

# Evidence

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Hon. Mary McGowan  
Circuit Judge, Little Rock  
and  
Hon. Duncan Culpepper  
Circuit Judge, Prescott

## EVIDENCE

by

Judge Mary Spencer McGowan

and

Krystal Mann

A Trial Court has broad discretion in its evidentiary rulings; hence, the Trial Court's findings will not be disturbed on appeal unless there has been a manifest abuse of discretion. Threadgill v State, 347 Ark. 986, 69 SW 3d 423(2002); Taylor v Taylor, 345 Ark. 300, 47 SW 3d 222(2001).

Abuse of discretion is a high threshold that does not simply require error in the Trial Court's decision, but requires that the Trial Court acted improvidently, thoughtlessly or without due consideration. Blanchard v State, \_\_\_ SW 3d \_\_\_, 2008 WL 4822988 (Ark. App.) (Nov. 5, 2008)

## **EVIDENCE**

### **QUESTION 1**

Carol Customer has sued the Antique Store, Inc. ("ASI"), for personal injuries which Ms. Customer sustained while she was on the property of defendant ASI. Ms. Customer had gone to ASI to purchase an antique lamp. After making her purchase, and while she was in the process of exiting the ASI store, she fell down a flight of stairs which caused her to fracture her right ankle. Ms. Customer contends that the wooden flight of stairs and hand rail were negligently designed and constructed, and that said design and construction defects were the proximate cause of her fall and resulting injuries. ASI denies that its stairs and hand rail were negligently designed or constructed and that any injuries sustained by Ms. Customer were the result of her own negligence or clumsiness.

(A) Ms. Customer's attorney asks Ms. Customer if two weeks after her fall defendant ASI had the subject flight of stairs and hand rail torn down and rebuilt.

Counsel objects: Evidence of subsequent remedial measures

Ruling:

(B) Ms. Customer's attorney moves to introduce evidence that a month before the trial, defendant ASI offered Ms. Customer the sum of \$25,000.00 to settle the case.

Counsel objects: Settlement negotiations

Ruling:

(C) Ms. Customer's attorney moves to introduce a sworn (notarized) report from Dr. Bones, Ms. Customer's treating orthopedic surgeon. Dr. Bones' report contains a

diagnosis of Ms. Customer's injuries received in the subject fall, it describes her course of treatment by Dr. Bones, and it states his expert opinion that Ms. Customer will have intermittent pain in her right ankle at the fracture site for the rest of her life.

Counsel objects: Hearsay

Ruling:

## QUESTION 2

Claude Careful was driving along Kingston Street when a little girl, Mary Smith, ran in front of him from between two parked cars. He tried to stop, but he could not stop before his car struck her. He picked Mary up, put her in his car and raced to the emergency room of the local hospital. In admitting Mary, Mr. Careful had to fill out a hospital admission form specifying, among other things, the cause of the injury. Mr. Careful wrote, "Young girl (admittee) jumped out from between two parked cars. My brakes were bad and I couldn't stop in time." Mr. Careful signed his name and placed the date on the form. Mary was admitted to the hospital for treatment. Mary's parents later sue Claude Careful.

(A) Mr. Careful moves to introduce into evidence the hospital admission form in order to show that Mary had suddenly jumped in front of his car.

Counsel objects: Relevance

Ruling:

(B) Mary's parents move to introduce into evidence the hospital admission form in order to show that Mr. Careful's brakes were bad.

Counsel objects: Hearsay

Ruling:

(C) Mary's parents move to introduce into evidence the following from Mary's hospital chart: (a)(By a doctor.) X-rays reveal broken ribs and chipped collarbone. Patient complains of numbness in right leg. Nerve damage suspected. (b)(By a nurse.) Patient in obvious pain. Administered sedative.

Counsel objects: Hearsay

Ruling:

### QUESTION 3

Chuck Finnie was charged with First Degree Murder in the death of Earl "Nasty" Tatum. He entered a plea of "not guilty" and claimed "self-defense." At his trial, he called a witness, Junior DeLap, who was asked the following questions:

Q. How long have you known the Defendant?

A. 37 years.

Q. In that time, have you become aware of his reputation for peaceableness and law-abiding behavior?

A. I have.

(A) Counsel objects: Relevance

Ruling:

(B) Next, defense counsel sought to call Tony Boscobel, who advised that he had known the victim for 37 years, and that he was aware of Tatum's reputation for "lack of peaceableness," and that he had personally witnessed "Nasty" Tatum whup a seventy-five year-old nun from the Holy Sisters of the Abject Poor across the head with a crowbar just one week before the defendant shot Tatum dead in the head.

Counsel objects: Relevance

Ruling:

#### QUESTION 4

Carol Cautious was driving alone on Arkansas Highway 15, a two lane road, at about 7:45 a.m., when she saw an approaching car veer into her lane of traffic. Thinking that the approaching car was crossing to the shoulder of the road, Cautious swerved into the left-hand lane to avoid an accident. The approaching car then crossed back into the left-hand lane. The two vehicles collided in the left-hand lane, and Randy Reckless, the driver of the approaching car, who was also alone, was killed. The widow of Reckless, on her own behalf and as representative for the Estate of Reckless, has sued Cautious in a wrongful death action in Circuit Court in Arkansas

At the trial of the case, the lawyer for Cautious seeks to introduce into evidence the following:

(A) Testimony from a witness that Reckless regularly weaved back and forth over the centerline of the road because he delivered newspapers in his vehicle, and, as he was throwing papers, he sometimes crossed the centerline of the road.

Counsel objects: Relevance

Ruling:

(B) Testimony from a witness that she had seen Reckless drive on this stretch of Highway 15 a dozen times, and that Reckless was speeding half of those times.

Counsel objects: Relevance

Ruling:

(C) Testimony from Cautious that immediately following the accident Reckless' widow had visited Cautious in the hospital where Cautious was recovering from her injuries, and Reckless' widow had offered to pay the medical and hospital expenses incurred by Cautious.

Counsel objects: Relevance

Ruling:

## QUESTION 5

Jack and Jill, two nine-year-old children, were trick-or-treating on Halloween night when they came to the house owned by "Old Crabby Appleton." Jack said to Jill, "I'm afraid to get anything from him. I've heard that he put a razor blade in Bo Peep's apple last year." Jill said that she wasn't afraid and went to Appleton's house. She came back shortly with a candy apple, looked it over closely and said, "No razor blade in here." Then she took a bite and said, "This tastes strange, sweet but bitter." Jill took two more bites and threw the apple down. About two minutes later, Jill complained to Jack, "My

stomach hurts. I'd better go home." Jill went home and her mother asked her, "What is wrong?" Jill replied, "My stomach started hurting right after I ate Old Crabby Appleton's apple." Then she vomited. Jill's mother took Jill to the emergency room of the local hospital. Jill's mother told the doctor who admitted Jill, "My daughter told me that her stomach began to hurt right after she ate an apple which Crabby Appleton had given her. She started throwing up, so I brought her here."

Crabby Appleton is charged with attempted murder for poisoning Jill.

(A) Jill is asked about what Jack said about his reason for not going to Appleton's house.

Counsel objects: Relevance

Ruling:

(B) Jack is asked about what Jill said about the taste of the apple and about her stomach hurting:

Counsel objects: Hearsay

Ruling:

(C) Jill's mother is asked about what Jill told her when she asked what was wrong.

Counsel objects: Hearsay

Ruling:

(D) The doctor is asked about what Jill's mother told him when Jill was admitted to the hospital.

Counsel objects: Hearsay

Ruling:

#### QUESTION 6

Donna Danner has sued Henry Hunter and the World Wide Data Corporation ("WWDC") for battery arising out of an alleged incident of sexual harassment. Donna Danner alleges that on her first day of work at WWDC as a temporary receptionist, Henry Hunter, the chief executive officer for WWDC, stopped at her desk and introduced himself. According to Ms. Danner, a few minutes later Mr. Hunter summoned her to his private office. Ms. Danner further alleges that Mr. Hunter told her that he was the man in charge, and that if anyone at that company wanted to advance, they had to get his approval. Ms. Danner further alleges that Mr. Hunter complimented her on how good she looked and suddenly put his arms around her and kissed her. Ms. Danner alleges that she pushed Mr. Hunter away, and returned to her desk.

Only Ms. Danner and Mr. Hunter know for certain what, if anything, happened between them. Through office gossip, Ms. Danner heard that Mr. Hunter was reported to have undergone psychological treatment for alleged uncontrollable impulses to have sex with his female employees. The psychologist was reported to be Dr. Joyce, and the treatment was rumored to have ended about two months before Ms. Danner's alleged encounter with Mr. Hunter. Due to a European tour, Dr. Joyce was not available for a pre-trial deposition. Mr. Hunter has acknowledged that Dr. Joyce has been his treating

psychologist, but Mr. Hunter denies that his treatment had anything to do with his alleged uncontrollable sexual impulses. Mr. Hunter contends that he only saw Dr. Joyce for marital counseling.

(A) The plaintiff has subpoenaed Dr. Joyce to the trial and plans to call Dr. Joyce as her next witness. The plaintiff wants to elicit Dr. Joyce's testimony as to the reasons for which Mr. Hunter sought treatment.

Counsel objects: Privilege and unfair prejudice

Ruling:

#### QUESTION 7

M and W, a married couple, often became intoxicated and fought with each other. M has injured W on several occasions to the extent that medical treatment was necessary. During one particularly severe beating, a neighbor called the police. A police officer responded to the home of M and W with lights and siren activated. When M heard the police car pull up, he told W, "You tell the police these injuries came from an intruder who I then chased out of our home. If they charge me with this one, I'm a goner for sure." When the policeman came to the door, M was waiting for him and said, "Now I may have put her in the hospital beating her in the past, but I didn't do this one!" M was arrested, posted bond and was released having been charged with First Degree Domestic Battery. Paul, M's employer and minister, called M to determine if the allegations he had heard about the domestic battery were true. If the allegations were true, Paul intended to fire M. M told Paul, "Well, we got drunk and I hit her, but she just pushed me too far." Paul is a minister and associate pastor of New Providence Baptist Church. He also is a

carpenter and employs M. Thirty days prior to Paul's conversation with M, Paul had invited M to attend his church. Although not a member, M had attended church there on several occasions. In a pretrial motion, M's attorney asked to have M evaluated by a psychiatrist in preparation of a defense of not guilty by reason of mental illness.

The Court ordered an evaluation of M by a competent psychiatrist. During the examination conducted by the psychiatrist, M told the psychiatrist everything that had happened, including previous beatings administered by him to W and the fact that he had, in fact, beaten W on the instance in question.

(A) Defendant's counsel files a Motion in Limine regarding M's statements to the wife and to Paul.

Ruling:

(B) Defendant's counsel, by Motion in Limine, seeks to keep the prosecution from using M's statement, "Now I may have put her in the hospital beating her in the past, but I didn't do this one!"

Ruling:

## QUESTION 8

In the case of City v. Penelope Perpetrator, Officer Poindexter testifies that when she exited her patrol car, Victor Victim, in a very animated state, was shouting at Penelope Perpetrator, the defendant, "You idiot, you could have killed me when you ran that stop sign."

Counsel objects: Hearsay

Ruling:

## QUESTION 9

In an automobile collision case, the Defendant passed a car driven by Witness just seconds before Defendant rear-ended Plaintiff.

(A) In addition to the physical facts which the Witness describes, the Witness testified that when Defendant passed him he (Witness) made a comment to his Passenger as follows: "If that guy doesn't slow down, he is going to hurt somebody."

Counsel objects: Hearsay

Ruling:

(B) The police officer testifies that from the measurements he made of the skid marks, he thinks Defendant was traveling at least 30 m.p.h. over the speed limit, which was posted near the accident scene.

Counsel objects: Relevance

Ruling:

## QUESTION 10

Jones is suing Smith, the executive vice president of a corporation, based on allegations that the executive vice president secretly used corporate assets for personal gain. The case is a civil trial to recoup the assets secretly diverted from the corporation. The Defendant, Smith, was convicted of theft by deception in Pulaski County ten years ago.

(A) The Plaintiff's counsel moves to admit the prior conviction in the civil trial.

Counsel objects: Unfair prejudice

Ruling:

(B) Can extrinsic evidence be introduced if the Defendant denies the conviction?

Ruling:

## RECENT EVIDENTIARY RULINGS

I. Arkansas Rule of Evidence 804(b)(7) – Child hearsay exception

Seely v State of Arkansas, \_\_\_ SW 3d \_\_\_, 373 Ark. 141(April 10, 2008)

II. Ark. Code Ann. §16-46-108

Hearsay exceptions

Discover Bank v Pommell, \_\_\_ SW 3d \_\_\_, 2008 WL 4060997 (Ark. App.)  
(September 3, 2008)

Affidavit of account manager and attached documents in a credit card debt collection suit constitute a valid hearsay exception.

III. Arkansas Rules of Evidence 801(c) and Rule 701

Flowers v State, \_\_\_ SW 3d \_\_\_; 373 Ark. 127, 2008 WL 963487 (April 10, 2008)

Hearsay or not; Lay opinion testimony

IV. Ark. Rules of Evidence 404(b)

Pedophile exception regarding similar acts

Efird v State, \_\_\_ SW 3d \_\_\_; 102 Ark. App. 110, 2008 WL 943924 (Ark. App.)  
(April 9, 2008)

Strong v State, \_\_\_ SW 3d \_\_\_; 372 Ark. 404, 2008 WL 451204 (Ark. February 21, 2008)

Admission of Bad Act Evidence

Holman v State, \_\_\_ SW 3d \_\_\_; 372 Ark. 2, 2007 WL 4373087 (Ark. December 13, 2007)

V. Arkansas Rules of Evidence 804(a)(5) and (b)(1)

Evidence from Prior Proceedings

Beasley v State, 370 Ark. 238, 258 SW 3d 728(2007)

VI. Analysis of differences between Motions to Suppress and Motions in Limine

Mhoon v State, 369 Ark. 134, 251 SW 3d 244(2007)

## RECUSAL

- I. Disqualification checklist
- II. Questions and Answers regarding Recusal

## Disqualification Checklist

- Do you have a personal bias or prejudice concerning a party?
- Do you have a personal bias or prejudice concerning a party's lawyer?
- Do you have personal knowledge of disputed evidentiary facts concerning the proceeding?
- Did you serve as a lawyer in the matter in controversy?
- Did a lawyer with whom you previously practiced law serve during such association as a lawyer concerning the matter?
- Have you been a material witness concerning the matter in controversy?

Do you, individually or as a fiduciary, or your spouse, parent or child wherever residing, or any other member of your family residing in your household, have:

- an economic interest in the subject matter in controversy?
- an economic interest in a party to the proceeding?
- any other more than de minimis interest that could be substantially affected by the proceeding?

Are you, your spouse, or a person within the third degree of relationship to either of you, or the spouse of such a person:

- a party to the proceeding, or an officer, director or trustee of a party?
- acting as a lawyer in the proceeding?
- likely to be a material witness in the proceeding?
- known by you to have a more than de minimis interest that could be substantially affected by the proceeding?

### **A judge is disqualified from cases:**

- If one of the litigants is a former client (Letter from Arkansas Judicial Discipline and Disability Commission to Judge Olly Neal (January 27, 1997)).
- If one of the lawyers:
  - practices with a lawyer the judge has hired to defend the judge in another case (Arkansas Advisory Opinion 92-3) (disqualification may be remitted);
  - is opposing the judge for re-election (Arkansas Advisory Opinion 94-2);
  - is an announced candidate for the judge's position, even if no one before the court objects or files a motion asking the judge to recuse (Arkansas Advisory Opinion 94-5);
  - rents office space from the judge (Arkansas Advisory Opinion 97-3) (disqualification may be remitted);
  - leases office space in a building owned by the judge and his wife (Informal Adjustment of Ford (Arkansas Judicial Discipline & Disability Commission September 22, 1998));
  - is a tenant in an office building owned by a general partnership in which the judge is one of three partners even if one of the other partners manages the building, the judge has no direct dealings with the tenants, and the attorney is only one of many tenants (Arkansas Advisory Opinion 97-5) (disqualification may be remitted).

### **A judge is not disqualified from cases:**

- In which a subsidiary of AT&T is a party if the judge is the executor and one of three beneficiaries of an estate that holds approximately 1,000 shares of an equity income fund about 18% of which is invested in AT&T (Arkansas Advisory Opinion 94-8);
- Involving the office of the state attorney general if the judge's sibling is an attorney employed in the litigation division of the office unless the sibling will appear of record as attorney or assists in any way in the preparation or trial (Arkansas Advisory Opinion 92-6) (the relationship should be disclosed).
- In which one of the attorneys

- shares office space with the judge's sibling-in-law where the two attorneys' practices are separate and they are not partners in a firm (Arkansas Advisory Opinion 95-2);
- is the uncle of the judge's part-time secretary (Arkansas Advisory Opinion 95-6);
- is the spouse of the judge's court reporter (Arkansas Advisory Opinion 96-7) (the relationship should be disclosed).

**Should the judge recuse:**

1. When the judge owns stock of a party?
2. When one of the attorneys in the proceeding at hand is a former law partner of the trial judge?
3. If an attorney leases office space in a building owned by the judge and his wife?
4. If one of the lawyers is a tenant in an office building owned by a partnership which the judge is one of three partners?
5. If one of the attorneys shares office space with the judge's son-in-law where the two attorneys' practices are separate and they are not partners in a firm?
6. If a litigant is a former client of the judge?
7. If an attorney is an announced candidate for the judge's position, even if no motion to recuse has been made?
- 7a. If an attorney notifies the judge that he will run against him at the next election?
8. If an attorney's law partner is a former opponent of the judge in a judicial race?
9. If the judge's 20-year-old son, who does not live at home, works part time for the prosecutor?
10. If the judge's wife and the wife of a party are second cousins but the cousins have had no contact with each other in the past 25 years?
11. If one of the attorneys is the uncle of the judge's part-time secretary?
12. If the judge's wife is a juror in the case?
13. If one of the attorneys is the spouse of the judge's court reporter?
14. If the judge previously prosecuted the defendant in a pending criminal case?
- 14a. What if those prior convictions are being used for habitual offender purposes?
15. If a party files a complaint against the judge with the Judicial Discipline & Disability Commission?

16. If the judge has personal knowledge concerning a disputed evidentiary fact in question from previous judicial proceedings?
17. If the judge who issued a search warrant is presiding over a hearing to suppress evidence based on the validity of the search warrant?
18. If the judge is presiding over a post conviction proceeding and the same judge presided over the defendant's trial?
19. If a defendant threatened to file a class action lawsuit in federal court against the judge for failure to properly arraign him?
20. If, at a hearing on a motion for new trial, it became necessary for the trial judge to testify?
21. If the judge makes comments indicating he would rule against the defendant before the plaintiff rested?
22. If the judge or his staff obtained evidence to be used in a contempt hearing pending before the judge?
23. If the judge, as a taxpayer, is presiding over an illegal exaction case involving Amendment 55 wherein a party seeks refunds to taxpayers in a class action?
24. If the attorney for one party had previously represented the judge in an unrelated matter?
25. If the judge knows the family involved in a probate case and had previously been concerned about the mother during her stay in intensive care?
26. If the justice wrote a dissenting opinion, which involves some of the same questions presented in a different appeal?
27. If the trial judge develops opinions, biases or prejudices during a trial?