No. 99-1702

IN COURT OF APPEALS OF WISCONSIN
DISTRICT III

FILED

July 18, 2000

Cornelia G. Clark
Clerk of Supreme Court
Madison, WI

CHRISTOPHER WATERS, BY HIS GUARDIAN AD LITEM, ARDELL W. SKOW, RICHARD WATERS AND CONNIE WATERS,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

KENNETH PERTZBORN, DIANE PERTZBORN AND STATE FARM FIRE & CASUALTY CO.,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS,

NICHOLAS HAUS, PAULA HAUS, AL HAUS AND MSI INSURANCE CO.,

DEFENDANTS-RESPONDENTS.

CERTIFICATION BY COURT OF APPEALS OF WISCONSIN

Before Cane, C.J., Hoover, P.J., and Peterson, J.

Pursuant to WIS. STAT. RULE 809.61,[1] we certify this appeal to the Wisconsin Supreme Court to determine whether a trial court may bifurcate damages from liability to be tried before separate juries.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Ten-year-old Christopher Waters suffered serious injuries when he sledded down a hill on a neighbor's property in a residential neighborhood into a street where he was struck by a car. He brought this action against the driver, Nicholas Haus, and the property owners, Kenneth and Diane Pertzborn. The Pertzborns moved for summary judgment based on recreational use immunity as provided in WIS. STAT. § 895.52. Waters argued that the recreational immunity statute does not apply because he fit under the invitee exception set out in WIS. STAT. § 895.52(6)(d). The trial court denied the motion for summary judgment, concluding that outstanding issues of fact exist regarding the invitation.[2]

Recognizing that the jury's answer to questions relating to recreational use immunity or liability might obviate the need for expensive discovery and trial on damage issues, the trial court severed damages from liability to be tried before separate juries. Even though the liability trial was expected to last three days and the damage trial only one and one-half days, discovery related to damages would be very expensive because Waters named fifty expert witnesses relating to damages.[3] The trial court concluded that it had authority under ***Zawistowski v. Kissinger***, 160 Wis. 2d 292, 466 N.W.2d 664 (Ct. App. 1991), and WIS. STAT. § 906.11(1) to schedule this case in a manner that potentially reduces the parties' discovery and trial expenses and maximizes the prospect of settlement

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[2] The Pertzborns' cross-appeal, challenging the denial of their motion for summary judgment. The issues on cross-appeal include whether the recreational use immunity statute applies when activities on the premises result in injury off the premises; whether the statement by the Pertzborns' 11-year-old daughter "let's go over to my house or something" constitutes an invitation by the owner for the specific occasion; whether Diane Pertzborn's instructions to the children that if they wanted to go sledding they should go over to the school constitutes a recision of any invitation by the owner for a specific occasion.

[3] The importance of limiting discovery expenses before resolving significant threshold issues was recently confirmed by the holding in ***Jandrt v. Jerome Foods***, 227 Wis. 2d 531, 597 N.W.2d 744 (1999).

after the liability trial. Waters argues that bifurcating damages from liability for trial before separate juries violates WIS. CONST. art. I, § 5 and the five-sixths rule set out in WIS. STAT. § 805.09(2), and that it tilts the scales of justice in favor of defendants.

Federal courts are allowed to try individual issues before separate juries provided the issues are divided in a way that prevents the same issue from being reexamined by different juries. *See* ***In re Rhone-Poulenc Rorer, Inc.***, 51 F.3d 1293, 1303 (7th Cir. 1995). That practice is explicitly allowed by FED. R. CIV. P. 42(b) and does not violate the Seventh Amendment to the United States Constitution. *See* ***Gasoline Prods. Co. v. Champlin Refining Co.***, 283 U.S. 494, 498-99 (1931). Waters nevertheless argues that the Wisconsin Constitution does not allow trying issues before separate juries. *Citing* ***State v. Hansford***, 219 Wis. 2d 226, 580 N.W.2d 171 (1998), Waters claims that the right to a jury trial protected by art. I § 5 includes the right to the same kind of trial as would have existed at common law at the time the Wisconsin Constitution was adopted. That would require that all questions essential to support a judgment be heard and agreed to by the same panel of jurors. *See* ***Christensen v. Schwartz***, 198 Wis. 222, 225, 223 N.W. 839 (1929). At common law, a special verdict covered "every material fact in dispute under the pleadings." *See* ***Baxter v. C&NW Ry. Co.***, 104 Wis. 307, 312, 80 N.W. 644 (1899).

The Pertzborns respond that the jury trial right remains inviolate as required by art. I, § 5 even if issues are decided by separate juries. They argue that the details structuring jury trials can change to fit the times. Common law is not stagnant. Rather, it should be brought into accord with present day standards of wisdom and justice rather than continue with an outmoded and antiquated rule of the past. *See* ***Mariorenzi v. Diponte Inc.***, 333 A.2d 127 (R.I. 1975), quoted with

approval in ***Antoniewicz v. Reszcynski***, 70 Wis. 2d 836, 849, 236 N.W.2d 1 (1975). They urge a construction of the Wisconsin Constitution comparable to the United States Supreme Court's construction of the Seventh Amendment, which does not preserve antiquated matters of form or procedure and allows "new devices ... to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice." *See* ***Ex parte Peterson***, 253 U.S. 300, 309-10 (1920).

Waters also claims, however, that submitting issues to separate juries violates WIS. STAT. § 805.09(2), which requires that the same five-sixths of the jury agree on all of the questions in the verdict. The Pertzborns reply that nothing requires that each verdict must resolve the entire case. They note that appellate courts frequently remand causes for a new trial on damages or liability to be tried before a new jury. WISCONSIN STAT. § 805.15(6) (the Powers option) and § 803.04(2)(b) (the Direct Action Statute) recognize that the requirement that the same five-sixths agree on all of the questions should not be taken too literally.

Waters argues that, regardless whether trying the issues before separate juries is lawful, it should not be allowed because it unfairly tilts the scales of justice in favor of defendants. He cites Jennifer M. Granholm and William J. Richards, *Bifurcated Justice*: *How Trial-Splitting Devices Defeat the Jury's Role*, 26 U. TOL. L. REV. 505, 513 (1995), to support his argument that bifurcation is more than a mere procedural tool to enhance judicial economy, but rather affects substantive rights. In addition, the Wisconsin Academy of Trial Lawyers, in its amicus brief, contends that bifurcation discourages settlement. However, a survey of federal and state judges, reported in Symposium, *Issues in Civil Procedure*: Advancing the Dialogue, *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General*

Civil Cases, 69 B.U.L. REV. 731 (1989), shows overwhelming support for bifurcation, including a positive impact on fairness of the outcome as well as accelerated trial process. Studies showing that the outcome is altered when more than one jury is utilized beg the question whether greater success for defendants reflects greater or less fairness in the proceedings.

This appeal presents issues of first impression including construction of the Wisconsin Constitution, statutory construction and the inherent powers of the courts. Other jurisdictions have allowed trial before separate juries in some circumstances to facilitate alternative dispute resolution, promote judicial economy or achieve fairness to the parties. *See* C.R. McCorkle, Annotation, *Separate Trial of Issues of Liability and Damages in Tort*, 85 A.L.R.2d 9 (1999). The procedure has been discussed and encouraged at Wisconsin Judicial Education Seminars, suggesting that circuit courts are beginning to utilize the device. *See e.g.,* 1998 Civil Law Seminar. If trying issues to separate juries is allowable, the court may wish to invoke its superintending authority over circuit courts to determine the circumstances in which bifurcation will be allowed and the procedures that must be followed. The court may also wish to consider whether bifurcating preliminary issues such as immunity would be allowed even if separating damages from liability would not. Therefore, we respectfully certify this case to the supreme court to determine whether the circuit court properly ordered trials on liability and damages before separate juries.