



During *voir dire*, Johnson's counsel asked about prior involvement in litigation by any venire member. Specifically, counsel asked, "Now not including family law, has anyone ever been a plaintiff or a defendant in a lawsuit before?" Although numerous members of the panel responded affirmatively, a venireperson named "Mims" did not respond to the question and was eventually chosen to sit on the jury.

At the close of a six-day trial, the jury deliberated for forty minutes and returned a verdict in Defendants' favor. Mims signed the verdict. After the trial, Johnson's counsel investigated Mims's civil litigation history using Missouri's automated case record service, CaseNet, and discovered that Mims had previously been a defendant in multiple debt collection cases and in a personal injury case. At least three of the lawsuits against Mims were recent, as they were filed within the previous two years.

Johnson filed a motion for new trial alleging intentional nondisclosure by Mims for failing to disclose prior litigation experience when asked during *voir dire*. The trial court conducted a hearing on the motion. To support his allegation of intentional nondisclosure, the only evidence Johnson presented to the court were the litigation records he discovered on CaseNet. Johnson did not call Mims or any other witnesses to testify at the hearing nor did he obtain an affidavit from Mims to support his argument.

After the hearing concluded, the trial court granted Johnson's motion and ordered a new trial. The court determined that counsel's question during *voir dire*

was clear and unambiguous, and Mims's involvement in prior litigation was recent. As a result, her failure to respond constituted an intentional nondisclosure. The court inferred prejudice from the intentional concealment. The court reached no decision on Johnson's additional arguments in support of his motion for new trial, finding the issue of intentional nondisclosure dispositive. Defendants appeal.

## II. DISCUSSION

On appeal, Defendants set forth three allegations of error. First, they contend that counsel's question during *voir dire* regarding prior litigation experience was unclear, and therefore, there is no issue of nondisclosure because the question did not trigger the juror's duty to respond. Second, Johnson failed to demonstrate Mims's purported nondisclosure was intentional because he did not put forth any evidence to support a finding of intent. Lastly, Defendants contend that Johnson's juror nondisclosure challenge was untimely, as it was brought after Johnson received an adverse verdict following a six-day jury trial.

### I.

Members of the venire have a duty on *voir dire* examination to fully, fairly, and truthfully answer all questions asked of him or her specifically, and those asked of the panel generally, so that his or her qualifications may be determined and challenges may be posed. *Massey v. Carter*, 238 S.W.3d 198, 200-01 (Mo. App. 2007). "The duty to disclose is triggered only after a clear question has been asked." *Id.* at 201. The question asked during *voir dire* must clearly and unambiguously trigger the juror's obligation to disclose the information called for.

***McBurney v. Cameron*, 248 S.W.3d 36, 42 (Mo. App. 2008)**. In reviewing the grant of a motion for new trial based on a claim of juror nondisclosure, this court must first determine, from an objective standpoint, whether the question asked of the prospective juror was sufficiently clear in context to have elicited the undisclosed information. ***Id.*; *Nadolski v. Ahmed*, 142 S.W.3d 755, 765 (Mo. App. 2004)**. Whether a question was sufficiently clear is a threshold-issue that this court reviews *de novo*. ***McBurney*, 248 S.W.3d at 42**.

During *voir dire*, Johnson's counsel asked the veniremembers, "Now not including family law, has anyone ever been a plaintiff or a defendant in a lawsuit before?" Several venirepersons disclosed prior involvement in lawsuits. One venireperson mentioned her involvement as a defendant in a personal injury suit against a limited liability company she owned with her husband. Another venireperson disclosed a "dog-bite" lawsuit where, as a child, her parents sued the dog owner on her behalf. Numerous other venirepersons disclosed lawsuits where they acted as a plaintiff or a defendant. Among the various disclosures were a class action lawsuit, a property dispute, a car accident case, and a discrimination lawsuit. After each individual disclosure, counsel merely asked the responding venireperson whether the experience would affect his or her ability to be a fair and impartial juror on this case. Counsel did not delve further into each venireperson's response. Upon eliciting all of the preceding disclosures, counsel asked, "Now did I miss anyone here? I just want to make sure. No other people that have been, not including family law, a plaintiff or a defendant on any case? Let the record reflect

that I see no additional hands.” Juror Mims remained silent throughout this line of questioning.

Defendants contend that the inquiry at issue was unclear because the phrase “now not including family law” renders the question ambiguous and confusing. “The issue is whether a reasonable venire member *would have* understood what counsel intended.” *Id.* “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.” *Id.* at 46. The record must demonstrate that, from an objective standpoint, the question was clear in the total applicable context. *Id.* Here, the total applicable context does not render counsel’s inquiry unclear. The question generally asked about prior litigation experience and specifically excluded any litigation involving domestic relations. In cases where counsel’s question during *voir dire* regarding prior litigation experience has been deemed unclear, a general question is typically followed or surrounded by more detailed questions “honing in” on specific lawsuits. *Id.* For example, in ***Payne v. Cornhusker Motor Lines, Inc.***, the court found that, taken in context, counsel’s question asking venirepersons to disclose claims made “for personal injuries or monetary damages” did not clearly require disclosure of a property-damage lawsuit in which a venire member was a plaintiff. **177 S.W.3d 820, 842-43 (Mo. App. 2005)**. Additionally, in ***McBurney***, this court determined that, in context, counsel’s general question regarding prior litigation experience was extensively surrounded with questions about personal injury claims and litigation.

**248 S.W.3d at 45.** The majority in *McBurney* could not isolate the general question regarding prior litigation experience from its surrounding context and, thus, could not find that a reasonable venireperson would have understood counsel's general question about prior litigation experience was intended to solicit information about "*all kinds of claims and cases.*" **Id. at 46.**

Here, the inquiry into prior litigation experience is similar to counsel's questioning in *Massey*, where counsel asked generally, "have any of you ever filed a lawsuit?" **238 S.W.3d at 201.** After a venireperson mentioned filing a claim "as a homeowner," and after finding out the venireperson was satisfied with how things were resolved in that case, counsel asked, "Have any of you ever been sued by anyone?" **Id.** The juror in question failed to disclose he had been sued five times in collection lawsuits. **Id. at 200.** The court in *Massey* pointed out that, after the question about having been "sued by anyone," there were no follow-up questions "honing in" on a specific kind of lawsuit, as there was in *Payne*. **Id. at 201.** The court determined that counsel's question "remained a general question." **Id.**

Applying the objective standard of clarity developed in prior case law, this court agrees with the trial court's assessment that the *voir dire* question was reasonably clear and triggered Mims's duty to disclose the multiple debt collection lawsuits against her suit for personal injuries. The question remained a general question and was not rendered confusing or ambiguous by surrounding context. Counsel's question clearly indicated that he was not interested in disclosure of

“family law” disputes. From the standpoint of a reasonable lay person, debt collection lawsuits and suits for personal injuries are not excluded by counsel’s general inquiry into prior litigation experiences. With the question so narrowed, counsel’s question unequivocally triggered Mims’s duty to disclose. *Id.* However, Mims remained silent. Failure to answer a clear question is considered a nondisclosure. *Id.* Accordingly, Defendants’ first point is denied because the trial court correctly determined counsel’s question was reasonably clear.

## II.

After it is objectively determined that the question *was* reasonably clear in context and that a nondisclosure occurred, this court reviews whether the trial court abused its discretion in deciding whether the nondisclosure was intentional or unintentional. *McBurney, 248 S.W.3d at 42.* “An abuse of discretion occurs where the trial court’s ruling is so arbitrary and unreasonable as to shock one’s sense of justice and indicate a lack of careful consideration.” *Nadolski, 142 S.W.3d at 764* (quoting *Duckett v. Troester, 996 S.W.2d 641, 646 (Mo. App. W.D. 1999)*). “A trial court has great discretion in determining whether to grant a new trial.” *Id.* This court is more liberal in upholding a grant of a new trial than in awarding a new trial when the trial court denies the motion. *Id.*

Here, the trial court determined that Mims’s nondisclosure of her involvement in prior litigation was intentional and, therefore, inferred prejudice from her concealment. “The distinction between intentional and unintentional nondisclosure is significant.” *Id.* As the Supreme Court of Missouri explained in.

*Wilford ex rel. Williams v. Barnes*, this distinction determines whether prejudice can be inferred from a nondisclosure. **736 S.W.2d 33, 37 (Mo. banc 1987)**. If the nondisclosure was unintentional, a new trial is not warranted unless prejudice resulted from the nondisclosure. *Aliff v. Cody*, **987 S.W.2d 439, 444 (Mo. App. 1999)**. On the other hand, bias and prejudice is presumed if a juror intentionally withholds material information. *Harlan ex rel. Brines v. Cibis*, **882 S.W.2d 138, 140 (Mo. banc 1994)**. "Questions and answers related to a prospective jurors prior litigation experience are always material." *Nadolski*, **142 S.W.3d at 767**. A finding of intentional concealment of material information has "'become tantamount to a per se rule mandating a new trial.'" *Brines*, **882 S.W.2d at 140 (citation omitted)**.

Prior case law clearly sets forth what is required to find intentional or unintentional nondisclosure. An intentional nondisclosure occurs when the prospective juror has no reasonable inability to understand the question, and when the prospective juror actually remembers the experience or it was of such significance that his or her purported forgetfulness is unreasonable. *Massey*, **238 S.W.3d at 202**. Unintentional nondisclosure occurs when the prospective juror forgets the experience or misunderstands the questions, or when the experience was insignificant or remote in time. *Id.*

Here, the trial court determined that Mims's nondisclosure was intentional because she had "previously been a defendant in multiple collection cases and had been a party in a personal injury case." Because the court found that Mims's nondisclosure was intentional, prejudice was inferred and a new trial ordered. In so

finding, Defendants contend that the trial court abused its discretion, arguing that Johnson failed to put forth any evidence demonstrating Mims's intent to conceal her prior litigation experience. Defendants note that Johnson did not subpoena Mims or any other witnesses to testify at the hearing on the motion for new trial. Nor did Johnson submit an affidavit to the trial court to support his argument that Mims intentionally concealed her prior litigation experiences.

Although Johnson did not provide the trial court with any *direct* evidence explaining why Mims failed to answer the pertinent questions as to a material matter, the trial court's determination that Mims's nondisclosure was intentional is not an abuse of discretion. "The determination of whether concealment is intentional or unintentional is left to the sound discretion of the trial court."

**Williams, 736 S.W.2d at 36.** The record establishes that a nondisclosure occurred, as Mims did not respond to counsel's clearly asked question, and that Mims's involvement in prior litigation is both extensive and recent, as demonstrated by counsel's litigation records search via CaseNet. Defendants cite no case law supporting their argument that either an affidavit or testimony is necessary to support a finding of intentional nondisclosure. In this case, the trial court based its findings on the CaseNet litigation records submitted by Johnson, which demonstrate Mims's involvement as a defendant in numerous lawsuits. In addition, Mims's prior litigation is of recent vintage. At least three of the lawsuits against Mims were filed within the previous two years.

Although the better practice here would have been for the party seeking a new trial to have either deposed Mims, obtained an affidavit, or had her testify, under these facts there was no reasonable inability to understand the question, as several veniremembers provided relevant disclosures of prior litigation experience, and Mims's litigation history was of such significance that forgetfulness is unreasonable, as her experiences were both numerous and recent. The trial court properly found that Mims's nondisclosure was intentional. Because Mims's nondisclosure was intentional, bias and prejudice are presumed. **Brines, 882 S.W.2d at 140.** A finding of intentional concealment of material information has "become tantamount to a per se rule mandating a new trial.'" **Id. (quoting Wilford, 736 S.W.2d at 37).** "Questions and answers related to a prospective jurors prior litigation experience are always material." **Nadolski, 142 S.W.3d at 767.** The trial court, therefore, did not abuse its discretion in finding intentional nondisclosure and ordering a new trial. The point is denied.

### III.

In their third point, Defendants contend that the trial court erred in granting a new trial because Johnson's juror nondisclosure argument was untimely, as it was brought after Johnson received an adverse verdict following a six-day jury trial. In support, Defendants point to **McBurney**, where this court commented in *dicta* on the issue. **248 S.W.3d at 41.**

In **McBurney**, this court noted that the issue of timeliness and waiver was first raised by the Supreme Court of Missouri in **Brines v Cibis, 882 S.W. 2d 138**

(Mo. banc 1994). In *Brines*, plaintiffs appealed an adverse verdict on the basis of one juror's failure to disclose on *voir dire* that he had been a defendant in multiple collection cases. *Id.* at 139. As here, the defendant argued a claim based on litigation history must be raised before submission and, if not, it is untimely and waived. *Id.* at 140. The Court declined to adopt the defendants' argument that an issue regarding prior litigation experience must be raised before submission. *Id.*

This court resurrected the issue in *McBurney*, stating that "the issue may not necessarily be settled forever in view of the technological advances in the thirteen years since *Brines*." 248 S.W.2d at 41. *McBurney* displayed this court's willingness to delve into a claim on the issue of timeliness and waiver, "at least with regard to cases that extend beyond a short time." *Id.* With the relative present day ease of procuring the veniremember's prior litigation experiences, via CaseNet, "[w]e encourage counsel to make such challenges *before* submission of a case whenever practicable." *Id.* at 41 (emphasis added).

Even though this court expressed a willingness to entertain such a claim, there has been no showing that it was *practicable* for either party to have taken time out from trial to have discovered the nondisclosure and revealed it to the court. Moreover, the Supreme Court of Missouri's ruling, as set forth in *Brines*, still controls the issue. The point is denied.

For the foregoing reasons, the judgment of the trial court is affirmed.

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Harold L. Lowenstein, Judge

All Concur.