IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

TAMMY FAYE GRANT, on her own behalf and as Administrator for THE ESTATE OF CORNELIUS WARE, Deceased,	)	
Plaintiff,	)	04 C 2612
v.	)	Judge Lefkow
CITY OF CHICAGO and CHICAGO POLICE OFFICERS ANTHONY BLAKE, JOHN CLEGGETT, RICHARD GRIFFIN, and TIFFANY WALKER,	)	
Defendants.	)	JURY TRIAL DEMANDED

PLAINTIFF'S RESPONSE TO DEFENDANT OFFICERS' MOTION FOR BIFURCATION

Plaintiff, TAMMY GRANT, on her own behalf and on behalf of the Estate of her deceased son, Cornelius Ware, by her attorneys, LOEVY & LOEVY, opposes Defendant Officers' Motion for Bifurcation as follows.

Introduction

Where a case involves multiple sets of Defendants arising out of the same transaction, the caselaw demonstrates a very strong presumption in favor of one trial at which all claims can be tried at once. Indeed, the manifest inefficiency in having two trials where one would suffice cannot be overstated. And Defendants' arguments notwithstanding, it is a very straightforward proposition to try the *Monell* claims together with the related underlying claims here. The Court need look no further than the case of *Robinson v. City of Harvey*, Case No. 99 C 3696, in which this Court denied an identical motion to bifurcate and proceeded to trial on a very similar *Monell* claim involving undersigned counsel for the Plaintiff. As here, the *Monell* aspect of that case entailed less than a day of testimony, and it was frequently intertwined with the underlying claims in

any event. As for the risk of prejudice, the first *Robinson* jury found for the City but against the officers, ending any argument that juries are not "smart enough" to follow the instruction to apply evidence only for the purpose for which it was admitted.[1] The Court was correct to deny the motion then, and it should do so here.

BACKGROUND

Plaintiff's son, Cornelius Ware, was shot and killed by Defendant Officers in front his young brothers and sisters, his mother, and grandmother. Mr. Ware was fatally shot even though he did not pose a threat to anyone. In addition to his family members who saw him shot, the only third party witness testified that when Mr. Ware was shot, he was sitting in a parked car waiving his empty hands in the air for the police to see that he was not a threat. One thing that all parties agree on is that Mr. Ware did have a wooden cane in the car since he was a paraplegic who was without the use of his legs. Despite the numerous witnesses who testified otherwise, Defendant Officers continue to claim that Mr. Ware pointed a gun at them.

That claim is hardly unique among members of the Chicago Police Department. When Chicago Police Officers shoot someone, they invariably justify their use of deadly force by stating that either (a) the person pointed a weapon at the officer; or (b) the person tried to take an officer's weapon. Sometimes, such as here, such explanations are not genuine, but instead are invented after the fact to try to explain an unjustified shooting. The problem that proximately caused Mr. Ware's death is that the Chicago Police Department always accepts this explanation and never conducts a true investigation to determine the truth of the claim. In other words, all a police officer has to do is utter the

[1] Since that time, Plaintiffs' counsel has tried consolidated *Monell* claims in other cases as well, such as *Smith v. City of Urbana,* Case No. 01 C 2209 and *Garcia v. City of Chicago*, Case No. 01 C 8945. In Plaintiff's counsel's experience, the notion of trying *Monell* claims together with the underlying claims has proved far simpler and more efficient than trying to carve them apart.

magic words that the suspect "had a gun," and he is virtually guaranteed immunity because the Chicago Police Department will not investigate the homicide by the officer. Here, within hours, the Chicago Police Department found that its officers' use of deadly force was justified before ever truly investigating the case.

Unfortunately, this is a reality with which the Defendant Officers were familiar when they killed Mr. Ware. Because of that reality, Plaintiff includes a claim against the City of Chicago that by acquiescing to the wrongful use of deadly force, through its failure to investigate shooting-related misconduct, it failed to properly control its officers.

Through discovery, Plaintiff obtained dozens of shooting related investigation files spanning the two years before Mr. Ware's fatal shooting. Plaintiff hired a police practices expert to review those shooting related investigation files. After the expert's review, he concluded that the City of Chicago fails to investigate allegations of misconduct against officers who use deadly force. *See* Exhibits A (expert opinion about investigation procedures) and B (spreadsheet description of investigations reviewed). The City of Chicago's failure to control its officers by allowing them to recklessly use deadly force without the fear of being held accountable was the driving force behind Defendants' misconduct here and forms the basis for Plaintiff's claims under *Monell v. Department of Soc. Serv. of New York*, 436 U.S. 658 (1978).

Contrary to Chicago's pending motions, Plaintiff's *Monell* claims need adjudication in order for Plaintiff to obtain full justice for her son's wrongful death. Those claims are fully ready for adjudication here since Plaintiff's expert long ago tendered his report and the basis for his opinion, which stems directly from investigation documents produced by Chicago.

Defendants' Motion

With Defendant Officers' motion here, Chicago's Corporation Counsel's office has now filed its third motion attempting to put off Chicago's accountability for its failure to reign in the use of deadly force by its heavily armed police officers. This motion, like the previous two, lacks merit.

Defendant Officers claim that they will be prejudiced by a trial that simultaneously resolves both their misconduct and that of the City of Chicago in breeding the unjust use of deadly force. They further argue that bifurcation will serve the interest of judicial economy. Neither of these argument is true.

ARGUMENT

As a threshold issue, the burden is on Defendant Officers to convince this Court that bifurcation is warranted. *See Caterpillar, Inc. v. Deere & Co.*, 1997 WL 17798, *1 (N.D.Ill. Jan. 14, 1997) (well-established that the party moving for bifurcation "bears the burden of proving that separate trials are justified"), citing 5 *Moore's Federal Practice*, ¶ 42.03[1]. As Chief Judge Aspen put it, "I proceed from the position of the Federal Rules of Civil Procedure; specifically, that the unitary resolution of lawsuits is sought. A single trial on the merits of all contested issues and claims of the parties is preferable to their piecemeal adjudication." *Terrell v. Childers*, 1996 U.S. Dist. Lexis 9618, *42 (N.D.Ill. 1996) (Aspen, J.) (citing Rule 42 Advisory Committee Notes and 9 Wright & Miller, *Federal Practice & Procedure*, § 2388).

Even with those considerations, the decision here is firmly entrusted to the discretion of the trial court, and no appellate court is likely to second guess this Court no matter which way it goes on the question. *See McLaughlin v. State Farm Mut. Auto. Ins. Co.*, 30 F.3d 861, 870 (7th Cir. 1994) ("It is well-established that a denial of a motion for a bifurcated trial should be set aside only upon a clear showing of abuse of discretion").

Thus, what is at stake is simply this Court's determination on how best to marshal its resources.

Defendants are undoubtedly correct that some courts have opted to bifurcate *Monell* claims from Section 1983 claims against individual defendants. But it is equally true that, faced with the same issue, other courts have refused to do so. *See, e.g., Nessel v. City of Northlake*, 1994 U.S. Dist. Lexis 17345, 1994 WL 685508 (N.D.Ill. Dec. 5, 1994) (rejecting motion to bifurcate "policy and practice" claim because limiting instructions and "our efficiency concerns strongly favor a single trial over dual trials"); *Crawford v. City of Kansas City*, 1997 U.S. Dist. Lexis 9780, *3-*7 (D. Kan. June 11, 1997) (denying motion to bifurcate *Monell* claim from excessive force claim because some witnesses would be required to testify twice and any prejudice could be cured by limiting instruction); *White-Ruiz v. City of New York*, 1996 U.S. Dist. Lexis 18890, *1-*3 (S.D.N.Y. Dec. 20, 1997) (refusing to bifurcate *Monell* claim from those against individual officers in favor of hearing all in one proceeding).

Thus, with no clear precedent compelling any particular conclusion, the Court must looks at the facts and circumstances of each case to assess whether Defendants meet their burden of proving that bifurcation is appropriate – with a "tie" going against bifurcation. *See Oasis Indus., Inc. v. G.K.L. Corp.*, 1993 U.S. Dist. Lexis 3992, *26-*27 (N.D.Ill. March 30, 1993) (Defendant "failed to meet its burden of demonstrating that bifurcation is warranted because there is insufficient evidence that bifurcation will encourage convenience, efficiency, and judicial economy. *National's argument has simply presented evidence that the claims are separate and stand alone, but that is usually the case"*). Under the facts and circumstances here, bifurcation is not warranted because Defendants' fear of prejudice and judicial economy arguments are not rooted in the facts of this case. .

I. THERE IS LITTLE PREJUDICE TO DEFENDANT OFFICERS TO JUSTIFY BIFURCATING TRIAL OF PLAINTIFF'S CLAIMS AGAINST THEM FROM CLAIMS AGAINST CHICAGO.

A. The Risk of Prejudice to Defendant Officers is Minimal.

Despite Defendants' generalized fears about prejudice, there is very little risk of prejudice to them by trying this case as a whole. Plaintiff agrees that the claims against the Defendant Officers here center on whether they were reasonable in using deadly force against her son. Plaintiff further agrees that in order for an individual defendant to be liable under 42 U.S.C. § 1983, he must have engaged in some personalized conduct that caused the constitutional violation. But both of those concepts are beside the point. The crux of the bifurcation issue is whether the Defendant Officers will somehow be prejudiced by being part of the trial against Chicago for Plaintiff's *Monell* claims. They will not.

First, there is very little risk that a jury will be sidetracked or influenced by Plaintiff's claims against Defendant Officers. This is a case that poses very stark versions of events by each side. The jury here will have to decide whether it believes Mr. Ware's family and the only objective eye witness, who all agree that Mr. Ware was unarmed when he was shot, or whether it believes the Defendants that Mr. Ware pointed a gun. It is difficult to see how the *Monell* evidence about the way police shooting investigations are conducted will taint a jury's decision of who to believe.

Second, contrary to Defendants' fears, there is no risk of guilt by association with other officers who committed similar misconduct. Plaintiff does not seek a series of mini-trials relating to allegations of misconduct against other officers. Instead, Plaintiff's *Monell* evidence centers on the cursory manner in which police shooting cases are investigated. It is Plaintiff's claim that the institutional system used by Chicago to shield its officers from any scrutiny about police shootings is the moving force behind the

violation of Mr. Ware's constitutional rights. That claim centers on an analysis of investigation procedures used to investigate police shootings – hardly the sort of incendiary prejudicial evidence that Defendants claim to need protection from.

Finally, Plaintiff is not seeking at trial to hold Defendant Officers liable because of Chicago's policy of failing to investigate its officers. Contrary to Defendant Officers' argument, any risk that evidence of Chicago's *pro forma* investigations will prejudice them is minimal since (as Defendant Officers themselves point out) they were not the ones who conducted the investigations that are complained of. Accordingly, Plaintiff's evidence about Chicago's investigation procedures of its own officers will not prejudice Defendant Officers.

The bottom line is that Plaintiff's *Monell* evidence is unlikely to result in any prejudice to Defendant Officers if this case is tried at one time. Accordingly, bifurcation is not warranted here.

B. Any Prejudice to Defendants Can Be Minimized by this Court.

Even if there were a risk of prejudice to Defendant Officers by trying Plaintiff's *Monell* claims at the same trial with them, that prejudice can be minimized. This Court is obviously not the first to be confronted with the question of trying multiple claims against different defendants in the face of the possibility of prejudice. What is lost on Defendants is that the mere existence of the potential for prejudice does not end the matter by any stretch, for if that were the case, the number of federal trials would multiply out of control. Instead of bifurcating proceedings every time there is potential prejudice and confusion, Federal Rule of Evidence 105 directs the district court to provide instructions to the jury "restrict[ing] the evidence to its proper scope."

Here, the jury could be specifically instructed to consider evidence only for the purpose for which it is introduced. Defendants are undoubtedly tempted to question the

efficacy of this solution, but limiting instructions are taken very seriously by the courts in this Circuit as a tool for reducing or eliminating prejudice, and it has long been the law that juries are presumed to follow them. *See McLaughlin v. State Farm Mut. Auto. Ins. Co.*, 30 F.3d 861, 870-71 (7th Cir. 1994) (no need to bifurcate to avoid prejudice where it is presumed jury could follow limiting instruction on how to consider the evidence); *Terrell v. Childers*, 1996 WL 385310, *14 (N.D.Ill. July 3, 1996) (rejecting argument that prejudicial evidence against one defendant would "spill over" onto others because court "will not try the case with the notion that jurors will not faithfully undertake their obligations"); *National Union Fire Ins. Co. v. Dowd & Dowd*, 191 F.R.D. 566, 567 (N.D. Ill. 1999) ("a properly instructed jury will be able to follow and absorb the testimony of a carefully-organized – albeit longer – trial of the entire matter" where the facts were not particularly complex).

The seminal case on this point is the Seventh Circuit's decision in *Berry v Deloney*, 28 F.3d 604 (7th Cir. 1994), a case where a high school student sued her guidance counselor regarding what she claimed was coerced sex and a resulting abortion. The *Berry* plaintiff sought to bifurcate the damage issue from the liability phase to ensure the jury would not hear evidence concerning her prior sexual history and past abortions when deciding the liability issues. *Id.*, at 606-09.

Despite the manifestly prejudicial nature of such testimony, the Seventh Circuit affirmed the refusal to bifurcate on the grounds that it was confident the properly-instructed jury would not misapply evidence on the wrong issue. *Id.* ("The trial court's repeated admonition to the jury to consider the disputed evidence only in assessing damages precluded any need for a bifurcation motion . . . The parties interests were better served by the simultaneous trial of liability and damage issues. Testimony as to liability would come from the same witnesses who would testify as to damages, making this action conducive to adjudication in a single, comprehensive proceeding").

In sum, if the Seventh Circuit is fully confident that a jury can sort out testimony about past sex and abortions, then surely the less prejudicial testimony at issue here about investigation procedures can be properly applied as well. *See, e.g., Fall v. Indiana Univ. Bd. of Trustees*, 33 F. Supp. 2d 729, 735-37 (N.D. Ind. 1998) (refusing to bifurcate on prejudice grounds because "the degree of potential prejudice associated with the [policy and practice] evidence objected to [in this case] pales in comparison to the prejudicial effect of the evidence relating to the *Berry* plaintiff's sexual history and previous abortions"). The potential for prejudice thus does not compel bifurcation.

II. JUDICIAL ECONOMY IS SERVED BY ONE TRIAL, NOT TWO.

Despite Defendants's best spin, judicial economy is served for this Court to conduct one trial, not two. One consolidated trial would require the parties to devote a small amount of time to the *Monell* issues; whereas, a separate *Monell* trial would require a full scale proceeding. Dating at least as far back as *Monell v. Department of Soc. Serv. of New York*, 436 U.S. 658 (1978), the Supreme Court has read our Constitution to permit parties to sue municipalities for independent, non-derivative liability. *Monell*, 436 U.S. at 694 (local government can be sued under Section 1983 "when execution of a government's policy or custom . . . inflicts the injury"). *See also Canton v. Harris*, 489 U.S. 378, 388-89 (failure to train); *Sledd v. Lidsay*, 102 F.2d 282, 288-89 (7th Cir. 1996) (failure to discipline officers). There is no basis to separate the *Monell* claim from Plaintiff's underlying claims against Defendant Officers.

A. A Consolidated Monell Trial Is Most Efficient.

Here, there are several witnesses who will be called on to present testimony both about Defendant Officers' misconduct and about the *Monell* issues. It serves the interest of judicial economy to present those witnesses in a consolidated streamlined trial.

Regardless of the extent of overlap of witnesses, the fact is that the presentation of *Monell* evidence will not be the overwhelming hardship that Defendants intimate. Plaintiff will rely primarily on his expert who long ago presented his opinions, methodology, and analysis to Defendants about Plaintiff's claims against Defendant Officers and Chicago. His testimony about the *Monell* claims should be straightforward and encompass his review of the investigation procedures as outlined in his expert report. The sum total of his *Monell* testimony should last no more than a few hours in the context of a week long trial.

Regardless, even if Defendants' bifurcation motion were granted, much of the *Monell* evidence will be introduced in Plaintiff's underlying claims against Defendant Officers. The Department failed to preserve physical evidence, conform with chain of custody requirements, or to perform rudimentary investigation techniques. Plaintiff's *Monell* expert will be called upon to testify about the failure of the Chicago Police Department to document any physical evidence that ties Cornelius Ware to the alleged weapon that Defendants say he held. For instance, there is no evidence that Cornelius Ware's fingerprints or DNA were on the weapon, nor were there photographs taken of where the gun was allegedly recovered. In addition, the car that Mr. Ware was driving when he was shot was not preserved by the Police Department so that an analysis could be done of bullet trajectories. The Department even failed to perform a weapon ownership search before exonerating its officers. Those investigation shortcomings stem from the procedure of the Chicago Police Department to justify police shootings of citizens within a day of the event under the auspices of a "roundtable" meeting even before any real evidence is gathered. Plaintiff's expert will, therefore, testify about facts that relate both to Plaintiff's claims against the Defendant Officers and against the City of Chicago. That testimony fits seamlessly in a consolidated trial.

Contrast the ease of fitting that testimony into one consolidated trial with the difficulty of having to recall witnesses, reintroduce them, and orient a jury about how that testimony fits into the larger case, and it becomes painfully clear that Defendants' bifurcation request is not premised on judicial economy at all.

B. Defendant Officers Proclaimed Intent to Save Judicial Resources Is a Sham.

Defendant Officers purportedly hold out the tantalizing prospect that this Court may be able to avoid conducting a trial on the *Monell* claim. As noted above, that prize is hardly worth the gamble since the *Monell* phase of a consolidated trial will be pretty limited. Conversely, the risk of a separate and more involved *Monell* phase of trial is inherently part of Defendant Officers' deal presented to this Court. Defendant Officers ask this Court to gamble the risk of a larger trial on the *Monell* claim for the possible benefit of losing half a day of testimony on the *Monell* issues in the consolidated case. That deal does not enhance judicial resources.

Defendant Officers premise their deal on the prospect that a *Monell* hearing may not be necessary if Plaintiff does not prevail against them. Even that prospect is a gamble. It is possible that a jury could find a constitutional violation but still find Defendant Officers are protected by qualified immunity. In that context, Plaintiff could still prevail on liability against Chicago under her *Monell* theory. *See, Nessel v. City of Northlake*, 1994 WL 685508 (N.D.Ill. Dec. 5, 1994). In *Nessel*, the Court correctly noted the risk inherent in the bifurcation gamble even if the individual Defendants prevail:

> the defendants argue that bifurcation would be economical because if the plaintiff is unsuccessful against the individual defendants in the first trial, the second trial (against the city) would be mooted. Although this argument might have been applicable in Myatt and Ismail, it is misplaced here. If the individual defendants successfully mount a defense of qualified immunity--essentially arguing that they committed constitutional violations in good faith--the city may still be liable. [FN6] *See Ricciuti v.*

> *New York Transit Authority*, 796 F.Supp. 84, 86 (S.D.N.Y.1992). This is true because the qualified immunity defense is available to individuals but not to governmental bodies. *Id.* As a result, if the trial were bifurcated, evidence pertaining to the conduct of the individual defendants would necessarily have to be presented twice, regardless of the outcome of the first trial. Because such obvious inefficiency strongly favors a single trial and outweighs any risk of potential prejudice to the individual defendants caused by their municipal co-defendant, the defendants' motion to bifurcate trial must be denied.

1994 WL 685508 at *3. Plaintiff asks this Court to forgo Defendant Officers' illusory promises of judicial economy and, instead, devote the short time needed to address Plaintiff's *Monell* claims in a consolidated trial.

C. This Court Is Well Equipped to Prevent Jury Confusion

Defendant Officers' final argument underestimates the ability of this Court and of the potential jury. They argue that a consolidated trial would confuse a jury. As noted above, this Court is well equipped to issue jury instructions to prevent the type of confusion that Defendant Officers raise. In addition, Plaintiff is confident that any empaneled jury will be fully capable of fulfilling its duty to make findings of fact for Plaintiff's claims – the use of excessive force and whether Chicago's policy in fact was the driving force behind that excessive force. Defendants' worry about jury confusion is unfounded. Accordingly, it is not a basis to bifurcate the trial.

CONCLUSION

There is very little risk of prejudice to Defendant Officers stemming from a consolidated trial of Plaintiff's claims against them and her *Monell* claims against Defendant City of Chicago. First, the issues relating to the claims against each are quite distinct. Second, there is no risk of guilt by association because Plaintiff's *Monell* evidence is not premised on the bad acts of other officers. Third, the *Monell* evidence is not inflammatory at all toward Defendant Officers, since it merely relates to investigatory tactics employed by the Chicago Police Department. Even if there were a risk of some

prejudice, those risks could be capably addressed by this Court through proper jury instructions.

In addition, there is no real judicial economy benefit to justify bifurcation. The time that will be devoted to Plaintiff's *Monell* claims in the consolidated case is minimal; whereas, a bifurcated trial will require the *Monell* portion to become a full blown trial. Defendant Officers' seemingly best argument – that a *Monell* trial is not necessary if Plaintiff does not prevail against them – is not even true because Plaintiff's *Monell* claims could very well survive, even if the jury found the individual officers were not liable. Finally, there is no real risk of jury confusion because the claims encompass distinct concepts and because this Court and any empaneled jury would be able to separate the issues. Accordingly, there is no basis to justify bifurcation of the trial here.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I, Mark Reyes, an attorney, certify that on December 13, 2005, I served this document by ECF electronic filing as to each party who is represented by counsel who uses electronic filing.

S/Mark Reyes
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