

<b>Pangburn v CSX Transp., Inc.</b>
2017 NY Slip Op 32842(U)
August 18, 2017
Supreme Court, Erie County
Docket Number: I2014-806224
Judge: Donna M. Siwek
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STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

KEVIN A. PANGBURN,

*Plaintiff,*

v.

Index No. I2014-806224

CSX TRANSPORTATION, INC.,

*Defendant,*

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SIWEK, J.,

**MEMORANDUM DECISION**

Defendant CSX Transportation, Inc. ("CSX") moves for an order bifurcating the trial with the issue of liability tried first and the damages issue tried only if necessary, pursuant to CPLR §603, 22 NYCRR §202.42(a), due process clause, applicable common law and case law. The motion for bifurcation is opposed by plaintiff Kevin A. Pangburn. The motion was argued June 29, 2017 and was held in abeyance by agreement of counsel for the purpose of engaging in settlement negotiations. The parties were unable to come to a settlement, and the motion was deemed submitted as of August 10, 2017. The trial of this case is scheduled for jury selection on

September 21, 2017, with proof to go five days, beginning on September 25, 2017.

Trial courts are “encouraged” to order a bifurcated trial in any action for personal injury where it appears that bifurcation may assist in clarification or simplification of issues and a fair and more expeditious resolution of the action. See, 22 NYCRR §202.42(a), *Edwards v Devine*, 111 A.D.3d 1370 (4th Dept. 2013). However, where the nature of the plaintiff’s injuries has an important bearing or is probative on the question of liability, a unified trial should be held. See, *Booker v. Mart Corp.* (4<sup>th</sup> Dept. 2004) and *Guizzotti v. English*, 273 A.D.2d 937 (4<sup>th</sup> Dept. 2000). A single trial on both liability and damages is warranted when medical evidence concerning the nature of the party’s injuries is necessary in order to corroborate a party’s version of how the accident happened. See, *Roman v. McNally*, 99 A.D.2d 544 (2d Dept. 1984) and *Guizzotti, supra*. The party opposing bifurcation bears the burden of showing that the nature of the injuries necessarily assists the fact finder in determining the issue of liability. Ultimately, the decision as to whether to conduct a unified or bifurcated trial rests within the discretion of the trial court and should not be disturbed absent an improvident exercise of that discretion.

The instant case is brought pursuant to Federal Employers Liability Act (“FELA”) as the result of injuries plaintiff claims to have sustained in the course and scope of his employment as a trackman with CSX on July 5, 2011. Plaintiff was descending from the bed of a CSX truck that was equipped with two sets of stairs; one permanent set of stairs that was built into the bed of the truck with three non-movable stairs and another set of stairs consisting of two movable pull-out steps. It was in the course of utilizing the movable steps that plaintiff claims that his foot slipped off the step and away from the truck, causing him to lose his balance and lose his grip on the railing with his left hand while maintaining his grip with his right hand and was caused to hang

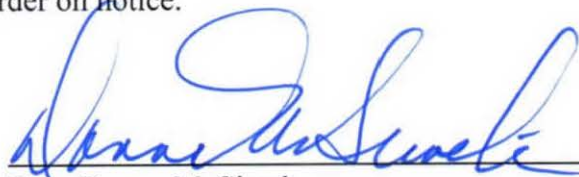
with his full weight on his right hand and shoulder. Plaintiff claims to have felt immediate pain and heard a pop in his right arm. Plaintiff was ultimately diagnosed with a brachial plexus injury, leaving him with a significant disability. There were no witnesses to the event. Plaintiff testified that he immediately notified his foreman, Jim Lafler, as to what had occurred. Lafler then transported the plaintiff to DeGraff Hospital. Jim Lafler passed away before his deposition could be taken. Plaintiff alleges that the movable steps were defective with respect to their configuration and stability and further that CSX was on notice of the alleged defects.

The instant motion to bifurcate was brought after counsel had taken videotaped trial testimony of plaintiff's treating physicians, Bennett Myers, M.D. and Adnan Siddiqui, M.D. It appears that as part of its defense, CSX will call into question whether the incident occurred as plaintiff describes and/or whether it happened at all. (Since the submission of this motion, videotaped trial testimony of plaintiff's third and final treating physician, Dr. Robert Plunkett, has been taken.) In opposing the bifurcation motion, plaintiff claims that he must be allowed to introduce medical evidence of the nature of his injuries to corroborate his version of the accident. It is clear from the videotaped trial testimony of plaintiff's treating physician, Dr. Bennett Myers, taken on December 21, 2016 that he believes plaintiff's description of the accident and the sudden shift in body weight is consistent with causing injury to the brachial plexus (see Dr. Bennett Myers trial testimony, Defendant's Exhibit "F", pp. 64-65). Dr. Myers' medical testimony could be used by plaintiff to corroborate plaintiff's version of the unwitnessed accident, and to rebut the defendant's assertion that the accident did not happen or did not happen in the way plaintiff describes. Additionally, CSX points out a discrepancy in Dr. Siddiqui's office notes as to how the accident occurred. Dr. Siddiqui's office notes describe a

different version of how the accident occurred, with plaintiff falling while going up the stairs. Therefore, it would seem that Dr. Siddiqui's medical records and his testimony would be relevant for both the plaintiff and the defendant on the issue of how or even if this accident occurred. Because the medical proof, which has already been preserved by videotape could be relevant to corroborating plaintiff's version of the accident, in our discretion, we decline to grant defendant's motion to bifurcate.

Additionally, we note that this application was brought after two of the three treating physicians were videotaped for trial and that the third and final trial testimony of Dr. Plunkett has been completed. Counsel has already incurred the expense of preserving this trial testimony. The entire trial, with liability and damages, should take approximately five days. The concepts involved in the trial are not complicated. There is no prejudice to the defense that can be ascertained. Under the totality of the circumstances, and in the interests of judicial economy the issues of liability and damages should be tried together, before one jury. Therefore, in the discretion afforded the Court pursuant to CPLR §603 and NYCRR §202.42(a), defendant's motion to bifurcate is denied.

This is the Decision of the Court. Submit Order on notice.



Hon. Donna M. Siwek  
Justice of the Supreme Court

Dated: August 18, 2017