

CPLR 4011: Interposition of Interlocutory Judgment Is Discretionary with the Court

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applicable to subsequent taxpayer suits by different taxpayers inclusive of all issues which could have been raised in prior suits, or merely those questions actually litigated previously?

The Court of Appeals resolved this matter in *Murphy v. Erie County*,¹⁴⁸ one of several taxpayers' actions unsuccessfully challenging various transactions concerning construction and management of a stadium by Erie County. A prior taxpayer suit, which merely raised a threshold question regarding the absence of competitive bidding, had been dismissed on the merits.¹⁴⁹ Defendants in *Murphy* argued that the prior action was a complete defense to this action under the doctrine of res judicata. The Court weighed the desirability of an end to taxpayer suits concerning a particular matter against their usefulness as a check on abuse of official power and held that said doctrine bars only litigation of those issues which were litigated in prior taxpayer suits.¹⁵⁰

The doctrine of res judicata should not prevent courts from passing upon the merits of contentions not presented in a previous taxpayer suit. Otherwise, an initial ineffectual challenge will bar forever from judicial consideration valid challenges to unlawful actions. For, "[t]he effect of the judgment is not at all dependent upon the correctness of the verdict or finding upon which it was rendered."¹⁵¹ In light of the potential danger inherent in barring subsequent taxpayer actions, the doctrine of res judicata should be applied only when the arguments of the subsequent plaintiffs have been presented adequately and considered on the merits.¹⁵²

ARTICLE 40 — TRIAL GENERALLY

CPLR 4011: Interposition of interlocutory judgment is discretionary with the court.

Separate trials on the issues of liability and of damages are proper under CPLR 603.¹⁵³ Under CPLR 4011, a court is empowered to "regulate the conduct of the trial in order to achieve a speedy and

City of Oswego, 207 App. Div. 134, 141, 202 N.Y.S. 243, 247 (4th Dep't 1923), *aff'd*, 238 N.Y. 606, 144 N.E. 911 (1924).

¹⁴⁸ 28 N.Y.2d 80, 268 N.E.2d 771, 320 N.Y.S.2d 29 (1971), *aff'g* 34 App. Div. 2d 295, 310 N.Y.S.2d 459 (4th Dep't 1970), *aff'g* 60 Misc. 2d 954, 304 N.Y.S.2d 242 (Sup. Ct. Erie County 1969).

¹⁴⁹ *Hurd v. Erie County*, 34 App. Div. 2d 289, 310 N.Y.S.2d 953 (4th Dep't 1970).

¹⁵⁰ 28 N.Y.2d at 85-86, 268 N.E.2d at 773, 320 N.Y.S.2d at 32.

¹⁵¹ *Wilson's Executor v. Deen*, 121 U.S. 525, 534 (1887).

¹⁵² See 5 WK&M ¶ 5011.35; *Developments in the Law — Res Judicata*, 65 HARV. L. REV. 818, 858-59 (1952).

¹⁵³ See *Berman v. J.J. Enterprises, Inc.*, 13 App. Div. 2d 199, 214 N.Y.S.2d 945 (1st Dep't 1961).

unprejudiced disposition of the matters at issue in a setting of proper decorum." The latter section enables the court to utilize the split trial procedure.

Some confusion has arisen regarding the circumstances under which a defendant can appeal a determination for the plaintiff on the liability issue before trial of the issue of damages. In *Bliss v. Londner*,¹⁵⁴ the Second Department had held that appeal of such determination must await entry of judgment, a mere ruling on the matter in the course of trial not being immediately appealable.¹⁵⁵ Subsequently, the First Department, in *Hacker v. City of New York*,¹⁵⁶ held that there is an appeal as of right of the judgment in a separate trial on the liability issue prior to the trial of the damages issue.¹⁵⁷ To achieve uniformity with the First Department, the Second Department, in *Fortgang v. Chase Manhattan Bank*,¹⁵⁸ then decided to entertain immediate appeals from an interlocutory judgment on the liability issue alone.¹⁵⁹

These developments in the law have inspired this question: Does the immediate right of appeal available with separate trials also apply when the split trial procedure is invoked in a continuous proceeding?

In *Jack Parker Construction Corp. v. Williams*,¹⁶⁰ petitioner, pursuant to article 78 of the CPLR, sought to compel entry of an interlocutory judgment in a negligence action in which he was a defendant. The jury had returned a verdict in favor of the plaintiff solely on the liability issue during a split trial. The trial judge declined to interpose an interlocutory judgment, which is necessary to immediate appeal.¹⁶¹

The Appellate Division, Second Department, approved use of the split trial procedure for speedier and more efficient disposition of cases,¹⁶² and preferred "immediate trial of the damage question before the same jury which decided liability."¹⁶³ It recognized, however, the trial judge's discretion to interpose an interlocutory judgment in exceptional cases, to permit appeal prior to completion of the entire

¹⁵⁴ 20 App. Div. 2d 640, 246 N.Y.S.2d 296 (2d Dep't 1964).

¹⁵⁵ *Id.* at 640, 246 N.Y.S.2d at 297.

¹⁵⁶ 25 App. Div. 2d 35, 266 N.Y.S.2d 194 (1st Dep't 1966).

¹⁵⁷ *Id.* at 37, 266 N.Y.S.2d at 196.

¹⁵⁸ 29 App. Div. 2d 41, 285 N.Y.S.2d 110 (2d Dep't 1967).

¹⁵⁹ *Id.* at 42-43, 285 N.Y.S.2d at 111-12.

¹⁶⁰ 35 App. Div. 2d 839, 317 N.Y.S.2d 911 (2d Dep't 1970).

¹⁶¹ *Id.* at 839-40, 317 N.Y.S.2d at 912.

¹⁶² See Zeisel & Callahan, *Split Trial and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606 (1963).

¹⁶³ 35 App. Div. 2d at 839, 317 N.Y.S.2d at 912; see 7B MCKINNEY'S CPLR 603, supp. commentary at 42 (1966).

trial.¹⁶⁴ The *Fortgang* case, in which the court had spoken in general terms, was limited to the facts of the *Hacker* case, which it was intended to follow.¹⁶⁵ *Hacker* expressly did not apply to the continuous proceeding, wherein one jury either tries both issues simultaneously or promptly hears the damages question after returning a verdict on the liability issue.¹⁶⁶

The Second Department properly resolved the question of the right to immediate appeal on the liability issue alone in a split trial by permitting the trial judge to weigh the equities and interpose an interlocutory judgment when justice requires. Courts ordinarily will realize the advantage and economy in allowing the same jury, with its familiarity with the facts, to try the issue of damages. This will expedite trial of the damages question and probably result in more equitable damage verdicts.¹⁶⁷ Where this procedure unduly prejudices the defendant or in other special circumstances, however, the court may interpose an interlocutory judgment and thus allow earlier appeal.

CPLR 4011: Prejudicial separation of issues of liability and of damages requires retrial.

CPLR 4011 restates the power to determine the sequence of issues presented at trial which common law vested in the trial judge.¹⁶⁸ In the absence of distinct statutory mandate to the contrary, it frees the trial court to effect rapid and just disposition by those means which the court's discretion dictates. As a result of this broad power, most negligence actions are "bifurcated trials."¹⁶⁹ wherein the issue of liability is tried separately from and prior to the issue of damages.¹⁷⁰ Thus, unnecessary litigation is avoided, since no trial of damages occurs if the liability issue is determined in the defendant's favor. Where the nature of the plaintiff's injuries has a significant bearing on the issue of the defendant's liability, however, a "bifurcated trial" may prejudice the plaintiff's case. *Williams v. City of New York*¹⁷¹ illustrates how a trial court's decision to modify the usual trial sequence may substantially influence both the trial and the judgment.¹⁷²

¹⁶⁴ *Id.*; see 4 WK&M ¶ 4011.05.

¹⁶⁵ 25 App. Div. 35, 37, 266 N.Y.S.2d 194, 196 (1st Dep't 1966).

¹⁶⁶ *Id.* at 36-37, 266 N.Y.S.2d at 195-96.

¹⁶⁷ See 7B MCKINNEY'S CPLR 603, supp. commentary at 42 (1966).

¹⁶⁸ See 4 WK&M ¶ 4011.04.

¹⁶⁹ See 7B MCKINNEY'S CPLR 4011, supp. commentary at 33 (1966).

¹⁷⁰ CPLR 603 states: "In furtherance of convenience or to avoid prejudice the court may order a separate trial of any claim or any separate issue. . . ."

¹⁷¹ 36 App. Div. 2d 620, 318 N.Y.S.2d 536 (2d Dep't 1971) (mem.).

¹⁷² See 7B MCKINNEY'S CPLR 4011, supp. commentary at 33 (1966).