

STATE OF VERMONT  
ORANGE COUNTY, SS

FILED  
JAN - 7 1994  
ORANGE SUPERIOR

NICOLE GRAY and JAN GRAY, )  
individually and as personal )  
representative of JOSHUA GRAY )  
vs )  
GIFFORD MEMORIAL HOSPITAL, INC. and )  
BRENT BURGEE, M.D. )

ORANGE SUPERIOR COURT  
DOCKET NO. S27-91 Oec

ENTRY ORDER

DEFENDANT BURGEE'S MOTION TO BIFURCATE

Defendant Brent Burgee, M.D., by his attorney David L. Cleary, has moved to bifurcate the issues of liability and damages in this action which is scheduled for jury draw on January 17, 1994. Plaintiffs, by their attorney Gareth H. Caldbeck, Esq., oppose the motion. A telephone hearing was held on January 7, 1994. Ritchie E. Berger, Esq. joined in the motion on behalf of Defendant Gifford Memorial Hospital, Inc. Mr. Cleary was not present for the telephone hearing.

This is a medical malpractice action in which the Plaintiffs seek recovery against Defendants based on alleged negligence resulting in a stillbirth. Damages are claimed under the wrongful death statute, 14 V.S.A. Sec 1491 and 1492.

Under V.R.C.P. 42(b), the decision to bifurcate is within the discretion of the trial court. Through case law developed under the comparable federal rule, three factors have emerged as the relevant factors for the court to consider: whether bifurcation will expedite disposition of the case and conserve judicial resources; whether bifurcation would avoid prejudice that would otherwise appear in the case; and whether the two issues can be treated

independently for evidentiary purposes.

The court is not persuaded that the risk of prejudice is compelling in this case. While damages testimony may arouse some sympathy on the part of jurors, there is no reason to think that jurors cannot sort out whether the sad event of a stillbirth occurred due to negligence on the part of defendants or due to some other cause.

The Plaintiffs, in their memorandum in opposition, have represented that some of the testimony of Plaintiff Nicole Gray relates to both liability and damages. If the hearing were bifurcated, her testimony concerning pain symptoms during the labor process would either have to be repeated at the damages stage, which would result in duplication of testimony, or the jury would have to be reminded of it without full repetition, which would interfere with the Plaintiffs' opportunity to present their case in context. Nicole Gray's testimony about pain and other physical sensations she experienced during labor are critical to both parts of the case. The court concludes that because of this the evidence on the liability and damages issues are not able to be presented independently.

As to the third factor, it is not clear that bifurcation would expedite resolution of the case. In the event liability were found, bifurcation could actually result in a lengthier process because of the need to repeat or at least make reference to prior testimony of the parents about the period of labor. Thus this case is not distinguishable from the majority of cases in which efficiency is best promoted by a unified hearing on all issues.

Upon consideration of the above factors, the court determines that there is not a sufficiently compelling reason or combination of reasons to depart from the usual format of a unified hearing. Therefore, Defendant Burgee's Motion to Bifurcate is DENIED.

Dated at Chelsea, Vermont this 7th day of January, 1994.

Mary Miles Teachout  
Mary Miles Teachout  
Superior Judge