

No. _____

**In the
Supreme Court of the United States**

FEDERAL KEMPER LIFE ASSURANCE COMPANY,
Petitioner,

v.

KAKKADASAN SAMPATHACHAR, M.D.,
Respondent.

**On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Third Circuit**

PETITION FOR WRIT OF CERTIORARI

BRYAN D. BOLTON
Counsel of Record
MICHAEL P. CUNNINGHAM
M. DAVID MALONEY
FUNK & BOLTON, P.A.
TWELFTH FLOOR
36 SOUTH CHARLES STREET
BALTIMORE, MARYLAND 21201
(410) 659-7700

Counsel for Petitioner

QUESTION PRESENTED

Whether a special verdict under Rule 49(a) of the Federal Rules of Civil Procedure must contain jury findings on all issues of material fact raised by the pleadings and the evidence when a party demands the submission of those issues to the jury.

**PARTIES TO THE PROCEEDING AND
STATEMENT UNDER RULE 29.6**

The petitioner is Federal Kemper Life Assurance Company. The respondent is Dr. Kakkadasan Sampathachar.

Federal Kemper Life Assurance Company, now known as Chase Insurance Life and Annuity Company, is a wholly owned subsidiary of Protective Life Insurance Company, which is a wholly owned subsidiary of Protective Life Corporation. Protective Life Corporation is a publicly traded company. No publicly held company owns ten percent or more of Protective Life Corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Federal Kemper Life Assurance Company (“Federal Kemper”) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS AND ORDERS BELOW

The order of the district court sustaining plaintiff’s objection to defendant’s proposed special verdict slip (App., *infra*, 18a-19a) is unreported. The judgment of the district court (App., *infra*, 12a-13a) is unreported. The opinion of the court of appeals affirming the judgment of the district court (App., *infra*, 1a-9a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 2006. App., *infra*, 10a-11a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the construction and interpretation of Rule 49(a) of the Federal Rules of Civil Procedure, which provides as follows:

Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do

so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

Fed. R. Civ. P. 49(a).

STATEMENT OF THE CASE

Kakkadasan Sampathachar (“Dr. Sampathachar”), filed suit against Federal Kemper seeking to recover death benefits allegedly due under a life insurance policy insuring the life of his wife, Pannathpur Jayalakshmi Sampathachar, M.D. (“Mrs. Sampathachar” or “the Insured”). Dr. Sampathachar claimed his wife drowned in the Ganges River after disappearing from their home in rural India.

Dr. Sampathachar’s entire case was premised on his contention that a corpse found in the Ganges River on November 6, 2001, was his wife’s body. The body Dr. Sampathachar allegedly identified as his wife, however, had certain anatomical features that conflicted with his wife’s medical and dental records. Federal Kemper’s defense was based on evidence that the body was not the Insured’s and, therefore, Dr. Sampathachar had no proof his wife was dead.

Given the anatomical differences between the body retrieved from the Ganges River and the Insured, Federal Kemper requested that the special verdict include a question requiring the jury to determine whether the body retrieved from the Ganges River on November 6, 2001, was that of the Insured. The district court refused to submit that question to the jury. In doing so, the district court essentially nullified Federal Kemper’s right to a jury trial by removing from the jury’s consideration the disputed issue of fact around which the entire defense was constructed. After a ten-day trial, the

jury returned a verdict in favor of Dr. Sampathachar on his breach of contract claim.¹

This case presents a question of recurring importance that is pertinent to all federal civil jury trials in which a special verdict form is used: whether Rule 49(a) of the Federal Rules of Civil Procedure requires that a special verdict include findings on all issues of material fact when such findings are specifically requested by a party.

I. Factual Background

Between 1995 and 1999, Mrs. Sampathachar obtained \$10.5 million in life insurance from seven different insurance companies. Dr. Sampathachar was the designated beneficiary on each of the policies acquired by Mrs. Sampathachar. One of the policies, a \$1 million term life insurance policy, was issued by Federal Kemper.

In April 2001, the Sampathachars left the United States and traveled to Bangalore, India. Although Dr. Sampathachar claimed they only intended to visit India for 6-12 months and planned to return to the United States, the Sampathachars ceased making mortgage payments on their Philadelphia residence, and their home of twenty years went into foreclosure. C.A. App. 2436-37.

According to Dr. Sampathachar, Mrs. Sampathachar mysteriously walked out of their rural home near Bangalore at 4:30 in the morning on October 17, 2001, taking nothing

¹ Dr. Sampathachar alleged claims for breach of contract and bad faith against Federal Kemper. The jury found in favor of Federal Kemper on the bad faith claim.

but the clothes she was wearing. On October 28, 2001, Dr. Sampathachar learned from the police that his wife had checked into a hotel in Devaprayag, a remote village in northern India approximately 2,500 kilometers from their home.

On November 2, 2001, Dr. Sampathachar's nephew Pannathpur Raghavendra ("Mr. Raghavendra") traveled to Devaprayag to search for his aunt. After searching for several days without success, Mr. Raghavendra decided to search the Ganges River. C.A. App. 2995.

On November 6, 2001, Mr. Raghavendra reported that his aunt's body was discovered in the Ganges River. C.A. App. 2128, 2998-3000. Although the body was partly decomposed and bloated, C.A. App. 3077-78, Mr. Raghavendra identified the body as his aunt's. The body was taken to a hospital for a postmortem examination.

Dr. Sampathachar traveled overnight to the morgue where the body was kept. C.A. App. 2130-32. Based on a visual inspection of the decomposing and bloated corpse, Dr. Sampathachar also identified the body as his wife's. C.A. App. 2136-37.

A postmortem examination was performed by Dr. S.D. Saklani. One of the reasons Dr. Sampathachar claims he was able to identify the body was because Dr. Saklani's postmortem examination revealed the body had no uterus. C.A. App. 2140-41. According to Dr. Sampathachar, his wife had an abdominal hysterectomy that involved the removal of the uterus, left-side ovary, and left-side fallopian tube. C.A. App. 2045-46, 2250-51. This was confirmed by her medical records. C.A. App. 5465.

Dr. Saklani testified that the ovaries and fallopian tubes were present in the body he examined. C.A. App. 3953. If the body had both fallopian tubes and ovaries, then the body could not have been Mrs. Sampathachar's. Dr. Sampathachar further testified that his wife had a six-inch vertical scar on her lower abdomen. C.A. App. 2250. Dr. Saklani did not find a scar on the abdomen of the body. C.A. App. 3952-53, 5506-08 (Postmortem Report).

Dr. Saklani's postmortem report further noted that the body had four teeth missing in the upper jaw, but none missing in the lower jaw. C.A. App. 3949-51, 5507. This was significant because Mrs. Sampathachar's dental records confirmed she was missing both wisdom teeth in the lower jaw. C.A. App. 3209, 5475 (Dental Record). The presence of wisdom teeth in the lower jaw of the body means the body could not have been Mrs. Sampathachar's.

After the postmortem examination was completed, the body was released to Dr. Sampathachar and the body was immediately cremated. On November 16, 2001, Dr. Sampathachar called Federal Kemper and reported that his wife had died. C.A. App. 2830. After completing its investigation, Federal Kemper denied Dr. Sampathachar's claim for lack of due proof of death.

II. Proceedings In The District Court

Dr. Sampathachar, claiming to be a resident of Pennsylvania, sued Federal Kemper in the Pennsylvania Court of Common Pleas of Philadelphia County. Federal Kemper removed the action to the United States District Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1441. The district court retained jurisdiction pursuant to 28 U.S.C. § 1332.

In the amended complaint, Dr. Sampathachar alleged that Mrs. Sampathachar died by drowning in the Ganges River on November 7, 2001, and he attached a copy of the death certificate issued for the body retrieved from the Ganges River and purportedly identified as Mrs. Sampathachar's. C.A. App. 49, 54-55.

At trial, Dr. Sampathachar maintained that the body retrieved from the Ganges River was that of Mrs. Sampathachar. Federal Kemper defended against this allegation by presenting medical and dental evidence through two expert witnesses tending to show the body could not have been the body of the Insured. In rebuttal, Dr. Sampathachar called two expert witnesses to challenge the accuracy of Dr. Saklani's post-mortem findings. Without question, the identification of the body was the ultimate issue in dispute at trial. Indeed, the body retrieved from the Ganges River on November 6, 2001, provided the entire basis for Dr. Sampathachar's claim that (1) the Insured was dead, and (2) the Insured died while the policy was in force.²

In light of the material dispute of fact concerning the identification of the body, Federal Kemper requested inclusion of the following interrogatory in the special verdict slip:

Do you find that Kakkadasan Sampathachar has proved by a preponderance of the evidence that the body retrieved from the Ganges River

² Dr. Sampathachar stopped paying insurance premiums after Mrs. Sampathachar disappeared. If Mrs. Sampathachar died when the policy was not in force, then Federal Kemper would have no obligation to pay benefits under the policy.

on November 6, 2001, was his wife,
Pannathpur Sampathachar?

Yes _____ No _____

C.A. App. 1578. Dr. Sampathachar objected to this proposed interrogatory, arguing that he did not have to prove the body was the Insured's. C.A. App. 1583. The district court sustained Dr. Sampathachar's objection, and instead submitted plaintiff's proposed interrogatory to the jury, which read as follows:

Do you find by a preponderance of the evidence that Pannathpur Jayalakshmi Sampathachar is dead?

_____ Yes _____ No

App., *infra*, 14a. The jury, therefore, was permitted to find the Insured was dead without resolving whether the body retrieved from the Ganges River was the Insured's body.

Federal Kemper also requested that the jury be instructed that it must find that the body was Mrs. Sampathachar's in order to find that she is dead. Federal Kemper proposed the following jury instruction:

Dr. Sampathachar contends the body recovered from the Ganges River on November 6, 2001, was that of his wife, Pannathpur Sampathachar. Federal Kemper and American General contend that Dr. Sampathachar is not entitled to recover under the policies because the dental and

medical evidence proves the body is not that of Pannathpur Sampathachar.

Dr. Sampthachar bears the burden of proof on this issue, which means he must prove by a “preponderance of the evidence” that the body recovered from the Ganges River on November 6, 2001, was his wife’s body.

If you find that Dr. Sampathachar did not meet his burden of proving by a preponderance of the evidence that the body retrieved from the Ganges River was Mrs. Sampathachar, then you must find for the defendants, Federal Kemper and American General.³

C.A. App. 1556-57. Dr. Sampathachar objected to this proposed instruction, again arguing that he did not have to prove the body was the Insured’s. C.A. App. 1946. The district court sustained plaintiff’s objection and declined to give Federal Kemper’s proposed jury instruction. C.A. App. 28.

In essence, the district court’s rulings nullified Federal Kemper’s defense and removed from the jury’s consideration the issue of whether the body was Mrs. Sampathachar’s. The jury returned a special verdict finding that Mrs. Sampathachar was dead. Based on the jury’s special verdict, the district court entered a judgment against Federal Kemper on plaintiff’s breach of contract claim in the amount of \$1 million. App., *infra*, 12a-13a.

³ American General Life Insurance Company was a co-defendant at trial, but settled with plaintiff prior to the jury’s verdict.

On June 21, 2005, the district court denied Federal Kemper's post-trial motion to alter or amend the judgment and for judgment as a matter of law. C.A. App. 31. On July 13, 2005, Federal Kemper filed a timely notice of appeal. C.A. App. 21-23.

III. Proceedings In The Court Of Appeals

On appeal, Federal Kemper argued that Federal Rule of Civil Procedure 49(a) required the district court to submit an interrogatory to the jury asking whether the body retrieved from the Ganges River on November 6, 2001, was that of Mrs. Sampathachar.

In an opinion filed June 16, 2006, without citing or discussing Rule 49(a), the court of appeals affirmed the district court judgment. App., *infra*, 1a-9a. The opinion, however, included the following footnote:

Moreover, given that plaintiff's case at trial rested entirely on evidence that Mrs. Sampathachar drowned in the Ganges River and that the body pulled from the river was hers, we can reasonably assume, based on the jury's verdict, that the jury concluded that the body pulled from the river was in fact Mrs. Sampathachar's body.

App., *infra*, 6a. The court of appeals thus acknowledged that plaintiff's alleged identification of the body was the key factual issue underlying the entire controversy. Nevertheless, the court of appeals "assumed" the jury found the body was Mrs. Sampathachar's—a question the district court refused to submit to the jury. No authority supports the appellate court's assumption. To the contrary, the jury was required to make

findings on all issues of material fact pursuant to the binding precedents from this Court and in accordance with the provisions of Rule 49(a).

REASONS FOR GRANTING THE PETITION

Nearly two centuries ago, this Court made clear that a special verdict must include findings on all issues of material fact. If a special verdict contained no express finding on a material issue of fact, then the verdict was insufficient to sustain the entry of judgment.

The adoption of Rule 49(a) as part of the Federal Rules of Civil Procedure modified the common law rules governing the use of special verdicts. Under Rule 49(a), if a material issue of fact is omitted from the special verdict slip, and no party demands its submission to the jury, then the parties are deemed to have waived the right to a jury trial on that issue.

Since the adoption of the Rules of Civil Procedure, this Court has not addressed its nineteenth-century precedent in light of Rule 49(a) or otherwise addressed the findings required to sustain a modern special verdict when waiver is not an issue.

This case presents an opportunity for the Court to construe Rule 49(a) and affirm the continuing vitality of the Court's nineteenth century precedent requiring findings on all issues of material fact when a party demands the submission of those issues to the jury. Moreover, this case calls for an exercise of the Court's supervisory powers to protect the constitutional right to a jury trial and overrule the Third Circuit's decision sanctioning a district court ruling that completely departed from the accepted and usual course of judicial proceedings by

removing the determinative issue of fact from the jury's consideration.

I. Rule 49(a) Should Be Construed To Require Special Verdicts To Include Findings On All Issues Of Material Fact When A Party Demands The Submission Of Those Issues To The Jury

At common law, a special verdict was simply a statement of the facts found by the jury. Sir William Blackstone explained the procedure this way:

And herein they state the naked facts, as they find them to be proved, and pray the advice of the court thereon, concluding conditionally that if upon the whole matter the court shall be of opinion that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant. This is entered at length on the record, and afterwards argued and determined in the court at Westminster, from whence the issue came to be tried.

William Blackstone, 3 Commentaries *377. This procedure necessarily required the jury to render findings on all issues of material fact or the verdict would be legally ineffectual. *See* Prentice H. Marshall, 9 Moore's Federal Practice § 49.10 (2004) [hereinafter Moore's Federal Practice] (explaining limitations on special verdicts at common law); Hon. John R. Brown, Federal Special Verdicts: The Doubt Eliminator, 44 F.R.D. 338, 349 (1968) (discussing pitfalls of special verdicts under common law).

In the early nineteenth century, the Supreme Court incorporated this common law rule into American law:

Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue ... if it appears to that court or to the appellate court that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict.

Patterson v. United States, 15 U.S. 221, 225 (1817).

Regardless of the evidence presented, a court could not simply assume the jury made a finding when the finding was not expressly made. *See Barnes v. Williams*, 24 U.S. 415, 416 (1826). “Where a special verdict is rendered all the facts essential to entitle a party to a judgment must be found, and a judgment rendered on a special verdict failing to find all the essential facts is erroneous.” *Ward v. Cochran*, 150 U.S. 597, 608 (1893).

A judgment would be reversed regardless of the evidence that might support it unless an express finding on every material fact was included in the special verdict. *See Barnes*, 24 U.S. at 416-17 (reversing judgment and awarding new trial where evidence may have supported an essential factual finding, but jury did not make the necessary finding). Even in a case where the special verdict expressly acknowledged the evidence supporting a conclusion, but did not actually state the conclusion, the judgment on the verdict could not be sustained:

Although, in the opinion of the Court, there was sufficient evidence in the special verdict

from which the jury might have found the fact, yet they have not found it, and the Court could not, upon a special verdict, intend it. The special verdict was defective in stating the evidence of the fact, instead of the fact itself. It was impossible, therefore, that a judgment could be pronounced for the plaintiff.

Id. at 416; *see also Hodges v. Easton*, 106 U.S. 408, 411-12 (1882) (refusing to assume judgment was supported by facts not found in jury verdict slip where jury verdict did not expressly make factual findings).

This common law rule was well settled and repeatedly upheld by the Supreme Court. Indeed, shortly before the Federal Rules of Civil Procedure became effective, the Court observed that “a judgment upon a special verdict cannot be sustained unless the findings extend to all material issues.” *United States v. Esnault-Pelterie*, 299 U.S. 201, 205 (1936) (vacating judgment for plaintiff in patent infringement suit where trial court failed to make specific finding on validity of patent). Shortly before the enactment of the Federal Rules of Civil Procedure in 1937, this line of Supreme Court cases ended.

Rule 49(a) modified the use of special verdicts by addressing the limitations on special verdict practice that had existed at common law. *See* 9 Moore’s Federal Practice § 49.10. A district court is now permitted to “make a finding” on any material fact that is omitted from the special verdict slip absent a party’s demand for its submission. *See* Fed. R. Civ. P. 49(a) (“[E]ach party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury.”). Even if the trial court fails to make an express finding, “it shall be

deemed to have made a finding in accord with the judgment on the special verdict.” *Id.*

These changes to the common law relieved the district court from the burden of ensuring that all facts material to the judgment are found by the jury and have, as one commentator noted, “revitalized the special verdict.” 9 Moore’s Federal Practice § 49.10. Indeed, in some circuits the modern special verdict is the preferred method for jury verdicts in certain cases. *See, e.g., Structural Rubber Prods. Co. v. Park Rubber Co.*, 749 F.2d 707, 723-24 (Fed. Cir. 1984) (stating preference for use of special verdicts in certain patent cases); *Envirex, Inc. v. Ecological Recovery Assocs., Inc.*, 454 F. Supp. 1329, 1339-40 (M.D. Pa. 1978) (noting preference for use of special verdicts in complex cases), *aff’d without op.*, 601 F.2d 574 (3d Cir. 1979).

Rule 49(a), however, leaves at least one issue unresolved. Although the parties clearly waive the right to a jury finding on any issue of material fact intentionally or inadvertently omitted from the special verdict, Rule 49(a) does not address the situation when a party specifically demands the submission of an issue of material fact to the jury and the court refuses to include the question on the special verdict slip. Under such circumstances, a special verdict that does not contain findings on all issues of material fact would seem to violate the long-standing common law precedents established by this Court before the adoption of Rule 49(a).

A fact is “material” if, under the governing law, it would affect the outcome of the lawsuit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Napier v. F/V Deesie, Inc.*, 454 F.3d 61, 66 (1st Cir. 2006); *Zamora v. Elite Logistics, Inc.*, 449 F.3d 1106, 1112 (10th Cir. 2006); *Justofin v. Metro. Life Ins. Co.*, 372 F.3d 517, 521 (3d Cir.

2004); *see also Hodges v. Easton*, 106 U.S. 408, 412 (1882) (referring to material facts as “all the facts essential to a recovery”). Modern decisions in the lower courts generally apply the common law standards enunciated by this Court and require that all “material” issues of fact be submitted to the jury in a special verdict pursuant to Rule 49(a). *See, e.g., Wheeler v. John Deere Co.*, 935 F.2d 1090, 1101 (10th Cir. 1991) (“Once a trial court elects to use such interrogatories on a given element of a plaintiff’s claim, all material issues must be included in the interrogatories.”); *U.S. Fire Ins. Co. v. Pressed Steel Tank Co.*, 852 F.2d 313, 318 (7th Cir. 1988) (“Rule 49(a) requires a district court to submit all material issues raised by the pleadings and evidence.”); *Sakamoto v. N.A.B. Trucking Co.*, 717 F.2d 1000, 1005 (6th Cir. 1983) (“A Rule 49(a) special verdict is designed to cover all of the material factual issues in the cases.”); *Simien v. S.S. Kresge Co.*, 566 F.2d 551, 555 (5th Cir. 1978) (“Once the decision is made to submit the case on special interrogatories, the judge must submit all material issues raised by the pleadings and the evidence.”).

Some courts hold that a special verdict need only contain interrogatories directed toward the “ultimate” conclusions of fact in the case. *See, e.g., Local 159 v. Nor-Cal Plumbing, Inc.*, Nos. 96-16172 & 96-16284, 1999 U.S. App. LEXIS 17968, at *36 (9th Cir. July 27, 1999); *Austin-Westshore Constr. Co. v. Federated Dept. Stores, Inc.*, 934 F.2d 1217, 1221 (11th Cir. 1991) (“Today, under the special verdict system, the jury makes formal findings on issues of ultimate fact and the court applies the law.”) (quoting *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1520 (6th Cir. 1990)); *Travelers Ins. Co. v. Truitt*, 280 F.2d 784, 789 (5th Cir. 1960). A judgment cannot stand, however, when a jury’s factual findings lack the requisite elements to sustain a claim. *See Chemetron Corp. v. Bus. Funds, Inc.*, 682 F.2d

1149, 1171-72 (5th Cir. 1982) (reversing judgment entered pursuant to special verdict where jury found fraudulent non-disclosure but made no finding regarding the confidential relationship that would be necessary to create duty to disclose).

The Third Circuit's decision in the present case represents a significant departure from the common law and statutory rules of special verdict practice. Although the Third Circuit acknowledged that "plaintiff's case at trial rested entirely on evidence that Mrs. Sampathachar drowned in the Ganges River *and that the body pulled from the river was hers,*" (App., *infra*, 6a (emphasis added)), the court nevertheless affirmed the district court decision refusing to require the jury to determine whether the body found in the Ganges River was that of Mrs. Sampathachar. App., *infra*, 5a-6a. The court of appeals concluded it could "reasonably assume" the jury found the body pulled from the river was Mrs. Sampathachar's. App., *infra*, 6a.

This is precisely the kind of guesswork barred by the common law. A court cannot "assume" the jury made a finding not expressly stated in the special verdict. *See Hodges*, 106 U.S. at 411-12; *Barnes*, 24 U.S. at 416. This Court should construe Rule 49(a) to require special verdicts to include findings on all issues of material fact, as required by the common law, when a party demands the submission of those issues to the jury.

II. This Court Should Exercise Its Supervisory Powers To Protect The Right To Trial By Jury

Nothing in the text of Rule 49(a) purports to abrogate the right of a party to have a jury determine all issues of material fact, provided the party demands their submission to the jury. *See* Fed. R. Civ. P. 49(a). Unless and until this Court chooses to change or abolish this common law principle, or it is modified by a statute that expresses a clear intention to change the common law, it remains the law of the land. *See, e.g., Tenet v. Doe*, 544 U.S. 1, 11 (2005) (reversing court of appeals for failure to follow *Totten v. United States*, 92 U.S. 105 (1876)); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) (“Statutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.”). Here, Rule 49(a) did not change the common law requirement that special verdicts contain findings on all issues of material fact, except to the extent the parties “waive” the submission of such issues to the jury.

The court of appeals’ opinion in this matter departed from a line of decisions that dates back nearly two centuries. There is no authority under the common law or under the Federal Rules of Civil Procedure supporting the decision to assume the jury made factual findings that it was specifically precluded from making. Indeed, the court of appeals has sanctioned a departure from the accepted and usual course of

judicial proceedings that calls for an exercise of this Court's supervisory powers. *See* Sup. Ct. R. 10(a).⁴

The failure of the district court to require the jury to determine whether the body retrieved from the Ganges River was the Insured deprived Federal Kemper of its Seventh Amendment right to have each issue of material fact decided by a jury. The Seventh Amendment preserves the right to jury trial as it existed when the Bill of Rights was adopted in 1791. *See* U.S. Const. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved”); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 333 (1979) (“[The] thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791.”) (quoting *Curtis v. Loether*, 415 U.S. 189, 193 (1974) (alterations in original)). Thus, actions that would have been tried by jury at common law, such as an action for breach of contract, are still tried before a jury today. *See Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 459 (1977) (giving “suits for damages for breach of

⁴ Although the court of appeals' opinion was designated “non-precedential,” that fact is not a legitimate basis for ignoring governing law. *See Symbol Techs., Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1368 (Fed. Cir. 2002). Moreover, the Third Circuit has no rule prohibiting the citation of non-precedential opinions. Indeed, district courts in the Third Circuit and elsewhere often rely upon unpublished and non-precedential opinions of the Third Circuit. *See, e.g., In re Diet Drugs Prods. Liab. Litig.*, 434 F. Supp. 2d 323, 332 n.8 (E.D. Pa. 2006) (noting non-precedential opinions of the Third Circuit are persuasive authority); *Cont'l Cas. Co. v. Fifth/Third Bank*, 418 F. Supp. 2d 964, 975 (N.D. Ohio 2006) (describing unpublished Third Circuit decisions as persuasive authority).

contract” as example of suits in which Seventh Amendment right to trial by jury applies); William Blackstone, 3 Commentaries *156 (explaining that in action for breach of contract, jury would award damages in proportion to injury sustained by plaintiff and as occasioned by defendant’s breach).

In a breach of contract action, the facts concerning the breach must be determined by the jury. *See Atlas Roofing Co.*, 430 U.S. at 459 (stating “issues of the making of the contract and its breach” were to be determined by jury, as preserved by the Seventh Amendment). This right, however, was violated by the district court’s failure to submit Federal Kemper’s proposed verdict interrogatory. *See Hodges*, 106 U.S. at 412 (“It was the province of the jury to pass upon the issues of fact, and the right of the defendants to have this done was secured by the Constitution of the United States.”). As a result, judgment was entered without the jury determining the identity of the body.

In its opinion, the Third Circuit did not determine that the identity of the body was not a material fact. Rather, the Third Circuit assumed the jury must have found the body was Mrs. Sampathachar’s because it found she was dead. Finding that Mrs. Sampathachar is dead, however, is not the same as finding that the body was Mrs. Sampathachar’s. If the jury had expressly found the body removed from the Ganges River was Mrs. Sampathachar’s, then logic would sustain the conclusion that Mrs. Sampathachar is dead. The jury, however, was limited to finding that Mrs. Sampathachar was dead and logic cannot support the assumption that the jury

found the body was Mrs. Sampathachar's.⁵ Once the jury failed to expressly find the body was Mrs. Sampathachar's, as required by Rule 49(a), the court of appeals had no authority to usurp the jury's fact-finding function.

Moreover, the question of whether Mrs. Sampathachar died while the policy was in force was never answered by the jury. The jury, for example, could have decided the body was not the Insured's, but believed she died some time within the past few years because (a) she had not been heard from in more than three years, and (b) the insurance companies' investigator was unable to locate her. If, however, the body retrieved from the Ganges River on November 6, 2001, was not the Insured's body, and the Insured did not die while the policy was in force, then there was no breach of contract.

The court of appeals erred by affirming the district court's departure from this Court's precedents and Rule 49(a). The result of this error nullified Federal Kemper's defense and violated its Seventh Amendment right to have the controlling issue of fact determined by a jury.

⁵ The assumption that the jury must have found the body was Mrs. Sampathachar's because it found she "is dead" exemplifies the logical fallacy known as "affirming the consequent." "Affirming the consequent" means to fallaciously assume the converse of a statement is true. *See Stewart Foods, Inc. v. Broecker*, 64 F.3d 141, 145 n.3 (4th Cir. 1995); Irving M. Copi & Carl Cohen, *Introduction to Logic* 240-41 (8th ed. 1990).

CONCLUSION

For all of these reasons, Federal Kemper respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted.

Bryan D. Bolton
Counsel of Record
Michael P. Cunningham
M. David Maloney
Funk & Bolton, P.A.
Twelfth Floor
36 South Charles Street
Baltimore, MD 21201
(410) 659-7700

Counsel for Petitioner

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