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MISSOURI'S NEW EVIDENTIARY RULES—USE OF PRIOR INCONSISTENT STATEMENTS AS SUBSTANTIVE EVIDENCE AND FOR IMPEACHMENT OF ONE'S OWN WITNESS

*Rowe v. Farmers Insurance Company*¹

Should a party be allowed to impeach his own witness without limitation when that witness contradicts his earlier out-of-court statements? If prior inconsistent statements are admissible to impeach a witness, then should the trier of fact be allowed to consider these extrajudicial statements as substantive evidence? Until recently, Missouri followed the rule that one could not impeach his own witness absent a showing of surprise and harm.² In addition, the orthodox view limited use of a prior inconsistent statement to impeachment, thus affecting only the credibility of the witness.³ The statement was not admissible as substantive evidence because it was deemed hearsay. Many times, however, the out-of-court statement was considered as the truth by jurors who were faced with confusing jury instructions.⁴ Indeed,

1. *Rowe v. Farmers Ins. Co.*, 699 S.W.2d 423 (Mo. 1985) (en banc).

2. *State v. Byrd*, 676 S.W.2d 494 (Mo. 1984) (en banc); *State v. Armbruster*, 641 S.W.2d 763 (Mo. 1982); *State v. Kinne*, 372 S.W.2d 62 (Mo. 1963); *State v. Turner*, 272 S.W.2d 266 (Mo. 1954); *State v. Castino*, 264 S.W.2d 372 (Mo. 1954); *Malone v. Gardner*, 362 Mo. 569, 242 S.W.2d 516 (1951) (en banc); *Mooney v. Terminal R.R. Ass'n*, 352 Mo. 245, 176 S.W.2d 605 (1944); *State v. Gregory*, 339 Mo. 133, 96 S.W.2d 47 (1936); *State v. Drummins*, 274 Mo. 632, 204 S.W. 271 (1918); *Jordan v. Robert Half Personnel Agencies*, 615 S.W.2d 574 (Mo. Ct. App. 1981); *Woelfle v. Connecticut Mut. Life Ins.*, 234 Mo. App. 135, 112 S.W.2d 865 (1938); *Ross, Impeaching One's Own Witness in Missouri*, 37 Mo. L. Rev. 507 (1972).

3. *Ellis v. United States*, 138 F.2d 612 (8th Cir. 1943); *State v. Granberry*, 491 S.W.2d 528 (Mo. 1973) (en banc); *Rogers v. Fiandaca*, 491 S.W.2d 560 (Mo. 1973); *State v. Kinne*, 372 S.W.2d 62 (Mo. 1963); *Woelfle v. Connecticut Mut. Life Ins. Co.*, 234 Mo. App. 135, 112 S.W.2d 865 (1938).

4. Several authorities have noted the futility of instructing a juror to disregard the truth of an out-of-court statement. Assuming that a juror would comprehend the distinction between use of the statement for impeachment and as substantive evidence, a juror will inevitably decide which of the two statements he believes is true, thus giving the evidence substantive weight. *See, e.g., Pulitzer v. Chapman*, 337 Mo. 298, 85 S.W.2d 400 (1935) (en banc); McCORMICK ON EVIDENCE § 251 (E. Cleary

attorneys often attempted to get the evidence before the jury under the guise of impeachment, actually hoping that it would be considered as substantive evidence.⁵

Recently, the Missouri Supreme Court addressed these issues, forming new evidentiary rules to govern the impeachment of one's own witness and the use of prior inconsistent statements as substantive evidence. In *Rowe v. Farmers Insurance Company*,⁶ the Missouri Supreme Court held that in a civil case one can impeach his own witness by use of a prior inconsistent statement without limitation.⁷ In addition, prior inconsistent statements can now be considered as substantive evidence in civil cases where the witness is at trial and subject to cross-examination.⁸ Although the decision provides a much needed change in Missouri evidentiary rules, it fails to answer some important questions and to provide certain necessary safeguards.

In *Rowe*, suit was brought when an insurance company failed to pay a claim on an automobile insurance policy. The plaintiff's automobile was found burning in a field approximately seven miles from his home. The insurance company asserted that the plaintiff either had his automobile burned to collect the insurance proceeds or had later known who was responsible but failed to report this information to the company or the police.⁹ At trial the insurance company called the plaintiff's cousin as a witness. During the investigation of the fire the witness told a police officer that he had overheard the plaintiff tell another man that he intended to burn his car in order to buy a truck. In a later deposition and at trial, however, the witness denied overhearing any such conversation. The plaintiff had visited the witness just a week prior to the pre-trial deposition and had discussed his suit against the insurance company.¹⁰

3d ed. 1984) [hereinafter MCCORMICK ON EVIDENCE]; Graham, *Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendment of Federal Rules of Evidence 801(d)(1)(A), 613, and 607*, 75 MICH. L. REV. 1565, 1573 (1977).

The court in *Rowe* also recognized the ineffectiveness of a limiting instruction, stating that it was at best confusing and that, "the repetitive effect of calling attention to the prior inconsistent statement by the instruction probably cannot do other than highlight the matter in the minds of the jurors thereby making them more inclined to rely on the statement than to disregard it." *Rowe v. Farmers Ins. Co.*, 699 S.W.2d 423, 426 (Mo. 1985) (en banc).

5. Ordovery, *Surprise! That Damaging Turncoat Witness is Still with Us: An Analysis of Federal Rules of Evidence 607, 801(d)(1)(A) and 403*, 5 HOFSTRA L. REV. 65, 66 (1976); see also *United States v. Dunmore*, 446 F.2d 1214, 1221 (8th Cir. 1971).

6. 699 S.W.2d 423.

7. *Id.* at 425.

8. *Id.* at 428.

9. *Id.* at 423.

10. *Id.*

The trial court did not allow the defendant to introduce evidence of the witness' prior inconsistent statement, relying upon the rule against impeaching one's own witness. Similarly, an extrajudicial written statement by the plaintiff's girlfriend that she saw the plaintiff give his car to some people the night it was burned was also excluded after she denied making the statement in a deposition. Again, the trial court reasoned that one could not impeach his own witness. The jury found the insurance company liable on the policy and the court of appeals affirmed.¹¹

After examining the basis of the rule against impeaching one's own witness, the Missouri Supreme Court found that valid reasons for the rule no longer existed. The court observed that it was unrealistic to expect parties to guarantee the credibility of their witness since they are forced to take witnesses as they find them.¹² It also noted that the rule actually inhibited the ability of courts and juries to determine the truth because information reflecting on the witness' credibility was not before them. Thus, the court followed the trend of other states,¹³ deciding that, "the time has come for us to recognize the right of any party to introduce a prior inconsistent statement to impeach any witness regardless of by whom the witness may have been subpoenaed or called."¹⁴

The court then abandoned the orthodox rule, thereby allowing use of prior inconsistent statements as substantive evidence in civil cases where the witness is at trial and subject to cross-examination.¹⁵ The court reasoned that the earlier extrajudicial statement was often more reliable than the statement made at trial and that instructions to jurors allowing the out-of-court statement to be considered only for assessing the witness' credibility were confusing.¹⁶ Moreover, by having the witness available for present cross-examination, any hearsay dangers were greatly diminished.¹⁷ The case was remanded by the court for a new trial.¹⁸

Although the exact origin of the rule against impeaching one's own witness is uncertain,¹⁹ it had its basis in early trial practice where witnesses

11. *Id.*

12. *Id.* at 424.

13. *See infra* note 32.

14. *Rowe*, 699 S.W.2d at 425.

15. *Id.* at 428. The court specifically limited its holding to civil cases, although it noted that the Missouri legislature similarly abandoned the orthodox rule in criminal cases in Mo. REV. STAT. § 491.074 (1985). Judge Donnelly, in his concurring opinion, expressed concern that the admission of prior inconsistent statements as substantive evidence in criminal cases would violate the defendant's right of confrontation as provided by Mo. CONST. art. I, § 18(a). 699 S.W.2d at 480 (Donnelly, J., concurring). Thus, in his view, the new Missouri statute would be unconstitutional. The supreme court, however, did not address this issue in its decision.

16. *Rowe*, 699 S.W.2d at 426.

17. *Id.* at 427.

18. *Id.* at 428.

19. Three major theories have been advanced as to the origin of the rule

were in effect character witnesses for the parties and had no knowledge of the merits of the suit. Each party would gather friends and relatives to be "oath-helpers" who testified as to the veracity of that party.²⁰ Therefore, it was inconceivable to allow a party to impeach his own witness. If a witness did not testify as expected, then the party could only blame himself for not having chosen a better witness.

The purpose of the rule against impeaching one's own witness was based on several rationales.²¹ First, in early practice the party was thought to vouch for the credibility of his own witnesses.²² Since the parties chose their own witnesses, they were required to guarantee their credibility. In today's trial setting, however, a party cannot choose his witnesses but instead must rely on those with knowledge of the facts.²³ Moreover, it is often difficult to determine who is a party's "own witness" and consequently, which party should vouch for his credibility.²⁴ Since it is unrealistic to expect a party to guarantee his witness' credibility, this rationale is no longer a valid basis for the rule.

A further justification for the rule was that if such impeachment were allowed, the witness could be coerced into giving favorable testimony by fear of abuse of his character by the disappointed party.²⁵ Witnesses are often easily intimidated by domineering attorneys. If the witness had made an out-of-court statement which was inaccurate or misleading, he may have been afraid to recant or correct that statement at trial. His testimony could thus

against impeaching one's own witness. The first theory is that the rule arose from the decisory oath of Roman law which was part of the Code Justinian. Professor Wigmore espouses the second theory that the rule had its origins in the medieval trial by purgation. See 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 896 (1970). Finally, Dean Ladd advanced the theory that the more probable origin was found in the transition from the inquisitorial method of trial to an adversary system. See Ladd, *Impeachment of One's Own Witness-New Developments*; 4 U. CHI. L. REV. 69, 70 (1936).

20. Schatz, *Impeachment of One's Own Witness: Present New York Law and Proposed Changes*, 27 CORNELL L. REV. 377, 378 (1942); Comment, *Impeaching One's Own Witness*, 49 VA. L. REV. 996 (1963).

21. See McCORMICK ON EVIDENCE, *supra* note 4, § 38; J. WIGMORE, *supra* note 19, §§ 898-99; Ladd, *supra* note 19, at 76-82; Ross, *supra* note 2, at 507; Schatz, *supra* note 20, at 379.

22. See *State v. Kinne*, 372 S.W.2d 62, 67 (Mo. 1963); *Crabtree v. Kurn*, 351 Mo. 628, 647, 173 S.W.2d 851, 859 (1943); McCORMICK ON EVIDENCE, *supra* note 4, § 38; J. WIGMORE, *supra* note 19, § 898; Ladd, *supra* note 19, at 76; Ross, *supra* note 2, at 507; Comment, *supra* note 20, at 1005.

23. McCORMICK ON EVIDENCE, *supra* note 4, § 38; J. WIGMORE, *supra* note 19, § 898; Ladd, *supra* note 19, at 77; Ross, *supra* note 2, at 508; Schatz, *supra* note 20, at 379-80, 389.

24. For a discussion of the problem of determining who is one's own witness, see J. WIGMORE, *supra* note 19, § 909; Ross, *supra* note 2, at 509-12;

25. J. WIGMORE, *supra* note 19, § 899; Ladd, *supra* note 19, at 80; Ross, *supra* note 2, at 508; Schatz, *supra* note 20, at 380.

be swayed by an overpowering attorney who had the ability to either build the witness' character or to blacken his reputation for truthfulness by introducing his prior contradictory statement. Therefore, the coercion argument as a basis for the rule still makes some sense. However, the rule protects both the honest and dishonest witness; and the honest witness would most likely be able to explain any inconsistencies from his earlier testimony without fear of abuse of his character.²⁶

A final rationale given for the rule was that if prior out-of-court statements were allowed into evidence for impeachment purposes, then the statements were already in front of the jury and could be considered as substantive evidence, notwithstanding the limiting instructions.²⁷ Thus, to prevent this misuse, courts reasoned that the prior inconsistent statement should not be admitted into evidence for any purpose against one's own witness. After the *Rowe* decision, however, this is not a valid justification for the rule in Missouri. Moreover, in all impeachment situations involving out-of-court statements, evidence which may be prejudicial to one party is nonetheless presented to the jury and is often considered for improper purposes.

In the *Rowe* decision, the Missouri Supreme Court recognized the unreasonableness of the no impeachment rule in modern trial settings.²⁸ Use of the rule to prohibit impeaching one's own witness would actually limit the jury's ability to find out the truth since important information regarding the witness' credibility would be kept from them.²⁹ In addition, where the witness had made prior inconsistent statements out-of-court, such statements could still be used for some other purpose such as refreshing recollection.³⁰ There-

26. J. WIGMORE, *supra* note 19, § 899.

27. MCCORMICK ON EVIDENCE, *supra* note 4, § 38; Ladd *supra* note 19, at 86; Ross, *supra* note 2, at 508-09.

28. *Rowe*, 699 S.W.2d at 424 ("No valid reason for this anachronistic rule would seem to exist today").

29. In *London Guar. and Accident Co. v. Woelfe*, 83 F.2d 325, 332 (8th Cir. 1936) the court stated:

The purpose of a trial, however, is to seek for and, if possible, find the truth and to do justice between the parties according to the actual facts and the law, and any rule which stands in the way of ascertaining the truth and thus hampers the administration of justice must give way.

Id.; see also, MCCORMICK ON EVIDENCE, *supra* note 4, § 38; Schatz, *supra* note 20, at 390.

30. For the purpose of refreshing a witness' memory where the witness claimed that he had forgotten a prior observance, the attorney could "direct the attention of [the] witness to statements previously made by him as to the subject-matter of his testimony . . ." *Brown v. Chicago R.I. & P.R. Co.*, 315 Mo. 409, 419, 286 S.W. 45, 50 (1926).

Cross-examination of one's own witness for the purpose of refreshing his recollection concerning an out-of-court statement is proper within reasonable limits and is subject to the sound discretion of the trial court. See *Woelfle v. Connecticut Mut. Life Ins. Co.*, 234 Mo. App. 135, 152, 112 S.W.2d 865, 874 (1938). Although the

fore, although the statement could not have been used to impeach one's own witness, it nevertheless may have had the effect of discrediting him. Because of its limited utility in today's courtrooms, the rule prohibiting the impeachment of one's own witness has now been abandoned by the majority of states.³¹ Most states have adopted the approach of Rule 607 of the Federal Rules of Evidence, which provides that "the credibility of a witness may be attacked by any party, including the party calling him."³² Other states have placed limitations on when one may impeach his own witness, such as requiring a showing of surprise and affirmative harm.³³ Missouri now appears to follow the federal rules approach.³⁴

Prior to the *Rowe* decision, the rule in Missouri was that impeachment of one's own witness was prohibited absent a showing of surprise and entrapment.³⁵ In order to impeach the witness, the party had to show actual surprise at the witness' unfavorable testimony.³⁶ Thus if the party knew in advance that the witness had changed his testimony, he could not impeach the witness as to any earlier inconsistent statements.³⁷ In addition, the party had to be entrapped into calling the witness and affirmatively harmed by his

evidence is not admissible to impeach the witness, it nonetheless often has that effect. See MCCORMICK ON EVIDENCE, *supra* note 4, § 38, at 84 n.12.

31. MCCORMICK ON EVIDENCE, *supra* note 4, § 38; J. WIGMORE, *supra* note 19, §§ 904-05 (Supp. 1985).

32. FED. R. EVID. 607; ALASKA R. EVID. 607; ARIZ. R. EVID. 607; ARK. UNIF. R. EVID. 607; CAL. EVID. CODE § 785 (West 1966); COLO. R. EVID. 607; DEL. UNIF. R. EVID. 607; HAW. R. EVID. 607; ILL. SUP. CT. R. 238 (criminal cases); IOWA R. EVID. 607; KAN. STAT. ANN. § 60-420 (1963); ME. R. EVID. 607; MINN. R. EVID. 607; MONT. R. EVID. 607(a); NEB. REV. STAT. § 27-607 (1979); N.M. R. EVID. 607; N.C. R. EVID. 607; N.D. R. EVID. 607; OKLA. STAT. ANN. tit. 12, § 2607 (West 1980); S.D. CODIFIED LAWS ANN. § 19-14-8 (1979); TEX. R. EVID. 607; UTAH R. EVID. 20; VT. R. EVID. 607; WASH. R. EVID. 607; WIS. R. EVID. 906.07; WYO. R. EVID. 607; *Davis v. State*, 249 Ga. 309, 290 S.E.2d 273 (1982); *Tri-City Van & Storage, Inc. v. Slone*, 437 S.W.2d 211 (Ky. 1969).

33. *State v. Smith*, 138 Conn. 196, 82 A.2d 816 (1951); *Poole v. State*, 290 Md. 114, 428 A.2d 434 (1981); *Hall v. State*, 250 Miss. 253, 165 So. 2d 345 (1964); *People v. Knatz*, 76 App. Div. 2d 889, 428 N.Y.S.2d 709 (1980); D. C. CODE ANN. § 14-102 (1966); FLA. STAT. ANN. § 90.608(2) (West 1979); ILL. SUP. CT. R. 238 (1967); IND. CODE ANN. § 34-1-14-15 (Burns 1977); LA. REV. STAT. ANN. § 15:487 (West 1967); MASS. GEN. LAWS ANN. ch. 233, § 23 (West 1959); MICH. R. EVID. 607; N.J. R. EVID. 20; OHIO R. EVID. 607; VA. CODE ANN. § 8.01-403 (1984).

34. *Rowe*, 699 S.W.2d at 425.

35. See cases cited *supra* note 2. In his dissenting opinion, Judge Billings, arguing in favor of the old rule, set forth the precise parameters of the common law rule in Missouri. *Rowe*, 699 S.W.2d at 437-38 (Billings, J., dissenting).

36. *State v. Byrd*, 676 S.W.2d 494 (Mo. 1984) (en banc); *Crabtree v. Kurn*, 351 Mo. 628, 173 S.W.2d 851 (1943); *Jordan v. Robert Half Personnel Agencies*, 615 S.W.2d 574 (Mo. Ct. App. 1981); *Woelfle v. Connecticut Mut. Life Ins. Co.*, 234 Mo. App. 135, 112 S.W.2d 865 (1938).

37. *Crabtree v. Kurn*, 351 Mo. 628, 173 S.W.2d 851 (1943).

testimony.³⁸ There must have been prejudice to the party due to his justified reliance on the witness' earlier testimony.³⁹ Mere lack of memory, failure to testify, or failure to relate favorable facts did not constitute harm sufficient to allow impeachment.⁴⁰ The witness had to give testimony positively favorable to the other side so as to "become in effect a witness for the adverse side."⁴¹ In other words, harm was defined not only as actual harm to the proponent, but also as favorable results to the opponent. If such surprise and harm were shown, then the party would be allowed to introduce his own witness' prior inconsistent statement for impeachment. One question which the Missouri court did not specifically address in *Rowe*, and on which the federal courts seem to be unsure, is whether the party must still show surprise and harm in order to impeach his own witness.⁴² Federal Rule 607 makes no mention of surprise and harm, both of which had been required for impeachment prior to the enactment of the Federal Rules.⁴³ Nonetheless, some federal courts have since hinted at the continued vitality of these requirements notwithstanding the clear language of Rule 607.⁴⁴ The Eighth Circuit Court of Appeals in particular has found surprise and harm relevant to allowing impeachment, but has noted that it is uncertain whether those factors are now mandatory.⁴⁵

In *Rowe*, the defendant's attorney could not claim surprise at the witness' testimony because the statements made during the investigation had

38. *State v. Kinne*, 372 S.W.2d 62 (Mo. 1963); *Crabtree*, 351 Mo. 628, 173 S.W.2d 851; *State v. Drummins*, 274 Mo. 632, 204 S.W. 271 (1918); *Jordan v. Robert Half Personnel Agencies*, 615 S.W.2d 574 (Mo. Ct. App. 1981).

39. *Crabtree*, 351 Mo. 628, 173 S.W.2d 851; Ross, *supra* note 2, at 517.

40. *United States v. Dunmore*, 446 F.2d 1214 (8th Cir. 1971); *Goings v. United States*, 377 F.2d 753 (8th Cir. 1967), *cert. denied*, 393 U.S. 883 (1968); *State v. Byrd*, 676 S.W.2d 494 (Mo. 1984) (en banc); *State v. Armbruster*, 641 S.W.2d 763 (Mo. 1963); *Crabtree*, 351 Mo. 628, 173 S.W.2d 851; Ordover, *supra* note 5, at 67.

41. *State v. Byrd*, 676 S.W.2d 494 (Mo. 1984) (en banc); *State v. Armbruster*, 641 S.W.2d 763 (Mo. 1963); *State v. Drummins*, 274 Mo. 632, 204 S.W. 271 (1918); Ross, *supra* note 2, at 516.

42. One commentator states that surprise and harm are no longer required in federal court. Ordover, *supra* note 5, at 68. However, some federal courts have implied otherwise. See *infra* notes 44-45 and accompanying text.

43. *United States v. Allsup*, 485 F.2d 287, 291 (8th Cir. 1973); *United States v. Coppola*, 479 F.2d 1153, 1158 (10th Cir. 1973); *United States v. Watson*, 450 F.2d 290, 291 (8th Cir. 1971), *cert. denied*, 405 U.S. 993 (1972); *United States v. Dunmore*, 446 F.2d 1214 (8th Cir. 1971); *Goings v. United States*, 377 F.2d 753, 759 (8th Cir. 1967), *cert. denied*, 393 U.S. 883 (1968); *Graham*, *supra* note 4, at 1612; Ordover, *supra* note 5, at 67.

44. See *Ruff v. Wyrick*, 709 F.2d 1219 (8th Cir. 1983); *United States v. Palacios*, 556 F.2d 1359 (5th Cir. 1977); *United States v. Alvarez*, 548 F.2d 542 (5th Cir. 1977); *United States v. Garcia*, 530 F.2d 650 (5th Cir. 1976); *United States v. Rogers*, 549 F.2d 490 (8th Cir. 1976); *United States v. Morlang*, 531 F.2d 183 (4th Cir. 1975); *Graham*, *supra* note 4, at 1613.

45. *Ruff v. Wyrick*, 709 F.2d 1219 (8th Cir. 1983); *United States v. Rogers*, 549 F.2d 490 (8th Cir. 1976); *Graham*, *supra* note 4, at 1613.

already been contradicted by later statements in the witness' pre-trial deposition. Thus, a showing of surprise no longer seems to be required for impeachment.⁴⁶ Moreover, because the witness merely failed to give desired testimony, his statements were not harmful as defined in earlier decisions.⁴⁷ Similarly, his testimony did not positively benefit the plaintiff since he denied ever making the statement that he had overheard the conversation. The court instead allowed impeachment where the witness' testimony was merely less favorable than expected. The court's actual intent may have been to redefine the requirement of harm. Indeed, requiring some harm as a prerequisite to impeachment of one's own witness does seem reasonable.⁴⁸ If, on the other hand, harm was required as defined under the former rule, then the defendant would be unable to impeach the witness with his prior inconsistent statement. Since the decision purports to abolish the old Missouri rule, it is likely that impeachment of a party's own witness will now be allowed notwithstanding the absence of surprise or affirmative harm.⁴⁹

A major problem in the decision lies in the relevance of the inconsistent statement. In order to justify admission of the prior inconsistent statement for impeachment, the in-court testimony must in a real sense contradict the earlier statement.⁵⁰ It must not only be inconsistent with the witness' testimony, but must also be related to a noncollateral matter.⁵¹ For example, where a witness makes an out-of-court statement that "the light was red when the plaintiff crossed the intersection," and then in-court testifies that "the light was green," there is an inconsistency as to a noncollateral matter. The color of the light is the inconsistency and is also relevant to the issues at trial.

46. Even when the statement can be used only for impeachment, the requirement of surprise has received much criticism. Two common objections are made to the requirement of surprise. First, even if prior to trial the party knows of the change in testimony he should still be allowed to show the contradiction since he would have been able to do that had the other party called the witness. The second objection lies in that the change in testimony will generally affect only a portion of the entire testimony. Therefore, the party should be able to benefit from the remainder of that witness' testimony and yet show the contradiction on this one point. J. WIGMORE, *supra* note 19, § 904; *see also* London Guar. and Accident Co. v. Woelfe, 83 F.2d 325, 334 (8th Cir. 1936); MCCORMICK ON EVIDENCE, *supra* note 4, § 38, at 83.

47. *See supra* notes 38-41 and accompanying text.

48. Dean Ladd found that no legitimate purpose for impeachment existed where harm was not present, stating that "the problem is presented only when a witness gives destructive testimony to the party who calls him, and has previously made favorable declarations to the contrary." Ladd, *supra* note 19, at 87.

49. *Rowe*, 699 S.W.2d at 425.

50. *See Comment, supra* note 20, at 1004.

51. *U.S. v. Laughlin*, 772 F.2d 1382 (7th Cir. 1985); *Shanahan v. Southern Pac. Co.*, 188 F.2d 564 (9th Cir. 1951); *Conley v. Kaney*, 250 S.W.2d 350 (Mo. 1952); *Wiesemann v. Pavlat*, 413 S.W.2d 23, 29 (Mo. Ct. App. 1967).

However, suppose the witness makes an out-of-court statement to a police officer that "the light was red when the plaintiff crossed the intersection." Then in court the witness says "I did not see the light." What is the inconsistency? It is whether or not the witness saw the light. The evidence relevant to the issues in the law suit is whether or not the light was red. Whether the witness saw the light or not is an extrinsic matter.

Similarly, what is the inconsistency in the *Rowe* decision? The witness' extrajudicial statement was "I overheard the plaintiff tell X that he was going to burn his car to get the insurance." On the stand at trial the witness testified "I did not ever make that statement."⁵² Here the inconsistency lies in whether the witness made the statement or not. This is a collateral matter since it has no independent purpose other than for contradiction.⁵³ Therefore, the prior inconsistent statement should not have been admissible. The resulting confusion and delays should not justify admission of the statement where it deals with a collateral matter and where no harm is shown.

If harm was required as a prerequisite to impeachment, then there is some assurance as to the relevancy of the out-of-court statement; in order for harm to occur, the statement must deal with a matter in issue. Moreover, if the earlier statement is admitted only because of its affect on the credibility of the witness, then a party would have no legitimate reason for proving his own witness' prior inconsistent statement unless he has been harmed. Whether or not harm is still required to impeach one's own witness in Missouri is left unanswered by the *Rowe* decision.

When determining whether a prior inconsistent statement should be admitted as substantive evidence, the main concern is whether the statement is sufficiently complete and accurate for presentation to the jury.⁵⁴ Missouri previously followed the orthodox rule that extrajudicial prior inconsistent statements were hearsay and therefore could not be admitted as the truth of the matter asserted.⁵⁵ The prior inconsistent statement, however, would be used to impeach the credibility of a witness.⁵⁶ Use of the statement to impeach

52. *Rowe*, 699 S.W.2d at 423.

53. *U.S. v. Laughlin*, 772 F.2d 1382 (7th Cir. 1985); *Kirkendoll v. Neustrom*, 379 F.2d 694 (10th Cir. 1967); *Conley v. Kaney*, 250 S.W.2d 350 (Mo. 1952).

54. *Ordover*, *supra* note 5, at 69.

55. *State v. Granberry*, 491 S.W.2d 528 (Mo. 1973) (en banc); *State v. Kinne*, 372 S.W.2d 62 (Mo. 1963); *Woelfle v. Connecticut Mut. Life Ins.*, 234 Mo. App. 135, 112 S.W.2d 865 (1938).

56. *See cases cited supra* note 55. The prior inconsistent statement could be used to impeach a witness, whether made in or out of court. *Neavill v. Klomp*, 427 S.W.2d 446, 448 (Mo. 1968). The prior inconsistent statement may be used to impeach because its existence affects the credibility of the witness. The statement is relevant because when taken with his contradictory in court testimony, the jury may infer that the witness has erred. Either he has some reason to lie, some bias, faulty memory or perception, or faulty recollection, or he has some other quality which has caused him to change his testimony. This capacity to err thereby affects his credibility as a witness. *J. WIGMORE, supra* note 19, §§ 902, 1017.

but not as substantive evidence was problematic because confusing instructions made it difficult for juries to disregard prior statements except for impeachment purposes.⁵⁷ Attorneys would introduce the prior inconsistent statement in front of the jury under the guise of impeachment, actually hoping that the jurors would consider the truthfulness of the statement. If a juror believed the witness had told the truth earlier, then it was difficult for the juror to ignore the truth of that prior statement.⁵⁸ Consequently, the rules on impeaching a witness by a prior inconsistent statement and on the admission of the statement as substantive evidence should mirror each other. If the statement is admissible to impeach, it should be admissible as substantive evidence.⁵⁹

In *Rowe*, the Missouri Supreme Court abandoned the orthodox rule finding that "when the declarant is available for cross-examination . . . enough of the dangers of hearsay and unreliability [are] absent to justify the substantive use of prior inconsistent statements in civil cases."⁶⁰ In determining the admissibility of a prior inconsistent statement, there must be sufficient assurance that the statement was in fact made.⁶¹ As an out-of-court statement offered for the truth of the matter asserted, the statement falls within the definition of hearsay.⁶² This was the basis of the orthodox rule.⁶³ As hearsay, the extrajudicial statement has the inherent problems of no opportunity to cross-examine at the time the statement was made, inability of the jury to observe the demeanor of the witness, and the fact that the statement was not made under oath.⁶⁴ The main concern actually lies in the lack of a right to immediate cross-examination.⁶⁵

The issue is whether later cross-examination at trial is a sufficient substitute for contemporaneous cross-examination at the time the statement was

57. *State v. Granberry*, 491 S.W.2d 528, 535 (Mo. 1973) (en banc); McCORMICK ON EVIDENCE, *supra* note 4, § 251.

58. *Graham*, *supra* note 4, at 1573.

59. *See Graham*, *supra* note 4; Ordovery, *supra* note 5.

60. *Rowe*, 699 S.W.2d at 428.

61. Not only must there be sufficient assurance that the prior statement was made but there also must be assurance that "subtle influence, coercion, or deception has not impaired its reliability." *Graham*, *supra* note 4, at 1582.

62. *See J. WIGMORE*, *supra* note 19, § 1018; Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948).

63. Cantwell & McGlamery, *Prior Inconsistent Statements: Conflict Between State and Federal Rules of Evidence*, 34 MERCER L. REV. 1495, 1497 (1983); *see also DiCarlo v. United States*, 6 F.2d 364, 366 (2d Cir. 1925) (court found that hearsay objection to prior inconsistent statement was not in substance good since the witness was in court and available for cross-examination).

64. *DiCarlo*, 6 F.2d at 368; *Woelfle v. Connecticut Mut. Life Ins.*, 234 Mo. App. 135, 151, 112 S.W.2d 865, 874; McCORMICK ON EVIDENCE, *supra* note 4, § 251; Cantwell & McGlamery, *supra* note 63, at 1497; *Graham*, *supra* note 4, at 1568.

65. *See Ruhala v. Roby*, 379 Mich. 102, 124-25, 129, 150 N.W.2d 146, 155-56, 158 (1967); McCORMICK ON EVIDENCE, *supra* note 4, § 251; *Graham*, *supra* note 4, at 1569.

made. Several authorities have argued that stale cross-examination cannot be an effective substitute to prevent hearsay dangers.⁶⁶ Most legal scholars, however, have viewed the opportunity to cross-examine the witness at trial as an adequate safeguard.⁶⁷

Another justification for the orthodox rule is that an essential element of the law suit should not be proven by an unacknowledged out-of-court statement.⁶⁸ However, as Judge Blackmar notes in his concurring opinion, every element of the case must be established by substantial evidence. Therefore, a court will be reluctant to accept a single out-of-court statement to establish an essential element of the case.⁶⁹

In his *Rowe* dissenting opinion, Judge Billings also pointed out dangers which would exist if oral, extrajudicial, prior inconsistent statements were admissible as substantive evidence.⁷⁰ Because the concern is for the accuracy of the out-of-court statement, any influences which may affect the truthfulness of the statement must be considered. The risk of complete fabrication, inaccurate or incomplete presentation of the earlier statement, and the possibility of undue influence in getting the statement are all dangers which are present.⁷¹ Many months or possibly years have passed between the time of

66. One court noted the difficulty with stale cross-examination. It reasoned that since cross-examination is an adversary proceeding, the cross-examiner is attempting to have the witness equivocate his testimony. Where the witness refuses to adopt his prior statement, there can be no effective cross-examination regarding it. Additionally, the court noted that the prior inconsistent statement is given a stronger status over in court testimony, and that the adverse cross-examiner must in effect become the witness' friend in order to rehabilitate his in court statements. *Ruhala*, 379 Mich. at 124-25, 150 N.W.2d at 156.

Finally, the court stated:

No matter how deadly the thrust of the cross-examiner, the ghost of the prior statement still stands. His questions will always sound like attempts to permit the witness to explain why he changed his story before coming to court, with the jury being left to infer that he might have been induced to change his story in the intervening months or years for some unrevealed and sinister reason.

Id. at 128, 150 N.W.2d at 158; *see also* *State v. Granberry*, 491 S.W.2d 528, 533 (Mo. 1973) (en banc).

67. Both McCormick and Wigmore adhere to the view that the purpose of the hearsay rule is satisfied where the witness is available for present cross-examination since there is ample opportunity to ask him about his prior statement. MCCORMICK ON EVIDENCE, *supra* note 4, § 251, at 245; J. WIGMORE, *supra* note 19, § 1018, at 996; *see also* *Cantwell & McGlamery*, *supra* note 63, at 1498.

68. This concern is most often expressed in criminal cases where, for example, the witness has made an out-of-court inconsistent statement identifying the defendant as the guilty party. When the witness recants his identification at trial, the out-of-court statement should not then be allowed as the sole evidence of the defendant's guilt. *See* *Bridges v. Wixon*, 326 U.S. 135, 153-54 (1945).

69. *Rowe*, 699 S.W.2d at 429.

70. *Id.*, at 434-35.

71. *Id.* at 434.

the original statement and the trial. The witness could have lied at the time the statement was made. Similarly, the statement could be given an unintended meaning or be incomplete. It also may have been the result of suggestion or coercion. At the time of trial the witness most likely could not repeat exact statements he had made months before. Thus, the possibility of inaccuracy is much greater where there has been no contemporaneous record made of the oral extrajudicial statement.

Notwithstanding these concerns, the trend has been towards abandonment of the orthodox rule. Because some extrajudicial statements have sufficient guarantees as to their reliability, many courts have allowed their admission into evidence.⁷² Indeed, some prior extrajudicial statements may be even more reliable than the in court testimony. Since the prior statement is made closer in time to the disputed event, the witness' memory is clearer and there has been less time for other influences to alter the witness' view.⁷³ There are also guarantees as to reliability where the prior inconsistent statement has been accurately recorded in some form, such as a written statement signed by the declarant, or a videotaped or taperecorded statement.

Prior deposition testimony had been deemed nonhearsay by the Missouri Supreme Court so that such testimony could be admitted as substantive evidence even though it involved out-of-court prior inconsistent statements.⁷⁴ Similarly, the Federal Rules of Evidence adopted in 1972 provide that prior inconsistent statements which are in testimonial form may be considered as substantive evidence in federal courts.⁷⁵ Rule 801(d)(1)(A) provides that a statement is not hearsay and therefore may be admitted as substantive evidence if "the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with his testimony, and was . . . given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition."⁷⁶

The new Missouri rule announced in the *Rowe* decision conforms with an earlier proposed Federal Rule 801(d)(1)(A).⁷⁷ The proposed rule would have provided that any prior inconsistent statement is nonhearsay and may be considered as substantive evidence if the witness is present at trial and subject to cross-examination concerning the statement. After much debate,

72. Cantwell & McGlamery, *supra* note 63, at 1498; Morgan, *supra* note 62, at 193.

73. *Pulitzer v. Chapman*, 337 Mo. 298, 318, 85 S.W.2d 400, 411 (1935) (en banc); McCORMICK ON EVIDENCE, *supra* note 4, § 251, at 745; Cantwell & McGlamery, *supra* note 63, at 1500.

74. *State v. Granberry*, 491 S.W.2d 528 (Mo. 1973) (en banc); *Pulitzer*, 337 Mo. at 320, 85 S.W.2d at 411.

75. See FED. R. EVID. 801(d)(1)(A).

76. *Id.*

77. Rules of Evidence for United States Courts & Magistrates, 56 F.R.D. 183, 293 (1973).

however, Congress limited the admissibility of such statements to those which were more reliable, i.e., those which were originally made under oath and subject to cross-examination.⁷⁸

In its complete abandonment of the orthodox rule, Missouri has joined the majority of other states. Many states have adopted the approach of the proposed federal rule instead of Rule 801(d)(1)(A) as adopted.⁷⁹ The remainder of the states are divided between those that still adhere to the orthodox rule⁸⁰ and those that follow rules similar to Rule 801(d)(1)(A) of the Federal Rules of Evidence.⁸¹ Although one of the results anticipated by Con-

78. FED. R. EVID. 801(d)(1)(A). The federal rule as adopted was different from the proposed rule because of fear of potential abuses. MCCORMICK ON EVIDENCE, *supra* note 4, § 251, at 746. Several fears were expressed including:

The danger that pressure would be increased to secure more pre-trial statements, that untrue statements would be obtained for use at trial by oppressive insurance adjusters, that trials would be cluttered by prior statements and that trials would proceed by the use of carefully written statements drafted in the lawyer's offices.

Ordovery, *supra* note 5, at 74; For a discussion of the legislative history of Rule 801(d)(1)(A), see Cantwell & McGlamery, *supra* note 63, at 1503-05; Graham, *supra* note 4, at 1575-81.

79. Alaska: *Beavers v. State*, 492 P.2d 88 (Alaska 1971), ALASKA R. EVID. 801(d)(1)(A); Arizona: ARIZ. R. EVID. 801(d)(1), *State v. Skinner*, 110 Ariz. 135, 515 P.2d 880 (1973); Arkansas: ARK. UNIF. R. EVID. 801(d)(1)(i) (civil); California: CAL. EVID. CODE § 1235 (West 1966); Colorado: COLO. R. EVID. 801(d)(1)(A), *People v. Mulligan*, 193 Colo. 509, 568 P.2d 449 (1977); Delaware: DEL. CODE. ANN. tit. 11, § 3507(a) (1979) (criminal), *Keys v. State*, 337 A.2d 18 (Del. 1975); Georgia: *Gibbons v. State*, 248 Ga. 858, 286 S.E.2d 717 (1982); Indiana: *Patterson v. State*, 263 Ind. 55, 324 N.E.2d 482 (1975); Kansas: KAN. STAT. ANN. § 60-460(a) (1976), *State v. Holt*, 228 Kan. 16, 612 P.2d 570 (1980); Kentucky: *Nugent v. Commonwealth*, 639 S.W.2d 761 (Ky. 1982); Montana: MONT. R. EVID. 801(d)(1); Nevada: NEV. REV. STAT. § 51.035(2)(a) (1971); New Jersey: N.J. REV. STAT. § 2A.84A (Supp. 1974); N.J. R. EVID. 63(1)(a); North Dakota: N.D. R. EVID. 801(d)(1)(A) (civil); Pennsylvania: *Commonwealth v. Loar*, 264 Pa. Super. 398, 399 A.2d 1110 (1979); South Carolina: *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982), *cert denied*, 460 U.S. 1103 (1983); Utah: UTAH R. EVID. 801(d)(1)(A); Wisconsin: WIS. R. EVID. 908.01(4)(a)(1); Wyoming: WYO. R. EVID. 801(d)(1) (civil).

80. *Isbell v. State*, 57 Ala. App. 444, 329 So. 2d 133, *cert. denied*, 295 Ala. 407, 329 So. 2d 140 (1976); *Turner v. United States*, 443 A.2d 542 (D.C. 1982); *People v. Krug*, 38 Ill. App. 3d 383, 347 N.E.2d 807 (1976); *State v. Ray*, 259 La. 105, 249 So. 2d 540 (1971); *Capital Raceway v. Smith*, 22 Md. App. 224, 322 A. 2d 238 (1974); *Sims v. State*, 313 So. 2d 388 (Miss. 1975); *State v. Gomes*, 116 N.H. 113, 352 A.2d 713 (1976); *State v. Sinclair*, 45 N.C. App. 586, 263 S.E.2d 811, *rev'd on other grounds*, 301 N.C. 193, 270 S.E.2d 418 (1980); *State v. Roddy*, 401 A.2d 23 (R.I. 1979); *Martin v. State*, 584 S.W.2d 830 (Tenn. Crim. App. 1979).

81. FLA. STAT. ANN. § 90.804(2)(1) (West 1979); HAW. R. EVID. 802.1(1); ME. R. EVID. 801(d)(1); MICH. R. EVID. 801(d)(1); MINN. R. EVID. 801(d)(1); NEB. REV. STAT. § 27-801(4)(a) (1979); OHIO R. EVID. 801(d)(1); OKLA. STAT. ANN. tit. 12, § 2801(4)(a) (West 1980); OR. R. EVID. 801(4)(a)(A); S.D. CODIFIED LAWS ANN. § 19-16-2 (1979); TEX. R. EVID. 801(c)(1); VT. R. EVID. 801(d)(1); WASH. R. EVID. 801(d)(1); *State v. Spadafore*, 159 W. Va. 236, 220 S.E.2d 655 (1975).

gress in adopting the federal rule was to provide a uniform evidentiary rule on the use of prior inconsistent statements,⁸² the actual effect has been to allow for more diversity between the federal and state rules.⁸³

Rule 801(d)(1)(A) as adopted has been criticized as being too narrow in its admission of prior inconsistent statements.⁸⁴ Certain extrajudicial statements not covered in Rule 801, however, should nonetheless be admitted as substantive evidence because there are sufficient guarantees of their reliability.⁸⁵ For example, where the witness admits making the earlier statement there is less of a problem with fabrication or distortion and the earlier statements should be admissible as substantive evidence.⁸⁶ Similarly, where the out-of-court statement was accurately recorded it should be admissible.

The main difficulty with the *Rowe* decision lies in a complex fact situation to which the rules adopted are not easily applied. The out-of-court statement should not be admissible for any purpose since it deals with a noncollateral matter.⁸⁷ Here the inconsistency is making the statement versus not making the statement, which is not relevant to substantive evidence. What is relevant is the truth of the statement overheard by the witness, as to which there is no inconsistency. As previously discussed, the statement should have been inadmissible for impeachment of the witness.⁸⁸ If it is inadmissible to impeach, it should also be inadmissible as substantive evidence.

The decision seems to reflect a desire by the court to change Missouri evidentiary rules. However, the new rules are not easily applicable to this case. The court could have decided that the out-of-court events were admissible over hearsay objections as admissions through conduct by the plaintiff.⁸⁹ Since the plaintiff visited the witness prior to the deposition and trial and thereafter the witness' testimony changed, the evidence could have been admitted to show the plaintiff's awareness of liability.⁹⁰ Many Missouri deci-

82. One of the main concerns was the problem of forum shopping due to the different evidentiary rules followed in state and federal courts. See Weinberg, *Choice of Law and the Proposed Federal Rules of Evidence: New Perspectives*, 122 U. PA. L. REV. 594 (1974). Because most states have not followed the federal rule, the danger of forum shopping still exists.

83. See Cantwell & McGlamery, *supra* note 63, at 1512-17.

84. See MCCORMICK ON EVIDENCE, *supra* note 4, § 38, at 121; Graham, *supra* note 4, at 1566, 1582.

85. See Graham, *supra* note 4, at 1566; *supra* notes 72-74 and accompanying text.

86. See Graham, *supra* note 4, at 1583.

87. See *supra* notes 50-53 and accompanying text.

88. *Id.*

89. Admission by conduct is generally regarded as any wrongdoing by a party in connection with his case which amounts to an obstruction of justice. *United States v. Weir*, 575 F.2d 668 (8th Cir. 1978); see also *Pomeroy v. Benton*, 77 Mo. 64, 86 (1882); MCCORMICK ON EVIDENCE, *supra* note 4, § 273, at 808.

90. *United States v. Bongard*, 713 F.2d 419 (8th Cir. 1983); *State v. Stapleton*,

sions have allowed evidence to show that a party has attempted to fabricate or destroy evidence or to persuade a potential witness.⁹¹ The court instead decided to abandon the orthodox rule as to prior out-of-court statements.

Changes in Missouri evidentiary rules regarding the use of prior inconsistent statements for impeachment of one's own witness and as substantive evidence were needed notwithstanding the difficult application to the *Rowe* decision. Prior to *Rowe*, Missouri followed outdated rules of law which no longer conformed to the realities of today's courtrooms. In allowing impeachment of one's own witness, the Missouri Supreme Court has provided a more effective mechanism for finding the truth where the witness has made inconsistent statements. Moreover, by the admission of a prior inconsistent statement as substantive evidence, jury confusion and attorney manipulation has been diminished in civil cases.

Nonetheless, the new rules go too far and some limitations should be imposed. Impeachment of one's own witness should still require some showing of harm. Without such a requirement there would be useless delays while the jury was subjected to the admission of collateral evidence irrelevant to the law suit. In addition, by allowing for admission of all prior inconsistent statements as substantive evidence where the declarant is at trial and subject to cross-examination, the court has failed to provide necessary safeguards to assure that the statement was in fact made. In contrast, the Federal Rules provide an approach which is too limited in that many reliable statements would be excluded. A better approach is to allow for admission of out-of-court prior inconsistent statements which are made under oath subject to the penalty of perjury at trial, hearing, or other proceeding or in a deposition, as under the Federal Rules. In addition, statements which are acknowledged by the declarant or which have been accurately recorded, either by written statement signed by the declarant or by videotape or taperecording should be admissible. By providing such limitations there is sufficient assurance that the statement was in fact made and the basis of the hearsay rule is preserved.

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518 S.W.2d 292 (Mo. 1975) (en banc); *State v. Seals*, 515 S.W.2d 481 (Mo. 1974); *State v. Mason*, 394 S.W.2d 343 (Mo. 1965); *State v. Smith*, 355 Mo. 59, 194 S.W.2d 905 (1946); *State v. Matthews*, 202 Mo. 143, 100 S.W. 420 (1907); *State v. Chunn*, 701 S.W.2d 578 (Mo. Ct. App. 1985); *State v. Holman*, 556 S.W.2d 499 (Mo. Ct. App. 1977).

91. See cases cited *supra* note 90.

