

IN THE SUPREME COURT OF MISSOURI

SHANNON BAIR

APPELLANT-PLAINTIFF,

v.

Supreme Court No. SC92904

WILLIAM FAUST

RESPONDENT-DEFENDANT.

APPELLANT'S SUBSTITUTE BRIEF

Appeal from the Circuit Court of Jackson County, Missouri
Sixteenth Judicial District, Division 15
The Honorable Robert M. Schieber
Case No. 0916-CV19706

Respectfully submitted,

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CERTIFICATE OF SERVICE AND BRIEF COMPLIANCE

The undersigned certifies that on December 31, 2012, this document was sent by way of the Missouri Electronic Filing System to:

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The undersigned certifies that this brief is in compliance with Rule 84.06(b). Pursuant to information provided by Microsoft Office Word 2007, this brief contains a total of 6,883 words. Pursuant to Rule 55.03(a), the undersigned certifies that the original of this electronic brief was signed by the undersigned attorney.

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JURISDICTIONAL STATEMENT

This is an appeal from the final judgment of the Circuit Court of Jackson County, Missouri, entered on May 24, 2011 following a jury verdict. Shannon Gibbons appeals from the final judgment [L.F. 1072] and seeks remand for a new trial.

Jurisdiction in the Supreme Court of Missouri is proper pursuant to Mo. Const. art. V § 10 because this Court ordered the transfer of this cause following the opinion of the Court of Appeals for the Western District of Missouri affirming the final judgment of the trial court.

STATEMENT OF FACTS

Appellant-Plaintiff Shannon Gibbons (formerly Bair) sustained injuries June 5, 2009 when her car flipped and rolled after leaving the roadway on U.S. 50 Highway in Lee's Summit, Jackson County, Missouri. [TR. 204:19-209:18, 647:12-17]. Ms. Gibbons filed suit (Case No. 0916-CV19706) alleging that Respondent-Defendant William Faust pulled out in front of Ms. Gibbons nearly causing a collision, and then in a fit of rage intentionally swerved into Ms. Gibbons' lane causing her to lose control and veer off the road. [L.F. 16].

As trial approached, Plaintiff's counsel, Aaron W. Smith¹, considered whether Ms. Gibbon's appearance at trial would be emotionally and/or strategically to her advantage. [TR. 165:3-18; 190:18-24, 489-491:19, 496:20-497:4]. Trial commenced on May 10,

¹Following trial, Ms. Gibbons terminated her relationship with her trial counsel, Aaron W. Smith, and retained the law firm of Burmeister Gilmore LLP to pursue this appeal.

2011. [TR. 10]. During voir dire, to gauge juror reaction to Ms. Gibbons' potential absence, Plaintiff's counsel indicated that Ms. Gibbons would not be present at trial.² [TR. 89:3-4]. The venire voiced that her absence would cause them great concern and that they would hold such absence against Ms. Gibbons. [TR. 88:25-90:16].

Prior to adjourning for the day, Defendant's counsel pressed Plaintiff's counsel as to who would explain Ms. Gibbons' absence from trial. [TR. 153:12-21]. Plaintiff's counsel responded that if Ms. Gibbons did not appear that he intended to have her husband testify as to why she was not present. [TR. 153:22-154:8]. Plaintiff's counsel informed the trial court and Defendant's counsel that he intended to inform Ms. Gibbons about "what transpired in voir dire" and "let her make the decision" as to whether she would testify. [TR. 154:21-155:3].

Also that evening, the trial court and counsel discussed the propriety of Mr. Smith's intention to use four slides he had titled "Rules of the Road" in his opening statement. [TR. 148-149]. Faust's counsel's main concern was whether the jury would misconstrue the slides as stating Missouri law. [TR. 148-149]. Smith said that the slides represented common sense "rules of the road" as well as the standard of care. [TR. 149:22-150:2, 151:7-10]. Smith denied that the slides were pulled from Missouri statutes.

² Plaintiff's counsel stated "my client's not going to be here" but later stated for the record that he did so in the context of determining the effect of Ms. Gibbons' potential absence on the jury, and that the statement was not to be taken as definitive. [TR. 504:8-22].

[TR. 152:19]. The trial court ruled that Smith could use the slides; however, the quotation marks surrounding “Rules of the Road” were to be omitted. [TR. 152:22-153:1].

The following morning, Defendant’s counsel notified the trial court that the source of the four slides were, in fact, Missouri statutes. [TR. 156-159]. Mr. Faust’s counsel moved for sanctions based upon Mr. Smith’s misrepresentations regarding the source of the slides. [TR. 158:25-159:1]. The trial court precluded the use of the slides. [TR. 164:25-165:1].

Defendant’s counsel also directed the discussion to Ms. Gibbons’ potential absence at trial. [TR. 165:3-168]. Defendant’s counsel moved that Ms. Gibbons should be excluded from trial, and stated the following in support:

Is she going to come in tomorrow? The next day? No, that is completely unfair, absolutely unfair. What he’s doing is creating in front of the jury this idea that she can come and go as she pleases, that she doesn’t have to be here to prosecute her cause of action.

[TR. 161:14-19].

Do I have to wait because after every break in she walks and all of a sudden we have this grand entrance and create this sort of Hollywood circus atmosphere? That’s not appropriate. It’s not appropriate to have the jury looking to see if she’s coming in at the next break.

[TR. 161:22-162:1].

[Ms. Gibbons] could walk through the door at any time and create this sort of specter of simply that now she's finally here and can sit in this courtroom and this is the problem that we're dealing with. And I can't think of instructions that are good enough to cover all the prejudice, that are sufficient to cover all the prejudice.

[TR. 168:3-9].

In response to Defendant's argument to exclude Ms. Gibbons from trial, the trial court ordered:

She didn't show up for voir dire. She's not here today. I'm excluding her from the courtroom. She won't be able to walk in this grand entrance. I won't allow it. I mean, if she decides to show up. If she gets here in the next ten minutes, before we bring the jury down; but if she doesn't come, after we start opening statements and evidence, she's not going to come at all.

[TR.168:24-169:5].

The trial court permitted Plaintiff's counsel to call Ms. Gibbons to summon her to the courthouse. [TR. 170:16-17]. After a short recess, Faust's counsel again raised the issue of Smith's misrepresentations regarding the slides, and moved the trial court to dismiss the case:

I want to address this issue of these slides. This is misrepresentation to the Court. It was a lie to me. I mean, I believe it's the Court's decision to decide what you want to do with the misrepresentation to the Court, but it was a lie to me in the hall, a lie to me in this courtroom, a lie to me on the record. And that is just flat out wrong.... I'm moving to dismiss this case with prejudice. His client is not even going to be here in court. Not even going to be here.

[TR. 171:4-14].

After calling his client, Plaintiff's counsel informed the trial court that Ms. Gibbons probably could be present within thirty-five minutes to an hour. [TR. 171:15-17]. In response, the trial court stated "I'm not going to do that. I've got a jury waiting." [TR. 171:18-19]. Faust's counsel interjected:

Mr. Smith, you have created the issue by her not being here.

This is an issue all of your own creation....

[TR. 171:20-23].

In response to Faust's counsel's accusations against Mr. Smith, the trial court stated that it would allow the Defendant to invoke an adverse inference, and allow Defendant to argue to the jury that it could infer from Ms. Gibbon's absence that her testimony would have been unfavorable to her case. [TR. 171:24-172:4]. Mr. Smith then asked the trial court if the allowance of an adverse inference was a sanction on himself or his client to which the court responded: "Yeah. She's not here." [TR. 172:23].

The trial court then instructed Defendant's counsel:

I think you're entitled to point out the empty chair. I think you're entitled a question where she is. I think you're entitled to talk about the fact you won't hear her version of events.

[TR. 175:11-14].

Plaintiff's counsel again requested thirty minutes to get Ms. Gibbons to the courtroom, or in the alternative, to allow her admittance after opening statements. [TR. 178:4-7, TR. 185:16-25, *see generally* TR. 165:21-185:25].

It appears at this time that the trial court was entertaining this request, as is evident by the trial court, awhile later, offering the same ten minute ultimatum for Ms. Gibbons to appear in the courtroom. [TR. 187-199; 199:15-17]. Faust's counsel responded:

I'm requesting that she be banned from this courtroom.... I don't think she should be allowed to come in here. I think there should be adverse inferences. I would move that the case be dismissed with prejudice right now. I think we ought to move forward on those grounds or dismiss the case. I think she has toyed with us long enough.

[TR. 189:16-17; 189:25-190:4].

Mr. Smith responded:

Your Honor, I'm not toying with anybody. My client is not toying with anybody. Had I known this would be an issue that unfolded like this, I would have talked to her this

morning. I've talked to the client; she's getting ready; she should be here in thirty minutes. This should not come down on my client for me saying to her, I'm still not aware of any rule that requires her to be here.

[TR. 190:5-11].

The trial court responded: "Candor with the Court. Candor with the tribunal. How about that? . . . [it's] about being coy. The whole thing stinks, Mr. Smith. It just does."

[TR. 190:12-17].

Smith further pleaded with the trial court not to sanction his client for his mistakes and informed the trial court that Ms. Gibbons was getting ready and that she could be present within thirty minutes. [TR. 190:18-191:9]. Faust's counsel continued:

And I think she should be excluded from the courtroom. I think the adverse inferences should be drawn. . . Even if she shows up now, I've still got to deal with all the voir dire issues. If she shows up now, we've got all those issues and other inferences and explanations to the jury. . . And I think we need to go forward and she should be banned from the courtroom and draw the adverse inferences if that's what we want to do.

[TR. 192:9-193:1].

During this discourse, the trial court concentrated on the propriety of Mr. Smith's actions with respect to the slides, as well as his pre-trial tactical choices and explanations

for why Ms. Gibbons would not be appearing at trial. [TR. 186-199]. After Defendant's counsel repeatedly moved for sanctions,³ and after the trial court reprimanded Plaintiff's counsel for playing "hide the ball," lacking "candor with the court," and "being coy," [TR. 189-90], the trial court stated that trial would commence in ten minutes and that if Plaintiff was not there at that time she would be excluded from trial. [TR. 199:15-17].

When court reconvened, Plaintiff's counsel informed the trial court that Ms. Gibbons had just gotten out of the shower when he informed her that she needed to be there in ten minutes, and that she was on her way.⁴ [TR. 199:22-200:2]. Plaintiff's counsel asked for a few more minutes to give his client a fair opportunity to arrive at the

³ On numerous occasions Defendant's counsel moved for sanctions ranging from an adverse inference to dismissal with prejudice. [TR. 158:25-159:1; 163:9-10; 171:12-14; 187:10-11; 190:1-4; 192:10-13; 192:24-193:1; 193:10-14].

⁴ After telling the court that Ms. Gibbons could be at the courthouse within thirty minutes, Plaintiff's counsel asked his co-counsel to contact Ms. Gibbons. [TR. 494:16-17]. However, co-counsel refused to ask Ms. Gibbons to come to the courthouse as he was under the impression that the judge had already excluded her from being present and did not want to violate the trial court's order. [TR. 494:17-18].

In recounting the conversation for the record, Plaintiff's counsel stated to the trial court that "[i]t wasn't until the last 15 minutes that you affirmatively told me that, yeah, if you get her here in the next 15 minutes, I'll allow it. Up until that last 15 minutes there was a standing court order that excluded her from this courtroom." [TR. 494:19-23].

courthouse. [TR. 200:2-5]. The trial court denied the request and stated to Defendant's counsel: "You can refer to the empty chair. You can talk about her lack of testimony...[s]he's excluded from the courtroom." [TR. 200:17-22].

Trial commenced. [TR. 201:23-202]. During opening statement Faust's counsel told the jury that Ms. Gibbons would not be present in the courtroom and that they could "draw the inference that any testimony that she would give would be unfavorable to her case." [TR. 223:6-23]. Defendant's counsel repeatedly referred to Ms. Gibbons as the "not-present plaintiff," [TR. 226:7] or the "nonpresent plaintiff," [TR. 226:21; 228:14-15; 230:7-8], and in one form or another referenced her absence over fifteen times in opening statement. [TR. 223-230:9]. Defendant's counsel also repeatedly instructed the jury that it could draw an adverse inference based upon Ms. Gibbons' absence. [TR. 223:10-12, 229:15-17, 230:7-9]. Defendant's counsel concluded his opening statement by telling the jury: "[Defendant] was not at fault for this accident. Our non-present plaintiff was at fault for this accident. She's not here for a reason." [TR. 230:7-9].

Following opening statements, an off-the-record conversation ensued in the trial court's chambers regarding whether or not the trial court would consider a mistrial. [TR. 485:15-487:20]. Although no record of the conversation was taken at the time, Plaintiff's counsel later went on record to document the trial court's position during that conversation that, if requested, any mistrial would be summarily denied. [TR. 485:19-20; 486:20-21].

In response to the trial court's inquiry as to what the basis of mistrial would be, Plaintiff's counsel explained that the motion for mistrial would be based upon: 1)

excluding Plaintiff from trial and 2) allowing defendant to argue an adverse inference during opening statements. [TR.487:4-12]. The trial court did not refute Plaintiff's counsel's impression that it would not consider a mistrial, but rather recounted the basis of its decision to exclude Ms. Gibbons from the courtroom. Based upon statements made during voir dire, the trial court characterized Ms. Gibbon's absence as a voluntary act. The trial court also explained its decision to allow an adverse inference [TR. 488-504:6] and described Plaintiff's absence as a "tactical maneuver" that "didn't play out as [Smith] had anticipated." [TR. 491:17-18].

Although Ms. Gibbons was unsuccessful in her attempt to arrive at trial by the court-ordered deadline [TR. 199:25-200:5; 509:17-510:5], her husband testified that Ms. Gibbons was present in the courthouse throughout trial and planned to remain there until the jury reached a verdict. [TR. 459:11-18]. Further, Plaintiff was present in the courtroom, outside the presence of the jury, for an offer of proof on Friday, May 13, 2012, the last day of trial. [TR. 507:14-519:25].

After the close of evidence, Plaintiff's counsel moved to prohibit Defendant's counsel from referencing an adverse inference in closing argument: "And based on this case [*Calvin v. Jewish Hospital of St. Louis*, 746 S.W.2d 602 (Mo. App. E.D. 1988)], the plaintiffs [sic] would again move the Court for an order restricting defense counsel from referencing an adverse inference during closing arguments based on the Court's exclusion of the plaintiff's presence at trial." [TR. 506:18-22]. The trial court denied the motion. [TR. 506:23].

During closing arguments, Defendant's counsel repeatedly referred to Ms. Gibbons' absence and asserted to the jury:

Ms. Gibbons was not here. She did not appear in court at any time to tell her version of the events, plaintiff's version. Mr. Smith talks about personal responsibility and taking responsibility for your actions. Ms. Gibbons never took that chair (referencing the witness stand). She never took that chair. She never even took that chair (referencing the chair at counsel's table). You didn't get to hear from her. You didn't get to hear her side of the events. So you are left to put together the events that happened on that roadway and, even more importantly, the events that were talked about as far as future issues for her in the hands of others. She took that out of our hands. She gave no testimony as to any of these harms or losses.

[TR. 644:17-645:3].

[Y]ou may infer from her lack of appearance in court and her lack of testimony that any testimony she gave would have been detrimental to her cause of action. Think about that.

[TR. 645:6-9].

The jury returned a verdict in the amount of \$60,000. In its verdict, the jury apportioned 85% fault to Ms. Gibbons. The trial court entered judgment for Ms. Gibbons

in the amount of \$9,000. [L.F. 838, 1072]. Gibbons filed a Motion for New Trial [L.F. 861] in which she argued that even if her exclusion from trial could be justified, the additional allowance of an adverse inference constituted clear error. [Supp. TR. 8:11-21]. Plaintiff's counsel also argued that Ms. Gibbons' absence could not be characterized as voluntary because she was in fact on her way to the courthouse when she was excluded by the trial court's order, and she was present for an offer of proof. [Supp. TR. 3:21-4:11].

The trial court responded that it had "read and re-read the transcript," that it "had given the case a tremendous amount of thought" and that it was an "incredibly close call just given the tenor of what occurred and how it all came down." [Supp. TR. 9:1-4]. Up against a deadline, the court gave it one more day of consideration and then denied the Motion for New Trial. [Supp. TR. 9:5-11; L.F. 1061].

After Plaintiff's counsel filed a notice of appeal, Ms. Gibbons terminated her relationship with Mr. Smith and retained present counsel, Burmeister Gilmore LLP to pursue this appeal. The Court of Appeals for the Western District of Missouri affirmed the trial court's final judgment, and denied Ms. Gibbons' application for transfer to this Court. This Court subsequently granted Ms. Gibbon's application for transfer.

POINTS RELIED ON

- I. THE TRIAL COURT ERRED IN ALLOWING RESPONDENT TO ARGUE AN ADVERSE INFERENCE TO THE JURY BECAUSE MISSOURI LAW PRECLUDES AN ADVERSE INFERENCE BASED UPON A WITNESS'S ABSENCE WHEN THE COURT HAS BARRED THE WITNESS FROM TESTIFYING IN THAT THE TRIAL COURT EXCLUDED SHANNON GIBBONS FROM APPEARING AT TRIAL AND THEN ALLOWED RESPONDENT TO ARGUE AN ADVERSE INFERENCE BASED UPON HER ABSENCE.**

Authority Principally Relied On

Barnes v. Kissell, 861 S.W.2d 614, 620 (Mo. App. W.D. 1993).

Calvin v. Jewish Hosp. of St. Louis, 746 S.W.2d 602, 605 (Mo. App E.D. 1988).

State v. Hammonds, 651 S.W.2d 537, 539 (Mo. App. E.D. 1983).

- II. THE TRIAL COURT ERRED IN EXCLUDING PLAINTIFF FROM TRIAL BECAUSE A LITIGANT HAS A RIGHT BUT NOT AN OBLIGATION TO ATTEND TRIAL IN THAT THE TRIAL COURT EXCLUDED PLAINTIFF FROM TRIAL IN RESPONSE TO PLAINTIFF'S ABSENCE DURING VOIR DIRE.**

Authority Principally Relied On

Blessing v. Blessing, 539 S.W.2d 699 (Mo. App. St.L. D. 1976).

Peth v. Heidbrier, 789 S.W.2d 859, 863 (Mo. App. E.D. 1990).

State v. Clark, 981 S.W.2d 143, 146 (Mo. 1998).

ARGUMENT

Standard of Review for all Points

This Court reviews the trial court’s rulings for “abuse of discretion.” *State v. Price*, 541 S.W.2d 777, 778 (Mo. App. St.L. D. 1976). “[T]he granting or withholding of a new trial for improper argument is a matter for the trial court’s discretion and an appellate court will not interfere without a showing that the trial court abused its discretion to the prejudice of the appellant.” *Id.* (citing *State v. Turley*, 518 S.W.2d 207, 211 (Mo. App. St.L. D. 1975) and *State v. Connell*, 523 S.W.2d 132 (Mo. App. St.L. D. 1975)).

“An abuse of discretion is an erroneous finding and judgment which is clearly contrary to the facts and circumstances before the court—a judicial act which is untenable and clearly against reason and which works an injustice.” *Beckman v. Beckman*, 545 S.W.2d 300, 301 (Mo. App. St.L. D. 1976) (quoting *State v. Letourneau*, 515 S.W.2d 838 (Mo. App. St.L. D. 1974)). “The exercise of judicial discretion should be directed toward the accomplishment of fundamental fairness and the avoidance of unfair disadvantage.” *Barnes v. Kissell*, 861 S.W.2d 614, 620 (Mo. App. W.D. 1993) (citing *Calvin v. Jewish Hosp. of St. Louis*, 746 S.W.2d 602, 605 (Mo. App. E.D. 1988)).

I. THE TRIAL COURT ERRED IN ALLOWING RESPONDENT TO ARGUE AN ADVERSE INFERENCE TO THE JURY BECAUSE MISSOURI LAW PRECLUDES AN ADVERSE INFERENCE BASED UPON A WITNESS'S ABSENCE WHEN THE COURT HAS BARRED THE WITNESS FROM TESTIFYING IN THAT THE TRIAL COURT EXCLUDED SHANNON GIBBONS FROM APPEARING AT TRIAL AND THEN ALLOWED RESPONDENT TO ARGUE AN ADVERSE INFERENCE BASED UPON HER ABSENCE.

A. An adverse inference against Ms. Gibbons was not proper after her court-ordered exclusion from trial.

Settled Missouri law shows the trial court abused its discretion when it not only authorized but encouraged Respondent to argue an adverse inference following its order excluding Ms. Gibbons from trial. Consequently, Ms. Gibbons is entitled to a new trial.

Missouri law holds that it is clear error to allow an adverse inference based upon the absence of a witness when the court has barred that witness from testifying. *Barnes v. Kissell*, 861 S.W.2d 614, 620 (Mo. App. W.D. 1993); *Delaporte v. Robey Bldg. Supply, Inc.*, 812 S.W.2d 526, 533 (Mo. App. E.D. 1991); and *State v. Price*, 541 S.W.2d 777, 778-79 (Mo. App. St.L. D. 1976). To do so constitutes manifest injustice and reversible error. *Calvin*, 746 S.W.2d at 605.

In fact, the error is so grave that the aggrieved party need not even preserve it for appellate review. *Id.* (citing *State v. Hammonds*, 651 S.W.2d 537, 539 (Mo. App. E.D.

1983)); *see, also*, Mo. Sup. Ct. R. 78.08 and 84.13(c). The utilization of an adverse inference following the trial court's exclusion of a witness's testimony is akin to plain error, affecting the aggrieved party's substantial rights resulting in manifest injustice and a miscarriage of justice. *Hammonds*, 651 S.W.2d at 539.

In *Barnes v. Kissell*, the Court of Appeals, Western District affirmed and applied these principles, finding the trial court abused its discretion when it permitted plaintiff's counsel to argue in closing argument that defendant failed to offer expert testimony refuting plaintiff's claims—this after the trial court had excluded defendant's medical expert from trial. 861 S.W.2d at 619-620 (Mo. App. W.D. 1993). In ordering a new trial, the Court of Appeals observed:

To allow such argument is at odds with Missouri law and is contrary to any notion of fairness or justice.... The exercise of judicial discretion should be directed toward the accomplishment of fundamental fairness and the avoidance of unfair disadvantage. In the present case, the trial court's rulings represent a divergence from this principle. As a result, we find that the trial court's rulings concerning [defendant's excluded expert] were arbitrary and, therefore, an abuse of discretion.

Id. at 620 (internal citations omitted) (*citing Calvin*, 746 S.W.2d 602 (Mo. App. E.D. 1988) and *Mathews v. Chrysler Realty Corp.*, 627 S.W.2d 314, 318 (Mo. App. W.D. 1982)).

Calvin v. Jewish Hosp. of St. Louis is also instructive. *Calvin*, 746 S.W.2d 602, 605 (Mo. App. E.D. 1988). In *Calvin*, the Court of Appeals, Eastern District held that the trial court erred in allowing the plaintiff to comment on the defendant's lack of a medical expert after the trial court granted plaintiff's motion to exclude defendant's medical expert. *Calvin*, 746 S.W.2d at 605. By allowing the plaintiff to argue an adverse inference, the trial court was "[p]ermitting, indeed implicitly approving," the argument that the defendant could not obtain the very evidence the trial court had excluded. *Id.* In finding that "[f]undamental fairness mandates remanding this case for a new trial," the Eastern District stated:

When a witness' testimony is excluded on an attorney's motion, it is misconduct constituting manifest injustice and thus reversible error if that attorney requests the jury to draw an adverse inference from his opponent's failure to produce that witness even though the error is not preserved for appellate review.

Id.

The Eastern District issued a similar ruling in *State v. Hammonds*, finding the trial court erred in permitting the prosecutor to argue an adverse inference after sustaining the prosecutor's motion to exclude the defendant's witness from trial. *Hammonds*, 651 S.W.2d at 538-39. The Eastern District remanded the case for a new trial even though the defendant had not properly preserved the issue for appeal—finding that, even under the more stringent standard of "plain error" review, the error affected the aggrieved party's

“substantial rights resulting in manifest injustice.” *Id.*

In the instant case, the trial court excluded Ms. Gibbons from trial on Defendant’s motion. [TR. 161:14-19, 61:22-162:1, 168:3-9, 168:24-169:5, 171:18-19, 189:16-17, 189:25-190:4, 192:9-193:1, 199:15-17, 200:17-22]. The trial court then permitted Defendant to argue an adverse inference to the jury based upon Plaintiff’s involuntary, court-ordered, exclusion from trial. [TR. 171:24-172:4, 175:11-15, 200:17-22, 493:1-494:5, 506:23]. Such an outcome constitutes an abuse of discretion. Consequently, a new trial must be granted.

The trial court’s judgment and the Western District’s memorandum opinion affirming the judgment contradict longstanding, well-established principles and create uncertainty in the law. Missouri case law was, until the Western District’s opinion, clear and consistent. Where, as here, an adverse inference is preceded by a motion and order by the trial court excluding the witness from testifying, the trial court commits plain, reversible error. *Calvin*, 746 S.W.2d at 605; *Barnes*, 861 S.W.2d at 619-620; and *Hammonds*, 651 S.W.2d at 538-39. In the instant case, however, a Missouri appellate court has held, for the first time, that an adverse inference can be utilized after a motion and order excluding a witness. In so doing, the Court of Appeals not only created new law, it contradicted clear and consistent existing law. *Calvin*, 746 S.W.2d at 605; *Barnes*, 861 S.W.2d at 619-620; and *Hammonds*, 651 S.W.2d at 538-39. A new trial is needed to remedy this error.

B. Ms. Gibbons' absence from the courtroom was compulsory, and cannot be construed as voluntary.

Ms. Gibbons' failure to testify was not voluntary. Defendant's counsel repeatedly requested an order from the trial court excluding her from trial. [TR. 161:14-19, 61:22-162:1, 168:3-9, 168:24-169:5, 171:18-19, 189:16-17, 189:25-190:4, 192:9-193:1, 199:15-17, 200:17-22]. The trial court granted Defendant's counsel's request, and issued an order prohibiting Ms. Gibbons from entering the courtroom. [TR. 171:24-172:4, 175:11-14, 200:17-22, 493:1-494:5, 506:23].

Plaintiff's counsel had every right to conduct voir dire without Ms. Gibbons present. [TR. 168:24]. There existed no procedural requirement necessitating Ms. Gibbons' presence at voir dire, or abrogating her right to testify later in trial if she was not present for voir dire. If she wanted to appear only for her testimony, that was her choice.

Further, Plaintiff's counsel had every right to suggest in voir dire that Ms. Gibbons would not be present in order to determine if partial or complete absence on her part would bias the venire against her. [TR. 89:3-4]. Statements made by counsel during voir dire are not evidence, and such statements are not presumptively prejudicial to the opposing party absent a showing of bad faith. *Peth v. Heidbrier*, 789 S.W.2d 859, 863 (Mo. App. E.D. 1990).

"The purpose of voir dire is to determine which persons harbor bias or prejudice against either party which would make them unfit to serve as jurors." *State v. Nicklasson*, 967 S.W.2d 596, 608 (Mo. 1998) (citing *State v. Antwine*, 743 S.W.2d 51, 60 (Mo. banc

1987)) . “Deeply ingrained in Missouri law lies the principle that ‘a liberal latitude is allowed in the examination of jurors on their voir dire....’” *State v. Brown*, 547 S.W.2d 797, 799 (Mo. 1977) (*quoting State v. Granberry*, 484 S.W.2d 295 (Mo. banc 1972)). “Since bias often lies deep within the minds of prospective jurors, counsel should be allowed a wide latitude to expose that bias.” *Id.* (*citing Littell v. Bi-State Transit Development Agency*, 423 S.W.2d 34 (Mo. App. 1967)); *see also Nicklasson*, 967 S.W.2d at 608-9 (Mo. 1998) (“‘Litigants have the right, through the process of voir dire, to discover bias or prejudice on the part of prospective jurors and they should be allowed wide latitude in the search for open minded jurors.’” (*quoting State v. Finch*, 746 S.W.2d 607, 613 (Mo. App. W.D. 1988))).

Based upon the exceedingly negative response the venire voiced in response to Plaintiff’s counsel’s representation that Ms. Gibbons would not be present for trial, [Tr. 88-90], Ms. Gibbons certainly had the right to contemplate the consequences of her potential absence and decide whether she would need to testify at some point during her case. Further, after the trial court prohibited testimony explaining Ms. Gibbons’ absence, [TR. 178:4-7, TR. 185:16-25, *see generally* TR. 165:21-185:25], Ms. Gibbons had a right to reconsider whether or not she would testify. But the trial court’s order prevented her from making that decision and then allowed Defendant to make an argument as if she had decided not to come. [TR. 200:17-22].

Practically speaking, Ms. Gibbons could have testified on any day during her case-in-chief. However, the trial court’s order entered in response to Defendant’s counsel’s argument that it would be “completely unfair” for Ms. Gibbons to appear, established an

extremely short deadline by which she needed to arrive at the courthouse. [TR. 161:14-19; 168:24-169:5]. Despite an attempt to meet the deadline, Ms. Gibbons could not arrive in time. [TR. 199-200]. The trial court officially excluded her from trial at a time when she was on her way to the courthouse in an effort to meet the Court's exceedingly short deadline, a further indication that her absence cannot be construed as voluntary. [TR. 199:22-200:2, 509:17-510:5].

Ms. Gibbons remained at the courthouse throughout the trial even though the trial court would not permit her inside the courtroom. [TR. 459:11-18, TR. 507:14-519:25]. Her husband testified that she was present in the courthouse, and would remain at the courthouse throughout trial until a verdict was reached. [TR. 459:11-18]. Further, Ms. Gibbons was present for an offer of proof [TR. 507:14-519:25].

Assuming, *arguendo*, that the trial court had not ordered Ms. Gibbons excluded from trial, and Ms. Gibbons still chose not to testify, it would have been entirely appropriate for the trial court to permit Respondent to argue an adverse inference in closing argument based upon Ms. Gibbons' voluntary failure to testify. But that is not what transpired.

The trial court, after excluding Ms. Gibbons from the courtroom prior to the introduction of any evidence, allowed Defendant's counsel to argue the adverse inference in opening statement (and throughout trial). [TR. 200:17-22]. Defendant's counsel took full advantage, telling the jury in opening statement that Ms. Gibbons would not testify and that they could "draw the inference that any testimony that she would give would be unfavorable to her case." [TR. 223:10-12]. It was safe for defendant to do so because he

knew, by virtue of the trial court's exclusionary order, that Ms. Gibbons would not be allowed to testify. [TR. 200:17-22].

This illustrates that an adverse inference based upon a witness's absence is truly only appropriate in closing argument after the witness has been given the opportunity to testify and has failed to do so. Arguing an adverse inference in opening statement is not proper because, if the witness truly has the opportunity to voluntarily testify later at trial, counsel would not know during opening statement whether the witness would testify or not. Here, however, Defendant's counsel was perfectly comfortable arguing the adverse inference in opening statement because he already knew the trial court had excluded Ms. Gibbons from trial; he already knew she could not testify. [TR. 200:17-22].

Based upon the foregoing, it is abundantly clear that Ms. Gibbons' absence was compulsory, and not voluntary. Defendant's counsel sought and received the trial court's order excluding Ms. Gibbons from the courtroom, and was allowed to argue an adverse inference in opening statement and throughout the trial. A new trial is warranted to remedy this error, one so grave Missouri law holds it need not even be preserved.

II. THE TRIAL COURT ERRED IN EXCLUDING PLAINTIFF FROM TRIAL BECAUSE A LITIGANT HAS A RIGHT BUT NOT AN OBLIGATION TO ATTEND TRIAL IN THAT THE TRIAL COURT EXCLUDED PLAINTIFF FROM TRIAL IN RESPONSE TO PLAINTIFF'S ABSENCE DURING VOIR DIRE.

A. Ms. Gibbons had a right to participate in her own trial.

The trial court further abused its discretion in excluding Ms. Gibbons from trial. Ms. Gibbons had a right to attend the remainder of her trial despite her absence during voir dire and despite her counsel's statements during voir dire that Ms. Gibbons would not be present. [TR. 89:3-4]. Indeed, nothing compels a litigant to be present for voir dire as a prerequisite to testifying later at trial. The trial court's exclusion of Ms. Gibbons from her own trial constituted an abuse of discretion. Consequently, a new trial is appropriate.

In Missouri, a litigant has a right to be present at her own hearing and has a right to attend the trial. *Blessing v. Blessing*, 539 S.W.2d 699, 702 (Mo. App. St.L. D. 1976); *see also Patrick V. Koepke Constr., Inc. v. Paletta*, 118 S.W.3d 611 (Mo. App. E.D. 2003). But a litigant is not required to attend trial if the litigant chooses not to attend. *Spirtas Co. v. Division of Design*, 131 S.W.3d 411, 415-16 (Mo. App. W.D. 2004) ("no rule or case law which sets out a requirement that a plaintiff (or any other party) must personally attend trial when they are represented by counsel, absent a subpoena or similar compulsion requiring the party's attendance at trial").

Plaintiff's counsel's statements during voir dire, and Ms. Gibbons' absence from voir dire, did not provide a sufficient basis for the trial court to prohibit Ms. Gibbons from exercising her right to appear later at her trial. The court abused its discretion in excluding her from trial. Accordingly, a new trial is warranted.

Further, as more fully discussed in Point I *supra*, even if the trial court's exclusion of Ms. Gibbons were appropriate, the trial court could not take the addition step of

authorizing an adverse inference based upon the court-ordered exclusion. Missouri law is clear that an adverse inference is improper after the court-ordered exclusion of the witness/litigant from trial. *See* Point I *supra*.

B. Ms. Gibbons' absence from voir dire and her attorney's statement during voir dire did not preclude her from testifying later at trial.

Defendant's counsel's motion to exclude Ms. Gibbons from trial was premised upon Mr. Smith's statement during voir dire that Ms. Gibbons would not be present at trial. [TR. 161:14-162:1; 165:3-168:9]. But Mr. Smith's statement during voir dire did not preclude Ms. Gibbons from reconsidering whether she would need to testify later in trial because statements made in voir dire are not evidence and a valid purpose of voir dire is to test potential trial strategies and gauge the venire's reaction to such strategies. *State v. Clark*, 981 S.W.2d 143, 146 (Mo. 1998); *Peth v. Heidbrier*, 789 S.W.2d 859, 863 (Mo. App. E.D. 1990); *State v. Nicklasson*, 967 S.W.2d 596, 608 (Mo. 1998); and *State v. Brown*, 547 S.W.2d 797, 799 (Mo. 1977).

During voir dire, "a liberal latitude is allowed in the examination of jurors." *State v. Clark*, 981 S.W.2d 143, 146 (Mo. 1998) (*quoting State v. Granberry*, 484 S.W.2d 299 (Mo. banc 1972)). Statements made by counsel during voir dire are not evidence, and such statements are not presumptively prejudicial to the opposing party absent a showing of bad faith. *Peth v. Heidbrier*, 789 S.W.2d 859, 863 (Mo. App. E.D. 1990).

In the instant case, Plaintiff's counsel chose to conduct voir dire without Ms. Gibbons present. [TR. 168:24]. During voir dire, in testing a potential trial strategy,

Plaintiff's counsel told the venire that Ms. Gibbons would not be present for trial. [TR. 89:3-5]. The venire reacted negatively to Plaintiff's potential absence from trial. [TR. 88:25-90:16]. Plaintiff's counsel then told the venire that there would be an explanation for Plaintiff's absence from trial. [TR. 92:9-11]. Plaintiff's counsel informed the trial court and Defendant's counsel that he intended to inform Ms. Gibbons about "what transpired in voir dire" and "let her make the decision" as to whether she would testify. [TR. 154:21-155:3].

The following morning, during a conference prior to opening statements, the trial court ruled that Plaintiff's counsel would not be permitted to offer testimony explaining Ms. Gibbons' absence from trial. [TR. 178:4-7, TR. 185:16-25, *see generally* TR. 165:21-185:25]. Further, the trial court ruled that Defendant would be permitted to argue an adverse inference if Ms. Gibbons failed to arrive in ten minutes. [TR. 171:24-172:4, 175:11-14, 200:1-22, 493:1-494:5, 506:23]. Based upon the trial court's rulings, Plaintiff's counsel called Ms. Gibbons to summon her to the courtroom. [Tr. 199:25-200:5, 509:17-510:5]. Ms. Gibbons tried unsuccessfully to get to the courtroom by the court-ordered deadline. *Id.* The trial court ordered Ms. Gibbons excluded from the entire trial. [TR. 200:21-22].

Regardless of Plaintiff's counsel's statements made during voir dire, Ms. Gibbons had a right to appear later at trial. *Blessing* 539 S.W.2d at 702; *see also Patrick V. Koepke Constr., Inc.*, 118 S.W.3d at 616. Plaintiff's counsel's representation during voir dire was not a matter of evidence (*Peth*, 789 S.W.2d at 863) and Plaintiff's counsel had a right to test the venire's response to Plaintiff's potential absence—wide latitude is

afforded when examining potential jurors. *State v. Clark*, 981 S.W.2d at 146. Based upon the response from the venire, Ms. Gibbons and her counsel had a right to reevaluate the circumstances and present Ms. Gibbons' live testimony later in trial.

Further, Ms. Gibbons and her counsel had a right to reevaluate whether she would testify after the trial court's orders excluding any explanation for her absence and the allowance of an adverse inference if Ms. Gibbons failed to attend. [TR. 185:1-3]. But Ms. Gibbons was not afforded the opportunity to reevaluate because the trial court permitted her only ten minutes to arrive at the courthouse. [TR. 169:2-5]. While Ms. Gibbons tried to arrive by the court-ordered deadline, she could not make it in time. [TR. 199:25-200:5, 200:17-22, 509:17-510:5].

Ms. Gibbons' attendance may have presented credibility risks for her and her counsel, due to Plaintiff's counsel's representation during voir dire that she would not attend trial. However, Ms. Gibbons' attendance certainly would neither have prejudiced Defendant nor have created an unfair disadvantage for Defendant—if anything, Ms. Gibbons' later attendance would *assist* Defendant in attacking the credibility of Ms. Gibbons and her counsel (based upon Plaintiff's counsel telling the venire that Ms. Gibbons would not be present).

Ms. Gibbons had a right to reconsider whether she would testify after the venire's negative reaction to her potential absence. The trial court abused its discretion when it granted Respondent's motion to exclude Ms. Gibbons from trial and allow Respondent to argue an adverse inference. Accordingly, a new trial is warranted.

CONCLUSION

“The exercise of judicial discretion should be directed toward the accomplishment of fundamental fairness and the avoidance of unfair disadvantage.” *Barnes*, 861 S.W.2d at 620 (*citing Calvin*, 746 S.W.2d at 605). By first excluding Ms. Gibbons from trial, and then permitting Defendant to argue an adverse inference based upon that exclusion, the trial court unfairly prejudiced Ms. Gibbons. The trial court abused its discretion, and fundamental fairness dictates a new trial is in order.

Further, the Court of Appeals’ memorandum opinion, which affirms the trial court’s order, contradicts longstanding, well-established precedent, and blurs what was previously a bright-line rule. *Calvin*, 746 S.W.2d at 605; *Barnes*, 861 S.W.2d at 619-620; and *Hammonds*, 651 S.W.2d at 538-39. A new trial is needed to reassert clear and consistent existing law.

Based upon the foregoing, Ms. Gibbons respectfully requests that this Court reverse the judgment of the trial court and remand this case for a new trial.

Respectfully submitted,

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