IN THE SUPREME COURT OF TEXAS

NO. 04-0575

COLUMBIA MEDICAL CENTER OF LAS COLINAS, INC. D/B/A LAS COLINAS MEDICAL CENTER , PETITIONER,

v.

ATHENA HOGUE, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ROBERT HOGUE, JR., DECEASED, CHRISTOPHER HOGUE, AND ROBERT HOGUE, III, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued April 12, 2005

JUSTICE BRISTER, joined by JUSTICE MEDINA, concurring.

I join the Court's opinion. But I would be clearer about the "trifurcation" of this trial into three parts: (1) ten days of evidence, two days of arguments, and a verdict on the hospital's negligence, followed by (2) one more day of arguments and a second verdict on exemplary damages, and finally (3) further arguments and a third verdict on the plaintiff's contributory negligence. Rather than merely expressing "serious reservations" about this "unusual" procedure, I would say "Don't do it."

Bifurcation is proper in a few instances,[1] but no one appears to have ever bifurcated the plaintiff's negligence from the defendant's negligence as the trial court did here. Trial on these two issues cannot be severed; a jury cannot decide whose negligence (if any) caused an occurrence without knowing what both did. Nor can a jury apportion fault between two parties until it finds both negligent.[2] Whenever there is evidence that both parties are negligent, it is hard to imagine any circumstances in which a trial judge could properly bifurcate the trial of these issues and ask a jury about them separately.[3]

Since 1973, we have required broad-form jury questions because the complexity of granulated questions threatened to make the jury system unworkable.[4] We reformed jury submission practice so that questions would be submitted "logically, simply, clearly, fairly, correctly, and completely."[5] But submitting the negligence of two parties in separate questions at different points in the trial is not logical (as the two are related), simple (as two sets of arguments and deliberations are required), clear (as the fault question is asked twice), fair (as someone must go last), correct (as

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[1] *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 41.009 (allowing defendants to opt to bifurcate trial on exemplary damages); *Baker v. Goldsmith*, 582 S.W.2d 404, 409 (Tex. 1979) (allowing bill-of-review to be tried separately from underlying case).

[2] *See* TEX. CIV. PRAC. & REM. CODE § 33.003; TEX. R. CIV. P. 277.

[3] *See, e.g.*, *Otis Elevator, Co. v. Bedre*, 776 S.W.2d 152, 153 (Tex. 1989) (holding court of appeals erred in remanding issue of defendant's negligence but not plaintiff's); *Elbaor v. Smith*, 845 S.W.2d 240, 251 (Tex. 1992) (holding trial court erred in failing to submit issue of plaintiff's negligence as well as defendant's).

[4] *See Yarborough v. Berner*, 467 S.W.2d 188, 193 (Tex. 1971) ("The present practice of separate submission of [granulated] issues has been the author of much confusion and mischief, has unduly complicated the special issue system, and has, on occasion, smothered what otherwise would be a simple submission under the special issue system."); *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984); *see also* TEX. R. CIV. P. 277 ("In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions.").

[5] *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 664 (Tex. 1999).

there is no precedent for this), or complete (as the charge is split in half). Granulated questions are frustrating and confusing enough when they appear in a single charge; they are surely much more so if given to jurors at different times.

The record reflects the trial court "trifurcated" this case because, after initially finding no evidence of contributory negligence (correctly), he decided to submit the question nonetheless as a "bill" in case an appellate court disagreed. But a jury question should be submitted if the evidence supports it and refused if the evidence does not; it cannot be halfway submitted as an afterthought so one can have it both ways. Either party — plaintiff or defendant — is prejudiced if its issues are postponed until after the jury has decided most of the case and is ready to go home. In this case, for example, the plaintiff's counsel simply urged jurors in the third set of closing arguments to "[b]ring it to an end. Just say no, and then we can all be done with this work that you've done . . . ."

"Our courts have always frowned upon piecemeal trials, deeming the public interest, the interests of litigants and the administration of justice to be better served by rules of trial which avoid a multiplicity of suits."[6] We should state today, as we have in the past, that we "remain resolute that piecemeal trials as a general rule should be avoided."[7] Accordingly, I would hold the trial court's "trifurcation" was erroneous. But as there was no evidence the plaintiff here was negligent,[8] the trial

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[6] *Iley v. Hughes*, 311 S.W.2d 648, 651 (Tex. 1958).

[7] *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 30 n.29 (Tex. 1994).

[8] *Jackson v. Axelrad*, 221 S.W.3d 650, 652 (Tex. 2007) ("[L]aymen generally have no duty to volunteer information during medical treatment.").

court's initial refusal to submit contributory negligence was correct and rendered its later error harmless.

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Scott Brister
Justice

OPINION DELIVERED: August 29, 2008