SC96195

IN THE SUPREME COURT OF MISSOURI

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 RESPONDENT SHERRY SPENCE

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SUPPLEMENTAL STATEMENT OF FACTS

The 38-page Statement of Facts in Appellant's Substitute Brief ("Substitute Brief") is neither a fair nor concise statement of facts without argument as required by Rule 84.04(c). Defendant's rendition of the "facts" argues for the position it wishes to take, omitting other facts essential to a fair analysis of the issues before the Court. When read in light of the proper standard of review, the Substitute Brief does not afford the necessary immediate, accurate, complete, and unbiased understanding of the facts in this case.[1] As a result, Respondent submits her Supplemental Statement of Facts.

This case arises out of a 2012 pickup truck /train collision that killed Scott Spence. His wife of 33 years (Tr. 1073), Sherry Spence, sued for his wrongful death (L.F. 63-72). At the time of trial, the case was nearly two years old, and the Trial Court had made many rulings on substantive and procedural issues (L.F. 1-62), including an order sanctioning BNSF by striking its preemption defenses because it had filed a false affidavit in an effort to avoid partial summary judgment (S.S.L.F. 1-3; R.App. A55-57).[2] Thus, the Trial Court was familiar with this case when it went to trial.

Trial began April 20, 2015, and the case was submitted to the jury on April 28. The jury heard from four witnesses about "near misses" caused by being unaware of trains

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[1] *Wipfler v. Basler*, 250 S.W.2d 982, 984 (Mo. 1952).

[2] " S.S.L.F." refers to the Second Supplemental Legal File filed in the Court of Appeals; "R.App." refers to the Respondent's Substitute Appendix, filed in this Court.

approaching the crossing where Scott was killed (Tr. 295-297, 303-305, 309, 329-333 and 843-845). Plaintiff also presented evidence that the sight lines at the crossing were unreasonably dangerous because drivers had to turn their heads completely around and look back over their right shoulders in order to see approaching trains (Tr. 304, 331-332, 381-383, 509, 518-519, 532-533 and 624-625). As a result of this defect, exacerbated by excess vegetation (Tr. 692, 713, and 846), Decedent was unable to see Defendant's train in time to avoid the collision (Tr. 515).[3]

Unlike Decedent, the train's engineer and conductor had the benefit of being elevated in the locomotive which allowed them to see Decedent's vehicle approaching the crossing without slowing (Tr. 660, 694-695, and 701). The engineer confessed that if both the train and the pickup continued to travel without slowing, there would be a collision (Tr. 695), but the train crew made no attempt to slow the train until ***after*** the collision (Tr. 708). On appeal BNSF does not challenge the sufficiency of the evidence of liability.

The jury's verdict assessed 15% of the fault to BNSF for the conduct of its crew, 80% to BNSF for its deficient crossing, and 5% to Decedent (L.F. 1188). The jury assessed

[3] According to Plaintiff's experts, Decedent could not have seen the oncoming train until he had only about four seconds left to live. Given that 2.5 of those seconds were consumed by "reaction time," the train dash cam showed Decedent did the only thing he could do with the two seconds he had left: he slammed on his brakes, skidded in loose gravel onto the track just as the train, travelling at 54 miles per hour, smashed his truck, killing him (Tr. 515, Plaintiff's exhibit 3).

Plaintiff's damages at $20 million (L.F. 1188), which the Trial Court reduced to $19 million for Decedent's fault (L.F. 1189). BNSF does not challenge the amount of the verdict on appeal.

JUROR CORNELL

The jury questionnaire for Juror Cornell was ambiguous: at the top her name was typed "C-A-R-N-E-L-L," but in the body it was shown twice as "C-O-R-N-E-L-L," once where her husband's name was written in, and once in her signature (Tr. Vol. 9 Aug. 20, 2015 at 63; R.App. A7-14). When Cornell reported for trial, she informed the staff of the incorrect spelling of her name (*Id.* at 78).

Upon learning of that misspelling, Deputy Court Clerk Cindy Wheeler advised "one attorney from each side that it was not Kimberly Carnell, it was Kimberly Cornell." (Tr. Vol. 9 Aug. 20, 2015 at 64). While Wheeler was unsure which lead defense attorney she told, she knew it was either Laurel Stevenson or Doug Dalgleish (Tr. Vol. 9 Aug. 20, 2015 at 79-80), and that she supplied this information to counsel ***before*** voir dire commenced (Tr. Vol. 9 Aug. 20, 2015 at 65). Counsel acted like they heard her when she gave them Cornell's correct name (Tr. Vol. 9 Aug. 20, 2015 at 64).

Wheeler also made a hand-written correction to the master list of venirepersons (L.F. 1797, R. App. A-2) and provided it to the attorneys to make peremptory challenges (Tr. Vol. 9 Aug. 20, 2015 at 66-68). Additionally, she provided all counsel a seating chart with Cornell's correctly-spelled name before the jury was seated (Tr. Vol. 9 Aug. 20, 2015 at 68-69; L.F. 1799, R. App. A-3).

At pages 6-7 of its Substitute Brief, BNSF states that Wheeler did not know when the Trial Court learned of the correct spelling of Cornell's name, but she told Judge Mitchell about the error in Cornell's name at some point (Tr. Vol. 9 Aug. 20, 2015 at 78-79), because before the jury was sworn, the Court made a record of the names of the jurors who had been selected to ensure that both sides agreed that the jury conformed to the parties' peremptory challenges and strikes for cause. Defense counsel agreed that "Kimberly ***Cornell***" should be seated as a juror (Tr. 183, R.App. A-4; emphasis added).

One issue raised by BNSF is whether it had enough time to do a Case.net search of Cornell. Sound log recording sheets reflect that on the first day of trial, voir dire began at 8:28 a.m.—***after*** Wheeler informed counsel of the correct spelling of Cornell's name—and ended at 11:23 a.m. (S.S.L.F. 59-63). Thereafter, the Court was in recess and then took up challenges for cause and other matters before the jury was sworn at 12:35 p.m. (S.S.L.F. 63; Tr. 163-197). BNSF had already done a Case.net search of all venirepersons *except* Cornell before trial (L.F. 1804), so once it was given the correct spelling (which was sometime before 8:28 a.m.), its legal team had over four hours to complete a review of Case.net for Cornell before the jury was sworn.

BNSF had access to Wi-Fi in the courthouse (Tr. Vol. 9 Aug. 20, 2015 at 69), and it had four lawyers and a paralegal at voir dire, available to conduct the search for Cornell (Tr. 15, 21, and 102). (This does not include the resources available to counsel by telephone if they had chosen to seek assistance in conducting the Case.net search from the offices of the two law firms representing BNSF.) BNSF presented no evidence that four hours was insufficient time to do a Case.net search of Cornell, nor did it request additional

time to conduct its search after learning of the misspelling of Cornell's name. BNSF never sought to have the Court make further inquiry of Cornell, either before the jury was sworn, or in the eight days before submission of the case to the jury.[4]

VOIR DIRE QUESTIONS ABOUT TRUCK AND CAR WRECKS

Most of BNSF's questioning of the venirepanel on the issue of involvement in motor vehicle accidents focused on situations where a wreck occurred because the vision of one or both drivers was obstructed (Tr. 145-152). Only six venirepersons out of a panel of 69 gave any response to the questions as framed, with five of the six who did respond indicating that the accidents involved obstructed visibility.

POST-JUDGMENT MOTIONS

On May 27, 2015, BNSF filed its Motion for Judgment Notwithstanding the Verdict, for a New Trial and/or to Reduce or Remit Any Damages Award ("Motion for New Trial") and Suggestions in Support, claiming many errors (L.F. 1499-1511). Concurrently, it filed its "Motion for Evidentiary Hearing and Request for Summons to Kimberly Cornell Regarding Defendant's Motion for JNOV, New Trial and/or Remittitur" (L.F. 1329). One of BNSF's claims revolved around several cases not disclosed by Cornell, which BNSF

[4] Two alternate jurors were still impaneled when the case was submitted (Tr. 1500), so if BNSF had complained about nondisclosure by Cornell before submission, the Trial Court could have replaced her if it found such relief was warranted.

claimed it discovered only ***after*** the jury returned its verdict (Tr. Vol. 9 Aug. 20, 2015 at 32-33).

Because Defendant's Motion for New Trial sought relief on a claim of juror nondisclosure, on June 18, 2015, Plaintiff filed her Motion to Determine Defendant's Entitlement to Seek Post-Trial Relief Based on Alleged Juror Nondisclosure, claiming, *inter alia*, that BNSF was not entitled to an evidentiary hearing because it had not satisfied its burden under Rule 69.025 to demonstrate compliance with Rule 69.025(d) or (e) (L.F. 1791). Four days later, June 22, Defendant filed its "Notice of Compliance with Rule 69.025," seeking to demonstrate its entitlement to an evidentiary hearing (L.F. 1801). BNSF attached an affidavit to the Notice which averred that it conducted a Case.net search of all 80 members of the original venirepanel (L.F. 1803-1804).

On that same day, BNSF moved to disqualify Judge Mitchell from hearing its post-judgment motions on the ground that Cornell had "friended" Judge Mitchell on Facebook at some unspecified time (L.F. 1812).[5] At Judge Mitchell's request, this Court assigned

[5] Judge Mitchell voluntarily made a Social Media Disclosure on June 12, 2015, in which he stated that he had reviewed his list of Facebook "friends" and discovered it included Cornell (L.F. 1783). Judge Mitchell's review of his Facebook "friends" was prompted by an Advisory Opinion mailed to Missouri judges on April 30, 2015, two days ***after*** the jury returned its verdict (L.F. 1785-1786). Judge Mitchell had used Facebook since 2011 as part of three campaigns for judicial office, and had "friended" hundreds of people on this basis (L.F. 1783).

Judge Joseph Walsh to decide BNSF's disqualification motion. That motion was heard on an expedited basis on July 28 (L.F. 56), and denied on August 5, 2015 (L.F. 2156-2163). Judge Walsh found someone "friending" another on Facebook was a "purely superficial relationship" which "no reasonable person could rationally conclude" would influence Judge Mitchell (L.F. 2162). BNSF has not claimed error by Judge Walsh on this appeal.

Before the filing of the motion to disqualify, the Trial Court had set the various post-judgment motions for hearing on July 1, 2015. That hearing was cancelled while Judge Walsh sorted out the Facebook imbroglio; ultimately, the hearing on the post-judgment motions was reset for August 20, 2015, five days before the Court lost jurisdiction (L.F. 2367).

AUGUST 20, 2015 HEARING

At the beginning of the August 20 hearing, the trial court pragmatically advised all parties that it would hear evidence, including holding a hearing on BNSF's claims, and then decide the pending motions (Tr. Vol. 9 Aug. 20, 2015 at 7-8).

At that hearing Wheeler testified to her efforts to alert counsel to the Cornell problem, previously described (Tr. Vol. 9 Aug. 20, 2015 at 55-90). The only witness BNSF called to contradict Wheeler was Laurel Stevenson, who denied being advised of the correct spelling of Cornell's name before voir dire (Tr. Vol. 9 Aug. 20, 2015 at 92-93). Defendant did not call its other lead counsel; instead it attempted to use affidavits from its other attorneys on the issue of whether they were aware of the correct spelling of Cornell's name; Plaintiff objected to those affidavits as hearsay (Tr. Vol. 9 Aug. 20, 2015 at 26-27). Although the Trial Court reserved ruling on the affidavits (Tr. Vol. 9 Aug. 20, 2015 at 26-

29), ultimately it sustained Plaintiff's objection (L.F. 2367). BNSF has not appealed that ruling.

BNSF also called Justin Murphy, its claims representative monitoring the trial (Tr. Vol. 9 at 40), to testify about statements allegedly made by Cornell after the verdict, something not mentioned in its post-judgment motions (L.F.1499-1511). The first time Defendant alleged that Cornell had talked to Murphy was when BNSF proffered him as a witness at the August 20 hearing (Tr. Vol. 9 Aug. 20, 2015 at 38). Plaintiff objected to Murphy's testimony; the Court heard the evidence subject to the objection, which it ultimately sustained (L.F. 2367).

Cornell did not testify at the August 20 hearing because she was in the hospital.[6] Jim Tweedy, a local lawyer, appeared on her behalf and testified that he had learned that Cornell had been transported by ambulance to the hospital (Tr. Vol. 9 Aug. 20, 2015 at 13). He called medical facilities to try to locate her (Tr. Vol. 9 Aug. 20, 2015 at 13). Eventually, a hospital provided Tweedy with a facsimile transmission dated August 19, 2015, confirming that Cornell was a patient in the facility (Tr. Vol. 9 Aug. 20, 2015 at 15-16). The statement from the hospital was presented to the Court for *in camera* inspection and filed under seal, after which it was made available to counsel for review (Tr. Vol. 9 Aug. 20, 2015 at 15).

[6] Cornell did appear at the first hearing for which she was summoned at the request of BNSF (Tr. Vol. 9 at 9-12) but was not called as a witness.

Noting that the time for ruling on post-judgment motions was running out, the Court instructed Tweedy to provide notice if Cornell became available for questioning before the August 25 deadline (Tr. Vol. 9 Aug. 20, 2015 at 16). Thus, Tweedy filed notices on Sunday, August 23 (L.F. 2311) and Monday, August 24 (L.F. 2361) of Cornell's ongoing unavailability. On August 25, BNSF filed a motion to strike those notices (L.F. 2363-2366). Subsequently, Tweedy filed a written excuse from Cornell's physician verifying that she was medically unable to appear and give testimony between August 24 and September 1, 2015 (L.F. 2375-2376). BNSF made no record below explaining why it did not depose Cornell during the Facebook delay, and on this appeal it does not claim the Trial Court erred in its handling of Cornell's failure to testify.

RULINGS ON POST-JUDGMENT MOTIONS

The Trial Court waited until the ninetieth day after BNSF filed its post-judgment motions—allowing BNSF the maximum amount of time to provide any additional evidence it wished—before ruling the pending motions (L.F. 2367). BNSF did not request that the Court make any findings of fact on the issues raised at the evidentiary hearing. Nonetheless, the Court specifically found that Wheeler's testimony was credible and that the testimony of Stevenson was credible in part and not credible in part (L.F. 2367). Having made these determinations of credibility, the Court denied all of Defendant's claims for relief for juror nondisclosure (L.F. 2367).

BNSF'S FAILURE TO TIMELY DISCLOSE PROPOSED EXPERT

During pretrial discovery, BNSF requested a scheduling order, which the Trial Court entered. That Order required BNSF to disclose expert witnesses by September 10,

2014 (S.S.L.F. 15).

On August 14, 2014, Plaintiff sought leave to file a First Amended Petition, adding an allegation that BNSF was negligent in removing the American Association of State Highway and Transportation Officials ("AASHTO") sight tables from its engineering instructions (S.S.L.F. 17-18). On August 18, the Court denied such leave, and on August 21, BNSF deposed Plaintiff's engineering expert, Dr. Kenneth Heathington (Supp. L.F. 24). Although Heathington was questioned about his opinions relating to the removal of the AASHTO sight tables, as well as other engineering opinions (Supp. L.F. 25), when BNSF disclosed its experts several weeks later, it did not identify any engineering experts to refute Dr. Heathington's opinions.

Subsequently, the case was continued until April 20, 2015 (L.F. 25). The Court entered an agreed amended scheduling order which, despite having guidelines for completing expert discovery, contained no extension of the expired expert disclosure dates (S.S.L.F. 31-35). On November 24, 2014, three months after deposing Dr. Heathington, and over two months after the expert deadline, BNSF sought leave for the first time to designate an engineering expert. (Supp. L.F. 1).

Revisiting the issue of allowing Plaintiff's proposed amendment to her Petition, the Court gave Plaintiff the option of either amending her Petition to add a specific claim regarding the AASHTO sight tables, in which case BNSF would be allowed to name an expert, or withdrawing her proposed amendment, in which case BNSF's motion to name an engineering expert would be denied (Supp. L.F. 26-27). Plaintiff withdrew her motion to amend (Supp. L.F. 31). Thereafter, relying on the scheduling order dates, BNSF filed a

Motion for Protective Order prohibiting Plaintiff from taking depositions on the ground that "discovery is already closed" (S.S.L.F. 48). The Trial Court granted BNSF's motion (S.S.L.F. 58).

SPENCE'S JURY INSTRUCTIONS AND VERDICT FORM

BNSF accurately sets out Plaintiff's verdict directors (Instructions Numbers 6 and 7, R.App. A-27-28) and the Verdict Form tendered by Plaintiff. Plaintiff had only one cause of action for the death of her husband, but the case was submitted on two different theories as contemplated by Comment B to MAI 37.05(1) (R.App. A-48-49). One theory—the uncontrolled vegetation/sight distance claim—rested on BNSF's direct negligence. The other—the failure to slow or stop the train—rested on its vicarious liability for the fault of the train crew. The differing elements of these theories necessitated use of two verdict directors (Tr. 1410-1411).

BNSF also accurately sets out Instruction Number 8 (R.App. A-29), based on a duty recognized in *Alcorn v. Union Pacific R.R. Co.*, 50 S.W.3d 226, 242 (Mo. 2001), but to understand the giving of that instruction, it is necessary to consider the context supplied by Instruction Numbers 13 and 14, given at the request of BNSF, which also addressed the duties owed by the parties.

INSTRUCTION NO. 13

> You are instructed that when any person driving a vehicle approaches a railroad grade crossing, the driver of the vehicle shall operate the vehicle in a manner so that he will be able to stop, and he shall stop the vehicle not less than fifteen feet and not more than fifty feet from the nearest rail of the railroad track and shall not proceed

until he can safely do so if an approaching train is visible and is in hazardous proximity to such crossing.

(L.F. 1155; R.App. A30).

INSTRUCTION NO. 14

You are instructed that Defendant BNSF is only required to keep its right-of-way reasonably clear of vegetation, undergrowth or other debris for a distance of 250 feet each way from the near edge of a public grade crossing where such things would materially obscure approaching trains from the view of travelers on the highway.

(L.F. 1156; R.App. A-31).

Plaintiff objected to Instruction Numbers 13 and 14 because they were abstract statements of law and Not-in MAI (Tr. 1419-1420). Alternatively, Plaintiff argued that if the Court was going to give instructions describing abstract duties, that she would tender Instruction Number 8 in response to BNSF's similar, Not-in-MAI Instruction Numbers 13 and 14 (Tr. 1414; Tr. Vol. 9 at 136-137).[7]

[7] Plaintiff's proposed instructions filed with her pretrial compliance materials did not include any Not-in-MAI instructions (L.F. 747-769).

ARGUMENT

I. The Trial Court did not err by overruling Defendant's Motion for New Trial on the ground of juror nondisclosure (Responding to Appellant's Points I and III).

Standard of Review

The general standard of review for juror nondisclosure cases was described by this Court in *Smith v. Brown & Williamson Tobacco Corp*., 410 S.W.3d 623, 639-640 (Mo. 2013):

> This Court will not disturb a trial court's ruling on a motion for new trial based on juror misconduct unless the trial court abused its discretion….
>
> A party alleging juror misconduct during voir dire must present evidence to substantiate its allegations. … When making factual determinations a circuit court is free to disbelieve any, all, or none of the evidence. ***Where the trial court makes no specific findings of fact, the reviewing court must assume that all facts were found in accordance with the result reached.*** Appellate courts defer to the trial court on factual issues because it is in a better position not only to judge the credibility of witnesses and the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record.

(Internal citations and quotation marks omitted; emphasis added). Where a trial court rules on issues after an evidentiary hearing, "an appellate court determines whether the evidence was sufficient to support the facts found by reviewing only the evidence and reasonable

inferences that support those findings and, in doing so, it examines them in the light most favorable to those findings." *Seck v. Department of Transportation*, 434 S.W.3d 74, 78-79 (Mo. 2014). In regard to Rule 69.025 itself, the interpretation of Supreme Court Rules are "reviewed *de novo* because this Court interprets its rules by applying the same principles used for interpreting statutes." *McGuire v. Kenoma, LLC*, 447 S.W.3d 659, 662 (Mo. 2014).

Summary of Argument

Plaintiff is not, as BNSF suggests, asking this Court to re-write Rule 69.025. To the contrary, Plaintiff urges this Court to apply Rule 69.025 in a manner consistent with its express language, history, and purpose. This Court adopted Rule 69.025 to prevent exactly what BNSF seeks to do here: set aside a verdict based on information found in Case.net ***after*** the verdict, but which could easily have been found by a review of Case.net ***before*** the case was submitted. It is undisputed that when BNSF belatedly did a Case.net search ***after trial***, it found the ***same information*** which formed the basis for its Motion for New Trial. There is no legitimate reason why Cornell's alleged nondisclosure could not have been discovered had BNSF simply done the "review of Case.net" required by Rule 69.025. Indeed, BNSF never raised the argument in the Trial Court which it seeks to advance here—that in performing a review of Case.net, litigants are not required to actually look at what is discovered by the review.[8]

[8] BNSF's arguments to this Court are starkly different than the argument it made below. In raising this issue in the Trial Court, BNSF claimed that if it had been provided with the

BNSF's narrow interpretation of Rule 69.025 is at odds with the language and purpose of the rule, which requires litigants to use information available on Case.net to challenge jurors who have had experiences that might impact their impartiality ***before submission of the case***. The question before the Court is whether a "review of Case.net" means a party claiming nondisclosure can ignore readily accessible information found by a Name Search of Case.net, and then rely on that same material it would have discovered if it had simply looked.

A. Defendant waived its right to complain about nondisclosure of the accident involving Cornell's son and her litigation because it failed to conduct a reasonable investigation (Responding to Appellant's Points IB and III).

Rule 69.025(e) states that a party "waives the right to seek relief based on juror nondisclosure" if that party fails to conduct a reasonable investigation, defined by Rule 69.025(b) as a "review of Case.net." Defendant's own evidence establishes that it conducted no review of Case.net for anyone after April 16, 2015, four days before the start of trial (L.F. 1804; R.App. A-59). Thus, ***even after Wheeler informed BNSF of Cornell's correct name on April 20*** **(Tr. Vol. 9 at 64-65)*****, it conducted no review of her record on***

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correct spelling of Cornell's name, it could have done research allowing it to learn about "her son's wrongful death in an automobile accident. . . ." (L.F. 1523). On appeal, BNSF argues ***for the first time*** that it was not practical for it to have learned about the accident that killed Cornell's son by doing a Case.net search.

Case.net. At the August 20 hearing, the only evidence BNSF offered to excuse its failure to do a Case.net search of Cornell was the testimony of Laurel Stevenson, one of Defendant's counsel, who denied that ***she*** was ever informed of the mistake in Cornell's name before the jury's verdict (Tr. Vol. 9 at 92-93). In contrast, Deputy Clerk Wheeler testified unequivocally that she provided Cornell's correct name to either Stevenson or Defendant's other lead counsel (*Id*. at 79-80). (Neither the other lead counsel, nor any of BNSF's other lawyers present during jury selection testified at the August 20 hearing.[9]) Before the jury was sworn, Wheeler also provided counsel for both parties with a hand-written correction to the spelling of Cornell's name on the master list of venirepersons used by attorneys to make strikes from the panel (*Id*. at 66-68; L.F. 1797; R.App. A-2), and a seating chart with Cornell's correctly spelled name (Tr. Vol. 9 at 68-69; L.F. 1799; R.App. A-3). Finally, the Trial Court made a record before the jury was sworn that it conformed to the strikes:

> THE COURT: These are the first 12, Natalie Jo Frye, Jerrod Alan Mitchell, Allie Rowland, Rosalie Page, Freddie Ann Bye, ***Kimberly Ann Cornell,*** Betty June Cobb, James S. Walker, Richard David Yoebst, Tiffany Renee Parris, Joseph Arvin Freed, Karen Sue Rainey.

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[9] Defendant offered affidavits by three other attorneys who helped try this case, in an attempt to dispute Wheeler's testimony (Tr. Vol. 9 Aug. 20, 2015 at 26-27, Ex. A98, A99, and A100). Plaintiff objected to admission of those affidavits, the Court reserved its ruling (Tr. Vol. 9 Aug. 20, 2015 at 26-27, 29), but ultimately excluded them (L.F. 2367).

MR. COLLINS: That's correct, Your Honor.[10]

(Tr. 183; R.App. A-4; emphasis added). There was ample evidence that BNSF was aware of the correct spelling of Cornell's name before the commencement of voir dire but did nothing to find out about what it might have learned by reviewing Case.net. None of Defendant's Points Relied On in this Court assert that the Trial Court erred in finding that Wheeler's testimony was credible.

Had Defendant done a Case.net search of Cornell before the jury was sworn, it would have learned that her litigation history included an action for the death of her son ***arising out of a truck accident***, as BNSF noted in the attachments to its post-judgment motions and suggestions, which included portions of Case.net and other records accessible through Case.net (L.F. 1573-1575; 1830-1853). For example, the Petition for Wrongful Death (submitted to the Trial Court by BNSF ***after*** the verdict) averred that Cornell's son "was fatally injured while riding as a passenger in a 1989 Chevrolet Truck" (L.F. 1852).

BNSF seeks to excuse its failure to conduct a review of Cornell's Case.net record by claiming that the jury selection process in Stoddard County "requires that a Case.net review be completed before the commencement of trial" (Substitute Brief at 81). It cites no authority for that proposition, and it is simply wrong. There is no local rule in Stoddard County requiring Case.net searches to be done before trial starts, nor was there any such dictate in the scheduling orders entered by the Trial Court. The reality is that in many Missouri counties the parties do not find out who is going to be on the venirepanel until

[10] Mr. Collins was one of BNSF's counsel assisting in jury selection (Tr. 15).

shortly before voir dire commences, and the review required by Rule 69.025 cannot be completed days before trial begins. It is bizarre to suggest that a Trial Court would ***forbid*** a Case.net review of a venireperson whose correct name was not supplied to counsel until shortly before voir dire began, and Judge Mitchell made no such irrational order in this case.

BNSF next argues that it could not be required to do ***another*** Case.net search of Cornell because it had already done a Case.net search of ***Carnell***, and the plain language of Rule 69.025 does not require it to do another search, even if it learns the name of the subject of its first search was misspelled (Substitute Brief at 82). Well of course, if BNSF did not care what a Case.net would show, it was perfectly free to not do a meaningful review of the person who was ***actually*** Venireperson No. 22, but it cannot complain about her nondisclosure of what such a review would have revealed. Allowing a party who learns that the original spelling of a panelist's name was incorrect to eschew a new search would reward willful indifference to what such a search might show. Permitting such a party to seek a new trial by waiting until after an adverse verdict to review Case.net would be precisely the kind of sandbagging Rule 69.025 was designed to prevent. *Cf. State v. Hadley*, 815 S.W.2d 422, 423 (Mo. 1991).

Defendant claims that the Trial Court's failure to make an express finding that it did not conduct a reasonable investigation means that the Court found that it ***did*** such an investigation, even though BNSF admits it did not review Case.net concerning Cornell (Substitute Brief at 82). This argument ignores the standard of review, under which "any issues of fact upon which no specific findings are made are considered as having been

found in accordance with the court's judgment." *Hunter v. Moore*, 486 S.W.3d 919, 925 (Mo. 2016).[11]

BNSF claims that since the Trial Court overruled Plaintiff's Motion to Determine Defendant BNSF's Entitlement to Seek Post-Trial Relief Based on Alleged Juror Nondisclosure ("Motion to Determine"), that necessarily means that the Court found BNSF did comply with Rule 69.025 (Substitute Brief at 82). Defendant ignores the context of the filing of Plaintiff's Motion to Determine. On May 27, 2015, BNSF filed its Motion for Evidentiary Hearing in connection with Cornell (L.F. 1329), seeking a hearing on the issue of whether Cornell had concealed information about her involvement in lawsuits and her son's truck wreck (L.F. 1329-1330). While it attached Case.net records to the Motion detailing the wrongful death action for the truck wreck (L.F. 1335-1337), the Motion made no reference to Rule 69.025, nor did it purport to explain how it complied with the rule. Consequently, on June 18, 2015, Plaintiff filed her Motion to Determine in which she argued that the Trial Court should enter an order "requiring Defendant BNSF to demonstrate compliance with Rule 69.025. . . ." Her Motion cited to Rule 69.025(f), which states:

> **Post-Trial Proceedings.** A party seeking post-trial relief based on juror nondisclosure has the burden of demonstrating compliance with Rule 69.025

[11] This is true even when a trial court makes detailed findings of fact as to some, but not all, issues. *Hunter*, 486 S.W.3d at 925.

(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.

In her Motion to Determine, Plaintiff argued, *inter alia*, that:

> [B]efore the court is required to conduct an evidentiary hearing, Rule 69.025 places the burden squarely upon the party seeking post-trial relief based on alleged juror non-disclosure to demonstrate compliance with subsections (d) and (e) of Rule 69.025.
>
> Defendant BNSF has not, and cannot, demonstrate its entitlement to seek post-trial relief based on alleged juror non-disclosure. Defendant BNSF has not, and cannot, establish that before the jury was sworn it either (1) conducted a reasonable investigation, or (2) informed the court that it had reasonable grounds to believe that a prospective juror had failed to disclose that he or she had been a party to litigation.

(L.F. 1791). Apparently, BNSF found this Motion to be persuasive because ***four days later*** it filed its Notice of Compliance with Rule 69.025 (L.F. 1801-1811) in which, ***for the first time,*** it belatedly detailed its efforts to conduct a reasonable investigation, including its claim that its defense team spent four days doing Case.net searches of all 80 persons identified in the Pool Selection Report (L.F. 1804; 1333-1334; R.App. A-58-59; Ex. A51).

At the beginning of the August 20 hearing, Judge Mitchell asked counsel if they had discussed the order in which the Court should take up various matters (Tr. Vol. 9 Aug. 20, 2015 at 7). Plaintiff argued that BNSF should be required to establish its right to proceed under Rule 69.025 before adducing evidence (Tr. Vol. 9 Aug. 20, 2015 at 8). The Trial

Court observed that the allegations behind the request for an evidentiary hearing concerning Cornell were significant, as was the Plaintiff's Motion for Determination. The Court then asked defense counsel, "Can I assume that if the Court were to rule in favor of Plaintiff to deny a hearing based on Rule 69.025, that there would then be an offer of proof made?" (*Id.*) BNSF's counsel responded, "There would be an offer of proof. We're going to have to go through that step anyway, Your Honor." (*Id.*) Ultimately, proving once again that trial judges are frequently wiser than the lawyers who appear before them, the Court reserved ruling on the Motion to Determine until it decided the other post-judgment motions (*Id.*)

The Court heard the evidence previously described and found that the testimony of Wheeler to be credible and the testimony of Defendant's counsel—part of whose testimony was offered to contradict Wheeler—to be credible in part and not credible in part (L.F. 2367; R.App. A-60). The conflict between the testimony of the two witnesses had to do with the critical issue of whether Wheeler informed defense counsel of the correct spelling of Cornell's name. It makes no sense to suggest that Judge Mitchell found anything other than that ***BNSF knew Cornell was not Carnell***, but failed to do a review of her Case.net record. Accordingly, the Court found that, **"All claims of Defendant for relief for juror non-disclosure are DENIED."** (*Id.*; emphasis in original).

It is correct, as BNSF argues, that the Court also denied Plaintiff's Motion to Determine, but that decision is hardly surprising. Why would the Court rule that BNSF was not entitled to put on evidence in support of its claim that it did not know the correct spelling of Cornell's name after it had ruled (by finding on the basis of the evidence it

heard) that BNSF ***did know*** Cornell was not Carnell? If the Court had ***granted*** Plaintiff's Motion, would that mean the extensive evidence that Defendant knew who Cornell was before the jury was sworn would have to be stricken? The more logical conclusion is that the Trial Court determined that Plaintiff's Motion was moot in light of its findings of fact.

To recapitulate, BNSF knew who Cornell was. It chose not to do a review of Case.net concerning her background. It thereby waived its right to complain of what such a review would have revealed. Even if the legal defense team could not review the Case.net records for Cornell in the four hours before the jury was sworn, it could have done the review in the eight days before the jury received the case.

In this appeal Defendant could have raised the issue of whether the Court's finding as to what Wheeler said was error by including that issue in its Points Relied On, but it did not do that. It is, of course, axiomatic that "an argument not set out in the point relied on but merely referred to in the argument portion of the brief does not comply with the requirements of Rule 84.04(d) and the point is considered abandoned in this Court." *Brizendine v. Conrad*, 71 S.W.3d 587, 593 (Mo. 2002).[12]

[12] Even though it is not preserved as error, Defendant's Brief still insinuates that the Trial Court's finding was against the weight of the evidence, pointing to affidavits by three other of its attorneys who denied that they ever knew the correct spelling of Cornell's name (Substitute Brief at 82 n. 27). While BNSF characterizes this as the Court's failure to consider the affidavits, in reality the Court sustained objections to the affidavits (L.F. 2367). Defendant does not assert that action as error in its Points Relied On for good

The plain language of Rule 69.025(e) does not allow a party to ignore the information contained on Case.net when doing a "reasonable investigation"

Since Defendant did not do what it was required to do under Rule 69.025(e) to preserve any claim of nondisclosure by Cornell, it tries to avoid the consequences of its failure by rewriting the rule, arguing that the waiver in Rule 69.025(e) only extends to juror nondisclosure *of litigation history*. The short answer to this argument is that the truck accident that killed Cornell's son was part of her litigation history. The death action and the accident were inextricably intertwined, something BNSF conceded in the Suggestions supporting its Motion for New Trial, when it claimed that it was entitled to a new trial because the misspelling of Cornell's name prevented it from doing the research which would have disclosed a lawsuit "for her son's wrongful ***death in an automobile*** [*sic*] ***accident***." (L.F. 1523; R.App. A-61; emphasis added).

The argument BNSF made below is not the same argument it makes in this Court. Below, it claimed that it could not do an accurate Case.net search because ***it never knew the correct spelling of Cornell's name***. In this Court, Defendant makes a different

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reason: they were hearsay, 2A C.J.S. *Affidavits* § 66 (April 2017 Update). Missouri courts have consistently held "without exception" that in the absence of a stipulation by the parties, affidavits are inadmissible at an evidentiary hearing. *Jhala v. Patel*, 154 S.W.3d 12, 20 (Mo.App. E.D. 2004).

argument, namely that its failure to do a Case.net search is irrelevant because its failure could not waive its right to raise nondisclosure of the ***truck accident*** by Cornell, since it did not involve her litigation history. The problem is, BNSF never made that argument in the Trial Court.

It is axiomatic that:

> Appellate review . . . is limited to those issues put before the trial court. It has long been the rule in Missouri that an issue which is not presented to the trial court is not preserved for appellate review. ***Parties are bound by the position they took in the trial court and will not be heard on a different theory on appeal.*** An appellate court will not, on review, convict a trial court of error on an issue which was not put before it to decide.

Country Mutual Ins. Co. v. Matney, 25 S.W.3d 651, 654 (Mo.App. W.D. 2000) (internal citations and quotation marks omitted; emphasis added). Having taken one position in the trial court, BNSF "cannot take an opposite position on appeal." *Spicer v. Farrell*, 650 S.W.2d 695, 697 (Mo.App. S.D. 1983). In the trial court, BNSF argued that it would have learned of the wreck causing the death of Cornell's son if it had known Cornell's correct name because it could have conducted a Case.net search (L.F. 1523; R.App. A-61). The fact it lost this ***factual*** argument does not allow it to take the opposite position in this Court.

More importantly, Rule 69.025(e) does ***not*** state (as BNSF claims) that a "party waives the right to seek relief ***only*** based on juror nondisclosure ***of litigation history***. . . ." To reach the result BNSF advocates, this Court would have to add the highlighted language to the rule.

In interpreting this remedial rule, the canons guiding this Court were described in *In re Hess*, 406 S.W.3d 37, 43 (Mo. 2013):

> The same principles used to interpret statutes apply when interpreting this Court's rules, with the difference being that this Court is attempting to give effect to its own intent. This Court's primary rule of interpretation is to apply the plain language of the rule at issue. . . . If the intent is clear and unambiguous by giving the language used its plain and ordinary meaning, then this Court is bound by that language and there is neither need nor reason to apply any other rule of construction in interpreting the rule.

(Internal citations and quotation marks omitted). The Court does not add language to a rule "where it does not exist." *Peters v. Wady Industries, Inc.*, 489 S.W.3d 784, 792 (Mo. 2016). Accordingly, the Court enforces the rule as it is written, "not as [it] might have been written." *Turner v. School District of Clayton*, 318 S.W.3d 660, 667 (Mo. 2010). It follows that the Court "cannot incorporate unwritten conditions, exceptions, or limitations into" the language of Rule 69.025. *In Interest of J.L.H.*, 488 S.W.3d 689, 696 (Mo.App. W.D. *en banc.* 2016). Instead, the Court gives broad effect to the rule's language to effectuate its purpose. *Holtcamp v. State*, 259 S.W.3d 537, 540 (Mo. 2008). In determining that intent, "this Court will look to the plain and ordinary meaning of those words as defined in the dictionary." *Dorris v. State*, 360 S.W.3d 260, 267 (Mo. 2012).

Missouri courts have always held that rules of court should be reasonably interpreted and administered. *Harbison v. Chicago, R.I.&P. Ry. Co.*, 37 S.W.2d 609, 612

(Mo. 1931). Thus, in *Ray County Savings Bank v. Hutton*, 123 S.W. 47, 50 (Mo. *en banc*. 1909), Judge Lamm said:

> The rules of this court are not administered except with reason. It would be self-stultification for us to apply reason to the administration and interpretation of substantive law and to ride off on a dry and narrow interpretation, devoid of reason, when dealing with our own rules.

This includes construing rules "in light of the existing and anticipated evils at the time the rule was ordered so as to promote the purposes and objects thereof." *Garland v. American Family Mutual Ins. Co*., 458 S.W.2d 889, 891 (Mo.App. 1970). In this regard, the "historical background of this rule, and the evolution in the law which preceded its establishment, are proper and relevant subjects of inquiry in arriving at its meaning." *State ex rel. R-1 School District of Putnam County v. Ewing*, 404 S.W.2d 433, 436-437 (Mo.App. 1966). Doubt as to whether to apply a remedial statute or rule to circumstances potentially within its ambit are resolved in favor of its applicability. *Tolentino v. Starwood Hotels and Resorts Worldwide, Inc*., 437 S.W.3d 754, 761 (Mo. 2014).

The plain language of Rule 69.025(e) says, *inter alia*, a party can avoid waiver of relief "based on juror nondisclosure," if the party conducts a "reasonable investigation" which is defined as "review of Case.net before the jury is sworn." Defendant claims that this rule only applies to juror nondisclosure ***of litigation history*** (Substitute Brief at 60-63), thereby requiring this Court to incorporate an "unwritten limitation" on the text of the rule, *J.L.H.*, 488 S.W.3d at 696, and to add language "where it does not exist," *Peters*, 489 S.W.3d at 792, something that this Court has eschewed.

Khoury v. ConAgra Foods, Inc., 368 S.W.3d 189, 202 n. 12 (Mo.App. W. D. 2012), is the only authority BNSF cites in support of its argument that the waiver in Rule 69.025 is limited to nondisclosure of litigation history, relying on this language: "[Rule 69.025 is] expressly related to juror nondisclosure of *litigation history* only." (Substitute Brief at 63-64; emphasis in Brief).

In *Khoury* a juror failed to disclose bias against corporations in response to a question asked by defendant on voir dire. After the jury was sworn, defendant presented the trial court a printout of the juror's Facebook page which evidenced his animus to corporations generally. The trial judge questioned the juror and decided to replace him with an alternate. After a defense verdict, plaintiffs appealed, claiming the trial court erred in replacing the juror because the presentation of the Facebook material was untimely. Plaintiffs did not rely on Rule 69.025 on appeal because the case was tried before it took effect, 368 S.W.3d at 202 n. 12.

Defendant's reliance on *Khoury* as precedent is unsound for several reasons. First, the language cited by BNSF is dicta since the trial in *Khoury* occurred before the effective date of Rule 69.025. Since the issue of whether Rule 69.025 was limited to "juror nondisclosure of litigation history only" was not necessary for the decision in *Khoury*, the Court's commentary on the rule was *dicta*, *Vogl v. State*, 437 S.W.3d 218, 225 n. 8 (Mo. 2014), and it would be "unfair as well as improper to give permanent and controlling effect to casual statements outside the scope of the real inquiry." *State v. Miles Laboratories*, 282 S.W.2d 564, 573 (Mo. *banc* 1955).

More importantly, it is *dicta* taken out of the context of *Khoury*, in which the Western District correctly noted that the language of Rule 69.025 limited the scope of the ***searches*** required of parties by Rule 69.025. The issue in *Khoury* was whether a Facebook search not completed ***before*** the jury was sworn was untimely. Holding that a Facebook search is not required on top of the mandatory Case.net search is very different from arguing that a party does not have to review the results of the required Case.net search. Neither *Khoury* nor the rule say anything about limiting the ***results*** of what is (or can be) learned by a review of Case.net, an issue that could not be raised in *Khoury*. Limiting what ***databases*** must be searched makes sense in the context of *Khoury*, because, by its terms, the Rule only requires Case.net searches, not blanket internet searches, which was the issue in *Khoury*.[13]

A different question is presented in the case *sub judice*. Unlike *Khoury*, the matter that BNSF claims Cornell had a duty to disclose—the wreck that killed her son—could be, and was discovered by conducting a review of information available on Case.net. As was noted, *supra*, BNSF attached Case.net documents that established Cornell was a party to a death action involving a truck accident that killed her son.

Moreover, BNSF suggests that a "review of Case.net" is limited to looking at the result of a name search without doing any further examination, no matter how much the name search invites further inquiry, or how easy the search is. That argument ignores the requirement that this Court, in interpreting its rules, will "look to the plain and ordinary

[13] Ordinarily, a Case.net search would not reveal anything on Facebook.

meaning of those words as defined in the dictionary." *Dorris*, 360 S.W.3d at 267. Defendant makes no effort to define "review" in its Brief, for obvious reasons: the pertinent definition of "review" in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED at 1944 (1993) is "3 a: to take a view of: examine with *consideration or attention*; * * * 5: to go over or examine critically or *deliberately*. . . ." (Emphasis added).

A view with consideration or attention of Cornell's Case.net Name Search in April of 2015 would have revealed that she was a party to two traffic offenses, two actions for orders of protection, one probate matter involving a guardianship, one small claims case for bad car repairs, one breach of contract case for the sale of a used pickup truck, one action for an injunction involving a dog running at large, five collection cases, ***and one wrongful death suit (involving the death of her son in a truck wreck)*** (T.S.L.F. 1-4)**.** Is it remotely plausible to suggest that an examination with consideration or attention of the results of Cornell's Case.net Name Search by a lawyer defending a death action would not look at what type of lawsuits the search revealed, or would not want to know something more about a venireperson's ***wrongful death suit***? If BNSF had done a Case.net search of Cornell before the verdict—something it admits it failed to do—it would have seen that death action standing out like a beacon in the night. Is it an examination with consideration or attention to see the death lawsuit, but not click on the link for that case? If it had, BNSF would have learned almost ***instantaneously*** that "on or about October 2, 2006, [Cornell's son] Cody Dewayne Boone was fatally injured while riding as a passenger in a 1989 Chevrolet Truck. . . ." (L.F. 1851). Indeed, that is exactly what BNSF did, but only ***after***

the verdict. BNSF readily found this information on Case.net (L.F. 1573-1575) and submitted it to the Trial Court in support of its Motion for New Trial (L.F. 1828-1853) as proof that Cornell did not disclose the accident involving her son. If BNSF could learn of all this information to prove its claim of nondisclosure ***after*** the verdict by doing a Case.net search, why could it not do the same thing ***before*** the jury was sworn, or failing that, before the jury retired to deliberate?

Defendant complains that requiring it to click on the computer link for the wrongful death action in Cornell's case would impose 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 asked at voir dire (Substitute Brief at 64). Its protestations wildly exaggerate the difficulty in finding information about the contents of documents immediately accessible on Case.net. The information about Cornell's death action—including the pleadings—can be accessed in less than two minutes. Of all the cases involving Cornell, the least defensible to ignore would be her death action.

Moreover, if BNSF's legal team was not examining pleadings and other court documents when it did Case.net searches on the other venirepersons, ***why did it take them four days to do the searches?*** (L.F. 1804; R.App. A-59). We know from Defendant's post-judgment filings that it was so thorough that it did Case.net searches for ***spouses*** of venirepersons (L.F. 1494). The only information gained in that four days of searches that triggered any attention by BNSF involved venireperson, Wilma Laird, who had been a plaintiff in a wrongful death action ten years earlier. While she denied ever making a claim

for "physical injuries," Ms. Laird's questionnaire indicated she had been a party to a lawsuit, but it did not identify the nature of the lawsuit (T.S.L.F. 87). According to BNSF's Motion for New Trial, its research revealed that she had been a plaintiff in a ***death case,*** which led it to challenge her for cause before the commencement of voir dire (L.F. 1503; Tr. 10). Defendant moved to strike Ms. Laird for cause ***before voir dire*** (Tr. 10-11), but the Trial Court overruled the challenge as premature since no one had asked Ms. Laird about whether that fact alone would cause her to favor one side or the other.[14] Defendant asked no questions of Ms. Laird to explore potential bias due to her own experience. Indeed, during the entire voir dire, BNSF asked no questions of any venirepersons about how litigation history would affect their ability to be fair, whether the history was disclosed or concealed.[15]

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[14] Defendant argued in its Motion for New Trial that had it known about Cornell's wrongful death action, "she likely would have been disqualified from serving as a juror" (L.F. 1503), but it never explained why that fact alone would disqualify her, any more than it would disqualify Ms. Laird. Just "because a juror falls into the category of people that *may* have a propensity to be biased on a particular subject does not mean that he or she is, in fact, biased." *State v. Garvey*, 328 S.W.3d 408, 415 (Mo.App. E.D. 2010). *Accord: Moss v. Mindlin's, Inc*., 301 S.W.2d 761, 771-772 (Mo. 1956).

[15] Aside from Cornell, 31 members of the venirepanel indicated on questionnaires that they had never been a party to a lawsuit when, in fact, they had (T.S.L.F. 15-86).

The most accurate test of the efficacy of the review of Case.net as a tool for learning of the accident involving Cornell's son is what BNSF said in its initial post-judgment pleadings. In the Suggestions in Support of its Motion for New Trial—filed before the Trial Court found its claim that it did not learn the correct name of Cornell until after the verdict to be not credible—BNSF explained the prejudice it suffered by not receiving the correct spelling of Cornell's name this way:

> **[*H*]*ad BNSF been provided accurate information so that it could have conducted its research on the correct prospective juror, BNSF would have learned that Ms. Cornell had made a claim and recovered money damages for her son's wrongful death in an automobile accident***—a claim similar to Plaintiff's claim for the wrongful death of her husband in an automobile accident.

(L.F. 1523; R.App. A-61; emphasis added). Thus, BNSF took the position in the trial court that, had it been able to do a reasonable investigation of Cornell on Case.net, ***it would have learned the exact information*** it now claims was intentionally concealed.

Construing the Rule to accomplish its purpose

BNSF quotes a portion of *Gabriel v. Saint Joseph License, LLC*, 425 S.W.3d 133, 139 (Mo. App. W.D. 2013), at page 61 of its Substitute Brief. Unfortunately, the quotation from *Gabriel* is taken out of context and is incomplete; the full quotation states:

> When interpreting a statute, our primary task is to determine the legislature's intent. The preferred means for doing this is to accord the statute's language its plain and ordinary meaning. ***However, we do not construe a statute narrowly if that interpretation would conflict with the statute's purpose. Indeed, the Missouri***

> ***Supreme Court has instructed that the primary rule of statutory construction is to glean legislative intent by understanding the statute according to its objective.*** Isolated sentences do not guide us: We look to the provisions of the whole law and its object and policy.

Id. (Emphasis added). As this Court has noted when dealing with a remedial provision, the Court will give it broad effect, and construe it to meet the purpose, spirit and reason for which it was passed. *Holtcamp*, 259 S.W.3d at 540. Interpreting the "reasonable investigation" required by Rule 69.025 of Case.net to include actually looking at what the required search finds is certainly in keeping with the "spirit or the reason" for the rule. *Id*. Further, *Gabriel* cites to Rule 41.03, which requires that rules be "construed to secure the just, speedy and inexpensive determination of every action."

BNSF's narrow interpretation of the rule—limiting it to (1) nondisclosure of litigation history only and (2) narrowly defining "litigation history" to exclude everything contained on Case.net about that litigation other than the person's name, does not comport with the "just, speedy and inexpensive determination of every action." It certainly does not comport with giving it broad effect to meet the purpose, spirit and reason this Court adopted the Rule. BNSF's proposed interpretation is the antithesis of the purposes for which the Rule was adopted, as its history reveals.

The Long Road to Rule 69.025

Rule 69.025 is the culmination of a struggle that frustrated many members of the judiciary, both at the trial and appellate level, who have seen enormous amounts of judicial resources devoted to retrials in cases where nondisclosure became a favored form of

sandbagging. This was a particular problem in Missouri, prompting one Court to observe that, "in Missouri's state courts ***as perhaps nowhere else*** nondisclosure claims have become a powerful weapon in the hands of a verdict loser, plaintiff or defendant." *Matlock v. St. John's Clinic, Inc*., 368 S.W.3d 269, 274 (Mo.App. S.D. 2012) (emphasis added). Avoiding retrials by simple measures—like doing a Case.net search that would show Cornell had a son killed in a truck wreck—not only saves money and time for litigants; in an era when fiscal shortfalls are routinely forecast for this State, it also eases the strain on the budget of the judiciary. "[T]imeliness in a juror challenge is important in view of the expense and burden to parties ***and taxpayers*** of conducting another jury trial." *McBurney v. Cameron*, 248 S.W.3d 36, 41 (Mo.App. W.D. 2008). It was this context that informed the decision to adopt Rule 69.025, imposing a duty on litigants to find out information that was readily retrievable by a Case.net search. If such information could be found by conducting a search of Case.net after a verdict the party did not like, the Court adopted the Rule to require such search be done before the time and expense of trial occurred.

The failure to disclose material information on voir dire has never resulted in an automatic new trial. In *State v. Kirkpatrick*, 428 S.W.2d 513 (Mo. 1968), counsel for defendant in a rape case knew before trial that a venireperson named Wallis had made statements indicating his belief that defendant was guilty, but he did not challenge the venireperson for cause. This Court held the record therefore showed "that there was no prejudicial concealment because defendant, through his attorney, had full knowledge of the allegedly prejudicial state of mind of the venireman in question at the time he was examined." *Id.* at 517.

The obligation to investigate a venireperson's background was not always recognized in this state. For example, in *Woodworth v. Kansas City Public Service Co.*, 274 S.W.2d 264, 271 (Mo. 1955), this Court affirmed grant of a new trial for a juror's failure to disclose that he had made a property damage claim against the defendant, holding that, absent ***actual*** knowledge of the undisclosed claim, a new trial was properly granted. The issue that prompted Rule 69.025 was not such actual knowledge, but constructive knowledge. Put another way, what obligation does a party have to conduct an investigation to find out information before the cost and expense of a trial?

This Court revisited the question of a party's duty to investigate a juror's nondisclosure in *Brines ex rel. Harlan v. Cibis,* 882 S.W.2d 138, 140 (Mo. 1994), in which defendants argued that plaintiff should be barred from claiming juror nondisclosure because he did not exercise due diligence in discovering the nondisclosure. The majority opinion rejected that argument, based on the difficulty of conducting such an investigation with the tools available at that time. *Id.* at 140. While not addressing the due diligence question, Judge Holstein filed a cogent dissenting opinion in which he observed that, "A new trial subjects the courts, defendant and taxpayer to substantial cost." (*Id*. at 143).[16]

By 2008 the tide began to shift in *McBurney v. Cameron*. Plaintiffs filed a medical negligence case and lost in the trial court. In a motion for new trial they claimed that Juror

[16] Of course, when *Brines* was decided, the internet effectively did not exist. The logistical difficulties referred to by the majority opinion were substantial.

Marchant failed to disclose that he had been sued in litigation related to his parents' business. On appeal from the denial of that motion, before addressing issues of the clarity and context of the questions asked on voir dire, Judge Smart commented on the timeliness of plaintiffs' challenge to Marchant's nondisclosure by noting the need to research litigation history of those serving on juries:

> The common delay in checking records generally seems to be based on counsel's assumptions 1) that the *voir dire* questions were all clear in context; and 2) that all the jurors tend to be very open and forthright, happy to inform counsel of every matter remotely related to a question, even if the matter is personally embarrassing to the juror. ***Experience continues to confirm that such assumptions are unrealistic.***
>
> Because conducting a civil jury trial is extremely demanding, we do not wish to add another burden to counsel's checklist; but ***timeliness in a juror challenge is important in view of the expense and burden to parties and taxpayers of conducting another jury trial. If the issue is raised before submission of the case, there remains time to remove a challenged juror and to replace that juror with an alternate.***

248 S.W.3d at 41. (Emphasis added).

Judge Smart contrasted the relative ease in searching litigation history because of technological advances made since *Brines*, noting that it was not unrealistic to think an attorney could "send . . . clerical staff to any computer, at any time of day or night, to research the civil litigation records before submission of the case, rather than waiting until

after an adverse verdict to do so." *Id*. at 41-42. Finally, citing Case.net, Judge Smart, encouraged counsel "to make such challenges *before* submission of the case whenever practicable." *Id.*

McBurney heralded the demise of the technology impediment rationale of *Brines*. This Court directly addressed the obligation to discover information available on Case.net in *Johnson v. McCullough*, 306 S.W.3d 551 (Mo. 2010). In *Johnson*, Juror Mims failed to disclose the fact that she had been sued several times for bad debts. After a defense verdict, plaintiff discovered Mims' litigation history by a Case.net search and filed a motion for new trial. As in the instant cause, the "proof" of nondisclosure consisted of Case.net records. The trial court granted a new trial under existing law, and defendants appealed, arguing that the nondisclosure argument was untimely.

This Court refused to retroactively install a new standard, but it unanimously announced a prospective rule that profoundly altered prior case law:

> [I]n light of advances in technology allowing greater access to information that can inform a trial court about the past litigation history of venire members, it is appropriate to place a greater burden on the parties to bring such matters to the court's attention at an earlier stage***. Litigants should not be allowed to wait until a verdict has been rendered to perform a Case.net search for jurors' prior litigation history when, in many instances, the search also could have been done in the final stages of jury selection or after the jury was selected but prior to the jury being empanelled***. Litigants should endeavor to prevent retrials by completing an early investigation.

> 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 empanelled and present to the trial court ***any relevant information*** prior to trial.

306 S.W.3d at 558-559 (emphasis added).[17]

That is what should have happened in this case. If Defendant had examined the litigation history of Cornell before the jury was empaneled—or at least before the case was submitted—it would have discovered all of the information it now claims requires a new trial. BNSF actually conceded this in its Motion for New Trial BNSF, admitting that the only thing it needed to find this information was the correct spelling of Cornell's name (L.F. 1503). Defendant did not have to have Cornell's correct name days before trial, however, because ***it learned the correct spelling before voir dire, and long before the jury retired***.[18] Indeed, Rule 69.025 does not require that searches be performed before trial, as in many venues attorneys do not receive information on potential jurors until the morning

[17] After *Johnson*, this Court adopted Rule 69.025, which took effect January 1, 2011.

[18] Like the *Johnson* decision by this Court, other Courts have acknowledged that jurors who are found to be disqualified during the course of trial may be replaced by alternate jurors ***prior to the time the jury retires to consider its verdict***. *Khoury*, 368 S.W.3d at 203. See also, *McBurney*, 248 S.W.3d at 41 (noting that if the issue is raised before submission of the case, there remains time to replace a challenged juror with an alternate).

of trial. If the Court were to accept Appellant's argument that it had no duty upon learning new information to run a search on the ***correct*** name, it would encourage willful ignorance and the sandbagging the Rule was adopted to eliminate.[19]

B. There was no duty to disclose the truck accident involving Juror Cornell's son during voir dire because the questions posed by BNSF's counsel were not sufficiently clear (Responding to Appellant's Point IA).

Respectfully, Plaintiff submits that this Court need not address the issue of the clarity of BNSF's voir dire questions because, whether they were clear or not, BNSF did not comply with Rule 69.025 by conducting a review of Case.net once it learned the proper spelling of Cornell's name, a predicate to relief for nondisclosure. However, even had BNSF complied with the rule, its questions were not clear in context.

Standard of Review

The question of whether a question was sufficiently clear is a threshold issue the Court reviews *de novo*. *Johnson*, 306 S.W.3d at 555.

BNSF contends that Juror Cornell failed to answer clear questions during voir dire which should have elicited the fact that her son was killed in a truck accident. BNSF's

[19] Indeed, there is no material distinction between running a search on corrected spelling, and running the name of a juror whose name did not appear on the list at all, or who inadvertently was put in a different venire panel than initially intended. BNSF's argument would have far reaching consequences if accepted.

argument is without merit because the questions posed to the jury panel, when taken in context, were not clear and unambiguous (Tr. 124-131 and 135-152; R. App. at A-7-14).

Because "nondisclosure claims have become a powerful weapon in the hands of a verdict loser[,]" the clarity of questions must be demonstrated by "exacting proof" when a party seeks a new trial based on juror nondisclosure. *Matlock*, 368 S.W.3d at 274. Thus, a party claiming nondisclosure bears the burden of demonstrating that the questions, when considered in light of their precise wording ***and the context created by surrounding questions***, would have caused a lay person to "reasonably conclude that the undisclosed information was solicited by the question." *Keltner v. K–Mart Corp.*, 42 S.W.3d 716, 726 (Mo. App.E.D. 2001).

BNSF's Questions Lacked Clarity

Missouri courts require specificity in voir dire questions. In a nondisclosure claim, the threshold issue is whether the question was clear and unambiguous. *Sapp v. Morrison Brothers Co.*, 295 S.W.3d 470, 477 (Mo.App. W.D. 2009). A venireperson's duty to respond is only triggered when a clear question is asked. *Johnson*, 306 S.W.3d at 555. There is no issue of nondisclosure when a question is not sufficiently clear to trigger a duty to respond. *Payne v. Cornhusker Motor Lines, Inc.*, 177 S.W.3d 820, 841 (Mo.App. E.D. 2005).

Although a venireperson has a duty to respond truthfully, that duty does not arise until the lawyers frame their questions in a way that makes clear what information is

sought. Lawyers know what information they want, and they control the form of their inquiries; therefore, Missouri courts do not allow lawyers to "take advantage of their own, or their opponent's, ambiguous questions to impeach a verdict they dislike." *Keltner*, 42 S.W.3d at 723.

In determining whether the questions asked by counsel for BNSF meet the exacting requirements for clarity, they may not be viewed in isolation, as BNSF asks this Court to review them. (Substitute Brief at 54-55); instead, the questions must be viewed in context. *McBurney*, 248 S.W.3d at 45. The questions which BNSF points to as predicates for nondisclosure were insufficiently clear to require disclosure of the accident in question because, in context, the questions were susceptible to more than one interpretation. *Keltner*, 42 S.W.3d at 722.

Instructive on this issue is *J.T. ex rel Taylor v. Anbari*, 442 S.W.3d 49 (Mo. App. S.D. 2014), where the Court explained the exacting specificity required to impose a duty to respond on a jury panel. After the venirepanel in *Anbari* was asked whether anyone "had any experience where you or your family or close friend has been treated in your veins or your arteries with stents[,]" one woman failed to respond that she and her husband had both received arterial stents. *Id*. at 55. In holding that this was not a nondisclosure, the Court noted that the attorney had previously stated that he was "especially concerned with a clot in the left leg" and had asked whether anyone or their family had received treatment for "a blood clot in the leg." In light of these questions the Court determined that it would be reasonable to conclude that the final question regarding stents only required a response if she or her immediate family had received a leg stent. *Id*. at 57.

Here, BNSF specifically cites two voir dire questions it contends required Cornell to disclose that her son had been killed in a motor vehicle accident (Substitute Brief at 54).

Only by viewing BNSF's questions in isolation can it argue they were clear enough to require Cornell to disclose her son's truck wreck, an approach Missouri law has consistently rejected. *McBurney*, 248 S.W.3d at 42. In context, the questions asked by counsel for BNSF were not clear enough to trigger a duty to disclose.

In regard to prior accidents, the actual questioning by counsel for BNSF focused on whether anyone had been involved in an accident where view obstruction may have played a role. BNSF's counsel prefaced the entire section regarding prior accidents as follows:

> Who here drives a *pickup truck*? . . . Who here drives a *single cab pickup truck*, as opposed to an *extended cab*? . . . I think *there will be testimony* in this case, talking about an *A-pillar* or a *B-pillar*. . . . [W]e anticipate that *there might be testimony* with regard to . . . the *pillars* on the *truck* [.] . . . Anyone ever had an experience driving a *pickup truck* where those *pillars* in any way *obstructed* your view?

(Tr. 145, emphasis added). Venireperson Mooty responded affirmatively, and counsel for BNSF focused on the obstruction portion of the question by asking what Mr. Mooty did when his view had been obstructed (Tr. 145). Venireperson Eudaley responded she had also had "the issue with the pillar in the pickup truck," which resulted in an accident (Tr. 146), whereupon defense counsel reiterated the focus of her questioning by asking Eudaley: "And you had a little bit of *blockage* on the *pillar* and you went ahead and went anyway?" After an affirmative response from Eudaley, counsel for BNSF continued by

asking, "[D]id that *pillar obstruct* your entire approach to that stop sign, or did it just *obstruct* when you got up there?" (Tr. 148). BNSF concluded its questioning of Eudaley by asking:

> [G]iven that *there may be testimony* in this case about the *pillars* in Mr. Spence's *truck*, is there anything about your experience, particularly given that you were in an *accident* that you think . . . I probably wouldn't be the right person in this case?

(Tr. 148)

***

The questioning about accidents continued by asking,

> "What about anyone else who's had an issue with a *pillar* and a *pickup truck*? Okay. ***Anyone else*** **who's been in an *automobile accident,* a *motor vehicle accident,* or had a close family member who has?"**

Venireperson Fees then responded to this question by again discussing an accident where vision had been obscured saying that the other driver might have hit her because of a blind spot (Tr. 149).

***

Counsel for BNSF continued on with the same line of questioning, but narrowed it even further by asking whether, "Anyone else ***who's been in*** an *auto accident*?" Only Venirepersons Mattingly and Niswonger, responded in the affirmative (Tr. 150-51). Like Mooty, Eudaley, Fees, and Mattingly before her, Niswonger's comment concerning her

accident indicated that there was an issue with one driver being unable to see the other. She stated that she wasn't sure where the lady who hit her had come from (Tr. 151).

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Counsel for BNSF followed up this line of questioning by stating**, "***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 heard from today*?" Venireperson Blankenship responded that her daughter had (Tr. 151; emphasis added).

***

After Blankenship's response, counsel for BNSF did not follow up to ask whether there were other jurors who had been missed (Tr. 152). From the record it cannot be determined either that there were no other jurors who raised their hands in response to this line of questioning or specifically whether Cornell raised her hand. Once Blankenship responded, counsel for BNSF immediately started a new area of inquiry about jurors who had testified as a witness in a civil case (Tr. 152).

Considering the entire context of the voir dire questioning and the fact that the panel had been told at the outset that this case concerned a death caused by a collision between a pickup truck and a train involving visibility issues, it is reasonable to believe that the continued focus on visibility crashes narrowed the scope of the questions to some jurors as accidents involving either a poor line of sight in general, or a poor line of sight caused by pickup truck pillars in particular. Having conditioned the venirepanel to think in those terms, the question is not sufficiently clear in context. Therefore, when counsel attempted

to backtrack and broaden the questions to include generic automobile accidents she failed to ask an unambiguous question.

Consider the nature of the facts disclosed in response to these ambiguous questions, in contrast to what happened to Cornell's son. Cornell's Petition alleges that her son was fatally injured while a passenger in a truck whose driver negligently ran off the roadway and hit a tree (L.F. 1848). Nothing in that description suggests obstructed visibility. Did questions about truck wrecks caused by obstructed visibility trigger a duty to disclose information about the accident in which Cornell's son was involved? Not unequivocally.

> The risk of lack of clarity rightfully falls on the party framing the questions:
>
> The duty of counsel to show that the question was clear is not satisfied when some venire members could reasonably think one thing and some other venire members could reasonably think the opposite. If the record shows that the question was not clear in the total applicable context, the risk of lack of clarity should fall on the party framing the question, not the opposing party.

McBurney, 248 S.W.3d at 46.

Therefore, while it *could* be inferred from the question to which only Venireperson Blankenship responded, that counsel was asking a very broad question—whether any close friends or family members had been involved in any kind of automobile accident—this line of questioning ***could also be interpreted*** as asking ***only*** what it clearly does ask**:** whether any of the potential jurors themselves had been involved in an auto accident that had not already been talked about (wrecks involving lack of visibility). If reasonable

people could understand the question in context differently, it does not meet the clarity threshold.

Likewise, although venirepersons Mooty, Eudaley, Fees, Mattingly, Niswonger and Blankenship disclosed truck or automobile accidents during voir dire, these responses in no way suggest that, taken in context, the questions asked by BNSF's counsel were so clear that every panel member *would* assume that counsel's specific inquiry concerning truck pillars or accidents resulting from some type of vision obstruction had moved on to include generic automobile accidents caused by any factor. Indeed, exactly the opposite could be inferred in that the incidents described by venirepersons Fees (Tr. 149), Mooty (Tr. 145-46), Eudaley (Tr. 146-48), Niswonger (Tr. 151) and Mattingly (Tr. 150), each concerned occurences in which visibility issues caused an accident. Further, if, as BNSF contends, the question regarding automobile accidents clearly asked for disclosure of any accident beyond those in which the individual potential jurors had been personally involved—including accidents in which any of their close friends or family members had been involved—one would surely have expected more than six potential jurors out of a panel of 69 to have responded affirmatively (Tr.163). The low number of responses, along with the continued focus on visibility issues, should have alerted counsel to the fact that her question had not been understood the way she wanted it to be.

Most people who drive or ride in motor vehicles will, at some point in their lives, be involved in a motor vehicle accident:

> By car insurance industry estimates, you will file a claim for a collision about once every 17.9 years. That's if you're an average driver, which, whether you're willing to admit it or not, you likely are.

Toups, *How Many Times Will You Crash Your Car*, FORBES (July 27, 2011).

To suggest that out of a panel of 69 people only six would admit to having any involvement, either personally or by close family members or friends, in automobile accidents indicates something that would, as Judge Holstein said in a different context, "defy all laws of probability." *Brines*, 882 S.W.2d at 142. Does that mean the venirepanel was populated—in BNSF's parlance—with "perjurers"? The more logical explanation is that the context in which the question was asked led most of the venirepersons—including Cornell—to think that counsel was asking about a particular *kind* of motor vehicle accident: namely, one in which the cause was an obstruction to visibility. That explanation is far more plausible than mass mendacity on the part of a Stoddard County venire.

Having failed in its obligation to perform a reasonable investigation into Cornell's litigation history, BNSF argues that nondisclosure occurred during voir dire because Cornell ignored the Trial Court's admonition to disclose her litigation history. Contrary to BNSF's contention that it was entitled to rely on the Trial Court to frame an appropriate question, the Court has no obligation to frame voir dire questions for attorneys. *State v. Dixon*, 717 S.W.2d 847, 848 (Mo. 1986); *McBurney*, 248 S.W.3d at 42 ("*Lawyers* have a duty to frame *their* questions in a way that makes clear what information is being sought") *Id*. at 44 (emphasis added).

BNSF claims that the following statement by the Court required Juror Cornell to disclose information about her litigation history:

> [W]e 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?*** (Tr. 25-26, emphasis added).

Context is as important here as it is with questions asked by counsel. The Trial Court gave this admonition in conjunction with a general explanation of the voir dire process. In fact, before making the admonition about the importance to the parties of knowledge about each potential juror's litigation history, the trial judge had explained to the venirepanel the process which would be followed in the jury selection process by saying: If you would, if you get ready to respond, please hold up your paddle that has a number on it, so that ***the attorneys can then address you*** by name (Tr. 24-25).

Given the context of the Court explaining the voir dire process for the jury before ***the attorneys*** began asking questions, it is a reasonable inference that some on the venirepanel might have interpreted the Court's admonition not as a question which required an immediate response, but rather as an instruction to think carefully when answering questions asked ***by one of the attorneys*** about litigation history. Inasmuch as no clear questions about litigation history were asked by either of the attorneys in voir dire, when taken in context, there is no clearly demonstrable nondisclosure based on the Court's admonition.

Further, in the context of the Court's explanation about the importance of disclosing litigation history the Court indicated that it was only concerned with litigation which the potential jurors had "….***not already disclosed on the juror questionnaire***." Thus, even if the Court's admonition were deemed to unequivocally require an immediate response it only required a response if the potential jurors believed that they had not properly completed their juror questionnaires. The panel members initially filled out questionnaires more than 10 weeks before voir dire (L.F. 1796). The questionnaires were not given to the panel members to review before voir dire began.

Even assuming that Cornell filled out and signed the questionnaire at the center of this dispute, which has not been proved, Cornell could have reasonably believed that she had provided all of the information she was obligated to provide.

A deliberate nondisclosure cannot be presumed from this question when Cornell did not have an opportunity to review her questionnaire which was an integral part of the inquiry by the Court. This is particularly true where, as here, the potential juror's failure to disclose certain matters was objectively reasonable. Further, it is noteworthy that the Trial Court apparently did not find its own question to be unambiguous when viewed in context because Judge Mitchell denied BNSF's motion for new trial on the basis of juror nondisclosure despite this issue having been raised by BNSF (Tr. Vol. 9 at 118-19).

The Trial Court did not abuse its discretion in finding that a new trial was not warranted based on juror nondisclosure during voir dire because, taken in context, the questions relied on by BNSF to establish nondisclosure were ambiguous and did not trigger any duty for members of the venire panel to respond. The judge was entitled to take into

account the reality that members of the venire did not have the luxury of culling a written transcript to isolate the questions BNSF now points to as evidence of intentional nondisclosure. He was aware that by the time counsel for BNSF launched this line of questioning the jurors were well into their third hour of trying to follow the questions hurled at them by attorneys who could reasonably have been perceived as jumping from topic to topic with little transition. The trial judge was present and had the benefit of personally observing the manner in which the questions were asked and whether, in each instance, the potential jurors had adequate opportunity to respond before the line of questioning veered off in another direction. His determination that there was no intentional nondisclosure by Cornell based on her failure to respond to questions during voir dire was not an abuse of discretion.

C. BNSF may not rely on the failure of Juror Cornell to disclose litigation history on her juror questionnaire (Responding to Appellant's Point III).

Because BNSF asked no questions during voir dire about litigation history by BNSF, it now seeks to premise its claim of nondisclosure of litigation history on the information contained in the juror questionnaires.

Such questionnaires are authorized by R.S.Mo. § 494.415 (2016), which refers to a "juror qualification form" designed to "[e]licit information concerning the prospective juror's qualifications." § 494.415.1(3). Jurors' qualifications are described in R.S.Mo. § 494.425 (2016), which specifies eight categories of persons who cannot serve on a jury, including persons who are under the age of 21 years, persons who are not citizens,

convicted felons, etc. The legislative purpose behind § 494.415's requirement to send out a form designed to elicit information about qualifications is to "identify persons who are ineligible to serve as a juror." *Prewitt v. Cofer*, 979 S.W.2d 521, 526 (Mo.App. E.D. 1998). "It is not the function of the juror qualification form to replace voir dire; voir dire is necessary to discover the state of mind of prospective jurors and determine by examination whether their attitudes and prejudices render them unfit to serve as a juror." *Id.*

In *Prewitt* two venirepersons incorrectly answered a question on a juror qualification form that asked whether they or members of their families had ever been a party to a lawsuit or made a personal injury claim. Defendant argued that the questionnaires were competent proof of their nondisclosure of material information. The Eastern District disagreed:

> It is not the function of the juror qualification form to replace voir dire; voir dire is necessary to discover the state of mind of prospective jurors and determine by examination whether their attitudes and prejudices render them unfit to serve as a juror. *State v. Morehouse*, 811 S.W.2d 783, 785 (Mo.App. W.D. 1991). ***A defendant cannot rely upon answers on a juror qualification form to prove nondisclosure of information by a juror.***

979 S.W.2d at 526 (emphasis added). In *Morehouse*, cited by *Prewitt*, the Western District said this:

> The underlying purpose of voir dire is to determine the ability and willingness of venirepersons to follow the law and evidence. That purpose is best served by the give-and-take of voir dire, and by observing the demeanor of the

> venirepersons. Because of this, we determine that the juror qualification form authorized by § 494.415 is not meant to be a substitute for voir dire, and it is more properly used to determine the qualifications, not the attitudes and prejudices of jurors.

811 S.W.2d at 785 (internal citations omitted).

These cases do not discuss the interplay of § 494.415, originally passed in 1989, and Rule 69.025, which this Court adopted over 20 years after enactment of the statute. Rule 69.025 does not limit the waiver to nondisclosure that results from questioning by counsel. Instead, the language of the rule is broad and waives all claims of juror nondisclosure if the party fails to conduct a reasonable investigation of Case.net. BNSF again attempts to engraft limiting language that is not in the rule and is not consistent with the purpose of the Rule. Further, if there were any conflict between the Rule and the statute, the "the rule always prevails" in matters such as this. *State ex rel Union Elec. Co. v. Barn*es, 893 S.W.2d 804, 805 (Mo. 1995).

BNSF's argument also ignores this Court's holding in *Wingate by Carlisle v. Lester E. Cox Med. Ctr.*, 853 S.W.2d 912, 914 (Mo. 1993), that attorneys have no right to rely on information in juror questionnaires which are not in compliance with § 494.415, even had it not waived the issue. In *Wingate* the issue was "whether the questionnaire 'substantially complied' with the statute." *Id*. A jury questionnaire that asks about prior litigation history obviously does not comply with § 494.415 because it is not designed to elicit information about statutory qualifications, since there is no "automatic disqualification" for having been a party to a lawsuit.

Traditionally, Missouri law has recognized that the failure to ask a question on voir dire waives the right to challenge a juror on any grounds not asked. *State v. Walton*, 796 S.W. 2d 374, 379 (Mo. 1990). Counsel for BNSF asked no questions about litigation history during voir dire. In such circumstances the issue is whether the attorney may justifiably rely on the answers given on juror questionnaires and thereby be excused from asking voir dire questions about previous lawsuits. *Wingate* held that an attorney ***may not rely*** on unauthorized court customs during jury selection. 853 S.W.2d at 914.

Respondent anticipates that BNSF will argue, as did the unsuccessful appellant in *Wingate*, that the questionnaire is not an unauthorized custom but, rather, legislatively mandated under § 494.415**.** This argument fails because the questionnaire at issue does not substantially comply with the statute. As in *Wingate*, the record is devoid of evidence[20] that the juror questionnaires used in this case had been approved by the circuit court *en banc* for use in all cases as required by § 494.415. Nor is there any evidence that the form contained instructions that it be returned within 10 days, a factor the *Wingate* court pointed to as being noncompliant with the statute, 853 S.W.3d at 915. The questionnaire also fails to require the potential juror to "declare that the responses are true to the ***best*** of his knowledge" asking instead for the potential jurors to declare only that the responses are

[20] BNSF belatedly attempted to cure this evidentiary defect by adding documents which were not part of the trial court record to its Supplemental Legal file in the Court of Appeals. As noted in Plaintiff's objection to this practice (T.S.L.F.10-14) these documents are not properly before the Court.

"…according to my knowledge and belief."[21]

In the instant cause there is not even any proof that the juror questionnaire regarding Cornell was completed or signed by her. The document was not notarized and there is no testimony or other evidence which establishes that it was either completed or signed by Cornell.

The Trial Court in the instant case properly denied BNSF a new trial as it had waived any alleged nondisclosure by not complying with the Rule, and the questionnaire did not substantially comply with the statutory requirements of § 494.415**.**

D. The Trial Court did not err in finding that there was no intentional nondisclosure on the part of Juror Cornell

It is only in the event this Court finds it reasonable to excuse BNSF for its demonstrated failure to comply with Rule 69.025 ***and*** for its failure to ask clear questions during voir dire ***and*** for its unjustified reliance on the statutorily deficient juror questionnaire that the Court must consider whether BNSF should be granted a new trial on the basis of any intentional nondisclosure on the part of Juror Cornell. Respondent respectfully suggests that this Court need not reach this issue.

[21] In *Wingate*, the court found that the questionnaire which only requested the juror to answer "as completely and honestly as possible" was not in substantial compliance with the statute.

Standard of Review

Once a party has shown that there was a nondisclosure, then the trial court must decide if the nondisclosure was intentional or unintentional. If the matter was insignificant or remote in time, or if the juror has reasonably misunderstood the question, a court may find the nondisclosure to be unintentional. *Williams by Wilford v. Barnes Hosp.*, 736 S.W.2d 33, 36 (Mo. 1987); *Rogers v. Bond*, 880 S.W.2d 607, 611(Mo. App. E.D. 1994). This Court reviews a trial court's determination of whether a nondisclosure is intentional or unintentional for abuse of discretion. *Id*. at 610-11.

The trial court is afforded significant discretion in determining whether a nondisclosure was intentional or unintentional, and its decision in this regard will not be reversed on appeal absent an abuse of that discretion." *Id.* Where, as here, the Appellant has failed to ask the Court to make specific findings of fact, this Court will consider the facts established as being consistent with the Court's ruling. *Stotts v. Meyer*, 822 S.W.2d 887, 891 (Mo.App. E.D. 1991). When the basis of a motion for new trial is a claim of juror nondisclosure, the denial of the motion constitutes "an implied finding that there was no prejudice from the juror misconduct." *Rogers v. Steuermann*, 552 S.W.2d 293, 295 (Mo. App. 1977). The order in this case contains a specific denial of any relief on the basis of alleged juror nondisclosure. (L.F. 2367).

> 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.

Bell v. Sabates, 90 S.W.3d 116, 120 (Mo.App. W.D.2002) (citations and quotation marks omitted). BNSF bears the burden of proof and cannot establish either of these prerequisites to the relief it requests.

"Unintentional nondisclosure exists where, for example, the experience forgotten was insignificant or remote in time, or where the venireman reasonably misunderstands the question posed. *Id.* Unintentional nondisclosure may also be found where an attorney who directs the focus of questions and answers fails to appropriately follow up. *Midwest Materials Co., v. Village Development Co.*, 806 S.W.2d 477, 500 (Mo. App. S.D. 1991). Thus, even if this Court should find that BNSF has established that Cornell failed to disclose her litigation history,[22] BNSF has failed to establish either that Cornell actually remembered the cases shown in Case.net or that her forgetfulness was unreasonable.[23] In

[22] Respondent contends that no failure to disclose occurred because BNSF failed to meet its burden of proof on the issue of clarity in that there was no clear question during voir dire or on the juror questionnaire which required Ms. Cornell to disclose all of the cases which BNSF now claims entitle it to a new trial or, alternatively, because she reasonably believed that she had disclosed all of the information which had been requested due to the lack of clarity.

[23] While BNSF complains bitterly about its inability to question Juror Cornell to establish what she did or did not remember, as illustrated in the Supplemental Statement of Facts, *supra* at 6-7, BNSF's inability to question Juror Cornell was largely the result of its chosen

looking at the question of what Juror Cornell knew or believed about her litigation history, it is important to consider her status as a lay person who dropped out of high school, matters directly bearing on her ability to comprehend the questions asked (L.F. 1796).

Missouri courts have recognized that venirepersons do not have the same understanding about what constitutes a lawsuit as do attorneys and judges. This reality was succinctly articulated by the trial judge in *Byers v. Cheng*, 238 S.W.3d 717, 725 (Mo. App. E.D. 2007), cited by the Eastern District:

> My experience with dealing with venirepersons [is that] their concept of a lawsuit and our concept of a lawsuit are entirely different…and many jurors will tell you they don't believe it's a lawsuit unless they have to come into court and testify. Outside of that they don't think it's a lawsuit. Their perception of a lawsuit is based on what they see on television, the Matlock syndrome. You come into the courtroom, you swear, you testify.

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litigation strategy, compounded by the fact that it failed to take Cornell's deposition during the delay occasioned by its ill-founded motion for recusal, *c.f. Prewitt*, 979 S.W.2d at 525. Nonetheless, as was the case in *Johnson*, 306 S.W.3d at 557, where the court relied on Case.net records in concluding that there had been an intentional nondisclosure, the Trial Court in the instant cause properly used Case.net records supplied by the party requesting relief as a basis for his denial of a new trial and implicit finding that there had been no intentional nondisclosure.

In *Brines*, Judge Holstein, a former trial judge and later a distinguished member of this Court, echoed this sentiment in his dissent:

> To a lawyer, the precise question asked during *voir dire* seems simple and clear: "Do we have anyone here on the panel who is now or has been a defendant in a lawsuit?" The record discloses no hands were raised. That in itself is remarkable. In today's litigious and highly regulated society, to have any randomly selected group of twenty or more persons, none of whom has ever been a "defendant in a lawsuit," would defy all laws of probability. For such a group to answer the question in the negative would, in a technical sense, mean that none had ever been involved with a parking ticket, a speeding ticket, an uncontested divorce proceeding, a small claim, or any number of legal proceedings known to lawyers to make one into a "defendant in a lawsuit." It is far more likely that they simply failed to make a disclosure.

882 S.W.2d at 142. Judge Holstein noted that did not mean that most all of the members of the venire were lying: "It is at least conceivable that an unsophisticated person served with a summons in a collection matter, traffic case, or the like, to which such person has no defense, would not understand himself to have been a "defendant in a lawsuit." *Id.* These comments are particularly salient when applied to Cornell, an unemployed high school dropout, married to a truck driver (R.App. A-1). It is wrong to attribute to her the level of sophistication suggested by BNSF.

This recognition that jurors are known to be inaccurate historians concerning past litigation was one of the underlying reasons for the promulgation of Rule 69.025. No

longer are attorneys permitted to sit back and rely on jurors to disclose a history about which they may have an inaccurate understanding. BNSF asks this Court to ignore the clear language of Rule 69.025 and to disregard the concerns articulated by numerous Courts, including this Court in *Johnson*, which led to adoption of the rule. For the very good reasons that led to the enactment of the Rule, this Court should decline that invitation.

Questions 14 and 15 on the Juror Questionnaire

BNSF's argument regarding the asserted nondisclosure of litigation history is based on two questions in Cornell's juror questionnaire dated February 6, 2015 (L.F. 1796). That argument must be viewed with an eye toward the clarity of those questions and the nature of the litigation history alleged to have been intentionally withheld. The questions at issue are:

> 14. 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*)?**
>
> 15. 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*?**

(Emphasis added).

In its argument that Juror Cornell intentionally failed to disclose her litigation history on her juror questionnaire, BNSF points to nine entries from Case.net which concern Juror Cornell. Each of these cases was considered by the Trial Court[24] in its

[24] Judge Mitchell specifically stated on the record at the post-trial hearing that the Court had seen and reviewed all of the documents relative to these cases (Tr. Vol. 9 at 33).

assessment of the responses on Juror Cornell's questionnaire, and its determination that they were not the type of cases which would, if not disclosed, rise to the level of intentional concealment. The specifics of the cases considered by the Trial Court were as follows:

- ***Lewis Furniture Co. v. Steven and Kimberly Cornell***- A debt case which was dismissed with no court appearance by Cornell (L.F. 1355-56).
- ***Dexter Hospital v. Kimberly Cornell***- A suit on account which was dismissed without an appearance by Cornell (L.F. 1434-36).
- ***Capital One Bank v. Kimberly A. Cornell***- A breach of contract case resulting in a default judgment with no evidence Cornell ever appeared.
- ***Sandy Lynxwiler v. Steven and Kimberly Cornell***- A breach of contract case in which no pleadings were filed by Cornell and which resulted in a default judgment (L.F. 1423-33).
- ***Michael E. Rhodes et ux v. Steven Cornell, et ux***- A case seeking a restraining order against Ms. Cornell and her husband regarding their dog running loose which was dismissed without an appearance by Cornell (L.F. 1389-98).
- ***Springleaf Financial Services v. Steven Cornell and Kimberly A. Cornell***- A collection case which was dismissed with no appearance by Cornell (L.F. 1399-1422).
- ***Teresa Lynn Zook, Petitioner v. Kimberly A. Cornell, Respondent***- A domestic case involving Cornell's former sister-in-law. (L.F. 1381) A case in which Cornell

was not named as either a Plaintiff or Defendant and in which no money was sought for physical injury or damage to property (L.F. 1357-88).

- ***Caden Cornell, a minor by his guardian v. Kimberly A. Cornell and Steven D. Cornell, Respondents***- A guardianship case concerning Cornell's minor son in which Cornell was not named as either a Plaintiff or Defendant and in which no money was sought for physical injury or damage to property (L.F. 1338-54).
- ***Kimberly Cornell v. Kendall L. Pullum***- A "friendly suit" filed to obtain court approval of an out-of- court settlement for the wrongful death of Cornell's son. The only court appearance involved was the one at which Cornell asked the Court to approve a settlement (L.F. 1335-37, R.App. A-5-6).

Aside from the fact that BNSF would have had all of this information ***but for its own failure to perform a reasonable search of Case.net*** as required by Rule 69.025, a closer look at these nine cases supports the Trial Court's denial of BNSF's motion on the basis that Juror Cornell's failure to respond was not intentional but rather was more likely based either on a reasonable failure to recall or a misunderstanding about the nature of questions 14 and 15 or the lack of proof regarding who provided the information.

To summarize, of the nine cases, four were collection cases in which Cornell never appeared and which did not involve claims for money damages for personal injury or property damage. One was a minor dispute over letting a dog run loose which did not seek money damages and which was ultimately dismissed without an appearance by Cornell. Two were not required to be disclosed in connection with the juror questionnaire

form because they were cases in which Juror Cornell was not named as a plaintiff or defendant and in which no money damages were sought.

In only two of these nine cases did Cornell even step foot inside a courtroom. In the *Lynxwiler* case Cornell apparently made an initial appearance but filed no pleadings, as a result of which a default judgment was entered against her when she did not appear at the next scheduled appearance. But Lynxwiler was not within the ambit of Question No. 15 because it was an action for breach of contract and did not involve damage to property or physical injuries (L.F. 1423-33). The other appearance was for the limited purpose of getting approval of the wrongful death settlement.

Thus, of the nine cases which BNSF asserts constitute prejudicial, intentional nondisclosure, only one, the "friendly suit", has any arguable significance. But even this "friendly suit," filed to obtain court approval of an out-of-court settlement for the wrongful death of Cornell's son, does not support BNSF's contention. The record of the wrongful death action reflects that it had a three-day lifespan from the filing of the petition, ***which was not signed by Cornell***, to the final docket entry. At the single court appearance Cornell did nothing more than ask the Court to approve the out-of-court settlement (L.F. 1335-37, R.App. A-5-6). Significantly, there was no adversarial proceeding which might have remained with Cornell and marked this experience as a "lawsuit" such that it would have necessarily come to her mind when faced with questions 14 and 15 on the juror questionnaire.

Thus, on the record before it, absent an abuse of discretion, this Court must find, as the Trial Court implicitly did, either that there was no nondisclosure or that any

nondisclosure which may have occurred was not intentional. *Midwest Materials*, 806 S.W.2d at 501 (holding that in the absence of a finding to the contrary, a lack of bias and prejudice was implicit in the trial court's overruling of the new trial motion).

It was not an abuse of discretion for the Trial Court to find that there was no intentional nondisclosure in the responses to questions 14 and 15 on the Cornell juror questionnaire which objectively could have been misunderstood by a prospective juror. This is the very type of issue animating this Court to require counsel to make a reasonable search of Case.net prior to the jury being seated. BNSF should not be rewarded by this Court for its failure to comply with Rule 69.025.

II. The Trial Court did not err in excluding the testimony of BNSF's claims representative, Justin Murphy relating to alleged post-verdict statements of Juror Cornell (Responding to Appellant's Point II).

Standard of Review

A trial court enjoys considerable discretion in the admission or exclusion of evidence, and, absent clear abuse of discretion, its action will not be grounds for reversal." *Lozano v. BNSF Ry. Co.*, 421 S.W.3d 448, 451 (Mo. 2014). On appeal, a reviewing court presumes that rulings within the discretion of the trial court are correct and the appellant bears the burden of showing that the trial court abused its discretion. *IMR Corp. v. Hemphill*, 926 S.W.2d 542, 546 (Mo.App. E.D.1996).

Summary of Argument

BNSF claims the Trial Court erred in excluding testimony from BNSF's claims representative, Justin Murphy. Murphy, was in the courtroom when the verdict was read, and purports to have approached Juror Cornell to ask her what the verdict was (somehow having missed the result of the trial he had sat through) (Tr. Vol. 9 at 41). He also claims to have overheard Juror Cornell speaking with Mrs. Spence after the verdict (Tr. Vol. 9 at 42).

The Trial Court did not err in excluding this evidence for several reasons. First, Defendant has failed to preserve the issue because it was not raised in its Motion for New Trial. Moreover, the out-of-court statement was hearsay, offered to prove the truth of what Murphy alleged Cornell said. Additionally, it was offered to impeach the verdict. Under long-standing Missouri law, such testimony is not admissible. Finally, even if the alleged

statements had been made by Cornell, and even were the claimed error preserved, Murphy's testimony is irrelevant because there were no questions asked during voir dire or on the juror questionnaire which would have called for a response by Cornell disclosing the subjects she allegedly spoke about after the verdict. The potential jurors were never asked during voir dire if anyone had (1) lost a close friend or family member in a motor vehicle accident, (2) if they had friends or significant others (like an "ex") who had had a "close call" with a train, or (3) if they had friends of who had had children who had been killed in train collisions. For all of these independent and equally dispositive reasons, the Trial Court did not err in excluding Murphy's hearsay testimony which sought to impeach the verdict with irrelevant testimony.

BNSF has Failed to Preserve this Claim of Error

The Court need look no further on this point than the fact BNSF did not properly preserve the claim it now advances on appeal, namely that Murphy's testimony was admissible to show that Juror Cornell remembered ***her son's accident.*** In its Substitute Brief at page 69, BNSF states 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. However, the argument for admissibility of this evidence made in the Trial Court was different; there BNSF argued that the testimony was offered to establish "… what she knew at the time ***regarding prior lawsuits***" (Tr. Vol. 9 at 38). While BNSF attempts to make them identical, they are by nature very different.

At the hearing on post-trial motions on August 20, 2015, Defendant attempted to introduce, for the first time, a claim that post-verdict conduct of Juror Cornell established

intentional nondisclosure. This argument had not been raised in BNSF's Motion for New Trial, despite the fact that, if the alleged conduct occurred at all, it occurred on the very day the verdict was returned. As a result the claim has not been properly preserved. Rule 78.07(a) states unequivocally that preservation of a claim of error for appellate review demands that it be made in the motion.[25] This Court has recognized that it is insufficient for a point of error to be raised only in written suggestions or at a hearing in support of a post-trial motion. *First Place, Inc. v. Douglas Toyota III, Inc*., 801 S.W. 2d 721, 724-25 (Mo. App. S.D. 1990).

Plaintiff's counsel properly objected to this undisclosed basis for BNSF's motion both because it had not been raised in BNSF's post-trial motions ***and*** because it was hearsay (Tr. Vol. 9 at 37-39). In fact, the first time Plaintiff's counsel heard any allegation that Juror Cornell had spoken to the BNSF claims representative was when BNSF proffered

[25] Nothing in BNSF's Motion for New Trial mentions a claim based on evidence that Juror Cornell actually remembered the matters which BNSF claims she failed to disclose. The only claims of error related to juror nondisclosure issues are found in paragraphs 13 and 14 of its motion. (L.F. 1502-03). These paragraphs are set forth in their entirety in Respondent's Substitute Appendix at A-15-16; they make no mention of Cornell's state of mind.

Murphy as a witness at the hearing on its post-trial motions (Tr. Vol. 9 at 37-39).[26] BNSF admitted this when questioned by the Court. Specifically, In response to counsel for BNSF's assertion at the motion hearing that BNSF was entitled to introduce evidence "regarding Juror Cornell's nondisclosure and her state-of-mind in terms of what she knew at the time ***regarding prior lawsuits***" the Court inquired "There's nothing in any of your post trial motions that makes any reference to this is there?" The response from BNSF's counsel was "I don't believe so, no" (Tr. Vol. 9 at 38). BNSF's untimely claim of error preserved nothing for review, and this Court need look no further to affirm the Trial Court's ruling on this issue.

No Question Was Asked Requiring Disclosure of the

Information in the Alleged Statements of Cornell

Even had the matter been preserved, the alleged statements by Cornell did not relate to any of the issues raised on appeal. Instead, the most that the alleged statements show is that Juror Cornell remembered that her son had died in an accident. While related, the fact that Juror Cornell was aware of losing her son does not prove anything with respect to her state of mind as to prior lawsuits. The fact someone remembers a family member died is not synonymous with the understanding that the settlement for that loss was a lawsuit.

[26] The fact that counsel "did not offer any evidence at the hearing to refute Murphy's testimony" resulted from the fact that counsel was unaware that the purported evidence existed much less that it would be offered.

Thus, the issue is not whether Cornell was aware that her son had died, but whether she thought the friendly settlement of that claim was a lawsuit. Under the circumstances, a lay person such as Cornell reasonably could have considered the out-of-court settlement related to her son's death not to be a lawsuit.

It is noteworthy that the Trial Court had before it evidence that the wrongful death lawsuit was a non-adversarial out-of-court settlement with an insurance company which took place in 2007. The case file was opened on January 16, 2007 and the final docket entry was two days later (L.F. 1828-29). The only court involvement consisted of Cornell appearing on a single occasion at the required hearing to approve the settlement on January 17, 2007 (L.F. 1335-37, R.App. A-5-7). It is entirely reasonable that Cornell did not consider this uncontested matter to be a "lawsuit". Many times the paperwork and everything else in such friendly settlement claims are drafted by the insurance company, and in fact filed by the insurance company or their counsel immediately before the settlement hearing. In this case the attorney for the insurance company filed the necessary paperwork the day before the settlement hearing. The "petition" was not signed by Cornell (L.F. 1852-53). Based on the record, it would be speculative and inequitable to infer any intent to hide this information when the statements allegedly made were about areas which were not inquired into, and which are not synonymous with each other.

Purported Statements Constitute an Improper Attempt to Impeach the Verdict

Another independent and equally dispositive reason for affirming the Trial Court's exclusion of the testimony of Murphy is the long standing rule that the conduct of a juror inside or outside of the jury room, whether before or after a verdict, may not be used to

impeach the verdict. *McDaniel v. Lovelace*, 439 S.W.2d 906, 909 (Mo.1969). Missouri law is unequivocal on this point. This rule is based on public policy grounds, that have long stood the test of time, that jurors speak through their verdict and "it is infinitely better that the irregularities, which undoubtedly sometimes occur in the jury room, should be tolerated rather than throw open the doors and allow every disappointed party to penetrate its secrets." *State v. Fox*, 79 Mo.109, 112 (1883).

In *Jones v. Wahlic*, 67 S.W.2d 729, 731 (Mo. App. E.D. 1984) the court addressed a nearly identical situation in which the attorney for the losing party attempted to impeach the verdict with an affidavit containing statements allegedly made by jurors. In ruling that this evidence was improper, the *Jones* court noted that the affidavit of the attorney as to statements made by jurors was inadmissible because it was hearsay. The Court went on to note, however, it was ***not only inadmissible hearsay, but also as an improper attempt to impeach the verdict.*** Testimony from a BNSF employee attempting to impeach the verdict through statements allegedly made by Cornell is not admissible under foundational Missouri law, and the Trial Court properly excluded same.

Purported Statements are Hearsay

The statements Murphy sought to describe, allegedly from Cornell, are clearly hearsay. *Jones*, 67 S.W.2d at 731 (excluding similar testimony by an attorney). BNSF, apparently recognizing the infirmity of its argument that the proffered testimony was not hearsay, attempts to argue that the out-of-court statements Murphy claims to have overheard are admissible because they were not offered to prove the truth of the matter

asserted or, alternatively, under the state of mind exception to the hearsay rule. BNSF is wrong in these assertions.

Hearsay is defined as an out-of-court statement of another offered to prove the truth of the matter asserted in that statement. *Bynote v. National Super Markets, Inc.*, 891 S.W.2d 117, 120 (Mo. 1995). While exceptions to the general rule prohibiting hearsay statements do exist; such circumstances do not exist in regard to the statements Murphy sought to introduce.

BNSF's claim that Murphy's testimony was not offered to prove the truth of the matter asserted is without merit. Missouri courts have recognized that when a statement ***involving the declarant's knowledge*** is made ***after*** the act to which the knowledge is relevant (here the jury deliberations) the statement is not admissible as non-hearsay. *Hunt v. National Super Markets, Inc.*, 809 S.W.2d 157, 159 (Mo. App. E.D. 1991). This is because the only way the trier of fact can decide whether the declarant knew about or remembered the matter alleged to be relevant to the wrongful act is to conclude that the out-of-court, after-the-fact statement alleged to have been made by the declarant is true. *Id.* at 160. In the instant case BNSF asks this Court to use purported post-verdict, out-of-court statements to support a finding that Juror Cornell knowingly withheld information about the death of her son which she was obliged to disclose. The only way these alleged statements would have any relevance is if, in fact, they were true. BNSF's argument that the testimony was not offered for the truth of the matter asserted is sophistry, and not even very well concealed. Mr. Murphy's testimony was inadmissible hearsay, and thus properly excluded.

Even if this Court were to decide that the out-of-court statements were not offered to prove the truth of the matter asserted, the statements are still inadmissible under the state of mind exception to the hearsay rule because they fail the time and place requirements of the exception. *Bynote* at 121. Out-of-court statements which are offered under the state of mind exception must be made ***prior to or contemporaneously with*** the event to which the statement is alleged to have relevance. *Kelly v. St. Luke's Hospital of Kansas City*, 826 S.W.2d 391, 396-97 (Mo. App. W.D. 1992). Declarations made after an event are inadmissible. *Maloy v. Cabinet & Bath Supply, Inc.*, 187 S.W.2d 922 (Mo.App. S.D. 2006).

This case involves testimony offered to show knowledge of events which are alleged to have impacted jury deliberations; specifically that Cornell "actually remembered her son's death in a motor vehicle accident."[27] Because the testimony is offered to show Juror Cornell's state of mind during deliberations, the purported statements must have been made contemporaneously with or before deliberations in order to fall within the state of mind exception to the hearsay rule. Juror Cornell's state of mind after the verdict was returned is not competent evidence of what her state of mind may have been during deliberations, let alone the key time in question, when answering questions during jury selection. The statements offered do not meet the requirement that they be made prior to, or contemporaneously with, deliberations, and thus they are inadmissible.

[27] Cornell's recall of her son's accident is only relevant if she had a duty to disclose the information which, as established in Argument IB of this Brief, she did not.

BNSF was Not Prejudiced by the Court's Ruling

In any event, BNSF cannot establish that it was prejudiced as a result of the Trial Court's rulings regarding Murphy's testimony because the Court heard the testimony as part of BNSF's Offer of Proof and stated on the record that it was unimportant to "parse words" about what evidence was admissible or inadmissible because "I will consider the whole thing in ruling on all of the motions relative to juror nondisclosure" (Tr. Vol. 9 at 101).

III. The Trial Court did not err in permitting submission of a verdict form in conformity with Comment B to MAI 37.05 and the corresponding two verdict-directors contemplated by the Comment (Responding to Appellant's Point IV).

Summary of Argument

BNSF asserts as error the Trial Court's failure to instruct the jury using "a single verdict director specifying disjunctive acts of negligence" (L.F. 1503). Plaintiff, however, did not have disjunctive claims against BNSF. Instead, plaintiff had a claim against BNSF for its vicarious liability under *respondeat superior*, as well as a separate claim against BNSF for its corporate conduct in failing to maintain a safe crossing. Under such circumstances, the Trial Court did exactly what the Missouri Approved Jury Instructions ("MAI") "Committee Comments" advised was proper. The Trial Court should not be convicted of error in following MAI.

The Verdict-Directing Instructions Were not Required to be in the Disjunctive

Missouri's system of instructing juries in civil cases is governed by MAI. These instructions are prepared by the Missouri Supreme Court Committee on Civil Jury Instructions. The MAI book contains not only pattern jury instructions, but also Committee Comments and Notes on Use which provide further guidance to both counsel and the courts about how to properly instruct a jury. The Trial Court must follow MAI if possible, and if there is no specific MAI instruction, modify existing MAI instructions to conform to the law. Rule 70.02(b).

Defendant argues that any time a plaintiff submits multiple negligent acts they must be submitted disjunctively, *citing Host v. BNSF Rwy. Co*., 460 S.W.3d 87, 98 (Mo. App.

W.D. 2015) (Appellant's Brief at 78). It thereby misstates the law, and more particularly, the holding in *Host*. In that case the Court held that:

> It is perfectly proper for a plaintiff to plead and to submit alternative theories for a single injury. The question, of course, is in what manner alternative theories for a single injury should be instructed. ***Missouri courts have allowed plaintiffs making submissible cases of both common law and per se negligence to offer separate jury instructions on each theory.*** They have also permitted such plaintiffs to offer a single instruction disjunctively submitting both theories of negligence.

460 S.W.3d at 87 (citations and quotation marks omitted) (emphasis added). Submitting different theories by separate verdict-directing instructions has been allowed in death actions, *Mathes v. Sher Express, L.L.C.*, 200 S.W.3d 97, 105 (Mo. App. W.D. 2006).

In the instant cause Plaintiff submitted two verdict-directing instructions that set forth plaintiff's claims of negligent conduct that in each instance allowed the jury to assess a percentage of fault to BNSF for particular conduct if such conduct "directly caused or directly contributed to cause the death of Scott Spence" (L.F. 1148-1149). Instruction Number 6 was plaintiff's claim of negligence concerning the condition of Defendant's railroad crossing that had nothing to do with the negligence of its train crew (L.F. 1148; R.App. A-27). Instruction Number 7 was based on the separate conduct of Defendant's train crew under *respondeat superior* (L.F. 1149; R.App. A-28). The form of verdict was modified to permit discrete findings of fault correlating to each of the three verdict-directing instructions (including the comparative fault instruction allowing the jury to

assess fault to Decedent). Such modification was appropriate under the circumstances of this case, *Mathes*, 200 S.W.3d at 105-06.

The Verdict Form Properly Permitted the Jury to Assess Fault Separately on the Two Claims under Comment B to MAI 37.05

While Defendant's arguments are often amorphous and hard to distill, the gist of its argument is that it was error to allow the jury to assign fault for both the conduct of its employees in operating the train and its corporate conduct for the dangerous condition of the crossing. This, however, is exactly what MAI instructs should be done in exactly these circumstances.

Defendant argues that it was error for the Court not to give MAI 37.07 (R.App. A-49). This is the verdict form provided by MAI for a single plaintiff versus defendant comparative fault case. Defendant ignores Comment B to MAI 37.05 (R.App. A-47),[28] the section on modification to jury instructions when vicarious liability due to actions of an

[28] BNSF's argument that Comment B should be ignored because it is found in the section of MAI 37.05 dealing with situations where agency is disputed was not argued in the trial court and does not fit with the language or the reason behind the Comment. The content of the Comment in no way depends upon disputed agency. Instead the Comment addresses situations, just like the one in this case, where a plaintiff has both a vicarious liability claim and a direct negligence claim against the same defendant. There is no material or principled distinction between the two situations that would justify the disparate treatment argued for by BNSF.

agent is at issue in a case. As this case involved exactly the situation that Comment was created for, the Trial Court properly followed its dictates.

Comment B, in describing how to properly instruct a jury in cases such as this, states:

> B. If a plaintiff seeks to recover in a comparative fault case from a master or principal based on both *respondeat superior* and also based upon the negligent acts of the master (i.e., based on the negligent driving of the employee and also based on the employer's negligence in furnishing a truck with defective brakes), then the jury should be asked to assess one percentage of fault based on the employee's driving, a different percentage of fault based on the employer's conduct in furnishing the truck with defective brakes, and another percentage of fault based on the conduct of plaintiff. In this instance, the comparative fault verdict form would have a blank for the employee's percentage of fault ***(which is chargeable to both the employee and the employer)***; another blank for a percentage of fault for the employer's conduct as submitted in the verdict director submitting the employer's conduct in furnishing the truck with bad brakes (this fault is chargeable only to the master); and a blank for the percentage of fault assessed to plaintiff. However, in *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. 1995),[29] the Supreme

[29] The instructions in this case do not run afoul of *McHaffie* because there is no attempt to submit two theories of imputed liability; instead there is one verdict director for liability

> Court held that 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). *Id.* at 867.

This Comment is on all fours with the instant cause. The failure of the train crew to slow or stop the train is a *respondeat superior* claim, exactly like the negligent driving of the employee in the Comment. Similarly, the conduct of BNSF in regard to the condition of the crossing is "based on the employer's negligence," just like the Comment's example of providing a truck with bad brakes. The clear teaching of Comment B to MAI 37.05(1), is that the proper form of verdict for claims where the source of duty is different (e.g. negligent acts of the train crew v. negligent acts of the railroad) is to have the jury assess one percentage of fault based on the crew's conduct, another percentage of fault based on the conduct of BNSF in regard to the condition of the crossing, and yet another percentage of fault for any negligent conduct chargeable to Decedent. *Id.*

Separately assessing BNSF's fault for the distinct theories of negligence, as was done in the instant cause, was appropriate under the circumstances and was in conformance with Committee Note B to MAI 37.05(1).

Further, BNSF has failed to demonstrate how it was prejudiced by the separate allocations of fault. Even in a disjunctive verdict director both the crew's negligence and

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based on the imputed negligence of the train crew and a separate verdict director based on BNSF's independent negligence with respect to the safety of the crossing.

the dangerous condition of the crossing would have to be considered by the jury. There is no difference between an assessment of fault that is 95% to BNSF and 5% to Scott Spence and an assessment of fault that is 15% to BNSF on the claim for negligence of its crew, 80% to BNSF for maintaining a dangerous crossing and 5% to Scott Spence. The math is the same under either submission.

IV. The Trial Court did not err in submitting Not-in-MAI Instruction Number 8 to the jury (Responding to Appellant's Point V).

Standard of Review

A modified MAI or a Not-in-MAI instruction is not presumed to be erroneous. *See, Taylor v. Associated Elec. Coop., Inc.*, 818 S.W.2d 669, 673[9] (Mo.App. W.D. 1991). To reverse a jury verdict on the ground of Not-in-MAI instructional error, it must appear that the offending instruction misdirected, misled, or confused the jury; the burden to prove the error rests with the party challenging the instruction. *Cornell v. Texaco, Inc.*, 712 S.W.2d 680, 682 (Mo. 1986).

Summary of Argument

BNSF also asserts as error the giving of jury instruction number 8 which stated:

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 preventive measures it can take, to avoid the collisions.

(L.F. 1150; R.App. A-29).

Instruction Number 8 was a proper statement of the law taken from this Court's opinion in *Alcorn v. Union Pacific*, 50 S.W.3d at 242. This instruction was given by Plaintiff in direct response to Instruction Numbers 13 and 14 tendered by Defendant (R.App. A-30-31), and which the Trial Court had already indicated it would give. All three of these instructions concern the duties of the parties, which was a significant theme and

issue throughout trial. Instruction No. 8 would have been unnecessary had BNSF not tendered two such instructions, which the Court advised it intended to give (as counsel for Mrs. Spence stressed at the instruction conference), but it was unfair to place undue emphasis only on duties of Decedent, ignoring duties owed by Defendant. Because the instruction was a proper statement of the law, and because any error which may have occurred was invited by BNSF's not-in MAI instructions, there is no basis to remand this case based on a claim that giving this instruction constituted error.

Instruction No. 8 Complies with Rule 70.02(b)

Instruction Number 8 properly meets the test for a Not-in-MAI instruction, which a court reviews "to determine whether the jury [could] understand the instruction and whether the instruction follows applicable substantive law by submitting the ultimate facts required to sustain a verdict," *Seitz v. Lemay Bank & Trust Co.*, 959 S.W.2d 458, 462 (Mo. 1998). Instruction Number 7 provided for the substance of the cause of action based on *respondeat superior* liability. Instruction Number 8 simply advised under what circumstances the duty to act existed, taken almost verbatim from this Court's decision in *Alcorn*.[30] In that case, this Court identified the duty owed when a train crew sees a vehicle making an unwavering approach to a crossing. Instruction Number 8 met the requirements of Rule 70.02(b) in that it was simple, brief, impartial, free from argument and did not submit to the jury or require the jury to make findings of detailed evidentiary facts.

[30] The only modification of the *Alcorn* language was to change the word "engineers" to "crew."

The Trial Court did not err in giving Instruction Number 8 because the instruction correctly stated the law concerning the respective duties the jury was called upon to evaluate and did not, as BNSF contends, address the same subject matter. Instruction Number 7 is a verdict director which told the jury what specific acts it had to find in order to assess fault to BNSF based on the acts and omissions of its crew members. Instruction Number 8 did not did not tell the jury that it must assess a percentage of fault to BNSF under any circumstances; rather, it advised the jury about the circumstances under which a duty to act arises. Duty is a question of law and the instructions are the law of the case given to the jury by the court for guidance in its deliberations.

Instruction Number 8 was not only proper, it was necessary in light of BNSF's repeated efforts to mislead the jury into believing that its crew owed no duty to Decedent and that the crew had the right to assume that he would stop at the crossing (*See, e.g.* Tr. 242, 558-59, 1378, 1477- 79, and 1495). Because of these repeated misstatements of the law, it was not improper for the Trial Court to clarify for the jury the circumstances under which the BNSF crew was charged with a duty to attempt to avoid the collision. The existence of this duty was expressly recognized in *Alcorn*, the instruction was not a misstatement of the law, was not argumentative, and did not require the jury to make detailed findings of evidentiary fact.

BNSF's own actions in requesting and obtaining two similar instructions necessitated the giving of Instruction Number 8, and BNSF cannot complain about an instruction its own conduct invited

BNSF's argument ignores its own Instruction Numbers 13 and 14 which are essential to understand the Trial Court's decision to give plaintiff's instruction Number 8. These instructions tendered by BNSF stated as follows:

INSTRUCTION NO. 13

> You are instructed that when any person driving a vehicle approaches a railroad grade crossing, the driver of the vehicle shall operate the vehicle in a manner so that he will be able to stop, and he shall stop the vehicle not less than fifteen feet and not more than fifty feet from the nearest rail of the railroad track and shall not proceed until he can safely do so if an approaching train is visible and is in hazardous proximity to such crossing.

(L.F. 1155).

INSTRUCTION NO. 14

> You are instructed that Defendant BNSF is only required to keep its right-of-way reasonably clear of vegetation, undergrowth or other debris for a distance of 250 feet each way from the near edge of a public grade crossing where such things would materially obscure approaching trains from the view of travelers on the highway.

(L.F. 1156.)

These Not-in-MAI instructions concerned duties owed by Decedent and duties owed by the railroad with respect to vegetation. As noted in the instruction conference (Tr. 1414), and again during oral arguments on BNSF's post-trial motion (Tr. Vol. 9 at 136), Plaintiff only tendered Instruction Number 8 in direct response to BNSF's tender of Instruction Numbers 13 and 14[31] and the Court's prior ruling that it would give those instructions.

Having tendered a nearly identical instruction on duty, BNSF cannot now argue that the giving of plaintiff's instruction on the same issue is somehow error. As Plaintiff's counsel stated in offering Instruction Number 8, "once the [court] determined that [BNSF] could embellish its verdict directors with additional instructions to its benefit" I "could not stand idly by and allow such embellishments to go unchallenged" (L.F. 2201). A "fair trial" is "the inestimable privilege of both sides." *Cervillo v. Manhattan Oil Co.*, 226 Mo. App. 1090, 49 S.W.2d 183, 194 (1932).

Even if the giving of Instruction Number 8 would have been error if tendered alone, it is not in light of defendant's invitation to do so by convincing the Court to give similar

[31] These instructions were not limiting instructions, as BNSF represented to the Trial Court in an apparent effort to claim they were authorized by MAI (L.F. 1155-56). As pointed out by counsel for Plaintiff at the instruction conference, these instructions bear no resemblance whatsoever to the form of limiting instructions authorized in MAI 34.06 (Tr. 1420-22; R.App. A-45).

instructions. The general rule is that "a party may not invite error and then complain on appeal that the invited error was in fact made." *Lau v. Pugh*, 299 S.W.3d 740, 757 (Mo. App. S.D. 2009). As *In Re Berg*, 342 S.W.3d 374, 384 (Mo.App. S.D. 2011), held, "It is axiomatic that a 'party cannot lead a trial court into error and then…' lodge a complaint about the action."

Statements of Plaintiff's Counsel Do Not Support BNSF's Claims of Error

BNSF attempts to support its argument with statements made by counsel for Plaintiff at the instruction conference. It is true that counsel indicated on the record her belief that Instructions 13 and 14 (as well as her own instructions 8 and 9) were not MAI instructions and should not be given; however, she also explained her reluctant tender of Instruction Numbers 8 and 9.

> MS. WOLZ: Judge, just briefly, I'm willing to stand on my brief with regard to the issue of instruction [sic] because I think they were perfectly fine. . . . Now, what I do want to remind the Court is the only reason I submitted those two Instructions is because the Court had already told BNSF that they could submit their Instructions 13 and 14, which are exactly the same thing…. I could not stand by and let them embellish theirs after you already said they would, [sic] that's when I tendered mine. …in light of the Court's ruling with regard to their non-MAI instructions, I felt that I had to do that….

(Tr. Vol. 9 at 136-137).

Instruction No. 8 Did Not Give the Jury a Roving Commission

Nor is there any merit to BNSF's complaint that Instruction Number 8 was a roving commission. "When the plaintiff's theory is supported by the evidence and the instruction submits the ultimate facts that define the plaintiff's theory for the jury, the instruction is not a roving commission." *Rinehart v. Shelter Ins. Co.* 261 S.W.3d 583, 594 (Mo.App. W.D. 2008). Instruction Number 8 satisfies this test.

BNSF's Attempts to Distinguish *Alcorn* are Unpersuasive

BNSF's argument that the *Alcorn* court's discussion of the issue of "unwavering approach" as being a specifically identifiable hazard was made only in the context of whether preemption applied to the plaintiff's claim does nothing to advance its argument. *Alcorn* does not stand for the proposition that the duty of a train crew only arises if preemption is at issue; rather, the duty arises from a factual situation, just like the one in the instant case, in which the crew sees a vehicle making an unwavering approach to a crossing and has time to take some evasive action.[32] In such a situation *Alcorn* holds that there is no preemption as a matter of law. Instruction 7 required the jury to make a finding that the crew knew or should have known that Decedent was making an unwavering

[32] This duty is in accord with the duty imposed upon Missouri motorists who have a duty to avoid an impending collision by "slowing, stopping, swerving or other means reasonably available and consistent with his own safety" when it becomes or should become apparent that another driver is unable to or will not take action to avoid a collision. *Nolte v. Childress*, 387 S.W.2d 569, 573 (Mo. 1965).

approach to the crossing in time to slow or stop the train before it could assess liability against BNSF on that claim. Both Instruction Numbers 7 and 8 properly set out the applicable law in this case.

Instruction Number 8 Was Not a Verdict-Director

BNSF's argument that Instruction Number 8 did not contain a time element is not relevant because it was not a verdict-director; Instruction Number 7 directed the jury about the specific findings it had to make in order to assess fault against BNSF.[33] Paragraph Second of Instruction No. 7 properly instructed the jury with respect to the time element requiring a finding that the 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***" before it could assess fault to BNSF (L.F. 1149).

BNSF's final complaint about Instruction Number 8 is also without merit. BNSF argues that the instruction included the phrase "in addition to any other preventive measures it can take," which was not supported by the evidence and was not supported by the facts of this case. Again, BNSF is trying to transform Instruction Number 8 into a verdict-director; but only Instruction Number 7 told the jury the circumstances under which it could or must assess a percentage of fault against BNSF. The jury was never instructed that it could assess fault against BNSF for failure to take "other preventative measures."

[33] Instruction 8 did not instruct the jury about when it could or could not assess fault against BNSF.

Further, even if it had been so instructed, this would not constitute error because there was evidence that the crew could have taken other preventative measures such as sounding the horn (Tr. 321).

All of the claims of error BNSF has raised in connection with Instruction Number 8 were invited by BNSF's decision to seduce the Trial Court into giving its Not-in-MAI Instruction Numbers 13 and 14; Defendant is not entitled to raise the giving of Instruction Number 8 as error because the error, if any, was invited by BNSF.

V. The Trial Court did not err in allowing evidence about BNSF's modification of its engineering instructions or in denying BNSF's objection and request for mistrial based on such evidence; nor did the court abuse its discretion in refusing BNSF's untimely request to name an engineering expert (Responding to Appellant's Point VI).

Summary of Argument

BNSF's last point on appeal lumps three separate claims of error together. Initially, BNSF claims the Trial Court erred when it did not grant a mistrial when Plaintiff's counsel mentioned, in Opening Statement, evidence regarding sight tables he expected would be admitted in the case. Under the applicable law, it is not error for a Trial Court to refuse to grant the drastic remedy of a mistrial when counsel in opening references evidence he has a good faith belief will be admitted in the case.

BNSF's second argument is that it was error to allow the admission of this evidence. This claim of error falls flat, however, based on the simple fact that BNSF never objected to this evidence when it was offered. As the evidence came into the record without objection, BNSF cannot now assert it was error to allow same.

Finally, BNSF claims it was error for the Trial Court to not allow it to call an untimely disclosed additional expert, Robert Blaschke. In regard to Blaschke, BNSF claims this proposed expert could have addressed the issue of the removal of the sight tables. However, neither BNSF's Offer of Proof regarding Blaschke nor his affidavit in support of the motion even mention this issue (L.F.1017-19 and 1030-36; R.App. A-17 and A-20). Further, the Offer of Proof that was made showed that the testimony of this expert

was, at best, redundant. When the matter is broken down into the actual errors asserted, there is no basis for a new trial on any of these grounds.

References to Removal of Sight Tables in Opening Statement were Within the Wide Latitude Afforded Counsel

BNSF's initial complaint is that the Trial Court erred in failing to grant its motion for mistrial when counsel for Plaintiff mentioned the removal of the sight tables in Opening Statement. The removal of the sight tables, however, was relevant evidence on several issues in the case, which Plaintiff had a good faith belief would be admitted. It is long established law in Missouri that counsel is granted wide latitude and has the right during Opening Statements to present a good faith statement of what he believes the evidence in the case will be. *Buck v. St. Louis Union Trust Co.*, 185 S.W. 208, 212 (Mo. 1916); *Tennis v. General Motors Corp.*, 625 S.W.2d 218, 223 (Mo.App. S.D. 1981).

Nothing in the Opening Statement of Plaintiff's counsel ran afoul of this well-established rule. Plaintiff's counsel's good faith in this regard can be seen by the fact such evidence was in fact admitted in the case, ***without objection***! The Trial Court did not err when it refused BNSF's request for a mistrial on the basis that counsel mentioned evidence in opening which in fact was admitted and before the jury for all purposes in the case. Further, even had this evidence not been admitted at trial, a mistrial is "the most drastic remedy," which is reserved only for the most "grievous" circumstances. *Hawkins v. Compo*, 781 S.W.2d 128, 131 (Mo.App. W.D. 1989). BNSF sought no relief other than a mistrial, which this Court has previously cautioned against. See e.g. *State v. Brigham*, 709

S.W.2d 917, 921 (Mo.App. S.D. 1986). The Trial Court did not abuse its broad discretion in overruling BNSF's motion for a mistrial based on Plaintiff's Opening Statement.

Issue of Removal of AASHTO Sight Tables Has Not Been Preserved

In its brief BNSF argues that evidence of the removal of the AASHTO sight tables by BNSF was erroneously introduced. What BNSF fails to identify is where it objected to this evidence when it was introduced. The reason for this failure is simple and dispositive; BNSF failed to object when this evidence was offered, and has therefore preserved nothing.

Evidence of the removal of the sight tables was elicited from several witnesses with no objection by BNSF. The first witness to testify about this issue was Dr. Heathington. No objection was raised to his testimony about removal of the AASHTO sight tables. (Tr. 490-493). Another of Plaintiff's experts, William Hughes, also testified about this issue. There was no specific objection[34] raised at the time of his testimony either. (Tr. 991). In addition, two of BNSF's own witnesses, Cheryl Townlian (Tr. 730-38) and Steve Harlan (Tr. 925) testified about this issue with no objection from BNSF.

Claim of Error During Closing Argument Has Not Been Preserved

[34] Counsel for BNSF did make a "continuing objection" to testimony by Mr. Hughes by "renewing my objections from yesterday;" however, a review of the objections raised "yesterday" reflects that there was no mention of AASHTO, engineering instructions or sight tables (Tr. 828-831).

To the extent BNSF argues that it is entitled to a new trial based on comments made by Plaintiff's counsel in Closing Argument, this argument again fails for multiple reasons. First, like the evidence itself, such claimed error was not preserved as no such objection was made during Plaintiff's closing.

A party's failure to object to closing arguments of opposing counsel at trial is fatal to an allegation of error. *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 15 (Mo. 1994). Further, the evidence in question was admitted without objection. As such, it would have been reversible error for the Trial Court to exclude such record evidence in closing argument. See e.g. *Newton v. Ford Motor Co.*, 282 S.W.3d 825 (Mo. 2009); *Coats v Hickman*, 11 S.W.3d 798, 803-804 (Mo.App. W.D. 1999) (Having failed to object when opposing party introduced evidence, appellant waived any subsequent objection to such evidence).

Further, even had BNSF not waived this issue on two separate occasions, the permissible field of argument in closing is broad and counsel is permitted "wide latitude in his comments." *Hammer v. Waterhouse*, 895 S.W.2d 95, 106 (Mo.App. W.D. 1995).

Evidence of Removal of Sight Tables was Relevant to Proof of BNSF's Knowledge of the Dangerous Condition of its Crossing

Even if the Court were to ignore all of the above, evidence about the removal of the AASHTO sight tables was admissible for multiple purposes. Primarily, it is important to acknowledge that there is a recognized distinction between allegations and evidence. *Rombach v. Rombach*, 867 S.W.2d 500, 502-503 (Mo. 1993). As this Court noted in *Rombach*, "'Alleged' has a commonly accepted meaning in the context of a lawsuit.

Generally, it is understood to mean the assertion of claims or defenses in the pleadings. Evidence on the other hand refers to items of proof of the facts that have been averred or alleged." *Id.*

Plaintiff's withdrawal of the ***allegation*** that BNSF's removal of the AASHTO sight tables from its engineering instructions as an independent act of negligence did not constitute a waiver of Plaintiff's right to introduce ***evidence*** that it had done so because such ***evidence*** was relevant to show that: "…. the crossing was not good and sufficient because it did not afford eastbound motorists adequate sight distance to observe trains approaching form the south and that …. Defendant BNSF ***knew or by using ordinary care could have known of this condition***…." as required by Paragraphs First and Second of Instruction Number 6, Plaintiff's verdict director on the claim of an inadequate crossing.

Thus, while the ***allegation*** is the failure to warn about or remedy the deficient sight lines at the crossing; the fact that BNSF knew about the AASHTO sight tables and made a corporate decision to disregard them was ***evidence*** which was probative of the fact that BNSF knew, or by using ordinary care could have known, about the dangerous sight lines at the crossing where Scott Spence lost his life. Plaintiff neither argued nor submitted the removal of the sight distance tables as an independent act of negligence; rather, Plaintiff submitted her case on the issue of whether the crossing was "good and sufficient" in light of the inadequate sight distance available to motorists approaching the crossing from the west as Mr. Spence was on the day he was killed, a matter which had been pled from the earliest days of the case.

In the same manner that evidence of near misses was probative of BNSF's knowledge of the dangerous condition of its crossing, evidence of the removal of the sight tables is nothing more than another way to demonstrate that BNSF, by using ordinary care, could have known of the dangerous condition of its crossing in time to have taken action that would have saved Scott Spence's life. This is far different than instructing the case in such a way that the jury must find the crossing to be inadequate ***because*** BNSF removed the AASHTO sight tables from its engineering instructions.

Further, such evidence was relevant to the issue of aggravating circumstances. At trial, Plaintiff proceeded with multiple claims, including a count for aggravating circumstances. Even had the evidence initially been admissible for only this limited purpose, defendants would have again waived any claim regarding its use by not seeking a limiting instruction. *Martin v. Durham*, 933 S.W.2d 921, 924 (Mo.App. W.D. 1996). Likewise, when Plaintiff chose to withdraw this claim at the close of evidence, it was incumbent upon BNSF to request a withdrawal instruction. Failure to do so is yet another failure to preserve this issue. *See, e.g. First National Bank of Fort Smith v. Kansas City Southern Railway Co.*, 865 S.W.2d 719, 740 (Mo.App. W.D. 1993).

No Abuse of Discretion in Denial of Untimely Request to Name an Expert

BNSF's final argument is that the Trial Court abused its discretion in ruling that BNSF could not make an untimely endorsement of an expert. The Trial Court acted well within its broad discretion to control its docket and the process of litigation, including pre-trial discovery. *See, e.g. State ex rel. Robinson v. Franklin,* 48 S.W.3d 64, 69 (Mo.App. W.D. 2001).

In order to fairly evaluate the conduct of the Trial Court one must look at the totality of the circumstances under which it made its rulings, including the fact the Court even handedly rejected attempted late disclosures by both BNSF and Plaintiff.

The Trial Court, at the express request of BNSF, entered a scheduling order under which BNSF was to disclose its experts by September 10, 2014 (S.S.L.F. 7). In August of 2014, BNSF took the deposition of plaintiff's engineering expert, Kenneth Heathington, and had the opportunity to question him about his opinions. Dr. Heathington was specifically asked about his opinions with respect to removal of the AASHTO sight tables from BNSF's engineering instructions (Supp. L.F. 25). Yet, when BNSF disclosed its experts a few weeks later, it did not disclose Blaschke or any other engineering expert.

There was nothing arbitrary or capricious regarding the Court's orders with respect to discovery. The Court held both Plaintiff and BNSF to the deadlines they had previously agreed upon. Further, BNSF had ample time to add an engineering expert between the date it learned of Dr. Heathington's opinions and its deadline to disclose experts. Given the vast number of engineering opinions Dr. Heathington was going to address, one would be hard pressed to believe that BNSF suddenly decided it needed an engineering expert ***three months after*** learning Dr. Heathington's opinions and more than two months after the agreed upon deadline for BNSF's disclosure of expert witnesses.

Additional support for the Trial Court's decision can be seen by a review of Blaschke's Offer of Proof and supporting affidavit (L.F.1017-19 and 1030-36; R.App. A-17 and A-20). The actual Offer of Proof and supporting affidavit show that the late testimony defendant sought to add was either cumulative of other evidence or concerned

matters which were not disputed (*See, e.g.* Tr. 579-585 where counsel for BNSF questioned Dr. Heathington about the various limitations of applying AASHTO to existing crossings and Tr. 996-98 where the same evidence was brought out during the cross examination of Hughes). Thus, Plaintiff's experts ***agreed*** with many of the matters BNSF claims Blaschke would have testified about.

Mr. Blaschke's proffered opinions were, therefore, nothing more than an untimely attempt to rebut Dr. Heathington's opinions all of which were known to BNSF, by virtue of Heathington's comprehensive report, before Heathington's deposition was taken on August 21, 2015—well before BNSF's deadline to designate experts.

BNSF was likewise aware through Dr. Heathington's report and deposition testimony that the applicability and usefulness of the AASHTO sight tables in determining whether the crossing in question was inadequate would be evidence and at issue in the case. Yet, it was not until Plaintiff attempted to amend her petition to allege the removal of the sight tables as an independent act of negligence that BNSF sought to take advantage of the moment to remedy its failure to name an expert within the time allowed under the agreed scheduling order.

BNSF's claim that it was entitled to name Blaschke to meet the new allegations in Plaintiff's First Amended Petition was a thinly veiled attempt to remedy its failure to timely name an engineering expert. There is no abuse of discretion in the Trial Court denying BNSF's attempt to leverage a minor pleading change into an opportunity to name an expert after the deadline for doing so had passed—a deadline which, ironically, BNSF insisted on having put in place.

Indeed, in its own effort to prevent Plaintiff from taking depositions after expiration of the agreed upon discovery deadline, BNSF aptly articulated the reason that the Court has such broad discretion in controlling discovery. In its Motion for Protective Order, filed on February 7, 2015, BNSF successfully argued that:

> ….To permit a litigant to go through years of discovery, go past the discovery deadline, and then demand further depositions….would defeat the schedule established by this Court for the orderly completion of discovery and preparation for trial….(S.S.L.F. 49).

Cognizant of the fact that Missouri courts have recognized that untimely disclosure or nondisclosure of expert witnesses is "so offensive to the underlying purposes of the discovery rules that prejudice may be inferred…." [35]Judge Mitchell did not abuse his discretion in refusing BNSF's request to name an engineering expert after the deadline BNSF chose for doing so had passed. Any prejudice BNSF may have suffered as a result of not having an engineering expert is the result of its own failure to timely disclose one. The Trial Court did not abuse its discretion in ruling BNSF could not designate Blaschke out of time.

Blaschke's Proposed Testimony is Merely Cumulative

Even if there was any way to argue the Trial Court should have allowed testimony from Blaschke, exclusion of any such evidence would be harmless because his proposed testimony concerned matters that were either not in dispute or was cumulative of other

[35] *Ellis v. Union Electric Co.*, 729 S.W.2d 71, 75 (Mo.App. E.D. 1987).

evidence. In footnote 39 at page 110 of its Substitute Brief BNSF sets forth the four points that Blaschke was prepared to testify about.

The first point Blaschke would have testified to is that "AASHTO design criteria and design values were guidelines, ***not standards***, to be used by highway designers, ***not railroad companies.***" In addressing this issue, Plaintiff's expert, Dr. Heathington testified that AASHTO was not a legal requirement. Another of Plaintiff's experts, William Hughes, agreed that the Railroad Highway Grade Crossing Handbook which contains the AASHTO sight tables (Tr. 1003) specifically states that the handbook does not "constitute a standard, specification or regulation" (Tr. 996). He also agreed that the guidelines in the handbook, including the sight distance tables, were not mandatory (Tr. 997). Thus, Blaschke's testimony would add nothing to the information the jury had already heard on this point. This fact is punctuated by the admission of BNSF's counsel in closing argument that there was ***no evidence*** that AASHTO is the rule or the law (Tr. 1492).

Insofar as Blaschke would have testified that the AASHTO design criteria were not intended to be used by railroad companies, this testimony would have been a direct contradiction of testimony given by Cheryl Townlian, BNSF's manager of engineering for the territory covering the crossing where Scott Spence was killed (Tr. 719-720). Townlian testified that, at times, she would use portions of the sight tables even on existing crossings (Tr. 737). Steve Harlan, a BNSF Roadmaster (Tr. 919), testified that the sight distance tables were previously included in the BNSF engineering instructions (Tr. 925). So, while the AASHTO design guidelines were drafted for use by highway designers, testimony that they ***were not to be used by railroad companies*** would simply not be true. A party is bound

by its own testimony on matters of fact. *Steward v. Baywood Villages Condominium Ass'n.*, 134 S.W.3d 679, 683-84 (Mo.App. E.D. 2004).

The third matter BNSF says Blaschke was prepared to testify about was that "the AASHTO guidelines are to be used for "new roadway facilities or existing roadway facilities that are undergoing major reconstruction…" Once again, this point was not at issue. Dr. Heathington testified that the AASHTO design manual was drafted for use by highway engineers engaged in ***new*** construction projects (Tr. 584). He further conceded that the crossing at issue in this case was not new construction (Tr. 584). Plaintiff's argument was not that AASHTO mandated use of the sight tables for existing crossings; rather, Plaintiff's common sense argument was that even standards developed for new construction ***could have been applied*** or adapted in analyzing the relative safety of existing crossings. Blaschke's testimony on this point would have again been merely cumulative, and would not refute Plaintiff's common sense argument.

The final matters BNSF claims Blaschke would have testified to were that "an existing roadway is not to be considered 'unsafe' simply because its geometry is inconsistent with the guidelines of [AASHTO]" and 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'" (Substitute Brief at 110).

First, no witness testified, and Plaintiff did not argue, that the mere fact that the geometry of a crossing was inconsistent with AASHTO guidelines automatically caused the crossing to be "unsafe." Instead, the testimony from Plaintiff's witnesses showed that

the "skew" of the tracks in this case was extreme and the sight lines were completely inadequate (Tr. 522, 532-33).

There was also testimony from Eric Curtit, the administrator of railroads for the Missouri Department of Transportation, who testified on behalf of BNSF, about the factors which are relevant when determining the safety of a crossing (Tr. 1269). Curtit administers the grade safety program for the state of Missouri (Tr. 1270). He testified that the objective data used by the state to evaluate the relative safety of a crossing does not "take into account the geometry as far as elevation" and it "also does not account for skew" (Tr. 1271). He also testified that, while sight distance is "a factor" his team looks at in evaluating safety; MoDOT does not have rules in place which specifically relate to sight distance (Tr. 1273-74). Even absent Blaschke's testimony there was ample evidence which made it clear to the jury that inconsistency with AASHTO sight guidelines did not automatically mean a crossing was unsafe.

Blaschke's opinion that the sight distance was "more than adequate" and "exceptional" is also cumulative of the testimony of BNSF's reconstruction expert, Stan Oglesby who testified that when he performs a reconstruction it is important for him to do an assessment of visibility of the motorist (Tr. 1173). Oglesby visited the scene of the fatality the day after it occurred and testified unequivocally to his opinion that there was nothing about the crossing that would materially obstruct a motorist's view (Tr. 1174). Finally, Oglesby testified that, in his opinion, the train which struck and killed Scott Spence would have "easily been visible in numerous places" (Tr. 1176) and that the train was "clearly visible for a significant distance" (Tr. 1177).

The foregoing illustrates that BNSF did not suffer prejudice from the Trial Court's use of its broad discretion to disallow a late disclosed expert, and certainly not prejudice sufficient to require a new trial.

CONCLUSION

As a direct result of BNSF's failure to comply with Rule 69.025, this Court and Sherry Spence find themselves in the very situation which the Rule was intended to prevent. Neither the law nor the facts support the claims of error raised by BNSF. Plaintiff therefore respectfully requests that this Court affirm the Trial Court's denial of a new trial, and allow the considered verdict of the jury to stand.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on June 26, 2017, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the attorneys of record and further certify that the attached brief contains the information required by Supreme Court Rule 55.03, complies with Supreme Court Rule 84.06(b) and contains 27,727 words, excluding the cover, this certification, the signature blocks and the appendix as determined by Microsoft Word software.

/s/ Michael W. Manners
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