IN THE

Supreme Court of Virginia

RECORD NO. 091840

HEINRICH SCHEPERS
GMBH & CO. KG,

Appellant,

v.

SHERMAN WHITTAKER,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

This is the third time an aspect of this personal injury case has been presented to this Court. In the instant appeal, the appellant, Heinrich Schepers GmbH & Co., KG ("Heinrich"), challenges the trial court's decision to impanel a jury after this Court remanded the case for further proceedings. The assignment of error is confined to the limited issue of whether the trial court's denial of Heinrich's Motion to Strike the Jury Demand after remand was an abuse of discretion because Heinrich alleges appellee, Sherman Whittaker ("Whittaker"), had previously agreed to waive his jury right in exchange for Heinrich's agreement not to put on a defense, without admitting liability, at the original trial. In its Petition for Appeal, Heinrich assigned error to two other discretionary rulings by the trial court, and, on January 12, 2010, this Court granted Heinrich an appeal on all three assignments. Heinrich has chosen to abandon the other two assignments of error.

Whittaker was injured on August 14, 2002, while working as a longshoreman on board a vessel owned by Heinrich. On January 30, 2004, Whittaker filed suit against Heinrich in the Circuit Court for the City of Portsmouth, seeking $74,000 in damages and demanding a trial by jury. (Appendix ["App."] 1.) When the trial court refused to allow Whittaker to increase the *ad damnum* clause of his motion for judgment from $74,000 to

$2.5 million, Whittaker filed a Petition for Interlocutory Appeal to this Court in an effort to resolve the issue before trial. This Court denied the Petition for Interlocutory Appeal on January 9, 2007. Thereafter, Whittaker filed another motion to increase the *ad damnum*, this time to $5 million, which the trial court denied, affirming its previous ruling, which issue was subsequently reversed on appeal.

The case was scheduled for trial on March 7, 2007 before the Honorable J.A. Cales Jr. At a pretrial hearing two days before trial, counsel for Whittaker informed the Court that he was going forward without a jury solely due to the trial court's ruling that Whittaker's damages would be limited to $74,000, and reserved the right to try the case before a jury on remand if this Court reversed the trial court's refusal to allow him to increase the *ad damnum* clause. Counsel for Heinrich informed the Court that Heinrich would not contest liability because of the limited *ad damnum* and because this Court's refusal to hear Whittaker's Petition for Interlocutory Appeal indicated that this Court agreed with the trial court's decision. On the day of trial, counsel for Whittaker reiterated his reservation of the right to try the case before a jury if he prevailed on appeal. The matter then proceeded to trial without a jury, and the trial court entered judgment in the amount of $74,000. Counsel for Heinrich offered no evidence on the issue of liability or damages and, at the

close of the evidence, moved for summary judgment against his client, as some type of admission of liability.

Whittaker appealed the trial court's refusal to allow him to increase the *ad damnum* and, on June 6, 2008, this Court reversed the trial court's decision and remanded the case to the trial court for further proceedings. The Court added that "[t]he 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." *Whitaker v. Heinrich Schepers GMBH & Co., KG,* 276 Va. 332, 338, 661 S.E.2d 828, 831 (2008).[1]

Upon remand, Whittaker moved for an increase of the *ad damnum* to $10 million, and that motion was granted. On July 23, 2008, Heinrich moved to strike Whittaker's jury demand. (App. 181.) Heinrich argued that Whittaker and Heinrich had agreed before the bench trial that Whittaker would waive his right to a jury in exchange for Heinrich's agreement not to contest liability, and because Heinrich could not contest liability in light of the remand instruction, Whittaker should lose his right to proceed before a jury. At a hearing on August 19, 2008, the trial court denied Heinrich's motion on the basis that Whittaker had properly reserved his right to a jury trial on remand, and the

---

[1]This portion of this Court's June 6, 2008 Opinion is hereinafter referred to as the "remand instruction."

decision to proceed without a jury was a limited one, and not intended as a waiver of all future proceedings. (App. 207.) Thus, the trial court impaneled a jury to decide the issue of damages only pursuant to the remand instruction.

The matter went to trial before a jury on May 27, 2009. (App. 563.) After three days of trial, the case was submitted to the jury on May 29, 2009. On May 29, 2009, the jury returned a verdict for Whittaker in the amount of $5 million. Final judgment was entered on June 15, 2009. (App. 1528.) Heinrich noted its appeal and filed a Petition for Appeal, which this Court granted on January 12, 2010.

QUESTIONS PRESENTED

I. Whether the trial court correctly exercised its discretion in granting Whittaker a jury trial.

II. Whether the trial court correctly exercised its discretion in granting Whittaker a jury trial where Whittaker had specifically preserved his right to proceed with a jury upon remand of this case to the trial court.

In accordance with Rule 5:28(b) of the Rules of the Supreme Court of Virginia, Whittaker states that the first and third Questions Presented in Heinrich's Brief (and not included in its Petition for Appeal) are unrelated to the Assignment of Error. The Assignment of Error is limited to the issue of

whether the trial court "abused its discretion in denying Heinrich's Motion to Strike the Jury Demand after remand, since Whittaker had previously agreed to waive his jury right in exchange for Heinrich's agreement to forego its defense on the issue of liability." Thus, only the existence of a quid pro quo agreement and the trial court's use of discretion in not recognizing or enforcing that agreement is at issue. The first Question Presented asks, "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?" This question is not related to the error assigned because the issue of "good cause" is not relevant when considering the question of an agreement between the parties. Heinrich attempts to expand the issues on appeal.

The same is true with respect to the third Question Presented, which asks whether "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 the assignment of error is limited to the question of a pretrial agreement between the parties and whether the trial court erred in refusing to strike the jury demand in light of that agreement, the question of whether the remand instruction limited the issues on remand is beyond the ambit of the assignment.

STATEMENT OF FACTS

I. The Accident

Whittaker suffered serious and permanent injuries on August 14, 2002 while working as a longshoreman on board the M/V Buenos Aires, a vessel owned by Heinrich. At the time of the accident, Whittaker was employed by P&O Ports North America to load and discharge cargo in the scope of his employer's stevedoring operations at Portsmouth Marine Terminal. (App. 47.) The accident occurred while Whittaker was walking across a walkway that was rusted and in disrepair, but which had been painted to conceal its condition. Because of the deteriorated condition of the walkway, it gave way as Whittaker walked across it, causing him to fall through the walkway down to the deck below. (App. 47.)

Whittaker remained out of work from August 15, 2002 through March of 2003, when he was permitted to return to light duty work at a reduced wage. Then, in June of 2005, Whittaker was forced to retire because of the injuries he sustained in the accident and has remained out of work since that time. (App. 48.)

II. Proceedings Before Remand

Whittaker filed suit against Heinrich, seeking damages in the amount of $74,000. (App. 1.) When he attempted to increase the *ad damnum* clause of his motion for judgment to $2.5 million in December 2005, counsel for Heinrich opposed the motion on the basis that Whittaker had acted in bad faith in claiming damages below the federal jurisdictional threshold and that Whittaker should therefore be limited to his original *ad damnum.* The trial court agreed with Heinrich, denied Whittaker's motion to increase the *ad damnum* clause, and capped Whittaker's damages at $74,000. Whittaker hired new counsel and filed subsequent motions to increase the *ad damnum,* but the trial court again denied his motion. (App. 173.)

In an effort to resolve the issue before trial, Whittaker filed a Petition for Interlocutory Appeal to this Court in which he sought to reverse the trial court's decision on his motions to amend the *ad damnum* clause. This Court refused Whittaker's petition on January 9, 2007. *Whittaker v. Heinrich Schepers GmbH & Co., KG*, Record No. 061672 (Va. Jan. 9, 2007). On February 22, 2007, Whittaker filed another motion to increase the *ad damnum* to $5 million, which the trial court again denied. (App. 174.)

The matter went to trial on March 7, 2007. As noted, Whittaker was limited to a verdict of $74,000 due to the trial court's denial of Whittaker's

motions to increase the *ad damnum.* Two days before trial, the court held a pretrial hearing. (App. 10.) Counsel for Whittaker explained his plan to proceed on the day of trial as follows:

> MR. BREIT: What basically has transpired between Mr. Powers 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 it, at least with regard to the present posture of the case, the amount sued for it $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 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, 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 stated his position as follows:

> 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.) On the day of trial, counsel for Whittaker and the trial judge engaged in the following colloquy:

> THE COURT: I think for the record there are two things I can do so you don't have to. I'm going to note your continuing objection to my failure to allow you to increase the ad damnum.
>
> MR. BREIT: Yes sir. Thank you.
>
> THE COURT: And I think also, as I understood what you said the other day, and I think we should put this on the record, the only reason we're not going with a jury is because of that ruling, and I think you should put your position on the record just to protect your position.
>
> MR. BREIT: Yes, sir. 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 by 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. 45-46.) Counsel for Heinrich then stated as follows:

> MR. POWERS: Your Honor, briefly, 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.

(App. 46-47.) Counsel for Heinrich never stated that Whittaker was waiving his jury right in exchange for Heinrich's agreement to forego its defense on the issue of liability. The issue in this appeal was never a part of any agreement other than counsel for Heinrich making his own independent judgment about how he wished to proceed.

The matter then proceeded to trial without a jury, and the trial court entered judgment in the amount of $74,000. Counsel for Whittaker presented evidence on the issues of liability and damages, and counsel for Heinrich offered no evidence on either issue. At the close of evidence, counsel for Heinrich moved for summary judgment in Whittaker's favor, stating that "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." (App. 97.)

After the trial court entered judgment in the amount of $74,000, Whittaker filed a Petition for Appeal to this Court. The petition was granted and, on June 6, 2008, this Court reversed the trial court's decision. Hence, the matter was remanded to the trial court for further proceedings. This Court added that "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." *Whitaker v. Heinrich Schepers GMBH & Co. KG*, 276 Va. 332, 338, 661 S.E.2d 828, 831 (2008).[2]

III. Proceedings After Remand

After remand, on July 8, 2008, the trial court entered an order allowing Whittaker to amend the *ad damnum* clause to $10 million. (App. 180.) On July 23, 2008, Heinrich filed a Motion to Strike the Jury Demand in which it asserted that Whittaker had waived his right to a jury trial, that the right could not be revived on remand, and the parties had an agreement whereby Whittaker would waive his right to a jury trial in exchange for Heinrich's decision not to contest liability. (App. 181.) The trial court heard the motion on August 18, 2008. Counsel for Heinrich stated that he was only asking that Whittaker "be bound by the agreement that he entered into." (App. 206.) The trial court denied the motion, explaining as follows:

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[2]As noted above, this language is referred to herein as the "remand instruction."

> THE COURT: Well, my problem is was [sic] the understanding that I had throughout, and I think it's clear from the record. I don't know what understanding you had. I don't know what—I believe it was the same understanding Mr. Breit had. I don't know—I can't go into your mind and know what understanding you had, but, clearly, that the waiver was one of accommodation and conditioned on my ruling being correct.
>
> 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 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.

(App. 206.) The trial court therefore denied Heinrich's Motion to Strike the Jury Demand.

The matter went to trial before a jury on May 27, 2009. (App. 563.) After three days of testimony, the case was sent to the jury on May 29, 2009. On May 29, 2009, the jury returned a verdict for Whittaker in the amount of $5 million. Final judgment was entered on June 15, 2009. (App. 1528.) Heinrich noted its appeal and filed a Petition for Appeal, which this Court granted on January 12, 2010.

SUMMARY OF ARGUMENT

Heinrich raises a host of issues in its Brief of Appellant that were not raised below, preserved below, within the scope of its Assignment of Error, or addressed in its Petition for Appeal.

Heinrich has decided to abandon two of the assignments of error for which this appeal was awarded, most likely because of its failure to preserve those issues in the trial court and the discretionary nature of those issues. The remaining Assignment of Error is likewise fraught with procedural defects. The only argument raised by Heinrich in the trial court with respect to the jury trial issue was that the parties had a quid pro quo arrangement whereby Whittaker waived his right to a jury in exchange for Heinrich's agreement not to contest liability, and since Heinrich could not contest liability as a result of the remand instruction, Whittaker should lose his right to a trial by jury. Its Assignment of Error is limited to that issue. In its Brief of Appellant, however, it argues that (1) the trial court should have required Whittaker to show "good cause" before granting him a jury trial; (2) the trial court should have considered the factors considered by federal courts in applying Rule 39 of the Federal Rules of Civil Procedure; (3) the trial court was mistaken in construing the remand instruction as a limiting instruction; and (4) this Court's remand instruction was in error. None of these issues were preserved below, nor did they fall within the assignment of error. With respect to the third new issue,

Heinrich failed to petition this Court for a rehearing on the remand instruction. As a result, it has waived the right to challenge it, and it is now the

law of the case. This appeal is actually more in the nature of a petition for rehearing of the original decision of this Court.

Appellate procedural defects aside, Heinrich's appeal lacks merit because the trial court was correct in permitting Whittaker to proceed before a jury. Virginia law authorizes the use of discretion in determining whether to grant a jury trial, and the trial judge knew that Whittaker had preserved his right to proceed before a jury should a new trial be awarded. Whittaker did not decide to proceed without a jury based on Heinrich's agreement not to contest liability; nor did Heinrich agree not to contest liability based on Whittaker's conditional waiver of his jury trial right. Instead, the record demonstrates that Whittaker's decision was based on a desire to create a record for appeal without incurring the time and expense of a jury trial, while Heinrich's decision was based on its limited exposure and the belief of its counsel that this Court would uphold the trial court's decision that Whittaker was limited to an award of $74,000. When this Court correctly ruled in Whittaker's favor, it also, correctly, limited the issue on remand to the determination of damages because Heinrich failed to contest the issue of liability. Counsel for Heinrich miscalculated his duty to protect his client's interests, and elected to waive all procedural and substantive rights. Hence,

this Court should affirm the trial court's refusal to grant Heinrich's Motion to Strike the Jury Demand.

STANDARD OF REVIEW

Whittaker agrees with Heinrich's assertion that the decision to grant or deny a request for trial by jury is reviewed under an abuse of discretion standard. *Thomas v. Commonwealth*, 218 Va. 553, 238 S.E.2d 834 (1977). Further, the trial judge has complete discretion to order a jury trial pursuant to § 8.01-336 of the Code of Virginia.

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES

I. HEINRICH'S APPEAL IS PROCEDURALLY DEFECTIVE.

A. The Limits Of The Assignment Of Error.

Rule 5:17(c) of the Rules of this Court provides that "under a separate heading entitled 'Assignments of Error', the petition shall list the specific errors in the rulings below upon which the appellant intends to rely. Only errors assigned in the petition for appeal will be noticed by this Court." Va. Sup. Ct. R. 5:17(c). As this Court has explained, "the purpose of assignments of error is to point out the errors with reasonable certainty in order to direct this court and opposing counsel to the points on which appellant intends to ask a

reversal of the judgment, *and to limit discussion to these points.*" *Yeatts v. Murray*, 249 Va. 285, 290, 455 S.E.2d 18, 21 (1995) (emphasis added); *Dudley v. Estate Life Ins. Co. of Am.*, 220 Va. 343, 348, 257 S.E.2d 871, 874 (1979) ("Elementary is the rule of appellate procedure that the scope of argument on appeal is limited by the assignments of error.") (quoting *Harlow v. Commonwealth*, 195 Va. 269, 271, 77 S.E.2d 851, 853 (1953)).

The Assignment of Error is as follows:

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

Thus, the only issue on appeal is whether there was an agreement between Whittaker and Heinrich whereby Whittaker would waive his jury right in exchange for Heinrich's agreement to forego its defense on liability, and whether the trial court abused its discretion in refusing to strike the jury demand in light of that agreement, if any. The discussion, therefore, must be limited to that issue. By restricting its assignment of error to the question of an agreement to waive a jury in exchange for an agreement to forego a defense, Heinrich, of its own accord, limited the scope of the appeal before this Court.

Despite the limited scope of the assignment, Heinrich now attempts to expand it to include (1) an argument that the trial court abused its discretion

in reinstating Whittaker's jury demand without a "good cause" showing pursuant to Rule 3:12 of the Rules of the Supreme Court of Virginia; (2) an argument that the trial court should have applied the factors considered by federal courts in applying Rule 39 of the Federal Rules of Civil Procedure; (3) an argument that the trial court was mistaken in construing the remand instruction as a limiting instruction; and (4) an argument that this Court erred in including a limiting instruction in its Opinion of June 6, 2008. Heinrich's attempt to stretch the assignment of error beyond its manifest confines is in violation of Rule 5:17 of the Rules of this Court.

Moreover, Heinrich failed to assign error to the trial court's decision that Whittaker reserved his right to a jury trial. The trial court denied Heinrich's Motion to Strike the Jury Demand because of its opinion that Whittaker did not waive his right to a jury on remand, yet Heinrich does not assign error to the trial court's decision on that basis. For this reason alone, the appeal should be dismissed. Va. Sup. Ct. R. 5:17(c).

B. Arguments Not Preserved Below.

This Court repeatedly has held that arguments not raised in the trial court will not be considered for the first time on appeal. *Montgomery v. McDaniel*, 271 Va. 465, 470, 628 S.E.2d 529, 532 (2006); Va. Sup. Ct. R. 5:25. Section 8.01-384(A) of the Code of Virginia requires litigants to make the trial court aware of the grounds for objections to the trial court's rulings at the time of the ruling. While "formal exceptions" to rulings or orders of the court are unnecessary, a party must, at the time of the ruling make "known to the court the action which he desires the court to take or his objections to the action of the court and his grounds therefor." Va. Code Ann. § 8.01-384(A). For an argument to be preserved, "the [trial] court must be aware of a litigant's legal position." *United Leasing Corp. v. Lehner Family Bus. Trust*, No. 090254, 2010 WL 653157, at *6 (Va. Sup. Ct. Feb. 25, 2010). Here, Heinrich never argued below that Whittaker was required to demonstrate "good cause," that it should apply the factors considered by federal courts in applying Rule 39 of the Federal Rules of Civil Procedure, or that the remand instruction did not limit the issues to be decided on remand. Indeed, none of those arguments were raised in the trial court or in Heinrich's Petition for Appeal. Accordingly, those arguments have not been preserved and should not be considered on appeal.

C. The Failure To Petition This Court For A Rehearing.

The fourth new argument raised in the Brief of Appellant, that this Court erred in including a limiting instruction in its Opinion of June 6, 2008, should have been raised in a petition for rehearing pursuant to Va. Code Ann. § 8.01-675.2 and Va. Sup. Ct. R. 5:39, but it was not. Assertions of error in an opinion of this Court that could have been made in a petition for rehearing, but were not, will not be considered by this Court. *Jackson v. Warden of Sussex I State Prison*, 271 Va. 434, 450, 627 S.E.2d 776, 790 (2006). Moreover, an appellate court is without power to amend or correct its mandate after the term at which it was rendered, and the time for a rehearing has expired. *Riggsby v. Tritton*, 147 Va. 1084, 1087, 133 S.E. 580, 581 (1926). When the deadline for filing a petition for rehearing passed, Heinrich forever lost its right to assert error in this Court's June 6, 2008 Opinion.

D. The Independent Basis For The Trial Court's Decision.

Regardless of whether the parties had an "agreement," which they did not, the trial court's decision was that Whittaker's waiver was an accommodation and Whittaker reserved his right to a jury should he prevail on appeal. This Court has recognized that if an independent basis exists for the trial court's decision which is not challenged by an assignment of error,

this Court cannot reach the merits of the error assigned. *Magco of Md., Inc. v. Barr*, 262 Va. 1, 1, 545 S.E.2d 548, 548 (2001); *Rash v. Hilb, Rogal & Hamilton Co.*, 251 Va. 281, 286-87, 467 S.E.2d 791, 794-95 (1996). The trial court's decision was independent of the issue of an "agreement"; in fact, the trial court never reached the issue of whether an agreement existed between the parties; to the contrary, the trial court specifically said "I don't know what understanding you had." (App. 45-46.) It found that Whittaker had preserved his right before proceeding without a jury. While counsel for Heinrich argued below that the parties had an agreement and that the trial court should deny Whittaker's right to a jury trial because of the agreement, the trial court ruled against Heinrich on its motion to strike the jury on the basis that Whittaker's waiver was conditional. Heinrich's assignment of error does not, however, address that basis for the trial court's decision. Thus, the assignment of error is fatal because it fails to address the independent basis upon which the trial court made its decision. This Court cannot reach the merits of the error assigned because Heinrich has failed to address the reasons for the trial court's decision to deny the Motion to Strike the Jury Demand.

II. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING HEINRICH'S MOTION TO STRIKE THE JURY DEMAND.

A. Whittaker's Right To Trial By Jury Is Protected By The Constitution and Code of Virginia.

Whittaker's right to a jury trial is protected by the Constitution of Virginia, which provides in pertinent part, "in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred." Va. Const. art. I, § 11. Section 8.01-336 of the Code of Virginia reinforces that right, providing that "the right of trial by jury as declared in Article I, Section 11 of the Constitution of Virginia and by statutes thereof shall be preserved inviolate to the parties." Va. Code Ann. § 8.01-336(A). It provides further as follows:

> Court-ordered jury trial—Notwithstanding any provision in this Code to the contrary, in any action asserting a claim at law in which there has been no demand for a trial by jury by any party, a circuit court may on its own motion direct one or more issues, including an issue of damages, to be tried by a jury.

Va. Code Ann. § 8.01-336(C). Thus, in Virginia, the right to a jury trial is deemed sacred, and a trial court has the power, by statute, to direct that a case be tried by a jury on its own motion, regardless of whether a jury trial has been demanded. The statute signals the General Assembly's commitment to the right to a jury trial in civil cases as preserved by the Constitution of Virginia.

In arguing that the trial court abused its discretion in impaneling a jury, Heinrich ignores the provisions of § 8.01-336(C), which gave the trial court the power to order a jury trial even if there had been no demand. In this case, the trial court did not need to resort to ordering a jury trial on its own motion because the original pleading in this case demanded a jury and that demand remained in effect upon remand of the case because Whittaker preserved the right to a jury in the event he prevailed on appeal. Even if he could be deemed to have entered into a limited waiver of the right to a jury, § 8.01-336(C) gave the trial court the power to order a jury trial on its own motion upon remand.

B. Whittaker Did Not Waive His Right To A Jury Trial Upon Remand.

Heinrich's argument that Whittaker waived his right to a jury and that the right could not be revived on remand has no support in Virginia law. Whittaker did not waive his right to a jury; instead, he specifically reserved his jury trial right. The trial court's statement that there was no "clear waiver" is consistent with Virginia law. "Waiver is the voluntary and intentional abandonment of a known legal right, advantage, or privilege." *Chawla v. BurgerBusters, Inc.*, 255 Va. 616, 622-23, 499 S.E.2d 829, 833 (1998) (citing *Weidman v. Babcock*, 241 Va. 40, 45, 400 S.E.2d 164, 167 (1991); *Fox v. Deese*, 234 Va.

412, 425, 362 S.E.2d 699, 707 (1987)). "The essential elements of waiver are knowledge of the facts basic to the exercise of the right and intent to relinquish that right." *Id.* (citing *Weidman*, 241 Va. at 45, 400 S.E.2d at 167; *Fox*, 234 Va. at 425, 362 S.E.2d at 707). Counsel for Whittaker never "relinquished" Whittaker's right to a jury trial or had any "intent" to permanently waive a jury; indeed, he clearly and repeatedly reserved that right in the event the damages cap was lifted by reversal on appeal. Whittaker had the right, consistent with his initial demand and subsequent reservation, to a jury trial upon remand. Indeed, even Heinrich acknowledges that Whittaker's waiver was limited to the trial before remand. (Br. of Appellant p. 40.)

Furthermore, even if the Court construes Whittaker to have entered into a limited waiver, the right of a party to withdraw a previous waiver of a jury trial is recognized in Virginia, even where the withdrawal is made 30 days before trial. In *Painter v. Fred Whittaker Co.*, 235 Va. 631, 369 S.E.2d 191 (1988), this Court held that it was an abuse of discretion for a trial court to hold a party to his previous consent to a special three-member jury after he made a demand for a full jury more than 30 days prior to trial. The Court found persuasive its earlier decision in *Thomas v. Commonwealth*, 218 Va. 553, 556, 238 S.E.2d 834, 836 (1977), wherein this Court held that a trial court abused its discretion in refusing to allow a defendant in a criminal case to

withdraw his previous waiver of a jury trial 11 days before trial. Citing Article I, § 11 of the Virginia Constitution and Va. Code Ann. § 8.01-336, this Court found in *Painter* that the motion was timely and, if granted, would not prejudice the objecting party. 235 Va. at 635, 369 S.E.2d at 193.

Heinrich cites cases from other jurisdictions in which courts have held that the waiver of the right to a jury trial remains in effect on remand. Those cases represent a minority view. The majority view is that the waiver of a jury in one trial does not affect the right to demand a jury in a second trial after remand. *In re Lesikar*, 285 S.W.3d 577, 587 (Tex. App. 2009); *Seymour v. Swart*, 695 P.2d 509, 512 (Okla. 1985) ("The right of a trial by jury may be demanded and exercised as if the remanded proceedings were initiated afresh . . . . The majority view is that in the absence of a statute or stipulation compelling a contrary conclusion, a waiver of a jury trial is not binding on a subsequent trial if the right to a trial by jury is otherwise applicable."); *Nedrow v. Mich.-Wis. Pipe Line Co.*, 246 Iowa 1075, 1079, 70 N.W.2d 843, 845 (1955) ("[The great weight of authority [adheres to the rule that] the waiver of a jury on one trial generally does not affect the right of either of the parties to demand a jury on a second trial."); *Spring v. Dep't of Labor & Indus. of State*, 39 Wash. App. 751, 695 P.2d 612 (1985) (same); *Tesky v. Tesky*, 110 Wis. 2d 205, 209-12, 327 N.W.2d 706, 708-09 (1983) (holding that, in line with the

"great weight of authority, 'a party is entitled' as a matter of right to a jury trial on a question of fact if that issue is retried on remand, despite the party's waiver of a jury trial before appeal"). The rule that the right to jury trial is revived upon remand despite a waiver of that right prior to appeal is consistent with Virginia's commitment to the right to a trial by jury as preserved in the Constitution of Virginia and by statute. Therefore, even if Whittaker had "waived" the right to a jury trial without reservation, he retained the right to a jury trial when the case was remanded back to the trial court.[3]

C. There Was No "Agreement" To Waive A Jury In "Exchange" For Heinrich's Decision Not To Contest Liability.

Heinrich claims that there was an "agreement" between counsel that Heinrich would not contest liability in exchange for Whittaker's waiver of his right to a jury trial. This assertion has no support in the record. Counsel for

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[3]It is revealing that among the cases from other jurisdictions cited in Heinrich's Brief, the only case in which an appellate court reversed a trial court's decision to grant a jury trial is a New York case decided in 1943, *Laventhall v. Fireman's Ins. Co. of Newark*, 266 A.D. 756, 41 N.Y.S.2d 261 (1943). Unlike the instant case, the plaintiff in *Laventhall* waived his right to a jury trial unconditionally, and did nothing to preserve his right to a jury trial on remand. Moreover, even among the cases involving unconditional waivers, *Laventhall* is contrary to the majority view on the issue of whether such a waiver remains in effect on remand. Heinrich has cited no case in which a trial court was held to have abused its discretion in granting a jury trial where the plaintiff preserved his right to a jury trial before appeal.

Heinrich stated on the record that Heinrich was not going to contest liability because (1) the plaintiff was limited to a recovery of $74,000; (2) this Court had validated the trial court's refusal to allow Whittaker to increase the *ad damnum* when it denied Whittaker's petition for interlocutory appeal; and (3) doing so comported with the interests of judicial economy. (App. 46.) In essence, Heinrich was certain that it would be safe on appeal because it believed that this Court had signaled its agreement with the trial court's decision on the *ad damnum* issue when it denied Whittaker's Petition for Interlocutory Appeal and, accordingly, it was willing to allow liability to be decided against it without contest. Heinrich was not, as it now claims, motivated by an "agreement" between counsel that Whittaker would waive his right to a jury in exchange for Heinrich's decision not to contest liability. Even if Whittaker had tried the case to a jury, he would have been limited to a $74,000 award. Hence, the presence of a jury had nothing to do with the decision not to contest liability. The decision was a risk Heinrich's counsel was willing to take based on his faulty interpretation of this Court's action with respect to Whittaker's Petition for Interlocutory Appeal.

The lack of an agreement to waive a jury in exchange for Heinrich's decision not to contest liability is evinced by counsel for Heinrich's statement at the close of the evidence during the bench trial. After moving for summary

judgment against his client, counsel for Heinrich represented to the trial court that Heinrich would be contesting liability but for the cap on damages. He did not state that Heinrich would be contesting liability if the case were being tried before a jury. Hence, counsel for Heinrich's statement reveals that even if the first trial had been presented to a jury, Heinrich would not have contested liability, because Whittaker was limited to a $74,000 recovery. Indeed, the first time any mention was made of an "exchange" of a waiver of the jury right for an agreement not to contest liability was in Heinrich's postremand Motion to Strike the Jury Demand. Although Heinrich now claims that it relied upon Whittaker's waiver when it decided not to contest liability, that is not supported in the record. The real reason it made the decision was that Whittaker was limited to $74,000 in damages. Indeed, it simply defies logic that the parties would enter into such an agreement because it did not matter, for purposes of Heinrich's exposure, whether a jury was impaneled or not. Even with a jury, Whittaker's recovery would have been limited to $74,000.

Heinrich claims that "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." (Br. of Appellant p. 31.) There is no question that both parties bore the risk that, on appeal, this Court would rule against them. If Whittaker lost on appeal, he

would have been left with a $74,000 verdict. Heinrich risked not being able to contest liability on remand. Apparently, that was a risk Heinrich was willing to take. It was not, however, a risk that resulted from reliance on Whittaker's decision to forego a jury for the limited purpose of creating a record for appeal. Counsel for Whittaker took the necessary steps to protect his client's rights; counsel for Heinrich simply failed to do so and now seeks to make Whittaker a party to his failure.

It is true, as demonstrated by counsel for Whittaker's remarks during the pretrial hearing, that the parties conferred and reached an agreement concerning the manner in which evidence would be presented to the trial court. (App. 12-13.) There was an agreement, but there was not a *quid pro quo* exchange. Had Heinrich insisted upon a full trial, its counsel could have asked for one.

Assuming, *arguendo*, that there was an agreement, the trial court cannot be said to have abused its discretion. It was faced with a mandate from this Court which directed it to limit the issue on retrial to damages. The opinion said nothing about Whittaker's right to a jury trial, yet Whittaker had preserved its right to proceed before a jury in the trial court and requested a jury trial on remand in his appellate briefs. Because the trial judge knew that Whittaker had preserved his right to try the case before a jury upon remand, he properly

denied Heinrich's Motion to Strike the Jury Demand. What Heinrich asserts now is that the trial court should have deprived Whittaker of his constitutional right because Heinrich failed to object to the finding of liability in order to preserve his client's rights. This was simply one attorney's failure to object, and the trial court certainly recognized that.

Heinrich finds itself in its current predicament simply because it did nothing in the first trial or appeal to protect its right to contest liability in the event the case was reversed. Instead, in its relief requested, it asked only that the trial court's decision be affirmed. Apparently, it was so certain that this Court would affirm the trial court's decision, that it did not deem it necessary to protect its interests in the event this Court reversed and remanded the case. By contrast, Whittaker asked for remand and trial by jury upon remand, thereby reiterating the reservation maintained below.

The trial court went to great lengths to protect Whittaker's right to a jury trial, even though the parties were proceeding without a jury. Counsel for Heinrich decided not to contest liability, not as a result of any agreement, but because counsel for Heinrich mistakenly believed that this Court's denial of Whittaker's Petition for Interlocutory Appeal was a signal from this Court that the trial court was correct in denying Whittaker's motion to amend the *ad damnum*. While the authorities weigh heavily in favor of Whittaker on the

issue of whether he was entitled to a jury after remand, there is no authority which allows Heinrich relief from the consequences of its decision to not contest liability during the first trial. Apparently recognizing this dilemma, Heinrich has fashioned the novel argument that the parties entered into an agreement based on mutual, dependent waivers, despite the complete lack of support in the record for such an agreement. Heinrich cannot point to any evidence of an agreement that was "in exchange" for its own actions, as it claims on appeal, and its Assignment of Error is, therefore, without merit.

Furthermore, there is a fatal flaw in Heinrich's analysis. Any agreement between the parties was simply as to the manner in which evidence would be presented below so that the matter could be taken up on appeal, and this had nothing to do with the issue of jury waiver. Any such agreement relates to the issues that would be decided on remand, and this Court has already decided that the issue on remand would be limited to damages. As addressed below, that is the law of this case. Heinrich is attempting in this appeal to bootstrap a jury waiver argument to an issue that has already been decided and cannot be revisited. Because Heinrich's entire argument is based on this faulty foundation, it cannot prevail.

III. WHITTAKER WAS NOT REQUIRED TO SHOW "GOOD CAUSE" PURSUANT TO RULE 3:21.

Heinrich claims that the trial court should have required a "good cause" showing in order to "reinstate Whittaker's jury demand" pursuant to Rule 3:21 of the Rules of the Supreme Court of Virginia. (Br. of Appellant p. 14.) As noted above, this issue was not raised in the trial court, not addressed in the petition for appeal, and does not fall within the parameters of Heinrich's assignment of error. It should not, therefore, be considered on appeal. Va. Sup. Ct. R. 5:17, 5:25. Even if this issue had been properly addressed in the trial court, which would have allowed Whittaker to demonstrate "good cause," this argument is baseless. Rule 3:21 specifies that the right to a trial by jury "as declared by the Constitution of Virginia, or as given by an applicable statute or other authority" remained "unchanged by these rules." Va. Sup. Ct. R. 3:21(a). It provides that any party may demand a trial by jury in the complaint or by "(1) serving upon other parties a demand therefore in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to the issue, and (2) filing the demand with the trial court. Such demand may be endorsed upon a pleading of the party." Va. Sup. Ct. R. 3:21(b). Heinrich's "good cause" argument appears to relate to Rule 3:21(d), which provides that "[a]bsent leave of court for good cause shown, the failure of a party to serve and file a demand as

required by this rule constitutes a waiver by the party of trial by jury." Va. Sup. Ct. R. 3:21(d). Rule 3:21 applies to the timing of jury demands. Heinrich did not argue below that Whittaker made an untimely demand for a jury trial. It asserted only that Whittaker was not entitled to a jury trial because he had waived that right in exchange for Heinrich's agreement not to contest liability.

Whittaker made his demand for a jury in the original Motion for Judgment filed on January 30, 2004. That demand remained in effect throughout the litigation and was preserved before and during the bench trial. The trial court and the parties understood that if Whittaker were to prevail on appeal, the limited waiver would no longer be in effect. Hence, upon remand by this Court, Whittaker's conditional waiver was no longer applicable, by its own terms. Heinrich cannot not argue that this was not Heinrich's understanding of the terms of the agreement. There was, therefore, no need to show "good cause."

To support its argument, Heinrich cites several Virginia cases in which jury waivers were enforced. *Azalea Drive-In Theater, Inc v. Sargoy*, 215 Va. 714, 720-21, 214 S.E.2d 131, 136 (1975) (upholding a contractual jury trial waiver); *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."). These cases are inapplicable here because Whittaker preserved his right to a jury upon remand. During the bench trial, Whittaker made a clear preservation of his right to a jury trial upon remand, and he was not required to make a second demand.

As a corollary to the "good cause" argument, Heinrich urges the Court to apply the list of factors recognized by federal courts when evaluating a request to reinstate a jury right under Rule 39(b) of the Federal Rules of Civil Procedure based on its argument that Rule 39 mirrors Rule 3:21 of the Code of Virginia. Like so many other arguments, this argument was not raised below or in the petition for appeal. It should not be considered now. Va. Sup. Ct. R. 5:17, 5:25. Also, as stated, Rule 3:21 is not applicable here because Whittaker preserved his right to a jury trial upon remand; accordingly, the factors considered under the similar federal statute are inapplicable here, also. Rule 39(b) grants a district court discretion to order a jury trial despite a party's failure to comply with the 10-day requirement in Rule 38 of the Federal Rules of Civil Procedure. In exercising its discretion, a district court should grant the request for a jury trial "in the absence of strong and compelling reasons to the contrary." *Daniel Int'l Corp. v. Fischbach & Moore, Inc.*, 916 F.2d 1061, 1064 (5th Cir.1990). The five factors considered are (1) whether the case involves issues which are best tried to a jury; (2) whether

granting the motion would result in a disruption of the court's schedule or that of an adverse party; (3) the degree of prejudice to the adverse party; (4) the length of delay in making the request; and (5) the reason for the delay in making the request. *Id.* Heinrich argues that because Rule 39 is similar to Rule 3:21 of the Rules of the Supreme Court of Virginia, this Court should consider these five factors. The argument lacks merit.

Even assuming this Court decides to adopt the Rule 39 considerations, they do not support Heinrich's argument. Heinrich focuses on the "prejudice" factor, apparently conceding that the other factors weigh in favor of a jury trial. Heinrich argues that it suffered "overwhelming" prejudice as the result of the jury trial because it "had refrained from contesting liability in reliance on the jury waiver." (Br. of Appellant p. 29.) The "prejudice" of which Heinrich complains was of its own making. It took the risk that it would not be able to contest liability on remand, but it was willing to do so because it believed that the trial court's decision would be affirmed. It had the opportunity to file a petition for rehearing in order for this Court to reconsider the remand instruction, but it failed to do so. In addition, the cases it cites do nothing to further its argument. In *Musick v. Norton*, 215 F. Supp. 2d 171, 173 (D.D.C. 2002), the prejudice resulted from the plaintiff's failure to demand a jury on remand until two months before the trial was scheduled. Likewise, in

Graefenhain v. Pabst Brewing Co., 870 F.2d 1198 (7th Cir. 1989), the plaintiffs' stipulation to proceed without a jury was not conditioned upon the outcome of the appeal, which was the case here. Finally, having moved for summary judgment against itself, Heinrich cannot now claim it is entitled to contest liability.

Notably, Heinrich has not sought to set aside the verdict as excessive, nor is the size of the verdict an issue on appeal. While Heinrich elected not to present evidence on the issue of liability, the consequences are the result of its failure to protect itself from an adverse decision on appeal, not the trial court's decision to allow Whittaker to proceed before a jury. Heinrich has failed to demonstrate how the trial court's decision allowing a jury trial prejudiced Heinrich. Even if the case had been tried to a judge on remand, Heinrich would not have been able to contest liability. Thus, Heinrich cannot demonstrate prejudice from having a jury, as opposed to a judge, sitting as the trier of fact.

IV. THE TRIAL COURT WAS NOT "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.

Although not preserved below and not within the parameters of its Assignment of Error, Heinrich also claims that the trial court should have deemed this Court's remand instruction as an "assumption" or an "observation" as opposed to a limitation. Heinrich cites no authority in support of the notion that a trial court is free to ignore this Court's manifest orders on remand, and it fails to explain how the remand instruction could be construed as anything other than a limitation of the issues on remand.

Heinrich claims that

> [b]ecause of the procedural posture of this case on its original remand, Heinrich as 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.

(Br. of Appellant p. 34.) This is untrue. Nothing "constrained" Heinrich from filing a petition for rehearing with this Court if it wanted to challenge this Court's limitation of the issue on remand to damages in its June 6, 2008 Opinion. Nothing prevented Heinrich from arguing below, as it does now, that the trial court should not construe this court's remand instruction as a limiting

instruction. Indeed, instead of making that argument below, counsel for Heinrich conceded to the judge that he was "stuck with" his concession of liability in the bench trial. (App. 200.) He made no effort to convince the trial court that construing the remand instruction as a limiting instruction would be a "mistake." Not only did the trial court never have the opportunity to address the issue, it became the law of the case.

V. THE REMAND INSTRUCTION WAS NEVER CHALLENGED BY PETITION FOR REHEARING AND IT IS NOW THE LAW OF THE CASE.

Once the deadline passed for filing a petition for rehearing in response to this Court's June 6, 2008 Opinion, this Court's remand instruction became the law of the case. In *Chappell v. White*, 184 Va. 810, 816, 36 S.E.2d 524, 526-27 (1946), this Court explained the law of the case doctrine and the purpose behind it, as follows:

> The doctrine, briefly stated, is this: Where there have been two appeals in the case, between the same parties, and the facts are the same, nothing decided on the first appeal can be re-examined on a second appeal. Right or wrong, it is binding on both the trial court and the appellate court, and is not subject to re-examination by either. For the purpose of that case, though only for that case, the decision on the first appeal is the law. It differs from *res judicata* in that the conclusiveness of the first judgment is not dependent upon its finality. The first judgment is generally, if not universally, not final. The reason of the rule is twofold. First, after the rehearing period has passed, the appellate court has no power to change its judgment and the mandate for retrial removes the case from its jurisdiction. Second, it is necessary to the orderly and efficient administration of justice. It would greatly increase the

> labor of appellate courts and the costs to litigants if questions once considered and determined could be reopened on any subsequent appeal.

Id. at 816, 36 S.E.2d at 526. Under the doctrine,

> [when] there have been two appeals in the same case, between the same parties, and the facts are the same, nothing decided on the first appeal can be re-examined on a second appeal. Right or wrong, it is binding on both the trial court and the appellate court, and is not subject to reexamination by either. For the purpose of that case, though only for that case, the decision on the first appeal is the law.

Miller-Jenkins v. Miller-Jenkins, 276 Va. 19, 25-27, 661 S.E.2d 822, 826 (2008) (quoting *Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 620, 93 S.E. 684, 687 (1917)); *see Uninsured Employer's Fund v. Thrush*, 255 Va. 14, 18, 496 S.E.2d 57, 59 (1998); *Chappell*, 184 Va. at 816, 36 S.E.2d at 526-27; *Kemp v. Miller*, 160 Va. 280, 284, 168 S.E. 430, 431 (1933).

"Pursuant to the 'law of the case' doctrine, when a party fails to challenge a decision rendered by a court at one stage of litigation, that party is deemed to have waived her right to challenge that decision during later stages of the 'same litigation.'" *Miller-Jenkins*, 276 Va. at 25-27, 661 S.E.2d at 826 (2008) (quoting *Kondaurov v. Kerdasha*, 271 Va. 646, 658, 629 S.E.2d 181, 188 (2006)). The doctrine "applies both to issues that were actually decided by the court, and also to issues necessarily involved in the first appeal, whether actually adjudicated or not." *Id.* (quoting *Kemp*, 160 Va. at

285, 168 S.E. at 431; *Searles v. Gordon*, 156 Va. 289, 296, 157 S.E. 759, 761 (1931); *Norfolk & W. R.R. v. Duke*, 107 Va. 764, 766, 60 S.E. 96, 97 (1908)).

Obviously, the parties to the first and second appeals in this case are the same and the facts are also the same. Accordingly, once the period passed for filing a petition for rehearing in the first appeal, the decisions made therein became the law of the case. Applied here, the law of the case doctrine means that this Court cannot reexamine the remand instruction in its June 6, 2008 Opinion. Hence, Heinrich's argument that this Court's remand instruction was in error cannot now be addressed.

If one assumes that Heinrich was aware of this Court's rules governing petitions for rehearing, it becomes apparent that Heinrich made a tactical decision upon its review of this Court's June 6, 2008 opinion. As it asserts in its Brief of Appellant, Heinrich is of the opinion that the remand instruction was in error. Yet, instead of requesting a rehearing to challenge the remand instruction while the case remained within this Court's jurisdiction, it decided to use the remand instruction against Whittaker in an effort to challenge Whittaker's right to a jury trial on remand. Whittaker should not pay the price for Heinrich's strategic error.

Heinrich asks this Court to reconsider its remand instruction, a request that can only be accomplished under this Court's rules by way of a petition for

rehearing. Instead of following this Court's rules for consideration of the issue, it waited until now, in its Brief of Appellant, to argue, for the first time, that this Court's "limiting instruction" was in error. It raises this issue for the first time after Whittaker has undergone the expense of a jury trial. Whittaker should not be penalized for Heinrich's procedural failure.

Heinrich also claims that Whittaker assumed that if this Court reversed the trial court's decision on Whittaker's motions to increase the *ad damnum,* it would remand the case for a new trial which would include the issue of liability. It makes this argument based on the relief requested in Whittaker's Brief of Appellant in that appeal, wherein he requested relief in the form of a remand for a "jury trial on the merits." (App. 133.) First, it was not Whittaker's responsibility to preserve Heinrich's right to contest liability. Second, Whittaker's requested relief demonstrates nothing more than his continuing reservation of the right to a jury trial upon remand. Heinrich, on the other hand, requested only that this Court affirm the trial court's decision. Heinrich was so certain that this Court would not reverse the trial court's decision that it failed to protect its interests. Again, Whittaker should not be made to suffer the consequences of Heinrich's strategic mishaps.

VI. THIS COURT CORRECTLY LIMITED THE ISSUE ON REMAND TO DAMAGES.

Even if the law of the case doctrine were inapplicable here and Heinrich could challenge the remand instruction, its argument fails because this Court was correct in limiting the issue on remand to damages. Counsel for Heinrich made a tactical decision not to contest liability in the bench trial because he believed that he would prevail on appeal. There was nothing to stop him from contesting liability below. He made that decision because of the cap placed on damages, the cost of presenting a defense, and the belief that Heinrich would prevail on appeal. He was willing to risk the consequences of that decision because he believed, erroneously as it turns out, that this Court's refusal to hear Whittaker's Petition for Interlocutory Appeal indicated that this Court would affirm the trial court's decision on appeal. In its current appeal, Heinrich asks this Court to impose the consequences of Heinrich's risk onto Whittaker by depriving Whittaker of his right to a jury trial.

Heinrich's argument that there was an agreement between the parties is based on the flawed premise that even though Heinrich decided not to contest liability and moved for summary judgment against itself during the bench trial, it was entitled to a new trial on the issue of liability in the event this Court reversed the trial court's decision. The problem with its position is that, unlike Whittaker, it did nothing to protect its rights on remand.

Heinrich was well within its rights to contest liability if it so chose. It chose not to because of the expense of doing so in a case with limited exposure and which it believed that it would win on appeal. Apparently, Heinrich never considered the possibility that it might not prevail on appeal. Thus, it did everything in its power to demonstrate to the trial court that it was conceding the issue of liability. Moreover, in its responsive briefs in the first appeal to this Court, it asked only that the trial court's decision be affirmed. (App. 152.) By requesting such relief, it was asking not only that the damages aspect of the trial court's judgment be affirmed, but also the trial court's judgment on liability. It cannot now assert that it was entitled to a new trial on the issue of liability when, in fact, it consistently has requested that both the trial court and this Court find against it on that issue. *Ambiance Assocs. v. Kilby*, 230 Va. 60, 62-63, 334 S.E.2d 556, 558 (1985) (refusing to allow defendant to withdraw his admission of liability on appeal and ordering a new trial limited to the issue of damages).

Heinrich argues that it would have been "nonsensical" for it to have appealed the trial court's decision in the first trial because it had not contested liability below, had moved for summary judgment against itself, and the result was in its favor. (Br. of Appellant p. 43.) It asserts that because there was nothing it could have done to protect itself on appeal after it had allowed

judgment to be entered against itself without contest, this Court should find that the remand instruction worked a "manifest injustice" during the remanded trial. However, it made that decision of its own accord because it believed that doing so was to its benefit at that time, given the status of the case and its belief that the trial court's decision would be affirmed on appeal. When it did have the opportunity to challenge the remand instruction through a petition for rehearing, it failed to do so. Accordingly, this is not a case which warrants a disregard of the law of the case doctrine on the basis of manifest injustice.

Finally, Heinrich suggests that this Court made a mistake in ordering the limitation of issues on remand because it was unaware of the agreements made by counsel at the time of the bench trial. The record belies Heinrich's position. In the first appeal, this Court had access to all of the transcripts that Heinrich claims to support its argument that a "mutual" agreement existed between the parties. It is not surprising that this Court did not recognize the existence of an "agreement" in those transcripts, since no such agreement was ever described. It is therefore presumptuous, at best, to argue that this Court was not aware of the manner in which the bench trial proceeded. Moreover, in the Court's June 6, 2008 Opinion, the Court described the events of the March 7, 2007 trial, and was therefore familiar with the transcript and the positions of the parties before and during the trial.

VII. HEINRICH HAS FAILED TO DEMONSTRATE THAT IT WAS PREJUDICED BY THE DECISION TO IMPANEL A JURY.

Because the remand instruction is the law of the case, Heinrich was only entitled to a trial limited to the issue of damages on remand. The issue on remand was limited to damages whether the case was tried to a judge or a jury. Heinrich's argument that it was prejudiced because the jury only heard evidence related to damages, without any mitigating evidence regarding liability, is meritless, as the same would have been true of a bench trial on remand. Thus, Heinrich can only prevail in this appeal if there is something inherently prejudicial about a jury trial that does not exist when a case is tried before a judge. There is simply no basis in the law for that position. Whittaker's right to a jury trial is preserved by the Constitution of Virginia and Virginia statute, and there is no authority to support the argument that jury trials are prejudicial per se.

In determining what constitutes "prejudice," the cases addressing motions to increase *ad damnum* are instructive. In *Peterson v. Castano*, 260 Va. 299, 534 S.E.2d 736 (2000), this Court held that a plaintiff's motion to increase the *ad damnum* from $50,000 to $150,000 did not result in prejudice to the defendant because the defendant had ample time within which to prepare his defense. Likewise, in *Bell v. Kirby*, 226 Va. 641, 311 S.E.2d 799 (1984), this Court held that the trial court properly allowed the plaintiff to increase the *ad damnum* from $50,000 to $100,000, two days before trial.

Here, Heinrich admits in its Brief that it was well aware that Whittaker would seek a jury trial if he prevailed on appeal, so it cannot claim that it was surprised when Whittaker sought a jury trial on remand. Moreover, since the jury trial issue was resolved in August of 2008, even before the May 27, 2009 trial date was set, Heinrich cannot claim that its defense was hampered by a lack of time to prepare. *See Painter*, 235 Va. at 635, 369 S.E.2d at 193 (holding that it was an abuse of discretion to refuse a party's demand for a full jury made more than 30 days before trial because the objecting party was not prejudiced); *Thomas*, 218 Va. at 556, 238 S.E.2d at 836 (holding that it was an abuse of discretion to refuse to allow a defendant in a criminal case to withdraw his previous waiver of a jury trial 11 days before trial); *Lawrence v. Hanson*, 197 F. Supp. 2d 533, 537 (W.D. Va. 2002) ("[B]ecause the plaintiff's request for a jury trial in this case was made well before the trial date, it is difficult for the defendants to argue that they are prejudiced by such a request.").

Accordingly, Heinrich has no basis to claim that it was prejudiced by the trial court's decision to grant a jury trial. Upon remand, it was only entitled to a trial limited to the issue of damages. It cannot show that it suffered any prejudice as the result of the decision to allow Whittaker to proceed before a jury instead of a bench trial. If Heinrich's argument were to prevail, it would set constitutional law in Virginia back two hundred years.

CONCLUSION AND STATEMENT OF RELIEF REQUESTED

For the reasons stated, Appellee, Sherman Whittaker, respectfully requests that this Court affirm the trial court's judgment in this matter.

Respectfully submitted,

SHERMAN WHITTAKER

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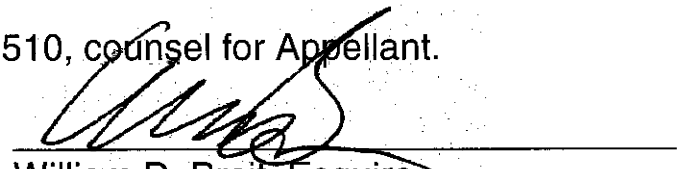
CERTIFICATE PURSUANT TO RULES 5:26(d) AND 5:28 OF THE RULES OF THE SUPREME COURT OF VIRGINIA

Pursuant to Rules 5:28 and 5:26 (d) of the Rules of the Supreme Court of Virginia, I hereby certify that, on this 18th day of March 2010, I filed fifteen copies of this Brief of Appellee, and an electronic copy via email, with the Clerk's Office of the Supreme Court of Virginia and mailed three copies, via U. S. mail, to F. Nash Bilisoly, Esquire, Vandeventer Black, L.L.P., 500 World Trade Center, Norfolk, Virginia 23510, counsel for Appellant.



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