3/23/01

SUPREME COURT OF LOUISIANA

No. 00-C-1372

DON PERKINS, ET AL.

VERSUS

ENTERGY CORPORATION, ET AL.

consolidated with

No. 00-C-1387

JOSEPH BUJOL, III, ET AL.

VERSUS

ENTERGY CORPORATION, ET AL.

consolidated with

No. 00-C-1440

ROBERT HRACEK, ET AL.

VERSUS

ENTERGY CORPORATION, ET AL.

KNOLL, JUSTICE, dissenting

For the following reasons, I respectfully dissent from the majority's determination concerning the issue of reargument. Although this practice is frequently utilized in the First Circuit, in my view it is clearly unconstitutional. The record shows that this case was initially assigned to a three-judge panel (Gonzales, Guidry, Weimer). Before the case was heard, and without the knowledge of the litigants, the panel conferred and decided that because of the complexity of the case and the strong likelihood that the three would not agree, the three-judge panel decided to have the case heard by a five-judge panel. Citing, Uniform Rules — Courts of Appeal, Rule

1-5.[1] The parties were not notified of the five-judge panel until oral argument.[2]

Ultimately, the court rendered a 3-2 judgment reversing the trial court. The plaintiffs filed for a rehearing/reargument citing La. Const. art. V, § 8 (A), (B). The plaintiffs contended that because two judges dissented after the initial argument, the constitution required reargument before the court en banc. The court of appeal disagreed and denied reargument.

The court of appeal held that the plaintiffs were not entitled to reargument on the merits of the case. They reasoned that when a case is heard initially by a three-judge panel, a party has a constitutionally provided right to reargument because a judgment cannot be rendered in a civil matter when one of the original three judges dissents. However, the court held that once a judgment is rendered by a five-judge panel, there is no right to reargument or en banc consideration, because five judges are deciding the case, and no right to rehearing, because rehearing is discretionary.

The plaintiffs argue that the Constitution and its history require reargument before a larger panel when one judge dissents. The plaintiffs reason that because two judges dissented after the initial argument of the case, the Constitution requires

---

[1] Uniform Rules — Courts of Appeal, Rule 1-5 states in pertinent part:

> The court ordinarily will sit in rotating panels, each composed of 3 Judges, as may be directed by the Chief Judge. In civil cases, when a judgment or ruling of a trial court is to be modified or reversed and one judge dissents, the case shall be reargued or resubmitted before a panel of at least 5 Judges, a majority of whom shall render judgment. . . . When authorized by law, or when the court deems it necessary to promote justice or expedite the business of court, the court may sit in panels of more than 3 judges or en banc.

[2] The Clerk of Court for the First Circuit provided information that in all cases the court sends the parties a docket sheet noting the argument date and the panel assignment. The "notice" does not contain any notification of a waiver of reargument or that the case is going to be originally heard before a five-judge panel.

reargument. They maintain that the intent behind the constitutional provision is a differently configured, larger panel for reargument.

In my view, the plaintiffs are entitled to a reargument by a larger panel. Under the Constitution, each court of appeal shall sit in panels of at least three judges. La. Const. art. V, § 8(A). Thus, in this case, the court's decision to initially hear the case in a panel of five judges does not violate the Constitution. However, clearly the intent of subsection (B) is to grant the parties a constitutional right to reargument before a larger panel when the decision of the initial panel is to reverse or modify the judgment and that decision is not unanimous.[3]

---

[3] La. Const. art. V, § 8(A), (B) provides:

> (A) Circuits; Panels. The state shall be divided into at least four circuits, with one court of appeal in each. Each court shall sit in panels of at least three judges selected according to rules adopted by the court.
>
> (B) Judgments. A majority of the judges sitting in a case must concur to render judgment. However, in civil matters only, when a judgment of a district court is to be modified or reversed and one judge dissents, the case shall be reargued before a panel of at least five judges prior to rendition of judgment, and a majority must concur to render judgment. (emphasis added).

A review of the Legislative history of La. Const. art. V § 8(B) leads to Vol. VI, p. 756 of the transcripts from the Constitutional Convention. Therein, Delegate Chris J. Roy explained § 8(B) upon its presentation to the delegates. In the debate over the article on the floor of the Convention, only "reversal" is discussed in considering the effect of the article. Below is a transcript of the pertinent portions of the debate.

> If two of the three judges sitting on the panel, you understand, decide that they disagree with the district judge even though they haven't heard the witnesses, saw them testify, etc. and all these good things that you don't want to reverse district judges for, they may nevertheless vote two to one against a dissenting judge who says that the case should not be reversed or modified. When that occurs, the present rules of the courts are that if you apply for a rehearing, the rehearing goes back to the same panel that heard the case. So what happens, the two judges that already decided against you and reversed the district judge

naturally deny the rehearing.

. . . .

Now what does my amendment do? . . . .

. . . It simply says this. When a case goes up to a court of appeal and when you are going to reverse the district judge or modify its opinion, then if there is one dissent of the three who says that it should not be done, that you should not reverse this district judge, at that time instead of rendering the opinion, the parties are entitled to a reargument before at least five judges of that appellate court. In other words they call in two additional judges, the case is reargued. If at that time a majority decides that you should in fact be reversed, you are reversed. If not, you are not reversed. Now let me show you what can happen as a result of the present circumstance. Since the courts of appeal sit in rotating panels of three, never the same three judges at the same time, we are getting out of the same court of appeal sometimes different results in almost identical cases. That is compounded when you think of the fourth circuit having nine judges and they sit in panels of three. You can get out of the same court of appeal two different results from the same type case. I think this is a very, very good amendment. What it does is, it allows the verdict, the judgment of that district judge to be entitled to a little more weight than it's got now. As you see right now you can simply disagree with the district judge, two judges reversing, and that is the end of it. That's the finis of it.

. . . .

All I am saying today is that no two judges on an appellate court who read a cold record should be able to take what a district judge has done after hearing a case for three days and subvert it by simply outvoting another judge. It does not do anything except, and this is the argument against it, it makes some appellate judges, if they have to reargue the case, you have to call in two more appellate judges and two more will have to read the record . . . .

I think that in the interest of justice, it is not too much to ask an appellate court to have two more judges come in and read a record where one judge vehemently dissents and says you have done the wrong thing by reversing this district judge. Let's seek justice ... when two judges can take a district court and reverse it simply almost on a whim, that is not justice in my judgment.

The majority centers its determination on the number of judges on the initial panel as the issue. This is incorrect. The issue is the denial of a mandatory constitutional right to reargument when a judgment is modified or reversed. The constitution clearly states in (B): "... when a judgment of a district court is to be modified or reversed ... the case shall be reargued ...." The majority rewrites this provision of the constitution when it states: "However, this provision does not, and was not intended to, entitle parties to reargument where a five-judge panel hears the case in the first instance." As can be seen, the majority's emphasis is on the initial five-judge panel. The triggering entitlement to reargument is when a judgment is modified or reversed. When this happens, reargument is mandatory. I fail to see how reargument is constitutionally satisfied by having a five-judge panel initially. Reargument is a clear and unambiguous term, simply meaning "argue again." In my view, the majority is clearly denying the parties a mandatory constitutional right to reargument. Thus, I find this case prematurely before us and would remand to the court of appeal for reargument before a larger panel.

As to the number of judges that should hear the reargument in a case initially heard before a five-judge panel, the answer is not so clear. The Constitution states that

---

. . . .

> All I am saying is that yesterday you said that the more people you have looking at a record the better chance that justice will prevail. I have to agree with that although I didn't want it to be reviewed. If we are going to review then let's have as many possible which doesn't impede the efficient operation of the court look at it. That's all this amendment does. It say that when two decide to reverse one, and to reverse that district judge, it must be reviewed by at least five.

reargument shall be heard before a panel of a least five. However, in a case that is initially heard before five judges, reargument before five would still effectively deny the right to reargument afforded by the constitutional article because it is unlikely that one will change his view. This is what the constitutional article sought to avoid. See, Vol. VI, p. 756 of the transcripts from the Constitutional Convention (stating that the present rules of the courts are that if you apply for a rehearing, the rehearing goes back to the same panel that heard the case. So what happens, the two judges that already decided against you and reversed the district judge naturally deny the rehearing).

Thus, in order to adhere to the intent of the constitutional article, I see two possible alternatives to the size of the reargument panel when the case is initially decided before a five-judge panel. First, the panel should be increased by the number of judges in the original panel that vote to reverse or modify the trial court. Thus, if the vote is 4-1, the reargument panel would be increased to a nine-judge panel or if the vote was 3-2, the reargument panel would be increased to eight-judge panel (because an even-number panel would create its own problems, I would recommend that the panel always be nine judges). The second alternative when a judgment of a district court is to be modified or reversed by a five-judge panel and one judge dissents, the case should be heard en banc.

Notwithstanding my dissent on the above issue, I further dissent from the majority's conclusion on the merits of the case. Judge Guidry, in his dissent, succinctly stated the major error in the court of appeal's opinion. He concluded that:

> The majority using "manifest error" language throughout its opinion ... conducted a de novo review and substituted its judgment for that of the trial court.

Perkins v. Entergy Corp., 98-2801 (La. App. 1st Cir. 12/28/99), 756 So. 2d 388, 414 (Guidry, J., dissenting).

The trial court's findings concerning factual matters should be afforded great

discretion. Creekmore v. Elco Maintenance, 94-1571 (La. App. 1st Cir. 6/30/95), 659 So. 2d 815. The factfinder's choice between two permissible views of the evidence cannot be clearly wrong. Id., citing, Stobart v. State, 617 So. 2d 880 (La. 1993). This Court has held that in the absence of such factors as internally inconsistent testimony of an expert or contradictory documents or objective evidence, determinations of fact that are based on evaluations of the credibility of expert witnesses can "virtually never be manifestly erroneous or clearly wrong." Sportsman Store of Lake Charles, Inc. v. Sonitrol Security Systems, 99-0201 (La. 10/19/99), 748 So. 2d 417, 421. "Even though an appellate court may feel its own evaluations and inferences are more reasonable than the factfinders, reasonable evaluations of credibility ... should not be disturbed upon review where conflict exists in the testimony." Cormier v. Comeaux, 98-2378, (La. 7/7/99), 748 So. 2d 1123, 1127 (emphasis added).

In my view, it is significant that this complicated evidentiary trial was based largely on expert testimony from both sides. Essentially, it was a trial of expert opinions. The trial court heard the testimony of the plaintiff's expert who testified that the most likely scenario was that the voltage sag led to the introduction of debris or particles within the flow system as described in the Schmidt Report. The trial court found that "Owens' opinions and conclusions [were] entirely consistent with, and supported by, the Entergy investigative report, ..., and the findings of the Exxon investigative team ...." Thus, the evidence demonstrated that the failure of the static shield wire and subsequent failure of the relaying schemes were the direct result of negligent maintenance and operation by the defendants. The trial court then determined that it was this negligence which caused the accident at the plant based on, among other things, the testimony of Owens that the voltage sag was a very serious event that caused transients to break loose all over the ALAC system. Owens

distinguished this type of sag from a total power outage, testifying that this sag caused the equipment to shut down out of sequence causing the plant to lose control of overflow and pressure.

Thus, the trial court determined, based on the expert testimony which was supported by a plethora of additional evidence, that the voltage sag more probably than not produced the abnormal pipeline conditions which led to the flash fire. In other words, the trial court had two sets of expert testimony, both of which were internally consistent and equally contradicted by the evidence presented by each party, and chose the plaintiff's expert over the defendant's expert. The court of appeal then examined all of the evidence and, despite the clear mandate of Sportsman Store of Lake Charles, Inc. (that evaluations of the credibility of expert witnesses can "virtually never be manifestly erroneous or clearly wrong"), concluded that the trial court's decision was manifestly erroneous. In my view, the court of appeal substituted its opinion for that of the trial court's. Accordingly, I respectfully dissent.