IN THE SUPREME COURT OF MISSOURI

SHANNON BAIR

APPELLANT-PLAINTIFF,

v. **Supreme Court No. SC92904**

WILLIAM FAUST

RESPONDENT-DEFENDANT.

APPELLANT'S SUBSTITUTE REPLY 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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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. It is reversible error for a trial court to permit an adverse inference following the court-ordered exclusion of a witness or litigant from trial.

Respondent fails to point to a single case in which a Missouri appellate court permitted an adverse inference following the court-ordered exclusion of a witness or litigant from trial. Indeed, no such case exists.

Respondent cites *Bernat v. State*, 2005 WL 221450 (Mo. App. E.D. 2005) and *Pasternak v. Mashak*, 428 S.W.2d 565 (Mo. 1967) in support of his contention that the trial court properly permitted Respondent to argue an adverse inference after the trial court excluded Ms. Gibbons from trial. *See* Resp. Brief, 24-25, 35. Respondent's reliance on these cases is misplaced.

In neither *Bernat* nor *Pasternak* did the trial court exclude the litigant from trial. *Bernat*, 2005 WL 221450 and *Pasternak*, 428 S.W.2d 565. In both cases, the trial court

permitted the litigant in the courtroom and the litigant still chose not to testify. *Id*. Because the trial court had not excluded the litigant from the courtroom in either *Bernat* or *Pasternak*, those litigants' failure to testify was clearly voluntary, and an adverse inference was properly permitted. *Id*.

There is a key difference, however, between the instant case and *Bernat* and *Pasternak*. Here, it is undisputed that Respondent requested, multiple times, that Shannon Gibbons (formerly Shannon Bair) be barred from the courtroom and barred from testifying. [TR. 161:13-19, 161:22-162:1, 168:3-9, 189:16-17, 189:25-190:4, 192:9-193:1, 199:11-14, 200:15-22]. Further, it is undisputed that the trial court granted Respondent's request and ordered Ms. Gibbons excluded from the courtroom for the entire trial. [TR. 168:24-169:5, 171:24-172:4, 172:16-20, 175:3-5, 175:11-15, 200:17-22]. Ms. Gibbons' court-ordered exclusion is the crucial distinction from the authorities relied upon by Respondent; that distinction renders *Bernat* and *Pasternak* inapposite to the instant case.

The issue before this Court is whether an adverse inference is proper following the court-ordered exclusion of a witness or litigant from trial. Consequently, cases where the trial court actually ordered the exclusion of a witness or litigant are instructive. In her substitute brief, Ms. Gibbons cites three cases in which Missouri appellate courts determined the propriety of an adverse inference following the court-ordered exclusion of a witness from trial. *See* App. Sub. Br. 20-24, 33; *Calvin v. Jewish Hosp. of St. Louis*, 746 S.W.2d 602 (Mo. App. E.D. 1988); *Barnes v. Kissell*, 861 S.W.2d 614 (Mo. App. W.D. 1993); and *State v. Hammonds,* 651 S.W.2d 537 (Mo. App. E.D. 1983). In each of these

three cases where the trial court excluded a witness from trial, the appellate court held that the trial court erred in permitting an adverse inference. *Calvin*, 746 S.W.2d at 605; *Barnes*, 861 S.W.2d at 619-620; and *Hammonds*, 651 S.W.2d at 538-39.

Respondent's reliance on *Bernat* and *Pasternak* only strengthens Appellant's position. Specifically, in these two cases where the trial court did not exclude the litigant from trial, an adverse inference was deemed proper. *Bernat*, 2005 WL 221450 and *Pasternak*, 428 S.W.2d at 568. Conversely, in the three cases where the trial court ordered the witness excluded from trial, and then authorized an adverse inference, the appellate courts remanded each of the cases for new trials. *Calvin*, 746 S.W.2d at 605; *Barnes*, 861 S.W.2d at 619-620; and *Hammonds*, 651 S.W.2d at 538-39.

This is not a coincidence. The fulcrum issue in these "adverse inference" cases is whether or not the trial court excluded the witness from trial prior to permitting an adverse inference. Where the witness is excluded by order of the trial court, the trial court abuses its discretion by allowing an adverse inference (*Calvin*, *Barnes*, and *Hammonds*). The error is so grave, in fact, that the aggrieved party need not even preserve it. *Barnes*, 861 S.W.2d at 620 (*citing Calvin*, 746 S.W.2d at 605). Conversely, when no such court-ordered exclusion exists, an adverse inference is proper (*Bernat* and *Pasternak*).[1]

[1] Respondent misrepresents a point made by Ms. Gibbons in her substitute brief on this issue. Based upon the holdings in *Bernat* and *Pasternak*, Ms. Gibbons noted that: "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

This bright-line rule is simple, straightforward, and proves decisive in the instant case. It is clear that Respondent's counsel requested that Ms. Gibbons be excluded from the courtroom for the entirety of trial. [TR. 161:13-19, 161:22-162:1, 168:3-9, 189:16-17, 189:25-190:4, 192:9-193:1, 199:11-14, 200:15-22]. Further, it is undisputed that the trial court granted Respondent's request and barred Ms. Gibbons from the courtroom. [TR. 168:24-169:5, 171:24-172:4, 172:16-20, 175:3-5, 175:11-15, 200:17-22]. Because Ms. Gibbons was barred from the courtroom, it was reversible error for the trial court to permit Respondent to argue an adverse inference. *Calvin*, 746 S.W.2d at 605; *Barnes*, 861 S.W.2d at 619-620; and *Hammonds*, 651 S.W.2d at 538-39.

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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." App. Sub. Br. 28.

Respondent cherry-picks from this quote and in so doing twists Ms. Gibbons' point: "'Appellant's counsel agrees an adverse inference 'would have been entirely appropriate' in closing argument based on appellant's 'voluntary failure to testify.'" Resp. Br. 35 n. 10. In quoting Appellant's brief, Respondent conveniently omits the portion of Appellant's quote stating that the absence of an order excluding Ms. Gibbons is a necessary prerequisite to an adverse inference being deemed "entirely appropriate." Because a motion and order did precede the adverse inference in this case, the adverse inference was not appropriate pursuant to *Calvin*, *Barnes*, *Hammonds*, *Bernat* and *Pasternak.*

By asking this Court to affirm the use of an adverse inference after the trial court excluded Ms. Gibbons from trial, Respondent is asking this Court to contradict well-established 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. In fact, Respondent requests that this Court, for the first time, permit an adverse inference following the court-ordered exclusion of a litigant from trial. This Court should reject such a request. Instead, this Court should reinforce the bright-line rule confirmed in *Calvin*, *Barnes*, *Hammonds*, *Bernat* and *Pasternak*: namely, that it is reversible error to permit an adverse inference following a witness or litigant's court-ordered exclusion from trial. *Calvin*, 746 S.W.2d at 605; *Barnes*, 861 S.W.2d at 619-620; and *Hammonds*, 651 S.W.2d at 538-39.

The trial court abused its discretion in permitting Respondent to argue an adverse inference after Ms. Gibbons was excluded from trial. Consequently, a new trial is warranted.

B. It is reversible error for the trial court to permit an adverse inference whether the excluded witness is a party or nonparty.

Respondent attempts to distinguish *Calvin*, *Barnes*, and *Hammonds* by pointing out that, in each of those cases, the trial court excluded a nonparty witness, as opposed to a party, from trial. *See* Resp. Br. 25. This is a distinction without meaning. In fact, if anything, this distinction only serves to support Ms. Gibbons' position.

Missouri's appellate courts have observed that "manifest injustice" results from allowance of an adverse inference following a nonparty witness's court-ordered exclusion

from trial. *Calvin*, 746 S.W.2d at 605; *Barnes*, 861 S.W.2d at 620; and *Hammonds,* 651 S.W.2d at 539. "To allow such argument is at odds with Missouri law and is contrary to any notion of fairness or justice." *Barnes*, 861 S.W.2d at 620. The unfair prejudice is so severe to the aggrieved party that the issue need not even be preserved for appeal. *Barnes*, 861 S.W.2d at 620 (*citing Calvin*, 746 S.W.2d at 605).

If manifest injustice results where the excluded witness is a nonparty, common sense dictates that the injustice is even greater were the excluded witness is a party. By permitting an adverse inference against a party, the trial court is allowing the jury to assume that any testimony that party would give would be detrimental to her case.

In the instant case, the trial court allowed Respondent's counsel to tell the jury it could "draw the inference that any testimony that [Ms. Gibbons] would give would be unfavorable to her case" [TR. 223:8-22]. Respondent's counsel repeatedly instructed the jury that it could draw an adverse inference based upon Ms. Gibbons' absence. [TR. 223:10-23, 229:11-17, 230:7-9, 645:6-9]. Respondent's counsel stated: "[Defendant] was not at fault for this accident. Our nonpresent plaintiff was at fault for this accident. She's not here for a reason." [TR. 230:7-9] (emphasis added). And Respondent's counsel ended his closing argument by instructing the jury that "you may infer from [Ms. Gibbons'] 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] (emphasis added).

By permitting an adverse inference against Ms. Gibbons, and permitting Respondent's counsel to represent to the jury that Ms. Gibbons did not testify because her

testimony would be detrimental to her case, the trial court ensured the jury would conclude that, had Ms. Gibbons testified, she would have told the jury she was solely at fault for the subject automobile collision and further that she suffered no injuries as a result of the collision. It is difficult to imagine a more prejudicial scenario.

Clearly, an adverse inference permitted against a party is significantly more prejudicial than an adverse inference against a nonparty. Consequently, if it is unfairly prejudicial and reversible error to permit an adverse inference after excluding a nonparty witness, it is certainly reversible error where the excluded witness is a party.

Based upon *Calvin*, *Barnes*, and *Hammonds*, it is clear that an adverse inference is improper following the court-ordered exclusion of a nonparty witness from trial. Where the excluded witness is a party, and the unfair prejudice of permitting an adverse inference is even greater, the same principle must apply. The trial court abused its discretion in permitting an adverse inference after it ordered Ms. Gibbons excluded from trial. Consequently a new trial is appropriate.

C. Respondent's motion to exclude Ms. Gibbons from trial was the reason Ms. Gibbons could not testify.

Respondent further attempts to distinguish *Calvin*, *Barnes*, and *Hammonds* by arguing that Respondent's motion to exclude was not the reason Ms. Gibbons could not testify. Respondent tries to argue that his counsel moved to exclude Ms. Gibbons only after the trial court had already excluded her from trial. *See* Resp. Br. 26-27. The record simply does not support Respondent's argument.

The record demonstrates that the trial court's first order excluding Ms. Gibbons came in response to arguments by Respondent's counsel that Respondent would be unfairly prejudiced by not knowing if Ms. Gibbons would choose to appear later at trial. Before the trial court ever considered excluding Ms. Gibbons, Respondent's counsel made the following arguments:

> [T]here was a statement made in voir dire yesterday that the plaintiff will not be present for these entire proceedings.

[TR. 160:7-9].

> I'm going to address more of that when we talk about his client not coming and his promise to the jurors that there will be an explanation.

[TR. 160:25-161:2].

> This is about the liability issues of that car accident and it's about her damages, not about whether she can show up when she wants to show up and not show up.

[TR. 161:7-10].

> Is she going to come in tomorrow? The next day? No, that is completely unfair, absolutely unfair. What [Mr. Smith's][2] doing is creating in front of the jury this idea that she can

[2] Following 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.

> come and go as she pleases, that she doesn't have to be here to prosecute her cause of action. But yet you're going to get an explanation for this. From who? He's created this side issue by having her not show up. But he's promised the jury, you're going to hear an explanation. On what? 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 161:14-162:1].

> [S]he's seeking redress from this Court. And she's not here.

[TR. 167:2-3].

> Mrs. 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.

[TR. 168:3-7].

> And let me figure out some way to talk about this issue, because here's the issue: Then do I get to argue this to the jury?

[168:21-23].

In response to these arguments by Respondent's counsel regarding whether or not Ms. Gibbons should be allowed to appear later at trial, the trial court ordered that she would be excluded from trial if she did not appear in ten minutes. [TR. 168:24-169:5]. Respondent's counsel then expressed his appreciation for the trial court's exclusionary order in response to Respondent's concern that Ms. Gibbons could choose to testify later at trial:

> All right, the first thing that I was concerned about was that she would show up later. And I appreciate that, Your Honor. I think that kind of surprise would be beyond the pale.

[TR. 169:6-9].

The record is clear that the trial court excluded Ms. Gibbons in response to Respondent's counsel's arguments that it would be unfair to Respondent for Ms. Gibbons to appear later at trial. Further, as the trial court reconsidered its initial exclusionary order [TR. 168:24-169:5], Respondent's counsel continued to push for a prohibition on Ms. Gibbons' appearance. [TR. 189:16-17, 189:25-190:4, 192:9-193:1, 199:11-14, 200:15-22]. In response to Respondent's counsel's repeated requests, the trial court issued a final exclusionary order against Ms. Gibbons. [TR. 200:17-22].

Respondent's attempt to cast the trial court's exclusionary order as a *sua sponte* endeavor is simply not supported by the record. *See* Resp. Br. 26-27. The reason Ms. Gibbons could not testify later at trial was because Respondent's counsel sought and received an order barring Ms. Gibbons from the courtroom.

In a further attempt to distinguish *Calvin*, *Barnes*, and *Hammonds*, Respondent argues that the reason for Ms. Gibbons' failure to testify was not Respondent's counsel's motion, but rather the actions of Ms. Gibbons' and her attorney. *See* Resp. Br. 27. This argument fails because Respondent confuses the facts that gave rise to Respondent's motion to exclude with the fact that actually prevented Ms. Gibbons from testifying. Specifically, the facts giving rise to Respondent's motion to exclude were Ms. Gibbons' counsel's statement during voir dire and Ms. Gibbons' absence from voir dire and opening statement. Conversely, the fact that actually prevented Ms. Gibbons from testifying was Respondent's motion to exclude her from the courtroom.

In *Calvin*, the fact giving rise to the motion to exclude was the defendant's disclosure of an expert witness just 17 days prior to trial. 746 S.W.2d at 603-4. The fact that actually prevented the witness from testifying was the plaintiff's motion to exclude. *Id*. at 605. The Eastern District remanded, deeming the plaintiff's use of an adverse inference improper because the reason for the witness's failure to testify was the plaintiff's motion to exclude. *Id*.

Similarly, in *Barnes*, the fact giving rise to the motion to exclude was the defendant's expert's failure to honor an agreement to allow the plaintiff's spouse to be present at an independent medical examination. 861 S.W.2d at 619. However, the fact that actually prevented the expert from testifying was the plaintiff's motion to exclude. *Id*. at 619-20. The Western District remanded, finding the plaintiff's use of an adverse inference improper because the reason for the witness's exclusion was the plaintiff's motion to exclude. *Id*.

In *Hammonds*, the fact giving rise to the motion to exclude was the defendant's disclosure of a witness on the morning of trial. 651 S.W.2d at 538. The fact that actually prevented the witness from testifying was the prosecution's motion to exclude the late-disclosed witness. *Id*. The Eastern District remanded, finding the prosecution's use of an adverse inference improper because the reason for the witness's exclusion was the prosecution's motion to exclude. *Id*. at 539.

The instant case is similar to *Calvin*, *Barnes*, and *Hammonds*. Here, the facts giving rise to Respondent's motion to exclude were Mr. Smith's voir dire statement and Ms. Gibbons' absence from voir dire and opening statements. However, the fact that actually prevented Ms. Gibbons from testifying was Respondent's counsel's motion to exclude her from the courtroom. [TR. 161:13-19, 161:22-162:1, 168:3-9, 189:16-17, 189:25-190:4, 192:9-193:1, 199:11-14, 200:15-22]. Like *Calvin*, *Barnes*, and *Hammonds*, because the reason for Ms. Gibbons' exclusion was Respondent's motion to exclude her, Respondent's use of the adverse inference was improper.

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

Respondent argues that Ms. Gibbons voluntarily elected not to testify at trial because she was not present for voir dire or opening statements and because her counsel stated during voir dire that Ms. Gibbons would not testify. *See* Resp. Br. 41-43. Yet Respondent fails to cite any authority that mandates a party must be present for voir dire or openings statements as a prerequisite to testify later at trial. Further, Respondent fails

to explain why, if Ms. Gibbons' failure to testify was truly voluntary, Respondent sought and obtained an order from the trial court excluding Ms. Gibbons from the courtroom and barring her from testifying at trial. If it were truly voluntary, an exclusionary order would be unnecessary.

There exists no procedural rule requiring a party to be present at voir dire or opening statements in order for that party to be permitted to testify at trial. Further, statements made during voir dire are not evidence (*Peth v. Heidbrier*, 789 S.W.2d 859, 863 (Mo. App. E.D.1990)) and "a liberal latitude is allowed in the examination of jurors" (*State v. Clark*, 981 S.W.2d 143, 146 (Mo. 1998)) to uncover juror bias and test potential trial strategy. Although Ms. Gibbons was not present for voir dire and although her counsel, in testing a potential trial strategy, told the jury that she would not testify, nothing prevented Ms. Gibbons and her counsel from changing their minds about whether or not she would testify later at trial.

Contrary to Respondent's assertion that Ms. Gibbons' failure to testify was a voluntarily election on her part (*see*, *generally*, Resp. Br. 29-36), Respondent's counsel admitted on the record that Ms. Gibbons' trial counsel, Mr. Smith, had told him that Ms. Gibbons may decide to testify later at trial:

> And the other thing that was told to me is, well, maybe she will be here tomorrow. You did say that to me, Mr. Smith. Maybe she will. Is that a fair way to try a case? I've got to wait for any day that she comes down here? That's not right.

> And I think she should be excluded from the courtroom. I think the adverse inferences should be drawn.

[TR. 192:5-10]. Respondent acknowledged he was concerned Ms. Gibbons could change her mind and decide to testify, which was the impetus for seeking the trial court's order excluding her from trial. [*See*, *e.g.*, TR. 169:6-9 (Respondent's counsel: "[T]he first thing that I was concerned about was that she would show up later.")]. Respondent's counsel explained to the trial court:

> "[W]e wanted protection from a potential trial tactic of having the plaintiff come in at any time and focusing additional sympathy on her and her case by showing up at her leisure. And that, I argued, was not a fair trial tactic. It is not a fair trial tactic to have to wonder if she's going to be here or not going to be here, is she going to testify or not testify."

[TR.498:12-18]. Clearly, Respondent's counsel knew that Ms. Gibbons had not "elected" not to testify. Respondent's counsel knew that Ms. Gibbons could have decided to testify at trial despite her absence from voir dire and opening statements and despite her counsel's statements during voir dire.

In order to prevent Ms. Gibbons from deciding to testify, Respondent's counsel repeatedly requested an order from the trial court excluding her from trial. [TR. 161:13-19, 161:22-162:1, 168:3-9, 189:16-17, 189:25-190:4, 192:9-193:1, 199:11-14, 200:15-22]. The trial court granted Respondent's counsel's request, and issued an order prohibiting Appellant from entering the courtroom. [TR. 168:24-169:5, 171:24-172:4,

172:16-20, 175:3-5, 175:11-15, 200:17-22]. This cannot be disputed.

Once Ms. Gibbons was informed by her counsel that the trial court was going to exclude her from trial if she was not present for opening statements, she attempted to get dressed and arrive at the courthouse by the court-ordered ten-minute deadline. [TR. 199:22-200:2]. While Respondent claims that the trial court permitted Appellant close to 90 minutes to arrive at the courthouse (*see* Resp. Brief 29), up until the last ten minutes, Mr. Smith's co-counsel was under the impression that there was a standing court order barring Ms. Gibbons from the courtroom. [TR. 494:16-23]. Consequently, it was only after the trial court announced the ten-minute deadline for Ms. Gibbons to arrive that Mr. Smith's co-counsel called Ms. Gibbons and instructed her to come to the courthouse. [TR. 494:17-18]. Because Ms. Gibbons had just stepped out of the shower at the time of the telephone call, she was unable to get dressed and arrive at the courthouse in time. [TR. 199:22-200:2; 509:17-510:5].

Ms. Gibbons' counsel requested that Ms. Gibbons be permitted to enter the courtroom after opening statements. [TR. 185:20-25, 187:19-188:2]. The trial court refused this request. [TR.194:11-12]. Ms. Gibbons' counsel asked for a few more minutes to give his client a fair opportunity to arrive at the courthouse. [TR. 200:2-5]. The trial court denied the request and stated to Respondent'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].

While Ms. Gibbons could not arrive in the courtroom by the court-ordered deadline, she remained at the courthouse for the duration of her trial. [TR. 459:11-18].

Further, Ms. Gibbons was present in the courtroom, outside the presence of the jury, for an offer of proof on the last day of trial. [TR. 507:14-519:25].

The record is clear that Ms. Gibbons attempted to get to the courthouse by the court-ordered deadline. Further, no procedural rule required her to be present for voir dire or opening statements. If Ms. Gibbons chose to be present only for her testimony, that was her choice. *See, e.g., Spirtas Co. v. Division of Design*, 131 S.W.3d 411, 415-16 (Mo. App. W.D. 2004) (There exists "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."). But the trial court prevented Ms. Gibbons from making that voluntary choice by ordering her excluded from the courtroom.

The trial court's order precluded Ms. Gibbons from testifying. Consequently, Ms. Gibbons' absence from the courtroom was compulsory, and cannot be construed as voluntary.

CONCLUSION

Missouri case law is exceedingly clear that it is reversible error for a trial court to permit an adverse inference after a motion and order excluding a witness or litigant from trial. Here, the trial court committed reversible error by allowing Respondent to argue an adverse inference based upon Ms. Gibbons' court-ordered exclusion from trial. Appellant Shannon 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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CERTIFICATE OF SERVICE AND BRIEF COMPLIANCE

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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 4,058 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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