Concurring Opinion, Case No.23652 State of West Virginia ex rel. Otis L. Cavender & Marguerite Cavender v. Hon. Charles E. McCarty, et al.

No. 23652 - State of West Virginia ex rel. Otis L. Cavender and Marguerite Cavender v. Honorable Charles E. McCarty, Judge of the Circuit Court of Roane County, Billy Fouty and Patricia Fouty

Cleckley, Justice, concurring:

This case raises the age-old question regarding the scope and breadth of the trial court's discretion in bifurcation cases under Rule 42(b) of the West Virginia Rules of Civil Procedure. In the ordinary bifurcation case, I would dissent from the majority's opinion.See footnote 1 *1* I do not believe that a reversal by an appellate court in the area of trial management should be lightly undertaken. Proper respect for the trial court rulings and judgment in this area is not only better from an institutional standpoint, but it also makes good common sense to leave in tact the judgment of those men and women at the circuit court level who are best suited to make the call. The decision to separate the trial of liability from damages, however, is not merely a matter of trial management, it involves a decision that could very well impact and influence the outcome of the trial. In these limited instances, the reasoning of the circuit court must more carefully be reviewed.

Undoubtedly, it is well settled that the trial judge has broad discretion in ruling on pre-trial management matters, and we review the circuit court's ruling of a bifurcation motion only for abuse of its considerable discretion. See Intercity Realty Co. v. Gibson, 154 W.Va. 369, 377, 175 S.E.2d 452, 456-57 (1970). Our limited authority to correct the circuit court is familiar: only where the lower court's order was plainly wrong and resulted (or, in this case could result) in substantial prejudice to the aggrieved party should we, as an appellate court, interfere. Our recent cases have made it clear that the decision to bifurcate vel non is a matter to be decided on a case-by-case basis, and must be subject to an informed discretion of the trial judge in each instance. See Barlow v. Hester Industries, Inc., ____ W.Va. ____, ____ S.E.2d ____ (No. 23305, 11/15/96) ("The discretion to rule on a Rule 42(b) motion, however, has limits and should be exercised only after an examination of the individual case") (Slip Op. pg. 13). Thus, the decision to bifurcate must be made only after the trial court, in the exercise of its discretion, weighs the various considerations of convenience, prejudice to the parties, expedition, and economy of resources.

The subject of bifurcation in a civil case involving the separation of liability from damages has generated a heated controversy among commentators and the legal profession. To be sure, there are two schools of thought on this subject. First, those who

favor liberal bifurcation emphasize "the time saving,See footnote 2 *2* and also suggest that in theory there should be no difference in the eventual outcome of the case." Lis v. Robert Packer Hospital, 579 F.2d 819, 824 (3d Cir. 1978), cert. denied, 439 U.S. 955, 99 S.Ct. 354, 58 L.Ed.2d 346 (1978). This argument is squarely rejected by an equally impressive group of scholars who advance that in personal injury cases the separation may very well affect the outcome.See footnote 3 *3* See 9 Wright & Miller, Federal Practice and Procedure § 2390, at 508 (1995) ("But when it is seen that the split trial reduces by more than half the cases in which

personal injury plaintiffs are successful, it is apparent that bifurcation makes a substantial change in the nature of the jury trial itself"). Additionally, it is contended that bifurcation obviates the expense of preparing for trial until liability has been found, and that bifurcation may act as a stimulus to settle

cases after the finding of liability. Stevenson v. General Motors Corp., 513 Pa. 411, 416, 521 A.2d 413, 415 (1987).

It would exceed the scope and purpose of this concurring opinion to take sides in this debate. The point that I underscore is that the decision to separate the trial of liability from damages is important, affecting more than convenience; "it makes a substantial change in the nature of the jury trial itself." Wright & Miller. It is for this reason that the bifurcation decision goes beyond the pale of mere trial management. This significance was recognized by the Federal Advisory Committee on Civil Rules, while saying that bifurcation should be encouraged where experience has demonstrated its worth," the Committee cautioned also that separation "is not to be routinely ordered." Advisory Committee's Note to the 1966 Amendment of Rule 42(b), 39 F.R.D. 113. We adhere to that position. We believe as a policy matter that the admonition of the Advisory Committee is sound and that separation of this kind should be sparingly used.

Similarly, American courts have always expressed a preference for unitary trials in both criminal and civil cases. As the United States Supreme Court suggested in

Zafiro v. United States, 506 U.S. 534, 537, 112 S.Ct. 933, 937, 122 L.Ed.2d 317 (1993) (citing Richardson v. Marsh, 481 U.S. 200, 209, 107 S.Ct. 1702, 1708, 95 L.Ed.2d 176 (1987)), unitary trials promote efficiency and serve the interest of justice by avoiding the scandal and inequity of inconsistency. Indeed, it is ordinary and usual to expect no separation of the issues of damages and liability, and separation of these issues for trial purposes not only runs counter to the intention of the federal rule drafters, but is at odds with our practice. While the trial court retains discretion to make the bifurcation call, it is not his or her prerogative to influence the outcome of personal injury litigation without sufficient justification. Therefore, the trial court must support the decision to bifurcate with an explication demonstrating its exercise of an informed discretion in the circumstances of the particular case.

In determining whether to bifurcate a trial, circuit courts should be mindful of the danger that evidence relevant to both issues may be offered at only one-half of the trial. This hazard necessitates the determination that the issues of liability and damages be totally independent of each other prior to permitting bifurcation. This issue was aptly addressed in Brown v. General Motors Corp., 67 Wash.2d 278, 282, 407 P.2d 461, 464 (1965), where it was said that:

"[Bifurcation] should be carefully and cautiously applied and be utilized only in a case and at a juncture where informed judgment impels the court to conclude that application of the rule will manifestly promote convenience and/or actually avoid prejudice. Piecemeal litigation is not to be encouraged. Particularly is this so in the field of personal injury litigation, where the issues of liability and damages are generally interwoven and the evidence bearing upon the respective issues is commingled and overlapping." (Citations omitted.)

See also, York v. AT&T Co., 95 F.3d 948, 958 (10th Cir. 1996) ("Such decisions must be made with regard to judicial efficiency, judicial resources, and the likelihood that a single proceeding will unduly prejudice either party or confuse the jury."); Saxion v. Titan-C-Manufacturing, Inc., 86 F.3d 553, 556 (6th Cir. 1996) ("A decision ordering bifurcation is dependent on the facts and circumstances of each case."); O'Dell v. Hercules Inc., 904 F.2d 1194, 1202 (8th Cir. 1990) ("In exercising discretion [to bifurcate] courts should consider the preservation of constitutional rights, clarity, judicial economy, the likelihood of inconsistent results and possibilities for confusion."). The court in Kimberly- Clark Corp. v. James River Corp., 131 F.R.D. 607, 608-609 (N.D.Ga. 1989), posted seven considerations which may be addressed in making the decision whether to bifurcate: (1) whether the issues sought to be tried separately are significantly different, (2) whether the issues are triable by jury or the court, (3) whether discovery has been directed to a single trial of all issues, (4) whether the evidence required for

each issue is substantially different, (5) whether one party would gain some unfair advantage from separate trials, (6)

whether a single trial of all issues would create the potential for jury bias or confusion, and (7) whether bifurcation would enhance or reduce the possibility of a pretrial settlement. Citing, Martin v. Bell Helicopter Co., 85 F.R.D. 654, 658 (D.Col. 1980); Gonzalez- Martin v. The Equitable Life Assurance Society, 845 F.2d 1140, 1145 (1st Cir. 1988). In the final analysis, Kimberly-Clark appropriately articulated my concern that "the paramount consideration must remain a fair and impartial trial to all litigants through a balance of benefit and prejudice." Kimberly-Clark, 131 F.R.D. at 609, (citations omitted).

If we are ultimately persuaded by the data that strongly suggests that bifurcation can impact prejudicially to plaintiffs in the amount of verdicts, it is unequivocally clear that all "ducks" must be in a row before the trial court takes the giant step of potentially influencing the outcome of a case by allowing bifurcation. Although I will acknowledge that courts have an obligation to make certain that juries do not unfairly punish defendants with outrageous and derelict verdicts for plaintiffs, I hasten to point out that this obligation must be balanced against the right of plaintiffs to have just and adequate verdicts. In balancing these twin concerns, courts must not knowingly or negligently tilt the scale in favor of either side. Ours is the task of engaging in creative thinking that solomonizes. In being true to this task, judges must be forever vigilant to the built-in bias of bifurcation. Should a trial court fail in this regard, then it becomes the duty of this

Court to correct the scales of justice. Unfortunately, the circuit court's decision and justification for bifurcation are wide of the mark.

Footnote: 1 *1For the same reasons I stated in State ex rel. Allen v. Bedell, 193 W.Va. 32, 454 S.E.2d 77 (1995), (Cleckley, J., concurring), I believe that a writ of prohibition is inappropriate in this case. If members of the Bar believe that more access to this Court is necessary in interlocutory matters, they should take their argument to the Halls of the West Virginia Legislature and request new legislation on the subject.*

Footnote: 2 *2An earlier statistical study by Professor Hans Zeisel and an associate suggested that routine bifurcation reduced the average time spent in trial about twenty percent. Zeisel & Callhan, Split Trials and Time Savings: A Statistical Analysis, 76 Harv. L.Rev. 166 (1963). As a basis for their conclusion, they looked at two factors: (1) if the case is bifurcated and the jury finds no liability, there is no need to present evidence relating to damages (of course, in a unitary trial the evidence of every issue must be presented before the jury commences with its deliberation); and (2) in cases where liability is initially determined in favor of the plaintiff, the defendants show an increased willingness to settle the case; once again avoiding the necessity of introducing time-consuming evidence relating to damages.*

Footnote: 3 *3In Lis v. Robert Packer Hospital, 579 F.2d at 824 n. 7, it is stated that:*

"It can reasonably be suspected that the degree of negligence, the contributory negligence of the plaintiff, and other conduct of the parties are presently reflected, with many juries, in the finding of damages as well as the finding of liability. To a purist it probably would seem desirable to put an end to this, but it may be argued that this lends a beneficial flexibility to the strict rules of liability and contributory negligence. At least it should be recognized that separate trials of liability and damages differ from a single trial in more than form. Note, Separate Trial of a Claim or Issue in Modern Pleading; Rule 42(b) of the Federal Rules of Civil Procedure, 39 Minn. L.Rev. 743, 760-61 (1955)."