



MISSOURI SUPREME COURT DECISION WHERE MAJORITY AND DISSENT SHARPLY DISAGREE OVER THE NATURE OF LOWER COURT'S RULING UNDERSCORES IMPORTANCE OF CLEAR TRIAL COURT RULINGS FOR PURPOSES OF APPEAL
***SHANNON L. BAIR v. WILLIAM M. FAUST*, --- S.W.3D ---, 2013 WL 3716435 (Mo. BANC, JULY 16, 2013)**

A recent opinion from the Missouri Supreme Court is notable not so much for its conclusion, but for the stark contrast in how the majority and dissenting opinions viewed and interpreted a lower court ruling. The opinion serves to highlight the importance of building a clear record of trial court rulings for purposes of appeal.

During *voir dire* of this automobile accident case, plaintiff's counsel informed the court and defendant's counsel that his client would not be appearing or testifying, but did not give an explanation as to why, simply asserting that an explanation would be forthcoming in the evidence. On the second day of trial, when plaintiff again failed to appear, defendant's counsel expressed a concern that plaintiff would try to make a "grand entrance" at trial later in the proceedings. At that point, plaintiff's counsel explained that plaintiff's husband would later testify that plaintiff did not want to be in the same room with the defendant because she felt defendant had ruined her life for reasons having to do with the accident itself and certain events which occurred during the ensuing litigation.

Upon defendant's motion, the trial court ruled that, while it is any party's prerogative not to appear and testify, Missouri law allows the opposing party to argue an adverse inference from the party's absence and defendant here would be allowed to so argue. The trial court also ruled that plaintiff's husband would not be allowed to testify to why plaintiff herself was not present in that his explanation for why was hearsay. After these adverse rulings, plaintiff's counsel indicated he wanted the opportunity to speak with his client about changing her mind as to whether to appear and testify. The trial court gave plaintiff's counsel some period of time to get plaintiff to the courtroom, if she so chose, but ruled plaintiff would not be allowed to be present in the courtroom later if she did not appear in court before opening statements began. Plaintiff, in fact, did not appear before opening statements and the trial court excluded her from the courtroom for the remainder of the trial. Ultimately, the trial court allowed defendant to argue an adverse inference from plaintiff's absence. Defendant took full advantage of this ruling, including referring to plaintiff's absence 15 times in opening statements, arguing an adverse inference multiple times, consistently referring to plaintiff as the "non-present plaintiff" and arguing to the jury that the "non-present plaintiff was at fault for this accident[, and] [s]he's not here for a reason." The jury returned a verdict for plaintiff for \$60,000, but attributed plaintiff 85% of the fault.

On appeal, the Supreme Court reversed and remanded for a new trial. The majority opinion, while assuming but not deciding that it was not an abuse of discretion to exclude plaintiff entirely from the courtroom, held it was an abuse of discretion to both exclude plaintiff from the courtroom and allow an adverse inference about her absence. According to the majority opinion, "[t]he two actions taken together resulted in Plaintiff suffering manifest injustice."



(Continued from Page 1)

The lengthy dissenting opinion disagreed with the majority's characterization of the trial court's initial ruling as being one where the trial court excluded plaintiff from the courtroom, as opposed to plaintiff's absence being an event of her own choosing. According to the dissent, the court's ruling was not to exclude the plaintiff from trial, but rather only that she would be prevented from coming in later and thereby disrupting the proceedings. Plaintiff freely chose not to attend her own trial and freely chose not to testify on her own behalf, and, after warning plaintiff's counsel that she would not be allowed to come and go as she pleased, the trial court barred her from entering the courtroom once trial began. Thus, according to the dissent, the trial court's initial ruling was not one of excluding plaintiff from testifying, but of enforcing plaintiff's freely made choice not to testify. As a result, the dissent would have found no abuse of discretion in also allowing an adverse inference.

Both the majority and the dissent agreed that if the trial court had both excluded plaintiff from testifying (as opposed to plaintiff's absence being of her own choosing) and then allowed defendant to argue that the jury should draw an adverse inference from plaintiff's failure to testify, it would have abused its discretion. However, they disagreed on whether the trial court had in fact excluded plaintiff from the courtroom. Each characterized it as a different type of ruling, and, as it turned out, the nature of this initial ruling was ultimately outcome determinative. The opinion, therefore, serves to underscore the importance of building and maintaining a clear record as to trial court rulings, especially those made from the bench without the benefit of written orders.

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