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# ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2020

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A.M.

v.

M.G.M.

**Appeal from Mobile Circuit Court  
(DR-18-900075)**

On Third Application for Rehearing

MOORE, Judge.

APPLICATION OVERRULED.

Thompson, P.J., and Edwards and Hanson, JJ., concur.

Donaldson, J., concurs specially.

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DONALDSON, Judge, concurring specially.

I concur to overrule the application for rehearing. I write specially to address an issue discussed in the court's opinion on second application for rehearing. I note that, to the extent A.M. objected to the admission of certain portions of the testimony of Dr. Catarina Arata, a psychologist, as being unfairly prejudicial to the fact-finder rather than as being unfairly prejudicial to her because of some procedural or notice deficiency, that part of Rule 403, Ala. R. Evid., addressing unfair prejudice has questionable application in a bench or nonjury trial.

Rule 403 is described as being "identical to its counterpart under the Federal Rules of Evidence." Advisory Committee's Notes to Rule 403. "Federal cases construing the Federal Rules of Evidence are considered persuasive authority for Alabama state courts construing the Alabama Rules of Evidence. See Williams v. Harris, 80 So. 3d 273 (Ala. Civ. App. 2011)." Municipal Workers Comp. Fund, Inc. v. Morgan Keegan & Co., 190 So. 3d 895, 909 n.3 (Ala. 2015). Regarding the possible exclusion of relevant evidence because of unfair

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prejudice under Rule 403, Fed. R. Evid., it has been observed that

"[t]his portion of Rule 403 has no logical application to bench trials. Excluding relevant evidence in a bench trial because it is cumulative or a waste of time is clearly a proper exercise of the judge's power, but excluding relevant evidence on the basis of 'unfair prejudice' is a useless procedure. Rule 403 assumes a trial judge is able to discern and weigh the improper inferences that a jury might draw from certain evidence, and then balance those improprieties against probative value and necessity. Certainly, in a bench trial, the same judge can also exclude those improper inferences from [the judge's] mind in reaching a decision."

Gulf States Utils. Co. v. Ecodyne Corp., 635 F.2d 517, 519 (5th Cir. Unit A Jan. 1981) (footnote omitted). See also Schultz v. Butcher, 24 F.3d 626, 632 (4th Cir. 1994) ("[I]n the context of a bench trial, evidence should not be excluded under [Rule] 403 on the ground that it is unfairly prejudicial. ... For a bench trial, we are confident that the [trial] court can hear relevant evidence, weigh its probative value and reject any improper inferences."); 22A Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5213 (2014) (noting that the process of ruling on an objection to relevant evidence as unfairly prejudicial

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differs in a nonjury trial "because the judge has to see the putatively prejudicial evidence in order to rule").