UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

RYAN McFADYEN, *et al.*, *Plaintiffs,* v. DUKE UNIVERSITY, *et al.*, *Defendants.*	1:07-CV-953-JAB-JEP

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO THE CITY OF DURHAM'S MOTION TO SEVER

This matter is before the Court on the City of Durham's motion [ECF 395] to sever the proceedings on Count 41 from the three other claims going forward in this action.[1] The motion should be denied because any theoretical prejudice or confusion that may arise from a single trial is outweighed by the risk, if Count 41 is severed, of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources, the length of time required to conclude multiple suits, and the relative expense to all concerned.

[1] After the City filed its motion to sever, several claims and defendants were dismissed from this action either by stipulation of the Plaintiffs or by this Court's order [ECF 401] granting the motions for judgment on the pleadings as to Counts 1, 2, 5, 18, and 37 filed by certain Duke Defendants and Linwood Wilson. At this time, only three other claims are going forward in addition to Count 41: Plaintiffs' claim for breach of contract, fraud, and obstruction of justice (Counts 21, 24, and 18, respectively).

STANDARD OF REVIEW

The ability of plaintiffs to join together in one lawsuit is provided by Rule 20 of the Federal Rules of Civil Procedure. Rule 20(a) provides:

> Persons may join in one action as plaintiffs if . . . they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and any question of law or fact common to all plaintiffs will arise in the action.
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> Persons . . . may be joined in one action as defendants if . . . any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and any question of law or fact common to all defendants will arise in the action.
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> Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.

In addition, Fed. R. Civ. P. 20(b) provides that the court may order separate trials "to protect a party from prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party." Rule 21 provides that "court may at any time, on just terms, . . . sever any claim against a party."

The decision to sever actions for trial is within the discretion of the trial court, and is reviewable only for abuse of that discretion. *Arnold v. Eastern Air Lines, Inc.*, 681 F.2d 186, 192 (4th Cir. 1982). In this Circuit, it is well settled that severance should not be granted if the risks of

prejudice and possible confusion are outweighed by the cumulative "risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives." *Id.* at 193.

A. The City's proposed severance would effectively double the burden on the parties, witnesses and available judicial resources; the length of time required; and the expense to all concerned.

Severing Count 41 would essentially double the burden on the parties (except the City), the witnesses, and judicial resources. The Plaintiffs, their witnesses, and the Court would be required to conduct two trials in which Plaintiffs would be required to prove and re-prove many of the the same facts through many of the same witnesses. Likewise, the City's proposed severance would double the length of time required to conduct two trials for all concerned (except the City), and it would double the expense to all concerned (except the City). Further, while the City is correct to note that Count 41 involves discrete issues of law, that is true of virtually any case involving multiple claims, and it is no basis for severing a claim where, as here, the claims will involve proof of common facts. To the contrary, under those circumstances, severance creates the risk of inconsistent adjudications of common factual issues.

B. The risks, costs, delays, and burdens that severance will cause outweigh any plausible risk of prejudice or confusion to the City.

The City contends that it would be prejudiced if Plaintiffs' state

constitutional claim against the City were tried along with Plaintiffs' "many other claims asserted against the 12 other Defendants in this case." The "many other claims" the City refers to are Counts 1, 2, 5, 18, and 32. However, as noted above, all of those claims were dismissed, except for part of Count 18 (Plaintiffs' claim for obstruction of justice), after the City filed its motion to sever. *See* n. 1, *supra*. Likewise, of the "12 other Defendants" the City refers to in support of its motion, 3 of them were dismissed from the action, leaving only 9 "other defendants" in the action. Thus, Count 41 would be tried together with only three other claims: Plaintiffs' claim for breach of contract, fraud, and obstruction of justice (Counts 21, 24, and 18, respectively). Therefore, the prejudice and confusion of the issues that the City contends it would suffer by trying Count 41 with Plaintiffs' "many other claims against the 12 other defendants" has been cured by Plaintiffs stipulations and the Court's rulings dismissing most of those claims and defendants from the action.

Moreover, a defendant seeking severance of a claim or party must point to "specific facts" that would support a finding of prejudice or confusion. *See Arnold v. Eastern Air Lines*, 681 F.2d 186, 192 (4th Cir. 1982). Here the City offers no specific fact that would plausibly support a finding of prejudice or confusion of the issues that outweighs the burden on the parties, witnesses and available judicial resources; the increased time required and expense *to all concerned* (except the City) that would result from two trials versus one.

The City relies heavily on the Fourth Circuit's decision in *Arnold*, 681 F.2d 186 (4th Cir. 1982). But *Arnold* involved "the district court's decision

to try . . . four [separate] actions and the third party claims incident to two of them as a single unit." *Id.* at 192. This case is, and always has been, one single action. Further, in *Arnold*, the defendants pointed to specific facts showing they would suffer actual prejudice if the actions were not severed for trial. For example, one defendant contended that it would be prejudiced by the admission of evidence of liability insurance that would be inadmissible in a severed trial. Another defendant asserted it would be prejudiced by the introduction of evidence of its co-defendant's "gross culpability", which would not be admissible against that defendant in a severed trial. Defendants also claimed they would be prejudiced by the introduction of evidence of the injuries suffered by victims of an airline crash, which would not be admissible against them in a severed trial. And even in the face of those specific, legitimate contentions of confusion that would result from consolidating the trial of four separate actions and the third party claims incident to two of those actions, coupled with the prejudicial effect of admitting evidence of insurance, injuries suffered by plane crash victims, and one defendants "gross culpability", all of which would inadmissible against most of the defendants in severed trials, the Fourth Circuit affirmed the trial court's denial of the defendants' motions to sever.[2]

Here, the City's claims of prejudice and confusion are largely

[2] *Id. Arnold* underscores the wide discretion afforded to trial courts in this Circuit in deciding whether to sever claims or defendants. *Id.* (noting that the Fourth Circuit's review of the denial of a motion to sever is limited to determining whether trial court's discretion was abused; if so, whether prejudice resulted; and finding no abuse.)

conclusory, it relies on "multiple" claims and parties that have been dismissed from this case, and it points to nothing remotely like the prejudicial effects asserted in *Arnold* stemming from the admission of otherwise inadmissible evidence of liability insurance and graphic evidence of the injuries suffered by victims of an airline crash. The only contention the City makes that approaches those made by the defendants in *Arnold* is the City's conclusory assertion that it will be prejudiced by the gross culpability of the Duke Defendants. Even if it were true, the City's claims of prejudice and confusion do not justify essentially doubling the burdens, time, expense, and judicial resources that severance of Count 41 would require.

CONCLUSION

The City's motion to sever should be denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that on the date stamped below, the foregoing Plaintiffs' Memorandum in Opposition to the City of Durham's Motion to Sever was electronically filed with the Court's CM/ECF System, which will issue a Notice of Electronic Filing (NEF) to counsel of record for every party registered to receive NEFs through the Court's CM/ECF System. I further certify that every party to this action has at least one counsel of record registered to receive NEFs in this action.

/s/ Robert C. Ekstrand
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