Thresher v. Kiernan, No. 86-5-06 Oecv (Teachout, J., Sept. 26, 2008)

STATE OF VERMONT
ORANGE COUNTY

PAULA THRESHER	)	
	)	**Orange Superior Court**
v.	)	**Docket No. 86-5-06 Oecv**
	)	
JOSEPH KIERNAN, M.D.	)	
and GIFFORD MEDICAL CENTER	)	

ENTRY ORDER
Motions related to trial scheduling issues

This medical malpractice action is scheduled for a five day jury trial, starting Monday, October 6, 2008. The jury was drawn on September 15th. After the jury draw, Plaintiff's attorney, George Spaneas, informed the court that he did not believe the trial could be completed in five days. A status conference was held on September 22nd and continued on September 24th. Attorney Spaneas informed the court that his experts were not available until Thursday of the trial week. He had known this since late June. After the conference on September 22nd, he attempted to reschedule them to earlier in the trial week, but was unable to do so.

On September 24th, Attorney Spaneas orally moved for alternative forms of relief: (1) additional days to be made available for trial, (2) 4-5 days to be assigned to Plaintiff's evidence only, (3) strike the jury and recommence the trial, or (4) declare a mistrial based on the court's limitation of Plaintiff's use of time. Defendants' attorney, Ritchie Berger, moved to bifurcate the trial, proceeding with the liability phase during the week of October 6th, with damages to be tried to a separate panel at a later time. He agreed to Plaintiff's liability expert being presented on Thursday morning, even if out of sequence.

The case was estimated two years ago to need 5-7 days of trial time. On April 2, 2008, it was scheduled for five specific days in July. At a pretrial conference on June 16th, Attorney Spaneas noted that he thought it might not finish in 5 days and could need 7 days. For unrelated reasons, the case was rescheduled shortly thereafter from July to the week of October 6-10 (five days). No objections to the five-day schedule were filed at any time from late June on, prior to the jury draw. The presiding judge and defense counsel made other commitments for the week following the trial. Various witnesses,

including professionals, were scheduled by defense counsel for appearance at trial in reliance on the five day schedule.

The jury draw was held on September 15th. During voir dire, all of the jurors were told that the trial would last five days, and all were specifically questioned about their availability for the week of October 6th. Both parties selected panel members based on the juror's representations as to their availability during the week of October 6th only.

At the conferences on September 22nd and 24th, the court attempted to accommodate the interests of all parties and to use judicial resources efficiently, but it appears that the full trial cannot be concluded in five days. Testimony of Plaintiffs' experts on Thursday would not leave enough time for defense witnesses, a charge conference, closing arguments, instructions to the jury, and deliberations to be concluded by the end of the day on Friday, if the trial is on both liability and damages.

The requests in Plaintiff's motion cannot be granted for several reasons. Additional days of trial time cannot be made available in a timely manner. The judge and defense counsel are otherwise committed during the week following October 10th. The trial could not be continued until after a gap of at least 11 days, which is too long a hiatus in the middle of a medical malpractice trial in which all issues are tried together. Defendants would be prejudiced in the scheduling of their witnesses. Jurors and one alternate have been selected based on their representations as to their availability during the week of October 6th only, and no later dates. There is no agreement to go to verdict with fewer than twelve jurors.

Regarding the request to strike the jury and restart the trial, this option would result in a tremendous waste in resources for a reason that was entirely avoidable. The jury draw in this case consumed nearly two-thirds of a day of court time and entailed expenses which are paid for by taxpayers. The jury draw furthermore probably represented a full day off work, including loss of income, for many of the Orange County citizens who participated. Resources should not be wasted for something that could have been, but was not, raised at any time during the two months between when the trial dates were specially assigned and the day of the jury draw. Similarly, the court will not declare a mistrial on the ground that it erred in limiting Plaintiff's trial time when Plaintiff's counsel did not bring the matter to the court's attention in a timely manner.

Considerations of economy and efficiency in the use of judicial resources call for consideration of Defendants' motion for separate trials on the issues of liability and damages. The potential for prejudicial effect on both parties is an important consideration.

V.R.C.P. 42(b) authorizes courts to order separate trials on the issues of liability and damages when doing so would be "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy."[1] In

[1] The Reporter's Notes to V.R.C.P. 42(b) indicate that the Rule is substantially similar to Federal Rule of Civil Procedure 42, and the court accordingly relies upon federal cases and authorities as an aid to

determining whether separate trials should be ordered, trial courts consider whether any of the criteria listed in the text of Rule 42(b) have been met. See *Saxion v. Titan-C-Manufacturing, Inc.*, 86 F.3d 553, 556 (6th Cir. 1996) (explaining that the decision is dependent upon the facts and circumstances of each case). Trial courts also consider whether bifurcation would unfairly prejudice the non-moving party, but the ultimate decision as to whether bifurcation is appropriate lies within the sound discretion of the trial court. *Id.*; see also 9A Wright & Miller, Federal Practice and Procedure: Civil 3d § 2388 (explaining factors to be considered in exercise of discretion).

An initial question is whether bifurcation is appropriate in a medical malpractice action. There is a risk, as explained by leading treatises and opinions by respected jurists, that separation of the issues of liability and damages in a negligence case could affect the outcome of the case. See, e.g., 9A Wright & Miller, Federal Practice and Procedure: Civil 3d § 2390 (explaining that, as a result, bifurcation should be ordered sparingly); see also, e.g., *Lis v. Robert Packer Hosp.*, 579 F.2d 819, 824 (3d Cir. 1978) (Aldisert, J.) (explaining history of federal district courts' implementation of Rule 42(b), and concluding that bifurcation decisions should be the "result of an informed exercise of discretion on the merits of each case"). Thus the discretion to bifurcate should be exercised sparingly, and only after careful consideration of the facts and circumstances of the case.

Federal courts have determined that bifurcation of liability and damages is appropriate in medical malpractice actions when the circumstances warrant. Compare, e.g., *Hamre v. Mizra*, 2005 WL 1083978 (S.D.N.Y. May 9, 2005) (concluding that bifurcation may be ordered in medical malpractice cases, and granting bifurcation over plaintiff's objection); *Sellers v. Baisier*, 792 F.2d 690, 694 (7th Cir. 1986) (affirming bifurcation in a medical malpractice action over a plaintiff's objection) with *Carter v. Finley Hosp.*, 2004 WL 833685 (N.D. Ill. Apr. 16, 2004) (denying bifurcation in medical malpractice action, but only after considering whether bifurcation was appropriate on the facts and circumstances of the case). Furthermore, although the initial decision to bifurcate was not an issue on appeal and although the circumstances of the case were different, *Chater v. Central Vermont Hospital* provides a Vermont example of bifurcation in a medical malpractice action. 155 Vt. 230 (1990). Based upon these considerations, the court concludes that bifurcation of liability and damages issues may be ordered in the present case, if circumstances warrant.

Given the manner in which the scheduling problem developed in this case, specifically that the trial schedule was clear and the issue was not raised until after the jury was drawn, bifurcation of the issues of liability and damages in this case would be in furtherance of convenience, and conducive to expedition and economy. It appears that a separate trial on the issue of liability can be completed during the week of October 6th,

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interpreting V.R.C.P. 42(b). Additionally, although the text of Rule 42(b) does not expressly mention the bifurcation of issues of liability and damages, the separation of those issues for trial is "an obvious use" of Rule 42(b) because (1) the existence of liability must be resolved before damages may be considered and (2) bifurcation of the issues often promotes judicial economy and convenience. 9A Wright & Miller, Federal Practice and Procedure: Civil 3d § 2390.

even though it would be prejudicial to the Plaintiff to try to complete the entire trial during that week. Plaintiff may be accommodated by presenting expert witness testimony out of sequence, if necessary. To the extent that bifurcation of the issues of liability and damages makes it possible to go forward with the trial, it represents a tremendous savings in expenses and resources. Defendants do not claim prejudice from bifurcation, but claim prejudice from waste and delay if the trial were postponed.

Separation of the issues of liability and damages will not cause significant prejudice to Plaintiffs. Although it is likely that the Plaintiff may need to present some duplicative evidence between the trials of liability and damages in this case (even if the same jury is used), any problems presented by overlapping evidence in this case do not outweigh the significant problems identified above. Moreover, the issues of liability and damages in this case are not "so interwoven . . . that the one cannot be submitted to the jury independently of the other without confusion and uncertainty which would amount to a denial of a fair trial." *Arthur Young & Co. v. U.S District Court*, 549 F.2d 686, 693 (9th Cir. 1977) (quoting *United Air Lines, Inc. v. Wiener*, 286 F.2d 302 (9th Cir. 1961)). Furthermore, significant delay in the trial of the case will be avoided. If the court were to strike the jury and schedule a new jury draw and trial, resolution of the case would be delayed for several months, due to the court's schedule and limited judicial resources. This would be contrary to the interests of all parties.

For these reasons, the court concludes that bifurcation of the issues of liability and damages represents the best solution to the particular scheduling problem presented by this case. There is no need to decide at this time whether to use a separate jury panel, as it may not be necessary to try the liability and damages phases before separate juries. The court will attempt to follow the "better and preferred practice" of using the same jury to hear all issues in an action, even if the issues are heard at different times, Federal Practice and Procedure, *supra*, at § 2391, but notes that there is no constitutional obstacle to separate trials before different juries if the circumstances require. *Id.*

ORDER

For the foregoing reasons, Plaintiff's motion is denied and Defendant's motion is granted only as to bifurcation. The issues of liability and damages shall be bifurcated for trial under V.R.C.P. 42(b). The trial scheduled for October 6-10, 2008 shall be on the issue of liability only.

Dated at Chelsea, Vermont this 26th day of September, 2008.

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Hon. Mary Miles Teachout
Superior Court Judge