OA - 12-7-94 017

IN THE
SUPREME COURT OF FLORIDA

LOURDES DE LA ROSA,

Petitioner,

-vs.- CASE NO. 83,369

MARCOS A ZEQUEIRA,

Respondent.
_____/

ON REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA FOR THE THIRD DISTRICT

REPLY BRIEF OF PETITIONER LOURDES DE LA ROSA

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Introductory

The issue presented for decision in this case has been squarely joined. There is remarkable agreement between the parties both as to the operative facts and as to the legal principles which should govern the disposition of this appeal.

Where the parties disagree is with regard to how the law should be applied to the specific facts involved. Otherwise, the Initial Brief and the Answer Brief appear to be in harmony on the following matters:

(A) The only issue presented in this appeal is whether a juror's non-disclosure during voir dire of his or her prior involvement in litigation can be sufficient to support the granting of a new trial. Compare Initial Brief at 1 with Answer Brief at 2.

(B) A new trial based upon juror concealment should be granted when there has been (1) a material (2) concealment of some fact during voir dire and (3) the failure to discover the concealment is not due to want of diligence on the part of the complaining party. Compare Initial Brief at 10 with Answer Brief at 10.

(C) In this case, Juror Edmonson failed to respond to questions addressed to the jury panel concerning prior involvement in litigation despite the fact that Mr. Edmondson had been a party to litigation at least six times in the past. In general, the Initial and the Answer Briefs are in accord with respect to the pertinent facts. Compare Initial Brief at 1 to 7 with Answer Brief at 2 to 6.

(D) The standard of review applicable to an Order granting a new trial is abuse of discretion. On appeal, such an Order carries with it a presumption of correctness. Compare Initial Brief at 20 to 21 with Answer Brief at 26.

Thus, the parties to this appeal largely agree as to both the facts and the law. Disagreement arises only with regard to how the law should be applied in this instance. In this regard, the Answer Brief argues that Juror Edmonson's concealment of his litigation history was not of material importance in the selection of the jury; that Juror Edmonson may not have intentionally concealed anything at all and that counsel for Mrs. de la Rosa was not diligent in his questioning of the jury panel.

The Answer Brief is wrong on all three points, for reasons set forth in greater detail below.

II

The Facts Concealed by Juror Edmonson Were Material

In an attempt to demonstrate that the information withheld by Juror Edmonson was not material, the Answer Brief resorts to mischaracterization and faulty reasoning. It continually refers to Mr. Edmonson's litigation history as merely an involvement in a series of "collection actions," as if legal proceedings to recover upon a contractual obligation are not very serious or do not really implicate the judicial system at all.

In realty, Juror Edmonson had a long, and generally unhappy, record of being sued by his creditors for defaulting upon his legal obligations. He was sued by his wife for the dissolution of their marriage. He was even sued by his own lawyers. The record clearly indicates that Juror Edmonson's prior involvement with the legal system had not been a terribly pleasant experience for him.

What counts is not the magnitude of the cases filed against him or even the nature of the actual lawsuits. What counts in this context is that Juror Edmonson intentionally remained silent when he had an affirmative duty to speak. Mr. Edmonson's silence did two things. First, it cut off all opportunity for counsel to inquire further and to elicit Mr. Edmonson's thoughts about the courts, the legal system and his own experience and feelings about each. Second, it raised a rebuttable presumption that the information

withheld was material to counsel's decision-making about the composition of the jury.

Mr. Edmonson's act of concealment distorted the process itself. By refusing to answer, Mr. Edmonson made it impossible for counsel on either side to determine whether or not he could serve as a juror and discharge that responsibility in a dispassionate and even-handed manner.

That is why the Answer Brief is so unfair when it smugly notes that "we have no idea what Juror Edmonson feels about any of these issues because nobody ever asked him." Answer Brief at 19. In fact, somebody did ask him, and Juror Edmonson failed to respond. As a consequence, it was the wrongful act of Mr. Edmonson himself which has caused the parties to be ignorant of his inner feelings and possible prejudices.

Hence, silence in response to direct questioning during voir dire is worse than a false answer. It leaves the parties with no information concerning the potential biases and prejudices of the juror involved. It deprives counsel of the facts necessary to make considered judgments about the use of challenges. It also makes it possible for litigants like Dr. Zequeira to raise the possibility that the question was never heard or was misunderstood.

And it enables arguments to be made which unfairly invert the burden of proof. Time and again, the Answer Brief demands that Mrs. de la Rosa prove a negative. Mrs. de la Rosa, however, cannot prove that Juror Edmonson was prejudiced against her on the basis of his

silence. Mrs. de la Rosa cannot prove that Juror Edmonson was listening to the questions because he gave no indication one way or the other. Mrs. de la Rosa can never show that Juror Edmonson thought a divorce "proceeding" was not a "lawsuit" or that "he considered his minor involvement in collections actions not to be pertinent or responsive to the questions posed by Plaintiff's counsel..." Answer Brief at 13.

All the parties can do at this point is speculate, as the Answer Brief does extensively in an effort to minimize or explain away Mr. Edmonson's conduct. In reality, no one can ever know. That is justification enough for the creation of a presumption that Mr. Edmonson decided to conceal his prior involvement in litigation precisely because it was material.

Many courts have adopted such a standard when dealing with a juror's failure to respond to questioning during voir dire. The most pertinent example is Missouri.

The Answer Brief relies upon a Missouri case (at page 19 n.11) for the proposition that "courts in other jurisdictions" "have long required some type of 'similarity' between the type of 'concealed' information and the cause of action involved in a given case..." Answer Brief at 19. The cited case is from the Missouri Court of Appeals: Alexander v. F.W. Woolworth Company, 788 S.W.2d 763 (Mo. Ct. App. 1990).

What the Answer Brief fails to disclose is that Alexander was overruled four years later by the Missouri Supreme Court, sitting

en banc, in the case of Brines v. Cibis, 882 S.W.2d 138 (Mo. 1994). Brines spoke to the issue of "similarity," and it had this to say:

> [Q]uestions and answers pertaining to a prospective juror's prior litigation experience are material. The fact that a prospective juror has been sued as a defendant or has prosecuted cases as a plaintiff may cause the juror to be predisposed to defendants or to plaintiffs, as the case may be. The possibility of that predisposition makes the questions and answers material.

Brines, 882 S.W.2d at 140.*

Both the federal and the Florida courts are in accord. A juror's concealment of his or her prior involvement in litigation is generally held to be material in virtually all instances. It indicates direct experience with the legal system and, thus, probable opinions concerning its fairness and efficiency. In addition, the act of concealment is a material event in and of itself because it denies to counsel the ability to carry out an effective trial strategy.

In this appeal, "[i]n this post-mortem inquiry, we cannot know of course what counsel would have done with the suppressed information. Nor can we take his post-mortem word for it. But we need not presume to speculate on the judgment he would have made. It is enough, we think, to show probable bias of the jurors and prejudice to the unsuccessful litigant if the suppressed information

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*For the Court's convenience, a copy of Brines is attached as an Appendix.

was of sufficient cogency and significance to cause us to believe that counsel was entitled to know of it when he came to exercise his right of peremptory challenge. If so, the suppression was a prejudicial impairment of his right." Photostat Corporation v. Ball, 338 F.2d 783, 787 (10th Cir. 1964).

III

Juror Edmonson Intentionally Concealed Material Information

Once again, the Answer Brief seizes upon the fortuity that the juror misconduct at issue in this case consists of silence (rather than the telling of a falsehood) to support an elaborate web of speculative excuses for Juror Edmonson's actions. "[H]e might not have been paying attention, and thus did not hear the questions." Answer Brief at 12. "It is reasonable to assume that Juror Edmonson may not have considered himself to be a 'party' to these collection actions." Answer Brief at 18. "Juror Edmonson may have had a very good explanation for why he did not respond to the question as phrased." Answer Brief at 22. Or, conceivably, he suffered a minor stroke at the instant the question was posed. Or he had a transient out-of-the-body experience which temporarily removed him from the courtroom. Or it simply slipped his mind that he had been sued six times, had his wages garnished, been sued for divorce by his wife and had default judgments entered against him.

The questions posed by Mrs. de la Rosa's counsel could not have been more exact and to the point: "Has anyone on the panel

themselves been involved in a lawsuit...whether its been for personal injury, a commercial dispute where you have been involved in litigation?" TR-176. "Anyone else that has been involved in a lawsuit?" TR-177 to 178.

To assert that Juror Edmonson's failure to respond is merely the product of his misunderstanding the questions or attributable to his poor hearing is to defy reason. Worse, it necessarily imposes upon Mrs. de la Rosa the impossible task of proving the motivations underlying silence when there has been a failure to communicate in the first place. The Answer Brief essentially demands that Mrs. de la Rosa proffer evidence to show that there is no evidence: "For a trial court to exercise his or her discretion on a motion for new trial premised upon possible juror misconduct, it is crucial to have actually observed the juror." Answer Brief at 25 (emphasis in original). In this case, that crucial observation would have consisted of the trial court watching Mr. Edmonson not responding; i.e., doing nothing!

The law is exactly the opposite. It has never been required for a complaining party to prove malice or even purposefulness on the part of a non-responding juror. New trials have been ordered even when information is withheld inadvertently and because of an innocent misunderstanding:

> None of the jurors in our case or any of their immediate families were or had been plaintiffs in a pending suit. On the record, their involvement in automobile accidents with resultant claims were inadvertently withheld

> due to a misunderstanding of the questions on voir dire. But the information was withheld through no fault of the unsuccessful litigant. But it did involve experiences of these jurors which gave rise to claims for damages and for which they were paid. When these experiences are considered separately or in totality, we think they were of such nature and gravity as to generate an attitude of probable bias in favor of the plaintiff and against the defendant's case. In any event, we have no doubt that counsel was entitled to know about them.

Photostat Corporation v. Ball, 338 F.2d 783, 787 (10th Cir. 1964).

IV

Counsel for Mrs. de la Rosa Was Diligent In Attempting to Obtain the Truth

As even the Answer Brief recognizes, the diligence required of counsel is the diligence necessary to ask the right questions: "the 'due diligence' prong of the Skiles test has typically been utilized to determine whether the questions posed by counsel during voir dire were sufficiently particularized to have elicited the specific information alleged to have been concealed..." Answer Brief at 25. Thus, a party may not complain about answers not given to questions never asked.

In this instance, there can be no responsible doubt but that Mrs. de la Rosa's counsel specifically asked the jury panel--not once but repeatedly--for any information about their prior involvement in litigation. In other words, the diligence requirement was fully met in this case.

The Answer Brief, however, would broaden the scope of the "due diligence" required and erect additional hurdles in front of a complaining litigant. The Answer Brief asks this Court to impose a new requirement that a juror interview be conducted in all instances as an inflexible precondition to the granting of a new trial.

This both misses the point and is wrong. Prejudice and bias are not the only concerns at issue. What is also important to preserve is the integrity of the jury selection process. Thus, counsel might well decide to challenge a juror on the strength of facts concealed, even if prejudice is not readily apparent and is later specifically disclaimed in a juror interview. Post-trial inquiries cannot repair the damage done to counsel's pre-trial decision-making. The ultimate revelation of concealed information does not turn the clock back and enable counsel to exercise a peremptory challenge that was not used and which no longer even exists.

In any event, a juror who willfully conceals material information during voir dire is likely to be a juror who will strenuously deny any prejudice under oath. How many examples will there be of jurors eagerly testifying that they have been biased and partisan in carrying out their responsibilities? How many jurors will testify to that effect after they have been asked in voir dire whether they know of any reason why they should not serve? A juror

interview in such a circumstance is likely to be a complete waste of time.

That is why the law does not require a showing of actual prejudice. It is sufficient that information be withheld in response to questioning and that the information be material. Evidence to that effect is enough to justify a new trial in all instances.

A juror interview may be helpful in obtaining testimony or in resolving disputes or conflicts in the evidence. It is, however, only one mechanism for establishing the truth. Where there is sufficient evidence of a juror's material concealment which has been obtained from other sources, an interview should not be required. There is no reason to exalt one method of fact-finding over all others.

The Answer Brief insinuates that the efforts of Mrs. de la Rosa's counsel at uncovering the truth were actually a litigation stratagem employed in all cases "where a plaintiff does not prevail at trial." Answer Brief at 28. This statement is made with absolutely no record support and is, in fact, not correct. There was a specific reason why Juror Edmonson was the only juror in this case whose public records were researched, but Ms. de la Rosa will not follow the Answer Brief's practice of reciting facts that do not appear of record.

Otherwise, there is no good reason why such an investigation must be carried out during trial or be forever waived, as the Answer

Brief urges. While Rule 1.431(h) of the Florida Rules of Civil Procedure contemplates that most post-verdict juror interviews will be requested within ten days following trial, it also recognizes that there will be situations where adherence to such a timetable would be impossible and it allows for exceptions. Juror misconduct is, at its core, such a fundamental corruption of the judicial process that its existence should not be excused simply because the jury has been discharged.

Otherwise, the advantage will be given to large law firms that can afford to devote time and money to juror research in the midst of trial. The sole practitioner will not have a chance. Lengthy trials will also be favored in preference to shorter judicial proceedings. Justice will not be done.

The trial court correctly held that Juror Edmonson had withheld material information during voir dire and in response to specific questions designed to elicit the substance of the facts concealed. It exercised its broad discretion to order a new trial. The Court of Appeal erred when it decided to substitute its judgment for that of the trial court and when it imposed new and additional requirements that have previously been unknown to the law of juror misconduct.

The judicial process works when it delivers justice derived from the facts and law applicable to each particular case. In the normal course of events, an unsuccessful litigant may feel disappointed and may disagree strongly with the ultimate outcome,

but he or she cannot claim that justice was rendered without an opportunity to be heard, to present evidence, to argue the law and to know that a decision was made based upon the merits of the controversy as presented in court and not upon bias, prejudice, interest or greed.

What interferes with that process interferes with the very fabric of justice. When decisions are made on the basis of extra-judicial influences, then the system itself loses a part of its value and much of its credibility.

It is wise to keep up appearances. It is not enough for the legal process merely to dispense justice; it must be perceived as dispensing justice. Mrs. de la Rosa should feel that her case was decided on the merits alone and not by a juror's prejudice. To meet that objective requires a new trial.

CONCLUSION

Petitioner Lourdes de la Rosa respectfully submits that the judgment and decision of the Court of Appeal for the Third District should be reversed with directions to remand this case to the Circuit Court for a new trial.

Respectfully submitted,

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APPENDIX

Sheila Rene BRINES, By and Through Her Next Friend Roxana Kim HARLAN, Appellant,
v.
Gerhard W. CIBIS, M.D., et al., Respondents.

No. 76592.

Supreme Court of Missouri,
En Banc.

Aug. 15, 1994.

Rehearing Denied Sept. 20, 1994.

In medical malpractice action alleging negligent care and treatment of minor patient's congenital glaucoma, the Circuit Court, Jackson County, Gene R. Martin, J., entered verdict in favor of physicians. Patient appealed. The Court of Appeals, 784 S.W.2d 201, reversed and remanded for new trial. On remand, the Circuit Court, Jon R. Gray, J., entered verdict in favor of physicians, and patient again appealed. Transfer was granted. The Supreme Court, Limbaugh, J., held that: (1) juror's silence when asked by trial judge whether anyone on jury panel was or had been defendant in lawsuit constituted intentional nondisclosure on material issue; (2) inquiry into prejudice from material nondisclosure was precluded; and (3) patient was not required to investigate whether prospective juror had answered questions truthfully unless patient had some indication that answer was false.

Reversed and remanded.

Holstein, J., filed opinion dissenting in which Covington, C.J. concurred.

[1] JURY ⇐ 131(18)
230k131(18)
Nondisclosure, whether intentional or unintentional, can occur only after clear question is asked on voir dire.

[2] JURY ⇐ 131(18)
230k131(18)
Juror's silence when asked by trial judge whether anyone on jury panel was or had been a defendant in lawsuit constituted intentional nondisclosure on material issue, where juror had previously been sued eight times; question unequivocally triggered prospective juror's duty to disclose previous lawsuits against him.

[3] JURY ⇐ 131(18)
230k131(18)
Trial court abused its discretion in finding that juror's nondisclosure during voir dire of medical malpractice action of fact that he had been defendant in lawsuits eight times was unintentional; juror understood that he was being asked to reveal any lawsuits against him, all of lawsuits were of recent vintage, juror recalled lawsuits, and juror's explanation for his silence, that prior lawsuits did not "pop into" his head, was unreasonable.

[4] APPEAL AND ERROR ⇐ 968
30k968
Trial court's findings regarding whether juror's explanation for nondisclosure during voir dire is reasonable are given great weight and will not be disturbed on appeal unless trial court abused its discretion.

[5] JURY ⇐ 131(18)
230k131(18)
Only where juror's intentional nondisclosure does not involve material issue, or where nondisclosure is unintentional, should trial court inquire into prejudice; overruling Alexander v. Woolworth, 788 S.W.2d 763 (Mo.App. 1990); Washburn v. Medical Care Group, 803 S.W.2d 77 (Mo.App. 1990); Beeks V. Hierholzer, 831 S.W.2d 261 (Mo.App. 1992).

[5] JURY ⇐ 149
230k149
Only where juror's intentional nondisclosure does not involve material issue, or where nondisclosure is unintentional, should trial court inquire into prejudice; overruling Alexander v. Woolworth, 788 S.W.2d 763 (Mo.App. 1990); Washburn v. Medical Care Group, 803 S.W.2d 77 (Mo.App. 1990); Beeks V. Hierholzer, 831 S.W.2d 261 (Mo.App. 1992).

[6] JURY ⇐ 131(18)

230k131(18)
Regarding intentional nondisclosure of prospective juror, questions and answers pertaining to prospective juror's prior litigation experience are material; fact that prospective juror has been sued as defendant or has prosecuted cases as plaintiff may cause juror to be predisposed to defendants or to plaintiffs.

[7] JURY ⇐ 142
230k142
While litigant who is privy to information regarding prospective juror's false answer or nondisclosure during voir dire waives any right to complain after trial by failing to challenge juror when information was obtained, litigant is not required to investigate whether prospective jurors have answered questions truthfully unless litigant had some indication that answer was false.

Gary C. Robb, Kansas City, for appellant.

William L. Yocum, Kansas City, for respondents.

LIMBAUGH, Judge.

This appeal arises from an action brought on behalf of Sheila Brines, a minor, against Gerhard Cibis, M.D., and King Lee, M.D., for alleged negligence in the care and treatment of Brines' congenital glaucoma. A jury returned a defendant's verdict by a 9-3 vote, and the trial court entered judgment accordingly. Brines appealed to the Court of Appeals, Western District, 784 S.W.2d 201; thereafter, this Court granted transfer. The judgment is reversed.

Brines argues that the trial court erred in overruling her motion for a new trial because a juror who voted in favor of the defendants intentionally failed to disclose at voir dire that he had been sued on eight previous occasions. Williams v. Barnes Hospital, 736 S.W.2d 33 (Mo. banc 1987), states Missouri's test to distinguish between intentional and unintentional nondisclosure:

> 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. (Citations omitted.)
> Unintentional nondisclosure exists where, for example, the experience forgotten was insignificant or remote in time, ... or where the venireman reasonably misunderstands the question posed,.... (Citations omitted.)

Id. at 36.

[1][2] Nondisclosure, whether intentional or unintentional, can occur only after a clear question is asked on voir dire. Wingate v. Lester E. Cox Medical Center, 853 S.W.2d 912, 916 (Mo. banc 1993). During jury selection, the trial judge asked: "Do we have anyone on the [jury] panel who is now or has been a defendant in a lawsuit?" This question unequivocally triggered the prospective jurors' duty to disclose previous lawsuits against them. The juror in question remained silent even though he had been a defendant in eight lawsuits. His silence establishes nondisclosure.

[3] Whether the nondisclosure was intentional or nonintentional is more problematic. At the post-trial proceeding on the motion for a new trial, the juror acknowledged that he had been sued eight times and that on each occasion he received a personal summons. All of the lawsuits were filed within the previous six years. Seven of the eight lawsuits were brought by doctors to collect for medical services; the other was brought by an insurance company claiming damages due to an automobile accident in which the juror was involved. When the juror was asked, "And at that time [jury selection] ... you knew that you had been a defendant in at least the eight lawsuits that we discussed, correct?", the juror responded, "I knew that I had been sued by doctors, yes." When asked to explain his silence, the juror testified, "It just didn't click"; "It just didn't connect"; the prior lawsuits simply did not "pop into" his head.

[4] After the post-trial proceeding, the trial judge entered the following findings: "Upon the whole of the circumstances, the court finds [the juror's] explanation for non-disclosure of the several collection lawsuits to be honest, cogent and reasonable and accordingly concludes that said non-disclosure was unintentional." These findings are given great weight and will not be disturbed on appeal unless the trial court abused its discretion. Anglim v. Missouri Pacific R.R., 832 S.W.2d 298, 306 (Mo. banc 1992). In this case, however, the evidence did not support the trial court's findings. Given that the juror understood that he was being asked to reveal any lawsuits against him, that all the lawsuits were of recent vintage, and that he actually recalled the lawsuits, the explanation for his silence was unreasonable. Therefore, the trial court abused its discretion in finding unintentional nondisclosure.

***140** [5] Citing several Court of Appeals opinions, Doctors Cibis and Lee argue that "[if] a party fails to prove prejudice, a new trial is not warranted, regardless of whether the juror's nondisclosure is intentional or unintentional." See Alexander v. F.W. Woolworth, 788 S.W.2d 763 (Mo.App.1990); Washburn v. Medical Care Group, 803 S.W.2d 77 (Mo.App.1990); and Beeks v. Hierholzer, 831 S.W.2d 261 (Mo.App.1992). In Williams, however, this Court rejected a requirement that a party prove prejudice if the intentional nondisclosure involved a material issue. "Having found intentional concealment, bias and prejudice must be presumed to have influenced the verdict." Williams, 736 S.W.2d at 38. Noting the importance of full juror disclosure, this Court held that "[i]f a juror intentionally withholds material information requested on voir dire, bias and prejudice are inferred from such concealment. For this reason, a finding of intentional concealment has 'become tantamount to a per se rule mandating a new trial.' " (Citations omitted.) Id. at 37. Only where a juror's intentional nondisclosure does not involve a material issue, or where the nondisclosure is unintentional, should the trial court inquire into prejudice. Id. at 37. To the extent that Alexander, Washburn, and Beeks hold otherwise, they are overruled.

[6] Although none of the parties expressly address the materiality aspect of the intentional nondisclosure, questions and answers pertaining to a prospective juror's prior litigation experience are material. The fact that a prospective juror has been sued as a defendant or has prosecuted cases as a plaintiff may cause the juror to be predisposed to defendants or to plaintiffs, as the case may be. The possibility of that predisposition makes the questions and answers material.

[7] Finally, Doctors Cibis and Lee contend that Brines should be barred from claiming juror nondisclosure because Brines did not exercise "due diligence" in discovering the nondisclosure. Specifically, they argue that "by using due diligence, [Brines] could have learned well before the jury began its deliberations that [the juror] had been sued." If the juror were then challenged and removed, the need for a new trial could have been avoided.

This "due diligence" proposal, as we perceive it, is designed to prevent "sandbagging" so that litigants cannot reserve objections to errors that are curable during trial. This Court, however, has already fashioned a rule that adequately addresses that concern. A litigant who is privy to information regarding a prospective juror's false answer or nondisclosure waives any right to complain after trial by failing to challenge the juror when the information was obtained. Cook v. Kansas City, 358 Mo. 296, 214 S.W.2d 430, 433 (1948). This rule does not, however, require that a litigant investigate whether the prospective jurors have answered the questions truthfully unless the litigant had some indication that the answer was false. See Jay M. Zitter, Effect of Juror's False or Erroneous Answer on Voir Dire Regarding Previous Claims or Actions Against Himself or His Family, 66 A.L.R.4th 509 (1988) (compiling cases where attorney having reason to believe that jurors' answers were false had duty to investigate). Although this Court wrote of a "due diligence" requirement in Woodworth v. Kansas City Public Service Co.,

274 S.W.2d 264 (Mo.1955), it actually rejected a duty to investigate prospective juror's answers. The "due diligence" referred to in Woodworth is that required of litigants who actually know of the juror's nondisclosure or false answers. In our view, the delays and logistical difficulties in imposing a duty to investigate every juror's answers outweigh the benefits derived from that duty. The requirement that litigants challenge jurors when the nondisclosure becomes apparent is sufficient to prevent abuse.

To summarize, the failure to disclose eight prior lawsuits was intentional nondisclosure on a material issue. Heeding the Williams mandate, we reverse the judgment of the trial court and remand for new trial.

BENTON, THOMAS, PRICE and ROBERTSON, JJ., concur.

HOLSTEIN, J., dissents in separate opinion filed.

COVINGTON, C.J., concurs in opinion of HOLSTEIN, J.

***141** HOLSTEIN, Judge, dissenting.

I respectfully dissent.

In the post-trial hearing, Mr. Oldham acknowledged he did not mention seven prior collection suits against him and did not disclose an insurance company's claim against him. He testified he didn't forget them, and "it ain't that I just didn't want to say anything," but "it just didn't click," "it just didn't connect." As to the insurance company claim, he remembered he "was there to set up arrangements to pay the lady I hit and for the not having insurance." In the collection cases, his checks were garnished. The garnishments appeared to be part of the bill collection process for certain medical bills. In none of the collection cases did he appear in court, and in no case did he appear before a jury. He did not contest any of the claims, retain an attorney, or otherwise defend the actions.

The determination of whether the nondisclosure was intentional or unintentional lies within the sound discretion of the trial court. Williams by Wilford v. Barnes Hosp., 736 S.W.2d 33, 36 (Mo. banc 1987). The trial court found Mr. Oldham's nondisclosure was unintentional. That finding should not be disturbed here as long as it has a "reasonable foundation in fact" and rests upon "competent evidence in the record or within the knowledge of the trial court." Williams at 40 (Higgins, J., dissenting). That factual determination should be affirmed absent a showing of an abuse of discretion. This Court defined abuse of discretion as:

> Judicial discretion is abused when a trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable men can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

Wingate v. Lester E. Cox Medical Center, 853 S.W.2d 912, 917 (Mo. banc 1993). The duty to disclose information arises only after a clear question has been asked on voir dire. Wingate at 916.

In this case, the trial court believed Mr. Oldham's reason for not responding to the question, "Do we have anyone on the panel who is now or has been a defendant in a lawsuit?" I cannot conclude that such belief is so unreasonable as to "shock the sense of justice."

If, as Oldham testified, it is true that his failure to respond was that "it just didn't click ... it just didn't connect," then his failure to disclose the lawsuits was unintentional. If his explanation was false, of course, the failure to disclose was intentional.

The trial court concluded the reasons given by Mr. Oldham were true. The basis for the trial judge's conclusion was his presence when the original questions were asked at voir dire, his observation of Mr. Oldham's demeanor during the trial, and his observations of Mr. Oldham as a witness in the post-trial hearing. This led the trial judge to conclude that the

explanation was "honest, cogent and reasonable."

By contrast, this Court concludes that Mr. Oldham's statements were false. The majority's conclusion is based upon the fact that Mr. Oldham admitted he understood the question, at least when asked after trial, and that the lawsuits were of recent vintage. Based on these two facts, the majority substitutes its conclusion for that of the trial judge. Plainly, the majority here is reweighing the credibility of testimony.

The long-standing rule of appellate courts has been to defer to trial court findings on factual matters. Such deference is born of experience and the firm belief that one who hears testimony and sees the witness's demeanor is in a far superior position to judge the credibility of that witness. In our legal system, we take it almost as an article of faith that a factual determination as to truthfulness is best done by one who directly observes the witness. Those notions lay at the foundation of the common law rule prohibiting hearsay evidence and the constitutional right to confrontation of witnesses. Here the majority gives no hint of deference to the trial judge. We should never lightly regard the ability of those hearing and seeing the evidence presented to gauge the demeanor and assess the credibility of witnesses. ***142** Washburn v. Medical Care Group, 803 S.W.2d 77, 83 (Mo.App.1990).

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.

Does this mean that most or all the panel was intentionally lying because they failed to disclose any brushes with the court system? The obvious answer is "no." The reason potential jurors do not respond to such questions is that the popular notion of being a "defendant in a lawsuit" may not mean the same thing as it does to lawyers. To many ordinary people, being a "defendant in a lawsuit" means hiring a lawyer and going to court to defend some claim on the merits before a judge or a jury. To a venireperson asked that question, it may be perceived as seeking to know if the juror had contact with court personnel or if the potential juror had some experience or background with how a trial works. From that perspective, it seems irrelevant that one has received a summons. 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."

As judges, it is often difficult to comprehend how such misconceptions of such simple matters can occur on the part of citizens. Matters which seem simple and clear to those of us steeped in the law may be confusing or ambiguous to ordinary citizens. Our own ability to understand people like Mr. Oldham may be obscured by a lifetime of legal experience and, at least at the appellate level, a relatively isolated existence. I simply cannot say with the certainty expressed by the majority that real, honest and decent citizens cannot have occasions when a question like the one here just does not "click." Thus, I am unwilling to say that the trial court's choice of believing Mr. Oldham's testimony shocks my sense of justice.

While I need not discuss the question at length here, I believe the Court should take this opportunity to clarify the statement made in Williams that "a finding of intentional concealment has 'become tantamount to a per

se rule mandating a new trial.' " Williams, 736 S.W.2d at 37. Williams seems not only to create an inference of prejudice but an irrebuttable presumption of prejudice requiring a new trial in every case. Surely, the majority would not grant a new trial if Mr. Oldham had been one of those jurors who voted for a plaintiff's verdict. As noted by Judge Carl Gaertner in Alexander v. F.W. Woolworth Co., et al., 788 S.W.2d 763, 768 (Mo.App.1990), this "so-called 'per se rule' has not been applied except in instances where the nondisclosure, although found to be at least constructively intentional, was coupled with other factors.... [A]ll [the cases] focus upon nondisclosure of experiences of similar types of litigation or comparable physical injuries." I commend the rationale of Alexander to the majority of this Court. It would seem eminently bad law to set aside a jury verdict because of jury nondisclosure in the absence of some realistic indication that the process or the outcome was flawed by reason thereof.

In this particular case, it is a stretch of reason to assert that the seven uncontested collection cases brought by doctors against Mr. Oldham, resulting in garnishment, predisposed him to be more favorable to doctors or that, somehow, his involvement in an automobile property damage case would have some impact in a medical malpractice case. Nondisclosure should not mandate an order for new trial unless the information withheld is somehow material, that is, information that conceivably affects the outcome of the case. *143 Certainly, had all we now know about Mr. Oldham been disclosed before trial, it would not have been necessary to excuse him for cause at plaintiff's request. The only potential basis for his removal would have been a peremptory challenge.

A new trial subjects the courts, defendant and taxpayer to substantial cost. The egregiousness of invading a party's potential right to exercise peremptory challenge for obscure reasons pales when compared to the substantial burdens of a new trial order when no prejudice occurred. The benefit of a new trial is de minimis in a case where neither party was at fault and the juror had not been shown to be disqualified because of a predisposition in favor of or against either of the parties. I am unable to find that Mr. Oldham's prior contact with the court system was somehow material to the outcome of this case.

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