

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
J. Durham Cole, Circuit Court Judge

S.C. Supreme Court

Appellate Case No. 2012-212871
Trial Court No. 2007-CP-42-4601
Order (S.C. Ct. App. filed Aug. 3, 2012)

Lawrence E. Morrow and Evelyn M. Morrow, Petitioners,

v.

Fundamental Long-Term Care Holdings, LLC,
Fundamental Clinical Consulting, LLC, Fundamental
Administrative Services, LLC, THI of Baltimore, Inc.,
THI of South Carolina at Magnolia Place at Spartanburg,
LLC d/b/a Magnolia Place at Spartanburg, Respondents.

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MISCELLANEOUS

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ARGUMENTS

I. The Respondents Mischaracterize the Effect of the Circuit Court's Order of "Bifurcation"

The Respondents assert that should a proposed second trial become necessary, "the jury would be instructed about the prior judgment against the Facility, including the actual damages award, and it would then determine the liability, if any, of the non-Facility Defendants for the Morrows' actual damages as well as any punitive damages to be awarded against those Defendants." (Resp. Br. p. 4). Respondents add that any "punitive damage award" would be based upon "[the Morrows'] theories of both indirect and direct liability in view of their conduct as established at trial." (*Id.*).

But the trial court's order does not set forth that sort of procedure. Instead, the Morrows must try their *complete* case against THI, and if they obtain a verdict, they must try their *complete* case a second time, with the second (and separate) jury being told that the Morrows have already tried the case once and gotten a verdict before another jury.

The order states:

In a separate trial by a different jury [empaneled] at a subsequent date, and only if necessary, Plaintiffs['] claims for punitive damages against the remaining Defendants for their alleged conduct *and liability for the actual and punitive damages awarded in the first trial* against THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg (reserving for non-jury adjudication in the same proceeding any equitable claims not properly tried to a jury), and subject to any set-offs allowed by law....

(App. p. 319, ¶ 2(b)) (emphasis added). The order forecasts that in the second trial – and before the different jury – the Morrows will have to re-call all of their liability witnesses who testified at the first trial, including their retained experts and their fact witnesses, to

establish the remaining defendants' "liability" for their damages. And the Morrrows will be at the disadvantage of trying the case to a jury who might be inclined not to return a "second" verdict in their favor, no matter how the judge in the second trial instructs them.

Respondents minimize the effect of the trial court's order that effectively splits this case into two different cases. They take the view that the results of the first trial would bind them in the second trial. But this indication is disingenuous. The only parties who can be precluded from relitigating an issue on the basis of offensive collateral estoppel are persons who were parties to a prior action or in privity with a party to a prior action. *Carrigg v. Cannon*, 347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001). It seems obvious that the Corporate Defendants will assert they do not qualify as "privies" with THI and that they did not have a fair and full opportunity to litigate issues of liability, particularly where the trial court's order mandates a second trial as to their liability only if the Morrrows prevail in the first trial against THI. *See Wade v. Berkeley County*, 330 S.C. 311, 317, 498 S.E.2d 684, 687 (Ct. App. 1998) ("A party may assert nonmutual collateral estoppel to prevent relitigation of a previously litigated issue unless the party sought to be precluded did not have a fair and full opportunity to litigate the issue in the first proceeding, or unless other circumstances justify providing the party an opportunity to relitigate the issue.").

This is *not* an order of "bifurcation." A "bifurcated trial" is "[a] trial that is divided into two stages, such as for guilt and punishment or for liability and damages." Black's Law Dictionary 1644 (9th ed. 2009). *See also Doyle v. Doyle*, 258 P.3d 553 (Utah 2011) (the term "bifurcation" normally refers to formal separation of two parts of a case

(e.g., liability and damages), not just analytical separation of two different inquiries). “Bifurcation” would involve the Morrows trying their full case on liability and, if they win, trying only the issues of actual and punitive damages against the Defendants. But, instead of following that sort of procedure, the order requires the Morrows to try their complete case – *twice* – before *two* different juries. This procedure utterly fails any attempt at judicial economy and places an overwhelming burden on the Morrows. *Cf. I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (characterizing “judicial economy” as an important public policy). This is a material alteration of trial process. It is not minimal inconvenience.

This Court should reverse the decision to dismiss this appeal. The Court should either retain the appeal and order briefing on the merits, or the Court should remand the case to the Court of Appeals with instructions to proceed with briefing on the merits.

II. The Authorities That the Respondents Cite Do Not Control this Case

The Respondents cite to cases where the issue of liability against all defendants was tried separately from the issue of resulting damages and assert that those cases control in this matter. The Court should not be persuaded by these citations. These authorities are meaningfully distinguishable and they do not inform these circumstances.

For instance, the Respondents cite to *Fortune v. Gibson* in arguing “our State’s jurisprudence already instructs [that] the use of two juries is not a problem.” 304 S.C. 279, 403 S.E.2d 674 (Ct. App. 1991) (Return, p. 6; see also p. 25). But the Respondents failed to include the paragraph that precedes the paragraph the Respondents quoted,

which is telling. That paragraph provides:

We note from the outset that this is not a case in which we must decide the propriety of the bifurcated trial; all parties consented to separate trials on the issues of liability and damages. Instead, the question before us is whether the same jury that decided the liability issue also must decide the issue of damages.

304 S.C. at 281, 403 S.E.2d at 675. We thus know that the Respondents omitted two things about *Fortune*. First, the propriety of bifurcation was not an issue before the Court. The parties in that case *consented* to separate trials on liability and damages. Second, the case involved true bifurcation in which separate trials are held on the issues of liability and damages but with all parties present for both phases. Neither circumstances occurred in the present case.

The facts of *Fortune* are also important. The case involved an appeal from a judgment in two negligence actions that were consolidated for trial. Kareem Fortune and Darryl McGhaney were passengers in a car driven by Anthony Gibson. Gibson's car collided with a vehicle being driven by Howard Trapp. Fortune and McGhaney (the passengers) sued Gibson and Trapp (both of the drivers) for injuries they suffered as a result of the accident. Gibson (one driver) filed a cross-claim against Trapp (the other driver) for his damages.

After the parties agreed to a bifurcated trial, the issue of liability was tried and a jury returned a verdict against Trapp (a driver) in favor of Fortune, McGhaney, and Gibson (all of the people in the other car). During the recess before the damages phase, one of the jurors was selected for another jury. The judge recessed until the full jury could be reassembled. During that recess, two additional jurors were seated on yet another jury.

The judge then asked the parties if they would proceed in the damages phase with less than twelve jurors. Trapp refused. Thereafter, the judge sustained a motion, over Trapp's objection, to continue the damages phase until the next term of court. Trapp moved for a new trial absolute on the ground that he was entitled to have the same jury decide the damages issue as had decided the issue of liability. The motion was denied. The damages phase was tried at a later term of court with a different jury. The jury awarded damages against Trapp, Trapp appealed, and the Court of Appeals affirmed.

The point is this: *Fortune* did *not* involve a situation that is remotely comparable to this case. The trial judge did not require Fortune to try his case once against Gibson (the driver of the car in which Fortune was a passenger), get a verdict, and *then* – depending upon what that verdict was – try the case *again* against Trapp (the driver of the other car). Instead, liability for all claims of liability as to both defendants were tried in one trial, and a second jury assessed damages. *Fortune* is no comparable. Respondents' cite to the case is misleading.

The same is true of Respondents' repeated cites to *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000). (Resp. Br. pp. 7-8, 19-20, 21, 23, 24, 26). *Flagstar* involved a contract dispute over whether an insurance policy Royal issued covered discrimination claims Flagstar had settled. Flagstar moved for bifurcation of the trial into two distinct phases pursuant to Rule 42(b), SCRCP (providing for separate trials of any "separate issue" as long as the right to trial by jury is preserved inviolate). Flagstar proposed that a jury would first determine whether Exclusion C in the Royal policy operated to preclude coverage. If the jury found coverage precluded, Flagstar would lose

and the case would be over. If Flagstar won on preclusion, the trial would proceed to the issues of whether the acts constituted “occurrences” or “personal injury” under the policy. The trial court granted the motion to bifurcate and Royal appealed. This Court reversed the Court of Appeals, which had found the order was immediately appealable.

Here again, to suggest that these circumstances are comparable to the present case is to play loosely with the facts. All of the claims in *Flagstar* were being brought in *one* proceeding against *all* liable parties. The bifurcation order divided the case into two phases to determine separate issues, but all parties were present for each phase. That situation is vastly different from the situation in this case, where the Petitioners are being forced to try their complete case twice, in two different proceedings, before different juries, and against two defendants whom the Morrows claim are jointly and severally liable for their damages.

This Court should not be persuaded by Respondents’ cite to these cases. Each precedent is distinguishable from the Morrows’ case and the distinction is one that makes a difference.

III. The Court Should Disregard the Respondents’ Extensive Arguments Regarding the Merits

The Respondents present their version of the facts in this case without citing to any portion of the Appendix. (Resp. Br. pp. 10-15). Although some background inquiry into the underlying action is necessary, the merits of the “bifurcation” order are not before this Court. Instead, the *only* issue is whether the appeal of the order may proceed or

whether it was properly dismissed. *Cf. Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 73 n. 7, 533 S.E.2d 331, 333 n. 7 (2000) (Court pointed out that “some minimal inquiry will always be necessary on the part of the appellate court considering the appealability of an order which is alleged to have deprived a party of a mode of trial”).

The Court should not be persuaded to decide the issue of appealability based upon Respondents’ rendition of the facts. The Court should reverse the decision to dismiss this appeal and hold that the order in this case is immediately appealable. The order requires the Morrows to try two complete cases before two different juries against defendants whom they claim are jointly and severally liable. The Court should either permit briefing on the merits of the appeal or the Court should remand this matter to the Court of Appeals with instructions that the parties proceed to briefing.

IV. The Cases That the Respondents Cite Regarding General Control of the Trial and the Trial Court’s Ability to Change its Mind Should Not Persuade This Court to Affirm the Decision to Dismiss the Morrows’ Appeal

The Respondents cite to a number of cases from South Carolina or other jurisdictions that address the general principle that a trial court has the ability to control litigation and therefore “maintains the authority to modify the decision to bifurcate as the case develops.” (Resp. Br. p. 16; pp. 16-18). Each of these decisions are distinct from this case in a meaningful way, and they should not persuade this Court to find the order in this case is not immediately appealable.

For instance, *PPG Indus. v. Orangeburg Paint & Decorating Ctr.* involved a trial court that denied summary judgment but then reconsidered the denial, reversed position

and granted the motion. 297 S.C. 176, 183, 375 S.E.2d 331, 335 (Ct. App. 1988). The Court of Appeals held that a trial judge has authority to reconsider a motion for summary judgment that the judge has previously denied. That ruling is aimed at disposing of the entire case and is different from the ruling in this case. Here, the trial judge has ordered the Morrums to proceed against only one defendant before one jury, and then against the co-defendant before a different jury. The Respondents' position contemplates a hypothetical possibility that at some point during this process the trial judge might change his mind and agree that this procedure was wrong. What do the Respondents think will happen then? The only thing to do at *that* point would be to declare a mistrial and order a new trial with all of the defendants present. That scenario is a far cry from the order in *PPG*, where the judge dismissed the entire case after previously refusing to do so.

The next case, *Ashenfelder v. City of Georgetown*, involved an appeal following a trial court's grant of a directed verdict against plaintiff on some claims and then a mistrial on the remaining claims. 389 S.C. 568, 698 S.E.2d 856 (Ct. App. 2010). The plaintiff appealed the dismissed claims. The defendant cross-appealed the failure to dismiss *all* of the claims. The narrow issue on appeal was whether the rulings were appealable in light of the fact that the mistried claims remained for trial. The Court of Appeals held the case was not immediately appealable and dismissed the appeals without prejudice.

The court stated:

A trial judge may direct a verdict where there are no material facts in dispute and the case presents only a question of law. Rule 50(a), SCRCPP; *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008). However, that decision is still subject to revision at any time before entry of that judgment by the clerk when the directed

verdict is not certified and other claims in the action have not yet been adjudicated:

The trial judge, under our procedure, is afforded many opportunities to change his mind. For instance, no authority is needed for the proposition that a trial judge, even after judgment, has the right to grant a new trial based upon his reconsideration of a previous motion for directed verdict and of course many other illustrations could be given of a trial judge's right to reconsider decisions he has made during the course of a trial and before final judgment is entered.

PPG Indus., Inc. v. Orangeburg Paint & Decorating Ctr. Inc., 297 S.C. 176, 183, 375 S.E.2d 331, 335 (Ct. App. 1988); see also Rule 54(b), SCRCPP; [*Grooms v. Zander*, 246 S.C. 512, 514, 144 S.E.2d 909, 910 (1965)] (“When the trial of this case was thus terminated, the status of the litigation and of the parties became the same as though no trial had taken place.”).

Ashenfelder, 89 S.C. at 576, 698 S.E.2d at 860-861.

As the quote illustrates, the issue in *Ashenfelder* involved the dismissal of an entire case and whether the order denying full dismissal was immediately appealable when the mistrial led to a “do-over.” The implication is that on retrial, the trial court could reinstate the dismissed claims or, alternatively, the court could dismiss the remaining claims, obviating the appeals of those rulings for either party (or both).

The remaining cases the Respondents cite are the same. Each involved a trial court's ability to reverse itself on its prior rulings as to dispositive motions. See *City of Wood River v. Geer-Melkus Const. Co.*, 444 N.W.2d 305 (Neb. 1989) (following a trial on the merits where all parties were present, the trial court revisited earlier ruling denying motion to dismiss third-party claims on statute of limitations basis; Supreme Court held trial court had authority to revisit the prior ruling even though the term of court had

expired); *Dawkins, Inc. v. Huff*, 836 So.2d 1062 (Fla. Ct. App. 2003) (case involved dismissal of an appeal from an order denying a motion to set aside entry of default; appellate court invited trial court to revisit those interlocutory rulings in light of discussion in its opinion); *Helping Others Maintain Environmental Standards v. Bos*, 941 N.E.2d 347 (Ill. Ct. App. 2010) (holding trial judge had authority to revisit interlocutory decision regarding motion to dissolve of a preliminary injunction). None of these cases involved an appeal of an order that broke a trial into two discrete actions that must be separately tried in full. This situation does not lend itself to an easy change of course midway through trial. Once the parties are in this procedure for a penny, they are in it for a pound.

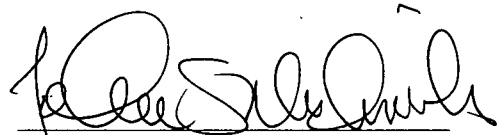
Respondents also assert that things may change, “such as in the event [the Morrows] provide evidence that could establish a basis for non-Facility corporate liability (*i.e.*, actionable negligence or recklessness) independent of the acts and delicts of the Facility.” (Resp. Br. pp. 17-18). This argument is specious. The trial court’s order stayed *any* discovery aimed at any defendant other than THI. (App. pp. 318-319, ¶ (3); cited in Respondent’s Br., pp. 9-10). Without discovery, there is no possibility that this sort of evidence will be produced.

CONCLUSION

The time to review this order is now. The trial court has restructured the Morrrows' case into two separate trials before two different juries, and the order deprives the Morrrows of the substantial right to choose the defendants against whom they wish to proceed. *Neeltec Enterprises, Inc. v. Long*, 397 S.C. 563, 725 S.E.2d 926 (2012) (the right of a plaintiff to choose her defendant is a substantial right). This Court should reverse the order dismissing this appeal. The Court should either permit briefing on the merits or it should remand the matter to the Court of Appeals and order the parties to proceed to briefing.

September 22, 2014

Respectfully submitted,



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The undersigned hereby certifies that on the date indicated below she served
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