

SC 96195

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**IN THE MISSOURI SUPREME COURT**

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**SHERRY SPENCE,  
Plaintiff-Respondent,**

**v.**

**BNSF RAILWAY COMPANY,  
Defendant-Appellant.**

**On Appeal From the Circuit Court of Stoddard County, Missouri  
The Honorable Stephen R. Mitchell**

**BRIEF OF THE CHAMBER OF COMMERCE  
OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE*  
IN SUPPORT OF APPELLANT**

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## **JURISDICTIONAL STATEMENT**

The Chamber as *amicus curiae* adopts the Jurisdictional Statement set forth in Appellant's substitute brief.

## STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (“Chamber”) is the world’s largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation’s business community.

The Chamber’s members rely on both state and federal courts to adjudicate claims and resolve disputes fairly, efficiently, and impartially. Acts of juror misconduct—such as the intentional juror nondisclosure the Court of Appeals found in this case—cause serious harm to the fair and impartial operation of the civil jury system. Such juror misconduct is particularly troubling to the business community, which relies on the impartiality of courts, and thus civil juries, to resolve disputes among businesses and with others. The Chamber and its members have both a unique perspective on this problem and a substantial interest in ensuring that state courts protect businesses against judgments tainted by juror misconduct and partiality.

## **CONSENT OF PARTIES TO FILING OF THIS BRIEF**

Both parties consent to the filing of this brief.

## STATEMENT OF FACTS

The Chamber as *amicus curiae* adopts the Statement of Facts as set forth in Appellant's substitute brief.

## POINTS RELIED ON

### **I. INTENTIONAL JUROR NONDISCLOSURE OF POTENTIAL BIAS, SUCH AS WHAT OCCURRED HERE, DEPRIVES PARTIES OF THEIR CONSTITUTIONAL RIGHT TO A FAIR TRIAL.**

U.S. Const. amends. V, VII

Mo. Const. art. I, §§ 10, 22(a)

*Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009)

*Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81 (Mo. banc 2010)

*Catlett v. Ill. Cent. Gulf R.R. Co.*, 793 S.W.2d 351 (Mo. banc 1990)

*Williams By & Through Wilford v. Barnes Hosp.*, 736 S.W.2d 33 (Mo. banc 1987)

### **II. THIS COURT’S REASONABLE INVESTIGATION RULE FOR JURY SELECTION SHOULD NOT BE READ ATEXTUALLY TO REQUIRE AN UNREASONABLE INVESTIGATION.**

Mo. S. Ct. Rule 69.025

*Johnson v. McCullough*, 306 S.W.3d 551 (Mo. banc 2010)

*Khoury v. ConAgra Foods, Inc.*, 368 S.W.3d 189 (Mo. Ct. App. W.D. 2012)

### **III. IMPARTIAL JURIES AND FAIR TRIBUNALS ARE OF CRITICAL IMPORTANCE TO THE NATION’S BUSINESS COMMUNITY.**

*Catlett v. Ill. Cent. Gulf R.R. Co.*, 793 S.W.2d 351 (Mo. banc 1990)

## ARGUMENT

The Missouri Constitution guarantees litigants a fair trial in a fair tribunal, which includes impartial jurors in civil trials. Appellant BNSF Railway Company did not receive a fair trial. In particular, the Court of Appeals correctly concluded that one juror intentionally failed to disclose material information about her son's death in an automobile accident. Indeed, as Judge Francis detailed in his concurring opinion, that particular juror answered falsely or otherwise intentionally failed to disclose a number of material facts during jury selection.

The Court of Appeals also correctly interpreted Missouri Supreme Court Rule 69.025 to only require parties to conduct a reasonable investigation of the litigation history of potential jurors. This reasonable investigation requirement, by the rule's plain text, does not extend to topics beyond the litigation history, such as questions related to a potential juror's prior experience with automobile accidents. Nor would it be appropriate for this Court to rewrite the rule as a matter of interpretation in this case.

The Chambers' members depend on courts to fairly and impartially resolve disputes between them and with other parties. Juror misconduct, such as the intentional nondisclosure of material information here, violates constitutional due process rights and in the process causes great harm to the Nation's business community. The judgment of the trial court should be reversed.

**I. INTENTIONAL JUROR NONDISCLOSURE OF POTENTIAL BIAS, SUCH AS WHAT OCCURRED HERE, DEPRIVES PARTIES OF THEIR CONSTITUTIONAL RIGHT TO A FAIR TRIAL.**

Just like its federal counterpart, the Missouri Constitution provides “[t]hat no person shall be deprived of life, liberty or property without due process of law.” Mo. Const. art. I, § 10; *accord* U.S. Const. amend. V. Both constitutions likewise provide for the right to a trial by jury in certain civil cases. *See* Mo. Const. art. I, § 22(a); U.S. Const. amend. VII. As the United States Supreme Court has declared, “[i]t is axiomatic that ‘[a] fair trial in a fair tribunal is a basic requirement of due process.’” *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

In the civil jury context, this Court has underscored that the constitutional “right to a trial by jury does not simply provide that 12 jurors will decide the case. If the right to trial by jury is to mean anything, all 12 jurors must be ‘fair and impartial.’” *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 87 (Mo. banc 2010) (citing *Catlett v. Ill. Cent. Gulf R.R. Co.*, 793 S.W.2d 351, 353 (Mo. banc 1990); *Lee v. Balt. Hotel Co.*, 136 S.W.2d 695, 698 (Mo. banc 1939)). As this Court has further explained, “[t]he competent juror ‘must be in a position to enter the jury box disinterested and with an open mind, free from bias or prejudice.’”

*Catlett*, 793 S.W.2d at 353 (quoting *State v. Ealy*, 624 S.W.2d 490, 493 (Mo. App. W.D. 1981)).

In this case, there is no serious dispute that Juror Cornell failed to enter the juror box disinterested and with an open mind, free from bias or prejudice. Indeed, as the Court of Appeals concluded, she intentionally failed to disclose during jury selection that her son had died in an automobile accident—despite other potential jurors disclosing much more minor automobile accidents—and that she filed a lawsuit for her son’s death. Slip Op. at 3–4 & n.1. As Judge Francis detailed in his concurring opinion, moreover, Juror Cornell falsely answered “No” under the penalty of perjury to two questions on the juror questionnaire she filled out before the jury selection process that dealt with prior lawsuits and recovery of monies for physical injuries and property damages. *See* Slip Op. at 1–2.

Indeed, Juror Cornell still did not disclose these material issues when the trial court admonished all jurors to do so during the jury selection process:

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

mine whether those might be relevant today in this case. Is there anyone on the panel who has been a party to a criminal or civil court case or lawsuit that you have not already disclosed on the juror questionnaire that was mailed to you ahead of time?

*Id.* at 2 (quoting trial court transcript; alteration added).

If there were any doubt that this nondisclosure were intentional and prejudicial, such doubt would have been put to rest when Juror Cornell approached the Plaintiff-Respondent after the trial, hugged her, and told her that she could relate to what the Plaintiff-Respondent was going through from the death of her husband in an automobile accident because she herself had lost a son in an automobile accident. *See* Tr. Vol. 9, at 41–42 (quoting testimony from one of Appellant’s representatives). Indeed, as the Court of Appeals concluded, “to Plaintiff’s credit, she never even suggests that Juror Cornell’s nondisclosure was anything but intentional, and thus presumptively prejudicial,” and “Plaintiff makes no real effort to overcome” that presumption of prejudice. Slip Op. at 3–4.

In sum, this is a classic case of a juror who was not impartial, thus depriving a party of its constitutional due process right to a fair trial. As this Court has held, “the fair and impartial operation of the jury is a guarantee to which every litigant rightfully makes claim. . . . Only a new trial will preserve inviolate [a litigant’s]

constitutional entitlement to a fair and impartial jury.” *Williams By & Through Wilford v. Barnes Hosp.*, 736 S.W.2d 33, 39 (Mo. banc 1987).

## **II. THIS COURT’S REASONABLE INVESTIGATION RULE FOR JURY SELECTION SHOULD NOT BE READ ATEXTUALLY TO REQUIRE AN UNREASONABLE INVESTIGATION.**

In 2010, the Missouri Supreme Court adopted a rule to allow for all parties in a civil action before a jury to have “an opportunity to conduct a reasonable investigation as to whether a prospective juror has been a party to litigation.” Mo. S. Ct. Rule 69.025(c). The rule further defines “reasonable investigation” to entail “review of the Case.net before the jury is sworn.” *Id.* 69.025(b). Failure to conduct a reasonable investigation results in the waiver of the right to seek relief based on any juror nondisclosure of litigation history. *Id.* 69.025(e).

The Chamber and its members support “reasonable investigation” rules such as this Court’s rule. Such rules encourage litigants to conduct due diligence on potential jurors—thus helping to ensure a fair trial and to avoid the expense of a retrial when juror nondisclosure of publicly available litigation history is discovered after a jury verdict has been reached. The Chamber, moreover, takes no position on

whether Appellant here has waived any claim to juror misconduct as to Juror Cornell's nondisclosure of her extensive litigation history.<sup>1</sup>

The decision of the Court of Appeals, however, did not rest on a party's reasonable investigation into a potential juror's litigation history. Instead, the court correctly concluded that Rule 69.025 did not apply to waive juror nondisclosure of facts *outside* of the juror's litigation history. Slip Op. at 5. In so doing, it adopted the Western District's interpretation that Rule 69.025 addresses and is "expressly related to juror nondisclosure on the topic of *litigation history* only." *Khoury v. ConAgra Foods, Inc.*, 368 S.W.3d 189, 202 (Mo. Ct. App. W.D. 2012) (emphasis in original).

This interpretation of Rule 69.025 is the most natural reading. Indeed, it is the only reasonable reading of arguably unambiguous text. If this Court were to disagree on policy grounds, it should seek to amend the rule and apply such amendment *prospectively*—just like it did when enacting Rule 69.025 itself. *See*

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<sup>1</sup> As the Court of Appeals noted, "the parties did their pretrial Case.net searches from a jury list that misspelled Juror Cornell's name ('Carnell'). A clerk later notified a lawyer from each side of this error just before or after the panelists were seated for voir dire, but no one became aware of what a Case.net search for 'Kimberly Cornell' would have yielded until after the trial." Slip Op. at 5 n.3.

*Johnson v. McCullough*, 306 S.W.3d 551, 558–59 (Mo. banc 2010); *Khoury*, 368 S.W.3d at 202–203. The Court of Appeals, however, offered some compelling policy reasons not to change the rule:

The dissent’s view, naturally and logically extended, would force litigants not merely to check Case.net litigation histories, but to open and examine documents filed in each listed case. Such duty here would have implicated many documents for Juror Cornell alone, let alone all other panelists. It seems more effective and efficient to ask an auto-accident question to the assembled panel, especially when Case.net may not reveal serious accidents involving close relatives or friends, or which occurred outside Missouri, or which did not result in Missouri litigation.

Slip Op. at 5 n.4.

In all events, the rule plainly does not, and should not, apply to Juror Cornell’s intentional nondisclosure of her son’s death in an automobile accident.

### **III. IMPARTIAL JURIES AND FAIR TRIBUNALS ARE OF CRITICAL IMPORTANCE TO THE NATION’S BUSINESS COMMUNITY.**

Businesses often find themselves in court and before civil juries, in disputes against one another and with others. As both plaintiffs and defendants, businesses rely on courts to adjudicate claims and resolve disputes fairly, efficiently, and im-

partially. It is thus of critical importance to the Chamber's members that such tribunals are impartial and that jurors in civil trials "enter the jury box disinterested and with an open mind, free from bias or prejudice." *Catlett*, 793 S.W.2d at 353 (internal quotation marks omitted). Similarly, where courts have imposed "reasonable investigation" duties on parties at the juror selection stage, it is important that the court rules put the parties on fair notice about their rights and responsibilities.

Acts of juror misconduct—such as the intentional juror nondisclosure the Court of Appeals found in this case—cause serious harm to the fair and impartial operation of the civil jury system. The Nation's business community, just like all other parties, deserves to have controversies resolved by impartial adjudicators. The Court of Appeals below correctly concluded that Appellant was deprived of that core constitutional due process right.

## CONCLUSION

For these reasons, the judgment of the trial court should be reversed.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE AND SERVICE**

The undersigned hereby certifies:

1. The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 2,441 words, excluding the cover, this certificate, and the signature block, as counted by Microsoft Word software; and
2. The attached brief includes all of the information required by Supreme Court Rule 55.03; and
3. The attached brief was served by means of the electronic filing system on May 15, 2017, upon Counsel of Record.

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