Serial: 111468

IN THE SUPREME COURT OF MISSISSIPPI

No. 89-R-99001-SCT

IN RE: THE MISSISSIPPI RULES OF CIVIL PROCEDURE

ORDER

This matter has come before the Court en banc on its own motion for consideration of amendments to Rules 20, 42 and 82 of the Mississippi Rules of Civil Procedure and the Comments thereto. Having considered the matter, the Court finds that the fair and efficient administration of justice in this state will be promoted by the amendments as set forth in Exhibits "A", "B", and "C" hereto.

IT IS THEREFORE ORDERED that Rules 20, 42 and 82 of the Mississippi Rules of Civil Procedure and the Comments thereto be and are hereby amended as set forth in Exhibits "A", "B", and "C" hereto.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this order upon the minutes of the Court and shall forthwith forward a true certified copy hereof to West Publishing Company for publication as soon as practical in the advance sheets of *Southern*

Reporter, Second Series (Mississippi Edition) and in the next edition of *Mississippi Rules of Court*.

SO ORDERED, this the 20th day of February, 2004.

/s/ Edwin Lloyd Pittman

EDWIN LLOYD PITTMAN, CHIEF JUSTICE, FOR THE COURT

EASLEY, J. OPPOSES ALL AMENDMENTS.
GRAVES, J. OPPOSES AMENDMENTS TO RULES 20 AND 82 AND THEIR COMMENTS.
DIAZ, J., NOT PARTICIPATING.

EXHIBIT "A" TO ORDER
MISSISSIPPI RULES OF CIVIL PROCEDURE

RULE 20. PERMISSIVE JOINDER OF PARTIES

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party ~~he~~ asserts no claim and who asserts no claim against the party ~~him~~, and may order separate trials or make other orders to prevent delay or prejudice.

[Amended February 20, 2004 to make rule gender neutral.]

Comment

The purpose of Rule 20 is to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple law suits. The rule is permissive in character; joinder in situations falling within the rule's standard is not required unless it is within the scope of compulsory joinder prescribed by Rule 19.

Rule 20(a) permits joinder in a single action of all persons asserting or defending against a joint, several, or alternative right to relief that arises out of the same transaction or occurrence or series of transactions or occurrences and presents a common question of law or fact. The phrase " transaction or occurrence" requires that there be a distinct litigable event linking the parties. Rule 20(a) simply establishes a procedure under which several parties' demands arising out of the same litigable event may be tried together, thereby avoiding the unnecessary loss of time and money to the court and the parties that the duplicate presentation of the evidence relating to facts common to more than one demand for relief would entail.

Joinder of parties under Rule 20(a) is not unlimited as is joinder of claims under Rule 18(a). Rule 20(a) imposes two specific requisites to the joinder of parties: (1) a right to relief must be asserted by or against each plaintiff or defendant relating to or arising out of the

same transaction, ~~or~~ occurrence, or the same series of transactions or occurrences ; and, (2) some question of law or fact common to all the parties will arise in the action. Both of these requirements must be satisfied in order to sustain party joinder under Rule 20(a). *See American Bankers Inc. of Florida v. Alexander*, 818 So. 2d 1073, 1078 ~~*Comstock v. Rayford*, 9 Miss. 423, 438-39 (1843) (unconnected parties having a common interest in the point at issue may unite in the same bill); *accord*, *Richardson v. Brooks*, 52 Miss. 118 (1876)~~. However, even if the transaction requirement cannot be satisfied, there always is a possibility that, under the proper circumstances, separate actions can be instituted and then consolidated for trial under Rule 42(a) if there is a question of law or fact common to all the parties. *See Fielder v. Magnolia Beverage Co.* 757 So. 2d 925 (Miss. 1999) citing *Stoner v. Colvin*, 236 Miss. 736, 748, 110 So.2d 920, 924 (1959) (courts of general jurisdiction have inherent power to consolidate action when called for by the circumstances). ~~*See* also Miss. Code Ann. §§ 11-7-21 and -23 (misjoinder and nonjoinder of parties) and 11-7-177 and -179 (1972) (judgments according to rights of parties).~~ If the criteria of Rule 20 are otherwise met, the court should consider whether different injuries, different damages, different defensive postures and other individualized factors will be so dissimilar as to make management of cases consolidated under Rule 20 impractical. *See Demboski v. CSX Transp., Inc.* 157 F.R.D. 28 (S.D. Miss 1994.) cited with approval in *Illinois Cen. R.R. Coj. v. Travis*, 808 So. 2d 928, 934 (Miss. 2002).

~~The general philosophy of the joinder provisions of these rules is to allow virtually unlimited joinder at the pleading stage but to give the court discretion to shape the trial to the necessities of the particular case.~~ Rule 20(b) gives ~~furthers this policy by giving~~ the court authority to order separate trials or make any other order to prevent another ~~a~~ party from being embarrassed, delayed, prejudiced, or put to unnecessary expense by the joinder of a party against whom the party ~~he~~ asserts no claim and who asserts no claim against the party ~~him~~. Aside from emphasizing the availability of separate trials, Rule 20(b) has little significance inasmuch as the power granted the court therein also is provided by the much broader grant of discretion set forth in Rule 42(b). *See* 3A Moore's Federal Practice ¶¶ 20.01-.08 (1968); 7 Wright & Miller, Federal Practice and Procedure, Civil §§1651-1660 (1972).

In order to allow the court to make a prompt determination of whether joinder is proper, the factual basis for joinder should be fully disclosed as early as practicable, and motions questioning joinder should be filed, where possible, sufficiently early to avoid delays in the proceedings.

[Comment amended February 20, 2004.]

EXHIBIT "B" TO ORDER
MISSISSIPPI RULES OF CIVIL PROCEDURE

RULE 42. CONSOLIDATION: SEPARATE TRIALS

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any ~~of all the~~ matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) Separate Trial. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counter-claim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by Section 31 of the Mississippi Constitution of 1890.

[Amended February 20, 2004 to correct scrivener's error.]

Comment

The purpose of Rule 42 is to give the court broad discretion to decide how cases on its docket are to be tried so that the business of the court may be dispatched with expedition and economy while providing justice to the parties. To this end, Rule 42(a) permits consolidation and a single trial of several cases on the court's docket, or of issues within those cases, while Rule 42(b) allows the court to order separate trials of particular issues within a single case.

Consolidation of actions presenting a common issue of law or fact is permitted as a matter of trial convenience and judicial economy. The court is given broad discretion to decide whether consolidation would be desirable; the consent of the parties is not required. It is for the court to weigh the savings of time and effort that consolidation would produce against any inconvenience, delay, or expense that it would cause.

Although the courts take a favorable view of consolidation, the mere fact that a common question is present, and that consolidation is therefore permissible under Rule 42(a), does not mean that the court must order consolidation. Consolidation may be denied if the common issue is not a central one, or if consolidation will cause delay, or will lead to confusion or prejudice. <u>In exercising its discretion to consolidate cases or particular issues, the court must recognize that on some issues consolidation may be prejudicial. To avoid prejudice, consolidation should be invoked only where the issues of law or fact justifying consolidation predominate over individual issues which will be heard in the consolidated proceedings.</u> The additional expense that consolidation may cost to some of the parties is a

factor to be considered though it is not necessarily conclusive. A motion to consolidate may be made as soon as the issues become apparent, even though not yet formally joined. A motion is not required, however, since the court may order consolidation on its own motion. Separate cases should not be jointly considered without an order of consolidation.

Consolidation is not new to Mississippi practice. *See Vicksburg Chemical Co. v. Thornell*, 355 So.2d 299 (Miss. 1978) (object of consolidating actions is to avoid a multiplicity of suits, to prevent delay, to clear congested dockets, to simplify the work of the trial court, and to save numerous costs and expenses); *Planter's Oil Mill v. Yazoo & M. V.R.R. Co.*, 153 Miss. 712, 717-18, 121 So. 138, 140 (1929) (proper conditions existing, the court may consolidate actions on its own motion or on the motion of either party); *Stoner v. Colvin*, 236 Miss. 736, 748-49, 110 So.2d 920, 924 (1959) (courts possess an inherent power to consolidate appropriate actions); V. Griffith, Mississippi Chancery Practice, § 506 (2d ed. 1950) (consolidation by agreement entered on record by solicitors of parties, or by motion of any party, or by the court of its own motion; court has duty to consolidate appropriate actions). The court has complete discretion within the bounds of justice and its jurisdiction to consolidate whatever issues it deems expeditious or economical to consolidate. *Stoner v. Colvin*, *supra* (trial court in its sound discretion has a right to consolidate for trial separate actions by different plaintiffs against common defendants for damages arising out of the same accident; this rule applies to both law and equity actions); *Columbus & G. Ry. Co. v. Mississippi Clinic*, 152 Miss. 869, 871, 120 So.2d 187, 188 (1929) (consolidation in court of law, of two separate actions on appeal from justice of the peace court, where interests of expediency and economy would be served, merges several actions into one action with but one judgment); but *See Stoner v. Colvin*, *supra* (in court of law separate instructions were rendered in two actions which had been consolidated for trial); and *Elliott v. Harrigill*, 241 Miss. 877, 882, 133 So.2d 612, 614 (1961) (consolidation of causes in equity does not make parties to one cause parties to the other, and separate decrees are entered, unless the nature of matters be such that it is clearly proper to include them in one decree); V. Griffith, *supra* § 506 (equity cases preserve identity of the causes, pleadings are carried on as if no consolidation had arisen, and separate decrees are issued); *Wilborn v. Wilborn*, 258 So.2d 804, 806 (Miss. 1972) (refusal to consolidate divorced wife's citation for contempt and husband's petition to modify child support decree was within court's discretion). The granting or denying of an order of consolidation is not a final judgment and thus is not appealable. *See* Miss. Code Ann. § 11-51-3 (1972) (final judgments or decrees appealable).

Rule 42(b) allows the courts to order a separate trial of any claim, cross-claim, counter-claim, or third-party claim, or of any separate issue or of any number of claims or issues. The court may do so in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy. The procedure authorized by Rule 42(b) may be distinguished from severance under Rule 21 as follows: Separate trials will usually result in one judgment; but severed claims become entirely independent actions to be tried and judgment will be entered thereon independently.

The provision for separate trials in Rule 42(b) is intended to further convenience, avoid delay and prejudice, and serve the ends of justice. It is the interest of efficient judicial administration that is to be controlling, rather than the wishes of the parties. The piecemeal trial of separate issues in a single suit is not to be the usual course. It should be resorted to only in the exercise of informed discretion when the court believes that separation will achieve the purposes of the rule.

If a single issue could be dispositive of the case, and resolution of it might make it unnecessary to try the other issues, separate trial of that issue may be desirable to save the time of the court and reduce the expenses of the parties. If, however, the preliminary and separate trial of an issue will involve extensive proof and substantially the same facts as the other issues, or if any saving in time and expense is wholly speculative, a separate trial should be denied. A separate trial may also be ordered to avoid prejudice, as where evidence admissible only on a certain issue may prejudice a party in the minds of the jury on other issues. For example, this principle may be applied, and a separate trial ordered though a single trial would otherwise be preferable, because in a single trial the jury would learn that defendant is insured. The possibility of such prejudice, however remote, justifies a separate trial if the issues are so unrelated that there is no advantage in trying them together. But if the issues are related, there is considerable authority to the effect that jurors today assume the presence of insurance, that knowledge of the fact of insurance is therefore not prejudicial, and that a separate trial should not be ordered.

Ultimately the question of separate trials should be, and is, within the discretion of the trial court. It must weigh whether one trial or separate trials will best serve the convenience of the parties and court, avoid prejudice, and minimize expense and delay. The major consideration, of course, must be which procedure is more likely to result in a just, final disposition of the litigation.

Any party may move for a separate trial. The motion may properly be made at a pre-trial conference; a motion is not required, however. The court may order a separate trial on its own motion. *See Sherman v. Stewart*, 216 Miss. 549, 556, 62 So.2d 876, 877-78 (1953) (although the submission for one trial of the issues of accord and satisfaction and the denial of the debt would have been better, the question of separate trials is a question within the sound discretion of the trial judge); *Christopher v. Brown*, 211 Miss. 322, 329, 51 So.2d 579, 582 (1951) (to prevent undue expense and loss of time and delay, discretion is vested in the trial judge to determine when and in what cases separate hearings may be had). An example is when a single issue could dispose of the case and make trial of the other issues unnecessary. *See* Miss. Code Ann. § 11-7-59 (1972) (defense which used to be set up in a plea but is set up in the answer in such a manner as to be clearly distinct and readily separable, and which goes to the entire cause of action, may on motion of either party be separately disposed of before the principal trial of the cause, in the sound discretion of the court). As with MRCP 42(a), an order granting or denying separate trials under 42(b) is not

appealable as a final judgment. *See* 9 Wright & Miller, Federal Practice and Procedure, Civil §§ 2381-2392 (1971); 5 Moore's Federal Practice ¶¶ 42.02-.03 (1974).

[Comment amended February 20, 2004.]

EXHIBIT "C" TO ORDER
MISSISSIPPI RULES OF CIVIL PROCEDURE

RULE 82. JURISDICTION AND VENUE

(a) Jurisdiction Unaffected. These rules shall not be construed to extend or limit the jurisdiction of the courts of Mississippi.

(b) Venue of Actions. Except as provided by this rule, venue of all actions shall be as provided by statute.

(c) Venue Where Claim or Parties Joined. Where several claims or parties have been properly joined, the suit may be brought in any county in which any one of the claims could properly have been brought. Whenever an action has been commenced in a proper county, additional claims and parties may be joined, pursuant to Rules 13, 14, 22 and 24, as ancillary thereto, without regard to whether that county would be a proper venue for an independent action on such claims or against such parties.

(d) Improper Venue. When an action is filed laying venue in the wrong county, the action shall not be dismissed, but the court, on timely motion, shall transfer the action to the court in which it might properly have been filed and the case shall proceed as though originally filed therein. The expenses of the transfer shall be borne by the plaintiff. The plaintiff shall have the right to select the court to which the action shall be transferred in the event the action might properly have been filed in more than one court.

(e) Forum Non-conveniens. With respect to actions filed in an appropriate venue where venue is not otherwise designated or limited by statute, the court may, for the convenience of the parties and witnesses or in the interest of justice, transfer any action or any claim in any civil action to any court in which the action might have been properly filed and the case shall proceed as though originally filed therein.

[Amended effective February 20, 2004, to add Section 82(e) allowing transfer for forum non-conveniens for cases filed after the effective date.]

Comment

Rule 82(a) reaffirms that nothing in the Mississippi Rules of Civil Procedure shall be construed as extending or limiting the jurisdiction of any state court.

Subdivisions (b) and (d) pertain to venue. Generally, venue is controlled by statute in Mississippi, *See* Miss. Code Ann. §§ 11-11-1 through -59 (1972), and the Mississippi Rules of Civil Procedure follow the statutes.

~~In situations where several defendants are involved, Rule 82(c) provides that the action may be brought in any court where any one of the claims could have been~~ properly ~~brought and that venue will thereupon be good as to all defendants; this tracks prior Mississippi law. Miss. Code Ann. § 11-11-3 (1972); *Gillard v. Great Southern Mortgage & Loan Corp.*, 354 So.2d 794 (Miss.1978); *Wofford v. Cities Service Oil Co.*, 236 So.2d 743 (Miss.1970) (plaintiff may elect county in which to bring suit when multiple defendants are joined, so long as choice is proper as to at least one material defendant).~~

~~Rule 82(d) is patterned after Miss. Code Ann. § 11-11-17 (1972). However, the~~ The rule adopts the recommendation of the dissenting opinions in *Gillard v. Great Southern Mortgage & Loan Corp.*, 354 So. 2d 794 (Miss. 1978) ~~*supra*~~, and requires that the cost of transferring an action to a court wherein venue is proper shall be borne by the plaintiff. *See Gillard,* ~~*supra*~~, at 798-801 (Sugg and Broom, JJ., dissenting opinions). Additionally, Rule 82(d) secures to the plaintiff the right to select the court to which the ~~his~~ action shall be transferred in the event it is originally brought in the wrong court and there are two or more other courts in which it could properly be filed.

Until the adoption of Rule 82(e), Mississippi had not recognized the doctrine of forum non-conveniens as applicable to the selection of forums within the state. *Clark v. Luvel Dairy Products, Inc.*, 731 So. 2d 1098 (Miss. 1998). Rule 82(e) now recognizes intrastate forum non-conveniens as to actions filed after its adoption on February 19, 2004. The rule recognizes that venue is essentially a legislative matter. However, where there are multiple venues which are all allowable under the statutes, and there are circumstances under which the inconvenience or disadvantage to one or more parties is substantial and a transfer to another county will not work a substantial hardship on the plaintiff, the court will now transfer the case or claim to the more convenient county. The doctrine is one of reason and common sense to be applied to avoid significant geographical disadvantage.

It has been said that modern advancements in technology and transportation have rendered the notion of intrastate forum non-conveniens obsolete. This is an overstatement. Although there is no doubt that many of the logistical difficulties of the past are now of lesser significance, the costs of travel, housing, the proximity of parties, witnesses, and non-trial staff and records remain factors for consideration in determining whether the burdens imposed by the plaintiff's choice of venue justify transfer.

[Comment amended February 20, 2004.]