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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Ronald Smithberg,	
Petitioner,	**Supreme Court No. _____**
vs.	**District Court No. 12-2016-CV-00042**
Paul Jacobson, Judge of District Court, Gary Smithberg, James Smithberg, and Smithberg Brothers, Inc.	
Respondents.	

PETITION FOR SUPERVISORY WRIT

Re: Ronald Smithberg v. Gary Smithberg, James Smithberg, and Smithberg Brothers, Inc., Divide County District Court, Northwest Judicial District, the Honorable Paul Jacobson presiding, and Judge Jacobson's Order for Bench Trial issued October 18, 2019.

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[¶ 3] STATEMENT OF THE ISSUES

[¶ 4] Whether this Court should issue a supervisory writ to the District Court directing that the above action be tried to a jury where a timely demand was first made, but waived for an initial trial, and such request was renewed after this Court reversed and remanded.

[¶ 5] RELIEF SOUGHT

[¶ 6] Petitioner seeks a jury trial, assignment of a new judge, and the issuance of a scheduling order.

[¶ 7] STATEMENT OF THE CASE

[¶ 8] In May 2016, after four years of receiving no benefits from his ownership of Smithberg Brothers, Inc. (the "Corporation"), and watching his brothers loot the Corporation, Ronald Smithberg ("Ron") brought suit against his brothers and fellow shareholders, James ("Jim") and Gary pursuant to a "Complaint and Jury Demand." (App.10,Doc.1). The District Court, Judge Paul Jacobson presiding, granted summary judgment, dismissed Ron's claims, and ordered Ron to proceed to trial where his sole remedy would be one he had never sought. (Doc.93). Ron appealed, but this Court dismissed.

[¶ 9] Trial was held April 19-20, 2018. On September 24, 2018, the undersigned filed a Demand for Change of Judge to remove Judge Jacobson from the unrelated case of Erickson v. Oberbeck, 53-2018-CV-01517 (Doc.23). Days later, Judge Jacobson adopted Jim and Gary's proposed findings, conclusions, and order. (Doc.252). Judge Jacobson ordered that the Corporation would have twelve

months to purchase Ron's interest, and that if such wasn't done, the Corporation would then be dissolved, with the assets first used to pay the Corporation's liabilities, and the remaining assets distributed pro rata to the shareholders. (Id.)

[¶ 10] Ron appealed Judge Jacobson's ruling and this Court reversed. Smithberg v. Smithberg, 2019 ND 195, 931 N.W.2d 211. Over Ron's objection, the District Court has set the trial of Ron's claim for a bench trial. (App.51,Doc.287). This Petition for Supervisory Writ follows.

[¶ 11] STATEMENT OF FACTS

[¶ 12] All of the following are derived from the filings of the parties that are on record with the District Court and available through Odyssey, and citations to the Petitioner's Appendix are made when appropriate.

[¶ 13] This action was initiated by a pleading entitled "Complaint and Jury Demand" dated May 24, 2016. (App.10,Doc.1). Ron filed his Complaint with the Court on July 6, 2016. On January 4, 2017, the Court issued an Order for a Scheduling Conference to be held on February 17, 2017. (App.21,Doc.9). On February 17, 2017, a Scheduling Conference was held via telephone. At that time trial dates were discussed, but no Scheduling Order was ever entered between the parties. (See, e.g., Doc.93, at ¶20 ("Here, no scheduling order has been entered . . . .")). On February 22, 2017, a Notice of Jury Trial was issued setting the trial for October 1, 2018, or approximately a year and a half later. (App.22,Doc.26). As all of the parties desired at that time to try to have an earlier trial, there was a date available for such in February 2018, and the Court had not made any substantive

rulings on any issues benefitting one party over the other, the parties stipulated to a Court trial to be scheduled "for February 2018, or as soon thereafter as possible." (App.23,Doc.38). On March 29, 2017, a Notice of Court Trial was issued setting the trial for a three-day bench trial beginning February 6, 2018. (App.24,Doc.40).

[¶ 14] On January 25, 2018, just weeks before Ron's thirteen claims were to be heard by the Court, the Court issued its Order Granting Defendants' Motion for Summary Judgment dismissing with prejudice all of Plaintiffs' Claims. (Doc.93). In addition, the Court rejected Ron's request to exclude Defendants' expert in part on the basis that "no scheduling order has been entered . . . ." (Id. at ¶20).

[¶ 15] Ron immediately appealed the decision to this Court. On January 30, 2018, the District Court issued an Order cancelling the February 6, 2018, Court Trial, but despite Ron having appealed, rescheduled the same for April 17, 2018. (App.25,Doc.97). Immediately thereafter, Ron filed an Objection to Order Rescheduling and Notice Reserving Jury Demand. (App.26,Doc.98).

[¶ 16] Ron's initial appeal was dismissed upon the motion of Defendants. As all of Ron's claims had been dismissed, he had no claims remaining for which a jury trial could be demanded and he did not have a right to a jury on Defendants' statutory valuation claim. E.g., Gen. Elec. Credit. Corp. v. Richman, 338 N.W.2d 814, 817 (N.D. 1983) ("There is no right to demand a jury trial in a statutory action in the nature of an equitable proceeding."); Pollock v. Brown, 441 A.2d 276 (D.C. Ct. App. 1982) ("Plaintiff's participation in a nonjury damages hearing, prior to this court's reversal of the entry of default, provides no indication of a willingness to

forego their right to a jury trial.") A Court Trial was thus held in April 2018, and the Court issued its decision in October 2018, which Ron then appealed.

[¶ 17] In his appellate briefing to this Court, Ron requested a jury trial. (App.28,Appel. Br., at ¶90, App.30,Appel. Reply Br., at ¶18). Defendants did not object to this request in their briefing. This Court subsequently reversed the grant of summary judgment and remanded for "further proceedings." Smithberg v. Smithberg, 2019 ND 195, ¶¶ 1, 29, 931 N.W.2d 211.

[¶ 18] A scheduling conference was held on September 24, 2019. At that time, Ron again requested a jury trial be scheduled. The Court requested that the parties brief the issue. (App.31,Doc.281). After the parties provided their respective briefs, the District Court denied Ron's request for a bench trial. (App.32-50,Docs. 282, 284, and 286). The case is presently scheduled for a three-day bench trial in September 2020. (App.51,Doc.287).

[¶ 19] JURISDICTIONAL STATEMENT

[¶ 20] This Court has authority to issue supervisory writs under N.D. Const. art. VI, §2, N.D. Cent. Code § 27-02-04, N.D. R. App. P. 21, and N.D. R. App. P. 27.

[¶ 21] ARGUMENT

[¶ 22] ***The right of trial by jury shall be secured to all and remain inviolate.***

N.D. Const. Art. 1, § 13

[¶ 23] ***The right to a trial by jury is the "most important of constitutional rights."*** *Reimers v. Eslinger, 2010 ND 76, ¶ 3, 781 N.W.2d 63 (quoting Barry v. Truax, 99 N.W. 769, 770 (N.D. 1904))*

[¶ 24] I. THIS COURT HAS BROAD SUPERVISORY JURISDICTION TO RECTIFY ERROR AND PREVENT INJUSTICE.

[¶ 25] This Court's power to issue a supervisory writ is granted by the North Dakota Constitution. N.D. Const. Art. VI, § 2. The Constitution does not limit this Court's remedial powers, but instead broadly grants the Court "such original and remedial writs as may be necessary . . . ." Id. As such, this Court has reviewed petitions for supervisory writs on a case-by-case basis. See, e.g., Heartview Foundation v. Glaser, 361 N.W.2d 232, 234 (N.D. 1985). Whether a writ is to be granted depends on whether such is necessary to "rectify error and prevent injustice" and there is no "viable alternative remedy." Id. See also Jane H. v. Rothe, 488 N.W.2d 789 (N.D. 1992); City of Fargo v. Dawson, 466 N.W.2d 584 (N.D. 1991); Burlington Northern, Inc. v. North Dakota Dist. Court, Richland County, 254 N.W.2d 453 (N.D. 1978) (issuing a supervisory writ vacating an improper discovery order). This Court has previously held that the denial of a trial by jury is properly the subject of a supervisory writ. See, e.g., City of Grand Forks v. Reimers, 2008 ND 153, ¶ 8, 755 N.W.2d 99; City of Fargo v. Dawson, 466 N.W.2d 584 (N.D. 1991); State v. Silkman, 317 N.W.2d 124, 125 n.1 (N.D. 1982); Odden v. O'Keefe, 450 N.W.2d 707 (N.D. 1990) (finding violation of right to jury trial, but denying supervisory writ "without prejudice" on basis that the Court was "confident that the

judges in the Northeast Judicial District will act in light of the principles set forth in this decision."). See also Pugeau v. Herbert, 760 So. 2d 325 (La. 2000) (granting supervisory writ for jury trial, noting "The right to a jury trial is favored in the law and any doubtful statutory provision should be liberally construed in favor of granting a jury trial.")

[¶ 26] The availability of an eventual appeal is not itself a bar to the grant of a supervisory writ. Compare State ex rel. Fitzgerald v. District Court, 703 P.2d 148, 154 (Mont. 1985). As the Montana Supreme Court has explained:

> There are no written regulations or laws respecting our power of supervisory control, and this Court has followed the practice of proceeding on a case-by-case basis although we have been careful not to substitute the power of supervisory control for an appeal provided by statute. We have said, however, that if it is apparent from the record that a relator will be deprived of a fundamental right, both justice and judicial economy require the Supreme Court to resolve the issue in favor of the relator and assume jurisdiction. If the cause in district court is mired in procedural entanglements and appeal is not an adequate remedy, we will issue a writ of supervisory control.

Id. (internal citations omitted). As this Court has stated: "Availability of an appeal after final judgment often falls short of sufficient protection, however, as the burden, expense, and delay involved in a trial renders an appeal from a final judgment an inadequate remedy." Olson v. North Dakota District Court Richland County, 271 N.W.2d 574, 578 (N.D. 1978); City of Williston v. Beede, 289 N.W.2d 235, 236 (N.D 1980) (issuing a supervisory writ is appropriate when "if the writ were not granted something would have been done which probably could not have been undone later"). "As the United States Supreme Court said in Sheppard v. Maxwell,

388 U.S. 333, 363 (1966): 'reversals are but palliatives; the cure lies in those remedial measures that will prevent injustice at its inception.'" Olson, at 578. Here, the issue that requires immediate attention from this Court is the denial of Ron's fundamental right to a jury trial.

[¶ 27] II. RON TIMELY DEMANDED A JURY TRIAL

[¶ 28] Whether a party may demand a jury trial on appeal on remand is a question of law to be reviewed de novo. See, e.g., In re Hulcher Servs., Inc., 568 S.W.3d 188, 190 (Tex. Ct. App. 2018); In re Dorraj, 836 N.W.2d 860, 863 (Wisc. Ct. App. 2013). As set forth above, Ron initiated the pending action by serving and filing a "Complaint and Jury Demand." Below, Defendants suggested, without explanation or citation, that such was not a sufficient invocation of Rule 38. (App.33,Doc.282, at ¶4). Although the District Court did not appear to rely on this argument in its decision, Defendants' argument is without merit.

[¶ 29] Rule 38 does not require any magic language to demand a jury. Indeed, a jury demand need not even be made in a pleading. N.D.R. Civ. P. 38(b)(1); see also N.D.R. Civ. P. 7(a) (defining pleadings). In this case, Ron's demand was set forth clearly and conspicuously as part of the caption of the Complaint: "Complaint and Jury Demand." Such is more than sufficient to meet Rule 38.

[¶ 30] A similar issue arose in Kahn v. Head, 114 F.R.D. 20 (D. Md. 1987). In that case, the defendant argued that "plaintiff's inclusion of the phrase 'Jury Trial

Demanded' under the docket number is insufficient to constitute an effective jury demand." The Court disagreed citing Rule 38 and explaining:

> Rule 38(b) does not describe how to indorse a pleading, and the Local Rules for the District of Maryland do not elaborate further. The court finds that plaintiff's chosen method of demanding a jury trial, placing the phrase 'Jury Trial Demanded' under the docket number constitutes endorsing the pleading. Therefore, the requirements of Rule 38(b) are satisfied. Both the defendant and the court had constructive and actual notice that the case would be tried by jury, as is evidenced from the similar phrase on defendant's papers, and from the court's scheduling order.

See also Dlamini v. Babb, 1:13-cv-2699, at 5 (N.D. Georgia, June 20, 2014) (same); Hupp v. Siroflex of Am., Inc., 159 F.R.D. 29, 30 (S.D. Tex. 1994) (holding that words "Jury Demanded" beneath cause of action number on original pleadings satisfied Rule 38); Wilson v. Olivetti North America, Inc., 934 P.2d 1231 (Wash. Ct. App. 1997) (noting jury demand substantially complied with requirements of Washington's Rule 38 where other party had actual notice).

[¶ 31] Defendants below also argued Ron waived a jury trial because he did not indicate the size of the requested jury or the issues to be tried. (App.33,Doc. 282, at ¶4). Rule 38 does not require either of these items to be addressed in a jury demand. Instead, to the extent that Ron was not more specific such only means that the default provisions of Rule 38 come into play. Specifically, in the absence of a request, the jury size is then to be six persons, and it is assumed that Plaintiff has "demanded a jury on all the issues so triable." N.D.R. Civ. P. 38(c); 38(d). That Ron's jury demand was sufficient is clearly evidenced by the fact that a six person jury trial was in fact initially ordered. (App.22,Doc.26). The Stipulation between

the parties further evidences this, as in it both parties agreed to "waive their right to a jury trial." (App., 23,Doc.38, at ¶ 2). If Ron had not made a valid jury demand, why was counsel for Defendants, after a jury trial had been ordered, agreeing that both parties were waiving their right to a jury?

[¶ 32] Although Ron submits that his jury demand was proper, Rule 38 does not sit in a vacuum. The right to a jury trial is inviolate. N.D. Const. Art 1, § 13; N.D.R. Civ. P. 38, 39. Because the "right of jury trial is fundamental, courts indulge every reasonable presumption against waiver." Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937); State v. Kranz, 353 N.W.2d 748, 752 (N.D. 1984) (same). Rule 1 further supports the conclusion that the jury demand by Plaintiff was sufficient. N.D.R. Civ. P. 1 (noting the Rules "should be construed, administered and employed by the court and the parties to secure the jury, speedy, and inexpensive termination of every action and proceeding.") Under the facts of this case, Ron timely requested a jury trial in his initial pleading.

[¶ 33] III. RON IS ENTITLED TO A JURY TRIAL ON REMAND BECAUSE THE ORIGINAL BENCH TRIAL STIPULATION APPLIED ONLY TO THE FIRST TRIAL SCHEDULED FOR FEBRUARY 2018.

[¶ 34] In this case, for the reasons and circumstances existing in 2017, despite properly demanding a jury trial, and having been granted one, Ron agreed to a bench trial to be held in February 2018. (App.23,Doc.38). However, as is also set forth above, the District Court granted summary judgment dismissing all of Ron's claims, which ruling was only reversed after an appeal. Smithberg v.

Smithberg, 2019 ND 195, 931 N.W.2d 211. Upon receiving the District Court's ruling, Ron immediately reserved the right to a jury trial on remand and noted the same in his briefs on appeal. (App.26,Doc.98; App.28, Appel. Br., at ¶90, App.30, Appel. Reply Br., at ¶18).

[¶ 35] As noted above, the right to a jury trial is inviolate and courts are to "indulge every reasonable presumption against waiver." Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937); State v. Kranz, 353 N.W.2d 748, 752 (N.D. 1984) (same). "An inviolate right 'must not diminish over time and must be protected from all assaults to its essential guaranties.' Moreover, any waiver of a right guaranteed by a state's constitution should be narrowly construed in favor of preserving the right." Wilson v. Horsley, 974 P.2d 316 (Wash. 1999) (internal citations omitted). "The policy favoring jury trials is of historic and continuing strength—insofar as the constitutional right to jury trial exists, it cannot be annulled, obstructed, impaired, or restricted by legislative or judicial action." Seymour v. Swart, 695 P.2d 509, 511 (Okla. 1985). See also Reimers v. Eslinger, 2010 ND 76, ¶ 8, 781 N.W.2d 632 (explaining the North Dakota Constitution's declaration that right to trial is "inviolate" "deprives the legislature and the courts of all authority 'to destroy by legislation or by judicial construction any of the substantial elements of the right of jury trial.'" (citations omitted)); Steelvest, Inc. v. Scansteel Service Center, Inc., 908 S.W.2d 104, 108 (Ky. 1995) ("The constitutional term 'inviolate' means that the right to trial by jury is unassailable.")

[¶ 36] In a case such as this, the "long-standing majority rule is that when an appellate court remands all or part of a case without limitation, a party who waived a jury before the original trial may nevertheless demand a jury on the remanded issue or issues." In Re Hulcher Services, Inc., 568 S.W.3d 188, 190 (Tex. Ct. App. 2018). In support of its decision, the Court in Hulcher provided the following extensive citations and explanations:

> See Dunlap v. Brooks, 3 Willson 425, 427 (Tex. Ct. App. 1888) (holding that whether a party waived or demanded a jury in a first trial does not control the party's right to waive or demand a jury after remand because the effect of an appellate court's reversal of a trial court judgment is to "remand the cause for trial as though no previous trial had been had"); In re Baker, 495 S.W.3d 393, 396 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding); In re Lesikar, 285 S.W.3d 577, 587 (Tex. App.—Houston [14th Dist.] 2009, no pet.); In re Marriage of Stein, 190 S.W.3d 73, 74–75 (Tex. App.—Amarillo 2005, orig. proceeding); Gordon v. Gordon, 704 S.W.2d 490, 492 (Tex. App.—Corpus Christi 1986, writ dism'd); Harding v. Harding, 485 S.W.2d 297, 299 (Tex. Civ. App.—San Antonio 1972, no writ); see also F.M. Davies v. Porter, 248 F. 397, 398 (8th Cir. 1918) (holding that written stipulation waiving jury in first trial did not affect right of either party to demand a jury on remand); Burnham v. N. Chicago St. Ry., 88 F. 627, 628–30 (7th Cir. 1898) (holding same and explaining that court could not presume that parties who stipulated in writing to waive jury trial anticipated a second trial at that time, especially considering that a second trial could be before a different judge or a judge who had already ruled against one of them); Osgood v. Skinner, 186 Ill. 491, 57 N.E. 1041, 1043 (1900) ("The agreement to waive a jury only binds the parties to that mode of trial for one trial...."); Nedrow v. Michigan-Wisconsin Pipe Line Co., 246 Iowa 1075, 70 N.W.2d 843, 844–45 (1955) (stating general rule and reversing trial court's interlocutory ruling denying jury trial on remand when parties had agreed to waive jury at first trial); Cochran v. Stewart, 66 Minn. 152, 68 N.W. 972, 973 (1896) (holding that because conditions at a second trial might be "wholly different" from those at the first, "[i]t is hardly fair to presume that by waiving a jury for one trial the parties intended to waive a jury for any further trial that may be had"); Benbow v. Robbins, 72 N.C. 422, 423 (1875)

> (holding that trial judge erred by denying jury trial on remand to parties who had agreed to waive jury in first trial); Worthington v. Nashville, C. & St. Louis Ry., 114 Tenn. 177, 86 S.W. 307, 308–09 (1905) (reviewing cases and adopting majority rule); Spring v. Dep't of Labor & Indus., 39 Wash.App. 751, 695 P.2d 612, 614–15 (1985) (adopting majority view and holding that trial court erred by refusing jury trial on first remand of case); In re Dorraj J.J., 349 Wis.2d 691, 836 N.W.2d 860, 863–65 (Wis. Ct. App. 2013) (noting that appellee had not identified evidence indicating that appellant intended to waive a jury for future fact-finding hearings and holding that "absent an unambiguous declaration that a party intends to bind itself for future fact-finding hearings or trials, a jury waiver applies only to the fact-finding hearing or trial pending at the time it is made"); cf. Brown v. Chenoworth, 51 Tex. 469, 475 (1879) (reversing judgment because trial court improperly refused the defendants a jury trial when they had not demanded a jury trial at the trial court's prior term); Dean v. Sweeney, 51 Tex. 242, 243 (1879) ("[I]f, at a preceding term, a jury had been waived or demanded, this should not control the right in the discretion of a party to demand at a succeeding term a trial by jury which had before been waived, or to waive such trial which had before been demanded."); Wilson v. Horsley, 137 Wash.2d 500, 974 P.2d 316, 321–22 (1999) (noting that "many states have determined that the waiver of a jury trial is not operative for the subsequent trial of the same case" and holding that right to jury trial is revived after mistrial even if previously waived); Tesky v. Tesky, 110 Wis.2d 205, 327 N.W.2d 706, 708 (1983) (holding that trial court erred by refusing jury demand after granting a new trial on a threshold liability issue in a bifurcated trial because "a party to a lawsuit is entitled as a matter of right to a jury trial on a question of fact if that issue is retried"). None of these cases distinguish between, or make an exception for, agreed waivers and waivers by failing to timely request a jury or pay the jury fee. See, e.g., F.M. Davies, 248 F. at 398; Burnham, 88 F. at 628–30; Osgood, 57 N.E. at 1043; Nedrow, 70 N.W.2d at 844–45; Baker, 495 S.W.3d at 395; Harding, 485 S.W.2d at 299.

In re Hulcher, 568 S.W.3d at 190-92. See also U.S. v. Groth, 682 F.2d 578, 580 (6th Cir. 1982) ("[W]aiver of a jury trial does not bar a demand for jury on retrial of the same case unless the original waiver explicitly covers this contingency."); United States v. Preston, 751 F.3d 1008, 1029 n.29 (9th Cir. 2014) ("Even if the prior jury

trial waiver was voluntary, because we have found error entitling Preston to a retrial, Preston's earlier consent to a bench trial, made prior to this appeal, does not carry over to any later retrial.)

[¶ 37] Judge Jacobson, in denying Ron a jury trial, ignored all of Ron's argument and cited cases without explanation. (App.49-50,Doc.286). Judge Jacobson's decision was in fact based on an argument not raised by the Defendants. (Compare App.41-48,Doc. 282 with App.49-50,Doc.286). Judge Jacobson instead relied upon a single quote from Professors Wright and Miller's treatise on Federal Practice and Procedure. (App.50,Doc.286, at ¶3). As noted by Judge Jacobson, Professors Wright and Miller assert: "Once the opportunity to demand a jury trial is effectively waived, the right to a jury trial is not revived by a reversal on appeal or by the grant of a new trial." (App.49,Doc.286, at ¶3). Notably, however, Professors Wright and Miller do not support this sentence or position with a footnote or any supporting cases. See, e.g., 9 Fed. Prac. & Proc. Civ. § 2321 (3d ed.) Similarly, in quoting Professors Wright and Miller, Judge Jacobson did not cite to or discuss any actual caselaw that supports the Wright and Miller conclusion. (App.49-50,Doc.286, at ¶3).

[¶ 38] As detailed above, presumably this is because there is extensive and overwhelming federal and state case law that is contrary to Professors Wright and Miller. Indeed, Courts, both state and federal, have widely recognized that the position taken by Judge Jacobson is the minority rule. See, e.g., Nedrow v. Michigan-Wisconsin Pipe Line Co., 70 N.W.2d 843, 844 (Iowa 1955) ("Likewise,

the great weight of authority is clearly against appellees' contention. The rule is 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.' 50 C.J.S. Juries, § 111 a(2); 31 Am. Jur. Jury, sec. 48, Annotation, 106 A.L.R. 203, 205; Schumacher v. Crane-Churchill Co., 66 Neb. 440, 92 N.W. 609."); United States v. Lee, 539 F.2d 606, 608-09 (6th Cir. 1976) ("[W]hen a reviewing court finds error in the conduct of a trial and reverses with directions for a new trial . . . the general rule is that a litigant is not bound by his prior waiver of a jury trial."). The Oklahoma Supreme Court has acknowledged the "minority position . . . that a waiver of jury trial cannot be retracted," but rejected the same, noting "the majority view is better reasoned . . . ." Seymour v. Swart, 695 P.2d 509, 512 (Okla. 1985). See also Tesky v. Tesky, 327 N.W.2d 706 (Wisc. 1983) ("We recognize that there is not unanimity on this issue in other jurisdictions. However, we believe our holding today is in accord with the weight of authority."); Spring v. Department of Labor, 695 P.2d 612 (Wash. Ct. App. 1985) (same and citing to Annot., Waiver of Right to Jury Trial as Operative after Expiration of Term During Which It Was Made, or as regards Subsequent Trial, 106 A.L.R. 203 (1937), and Waiver of Right to Trial by Jury as Affecting Right to Trial by Jury on Subsequent Trial of Same Case in Federal Court, 66 A.L.R. Fed. 859, 863 (1984)).

[¶ 39] As explained by the Oklahoma Supreme Court in Seymour, it is not appropriate to apply the concept of waiver, as such relates to a known right, but "the

right to a new trial was neither existent nor reasonably anticipated." Id. at 512. The Court further explained:

> Conditions may be completely different at the second trial from those which existed at the beginning. . . . It cannot be presumed that dispensing with a jury for one trial constitutes a continuing waiver even after reversal on appeal. After the trial has been conducted pursuant to the waiver, the waiver has accomplished its purpose and becomes ineffective. When, for any reason, an entirely new trial becomes necessary, neither party is precluded by any previous action taken with reference to a jury trial.

Id. at 513. See also Spring, at 756 (similar). In Seymour and many other cases, the Courts noted that waiver is defined as the voluntary and intentional relinquishment of a known right. Seymour, at 512; Tesky, at 709. North Dakota defines waiver similarly and in fact has explained that waivers of constitutional rights are not to be "inferred lightly," must be clearly and intentionally made, and that "Courts should indulge every reasonable presumption against waiver." See, e.g., State v. Kranz, 353 N.W.2d 748, 752 (N.D. 1984). The Court in Tesky, quoting the Court in Nedrow, explained: "If we are to say that the right waived must be an existing one, or even one reasonably anticipated, then this waiver cannot be effective, as a right to a new trial was not existent or reasonably anticipated." Tesky, at 709 (quoting Nedrow v. Michigan-Wisconsin Pipe Line Co., 70 N.W.2d 843 (Iowa 1955)); Wilson v. Horsley, 974 P.2d 316 (Wash. 1999) ("Since, as noted above, the party waiving the right to a jury trial likely does so without contemplating the possibility of a subsequent trial, the party does not intentionally 'waive' the right to trial by jury in the second trial. Additional because the right to a jury trial in the second trial was not a 'known' or existing right, it could not be impliedly waived.")

[¶ 40] While it is often appropriate to consider federal interpretations of the North Dakota Rules of Civil Procedure, such is not the case when it comes to Rules 38 and 39. As a starting point, it is clear that the "the North Dakota Constitution can grant greater, but not fewer, rights than those found in the United States Constitution." See, e.g., MKB Mgmt. Corp. v. Burdick, 2014 ND 197, ¶ 161, 855 N.W.2d 31. Unlike many other constitutional amendments, the right to a jury trial found in the Seventh Amendment to the United States Constitution has not been made applicable to the states through the Fourteenth Amendment. See, e.g., Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 432, n.14 (1996); Minneapolis & St. Louis R. Co. v. Bombolis, 241 U.S. 211, 217 (1916). Equally importantly, unlike the North Dakota Constitution, the Seventh Amendment to the United States Constitution does not provide that the right to a jury trial is "inviolate." Compare U.S. Const. 7th Amend. with N.D. Const. Art. I, § 13. This distinction is critically important.

[¶ 41] As the Kentucky Supreme Court explained in rejecting provisions of their civil procedure rules relating to the right to a jury:

> State constitutions may offer greater protections for their citizens than the federal constitution and the Kentucky courts are not bound by decisions of the United States Supreme Court when deciding whether a state statute, in this instance a procedural code provision, impermissibly infringes upon individual rights guaranteed by the state constitution, as long as the state constitutional protection does not fall below the federal floor. Because of the profoundly different approaches between the Seventh Amendment to the Constitution of the United States and the provisions of the Kentucky Constitution preserving the right to trial by jury, **the federal decisions on this subject are of little utility in Kentucky practice. Appellees' resort**

to federal authorities to support their arguments to the contrary must fail.

Steelvest, Inc. v. Scansteel Service Center, Inc., 908 S.W.2d 104, 107 (Ky. 1995) (internal citations omitted). This Court has previously recognized broader jury trial rights under North Dakota's Constitution than the United States Constitution. See, e.g., Reimers v. Eslinger, 2010 ND 76, ¶ 18, 781 N.W.2d 632.

[¶ 42] In North Dakota, the right to a jury trial is preserved to all cases in which it was a right at common law. See, e.g., Murphy v. Murphy, 1999 ND 118, ¶ 10, 595 N.W.2d 571. The state law cases Ron has cited and that precede Rules 38 and 39, more accurately reflect jury trial rights at common law. E.g., Steelvest, at 107 (reviewing Kentucky Rule 39 as compared to jury trial rights available at common law in 1791). Where a rule is capable of two interpretations, one of which would render it of doubtful constitutionality, and one that would not, the constitutional interpretation must be selected. See, e.g., Kulback v. Michael, 2014 ND 83, 845 N.W.2d 625. In this case, to adopt the District Court's analysis would render the District Court's decision unconstitutional. As such, this Court should reject the District Court's decision and adopt the majority rule.

[¶ 43] Simply put, this is not a situation where a jury was requested, then waived, and then prior to the same trial a party sought to revoke a waiver in an effort to game the system. Instead, in 2017, under the circumstances existing at the time, Ron agreed to waive a jury trial so as to allow a trial to be held in early 2018. That trial is now in the past and we are facing a new trial, after this Court has reversed,

and Ron has not agreed to waive his fundamental right to a jury trial, nor is there any basis for implying he ever agreed to waive all future rights to a jury trial. Compare Kranz, 353 N.W.2d at 752 ("In our view the waiver of such an 'inviolate' right, 'essential for preventing miscarriages of justice and for assuring that fair trials are provided for all Defendants,' must be a matter of certainty and not implication." (internal citations omitted)). Ron is thus constitutionally entitled to the requested jury trial.

[¶ 44] IV. EVEN IF THIS COURT WERE TO HOLD AS A MATTER OF LAW THAT THE ORIGINAL STIPULATION TO A BENCH TRIAL IS BINDING UPON RETRIAL, THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING GRANT A JURY TRIAL.

[¶ 45] As set forth above, it is Ron's position that he is entitled to a jury trial on remand as a matter of constitutional right. Given the majority rule, this Court should not go down the path of an abuse of discretion analysis. See, e.g. Tesky v. Tesky, 327 N.W.2d 706 (Wisc. 1983) (reversing denial of jury trial). As the Court in Tesky explained: "Unlike the court of appeals, our decision today does not turn on whether the trial judge abused his discretion in denying the plaintiff's request for a jury trial on the retrial of the coverage issue. We hold that a party to a lawsuit is entitled as a matter of right to a jury trial on a question of fact if that issue is retried." Id. at 708. If, this Court disagrees, however, the District Court still abused its discretion by denying a jury trial or, in the alternative, this Court should, in the interest of justice, order a jury trial.

[¶ 46] North Dakota Rules of Civil Procedure 38 and 39 set forth procedures relating to trial by the court or a jury. Although it is Ron's position that he has properly requested and not waived a jury trial on remand, pursuant to Rule 39 this Court may nevertheless grant a jury trial in its discretion. See, e.g., McMurl v. A.R. Minch, 506 N.W.2d 413, 414 (N.D. 1993); William Pierce v. ABM Carpet Co., Inc., 04 CV 1218 (S.D.N.Y. June 11, 2013). As explained by Professors Wright and Miller: "The court ought to approach each application under Rule 39(b) with an open mind and an eye to the factual situation in that particular case, rather than with a fixed policy against granting the application or even a preconceived notion that applications of this kind are usually to be denied." 9 C. Wright & Miller, Federal Prac. & Proc., § 2334 at 116 (1971). "It is well established that a district court should grant a Rule 39(b) motion 'in the absence of a strong and compelling reasons to the contrary.' A motion for trial by jury submitted under Rule 39(b) should be favorably considered unless there are persuasive reasons to deny it." Hiotis v. Sherman Distr. of Maryland, Inc., 607 F. Supp. 217, 219 (D.D.C. 1984). See also Green Const. Co. v. Kan. Power & Light Co., 1 F.3d 1005, 1011 (10th Cir. 1993) (same). In this case, there are no strong and compelling reasons to justify denial of a jury trial.

[¶ 47] Judge Jacobson in his decision emphasized that he is "reasonably familiar with the issues in this case . . . ." (App.50,Doc.296, at ¶4). This ignores that Judge Jacobson was reversed by this Court and this is one of the reasons that gives rise to Ron's concerns regarding a bench trial. The situation in William

Pierce is analogous to the case at bar. There, the case actually began in 2004 and the Plaintiff made a jury demand in both the original Complaint and Amended Complaint. In 2011, however, the Plaintiff in a Joint Pre-Trial Order agreed to a bench trial. In 2013, the case was changed to a new judge and that judge presided over a settlement conference. Subsequently the Plaintiff asked that a jury trial again be set. After briefing the issues, the trial judge agreed noting, among other things, that although the Court did not recall evidence being disclosed during the settlement conference, the Plaintiff's discomfort with a bench trial was reasonable. Similarly, as the cases cited by the Court in Hulcher reference, it is not fair to enforce a waiver of a waiver where the judge has subsequently ruled against a party. As the Second Circuit Court of Appeals has explained: "Inasmuch as Judge Duffy has already indicated his views on the factual questions to be tried, we think that withdrawal of plaintiff's waiver should be permitted regardless of the technical merits of his Rule 39 argument." Chanofsky v. Chase Manhattan Corp., 530 F.2d 470, 473 (2nd Cir. 1976).

[¶ 48] This argument is now even stronger as Judge Jacobson based his decision in large part upon a citation to Wright and Miller that was not even raised by Defendants and is entirely contrary to the extensive body of law that was cited by Ron. See, e.g., State v. Foard, 355 N.W.2d 822, 824 (N.D. 1984) ("Therefore, a judge's conduct will be unduly prejudicial to a defendant, and consequently an abuse of discretion, when a judge abandons a properly judicious role and assumes that of advocate.")

[¶ 49] There is also no basis for claiming prejudice by holding a jury trial. Compare McKinney v. County of Cass, 144 N.W.2d 416 (Neb. 1966) (affirming order allowing withdrawal of waiver where Plaintiff could not point to specific prejudice to self beyond vague claim of delay and inconvenience to witnesses). As noted above, there has never been a scheduling order entered. Compare Walker v. Amer. Gen. Life. Ins. Co., Case No. 15-cv-0450 (N.D. Okla. Oct. 13, 2015) (granting jury trial where Court had yet to enter a scheduling order). Moreover, there is no evidence that Ron has sought to delay proceedings. Indeed, Ron sought to immediately appeal the District Court's January 2018 Order. Had Defendants not sought to dismiss the same, the parties might well have been able to avoid a second trial at all or alternatively already had the same scheduled, if not completed.

[¶ 50] Below, Defendants argued that some of the evidence had already been addressed, that we should not start over, and that there would be complicated issues. (App.35-40,Doc.282,¶¶8-15). As noted by Ron below, however, the initial trial was solely on Defendant's valuation claim, and Ron must be entitled to present on all of its claims which it has not been allowed to do. (App.47,Doc.284,¶14). Compare Daley v. American Family Mut. Ins. Co., 355 N.W.2d 812 (N.D. 1984) ("A [party] is under no obligation to present his evidence during the [other party's] case. Even if the [party] proves a prima facie case, the [other party] need not rebut during the [party's] evidence but may wait until the [party] rests before putting on his case. It is fundamental to our system of justice the [other party] be afforded an opportunity to present his evidence.") In addition, Defendants' argument ignores

that the grant of a new trial, restores the case to the status it had before the trial took place and is open to be tried de novo. See, e.g., Schickle v. McFarlin, 666 A.2d 319, 319 (Penn. Sup. Ct. 1995). In reversing the denial of a jury trial on remand where all facts had previously been tried (which is much different than the case at bar), the Wisconsin Supreme Court has noted:

> It is true that the facts were already in the record in the sense that there was no new evidence to present at the second trial. However, the defendants' argument glosses over the fact that this court's decision in Bacheller introduced a significant new factual question into the case—the intent and conduct of the parties regarding ownership of the vehicle. Therefore the plaintiff is entitled to have these factual issues determined by a jury in a new trial.

Tesky v. Tesky, 327 N.W.2d 706, 709-10 (Wisc. 1983). On remand, Ron will now be presenting all of his evidence on all of his 13 claims, which was not previously the case. Under these facts, a jury trial must be allowed.

[¶ 51] Judge Jacobson also asserted that a "bench trial will resolve the issues sooner than a jury trial . . . ." (App.50,Doc.286, at ¶4). There is no record support for this. As it is, trial is not scheduled until September 2020. (App.51,Doc.287). Compare Hiotis, at 219 (finding no harm to granting jury trial when scheduled trial was not for three months). While Ron requested a five day jury trial on remand given the evidence that was developed prior to the first trial, the current bench trial is scheduled for three days and this is the same length that was originally scheduled in the original notice of jury trial. (App.22,Doc.26). Ron was never asked to choose between a three day bench trial or a three day jury trial. Given the choice, Ron would choose a three day jury trial.

[¶ 52] As for whether the remaining issues are complicated, such is irrelevant. As this Court has noted:

> That the issues are complex, or allegedly incomprehensible to a jury, or that the trial will be long and tedious, is not sufficient reason to deny a jury trial to a litigant who is entitled to it under the Constitution. We presume that there were long and tedious and difficult cases in Colonial and Territorial days, too, but jury trials were never denied for that reason and should not be denied now.

Landers v. Goetz, 264 N.W.2d 459, 463 (N.D. 1978).

[¶ 53] Judge Jacobson also noted that "some of Plaintiff's thirteen claims appear equitable in nature and one bench trial on all issues would serve judicial economy." (App.50,Doc.286, ¶4). As noted above, it is acknowledged that there is no right to a jury trial on equitable issues, the bulk of Ron's claims, however, involve legal claims to which Ron is entitled to a jury trial. If the Court wants to serve judicial economy, it certainly can have the jury also give an advisory jury on the equitable claims. N.D.R. Civ. P. 39. The opposite, however, is not constitutional. Landers, 264 N.W.2d at 463; Steelvest, at 908 S.W.2d at 109.

[¶ 54] V. RON IS ENTITLED TO HAVE A NEW JUDGE ASSIGNED.

[¶ 55] The rules of judicial conduct provide that a judge is required to avoid impropriety and the appearance of impropriety in all the judge's activities. Farm Credit Bank v. Brakke, 512 N.W.2d 718, 720 (N.D. 1994). The test for the appearance of impartiality is one of reasonableness. Id. at 721. When making a recusal decision, a "judge must determine whether a reasonable person could, on the basis of all the facts, reasonably question the judge's impartiality. State v.

Murchison, 2004 ND 193, ¶ 13, 687 N.W.2d 725. The purpose of reassignment is: "in part, to preserve the integrity of the court, to protect litigants from bias, and to ensure that allegations of prejudice do not affect fair administration of the law." T.F. James Co. v. Vakoch, 2001 ND 112, ¶ 18, 628 N.W.2d 298. A change of judge is also warranted where there is a "inability or unwillingness to follow" the Supreme Court's mandate as well as "out of concern for the tumult from and cost of litigation." Law v. Whittet, 2015 ND 16, ¶ 12, 858 N.W.2d 636.

[¶ 56] This Court previously denied Ron's interlocutory appeal, but then subsequently reversed the District Court's decision after trial. We are now before this Court a third time, this time as a result of the District Court's decision to deny Ron a jury trial. Such clearly raises concerns about the "tumult from and cost of litigation." Equally, if not even more, importantly, this Court has previously held that even where the Court is not concerned about actual prejudice, but there is an "allegation of prejudice presented to this Court we favor granting the change of judge when the judge has denied the demand for a jury trial and would then be presiding at the trial on the merits." See, e.g., United Hospital v. Hagen, 285 N.W.2d 586 (N.D. 1979).

[¶ 57] In denying Ron's request for a jury trial, the Court took it upon itself to rely on a legal theory and authority that was not raised by Defendants and wholly ignored Ron's cited case law. Such clearly raises an appearance of bias as a judge is not to be an advocate for one party over another. State v. Foard, 355 N.W.2d 822, 824 (N.D. 1984) ("Therefore, a judge's conduct will be unduly prejudicial to a

defendant, and consequently an abuse of discretion, when a judge abandons a properly judicious role and assumes that of advocate.") This situation is not dissimilar to that in State v. Vandehoven, 2009 ND 165, 772 N.W.2d 603. In that case, the Court required a different judge be assigned on remand where the district court improperly participated in plea negotiations which "may lead to a perception of bias . . . ." Id. at ¶ 32. See also State v. Dimmitt, 2003 ND 111, 665 N.W.2d 692 (same).

[¶ 58] As if it is not disconcerting enough that the District Court was doing legal research for Plaintiff, the District Court seeks to reassure Plaintiff that the Court is "reasonably familiar with the issues in the case." (App.50,Doc.286, at ¶ 4). This is not a case where the trial court simply misapplied the law and granted summary judgment. Instead, as recognized by this Court, the District Court granted summary judgment against the Plaintiff despite Ron having "filed a 64-page brief in opposition to the motion for summary judgment. The recitation of facts comprised the first 36 pages of the brief with citations to evidence in the form of deposition testimony, affidavits and other documents. He provided citation to pages and lines in depositions and other comparable documents." Smithberg v. Smithberg, 2019 ND 195, ¶ 13, 931 N.W.2d 211.

[¶ 59] North Dakota Supreme Court decisions are littered with innumerable situations where a new judge heard the case on remand whether because of retirement or other unavailability. See, e.g., In re Haugen, 2011 ND 28, 794 N.W.2d 448. Ron's right to have a trial that he perceives as fair, should not depend on a

retirement or other unavailability. Here given all that has occurred, a new judge should be assigned on remand.

CONCLUSION

[¶ 60] For the above-mentioned reasons, it is respectfully requested that this Court assign a new judge, direct such judge to hold a scheduling conference to address scheduling deadlines, and direct such judge after such scheduling conference to set a jury trial.

[¶ 61] Dated: November 25th, 2019.

/s/ Joel M. Fremstad
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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Ronald Smithberg, **Petitioner,** **vs.** **Paul Jacobson, Judge of District Court, Gary Smithberg, James Smithberg, and Smithberg Brothers, Inc.** **Respondents.**	**Supreme Court No. _____** **District Court No. 12-2016-CV-00042** **AFFIDAVIT OF SERVICE**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

Maggie Burlingame, being first duly sworn, deposes and says that she is of legal age and that on November 25, 2019, she served the following:

- **PETITION FOR SUPERVISORY WRIT; AND**
- **RONALD SMITHBERG'S APPENDIX**

were served electronically with the Clerk of the Supreme Court. A true and correct copy of the documents were electronically served on the following:

(Name)	(E-mail address)
Sheldon A. Smith	ssmith@smithporsborg.com
David J. Smith	dsmith@smithporsborg.com
Tyler J. Malm	tmalm@smithporsborg.com

M. Burlingame
Maggie A. Burlingame

Subscribed and sworn to me this 25th day of November, 2019.

Marlene Schumacher
Notary Public

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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(Name)	(E-mail address)
Honorable Paul W Jacobson	pjacobson@ndcourts.gov

M. Burlingame
Maggie A. Burlingame

Subscribed and sworn to me this 25th day of November, 2019.

Terri B. Smith
Notary Public

TERRI BOURCY SMITH
Notary Public
State of North Dakota
My Commission Expires May 19, 2023