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 REPLY BRIEF OF APPELLANT BNSF RAILWAY COMPANY

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Reply to Spence's Fact Statement

Spence's recitation of facts does not comply with Rule 84.04 because it is argumentative, includes irrelevant discussions, and omits other facts to create a misleading impression.

A. Irrelevant facts.

Spence discusses a pretrial ruling striking BNSF's preemption defense, which was not part of the appeal, and the factual underpinnings of BNSF's recusal motion, which Spence acknowledges is *not* at issue. Spence Br. at 1, 6-7 & n.5. Both are irrelevant and unmentioned elsewhere in Spence's Brief.

B. Misleading statements and omitted facts.

1. No evidence shows the trial court knew of the misspelling before the jury was sworn.

According to Spence, because the official court reporter transcript reflects Judge Mitchell using the word "Cornell" prior to the jury's swearing-in, he necessarily *knew* Juror Cornell's name had been misspelled. Spence Br. at 4. Spence's deduction is unsupported by the record.

First, Clerk Wheeler testified she had "no" idea when she told Judge Mitchell of the misspelling. (Tr. Vol. 9 at 79.) Second, that Judge Mitchell may have said "Cornell" is no evidence that he knew Juror Cornell's name *had been previously misspelled* in documents provided to the parties. Third, and most importantly, Spence's reliance on the official transcript is misplaced. The original "draft" transcript reflected that Judge Mitchell referred to Juror Cornell as "C*a*rnell" as late as closing argument. (Tr. Vol. 9

Aug. 20, 2015 at 49; L.F. 2279.) Thus, the final transcript is no evidence that Judge Mitchell *said* "Cornell"; rather, it is more likely that the court reporter simply corrected the spelling *after* BNSF's post-trial motion raised the issue. *See* (Court Reporter Affidavit filed 12/1/2015; Tr. Vol. 9 Aug. 20, 2015 at 49.)

2. The juror questionnaire reflected Juror Cornell's name as "C*a*rnell."

Spence claims that Juror Cornell's name was correctly spelled twice on the questionnaire. Spence Br. at 3. Spence omits that (1) both instances were handwritten, as opposed to the typed "C*a*rnell" on the questionnaire and all other pretrial documents, and (2) Clerk Wheeler testified she could not ascertain the spelling of Cornell's name from her signature, but instead relied on the typewritten name. (Tr. Vol. 9 Aug. 20, 2015 at 74.)

3. BNSF had no opportunity to question Juror Cornell.

Spence *entirely omits* that Juror Cornell sought and obtained a protective order, over BNSF's objection, that barred BNSF from questioning Juror Cornell on juror nondisclosure at the July 28, 2015 hearing. (L.F. 2126-29.) Worse, Spence states, without qualification, that "Cornell did appear at the [July 28th] hearing … but was not called as a witness." Spence Br. at 8 n.6. By noting Juror Cornell's presence at the hearing without mention of the protective order, Spence misleads the reader to believe that BNSF *had* an opportunity to question Juror Cornell on the issue relevant to this appeal—juror nondisclosure—but failed to take it. This is incorrect.

There also is no support for Spence's claim that "BNSF's inability to question Juror Cornell was largely the result of its chosen litigation strategy." Spence Br. at 56-7

n.23. BNSF (1) apprised the court of its need to question Juror Cornell in late May 2015; (2) requested her presence at the July 28th hearing (for which she obtained a protective order) and at the August 20th hearing (which she failed to attend); (3) requested an extension to obtain her testimony; (4) requested, alternatively, a sworn statement; and (5) repeatedly checked in with Cornell's counsel regarding her availability. *See* BNSF Br. at 14. BNSF's "litigation strategy" was to diligently pursue Juror Cornell's testimony. Any contrary assertion is false.

Argument

Point I

The trial court erred in denying BNSF a new trial in light of Juror Cornell's intentional nondisclosure of her son's death in an auto accident.

Spence sued BNSF for her husband's death in an auto accident. Juror Cornell's son also died in an auto accident. Yet, Juror Cornell did not disclose her son's auto fatality when BNSF asked the venire members whether they "ha[d] been in an automobile accident, a motor vehicle accident, or had a close family member who has." (Tr. Vol. 1 at 149.) Immediately after the verdict, however, Cornell disclosed her son's auto accident death to Spence and Justin Murphy.[1] Juror Cornell thereafter made herself unavailable to testify on the nondisclosure throughout the post-trial period.

Juror Cornell's nondisclosure of her son's fatal auto accident was intentional, prejudicial, and violative of BNSF's constitutional guarantee to a fair and impartial jury. *See* Mo. Const. art. 1, sec. 22(a). If this Court's longstanding "confidence in and deference to the findings of juries" is to ring true and not "hollow[,]" a new trial is required. *Williams By and Through Wilford v. Barnes Hosp.*, 736 S.W.2d 33, 38 (Mo. banc 1987); *see* BNSF Br. at 50-67.

Spence's main response to Juror Cornell's undisputed nondisclosure is to argue that BNSF waived error by failing to comply with Rule 69.025. But, as two courts of appeals now have held, Rule 69.025 applies to juror nondisclosure "on the topic of

[1] *See infra* at Point II.

litigation history only" and has no bearing on Juror Cornell's independent duty to disclose her son's auto accident. *Khoury v. ConAgra Foods, Inc.*, 368 S.W.3d 189, 202 (Mo.App. 2012) (emphasis in original); *Slip. op.* at *5.[2]

A. BNSF's questions were clear.

BNSF's questioning was "sufficiently clear" and triggered Juror Cornell's duty to disclose her son's auto accident. *J.T. ex rel. Taylor v. Anbari*, 442 S.W.3d 49, 56 (Mo.App. 2014). During voir dire, BNSF's counsel first asked whether venire members had experience driving a pickup truck where pillars obstructed the view. When the truck pillar questions were exhausted, BNSF switched topics and, as relevant here, clearly asked *three times* whether any juror, or a close friend or family member, had been in any type of "automobile accident." *See* (Tr. Vol. 1 at 145-49.) These questions were not limited by BNSF's *initial* questions regarding truck pillars; they were a continuation and expansion of BNSF's inquiries.

The clarity of BNSF's questioning is best illustrated by the jurors' answers. *See, e.g., Barnes*, 736 S.W.2d at 37. Several disclosed general auto accidents. For example, Ms. Fees revealed an accident in which a lady pulled in front of her; Mr. Mattingly

[2] Regardless, Rule 69.025's scope is not properly before the Court because Spence did not appeal the trial court's *denial* of her Motion to Determine Defendant BNSF's Entitlement to Seek Post-Trial Relief Based on Alleged Juror Non-Disclosure, which challenged BNSF's compliance with Rule 69.025. *See infra* Point I(D). Accordingly, while BNSF maintains that Rule 69.025 does *not* apply to Juror Cornell's nondisclosure of her son's auto accident, this Court need not consider the issue.

revealed two prior accidents—(1) a car pulled out in front of him and (2) he misjudged a car coming down the road; Ms. Niswonger was hit broadside; and Ms. Blankenship's daughter totaled three cars. (Tr. Vol. I at 149-52.)[3] Juror Cornell said nothing. (Tr. Vol. 1 at 149-52; *Slip op.* at *3 n.1.) "[I]t is unquestionable that [Juror Cornell] heard these responses …[; a]s such, [her] nondisclosure was unreasonable under the circumstances." *Barnes*, 736 S.W.2d at 38.

In short, the record clearly negates Spence's argument that BNSF's questioning was limited to accidents involving pillar obstruction.[4]

B. No Missouri authority supports Spence's position that BNSF's questions lacked clarity.

Spence fails to mention or distinguish BNSF's dispositive cases relating to a juror's duty to disclose. BNSF's Br. at 52-55. Rather, Spence relies on a single case—*Anbari*, 442 S.W.3d at 56-57—that did not decide the issue of clarity. Instead, *Anbari* held that the juror's nondisclosure of a medical procedure was *unintentional*. *Id*. at 57. The court accepted the juror's testimony that she misunderstood the question to refer to a *separate* medical issue, which she had disclosed, and noted that the undisclosed procedure was "remote in time." *Id*. at 56-57. In contrast, Juror Cornell disclosed

[3] The record flatly contradicts Spence's statement that these other jurors' answers involved "obstructed visibility." Spence Br. at 5, 43-44.

[4] The unauthoritative *Forbes* magazine article Spence cites to support her argument should not be considered because it lacks foundation and is not part of the appellate record. Spence Br. at 46-47.

nothing at voir dire; did not testify about her reasons for remaining silent; and could not forget her son's auto fatality no matter how "remote in time."[5]

C. Juror Cornell's nondisclosure of her son's auto accident was intentional and prejudicial, as Spence effectively concedes.

Spence does not dispute that Juror Cornell's nondisclosures were intentional and prejudicial.[6] *See Anbari*, 442 S.W.3d at 56. BNSF's questions were clear, and the idea that Juror Cornell forgot the circumstances of her son's death "unduly taxes … credulity." *Groves v. Ketcherside*, 939 S.W.2d 393, 396 (Mo.App. 1996); *see also infra*, Point II. Accordingly, a new trial is required.

D. Rule 69.025 has nothing to do with Juror Cornell's failure to disclose her son's auto fatality.

To avoid the requisite new trial, Spence conflates Juror Cornell's nondisclosure of her son's auto accident with her nondisclosure of litigation history by arguing that Rule 69.025 applies to juror nondisclosures on *any topic*, not simply litigation history. Spence's expansion of Rule 69.025 ignores its plain text and history and, regardless, is unsound policy.

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[5] Notably, the court of appeals, which also decided *Anbari*, specifically held that "BNSF's auto-accident questions were sufficiently clear in context." *Slip. op.* at *2-3.

[6] Spence alleges only that the nondisclosure of *litigation history* was unintentional, which is irrelevant to Point I. Spence Br. at 56-63; *see Slip op.*, at *3-4.

Contrary to Missouri law, Spence plucks isolated provisions of Rule 69.025 out of context, citing only subsections (b) and (f). *See Alberici Constructors, Inc. v. Dir. of Revenue*, 452 S.W.3d 632, 638 (Mo. banc 2015) (requiring statutory provisions "to be considered together, not read in isolation"); *Martinez v. State*, 24 S.W.3d 10, 18 (Mo.App. 2000) (same).

Rule 69.025, as a whole, explicitly applies only to juror nondisclosures of *litigation history*, i.e., whether a juror has been a "party to litigation." *See* Rule 69.025(a)-(f); BNSF Br. at 61-62. This reading is consistent with *Johnson v. McCullough*, which dealt with nondisclosure to a question asking whether "anyone [had] ever been a plaintiff or defendant in a lawsuit before," and proposed a rule explicitly limited to such "litigation history." 306 S.W.3d 551, 554, 558-59 (Mo. banc 2010).

Spence's contrary interpretation would produce absurd results, requiring a party conducting a "reasonable investigation" to look past Case.net's litigation report and review underlying filings for each listed case. Yet, Rule 69.025(c) requires only that the court provide parties "an opportunity to conduct a reasonable investigation as to whether a prospective juror has been a *party to litigation*."[7] Rule 69.025(c) (emphasis added).

[7] Nothing in Rule 69.025 or the cases leading to its enactment supports the broad reading that Spence proposes. Moreover, if, as Spence suggests, some Missouri counties require parties to conduct Case.net searches "shortly before voir dire commences[,]" parties would physically be unable to comply with the rule Spence proposes for eighty separate potential jurors. *See* (L.F. 1797-98.) Indeed, Spence's notation highlights the true

Likewise, if parties are required to review matters *beyond* litigation history, it is unclear why subsections (d) and (e)(2) only require a party to disclose that it has "reasonable grounds to believe that a prospective juror has failed to disclose that he or she has been a *party to litigation*."

In sum, Rule 69.025 does not reach Juror Cornell's nondisclosures of her son's auto accident. As the court of appeals recognized, it is "far more effective and efficient to ask an auto-accident question to the assembled panel, especially when Case.net may not reveal serious accidents … which occurred outside Missouri, or which did not result in Missouri litigation." *Slip. op.* at *5 n.4; *see also Johnson*, 306 S.W.3d at 559 n.4 (recognizing Case.net's limitations).

E. BNSF's argument has remained consistent.

BNSF preserved its argument that Rule 69.025 applies *only* to litigation history. *See* Spence Br. at 22-23. BNSF had no reason to argue that Rule 69.025 did not extend to Juror Cornell's nondisclosures of her son's auto accident—because it does not—*until* Spence raised the issue. Once she did, however, BNSF refuted Spence's unsupported argument. (L.F. 1803 n.1; Tr. Vol. 9 Aug. 20, 2015 at 22.) Indeed, BNSF argued at the post-trial hearing that "69.025 is not an issue … [because] there were additional questions asked by Counsel Stevenson[.] … [T]hese questions … do not relate to litigation history." (Tr. Vol. 9 Aug. 20, 2015 at 22.) There has been no waiver.

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purpose of Case.net—to reveal the *fact* of prior litigation, itself, so that counsel can explore during voir dire possible bias arising from the jurors' litigation experiences.

Point II

The trial court erred in excluding Justin Murphy's testimony about Juror Cornell's post-trial statements that established her knowledge and recollection of her son dying in an auto accident.

Justin Murphy's testimony regarding Juror Cornell's post-trial statements was not offered to impeach the verdict or for the truth of the statements and, thus, was admissible.[8] Murphy testified that he witnessed Juror Cornell hug Spence immediately after the verdict and tell her she could relate to what Spence had gone through because she lost a son. (Tr. Vol. 9 at 42-44.) She then told Murphy she had lost her son in an auto accident. (*Id.*) These post-trial statements established Juror Cornell's knowledge and ability to recall the event, both of which are relevant and probative on the issue of juror nondisclosure. *See Barnes*, 736 S.W.2d at 36. And, the evidence is not hearsay.[9] BNSF Br. at 69-72.

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[8] Spence's reliance on *McDaniel v. Lovelace*, 439 S.W.2d 906, 909 (Mo. 1969) and *Jones v. Wahlic*, 67 S.W.2d 729, 731 (Mo.App. 1984) is misplaced. BNSF did not offer Murphy's testimony to impeach the verdict or prove misconduct during deliberations. The testimony was offered to show Juror Cornell's intentional nondisclosures *during voir dire*. (Tr. Vol. 9 at 35-37, 45.) Moreover, Spence admits that the statements show that "Juror Cornell remembered that her son had died in an [auto] accident." Spence Br. at 67.

[9] Spence fails to distinguish or even address the cases BNSF cites that demonstrate the relevance of Murphy's testimony. BNSF Br. at 69-72.

BNSF preserved this issue by asserting in its post-trial motion that Juror Cornell intentionally failed to reveal material information called for during voir dire.[10] (L.F. 1502-03, 1520-24.) Additional information regarding a juror's alleged nondisclosure can be submitted at a hearing on the post-trial motions. *See, e.g.*, *Barnes*, 736 S.W.2d at 36; *see also* MO. S.CT. R. 78.05; *Peth v. Heidbrief*, 789 S.W.2d 859, 861 (Mo.App. 1990); *Knothe v. Belcher*, 691 S.W.2d 297, 298-99 (Mo.App. 1985). Such information can include testimony from jurors or other witnesses. *See Larsen v. Union Pac. R.R. Co.*, 503 S.W.3d 213, 219-20, 222-24 (Mo.App. 2016); *see also State v. Mayes*, 63 S.W.3d 615, 625-26 (Mo. banc 2001). Upon Juror Cornell's failure to appear at the August 20th evidentiary hearing, BNSF presented Murphy's testimony to prove intentional nondisclosure. (Tr. Vol. 9 at 36-39, 45.) The trial court erred by excluding it.

[10] Contrary to Spence's waiver argument, BNSF did not introduce Murphy's testimony to prove post-verdict misconduct. Spence Br. at 65-67. Rather, consistent with its post-trial motions, BNSF sought to prove, in Juror Cornell's absence, that she was aware of her son's auto fatality and that her failure to disclose was not unintentional or based on a lack of memory. (L.F. 1502-03, 1520-24.)

Point III

Juror Cornell intentionally provided false answers on the juror questionnaire and intentionally concealed information when she failed to respond to the trial court's unambiguous question during voir dire regarding her litigation history.

BNSF's Point III (unlike Point I) is specific to Juror Cornell's nondisclosures of her litigation history in response to (1) the juror questionnaire and (2) the trial court's questioning. Spence does not dispute Juror Cornell's extensive litigation history. She instead concocts multiple excuses for the undisputed nondisclosures. None has merit.

A. The trial court's and the juror questionnaire's inquiries were clear.

Questions 14 and 15 on the juror questionnaire were clear. Indeed, they are virtually identical to questions included in the form approved for use by this Court. (Exhibit A, attached to Appellant's Motion for Leave to File Supplemental Legal File, to be taken with the case, per the Court of Appeals' July 19, 2016 Order.)

The trial court's questioning also was unambiguous, and, contrary to Spence's suggestion, clearly asked a question to the venire.[11] The trial court asked, "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?" (Tr. Vol. 1 at 25-26.) Juror

[11] Spence submitted a proposed order to the trial court after the post-trial hearing with a proposed contrary finding of fact. (L.F. 2359-60; A9-A14.) The trial court did not enter the order or make the finding.

Cornell was duty-bound to respond, and her failure to do so constituted intentional and prejudicial nondisclosure. *See Banks v. Village Enters., Inc.*, 32 S.W.3d 780, 786 (Mo.App. 2000); *Farm Credit Servs. Of W. Mo., P.C.A. v. Slaughter*, 850 S.W.2d 433, 435 (Mo.App. 1993).[12]

Spence nevertheless speculates that Juror Cornell *may* have understood the court's question as "an instruction to think carefully when answering questions asked *by one of the attorneys* about litigation history," or, perhaps, that Juror Cornell *thought* she had disclosed her litigation history. Spence Br. at 48. Because the standard is what a "*reasonable* venire member would have understood," Spence's conjecture, including her repeated insinuations that Juror Cornell was incapable of understanding the questions, is misplaced and unsupported. *McBurney v. Cameron*, 248 S.W.3d 36, 42 (Mo.App. 2008) (emphasis added).

B. BNSF is entitled to rely on Juror Cornell's juror questionnaire because it complied with MO. REV. STAT. § 494.415.

Juror Cornell's failure to disclose litigation history in her sworn juror questionnaire supports BNSF's claim for juror nondisclosure.[13] In *Wingate by Carlisle v.*

[12] Although the trial court has no obligation to frame or ask voir dire questions, it is *authorized* to do so. *See, e.g., Farm Credit Servs.*, 850 S.W.2d at 435. When it does, venire members must fully and truthfully respond. *Id.*

[13] Spence suggests, with no supporting evidence, that Juror Cornell may not have completed and signed the subject questionnaire. *See* Spence Br. at 49, 54. Spence waived this argument because, at the August 20th hearing, her counsel marked,

Lester E. Cox Medical Center, this Court justifiably left open the possibility of a claim for juror nondisclosure on a juror questionnaire that complies with § 494.415. 853 S.W.2d 912 n.4 (Mo. banc 1993). Indeed, no policy is served by a rule that requires counsel to interrogate jurors at voir dire regarding the veracity of sworn denials in a § 494.415-compliant questionnaire.

Here, the juror questionnaire *did* comply with § 494.415. The juror questionnaire, which was certified by the Stoddard County Circuit Clerk and approved for use by the Stoddard County, Missouri, Circuit Court, substantially tracks the form approved by this Court and distributed to each circuit clerk pursuant to a 2005 Supreme Court Order.[14] (*See* Exhibits A and B, attached to Appellant's Motion for Leave to File Supplemental Legal File, to be taken with the case, per the Court of Appeals' July 19, 2016 Order.) The form here is, thus, worlds apart from the form found non-compliant in *Wingate*, which was approved by "a single judge for use in a single case." 853 S.W.2d at 914-15.

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introduced, and referenced the subject questionnaire as "Kim Cornell's jury information sheet" without questioning its authenticity. (Tr. Vol. 9 at 59, 63; L.F. 2238.)

[14] Because Spence raised the issue of compliance for the first time on appeal, BNSF introduced the 2005 Order and certified form in the court of appeals. Both were taken with the case per the court of appeals' July 19, 2016 Order and are part of the record. Moreover, this Court may take judicial notice of the documents. *See In re Marriage of Davis*, 493 S.W.3d 452, 455 (Mo.App. 2016); *Mince v. Mince*, 481 S.W.2d 610, 614 (Mo.App. 1972).

Spence nevertheless suggests that *no* juror nondisclosure claim can be based on a juror questionnaire because "[i]t is not the function of the juror qualification form to replace voir dire." Spence Br. at 50-52 (quoting *Prewitt v. Cofer*, 979 S.W.2d 521, 526 (Mo.App. 1998) and *State v. Morehouse*, 811 S.W.2d 783, 784 (Mo.App. 1991)). But, Spence ignores *Wingate*, *see supra*, and omits material distinguishing facts in *Prewitt* and *Morehouse*.

For example, the juror questionnaire in *Prewitt* was "unsworn." 979 S.W.2d at 525. The court found this fact determinative, noting that, at voir dire, jurors "take an oath which requires them to truthfully answer the questions put to them[.]" Here, the juror questionnaire was sworn "under penalty of perjury." (L.F. 1332.)

In *Morehouse*, a juror *disclosed* on his questionnaire[15] that he could *not* be a "fair and impartial juror in a criminal case," but remained silent when a similar question was asked at voir dire. 811 S.W.2d at 784-85. Without confronting the inconsistency, counsel moved to strike the juror; the court refused. *Id.* Finding no error, the court of appeals explained that voir dire was the proper forum to measure the jurors' opinions and impressions, which are subject to change based on "the specific case with which the juror was confronted upon voir dire." *Id.* Here, Juror Cornell *failed* to disclose in her sworn questionnaire verifiable and objective facts, not subjective bias capable of change.

Under Missouri law, therefore, BNSF is entitled to rely on Juror Cornell's failure to disclose substantial litigation history on her sworn, juror questionnaire.

[15] There is no indication in *Morehouse* that the juror questionnaire was sworn.

C. Juror Cornell's nondisclosures of litigation history were intentional.

Spence admits that Juror Cornell was a party in no less than nine court cases and stipulated to the records in each case.[16] These records show that Juror Cornell's litigation history is far removed from the unrelated collection case identified in *Byers v. Cheng*, 238 S.W.3d 717, 725 (Mo.App. 2007) or the "parking ticket, speeding ticket, … uncontested divorce proceeding, [and] small claim[s]" mentioned in the dissent in *Brines ex rel. Harlan v. Cibis*, 882 S.W.2d 138, 142 (Mo. banc 1994) (Holstein, J. dissenting).[17] Spence Br. at 57-58. In at least four cases, Juror Cornell had to "come in to court"; in at least one, she had to "testify"; and, in another—an adult abuse charge—the court assessed costs against her. *Cf. id.* at 725; (L.F. 1335-37, 1345, 1358-62, 1423-33.) Most significantly, as the plaintiff in the wrongful death suit, Juror Cornell executed an affidavit and a verified petition and testified at an in-court hearing. (L.F. 1838-42.)

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[16] Spence argues that, in two of the cases, Juror Cornell was a "Respondent" and, thus, not a "Plaintiff" within Question 14's ambit. Spence Br. at 60-62. Spence's speculation that Juror Cornell could distinguish between "Respondent" and "Plaintiff" is inconsistent with her argument that Juror Cornell did not know what a "lawsuit" was.

[17] Spence's proposed Third Supplemental Legal File, which this Court should reject, contains information similar to that identified in *Byers* and the *Brines* dissent. That information is not useful or relevant because it deals with immaterial proceedings and, regardless, adds nothing to the question of whether Juror Cornell intentionally failed to disclose her extensive litigation history.

Spence does not dispute the materiality of this nondisclosure.

In conclusion, Spence's speculation that Juror Cornell may not have known what a "lawsuit" is or what it means to be a "party" to litigation is both meritless and inconsistent with the controlling reasonable juror standard. Indeed, this Court has previously rejected a similar patronizing view of a reasonable juror's capabilities. *See Barnes*, 736 S.W.2d at 38.

D. BNSF complied with Rule 69.025.

The trial court properly determined that BNSF complied with Rule 69.025(f)—a ruling Spence did not appeal. To preserve a claim for juror nondisclosure of litigation history, a party must show that it (1) conducted a "reasonable investigation," defined as a "review of Case.net before the jury is sworn," and (2) informed the court *if* it had "reasonable grounds to believe that a prospective juror failed to disclose that he or she has been a party to litigation." *See* Rule 69.025(d), (e), (f). BNSF proved its compliance, as the trial court properly determined when it explicitly *denied* Spence's Motion to Determine Defendant BNSF's Entitlement to Seek Post-Trial Relief Based on Alleged Juror Non-Disclosure ("Motion"), which asserted that BNSF did *not* comply with Rule 69.025. (L.F. 1788-95, 2367.) Spence did not appeal that ruling, and, in any event, the trial court did not err.

For the first prong, it is undisputed that BNSF performed a pre-trial Case.net search of the names listed on the numerous documents provided to counsel before trial, which spelled Juror Cornell's name as "C*a*rnell." (L.F. 1801-11; 1854-60; Tr. Vol. 9 Aug. 20, 2015 at 75-78.) For the second, it is undisputed that *no* party had reasonable

grounds to believe Juror Cornell provided false information, and, thus, BNSF had no information to disclose.

Spence nevertheless argues that BNSF *knew* of the misspelling prior to the verdict and, thus, failed to "conduct a reasonable investigation." To the contrary, BNSF provided sworn testimony and affidavits—as is allowed under Rule 69.025(f)—stating that BNSF's counsel did *not* know of the misspelling before the verdict. (L.F. 2284-94; Tr. Vol. 9. Aug. 20, 2015 at 93.) The only evidence Spence offered to contradict BNSF's evidence was (1) Clerk Wheeler's vague testimony and (2) undated and *handwritten* jury materials. (L.F. 1797, 1799.) However, contemporaneous timestamped and typewritten documents—(1) the "Attendance Audit Report," run *nine days after voir dire*, and (2) the draft transcript—spelled Juror Cornell's name as "C*a*rnell." (L.F. 2279, 2299; Tr. Vol. 9, Aug. 20, 2015 at 49.) And, even if the clerk had informed BNSF of the misspelling, which is not reflected in the trial transcript, this would have occurred *after* BNSF conducted its Case.net review—a reasonable investigation under Rule 69.025(b).

Thus, BNSF complied with Rule 69.025(f), and the trial court properly denied Spence's Motion. To avoid this result—and because she did not appeal the trial court's denial—Spence now contends that the trial court *implicitly found* that BNSF *did* know of the misspelling and that BNSF did not comply with Rule 69.025. The record expressly contradicts Spence's argument.

First, the trial court rejected Spence's proposed "Order and Judgment on Post-Trial Motions," which explicitly asked the court to find that "the misspelling of Juror Cornell's name was … brought to the attention of counsel[.]" (L.F. 2355-60.) Second,

the trial court's finding that BNSF attorney Laurel Stevenson was "credible in part and not credible in part" supports no implicit finding that BNSF *knew* of the misspelling, much less a finding that BNSF did not comply with Rule 69.025. (L.F. 2367.) Rather, the findings were not attributed to any point of testimony, fact, or law. *See* BNSF Br. at 19-20.

Most significantly, the trial court denied Spence's Motion. Suffice it to say, there can be no "implicit findings" of non-compliance when the court *explicitly denied* Spence's Motion, which raised that exact issue.

Nor does Spence's suggestion that the trial court might have denied her Motion as moot hold water. The court's order does *not* mention mootness; it reads: "**PLAINTIFF'S MOTION TO DETERMINE DEFENDANT BNSF'S ENTITLEMENT TO SEEK POST-TRIAL RELIEF BASED ON ALLEGED JUROR NON-DISCLOSURE IS DENIED.**" (L.F. 2367) (emphasis in original). Further, the trial court explained that it would "reserve ruling on [Spence's Motion] … and then take that up with the other motions pending … after hearing the evidence." (Tr. Vol. 9 Aug. 20th, 2015 at 8.) The court did *not* suggest that Spence's Motion would become moot as soon as the parties introduced evidence. Thus, the only reasonable reading of the court's rulings is that it (1) denied Spence's Motion, finding that BNSF complied with Rule 69.025, and (2) denied BNSF's request for new trial *on the merits*.

In summary, if Spence wished to argue that BNSF failed to comply with Rule 69.025, Spence should have appealed the trial court's express denial of her Motion. BNSF had *no* duty to appeal a ruling in its favor. Nor is this case an example of

"sandbagging." Spence Br. at 18, 39. This is a case where clerical error, combined with Juror Cornell's nondisclosure of her son's death in an auto accident (Point I) and nondisclosure of her material litigation history (Point III), resulted in a fundamentally unfair verdict. A new trial is required.

Point IV

The trial court erred in permitting the submission of two verdict directing jury instructions and a verdict form that called for the jury to assess fault twice to BNSF regarding Spence's single claim of negligence.

The jury instructions submitted in this case were faulty because Spence did not have two "claims" against BNSF based on two "separate" theories of negligence. Spence Br. at 73-75. In certain instances, Missouri courts allow plaintiffs to offer separate verdict directing jury instructions on different theories of liability. This case is not one of them. As the court stated in *Host v. BNSF Railway Company* (a case Spence cites), "multiple theories seeking the same recovery against one or more defendants are considered a single 'claim' requiring only a single verdict director." 460 S.W.3d 87, 98 (Mo.App. 2015); BNSF Br. at 89-93. Missouri law is clear that multiple verdict directing instructions are not appropriate where, as here, a plaintiff submitting multiple theories "is entitled to only one recovery for his injuries…." *Id.*

Nor does Comment B to MAI 37.05(1) support Spence's argument that the trial court properly instructed the jury using multiple verdict directors and separate lines for assessment of fault on each of Spence's "claims" against BNSF. BNSF Br. at 93. Comment B to MAI 37.05 states that, as is the case with Spence's claim, "once an employer has admitted respondeat superior liability, it is improper to allow plaintiff to submit another theory of *imputed* liability against the employer (as distinguished from another theory of independent negligence)." MAI (7th Ed.) 37.05(1) [2012 Revision], cmt. b (*citing McHaffie v. Bunch*, 891 S.W.2d 822, 826 (Mo. banc 1995)). Spence

dismissed BNSF's train crew as defendants before trial, and BNSF admitted vicarious liability for the train crew's actions. (*See* L.F. 939-40 and 1095-96; *see also* L.F. 76 and 81.) Thus, Spence did not properly have "separate" claims against BNSF for direct and vicarious liability and only one verdict director was proper.

Even if Spence had alleged two separate claims against BNSF, she would have been required to submit two packages of jury instructions and separate assessments of Decedent's comparative fault. *See Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 169 (2007) ("[I]t is far simpler for a jury to conduct the apportionment FELA mandates if the jury compares like with like—apples to apples."). By failing to do so, Spence got the benefit, to BNSF's prejudice,[18] of asking the jury to assess fault two times to BNSF and only one time to Decedent. A new trial is required.

[18] Spence's claim (at pages 77-78) that BNSF failed to demonstrate prejudice from the improper instructions is incorrect. First, prejudice is presumed from the trial court's failure to follow MAI and the burden actually shifts to Spence to prove lack of prejudice. BNSF Br. at 92-93. Second, BNSF is prejudiced by having two assessments of fault while only providing one assessment against Decedent. Further, the jury was confused by the comparative fault question, as evidenced by the jury's note. (Tr. Vol. 9 at 1502-04.)

Point V

The trial court erred in submitting Spence's not-in-MAI instruction 8 to the jury and thereby prejudiced BNSF.

A. It was error to submit Instruction 8 to the jury.

The mandate of Rule 70.02(b) is clear:

> Whenever 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).

Contrary to Spence's suggestion (at pages 82-87), Instruction 8 was a not-in-MAI instruction that addressed the same subject matter as Instruction 7—Spence's "failure to stop or slow claim." Spence's counsel admitted as much. Spence Br. at 84; (Tr. Vol. 9 at 136-37.) Thus, under Rule 70.02(b) and (c), the trial court erred in giving Instruction 8.[19]

B. The trial court's error in giving Instruction 8 is not excused by the trial court's decision to give Instructions 13 and 14, and Instruction 8 is not "invited error."

[19] Spence's argument (at pages 86-87) that, unlike Instruction 7, Instruction 8 was not a verdict director is irrelevant. The fact that Instruction 7 followed MAI and instructed on all elements for the failure to slow or stop claim made it the *only* proper instruction or verdict director.

Spence erroneously argues (at pages 82-84, 87) that BNSF invited error regarding Instruction 8 when it "seduce[d]" the trial court to give Instructions 13 and 14. Those instructions set out Missouri law on Decedent's duty to stop at a railroad crossing (Instruction 13) and BNSF's duty regarding clearing its right-of-way at a railroad crossing (Instruction 14). Spence offers no authority to support the argument that giving allegedly erroneous instructions (such as Instructions 13 and 14) on certain duties justifies separate erroneous instructions on other duties—particularly duties already submitted in other MAI instructions.[20] To the contrary, BNSF could invite error only by tendering Instruction 8 or a separate instruction containing the exact same errors as Instruction 8. *See Hunt v. Hunt*, 387 S.W.2d 234, 237-38 (Mo.App. 1965); *see also Pickett v. Stockard*, 605 S.W.2d 196, 198 (Mo.App. 1980). *Spence*—not BNSF—tendered Instruction 8, which contains errors distinct from any other alleged erroneous instruction given to the jury, and, thus, BNSF did not invite the error.

C. This Court's *Alcorn* Opinion fails to justify or support Instruction 8 because Instruction 8 omits required elements of an *Alcorn* claim.

Instruction 8 also was improper because it did not correctly state Missouri law and failed to follow this Court's decision in *Alcorn v. Union Pacific Railroad Co*. by omitting the required timing element. 50 S.W.3d 226, 235-36 (Mo. banc 2001). In *Alcorn*, this Court approved an instruction nearly identical to Instruction 7. *Id.* at 242-43 & n.17; (L.F. 1179.) Importantly, that instruction, like Instruction 7, included language that imposed liability for the train crew only if they were aware of a driver's unwavering

[20] BNSF does not concede any error in giving Instructions 13 and 14.

approach "in time thereafter to have slackened the train's speed, but the train crew failed to do so[.]" *Id.* As this Court noted, that "instruction did not permit the jury to render a verdict for the plaintiff merely based on speed. … It also required the jury to find that the train crew could have braked in sufficient time to avoid the collision but failed to do so." 50 S.W.3d at 243.

That limitation, which is missing from Instruction 8, is critical because the sheer weight and speed of a train make it difficult, if not impossible, to stop the train in time to avoid most collisions.[21] *See* AAR Amicus at 19-22. To remove that limitation effectively creates strict liability by imposing negligence liability for a train crew's failure to stop the train even when it would have been physically impossible.

Spence's Response regarding *Alcorn* discusses the effect (or not) of preemption in that case. Spence Br. at 85-86. That is irrelevant. *Alcorn* approved an instruction that was given nearly verbatim in Instruction 7, including the timing element. *Alcorn* did not, however, approve a separate, additional instruction repeating the duty, particularly one that omits elements. 50 S.W.3d at 241-43. To the extent that *Alcorn* applied to this case, it was through Instruction 7. Nothing in *Alcorn* allows Instruction 8.

D. Not-in-MAI Instruction 8 gave the jury a roving commission.

Additionally, Instruction 8 erroneously instructed the jury that BNSF had a duty to take "any … preventative measures it can take" to avoid a collision with a vehicle making an unwavering approach to a railroad crossing. (L.F. 1180.) Instruction 8 meets

[21] Even Spence recognizes that negligence liability cannot be imposed for failure to slow or stop unless the crew "has time to take some evasive action." Spence Br. at 85-86.

the textbook definition of a roving commission. *See Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 766 (Mo. banc 2010). This roving commission is particularly problematic because it eliminates the need for plaintiffs, like Spence, to particularize their allegations as to railroad conduct. *See* AAR Amicus at 22-24.

In response, Spence offers (at page 85) a single, conclusory paragraph with no analysis. Missing from this paragraph is *any* record citation that defines what "preventative measures" BNSF was required to take—besides stopping/slowing, which is independently addressed in Instruction 7.[22]

Even by Spence's own logic, her claim against BNSF was for an alleged failure to stop or slow. To give a second, less specific version of Instruction 7, which allowed the jury even to consider "any other preventative measures" BNSF should have taken, constitutes prejudicial error and warrants a new trial.

[22] Spence's acknowledgement (on page 87) that Instruction 8 could have allowed the jury to find that failing to sound the horn properly—which was not included in Instruction 7 or any other instruction—was one of the "other preventative measures" underscores the prejudicial error of this instruction because it effectively allowed the jury to "roam freely through the evidence" without guidance.

Point VI

The trial court erred in denying BNSF's timely objection and request for mistrial, thereby allowing Spence to comment and introduce evidence on an issue Spence withdrew from the case before trial.

BNSF does not "lump three separate claims of error together" as Spence suggests (at page 88). This point properly sets forth the trial court's error and resulting prejudice to BNSF by allowing—over BNSF's timely objection—Spence to comment/argue and introduce evidence on negligence allegations withdrawn before trial. It also addresses the further harm from the trial court's decision to prevent BNSF from designating and calling Blaschke,[23] BNSF's proposed expert on those issues.[24]

A. Spence's injection of and reference to claimed modifications of BNSF's traffic engineering instructions were improper.

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); BNSF Br. at 109. Spence purposefully

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[23] Courts have repeatedly recognized prejudice from the improper exclusion of evidence. *See, e.g., Washington by Washington v. Barnes Hosp.*, 897 S.W.2d 611, 621 (Mo. banc 1995); *see also Shoemake v. Murphy*, 445 S.W.2d 332, 334-35 (Mo. 1969).

[24] Contrary to Spence's argument, the trial court denied BNSF's request to designate Blaschke because Spence withdrew those allegations of negligence—not because the designation was untimely. (Supp. L.F. 26-27.)

withdrew these negligence allegations before trial. Consequently, it was prejudicial error to allow Spence to inject that issue during opening statements.

B. BNSF preserved error by objecting during opening statements.

The trial court denied BNSF's objection and motion for mistrial and ruled it would allow evidence regarding the claimed modifications of BNSF's engineering instructions. (Tr. Vol. 2 at 214-16.) When the trial court made its position clear, BNSF had no further obligation to object to such evidence to preserve the issue—contrary to Spence's argument. BNSF Br. at 110-11; Spence Br. at 90-91.[25] *See Hammer v. Waterhouse*, 895 S.W.2d 95, 106 (Mo.App. 1995). The evidence Spence elicited at trial was of the same type BNSF objected to during opening, which the trial court overruled, and no further objection was required. (Tr. Vol. 2 at 215-16.)

C. Blaschke's proposed testimony concerned matters in dispute and was not cumulative.

Spence incorrectly argues (at pages 96-100) that BNSF was not prejudiced because Blaschke's proffered testimony concerned "matters that were … not in dispute" or was "cumulative." Cumulative testimony is that "of the same kind, to the same point."

[25] In addition to BNSF's objections in opening, BNSF objected to similar evidence before Spence's witness, Archer, was permitted to testify about it, objected to the introduction of exhibits used during Heathington's (Spence's expert's) testimony, and requested a mistrial before closing. (Tr. Vol. 2 at 273; Vol. 5 at 601-09, Vol. 9 at 1439-40; L.F. 297-322.) Contrary to Spence's suggestion (at page 93), BNSF also submitted a withdrawal instruction on the AASHTO issue, which was denied. (L.F. 1162.)

See Devine v. Wells, 254 S.W. 65, 68 (Mo. 1923). The matters intended to be addressed by Blaschke were not cumulative and were disputed because: (1) the trial court's rulings related to Blaschke's designation and exclusion were contingent on Spence's withdrawal of the AASHTO claims (Tr. Vol. 2 at 215-16; L.F. 1017-42); and (2) comparing BNSF's offer of proof of Blaschke's proposed testimony with Heathington's (Spence's expert's) testimony, shows a contradiction in their opinions. (L.F. 1017-42; Tr. Vol. 4 at 496-512.)

There were numerous differences of opinions—too many to recount here—between Blaschke and Heathington. For example, Blaschke was prepared to testify that "[t]he key design feature for a crossing is sight distance. Mr. Spence had exceptional sight distance[.] ... Even positioned as much as 60 feet from the nearest rail of the crossing, Mr. Spence could have seen a train 900 feet along the tracks to the south." (L.F. 1033-36.) In contrast, Heathington testified that his analysis of sight distance, based on the AASHTO "standards" and the surveyor's layout, was that the driver "is not hardly going to see anything." (Tr. Vol. 4 at 491-93, 504-07, 513.)

Blaschke also denied that the AASHTO sight tables were applicable, making it clear that they were not standards and not applicable to existing crossings. (L.F. 1030-36.) He also would have testified that the "clearing sight distance" is the proper sight distance to be used, and that Decedent had "exceptional sight distance" and would have been able to see a train approaching from more than "three times the required 650 feet"

when positioned 25 feet from the crossing.[26] (L.F. 1033-35.) Heathington disagreed, claiming that he relied in part on the AASHTO sight distance "standard" in concluding Decedent had virtually no visibility to alert him to an oncoming train. (Tr. Vol. 4 at 513.) Spence then went on to ask Heathington other questions regarding AASHTO, including, "When a crossing doesn't meet the AASHTO standard, then it's deficient 86 percent…," to which Heathington responded, "That's a lot. You might get by with 4 or 5 percent deficiency, you know, from time to time." (Tr. Vol. 4 at 519.) As shown, Blaschke's contrary opinions were not cumulative.

In sum, by denying BNSF's objection and request for a mistrial, the trial court allowed Spence to inject a previously-withdrawn issue. The trial court compounded the prejudice by refusing to permit BNSF to call its traffic engineering expert *and* by denying BNSF's offer of proof in that regard. BNSF is therefore entitled to a new trial.

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[26] Contrary to Spence's assertion (at page 97), this did not contradict Cheryl Townlian, another BNSF employee, who agreed that "clearing sight distances"—not the AASHTO green book—were the proper sight distances. (Tr. Vol. 5 at 736-37.)

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Certificate of Service and Compliance

Booker T. Shaw, of lawful age, first being duly sworn, states upon his oath that on July 26, 2017, a copy of Appellant's Substitute Reply Brief 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 7,696 words, excluding the cover, signature blocks, and the certification as determined by Microsoft Word software.

/s/ *Booker T. Shaw*
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