NOT DESIGNATED FOR PUBLICATION

ALFRED L. HANSEN	*	**NO. 2002-C-0257**
VERSUS	*	**COURT OF APPEAL**
ANN BANKS, ET AL	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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SUPERVISORY WRIT APPLCATION DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 96-10811, DIVISION "B"
Honorable Rosemary Ledet, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Miriam G. Waltzer, Judge Dennis R. Bagneris, Sr., and Judg Terri F. Love)

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APPLICATION FOR SUPERVISORY WRITS GRANTED. JUDGMENT OF THE TRIAL COURT DENYING STRIKING OF THE JURY AFFIRMED. MOTION TO STRIKE EXHIBIT GRANTED. REQUEST FOR SANCTIONS DENIED.

STATEMENT OF THE CASE

The plaintiff, Alfred L. Hansen, seeks review of a judgment denying his motion to limit his damage claim and strike the defendants' demand for a jury trial. The judgment was orally rendered on January 28, 2002 and was signed on February 4, 2002. The plaintiff's writ application was filed on February 8, 2002. A response to the writ application was filed on February 15, 2002. A reply brief was filed on March 11, 2002. Attached to the reply brief as an exhibit was a copy of a pleading filed in a matter in the First Judicial District Court for the parish of Caddo. On March 13, 2002, the respondent filed a motion to strike the exhibit attached to the plaintiff's reply brief and a request to sanction the plaintiff.

FACTS

In this personal injury action the plaintiff alleges that on July 6, 1995, a rental vehicle owned by Value Rent-A-Car and being operated by the defendant, Ann Banks, struck his vehicle. The rental vehicle had liability insurance limits of $10,000.00; however, at the time of the accident, the plaintiff had uninsured/underinsured coverage with USAA Casualty

Insurance Co. (USAA) in the amount of $100,000.00. The plaintiff filed suit against Ms. Banks, Value Rent-A-Car and USAA, his UM carrier. USAA requested a trial by jury.

Defendants Banks and Value subsequently settled with the plaintiff for the insurance policy limits of $10,000.00. Additionally, on February 21, 2001, USAA paid the plaintiff an unconditional tender of $15,000.00 on his UM motorist claim. The plaintiff then filed a motion to limit his damage claim to $50,000.00 and to strike the jury requested by USAA. USAA opposed the motion. Following oral argument on January 28, 2002, the trial court denied the motion to strike the defendant's jury trial request.

DISCUSSION

The plaintiff argues that the trial court erred in holding that La. C.C.P. art. 1732(1) does not allow a plaintiff to limit his damage claim so as to defeat a defendant's request for a jury trial. Alternatively, the plaintiff argues that the trial court erred in holding that a UM carrier should receive a credit for the amount of money tendered to its insured in calculating the threshold for a jury trial. Further, in the alternative, the plaintiff argues that the court erred in allowing the UM carrier to allege that its insured's cause of action exceeds $50,000.00, even though the UM carrier had made a McDill tender of only $15,000.00.

The trial court gave two reasons for denying the plaintiff's motion to limit his damage claim to $50,000.00 and to strike the defendant's jury trial request. First, the court stated that the unconditional tender made by USAA should be credited to the defendant toward the amount awarded. Thus, the plaintiff should only recover an additional $35,000.00, not $50,000.00. Second, the court found that under Cambridge Corner Corp. v Menard, 525 So.2d 527 (La. 1988), the trial court has a duty to look at the actual damages that may be recovered, and the court was not to accept the suggestion or stipulation by a party as to the amount they are willing to limit their damage claim. The court then stated that based on the pretrial discussions and representations of plaintiff's counsel, the plaintiff could conceivably recover an amount in excess of $50,000.00, given the major extent of his injuries.

The sole question to be considered by this court is whether the trial court abused its discretion by denying the motion to strike the defendant's jury trial request.

The plaintiff is arguing that he has the unilateral right to limit his damages to an amount less than the amount required for a jury trial. In short, he is arguing that it is his prerogative to determine whether the defendant is entitled to a jury trial. He cites no cases to support this position, and the jurisprudence holds otherwise.

A plaintiff has a right to make a stipulation that the amount of his claim is less than the amount specified for a jury trial. However, such a stipulation must be based on the good faith amount at issue. Our courts have traditionally upheld the right of a plaintiff or defendant to have a jury trial. Thus, in Bullock v Graham, 96-0711 (La. 11/1/96), 681 So.2d 1248, the court stated:

> Procedural maneuvers designed solely to deprive litigants of their right to jury trial based on jurisdictional amounts are disfavored. Black v. Prudential Property & Casualty Insurance Co., 93-878 (La. App. 3 Cir. 3/2/94), 634 So.2d 1340, 1344. Plaintiff's petition limiting the amount in controversy to $20,000.00 deprived the defendants of their right to a jury trial. Plaintiff should therefore be bound by that stipulation.

Id. at 3-4, 681 So. 2d at 1250.

The court, in Cambridge Corner Corp. v. Menard, 525 So.2d at 529-530, made it clear that when the good faith amount in dispute exceeds the amount needed for a jury trial, a plaintiff should not be able to file a demand for a lesser amount for purposes of preventing the defendant from having a jury trial. The court also made it clear that a court has a duty to determine whether a party lowered the amount of his demand in good faith.

Louisiana recognizes the right to a trial by jury, except in certain limited exceptions set forth by statute. La. C.C.P. arts. 1731 and 1732. A party claiming that its case fits within an exception to the right to a jury trial

has the burden of proving that the case falls within that exception. Parker v. Rowan Companies, Inc., 628 So.2d 1108, 1110 (La.1991); Cambridge Corner Corporation v. Menard, 525 So.2d 527, 530 (La. 1988); Blanchard v City Parish of East Baton Rouge, 95-2011 (La. App. 1 Cir. 4/30/96), 674 So. 2d 317, 329.

Thus, in the instant case, the burden of establishing that the case came within La. C.C. art. 1732(1), which is an exception to the general right to trial by jury, was on the plaintiff.

In this writ application, the plaintiff relies on the following allegations to support his contention that his claim is for an amount less than the amount needed for a jury trial. The plaintiff avers that he injured his lower back, right foot, left shoulder, and right thigh. Gulf Coast Medical Consultants treated him in the summer of 1995 and intermittedly through late 1995, at which time an MRI study was recommended. The MRI revealed mild bulging disks. Physical therapy was recommended and subsequently performed at Tulane Medical Center. The plaintiff's last physical therapy treatment was on February 16, 1996. Since that time the plaintiff has only seen doctors at Tulane Medical Center sporadically whenever his back pain flared up. His chief complaint is pain radiating down into his left leg. The plaintiff alleges that he also has degenerative disc disease, which predated

the 1995 car accident. He alleges that his medical expenses for the accident total approximately $2500.00, and he is not making a claim for loss of income. Nor is his wife making a consortium claim. For these reasons, he alleges his special damages are less than $2500.00.

The above-cited information suggests that damages in this case may not exceed $50,000.00. Yet, it is not readily apparent to this court that this was the information given to the trial court. Rather, in denying the motion, the trial court said:

> Based on pretrial discussion if Mr. Hansen's injuries is (sic), as represented by Mr. Schoenberger [plaintiff's counsel] earlier, he could recover an amount in excess of $50,000 given the major extent of his injuries. Therefore, I'm denying the motion to strike the jury and reserving the defendant's right to a jury.

Based on representations made in pretrial discussions, the trial court implicitly concluded that the plaintiff was not lowering his demand in good faith. The writ application contains no supporting documentation to establish that the amount of the plaintiff's claim is less than the jurisdictional amount needed for a jury trial. Nor does it appear that such information was given to the trial court. Rather, the plaintiff merely filed an ex-parte motion averring that his entire claim did not exceed fifty thousand dollars. This allegation apparently conflicted with information conveyed to the trial court

in the pretrial discussions. Therefore, it is not apparent the plaintiff met his burden of proving that he came within the exception to a jury trial contained in La. C.C.P. art. 1732 (1). Based on the information contained in the writ application and the opposition, it does not appear the trial court abused its discretion by denying the relator's motion to strike the defendant's request for a jury trial. Accordingly, plaintiff's writ application is hereby denied.

The only other issue raised by the parties is the issue of sanctions. The respondent has requested that this court sanction the relator for referring to a telephone conversation purportedly conducted with the attorney for the defendant in the case, Thomas v. Sisters of Charity of the Incarnate Word, 35186 (La. App. 2 Cir. 5/10/01), 2001 WL 936367, writ denied by, 2001-1672 (La. 9/21/01), 797 So.2d 673. Respondent also argues that sanctions should be awarded under La. C.C.P. art. 863 because the plaintiff attached a pleading from the Thomas case that was not a part of the record of this case nor a part of the reported Thomas case, a case which the plaintiff cited to support his argument on his right to stipulate that the value of his case is under $50,000.00.

This court consistently refuses to consider evidence that was not introduced and/ or filed in the trial court. Favaroth v. Appleyard, 2000-0359 (La. App. 4 Cir. 5/2/01), 785 So.2d 262, 266, writ denied by 2001-1945 (La.

11/9/01), 801 So.2d 375; Ansalve v. State Farm Mut. Auto. Ins. Co., 95-0211 (La. App. 4 Cir. 2/15/96) 669 So. 2d 1328, 1334: White v. West Carroll Hospital, Inc., 613 So.2d 150, 154 (La. 1992). For that reason the motion to strike the reference to the alleged telephone conversation and the pleadings filed in the Thomas case is granted. However, the respondent cites no cases wherein this court has imposed sanctions for referring to evidence not in the record. Rather, the respondent argues that sanctions should be imposed pursuant to La. C.C.P. art. 863 which provides:

> Art. 863. Signing of pleadings, effect
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> A. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address.
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> B. Pleadings need not be verified or accompanied by affidavit or certificate, except as otherwise provided by law, but the signature of an attorney or party shall constitute a certification by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact; that it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
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> C. If a pleading is not signed, it shall be stricken unless promptly signed after the omission

> is called to the attention of the pleader.
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> D. If, upon motion of any party or upon its own motion, the court determines that a certification has been made in violation of the provisions of this Article, the court shall impose upon the person who made the certification or the represented party, or both, an appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee.
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> E. A sanction authorized in Paragraph D shall be imposed only after a hearing at which any party or his counsel may present any evidence or argument relevant to the issue of imposition of the sanction.
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> F. A sanction authorized in Paragraph D shall not be imposed with respect to an original petition which is filed within sixty days of an applicable prescriptive date and then voluntarily dismissed within ninety days after its filing or on the date of a hearing on the pleading, whichever is earlier.

This court cannot grant the respondent's request for sanctions under La. C.C.P. art. 863 because only the trial court has the authority to impose sanctions for violation of the pleading certification requirements. Curole v. Avondale Industries, Inc., 2001-1808, p. 5 (La. App. 4 Cir. 10/17/01), 798 So.2d 319, 322, citing La. C.C.P. art. 2164, La. C.C.P. art. 863, and Hampton v. Greenfield, 618 So.2d 859 (La. 1993). Accordingly,

respondent's motion to strike is granted, and respondent's request for sanctions under La.C.C.P. art. 863 is denied.

APPLICATION FOR SUPERVISORY WRITS GRANTED. JUDGMENT OF THE TRIAL COURT DENYING STRIKING OF THE JURY AFFIRMED. MOTION TO STRIKE EXHIBIT GRANTED. REQUEST FOR SANCTIONS DENIED.