

Summary of SC92904, Shannon L. Bair v. William M. Faust

Appeal from the Jackson County circuit court, Judge Robert M. Schieber
Argued and submitted April 3, 2013; opinion issued July 16, 2013

Attorneys: Bair was represented by Brett T. Burmeister and Mark A. Gilmore of Burmeister Gilmore LLP in Independence, (816) 373-5590, and Faust was represented by Paul S. Penticuff and Ambika Behal of Baker Sterchi Cowden & Rice LLC in Kansas City, (816) 471-2121.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A woman appeals a trial court's judgment excluding her from the courtroom and allowing her opponent to argue an adverse inference to the jury based on her absence. In a 5-2 decision written by Chief Justice Mary R. Russell, the Supreme Court of Missouri reverses the judgment and remands (sends back) the case. Once the trial court granted the defendant's motion to exclude the woman from the trial, it abused its discretion in then allowing the defendant's attorney to make adverse inferences from the woman's absence. Judge Paul C. Wilson dissents. He would find that the trial court did not abuse its discretion but merely enforced the woman's choice not to be present and not to testify in the trial and that the court allowed the defendant's attorney to argue adverse inferences from the woman's absence based on her voluntary choice not to testify.

Facts: A woman sued a defendant for injuries she sustained as a result of an automobile accident. During jury selection, the woman's attorney made remarks indicating that the woman would not appear during the trial, as was her prerogative, but that he would provide an explanation later. On the second day of trial, the defendant's attorney voiced frustration that an impression was being created that the woman could come and go as she pleased and that the woman might attempt to make a "grand entrance" into the proceeding. After the court granted the defendant's attorney permission to argue an adverse inference based on the woman's absence from the trial, the woman's attorney sought additional time for his client to appear. The trial court gave her time to appear, but after the jury had been kept waiting for an hour and a half and the woman had not yet appeared, the court began the proceedings without her, ordering her excluded from the trial. The jury returned a verdict in the woman's favor but reduced its award to her after finding her 85 percent at fault for the accident. The trial court overruled the woman's motion for a new trial. The woman appeals.

REVERSED AND REMANDED.

Court en banc holds: The trial court abused its discretion in denying the woman's motion for a new trial. The adverse inference rule allows an unfavorable inference to be drawn against a party who has knowledge of the facts of the controversy but who fails to testify. An opponent may not draw an adverse inference, however, when the sole reason for the party's failure to testify was the granting of the opponent's own motion to exclude the testimony. Once it ordered the woman excluded from the trial, the court abused its discretion in allowing the defendant's attorney to argue adverse inference arguments about the woman's absence, resulting in manifest injustice.

Dissenting opinion by Judge Wilson: The author would affirm the trial court's judgment. He would hold that the woman voluntarily chose not to attend her trial or testify on her own behalf and that any perceived unfairness was the natural and readily foreseeable result of her choices. Accordingly, the trial court's order enforcing her choice not to attend the trial by barring her from making a "grand entrance" in the middle of trial was not the basis for the adverse inference argument, nor did it constitute an abuse of discretion. The trial court made a detailed record of the timeline of events that led it to exclude the woman from the courtroom and to allow the defendant's attorney to argue adverse inferences from the woman's absence, noting that it believed it had given her ample time to come to the court to present her case. It then gave the woman's attorney time to present arguments why the court's decision was wrong, but the attorney made no such arguments.