

SUPREME COURT OF WASHINGTON

Sackett v. Santilli

146 Wash. 2d 498 (2002) · Decided June 13, 2002

OPINION

IRELAND, J.

Ireland, J. — Defendant driver Thomas A. Santilli contends that CR 38(d), which provides that a party’s failure to perfect demand for a jury trial in accord with CR 38(b) implies that party’s consent to the waiver of the right to a jury, is unconstitutional under article I, section 21 of our state constitution. Santilli claims the constitution vests the legislature with the exclusive power to “provide for... waiving of the jury in civil cases.” Const, art. I, § 21.

Holding that section 21 should be read as a limitation on the power of the legislature, not a grant of exclusive authority, we affirm the Court of Appeals. **PROCEDURAL HISTORY** In February 1998, Russell and Carolyn Sackett commenced a lawsuit in King County Superior Court against Thomas Santilli. They sought to recover damages from Santilli for injuries they sustained in an automobile accident allegedly caused by Santilli’s negligence.

Pursuant to a case schedule order, the trial court set the case for trial on June 28, 1999 and established the “Change in Trial Date” as March 22, 1999. Because King County Superior Court Local Rule 38(b)(2) provides that “a jury demand shall be filed and served no later than the final date to change trial designated in the Case Schedule,” the effect of the order was to establish March 22, 1999, as the last day for either party to the case to demand a jury trial.

Santilli’s counsel, Shellie McGaughey, claims that she prepared a jury demand on January 14, 1999, well in advance of the deadline for filing such a demand. According *501to McGaughey, she signed both the jury demand and a check for the jury fee on the following day. McGaughey’s assistant, Heidi Powell, indicated that she then prepared a computer generated message to a legal messenger service directing it to serve a copy of the jury demand on opposing counsel and to deliver the original jury demand and a check for the requisite jury fee to the King County Superior Court by January 19, 1999.

Powell said that she recalled “placing the Demand and check at the [law firm’s] front desk so that it [sic] would be picked up by the afternoon messenger service and served and filed as required.” Clerk’s Papers (CP) at 39.

The March 22, 1999 deadline for making a demand for jury passed without the jury demand being served on the Sacketts’ counsel or filed with the King County Superior Court. McGaughey, who claims that she believed the jury demand had been properly served and filed, was advised on April

30, 1999, that opposing counsel had not received the jury demand. She claims that she then checked with the superior court, her bank, and the messenger service, and discovered that the demand for a jury had not been perfected.

McGaughey then filed and served a motion to require a jury trial or enlarge the time, together with her affidavit and an affidavit from Powell outlining the facts as set forth above. CP at 27-47. A superior court judge denied the motion on the basis that Santilli's jury demand was not filed or served by March 22, 1999, as required by CR 38(b).

Because Santilli conceded negligence, the case proceeded to trial before the court on the issues of causation, injuries, and damages only. The trial court concluded that Santilli's negligence had caused the Sacketts' injuries and indicated that it would grant judgment against Santilli in the amount of \$111,469.23. Santilli then moved for a new trial, arguing, in part, that the trial court erred in denying him a jury trial.

The trial court denied the motion and entered findings of fact, conclusions of law, and a judgment for \$111,469.23, together with postjudgment interest. The Court of Appeals affirmed the trial court, concluding that Santilli's failure to *502timely serve and file his demand for a jury trial constituted his consent to waive his right to a jury trial pursuant to CR 38(d).

We granted Santilli's petition for review and also granted amicus curiae status to the Washington State Trial Lawyers Association Foundation. ISSUE Does article I, section 21 of the Washington State Constitution prohibit this Court from adopting a rule providing for implied waiver of jury for failure to comply with its terms? ANALYSIS Santilli's primary contention is that his failure to perfect his demand for a jury trial in accordance with the provisions of CR 38(b) did not constitute his consent to waive his right to a jury trial.

He bases this contention on his assertion that CR 38(d), the court rule providing for implied consent to the waiver of the right to a jury trial, contravenes the state constitution. More specifically, he contends that CR 38(d) is unconstitutional because it amounts to an assumption by the judiciary of the legislature's exclusive power to provide for the waiver of the right to trial by jury in civil cases.

He bases his argument on article I, section 21 of the constitution, which provides that the right to a jury trial "shall remain inviolate, but the legislature may provide... for waiving of the jury in civil cases where the consent of the parties interested is given thereto." (Emphasis added.)

The Sacketts dispute Santilli's assertion that the sole authority to provide for the waiving of the right to jury trial resides with the legislature. They argue that it is well within the province of this Court to provide by rule for the implied waiver of the right to a jury trial and to define instances where a party will be deemed by his or her acts to have consented to waiver.

The legislature formerly set forth in statute the circumstances under which a party would be deemed to have *503 consented to the waiver of its right to a jury trial in civil litigation. According to former RCW 4.44.100, which was enacted in 1903, a party seeking to invoke the right to trial by jury was required to “serve upon the opposite party... and file with the clerk of the court a statement... that he elects to have such case tried by jury.” The statute went on to say that “[u]nless such statement is filed and such deposit made, the parties will be deemed to have waived trial by jury.” In 1967, upon the recommendation of the Judicial Council, this court adopted CR 38.1 In 1984, the legislature repealed several statutes, including RCW 4.44.100.

Laws of 1984, ch. 76, § 15(2). This had the effect of leaving CR 38 as the only provision in statute or rule governing the waiver of the right to a jury trial in civil cases. Thus, the issue of whether CR 38(d) violates article I, section 21 of the state constitution is before this Court.

In its ruling in favor of the Sacketts, the Court of Appeals did not reach the issue of whether CR 38(d) violates article I, section 21 of our state constitution. Rather, it noted that the “judiciary’s authority to prescribe court rules overrides the Legislature’s power to do so” and held that because the legislature recognized that CR 38 superceded RCW 4.44.100, there is “sufficient notice to direct interested parties to court rules for waiver provisions,” and “[t]herefore,...

CR 38 provides valid means for waiving trial by jury.” Sackett v. Santilli, 101 Wn. App. 128, 133, 5 P.3d 11 (2000), review granted, 142 Wn.2d 1016, 16 P.3d 1264 (2001). However, the Court of Appeals misses Santilli’s point. He does not complain that a jury trial waiver could not be implied without his permission.

Although article I, section 21 refers to the legislature’s power to provide for waiver of the right to jury trial in civil cases “where the consent of the parties interested is given,” we have previously determined that this provision speaks to the legislature’s power to *504 provide for express and implied consent to waiver.

In Neterer, we concluded that the “laws in force at the time of the adoption of the constitution recognized two kinds of consent to the waiver of jury trials in civil actions, viz., express consent and implied consent,” and held that “[t]he Legislature... may define what act shall constitute consent given.” State ex rel. Clark v. Neterer, 33 Wash. 535, 540-41, 74 P. 668 (1903).

Santilli is apparently well aware of this holding. Nor does Santilli focus on “notice” of the court rule, as does the Court of Appeals. See Sackett, 101 Wn. App. at 134-36. Rather, Santilli’s complaint is that the Supreme Court has no power to make a rule concerning waiver of jury trial. Only the legislature, according to Santilli, could make such a rule. Arguing to the contrary, the Sacketts point out that article I, section 21 provides only that the legislature “may” provide for waiver of a jury trial.

They emphasize that it does not say that the legislature “shall” provide for waiver. They suggest that because the word “may” is usually considered to be permissive, article I, section 21 is nonexclusive. It is our obligation to squarely address the authority of the Supreme Court in relation to article I, section 21. It is a well-established principle that the Supreme Court has implied authority to dictate its own rules, “even if they contradict rules established by the Legislature.” *Marine Power & Equip.*

Co. v. Dep’t of Transp., 102 Wn.2d 457, 461, 687 P.2d 202 (1984); see *State v. Fields*, 85 Wn.2d 126, 530 P.2d 284 (1975). This Court cannot, however, contradict the state constitution by court rule. Similarly, the legislature may not grant this Court authority to perform a function that is reserved exclusively to the legislature by the constitution.

Under principles of separation of powers, “[t]he Legislature is prohibited from delegating its purely legislative functions.” *Diversified Inv. P’ship v. Dep’t of Soc. & Health Servs.*, 113 Wn.2d 19, 24, 775 P.2d 947 (1989); see also *Manus v. Snohomish County Justice Court Dist. *505Comm.*, 44 Wn.2d 893, 895-96, 271 P.2d 707 (1954) (unconstitutional to delegate power to local justice of the peace committees to determine number of justices of the peace); 16A Am.

Jur. 2d Constitutional Law § 295 (“[T]he legislature... cannot delegate functions which the state constitution expressly and unqualifiedly vests in the legislature itself...”). Although the question of the construction of article I, section 21 in the instant case is a matter of first impression, it closely parallels a similar constitutional interpretation question concerning article IV, section 24.

That constitutional provision states: “The judges of the superior courts, shall from time to time, establish uniform rules for the government of the superior courts.” Const, art. IV, § 24. In *State ex rel. Foster-Wyman Lumber Co. v. Superior Court*, it was argued that the legislature could not provide by statute that the Supreme Court could make rules for the superior courts because the constitution confers on the superior courts alone the power to make rules for their government.

148 Wash. 1, 9, 267 P. 770 (1928). The *FosterWyman Lumber* court rejected this constitutional interpretation. “If interpreted... as a constitutional grant of power to the superior courts, it would effectually prohibit the legislature itself from passing any statutes governing procedure and practice in the superior courts.” *Foster-Wyman Lumber*, 148 Wash. at 10.

The court ruled that “the purpose of § 24 was to insure uniform rules of minute procedure,... not as a grant of power to make broad and general rules, but as a limitation upon the courts” from making rules which vary “according to the views of the particular judge who presided over the tribunal.” *Id.* Like section 24, section 21 should be read as a limitation on the power of the legislature, not a grant of exclusive authority.

When read in the context of the grant of authority expressed in article IV, section 1, it is apparent that article I, section 21 limits the power of the legislature to make provision for waiver only

“where the consent of the parties interested is given.” Const, art. I, § 21.

To the extent *506that this limitation applies, it applies to the legislature and courts alike. Since the power to provide for waiver is not exclusively vested in the legislature, it should be viewed as coextensive between the legislature and the court.

The coextensive authority vested by the constitution in the legislature and the court to make rules is not uncommon among the states. “[I]n most jurisdictions court rulemaking power has been shared, de jure or de facto, between courts and legislatures.” Hugh Spitzer, Court Rulemaking in Washington State, 6 U. Puget Sound L. Rev. 31, 59 (1982) (citation omitted).

The coextensive authority as between the legislature and this Court with respect to civil procedure is recognized in RCW 2.04.190, which states: The supreme court shall have the power to prescribe, from time to time, the forms of writs and all other process, the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving writs and process of all kinds; of taking and obtaining evidence; of drawing up, entering and enrolling orders and judgments; and generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature by the supreme court, superior courts, and district courts of the state.

In prescribing such rules the supreme court shall have regard to the simplification of the system of pleading, practice and procedure in said courts to promote the speedy determination of litigation on the merits. RCW 2.04.190 (emphasis added).

In addition, RCW 2.04.020 states: The supreme court shall be... vested with all power and authority necessary to carry into complete execution all its judgments, decrees and determinations in all matters within its jurisdiction, according to the rules and principles of the common law, and the Constitution and laws of this state. RCW 2.04.020 (emphasis added).

The legislature thus recognizes the role of court rule making and common law in civil procedure. *507It is useful to compare former RCW 4.44.100 (1972) with CR 38 to determine whether CR 38 contravenes the constitution.

The former statute provided: In all civil actions triable by a jury in the superior court any party to the action may, at or prior to the time the case is called to be set for trial, serve upon the opposite party or his attorney, and file with the clerk of the court a statement of himself, or attorney, that he elects to have such case tried by jury. If such a statement is served and filed, any party may likewise state that he elects to have a jury of twelve persons.

Unless such statement is filed and a jury fee paid as provided by law, the parties shall be deemed to have waived trial by jury, and if such a statement is served and filed, unless a jury of twelve

persons is so requested and such additional fee as may be required by law therefor is paid by the party requesting same, the parties shall be deemed to have waived a trial by a jury of twelve persons and the jury shall consist of six persons: PROVIDED, That, in the superior courts of counties of the first class such parties shall serve and file such statement, in manner herein provided, at any time not later than two days before the time the case is called to be set for trial.

Laws op 1972, 1st Ex. Sess., ch. 57, § 2 (emphasis added). By comparison, CR 38 provides, in pertinent part: (b) Demand for Jury. At or prior to the time the case is called to be set for trial, any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing, by filing the demand with the clerk, and by paying the jury fee required by law. (d) Waiver of Jury.

The failure of a party to serve a demand as required by this rule, to file it as required by this rule, and to pay the jury fee required by law in accordance with this rule, constitutes a waiver by him of trial by jury. CR 38(b) and (d) (emphasis added). CR 38 varies from former RCW 4.44.100 in that it requires the payment of a court-assessed fee. Excluding this difference, the two prescribe the same method for securing (or waiving) a civil jury trial. *508Further acknowledgment by the legislature of the coextensive authority for control of civil procedure is evidenced by RCW 2.04.200, which provides that “[w]hen and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect.” RCW 2.04.200.

The Foster-Wyman Lumber court also noted that a legislative interpretation of the constitution with an acquiescence by the courts “should have great weight with us in determining the proper view of the constitutional provision.” Foster-Wyman Lumber, 148 Wash. at 11. Such acquiescence is demonstrated by the action of the court in adopting CR 38 and by the legislature’s action in repealing the statute in 1984 to reduce “confusion to judges and lawyers” that may result from inconsistencies between court rules and statutes.

1984 Final Legislative Report, 48th Wash. Leg., Reg. Sess. at 199. Clearly, both the legislature and the courts believed that the courts had the constitutional power to make rules regarding waiver of jury trial. CONCLUSION The Washington Constitution, in article I, section 21, places a limitation on the authority of the legislature, not a grant of exclusive authority, concerning civil jury trial waiver.

The authority of the legislature and the court is coextensive with respect to making provision for implied waiver of the right to a jury in civil cases. CR 38(d) is a constitutional exercise of the court’s rule making authority.

The Court of Appeals is affirmed. Johnson, Madsen, Bridge, Chambers, and Owens, JJ., concur. The Judicial Council’s comment to the rule indicates that CR 38(d) “supercedes... RCW

4.44.100.” 71 Wn.2d lxxxvi. The language of CR 38(d) has not been altered by this Court since 1967.

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