In The

Supreme Court of Virginia

RECORD NO. 091840

HEINRICH SCHEPERS GMBH & CO., KG,

Appellant,

v.

SHERMAN WHITAKER,

Appellee.

BRIEF OF APPELLANT

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SUBJECT INDEX

Page

TABLE OF CITATIONS iii

ASSIGNMENT OF ERROR 1

QUESTIONS PRESENTED 1

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS IN THE TRIAL COURT 2

Original Proceedings 2

Instant Proceedings 3

STATEMENT OF FACTS 4

Procedural Facts 5

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES 13

Standard of Review 13

A. The Trial Court Abused its Discretion in Reinstating Whitaker's Jury Demand Without a Good Cause Showing 14

B. The Trial Court Abused its Discretion in Reviving Whitaker's Jury Waiver 25

C. The Trial Court Was Mistaken in Construing This Court's Statement that the Trial on Remand would be on Damages Only as a Limiting Instruction when Ruling on the Motion to Strike the Jury Demand 34

The Court Approved Agreement on Trial Procedure 36

The Appeal 40

The “Limiting” Instruction 41

RELIEF REQUESTED 47

CERTIFICATE..... 49

TABLE OF CITATIONS

Page(s)

CASES

Allocco v. Metropolitan Life Insurance Co.,
No. CIV 01-2220-PHX-JAT, 2008 WL 4372458
(D. Ariz. 2008) 28, 29

Azalea Drive-in Theater, Inc. v. Sargoy,
215 Va. 714, 214 S.E.2d 131 (1975) 16

Bloomer v. Gibson,
912 A.2d 424 (Vt. 2006) 15

Cantrell v. Crews,
259 Va. 47, 523 S.E.2d 502 (2000) 13

Carter v. Washington & O.D. RY.,
122 Va. 458, 95 S.E. 464 (1918) 45

City of Atlanta v. McLennan,
240 S.E.2d 881 (Ga. 1977) 21

Commonwealth v. Williams,
262 Va. 661, 553 S.E.2d 760 (2001) 13

Daniel Int'l Corp. v. Fischbach & Moore, Inc.,
916 F.2d 1061 (5th Cir. 1990) 28

Edlow v. Arnold,
243 Va. 345, 415 S.E.2d 436 (1992) 13

Ex parte Twintech Indus., Inc.,
558 So.2d 923 (Ala. 1990) 15

Fairfax Co. of Va., LLC v. Samson Realty, LLC,
74 Va. Cir. 141 (Fairfax County 2007) 16

Fairley v. Jones,
824 F.2d 440 (5th Cir. 1987) 27

Fawcett v. Richmond Leather Mfg. Co.,
155 Va. 518, 155 S.E. 714 (1930) 45-46

Flintkote Co. v. W.W. Wilkinson, Inc.,
220 Va. 564, 260 S.E.2d 229 (1979) 16

Graefenhain v. Pabst Brewing Co.,
870 F.2d 1198 (7th Cir. 1989) 30, 31

Halperin v. Kissinger,
542 F. Supp. 829 (D.D.C. 1982) 18

Hanlon v. Providence College,
615 F.2d 535 (1st Cir. 1980) 18, 19

Hook v. Turnbull,
10 Va. (6 Call) 85 (1806) 37

Kermarec v. Compagnie Generale Transatlantique,
358 U.S. 625 (1959) 32-33

Land Office Co. v. Clapp-Thomssen Co.,
442 N.W.2d 401 (N.D. 1989) 15

Laventhall v. Fireman's Ins. Co.,
41 N.Y.S.2d 302 (N.Y. App. Div. 1943) 24

MacKnight v. Hoffman, Inc. v.
Programs for Achievement in Reading, Inc.,
191 A.2d 354 (R.I. 1963) 23

Matthews v. Commonwealth,
253 Va. 180, 482 S.E.2d 810 (1997) 32

Miller-Jenkins v. Miller-Jenkins,
276 Va. 19, 661 S.E.2d 822 (2008) 45

Musick v. Norton,
215 F. Supp. 2d 171 (D.D.C. 2002) 29

Nassif v. Bd of Supervisors of Fairfax County,
231 Va. 472, 345 S.E.2d 520 (1986) 45

Parrott v. Wilson,
707 F.2d 1262 (11th Cir.), *cert. denied*,
464 U.S. 936 (1983) 28

Potts v. Rader,
179 Va. 722, 20 S.E.2d 690 (1942) 45

Powell v. Sears, Roebuck & Co.,
231 Va. 464, 344 S.E.2d 916 (1986) 37, 46

Raleigh Banking and Trust Co. v. Safety Transit Lines, Inc.,
157 S.E. 62 (N.C. 1931) 21

Shepard Co. v. General Motors Truck Co.,
146 A. 477 (R.I. 1929) 23

Spaulding v. Cameron,
274 P.2d 177 (Cal. Dist. Ct. App. 1954)..... 22, 23

Stathas v. Wade Estate,
380 A.2d 482 (Pa. Super. Ct. 1977)..... 21

United States v. Aramony,
166 F.3d 655 (4th Cir. 1999)..... 46

Vassalos v. Hellenic Lines, Ltd.,
482 F. Supp. 906 (E.D. Pa. 1979)..... 15

Vincent v. Chicago Ass'n of Realtors,
266 Fed. Appx. 472 (7th Cir. 2008)..... 32

Whitaker v. Heinrich Schepers GmbH & Co., KG,
Record No. 061672 (Jan. 9, 2007)..... 6

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. VII 31

VA. CONST. art. I, § 11 ..... 14, 31

STATUTES

28 U.S.C. § 1332(a) 5

Va. Code § 8.01-336 14

Va. Code § 8.01-336(B) 14

Va. Code § 8.01-377 3

RULES

FED. R. CIV. P. 38(b) 27

FED. R. CIV. P. 39(b) 27, 28

VA. SUP. CT. R. 3:21 ..... 16, 27

VA. SUP. CT. R. 3:21(b) 14, 27

VA. SUP. CT. R. 3:21(d) ..... *passim*

OTHER AUTHORITY

9 Charles Alan Wright & Arthur R. Miller,
Federal Practice & Procedure § 2321 (3d ed. 2009) 27

ASSIGNMENT OF ERROR

I. The trial court abused its discretion in denying Heinrich's Motion to Strike the Jury Demand after remand, because Whitaker had previously agreed to waive his jury right in exchange for Heinrich's agreement to forego its defense on the issue of liability.

Heinrich has elected not to pursue the other two assignments of error noted in its Petition for Appeal.

QUESTIONS PRESENTED

1. Is a jury right, once waived, reinstated upon remand for additional proceedings in the absence of a good cause showing in support of such reinstatement? (Assignment of Error I).

2. Did the trial court abuse its discretion in denying Heinrich's Motion to Strike the Jury Demand on remand, when in the first trial Whitaker had waived his jury right and Heinrich had refrained from contesting liability in reliance on that jury waiver? (Assignment of Error I).

3. Was the trial court mistaken in construing this Court's statement that the trial on remand would be on damages only as a limiting instruction when ruling on the Motion to Strike the Jury Demand? (Assignment of Error I).

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS IN THE TRIAL COURT

This is the second time an aspect of this case has been before this Court. A brief history of both is provided below as they are procedurally related and intertwined.

Original Proceedings

On January 30, 2004, the Appellee, Sherman Whitaker ("Whitaker"), filed a Motion for Judgment against Appellant, Heinrich Schepers GmbH & Co., KG ("Heinrich"), seeking $74,000 in damages for personal injuries, primarily related to his neck, sustained when injured on board a vessel owned by Heinrich.[1] A trial by jury was demanded. Almost two years later, in December 2005, Whitaker filed a Motion to Amend his ad damnum clause to $2.5 million. After the trial court denied the motion on successive occasions, this Court denied an attempted interlocutory appeal on January 9, 2007. Whitaker filed another motion, which was also denied, to increase the ad damnum clause to $5 million.

On March 7, 2007, by agreement of counsel and the trial court, Whitaker waived his right to a jury trial and Heinrich offered no evidence on the issue of liability. At the close of the evidence, Heinrich moved for

[1] The details of the procedural path the matter took to this Court initially are contained in the Opinion dated June 6, 2008 (App. 172), and will be only summarized here.

summary judgment pursuant to Code of Virginia § 8.01-377 in favor of Whitaker for the amount sued upon. The Court entered judgment in that amount without comment.[2]

Whitaker petitioned this Court for appeal of the trial court's successive denials of his motions to increase the ad damnum and requested a remand of the case "for trial by jury on the merits." (App. 133.) This Court granted the writ and, by Opinion dated June 6, 2008, reversed and remanded to the trial court for further proceedings. In doing so, this court included the following sentence: "The further proceedings, however, will be limited to the issue of damages, as the trial court's decision on liability has not been challenged by either party." (App. 179.)

Instant Proceedings

On remand, no new demand for a jury trial was made. Heinrich moved to strike the original jury demand on the grounds that it would be prejudicial in light of this Court's remand instructions. The trial court denied the motion.

The matter proceeded to a trial by jury on May 27-29, 2009. After deliberations, the jury returned a verdict for Whitaker in the amount of $5 million and the trial court entered final judgment in that amount on June 15,

[2] It is unclear from the record whether the Court was granting the Motion for Summary Judgment. (*See* App. 97.)

2009. Heinrich filed a timely Notice of Appeal to this Court of the denial of the Motion to Strike the Jury Demand and certain evidentiary matters, the latter of which Heinrich has elected not to pursue.

STATEMENT OF FACTS

On August 14, 2002, Whitaker, a longshoreman working aboard a merchant ship owned by Heinrich, fell through a section of catwalk to the deck below, a distance of approximately six and one-half feet, and landed upright. (App. 599.) No first aid was necessary, no ambulance or medical personnel were called and Whitaker walked off the ship under his own power, before driving himself to his employer's office to fill out an accident report in which he described his injuries as "skinned from shoulder to knees." (App. 1157-1158.) After completing the accident report, Whitaker drove himself to the local emergency room where he was treated for complaints of knee pain and low back pain; Whitaker never complained to the emergency room doctor of neck pain. (App. 633-638.) Whitaker was diagnosed as having a knee sprain and back sprain and discharged from the emergency room within several hours with instructions to take four days off before returning to work full duty. (App. 643-645.) The following day, Whitaker met with his attorney before being apparently steered to Dr. Arthur Wardell, who began a course of conservative treatment for various

complaints of pain in the knee, back, shoulder, wrist and neck. (App. 1161-1162, 1164-1165.) After six months of conservative treatment, Whitaker returned to work in a light duty supervisory capacity. (App. 1168-1167.) He remained in this light duty supervisory capacity for more than two years before electing to take early retirement at the age of 56. (App. 1170.) To date, Whitaker has never had surgery for any of his alleged injuries, including his neck.

Procedural Facts

As noted in the Statement of the Case, the original ad damnum in the Motion for Judgment alleged $74,000 in damages for the admitted purpose of evading federal diversity jurisdiction. (Heinrich is, and was at all relevant times, a German company.) (App. 1.) Answers to discovery indicated that the damages would exceed $74,000, but no motion to increase the ad damnum clause was made (App. 173.) After Whitaker declined to stipulate that his damage claim was limited to $74,000, Heinrich attempted to remove the case to the United States District Court for the Eastern District of Virginia on the grounds that "the amount in controversy now exceeds $75,000." *Id. See* 28 U.S.C. § 1332(a) (2000). However, because the Notice of Removal was more than thirty days after the initial discovery

responses, Heinrich agreed to a consent order remanding the matter to Portsmouth Circuit Court. (*Id*.)

In December 2005, Whitaker filed a Motion to Increase the Ad Damnum Clause to $2.5 million. (*Id*.) On successive occasions, hearings were held on that Motion, and in each instance the Motion was denied on the grounds that the original Motion for Judgment was filed in bad faith. (*Id.*) Eventually, a Petition for Interlocutory Appeal was submitted to this Court, but it was declined by Order of January 9, 2007. *Whitaker v. Heinrich Schepers GmbH & Co., KG*, Record No. 061672 (Jan. 9, 2007). On February 22, 2007, Whitaker filed another Motion to Increase the Ad Damnum Clause to $5 million, which was again denied. (App. 174.)

The matter was set for trial and a pretrial conference was held on March 5, 2007. (App. 10.) Prior to that conference, counsel for Whitaker and Heinrich had reached an agreement on how the matter should be tried procedurally before the court. Counsel for Whitaker described the agreement as follows:

> **MR. BREIT**: . . . What basically has transpired between Mr. Powers [counsel for Heinrich] and I is the trial on Wednesday, which was originally scheduled to be a jury trial, is now going to be tried by the Court. And the reason for that is, at least with regard to the present posture of the case, the amount sued for is $74,000, and therefore the Court cannot enter judgment for an amount greater than the amount sued for. Kind of like a medical malpractice case.

> I guess the Court could say, I think the plaintiff's damages are $3 million and, like a jury, then enter judgment for the $74,000, but because of the present posture of the case, it is, seems to me, a complete effort in futility to put on a full-blown trial because of the expense involved, the experts involved, the witnesses involved. It's an extensive [expensive] case to be presented to the Court and so we have agreed to just present sufficient evidence to the Court to make a finding with respect to liability and sufficient evidence for the Court to make a ruling or finding with respect to damages and then have the Court enter a judgment for the amount sued for.
>
> That may all change if the Court considers my argument this morning [to again increase the ad damnum], but, essentially, I have filed a list of witnesses and exhibits. The defendant has not filed any objections to the list of witnesses and exhibits. In fact, he hasn't even filed a list of witnesses and exhibits, so it's basically going to be a very short trial where we're going to introduce evidence based solely upon the present posture of the case, and that's the reason we're proceeding in that fashion.

(App. 12-13.)

Counsel for Heinrich responded:

> **MR. POWERS**: . . . With regard to Mr. Breit's original comments as to how this matter is to proceed, I do agree that, given the nature, I have essentially waived - - I'm not going to be calling any witnesses, I'm not putting on any evidence. I'm waiving any hearsay objections or otherwise, and I'm simply going to allow Mr. Breit to establish a record. I don't need to waste the Court's time, knowing that the Supreme Court has agreed with Your Honor's previous rulings, essentially.

(App. 33.) The trial court consented to the agreement and the matter was tried two days later. (App. 43.)

At the trial itself, on March 7, 2007, the agreement with the court was restated by counsel for Whitaker:

> **MR. BREIT**: . . . We're proceeding without a jury today by agreement of counsel that this is a case that has extensive number of witnesses, extensive amount of medical testimony and extensive amount of wage and expert testimony, and in lieu of going through all that procedure, since it appears as though the amount sued for is going to limit us, that in the present posture of the case, we have agreed to put on the evidence in this case to establish negligence, proximate cause and damages. Because, as the case presently stands, regardless of what the Court finds, it can only enter judgment in an amount sued for, and, therefore, we are preserving our position with respect to that objection but putting on evidence at trial sufficient for the Court to make rulings and decisions on those issues.
>
> **THE COURT**: But for that ruling, you would be requesting a jury?
>
> **MR. BREIT**: Absolutely.

(App. 45.) Counsel for Heinrich agreed:

> **MR. POWERS**: . . . I'm in agreement with Mr. Breit to the extent this Court's rulings are abundantly clear and the reasons for are contained in the record and we don't need to rehash that. Suffice it to say that, in light of the fact that the plaintiff has sued for $74,000 and in light of the fact that the Supreme Court has denied the petition for interlocutory appeal, essentially validating Your Honor's prior rulings on this issue, then it is my client's intention -- let me put it this way: My client is not going to contest. They're willing to have judgment entered against them for $74,000, and in light of the interest of judicial economy as well as the savings and convenience of the various witnesses, we have agreed not to put on any evidence, and, essentially, for that reason we will not be contesting liability knowing that the judgment is limited to the amount sued for, $74,000.

THE COURT: Okay. Mr. Breit, proceed.

(App. 46.)

Counsel for Heinrich subsequently reiterated that "[i]n light of the understanding with counsel that judgment will be entered in the amounts sued for," the defendant would not be cross-examining witnesses or putting on evidence. (App. 48.) Whitaker called three witnesses, including himself, and introduced seven exhibits. (App. 43-100.) Heinrich called no witnesses, cross-examined none of Whitaker's witnesses, and offered no exhibits. In lieu of presenting evidence, counsel for Heinrich again stated that, because of the limit on damages, he was not putting on any evidence:

> **MR. POWERS**: Your Honor, but for the fact that the plaintiff is limited to the amount sued for of $74,000, the defendant would be contesting liability as well as damages. However, given the present posture of the case, I am prepared to request, Your Honor, that summary judgment be entered pursuant to 8.01-377.1 in favor of the plaintiff for the amount sued upon.

(App. 97.)

Counsel for Whitaker renewed his request for an increase in the ad damnum and for judgment in the amount of $5 million. (App. 99.) In response to both Motions, the trail court stated, *in toto*:

> **THE COURT**: I'm going to enter judgment in the amount of $74,000, the amount sued for.

(App. 100.)

Whitaker appealed the denial of the Motions to increase the ad damnum to this Court. (App. 101.) Three Assignments of Error and two Questions Presented were noted, all of which specifically challenged only the trial court's denial of the ad damnum Motions. (App. 114.) Whitaker argued that the trial court abused its discretion in denying the Motions (Question Presented I) and that, in so doing, he was denied his right to a jury determination of damages (Question Presented II). (App. 132.) The Relief Requested was to reverse the decision of the Circuit Court, "permit amendment to increase the ad damnum and remand the case for trial by jury on the merits." (App. 133.)

This Court reversed, holding that denial of the Motion to Increase the Ad Damnum Clause was an abuse of discretion. (App. 178.) In its recitation of the facts and proceedings below, this Court noted specifically that, at the trial, "Whitaker . . . chose to have the matter tried by the court rather than by a trial by jury" and that, at the close of Whitaker's evidence, Heinrich had moved for summary judgment in Whitaker's favor for the $74,000 rather than put on evidence. In a footnote, this Court indicated that, in light of the reversal, it was not considering the remaining claim, that the denial of the Motions to Amend denied Whitaker's right to have the amount of damages determined by a jury. (App. 179.) While the relief

requested was a remand for a trial by jury on the merits, this Court remanded only on the issue of damages, stating that the trial court's decision on liability had not been challenged by either party. (*Id*.)

On remand, Whitaker circulated an order amending the ad damnum clause of the Complaint to $10 million on July 8, 2008. (App. 180.) No further demand for jury was filed. Heinrich filed a Motion to Strike the Jury Demand (based on the demand in the original Complaint) (App. 194.) on July 23, 2008, and the motion was heard on August 19, 2008. At the argument on the motion, counsel for Heinrich restated the original agreement between the parties and the trial court on the issues with regard to the original trial:

> **MR. POWERS:** Well, Your Honor, I guess the issue becomes one of whether or not you can conditionally waive a jury right.
>
> In this situation there was an understanding that based on the Court's ruling there was going to be a –
>
> **THE COURT:** A wrong ruling as it turned out.
>
> **MR. POWERS:** Unfortunately, Your Honor, but I think the Court's heart was in the right place. And that much is clear that the issue was, does the plaintiff choose to go forward without a jury or not? Nobody put a gun to the plaintiff's head and said, you have to waive your jury right.
>
> I understand the point that the plaintiff is making; that I wouldn't have waived it but for the fact that the Court had previously limited the amount of damages that he could recover.

> Nevertheless, there was an agreement. He agreed to waive the jury. I agreed to not contest liability. That was a done deal.
>
> On appeal I did not address the issue of admitting liability because we had a deal. Come hell or high water, at the end of the day, he waived his jury right. I relied on that.

(App. 198.) Henrich's counsel continued:

> I know what Your Honor said during the trial, and I don't dispute any of it. The fact of the matter is the same could apply to me. I wouldn't have admitted liability but for the fact that we had a situation where the plaintiff was limited to $74,000. He agreed to waive his jury trial. I agreed to concede liability.
>
> The Supreme Court made a point in its opinion of – in a reference of saying that the plaintiff chose to waive his jury and proceed with a bench trial. I'm not sure why the Supreme Court felt the need to put that in there other than the suggestion that he waived his jury trial. And the issue now before the Court is: Can he get it back again after I relied to my detriment, or to my client's detriment for that matter? My client relied to the detriment of the agreement that I would concede liability in exchange for him waiving his jury trial.
>
> So the issue, unfortunately, I lost on appeal, but that doesn't change the fact that he gets his jury back. I've conceded liability. I'm stuck with that now. My client is stuck with that now.
>
> So in that regard, Your Honor, I think a deal is a deal. And I don't think it's fair for the plaintiff to renege on the deal because he simply won on appeal. And now I'm faced with a situation of having to concede liability, and he wants his jury after this Court has already ruled without the jury on the issue of liability.

(App. 200.) The court denied the motion on the grounds that the jury waiver was conditional. (App. 207.)

The case was tried on May 27 through May 29, 2009 on the issue of damages alone. (App. 563, 909 & 1341.) On May 29, the jury returned a verdict for $5 million and judgment was entered on June 15, 2009. (App. 1528.)

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES

Standard of Review.

There are no Virginia cases addressing a party's attempted revocation of a jury waiver in a civil case, however, this Court reviews other trial court decisions affecting jury rights in civil cases for an abuse of discretion. *See*, *e.g.*, *Cantrell v. Crews*, 259 Va. 47, 52, 523 S.E.2d 502, 504 (2000) (holding that the trial court abused its discretion in refusing to dismiss for cause a juror who was, at the time of trial, a client of the firm representing the plaintiff); *Edlow v. Arnold*, 243 Va. 345, 347, 415 S.E.2d 436, 437 (1992) (reviewing a trial court's denial of the plaintiff's request to change her last peremptory jury strike for abuse of discretion). In criminal cases, this Court reviews a trial court's ruling on the revocation of a jury waiver for abuse of discretion. *Commonwealth v. Williams*, 262 Va. 661, 670, 553 S.E.2d 760, 764 (2001) ("once a defendant makes a voluntary

and intelligent waiver of this right [to a jury trial in a criminal case], his request to withdraw the waiver and be tried by a jury is subject to the circuit court's discretion"). Accordingly, the court should apply the abuse of discretion standard of review to this case.

A. **The Trial Court Abused its Discretion in Reinstating Whitaker's Jury Demand Without a Good Cause Showing.**

While trial by jury "ought to be held sacred" in Virginia, Va. Const. art. I, § 11, and "shall be preserved inviolate to the parties," Va. Code § 8.01-336, a party does not automatically receive a jury. Rather, a party must invoke its right to a jury trial by demanding one in accordance with Virginia Supreme Court Rule ("Virginia Rule" or "Va. Sup. Ct. R.") 3:21(b) (2010). *See also* Va. Code § 8.01-336(B) (2007) ("unless one of the parties demands that the case or any issue thereof be tried by a jury, . . . the whole matter of law and fact may be heard and judgment given by the court."). A jury demand must be made either in the Complaint or no "later than 10 days after the service of the last pleading directed to the issue," a time period that is not extended even by amended pleadings, "unless the order granting leave to amend expressly so states." Va. Sup. Ct. R. 3:21(b). If a party fails to comply with Virginia Rule 3:21(b) in demanding a jury, the failure "constitutes a waiver by the party of trial by jury." Va. Sup. Ct. R.

3:21(d). Critically, the only relief from a jury waiver provided in the Virginia Rules is by "leave of court for good cause shown." *Id.*

Although Whitaker timely demanded a jury, he withdrew that demand by stipulation with Heinrich. (App. 45.) On remand, the trial court issued an order amending Whitaker's ad damnum, but the order said nothing about extending the time for a new jury demand.[3] (App. 180.) The only avenue for reviving Whitaker's jury right under the Virginia Rules, therefore, would have been through "leave of court for good cause shown." Rule 3:21(d). But the trial judge asked no such showing of Whitaker, and did not even require Whitaker to move to reinstate his jury demand. (App. 206.) The trial court simply assumed that the jury demand was reinstated, and gave little consideration to Heinrich's Motion to Strike the Jury Demand:

> I just don't think it was a clear waiver. I don't think it was a waiver that was meant to go beyond that particular proceeding. I think the idea of the waiver, and **my understanding**

[3] Generally, amended pleadings do not support a jury demand unless they raise entirely new issues, such as new causes of action or new defenses. *See*, *e.g.*, *Bloomer v. Gibson*, 912 A.2d 424, 428 (Vt. 2006) (holding that an amended pleading that did not raise new issues did not revive the party's waived jury right); *Ex parte Twintech Indus., Inc.*, 558 So.2d 923, 925-26 (Ala. 1990) (same); *Land Office Co. v. Clapp-Thomssen Co.*, 442 N.W.2d 401, 403-04 (N.D. 1989) (same). Likewise, a party cannot circumvent a jury waiver in one case by filing a separate case on the same cause of action with a jury demand and moving to consolidate the two cases. *Vassalos v. Hellenic Lines, Ltd.*, 482 F. Supp. 906, 909 (E.D. Pa. 1979) ("it is clear that a right to demand a jury trial, once waived, can be revived only by raising new issues.").

> **throughout the whole thing that – and if I got reversed that it would be a jury trial. I had no question in my mind until I got your motion, honestly.**

(*Id.*) (emphasis added). In releasing Whitaker from his jury waiver without a showing of good cause as required by Virginia Rule 3:21(d), the trial court erred.

There was no basis in the law for the assumption that a jury waiver is nullified when a case is remanded, or that a jury waiver can be conditional. To the contrary, Virginia law recognizes, and enforces, jury waivers. In addition to inferring a jury waiver from a party's failure to demand a jury in accordance with Virginia Rule 3:21, Virginia enforces jury waivers made prospectively, prior to litigation, in contracts. *See*, *e.g.*, *Azalea Drive-in Theater, Inc. v. Sargoy*, 215 Va. 714, 720-21, 214 S.E.2d 131, 136 (1975) (holding that a jury waiver provision in a contract is enforceable); *Fairfax Co. of Va., LLC v. Samson Realty, LLC*, 74 Va. Cir. 141, 149 (Fairfax County 2007) (granting a motion to strike a jury demand in a lease dispute based on a jury waiver contained in the parties' lease). Virginia law also upholds jury waivers made deliberately, after the suit has commenced. *See*, *e.g.*, *Flintkote Co. v. W.W. Wilkinson, Inc.*, 220 Va. 564, 570, 260 S.E.2d 229, 232 (1979) ("The record discloses that Flintkote clearly waived a jury trial on the amount of such fees so the judgment for attorney's fees

will be affirmed.”). Neither the Virginia Rules nor case law suggests that a conditional jury waiver, or an automatic reinstatement of a jury demand on remand, is allowed.

While the trial court failed to require Whitaker to show good cause to reinstate his jury demand, the record is clear that Whitaker could not have made such a showing in any event. Whitaker’s only response to Heinrich’s Motion to Strike the Jury Demand was that he had a constitutional right to a jury and somehow had preserved that right while at the same time consenting to a full bench trial on the merits. (App. 186-87.) His reason for revoking his jury waiver was that since making it, this Court had granted him an increased ad damnum. (App. 201-202.) The ability to win more money, however, does not translate into good cause for switching from a bench trial to a jury trial in the middle of proceedings. Whitaker may have assumed (correctly, as it turns out) that a jury was likely to award more for his modest injuries than a judge would, but the jury’s anticipated generosity is not good cause for setting aside a waiver. Whitaker’s $10 million ad damnum involved the exact same factual and legal issues as his $74,000 ad damnum, and his jury waiver should have continued in force through the conclusion of the proceedings.

An increased ad damnum is not sufficient reason for a revived jury demand once the jury right has been waived. *Halperin v. Kissinger*, 542 F. Supp. 829, 833 (D.D.C. 1982). In *Halperin*, after an appeal from a bench trial, the case was remanded for a new trial. *Id.* at 830. The plaintiff then moved to amend his damages claim and, based on the increased damages, for relief from his earlier jury waiver. *Id*. at 832-33. In rejecting the jury demand, the court found that the amended damages claim "does not open up a new defense or a new ground upon which to recover damages, but instead supports the original claim." *Id.* at 833. Because there were no new issues in the amended pleadings, the plaintiff's previously waived jury right was not revived. *Id.* Further, the court held that "there is substantial risk of prejudice, should relief from the waiver be granted and a jury trial be allowed." *Id.*

Just as an increased ad damnum does not support reviving a jury demand, a trial court's erroneous rulings are immaterial to whether a party should be permitted a jury after waiver. As the United States Court of Appeals for the First Circuit held in *Hanlon v. Providence College*, 615 F.2d 535 (1st Cir. 1980), "once a party withdraws his demand for a jury trial, with the requisite consent of the other parties, he may not change his mind." *Id*. at 538-39. The trial began as a jury trial in *Hanlon*, but after a series of

adverse evidentiary rulings, the plaintiff elected, with the defendant's consent, to withdraw his jury demand. *Id.* at 537-39. The judge had encouraged the plaintiff to proceed without a jury, observing that the jury complicated matters because the court needed to prevent the jury from hearing inadmissible evidence, whereas in a bench trial the court could receive all the evidence plaintiff wished to proffer and the parties could argue admissibility in post-trial briefs. *Id.* at 537. In its post-trial brief, the plaintiff succeeded in convincing the trial court to reverse the evidentiary rulings that had prompted the plaintiff to waive his jury right. *Id.* at 538. The plaintiff argued on appeal that, because the trial judge reversed those evidentiary rulings, he should have been allowed to revoke his jury trial waiver. *Id.* The First Circuit rejected this argument, holding that a party should not be allowed to change his mind after withdrawing a jury demand with the other party's consent,

> especially . . . when a trial has been completed jury-waived. Otherwise, a party who came to regret his decision to stipulate to a bench trial could saddle an adversary who joined his stipulation with the unfair burden of a second trial.

Id. at 539.

In the instant case, the trial court reasoned that Whitaker requested a bench trial only because of the denial of the increase to the ad damnum, and that once that ruling was reversed, the jury right returned. (App. 206.)

It does not matter, however, why Whitaker waived his jury, or even that he may have been motivated by a ruling that was later reversed. The question the trial court should have asked was not why Whitaker waived the jury right, but why he should be allowed to reclaim the right at a second trial.

There was no good cause for Whitaker to be allowed a jury at the second trial over Heinrich's objection because the second trial did not involve any issues that were not tried at the first. Leaving intact the trial court's liability determination, the second trial was to differ from the first only in the amount of damages that Whitaker could recover. The second trial, therefore, was a continuation of the first. It is hard to imagine there ever being good cause for a party who waived his jury right at the beginning of trial to be allowed a jury mid-way through the trial. Impaneling a jury after the liability phase of the proceedings had been tried without one was no different in this remand situation than it would have been had Whitaker suddenly announced, in the middle of the first trial, that he changed his mind and wanted a jury after all. Once the trial began as a bench trial, it should have concluded as a bench trial. The trial court should not have allowed Whitaker to switch horses midstream.

While there is no Virginia law on this issue, several jurisdictions have concluded that a jury waiver remains in force for the life of the litigation. In

Raleigh Banking and Trust Co. v. Safety Transit Lines, Inc., 157 S.E. 62 (N.C. 1931), the Supreme Court of North Carolina considered a jury demand made after the case was remanded for a second trial. *Id.* at 64. The parties had waived their jury right at the first trial. *Id.* The remand was for additional fact-finding, and did not disturb the trial court's initial findings. *Id.* On appeal from the denial of the jury demand at the second trial, the North Carolina Supreme Court affirmed because the second trial was a continuation of the first: "The waiver of a jury trial at the first hearing continued in force until the final determination of all matters involved in the proceeding." *Id.* *See also City of Atlanta v. McLennan*, 240 S.E.2d 881, 883 (Ga. 1977) (holding that a "waiver of jury trial at the first trial of the civil case applies to retrials of the same case," and affirming the trial court's refusal to reinstate the jury demand when the case was remanded for further proceedings); *Stathas v. Wade Estate*, 380 A.2d 482, 484 (Pa. Super. Ct. 1977) (holding that the plaintiffs, having "waived their right to a jury trial," had no right to a jury at a second trial on the damages). In the instant case, because this Court left intact the trial court's liability finding and remanded for a trial on damages only, the second trial was a continuation of the first. Whitaker's jury waiver in the first trial, like the court's liability finding, also should have continued in force.

In *Spaulding v. Cameron*, 274 P.2d 177 (Cal. Dist. Ct. App. 1954), a California appellate court addressed the effect of a jury waiver in circumstances similar to those in the case at bar. *Id*. at 178. There, both parties waived their jury right at the first trial. *Id.* The appellate court affirmed the trial court's liability findings, and remanded the case for further fact-finding on damages. *Id.* At the second trial, the defendant sought to have a jury and the trial court rejected that request. *Id.* The appellate court, on appeal from the second trial, noted that in remanding the case previously, its "instructions . . . defined and limited the further proceedings in this case. The issue of liability was not to be redetermined. . . . Only the nature and amount of relief to which the plaintiff was entitled remained in question." *Id.* at 180. The second trial, therefore, was no different than would be a retrial on damages ordered by the trial court before appeal. *Id*. at 180-81. In either situation, a jury waiver would persist:

> If the trial court on motion for a new trial had discovered its error and had granted a limited retrial for the purpose of adjudicating issues that had not been determined, or if after the evidence was closed the trial had been re-opened for evidence . . . , it could scarcely have been contended by the defendant that in the further proceedings he was not bound by his waiver of a jury. We see no substantial difference between the proceedings that were had pursuant to the mandate of the Supreme Court and proceedings that would have been had if the trial court of its own volition had re-opened the case or had vacated its findings and judgment in part and had proceeded to

> determine the questions which it eventually did determine pursuant to the directions of the Supreme Court.

Id. Here, too, the jury waiver should have been evaluated no differently than it would have been had the trial court ordered a retrial on damages before the first appeal. It was improper for the trial court to reinstate Whitaker's jury right midway through the proceedings.

In some jurisdictions, a jury waiver continues in force even when the initial decision is reversed in full and remanded for an entirely new trial. In *Shepard Co. v. General Motors Truck Co.*, 146 A. 477 (R.I. 1929), the parties stipulated to trying the case without a jury. *Id*. at 477. On appeal, the Rhode Island Supreme Court reversed the judgment in full and remanded for a new trial. *Id.* The plaintiff demanded a jury at the second trial, and the trial court denied the demand. *Id.* On a second appeal, the Rhode Island Supreme Court noted that while the right to a jury trial is "inviolate," a party can waive it, and a "waiver of a trial by jury is a waiver for all time." *Id.* at 478. "If the right has been waived, it no longer exists." *Id. See also MacKnight v. Hoffman, Inc. v. Programs for Achievement in Reading, Inc.*, 191 A.2d 354, 355 (R.I. 1963) (holding that a waived jury right is not revived on remand because "a right once waived is gone forever and cannot be reclaimed," even though changed circumstances prevented the petitioner from anticipating the impact of the waiver at the time it was

made); *Laventhall v. Fireman's Ins. Co.*, 41 N.Y.S.2d 302, 303 (N.Y. App. Div. 1943) ("[p]laintiffs having waived their right to a jury trial cannot now retract this waiver, and it remains good during the life of the litigation," even after remand for a new trial).

Because Whitaker's jury right was not automatically reinstated upon remand, the trial court was required by Virginia Rule 3:21(d) to make a good cause determination before denying Heinrich's Motion to Strike the Jury Demand. The trial court, however, failed to do so, and instead relied on its erroneous assumption that the jury right was revived on remand. (App. 206.) Even had the trial court applied the proper test, it should have denied Whitaker a jury because there was no good cause for re-trying the damages portion of the case to a jury after holding a full bench trial on the merits. The only difference in the two trials was that Whitaker was allowed at the second to pursue a larger ad damnum. The potential amount of the verdict, however, does not present any new issues of fact or law, and therefore does not support a change from a bench trial to a jury trial. By allowing Whitaker to revoke his jury waiver after the case was fully tried to the bench, the trial court unjustly saddled Heinrich with a different finder of fact, on only a portion of the issues tried in the first trial.

This Court should reverse the trial court's denial of the Motion to Strike the Jury Demand and remand the case for a bench trial on damages. Even if this Court does not agree that the record is clear that there was no good cause for impaneling a jury after a portion of the case had been tried to the bench, then, at the very least, this Court should reverse the trial court's denial of Heinrich's Motion to Strike the Jury Demand and remand for a hearing on good cause, as required by Virginia Rule 3:21(d).

B. <u>The Trial Court Abused its Discretion in Reviving Whitaker's Jury Waiver.</u>

In addition to failing to require Whitaker to show good cause for reinstating his jury demand, the trial court failed to give any consideration to the prejudice Heinrich would suffer by impaneling a jury after the liability phase of the trial. Heinrich relied to its detriment on the jury waiver in deciding not to contest liability in the first trial (App. 200-201.) and was faced with a second trial before a separate finder of fact, whose sole purpose was to award Whitaker damages. The trial court abused its discretion by forcing Heinrich to defend against Whitaker's damages claim in front of a jury.

Throughout the first trial in this matter, both parties operated under the assumption that Whitaker's damages were capped at $74,000. (App. 45-47.) Based on that assumption, they entered into a stipulation regarding

the trial proceedings: there would be no jury, and Heinrich would not contest liability. (*Id*.) Both sides agreed that the expense of a jury trial and a liability defense would easily exceed the $74,000 damages cap. (App. 12-13; 33.) Because Whitaker waived his jury, Heinrich agreed to forego its liability defense, and Whitaker put on the minimum amount of evidence needed to sustain an award of $74,000. (App. 45-47.) When the case was remanded for a trial on damages only, Heinrich was precluded from contesting liability, while the trial court released Whitaker from his jury waiver.

There are no Virginia cases that offer a list of factors to consider when evaluating a request to reinstate a jury right at a remanded trial, after a party has waived the jury right at the first trial. In federal courts, however, it is well-established that the right to a jury, once waived, is not automatically revived by an appellate court's reversal of the trial court's judgment and remand:

> Once the opportunity to demand a jury trial effectively is waived, the right to jury trial is not revived by a reversal on appeal or by the grant of a new trial. It is within the discretion of the trial court under [Federal] Rule [of Civil Procedure] 39(b) whether to grant a jury trial in this situation to a party who previously has waived that right. The trial court may consider such factors as the circumstances surrounding the waiver, the suitability of the case for jury determination, and the mode of trial most likely to expedite the suit.

9 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2321 (3d ed. 2009). *See*, *e.g.*, *Fairley v. Jones*, 824 F.2d 440, 444 (5th Cir. 1987) (holding that the trial court did not abuse its discretion in refusing to reinstate a *pro se* plaintiff's jury right when the case was remanded for further proceedings on punitive damages, because it was undisputed that the plaintiff initially waived his jury right). Federal Rule of Civil Procedure ("Federal Rule" or "Fed. R. Civ. P.") 39(b) allows a court "on motion, [to] order a jury trial on any issue for which a jury trial might have been demanded." Fed. R. Civ. P. 39(b).

The federal rule governing a jury demand, Federal Rule 38, is nearly identical to Virginia Rule 3:21, providing that a party may demand a jury trial by "serving the other party with a written demand – which may be included in a pleading – no later than 10 days after the last pleading directed to the issue served," and filing the demand with the court. Fed. R. Civ. P. 38(b). This language mirrors Virginia Rule 3:21(b), which requires that a party demand a jury in its complaint or by "serving upon other parties a demand . . . in writing . . . not later than 10 days after the service of the last pleading directed to the issue" and filing the demand with the court. Va. Sup. Ct. R. 3:21(b). Whereas Virginia Rule 3:21(d) allows a party to remedy its failure to demand a jury only by "leave of court for good cause

shown," Federal Rule 39(b) provides simply that a court "may, on motion, order a jury trial." Cases applying Federal Rule 39(b), however, explain the analysis a court should conduct in deciding whether to order a jury trial after a party has waived its jury right.

In deciding whether to allow a jury despite a party's waiver of its jury right, federal courts consider (i) the prejudice to the adverse party; (ii) whether the issues are best tried to a jury; (iii) whether granting the motion would result in a disruption of the Court or adverse party's schedule; (iv) the length of the delay in requesting a jury trial; and (v) the reason for the tardiness in demanding a jury. *Daniel Int'l Corp. v. Fischbach & Moore, Inc.*, 916 F.2d 1061, 1064 (5th Cir. 1990); *Parrott v. Wilson*, 707 F.2d 1262, 1267 (11th Cir.), *cert. denied*, 464 U.S. 936 (1983). For example, in *Allocco v. Metropolitan Life Insurance Co.*, the United States District Court for the District of Arizona, looked to these factors in denying the plaintiff's jury demand after the judgment from the first trial, tried by stipulation without a jury, was reversed. No. CIV 01-2220-PHX-JAT, 2008 WL 4372458, at *1 (D. Ariz. 2008). The court there rejected the plaintiff's argument because

> The remanded trial does not involve a new issue. In fact, it does not differ from the first trial where [plaintiff] explicitly waived her right to a jury. Similarly, there has been no change in circumstances, nor any alleged mistake on the part of

> [plaintiff]. . . . No factor clearly weighs in [plaintiff's] favor. In fact, some weigh strongly against the granting of a jury trial. . . . The degree of prejudice to [defendant] would be significant because it would require reformulating their defense for a new type of trial.

Id. at *2. These same factors weigh against granting Whitaker a jury at the second trial in this matter. The second trial did not involve different issues than the first—just a larger ad damnum—and the prejudice to Heinrich was overwhelming, because Heinrich had refrained from contesting liability in reliance on the jury waiver.

The potential prejudice to the defendant was the basis for denying the plaintiff's belated jury demand in *Musick v. Norton*. 215 F. Supp. 2d 171, 173 (D.D.C. 2002). There, the plaintiff initially made a jury demand, but subsequently waived it. *Id.* at 171. Following the close of discovery and the deadline for dispositive motions, and two months before the trial was scheduled, the plaintiff sought to reinstate her jury demand. *Id.* at 173. The defendant objected, arguing that, in reliance on the plaintiff's jury waiver, she had refrained from moving for summary judgment and that her decisions regarding discovery were likewise predicated on plaintiff's jury waiver. *Id.* at 172. The trial court agreed that impaneling a jury would result in significant and irremediable prejudice for the defendant. *Id.* at 173.

The risk of prejudice in the instant case was even greater because Whitaker sought to impanel a jury in the middle of the trial proceedings, after the liability phase of the trial had been completed. Heinrich had predicated its trial strategy, especially its decision not to contest liability, on Whitaker's jury waiver. (App. 200-201.) The trial court permitted Whitaker to rescind his jury waiver, but there was no similar recourse for Heinrich to revisit its decision not to contest liability. Heinrich was prejudiced by this one-sided undoing of the parties' arrangement regarding trial procedure.

When a case is tried without a jury by stipulation, as here, the court should also consider the importance of upholding the parties' stipulations regarding trial procedure. In *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198 (7th Cir. 1989), following an appeal and partial remand, the plaintiff argued that he should be granted a jury trial notwithstanding his stipulation at the first trial that the matter would be tried to the bench. *Id.* at 1205. The plaintiff argued that, when he agreed to the jury waiver, the damages issue was a simple calculation, but after remand, there were other, complex evidentiary issues to be decided which were unanticipated when the parties stipulated to a bench trial. *Id.* Despite these changed circumstances, the Seventh Circuit held that, while a district court had discretion to decide whether to hold a party to its stipulations,

> Stipulations regarding the nature of trial proceedings are crucial to the prompt and efficient disposition of litigation. Therefore, once made, a stipulation is binding unless relief from the stipulation is necessary to prevent a 'manifest injustice' or the stipulation was entered into through inadvertence or based on an erroneous view of the facts or law.

Id. at 1206. In that case, despite the unanticipated evidentiary issues to be submitted to the trier of fact, the Seventh Circuit affirmed the trial court's decision to hold the plaintiff to his stipulation for a bench trial. *Id.*

Here, the circumstances of the parties' stipulation for a bench trial present a compelling reason to hold Whitaker to the arrangement. Heinrich relied on Whitaker's jury waiver in deciding not to contest liability at the first trial, and both parties agreed to a bare-bones bench trial, with only enough evidence to support a judgment of $74,000. (App. 206; 45-47.) While both parties made critical strategic decisions in reliance on the trial court's denials of the motions to increase the ad damnum, only Heinrich bore any consequence for that reliance.

The prejudice that results from changing a bench trial to a jury trial in the middle of proceedings is clear. A jury trial is fundamentally different than a bench trial, which is why the jury right is "sacred." Va. Const. art. I, § 11; *see also* U.S. Const. amend. VII ("In Suits at common law, . . . the right of trial by jury shall be preserved . . . ."). "'[T]here are important differences in preparing for a bench trial and a jury trial such as exhibits,

witness questioning, preparing jury instructions and the like.'" *Vincent v. Chicago Ass'n of Realtors*, 266 Fed. Appx. 472, 473 (7th Cir. 2008) (quotation omitted). Due to the myriad differences between a jury and bench trial, an attorney takes into account the finder of fact in each decision regarding strategy, exhibits, witnesses, questions, and every other aspect of the trial. Forcing a party, over its objection, to present the second half of a trial to a jury when the first half was tried by the court results in substantial prejudice. The basis for each of the attorney's decisions at the first trial is no longer valid. The party is forced to reformulate its defense for a jury, while being constrained by the decisions made during the bench trial.

By impaneling a jury in the second trial, after the first trial was held without one, the trial court placed Heinrich at a severe disadvantage: the jury would hear only evidence related to damages, without any mitigating evidence regarding liability. This case arises under maritime law, meaning that comparative, rather than contributory, negligence applies. *See Matthews v. Commonwealth*, 253 Va. 180, 182, 482 S.E.2d 810, 811 (1997) ("The standards of maritime law provide that contributory negligence is to be considered only in mitigation of damages in a tort action.") (citing *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 629

(1959) ("In instructing the jury that contributory negligence on Kermarec's part would operate as a complete bar to recovery, the district judge was clearly in error. The jury should have been told that Kermarec's contributory negligence was to be considered only in mitigation of the damages.")). Had Heinrich been able to contest liability before the jury, it could have shown the jury evidence that the visibly deteriorated grate through which Whitaker fell was an open and obvious danger and that Whitaker was negligent in stepping on it in the first place. Such evidence likely would have led to a reduction in the damages that the jury awarded Heinrich. Even if the jury had found Whitaker's negligence was only one-tenth of Heinrich's, the verdict would have been reduced by $500,000.

The impact of the disjointed presentation on the jury is clear, too. Entering the proceedings *in medias res*, the jury had heard none of the evidence presented at the first trial. The evidence presented at the second trial was out of context, and in this vacuum, it was given undue emphasis in the jurors' minds. Under such circumstances, an inflated verdict—$5 million for an accident from which Whitaker walked away and which did not even occasion surgery—is not entirely unexpected.

Because the trial court's denial of the motion to strike Whitaker's jury demand prejudiced Heinrich, this Court should reverse the trial court's decision and remand for another trial on the damages, without a jury.

C. **The Trial Court Was Mistaken in Construing This Court's Statement that the Trial on Remand would be on Damages Only as a Limiting Instruction when Ruling on the Motion to Strike the Jury Demand.**

Because of the procedural posture of this case on its original remand, Heinrich has been thus far constrained to argue that the trial court erred in denying its Motion to Strike the Jury Demand instead of the more logical argument that the trial court should have placed the parties in the position they were in prior to the reversal, *i.e.*, a jury trial on all aspects of the case, including liability and the newly enlarged damages. There is no doubt from a review of the record that Whitaker, Heinrich, and the trial court had agreed on a procedure for trying the case when the damages were limited to $74,000: the case would be tried to the court instead of a jury, Whitaker would introduce only enough evidence to establish bare liability, Heinrich would introduce no evidence and the court would enter judgment for $74,000. Such was done openly and on the record and for the express and valid purpose of saving the respective clients, the court and the citizens the time and expense of a jury trial when damages were so limited. The method for trying the case was unmistakably conditional on all parties' part

and was clearly understood to be mutual and in place only because of the cap on damages. Whether or not it was enforceable, counsel for Whitaker and Heinrich both made clear on the record that, but for the cap on damages, and if that cap were ever removed, the agreements on jury waiver and liability concession would not be in place.

On appeal, it was evident that both parties understood that, if the cap on damages were reversed, the parties would be placed in their original positions. Whitaker's "Relief Requested" reflected that understanding: he asked this Court to "permit the amendment to increase the ad damnum clause, and remand the case for trial by jury on the merits." (App. 1233.) However, rather inexplicably, this Court remanded for trial limited to the issue of damages only. It is suggested that, because of the unusual nature of the trial arrangement and the fact that it was not an issue on appeal, this Court was not aware of the agreement of the parties and the trial court when it made that comment. The limitation in that mandate, then, should be considered more of an assumption or an observation on this Court's part and not a limitation on the trial court's subsequent procedural decisions, including its ruling on the Motion to Strike the Jury Demand. As such, it is

suggested that this Court now clarify its original ruling and remand the matter to the trial court for a *de novo* trial.[4]

The Court Approved Agreement on Trial Procedure

That both parties and the trial court were aware of the conditional nature of the mutual waivers of jury and liability is manifest from the record.[5] Whitaker had repeatedly moved and argued for the trial court to increase the ad damnum clause and had been rebuffed each time. The injury itself had occurred on August 14, 2002 and the original Complaint had not been filed until January 2004. Thus, by the time the trial was scheduled in March 2007, the injury was almost five years old and the medical and vocational evidence had mounted. Heinrich was a German corporation and the injury occurred on a vessel with a foreign crew that traveled the world – liability depositions would have required significant overseas travel and bringing witnesses to testify at trial would have

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[4] Such suggestion would be within the Assignment of Error. On remand, the trial court would be free to consider Heinrich's Motion to Strike the Jury Demand in the context of a new trial on the merits, rather than a trial on damages only. The trial court then would be free to use its discretion to ensure that no party was prejudiced by the original erroneous ruling on the ad damnum clause and the subsequent court-approved arrangement on trial procedure.

[5] As has been noted previously, Heinrich did not actually "waive" or "concede" liability in a technical sense. Because damages were capped at $74,000, it agreed simply to not contest or challenge Whitaker's evidence on liability. The term "mutual waivers" is utilized here only as shorthand.

required considerable expense. Although Whitaker had never been required to undergo any surgical intervention, his medical history, both pre- and post-injury, was extensive and, after the remand, six physicians were deposed (one of them twice) and testified live. The trial on damages alone took three days. It was, thus, apparent to all parties and the trial court that a trial on liability and damages would be extensive and expensive.

Neither Whitaker nor Heinrich were willing to go to that expense when the damages were limited to $74,000 and there was no question under Virginia law that, no matter what evidence a jury heard, it could not award more than the ad damnum. *Hook v. Turnbull*, 10 Va. (6 Call) 85 (1806). As this Court noted in *Powell v. Sears, Roebuck & Co.*, 231 Va. 464, 468, 344 S.E.2d 916, 918 (1986) (denying post-verdict increase in a plaintiff's ad damnum), "decisions made by an insurer with respect to handling a case may vary depending on" the amount of the damages claimed and what the impact may be on the insurance policy. Thus, prior to the final pre-trial conference, counsel for Whitaker and Heinrich conferred and reached an arrangement which they presented to the Court for approval.

Counsel for Whitaker described the arrangement specifically: "we have agreed to just present sufficient evidence to the Court to make a finding with respect to liability and sufficient evidence for the Court to make

a ruling or finding with respect to damages and then have the Court enter a judgment for the amount sued for." (App. 13.) He noted that the arrangement would "all change" if the Court reversed itself and allowed an increase in the ad damnum but, assuming it would not, and "based solely upon the present posture of the case," he was going to introduce only limited evidence on liability and damages and Heinrich was introducing none. (App. 13.) Having already moved for summary judgment against itself for the $74,000, counsel for Heinrich specifically stated that, in order not to "waste the Court's time," he was not calling any witnesses nor putting on any evidence but was "simply going to allow Mr. Breit to establish a record." (App. 33.)

The Court consented to the agreement of counsel and convened a trial two days later without a jury. Prior to the commencement of the trial, counsel for Whitaker reiterated that, "by agreement of counsel," the matter was being tried without a jury and that only sufficient evidence to establish bare negligence, proximate cause and damages of $74,000 would be introduced by both parties. (App. 45.) Counsel for Heinrich confirmed the arrangement, making clear that they were not contesting liability "knowing that the judgment is limited to the amount sued for, $74,000." (App. 46.) At

the close of the evidence, Heinrich again moved for summary judgment *against itself* in the amount of $74,000 with the following caveat:

> **MR. POWERS**: Your Honor, *but for* the fact that the plaintiff is limited to the amount sued for of $74,000, *the defendant would be contesting liability* as well as damages. However, given the present posture of the case, I am prepared to request, Your Honor, that summary judgment be entered pursuant to 8.01-377.1 in favor of the plaintiff for the amount sued upon

(App. 97.) (emphasis supplied). Whitaker renewed the request for an increase in the ad damnum and the Court simply stated that it was going to "enter judgment" in the amount of $74,000. (App. 100.)

Thus, considering the quite legitimate concern for the costs involved in a "full blown trial" where damages were so limited, the parties agreed that a skeleton record would be created before the Court sufficient only to sustain a bare finding of liability and limited damages. Counsel for both parties made it crystal clear to each other and the trial court that the waiver of the jury demand and the decision not to challenge the abbreviated liability evidence were "based solely on the present posture of the case." (App. 211.) While Heinrich has argued above that a conditional jury waiver may not have been legally effective, there is no question that both counsel were proceeding on the assumption that the cap was in place and that the decisions would "all change" if the cap was ever removed. The trial court understood and approved the arrangement.

The Appeal

That both parties and the trial court understood the arrangement and relied upon it is clear from the briefing to this Court on the original appeal. The Assignments of Error were not to the judgment itself nor to the amount of damages awarded but, appropriately, to the denial of the motions to increase the ad damnum. Whitaker certainly assumed that, if this Court reversed the trial court on that motion, it would remand for a new trial, as his relief requested was for a "jury trial on the merits." (App. 133.) That he did not appeal the verdict itself makes sense because the trial took place as it did only because of the existence of the cap. If this Court reversed and removed the cap, the entire verdict would naturally fall away and the parties would be placed in the position they would be in had it not existed.

For Heinrich's part, there was nothing the trial court had done which could be challenged on appeal. It, of course, agreed with the trial court's denial of the motions to increase the ad damnum and it had moved for summary judgment against itself in the amount of $74,000, exactly what the trial court did. It would have been absurd to have appealed that verdict just as it would have been absurd for Whitaker to have done so. Both parties were "satisfied," if that is the word, with the $74,000 verdict if, and only if, the cap was in place (Whitaker was certainly not going to forgo the $74,000

had this Court affirmed). Review of the entire record reveals the universal assumption of the parties that the appeal was to the denial of the motions to increase the ad damnum and that, if reversed, the verdict would be deprived of one of its foundations and the proceedings would proceed below *as if the motion had been granted* and the cap removed.

The "Limiting" Instruction

However, for reasons which are unclear from the record on appeal, this Court remanded with instructions that any further proceedings would be limited to the issue of damages, "as the trial court's decision on liability has not been challenged by either party." (App. 179.) As was noted above, that limitation was neither contemplated nor requested by either party. It was not necessary to resolve either the Assignments of Error or the Questions Presented as they were directed exclusively to the motions to increase the ad damnum. There was no appeal of the verdict itself and, thus, the limiting instruction was extraneous and incidental to the appeal. It was, in effect, *dicta*.

As a result of its inclusion, however, the parties were placed in an unintended and disparate position on remand, a fact very much on the mind of counsel for Heinrich when arguing the Motion to Strike the Jury Demand:

> I understand the point that the plaintiff is making; that I wouldn't have waived it but for the fact that the Court had previously limited the amount of damages that he could recover.
>
> Nevertheless, there was an agreement. He agreed to waive the jury. I agreed to not contest liability. That was a done deal.
>
> On appeal I did not address the issue of admitting liability because we had a deal. Come hell or high water, at the end of the day, he waived his jury right. I relied on that.

(App. 198.) Heinrich's counsel went on to say:

> ….
>
> I know what Your Honor said during the trial, and I don't dispute any of it. The fact of the matter is the same could apply to me. I wouldn't have admitted liability but for the fact that we had a situation where the plaintiff was limited to $74,000. He agreed to waive his jury trial. I agreed to concede liability.
>
> …. And now I'm faced with a situation of having to concede liability, and he wants his jury after this Court has already ruled without the jury on the issue of liability.

(App. 200.)

This Court's comment that the lower court's decision on liability had not been challenged by either party is certainly true but, then, as noted above, neither had the decision on damages been challenged by either party. Because Whitaker had not put on anything more than the bare evidence necessary to establish $74,000 worth of damages and had intended to, and did, put on much more extensive testimony on remand, it

would have been illogical for him to have appealed the verdict on damages itself. He had, with the trial court's agreement and understanding, self-limited the evidence so there would be no basis to argue that it supported a higher award. Similarly, it would have been almost irrational for Heinrich to have challenged the sufficiency of the evidence for a finding of liability when both parties indicated that, had there been no cap, liability and damages would have been fully aired and contested. In effect, if not in actuality, the trial court had granted Heinrich's motion for summary judgment *against itself* for $74,000. To have appealed that would have been nonsensical.

The appeal was, thus, properly framed and, with great respect, it is suggested that the limiting language on remand was born of the odd and unusual procedural posture of the case, was outside the scope of the issues on appeal and was unnecessary to its resolution. Nowhere in the briefs is such a limitation requested or recommended as it is clear that both parties, at least, assumed that a reversal would result in a general remand.

In truth, the arrangement of counsel and the trial court is not described anywhere in the briefs or by this Court in its Opinion. That, perhaps, is the genesis of the misunderstanding that led to the inclusion of the limiting language on remand. Perhaps because of poor briefing or

because of erroneous assumptions on the parties' part, this Court did not fully understand that the parties and the trial court had reached an understanding on a truncated trial procedure which was mutual and conditional in nature and which would have rendered an appeal by Heinrich meaningless. The agreement contemplated that reversal of the ad damnum motions would have placed parties back at the trial level in equipoise, but that was not made clear to this Court.

The only way that the limiting language could be reconciled with the court approved arrangement of counsel would be if this Court believed that the jury trial had been waived and that damages would be tried by the court on remand. That would not have been the best solution, because Heinrich would still have been precluded from challenging liability, but it would have come closer to putting the parties back to equipoise than what occurred. Reinstating the jury while preventing Heinrich from contesting liability skewed the balance created by the trial court in allowing the abbreviated proceedings, and it is suggested that such an outcome was not contemplated by this Court in its Opinion.

However, the trial court certainly interpreted the comment as an instruction and was going to allow no evidence as to liability, either by way of defense or affirmative proof of contributory negligence. In effect, liability

was tried to the court on the assumption of a damages cap while damages were tried to a jury without such a cap. As previously argued, such is an untenable situation and is inherently unfair to the point where the jury was clearly compromised and rendered an inordinate verdict.

In general, when a reviewing court rules that a judgment of a trial court is in error, "the slate is wiped clean, with the result that on remand the parties begin anew." *Nassif v. Bd of Supervisors of Fairfax County*, 231 Va. 472, 480, 345 S.E.2d 520, 525 (1986). A reviewing court, of course, can limit the proceedings below and, if so done, it becomes the law of the case. *Miller-Jenkins v. Miller-Jenkins*, 276 Va. 19, 661 S.E.2d 822 (2008). However, the law of the case doctrine is "not inflexible." *Potts v. Rader*, 179 Va. 722, 733, 20 S.E.2d 690, 693 (1942). It can only be invoked "where the facts reappear on the second trial the same as when originally presented" and "there is nothing in the rule to inhibit a party, on a second trial, from supplying omitted facts or from averring a different state of facts." *Carter v. Washington & O.D. RY.*, 122 Va. 458, 464, 95 S.E. 464, 465 (1918). It is "essential that the former opinion be considered as a whole" when applying the doctrine and it "must be interpreted in the light of the proceedings in the first trial and its results, as previously narrated, and when so interpreted, there is no inconsistency in it." *Fawcett v. Richmond*

Leather Mfg. Co., 155 Va. 518, 531, 155 S.E. 714, 718 (1930). Although this Court has never elucidated specifically what exceptions exist for that doctrine, the federal courts have concluded that decisions of an appellate court must be followed in all subsequent proceedings unless: "(1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to the issue, or (3) the prior decision was clearly erroneous and would work manifest injustice.'" *United States v. Aramony*, 166 F.3d 655, 661 (4th Cir. 1999) *and cases cited therein.*

In *Powell*, *supra*, this Court announced a rule prohibiting post-verdict amendments increasing the ad damnum in personal injury cases because of the "substantial prejudice" which would occur to defendants. 231 Va. at 467, 344 S.E.2d at 917. While continuances and postponements can protect defendants from pre-verdict amendments, such are not available post-verdict. *Id.* Allowing an amendment to the ad damnum *after* a verdict on liability and, then, trying damages to a different finder of fact works similar substantial prejudice to defendants and is one which no continuance or postponement can cure.

Heinrich herein argues that including the limiting language relating to the remanded trial was erroneous, in that this Court was not cognizant of

the trial arrangement, and that to impose it on the remanded trial worked manifest injustice. In deciding not to contest liability, Heinrich had clearly relied on the assumption that the damage cap was in place and that there would be no jury. When the cap was removed, allowing a jury to hear damage evidence without also hearing liability evidence was so prejudicial to Heinrich that it resulted in an inordinate verdict.

If the limiting instruction is recognized as either erroneous or an incorrect observation, this Court has the ability to reverse the denial of the Motion to Strike the Jury and remand to the trial court with specific instructions to reconsider in light of the changed circumstances. The trial court at that point could then consider the Motion without the limiting instruction and convene a jury to hear the entire case "on the merits." Such result would comport with the original intent of the parties and the trial court and, without question, would do substantial justice. Any other result would distort that intent in such a way that the results would be unpredictable and obscure.

RELIEF REQUESTED

The Court should reverse the trial court's denial of Heinrich's Motion To Strike the Jury Demand and remand for a bench trial on damages, as it is clear from the record that Whitaker did not have good cause to reinstate

his jury demand. At the very least, the Court should reverse the denial of the Motion to Strike the Jury Demand and remand for a hearing on whether Whitaker had good cause. In the alternative, the Court should reverse the trial court's denial of Heinrich's Motion to Strike and remand the case for consideration of the Motion without a limiting instruction, and order a jury trial on the merits.

Respectfully submitted,

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CERTIFICATE

Pursuant to Rule 5:26(d), I hereby certify that, on this 22nd day of February, 2010, 15 paper copies and 1 electronic copy on CD of the foregoing Brief of Appellant and Joint Appendix were hand-filed with the Clerk of the Supreme Court of Virginia, and 3 paper copies of the same were sent via U.S Mail, postage prepaid, to:

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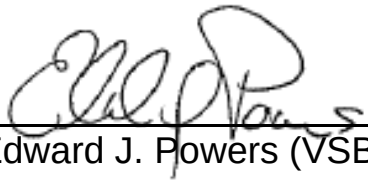

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