QUESTIONS OF GENERAL INTEREST AND IMPORTANCE

This case of first impression presents questions of general interest and importance as to the scope of the juror nondisclosure waiver under Rule 69.025 (e). More specifically, this case presents the question of whether nondisclosure by a potential juror during voir dire of information indisputably discoverable on Case.net may serve as the basis for a new trial when a litigant fails to conduct the mandatory "reasonable investigation" required by Rule 69.025(b) until after a verdict is returned.

Inherent to the analysis of this question is a determination by this Court of whether the Majority Opinion's interpretation of "litigation history," as including only the list of cases and not the other case information readily available on Case.net, is inconsistent with the plain language and purpose of Rule 69.025 as articulated by this Court in *Johnson v. McCullough*, 306 S.W.3d 551 (Mo. banc 2010).

APPLICATION FOR TRANSFER

Comes now Respondent Sherry Spence and pursuant to Rule 83.04 moves this Court to transfer this cause from the Court of Appeals to the Supreme Court of Missouri for final determination of the issues presented.

Statement of Facts

On October 20, 2012, Scott Spence was killed in a collision with a BNSF train at an unguarded crossing in Pemiscot County. His widow brought a claim for his wrongful death. Prior to voir dire, counsel for both parties were notified by the Deputy Circuit Clerk that the name of one potential juror had been misspelled and that her name was C**o**rnell rather than C**a**rnell.[1] Contrary to Rule 69.025(b), even though it knew the correct spelling of her name, BNSF did not do a Case.net search of Ms. Cornell before the jury was sworn. Instead, it waited until after the verdict was returned to conduct its search.

At trial the jury returned a verdict for Plaintiff, awarding her damages of $20 million. After making a reduction for the 5% fault assessed to decedent, the trial court entered judgment for Plaintiff in the amount of $19 million. On appeal, BNSF has not challenged the amount of the verdict or the sufficiency of the evidence to support the jury's assessment of fault. Instead, based on its post-trial Case.net search, BNSF claimed prejudice by Ms. Cornell's alleged intentional nondisclosure during voir dire of her

[1] At a hearing on the post-judgment motions, BNSF presented evidence disputing the testimony of the Deputy Circuit Clerk, but the trial court resolved that issue by finding the the Clerk's testimony to be credible.

litigation history and of an auto accident resulting in the death of her son. Plaintiff maintained that BNSF waived its right to claim nondisclosure because it failed to conduct a timely Case.net search of Ms. Cornell. Plaintiff also argued that the questions asked about accident history were insufficiently clear to trigger a duty to respond thereto. The trial court denied BNSF's Motion for New Trial based on its claim of nondisclosure.

On these facts, the Majority Opinion of the Court of Appeals reversed the judgment of the trial court, finding that BNSF's failure to do a timely Case.net search did not waive its right to claim juror nondisclosure of the information about the auto accident involving Ms. Cornell's son. At issue was the applicability of Rule 69.025, which provides, *inter alia*: "A party waives the right to seek relief based on juror nondisclosure if the party fails . . . to . . . [c]onduct a reasonable investigation . . . ." (Rule 69.025(b) says a reasonable investigation "means review of Case.net before the jury is sworn.") The Court based its determination that BNSF had not waived any complaint of nondisclosure on its interpretation of Rule 69.025, which the Court held applies to "juror nondisclosure . . . of litigation history only" and does not require review of instantly accessible information contained in the litigation history. Slip Op. at *5.

Legal Basis for Transfer

This case involves the first authoritative interpretation of the proper scope of Rule 69.025 since its adoption. Plaintiff respectfully submits it is thus highly appropriate for transfer so this Court can clarify what Rule 69.025(b) means when it requires a "review of Case.net." Does the rule require a Case.net search only for the ***existence*** of litigation history, or for ***all*** information easily available on Case.net? Further, this case presents the

question of whether, absent the Case.net review, Rule 69.025 allows a party to seek a new trial based on juror nondisclosure when the information the question sought to elicit would have been discovered by the reasonable investigation required by Rule 69.025.

Appellate Court Decision Contrary to Purpose of Rule 69.025

It is no secret jurors are often inaccurate historians during voir dire, whether through misunderstanding, inattention, or deceit. In 2010, this Court recognized that Case.net allowed litigants the opportunity to obtain useful information to explore potential bias ***before*** selecting the panel. *Johnson v. McCullough*, 306 S.W.3d 551, 558-59 (Mo. banc 2010). This recognition led the Court to adopt Rule 69.025. The appellate court decision narrowly limits Rule 69.025 and frustrates the salutary policy underlying its adoption: Avoiding unnecessary retrials**.**

The Majority Opinion has the (surely unintended) effect of encouraging litigants to willfully ignore relevant information available on Case.net and requires a retrial if that same information is not disclosed in voir dire. As noted by Judge Rahmeyer at page 3 of her dissent, the Majority Opinion puts at issue the efficacy of Rule 69.025 as an anti-sandbagging measure and returns both litigants and reviewing courts to a time of "uncertain and incongruous results" that led to the adoption of Rule 69.025. *See Johnson*, 306 S.W.3d at 558-559.

The basis for the Majority's concern seems to rest on its apprehension that it is burdensome to "force litigants not merely to check Case.net litigation histories, but to open and examine documents filed in each listed case." Slip Op. at *5, n.4. But this concern overlooks a comparison of the relative burdens between a simple Case.net search and retrial

of an eight-day case. Performing a search that only requires a click on a hyperlink is a relatively light burden that falls only on the litigants. In contrast, the duplication of time, money, and other resources that a retrial would consume is an exponentially greater burden, borne not only by the litigants but by the many other people directly or tangentially involved in the retrial. Here, significant time, effort, and money were put into the eight-day trial by the parties, trial judge, court personnel, the 14 jurors, and everyone participating in the trial, from experts to fact witnesses. Placing the burden on litigants comports with the declaration in *Johnson*, 306 S.W.3d at 559, that:

> [I]t 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.

Indeed, when assessing potential jurors, a litigant should desire to know not only whether a potential juror has been involved in a case, but what kind of case was involved. A "Litigant Name" search on Case.net will provide a list of all cases associated with that person, and includes information such as the "Case Type." According to post-judgment filings by Defendant, Ms. Cornell did not answer questions on a juror questionnaire asking if she had ever been a party to a lawsuit, despite the fact that BNSF's post-trial Case.net search revealed that she was a party to nine different lawsuits, including collection cases,

an adult abuse case, and a wrongful death case (arising out of her son's car wreck).[2] If BNSF's counsel had done a timely Case.net search of Ms. Cornell, showing that: (a) she had failed to disclose her litigation history, and (b) her Case.net history included, under "Case Type," a ***wrongful death case***, is it conceivable that a lawyer defending a major wrongful death case would not explore that particular case further? Is it plausible that the lawyer who saw such information would ***not*** ask the trial court to question Ms. Cornell about why she failed to provide such information, Rule 69.025(d)?

Not according to BNSF. In its post-judgment pleadings that BNSF averred that:

> Had Ms. Cornell told the truth on her questionnaire, ***or had BNSF been provided accurate information[3] 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.

Obviously, the distinction between nondisclosure of litigation history and nondisclosure of the accident would make no practical difference to BNSF because by learning that Ms. Cornell sued for her son's death in a car wreck, BNSF would necessarily

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[2] Although BNSF sought a new trial for Cornell's nondisclosure of her litigation history, its offer of Case.net records to prove that history established that a timely Case.net search would have revealed its existence before the jury was sworn.

[3] Recall, the trial court ultimately resolved this factual issue *against* BNSF, *see* n. 1, *supra*.

have learned that her son was ***involved in an accident***. In other words, the Case.net search not done by BNSF would have provided information about the accident, despite Ms. Cornell's failure to respond to the accident questions in voir dire.

To the extent that the Majority Opinion is a reaction to its finding that Ms. Cornell intentionally concealed information in response to a clear question, that is the wrong focus. Rule 69.025 makes no distinction between intentional or unintentional nondisclosures, partial nondisclosures, or inaccurate disclosures. The plain language of the Rule and the problem it was trying to solve does not make the nature of the juror nondisclosure—intentional or unintentional—relevant. Following adoption of the rule, the critical threshold question is, simply: Could the undisclosed information have been discovered by a reasonable investigation, i.e. by a Case.net search? If it could, then failure to make such a search precludes a party from seeking relief based upon the nondisclosure. Thus, the trial court will only decide if a nondisclosure was intentional when the error has been properly preserved.

Appellate Court's Reliance on Khoury *is Flawed*

The Court of Appeals found that BNSF's failure to do a Case.net search about Ms. Cornell did not waive its right to seek relief for juror nondisclosure by quoting *Khoury v. ConAgra Foods, Inc.*, 368 S.W.3d 189, 202 (Mo.App. W.D. 2012), for the proposition that Rule 69.025 "addresses and expressly relates 'to juror nondisclosure on the topic of *litigation history* only.'" Slip Op. at *5 (emphasis in original). This reliance on *Khoury* as precedent is unsound. The trial in *Khoury* occurred ***before*** Rule 69.025 took effect and involved information obtained from Facebook postings (that cannot be found in a Case.net

search), 368 S.W.3d at 202 n.12. For that reason, *Khoury's* pronouncement about the scope of the rule is dicta and has no precedential value. *Parker v. Bruner*, 683 S.W.2d 265 (Mo. banc 1985); *Swisher v. Swisher*, 124 S.W.3d 477, 482 (Mo.App. W.D. 2003).

More importantly, it is *dicta* taken out of the context of the *Khoury* opinion in which the court correctly noted that Rule 69.025 "limits the dictates of required background Internet searches on potential jurors to Case.net searches." 368 S.W.3d at 202 n.12. But the rule itself says nothing about limiting the ***review*** of Case.net searches to litigation history, an issue not before the *Khoury* Court. A different question is presented in the case *sub judice*. Unlike *Khoury*, the matter that BNSF claims Ms. Cornell had a duty to disclose—the wreck that killed her son—could be, and ultimately was, discovered by conducting a review of information available on Case.net before the jury was sworn.[4] Moreover, *Khoury's* dicta is contrary to the plain language of the rule, which speaks of waiver of "the right to seek relief based on juror nondisclosure"; it does ***not*** describe "the right to seek relief based on juror nondisclosure ***of litigation history*** . . . ."

Implications for Future Cases

This is an area where the law interpreting the meaning of Rule 69.025 is in its infancy; no prior cases have discussed the proper scope of the review required by the rule. Plaintiff would submit that the Majority Opinion's narrow construction of Rule 69.025 is contrary to Rule 41.03, which says, "Rules 41 to 101, inclusive, shall be construed to secure

[4] BNSF filed Case.net materials from the death case with the trial court as an attachment to its Motion for New Trial.

the just, speedy and inexpensive determination of every action." It also overlooks cases holding that the meaning of Supreme Court Rules is ascertained by "applying the same principles used for interpreting statutes," including the canon that this Court's intent is determined by applying "the plain language of the rule at issue." *In re Hess*, 406 S.W.3d 37, 43 (Mo. banc. 2013). Finally, a narrow construction of Rule 69.025 subverts the requirement that this Court's rules are to be construed "in the 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. S.D. 1970). In that regard, a narrow construction of the rule is contrary to the mandate of *Johnson*, the case animating adoption of Rule 69.025, that directed litigants to use reasonable efforts to examine litigation history on Case.net and "present to the trial court ***any relevant information*** prior to trial**.**" 306 S.W.3d at 559. Plaintiff would submit that "any relevant evidence" means ***any*** evidence that may help a trial court avoid a retrial.

Johnson represented an effort to significantly reduce the incidence of avoidable retrials in Missouri courts, recognizing, as had other Courts, 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) (internal quotation marks and citations omitted; emphasis added). Avoiding retrials by simple measures—like doing a Case.net search that would show Ms. Cornell had a son killed in a car 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).

Future litigants and their counsel need answers to these questions:

1) Does Rule 69.025 charge litigants with knowledge of all information that could be easily acquired by a Case.net search, or does the rule only require parties to determine whether cases associated with a potential juror appear in Case.net?
2) May counsel elect not to perform a Case.net search and still preserve the right to a new trial based on information that appears in Case.net, but is not disclosed by a juror in voir dire, if the information can be characterized as something other than "litigation history"?
3) Does Rule 69.025 apply only to voir dire questions on whether jurors have been litigants, or does the Rule apply to ***all*** voir dire questions that could be answered by conducting the required Case.net search?

This case implicates profoundly important issues as to the scope of Rule 69.025, making transfer singularly appropriate so that this Court can provide clear guidance to bench and bar on how to satisfy the requirements of the rule.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 2nd day of February, 2017 the foregoing Application for Transfer and all attachments were served by electronic mail to the following counsel of record:

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