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Bifurcation: A Powerful but Underutilized Tool in South Carolina Civil Litigation

Derek A. Shoemake

BIFURCATION: A POWERFUL BUT UNDERUTILIZED TOOL IN SOUTH CAROLINA CIVIL LITIGATION

I. INTRODUCTION

Bifurcation, the division of trial issues for separate and independent evaluation,[1] might be one of the most important concepts in civil litigation. It can have a major impact on everything from the framing of litigation strategy[2] to the likelihood of success at trial.[3] While there are many ways to bifurcate,[4] or even trifurcate,[5] a trial, this Comment focuses on only the historically predominant method of bifurcation: separation of the issue of liability from the issue of damages.[6]

Though its definition is relatively straightforward, bifurcation might also be one of the more misunderstood concepts in civil litigation. Judges from state and federal courts laud the virtues of bifurcation, yet these same judges rarely bifurcate cases before them.[7] The "conventional wisdom"[8] among trial lawyers is that bifurcation tends to be a boon for the defendant;[9] however, several studies have shown a benefit for the plaintiff.[10]

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1. *See* Edith Greene & Brian Bornstein, *Precious Little Guidance: Jury Instruction on Damage Awards*, 6 PSYCHOL. PUB. POL'Y & L. 743, 756 (2000); Laurens Walker, *A Model Plan to Resolve Federal Class Action Cases by Jury Trial*, 88 VA. L. REV. 405, 412 (2002).

2. *See, e.g.*, Rosen v. Reckitt & Colman, Inc., No. 91 Civ. 1675 (LMM), 1994 U.S. Dist. LEXIS 16511, at *2, *16–17 (S.D.N.Y. Nov. 10, 1994) (granting plaintiff's motion for bifurcation even where defendant argued that bifurcation would have a significant impact on trial strategy); William T. Hudgins, *The Fragile Right to a Civil Jury Trial in Colorado*, COLO. LAW., Jan. 1998, at 49, 50 ("[A] bifurcated trial can have a dramatic impact on trial strategy.").

3. *See* discussion *infra* Part II.C.

4. *See* Hydrite Chem. Co. v. Calumet Lubricants Co., 47 F.3d 887, 891 (7th Cir. 1995) ("The judge can bifurcate . . . a case at whatever point will . . . promote economy and accuracy in adjudication.").

5. Irwin A. Horowitz & Kenneth S. Bordens, *An Experimental Investigation of Procedural Issues in Complex Tort Trials*, 14 LAW & HUM. BEHAV. 269, 271 (1990) (explaining that trifurcation is a litigation tool that separates trials into three issues: general causation, liability, and damages).

6. *See* Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705, 705 (2000) (citing 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2390 (3d ed. 1995)); 8 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 42.20(6)(b) (3d ed. 1999). Another popular bifurcation method is to separate compensatory claims from punitive claims. *See* Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1322 (2005). While this Comment does not specifically address bifurcation of punitive damages in South Carolina, any changes to the baseline rules of bifurcation would inherently have a significant impact on the bifurcation of punitive claims. Still, it is better to treat the two main types of bifurcation separately. *See* discussion *infra* Part II.D.

7. *See infra* text accompanying notes 21–32.

8. Drury Stevenson, *Reverse Bifurcation*, 75 U. CIN. L. REV. 213, 228 (2006).

9. *Id.* at 228–29.

10. *See* discussion *infra* Part II.C.

South Carolina courts are not immune from this misconception. State courts have praised the practice[11] and declared that judges have broad discretion regarding bifurcation.[12] However, state court judges have rarely used bifurcation,[13] and the state has developed restrictions that seem to limit the application of bifurcation in most cases.[14] Specifically, South Carolina courts allow bifurcation only if the issues of both liability and damages do not overlap,[15] and the issues "are so distinct that [a separate] trial of each alone would not result in injustice."[16] South Carolina courts have broadly interpreted this "no overlap" requirement to preclude bifurcation when some evidence exists that is common to the issues of both liability and damages.[17] This rule is significantly different from the rules of other state and federal courts that have concluded—while working under nearly identical Rules of Civil Procedure—that the existence of some evidence that addresses both liability and damages does not automatically preclude an otherwise justified bifurcation.[18]

This Comment argues that given the potential efficiency of bifurcation, the overwhelming judicial support for the practice, and the effectiveness of bifurcation for both plaintiffs and defendants, the South Carolina Supreme Court should adopt a less stringent approach that would allow trial judges to bifurcate more cases. Such an approach would be more consistent with the current South Carolina Rules of Civil Procedure, especially considering that other courts have offered a broader interpretation based on nearly identical rules.[19]

Part II of this Comment analyzes four theoretical bases for bifurcation: opinions on the efficiency and use of bifurcation; arguments for and against the practice; the impact of bifurcation on plaintiffs and defendants; and bifurcation's relationship to tort reform and punitive damages. Part III provides a brief history of bifurcation from the nineteenth century English courts through the current Federal and South Carolina Rules of Civil Procedure. Part IV specifically examines the relevant caselaw on bifurcation in South Carolina and compares those decisions to other similar federal and state cases. Part V concludes by explaining that while South Carolina courts acknowledge the benefits of bifurcation, the "no overlap" requirement represents an outdated historical aversion to the practice that prevents trial judges from effectively using bifurcation as a tool for judicial economy and fairness. Therefore, this Comment concludes, the South Carolina Supreme Court should abandon this requirement.

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11. *See, e.g.*, Durham v. Vinson, 360 S.C. 639, 645 n.2, 602 S.E.2d 760, 762 n.2 (2004) ("We encourage judges . . . to bifurcate trials . . . when bifurcation helps to clarify and simplify the issues.").

12. *See, e.g.*, Senter v. Piggly Wiggly Carolina Co., 341 S.C. 74, 77, 533 S.E.2d 575, 577 (2000) (noting that bifurcation is a matter left to the "sound discretion of the trial court").

13. *See* discussion *infra* Part III.B.

14. *See* discussion *infra* Part IV.A.

15. Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 73 n.8, 533 S.E.2d 331, 333 n.8 (2000).

16. Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998) (citing Fortune v. Gibson, 304 S.C. 279, 281, 403 S.E.2d 674, 675 (Ct. App. 1991)).

17. *See id.*

18. *See* discussion *infra* Part IV.B–C.

19. *See* discussion *infra* Part IV.B.

II. THEORETICAL BASES FOR BIFURCATION

The Federal and South Carolina Rules of Civil Procedure give courts broad discretionary power to bifurcate trials to further convenience, avoid prejudice in, or expedite and economize litigation.[20] Understanding both how jurists and litigators view the practice, and how bifurcation influences litigation can help illustrate how bifurcation furthers the ends listed above.

A. More Popular Than Practiced

Many jurists and scholars extol the virtues of bifurcation and its ability to streamline the judicial process, yet courts infrequently employ the practice.[21] One comprehensive study of federal and state judges from across the country, including South Carolina,[22] found that of the ninety-four percent of federal judges who have granted bifurcation in their career, eighty-four percent felt it improved the trial process.[23] Still, only nineteen percent of all federal judges bifurcated more than ten cases in the previous three years, while fifty-two percent bifurcated less than five times in the same period.[24]

At the state level, of the eighty-two percent of judges who have granted bifurcation,[25] eighty-four percent felt it improved the trial process[26] and seventy-seven percent felt it enhanced the fairness of the outcome.[27] However, only twenty-one percent bifurcated more than ten cases in the previous three years, while fifty-seven percent granted bifurcation less than five times.[28] Bifurcation, then, is a matter left to the discretion of judges who strongly endorse the practice but actually bifurcate very few cases.

The explanation for this paradox is not completely clear. Procedural rules and caselaw in virtually every jurisdiction allow bifurcation.[29] Besides separating punitive damages claims, the vast majority of states, including South Carolina, have no statutes that address bifurcation in any other manner.[30] While South Carolina's statutes are silent on bifurcation, caselaw affords trial judges broad discretion in bifurcating cases.[31] However, South Carolina appellate judges rarely approve of the practice at the trial level.[32]

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20. *See* FED. R. CIV. P. 42(b); S.C. R. CIV. P. 42(b).

21. *See* Louis Harris & Assocs., Inc., *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases*, 69 B.U. L. REV. 731, 733–34 (1989) [hereinafter *Survey*] ("Judges overwhelmingly support the principle and practice of bifurcation. . . . However, bifurcation is used only occasionally.").

22. *Id.* at 731 ("State judges were interviewed in every state except Delaware, Hawaii, and Alaska.").

23. *Id.* at 743.

24. *Id.* at 744 tbl.5.4.

25. *Id.* tbl.5.2.

26. *Id.* tbl.5.3.

27. *Id.* at 745 tbl.5.6.

28. *Id.* at 744 tbl.5.4.

29. *See id.* at 743 tbl.5.1.

30. *See* JAMES M. BECK & ANTHONY VALE, DRUG AND MEDICAL DEVICE PRODUCT LIABILITY DESKBOOK § 11.02[1][a] (4th release 2007).

31. Durham v. Vinson, 360 S.C. 639, 644–45 n.2, 602 S.E.2d 760, 762 n.2 (2004).

32. *See* discussion *infra* Part IV.A.

The inconsistency might result from judges viewing bifurcation as a powerful tool best reserved for less common circumstances, such as extremely complex litigation involving mass torts or patent actions.[33] Professor Gensler notes that "when judges say they like bifurcation, what they really mean is that they like bifurcation within [these] traditional parameters."[34] Professor Gensler, who has argued for more routine bifurcation,[35] suggests that encouraging the use of the procedure outside these traditional parameters requires a modern examination of the bifurcation debate.[36]

B. The Bifurcation Debate

The chief argument for bifurcation is promotion of judicial economy.[37] Bifurcation reduces trial time regardless of which party prevails on the issue of liability. Clearly, if the defendant prevails on liability, a second trial on damages becomes moot.[38] When the plaintiff prevails on liability, however, the case is likely to settle and would therefore never reach the damages phase.[39] As Judge David Tobin notes, "I have bifurcated hundreds of cases in which the issues of liability and damages were involved. The most surprising statistic is that during [these] three and one-half years I have tried only one case in which the issue was damages!"[40] Judge Tobin also notes a number of other advantages of bifurcation that promote expediency, including shorter discovery periods and earlier trial dates.[41]

Internally, bifurcated trials seem to operate more efficiently. Such trials reduce the number of witnesses and exhibits jurors have to process and requires lawyers to focus narrowly on issues that are more specific.[42] As a result, some studies have found that jurors better understand evidence and use it more appropriately in bifurcated trials.[43]

Bifurcation can also reduce prejudice to the defendant. Studies show that evidence related to the severity of an injury, which is normally excluded in a liability trial, can evoke feelings of sympathy among jurors and influence a jury's determination of liability.[44] Specifically, a jury might award damages to a plaintiff whose case lacks legal merit "when they feel sorry for the plaintiff and believe that

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33. *See* Gensler, *supra* note 6, at 722.

34. *Id.* at 723.

35. *See id.* at 783.

36. *See id.* at 709–11.

37. Steven S. Gensler, *Prejudice, Confusion, and the Bifurcated Civil Jury Trial: Lessons from Tennessee*, 67 TENN. L. REV. 653, 653 (2000).

38. *See* David L. Tobin, *To B . . . or Not to B . . . "B . . ." Means Bifurcation*, FLA. B.J., Nov. 2000, at 14, 16.

39. *See id. But see infra* note 57 and accompanying text.

40. *Id.* at 14. Judge Tobin is a federal judge in the Eleventh Circuit. *Id.* at 20.

41. *Id.* at 20.

42. Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95, 157 (1996) (noting that bifurcated trials enable "the jury to focus on one issue at a time," making the "evidence more orderly and understandable to the jurors").

43. *See, e.g.*, Christine M. Shea Adams & Martin J. Bourgeois, *Separating Compensatory and Punitive Damage Award Decisions by Trial Bifurcation*, 30 LAW & HUM. BEHAV. 11, 23 (2006) (noting that evidence was "more likely to be used correctly within juries hearing the bifurcated evidence"); Strier, *supra* note 42, at 157.

44. *See* BECK & VALE, *supra* note 30, § 11.02[1][c][ii] (citing Gensler, *supra* note 6, at 741–42).

the defendant is better able to bear the cost."[45] One study found that jurors were more sympathetic to a severely injured plaintiff, and that because of this sympathy, the jurors were "substantially more likely to find . . . liability."[46] Furthermore, the sympathy toward the plaintiff actually resulted in animosity toward the defendant.[47] A bifurcated trial would remove from the liability phase the sympathetic, emotional evidence related to damages,[48] increasing the likelihood that the jury would make legally appropriate use of evidence[49] to reach "a rational, as opposed to emotional," verdict.[50]

Avoiding prejudice is beneficial not only for the defendant. The plaintiff may desire bifurcation where the evidence or testimony related to damages is likely to elicit "antipathy for the plaintiff, rather than sympathy."[51] Additionally, in some unitary trials, a plaintiff's injuries might result in damages requests so high that the jurors are inclined to give a defendant the benefit of the doubt by finding in a defendants's favor.[52]

Critics of bifurcation argue that the practice has a detrimental effect on the judicial system. Dan Cytryn, a plaintiff's attorney from Florida, specifically attacks Judge Tobin's assertion that a bifurcated trial enhances judicial economy.[53] He argues that bifurcation would actually lead to longer trials and discourage settlement.[54] Cytryn reasons that the defendant would avoid any pretrial settlement and only consider a settlement after the court rendered a liability verdict.[55] Further, he argues that judges would delay the start of a damages trial in hopes that the parties reach a settlement.[56] However, the authors of one study have challenged the notion that bifurcation has a significant impact on settlement ratios.[57]

Opponents of bifurcation also argue that it tends to create a sterile environment.[58] Stated differently, a bifurcated trial hides the seriousness of the plaintiff's injuries from the jury and removes the human element from the

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45. Gensler, *supra* note 6, at 716 (citing Lewis Mayers, *The Severance for Trial of Liability from Damage*, 86 U. PA. L. REV. 389, 394 (1938)).

46. Gensler, *supra* note 37, at 667 (citing Brian H. Bornstein, *From Compassion to Compensation: The Effect of Injury Severity on Mock Jurors' Liability Judgments*, 28 J. APPLIED SOC. PSYCHOL. 1477, 1485 (1998)).

47. Bornstein, *supra* note 46, at 1485 ("Increasing the amount of positive sentiment felt for one party was accompanied by increased negative feelings for that party's antagonist.").

48. Strier, *supra* note 42, at 158 (citing Horowitz & Bordens, *supra* note 5, at 271).

49. *See* Horowitz & Bordens, *supra* note 5, at 282.

50. *See* Mayers, *supra* note 45, at 400–01.

51. Gensler, *supra* note 37, at 668; *see also* Taylor v. Racetrac Petrol., Inc., 519 S.E.2d 282, 284–85 (Ga. Ct. App. 1999) (finding that the trial court should have bifurcated liability and damages where evidence of drug and alcohol abuse prejudiced the plaintiff).

52. *See* Gensler, *supra* note 37, at 668; Edith Greene et al., *The Effects of Injury Severity on Jury Negligence Decisions*, 23 LAW & HUM. BEHAV. 675, 690 (1999).

53. Dan Cytryn, *Bifurcation in Personal Injury Cases: Should Judges Be Allowed to Use the "B" Word?*, 26 NOVA L. REV. 249, 250 (2001).

54. *Id.* at 261–63.

55. *Id.* at 262.

56. *Id.*

57. Hans Zeisel & Thomas Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606, 1623 & tbl.9 (1963) (reporting virtually identical percentages of cases settled before and after Illinois adopted a rule permitting bifurcated trials).

58. Cytryn, *supra* note 53, at 255 (citing Gensler, *supra* note 6, at 767–69).

proceedings.[59] Professor Jack Weinstein notes that juries are responsible for far more than the mechanical application of law, arguing that juries satisfy a person's "strongly felt need for a 'fair decision,' for the judgment of reasonable and unbiased peers instead of the logical, legally proper, result."[60]

Judge Tobin acknowledges that the sterile environment is one of the major disadvantages to bifurcation because it potentially limits the plaintiff's ability to present a sympathetic view.[61] To overcome this disadvantage, he suggests that courts instruct the jury that the plaintiff has injuries, and, where the circumstances so warrant, that those injuries are severe.[62] Still, Judge Tobin believes that the advantages of bifurcation are strong enough to warrant its broader use.[63] Judge Tobin appears to distinguish between the human element as a factor—which courts should allow—and the human element as the controlling force—which courts should work to prevent. The predominance of the latter prompted an Illinois district court to declare that removing sympathy in the liability phase of a bifurcated trial is "fundamental in the true administration of justice."[64]

Opponents of bifurcation have also raised constitutional concerns about the procedure. Under the Reexamination Clause of the Seventh Amendment, "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[65] While some courts have interpreted this clause to mean that different finders-of-fact cannot decide the same legal issue, other courts have found that this clause poses little obstacle to bifurcation.[66] Even under the narrowest reading in the context of bifurcation, the Reexamination Clause would apply only when the bifurcated trial employed separate juries.[67] Given that the same jury generally hears both portions of a bifurcated trial, this constitutional issue would only arise in a minority of cases.[68] Regarding that minority of cases, Gensler notes that "[t]he Re-examination Clause does not prohibit different juries from hearing the same evidence; it only prohibits different juries from deciding the same issue."[69] Thus, this potential constitutional barrier does little to caution against more routine use of bifurcation. Courts seem willing to bifurcate complex and time-consuming cases,[70] which, given the typical length of litigation and geographic dispersion, are more likely to have different juries than a traditional negligence or slip-and-fall action.[71] Any expansion of

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59. *Id.*

60. Jack B. Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power*, 14 VAND. L. REV. 831, 833 (1961).

61. Tobin, *supra* note 38, at 16.

62. *Id.*

63. *Id.* at 20.

64. O'Donnell v. Watson Bros. Transp. Co., 183 F. Supp. 577, 585 (N.D. Ill. 1960).

65. U.S. CONST. amend. VII.

66. W. Russell Taber, *The Reexamination Clause: Exploring Bifurcation in Mass Tort Litigation*, 73 DEF. COUNS. J. 63, 64 (2006) (citations omitted).

67. Gensler, *supra* note 6, at 735; *see also In re* Rhone-Poulene Rorer Inc., 51 F.3d 1293, 1303 (7th Cir. 1995) (noting that a judge should not divide the issues so that they are examined by different juries).

68. Gensler, *supra* note 6, at 735–36.

69. *Id.* at 736.

70. *See* Durham v. Vinson, 360 S.C. 639, 644–45 n.2, 602 S.E.2d 760, 762 n.2 (2004); Gensler, *supra* note 6, at 722.

71. *See* Gensler, *supra* note 6, at 735 (citations omitted).

bifurcation seems especially likely to affect those latter cases that would not require two different juries, making any potential constitutional issue no more problematic than it is currently.

C. *Studies on the Benefits of Bifurcation*

Those involved in litigation might assume that bifurcation aids the defendant by compartmentalizing the trial and removing some of the "emotional" evidence from the liability phase.[72] One landmark study found that the defendant prevailed fifty-six percent of the time in a bifurcated trial, but prevailed only thirty-four percent of the time in a unitary trial.[73] Conversely, the plaintiff's chances of prevailing increased from forty-four percent in a bifurcated trial to sixty-six percent in a unitary trial.[74] Although these are significant differences, they should be considered in context. The study was conducted in 1963 and examined unitary and bifurcated trials only in tort cases in northern Illinois federal courts.[75] Another study, conducted in 1990, used mock juries in two toxic tort trials—one trial was bifurcated and the other was unitary—to determine the effect of bifurcation on the outcome of the trial.[76] The juries deciding the unitary trials found for the plaintiff nearly every time, while the juries deciding the bifurcation trials found for the plaintiff only two-thirds of the time.[77] Moreover, the researchers found that when deciding liability in the unitary trial, the jurors evaluated other evidence, especially the evidence regarding damages.[78]

While bifurcated trials can aid the defendant, they can offer a strategic advantage to the plaintiff as well. Studies have shown that while the defendant might win a favorable liability verdict more often in bifurcated trials, bifurcated trials result in "much larger" damages awards for the plaintiff when the plaintiff also prevails on liability.[79]

The relevance of these studies is not clear. The studies that only simulated trials seem to have lacked the nuances of an actual trial—artfulness of opposing counsel and disparate resources between plaintiffs and defendants.[80] Furthermore, the studies that used actual trials tended to focus only on tort claims in specific jurisdictions.[81]

Still, bifurcation does not result in a complete advantage for one party over another. While the plaintiff may lose the liability phase more often, the defendant risks paying a substantially larger damages award when the plaintiff prevails. Further, the results of the 1990 study indicate that when the plaintiffs lose, they do

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72. *See id.* at 767–68; Stevenson, *supra* note 8, at 228–29.

73. Zeisel & Callahan, *supra* note 57, at 1612 tbl.3.

74. *Id.*

75. *Id.* at 1606–07. The authors designed the study to focus specifically on a rule adopted by the Northern District of Illinois that permitted bifurcation of liability and damages issues in civil cases. *Id.*

76. Horowitz & Bordens, *supra* note 5, at 271–72.

77. *Id.* at 278 tbl.3.

78. *Id.* at 282.

79. *Id.* at 284. Other studies have reached similar results. Gensler, *supra* note 6, at 741–45 (reporting the results of several studies examining the effects of bifurcating trials).

80. Horowitz & Bordens, *supra* note 5, at 274–75.

81. Zeisel & Callahan, *supra* note 57, at 1606.

so because they lack the evidence to prove liability,[82] which is consistent with the "true administration of justice."[83]

D. Bifurcation, Tort Reform, and Punitive Damages

The recent push for tort reform in the United States has resulted in specific focus on bifurcation.[84] Given the growing attitude that courts should avoid "unreasoned and capricious jury verdicts"[85] and the ability of bifurcation to help manage caseloads[86] and properly focus juries,[87] bifurcation could be part of the solution to these problems. For example, a California commission on tort reform has recommended the mandatory bifurcation of liability and damages.[88] However, advocates of tort reform often use the term bifurcation to mean the separation of punitive damages claims from compensatory claims.[89] While the rationale supporting punitive bifurcation often mirrors the rationale in favor of liability and damages bifurcation,[90] grouping the two types of bifurcation together seems to inappropriately politicize the issue and marginalize the impact of liability and damages bifurcation.

State legislatures, as opposed to courts, have been the guiding force for punitive bifurcation.[91] A large number of states require courts to bifurcate either the

82. *See supra* notes 76–78 and accompanying text.

83. O'Donnell v. Watson Bros. Transp. Co., 183 F. Supp. 577, 585 (N.D. Ill. 1960).

84. *See, e.g.*, PUNITIVE DAMAGES AND BUSINESS TORTS: A PRACTITIONER'S HANDBOOK 84 (Thomas J. Collin ed., 1998) [hereinafter BUSINESS TORTS] (noting that state legislatures have enacted various punitive damages bifurcation measures "as part of comprehensive tort reform statutes"); Rustad, *supra* note 6, at 1299 (explaining the key role punitive damages play in modern tort reform debates).

85. Kristy Lee Bertelsen, Note, *From Specialized Courts to Specialized Juries: Calling For Professional Juries in Complex Civil Litigation*, 3 SUFFOLK J. TRIAL & APP. ADVOC. 1, 32 (1998); *see also* BUSINESS TORTS, *supra* note 84, at 83–84 (noting the trend toward bifurcation when punitive damages are involved).

86. *See supra* text accompanying notes 37–41.

87. *See supra* notes 42–43 and accompanying text.

88. REPORT OF THE CAL. CITIZENS' COMM'N ON TORT REFORM, RIGHTING THE LIABILITY BALANCE 147–48 (1977). Texas also requires the bifurcation of liability and damages upon motion by the defendant. TEX CIV. PRAC. & REM. CODE ANN. § 41.009(a)–(c) (Vernon 1997).

89. *See* Rustad, *supra* note 6, at 1321–24.

90. *See* BECK & VALE, *supra* note 30, § 11.02[1][e]; Rustad, *supra* note 6, at 1323–24 (arguing that separation of punitive and compensatory claims removes emotional evidence and prevents jury bias).

91. *See* BUSINESS TORTS, *supra* note 84, at 84.

amount of punitive damages[92] or the entire punitive claim,[93] and the vast majority of states do so by statute.[94]

Legislatures have designed these bifurcation statutes to control the amount of punitive damages awarded.[95] The political discussion, therefore, has focused on the narrow issue of damages amounts[96] rather than the inherent merits of bifurcation. Such a narrow discussion does not reflect the impact bifurcation could have on other aspects of litigation.[97] If the goal of tort reform is to improve the civil justice system as a whole, then attention to the inherent merits of bifurcation is beneficial in avoiding the political fray and the limited debate surrounding punitive bifurcation.[98]

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92. *See* ALA. CODE § 6-11-23(b) (LexisNexis 2005) (upon motion of either party); ALASKA STAT. § 09.17.020(a) (2006) (required automatically); CAL. CIV. CODE § 3295(d) (West 1997) (upon motion of the defendant); GA. CODE ANN. § 51-12-5.1(d)(1) (2000) (required automatically); IOWA CODE ANN. § 668A.1(2) (West 1998) (requiring the jury to first answer an interrogatory regarding punitive liability and then, if necessary, answer an interrogatory regarding the amount); KAN. STAT. ANN. § 60-3701(a) (2005) (required automatically); KY. REV. STAT. ANN. § 411.186(1)–(2) (LexisNexis 2005) (required automatically); MO. ANN. STAT. § 510.263(1)–(2) (West Supp. 2007) (upon motion of either party); MONT. CODE ANN. § 27-1-221(7)(a) (2007) (required automatically); NEV. REV. STAT. ANN. § 42.005(3) (LexisNexis 2006) (required automatically); OKLA. STAT. ANN. tit. 23, § 9.1(C) (West Supp. 2007) (required automatically); TEX CIV. PRAC. & REM. CODE ANN. § 41.009 (Vernon 1997) (upon motion of the defendant); UTAH CODE ANN. § 78-18-1(2) (Supp. 2007) (permitting evidence of a party's wealth to be admitted only after the jury makes a finding of liability for punitive damages); W.R. Grace & Co. v. Waters, 638 So. 2d 502, 506 (Fla. 1994) (required automatically); Rupert v. Sellers, 368 N.Y.S.2d 904, 912 (N.Y. App. Div. 1975) (required automatically); Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992) (upon motion of the defendant); Campen v. Stone, 635 P.2d 1121, 1132 (Wyo. 1981) (required automatically).

93. *See* ARK. CODE ANN. § 16-55-211(a) (2005) (upon motion of either party); 735 ILL. COMP. STAT. ANN. 5/2-1115.05(c) (West 2003) (upon motion of the defendant); MINN. STAT. ANN. § 549.20(4) (2000 & West Supp. 2007) (upon motion of either party); MISS. CODE ANN. § 11-1-65(1)(b)–(c) (2002 & Supp. 2007) (required automatically); N.J. STAT. ANN. § 2A:15-5.13(a)–(d) (West 2000) (required automatically); N.C. GEN. STAT. § 1D-30 (2007) (upon motion of the defendant); N.D. CENT. CODE § 32-03.2-11(2) (Supp. 2007) (upon motion of either party); OHIO REV. CODE ANN. § 2315.21(B)(1)(a)–(b), (D)(1) (LexisNexis 2005) (upon motion of either party).

94. *See* sources cited *supra* notes 92–93. The South Carolina General Assembly attempted to pass such a statute in 1997, but the measure failed. H.R. 3019, 112th Gen. Assemb., Reg. Sess. (S.C. 1997), *available at* http://scstatehouse.net/sess112_1997-1998/bills/3019.htm. The legislation would have mandated that "[i]n all actions seeking an award of punitive damages, the trier of fact shall determine the amount of punitive damages separately from the amount of compensation for all other damages." *Id.*

95. *See, e.g.*, GA. CODE ANN. § 51-12-5.1(d)(2) (2000) (requiring that when a fact finder decides that punitive damages are appropriate, a second trial shall determine "what amount of damages will be sufficient to deter, penalize, or punish the defendant").

96. *See, e.g.*, Rustad, *supra* note 6, at 1324 ("The purpose of bifurcation is to prevent evidence of aggravating circumstances or wealth of the defendant from creating jury bias in the compensatory damages stage.").

97. *See* discussion *supra* Part II.B–C.

98. *See* Rustad, *supra* note 6, at 1301 (arguing that many tort reform measures regarding punitive damages do not "advance the performance of our civil justice system").

III. THE HISTORICAL CONTEXT OF BIFURCATION

While the South Carolina Rules of Civil Procedure permit separate trials in several circumstances,[99] South Carolina courts granting bifurcation generally cite to Rule 42(b)[100]:

> 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, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State.[101]

Although Congress revised the Federal Rules of Civil Procedure in December 2007, South Carolina's bifurcation rule remains substantively similar to Federal Rule of Civil Procedure 42(b).[102] As a result, South Carolina courts use federal caselaw when examining and analyzing the state rule.[103] Therefore, understanding the history of bifurcation in South Carolina requires understanding the history of Federal Rule 42(b). Because of the recent revision, the text of South Carolina's Rule 42(b) is no longer identical to the federal rule. The former federal rule read as follows:

> 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, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by

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99. *See, e.g.*, S.C. R. CIV. P. 14(a) (allowing any party to move for the separate trial of a third-party claim); S.C. R. CIV. P. 18(c) (permitting the court to bifurcate a trial "as will prevent a party from being embarrassed, delayed or . . . to prevent delay or prejudice" where multiple claims have been joined); S.C. R. CIV. P. 20(b) (permitting separate trials to prevent embarrassment, delay, or prejudice where other parties have been joined).

100. *See* Senter v. Piggly Wiggly Carolina Co., 341 S.C. 74, 77, 533 S.E.2d 575, 577 (2000); Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 108–09, 512 S.E.2d 510, 516–17 (Ct. App. 1998).

101. S.C. R. CIV. P. 42(b).

102. The current federal rule reads as follows: "For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial." FED. R. CIV. P. 42(b). However, the changes were "intended to be stylistic only," so the textual changes should not affect any analytical comparison of the South Carolina rule and the federal rule. FED. R. CIV. P. 42(b) advisory committee's note to 2007 amendment; *see also* Lee H. Rosenthal, *Preface* to MOORE'S FEDERAL PRACTICE: REVISION OF THE FEDERAL RULES OF CIVIL PROCEDURE, at vii–xiv (2007) (detailing the history of the rules and the reasons for the stylistic changes).

103. *See, e.g.*, Johnson v. S.C. Nat'l Bank, 292 S.C. 51, 54–55, 354 S.E.2d 895, 896–97 (1987) (reviewing federal caselaw in construing South Carolina Rule 42).

> jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.[104]

A. The History of Bifurcation at the Federal Level

In *Simon v. Philip Morris Inc.*,[105] a district court in New York outlined the history of bifurcation.[106] Courts began to separate the issues of liability and damages at trial as early as the seventeenth century.[107] For example, early English courts afforded trial judges wide latitude in bifurcating issues for trial:

> [T]he court or judge may, in any case or matter, at any time or from time to time, order that . . . one or more questions of fact be tried before the others . . . and in all cases may order that one or more issues of fact be tried before any other or others.[108]

In early American jurisprudence, both courts of law[109] and courts of equity[110] used bifurcation. When the Federal Rules of Civil Procedure merged courts of law and equity in 1938, Rule 42(b) allowed for bifurcation in both courts.[111] Other than the stylistic revision in 2007, the United States Supreme Court has amended Rule 42(b) only once, in 1966.[112] The amendment "authoriz[ed] a separate trial 'when separate trials will be conducive to expedition and economy,' and . . . add[ed] the provision that begins with the words 'always preserving.'"[113] The advisory committee notes from the 1966 amendment recognized the efficiency of bifurcation in admiralty suits.[114] The committee further encouraged bifurcation "where experience has demonstrated its worth"[115] but also stated that "separation of issues was not to be routinely ordered."[116] Given this cautionary note, one scholar believes that the 1966 committee notes "galvanized a presumption against bifurcation."[117] However, the court in *Simon* noted:

> This statement did not limit in any way the trial judge's historic discretion to sever issues for trial in individual cases. The drafters recognized that the severance of issues for trial was a useful

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104. FED. R. CIV. P. 42(b) (1966) (amended 2007).
105. 200 F.R.D. 21 (E.D.N.Y. 2001).
106. *Id.* at 25–27.
107. *Id.* at 26–27 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *164, *164).
108. *Id.* at 25 (alteration in original) (quoting Rules of the English Supreme Court of Judicature (1883) order 36, rule 8).
109. *Id.* at 26 (citing Gasoline Prod. Co., Inc. v. Champlin Refining Co., 283 U.S. 494, 497–98 (1931) (noting that a separate jury in a court of law could decide damages)).
110. *Id.* at 26 (citing Finley v. Asphalt Paving Co., 69 F.2d 498, 498 (8th Cir. 1934) (noting the bifurcation of the trial of a patent suit); Allen v. Phila. Co., 265 F. 817, 817–18 (3d Cir. 1920) (noting the bifurcation of a trial at equity)).
111. 4 WRIGHT & MILLER, *supra* note 6, § 1004 (3d ed. 2002).
112. 9 *id.* § 2381 (2d ed. 1994).
113. *Id.* at 426 n.1 (quoting FED. R. CIV. P. 42(b) (1966) (amended 2007)).
114. FED. R. CIV. P. 42(b) advisory committee's note to 1966 amendment.
115. *Id.*
116. *Id.*
117. Gensler, *supra* note 6, at 710.

> procedure whenever difficulty in proving one issue may warrant its being postponed as well as in complex litigations . . . .[118]

B. The History of Bifurcation in South Carolina

Before the 1985 revisions of the procedural rules,[119] South Carolina courts rarely bifurcated trials in any manner.[120] However, courts did allow bifurcation of legal and equitable claims, leaving the decision to the discretion of the trial courts.[121] Even though bifurcation of liability and damages was permitted, there was very little caselaw on the issue. *South Carolina Electric & Gas Co. v. Aetna Insurance Co.*[122] (*SCE&G*) helps explain this lack of decisions. In this case, the South Carolina Supreme Court held that it was inappropriate for an appeals court to order a new trial only on the issue of damages,[123] stating that "[i]n the absence of [an] authorizing statute or rule we do not feel warranted in making such an important innovation in our procedure."[124]

SCE&G remained good law for nearly a quarter of a century. However, in 1981, the South Carolina Supreme Court overruled the case when it decided *Industrial Welding Supplies, Inc. v. Atlas Vending Co.*[125] The court noted that other than *SCE&G* there was no other authority to support such a broad rule prohibiting the separation of trial issues.[126] Instead, the court adopted a new rule:

> [W]here there are distinct jury issues, and the issue as to which a new trial is required is separate from all other issues, and the error requiring new trial does not affect the determination of any other issue, the scope of [the] new trial may be limited to the single issue.[127]

Importantly, this holding, decided before the court adopted the current South Carolina Rules of Civil Procedure,[128] seems to apply only to new trials of separate issues ordered by appellate courts. However, the South Carolina Supreme Court has

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118. Simon v. Philip Morris Inc., 200 F.R.D. 21, 27 (E.D.N.Y. 2001).

119. *See infra* text accompanying notes 130–32.

120. *But see* Jones v. Massingale, 251 S.C. 456, 463–64, 163 S.E.2d 217, 220 (1968) (examining a lower court's bifurcation of the issue dealing with the validity of a release); Mitchell v. Fed. Intermediate Credit Bank of Columbia, 165 S.C. 457, 463, 164 S.E. 136, 137 (1932) (noting that a bifurcation of the issue of a dispositive affirmative defense could produce "beneficial results").

121. *See Mitchell*, 165 S.C. at 462–63, 164 S.E. at 137 (upholding the trial court's decision to order a separate trial for a legal claim); Greene v. Washington, 105 S.C. 137, 140, 89 S.E. 649, 650 (1916) ("The discretion should generally be in favor of trying those issues first which would most probably end the case.").

122. 233 S.C. 557, 106 S.E.2d 276 (1958), *overruled by* Indus. Welding Supplies, Inc. v. Atlas Vending Co., 276 S.C. 196, 201, 277 S.E.2d 885, 887 (1981).

123. *Id.* at 560, 106 S.E.2d at 277.

124. *Id.* at 561, 106 S.E.2d at 277.

125. 276 S.C. 196, 277 S.E.2d 885.

126. *Id.* at 201, 277 S.E.2d at 887.

127. *Id.*

128. *See* McLain v. Ingram, 314 S.C. 359, 360, 444 S.E.2d 512, 512 (1994) (noting the adoption of the current rules in 1985).

also cited this rule in finding that a trial judge erred by not directing a verdict on the issue of liability and submitting "only the issue of damages to the jury."[129]

Four years later in 1985, following the lead of the federal courts, South Carolina adopted its new Rules of Civil Procedure[130] and explicitly granted trial judges the discretion to bifurcate trials to further convenience, avoid prejudice, or promote expedition and economy.[131] The supreme court noted that "[t]he adoption of the [South Carolina Rules of Civil Procedure] in 1985 heralded a new era in South Carolina's civil practice, modernizing and streamlining our system."[132]

IV. BIFURCATION AS APPLIED IN SOUTH CAROLINA

A. Current South Carolina Law and the "No Overlap" Requirement

Under the state's current Rules of Civil Procedure, the South Carolina courts have explicitly held that a "motion seeking bifurcation of the issues of liability and damages . . . is addressed to the sound discretion of the trial court."[133] Generally, courts granting bifurcation have done so to promote convenience and efficiency or to avoid prejudice.[134] Also, under the current rules, "there is no per se rule that the same jury must decide both issues."[135] However, if a court orders bifurcation, it must ensure that a party will not lose its right to a full jury trial on all legal issues[136] or that a party appropriately waives this right.[137] Finally, a party cannot immediately appeal an order granting bifurcation.[138] However, once appealed, the appellate court can review bifurcation decisions for abuse of discretion only.[139]

While the trial court has broad discretion in ordering bifurcation, there is one critical limitation. In South Carolina, bifurcation is appropriate under Rule 42(b) only if the legal and factual issues of both liability and damages are completely distinct and do not overlap.[140] This requirement is quite stringent: "Where evidence

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129. *See* White v. Fowler, 276 S.C. 370, 373, 278 S.E.2d 777, 778 (1981).

130. *See McLain*, 314 S.C. at 360, 444 S.E.2d at 512 (noting that the South Carolina Rules of Civil Procedure were adopted in 1985).

131. S.C. R. CIV. P. 42(b).

132. *McLain*, 314 S.C. at 360, 444 S.E.2d at 512.

133. Senter v. Piggly Wiggly Carolina Co., 341 S.C. 74, 77, 533 S.E.2d 575, 577 (2000); *see also* Durham v. Vinson, 360 S.C. 639, 644–45 n.2, 602 S.E.2d 760, 762 n.2 (2004) (holding that a motion seeking bifurcation of punitive damages is also addressed to the discretion of the trial court).

134. *See, e.g.*, Doe v. Orangeburg County Sch. Dist. No. 2, 335 S.C. 556, 559, 518 S.E.2d 259, 260–61(1999) (noting that bifurcation is appropriate to avoid potential prejudice); Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 109, 512 S.E.2d 510, 517 (1998) (noting that the bifurcation decision requires consideration of "convenience, expedition, and judicial economy"); 4 S.C. JUR. *Action* § 43 (1991) (noting that prejudice, convenience, expedition, and economy are important considerations for the court in deciding whether to bifurcate a trial).

135. Fortune v. Gibson, 304 S.C. 279, 281, 403 S.E.2d 674, 675 (Ct. App. 1991).

136. Johnson v. South Carolina Nat'l Bank, 292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987).

137. *Id.* at 55, 354 S.E.2d at 897 (noting that the defendant waives the right to a jury trial if the complaint is equitable and the counterclaim is "legal and permissive").

138. *Senter*, 341 S.C. at 77–78, 533 S.E.2d at 577.

139. *Id.* at 77, 533 S.E.2d at 577.

140. *See* Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (1998) (citing *Fortune*, 304 S.C. at 281–82, 403 S.E.2d at 675); Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 73 n.8, 533 S.E.2d 331, 333 n.8 (2000).

relevant to the issues of both liability and damages overlap, bifurcation is inappropriate."[141]

Arguably, South Carolina's complete restriction on issue overlap does not arise from the Constitution's Reexamination Clause[142] for at least two reasons. First, no South Carolina court seems to have expressly held that the Reexamination Clause bars bifurcation when there is any overlap of issues. In its decision in *Fortune v. Gibson*,[143] the court relied on the Fifth Circuit's reasoning in *Alabama v. Blue Bird Body Co.*[144] to explain South Carolina's absolute prohibition against evidentiary and issue overlap: "[T]he distinct issues requirement is dictated for the very practical reason that if separate juries are allowed to pass on issues involving overlapping legal and factual questions[,] the verdicts rendered by each could be inconsistent."[145] While the Fifth Circuit in *Blue Bird* relied on the Seventh Amendment to caution against issue overlap,[146] the same court later cited *Blue Bird* to support the proposition that some overlap was acceptable.[147] Specifically, the court found that the Reexamination Clause does not preclude bifurcation where there is an overlap of evidence.[148]

Second, the only textual change that the South Carolina Supreme Court made when adopting the former Federal Rule 42(b) was to change the line "always preserving inviolate the right of trial by jury as declared by *the Seventh Amendment to* the Constitution or as given by a statute of the United States"[149] by removing reference to the Seventh Amendment.[150] If the Reexamination Clause of the Seventh Amendment prohibited bifurcation where there was any issue overlap, the South Carolina Supreme Court presumably would have retained the reference in South Carolina Rule 42(b).

South Carolina's historic antagonism toward bifurcation[151] seems to drive the state's strict "no overlap" requirement. Several South Carolina cases examining this requirement[152] use similar language to that used in the restrictive holding in

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141. *Creighton*, 334 S.C. at 108, 512 S.E.2d at 516 (citing *Fortune*, 304 S.C. at 281, 403 S.E.2d at 675).

142. *See* U.S. CONST. amend. VII ("[N]o fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.").

143. 304 S.C. 279, 403 S.E.2d 674 (Ct. App. 1991).

144. 573 F.2d 309 (5th Cir. 1978).

145. *Fortune*, 304 S.C. at 281–82, 403 S.E.2d at 675 (quoting *Blue Bird*, 573 F.2d at 318) (internal quotation marks omitted).

146. *Blue Bird*, 573 F.2d at 318 ("[T]he issue to be tried must be so distinct and separable from the others that a trial of it alone may be had without injustice . . . . [It] is the general right of a litigant to have only one jury pass on a common issue of fact." (citation omitted)).

147. Allison v. Citgo Petrol. Corp., 151 F.3d 402, 423 n.21 (5th Cir. 1998) (citing *Blue Bird*, 573 F.2d at 318–19) (distinguishing overlapping factual *issues* from overlapping *evidence*).

148. *Id.*

149. FED. R. CIV. P. 42(b) (1966) (amended 2007) (emphasis added).

150. S.C. R. CIV. P. 42(b).

151. *See* discussion *supra* Part III.B.

152. *See, e.g.*, Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 73 n.8, 533 S.E.2d 331, 333 n.8 (2000) (reinforcing the "'separate issue' mandate"); Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (1998) (citing Fortune v. Gibson, 304 S.C. 279, 281–82, 403 S.E.2d 674, 675 (1991)) ("Where evidence relevant to the issues of both liability and damages overlap, bifurcation is inappropriate.").

Industrial Welding Supplies, Inc. v. Atlas Vending Co.[153]—a case decided before South Carolina adopted Rule 42(b) in an effort to "moderniz[e] and streamlin[e]" civil practice in the state.[154] Ironically, *Industrial Welding* was actually an effort to relax what the supreme court considered to be an overly restrictive approach to bifurcation.[155]

A brief survey of several South Carolina cases illustrates the contours of bifurcation in the state. In *Creighton v. Coligny Plaza Limited Partnership*,[156] the state's court of appeals noted that a trial judge was within his discretion to bifurcate when he determined that the issues were distinct and bifurcation would expedite the trial.[157] In this negligence action, the trial judge found that the need for extensive medical testimony and numerous related discovery issues would be moot if the jury found the defendant not liable.[158] He further determined that the plaintiff's evidence regarding damages was not necessary to establish liability,[159] so the issues were distinct and would not overlap. According to the court, the trial judge properly considered "convenience, expedition, and judicial economy as required under Rule 42(b)" in ordering bifurcation.[160]

In *Durham v. Vinson*,[161] the South Carolina Supreme Court ordered a new trial on punitive damages because it held that the trial judge should not have admitted evidence of misconduct toward a third party.[162] This case is instructive because the court openly praised the use of bifurcation, noting that "[w]e encourage judges . . . to bifurcate trials in complex medical malpractice cases . . . , particularly when bifurcation helps to clarify and simplify the issues."[163] The opinion also noted that South Carolina courts must continue to heed the "'separate issue' mandate," but the decision whether to bifurcate is within a judge's discretion when the issues are distinct.[164]

Six years before *Durham*, in *Flagstar Corp. v. Royal Surplus Lines*,[165] the South Carolina Court of Appeals reversed a trial judge's bifurcation order, finding that an insurance case was so complex it would inherently involve overlapping issues.[166] While the South Carolina Supreme Court reversed the decision by the court of appeals on other grounds,[167] the court also seemed to agree that the underlying bifurcation might have been inappropriate:

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153. 276 S.C. 196, 201, 277 S.E.2d 885, 887 (1981) (allowing separate trials "where there are distinct jury issues" and the issues are separate from each other); *see also supra* text accompanying notes 125–27 (discussing the holding of *Industrial Welding*).

154. McLain v. Ingram, 314 S.C. 359, 360, 444 S.E.2d 512, 512 (1994).

155. *See Indus. Welding*, 276 S.C. at 201, 277 S.E.2d at 887.

156. 334 S.C. 96, 512 S.E.2d 510.

157. *Id.* at 109, 512 S.E.2d. at 517.

158. *Id.*

159. *Id.*

160. *Id.*

161. 360 S.C. 639, 602 S.E.2d 760 (2004).

162. *Id.* at 652, 602 S.E.2d at 767.

163. *Id.* at 644–45 n.2, 602 S.E.2d at 762 n.2.

164. *Id.*

165. 332 S.C. 182, 503 S.E.2d 497 (Ct. App. 1998), *rev'd on other grounds*, 341 S.C. 68, 73, 533 S.E.2d 331, 334 (2000).

166. *Id.* at 189, 503 S.E.2d at 501.

167. *Flagstar*, 341 S.C. at 73, 533 S.E.2d at 334 (reversing because a party cannot immediately appeal a bifurcation order).

> Our ruling should not be interpreted by the trial bench as in any way lessening the level of responsibility of the trial judge to determine appropriate severability in deciding a Rule 42(b) motion. In exercising their discretion, trial judges should take care to analyze whether or not the issues are overlapping or not distinct, in determining whether or not the "separate issue" mandate of Rule 42(b) is met.[168]

In the recent case of *Erickson v. Jones Street Publishers*,[169] the South Carolina Supreme Court reinstated a jury verdict on liability when the trial judge treated the liability verdict as a response to advisory interrogatories and then allowed a second verdict addressing both liability and damages.[170] On appeal, the court agreed with the appellant's arguments that after bifurcating the case, the judge was without power "to subsequently reopen the liability issue or disturb the jury's verdict."[171]

The South Carolina caselaw on bifurcation is less than robust and that dearth of caselaw is telling. While courts speak in sweeping terms about the broad discretion of the trial court[172] and the benefits of bifurcation,[173] the requirement of no issue overlap seems to speak even louder. Given South Carolina's historical opposition to bifurcation[174] and the constant reminders that even evidence should not overlap,[175] the courts seem to be cautioning judges to bifurcate only the clearest of cases. Oddly, the clearer the evidentiary divide, the less complex a case is likely to be. The level of complexity seems to be the underlying rationale for the reversal[176] of the trial judge's bifurcation decision in *Flagstar*.[177] Yet it was in a complex medical malpractice case, *Durham v. Vinson*, that the state's highest court most enthusiastically endorsed bifurcation.[178]

B. South Carolina as Compared to Other States

Most state rules governing bifurcation have language similar or identical to South Carolina Rule 42(b).[179] Accordingly, "[m]ost state rules and statutes grant state trial judges similarly broad discretion to sever issues for trial."[180] In

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168. *Id.* at 73 n.8, 533 S.E.2d at 333 n.8.

169. 368 S.C. 444, 629 S.E.2d 653 (2006).

170. *Id.* at 480–81, 629 S.E.2d at 672–73.

171. *Id.* at 479, 629 S.E.2d at 672.

172. *See, e.g.*, Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998) ("This court must review a trial judge's decision to bifurcate the issues of liability and damages under an 'abuse of discretion' standard." (citations omitted)).

173. *See, e.g.*, Durham v. Vinson, 360 S.C. 639, 645 n.2, 602 S.E.2d 760, 762 n.2 (2004) ("[B]ifurcation helps to clarify and simplify the issues.").

174. *See* discussion *supra* Part III.B.

175. *See supra* text accompanying notes 140–41.

176. Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 73, 533 S.E.2d 331, 334 (2000).

177. *See* Flagstar Corp. v. Royal Surplus Lines, 332 S.C. 182, 189, 503 S.E.2d 497, 501 (Ct. App. 1998), *rev'd on other grounds*, 341 S.C. 68, 533 S.E.2d 331 (2000).

178. *Durham*, 360 S.C. at 645 n.2, 602 S.E.2d at 762 n.2.

179. *See, e.g.*, ALA. R. CIV. P. 42(b); ARIZ. R. CIV. P. 42(b); COLO. R. CIV. P. 42(b); FLA. R. CIV. P. 1.270b; IND. R. TRIAL P. 42(b); IOWA R. CIV P. 186; N.J. R. CT. 4:7-7.

180. Simon v. Philip Morris Inc., 200 F.R.D. 21, 31 (E.D.N.Y. 2001).

Connecticut, for example, courts look to the overlap of issues as only one of many factors in deciding whether to bifurcate a case. Among those factors are:

> (1) whether the issues are significantly different from one another; (2) whether the issues are to be tried before a jury or to the court; (3) whether the posture of discovery on the issues favors a single trial or bifurcation; (4) whether the documentary and testimonial evidence on the issues overlap[;] and[] (5) whether the party opposing bifurcation will be prejudiced if it is granted.[181]

In *Terrain Enterprises, Inc. v. Mockbee*,[182] the Mississippi Supreme Court ruled that the trial judge was within his discretion in bifurcating a trial where evidence relating to damages was reviewed in the liability phase.[183] The court held that the efficiency and clarity provided by bifurcation outweighed any harm done by the overlap of issues in the two phases of trial.[184]

C. *South Carolina as Compared to the Fourth Circuit*

The Fourth Circuit Court of Appeals and the lower federal courts in South Carolina seem to take a more liberal and permissive view of bifurcation than South Carolina state courts do.[185] However, other district courts in the Fourth Circuit specifically caution against bifurcation, though these courts would allow some overlap.[186] The relevant caselaw in the Fourth Circuit regarding bifurcation indicates that when one issue might be highly prejudicial to the determination of another, bifurcation is appropriate.[187] In *Dixon v. CSX Transportation, Inc.*,[188] the court actually overruled a court's refusal to bifurcate, finding that the trial court should have ordered bifurcation because evidence introduced regarding one claim was highly prejudicial to a separate claim.[189] The court also ruled that the process of resolving both state and federal claims in the same trial resulted in "considerable juror confusion."[190]

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181. PRI Capital Group, LLC v. E. Capital Funding, LLC, No. X04CV0101035125, 2004 Conn. Super. LEXIS 3426, at *6 (Conn. Super. Ct. Nov. 17, 2004) (citing Dallas v. Goldberg, 143 F. Supp. 2d 312, 315 (S.D.N.Y. 2001)). Other state courts have ruled, either implicitly or explicitly, that some overlap between liability and damages is not determinative of the bifurcation decision. *See, e.g.*, Ham v. H.M.R. Joint Venture, No. DV 99-194, 2002 Mont. Dist. LEXIS 2536, at *6 (D. Mont. Mar. 22, 2002) (considering issue and factual overlap together); State v. Monschke, 135 P.3d 966, 977 (Wash. Ct. App. 2006) (finding bifurcation inappropriate where there is a substantial overlap of issues).

182. 654 So. 2d 1122 (Miss. 1995).

183. *Id.* at 1132.

184. *Id.*

185. *See infra* notes 187–94 and accompanying text.

186. *See infra* notes 195–97 and accompanying text.

187. *See, e.g.*, Mattison v. Dallas Carrier Corp., 947 F.2d 95, 110 (4th Cir. 1991) ("[W]hen it is determined that the evidence . . . will be prejudicial to the jury's consideration . . . , bifurcation . . . remains an available solution.").

188. 990 F.2d 1440 (4th Cir. 1993).

189. *Id.* at 1443. The trial court had allowed evidence of loss of consortium on a state law claim while the federal law claim did not allow recovery for loss of consortium. *Id.*

190. *Id.* at 1444.

The Fourth Circuit also does not restrict bifurcation to claims that do not overlap. In fact, district courts within the Fourth Circuit have held that while an overlap of claims may "caution against bifurcation," an overlap between liability and damages issues does not preclude "an otherwise justified bifurcation."[191] Realizing "the benefits of 'bifurcated' trials,"[192] one South Carolina district court recently ruled that a trial judge did not abuse his discretion when he refused to bifurcate a trial, consequently allowing a jury to hear evidence of the defendant's net worth in the liability phase.[193] The court found that the trial judge sufficiently instructed the jury not to use such evidence in determining liability.[194]

Other district courts in the Fourth Circuit have viewed bifurcation as the exception. A district court in West Virginia refused to bifurcate and subject the parties to "the needless expense of two trials in the same action."[195] A district court in North Carolina similarly held that "a single trial [would] be more expedient and efficient."[196] The North Carolina court also noted that there are five factors traditionally considered in deciding whether to bifurcate: separability of the issues, simplification of discovery and the conservation of resources, prejudice to the parties, the effect of bifurcation on the possibility of settlement, and the suitability of bifurcating the trial but not discovery.[197]

North Carolina's consideration of multiple factors[198] is consistent with other courts adopting a stricter view of bifurcation where issue overlap is only one of many factors.[199] The federal view is consistent with Professor Gensler's argument:

> Courts should not reject bifurcation when they detect any overlap. Instead, courts must compare the likely overlap with the potential savings. Naturally, parties who feel disadvantaged by bifurcation have an incentive to exaggerate the expected overlap of evidence, while parties who feel advantaged by bifurcation will have a

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191. F & G Scrolling Mouse L.L.C. v. IBM Corp., 190 F.R.D 385, 388 (M.D.N.C. 1999).

192. Ellison v. Rock Hill Printing & Finishing Co., 64 F.R.D. 415, 418 (D.S.C. 1974).

193. Pernanza Hill v. USA Truck, Inc., No. 8:06-CV-1010-GRA, 2007 U.S. Dist. LEXIS 39197, at *30 (D.S.C. May 30, 2007).

194. *Id.*

195. Walhonde Tools, Inc. v. Allegheny Energy, Inc., No. 2:06-0537, 2007 U.S. Dist. LEXIS 43776, at *19–20 (S.D. W. Va. June 15, 2007). However, the court stated that it would consider granting bifurcation if the defendants could show a "substantial probability of prevailing on the question of liability." *Id.* at *20.

196. *F & G Scrolling Mouse*, 190 F.R.D. at 387 (citing Industrias Metalicas Marva, Inc. v. Lausell, 172 F.R.D 1, 2 (D.P.R. 1997); Johns Hopkins Univ. v. Cellpro, 160 F.R.D. 30, 35 (D. Del. 1995)).

197. *Id.* at 387–93.

198. *See id.*

199. Many federal courts outside the Fourth Circuit also treat issue overlap as one of several issues to consider in making a determination regarding bifurcation. *See, e.g.*, Griffin v. City of Opa-Locka, 261 F.3d 1295, 1301 (11th Cir. 2001) (finding "substantial overlap in the issues, facts, evidence, and witnesses"); Allison v. Citgo Petrol. Corp., 151 F.3d 402, 419 (5th Cir. 1998) (noting the concern of the "potential overlap of issues"); McLaughlin v. State Farm Mut. Auto. Ins. Co., 30 F.3d 861, 871 (7th Cir. 1994) (noting that issue overlap would not "significantly improve the management of the trial"); Willemijn Houdstermaatschaapij BV v. Apollo Computer Inc., 707 F. Supp. 1429, 1434 (D. Del. 1989) ("[O]verlapping of issues is significant to the decision whether to bifurcate."); Brad Ragan, Inc. v. Shrader's Inc., 89 F.R.D. 548, 548 (S.D. Ohio 1981) (finding that the existence of the same evidence regarding liability and damages did not preclude bifurcation).

> corresponding incentive to understate the expected overlap of evidence. Therefore, judges must use their experience to assess the likelihood of overlap independently.[200]

Unlike the view endorsed by federal courts and Professor Gensler, the South Carolina Supreme Court instructs trial judges to prohibit issue overlap,[201] which limits judges' discretion in deciding whether to bifurcate.

V. CONCLUSION

South Carolina would do well to eliminate its no overlap restriction and truly give trial judges discretion to bifurcate their trials. As a litigation tool, the benefits of bifurcation outweigh its burdens.[202] Despite the procedure's disadvantages,[203] many jurists and scholars support the practice.[204] By allowing the trial court to focus on one important issue at a time, the practice promotes an efficient use of judicial resources.[205] Additionally, the South Carolina Supreme Court has recognized the benefit bifurcation can bring to certain types of litigation.[206]

Further, bifurcation is not a tool that works unfairly in the defendant's favor. Although most studies show a higher win ratio for the defendant in a bifurcated trial,[207] two important considerations exist: the plaintiff often wins a higher damages award in a bifurcated trial when it prevails;[208] and in a unitary trial, the jury tends to use damages evidence inappropriately in determining liability.[209] The decrease in a plaintiff's chances of prevailing coupled with this increase in damages awards in bifurcated trials seems to reflect that juries in bifurcated cases are making decisions based on the evidence and not that juries are exhibiting any prejudice toward the plaintiff. Any process that enables juries to use evidence more appropriately to reach a legally accurate result furthers justice and prejudices no one.

Unfortunately, South Carolina courts make inefficient use of this litigation tool. Not until 1981, with the holding in *Industrial Welding Supplies, Inc. v. Atlas Vending Co.*, did the South Carolina Supreme Court truly enable trial judges to grant bifurcation.[210] However, the court still required the bifurcated issue to be "separate from all other issues."[211] When South Carolina adopted Rule 42(b) just a few years later in 1985, the court lauded the new efficiency the federal-based

200. Gensler, *supra* note 6, at 778–79 (internal citations omitted).
201. *See* Durham v. Vinson, 360 S.C. 639, 645 n.2, 602 S.E.2d 760, 762 n.2 (2004).
202. *See supra* text accompanying notes 37–52.
203. *See supra* text accompanying notes 53–60, 65–71.
204. *See* discussion *supra* Part II.A.
205. *See supra* text accompanying notes 42–43.
206. *See Durham*, 360 S.C. at 645 n.2, 602 S.E.2d at 762 n.2.
207. *See* Zeisel & Callahan, *supra* note 57, at 1612 tbl.3.
208. *See* Horowitz & Bordens, *supra* note 5, at 283.
209. *See id.* at 282.
210. 276 S.C. 196, 201, 277 S.E.2d 885, 887 (1981).
211. *Id.*

rules brought to South Carolina's civil litigation.[212] However, the court retained its no overlap requirement,[213] and imposed it on cases in which evidence regarding both damages and liability *might* overlap.[214]

While the no overlap restriction may prevent a bifurcated trial from violating the Constitution's Reexamination Clause, the clause, at most, prohibits two separate juries from ruling on the same legal issue.[215] Even the Fifth Circuit, quoted by the South Carolina Supreme Court in support of its no overlap restriction,[216] now allows for some overlap of liability and damages issues.[217] The South Carolina no overlap rule thus seems to reflect the state's antagonism to bifurcation[218] rather than an attempt to comply with the Reexamination Clause.

At the federal level, issue overlap alone will not prohibit bifurcation;[219] however, courts still rarely bifurcate cases.[220] This is unfortunate, especially considering the flexibility bifurcation can bring to the more routine civil actions.[221] However, the support of bifurcation lent by scholars and jurists such as Professor Gensler and Judge Tobin has provided bifurcation with a doctrinal boost.[222] As this work proliferates, perhaps more judges will feel comfortable expanding the use of bifurcation beyond its "traditional parameters."[223]

As it currently exists, South Carolina's no overlap rule creates at least three areas of confusion, which in turn create significant obstacles to the use of bifurcation. First, the restrictive nature of the rule is inconsistent with South Carolina's support of the underlying theory of bifurcation.[224] Courts in other jurisdictions that openly discourage bifurcation, however, would seem to allow the practice in cases where South Carolina's no overlap restriction would prohibit it.[225] Second, while the South Carolina Supreme Court has specifically endorsed bifurcation in certain complex cases,[226] logic seems to dictate that the more complex the case, the greater the likelihood of evidentiary overlap. Further, although its

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212. *See* McLain v. Ingram, 314 S.C. 359, 360, 444 S.E.2d 512, 512 (1994) ("The adoption of the [South Carolina Rules of Civil Procedure] in 1985 heralded a new era in South Carolina's civil practice, modernizing and streamlining our system.").

213. *See* Durham v. Vinson, 360 S.C. 639, 645 n.2, 602 S.E.2d 760, 762 n.2 (2004).

214. *Id.* at 651, 602 S.E.2d at 767.

215. *See supra* notes 66–67 and accompanying text.

216. Fortune v. Gibson, 304 S.C. 279, 281–82, 403 S.E.2d 674, 675 (Ct. App. 1991) (quoting Alabama v. Blue Bird Body Co., 573 F.2d 309, 318 (5th Cir. 1978)).

217. *See* Allison v. Citgo Petrol. Corp., 151 F.3d 402, 423 n.21 (5th Cir. 1998) (citing *Blue Bird*, 573 F.2d at 318–19).

218. *See supra* notes 119–24 and accompanying text.

219. *See supra* note 199.

220. *See* discussion *supra* Parts II.A, IV.C.

221. Tobin, *supra* note 38, at 16 (listing several advantages of bifurcation in routine negligence actions).

222. Two of Gensler's articles about bifurcation—Gensler, *supra* note 6, and Gensler, *supra* note 37—have been cited by courts and other journals more than fifty times since 2000. Westlaw Home Page, http://www.westlaw.com (enter citing reference; follow "Keycite" hyperlinks) (last visited Feb. 15, 2008).

223. *See* Gensler, *supra* note 6, at 723.

224. *See* Durham v. Vinson, 360 S.C. 639, 645 n.2, 602 S.E.2d 760, 762 n.2 (2004).

225. *See* discussion *supra* Part IV.

226. *Durham*, 360 S.C. at 645 n.2, 602 S.E.2d at 762 n.2 (encouraging bifurcation in complex medical malpractice cases).

decision was reversed on other grounds,[227] the South Carolina Court of Appeals has held that bifurcation might be particularly inappropriate in a complex case.[228] Thus, the no overlap rule has prohibited bifurcation in cases where the courts have actually encouraged its use. Finally, while the South Carolina appellate courts note the broad discretion of trial judges to order bifurcation,[229] consistent reminders to heed the no overlap requirement,[230] coupled with the courts' historic disapproval of the practice,[231] discourages trial judges from exercising that discretion in all but the most obvious cases. This result is detrimental because any increase in the use of bifurcation is arguably the direct result of the ability of judges who support the practice to freely employ the procedure.[232] Thus, South Carolina's no overlap requirement creates a formidable concrete hurdle that must be overcome by any judges wishing to bifurcate any of their cases.

South Carolina would eliminate this confusion and resulting obstacles if it abandoned the no overlap restriction. Bifurcation would be encouraged in both theory and practice; the inherent evidentiary overlap in complex cases would be one of only several factors for trial courts to consider; and trial judges would have the discretion in their bifurcation decisions. Furthermore, as caseloads continue to grow and bifurcation continues to prove itself a potent and efficient tool in civil litigation, removing the rigid no overlap requirement would allow trial judges in South Carolina the flexibility to make meaningful use of the procedure.

This first step is critical, but it should only be the beginning. Bifurcation, like any procedural tool, is only effective when used properly. The full benefits of bifurcation will likely be realized only when judges are willing to employ the practice in many types of cases.[233] As Judge Tobin observed, "bifurcation must be used on a larger number of cases in order to make it work."[234]

Before South Carolina can begin to realize the real benefits of bifurcation, it must first eliminate the restrictions on the use of the procedure in all but a few cases. The South Carolina Supreme Court should abandon the no overlap requirement, which would truly allow bifurcation under Rule 42(b) to usher in "a new era in South Carolina's civil practice."[235]

Derek A. Shoemake

227. Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 73, 533 S.E.2d 331, 334 (2000).

228. Flagstar Corp. v. Royal Surplus Lines, 332 S.C. 182, 189, 503 S.E.2d 497, 501 (Ct. App. 1998) ("Given the complexities of the insurance coverage issues in this case, we hold the trial court erred in granting the motion for separate trials."), *rev'd on other grounds*, 341 S.C. 68, 533 S.E.2d 331 (2000).

229. *See Durham*, 360 S.C. at 644–45 n.2, 602 S.E.2d at 763 n.2.

230. *See id.*

231. *See* discussion *supra* Part III.B.

232. *See* discussion *supra* Part IV.B–C.

233. *See* Tobin, *supra* note 38, at 20.

234. *Id.*

235. McLain v. Ingram, 314 S.C. 359, 360, 444 S.E.2d 512, 512 (1994).

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