IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2000 Term

FILED
January 28, 2000
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 26847

RELEASED
January 28, 2000
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.
JACK CRAFTON, HELEN CRAFTON, RICKY SCARBRO,
CARRIE SCARBRO, VERNON "GENE" ATKINSON,
JOHN D. ELLISON, TINA ELLISON, MATTHEW GRIFFITH,
JUANITA DAWN GRIFFITH, ROGER MOLES, GRACE MOLES,
JERRY WORKMAN, LINDA WORKMAN, THOMAS ATKINS
AND MARTHA ATKINS,
Petitioners,

v.

HONORABLE ROBERT A. BURNSIDE, JR., Judge of the
Circuit Court of Raleigh County; BELT SERVICE, INC.;
QUALITY BELT VULCANIZERS, INC.; C & E MINE BELT
SERVICE, INC.; SCANDURA; GOODYEAR TIRE &
RUBBER COMPANY; PANG RUBBER COMPANY; ITW DEVCON;
KOCH REFINING COMPANY; NORMAC ADHESIVE PRODUCTS, INC.;
LEWIS-GOETZ AND COMPANY, INC.; WEST VIRGINIA
BELT SALES AND REPAIR, INC.; LINATEX CORPORATION OF
AMERICA; BELT SPECIALTY CORPORATION; ELKAY MINING
COMPANY; ISLAND CREEK CORPORATION; EASTERN
ASSOCIATED COAL CORPORATION; CONSOLIDATION COAL
COMPANY; BETH ENERGY MINES, INC.; CANNELTON, INC.;
and other unknown John Doe business entities,
Respondents.

PETITION FOR A WRIT OF PROHIBITION

WRIT GRANTED AS MOULDED

Submitted: January 11, 2000

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JUSTICE STARCHER delivered the Opinion of the Court.

HON. THOMAS B. MILLER, sitting by special assignment.

JUSTICE SCOTT dissents and reserves the right to file a dissenting opinion.

JUSTICE DAVIS, deeming herself disqualified, did not participate in the decision of the Court.

SYLLABUS

Rule 60(b) of the *West Virginia Rules of Civil Procedure* does not apply to a motion to amend or reconsider a pre-trial scheduling or case management order.

Starcher, Justice:

In this case we hold that the circuit court should allow the plaintiffs to withdraw their consent to a bifurcated trial procedure to which their initial counsel had consented.

I.
Facts & Background

In the instant case, we address a request for a writ of prohibition by the plaintiffs in several pending cases in the Circuit Court of Raleigh County. These cases have been consolidated, although the limited record before us does not disclose the degree of consolidation. In each case, the plaintiffs make personal injury and wrongful death claims based on exposure to allegedly toxic chemical substances that were used in splicing rubber belts in coal mines. The defendants are enterprises that used, manufactured, and distributed these chemical substances.

On September 29, 1998, the circuit court entered an order granting the defendants' "Case Management Motion," and the court noted in its order that the plaintiffs "consented to the concepts and procedures outlined in the [defendants'] motion for a case management order." The order granting the case management motion provided, *inter alia*, that:

> 5. These cases shall be tried in a reverse bifurcated manner. [1] Specifically, the issues to be tried [in "phase one" of the trial] will be:
>
> > (a) Whether each plaintiff worked with and inhaled, ingested or was otherwise exposed to chemical fumes emitted from the defendants' products and utilized in their workplaces;
> >
> > (b) If so, the identity of the chemicals that are implicated under plaintiffs' causation theories;
> >
> > (c) Whether each plaintiff has suffered from a compensable disease process caused by the specific chemicals to which exposure is alleged;
> >
> > (d) If so, what are each plaintiff's com-pensatory damages?
>
> 6. The issues of "liability," namely *Mandolidis* violations of the employer defendants, the liability of the coal mining companies, and the alleged negligence, breach of warranties, liability under *Morningstar v. Black & Decker*, and liability for abnormally dangerous activities of the manufacturer/supplier defendants, along with the issue of punitive damages as to all defendants, will be severed and tried at a later date.

Other portions of the circuit court's "case management order" permitted discovery on liability issues, and did not preclude the defendants from seeking adjudication of liability issues by summary judgment, prior to the "phase one" "reverse bifurcation" trial of causation and damages.

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[1] "Reverse bifurcation" is the inevitable obfuscatory jargon coined by lawyers and judges to describe the trial of a case where damages are established first and liability second. . . . The process deserves consideration if a short damages trial and a lengthy liability trial is predicted. . . . I suspect the process is appropriate only for a fairly narrow category of cases.

In re Report of the Advisory Group for the United States District Court, 1993 WL 30497 at *52-54 (D.Me. Feb 1, 1993).

Subsequent to the court's entry of the case management order, the plaintiffs obtained additional counsel, who filed a "Motion to Reconsider Reverse Bifurcation." Plaintiffs' new counsel filed an affidavit in support of this motion, in which plaintiffs' initial counsel stated that due to his inexperience in toxic tort litigation, he was unaware that his clients would be significantly prejudiced by his consent to the reverse bifurcation trial process.

In their response to the plaintiffs' motion to reconsider, the defendants asserted (1) that reverse bifurcation was appropriate for the trial of the issues in these cases; and (2) that there were no grounds upon which the plaintiffs should be permitted to withdraw their consent to the case management order. However, the defendants did not assert in their response that they had engaged in such pre-trial conduct, based on the bifurcation aspects of the case management order, so that they would be irretrievably prejudiced by revision of the order.[2]

The plaintiffs replied to the defendants' response, disputing the defendants' contention that reverse bifurcation was appropriate and proper.

The circuit court, in a memorandum opinion, treated the plaintiffs' motion for reconsideration as a "motion for relief from judgment or order pursuant to Rule 60(b)," and denied the motion. Specifically, the circuit court's memorandum opinion focused on whether the plaintiffs' motion for reconsideration should be granted on the grounds of (1) "excusable neglect" by plaintiffs' initial counsel in

[2]The record before us also reflects that in a pending case raising similar issues in the Circuit Court of Kanawha County, the presiding judge has denied the defendants' request for a "reverse bifurcation" case management order.

consenting to the case management order (Rule 60(b)(1)); or (2) "any other reason justifying relief from the operation of the judgment," (Rule 60(b)(6)).

The circuit court concluded that the plaintiffs' initial counsel's consent to reverse bifurcation -- even if unwise, based on ignorance, and costly to the plaintiffs' case -- was a matter of trial strategy that could not fall in the category of "excusable neglect." The circuit court also concluded that the plaintiffs had not shown that reverse bifurcation was improper or unfairly prejudicial, despite the fact that it might be more financially burdensome on plaintiffs' counsel in financing the cases.

The plaintiffs thereafter filed the instant petition for a writ of prohibition seeking an order from this Court requiring the circuit court to vacate the case management order.

II.
Standard of Review

We must initially address the circuit court's characterization of the plaintiffs' motion to reconsider and revise the case management order as a Rule 60(b) motion.

Rule 60(b) by its plain terms applies to a "*final* judgment, order, or proceeding." (Emphasis added.) As the advisory committee's note to *Federal Rules of Civil Procedure*, Rule 60(b) makes clear, ". . . interlocutory judgments are not brought within the restrictions of the rule, but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires." 11 Charles Alan Wright *et al*., *Federal Practice and Procedure: Civil 2d* § 2852 at 233-34 n.8 (1995). One leading federal civil procedure treatise explains, "Rule 60(b) . . . applies only to 'a final judgment, order or proceeding.' Thus, the power of a court to modify an interlocutory

judgment or order at any time prior to final judgment remains unchanged and is not limited by the provisions of Rule 60(b)." *Id.* 8 *Moore's Federal Practice* § 42.21 states: "Orders granting or denying motions to bifurcate issues or claims for trial are interlocutory orders . . . [although they may be appealed in some instances]."

In the instant case, the plaintiffs' motion for reconsideration "should have been viewed as a routine request for reconsideration of an interlocutory . . . decision . . . . Such requests do not necessarily fall within any specific . . . Rule. They rely on 'the inherent power of the rendering . . . court to afford such relief from interlocutory judgments . . . as justice requires.'" *Greene v. Union Mutual Life Ins. Co. of America*, 764 F.2d 19, 22 (1st Cir. 1985) (citation omitted).[3]

To the extent that a rule of civil procedure was implicated by the petitioner-plaintiffs' motion to reconsider, it was Rule 16(e) of the *West Virginia Rules of Civil Procedure*, which contemplates that a circuit court may amend a scheduling order throughout the course of the proceeding.

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[3]The doctrine of "inherent power" provides: "A court 'has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction.'" Syllabus Point 3, *Shields v. Romine*, 122 W.Va. 639, 13 S.E.2d 16 (1940). The "inherent power" doctrine is "well recognized" in West Virginia. *See, e.g., Daily Gazette v. Canady*, 175 W.Va. 245, 251, 332 S.E.2d 262, 264 (1985). The plaintiffs in the instant case argued to the circuit court that:

> Given the significant constitutional, statutory and public policy implications involved in a bifurcation decision, this Court, as an independent expositor and defender of the law, has the authority, implicit in its duty to see that justice is done, to reassess its bifurcation decision in light of the strong preference that West Virginia places upon a fair trial *vis-a-vis* bifurcation.

This Court has recognized the desirability of circuit courts revisiting issues of substantial importance when fundamental rights are at stake: "We welcome the efforts of trial courts to correct errors they perceive before judgment is entered and while the adverse affects can be mitigated or abrogated." *State v. Jarvis*, 199 W.Va. 38, 45, 483 S.E.2d 38, 45 (1996).

Rule 16(e) specifically provides that a scheduling order controls litigation "unless modified by a subsequent order." The standard for such a modification is by implication lower than that contemplated in amending a final pre-trial order, which should only be done "to prevent manifest injustice." *Id*.

This Court is empowered to exercise its original jurisdiction to review the legal propriety of a circuit court's pre-trial orders. *See Gebr. Eickhoff Masch. v. Starcher*, 174 W.Va. 618, 328 S.E.2d 492 (1985). This Court has specifically utilized the remedy of prohibition to correct a court's pre-trial order so that a unitary trial could occur. In *State ex rel. Tinsman v. Hott*, 188 W.Va. 349, 424 S.E.2d 584 (1992), the circuit court's evidentiary pre-trial rulings had in effect bifurcated the claims of the plaintiff, forcing separate proceedings. However, we found that the claims could be tried together without unfair prejudice to the parties, and under this circumstance, our law's strong preference for unitary trials led us to grant the writ, applying an abuse of discretion standard.

In summary, we hold that Rule 60(b) of the *West Virginia Rules of Civil Procedure* does not apply to a motion to amend or reconsider a pre-trial scheduling or case management order. The circuit court's application of Rule 60(b) to the plaintiffs' motion for reconsideration of the case management order was erroneous. We review the circuit court's decision not to amend the case management order under an abuse of discretion standard.

III.
Discussion

Our review of the record before this Court leads us to the firm conclusion that the principal reason that the circuit court entered the "reverse bifurcation" case management order and adhered to that order was because the plaintiffs' initial counsel agreed to it.

It has been said that agreements of counsel made during the progress of a cause have never been treated as binding contracts to be absolutely enforced, but as mere stipulations which may be set aside in the sound discretion of the court when such action may be taken without prejudice to either party. See, e.g., *Porter v. Holt*, 73 Tex. 447, 11 S.W. 494 (1889). A stipulation of counsel originally designed to expedite trial should not be rigidly adhered to when it becomes apparent that it may inflict a manifest injustice on one of the contracting parties. *Maryland Cas. Co. v. Rickenbaker*, 146 F.2d 751, 753 (4th Cir. 1944.) *See also Brast v. Winding Gulf Colliery Co.*, 94 F.2d 179, 181 (4th Cir. 1938). A stipulation of counsel may be set aside on the request of a party on the ground of improvidence, if both parties can be restored to the same condition as when the agreement was made. Syllabus, *Cole v. State Compensation Comm'r*, 114 W.Va. 633, 173 S.E. 263 (1934).

In the instant case, the plaintiffs sought to be relieved of the effect of their initial counsel having stipulated, due to his undisputed inexperience and ignorance, to a trial procedure that is contrary to that which is enjoyed by essentially all other ordinary civil litigants in West Virginia.[4] Moreover, the

[4]Our historic preference for unitary trials is clear in our jurisprudence. *See, e.g., Tinsman, supra; see also State ex rel. Cavender v. McCarty*, 198 W.Va. 226, 231, 479 S.E.2d 887, 892 (1996) (*per curiam*) ("separate trials should not be ordered unless such a disposition is clearly necessary") and Justice Cleckley's concurrence therein. However, where necessity dictates alternative procedures, our rules permit them. *See* Syllabus Point 3, *State ex rel. Appalachian Power v. MacQueen*, 198 W.Va. 1, 479 S.E.2d 300 (1996).

economy and fairness of the sort of procedure that was agreed to by the plaintiffs' initial counsel is the subject of serious dispute.[5]

In light of the foregoing principles, we conclude that the plaintiffs should have been allowed to withdraw their consent to the reverse bifurcation procedure, and that the circuit court abused its discretion in failing to allow them to do so. On the limited record before us, we cannot rule on the issue of whether, absent the consent of the plaintiffs to "reverse bifurcation," the circuit court should adopt that procedure. The issue of possible reverse bifurcation should be addressed by the circuit court *de novo,* making any record that may be necessary, without giving any effect to the plaintiffs' previous stipulation to the procedure.

IV.
Conclusion

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[5]*See Walker Drug Company v. La Sal Oil Co.*, 972 P.2d 1238, 1245 (Utah 1998) (stating that reverse bifurcation is a rare and "drastic" technique arising out of the magnitude of the asbestos-related litigation caseload). *See generally* Roger H. Transgrud, "Joinder Alternatives in Mass Tort Litigation," 70 *Cornell L.Rev*. 779, 827-29 (1985). *See also* Sandra A. Smith, "Polyfurcation and the Right to a Civil Jury Trial: Little Grace in the Woburn Case," 25 *Boston College Env.Aff.L.Rev*. 649, 685 (1998) (focusing on the lawsuit that underlies the book and movie, "A Civil Action" and discussing how inappropriate "polyfurcation" can be "particularly harmful to injured parties" in the toxic tort context. *See also* J. M. Granholm and William J. Richards, "Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role," 26 *U.Toledo L.Rev*. 505 (1995).

The record in the instant case reflects that the circuit judge refused to refer the cases to the Mass Litigation Panel, pursuant to Trial Court Rule 26.01(b)(1) [1999], because they were not sufficiently numerous. Many of the factors that have been suggested as supporting a reverse bifurcated trial procedure, such as clearly established liability that would make a second phase of the trial unlikely, demonstrated absence of prejudice to the plaintiffs, lack of duplicative witnesses, and a great number of plaintiffs or defendants -- are not present in the instant case.

The writ of prohibition is granted as moulded, and the underlying case shall proceed in accord with the principles expressed herein.

Writ Granted as Moulded.