IN THE SUPREME COURT OF MISSOURI

SC 92904

SHANNON BAIR

Plaintiff-Appellant,

v.

WILLIAM FAUST

Defendant-Respondent.

RESPONDENT'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

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STATEMENT OF FACTS

On June 22, 2009, Plaintiff-Appellant Shannon Gibbons (formerly Shannon Bair) filed a petition for damages alleging automobile negligence against Defendant-Respondent William Faust. [L.F. 16]. Specifically, appellant alleged that on June 5, 2009, while she was operating a vehicle westbound on U.S. Highway 50 at the intersection of Milton Thompson Road in Jackson County, Missouri, respondent entered westbound U.S. Highway 50 from Milton Thompson Road and drove his vehicle immediately into the path of appellant, who locked her brakes and tires to prevent a collision. [L.F. 17]. Appellant alleged that after the near collision, she attempted to pass respondent in the outside lane, whereupon respondent began playing "cat and mouse" and swerved his vehicle toward appellant's vehicle causing her to lose control. [L.F. 17]. Appellant further alleged that her vehicle left the roadway, became airborne, and overturned several times. [L.F. 17]. Respondent denied appellant's allegations. [L.F. 35].

Trial of this matter commenced on December 13, 2010, but prematurely ended when the court granted a mistrial based on appellant's counsel's display of an improper PowerPoint slide during opening statement. [L.F. 6; 157:21-24, 171:12]. The second jury trial of this matter began on May 10, 2011. [TR. 10:2-6]. During *voir dire*, appellant's counsel stated, "**my client's not going to be here** . . . for this trial" and promised the potential jury pool "I'm going to give you some reasons," "I'll give you an explanation," and that "there will be some evidence about that." [TR. 89:3-4, 8-9; 92:9-11] [emphasis added].

After the jury was seated and dismissed for the day, appellant's counsel informed respondent's counsel that he intended to use four PowerPoint slides titled "Rules of the Road" in opening statement despite his prior representation that he would not use any slides. [TR. 148:9-17]. Respondent's counsel questioned the propriety of using the slides during opening statement and the origin of their content. [TR. 148:18-149:20]. Additionally, respondent's counsel expressed concern that the jury would misconstrue the slides as statements of Missouri law. [TR. 148:19-21]. Appellant's counsel represented to the trial court and respondent's counsel that the rules referenced in the slides were "common-sense" statements of the standard of care one would use while driving. [TR. 149:22-23, 150:15-17, 152:17-21]. Appellant's counsel plainly stated to the trial court: "Judge . . . . [i]t's not a statute." [TR. 152:17-21].

Respondent's counsel then addressed the statements made by appellant's counsel during *voir dire* regarding appellant's absence from trial. [TR. 92:9-11]. Appellant's counsel affirmed to the trial court and respondent's counsel that, as far as he knew, appellant would not be present for trial and that there would be an explanation. [TR. 153:3-154:8]. There was no medical reason for appellant's absence; she just simply would not be there. [TR.154:9-13]. Additionally, appellant's deposition testimony was not going to be played during her case in chief. [TR. 154:14-16]. Although appellant's counsel wanted to talk to appellant about what transpired in *voir dire*, he was going to "**let her make the decision**" whether to be present at trial. [TR. 154:21-155:3] [emphasis added].

Appellant was not present in the courtroom when court reconvened at 9:00 a.m. the next day. [TR. 155:25-156:1, 168:25]. Prior to opening statements, respondent's counsel made a record before the court regarding two issues: (1) the slides appellant's counsel planned to use in opening statement and (2) appellant's counsel's representation during *voir dire* that appellant would not be present for trial. [TR. 156:8-11, 160:7-9]. Respondent's counsel first addressed appellant's counsel's presentation to the court the previous day that the "Rules of the Road" slides were "not statute[s]." [TR. 152:17-21, 156:11-17]. Contrary to appellant's counsel's representations, the content of his slides was indeed taken word for word from Chapter 304 of the Missouri Revised Statutes. [TR. 156:18-23, 158:8-14]. When asked by the trial court if the slides were excerpts from the statute, appellant's counsel grudgingly admitted that "[t]here are parts of it that [are] from the statute." [TR. 163:23, 164:1-2]. Based on appellant's counsel's misrepresentation to him and the trial court regarding the source of the slides, respondent's counsel moved that the case be dismissed with prejudice. [TR. 171:12-13]. The trial court ruled that the slides could not be used in opening statement. [TR. 164:25-165:1].

The trial court then addressed appellant's failure to appear for trial. [TR. 165:3]. When asked about appellant by the trial court, appellant's counsel stated as follows:

> Well, **my client doesn't want to be here** for a few different reasons. Number one, she was run off the road by this guy two years ago on purpose. And this guy has put her through two years of litigation. This guy has made public comments in the paper about her being hot. And last, but not least, they sent a private investigator down to secretly videotape her

> wedding vows in Cancun two months ago. She's mortified by all this. She doesn't want to be in the same room with this guy. I mean, she kind of sees it as it's ruined her life. **And she doesn't want to be here**.

[TR. 165:4-13] [emphasis added].[1] Although appellant's counsel advised appellant on the consequences of her absence from trial, appellant still did not want to attend and in turn, did not appear in the courtroom the morning of trial. [TR. 165:14-18, 193:18-23, 168:25]. Respondent's counsel then asked the trial court if he could argue appellant's absence to the jury. [TR. 168:22-23]. The trial court stated as follows:

> She didn't show up in *voir dire*. **She's not here today. I'm excluding her from the courtroom.** She won't be able to walk in 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] [emphasis added].

Following this exchange, appellant's counsel stated, "I need to go call my client. I guess, and tell her exactly what you just told me. I don't have any other choice. **I'll leave it up to her**." [TR. 170:2-4] [emphasis added]. The trial court instructed appellant's

[1] Ultimately, appellant was not allowed to argue that respondent made public comments on the paper's website because there was no evidence to support this claim. [TR. 178:4-180:21].

counsel to "[m]ake your phone call. . . . [w]e'll see what happens." [TR. 170:16-18]. A recess was taken and upon return, appellant's counsel informed the court that appellant could not "get [there] within any time soon" and stated, "let's just go ahead." [TR. 170:23-24]. Respondent's counsel again moved the trial court to dismiss appellant's case with prejudice. [TR. 171:12-13]. Before the trial court could respond, appellant's counsel stated he could "have [appellant] here probably within 35, 40 minutes." [TR. 171:16-17]. The court said it was "not going to do that" because the jury was waiting. [TR. 171:18-19]. Respondent's counsel noted "this was an issue all of [appellant's counsel's] creation . . . ." [TR. 171:21-23]. The trial court ruled that respondent's counsel could use an adverse inference based on appellant's failure to appear in court and that any evidence offered as explanation was inadmissible. [TR. 171:24-172:4].

Respondent's counsel then asked the trial how he could use the adverse inference in opening statement. [TR. 172:12-19]. Specifically, he asked for the following clarification: "And so she's not going to be here; in fact, she's been excluded from the courtroom and you can draw an adverse inference from the fact that she's not here today. Is that a fair statement?" [TR. 172:16-19]. The trial court affirmed it was a fair statement. [TR. 172:20]. Respondent's counsel asked for further guidance on using the adverse inference in opening statement. [TR. 175:6-8]. In response, the trial court stated:

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

[TR. 175:11-15].

With the jury still waiting, the trial court asked counsel if there was any further record they would like to make. [TR. 176:25-177:4]. Respondent's counsel asked to confirm that there would be no explanation of appellant's absence. [TR. 177:5-10]. The trial court then inquired what appellant's counsel was planning to do by way of explanation. [TR. 181:8-9]. Appellant's counsel said he would put on evidence about what happened two years ago, that the matter had been pending for two years, and that respondent's private investigator ruined the memory of appellant's wedding for the rest of her life. [TR. 181:12-23]. Respondent's counsel then moved the trial court to exclude any testimony or argument that the private investigator had ruined appellant's memory of her wedding for the rest of her life. [TR. 181:24-182:13]. The trial court asked appellant's counsel who would testify about an invasion of privacy if not appellant. [TR. 182:14-18, 184:23-24]. In response, appellant's counsel admitted appellant would have to testify. [TR. 184:25-185:1]. He then stated he had no other choice but to get appellant to court. [TR. 185:2-3].

The trial court responded, "I'm not going to wait an hour for her to get here. I suppose you could put your investigator on, but I don't know what I'm going to allow you to argue." [TR. 185:4-7]. Appellant's counsel interrupted the court and stated, "Judge, let's do this, okay?" [TR. 185:8]. The trial court finished its statement, and appellant's counsel then stated he would have appellant in the courtroom in thirty minutes. [TR. 185:9-17]. The trial court responded, "I'm not waiting. We've had the jury up there for an hour now." [TR. 185:18-19]. Discussion ensued during which respondent's counsel renewed his motion for sanctions, requesting dismissal of the case.

[TR. 185:20-187:18]. Respondent's counsel clarified that it was his "understanding Plaintiff has been barred from the courtroom for the remainder of the case, and I have an adverse statement, and I want to weave that into my opening." [TR. 187:16-18].

Appellant's counsel again represented that appellant would be in the courtroom in thirty minutes. [TR. 187:19-20]. Appellant's counsel further stated that he "didn't know it was going to unfold like this . . ." and that he'd "never had a **client not want to come to trial.**" [TR. 187:24-25, 188:11] [emphasis added]. Appellant's counsel represented that after he told appellant exactly what the jury said during *voir dire*, she asked him, "do I have to be there?" [TR. 188:11-12, 24-25]. He stated, "I don't know of any rule that requires you to be there." [TR. 188:12-13]. She responded, "**I really don't want to go**. . . . I did this back in December and . . . **I don't want to do it again** . . . this guy has violated my privacy and **I don't want to go**." [TR. 188:13-16] [emphasis added]. Upon her counsel's explanation that some of the jurors may hold appellant's absence against her, appellant told her counsel "**I really don't want to come still**." [TR. 193:21-23] [emphasis added]. Additionally, appellant's counsel told appellant, "I don't know of any reason why you would have to go. We have your deposition."[2] [TR. 188:16-18].

The parties continued to debate appellant's counsel's misconduct and appellant's decision to not be present at trial. [TR. 189:9-199:14]. The entire exchange, which began

[2] Interestingly, appellant's counsel previously represented to the trial court and respondent's counsel that he would not offer appellant's deposition testimony at trial. [TR. 154:14-16].

at 9:00 a.m., ended at approximately 10:17 a.m. when appellant's counsel represented that his client was on her way and would be present in the courtroom in ten minutes and the trial court responded as follows:

> "This is unbelievable. I'm bringing the jury down in ten minutes. If she's not in the door, she's out. I'll let you make whatever record you need to make . . . . At 10:27 I'm bringing the jury down."

[TR. 199:15-18]. At 10:28 a.m., appellant still was not present in the courtroom. [TR. 199:22-25]. Appellant's counsel requested another five minutes because appellant was getting out of the shower when he told her she had ten minutes, even though he previously represented to the court she was on her way.[3] [TR. 198:22-23, 200:1-5]. The trial court stated it was bringing the jurors into the courtroom, as they had already been

[3] This was the last of appellant's counsel's numerous statements that he could get his client to court or that she would be there shortly. As an overview, he stated 1) he was going to call his client, but she couldn't get there soon so they should just go ahead, [TR. 170:2-4, 170:23-24]; 2) he could have her there in 30 to 45 minutes, [TR. 171:16-19, 185:18-19]; 3) she would be there in 30 minutes, [TR. 187:19-20]; 4) he would have her there in 30 minutes, [TR. 194:10]; 5) he could have her there in 15 minutes (9:40 a.m.), [TR. 194:13-17]; 6) she would be there in 10 minutes, [TR. 198:22-23]; and finally 7) just after 10:28 a.m., appellant would be there in 5 minutes, [TR. 200:1-5]. There was nothing excluding appellant from the public roadways, the courthouse parking lot, the lobby of the courthouse, or even the hallway outside the courtroom.

waiting an hour and a half. [TR. 200:12-14]. The trial court affirmed that respondent's counsel could "refer to the empty chair and talk about [appellant's] lack of testimony" and that appellant "was excluded from the courtroom." [TR. 200:15-22]. The parties then proceeded with opening statements. [TR. 202:22-230:9].

Two days later, prior to the close of appellant's case, the trial court made a record regarding appellant's exclusion from trial. [TR. 488:3-6]. While the trial court agreed that appellant had the right to not come to court to pursue her claim, it noted that this is typically done for good cause such as the party is infirm or disabled, or it would be psychologically detrimental to attend trial. [TR. 488:8-25]. The trial court stated it was completely unaware appellant was not going to be present at trial until appellant's counsel represented to the venire that she would not be and promised an explanation. [TR. 488:1-11]. The trial court noted there was no documentation that appellant had a phobia or fear about coming to the courtroom and presenting her case in open court with many protections. [TR. 488:12-20]. Further, the trial court noted that it was only after it laid the parameters that respondent's counsel was allowed an adverse inference and that it would limit testimony regarding appellant's absence that appellant's counsel indicated he would get appellant to the courtroom. [TR. 489:21-490:12]. Thus, the trial court was inclined to allow respondent to draw an adverse inference. [TR. 489:21-490:7]. Additionally, this conversation lasted close to an hour and a half, during which

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As the overall record in this case demonstrates, appellant's counsel's statements were often either wildly inaccurate or patently false.

appellant's counsel repeatedly stated he would get appellant to the courtroom. [TR. 490.10-491:14]. The last time appellant's counsel indicated he would get appellant to the courtroom within ten minutes was at 10:17 a.m., and the trial court gave appellant until 10:27 a.m. to arrive. [TR. 490:16-19]. When the trial court returned to the bench at 10:28 a.m. or 10:29 a.m., appellant was not present, and appellant's counsel stated she had just gotten out of the shower. [TR. 490:20-25]. This indicated to the trial court that appellant was not prepared to come at any time during the previous hour when the issue of her absence was discussed. [TR. 490:25-491:4]. The trial court explained that because of this, it had elected to begin trial without appellant present rather than keep the jury waiting even longer. [TR. 491:5-8].

That evening, the parties again discussed appellant's failure to appear. [TR. 491:9]. The trial court told appellant's counsel that if he presented case law indicating the court exceeded its authority, it would revisit the issue and allow appellant to participate. [TR. 491:9-12]. The next day, appellant's counsel indicated to the trial court that it was all "water under the bridge" and he was not going to pursue the issue of appellant's absence further. [TR. 491:13-15]. The trial continued. [TR. 491:15-16].

Regarding appellant's failure to appear, the trial court stated as follows:

> I continue to think it was a tactical maneuver and when it didn't play out as you had anticipated, things changed. And so now I think you're trying to couch it in terms of my excluding your client to set up any appeal that you may have. And that's fine. But what you term to be an exclusion I guess I would term to be her voluntary election not to participate. Because I gave

her the opportunity; I gave you the opportunity to get her here; I invited us to revisit the issue yesterday morning. You elected not to. So, you know, you term it as you may, but I think it is far different than my excluding somebody from being a witness and then allowing an adverse inference. Because I do think that is error. But, I mean, I think she had ample opportunity to be here to present her case, to have her day in court, and she voluntarily elected not to.

[TR. 491:17-492:6].

The trial court further stated:

I want to make it crystal clear on the record . . . . In *voir dire*, in front of a panel of 45, Plaintiff made a representation that she was not going to be here in trial and asked if any of the jurors or potential jurors had a problem with that and promised an explanation. Thereafter, when we had a discussion at the bench, it was represented to both [respondent's counsel] and I that she wasn't going to be here.

And that evening you were evasive and coy about the reasons why. As I was getting on the bench, I heard you and [respondent's counsel] talking about it. [Respondent's counsel] at that time didn't pursue it. And then we came and finally talked about it the next morning and finally got an explanation for why she wasn't going to be here.

And then when you learned that I was going to allow an adverse inference, which I think I'm allowed to under the law, and when you learned that I

was not going to let her husband testify to some of the things that you had anticipated him being able to testify to, because they are not legally and factually relevant, you changed your tune and put me in a box and started claiming that your client could indeed be here for the trial of her own cause. Which makes me think that the whole episode and the whole manufacturing of this was disingenuous as all get-out. I've got to say that. And I envisioned, again, that I wasn't going to allow her to come waltzing in here, once we had started the opening statement and the evidence in dramatic fashion, like she owned the place or like she was on stage. I wasn't going to allow her to do that.

And [respondent's counsel] is right. I have the inherent authority to control how a trial is conducted in this courtroom. I have the inherent authority to assure that it is a level playing field. And if I allowed her to do that, come waltzing in here at her discretion whenever she pleased, which I envisioned happening, I would have placed Defendant at a huge disadvantage, an unfair disadvantage. And I'm not going to allow that to happen.

I gave you a chance to get her here. You told me that you could get her here in a particular amount of time; I think it was 10 or 15 minutes. And then when I came out here, you said she was just getting out of the shower. I can't allow that to happen. I can't allow that type of manipulation of the system, of this Court, of the process, to happen.

> And I am confident that the Court of Appeals will agree with me that this is a unique situation. I have the utmost respect for those judges at the Court of Appeals. They are all good trial judges. They were good trial attorneys. I'm confident that on this record as a whole, I don't see them putting their stamp of approval on this type of activity.
>
> So, again, I think by you claiming that I have kept her out of the courtroom, I think when all is said and done, it was and continues to be a voluntary act on her part, and that was the plan from the get-go. And it only changed when it didn't go as anticipated or play out as you had anticipated it playing out.

[TR. 502:2-504:6].

On May 13, 2011, the jury returned a verdict in favor of appellant in the amount of $60,000. [L.F. 837-839]. In its verdict, the jury apportioned eighty-five percent fault to appellant and fifteen percent fault to respondent. [L.F. 827-839]. Judgment was entered on May 24, 2011, in the amount of $9,000. [L.F. 13, 837-838]. Appellant timely filed her Motion for New Trial, which was subsequently heard on September 20, 2011. [L.F. 859, 995]. On September 21, 2011, the trial court entered its Order denying appellant's Motion for New Trial. [L.F. 1061].

Upon filing a notice of appeal, appellant terminated her representation by Mr. Aaron Smith and retained present counsel, Burmeister Gilmore LLP, to pursue her appeal. The Court of Appeals for the Western District of Missouri affirmed the trial

court's final judgment and on October 5, 2012, denied appellant's application of transfer to this Court. This Court subsequently granted appellant's application for transfer.

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN ALLOWING RESPONDENT TO ARGUE AN ADVERSE INFERENCE TO THE JURY BASED UPON APPELLANT'S ABSENCE FROM THE COURTROOM BECAUSE MISSOURI LAW PERMITS AN ADVERSE INFERENCE BASED UPON A PARTY'S ABSENCE, IN THAT APPELLANT VOLUNTARILY ELECTED NOT TO ATTEND TRIAL DESPITE NUMEROUS OPPORTUNITIES GIVEN BY THE TRIAL COURT FOR HER TO DO SO, AND THE TRIAL COURT EXERCISED ITS INHERENT AUTHORITY TO CONTROL ITS COURTROOM BY PREVENTING A PREJUDICIAL DISPLAY BY APPELLANT APPEARING AT HER LEISURE DURING THE COURSE OF PROCEEDINGS.

Authority Principally Relied On

Bernat v. State, 2005 WL 221450 (Mo. App. E.D. 2005).

Keith v. Burlington Northern R.R. Co., 889 S.W.2d 911 (Mo. App. S.D. 1994).

Pasternak v. Mashak, 428 S.W.2d 565 (Mo. 1967).

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

II. THE TRIAL COURT DID NOT ERR IN EXCLUDING APPELLANT FROM TRIAL BECAUSE THE RIGHT OF A LITIGANT TO ATTEND TRIAL IS SUBJECT TO THE INHERENT POWER OF THE COURT TO CONTROL THE COURTROOM, IN THAT THE TRIAL COURT EXERCISED ITS INHERENT POWER TO CONTROL THE COURTROOM BY EXCLUDING

APPELLANT FROM THE COURTROOM TO MAINTAIN CONTROL OVER THE PROCEEDINGS AND TO PREVENT THE DISRUPTION AND UNFAIR PREJUDICE ASSOCIATED WITH APPELLANT'S UNPREDICTABLE AND DRAMATIC APPEARANCE DURING THE COURSE OF TRIAL.

Authority Principally Relied On

State v. Bowens, 964 S.W.2d 232 (Mo. App. E.D. 1998)

ARGUMENT

STANDARD OF REVIEW FOR ALL POINTS RELIED ON

"[T]he trial court's denial of a motion for new trial is reviewed under an abuse of discretion standard." *Moon v. Hy-Vee, Inc.*, 351 S.W.3d 279, 282 (Mo. App. W.D. 2011) (citation omitted). On appeal from a denial of a motion for new trial, the appellate court considers only the evidence that supports the trial court's decision and reviews the record from a standpoint favorable to the trial court's ruling. *Torre Specialties, Inc. v. Coates*, 882 S.W.2d 914, 918 (Mo. App. W.D. 1992) (citation omitted); *Brown v. Cedar Creek Rod & Gun Club*, 298 S.W.3d 14, 20 (Mo. App. W.D. 2009) (citation omitted). "Whether a new trial should be granted because of jury argument is a determination within the sound discretion of the trial court" and appellate review is limited to abuse of discretion. *Brown*, 298 S.W.3d at 20 (citation omitted).

"Deference is given to the better position of the trial judge to evaluate the prejudicial effect of . . . argument." *Henderson v. Fields*, 68 S.W.3d 455, 471 (Mo. App. W.D. 2001) (citation omitted). "The trial court abuses its discretion when its 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.'" *Moon*, 351 S.W.3d at 282 (internal citation omitted). "If reasonable people could differ, then the trial court's discretion has not been abused." *Id.* (citation omitted). The appellate court "view[s] the evidence in the light most favorable to the trial court's ruling." *Id.* (citation omitted).

I. THE TRIAL COURT DID NOT ERR IN ALLOWING RESPONDENT TO ARGUE AN ADVERSE INFERENCE TO THE JURY BASED UPON APPELLANT'S ABSENCE FROM THE COURTROOM BECAUSE MISSOURI LAW PERMITS AN ADVERSE INFERENCE BASED UPON A PARTY'S ABSENCE, IN THAT APPELLANT VOLUNTARILY ELECTED NOT TO ATTEND TRIAL DESPITE NUMEROUS OPPORTUNITIES GIVEN BY THE TRIAL COURT FOR HER TO DO SO, AND THE TRIAL COURT EXERCISED ITS INHERENT AUTHORITY TO CONTROL ITS COURTROOM BY PREVENTING A PREJUDICIAL DISPLAY BY APPELLANT APPEARING AT HER LEISURE DURING THE COURSE OF PROCEEDINGS.

The trial court did not abuse its discretion in allowing respondent to argue an adverse inference to the jury after it excluded appellant from further proceedings at trial because appellant voluntarily elected to not appear at the beginning of trial, and such a decision was not clearly against logic or so arbitrary or unreasonable as to shock the sense of justice or indicate a lack of careful consideration.

A. An Adverse Inference Against Appellant Was Proper After She Failed to Appear For Trial, Despite Numerous Opportunities Provided to Her By the Court to Appear Before She Was Excluded From Further Proceedings.

"Generally, in a civil proceeding, an opponent may draw an adverse inference against a party, knowledgeable of the facts in controversy, who fails to testify, and the opponent may argue such failure to testify to the jury." 75A Am. Jur. 2d Trial § 491

(2011) (citing *Bernat v. State*, 2005 WL 221450 at *2 (Mo. App. E.D. 2005) *transferred to* 167 S.W.3d 717 (Mo. 2005), *overruled on other grounds by* 194 S.W.3d 863 (Mo. 2006) (en banc)). The Missouri Supreme Court held that this rule is "well established" and that "[a] trial court's refusal to permit such argument when proper may constitute reversible error. . . ." *Pasternak v. Mashak*, 428 S.W.2d 565, 568 (Mo. 1967) (citations omitted). "Thus counsel may comment on the failure of a litigant who is present at the trial to testify as to a fact in issue, as well as on the failure of a party to be present at the trial and to contradict material testimony introduced." 75A Am. Jur. 2d Trial § 491 (2011) (citations omitted).

Appellant's counsel's reliance on *Calvin v. Jewish Hospital 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) is misplaced. *Calvin*, *Barnes*, and *Hammonds* each involve the propriety of allowing an opponent to draw an adverse inference from the failure of a **non-party witness** to testify at trial, not a **party**. While appellant argues these cases in terms of testimony of witnesses in general, the distinction between the type of witness is critically important. *Appellant's Substitute Brief* at 23, Shannon Bair v. William Faust, No. SC 92904 (Mo. Dec. 31, 2012) (hereinafter "Appellant's Substitute Brief"). A non-party witness has not availed himself to the court and the judicial process whereas a party has. Missouri courts have acknowledged that "[d]ifferent rules apply when a **party** having knowledge of the facts fails to testify." *See Keith v. Burlington Northern R.R. Co.*, 889 S.W.2d 911, 919 (Mo. App. S.D. 1994) (emphasis added).

Here, appellant is not a non-party witness but rather a litigant who sought out the court for legal redress.[4] Further, Missouri law holds that "[a]vailability is not a factor governing the right to comment when a party, as distinguished from a non-party witness, does not testify."[5] *Pasternak*, 428 S.W.2d at 569. A plaintiff who elects not to testify cannot defeat the defendant's right to an adverse inference by claiming that she was available and could have testified if called. *See id.* Thus, different rules apply here and the cases appellant relies on are neither controlling nor relevant.

Calvin, *Barnes*, and *Hammonds* are further distinguishable. The reasoning in each of these cases—that it was erroneous to allow opposing counsel to draw an adverse inference from the failure of a non-party witness to testify—was based on the fact that each opposing attorney knew his motion to exclude the witness was the **only reason** that the testimony of the non-party witness would not be presented. Here, while respondent's counsel did request appellant be banned from the courtroom [TR. 189:16-17], it was *after*

[4] Interestingly, appellant's counsel argued that the fact appellant had to file a lawsuit was in and of itself a part of her harms and losses. [TR. 196:17-21]. The trial court did not allow appellant's counsel to introduce such evidence by way of testimony from appellant's husband. [TR. 182:17-18, 183:19-20, 184:8-12, 185:6]. This was simply another example of appellant's misunderstanding of the legal process and her counsel's repeated attempts to overreach in a manner that prejudiced respondent.

[5] This well-established principle further corroborates the concept that non-party witnesses and party witnesses are in fact distinguishable when it comes to testifying.

the trial court initially excluded appellant based on her voluntary election not to appear for *voir dire* or the beginning of trial. [TR. 168:24-169:5]. The trial court then gave appellant ample opportunity to show up before the jury was brought down for opening statements. [TR. 169:2-5, 194:13-15, 199:15-18, 490:8-491:12]. Additionally, in *voir dire*, appellant's counsel represented to the venire that his client would not be present for trial. [TR. 89:3-4]. Later that evening and outside the jury's presence, appellant's counsel again affirmed that appellant would not be at trial and told the court that she "doesn't want to be here." [TR. 154:4-13, 165:4-13]. Further, appellant's counsel acquiesced to the trial court's ruling on multiple occasions by choosing to proceed with trial. [TR. 170:24, 185:8, 491:13-15]. The trial judge refused to allow appellant to represent to the jury that she would not appear and then let her make a "grand entrance" to engender sympathy on a manufactured, irrelevant issue. [TR. 168:24-169:5, 502:24-503:5]. Therefore, *Calvin*, *Barnes*, and *Hammonds* are not applicable to the case at bar because appellant is a party whose testimony was excluded primarily because of her representations through counsel to the trial court, respondent's counsel, and the jury that she would not be at her trial and her subsequent failure to appear after being given numerous opportunities to do so.

Finally, appellant's argument that the Court of Appeals for the Western District of Missouri "created new law" that "contradicted clear and consistent existing law" is completely wrong. *Appellant's Substitute Brief* at 23. Existing law, based on *Calvin*, *Barnes*, and *Hammonds*, denied adverse inferences when **non-party witnesses** were excluded from the court. That simply is not the case here where a party witness was

excluded. Thus, contrary to appellant's assertion, a Missouri appellate court did not for the first time find the opposite. *Appellant's Substitute Brief* at 23. Rather, the Western District found that "the adverse inference was a permissible consequence of [appellant's] choice not to appear for her trial."[6] *Western District Memorandum Supplementing Order Affirming Judgment Pursuant to Rule 84.16(b)* at 18, Shannon Bair v. William Faust, No. WD74395 (Mo. App. W.D. Aug. 28, 2012) (hereinafter "Western District Memorandum"). Appellant has failed to cite—and respondent's extensive research has not revealed—any Missouri authority holding that it is improper to allow an opponent to argue an adverse inference where a party has failed to appear or testify at trial. Obviously, if appellant never appeared in court and never testified, an adverse inference would always be allowed. As such, it is difficult to believe appellant's counsel did not convince his client of the importance of showing up for her trial. Regardless of the jury's feelings about a non-present plaintiff, certainly appellant's attorney was even more concerned about the adverse inference further confirming the trial court's belief that this entire situation was in fact an attempt to manipulate the court to the unfair prejudice of respondent.

Because appellant was excluded from the courtroom based on her own choices and not on respondent's motion, the trial court did not err in allowing an adverse inference

[6] The Western District also found that under the circumstances, the trial court did not abuse its discretion. *Western District Memorandum* at 18.

based on her absence. Therefore, a new trial should not be granted because there is no error to remedy.

B. Appellant's Absence From The Courtroom Was Voluntary And Cannot Be Construed As Compulsory.

What appellant terms as her "exclusion" from trial is nothing more than the trial court recognizing and enforcing her "voluntary election not to participate." [TR. 491:21-23]. After being fully advised about the consequences of her absence, appellant still chose not to appear in the courtroom for the beginning of trial. [TR. 165:14-18, 193:18-23]. After the trial court decided that respondent's counsel was allowed to draw an adverse inference and limited the testimony regarding appellant's absence from trial, appellant's counsel indicated he would get appellant to the courtroom. [TR. 489:21-490:12]. The trial court relented and indicated that if appellant could get to court, she could participate. [TR. 490:14-16]. In its entirety, this discussion lasted close to ninety minutes, during which appellant's counsel repeatedly said he would get her to the courtroom.[7] [TR. 490:16-19].

At approximately 10:17 a.m., appellant's counsel indicated he would get appellant to the courtroom within ten minutes. [TR. 199:16-18]. The trial court gave appellant until 10:27 a.m. to arrive. [TR. 199:16-18]. At 10:28 a.m., appellant was not present. [TR.

[7] Appellant's counsel made multiple, inconsistent statements to the trial judge regarding how long it would take appellant to arrive in his courtroom, all of which were well less than thirty minutes.

199:23-25]. Appellant's counsel stated appellant had just gotten out of the shower. [TR. 200:1]. This indicated to the trial court that appellant was not prepared to be present in court at any time during the previous hour when the issue of her absence was being discussed. [TR. 490:25-491:4].

Contrary to appellant's assertions, "[she] had ample opportunity to be present [in court] to present her case, to have her day in court and she . . . voluntarily elected not to." [TR. 492:4-6]. As the trial court stated:

> I have the inherent authority to control how a trial is conducted in this courtroom. I have the inherent authority to assure that it is a level playing field. And if I allowed her to do that, come waltzing in here at her discretion whenever she pleased, which I envisioned happening, I would have placed Defendant at a huge disadvantage, an unfair disadvantage. And I'm not going to allow that to happen.

[TR. 503:6-13]. "[Appellant's] absence was and continu[ed] to be a voluntary act on her part, and that was the plan from the get-go. And it only changed when it didn't go as anticipated or play out as [she] had anticipated it playing out." [TR. 504:1-6]. In fact, it was only after appellant's counsel was made aware that an adverse inference would be granted and testimony regarding her absence would be limited that he stated he would get her to the courtroom. Appellant's repeated statements to her counsel that she did not want to attend her own trial and appellant's counsel's statements "I don't have any other choice" and "if I had [known it was going to unfold like this], I would have told [appellant] look you're going to have to get over your things and be [in court]" together

actually indicate that appellant's presence in the courtroom would be compulsory. [TR. 187:25-188:2].

Further, while a liberal latitude is allowed in the examination of jurors, and statements made during *voir dire* are not evidence, appellant's counsel's statement to the venire that appellant was "not going to be here . . . for this trial" was prejudicial to respondent.[8] Appellant relies on *Peth v. Heidbreider*, 789 S.W.2d 859 (Mo. App. E.D. 1990), for the proposition that statements made by counsel during *voir dire* are not presumptively prejudicial to the opposing party absent a showing of bad faith.

[8] Appellant's counsel argues that appellant's presence in court after her counsel's statements that she would not attend trial would have actually assisted respondent in attacking the credibility of appellant and her counsel and therefore would not have been prejudicial to respondent. *Appellant's Substitute Brief* at 31. This is unfounded. The flaw in this reasoning is easily shown in the light of an actual cross-examination. If appellant was cross-examined regarding her promise not to attend trial, this would open the door for her to say why she almost didn't come to her own trial. Namely, because she was so frightened and stressed by coming to court. In essence, the cross-examination would have allowed appellant to give testimony on issues that would otherwise be irrelevant and unfairly prejudicial and obtain sympathy from the jury. Cross-examination on appellant's counsel's statements in *voire dire* was either effectively off-limits at best, or at worst, a trap for the unwary. This is just another example of appellant's counsel's multi-layered attempts to gain an unfair advantage by improperly manipulating the system.

Appellant's Substitute Brief at 24. Appellant's reliance on *Peth* is misplaced for three reasons. First, the statements here were actually prejudicial in that they were all part of a plan to manipulate the system to engender sympathy for appellant. Second, the statements made during *voir dire* in *Peth* related to identifying the defendant by family information. *Peth*, 789 S.W.2d at 862. Here, appellant's counsel's statements in *voir dire* had nothing to do with appellant's family. Rather, while appellant's counsel argued that his statements were supposedly made to test a trial strategy, more believably they were part of a scheme to garner additional sympathy.[9] This was indicated through his promise to the venire that they would hear an explanation of appellant's absence, which was intended to include a description of appellant's mental anguish. [TR. 153:12-154:3]. Third, even if *Peth's* holding did control the case at bar, appellant's reliance is still misplaced because the court held that statements made during *voir dire* "are not presumptively prejudicial to the opposing party **absent a showing of bad faith**." *Appellant's Substitute Brief* at 24; *see also Peth*, 789 S.W.2d 859. Here, however, there was a showing of bad faith. The trial court—on numerous occasions—reprimanded appellant's counsel on his "lack of being forthcoming," "being coy," playing "hide the ball," "sandbagging," not "talking about things ahead of time," and why it's necessary to be "up front in [our] litigation." [TR.

[9] Appellant's counsel argues it was simply a test of trial strategy, *Appellant's Substitute Brief* at 29, but it is difficult to ignore that his promise of an "explanation" to the jury was in reality a set-up. In essence, he created a backdoor through which he would attempt to introduce improper testimony regarding appellant's fear of respondent.

186:1-2, 186:3-4, 188:3-4, 189:2, 189:7-8, 492:15-20, 507:8]. Appellant's counsel refused to be straightforward with the court or respondent's counsel regarding his statement in *voir dire* and the trial court recognized this was in bad faith. [TR. 189:2-9]. *Peth* does not in any way support appellant's position on appeal.

Additionally, appellant failed to show good cause why she could not be present at trial and her failure to appear caused substantial delay in the proceedings. [TR. 89:3-4, 488:8-20, 491:5-12]. Allowing appellant to come waltzing in the courtroom whenever she pleased would have only created undue sympathy toward appellant and put respondent on an uneven playing field. [TR. 502:24-503:13]. Appellant took a risk in her attempt to utilize unfair theatrics to garner sympathy and bolster her case. [TR. 491:17-19]. Appellant's counsel even stated "if I had known that this was going to come down like this, I would have demanded that she be here." [TR. 198:21-22]. The trial judge recognized appellant's gambit and refused to allow his courtroom and the judicial process to be sullied by such scheming, particularly after appellant's counsel had been caught lying to the court on other matters. [TR. 152:17-21, 163:19-165:1, 502:10-11, 502:24-503:1, 504:4-6].

Appellant supposedly chose not to attend *voir dire* because she did not want to be there. [TR. 165:4-13, 188:9-18]. Further, after being fully advised of the consequences of her absence from trial, appellant still chose to not show up to court for the beginning of trial, including opening statements. [TR. 165:14-18, 193:18-23]. Appellant's counsel stated appellant was "scared to death of [respondent] and [respondent's counsel]," that respondent "put her through two years of litigation," that appellant "doesn't want to be in

the same room as [respondent]," and that she "sees it as it's ruined her life." [TR. 169:25, 165:7, 165:11-13]. Appellant found these reasons so compelling that she stayed away from the courtroom even when she knew of the consequences. In fact, appellant's counsel recounted his conversation with appellant the night before trial: "I talked to her about it last night. And she said, you know, Aaron, I really don't want to come still. And I said okay. So I came in this morning." [TR. 193:22-24]. Appellant's counsel attended trial alone because appellant chose to not be present based on reasons that, while spurious, would not have disappeared during trial. As the trial court found, it was only after appellant's counsel became aware of the adverse inference and testimony regarding appellant's absence was barred that "the tune had changed," and "it only changed when it didn't go as anticipated or play out as [appellant's counsel] anticipated it playing out." [TR. 489:24-490:10, 504:1-6].

Appellant argues her exclusion from the courtroom could not have been voluntary but instead compulsory because she "remained at the courthouse throughout the trial even though the trial court would not permit her inside the courtroom." *Appellant's Substitute Brief* at 26. Although appellant's argument states that her husband testified she was present and would be at the courthouse until a verdict was reached, her prior statement is misleading. *Appellant's Substitute Brief* at 26. The trial court determined the statement by appellant's counsel while appellant's husband was testifying that "[s]he's downstairs and she [has] been there all week" was inaccurate because "she [had] not been here all week." [TR. 493:1-5].

Further, appellant has failed to cite any authority for the proposition that an adverse inference based on a party's absence is only appropriate in closing argument after the party has been given an opportunity to testify and fails to do so. Drawing an adverse inference in opening statement is proper where, as here, a party represents that she will not be at trial, does not appear for opening statement and, after being given additional and ample opportunity, fails to show up for her own trial. Once all counsel were aware of the trial court's decision to ensure appellant's self-imposed absence, the adverse inference was the logical next step.[10] *See Pasternak*, 428 S.W.2d at 568. The trial court's ruling

[10] Appellant's counsel agrees an adverse inference "would have been entirely appropriate" in closing argument based on appellant's "voluntary failure to testify." *Appellant's Substitute Brief* at 26. He then argues that appellant's absence must have been compulsory rather than voluntary by stating that adverse inferences aren't appropriate during opening statement because if a witness "truly [had] the opportunity to voluntarily testify later at trial," whether the witness would testify is unknown during opening statement. *Appellant's Substitute Brief* at 27. This argument is misguided: appellant's counsel stated appellant would not be present and admitted he came to court the morning of trial alone because appellant still did not want to come. [TR. 193:22-24]. When court reconvened at 9 a.m., appellant was not present. [TR. 155:25-156:1, 168:25]. Opening statements would have begun but for respondent's counsel's obligation to point out appellant's counsel's lie to the court and that his slides would have given rise to yet another mistrial. Appellant's conduct, statements to her counsel, and her counsel's

merely held appellant to her word.[11] Because appellant voluntarily chose to not be present at trial, her absence was not compulsory.

Thus, the trial court did not abuse its discretion in excluding appellant from the courtroom and allowing respondent to draw an adverse inference in opening statement, and therefore a new trial should not be granted.

II. THE TRIAL COURT DID NOT ERR IN EXCLUDING APPELLANT FROM TRIAL BECAUSE THE RIGHT OF A LITIGANT TO ATTEND TRIAL IS SUBJECT TO THE INHERENT POWER OF THE COURT TO CONTROL THE COURTROOM, IN THAT THE TRIAL COURT EXERCISED ITS INHERENT POWER TO CONTROL THE COURTROOM BY EXCLUDING APPELLANT FROM THE

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representations made it clear that appellant would not be at trial. As the court found, the tune only changed when the inference was granted and testimony regarding appellant's absence was barred. [TR. 489:24-490:10, 504:1-6].

[11] When it denied appellant's motion for a new trial, the Missouri Court of Appeals for the Western District stated, "[w]hen she persisted in refusing to appear, the court's decision to exclude her from the remainder of the trial held her to her voluntary election in order to keep her from gaining undue sympathy and attention from the jury. The court determined that, if [appellant] were allowed to make a grand entrance whenever she pleased, she would place [respondent] at an unfair advantage." *Western District Memorandum* at 18.

COURTROOM TO MAINTAIN CONTROL OVER THE PROCEEDINGS AND TO PREVENT THE DISRUPTION AND UNFAIR PREJUDICE ASSOCIATED WITH APPELLANT'S UNPREDICTABLE AND DRAMATIC APPEARANCE DURING THE COURSE OF TRIAL.

A. Appellant's Right To Participate In Her Own Trial Is Not Absolute.

The trial court did not abuse its discretion in excluding appellant from the courtroom because a litigant's right to participate in trial is not absolute. The trial court's inherent power to control the courtroom and the conduct of persons before it allows it to exclude litigants within its discretion. The trial court excluded appellant from further proceedings at trial based upon her voluntary election to not appear at the commencement of trial in order to control the proceedings in its courtroom. The trial court had the inherent authority and discretion to do so. The trial court properly determined that the discretionary appearance of appellant at any time she chose during the proceedings would be disruptive and prejudicial. The trial court gave appellant ample opportunities to appear before determining that she should be excluded from further proceedings. There was no abuse of discretion and a new trial should not be granted.

Appellant had every opportunity to attend her trial. She voluntarily chose not to appear, despite the trial court's offering of a generous period of time for her to reconsider that decision following *voir dire* and before the presentation of evidence. Appellant's counsel repeatedly stated on the record that appellant "[did not] want to be here." [TR. 154:9-13, 165:4-13]. Indeed, appellant's absence appears to have been a deliberate trial strategy in that appellant's counsel expressed to the venire that there would be "an

explanation" and "evidence" presented regarding the reasons for appellant's absence from trial. [TR. 89:3-4, 89:8-9, 92:9-11, 153:3-154:8]. Appellant's counsel expressed an intent to "explain" that appellant's reluctance to be in the same room as respondent, who had "ruined her life," as the basis of her absence. [TR. 165:4-13]. Appellant intended to make her absence from trial and subsequent "grand entrance" a dramatic focal point for the jury. [TR. 169:1]. The trial court, aware of this strategy, ruled that it would not allow the decorum of proceedings in its courtroom to be disrupted or respondent to be unfairly prejudiced by the unpredictable and dramatic comings and goings of appellant. [TR. 168:24-169:5].

A litigant's right to participate in trial is tempered by the inherent power of the court to control the courtroom and maintain orderly procedure in the courtroom. *See State v. Bowens*, 964 S.W.2d 232, 239 (Mo. App. E.D. 1998) (holding that the trial court's exclusion of defendant during rendition of the verdict was not error after defendant refused to come to the courtroom during jury instructions and closing statements). Control over proceedings, conduct of participants, actions of officers and the environment of the court "is a power absolutely necessary for a court to function effectively and do its job administering justice." *In re Holmes*, 834 A.2d 384, 385 (N.H. 2003). "Every court has the inherent power, in furtherance of justice, to regulate the proceedings of a trial before it; to effect an orderly disposition of the issues presented; and to control the conduct of all persons in any manner connected therewith." *Schimmel v. Levin*, 125 Cal. Rptr. 3d 506, 510 (Cal. App. 3d 2011) (internal citations omitted).

Appellant inappropriately relies on *Blessing v. Blessing*, 539 S.W.2d 699 (Mo. App. St.L. D. 1976) and *Patrick V. Koepke Constr., Inc. v. Paletta*, 118 S.W.3d (Mo. App. E.D. 2003) for the proposition that appellant had a right to appear at trial regardless of her failure to appear for *voir dire* or opening statement and her counsel's statement during *voir dire* that "[appellant is] not going to be here . . . for this trial."[12] [TR. 83:3-4, 155:25-156:1, 168:25]. Neither *Blessing* nor *Koepke* addresses a party's right to appear at trial when that party voluntarily elects to not participate in trial and makes representations to the trial judge, the jury, and opposing counsel that she will not participate. *Blessing* addresses whether the trial court abused its discretion in refusing to continue a trial in the absence of a party due to an alleged physical condition. *See Blessing*, 539 S.W.2d at 702.

[12] Appellant also relies on *Spirtas Co. v. Division of Design & Constr.*, 131 S.W.3d 411, 415-16 (Mo. App. W.D. 2010), for the proposition that a litigant is not required to attend trial if the litigant chooses not to attend. The court in *Spirtas* was merely noting that defendant pointed to "no rule or case law which set out a requirement that a plaintiff (or any other party) must personally attend trial when represented by counsel, absent a subpoena or similar compulsion requiring a party's attendance at trial." *Id.* The issue here, however, is not whether appellant was required to attend trial, but whether she should be permitted to attend trial after representing to the venire, the trial court, and opposing counsel, that she would not be present at trial and voluntarily failing to appear for *voir dire* and opening statements in a transparent attempt to unfairly manipulate the proceedings.

Koepke addresses whether the trial court abused its discretion in refusing to continue a trial when the defendant was in the courtroom at the beginning of the proceedings, but left before he could be called as a witness. *See Koepke*, 118 S.W.3d at 616. Both *Blessing* and *Koepke* do, however, recognize that although a party has a right to attend trial, a party's absence is not always reason for a continuance. *See Blessing*, 539 S.W.2d at 702; *Koepke*, 118 S.W.3d at 616. This proposition implicitly recognizes that the trial court has the inherent power to control the courtroom and maintain its orderly procedure. As stated in *Blessing*, "the trial court has a right to control the docket and the progress of litigation." 539 S.W.2d at 702.

Here, appellant repeatedly informed her counsel that she did not want to be present at trial. [TR. 165:4-13]. Appellant's counsel represented to the trial court, the jury, and respondent's counsel that appellant would not be present at trial. [TR. 489:9-11]. Appellant's counsel indicated that he planned and prepared to proceed with trial in appellant's absence when he represented to the trial court and respondent's counsel that "her husband is going to come here and say exactly what is going on. He'll testify about why she doesn't want to come."[13] [TR. 165:21-23]. Appellant's counsel also represented

[13] Appellant's counsel intended for appellant's husband to testify as to why she wasn't present at trial in an attempt to engender unfair sympathy and inflate her alleged damages. [TR. 153:12-22]. His testimony would have highlighted appellant's mental anguish from being "put . . . through two years of litigation," her mortification at having her wedding vows video-taped, and her alleged fear of being in the same room as

to respondent's counsel that appellant might be present on the second day of trial. [TR. 192:5-6]. The trial court envisioned appellant "waltzing in here, once we had started the opening statement and the evidence in dramatic fashion, like she owned the place or she was on stage." [TR. 503:1-5]. The trial court believed this would put respondent at a huge and unfair disadvantage. [TR. 503:11-12]. Accordingly, the trial court exercised its authority in controlling how the trial would be conducted and the progress of litigation. The trial court found it necessary to accomplish this by excluding appellant from the courtroom, and it was within its discretion to do so.

Because the trial court properly excluded appellant from further proceedings based on its inherent authority to control the courtroom, a new trial should not be granted.

B. Appellant's Exclusion From The Courtroom Was Not Premised On Her Absence From Voir Dire Or Her Attorney's Statements During Voir Dire.

While respondent's counsel's motion to exclude appellant from trial may have been premised upon Mr. Smith's statement during *voir dire* that appellant would not be present at trial, the trial court did not make its decision to exclude her based on this.

On the morning of the first day of trial, when the trial court decided to exclude appellant from further proceedings, it stated "[s]he didn't show up in voir dire. She's not

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respondent or his counsel. [TR. 165:7-11, 167:5-20, 169:20-25]. This indicates either a misunderstanding of Missouri law on compensable damages, or more likely, another attempt to garner undue sympathy for appellant in an attempt to unfairly prejudice the jury.

here today. I'm excluding her from the courtroom. She won't be able to walk in 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]. This statement indicates that the trial court based its decision to exclude appellant from the courtroom on an interest in controlling the courtroom by not allowing grand entrances, and though the trial court was "confused and befuddled" as to why appellant wasn't present at *voir dire*, it also noted that she wasn't present at trial. Furthermore, even after acknowledging appellant's absence at *voir dire* and with knowledge of statements made by Mr. Smith during *voir dire*, the trial court still gave appellant multiple opportunities to get to the courtroom. [TR. 169:2-5, 170:16-24, 199:15-18]. It was only after appellant failed to appear in court despite these numerous opportunities that the trial court excluded her. Finally, when Mr. Smith asked for thirty to forty-five more minutes for appellant's arrival and whether her exclusion was a sanction, the trial court stated that it was not going to allow for more time because it had a jury waiting and that she wasn't there, indicating that the court was controlling the progress of litigation. [TR. 171:15-19, 172:24-25]. It did not state that appellant wasn't present at *voir dire* the day before or point to Mr. Smith's statements made during *voir dire*.

The Western District Court of Appeals affirmed these reasons leading to appellant's exclusion:

> [T]he court's rulings were directed at [appellant] because they were prompted by the choices *she* made. [Appellant] chose not to appear for *voir*

> *dire* or the start of trial, and according to her counsel's representations, repeatedly communicated to him that she did not want to appear at trial at all. The court afforded [appellant] ample opportunity to change her mind. When she persisted in refusing to appear, the court's decision to exclude her from the remainder of the trial held her to her voluntary election in order to keep her from gaining undue sympathy and attention from the jury.

Western District Memorandum at 18.

The trial court properly excluded appellant from the courtroom for a plethora of reasons that stretched beyond her absence at *voir dire* and Mr. Smith's statements made during *voir dire*. As such, the court properly exercised its discretion and a new trial should not be granted.

CONCLUSION

Appellant's right to participate in trial was subject to the trial court's inherent power to control the courtroom and protect the integrity of the judicial process. Appellant's exclusion from the courtroom was not premised on her absence from *voir dire* or her attorney's statements during *voir dire*, but rather on her own behavior and stated intentions. Furthermore, the adverse inference against appellant based on her voluntary absence from trial was proper. Because the trial court's decisions to exclude appellant from the courtroom and allow an adverse inference were proper and not clearly against logic or so arbitrary or unreasonable as to shock the sense of justice or indicate a lack of careful consideration, the trial court did not abuse its discretion.

Therefore, William M. Faust requests this Court to sustain and affirm the trial court's September 21, 2011 order and the court of appeals' August 28, 2012 order, for any or all of the above reasons set forth, and for such other relief as the Court deems just and proper under the circumstances.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 84.06(c), the undersigned certifies that: (1) this Brief includes the information required by Rule 55.03; (2) this Brief complies with the limitations contained in 84.06(a) and 84.06(b); and (3) this Brief contains 10,267 words, as calculated by the Microsoft Office Word 2010 software used to prepare this Brief.

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CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing Brief of Respondent William M. Faust was served via the Missouri Electronic Filing System this 22nd day of January, 2013, on:

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