Heathington on August 21, 2014, and, in fact, questioned Dr. Heathington about this opinion at page 38 of that deposition (partial transcript attached hereto as Exhibit 2). Further, Defendants' counsel is going to redepose Dr. Heathington in January 2015 and will have the opportunity to make further inquiry of Dr. Heathington regarding his opinions on this matter.

(Supp. L.F. 12.)

At a hearing on January 5, 2015, the trial court granted BNSF's motion permitting BNSF to designate an additional expert and requiring the disclosure to be made by January 15, 2015. (L.F. 296.) The trial court also granted Spence's motion for leave allowing Spence to amend her petition to include the new allegations of negligence relating to the claimed modifications of BNSF's engineering instructions, as set forth above. (Supp. L.F. 27.) BNSF then designated Joseph Blaschke, a traffic engineering expert, to testify on this very issue and offered to make him available for deposition by Spence's counsel. (L.F. 1037-1038.)

B. Spence's Withdrawal of Allegations in Paragraphs 11(m) and 15(n) and the Trial Court's Reversal of its Prior Order

Spence subsequently filed a Motion to Reconsider the trial court's order, previously issued from the bench on January 5, 2015 when all counsel were present, granting BNSF leave to designate a traffic engineering expert in response to Spence's new negligence allegations. (L.F. 33; Supp. L.F. 28-30.) As part of that motion, Spence's counsel agreed to withdraw the newly added paragraphs 11(m) and 15(n) of her First Amended Petition for the purpose of preventing BNSF from designating an expert on that subject matter. (Supp. L.F. 29.)

On January 9, 2015, without further hearing or argument, the trial court issued an Order memorializing its January 5th rulings. (L.F. 33-34; Supp. L.F. 26-27.) The trial

court reiterated that BNSF would be allowed to designate an additional expert.[12] (L.F. 33-34; Supp. L.F. 26 (stating "the court's rulings from the bench recited on January 5, 2015 shall apply").) However, the trial court also granted Spence five days to withdraw the new allegations of negligence related to the claimed modification of BNSF's engineering instructions, as set forth in paragraphs 11(m) and 15(n) of her First Amended Petition. (L.F. 34; Supp. L.F. 26.) The trial court further indicated that if Spence withdrew these allegations, the trial court would deny BNSF's Motion for Leave to designate experts on the issue of traffic engineering instructions. (L.F. 34; Supp. L.F. 27.)

Thereafter, on January 12, 2015, Spence filed her voluntary withdrawal of paragraphs 11(m) and 15(n) of her First Amended Petition. (L.F. 34; Supp. L.F. 31.) As a result of Spence's withdrawal of those allegations and the issue from the case, BNSF was not allowed to designate its expert on that issue. (L.F. 296.) Specifically, in its January 15, 2015 "Order Regarding Hearing on January 5, 2015," the trial court stated: "[I]n light of this Court's order of January 9, 2015, and the plaintiff's voluntary withdrawal of certain allegations in her First Amended Petition on January 12, 2015, this Court reverses its order sustaining defendants' motion for leave to designate an additional expert." (L.F. 296.) Spence filed her First Amended Petition for Damages by

[12] "Defendants were been [*sic*] permitted on January 5, 2015 to identify, by January 15, 2015, the name of a traffic design engineer expert, and to make that person available prior to the end of February 2015." (L.F. 296.)

Interlineation on January 14, 2015, in which paragraphs 11(m) and 15(n) were specifically stricken through. (L.F. 34, 67, 71; App. A79, A83.) BNSF subsequently filed a Motion to Reconsider, which the trial court denied. (L.F. 35; Supp. L.F. 32-57.)

C. Despite her Withdrawal, Spence Presented Argument and Evidence at Trial Regarding Alleged Modifications to BNSF's Engineering Instructions

Despite Spence's withdrawal of Paragraphs 11(m) and 15(n) from the First Amended Petition, Spence's counsel referenced that very issue in his opening statement:

> What BNSF says is the most important thing we can do on the railroad is to eliminate the loss of life and the way to accomplish this is to focus on the rules of compliance. They say nothing is more important than safety. That's from the president of BNSF. They say BNSF goes above and beyond federal requirements to prevent accidents. So I told you about the company policy about spending only taxpayer money, it goes deeper than that. *In order to be in a position where they don't have to improve crossings with lights and gates, BNSF has removed from their engineering instructions that employees use to evaluate crossings, the AASHTO sight table*.

(Tr. 215.) (emphasis added). BNSF immediately objected to these statements by counsel and promptly asked for a mistrial:

> We need to object to this because when [Spence] filed her First Amended Petition over objection, it included an allegation in paragraph 11 that we

> changed our engineering rules. At the time, back on January 5th, you allowed us to designate an expert on traffic design, Joe Blaschke, which we did. You then on January 9th, reversed that order because [Spence] withdrew that allegation on the First Amended Petition. So it is completely improper, Your Honor, violates your orders and constitutes grounds for a mistrial for Mr. Ponder to have brought that up today. We ask for a mistrial in light of that.

(Tr. 215-216.) The trial court, however, overruled BNSF's objection and request for mistrial. (Tr. 216.) Spence's counsel then continued in opening statement:

> So in order to effectuate this policy of not having to spend money on lights and gates, the Railroad has pulled the evaluation tool out of their engineering instruction.

(Tr. 217.)

After the trial court's denial of BNSF's objection and motion for mistrial, Spence introduced testimony from her traffic engineering expert, Dr. Kenneth Heathington, regarding the modification of BNSF's engineering instructions (removal of the AASHTO sight tables[13] from the BNSF engineering instructions—again, relating to the very allegations and issue Spence's counsel had previously withdrawn). (Tr. 490-493.) Specifically, Dr. Heathington testified, in part:

---

[13] AASHTO is the American Association of State Highway and Transportation Official ("AASHTO").

Q: Well, what I'm trying to understand, Doc, is --- is AASHTO a group that publishes standards that the USDOT uses in building highways?

A: Yes. In fact, most of the projects I'm familiar that they fund, you have to meet minimum AASHTO standards to get federal participation of those projects.

. . .

Q: And now here's the real question. Do Railroads use this? [AASHTO sight tables]

A: Not that I'm aware of. I've seen some of it in their engineering documents of Railroads, and I've seen them take that out, and don't leave it in there.

Q: Well, that's what I want to ask you about. Is it the case that you are aware that some Railroads have the AASHTO sight tables in their engineering instructions?

A: They have had it in the past, yes.

. . .

Q: All right. So the Railroads you know of have the sight table in their engineering instruction, for the most part?

A: Well, they may not have the sight table as we see the sight table nowadays.

Q: Uh-huh.

A; I've known them to having that in the past, and they took it out –

Q: Okay.

A: -- for some reason.

Q: Well, and that's the question here. Does – is it to your – is it your knowledge, based on your history of studying railroads and highways for your – how long you been doing this?

A: Over half a century.

Q: All right. That BNSF, the railroad we're talking about here today, had AASHTO sight tables in its engineering instructions?

A: Yes, a few years ago. That's correct.

Q: And then a few years ago, did they take it out?

A: Yes.

Q: You remember that?

A: At least, I haven't seen it in their latest operating table –

Q: Okay.

A: -- engineering table.

(Tr. 490-493.)

Spence's expert regarding crossing safety, William Hughes, also testified at trial about the alleged modifications of BNSF's engineering instructions. (Tr. 991.) Specifically, Hughes testified:

Q: So at some point in time, did you become aware as to whether or not BNSF was utilizing AASHTO in its engineering instructions to assess crossing safety?

A: One of the documents that I saw that was a Burlington Northern document, from their engineering department, dealt with their vegetation policy and how much they cleared and didn't clear. And on the back part of that document was, in fact, the AASHTO sight distance triangle. Subsequent versions of that document did not include that.

Q: So it's been taken out –

A: Yes.

Q: -- to your knowledge?

A: Yes.

(Tr. 991.)

Thereafter, Spence's counsel asserted in closing argument that BNSF modified and removed the AASHTO sight distance tables from its engineering instructions, as part of an argument that the jury should draw a negative inference from BNSF's removal of the sight distance tables. (Tr. 1461.) Specifically, Spence's counsel argued:

BNSF removed the sight triangle that is in AASHTO from the engineering instructions…They pulled it right out of the rulebook, because they didn't like it. (Tr. 1461.)

D. BNSF's Offer of Proof

BNSF made an offer of proof at trial from Joseph Blaschke, the traffic engineering expert previously designated by BNSF but subsequently precluded from testifying when Spence's counsel purposefully withdrew the allegations of negligence regarding the

alleged modifications of BNSF's engineering instructions. (L.F. 1017-1042.) In making its offer of proof, BNSF stated,

> This [offer of proof] relates to our expert, Joseph Blashkey [*sic*]…Again, the Court is familiar generally with this issue, so I won't take a lot of time on it, but we had asked back in the late fall to be able to identify an additional expert. That opportunity for a hearing was not available until January 5th. We were granted our request and asked by the Court to identify who that would be. We said it would be a traffic engineer. We subsequently identified him.
>
> And then on January 9th, [Spence's] counsel withdrew one of their allegations in their First Amended Petition, and then the Court reversed its order allowing us to be able to present Mr. Blashkey [*sic*]. We did previously advised [*sic*] the Court and Counsel that Mr. Blashkey [*sic*] could be available for a deposition well before the trial in this case, but given the Court's reversal, he was not deposed. And so therefore in order to make an appropriate offer of proof, we had to provide his affidavit as though he was sworn in under oath in lieu of trial testimony.
>
> The other thing I would say on this, Your Honor, is that you will recall in opening statement that [Spence] mentioned that BNSF had changed its engineer instructions that specifically goes to issues that Dr. Heathington had testified about and that was one of the bases for the Court reversing its ruling between January 5th and January 9th. Now, [Spence]

views it, as well – it's not a specific allegation, so therefore, they can present evidence as to some violation of substandard, I respectfully disagree. Again, I won't take more of the Court's time on that issue.

I did ask for a mistrial on Monday when that issue came up and certainly respect the Court's decision that that was denied. But we believe that we've been denied our opportunity to be able to fully defend this case. There would not have been any prejudice to [Spence] in allowing us to have brought Mr. Blashkey [*sic*] to trial as an expert. And so we offer his CV, his affidavit and our interrogatory answers, and there is a brief accompanying that offer of proof, as well, Your Honor.

(Tr. 1137-1139; *see also* L.F. 1017-1042.)

BNSF's offer of proof included proposed testimony from Mr. Blaschke relating to the issue of the alleged modifications of BNSF's engineering instructions, specifically the alleged removal of references to the AASHTO design guidelines. Specifically, Mr. Blaschke would testify, to a reasonable degree of engineering certainty that (1) AASHTO design criteria and design values were guidelines, *not standards*, to be used by highway designers, *not railroad companies*, (2) the AASHTO guidelines are to be used for "new roadway facilities or existing roadway facilities that are undergoing major reconstruction," (3) "AASHTO recognizes that existing highways (and railroad-highway grade crossings) should not be evaluated as "safe" or "unsafe" using [AASHTO] criteria," and (4) "an existing roadway is not to be considered "unsafe" simply because its geometry is inconsistent with the guidelines of [AASHTO]." (L.F. 1030 – 1036.) Mr.

Blaschke was also prepared to testify that, notwithstanding the inapplicability of AASHTO, the crossing was "more than adequate" and the sight distance for motorists approaching the subject crossing, in particular Mr. Spence, was "exceptional." (L.F. 1030 – 1036.) The trial court, however, denied BNSF's offer of proof and did not permit BNSF to call any expert on this issue. (Tr. 1140.)

Points Relied On

I.

The trial court erred in denying BNSF's Motion for New Trial on the basis of intentional juror nondisclosure of material information requested during voir dire because the trial court abused its discretion and BNSF was deprived of its constitutional right to a fair trial by twelve qualified and impartial jurors in that BNSF requested disclosure of material information relating to juror bias and prejudice in this wrongful death case, wherein Sherry Spence's husband was killed in a motor vehicle accident at a railroad crossing, by asking clear questions as to whether any of the jurors or their close family members had ever been involved in a motor vehicle accident, and Juror Cornell intentionally remained silent during voir dire, never disclosing that her son had been killed in a motor vehicle accident (and she had pursued a wrongful death action), and his death was an event of such personal significance she would not forget it, and in fact she did not forget it, demonstrated by when she went up to Spence after the verdict was reached, hugged her and told her she could relate to what Spence had gone through because she herself had lost a son, and then told BNSF representative Justin Murphy about the loss of her son in a motor vehicle accident.

Groves v. Ketcherside,

939 S.W.2d 393 (Mo.App. 1996).

J.T. ex rel. Taylor v. Anbari,

442 S.W.3d 49 (Mo.App. 2014).

Khoury v. ConAgra Foods, Inc.,

268 S.W.3d 189 (Mo.App. 2012).

Williams By and Through Wilford v. Barnes Hosp.,

736 S.W.2d 33 (Mo. banc 1987).

Mo. Const. Art. I § 22(a)

II.

The trial court erred in excluding BNSF representative Justin Murphy's testimony offered in support of BNSF's motion for new trial on the basis of intentional juror nondisclosure of material information requested during voir dire because the evidence was relevant, admissible, not hearsay or alternatively, it fell within a hearsay exception, in that BNSF requested disclosure of material information relating to juror bias and prejudice asking clear questions of the venire panel regarding whether any of the jurors or their close family members had ever been involved in a motor vehicle accident, and Juror Cornell intentionally remained silent concealing that her son had been killed in a motor vehicle accident, but immediately after the jury reached its verdict, Cornell went up to Spence, hugged her and told her she could relate to what Spence had gone through because she herself had lost a son, and then told Murphy about the loss of her son in a motor vehicle accident, revealing her knowledge and recollection of the event and her intentional concealment of the material information requested by BNSF during voir dire.

Brenneke v. Dep't of Missouri, Veterans of Foreign Wars of U.S. of Am.,
984 S.W.2d 134 (Mo.App. 1998).

Bynote v. Nat'l Super Markets, Inc.
891 S.W.2d 117 (Mo. banc 1995).

State v. Davenport,

924 S.W.2d 6 (Mo.App. 1996).

Williams By and Through Wilford v. Barnes Hosp.,

736 S.W.2d 33 (Mo. banc 1987).

III.

The trial court erred in denying BNSF's Motion for New Trial on the basis of intentional juror nondisclosure of material prior litigation history because the trial court abused its discretion and BNSF was deprived of its constitutional right to a trial by twelve impartial and qualified jurors in that Juror Cornell intentionally provided false answers, under penalty of perjury, and intentionally failed to disclose her extensive litigation history (most significantly a prior wrongful death suit she filed as plaintiff relating to the death of her son in a motor vehicle accident) in response to clear and specific questions in the trial court's juror questionnaire and the trial court's follow up question posed directly to the panel at the beginning of voir dire on that very same issue, and BNSF complied with Rule 69.025(d) and (e) (and demonstrated compliance in accordance with Rule 69.025(f)) when it conducted a reasonable investigation by performing Case.net searches of the names of the prospective jurors before trial, as provided by the court, and BNSF had no reasonable grounds to believe Juror Cornell had provided false answers and concealed from the court that she had been a party in prior litigation.

J.T. ex rel. Taylor v. Anbari,

442 S.W.3d 49 (Mo.App. 2014).

Khoury v. ConAgra Foods, Inc.,

368 S.W.3d 189 (Mo.App. 2012).

MO. S. CT. R. 69.025.

MO. S. CT. R. 4-3.3.

IV.

The trial court erred in overruling BNSF's objections and permitting the submission of two verdict directing instructions and a verdict form permitting two lines for BNSF's fault because the instructions and verdict form misled and misdirected the jury in that Spence had only one claim of negligence against a single defendant that must be submitted in one verdict director containing alternative disjunctive submissions, and permitting two verdict directors for one claim prejudiced BNSF by unduly emphasizing its alleged conduct in the verdict form and allowing the jury to make multiple assessments of fault against BNSF for a single claim.

Edgerton v. Morrison,

280 S.W.3d 62 (Mo. banc 2009).

Gumpanberger v. Jakob,

241 S.W.3d 843 (Mo.App. 2007).

Pickel v. Gaskin,

202 S.W.3d 630 (Mo.App. 2006).

MO. S. CT. R. 70.02

V.

The trial court erred in overruling BNSF's objections and submitting Not-In-MAI Instruction 8 to the jury because the court violated Rule 70.02(b) in giving the Not-In-MAI instruction that was roving and misled and misdirected the jury in that there was a separate and applicable MAI instruction regarding the same subject matter given by the trial court (Instruction 7) and Instruction 8 prejudiced BNSF by improperly omitting the time element as found in Instruction 7 applicable to Spence's negligent "failure to slow or stop claim," and improperly directed the jury that BNSF had a duty in the face of a vehicle with an unwavering approach to a train crossing to take "other preventative measures [BNSF] can take to avoid the collision" without defining or providing evidence of "other preventative measures".

Alcorn v. Union Pacific R.R. Co.,

50 S.W.3d 226 (Mo. banc 2001).

Klotz v. St. Anthony's Med. Ctr.,

311 S.W.3d 752 (Mo. banc 2010).

Lashmet v. McQueary,

954 S.W.2d 546 (Mo.App. 1997).

MO. S. CT. R. 70.02

VI.

The trial court erred in denying BNSF's objection and request for mistrial and allowing Spence's counsel to proceed to comment and introduce evidence regarding claimed modifications of BNSF's traffic engineering instructions, while not allowing BNSF to designate or call an expert on that issue, because the trial court abused its discretion resulting in prejudice to BNSF in that Spence had previously withdrawn these allegations of negligence from her pleadings before trial (and the issue was no longer in the case) for the specific purpose of obtaining the trial court's pre-trial order preventing BNSF from designating and calling an expert at trial on this very issue.

Delacroix v. Doncasters, Inc.,

407 S.W.3d 13 (Mo.App. 2013).

Calvin v. Jewish Hosp. of St. Louis,

746 S.W.2d 602 (Mo.App. 1988).

Maniaci v. Leuchtefeld,

351 S.W.2d 798 (Mo.App. 1961).

Int'l Div. Inc. v. DeWitt and Assoc. Inc.,

425 S.W.3d 225 (Mo.App. 2014).

Argument

I.

The trial court erred in denying BNSF's Motion for New Trial on the basis of intentional juror nondisclosure of material information requested during voir dire because the trial court abused its discretion and BNSF was deprived of its constitutional right to a fair trial by twelve qualified and impartial jurors in that BNSF requested disclosure of material information relating to juror bias and prejudice in this wrongful death case, wherein Sherry Spence's husband was killed in a motor vehicle accident at a railroad crossing, by asking clear questions as to whether any of the jurors or their close family members had ever been involved in a motor vehicle accident, and Juror Cornell intentionally remained silent during voir dire, never disclosing that her son had been killed in a motor vehicle accident (and she had pursued a wrongful death action), and his death was an event of such personal significance she would not forget it, and in fact she did not forget it, demonstrated by when she went up to Spence after the verdict was reached, hugged her and told her she could relate to what Spence had gone through because she herself had lost a son, and then told BNSF representative Justin Murphy about the loss of her son in a motor vehicle accident.

Standard of Review

The applicable standard under Missouri law is set forth in *J.T. ex rel. Taylor v. Anbari*, 442 S.W.3d 49, 56 (Mo.App. 2014):

> Evaluation of a nondisclosure claim involves two steps. First, the reviewing court must determine whether the question was clear. *Payne v. Cornhusker Motor Lines, Inc*., 177 S.W.3d 820, 841 (Mo.App. E.D. 2005). "Whether a question was sufficiently clear is a threshold issue that this Court reviews de novo." *Johnson v. McCullough,* 306 S.W.3d 551, 555 (Mo. banc 2010). "If the question is not clear, there has been no nondisclosure." *Payne,* 177 S.W.3d at 841. If the question was clear, the court next considers whether the nondisclosure was intentional. *Saint Louis University v. Geary*, 321 S.W.3d 282, 295 (Mo. banc 2009). If the nondisclosure was intentional, prejudice is presumed; if the nondisclosure was unintentional, the party seeking a new trial must prove prejudice. *Johnson*, 306 S.W.3d at 557. The determination of whether the nondisclosure was intentional is reviewed for abuse of discretion. *Id*. 'Only when [the] appellate court is convinced from the totality of the circumstances that the right to [a] fair trial and the integrity of the jury process has been impaired should the trial court be found to have abused [its] discretion.' *Geary,* 321 S.W.3d at 297 (quoting *Anglim v. Mo. Pac. R.R. Co*., 832 S.W.2d 298, 306 (Mo. banc 1992)).

Id.; *see also Williams By and Through Wilford v. Barnes Hosp.*, 736 S.W.2d 33, 36-37 (Mo. banc 1987) ("a finding of intentional concealment has become tantamount to a per se rule mandating a new trial.").

A. The trial court abused its discretion in denying BNSF's motion for new trial based on intentional juror nondisclosure.

The trial court abused its discretion by denying BNSF's motion for new trial based upon undisputed evidence that a juror (despite clear and unambiguous questioning by BNSF's counsel during voir dire) intentionally concealed material information that her son had been killed in an auto accident. A litigant's constitutional right to a fair and impartial jury, which our Constitution explicitly provides "shall remain inviolate," is well settled in Missouri. *See* Mo. Const. Art. I, § 22 (a); *see also Barnes,* 736 S.W.2d at 36. BNSF was deprived of its constitutional right to a fair trial by twelve impartial jurors, and therefore, this Court should reverse the trial court's judgment and remand for a new trial.

1. BNSF's counsel asked clear and unambiguous questions that triggered Juror Cornell's duty to disclose her son's fatal car accident.

The purpose of voir dire is to ensure the selection of a fair and impartial jury through questions that form the basis of peremptory challenges and challenges for cause. *See Payne,* 177 S.W.3d at 840-841. A clear and unambiguous question triggers a venireperson's duty to disclose information. *See Saint Louis University*, 321 S.W.3d at 295. A court reviews the clarity of 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." *Payne,* 177 S.W.3d at 841.

The court of appeals' analysis in *Groves v. Ketcherside* is instructive on this point. 939 S.W.2d 393 (Mo.App. 1996). The *Groves* court found reversible error based upon a venireperson's failure to disclose during voir dire in a medical negligence case that, fifteen years prior, (1) his wife had died as a result of alleged medical negligence and (2) the resulting wrongful death/medical malpractice action filed by the venireperson had been decided in favor of the defendant. 939 S.W.2d at 396-397. During the voir dire in that case, the venireperson failed to respond to the following questions: "[I]s there anyone else here who feels that you or a member of your immediate family has been a victim of extreme or excessive medical treatment by a physician?" "Do any of you here … feel that you've been treated improperly by some doctor in any way?" "How many of you have had something taken away from you that you didn't agree with, you didn't consent to, that wasn't your fault?" and "How many of you have had a medical condition go from bad to worse[?]" *Id*. at 395. All of those questions had been preceded with an explanation by counsel that the questions were intended to include "members of your immediate family, anyone that you're living in the same household with or members of your immediate family, such as husband, wife, children, parents that might live with you." *Id*.

After reviewing these questions, the court held that:

> [a]lthough Groves' attorney did not ask directly whether any of the panel members had filed a personal injury lawsuit, we conclude that the questions

> asked were not vague and should have been sufficient to have caused the venire person to inform the court and attorneys of his lawsuit for his wife's death. Although 15 years is a long time, asserting that the venire person had forgotten his wife's death and subsequent lawsuit unduly taxes our credulity.

Id. at 396; *see also Beggs v. Universal C.I.T. Credit Corp.*, 387 S.W.2d 499, 502-504 (Mo. banc 1965) (question whether anyone on the panel had "any trouble with any finance company in any way, shape or form" compelled disclosure of repossessions whether or not suits were filed).

The questions asked by BNSF's counsel in this case, like the questions reviewed in *Groves* and *Beggs*, were sufficiently clear and should have caused Juror Cornell to inform the trial court and attorneys of her son's death in a motor vehicle accident. Specifically, BNSF's counsel asked whether there was "[a]ny one else who's been in an automobile accident, a motor vehicle accident, **or had a close family member who has**?" (Tr. 149.) (emphasis added). After several jurors (but not Juror Cornell) responded in the affirmative, BNSF's counsel repeated the question: "Anybody that I've missed, who's been in an automobile accident that we haven't already talked about, ***or had a close friend or family member***, other than what we've heard from today?" (Tr. 149-151.) (emphasis added). At this point, another prospective juror described how her daughter had been involved in multiple automobile accidents and had "totaled three

cars," but Juror Cornell again remained silent and failed to disclose that her son had died in an automobile accident.[14] (Tr. 151.)

If anything, these questions were *more* specific and direct than the questions in *Groves* and *Beggs*. Certainly, the venirepersons were able to comprehend what information BNSF's counsel was attempting to solicit; as several prospective jurors responded that they and members of their families had been involved in motor vehicle accidents. (Tr. 149-151.) Yet, Juror Cornell—whose son had been killed in a motor vehicle accident—remained silent. The notion that her silence resulted from any confusion or lack of clarity in the questions posed by BNSF's counsel should "unduly tax [this Court's] credulity." *Groves*, 939 S.W.2d at 396. In sum, BNSF's clear and unambiguous questions triggered Juror Cornell's duty to disclose this material information and it is undisputed that she failed to do so.[15]

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[14] BNSF's auto accident questions (as well as earlier BNSF questions Spence has claimed made the auto accident questions unclear) are set forth in their entirety as part of the appendix; App. A67-A74.

[15] During and after the August 20, 2015 post-trial hearing, Spence's counsel urged the trial court to find that BNSF's auto-accident questions were not clear and submitted a proposed "Order and Judgment on Post-Trial Motions that included that proposed finding. (Tr. Vol. 9 at 108-109; L.F. 2358-2359; App. A88-A89.) Significantly, the trial court did not enter that proposed order nor did it make any such finding it its "Order Regarding After Trial Motions." (L.F. 2367; App. A2.)

2. The information requested was material to BNSF.

It is also beyond dispute that Juror Cornell's failure to disclose that her son had died in a motor vehicle accident was material in this case, which involved Spence's claim for damages against BNSF for the wrongful death of her husband as a result of a collision between his truck and the BNSF train. Critical to BNSF was disclosure by the venire panel on the material issue of whether they or members of their immediate family had been involved in a motor vehicle accident. Missouri law recognizes that this type of information is material to litigants in a case involving personal injury claims. *See Seaton v. Toma,* 988 S.W.2d 560, 562 (Mo.App. 1999) (finding that in a medical malpractice case a juror's failure to disclose a "disabling" injury sustained by her husband constituted intentional nondisclosure of material information warranting a new trial) and *Strickland By and Through Carpenter v. Tegeler,* 765 S.W.2d 726, 728 (Mo.App. 1989) (question of who on panel had any member of their immediate family with limitation of motion of their arm or any extremity called for disclosure of juror's niece and nephew born with arm deformity).

3. Juror Cornell's nondisclosure of her son's fatal car accident was intentional.

Once it is found that the questions asked by counsel triggered a venireperson's duty to answer, and the venireperson's silence constituted juror nondisclosure, the question becomes whether the alleged disclosure was intentional or unintentional. *See Anbari*, 442 S.W.3d at 56. "Intentional nondisclosure occurs: 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." *See Barnes*, 736 S.W.2d at 36; *see also Anderson v. Burlington Northern R.R. Co.*, 651 S.W.2d 176, 178 (Mo.App. 1983). Under Missouri law, when an intentional nondisclosure is established, a new trial is mandatory. *Id*.

The court's opinion in *Anderson* is instructive. 651 S.W.2d 176. In that case—a personal injury case—the jurors were asked during voir dire whether they or any members of their families had been a party to a lawsuit or made a claim or filed suit for money damages for some kind of bodily injury. *Id*. at 177. Although several venirepersons responded, one juror—who eventually was selected to serve on the jury—failed to disclose that, five years earlier, his brother had (1) sustained facial injuries in an automobile accident, (2) filed a lawsuit arising out of those injuries, and (3) recovered money damages after a trial. *Id* at 177-178.

In analyzing whether the juror in *Anderson* intentionally failed to disclose relevant information, the court discussed Missouri law on this issue:

> This analysis reveals that the courts have almost universally ordered a new trial where the failure to disclose was made with the juror's understanding of the question and his then present awareness of the prior experience. Where there exists no reasonable inability to comprehend the information solicited by the question asked of the prospective juror, and *where it develops that the prospective juror actually remembers the experience or that it was of such significance that his purported forgetfulness is*

> *unreasonable, failure to disclose is held to be intentional.* Intentional nondisclosure as determined by these factors, has become tantamount to a per se rule mandating a new trial regardless of the action taken by the trial judge in ruling upon the motion for a new trial.

Id. at 178 (emphasis added). Finding there to be no reasonable explanation for the juror's failure to disclose the prior claim and litigation, the court determined that the "defendant herein was deprived of his constitutionally guaranteed right to a trial by twelve impartial jurors and that it was an abuse of the trial court's discretion to deny defendant's motion for a new trial on this ground when the facts surrounding [the juror's] concealment disclosed it to be intentional." *Id*. at 181.

Similarly, in *Groves*, the appellate court held that:

> The juror's nondisclosure in this case amounts to an intentional nondisclosure. We find that based upon the questions asked there was no reasonable inability to comprehend the information solicited by the questions asked of the juror and any purported forgetfulness on the part of the juror about his lawsuit would be unreasonable.

Id. at 396.

Significant here, the *Groves* court reached this conclusion without a post-trial hearing or testimony from the juror at issue.[16] 939 S.W.2d at 395-396. Instead, the

[16] Despite its diligence, BNSF had no ability to question Juror Cornell throughout the post-trial proceedings. Though Juror Cornell appeared under subpoena at the July 28,

appellate court determined that the post-trial testimony of the juror was unnecessary and the authenticated and undisputed court records of the juror's prior wrongful death lawsuit, in and of themselves, were sufficient to determine that the trial court abused its discretion in erroneously concluding that no prejudice had occurred from the juror's failure to disclose his wife's death and the subsequent wrongful death/medical malpractice litigation. *Groves,* 939 S.W.2d. at 395-396.

Here, as in *Anderson* and *Groves*, there is no reasonable explanation for Juror Cornell's failure to respond to the questions posed by BNSF's counsel. Moreover, as in *Groves*, this conclusion is evident from the stipulated/certified records. It is simply unbelievable that Juror Cornell could forget her child died in an automobile accident. It is *particularly* unbelievable given that this case also is a wrongful death motor vehicle accident case and that BNSF's counsel specifically asked Juror Cornell and the other prospective jurors whether any of their close family members had been in motor vehicle

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2015 hearing on another motion, the trial court had granted her a protective order (specifically requested by her attorney) that precluded BNSF's intended questioning on juror nondisclosure. (L.F. 2129, 2131-2132.) Then, Juror Cornell, again under subpoena, failed to appear at the August 20, 2015 hearing. (Tr. Vol. 9 at 6.) Instead, Juror Cornell's attorney appeared and represented, without detail, that Juror Cornell was in the hospital and unavailable to testify. (Tr. Vol. 9 at 6-7, 9-10, 13-14.) Despite BNSF's continued efforts, Juror Cornell remained—according to her attorney—unavailable to testify through the expiration of the post-trial period. (L.F. 2310-2313, 2361, 2375.)

accidents. Still, nothing is more telling than Juror Cornell's statements to Spence and Justin Murphy *immediately after the verdict* in which she actually recalled her son's death in a motor vehicle accident and said she could "relate" to what Spence was going through. (Tr. Vol. 9. at 40-44.) (BNSF has provided in Point II the errors made by the trial court in excluding the evidence provided by BNSF representative Murphy. BNSF incorporates herein by reference the argument made in Point II as if fully set forth herein.) Mr. Murphy's testimony was particularly relevant and admissible to show Juror Cornell's actual knowledge and her ability to remember her tragic personal experience, and the trial court abused its discretion in disregarding this evidence. (Tr. Vol. 9. at 40-44.) The undisputed evidence allows only one conclusion: Juror Cornell's nondisclosure was intentional and "[o]nly a new trial will preserve inviolate [BNSF's] constitutional entitlement to a fair and impartial jury." *See Barnes*, 736 S.W.2d at 37 and 39; *see also Johnson*, 306 S.W.3d at 557 (prejudice is presumed in the event of intentional nondisclosure of material matter resulting in the necessity of a new trial).

B. Rule 69.025, by its own terms, relates to juror nondisclosure as to litigation history only and is not applicable to the juror's intentional nondisclosure in Point I.

BNSF anticipates Spence will argue (as she did in her application for transfer) that this Court should effectively rewrite Rule 69.025 and retroactively apply the rule to juror nondisclosure *on any topic*, as opposed to nondisclosure on the topic of litigation history

only. This Court should reject Spence's argument to extend Rule 69.025 beyond its unambiguous language.[17]

"This Court interprets its rules by applying the same principles used for interpreting statutes." *Buemi v. Kerckhoff*, 359 S.W.3d 16, 20 (Mo. banc 2011). "This Court's primary rule of interpretation is to apply the plain language of the rule at issue." *In re Hess*, 406 S.W.3d 37, 43 (Mo. banc 2013). "Isolated sentences do not guide us: We look to the provisions of the whole law [or rule] and its object and policy." *Gabriel v. Saint Joseph, LLC*, 425 S.W.3d 133, 139 (Mo.App. 2013).

Rule 69.025, by its own terms, applies only to juror nondisclosure on the topic of "litigation history." Rule 69.025(a) specifically refers to proposed questions "as to the *litigation history* of potential jurors," and provides that a party may waive the right "to inquire as to *litigation history*" (emphasis added). Subpart (c) provides that "the court shall give all parties an opportunity to conduct a reasonable investigation *as to whether a prospective juror has been a party to litigation*" (emphasis added), and subpart (b)

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[17] The majority opinion of the en banc Court of Appeals previously rejected this argument, and, in accordance with well-settled rules of construction, applied the plain language of Rule 69.025 in holding and sharing the "Western District's view [in *Khoury v. ConAgra Foods, Inc.*, 368 S.W.3d 189 (Mo.App. 2012), *app. for transfer denied*] that Rule 69.025, like its case-predecessor *Johnson v. McCullough*, 306 S.W.3d 551 (Mo. banc 2010), addresses and expressly relates to juror nondisclosure on the topic of *litigation history* only." *Slip. Op.* at *5. (emphasis in original).

defines "reasonable investigation" to mean a "review of Case.net before the jury is sworn." Subpart (d) discusses a party's obligations when it "has reasonable grounds to believe that a prospective juror has failed to disclose that he or she has been *a party to litigation*" (emphasis added). Subpart (e) provides that a party waives the right to seek relief based on juror nondisclosure if the party fails to "[c]onduct a reasonable investigation" regarding a juror's litigation history, as outlined in subparts (b) and (c), or fails to inform the trial court when "the party has reasonable grounds to believe a prospective juror has failed to disclose that he or she has been *a party to litigation*" (emphasis added).[18] No reasonable reading of this plain language, when read together and in context, could result in an interpretation that Rule 69.025 applies to any questioning on subject matter other than litigation history.

This interpretation also comports with this Court's stated intent behind Rule 69.025. In *Johnson v. McCullough*, issued shortly before the adoption of Rule 69.025, this Court expressed its intention to promulgate a rule relating to nondisclosure of litigation history: "[T]his Court will adopt a formal rule requiring litigants to promptly

[18] Notwithstanding the fact that Rule 69.025 does not apply to the nondisclosure that is the subject of Point I, there is absolutely no evidence, and Spence does not assert, that either litigant in this case knew of the juror's nondisclosure of her son's death in an auto accident before the verdict. BNSF first learned of the nondisclosure *after* the verdict when the juror was heard telling Spence that she could relate to what Spence had gone through because she had lost a son in a motor vehicle accident.

bring to the trial court's attention information about *jurors' prior litigation history*…. Until a Supreme Court rule can be promulgated to provide specific direction, to preserve the issue of a juror's nondisclosure, a party must use reasonable efforts to examine the *litigation history* on Case.net of those jurors selected but not empaneled and present to the trial court any relevant information prior to trial."[19] *Johnson*, 306 S.W.3d at 554, 559 (emphasis added).

This interpretation also is consistent with the Western District Court of Appeals' decision in *Khoury*, which addressed the issue of timeliness of a party's challenge of juror nondisclosure of material information other than litigation history. The *Khoury* court specifically rejected the argument that this Court in *Johnson* intended parties to research jurors "for any alleged material nondisclosure." *Khoury*, 368 S.W.3d at 202. Addressing the scope of this Court's opinion in *Johnson* and Rule 69.025 (promulgated subsequent to and as a result of the *Johnson* opinion), the Western District held that:

> In short, *Johnson* reflects a concerted effort by the Missouri Supreme Court to address timely and reasonable investigation of the *litigation history* of potential jurors. It is no coincidence that when the Supreme Court later promulgated a rule – Rule 69.025 – the rule was expressly related to juror

[19]Significantly, this Court recognized the limitations of Case.net, noting Case.net is not an official record, may contain inaccurate and incomplete information and may have limited usefulness in searches involving common names or when a person's name has changed. *See Johnson*, 306 S.W.3d at fn 4.

> nondisclosure on the topic of *litigation history* only. Neither *Johnson* nor any subsequently promulgated Supreme Court rules on the topic of juror nondisclosure require that *any and all* research – Internet based or otherwise – into a juror's alleged material nondisclosure must be performed and brought to the attention of the trial court *before* the jury is empaneled or the complaining party waives the right to seek relief from the trial court.

Id. at 202-203 (emphasis in original).

Spence's contrary position effectively asks this Court to rewrite Rule 69.025 and to impose, retroactively, an undue burden on litigants to perform not only a Case.net review, but also exhaustive searches and examinations of pleadings and other court documents to determine if prospective jurors have truthfully answered questions on *any* topic asked during voir dire. Imposing such a requirement would not be just, practical, or speedy (as Respondent has previously suggested), but instead would necessarily threaten the integrity of the jury selection process and a litigant's constitutional right to a fair jury trial.[20] Again, as this Court has made clear, "At the cornerstone of our judicial system

[20]The majority opinion of the en banc Court of Appeals correctly noted that such a requirement "would force litigants not merely to check Case.net litigation histories, but to open and examine documents filed in each listed case. Such duty here would have implicated many documents for Juror Cornell alone, let alone all other panelists. It seems more effective and efficient to ask an auto-accident question to the assembled panel, especially when Case.net may not reveal serious accidents involving close relatives or

lies the constitutional right to a fair and impartial jury, composed of twelve jurors … [and] [t]o this end, it is the duty of a juror on voir dire examination to fully, fairly and truthfully answer all questions directed to him (and to the panel generally) … ." *Barnes,* 736 S.W.2d at 36.

This Court has repeatedly affirmed its commitment to carefully guard a litigant's constitutional right to a fair jury trial. *See e.g. Watts v. Lester E. Cox Medical Centers,* 376 S.W.3d 633, 642 (Mo. banc 2012) (The constitutional right to trial by jury applies "regardless of any statutory provision, and is beyond the reach of hostile legislation.…[A] statute may not infringe on a constitutional right; if the two are in conflict, then it is the statute rather than the constitution that must give way.") (internal citations omitted); *Barnes*, 736 S.W.2d at 38-39.

Specifically, in *Barnes* this Court reiterated the constitutional mandate to preserve inviolate litigant's right to a fair and impartial jury as follows:

> Our Constitution guarantees "[t]hat the right of trial by jury … shall remain inviolate…." Mo. Const. art. I, sec. 22(a). We entrust to our juries the fortunes and futures of all who come before them. This Court has consistently deferred to and placed great confidence in the verdicts of juries, realizing that the jury system remains our brightest hope for achieving justice between litigants.

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friends, or which occurred outside Missouri, or which did not result in Missouri litigation." *Slip Op.* at *5 fn 4.

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> Our confidence in and deference to the findings of juries demands that we assure litigants of the integrity of the jury selection process as well. Such confidence and deference, after all, is justified only where the juries are composed of fair and impartial persons who take their responsibilities both as jurors and potential jurors seriously.
>
> Our concern with the products and processes of juries would be hollow indeed if we were to adopt a cavalier attitude toward the integrity of the very juries whose products and processes we so carefully guard. … [A]s we have said, the fair and impartial operation of the jury is a guarantee to which every litigant rightfully makes a claim. Until a better solution is found, we are left with no option but to deal harshly with a venireman's disregard for his responsibilities as a potential juror. Only a new trial will preserve inviolate appellant's constitutional entitlement to a fair and impartial jury.

Barnes, 736 S.W.2d at 38-39.

Rule 69.025, by its own unambiguous language, was not intended to be applied to the intentional nondisclosure beyond litigation history, nor should it be rewritten and applied retroactively now in a manner that would be hostile to and effectively deny BNSF's constitutionally guaranteed right to a trial by an impartial jury.

In the event the Court determines that the scope and requirements of Rule 69.025 should be amended, it is only just that any amendment be applied prospectively (as this

Court did when promulgating Rule 69.025) so that all litigants receive fair notice of their rights and responsibilities under any amendments going forward. *See Johnson*, 306 S.W.3d at 558-559; *Khoury*, 368 S.W.3d at 202-203.

In light of the undisputed record of intentional nondisclosure, the trial court abused its discretion in denying BNSF's motion for a new trial based upon Juror Cornell's intentional nondisclosure of her son's death in an automobile accident. BNSF was deprived of its constitutional right to a fair trial, and the integrity of the jury process was impaired. BNSF, therefore, is entitled to a new trial.

II.

The trial court erred in excluding BNSF representative Justin Murphy's testimony offered in support of BNSF's motion for new trial on the basis of intentional juror nondisclosure of material information requested during voir dire because the evidence was relevant, admissible, not hearsay or alternatively, it fell within a hearsay exception, in that BNSF requested disclosure of material information relating to juror bias and prejudice asking clear questions of the venire panel regarding whether any of the jurors or their close family members had ever been involved in a motor vehicle accident, and Juror Cornell intentionally remained silent concealing that her son had been killed in a motor vehicle accident, but immediately after the jury reached its verdict, Cornell went up to Spence, hugged her and told her she could relate to what Spence had gone through because she herself had lost a son, and then told Murphy about the loss of her son in a motor vehicle accident, revealing her knowledge and recollection of the event and her intentional concealment of the material information requested by BNSF during voir dire.

Standard of Review

An appellant bears the burden of establishing an abuse of discretion by the trial court in excluding evidence. *See Payne v. Cornhusker Motor Lines, Inc.*, 177 S.W.2d 820, 836 (Mo.App. 2005). A trial court abuses its discretion when a ruling shocks one's

sense of justice, indicates a lack of consideration, and is clearly against the logic of the circumstances. *See Payne*, 177 S.W.2d at 836. BNSF preserved error as to the exclusion of Murphy's testimony by raising Juror Cornell's failure to reveal material information during voir dire, (L.F. 1520-24), and by offering Murphy's testimony at the hearing on the motion for new trial when Juror Cornell failed to appear. (Tr. Vol. 9 at 42-44.)

Justin Murphy's Post-Trial Evidentiary Hearing Testimony Regarding Juror Cornell's Statements Immediately After She Signed the Verdict was Admissible and the Trial Court Abused its Discretion in Excluding and Disregarding the Testimony.

In the event the Court believes additional evidence was needed to establish Juror Cornell's intentional nondisclosure of material information, BNSF asserts that the trial court abused its discretion in excluding and disregarding Justin Murphy's testimony. When Juror Cornell failed to appear at the motion for new trial hearing on August 20, 2015, BNSF offered the uncontroverted testimony of Justin Murphy, a BNSF representative who was monitoring the trial, regarding Juror Cornell's post-trial statements to Spence about the death of Juror Cornell's son. This testimony was not offered to prove the truth of the statements, the facts of which are undisputed, or to impeach the verdict. Instead, Murphy's testimony was offered to show that immediately after the verdict Juror Cornell knew about and recalled her son's death in a motor vehicle accident. Thus, Murphy's testimony was not hearsay, and there was no valid legal basis to exclude it.

Testimony from jurors or other witnesses is proper to prove juror misconduct either contemporaneous with the motion or during later evidentiary hearings. *See Portis v. Greenhaw*, 38 S.W.3d 436, 445 (Mo.App. 2001); *see also State v. Mayes*, 63 S.W.3d 615, 625-26 (Mo. banc 2001); *State v. Dunn*, 21 S.W.3d 77, 84 (Mo.App. 2000). Indeed, information regarding a juror's alleged nondisclosure can be supplemented even at a hearing on post-trial motions. *See, e.g., Barnes*, 736 S.W.2d at 36; *see also* MO. S. CT. R. 78.05 (2016).

The testimony of a witness regarding the statement of another is hearsay "only when the statement is offered as proof of the matters therein stated." *See Still v. Travelers Indem. Co.*, 374 S.W.2d 95, 102 (Mo. 1963). Thus, a witness's statement is not hearsay when it is offered not to prove the truth of the matter asserted but for some other purpose that does not require a belief of its truthfulness, such as to explain subsequent conduct by a person who heard the statement or to show that such person had knowledge or notice of a certain fact. *See State v. Davenport*, 924 S.W.2d 6, 10 (Mo.App. 1996); *see also Brenneke v. Dep't of Missouri, Veterans of Foreign Wars of U.S. of Am.*, 984 S.W.2d 134, 144 (Mo.App. 1998); *Bynote v. Nat'l Super Markets, Inc.*, 891 S.W.2d 117, 121-122 (Mo. banc 1995).

Applying these principles, the trial court's decision to exclude Murphy's testimony was error. Although subpoenaed to testify at the August 20, 2015 post-trial evidentiary hearing, Juror Cornell did not appear. (L.F. 56-58, 2235; Tr. Vol. 9. at 6 and 9.) So, BNSF offered testimony through Murphy about statements made by Juror Cornell to Spence. Specifically, Murphy testified that, immediately after the verdict, he observed

Juror Cornell approach and hug Spence. (Tr. Vol. 9 at 42-44). Murphy also overheard Juror Cornell tell Spence that Cornell could relate to what Spence went through because Cornell had lost her son in a motor vehicle accident. (Tr. Vol. 9 at 42-44.) Murphy also testified Spence separately told him about the death of her son. (Tr. Vol. 9 at 41-44.) BNSF offered these statements at the post-trial evidentiary hearing to demonstrate Juror Cornell's knowledge, and that she did actually remember her son's accident despite her silence during voir dire. The fact that Juror Cornell actually remembered her son's death in a motor vehicle accident, even after the verdict, is particularly relevant to establish her intentional nondisclosure of that material information. *See Barnes*, 736 S.W.2d at 36 (stating that an element of intentional nondisclosure is that the juror at issue "actually remembers" the nondisclosed fact); *Overlap, Inc. v. A.G. Edwards & Sons, Inc.,* 318 S.W.3d 219, 224 (Mo.App. 2010) (same); *Anderson*, 651 S.W.2d at 178 ("[C]ourts have almost universally ordered a new trial where the failure to disclose was made with the juror's understanding of the question and his then present awareness of the prior experience. Where there exists no reasonable inability to comprehend the information solicited by the question asked of the prospective juror, and where it develops that the prospective juror actually remembers the experience or that it was of such significance that his purported forgetfulness is unreasonable, failure to disclose is held to be intentional.").

In short, BNSF did not offer Juror Cornell's statements to prove the truth of their contents—it is undisputed that Juror Cornell's son died as the result of an automobile accident. For these reasons, Mr. Murphy's testimony was not hearsay and the trial court

abused its discretion in excluding the testimony from the post-trial evidentiary hearing and disregarding the testimony.

III.

The trial court erred in denying BNSF's Motion for New Trial on the basis of intentional juror nondisclosure of material prior litigation history because the trial court abused its discretion and BNSF was deprived of its constitutional right to a trial by twelve impartial and qualified jurors in that Juror Cornell intentionally provided false answers, under penalty of perjury, and intentionally failed to disclose her extensive litigation history (most significantly a prior wrongful death suit she filed as plaintiff relating to the death of her son in a motor vehicle accident) in response to clear and specific questions in the trial court's juror questionnaire and the trial court's follow up question posed directly to the panel at the beginning of voir dire on that very same issue, and BNSF complied with Rule 69.025(d) and (e) (and demonstrated compliance in accordance with Rule 69.025(f)) when it conducted a reasonable investigation by performing Case.net searches of the names of the prospective jurors before trial, as provided by the court, and BNSF had no reasonable grounds to believe Juror Cornell had provided false answers and concealed from the court that she had been a party in prior litigation.

Standard of Review

The trial court's error in denying BNSF's request for post-trial relief based on Juror Cornell's failure to disclose her extensive litigation history is subject to the same standard of review as set forth in point one: 1) *de novo* review of clarity of question(s) posed and 2) review for abuse of discretion of trial court's determination of intentional or unintentional disclosures). *See Anbari,* 442 S.W.3d at 56. Because a juror's nondisclosure of litigation history is involved, BNSF is also required to demonstrate its compliance with Supreme Court Rule 69.025, subparts (d) and (e), in accordance with the post-trial procedure set forth in subpart (f) of that rule. *See Khoury,* 368 S.W.3d at 202-203 (Rule 69.025 promulgated to relate to juror nondisclosure on the topic of *litigation history* only).

A. Juror Cornell intentionally provided false answers to the trial court when she completed and signed under penalty of perjury the trial court's juror questionnaire relating to prior claims and litigation history and intentionally concealed her prior wrongful death lawsuit relating to the death of her son who died in a motor vehicle accident when she failed to respond to the trial court's direct and unambiguous question posed to the panel at the beginning of trial.

The record conclusively establishes—and it is undisputed—that Juror Cornell falsely answered questions 14 and 15 on the trial court's juror questionnaire, which she signed under penalty of perjury and returned to the trial court before the commencement

of trial. (L.F. 1332; App. A23.) Question 14 of the juror questionnaire asked: "Have you or any member of your immediate family been a party to any lawsuit (as plaintiff or defendant, not merely as a witness)?" (L.F. 1332; App. A23.) Question 15 of the questionnaire asked: "Have you ever made a claim or had a claim against you to obtain or recover money, either for physical injuries or for damage to property?"[21] (L.F. 1332; App. A23.) Juror Cornell responded "No" to both questions by marking the boxes next to the word "No." (L.F. 1332; App. A23.) Undeniably, those responses were false.

The record also conclusively establishes—and it is undisputed—that Juror Cornell, after having been instructed and sworn (Tr. 22-23; App. A62-A63), failed to reveal her litigation history when Judge Mitchell admonished the panel regarding the importance of knowing the jurors' litigation history and once again asked the panel if anyone had been a party to a criminal or civil court case or lawsuit:

> Let me remind everyone that under Missouri law, **a juror's failure to disclose his or her litigation history is presumed to be prejudicial.** So in view of the time and expense involved in preparing for a jury trial and considering the sacrifices that you jurors endure to make this trial

[21] The juror questionnaire was approved and authorized to be used by the Stoddard County Missouri Circuit Court and substantially tracks the form approved by this Court and distributed to each circuit clerk pursuant to a 2005 Supreme Court Order. (Exhibits A and B, attached to Appellant's Motion to File Supplemental Legal File, to be taken with the case, per the Court of Appeals' July 19, 2016 Order.)

> possible, **we need to know whether any of you have been involved in any prior criminal or civil court cases or lawsuits** in order to determine whether those might be relevant today in this case. **Is there anyone on the panel who has been a party to a criminal or civil court case or lawsuit that you have not already disclosed on the juror questionnaire that was mailed to you ahead of time? If so, indicate.**

(Tr. 25-26; App. A65-A66) (emphasis added). Juror Cornell remained silent. (Tr. 26; App. A66.)

The record also conclusively establishes—and it is undisputed—that, before her service on the jury in this case, Juror Cornell had been involved in a number of litigation matters.[22] (Tr. Vol. 9. at 32; L.F. 1335-1491, 1495-1496, 1793.) Most significantly, Juror Cornell was a plaintiff in a wrongful death suit relating to the motor vehicle accident that killed her son. (L.F. 1828-1853; App. A35-A60.) At the August 20, 2015 evidentiary hearing, Spence's counsel stipulated to the summary of Juror Cornell's litigation history and related certified court records. (Tr. Vol. 9. at 32.)

[22] The record before the trial court included the stipulations of counsel (Tr. Vol. 9. at 32), certified and undisputed court records regarding Juror Cornell's extensive litigation history (most significantly, the wrongful death action filed by Juror Cornell relating to the motor vehicle accident and the death of her son) (L.F. 1828-1853; App. A35-A60), and the testimony of Justin Murphy regarding Juror Cornell's statements after the verdict. (Tr. Vol. 9. at 41-44).

Given the clarity of the trial court's questions in the jury questionnaire and the trial court's admonishment emphasizing the importance of knowing a prospective juror's prior litigation history (Tr. 25-26; App. A65-A66), Juror Cornell had a duty to disclose her litigation history.[23] *See Saint Louis University,* 321 S.W.3d at 295 (unequivocal question triggers venireperson's duty to disclose information). There simply is no reasonable explanation (other than intentional nondisclosure) for Juror Cornell's decision not to disclose any of the information solicited by the trial court, nor is there any reasonable explanation (other than an intent to conceal) for Juror Cornell's decision to answer questions in the trial court's juror questionnaire falsely under penalty of perjury.[24] (L.F. 1332; App. A23.) The only reasonable conclusion is that Juror Cornell's false answers in her sworn juror questionnaire and failure to disclose information relating to her litigation

[23] After the August 20, 2015 post-trial hearing, Spence submitted a proposed "Order and Judgment on Post-Trial Motions" requesting a finding that the trial court's questioning regarding litigation history during voir dire was ambiguous and possibly misunderstood as not being a question at all. (L.F. 2358-2359; App. A88-A89.) The trial court did not enter Spence's proposed order or otherwise make such a finding.

[24] The uncontroverted evidence demonstrates that Juror Cornell engaged in a pattern of concealment. As described in Point I, Juror Cornell's concealment continued beyond her false questionnaire answers and failure to respond to questions posed by the trial court as she remained silent to specific questions from BNSF's counsel about jurors or their family members who had been in a motor vehicle accident.

history in response to the court's questioning during voir dire were intentional. Consequently, under well-settled Missouri law, BNSF is entitled to a new trial. *See Barnes,* 736 S.W.2d at 37; *see also Anderson* 651 S.W.2d at 178 (finding of intentional nondisclosure of such material information requires a new trial).

B. BNSF complied with Supreme Court Rule 69.025 and was entitled to post-trial relief based on false answers provided by Juror Cornell in her sworn juror questionnaire and her intentional nondisclosure of her prior litigation history.

The Supreme Court promulgated Rule 69.025, effective January 1, 2011, which, by its own unambiguous terms, relates to the issue of juror nondisclosure "on the topic of *litigation history* only." *Khoury,* 368 S.W.3d at 202 (emphasis in original). Rule 69.025 reads as follows:

> (a) **Proposed Questions**. A party seeking to inquire as to *the litigation history of potential jurors* shall make a record of the proposed initial questions before voir dire. Failure to follow this procedure shall result in waiver of the rights to inquire as to litigation history.[25]

[25] In this case, subsection (a) of 69.025 does not apply because the trial court, not the parties, sought to inquire as to the prospective jurors' litigation history in the juror questionnaire and in a follow up question asked directly to the panel at the beginning of trial. The right of the trial court to make such an inquiry is recognized under Missouri law, and nothing in Rule 69.025 abrogates or otherwise limits the trial court's authority in

(b) **Reasonable Investigation**. For purposes of this Rule 69.025, a "reasonable investigation" means review of Case.net before the jury is sworn.

(c) **Opportunity to Investigate**. The court shall give all parties an opportunity to conduct a reasonable investigation *as to whether a prospective juror has been a party to litigation.*

(d) **Procedure When Nondisclosure is Suspected**. A party who has reasonable grounds to believe that a prospective juror has failed to disclose that *he or she has been a party to litigation* must so inform the court before the jury is sworn. The court shall then question the prospective juror or jurors outside the presence of the other prospective jurors.

(e) **Waiver**. A party waives the right to seek relief based on juror nondisclosure if the party fails to do either of the following before the jury is sworn:

(1) Conduct a reasonable investigation; or

(2) If the party has reasonable grounds to believe a prospective juror has failed to disclose that *he or she has been a party to litigation*, inform the court of the basis for the reasonable grounds.

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this regard. *See State v. Talley*, 258 S.W.3d 899, 908-909 (Mo.App. 2008) (well established that trial court has broad discretion to question venire).

> (f) **Post-Trial Proceedings**. A party seeking post-trial relief based on juror nondisclosure has the burden of demonstrating compliance with Rule 69.025(d) and Rule 69.025(e) and may satisfy that burden by affidavit. The court shall then conduct an evidentiary hearing to determine if relief should be granted.

(emphasis added).

BNSF demonstrated compliance with Rule 69.025(d) and (e) (in accordance with subpart (f)), and the trial court necessarily made that determination as part of its post-trial rulings when it expressly denied "Plaintiff's Motion to Determine Defendant BNSF's Entitlement to Seek Post-Trial Relief Based on Alleged Juror Nondisclosure." This Court should therefore reverse and remand for a new trial.

1. BNSF's Compliance with Rule 69.025(e)(1)

BNSF, in accordance with Rule 69.025(f), demonstrated that it complied with Rule 69.025(e)'s requirement that BNSF "conduct a reasonable investigation"—which "[f]or purposes of this Rule 69.025 ... means review of Case.net before the jury is sworn." MO. S. CT. R. 69.025(b). The record conclusively establishes and it is undisputed that BNSF did, in fact, perform a review of Case.net on the names of the prospective jurors, as their names were typed on the juror questionnaires, Pool Selection Report, and seating chart, which had been distributed to counsel by the court before trial. (L.F. 1801-1811, 1854-1860; App. A26-A32; Tr. Vol. 9. at 75-78.) The evidence submitted post-trial included a Notice of Compliance and an uncontroverted affidavit from Kellie Mitchem

(the paralegal who performed the Case.net review on behalf of BNSF before trial). (L.F. 1801-1811.)

BNSF's reliance on information provided by the trial court in performing its Case.net review before trial was reasonable and consistent with the jury selection process in Stoddard County, which requires that a Case.net review be completed before the commencement of trial. Cindy Wheeler, Stoddard County's deputy circuit clerk, testified at the evidentiary hearing that the information contained within the juror questionnaires, the Pool Selection Report, and seating chart is provided to trial counsel *before trial* so they can rely on that information in performing a Case.net review and ensuring the selection of a fair and impartial jury. (Tr. Vol. 9. at. 71-77.) This is precisely what BNSF did.

Further, there is no mention in the record of any issue regarding the misspelling of Juror Cornell's name before voir dire, during voir dire, or during the trial. Instead, the first time that the record discloses *any* issue about the undisputed misspelling is at the post-trial evidentiary hearing. There, the deputy clerk testified, for the first time, that she became aware of the misspelling on the first morning of trial when the jurors were checking in and then informed one attorney from each side. (Tr. Vol. 9. at 63-65, 79-80.) However, the deputy clerk admitted that she could not recall to which of the attorneys she actually provided this information.[26] BNSF disputes it received this

[26] Additionally, the deputy clerk did not believe she brought any misspelling issue to the attention of the trial judge before voir dire, did not know exactly when during the trial she

information and provided sworn testimony from each of its counsel indicating they were unaware of any misspelling.[27] (L.F. 2284-2294; Tr. Vol. 9. at 93).

Even if it were true, however, this would have occurred *after* BNSF already conducted its Case.net review on the list of names provided by the court before trial. Nothing in the plain language of Rule 69.025 required BNSF to conduct another review.

Significantly, the trial court made no finding of waiver (for any alleged failure by BNSF to "conduct a reasonable investigation" under Rule 69.025(e)) in its Order Regarding After-Trial Motions. (L.F. 2367; App. A2.) To the contrary, the trial court specifically rejected Spence's claim that BNSF had waived its right to seek post-trial relief when it expressly denied Spence's Motion to Determine Defendant BNSF's Entitlement to Seek Post-Trial Relief Based on Alleged Juror Nondisclosure, (which specifically argued that BNSF failed to comply with Rule 69.025 and BNSF had waived

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may have brought the issue to the judge's attention, did not know if any opportunity was given to either side to run additional Case.net searches, and did not recall there being any discussion with the judge or counsel about allowing counsel additional time to run additional searches or investigation based on the misspelling. (Tr. Vol. 9. at 78-79, 81-82, 85.)

[27] Despite the express language of 69.025(f) allowing parties to demonstrate compliance with Rule 69.025 through affidavits, the trial court failed to consider the affidavits of BNSF's counsel (Mr. Collins, Mr. Dalgleish, and Mr. Yeretsky). (L.F. 2287-2294, 2367; App. A2.)

its right to seek post-trial relief based on Juror Cornell's nondisclosure of her extensive litigation history). (L.F. 1788-1795, 2367; App. A2.) Spence did not appeal that ruling.

2. BNSF's compliance with Rule 69.025(d) and 69.025(e)(2)

Because BNSF conducted a reasonable investigation by relying on the documents provided by the trial court, BNSF's only other obligation would be to disclose to the court if it had "reasonable grounds to believe that a prospective juror has failed to disclose." MO. S. CT. R. 69.025(d)-(e). However, that obligation never arose. Indeed, there is absolutely no evidence that the parties or their counsel had any reasonable grounds to believe Juror Cornell failed to disclose her litigation history.

BNSF offered uncontroverted evidence from its trial counsel (by affidavit, in accordance with Rule 69.025(f),[28] and through the live testimony of Laurel Stevenson) attesting under oath that 1) they had no knowledge of any misspelling of Juror Cornell's name before the verdict in the case, and 2) BNSF had no reasonable grounds to believe, either before the jury was sworn or before the verdict, that Juror Cornell failed to disclose she had been a party to litigation or that she provided false information in her sworn responses to the juror questionnaire or the questions from the bench at the beginning of voir dire. (L.F. 1801-1811, 2284-2294; Tr. Vol. 9. at 24-27, 93-95.)

[28] As noted earlier, in addition to the testimony of Ms. Stevenson, BNSF submitted affidavits of Mr. Collins, Mr. Dalgleish, and Mr. Yeretsky, BNSF counsel who were present during voir dire.

Moreover, the record demonstrates BNSF complied fully with Rule 69.025 regarding another venire person whose litigation history was discovered before trial. During the brief pre-trial conference immediately before the start of jury selection, BNSF's counsel informed the trial court that one of the prospective jurors on the list previously circulated to counsel before trial (Juror 55) had been a plaintiff in a wrongful death case involving the death of her husband and requested that the prospective juror be stricken for cause. (Tr. 10-12.) BNSF's counsel most certainly would have informed the court of Juror Cornell's involvement as a plaintiff in the wrongful death case relating to the death of her son in an auto accident had they known that information.

Spence also presented no evidence that she or her counsel learned of Juror Cornell's litigation history or nondisclosure prior to the end of trial.[29] Indeed, had Spence's counsel been aware of Juror Cornell's nondisclosure, they would have been required to so inform the court under the requirements of Rule 69.025(d) and Professional Rule of Conduct 4-3.3(b) and (c). MO. S. CT. R. 69.025 (2016); MO. S. CT. R. 4-3.3 (2016); MO. S. CT. R. 4-1.6 (2016). Spence's counsel also asserted at the August 20, 2015 hearing that even if they had performed additional Case.net searches after learning of the misspelling of Juror Cornell's name, such information would be protected under the

[29] Additionally, Spence's counsel presented no evidence that they conducted additional Case.net reviews (or searched specific court documents and pleadings beyond any initial Case.net search) on the correct spelling of Juror Cornell's name at any time before the verdict in this case.

attorney/client privilege. (Tr. Vol. 9. at 127.) Rule 4-3.3(c), however, contradicts that position requiring disclosure "even if compliance requires disclosure of information otherwise protected by Rule 4-1.6." MO. S. CT. R. 4-3.3 (2016).

BNSF was entitled to rely on the sworn juror questionnaire, answered under penalty of perjury, denying any litigation history. Further, during voir dire, BNSF was entitled to rely on Ms. Cornell's silence in response to the trial court's direct and unambiguous questioning that required her to disclose her litigation history. The reality is that Juror Cornell misled both the trial court and counsel for the respective parties by falsely answering questions in the juror questionnaire, and she continued to conceal her litigation history by failing to respond to Judge Mitchell's specific follow up question at the beginning of voir dire.

3. The Trial Court Determined BNSF's Compliance when it expressly denied "Plaintiff's Motion to Determine Defendant BNSF's Entitlement to Seek Post-Trial Relief Based on Alleged Juror Nondisclosure."

Finally, as noted earlier, it is significant that the trial court's August 25, 2015 Order Regarding After-Trial Motions did not make any finding of any waiver by BNSF under Rule 69.025(e). Instead, the trial court expressly denied Spence's Motion to Determine Defendant BNSF's Entitlement to Seek Post-Trial Relief Based on Alleged Juror Nondisclosure, which specifically challenged BNSF's right to seek post-trial relief

asserting BNSF's alleged failure to comply with Rule 69.025.[30] (L.F. 1788-1795, 1801-1811, 2284-2294.) Granting Spence's Motion would have effectively prevented BNSF from seeking any post-trial relief based on Juror Cornell's intentional nondisclosure of her litigation history. The trial court, however, rejected Spence's claim that BNSF had waived its right to seek post-trial relief, and expressly ruled that "**PLAINTIFF'S MOTION TO DETERMINE DEFENDANT BNSF'S ENTITLEMENT TO SEEK POST-TRIAL RELIEF BASED ON ALLEGED JUROR NONDISCLOSURE IS DENIED."** (L.F. 2367; App. A2.) (emphasis in original). Again, Spence did not appeal this ruling and, consequently, the trial court's determination is not an issue on appeal.

The trial court's ruling denying Spence's motion is particularly significant in the context of Rule 69.025(f), which requires a demonstration and presumed finding of compliance before the court conducts an evidentiary hearing and considers evidence to determine if post-trial relief on the basis of juror nondisclosure of litigation history should be considered or granted. *See* MO. S.CT. R. 69.025(f). The trial court expressed its intentions in this regard at the August 20, 2015 evidentiary hearing indicating that it

[30]After the August 20, 2015 post-trial hearing, Spence's counsel submitted a proposed "Order and Judgment on Post-Trial Motions," which specifically requested the trial court to find that BNSF failed to comply with Rule 69.025 and to grant "Plaintiff's Motion to Determine BNSF's Entitlement to Seek Post-Trial Relief on the Basis of Alleged Juror Nondisclosure." (L.F. 2355-2360; A9-14.) Significantly, the trial court did not enter the proposed Order, and expressly denied Spence's motion.

would "reserve ruling on the plaintiff's motion to determine entitlement …and then take that up with the other motions pending at the same time after hearing the evidence …." (Tr. Vol. 9 at 8). The trial court did precisely that when it expressly denied "Plaintiff's Motion to Determine Entitlement" and then, in accordance with Rule 69.025(f), considered BNSF's evidence regarding Juror Cornell's nondisclosure of material litigation history as part of BNSF's request for post-trial relief. (L.F. 2367; App. A2.)

In sum, BNSF complied with Rule 69.025 by conducting a Case.net review of all the names of the prospective jurors—as provided by the trial court—before trial, and there is no evidence that counsel had any reason to believe (until after the verdict) Juror Cornell provided false answers in her sworn juror questionnaire to the court or concealed from the trial court and counsel that she had been a party in prior litigation. Rule 69.025 cannot be interpreted or applied, especially under these facts and circumstances, to sanction, tolerate, or otherwise excuse a juror's perjury or intentional concealment, or to deprive a litigant of its constitutional right to a fair trial. This constitutional right must be guarded zealously if the integrity of our jury process is to be preserved. Juror Cornell's intentional conduct compromised the integrity of the jury process and deprived BNSF of its constitutional right to a fair trial by twelve impartial jurors. The trial court, therefore, abused its discretion in denying BNSF's post-trial relief and BNSF is entitled to a new trial.

IV.

The trial court erred in overruling BNSF's objections and permitting the submission of two verdict directing instructions and a verdict form permitting two lines for BNSF's fault because the instructions and verdict form misled and misdirected the jury in that Spence had only one claim of negligence against a single defendant that must be submitted in one verdict director containing alternative disjunctive submissions, and permitting two verdict directors for one claim prejudiced BNSF by unduly emphasizing its alleged conduct in the verdict form and allowing the jury to make multiple assessments of fault against BNSF for a single claim.

Standard of Review

Whether the trial court properly instructed the jury is a question of law that appellate courts review *de novo*. *See Edgerton v. Morrison*, 280 S.W.3d 62, 65 (Mo. banc 2009). When reviewing claimed instructional error, appellate courts view the evidence most favorably to the instruction, disregard contrary evidence, and reverse "where the party challenging the instruction shows that the instruction misdirected, mislead, or confused the jury." *Gumpanberger v. Jakob*, 241 S.W.3d 843, 846 (Mo.App. 2007). BNSF properly preserved the claim of instructional error in this point by objecting to the trial court's submission of the instructions at issue. (Tr. 1408-09, 1424.)

A. The trial court erred in allowing Spence to submit two verdict directors for one claim of negligence against a single defendant.

This Court should reverse and remand for a new trial because the trial court's submission of two verdict directors—Instructions 6 and 7—for a single claim of negligence violated MAI and constituted reversible error. To make matters worse, and contrary to MAI, the trial court also submitted a verdict form that allowed the jury to apportion comparative fault against BNSF twice for a single claim while apportioning fault only once against Spence. Because prejudice is presumed and Spence made no attempt to overcome the prejudice, a new trial is proper.

Use of the Missouri Approved Instructions ("MAI") is mandatory in any case in which the instructions apply. *See* MO. R. CIV. P. 70.02(b) (2016); *see also Pickel v. Gaskin*, 202 S.W.3d 630, 635-37 (Mo.App. 2006). Moreover, prejudice is presumed where a trial court fails to give an instruction required by MAI. *See Nagaragadde v. Pandurangi*, 216 S.W.3d 241, 244 (Mo.App. 2007). When instructional error results from the failure to give an MAI-mandated instruction, the burden shifts from the party claiming error (to show prejudice) to the party who offered the incorrect instruction (to show a lack of prejudice). *Compare Gumpanberger*, 241 S.W.3d at 846-47 (noting that in a case of instructional error resulting from a deviation from MAI format, "[t]he burden is on the party who offered the erroneous instruction to demonstrate on appeal that the erroneous instruction created no substantial potential for a prejudicial effect"), *with McLaughlin v. Hahn*, 199 S.W.3d 211, 217 (Mo.App. 2006) ("Because both the verdict

director and the converse instruction were non-MAI instructions, prejudice is not presumed but rather must be shown by Defendants.").

In this case, MAI 20.02, "Multiple Negligent Acts Submitted," is the applicable verdict director for Spence's wrongful death negligence claim in which multiple acts or theories of negligence are alleged. *See* MAI (7th Ed.) 20.02 [1983 Revision]. Specifically, Spence had one negligence claim for wrongful death based on two alleged wrongful acts by a single defendant: (1) failure to provide a good and sufficient crossing and (2) failure to slacken speed or stop the train despite knowing of decedent's "unwavering approach." Thus, pursuant to MAI 20.02, there should have been a single verdict director specifying the two disjunctive acts or theories of alleged negligence and modified for comparative fault pursuant to MAI 37.01. *See* MAI (7th Ed.) 20.02; *see also Host v. BNSF Railway Co.*, 460 S.W.3d 87, 98 (Mo.App. 2015) (stating "multiple theories seeking the same recovery against one or more defendants are considered a single 'claim' requiring only a single verdict director.").

Instead, despite the clear applicability of MAI 20.02, and over BNSF's objections,[31] the trial court submitted two separate verdict directors—Instruction 6 and Instruction 7—for a single negligence claim as follows:

INSTRUCTION 6

In your verdict on Plaintiff's claim against Defendant BNSF for compensatory damages for the wrongful death of her husband Scott Spence

[31] (Tr. 1408-1410.)

based on the condition of the crossing you must assess a percentage of fault to Defendant BNSF, whether or not Scott Spence was partly at fault, if you believe:

First, the crossing was not good and sufficient because it did not afford eastbound motorists adequate sight distance to observe trains approaching from the south, and

Second, Defendant BNSF knew or by using ordinary care could have known of this condition and

Third, Defendant BNSF failed to use ordinary care to warn of such condition, and

Fourth, such failure to exercise ordinary care directly caused or directly contributed to cause the death of Scott Spence.

The phrase "ordinary care" as used in this instruction means that degree of care that an ordinarily careful railroad would use under the same or similar circumstances.

(L.F. 1148; App. A3.)

INSTRUCTION 7

In your verdict on Plaintiff's claim against BNSF for compensatory damages for the wrongful death of her husband Scott Spence based on the conduct of BNSF's train crew you must assess a percentage of fault to Defendant BNSF, whether or not Scott Spence was partly at fault, if you believe:

First, the approach of the Spence vehicle to the crossing was unwavering, and

Second, Defendant BNSF's train crew knew or by using ordinary care could have known that by reason of such unwavering approach a collision was imminent in time thereafter to have slackened the train's speed or to have stopped the train, but Defendant BNSF's train crew failed to do so and

Third, Defendant BNSF's train crew was thereby negligent, and

Fourth, such negligence directly caused or directly contributed to cause the death of Scott Spence.

In assessing any such percentage of fault against Defendant BNSF you must consider the fault of BNSF's train crew to be the fault of BNSF.

The term "negligent" or "negligence" as used in this instruction means the failure to use ordinary care. The phrase "ordinary care" means that degree of care that an ordinarily careful person would use under the same or similar circumstances.

(L.F. 1149; App. A4.)

The trial court's failure to instruct the jury using only a single verdict director, as required by MAI 20.02, constituted error that is presumed prejudicial, and BNSF is

therefore entitled to a new trial. *See* MO. R. CIV. P. 70.02(b) and (c); *see also Pickel v. Gaskin*, 202 S.W.3d at 635-37; *Nagaragadde*, 216 S.W.3d at 244.[32]

Spence argued in the court of appeals that there was no error because MAI 37.05(1) allows submission of multiple verdict directors based on BNSF's separate respondeat superior liability for its train crew's actions. However, MAI 37.05(1) only is applicable when agency is contested. MAI (7th Ed.) 37.05(1) [2012 Revision]. In contrast, MAI 37.05(2) applies when "[a]gency [is] [n]ot disputed" and provides for "a single verdict directing instruction[.]" MAI (7th Ed.) 37.05(2) [1986 New]. Here, agency was not at issue because BNSF admitted vicarious liability for the train crew's actions and Spence dismissed the train crew. (L.F. 76, 81, 939-40, 1095-96.) Thus, MAI 37.05(2) controlled and supported only a single verdict director.

B. The trial court compounded the prejudicial effect of the instructional error by allowing the jury to apportion BNSF's fault twice on a single claim while only apportioning Scott Spence's fault once.

Compounding the prejudicial error of using two verdict directors to submit Spence's single claim to the jury, the trial court submitted a modified MAI verdict form

[32] That error was compounded by the fact that one director (Instruction 7) used both "negligence" and "ordinary care" while the other (Instruction 6) used only "ordinary care." MAI 11.07 specifically sets forth the instruction to be used when negligence and ordinary care are combined, and the trial court erred in failing to follow that instruction. MAI (7th Ed.) 11.07 [1996 Revision].

to the jury with two "claims" against BNSF (with two lines for the jury to assess fault against BNSF) and a single line for assessment of fault against decedent. Specifically, the verdict form stated, in part:

> On the claim of Plaintiff *Sherry Spence* for compensatory damages for the wrongful death of her husband, Scott Spence, we, the undersigned jurors, assess percentages of fault as follows:

Defendant	*BNSF on sight distance claim*	_____ % (zero to 100%)
Defendant	*BNSF on failure to stop or slow claim*	_____ % (zero to 100%)
Decedent	*Scott Spence*	_____ % (zero to 100%)
	TOTAL	_____ % (ZERO or 100%)

(L.F. 1158; App. A6.)

Spence asserted her wrongful death negligence claim against a single defendant, and BNSF asserted comparative fault. Under these circumstances, MAI 37.07 provides the appropriate verdict form, with one blank for BNSF's alleged negligence and one blank for decedent's alleged negligence. *See* MAI 37.07 (7th Ed.) [1986 New] Form of Verdict—Plaintiff vs. Defendant. The trial court, however, ignored MAI 37.07 and submitted a Not-In-MAI verdict form modified to include *two* blanks in which the jury

could assign fault against BNSF, the only case defendant. One blank was for an assignment of fault on the "sight distance claim" and the other was for an assignment of fault on the "failure to slow or stop claim." (L.F. 1158; App. A6.)

Over BNSF's objection,[33] the trial court submitted Spence's requested verdict form and the jury did exactly what MAI 37.07 is designed to prevent—it assigned fault twice to BNSF. Specifically, the MAI form does not provide for multiple assessments of fault against a party for a single claim. BNSF is therefore entitled to a new trial on this basis. *See* MAI (7th Ed.) 37.07 [1986 New].

The trial court's submission of a modified form with two blanks for the assessment of fault to BNSF and only one for the assessment of fault to decedent was error that is presumed to be – and was actually – prejudicial to BNSF.[34] *See* MO. R. CIV. P. 70.02(b) and (c); *see also Pickel*, 202 S.W.3d at 635-37; *Nagaragadde*, 216 S.W.3d at 244. Indeed, the trial court's method of instructing the jury misled, misdirected, and

[33](Tr. 1424-1425.)

[34] Although verdict forms are not technically part of the jury instructions, Missouri courts analyze verdict forms and verdict directors in the same manner. *See Edgerton*, 280 S.W.3d at 67-68. Applying those standards here, the verdict form actually submitted was contrary to MAI 37.07, which authorized only a single blank for the assessment of fault to each party. *See* MAI 37.07 (7th Ed.) [1986 New] Form of Verdict—Plaintiff vs. Defendant.

confused the jury, leading it to ask the following question shortly after beginning of deliberation:

> Does the total of sight distance claim, failure to slow and Scott Spence percent total 100 percent or do we decide on each at 100 percent and not worry about them equaling 100 percent?

(Tr. 1502.)

As this question demonstrates, the jury was unsure how to reconcile Spence's improper separate verdict directing Instructions 6 and 7 with BNSF's correctly submitted multiple-act comparative fault Instruction 12 and the improper verdict form relating to two purportedly separate claims. The jury's legitimate confusion was prejudicial to BNSF. More importantly, as a result of the erroneous verdict form, the jury did exactly what MAI 37.07 is designed to prevent—it assigned fault twice to BNSF. Nothing in MAI 37.07 supports this result. *See* MAI (7th Ed.) 37.07 [1986 New]. This Court, therefore, should grant a new trial.

V.

The trial court erred in overruling BNSF's objections and submitting Not-In-MAI Instruction 8 to the jury because the court violated Rule 70.02(b) in giving the Not-In-MAI instruction that was roving and misled and misdirected the jury in that there was a separate and applicable MAI instruction regarding the same subject matter given by the trial court (Instruction 7) and Instruction 8 prejudiced BNSF by improperly omitting the time element as found in Instruction 7 applicable to Spence's negligent "failure to slow or stop claim," and improperly directed the jury that BNSF had a duty in the face of a vehicle with an unwavering approach to a train crossing to take "other preventative measures [BNSF] can take to avoid the collision" without defining or providing evidence of "other preventative measures".

Standard of Review

Whether the trial court properly instructed the jury is a question of law that appellate courts review *de novo*. *See Edgerton,* 280 S.W.3d at 65. When reviewing claimed instructional error, appellate courts view the evidence most favorably to the instruction, disregard contrary evidence, and reverse "where the party challenging the instruction shows that the instruction misdirected, mislead, or confused the jury." *Gumpanberger*, 241 S.W.3d at 846. Where MAI dictates a particular form of instruction, giving a contrary instruction to that requirement is error that is presumed prejudicial. *Id.* The burden then shifts to the party who offered the erroneous instruction to demonstrate

on appeal that the instruction created no substantial potential of prejudice. *See Id*. at 846-847.

A. The trial court erred in giving Not-In-MAI Instruction 8 in violation of Missouri Supreme Court Rule 70.02(b).

This Court should reverse and remand for a new trial because the trial court erred in giving Not-In-MAI Instruction 8 when it already properly stated Missouri law as it pertains to Spence's failure to stop or slow claim in Instruction 7—an MAI submission. Further, Instruction 8 incorrectly stated Missouri law by eliminating necessary elements of Spence's claim and gave the jury a roving commission by instructing the jury to hold BNSF strictly liable for its failure to slow or stop the train (as the instruction said BNSF was *required* to do) and to take "other preventative measures"—a vague term undefined in the instruction or supported by the law or evidence. As a result, the submission of Not-In-MAI Instruction 8 prejudiced BNSF.

Missouri Supreme Court Rule 70.02(b) states that "[w]henever Missouri Approved Instructions contains an instruction applicable in a particular case that the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other instructions on the same subject." MO. S. CT. R. 70.02(b) (2016). Giving an instruction in violation of Rule 70.02(b) is presumed to be prejudicial error. *See* MO. S. CT. R. 70.02(c) (2016); *see also Doe 1631 v. Quest Diagnostics, Inc*., 395 S.W.3d 8, 13 (Mo. 2013); *Brown v. St. Louis Public Service Co.*, 421 S.W.2d 255, 259 (Mo. 1967).

In this case, the trial court gave verdict directing Instruction 7 regarding Spence's "failure to slow or stop claim." (L.F. 1149; App. A4.) Spence tendered, and the trial court gave, Instruction 7 as a MAI 20.01 instruction (with modifications), as follows:

INSTRUCTION 7

In your verdict on Plaintiff's claim against BNSF for compensatory damages for the wrongful death of her husband Scott Spence based on the conduct of BNSF's train crew you must assess a percentage of fault to Defendant BNSF, whether or not Scott Spence was partly at fault, if you believe:

First, the approach of the Spence vehicle to the crossing was unwavering, and

Second, Defendant BNSF's train crew knew or by using ordinary care could have known that by reason of such unwavering approach a collision was imminent in time thereafter to have slackened the train's speed or to have stopped the train, but Defendant BNSF's train crew failed to do so and

Third, Defendant BNSF's train crew was thereby negligent, and

Fourth, such negligence directly caused or directly contributed to cause the death of Scott Spence.

In assessing any such percentage of fault against Defendant BNSF you must consider the fault of BNSF's train crew to be the fault of BNSF.

> The term "negligent" or "negligence" as used in this instruction means the failure to use ordinary care. The phrase "ordinary care" means that degree of care that an ordinarily careful person would use under the same or similar circumstances.

(L.F. 1149; App. A4.)

Therefore, undeniably, there is a MAI instruction applicable to Spence's "failure to slow or stop claim" and, under Rule 70.02(b), the trial court was required to give Instruction 7 "to the exclusion of any other instructions on the same subject." (L.F. 1149; App. A4.); MO. S. CT. R. 70.02(b).

Yet, despite the clear mandate of Rule 70.02(b), the trial court gave to the jury, over BNSF's objection,[35] Not-In-MAI Instruction 8 on the same subject matter—Spence's failure to slow or stop claim. (L.F. 1150; App. A5; Tr. 1411 (wherein the trial court identifies Instruction 8 as a Not-In-MAI instruction tendered by Spence).) Instruction 8 reads as follows:

INSTRUCTION 8

> An unwavering approach by a vehicle at a railroad crossing, where the crew knew or should have known that a collision was imminent, is a specific, identifiable hazard. Such a hazard requires the train's crew either to slow the train or stop, in addition to any other preventative measures it can take, to avoid the collision.

(L.F. 1150; App. A5.)

[35] (Tr. 1411-1412.)

Because Instruction 7 is an applicable MAI instruction, and because Instructions 7 and 8 address the same subject matter, the trial court's decision to give Not-In-MAI Instruction 8 violated Rule 70.02(b) and constituted prejudicial error. *See* MO. S. CT. R. 70.02(b), (c); *see also Doe 1631*, 395 S.W.3d at 13; *Brown*, 421 S.W.2d at 259. In fact, Spence's counsel expressly acknowledged during the instruction conference that MAI is intended to prevent instructions like Instruction 8 "because the jury is supposed to look at the verdict director. The verdict director tells them the type of conduct that warrants a finding of negligence, and that's all they need to know. These types of instructions, like I said, are exactly what MAI was created to get rid of." (Tr. 1419-1420.)

B. Not-In-MAI Instruction 8 also improperly omitted the time element as found in Instruction 7 applicable to Spence's negligent "failure to slow or stop" claim.

In addition to violating MAI and Rule 72.02(b), Not-In-MAI Instruction 8 also misstated Missouri law because it failed to instruct the jury that a duty to stop or slow necessarily requires that a train crew have sufficient time "to have slackened the train's speed or to have stopped the train" once it knows or should know of an imminent collision. (L.F. 1149.)

Under well-settled Missouri law, all jury instructions "shall be given or refused by the court according to the law and the evidence in the case." *Oliver v. Ford Motor Credit Co., LLC*, 437 S.W.3d 352, 361 (Mo.App. 2014) (*citing* MO. S. CT. R. 70.02(a)). When an erroneous instruction misdirects, misleads, or confuses the jury, "the error is

prejudicial and the jury's verdict should be reversed." *Oliver*, 437 S.W.3d at 361 (internal citation omitted).

The trial court gave, over BNSF's objection,[36] Instruction 8 as a Not-In-MAI instruction based on the decision in *Alcorn v. Union Pacific R.R. Co.*, 50 S.W.3d 226 (Mo. banc 2001). (L.F. 1150; App. A5; Tr. 1411.) In the *Alcorn* decision, the Court approved language in a verdict directing instruction virtually identical to paragraph second of Spence's verdict directing Instruction 7 in this case. *Compare* 50 S.W.3d at 242-243 *with* L.F. 1149; App. A4. Critically, the Court approved of verdict directing language like the second paragraph in Spence's Instruction 7, in part, because "it [. . .] required the jury to find that the train crew could have braked in sufficient time to avoid the collision but failed to do so." *Alcorn*, 50 S.W.3d at 243. However, nothing in *Alcorn* supports the giving of an additional instruction and it most certainly does not support the erroneous Not-In-MAI Instruction 8 given in this case.

The giving of Not-In-MAI Instruction 8 was erroneous in that it completely omitted the time element and, instead, instructed the jury that an imminent collision always "requires the train's crew either to slow the train or stop…to avoid the collision." (L.F. 1150.) Without the timing language, the jury was instructed to impose liability on BNSF for failing to stop the train even if it would have been physically impossible to do

[36] BNSF's counsel specifically objected to Instruction 8 because, *inter alia*, it "is not an MAI instruction. There's no reason to give it. It is not supported by *Alcorn*." (Tr. 1411-1412.)

so in time to avoid the collision. This misled the jury and prejudiced BNSF, thereby requiring a new trial.

The omission of the requisite time element from Instruction 8 was prejudicial to BNSF because it allowed the jury to conclude that, contrary to the verdict directing Instruction 7, BNSF could be found to have violated a duty to avoid a collision even if there was not sufficient time to do so. In this manner, and by its terms, Instruction 8 is tantamount to a strict liability instruction which prejudiced BNSF in this negligence case.

C. Not-In-MAI Instruction 8 is also a roving commission for the jury to hold BNSF liable for decedent's death for failure to take other "preventative measures" to avoid the subject collision.

The trial court's submission of Not-In-MAI Instruction 8 also was error because it allowed the jury to find negligence if BNSF failed to take "any other preventative measures" to avoid an imminent collision. That broad, undefined phrase gave the jury no practical standard by which to measure BNSF's conduct and submission of Instruction 8 was not supported by the evidence, case law, or MAI.

Under well-settled Missouri law, a "roving commission" occurs when an instruction "assumes a disputed fact or submits an abstract legal question that allows the jury 'to roam freely through the evidence and choose any facts which suit [ ] its fancy or its perception of logic' to impose liability." *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 766 (Mo. banc 2010) (internal citations omitted). As stated by this Court:

> A jury instruction amounts to a "roving commission" when it fails to advise the jury, or point out in any way, what acts or omissions on the part of the

> defendant, if any, found by them from the evidence, would constitute liability. A jury instruction may also be considered a roving commission when it is "too general". Where an instruction submits a question to the jury in a broad, abstract way without being limited to any issues of fact or law developed in the case, it may be considered a "roving commission."

Lashmet v. McQueary, 954 S.W.2d 546, 550 (Mo.App. 1997) (internal citations omitted).

In this case, Spence's verdict directing Instruction 7 provided that BNSF could be found negligent if the jury believed, *inter alia*, that BNSF's train crew failed to stop or slow BNSF's train under certain specified conditions. (L.F. 1149.) Pursuant to Instruction 7 (and applicable law as set forth in the *Alcorn* decision), no other alleged action or inaction of BNSF's train crew could form the basis for BNSF's liability to Spence.

Nevertheless, contrary to Instruction 7 and over BNSF's objection,[37] the trial court gave Not-In-MAI Instruction 8 to the jury which, by its express terms, stated that BNSF has a duty in the face of a vehicle with an unwavering approach to a train crossing to take "other preventative measures it can take to avoid the collision." (L.F. 1150; App. A5.) Neither MAI nor case law supported submission of that phrase. Moreover, Spence

[37] BNSF also objected that Instruction 8, *inter alia*, was "also vague and ambiguous as to what – roving commission as to what preventative measures could have been taken because there's nothing in the evidence to support that any preventative measures exists, much less that they could have avoided the collision." (Tr. 1412.)

provided no evidence and cited no law to raise an issue (or support a submission) about any alleged failures of BNSF's train crew other than the alleged failure to stop or slow if decedent had an unwavering approach to the subject crossing.[38]

Therefore, to even mention any other possible legal duty by BNSF—particularly something as vague as "any other preventative measures it can take to avoid the collision"—injected a false and improper issue before the jury and allowed the jury to "roam freely through the evidence and choose any facts, which suited its fancy or it perception of logic, to impose liability" on BNSF. The submission of the roving commission in Not-In-MAI Instruction 8 therefore prejudiced BNSF and requires a new trial in this case.

[38] (Tr. 1411- 1413; *see also* L.F. 1149; App. A4.)

VI.

The trial court erred in denying BNSF's objection and request for mistrial and allowing Spence's counsel to proceed to comment and introduce evidence regarding claimed modifications of BNSF's traffic engineering instructions, while not allowing BNSF to designate or call an expert on that issue, because the trial court abused its discretion resulting in prejudice to BNSF in that Spence had previously withdrawn these allegations of negligence from her pleadings before trial (and the issue was no longer in the case) for the specific purpose of obtaining the trial court's pre-trial order preventing BNSF from designating and calling an expert at trial on this very issue.

Standard of Review

The applicable standard of review for a trial court's denial of a motion for mistrial is set forth in *Delacroix v. Doncasters, Inc*., 407 S.W.3d 13, 24 (Mo.App. 2013): "The decision to grant a mistrial is largely within the discretion of the trial court, and we will reverse a denial of a motion for mistrial only when there has been a manifest abuse of discretion. A manifest abuse of discretion occurs only when the error is so grievous that prejudice cannot be removed." *Delacroix*, 407 S.W.3d at 24 (internal citations omitted).

It is well-settled that "[t]he broad discretion vested in the trial court to control its docket, the progress of litigation including pre-trial discovery, … will not be disturbed on review unless appellant shows an arbitrary or capricious exercise and abuse of discretion." *Calvin v. Jewish Hosp. of St. Louis*, 746 S.W.2d 602, 604 (Mo.App. 1988).

The exercise of judicial discretion, "should be directed toward the accomplishment of fundamental fairness and the avoidance of unfair disadvantage." *Calvin*, 746 S.W.2d at 605 (*quoting Ellis v. Union Elec. Co.,* 729 S.W.2d 71, 76 (Mo.App. 1987)). With respect to objected-to argument or evidence at trial outside the scope of the pleadings, however, the trial court has no discretion to allow such argument or evidence. *See Int'l Div. Inc. v. DeWitt and Assoc. Inc.*, 425 S.W.3d 225, 228 (Mo.App. 2014).

The Trial Court Manifestly Abused Its Discretion Resulting in a Grievous Injustice

In this case, the trial court abused its discretion in denying BNSF's objection and request for mistrial and allowing Spence's counsel to comment, argue, and introduce evidence on the modifications of BNSF's engineering instructions, which related to the very allegations and issue Spence previously withdrew from Counts I and II of her pleadings before trial for the purpose of precluding BNSF's designation of a traffic engineering expert on this issue. (Tr. 215-217, 490-493, 99, 1460-1461; Supp. L.F. 31.)

Spence's allegations of negligence on this issue, which she withdrew before trial, read as follows:

> 11. Defendant BNSF, by and through its agents, servants and employees, … were negligent in causing injury and death to Decedent Scott A. Spence by their actions and inaction in one or more of the following respects:
>
> . . .

(m) They modified their engineering instructions for crossing design by removing that portion of the instructions which mirrored the industry and governmental standards.

(Supp. L.F. 16, 18.)

The trial court, in its pre-trial Order of January 9, 2015, specifically gave Spence's counsel the option of retaining the allegations in Spence's pleadings, in which case BNSF would have been allowed to designate a traffic engineering expert on that issue. (Supp. L.F. 26.) In the alternative, the trial court indicated that if Spence elected to withdraw those allegations and issue from the case, BNSF would be precluded from designating a traffic engineering expert. (Supp. L.F. 26-27.)

Spence's counsel opted to withdraw those allegations to remove that issue from the case; consequently, BNSF was not allowed to designate or to call its traffic engineering expert on that issue. (L.F. 63-72; App. A75-A84; L.F. 296; Supp. L.F. 31.) Following Spence's deliberate and calculated withdrawal of these allegations, the trial court stated, "[I]n light of this Court's order of January 9, 2015, and Spence's voluntary withdrawal of certain allegations in her First Amended Petition on January 12, 2015, this Court reverses its order sustaining defendants' motion for leave to designate an additional expert." (L.F. 296.)

It is well-settled in Missouri that "[t]he issues in a lawsuit are made by the pleadings before the trial begins, and the pleadings limit the scope of the trial to such issues." *Maniaci v. Leuchtefeld*, 351 S.W.2d 798, 800 (Mo.App. 1961). Matters that are stricken or deleted from the pleadings before trial are no longer issues in the case, and it

is reversible error for the trial court to permit a party to comment upon or to introduce evidence on such issues. *See DeWitt*, 425 S.W.3d at 228 (*citing Maniaci v. Leuchtefeld*, 351 S.W.2d 798, 800 (Mo.App. 1961)).

These standards apply in equal force to argument introduced during opening statements. While counsel is allowed "wide latitude" in opening statements, this latitude does not authorize "wholly irrelevant matter prejudicial in its nature." *Buck v. St. Louis Union Trust Co.*, 185 S.W.208, 212 (Mo. 1916). Similarly, though Missouri recognizes the right of counsel to present good faith statements of what counsel believes the evidence in the case will be, such statements must be "germane to an issue raised in the case." *See Tennis v. Gen. Motors Corp.*, 625 S.W.2d 218, 223 (Mo.App. 1981).

Under the well-settled principle set forth in *Maniaci* and *DeWitt*, the issue of BNSF's alleged modification of its engineering instructions was removed as an issue in the case upon Spence's purposeful withdrawal of these allegations from the pleadings. (L.F. 67, 71; App. A79, A83; Supp. L.F. 31.) BNSF was, therefore, surprised and prejudiced at trial when the trial court erroneously allowed (inconsistent with its prior rulings and over BNSF's objection) Spence's counsel to comment, introduce evidence, and argue to the jury in closing the very allegations and issue that Spence had previously withdrawn from the case (that BNSF had improperly modified its engineering instructions to remove any references to AASHTO design criteria). (Supp. L.F. 31; L.F. 67, 71; App. A79, 83; Tr. 215-217, 490-493, 991, 1461.) The prejudice was compounded

by the trial court's refusal to allow BNSF to call its traffic engineering expert, Joseph Blaschke, and by the denial of BNSF's offer of proof in that regard.[39] (Tr. 1137-1140.)

BNSF objected to Spence's improper reference during opening statement to the unpled theory and moved for mistrial. (Tr. 215-216.) The trial court denied the objection and made clear that it would permit Spence to present evidence regarding claimed modifications to BNSF's engineering instructions. (Tr. 214-216.) BNSF had no further obligation to object to such evidence to preserve the issue for appeal. *See Longshore v. City of St. Louis*, 699 S.W.2d 16, 18 (Mo.App. 1985); *see also Hammer v. Waterhouse*, 895 S.W.2d 95, 106 (Mo.App. 1995) (emphasis in original) ("[W]hen a party has duly

[39] As set forth in his affidavit, Mr. Blaschke was prepared to testify, to a reasonable degree of engineering certainty, *inter alia*, that (1) AASHTO design criteria and design values were guidelines, *not standards*, to be used by highway designers, *not railroad companies*, (2) the AASHTO guidelines are to be used for "new roadway facilities or existing roadway facilities that are undergoing major reconstruction," (3) "AASHTO recognizes that existing highways (and railroad-highway grade crossings) should not be evaluated as "safe" or "unsafe" using [AASHTO] criteria," and (4) "an existing roadway is not to be considered "unsafe" simply because its geometry is inconsistent with the guidelines of [AASHTO]." (L.F. 1030-1036.) Mr. Blaschke was also prepared to testify that notwithstanding the inapplicability of AASHTO, the crossing was "more than adequate" and the sight distance for motorists approaching the subject crossing, in particular Mr. Spence, was "exceptional." (L.F. 1030-1036.)

objected to a certain type of evidence and the objection has been overruled, he need not repeat the objection to further evidence *of the same type* in order to preserve the objection.").

The inconsistent rulings can best be described as arbitrary and contrary to the principle requiring that the exercise of judicial discretion "be directed toward the accomplishment of fundamental fairness and the avoidance of unfair disadvantage." *See Calvin,* 746 S.W.2d at 605. BNSF was unfairly surprised and prejudiced by Spence's reintroduction of this previously withdrawn issue. The trial court's refusal to sustain BNSF's objection and request for mistrial, and further refusal to allow BNSF to present expert testimony to respond, constituted a manifest injustice and reversible error. Fundamental fairness, therefore, warrants remanding this case for a new trial.

Conclusion

Wherefore, for the reasons set forth herein, BNSF moves that this Court reverse the trial court's judgment in all respects and remand for a new trial on all issues and for whatever further relief this Court deems fair and just.

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Appendix—electronically filed separately

Certificate of Service and Compliance

Randy P. Scheer, of lawful age, first being duly sworn, states upon his oath that on May 15, 2017, a copy of Appellant's Substitute Brief and Appendix was served by electronic mail upon Mr. J. Michael Ponder at mponder@cbpw-law.com and Ms. Kathleen A. Wolz at kwolz@cbpw-law.com and Mr. Jeff Bauer at jbauer@stronglaw.com and Mr. Michael W. Manners at mike@lelaw.com and counsel for Respondent. I also certify that the attached brief complies with the Supreme Rule 84.06(b) and contains 26,989 words, excluding the cover, the certification and the appendix as determined by Microsoft Word software.

/s/ *Randy P. Scheer*
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