IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1996 Term

No. 23652

STATE OF WEST VIRGINIA EX REL.
OTIS L. CAVENDER AND MARGUERITE CAVENDER,
Petitioners,

v.

HONORABLE CHARLES E. McCARTY,
JUDGE OF THE CIRCUIT COURT OF ROANE COUNTY,
BILLY FOUTY AND PATRICIA FOUTY,
Respondents

Petition for Writ of Prohibition

WRIT GRANTED

Submitted: October 1, 1996

Filed:

November 18, 1996

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The Honorable Charles E. McCarty, Judge
Ripley, West Virginia
Pro Se

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Billy and Patricia Fouty

This Opinion was delivered PER CURIAM.

JUDGE RECHT sitting by temporary assignment.

JUSTICE CLECKLEY concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among the litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance." Syl. pt. 1, Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979).

2. "Parties moving for separate trials of issues pursuant to West Virginia Rule of Civil Procedure 42(c), or the court if acting sua sponte, must provide sufficient justification to establish for review that informed discretion could have determined that the bifurcation would promote the recognized goals of judicial economy, convenience of the parties, and the avoidance of prejudice, the overriding concern being the provision of a fair and impartial trial to all litigants." Syl. pt. 6, Bennett v. Warner, 179 W. Va. 742, 372 S.E.2d 920 (1988).

Per Curiam:

In this original proceeding in prohibition, the petitioners, Otis L. Cavender and Marguerite Cavender, challenge a July 12, 1996, ruling of the Circuit Court of Roane County, West Virginia, Pursuant to that ruling, the respondent, the Honorable Charles E. McCarty, granted the motion of Billy Fouty and Patricia Fouty, also named as respondents, to conduct separate trials upon the issues of liability and damages in the underlying personal injury action. That action is styled Cavender v. Fouty, Civil Action No. 93-C-123, Roane

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[1]The Honorable Arthur M. Recht resigned as Justice of the West Virginia Supreme Court of Appeals effective October 15, 1996. The Honorable Gaston Caperton, Governor of the State of West Virginia, appointed him Judge of the First Judicial Circuit on that same date. Pursuant to an administrative order entered by this Court on October 15, 1996, Judge Recht was assigned to sit as a member of the West Virginia Supreme Court of Appeals commencing October 15, 1996 and continuing until further order of this Court.

County. The petitioners contend that the bifurcation of the liability and damage issues, under the circumstances herein set forth, was in contravention of law and, thus, constituted an abuse of discretion.

This Court has before it the petition for a writ of prohibition, the response of the trial judge, the response of the Foutys and all matters of record. For the reasons stated below, this Court grants the relief sought by the Cavenders and orders that the trial judge be prohibited from bifurcating the liability and damage issues.

I

As the parties indicate, Otis L. Cavender, in August, 1991, offered to buy from Billy Fouty, a used, electrical meter box, and

connecting paraphernalia, attached to a pole upon the Foutys' property. Mr. Fouty, an automotive mechanic, had no use for the meter box and sold it to Mr. Cavender for $50. Soon after, Mr. Cavender, using a ladder, attempted to detach the meter box and the paraphernalia from the pole. The pole gave way, and Mr. Cavender fell, sustaining serious injuries. According to the exhibits filed in this proceeding, Mr. Cavender incurred special damages in the range of $60,000 to $70,000.

In June 1993, the Cavenders instituted the underlying action. Thereafter, the Foutys moved for summary judgment, asserting that Mr. Cavender was a mere licensee upon their property when he was injured and that, therefore, they had no duty to protect him from dangers arising on the property from existing conditions. Agreeing with the Foutys, the trial judge granted summary judgment.

The summary judgment was appealed, however, and in Cavender v. Fouty, 195 W. Va. 94, 464 S.E.2d 736 (1995), this Court reversed and remanded the action for trial.

In Cavender, we indicated that the Foutys were correct in asserting that they had no duty to protect a licensee from dangers arising on the property from existing conditions. We also indicated, however, that, under the circumstances, Mr. Cavender could have been an invitee, and, if so, the Foutys had a duty to exercise ordinary care to keep and maintain their property in a reasonably safe condition. In any event, this Court held, in Cavender, that Mr. Cavender's status as a licensee or as an invitee was for a jury to

determine. 195 W. Va. at 97 n. 2 and 3, 464 S.E.2d at 739 n. 2 and 3.

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[2]It should be noted that in addition to the question of whether bifurcation of the underlying action was proper, the petitioners raise an issue concerning the following language in the Cavender opinion:

> In this case, the question is whether a buyer on a seller's property as part of an isolated commercial transaction, initiated by the buyer, is considered an invitee or a licensee. Except for a question concerning who proposed the buyer remove the setup, there appears to be no material question of fact. However, the circuit court erred in reaching the conclusion that the buyer was not an invitee because reaching any conclusion requires 'the drawing of legitimate inferences from the facts,' which is a jury function.

195 W. Va. at 98, 464 S.E.2d at 740. (emphasis provided and emphasis added).

According to the petitioners, the trial judge incorrectly

During the subsequent proceedings below, the Foutys filed a motion pursuant to Rule 42(c) of the West Virginia Rules of Civil Procedure to bifurcate the issues of liability and damages. The Foutys asserted that bifurcation should be granted because, if the Cavenders

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imposed an additional element of proof concerning liability, based upon the above language, by requiring that the petitioners prove not only that Mr. Cavender was an invitee but that Mr. Fouty proposed that Mr. Cavender would be the one to detach the meter box and the paraphernalia from the pole. In his response, however, the trial judge, rather than confirming that he added such a requirement concerning who was to detach the property from the pole, asserts that such an issue is not appropriately before this Court in a prohibition proceeding.

Nevertheless, as a matter of clarification, the above language of Cavender does not suggest that the petitioners, in addition to proving that Mr. Cavender was an invitee, must prove as a matter of law that Mr. Fouty proposed that Mr. Cavender would be the one to detach the meter box and the paraphernalia from the pole. Rather, as the language indicates, this Court was simply observing that the question of who was to detach the property from the pole is a question of fact and that the relevancy of that fact to the outcome

failed to establish liability, a substantial amount of time would be saved and the parties could avoid the expense of obtaining expert medical testimony. In addition, the Foutys asserted that, in view of the serious injuries sustained by Mr. Cavender, bifurcation would eliminate any possible prejudice adverse to the Foutys which might otherwise occur during the liability phase of the litigation. On July 12, 1996, the trial judge granted the motion to bifurcate and stated as follows in a letter memorandum of opinion:

> The liability issue in this case should take no more than a day of the Court's time and bifurcation could significantly cut the costs of expert witness fees, attorney fees, etc. Once the liability issue is resolved and the need of a trial for damages is determined, the Court can instruct another jury as to the findings of liability and how such damages were sustained by the plaintiff. . . .

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of the litigation is for a jury to determine.

> The defendants question the sympathy factor. Would a jury, hearing evidence regarding both liability and damages, be compelled to award damages against the defendants not based upon liability, but sympathy? This concern would be null if the liability issues were presented without the additional evidence of Mr. Cavender's medical problems and pain.

Following that ruling, the petitioners filed the petition for relief in prohibition with this Court. On August 8, 1996, this Court issued a rule directed to the respondents to show cause why relief should not be awarded.

II

This is an original proceeding in prohibition. See W. Va. Const. art. VIII, § 3; W. Va. R. App. P. 14; W. Va. Code, 53-1-1 [1931], et seq. Rather than asserting that the trial judge was without jurisdiction to grant the motion to bifurcate the issues of liability and damages, the petitioners assert that the trial judge's ruling was in contravention of law and, thus, constituted an abuse of discretion. Accordingly, our analysis in this proceeding begins with syllabus point 1 of Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (19779), which observes:

> In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among the litigants, lawyers and courts; however, this Court will use

> prohibition in this discretionary way to correct only substantial, clear cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

See also State ex rel. Amy M. v. Kaufman, 196 W. Va. 251, 470 S.E.2d 205 (1996); syl. pt. 1, State ex rel. U.S.F.&G. v. Canady, 194 W. Va. 431, 460 S.E.2d 677 (1995); syl. pt. 8, State ex rel. Collins v. Bedell, 194 W. Va. 390, 460 S.E.2d 636 (1995); syl. pt. 1, State ex rel. Doe v. Troisi, 194 W. Va. 28, 459 S.E.2d 139 (1995); syl. pt. 1, State ex rel. Smith v. Maynard, 193 W. Va. 1, 454 S.E.2d 46 (1994).

As stated above, the Foutys moved for bifurcation pursuant to Rule 42(c) of the West Virginia Rules of Civil Procedure. That rule provides:

> Separate trials.--The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by Article III, Section 13 of the West Virginia Constitution or as given by a statute of this State.

The petitioners assert that "there is nothing unique about this case" and that no circumstances exist concerning this litigation which do not exist in every routine personal injury action. Therefore, according to the petitioners, a single trial would promote judicial

economy and convenience, and any possible prejudice to the Foutys could be avoided by cautionary instructions to the jury. On the other hand, the trial judge and the Foutys rely upon the grounds, discussed above, in support of the motion to bifurcate and further state that the trial judge's ruling was not an abuse of discretion.

As this Court has previously indicated, the granting of separate trials pursuant to Rule 42(c) generally rests within the discretion of the trial court. State ex rel. State Farm Fire & Casualty v. Madden, 192 W. Va. 155, 160, 451 S.E.2d 721, 726 (1994); syl. pt. 3, Berry v. Nationwide Mutual Fire Insurance Co., 181 W. Va. 168, 381 S.E.2d 367 (1989); Bennett v. Warner, 179 W. Va. 742, 748, 372 S.E.2d 920, 926 (1988); Anderson v. McDonald, 170 W. Va. 56, 61, 289 S.E.2d 729, 735 (1982). See also 19 M.J. Trial § 5 (Michie 1991); 75 Am. Jur. 2d Trial § 140 (1991); Lugar and

Silverstein, West Virginia Rules of Civil Procedure 349 (Michie 1960); 9 Wright & Miller, Federal Practice and Procedure: Civil 2d, § 2388 (1995); Eunice A. Eichelberger, Annotation, Propriety of Ordering Separate Trials as to Liability and Damages, Under Rule 42(b) of Federal Rules of Civil Procedure, in Actions Involving Personal Injury, Death or Property Damage, 78 A.L.R. Fed. 890, 899 (1986); C. R. McCorkle, Annotation, Separate Trial of Issues of Liability and Damages in Tort, 85 A.L.R.2d 9, 14 (1962).

The Bennett case, supra, involved a claim by the Haneys that a title insurance company's delay in securing a right-of-way to property purchased by the Haneys constituted the intentional infliction of emotional harm. On the day of trial, the Circuit Court of Pendleton County, West Virginia, sua sponte, and without notice, bifurcated the issues of liability and damages under Rule 42(c).

Following a jury verdict for the title insurance company upon liability, the Haneys appealed. Noting that a trial court's authority under Rule 42(c) "is not unlimited" and that bifurcation should be granted only when "clearly necessary," this Court, in Bennett, reversed, holding that the bifurcation was error. In particular, we indicated, in Bennett, that the trial court had not "adequately considered" the question of bifurcating the Haneys action. 179 W. Va. at 748, 372 S.E.2d at 926. Importantly, syllabus point 6 of Bennett states:

> Parties moving for separate trials of issues pursuant to West Virginia Rule of Civil Procedure 42(c), or the court if acting sua sponte, must provide sufficient justification to establish for review that informed discretion could have determined that the bifurcation would promote the recognized goals of judicial economy, convenience of the parties, and the avoidance of prejudice, the overriding concern being the provision of a fair and impartial trial to all litigants.

See also State ex rel. Appalachian Power Co. v. Ranson, 190 W. Va. 429, 431 n. 4, 438 S.E.2d 609, 611 n. 4 (1993); syl. pt. 2, State ex rel. Tinsman v. Hott, 188 W. Va. 349, 424 S.E.2d 584 (1992).

In Tinsman, supra, the plaintiffs in a sexual harassment action brought a proceeding in this Court to prohibit the enforcement of a pretrial order which granted the defendants a separate trial under Rule 42(c) upon the issue of punitive damages. Indicating that a separate trial upon punitive damages is justified only in "extraordinary cases," 188 W. Va. at 354, 424 S.E.2d at 589, this Court, in Tinsman, awarded relief in prohibition and stated that the impact of evidence concerning punitive damages could be restricted through proper instructions to the jury. See Rule 105 of the West Virginia Rules of Evidence.

Moreover, in Bowman v. Barnes, 168 W. Va. 111, 282 S.E.2d 613 (1981), involving the deaths of an automobile driver and a passenger at a railroad crossing, the administrator of the deceased passenger brought an action against the railroad company and the administratrix of the deceased driver. The circuit court, on its own motion under Rule 42(c), ordered separate trials concerning the defendants. Nevertheless, upon appeal by the administrator of the deceased passenger from an adverse jury verdict, this Court, in Bowman, held that the ordering of separate trials was error. Noting, as in Bennett, that separate trials should not be ordered unless "clearly necessary," we stated, in Bowman, that it is "generally acknowledged that a single trial lessens the delay, expense and inconvenience involved in separate trials[.]" 168 W. Va. at 117, 282 S.E.2d at 617. In particular, this Court observed: "Therefore, we

conclude that Rule 42(c), R.C.P., which permits separate trials of multiple defendants, must be considered in light of the general policy of our joinder rules, which are designed to promote consolidation of issues and parties in a single trial to save expense and encourage judicial economy." 168 W. Va. at 120, 282 S.E.2d at 619.

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[3] The following language found in 88 C.J.S. Trial § 9 (1955), is worth noting:

> It is the policy of the law to limit the number of trials as far as possible, and separate trials are granted only in exceptional cases. Even under a statute permitting trials of separate issues, neither party has an absolute right to have a separate trial of an issue involved. The trial of all issues together is especially appropriate in an action at law wherein the issues are not complicated, such as in a replevin action, or the usual negligence case, or where the issues are basically the same.

In this proceeding, a close examination of the nature of the underlying action reveals that the petitioners are correct in their assertion that no circumstances exist concerning the action which do not exist in most routine or uncomplicated personal injury actions. There are no compelling factors in the litigation to indicate that separate trials are "clearly necessary" within the context of Bennett and Bowman, supra. Rather, the action consists of an uncomplicated claim for damages for personal injuries, where the sole issue as to liability is whether Mr. Cavender was a licensee or an invitee. As suggested in Tinsman, supra, and by Rule 105 of the West Virginia Rules of Evidence, any impact of the evidence concerning the Cavenders' damages which may be prejudicial to the Foutys, can, no doubt, be restricted through cautionary instructions to the jury.

Moreover, although this Court does not suggest that a trial court's discretion to order separate trials or bifurcate issues under Rule 42(c) should be unduly restricted, we emphasize that, as our prior decisions indicate, unitary trials are generally preferable over separate trials. In addition, in ordering separate trials or bifurcating issues under Rule 42(c), the trial court "must provide sufficient justification to establish for review that informed discretion could have determined that the bifurcation would promote the recognized goals of judicial economy, convenience of the parties, and the avoidance of prejudice[.]" Syl. pt. 6, Bennett, supra. Here, the trial judge essentially determined that, if the Foutys prevail upon the issue of liability, no witnesses concerning damages would be needed. Such a determination lacks the particularity contemplated in Bennett for relief under Rule 42(c).

Upon all of the above, therefore, this Court is of the opinion that the July 12, 1992, ruling of the Circuit Court of Roane County was in contravention of law and, thus, constituted an abuse of discretion. Accordingly, the relief sought by the petitioners is awarded, and the trial judge is prohibited in the underlying action from ordering separate trials upon the issues of liability and damages.

Writ granted.