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OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

Via U.S. Mail

Supreme Court of the State of Mississippi
Attn: Rules Committee on Civil Practice and Procedure
Post Office Box 249
Jackson, MS 39205

Re: Mississippi Rules of Civil Procedure Revision Project;
Proposed amendment to MISS. R. CIV. P. 38.

Dear Committee Members:

At the invitation of the Committee, I propose a revision to the *Mississippi Rules of Civil Procedure* to resolve a conflict between the bench trial provision of the *Mississippi Tort Claims Act* (MTCA) and the right to trial by jury under both Rule 38 of the *Mississippi Rules of Civil Procedure* and the Mississippi Constitution. This conflict arises when both a sovereign entity and a private entity are named as defendants in a lawsuit. Presently, there is no rule or Supreme Court decision to guide how such lawsuits should proceed with regard to the division of fact-finding labor between the court and the jury. The absence of a rule or decision leads to uncertainty in how these cases should proceed at trial and opens the door for the erosion of the parties' respective rights to a bench trial and to a jury trial.

Under the MTCA, the sovereign entity has an absolute right to a bench trial. MISS. CODE ANN. § 11-46-13(1). When a private entity is joined as a codefendant, there is a competing right to a jury trial with respect to the claims asserted against the private entity that is to "be preserved to the parties inviolate." MISS. R. CIV. P. 38(a); see also MISS. COST. art. III, § 31 ("The right of trial by jury shall remain inviolate . . ."). When this conflict arises, the action must either be severed or proceed in a single, bifurcated trial where the judge decides issues of fact related to the sovereign defendant and the jury decides those issues of fact related to the private defendant. While there is a strong policy against severance, proceeding in a single, bifurcated trial is permissible under Mississippi law and promotes efficiency and consistency. Such bifurcated trials are, in fact, conducted with some frequency.

June 2, 2016

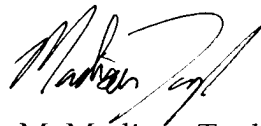
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Litigants and trial judges would benefit from a rule establishing the respective roles of the judge and the jury when this conflict arises. I propose a rule accounting for four principles to protect the parties' rights. First, an action where claims are asserted against both a sovereign entity and a private entity should proceed in a single trial. Second, in that single trial, the judge should independently determine issues of fact necessary to decide the claims against the sovereign entity. Third, the judge should render a decision regarding the sovereign entity before the jury returns a verdict regarding the private entity. Finally, the independent findings of the judge and the jury should be final notwithstanding incongruent results regarding either allocation of fault or apportionment of damages. Such a rule would be well-suited as an additional subsection to Rule 38.

I wrote an article on this conflict that was published by the *Mississippi Law Journal Supra*. That article more fully addresses the conflict, the issues created by the conflict, resolution of the conflict, and the need for a definitive procedure. I have enclosed a copy of this article in the event that the Committee wants to consider this proposal further.

In sum, I propose the promulgation of a rule establishing the procedure for fact-finding in trials when a sovereign entity and a private entity are joined as codefendants as set forth above. Such a rule would help preserve sovereign defendants' right to a bench trial and litigants' right to a jury trial on non-MTCA claims. If the Committee would like any clarification or has any questions, I would welcome the opportunity to discuss this proposal further.

Very truly yours,



M. Madison Taylor

MMT/enf

Enclosure

RESOLVING THE CONFLICT BETWEEN THE BENCH TRIAL PROVISION OF THE MISSISSIPPI TORT CLAIMS ACT AND THE RIGHT OF TRIAL BY JURY UNDER THE MISSISSIPPI CONSTITUTION

*M. Madison Taylor**

INTRODUCTION

When the Mississippi State Legislature waived the state's sovereign immunity from tort suits through the Mississippi Tort Claims Act (MTCA), it did not do so in a vacuum. The provision of the MTCA requiring a bench trial creates a conflict when a plaintiff asserts a claim against both a sovereign entity and a private entity. In such a situation, the Mississippi Constitution and the MTCA have competing provisions: the MTCA provides that the sovereign defendant has a right to a bench trial¹ and the Mississippi Constitution guarantees a right of trial by jury for the claims between private entities.² The Supreme Court of Mississippi has not addressed this conflict in a dispositive manner.

Federal courts interpreting the Federal Tort Claims Act (FTCA) have held that when the United States is sued the plaintiff cannot join other defendants with the government.³ The MTCA, however, clearly contemplates the joinder of private

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¹ MISS. CODE ANN. § 11-46-13(1) (2002).

² MISS. CONST. art. III, § 31. The MTCA does not and cannot abrogate the right of a private entity to a trial by jury under the Mississippi Constitution. *Id.*

³ *See, e.g.,* Uarte v. United States, 7 F.R.D. 705, 708 (S.D. Cal. 1948) ("The denial of [the Seventh Amendment right of trial by jury] is, to my mind, a clear expression that it was intended that the Government should be the only defendant in the case.").

entities as codefendants with the state.⁴ When a plaintiff asserts claims against a sovereign entity and a private entity, there are two viable resolutions to this trier of fact conflict: the court can either sever the action into two trials or the action can proceed in a single, bifurcated trial where the judge decides issues of fact with respect to the sovereign defendant and a jury decides issues of fact with respect to the private defendant. Part II of this Article briefly discusses sovereign immunity and the MTCA. Part II discusses the conflict between the Mississippi Constitution's right of trial by jury and the MTCA's bench trial provision and the ways to resolve this conflict; concluding that a bifurcated trial is the best resolution. Part III highlights remaining issues created by the conflicting provisions of the MTCA and the Mississippi Constitution. Part IV asserts that the current state of the law calls for judicial clarification and sets forth the elements that a clarifying rule should contain.

I. SOVEREIGN IMMUNITY AND THE MISSISSIPPI TORT CLAIMS ACT

The Mississippi Constitution of 1890 provides a right of trial by jury that "shall remain inviolate."⁵ The Mississippi Rules of Civil Procedure reiterate this right in Rule 38(a), which states: "The right of trial by jury as declared by the Constitution or any statute of the State of Mississippi shall be preserved to the parties inviolate."⁶ Despite the bold language of this constitutional provision, the right to a jury is not absolute. The Mississippi Supreme Court held in *Smith v. City of Meridian* that the right to

⁴ Unlike the FTCA, the MTCA anticipates the joinder of private defendants with sovereign entities, as evidenced by the portion of the venue provision which states: "The venue specified in this subsection shall control in all actions filed against governmental entities, *notwithstanding that other defendants which are not governmental entities may be joined in the suit*, and notwithstanding the provisions of any other venue statute that otherwise would apply." MISS. CODE ANN. § 11-46-13(2) (2002) (emphasis added). By stretching the MTCA venue provision to cover situations where there are both private and sovereign defendants in a single action, the legislature clearly had no intention of barring joinder of private entities with sovereign defendants.

⁵ MISS. CONST. art. III, § 31 ("The right of trial by jury shall remain inviolate . . .").

⁶ MISS. R. CIV. P. 38(a). Importantly, this rule uses the plural "parties," thus preserving the right for both defendant and plaintiff.

a jury only applies when a jury would have been required at common law.⁷ Thus, there is no right under the Mississippi Constitution to a jury trial when the legislature creates a cause of action that is in derogation of the common law.⁸ In the MTCA, the Mississippi State Legislature has created such a right.

The common law principle of sovereign immunity provides that states are immune from lawsuits.⁹ In *Alden v. Maine*, the United States Supreme Court held that the United States Congress could not subject a state to suit in the state's own courts absent the state's consent.¹⁰ Through the MTCA, the State of Mississippi has consented to being sued in its own courts under certain circumstances and upon certain conditions.¹¹ Specifically, the legislature provided: "[T]he immunity of the state and its political subdivisions from claims for money damages arising out of the torts of such governmental entities and the torts of their employees while acting within the course and scope of their employment is hereby waived"¹² Thus, the MTCA expressly creates a right that did not exist at common law—the right to sue the state for torts committed by the state, its subdivisions, or its employees. Since the right to sue the state under the MTCA is not a right that existed under the common law, the bench trial

⁷ 115 So. 2d 323, 326 (Miss. 1959) ("Section 31 of the Mississippi Constitution . . . applies only to those cases where a jury was necessary according to the principles of the common law." (citing *Walters v. Blackledge*, 71 So. 2d 433 (Miss. 1954))).

⁸ *Wells v. Panola Cnty. Bd. of Educ.*, 645 So. 2d 883, 898 (Miss. 1994). The Court explained:

The right to jury trial guaranteed by Section 31 applies only to those cases in which a jury trial was necessary *at common law*. At common law, suits such as *Wells*' against the State were not available at all, due to sovereign immunity. Therefore, Section 31 does not apply to the purely statutory remedy provided by the Accident Contingent Fund.

Id.

⁹ See Bradley K. Overcash, *Historical Context Important in Defense of Clients Under the MTCA*, MISS. DEF. LAW. ASS'N Q. 9 (Spring 2010), available at <http://www.wilkinstipton.com/userfiles/MDLA.pdf>.

¹⁰ 527 U.S. 706, 754 (1999) ("In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation.")

¹¹ MISS. CODE ANN. §§ 11-46-1 to -23 (2002).

¹² *Id.* at § 11-46-5(1).

provision of the MTCA does not violate the Mississippi Constitution.

II. THE CODEFENDANT CONFLICT

A. The Anatomy of the Conflict

When a claim is asserted against a single, private defendant, a jury sits as the trier of fact in accordance with Mississippi's constitutional mandate. Conversely, the bench trial provision of the MTCA provides that a suit against a sovereign entity shall be decided without a jury at a bench trial.¹³ Importantly, the bench trial provision of the MTCA clearly has neither the intention nor the authority to abrogate the private entity's right to a jury.

The trier of fact dichotomy breaks down when a plaintiff asserts claims against both a sovereign entity and a private entity. For example, a plaintiff could be injured by an automobile collision between a government employee (the sovereign defendant) and a private person.¹⁴ These codefendants then have competing rights. The sovereign defendant has a right to a bench trial properly conferred by the MTCA in derogation of common law. The plaintiff and the private defendant have a right under the Mississippi Constitution to have a jury decide all claims between the plaintiff and the private defendant.¹⁵ This conflict can also arise if a sovereign entity is sued and asserts a counterclaim against the original plaintiff. In that scenario, the original claim arising under the MTCA would merit a bench trial, while the plaintiff, against whom the counterclaim is asserted, has a right to a jury trial.¹⁶ Although the conflicting provisions of the

¹³ *Id.* at § 11-46-13(1) ("The judge of the appropriate court shall hear and determine, without a jury, any suit filed under the provisions of this chapter.")

¹⁴ This example is taken from Murry J. Waldman, *Contribution, Indemnity, Impleader and Joinder Under the Federal Tort Claims Act*, 100 U. PA. L. REV. 562, 571 (1952).

¹⁵ The jury trial provision found in article three, section 31 of the Mississippi Constitution applies to both plaintiffs and defendants. Accordingly, the plaintiff generally has a right to a jury except where the legislature has created a cause of action in derogation of common law such as the MTCA.

¹⁶ See Jim Fraiser, *A Review of the Substantive Provisions of the Mississippi Governmental Immunity Act: Employees' Individual Liability, Exemptions to Waiver of*

MTCA and the Mississippi Constitution can arise in a variety of ways, this Article primarily addresses the situation in which a sovereign entity and a private entity are joined as codefendants.

B. Resolving the Conflict

The United States Supreme Court has stated that the trial court's discretion "must, wherever possible, be exercised to preserve jury trial."¹⁷ One way to resolve the conflict is to sever the action into two trials where one will proceed as a bench trial and the other as a jury trial according to each defendant's rights. Severance neatly respects the competing right to bench trial and right to jury trial, but is grossly inefficient and disfavored under Mississippi law. Another solution is to proceed with a single, bifurcated trial where the judge sits as the trier of fact for issues related to the sovereign defendant and the jury is the trier of fact for the private defendant. Although either course creates ancillary issues, bifurcation more fully respects the competing rights while promoting judicial efficiency and justice.

1. Severance

One way to resolve this conflict is to sever the action into two trials. Severance would allow the claims against the sovereign defendant to be tried at a bench trial and the claims against the private entity to be tried before a jury. Mississippi Rule of Civil Procedure 42(b) provides that separate trials may be ordered for convenience, to avoid prejudice, or for expedition and economy.¹⁸

Immunity, Non-Jury Trial, and Limitation of Liability, 68 Miss. L.J. 703, 837-42 (1999).

¹⁷ *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 509 (1959). Although the Seventh Amendment is not enforceable against the states, Mississippi has used Seventh Amendment cases when interpreting the Mississippi Constitution's jury trial provision. *E.g.*, *Wells v. Panola Cnty. Bd. of Educ.*, 645 So. 2d 883, 898 (Miss. 1994) ("While the Seventh Amendment to the United States Constitution does not apply to trials in state courts, a useful analogy is provided by a federal case weighing a Seventh Amendment challenge.").

¹⁸ Miss. R. Civ. P. 42(b). Rule 42(b) states:

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 claims . . . or of any separate issue

Federal courts have interpreted the FTCA as preventing plaintiffs from joining private entities as codefendants with the government altogether.¹⁹ Like the MTCA, the FTCA requires that actions against the federal government be tried without a jury.²⁰ Discussing this codefendant conflict, a federal district court sitting in California reasoned in *Uarte v. United States* that:

[T]he statute specifically denies a jury trial. As the Government need not have given its consent to sue, when it did give it, it could condition it upon any grounds it chose. One of them is that the trial as to the person suing the Government shall be *without a jury*.²¹

The court continued, “The denial of [the Seventh Amendment right of trial by jury] is, to my mind, a clear expression that it was intended that the Government should be the only defendant in the case.”²² Judge Yankwich, who authored the *Uarte* decision, later expounded on this rationale:

[S]ome of the district judges, including myself, have taken the view that the [Federal Tort Claims] Act does not warrant joinder of tort feorsors as defendants. We find support for this view in the legislative history, in the denial of a jury trial which, if applied to an individual joint tort feorsor, would make the Act unconstitutional and in the fact that the Supreme Court, in interpreting another broad immunity waiver statute,—the Tucker Act—has rejected joinder, despite the fact that the liberal rules of

or of any number of claims . . . always preserving inviolate the right of trial by jury as declared by Section 31 of the Mississippi Constitution of 1890.

Id.

¹⁹ See, e.g., *Uarte v. United States*, 7 F.R.D. 705, 707-08 (S.D. Cal. 1948).

²⁰ 28 U.S.C. § 2402 (2006) (“Subject to chapter 179 of this title, any action against the United States under section 1346 shall be tried by the court without a jury . . .”).

²¹ *Uarte*, 7 F.R.D. at 707.

²² *Id.* at 708. Unlike the FTCA, the MTCA contemplates the joinder of private entities. See *supra* note 4 and accompanying text.

joinder of the Federal Rules of Civil Procedure are made applicable to suits brought under the Act.²³

Similarly, a federal district court sitting in Virginia found that “[t]he [Federal Tort Claims] Act’s terms imply no right of joinder against the Government’s will.”²⁴

Although the MTCA clearly contemplates joinder of private entities as codefendants,²⁵ the federal courts’ rationale for disallowing joinder could be applied to support severance of actions against both a sovereign entity under the MTCA and a private entity. The Mississippi Supreme Court has, however, strongly cautioned against severance. In *Adams v. Baptist Memorial Hospital*,²⁶ Mary Jane Adams, a resident of Virginia, was injured at Goldstrike Casino in Tunica County and received treatment for the injury at Baptist Memorial Hospital in DeSoto County.²⁷ She was released from the hospital and died in her sleep the next day.²⁸ Her husband filed a wrongful death action in Tunica County against Goldstrike for the initial injury and against three medical defendants for malpractice at the hospital.²⁹ The trial court granted a motion to transfer venue to DeSoto County for the medical defendants only and denied Goldstrike’s joinder motion; effectively severing the personal injury and medical malpractice claims.³⁰ The Mississippi Supreme Court heard an interlocutory appeal and held that the action should not be severed.³¹ In so holding, the court strongly asserted that severance is a disfavored resolution.³² The court’s rationale was that severance would not promote judicial efficiency;³³ would be

²³ Hon. Leon R. Yankwich, *Problems Under the Federal Tort Claims Act*, 9 F.R.D. 143, 154-55 (1949) (alteration in original) (citation omitted).

²⁴ *Drummond v. United States*, 78 F. Supp. 730, 731 (E.D. Va. 1948) (alteration in original).

²⁵ See *supra* note 4 and accompanying text.

²⁶ 965 So. 2d 652 (Miss. 2007).

²⁷ *Id.* at 653.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 654.

³¹ *Id.* at 655.

³² *Id.*

³³ *Id.* (“These rules shall be construed to secure the just, speedy, and inexpensive determination of every action.” (quoting MISS. R. CIV. P. 1)).

inconsistent with Mississippi's statute regarding joint tortfeasors;³⁴ and "would create, and almost certainly would result in, inconsistent holdings, including apportionment of fault."³⁵ Although this case did not arise under the MTCA, the court specifically noted: "[t]his analysis is applicable not only in wrongful death actions, but in other suits as well, because splitting the cause of action is prohibited by prior decisions of this [c]ourt and most certainly would lead to inconsistent verdicts by the separate juries."³⁶

The court in *Adams* cited its decision in *Alexander v. Elzie* for the proposition that Mississippi does not allow severance of causes of action.³⁷ The *Alexander* court held that "Res Judicata and the issue of splitting a cause of action are closely related."³⁸ Noting that Mississippi, along with the majority of jurisdictions, adopts the rule barring severance of a cause of action,³⁹ the court expressly adopted the rule and rationale against splitting actions as written in the Restatement of Judgments.⁴⁰ Comment (a) to section sixty-two of the Restatement of Judgments explains this rationale:

The rule stated in this Section is based on the idea that where a person has a single cause of action, in the interests of

³⁴ *Id.* (citing MISS. CODE ANN. § 85-5-7 (2011)).

³⁵ *Id.*

³⁶ *Id.* (noting that sections 11-7-13 and 85-5-7 of the Mississippi Code disallow severance). Unlike the case in *Adams*, an action against both a sovereign entity and a private entity would lead to inconsistent results regardless of whether the issues are severed or consolidated. Essentially, the concern about inconstant results is implicated by either resolution to the conflict between the MTCA and Mississippi Constitution. See *infra* Part III.B.

³⁷ *Id.* (citing *Alexander v. Elzie*, 621 So. 2d 909 (Miss. 1992)).

³⁸ *Alexander*, 621 So. 2d at 910 (citing *Rosenthal v. Scott*, 150 So. 2d 433, 436 (Fla. 1963)). The *Alexander* court stated:

Where a claim has been previously litigated, all grounds for, or defenses to recovery that were available to the parties in the first action, regardless of whether they were asserted or determined in the prior proceeding, are barred from re-litigation in a subsequent suit under the doctrine of res judicata.

Id. (citing *Dunaway v. W.H. Hopper & Assoc.*, 422 So. 2d 479 (Miss. 1982)).

³⁹ *Id.* ("Mississippi is among the majority of states which does not allow splitting a cause of action.")

⁴⁰ *Id.*

convenience and economy to the public and to the defendant he should be entitled to but one right of action and hence should be required to unite in one proceeding all matters which are part of it.⁴¹

Additionally, the court cited a prior decision which adopted the rationale of another jurisdiction in deciding that severance is strongly disfavored:

[A] rule of construction should be adopted which will most speedily and economically bring litigation to an end, if at the same time it conserves the ends of justice. There is nothing to be gained in splitting up the rights of an injured party . . . and much may be saved if one action is made to cover the subject.⁴²

Adams, Alexander, and the cases upon which they rely constitute a forceful doctrine that severance is strongly disfavored in Mississippi. There is no indication that this doctrine should not be applied to actions arising under the MTCA.

2. Bifurcated Trial

If the claims are not severed, the action must then proceed as a single, bifurcated trial. Whatever severance might accomplish in preventing prejudice, the other three considerations in Rule 42(b) for determining when severance is appropriate—convenience, expedition, and economy—are far better served by a bifurcated trial.⁴³ Proceeding in a single trial appears to be an accepted (and unchallenged) practice in Mississippi.⁴⁴ Again, in the absence of state court decisions directly on point, it is informative to look to federal courts' interpretation of the FTCA. While some federal courts have held that the United States cannot be joined as a

⁴¹ RESTATEMENT (FIRST) OF JUDGMENTS § 62 cmt. a (1942).

⁴² *Alexander*, 621 So. 2d at 910 (quoting *Kimball v. Louisville and Nat'l R.R. Co.*, 48 So. 230, 231 (Miss. 1909)). The *Alexander* Court quoted the Supreme Court of Minnesota's decision in *King v. Chicago, Milwaukee, & Saint Paul R.R. Co.*, noting that the holding was expressly adopted by the Supreme Court of Mississippi in *Kimball. Id.* (quoting 82 N.W. 1113 (Minn. 1900)).

⁴³ MISS. R. CIV. P. 42(b).

⁴⁴ See, e.g., *Univ. of Miss. Med. Ctr. v. Gore*, 40 So. 3d 545, 547 (Miss. 2010).

codefendant,⁴⁵ other courts have held to the contrary. The United States District Court for the District of Maryland held in *Englehardt v. United States* that the United States could be sued under the FTCA and joined as a codefendant with a private entity.⁴⁶ The court reasoned that the purpose of the FTCA was to make the government liable where a private person would be liable under the same circumstances.⁴⁷ Citing *Englehardt*, the United States District Court for the District of New Jersey also held that the United States could be joined as codefendant along with a private entity.⁴⁸

In *Estate of Jones v. Quinn*,⁴⁹ the Mississippi Supreme Court expressed its preference for single trials against multiple defendants. In *Quinn*, a plaintiff asserted claims against numerous defendants including both private entities and sovereign entities.⁵⁰ The defendants moved for severance on the grounds that venue for the private defendants was proper in the counties in which they reside.⁵¹ The Mississippi Supreme Court upheld the trial court's determination that severance was not proper despite the fact that venue had been determined by the inclusion of a sovereign defendant that had since been dismissed from the suit.⁵² The court reasoned: "When there is more than one possible proximate cause of an injury, brought about by the

⁴⁵ *See supra* Part II.B.1.

⁴⁶ *Englehardt v. United States*, 69 F. Supp. 451, 452-53 (D. Md. 1947).

⁴⁷ *Id.* at 452-53. The court first reasoned that there was no indication that Congress intended "to restrict suits against the United States to cases where it alone is sued." *Id.* at 452. Further, the court stated that "[t]he contrary seems . . . to follow from the express provision that the United States may be sued under circumstances where *if a private person*, would be liable to the plaintiff for damages, in accordance with the law of the place where the act or omission occurred." *Id.* at 453.

⁴⁸ *Bullock v. United States*, 72 F. Supp. 445, 445-46 (D. N.J. 1947) (reasoning that the FTCA contains an express provision that the court-promulgated Federal Rules of Civil Procedure apply to actions arising under the FTCA and these rules in turn provide for joinder of parties).

⁴⁹ 716 So. 2d 624 (Miss. 1998).

⁵⁰ *Id.* at 625.

⁵¹ *Id.* at 626-27.

⁵² *Id.* at 627-28. The court reasoned that venue was properly determined by the MTCA (section 11-46-13(2) of the Mississippi Code) to the exclusion of other venue provisions. *Id.*

negligence of more than one party, the purposes of the applicable rules best would be served by a single trial.”⁵³

Considering the Mississippi courts’ strong aversion to severance,⁵⁴ a bifurcated trial provides the best resolution to the trier of fact conflict between the MTCA and the Mississippi Constitution. Additionally, bifurcated trials are not uncommon in state courts.⁵⁵ Perhaps the greatest factor in favor of single bifurcated actions is, as the Mississippi Supreme Court has noted, that severing actions is grossly inefficient.⁵⁶ In many cases where this trier of fact conflict exists, the factual issues will be largely if not completely identical.⁵⁷ Additionally, keeping the actions together prevents the jury trial portion from infringing on the bench trial provision and vice versa.⁵⁸

III. REMAINING ISSUES

A. *The Appropriate Role for the Jury*

If the case is tried as a bifurcated trial, it can proceed in two ways: total bifurcation or partial bifurcation. In a partially bifurcated trial, claims against both the sovereign defendant and the private defendant are submitted to the jury and the judge treats the jury’s findings as to the sovereign defendant as advisory. In a totally bifurcated trial only the claims against the private entity (including the issues of allocation of fault and apportionment of damages) are submitted to the jury.

The partial bifurcation approach was utilized by the trial court in *University of Mississippi Medical Center v. Gore*.⁵⁹ In *Gore*, the trial proceeded with the State of Mississippi joined as a

⁵³ *Id.* at 629 (quoting *Kiddy v. Lipscomb*, 628 So. 2d 1355, 1358 (Miss. 1993)).

⁵⁴ *See supra* Part II.B.1.

⁵⁵ *E.g.*, *Univ. of Miss. Med. Ctr. v. Gore*, 40 So. 3d 545 (Miss. 2010).

⁵⁶ *Adams v. Baptist Mem’l Hosp.*, 965 So. 2d 652, 655 (Miss. 2007) (citing Miss. R. Civ. P. 1).

⁵⁷ *See, e.g.*, *Waldman. supra* note 14. at 571 (noting that the majority of cases involving this trier of fact conflict under the FTCA involves a government employee’s vehicle colliding with a private individual’s vehicle, causing plaintiff’s injuries).

⁵⁸ *See infra* Part III.

⁵⁹ 40 So. 3d 545 (Miss. 2010).

codefendant with a private party.⁶⁰ University of Mississippi Medical Center, the sovereign entity within the purview of the MTCA, requested that questions regarding its liability be submitted to the jury for an advisory verdict.⁶¹ The motion was granted, and at the conclusion of the trial, the jury determined that neither UMC nor the private entity defendant was liable.⁶² However, the trial judge disagreed with the jury's advisory verdict and entered judgment against UMC.⁶³ The Mississippi Supreme Court ultimately reversed the trial court's judgment against UMC.⁶⁴ Although the Court did not address the joinder issue on appeal, *Gore* illustrates how this conflict is playing out in the courts.

Total bifurcation, where only the issues related to the private defendant are submitted to the jury, offers substantial advantages over submitting everything to a jury and treating a jury's finding as to the sovereign defendant as advisory. One troubling aspect of the trial procedure in *Gore* is that UMC was wholly involved in the jury portion of the trial which did not affect UMC. By participating in *voir dire*, submitting jury instructions, and arguing its case to the jury, UMC was able to wield control over the jury portion of the bifurcated trial.⁶⁵ Total bifurcation prevents a sovereign defendant from intermeddling in the jury trial. Upholding a bifurcated trial, the Louisiana Court of Appeal reasoned that total bifurcation is preferable:

We note that nothing in the law or the jurisprudence inhibits a judge from adopting a jury's decision in a bifurcated trial, so long as he has independently considered the law and evidence first. Procedurally, the better trial procedure in

⁶⁰ *Id.* at 551-52.

⁶¹ *Id.*

⁶² *Id.* at 552.

⁶³ *Id.*

⁶⁴ *Id.* at 557.

⁶⁵ *Id.* at 551-52. This degree of involvement in the jury portion of a bifurcated trial by a sovereign defendant is intolerable. A sovereign defendant's involvement with the jury has far-reaching implications including affecting allocation of fault and apportionment of damages which are already compromised by the conflicting provisions of the MTCA and the Mississippi Constitution of 1890. See *infra* Part III.B.

bifurcated trials, in order to avoid this issue, would be for the trial judge to either prepare a judgment while the jury is deliberating and render the judgment contemporaneously with the jury verdict or render reasons for judgment as to the public defendants at the appropriate time.⁶⁶

This approach advocated by the Louisiana Court of Appeal most fully respects the solemn rights of the private defendant to a jury trial and the sovereign defendant to a bench trial. Although the advisory jury approach is acceptable under Mississippi law, the result is that the jury trial bleeds into the bench trial. Conversely, preparation of a bench ruling before the jury returns a verdict will achieve the same independent results as severed trials, while maximizing judicial efficiency.

B. Inconsistent Determinations

Allocation of fault and apportionment of damages are intertwined, and the conflict between the MTCA's bench trial provision and the Mississippi Constitution's jury trial provision sets the stage for inconsistent allocation and apportionment. Both the judge and the jury must make independent allocations of fault between the sovereign defendant and the private defendant pursuant to section 85-5-7 of the Mississippi Code.⁶⁷ Mississippi's rule allocating a percentage of fault to each defendant prevents many potential issues related to contribution and indemnity.⁶⁸ Although the allocation determined by the judge and the allocation determined by the jury will most likely differ, that does

⁶⁶ *Clement v. Griffin*, 634 So. 2d 412, 423 (La. Ct. App. 1994).

⁶⁷ MISS. CODE ANN. § 85-5-7(2) (2011). The code provides in part:

Except as otherwise provided in subsection (4) of this section, in any civil action based on fault, the liability for damages caused by two (2) or more persons shall be several only, and not joint and several and a joint tort-feasor shall be liable only for the amount of damages allocated to him in direct proportion to his percentage of fault.

Id.

not invalidate the single bifurcated action. Regarding such a discrepancy, the Federal District Court for the District of Montana reasoned:

Given enough cases, sooner or later judges and juries trying identical issues on identical but conflicting evidence are bound to disagree. Disquieting as it may be, I know of no rule of law which requires a judge as a fact-finder to conform his findings to those reached by a jury, or vice versa. As I see it, the law is to the contrary.⁶⁹

Although a judge might remedy inconsistent findings by entering a judgment notwithstanding the verdict under Rule 50,⁷⁰ a jury's determination generally should not be overridden merely because an award is too low or too high.⁷¹

Severing the action into two trials would not mitigate the problem of inconsistent allocations of fault. If anything, incongruent allocations of fault are more likely to occur when the action is severed due to variations in the proceedings. Inconsistent allocation of fault among parties is an inherent danger in this conflict between the MTC and the Mississippi Constitution. The problem of inconsistent allocation of fault cannot be remedied under the current rules, or obviated with a new rule, without infringing on other rights. The fact that the separate allocations of fault made by the judge and the jury will not likely equal one hundred percent in any given trial is an acceptable, even if uncomfortable, outcome.⁷²

When the judge and jury independently apportion fault,⁷³ the percentages determined by each will not always total one hundred percent. Such inconsistent allocations of fault can lead to discrepancies in the award of damages. One plausible scenario is

⁶⁸ See generally Waldman, *supra* note 14, at 563-69 (discussing issues related to suits for contribution and indemnity against the United States and the fact that such actions are based upon jury verdicts which erode the FTCA's bench trial provision).

⁶⁹ *Wright v. United States*, 472 F. Supp. 1153, 1157 (D. Mont. 1979).

⁷⁰ Miss. R. Civ. P. 50(b).

⁷¹ See, e.g., *Ross-King-Walker, Inc. v. Henson*, 672 So. 2d 1188, 1193-94 (Miss. 1996).

⁷² See *infra* notes 75-76 and accompanying text.

⁷³ See Miss. CODE ANN. § 85-5-7 (2011).

that the judge's allocation and the jury's allocation will leave the plaintiff shorthanded. For example, consider a hypothetical plaintiff whose damages are stipulated at \$100,000. The judge allocates twenty-five percent of the fault to the sovereign defendant, and the jury allocates twenty-five percent of the fault to the private defendant. The plaintiff has been awarded only \$50,000 despite the parties' stipulation that the damages are \$100,000.

In another related and more severe situation, the judge could determine that the sovereign defendant is not at fault, believing the private defendant to be totally at fault. At the same time, the jury could determine that the private defendant is not at fault, believing that the sovereign defendant is totally at fault. In this scenario, the plaintiff would have received full recovery at either a bench trial or a jury trial, but because of the conflict between the Mississippi Constitution and the MTCA, he receives no recovery.

The danger of inconsistent allocation of fault is a lingering issue when the inviolate right to jury and the MTCA's bench trial provision collide. This issue is just as likely to occur whether the action is severed or it proceeds at a bifurcated trial. If the claims are severed into two trials and the trier of fact in one trial makes a determination of liability, collateral estoppel could apply to the other still-pending action. If an issue that was litigated at a bench trial is raised at a subsequent jury trial, "relitigation of the issue before a jury might be foreclosed by *res judicata* or collateral estoppel."⁷⁴ Barring relitigation of common issues would allow a judge's determination in the bench trial (to which the private defendant is not a party) to infringe on the private defendant's right to have issues of fact determined by a jury. This is also true of the reverse situation where the bench trial occurs subsequent to the jury trial. Ironically, by keeping these claims in a single action, it is easier to prevent one from eroding the rights of the other defendant.

Although inconsistent allocations of fault and awards of damages can result in uncomfortable outcomes, these outcomes

⁷⁴ *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 550 (1990) (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 334 (1979)).

are tolerable. Incongruous apportionments also occur when one of multiple defendants settles prior to a jury verdict.⁷⁵ The jury must determine the total damages to which the plaintiff is entitled and accordingly apportion fault among those determined to be responsible parties. While the jury may apportion a percentage of fault to a defendant who has settled, the jury's apportionment will have no effect on the settlement, and likewise, the settlement value has no impact on the jury's apportionment.⁷⁶ Notably, it is a canon of criminal law that inconsistent jury verdicts are not sufficient reason to overturn a conviction.⁷⁷ The United States Supreme Court reasoned that inconsistent verdicts within a single trial are tolerable because the windfall can be garnered by either the state or defendant, depending on the circumstances.⁷⁸ This logic can be imported from criminal jurisprudence to allow for inconsistent findings to stand in a bifurcated MTCA trial.

IV. THE NEED FOR JUDICIAL CLARIFICATION

Proceeding in a single, bifurcated trial is certainly permissible under the current rules, but there is no directive to that effect. Although the Mississippi State Legislature properly created a cause of action in the Mississippi Tort Claims Act in

⁷⁵ See, e.g., *Krieser v. Hobbs*, 166 F.3d 736 (5th Cir. 1999). In *Krieser*, the defendant-physician settled early in the trial for \$650,000, leaving another physician and a hospital as defendants in the action. *Id.* at 738.

⁷⁶ See *id.* In *Krieser*, the jury found that damages totaled \$200,000 and apportioned fault as follows: the defendant-physician who settled prior to the verdict was fifty percent liable, the hospital-defendant was fifty percent liable, and the defendant-physician who had not settled was not liable. *Id.* The hospital then moved to have the pre-verdict settlement credited against the verdict. *Id.* The Fifth Circuit held that neither the pre-verdict settlement nor the verdict had an effect on the other and the plaintiff was "entitled to the fruits of each method of dispute-resolution." *Id.* at 745.

⁷⁷ See, e.g., *Culp v. State*, 933 So. 2d 264, 279 (Miss. 2005) (citing *Holloman v. State*, 656 So. 2d 1134, 1141 (Miss. 1995)). In *United States v. Powell*, the United States Supreme Court addressed a situation where a defendant was acquitted of a predicate offense and convicted of the compound offense, but the Court held that this was not grounds to vacate the conviction. 469 U.S. 57, 60-61 (1984).

⁷⁸ *Id.* at 66 (The court reasoned that in the event of inconsistent verdicts, "it is unclear whose ox has been gored. . . . [T]he possibility that the inconsistent verdicts may favor the criminal defendant as well as the Government militates against review of such convictions at the defendant's behest.")

derogation of common law,⁷⁹ under *Newell v. State*,⁸⁰ it is solely within the providence of the judiciary to promulgate a procedural rule to resolve the resulting procedural conflicts.⁸¹ The Supreme Court of Mississippi should, in the interest of uniformity and due process, promulgate a rule to clarify the procedural conflict with the Mississippi Constitution's right of trial by jury⁸² created by the MTCA's bench trial provision.

The rule crafted to address this conflict should prescribe four principles. First, an action where claims are asserted against both a sovereign entity and a private entity should proceed in a single trial.⁸³ Second, in the single trial, the judge should independently determine issues of fact necessary to decide the claims against the sovereign entity, and the jury should independently determine issues of fact necessary to decide the claims against the private entity.⁸⁴ Third, the judge should render a decision regarding the sovereign entity prior to the jury verdict regarding the private entity.⁸⁵ Finally, the independent findings of the judge and the jury should be final notwithstanding incongruent results regarding either allocation of fault or apportionment of damages.⁸⁶

Judicial clarification is necessary so that cases presenting this conflict are resolved in the same manner, thereby ensuring consistent application of judicial principles. A rule encapsulating

⁷⁹ See *supra* Part I.

⁸⁰ 308 So. 2d 71 (Miss. 1975).

⁸¹ *Id.* at 77 (holding that section 144 of Mississippi's Constitution "leaves no room for a division of authority between the judiciary and the legislature as to the power to promulgate rules necessary to accomplish the judiciary's constitutional purpose").

⁸² MISS. CONST. art. III, § 31.

⁸³ See *supra* Part II.B.

⁸⁴ This is necessary to preserve the sovereign entity's right to a bench trial under the MTCA and the private entity's right to a jury under Mississippi's constitution. See *supra* Part II.A.

⁸⁵ See *supra* Part III.A.

⁸⁶ See *supra* Part III.B. Of course, it would remain within the judge's discretion to grant a JNOV under Rule 50(b) of the Mississippi Rules of Civil Procedure on the claims against the private entity. It is important, however, that judges in bifurcated trials do not use the power of JNOV as a means to reconcile incongruent findings. Inappropriate use of JNOV would impermissibly undercut the private entity's inviolate right of trial by jury. Likewise, the judge in a bifurcated trial could grant a motion for new trial under Rule 59 of the Mississippi Rules of Civil Procedure (including any contingent additur or remittitur under section 11-1-55 of the Mississippi Code), but should refrain from doing so simply to remedy incongruent results.

the above principles would comport with both Mississippi jurisprudence and the Mississippi Rules of Civil Procedure. Most importantly, this proposed system most fully protects the rights of the sovereign State and the constitutional rights of the private individual. Holding a bifurcated trial where the judge renders a decision on the claims against the sovereign defendant, before the jury renders a verdict on the claims against the private defendant, fully respects the limited nature of the MTCA's waiver of sovereign immunity by effectuating the bench trial provision of the Mississippi Constitution. The private entity's inviolate right of trial by jury is likewise preserved by having the jury independently decide the claims against it. Proceeding in a single, bifurcated trial best serves the competing rights of the parties and promotes judicial efficiency by avoiding duplicative severed trials.

CONCLUSION

The Mississippi Tort Claims Act's bench trial provision is in conflict with the Mississippi Constitution's jury trial provision when a sovereign entity is joined as a codefendant with a private entity.⁸⁷ When the conflicting provisions of the MTCA and the Mississippi Constitution clash, the only available solutions are to sever the actions or have them proceed in one bifurcated trial where the judge decides issues of fact related to the sovereign defendant and the jury decides those issues of fact related to the private defendant. Severance is strongly disfavored under Mississippi law.⁸⁸ Conversely, proceeding in a single bifurcated action is permissible under Mississippi law and better serves the ultimate, conflicting goals of preserving the sovereign defendant's right to a bench trial and the private defendant's right of trial by jury.⁸⁹ At a bifurcated trial, the trial should remain totally bifurcated where the judge renders a decision before the jury announces its verdict, rather than partially bifurcated where the jury serves in an advisory capacity on issues related to the

⁸⁷ See *supra* Part II.A.

⁸⁸ See *supra* Part II.B.1.

⁸⁹ See *supra* Part II.B.2.

sovereign defendant.⁹⁰ Though issues regarding apportionment of fault and inconsistent awards remain with a single bifurcated trial, they would only be exacerbated by severing the actions. The current state of this conflict between the Mississippi Constitution and the Mississippi Tort Claims Act would benefit from judicial clarification.⁹¹

⁹⁰ See *supra* Part III.A.

⁹¹ See *supra* Part IV.