In The

Supreme Court of Virginia

RECORD NO. 091840

HEINRICH SCHEPERS GMBH & CO., KG,

Appellant,

v.

SHERMAN WHITAKER,

Appellee.

REPLY BRIEF OF APPELLANT

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Appellant, Heinrich Schepers GmbH & Co., KG ("Heinrich") hereby files its Reply Brief to the Briefs of Appellee, Sherman Whittaker ("Whittaker")[1] and Amicus Curiae, the Virginia Trial Lawyer's Association.

ARGUMENT

After almost seventy-five pages of briefing, it is clear that the parties agree on virtually all of the salient circumstances that lead to the present appeal. The only critical disagreement is the meaning of this Court's mandate in the original appeal and how the mandate should have informed the trial court's consideration of the Motion to Strike the Jury. From a review of all the circumstances leading to this Court's original mandate, it is apparent that this Court intended to remand the case for a fair determination of damages and that, by impaneling a jury for a new trial and allowing new evidence on damages only, the trial court abused its discretion in failing to achieve that result.

A. The Key Facts of the Case's Procedural History, Including the Parties' Agreement, Are Undisputed.

In his brief in this matter, Whittaker does not dispute the procedural history that underlies the legal issues in this appeal. Most significantly, he

[1] Both parties have spelled the Appellee's surname both as "Whitaker" and "Whittaker," and this Court, on the first appeal, used "Whitaker." Upon review of documents in the trial court record completed by the Appellee himself, it appears that Whittaker is correct and it will be used in this brief except in citations to this Court's earlier Opinion.

admits that, prior to the first trial, the parties reached an important agreement regarding the trial procedure: 1) the case would be tried without a jury; 2) both parties would voluntarily limit their evidence to just that amount "sufficient [for] the Court to make a finding with respect to liability and to damages;" and 3) the Court would enter judgment "for the amount sued for."[2] (Br. of Appellee 28; App. 12-13.) The trial court acquiesced in this arrangement and no jury was impaneled at trial. In pre-trial comments, counsel for Whittaker reiterated that he was voluntarily proceeding without a jury and limiting his evidence due to the cap on damages, and counsel for Heinrich made it clear that it, too, was limiting its evidence and would be contesting liability "but for the fact that plaintiff is limited to the amount sued for of $74,000.00." (App. 97.) Whittaker called three witnesses and Heinrich none. The trial court did not strike the jury demand or limit proof in any way; all of the parties' decisions on trial procedure and evidence were intentional and voluntary.

At the close of evidence, Whittaker's counsel argued that the evidence was sufficient for an award of $5 million dollars. (App. 99.) Noting that damages were limited to $74,000, counsel for Heinrich invited

[2] The amicus curiae's entire brief is premised on the erroneous assumption that there was no agreement between counsel and, thus, has no bearing on the issues before this Court. (Br. of Amicus Curiae 6.)

judgment in that amount. (App. 97.) In ruling, the trial court stated, *in toto*: "I am going to enter judgment in the amount of $74,000.00, the amount sued for." (App. 100.)

Whittaker does not dispute, following the first trial, that he appealed only the denial of his motions to increase the ad damnum and that neither party appealed the judgment itself. Nowhere in the briefing to this Court was the parties' procedural agreement ever described, nor was it mentioned in the Opinion itself. The only reference in that Opinion to the procedural setting was an observation that Whittaker had "chose[n] to have the matter tried by the Court rather than by a trial by jury." *Whitaker v. Heinrich Schepers GMBH & Co. KG.*, 276 Va. 332, 335, 661 S.E.2d 828, 829 (2008); (App. 174.) Reversing the trial court's denial of the motion to amend the ad damnum, this Court remanded "for further proceedings limited to the issue of damages." (App. 179.)

On remand, Heinrich moved to strike Whittaker's original jury demand because it violated the court-approved procedural agreement and would be prejudicial in light of the apparent remand instruction. (App. 181-185; 195-207.) The trial court's sole basis for denying Heinrich's Motion was that Whittaker's jury waiver had been conditional and that the condition no longer existed. (App. 207.) After Whittaker called a total of nine witnesses,

including the same three he called at the first stage of the trial, the jury returned a $5 million verdict. Heinrich appealed the trial court's denial of the Motion to Strike the Jury Demand.

B. The Questions Presented Are within the Assignment of Error and Were Properly Preserved for Appeal.

Whittaker argues that Heinrich's First and Third Questions Presented are unrelated to the Assignment of Error and were not preserved for appeal because "only the existence of a quid pro quo agreement and the trial court's use of discretion in recognizing or enforcing that agreement is at issue." (Br. of Appellee 5.) In making this argument, Whittaker ignores half of the Assignment of Error, focusing on only the portion referencing the parties' agreement. The complete assignment of error is

> The trial court abused its discretion in denying Heinrich's Motion to Strike the Jury Demand after remand, since[3] Whitaker had previously agreed to waive his jury right in exchange for Heinrich's agreement to forego its defense on the issue of liability.

(App. 1530.) All three questions presented relate directly to this Assignment of Error, as all three ask whether the trial court abused its discretion in denying the Motion to Strike in light of the parties' agreement. Contrary to Whittaker's characterization, Heinrich does not claim in the

[3] In its opening brief, Heinrich made a grammar correction and substituted the word "because" for "since." (Br. of Appellant 1.) The correct phrasing of the assignment of error appears here and in the Appendix at page 1530.

Assignment of Error or elsewhere that the parties had a quid pro quo, enforceable contract, but rather that (1) there was a court-approved agreement regarding how the trial would proceed—which Whittaker admits (Br. of Appellee 28)[4]—and (2) there was no good cause for the trial court to have allowed Whittaker to introduce new evidence to a jury to Heinrich's prejudice. Each of the Questions Presented addresses the trial court's abuse of its discretion in denying the Motion to Strike. Heinrich preserved these issues for appeal in that Motion, where it argued that it was prejudiced by the trial court permitting Whittaker to introduce additional evidence to a jury notwithstanding the parties' agreement and this Court's Opinion.[5]

C. This Court's Mandate Did Not Call for a New Trial and To Proceed With One Was an Abuse of Discretion.

When all of the clutter is stripped away and the case is viewed in light of the undisputed procedural setting, the questions are reduced to what this

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[4] "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." (Br. of Appellee 28.)

[5] Similarly, Whittaker's argument that there was an "independent basis" for the trial court's decision to allow him to rescind his jury waiver is based on his misreading of the Assignment of Error. The trial court's denial of Heinrich's Motion to Strike the Jury Demand was the basis for impaneling a jury. It was unnecessary for Heinrich to describe the trial court's reasons for denying the motion in the Assignment of Error.

Court intended in its original remand and whether the trial court incorrectly interpreted that mandate in ruling on the Motion to Strike the Jury Demand, to Heinrich's prejudice.[6]

As always, it is presumed that this Court's instructions were logical and intended to result in fundamental fairness. Whittaker and Heinrich's pre-trial agreement, which the trial court approved, resulted in a full bench trial and a monetary judgment. By interpreting this Court's mandate in such a way as to release Whittaker from the agreement, so that he was allowed to introduce new evidence to a jury, while concluding that Heinrich was precluded from similar relief, the trial court abused its discretion. The mandate can only be viewed fairly as requiring each party to live by its decisions to put on a truncated trial and requiring the trial judge simply to decide the issue of damages without the restrictions of the cap.

On brief, Whittaker and the amicus curiae mischaracterize this Court's decision in the first appeal as a remand for a "new trial." (Br. of

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[6] The parties agree on the "law of the case[0]" doctrine. Where there have been two appeals in the same case, and the facts are the same, nothing decided on the first appeal can be re-examined on the second. *Chappell v. White*, 184 Va. 810, 816, 36 S.E.2d 524, 526-27 (1946). Here the parties disagree not as to the doctrine itself, but what was ultimately decided in the first appeal and whether the facts presented to this Court regarding the procedural setting in each appeal are the same[0].

Appellee 28-29.)[7] The mandate does not call for a new trial, either by jury or the bench, but only for further proceedings limited to the issue of damages. This Court is well aware of how to order a "new trial" on damages rather than simply "further proceedings," and did not do so here.[8] Moreover, those further proceedings could not have logically been construed to allow one party to introduce additional evidence and not the other when both voluntarily limited their evidence at the first trial. This Court did not and would not have ordered a second trial in light of the agreement, for to do so would have resulted in a fundamental unfairness to Heinrich. Because the trial court's liability determination stood, and this

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[7] Amicus curiae goes so far as to characterize the instruction as a "trial *de novo* on the issue of damages only," a gross mischaracterization. (Br. Of Amicus 3.)

[8] *See*, *e.g*., *Monahan v. Obici Med. Mgmt. Servs., Inc.*, 271 Va. 621, 638, 628 S.E.2d 330, 340 (2006) ("We will therefore remand the case for a new trial limited to the issue of damages."); *Jenkins v. Pyles*, 269 Va. 383, 390, 611 S.E.2d 404, 408 (2005) ("For these reasons, we will reverse the Circuit Court's judgment, reinstate the verdict in favor of [plaintiff] as it relates to liability, and remand the case for a new trial limited to the issue of [plaintiff's] damages."); *Vasquez v. Mabini*, 269 Va. 155, 163, 606 S.E.2d 809, 813 (2005) ("we will reverse the judgment and remand the case to the trial Court for a new trial limited to the issue of damages.").

matter was tried under maritime law,[9] the trier of fact was required to determine and apportion damages according to degree of fault. The "further proceedings" on damages were only for those purposes. Certainly this Court did not intend a jury to be empanelled at that stage of the trial.

As this Court has recognized repeatedly,

> The authorities are uniformly to the effect that a motion for withdrawal of [a jury] waiver made after the commencement of the trial is not timely and should not be allowed.

Thomas v. Commonwealth, 218 Va. 553, 555, 238 S.E.2d 834, 835 (1977).[10] Here, as this Court noted in the first appeal, on the day of trial Whittaker "chose to have the matter tried by the court rather than by a jury." (App. 174). He should not have been allowed, when the case was remanded for further proceedings, to rescind his jury waiver and introduce

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[9] *See*, *Garlock Sealing Technologies v. Little*, 270 Va. 381, 387-88, 620 S.E.2d 773, 777 (2005) (in a maritime tort action, the trier of fact apportions damages pursuant to comparative law priciples). Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 5-4 (4th ed. 2004).

[10] *See also Commonwealth v. Williams*, 262 Va. 661, 670, 553 S.E.2d 760, 764 (2001) (holding that trial court did not abuse its discretion in denying criminal defendant's request, on the morning of trial, to withdraw his previous jury trial waiver); *Patterson v. Commonwealth*, 19 Va. App. 698, 701, 454 S.E.2d 367, 369 (1995) ("The Pattersons' waiver of trial by jury at their arraignment was knowing, intelligent, and voluntary. . . . Their motion to withdraw their waiver, made on the day of trial, was untimely."); *Davis v. Commonwealth*, 3318-02-3, 2003 WL 22843604 (Va. Ct. App. Dec. 2, 2003) (holding that a defendant's attempt, on the day of trial, to withdraw his jury waiver was untimely).

further evidence. The evidentiary phase of the trial had already commenced and concluded.

Contrary to the claims of Whittaker and the amicus curiae, Heinrich does not argue that trial by jury is inherently prejudicial.[11] Indeed, a full jury trial on the merits would have been unquestionably proper. The prejudice here resulted from impaneling a jury and allowing further evidence from the plaintiff only after the trial court had already determined liability and damages, when the only proceedings left were a reconsideration and apportionment of damages in light of the increased ad damnum. In these circumstances, the remand and the agreement of counsel must be read together and can only be reconciled by an intent to remand to the trial court for an on-the-record determination and apportionment of damages.

D. The Trial Court Abused its Discretion by Failing to Read This Court's Mandate To Accomplish Fundamental Fairness.

However, as posited in Heinrich's opening brief, it is possible that this Court may not have been provided sufficient procedural background to

[11] There is, however, ample research demonstrating that juries tend to award greater damages than judges. Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, Harvard Law School Discussion Paper No. 362, 33 J. Legal Stud. 1, 1-36 (2004). Whittaker's willingness to forego a jury when his damages were limited, and insistence on a jury trial once the limit was lifted, belies his claim that a bench and jury trial are indistinguishable. Nonetheless, Heinrich does not deny that there is a constitutional right to a jury if that right is properly invoked.

have been aware of the agreement on the first appeal and therefore issued its mandate in the mistaken belief that a full trial had occurred without the evidentiary self-limitation of both parties. In that event, the mandate must still be read as providing fundamental fairness to both parties and cannot be construed as giving only one side an opportunity for a new trial by a different finder of fact. Again, either both parties had to be bound by the court-approved agreement and the matter remanded to the trial court for determination and apportionment of damages, or the case had to be remanded for a full retrial on all issues. Either result would have been fair. The trial court's decision to permit only Whittaker to present additional evidence to a jury, however, was a miscarriage of justice that this Court surely did not intend.

The now-acknowledged agreement to create a bare record for appeal in the first trial of this case is not in the briefs or Opinion in the first appeal. Its absence in the Opinion is understandable, as the sole issue there was whether the trial court erred in denying the various motions to amend the ad damnum, not whether the trial court made any errors in the conduct of the trial itself. In reviewing that limited question, it is reasonable to believe that this Court presumed that a full trial had taken place, with each side calling all the witnesses it felt were necessary, that the Court's entry of

judgment for $74,000 was occasioned only by the cap on damages and that there would be no need for a new trial, but only reconsideration and apportionment of the damage award without the limitation of the cap. In that circumstance, it is logical that this Court would remand the case to the same fact-finder for such further consideration of damages. As noted supra, because this was a maritime case, the trial court would perform the required apportionment of those damages according to comparative fault, an impossible task unless the fact-finder also has heard the liability evidence.

On brief, Whittaker repeatedly refers to the parties' agreement as limited to his decision to waive his jury demand, juxtaposed against Heinrich's decision to forego a defense, ignoring his own concurrent tactical decision to self-limit his proof. He describes his "decision to forego a jury" as being "for the limited purpose of creating a record for appeal" without acknowledging that he also decided not to proceed with a "full-blown trial." (App. 12-13.) He states on brief that "had Heinrich insisted upon a full trial, its counsel could have asked for one." (Br. of Appellee 28.) The same, of course, is true of Whittaker. While he claims that his jury waiver was conditional, it is undeniable that he was forever foregoing a jury in the event that this Court denied his appeal of the ad damnum limitation. At the first

trial, the trial court did not exclude any of Whittaker's witnesses or exhibits. He had every opportunity to call the six additional witnesses who testified at the second trial, but chose not to. His evidentiary decisions at the first trial, like his jury waiver, were intentional and voluntary; because rescinding those decisions resulted in prejudice to Heinrich, the trial court should not have allowed him to do so without good cause.

Both parties' tactics during the bench trial had been premised on the existence of the ad damnum cap. Once removed, there is no rationale that would allow for a whole new trial on damages only, allowing Whittaker to re-try the heart of his case without the existence of a cap to a new trier of fact, while denying Heinrich the same opportunity. Whittaker had not objected to or appealed any rulings at trial, did not appeal the judgment itself and did not even ask this Court for a retrial on damages only. This all makes sense only in the context of the agreement of counsel, again approved by the trial court, to create a bare-bones record for appeal. If this Court was remanding for a new jury trial on damages only, it must have been unaware of the procedural history.

It is noteworthy that neither Whittaker nor the amicus curiae argues that putting both parties in the position they were in prior to trial would have been somehow unfair or in any way prejudicial. Similarly, neither Whittaker

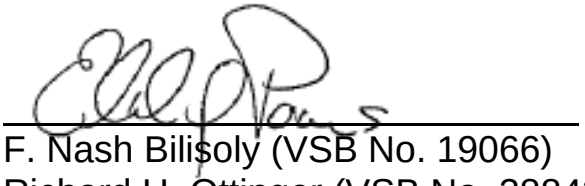
nor the amicus curiae contends that remanding the case for a new trial on damages only was fair or was requested by either party. Whittaker's entire argument is that Heinrich's counsel made a mistake in failing to preserve his right to offer additional evidence at a trial on remand, while his counsel did. But, review of the record reveals that Whittaker's counsel did nothing to protect his evidentiary rights on remand either, other than saying that he would have been asking for a jury "but for" the cap. (App. 45.) That is exactly what Heinrich's counsel said regarding the decision not to call witnesses. (App. 97.) Both counsel were preserving what rights they had in the event of a reversal. That being Whittaker's only rationale for construing the remand as he does, it is reciprocal and carries no weight.

As Heinrich pointed out in its opening brief, and neither Whittaker nor the amicus curiae dispute the logic, the only way the limiting language of the remand can be reconciled with the court-approved arrangement of counsel is if this Court believed the entire matter had been tried and was remanding the case back to the trial court for an on-the-record determination of damages without the cap. Such would have held both parties to their tactical decisions. However, if this Court was not aware of the arrangement, the remand instruction could be viewed as advisory and all issues retried by a judge or jury. Both parties either lived with their trial

decisions or were relieved of them - any different result is neither logically nor equitably possible.

The trial court prejudiced Heinrich by allowing Whittaker to introduce new evidence to a jury. This Court should reverse that decision and remand in a manner that will place both parties in a balanced position, free of prejudice. That can be accomplished by reversing the trial court's denial of the Motion to Strike the Jury Demand and remanding either (1) to the trial court for a determination and apportionment of damages based on the record of the first trial, or (2) for a new trial on all issues.

Respectfully submitted,



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CERTIFICATE

Pursuant to Rule 5:26(d), I hereby certify that, on this 15th day of April, 2010, 15 paper copies and 1 electronic copy on CD of the foregoing Reply Brief of Appellant 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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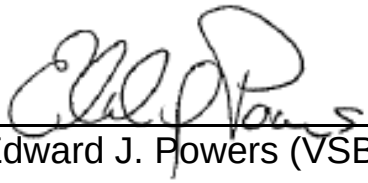

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