In The

Supreme Court of Virginia

RECORD NO. 091840

HEINRICH SCHEPERS GMBH & CO., KG,

Appellant,

v.

SHERMAN WHITAKER,

Appellee.

BRIEF OF AMICUS CURIAE
THE VIRGINIA TRIAL LAWYERS ASSOCIATION

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THE VIRGINIA TRIAL LAWYERS ASSOCIATION'S
BRIEF *AMICUS CURIAE*

COMES NOW the Virginia Trial Lawyers Association ("VTLA") and files this Brief *Amicus Curiae* in support of Appellee Sherman Whitaker with respect to Appellant Heinrich Schepers GmbH & Co., KG's Assignment of Error I.

ASSIGNMENT OF ERROR

In this brief, VTLA addresses the single Assignment of Error identified by Appellant, which states:

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.

QUESTIONS PRESENTED

The VTLA addresses three questions herein:[1]

[1] Upon information and belief, the appellee, Whitaker, will challenge the arguments and questions raised by the appellant, Heinrich, in its opening brief. The challenge likely will focus on Va. Sup. Ct. R. 5:25 and 5:28(b) and the adequacy of Whitaker's efforts to preserve and present properly those issues to this Court. VTLA generally concurs with Whitaker's urging of the Court to decline to address alleged errors and arguments that are not properly before it, but VTLA has not otherwise analyzed this issue. By addressing the substantive issues herein, therefore, VTLA is not taking the position that all such issues are properly before this Court. Rather, given the possibility that the Court may address these issues substantively, VTLA has proceeded to provide substantive analysis.

1. Does a party have a right to trial by jury on remand of a case from the Supreme Court of Virginia for a trial *de novo* on damages, where a jury was timely demanded prior to the first trial?

2. Does a trial court abuse its discretion when it affords the right to trial by jury by a party who has conditionally waived that right and subsequently exercised that right after the condition was satisfied?

3. Can a party who receives a trial by jury in a civil case be prejudiced, as a matter of law, solely by the fact that his case was heard by a jury rather than by a judge?

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS

For the VTLA's purposes in addressing the questions presented above, it submits the following statement of the case:

Appellee Sherman Whitaker ("Whitaker" or "Appellee") filed suit against Defendant Heinrich Shepers GmbH & Co., KG ("Heinrich" or "Appellant") on or about January 30, 2004 seeking $74,000.00 in damages for personal injuries. Whitaker demanded trial by jury.

Whitaker moved the trial court to amend his motion for judgment to increase the *ad damnum*. When the trial court denied this motion, Whitaker attempted an interlocutory appeal, which this Court denied. The case was tried on March 7, 2007 before the Honorable J.A. Cales, Jr. During colloquy among all counsel and the trial court before trial began, counsel for Whitaker stated plainly that Whitaker's election to proceed without a jury at that time was based on that court's ruling limiting Whitaker's damages to

$74,000.00; in other words, that Whitaker's decision was a conditional one. This representation was acknowledged by the trial court and not contested by counsel for Heinrich.

The trial court heard the evidence presented by the parties and entered judgment in Whitaker's favor in the amount of $74,000.00. Whitaker timely appealed the trial court's refusal to permit him to amend his motion for judgment to increase his *ad damnum*. On June 6, 2008, this Court reversed the trial court's decision and remanded the case to the trial court for trial *de novo* on the issue of damages, only. *See Whitaker v. Heinrich Schepers GMBH & Co., KG*, 276 Va. 332, 661 S.E.2d 828 (2008).

On remand, Whitaker amended his motion for judgment by order to increase the amount of his *ad damnum* to $10 million. Heinrich moved to strike Whitaker's jury demand, as set forth in the motion for judgment, on the ground that Whitaker had previously waived his right to jury trial. The trial court denied the motion, and a jury was empanelled. The jury returned a verdict for Whitaker in the amount of $5 million. On or about September 10, 2009, Heinrich filed its Petition for Appeal with this Court.

STATEMENT OF FACTS

The VTLA accepts Appellee's Statement of Facts as accurately summarizing the relevant portions of the record for purposes of this brief *amicus curiae*. Specifically, the VTLA notes and restates herein for reference the colloquy between counsel and Judge Cales on the record on March 7, 2007, prior to beginning that trial:

> 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 [counsel for Whitaker]: 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.)

> MR. POWER [counsel for Heinrich]: 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.)

Thus, Whitaker did not waive the demand for a jury he made in his motion for judgment. Rather, both Judge Cales and counsel for Whitaker memorialized in the record prior to the original trial of the case before Judge Cales that Whitaker would be proceeding before a jury but for Judge Cales's denial of Whitaker's motion to amend his *ad damnum* clause.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

I. Standard of Review

A trial court's decision regarding the right to trial by a fair and impartial jury must be reviewed on appeal as one "addressed to the sound discretion of the trial court[.]" *See Edlow v. Arnold*, 243 Va. 345, 347, 415 S.E.2d 436, 437 (1992) (quoting *Commercial Union Ins. Co. v. Moorefield*, 231 Va. 260, 265, 343 S.E.2d 329, 332 (1986)). Accordingly, "unless there has been abuse of that discretion, the judgment below will not be reversed on appeal." *See id.*

II. Summary of the VTLA's Position

Heinrich's argument is two-fold. First, Heinrich claims that Whitaker lost his right to trial by jury on the issue of damages upon remand because Whitaker supposedly agreed to waive his jury right absolutely and unconditionally. Second, Heinrich appears to take the position that it was prejudiced by the bare fact that a jury decided the issue of damages.

With regard to the first contention, Judge Cales and Whitaker's counsel clearly memorialized that Whitaker's decision to forego a jury trial was conditional. There is no evidence in the record, save Appellant's *ipse dixit* assertions, of any agreement to the contrary between the parties. Once the condition that gave rise to Whitaker's waiver was lifted, he

properly exercised, and Judge Cales properly afforded him, his right to trial by jury.

With regard to Heinrich's contention that it suffered prejudice by the mere fact of having a jury decide the issue, VTLA categorically rejects the premise that this is even possible. That a jury, rather than a judge, has decided a fact issue does not, standing alone, prejudice a litigant. True, in sharply limited circumstances, one may attack the factual determinations of a jury, just as one may attack the factual determinations of a judge. But Heinrich has not even attempted to do so here – Heinrich has not asserted that any mistake was made by the jury.

Instead, Heinrich implicitly invites the Court to speculate that Judge Cales would have awarded Whitaker less than the jury did. Heinrich then implicitly invites the Court to rule that this conjecture is enough to (A) trump Whitaker's constitutional right to trial by jury, (B) establish that Judge Cales abused his discretion in granting a jury trial, and (C) require the reversal of the result below. The Court should decline these invitations because, at their core, they are requests that the Court abandon the historic and modern constitutional preference for trials by jury above all others.

III. A Plaintiff is Guaranteed the Right to Trial by Jury in Civil Actions

The Constitution of the United States establishes the right to trial by jury in civil cases:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII. "It is essential that the right to trial by jury be scrupulously safeguarded[.]" *Lyon v. Mutual Ben. Health & Acci. Assoc.*, 305 U.S. 484, 492 (1939), *reh'g denied*, 306 U.S. 667 (1939).

The Seventh Amendment's guarantee of the right to jury trial in civil cases extends to jury trials on the issue of damages. *See Smyth Sales, Inc. v. Petroleum Heat & Power Co.*, 141 F.2d 41, 44 (3d Cir. 1944). *See also Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 498 (1931) (a new trial may be granted on a discrete issue, such as damages, without violation of the Seventh Amendment as long as the issues are submitted to jury by proper instructions); *J.T. Majors & Son, Inc. v. Lippert Bros., Inc.*, 263 F.2d 650, 655 (10th Cir. 1958) ("It is the function of the jury, and not the prerogative of the court, to determine the amount of damage[.]")

Likewise, the Commonwealth has enshrined this right to a jury trial in civil actions in its own Constitution, stating that "… 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 (emphasis added). This "inviolate" right to trial by jury has been repeatedly memorialized by statute and recognized by this Court. *See* Va. Code § 8.01-336 ("[t]he right of trial by jury as declared by Article I, § 11 of the Constitution of this Commonwealth and by the statutes thereof shall be preserved inviolate to the parties."); *Cantrell v. Crews*, 259 Va. 47, 50, 523 S.E.2d 502, 503 (2000) (quoting Va. Code § 8.01-358) ("Parties to litigation are entitled to a fair and impartial trial by a jury of persons who 'stand indifferent in the cause.'"); *Edlow v. Arnold*, 243 Va. 345, 347, 415 S.E.2d 436, 437 (1992) (citing VA. CONST. art I, § 11; Va. Code § 8.01-336; *Painter v. Fred Whitaker Co.*, 235 Va. 631, 634, 369 S.E.2d 191, 193 (1988)) ("In Virginia, the right to trial by jury extends to civil litigants as well as those accused of a criminal offense."); The state Constitutional provision is "clearly applicable to common-law actions seeking damages[.]" *Stanardsville Volunteer Fire Co. v. Berry*, 229 Va. 578, 583, 331 S.E.2d 466, 469-70 (1985) (citing *O'Brien v. Snow*, 215 Va. 403, 405, 210 S.E.2d 165, 167 (1974)). "'The right to a fair and impartial trial in a civil case is as fundamental as it is in a criminal case. The civil courts constantly strive to protect this right. It lies at the very basis of organized society and confidence in our judicial system.'" *Cantrell* 259 Va.

at 50, 523 S.E.2d at 503-04 (quoting *Temple v. Moses*, 175 Va. 320, 336, 8 S.E.2d 262, 268 (1940)).

IV. The Trial Court was Well Within its Discretion to Conduct a Jury Trial

In the criminal law context, the overwhelming majority of jurisdictions permit withdrawal of even an unconditional waiver of the right to trial by jury. Some states preserve this right by statute or procedural rule (*see*, *e.g.*, *Commonwealth v. Wright*, 362 Pa. Super. 464, 534 A.2d 970, 971-72 (Pa. Super. 1987); Ohio R.C. § 2945.05; *State v. Grimsley*, 3 Ohio App. 3d 265, 444, N.E.2d 1071, 1073 & 1073-74 n. 2 (Ohio App. 1982)); others leave withdrawal of an unconditional waiver within the "sound discretion" of the trial court. *See Marquez v. State*, 921 S.W.2d 217, 220 (Tx. 1996) (citing *People v. Chambers*, 7 Ca. 3d 666, 102 Cal. Rptr. 776, 778, 498 P.2d 1024 (Cal. 1972); Colorado R.S.A. § 18-1-406(3); *State v. Rankin*, 102 Conn. 46, 127 A. 916, 917 (Conn. 1925); *Floyd v. State*, 90 So. 2d 105, 106 (Fla. 1956); *People v. Catalano*, 29 Ill. 2d 197, 193 N.E.2d 797, 800 (Ill. 1963), *cert. denied*, 377 U.S. 904 (1964); *Woodson v. State*, 501 N.E.2d 409, 411 (Ind. 1986); *State v. Burnett*, 218 Kan. 696, 542 P.2d 707, 708 (Kan. 1976); *State v. Catanese*, 385 So. 2d 235, 237 (La. 1980); *Mathias v. State*, 284 Md. 22, 394 A.2d 292, 294 (Md. 1978), *cert. denied*, 441 U.S. 906 (1979); *People v. Miller*, 149 Misc. 2d 554, 566 N.Y.S.2d 429,

432 (N.Y. Super. Ct. 1990); *Sutton v. State*, 163 Neb. 524, 80 N.W.2d 475, 476 (Neb. 1957); *State v. Villareall*, 57 Ore. App. 292, 644 P.2d 614, 615 (Or. App. 1981); *State v. Ellis*, 598 S.W.2d 826, 827 (Tenn. Crim. App. 1980); *Thomas v. Commonwealth*, 218 Va. 553, 238 S.E.2d 834, 835-36 (1977); *State v. Cloud*, 133 Wis. 2d 58, 393 N.W.2d 123, 125 (Wis. App. 1986)).

As noted, *supra*, Virginia is among the majority of jurisdictions that permit withdrawal of even an unconditional waiver of the right to trial by jury. In the case of *Thomas v. Commonwealth*, *supra*, this Court held that the trial court abused its discretion in refusing to allow a defendant in a criminal matter to withdraw his waiver of a jury trial, which he made eleven days prior to trial. The Court based its decision on Article I, § 8 of the Constitution of Virginia and Virginia Code § 19.2-257 and -258, which preserve the right to trial by jury in criminal cases, in concluding that it was an abuse of discretion to refuse to permit the defendant to withdraw his previous waiver of jury trial where the motion was made timely, was not made for the purpose of delay, and where granting the motion would not unreasonably delay the trial.

This Court has applied such reasoning in the civil context. *See Painter v. Fred Whitaker Co.*, 235 Va. 631, 369 S.E.2d 191 (1988). In

Painter, the trial court had entered an order requested by counsel for both parties which fixed the case for trial before a special three-member jury. The defendant had agreed to the special jury panel on erroneous advice from his original attorney regarding the circumstances of the selection of same. Defense counsel subsequently withdrew from the case, and substitute counsel immediately moved to vacate the order, requesting that the trial court empanel a regular jury to hear the trial of the matter. The trial court denied the motion, despite its finding that the motion was timely made and that the plaintiff would not be prejudiced thereby. This Court reversed. Relying upon *Thomas*, this Court recognized that the trial by jury is "sacred" and "inviolate," and found that the defendant was entitled to withdraw his waiver of his right to a jury. *See Painter*, 235 Va. at 634-35, 369 S.E.2d at 193,

Given that the majority rule, as well as the rule in Virginia, permits the withdrawal of even an *unconditional* waiver of the right to trial by jury, there is no reason to challenge a trial court's exercise of discretion to grant the withdrawal of a *conditional* waiver after that condition is satisfied. In the instant case, the colloquy cited above shows conclusively that both the trial court and the parties were aware that Whitaker's waiver of his right to a jury trial was conditioned on the trial court's erroneous ruling that Whitaker

could not increase his *ad damnum*. The colloquy shows conclusively that Whitaker wished to and would insist on his right to trial by jury if this Court were to reverse the trial court's ruling on the *ad damnum* clause. This Court did reverse that ruling, the condition was satisfied, and Whitaker then exercised his right to trial by jury accordingly. The trial court was correct to afford him this right. Moreover, the decision to deny Heinrich's motion and to permit Whitaker to proceed with a jury trial was a decision fully and properly within the trial court's discretion pursuant to the spirit of Section 8.01-336(d) of Code of Virginia, which provides that a circuit court may, even in the absence of a jury demand, "on its own motion direct one or more issues, including an issue of damages, to be tried by a jury." *See id*. Accordingly, the trial court's decision denial of Heinrich's motion to strike Whitaker's jury demand should be affirmed.

V. Heinrich has not Demonstrated that it Suffered Prejudice By Having to Defend this Matter in Front of a Jury

Heinrich also argues that it was prejudiced by the very fact of a jury's having decided the issues in dispute. To be clear, Heinrich does not argue error in the jury's decision. Heinrich does not pursue remittitur or any other effort to alter the jury's decision. Heinrich does not argue that the jury heard inadmissible evidence or considered improper matters. Heinrich does not even argue that the jury was instructed incorrectly. Rather,

Heinrich contends that the bare act of a jury deciding these issues, and that alone, caused it prejudice.[2]

This argument is difficult to grasp. The constitutions of the United States and Virginia enshrine the right to trial by jury into our common law system of justice. Time and again the General Assembly and this Court have emphasized the sacred role of the jury. From ancient Rome, to post-Magna Carta England, to the establishment of the Commonwealth of Virginia and the formation of the United States of America, trial by jury has been understood to be one of the crucial protections of a free people. This protection applies equally to Heinrich and Whitaker – after all, the jury could just as easily have disappointed Whitaker as Heinrich with its decision.

Heinrich's disappointment notwithstanding, there is no right to trial by judge. There is, however, a right to trial by jury, and VTLA respectfully submits to the Court that the exercise of that right cannot be prejudicial to the parties. Disappointed litigants are free to challenge the instructions given to a jury, to attack evidentiary rulings regarding what the jury heard,

[2] Heinrich implies that it was prejudiced because the jury supposedly awarded a greater sum than Judge Cales would have. This is pure speculation and should be accorded no weight. More importantly, however, it is seriously beside the point. The very point of a jury trial is that the opinion of the presiding judge is not supposed to matter. As this Court has said many times, except in very rare cases, judges need not agree with a jury verdict to be obliged to enforce a jury verdict. Of note, Judge Cales enforced this jury verdict.

to question a jury's composition and even, in rare cases, to dispute an unsupportable jury verdict. Bereft of such challenges, however, the Court should reject Heinrich's implicit but central proposition that litigants can be prejudiced by the mere functioning of a fair jury. They cannot. The functioning of a fair jury that hears proper evidence, is correctly instructed, and has come to an unassailed decision is not, and cannot be, prejudicial to either party.

CONCLUSION

The following issues of fact and law are undisputed: Whitaker had the right to trial by jury, demanded a jury trial, subsequently elected to conditionally waive that right with the acknowledgment of all parties and the trial court, and was allowed by the trial court in its sound discretion to exercise the right to trial by jury after this Court satisfied the condition under which the waiver was made. There is no evidence in the record of any prejudice to Heinrich as a result of the trial court's decision to permit a jury trial on the issue of damages. Accordingly, the VTLA respectfully requests that the Court affirm the judgment of the trial court. VTLA also respectfully requests that the Court rule as a matter of law that a party who receives a trial by jury in a civil case cannot be prejudiced solely by the fact that his case was heard by a jury rather than by a judge.

Respectfully submitted,

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CERTIFICATE

Pursuant to Rule 5:26(d), I hereby certify that, on this 19th day of March, 2010, 15 paper copies and 1 electronic copy on CD of the foregoing Brief of Amicus Curiae The Virginia Trial Lawyers Association 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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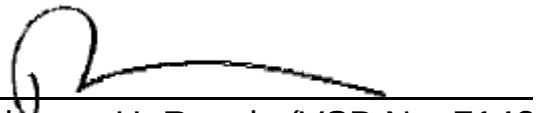

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