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# Civil Procedure - White v. McGinnis: The Ninth Circuit Expands Civil Jury Trial Waiver

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# CIVIL PROCEDURE

## *WHITE v. McGINNIS*: THE NINTH CIRCUIT EXPANDS CIVIL JURY TRIAL WAIVER

### I. INTRODUCTION

In *White v. McGinnis*,[1] the Ninth Circuit held that a civil litigant's knowing participation in a bench trial without objection constituted waiver of a timely jury demand.[2] This case overruled *Palmer v. United States*[3] in which the Ninth Circuit determined that acquiesence to a bench trial did not constitute waiver of a jury trial demand.[4] This article will examine the Ninth Circuit's rejection of the literal statutory language of civil jury trial waiver under Rules 38(d)[5] and 39(a)[6] of the Federal

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1. White v. McGinnis, 903 F.2d 699 (9th Cir. 1990)(en banc)(per Hall, J.; the other panel members were Goodwin, C. J., Browning, J., Wallace, J., Hug, J., Schroeder, J., Fletcher, Brunetti, J., and Fernandez, J.; Alarcon, J., concurring; Kozinski, J., dissenting, with whom Schroeder, J., and Fletcher, J. joined).

2. *White*, 903 F.2d at 700.

3. 652 F.2d 893 (9th Cir. 1981)(acquiesence to a bench trial did not waive the right to a jury trial where a timely demand was never properly withdrawn by oral or written stipulation in accordance with FED. R. CIV. P. 38(d) and 39(a)). In *Palmer* the Ninth Circuit refused to deviate from the explicit language of Rules 38(d) and 39(a) of the Federal Rules of Civil Procedure. The language of these Rules require that once a jury demand in a civil action has been properly asserted, it may only be withdrawn by written stipulation or by oral stipulation in open court. *Id. See infra* notes 5-6.

4. *Palmer*, 652 F.2d at 896.

5. FED. R. CIV. P. 38(d) provides:

> Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

6. FED. R. CIV. P. 39(a) provides:

> By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by

Rules of Civil Procedure.

## II. FACTS

In June, 1984, Edward Allen White, an Arizona State Prison inmate,[7] filed a complaint under 42 U.S.C. § 1983,[8] against Wayne McGinnis, an Arizona State Department of Corrections employee.[9] White alleged that McGinnis assaulted him during a cellblock search, violating his eighth amendment rights.[10] White made a timely demand for a jury trial,[11] but the court subsequently notified the parties that the case was set for a bench trial.[12]

During the five and one-half month period between the bench trial notice and the trial, White failed to bring his jury demand to the district court's attention.[13] White also failed to object to the absence of a jury during the bench trial, all the

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> jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

7. White v. McGinnis, 903 F.2d 699, 700 (9th Cir. 1990). White initially proceeded in *pro se*, but retained private counsel who entered an appearance on Aug. 30, 1985. *Id.* at 700 n.1.

8. 42 U.S.C. § 1983 (1991):

> Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

9. *White*, 903 F.2d at 700.

10. *Id.* U.S. CONST. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

11. *White*, 903 F.2d at 700. McGinnis did not dispute that White was entitled to a jury trial on his claims. *Id.* at 700 n.2.

12. *Id.* at 700. Before counsel was retained, the court informed the parties on Aug. 6, 1985 that a bench trial would take place on Jan. 21, 1986. *Id.*

13. *Id.*

while his counsel vigorously argued the case to the judge.[14] Moreover, after the verdict was entered in favor of McGinnis, White neither notified the district court of its procedural error before it entered judgment against him, nor filed a motion for a new trial after judgment.[15]

On appeal, White contended that a jury trial was required, relying on *Palmer v. United States*,[16] which held that the jury trial right is fundamental and every presumption must be made against its waiver.[17] In response, the defendant argued that White should be barred from raising the issue on appeal because it was not previously addressed before the district court.[18]

## III. BACKGROUND

### A. Constitutional And Statutory Foundation

The right to a civil jury trial under U.S. CONST. amend. VII,[19] or as specified by a federal statute, shall be preserved to the parties inviolate.[20] To determine whether the right to a civil jury trial exists, courts have adopted an historical test.[21] Specifically, if the right to a civil jury trial existed 200 years ago at common law[22] when the Constitution was adopted, the right still

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14. *Id.*

15. *Id.*

16. 652 F.2d 893 (9th Cir. 1981).

17. *White*, 903 F.2d at 700 (citing Palmer v. United States, 652 F.2d 893, 896 (9th Cir. 1981)). White also claimed ineffective assistance of counsel. However, Nicholson v. Rushen, 767 F.2d 1426, 1427 (9th Cir. 1985)(per curiam), held that a plaintiff in a section 1983 action who alleged excessive use of force had no right to such a claim. *White*, 903 F.2d at 700.

18. *White*, 903 F.2d at 700 (citing Westinghouse Elec. Corp. v. Weigel, 426 F.2d 1356, 1357 (9th Cir. 1970)(per curiam)). The rule generally applied on appeal is that errors asserted below will not be considered when the issue was not first raised in the trial court. The rationale behind this rule is that the error might have been avoided had it been raised first at the trial court level. *Id.*

19. U.S. Const. amend VII established the right to a civil jury trial: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."

20. Fed. R. Civ. P. 38(a) provides: "Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

21. J. Landers, J. Martin & S. Yeazell, Civil Procedure, at 705 (2d ed. 1988)[hereinafter Civil Procedure].

22. *See* Civil Procedure, *supra* note 21, at 705-06. Separate courts of law and eq-

exists.[23]

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, any party may demand a civil jury trial on any issue triable of right by a jury.[24] The party must serve a written demand upon the other parties after the lawsuit is filed.[25] However, the demand cannot be filed more than ten days after service of the last pleading that addressed legal issues which gave rise to the jury trial right.[26] If a party fails to serve a demand[27] and file it,[28] the right to a civil jury trial is waived.[29] However, the demand may not be withdrawn except by consent of the parties.[30]

Furthermore, Rule 39(a) of the Federal Rules of Civil Procedure provides that when a jury trial has been demanded, the

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uity existed originally at common law. Since plaintiff or defendant had a jury trial in actions at law, but not in equity, the jury trial right is preserved only in actions at law. Although the distinction between law and equity jurisdiction was never absolute (*e.g.*, the "clean up" doctrine permitted an equity court to decide issues that ordinarily would have been decided by a jury in an action at law), the modern distinction has become less clear with the merger of law and equity and the creation of new causes of action in response to a social and political order that is more complex than in 1791. *Id.* at 703-05. In addition, the reasonableness of allowing the exercise of the right to a jury trial in complex cases has been called into question. *Id.*

23. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959)(legal claims must be tried first to a jury when there are equitable claims by the plaintiff and legal defenses and counterclaims by the defendant).

24. FED. R. CIV. P. 38(b). *See supra* note 22 for a more complete discussion of which issues have right-to-jury-trial guarantees.

25. FED. R. CIV. P. 38(b).

26. FED. R. CIV. P. 38(b) provides:

> Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

27. FED. R. CIV. P. 38(d) provides that a party demanding a civil jury trial must serve notice on opposing counsel and file a copy of the demand with the court clerk pursuant to FED. R. CIV. P. 5(d). *See supra* note 5.

28. FED. R. CIV. P. 5(d) provides:

> All papers . . . shall be filed with the court either before service or within a reasonable time thereafter, but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

29. FED. R. CIV. P. 38(d). *See supra* note 5 for expressed language.

30. FED. R. CIV. P. 38(d).

action shall be designated on the court docket as a jury action.[31] In addition, unless a written stipulation to waive the jury trial is filed with the court, or an oral stipulation is made in open court on the record, all issues demanded to be tried by jury shall be so tried.[32] The court may also find that a right to jury trial on some or all of the issues does not exist under the Constitution or statutes of the United States.[33]

## B. Raising Issues For The First Time On Appeal

Strong policies normally preclude a civil litigant from raising the jury trial entitlement issue for the first time on appeal.[34] For example, the Seventh Circuit in *Lovelace v. Dall* determined that it is unfair to permit a party to have a trial, discover it has lost, and then because the result is unsatisfactory raise the jury trial issue.[35]

However, the Ninth Circuit, in *United States v. Gabriel*,[36] decided that it may review "an issue conceded or neglected below if the issue is purely one of law and the pertinent record has been fully developed."[37] Subsequently, the Ninth Circuit identified several other exceptions which allow it discretion to hear an issue not raised below. In *Bolker v. Commissioner*,[38] the court recognized three narrow exceptions: (1) when review is necessary to prevent a miscarriage of justice; (2) while appeal is pending and a new issue arises because of a change in the law; or (3) when the issue is purely one of law and does not require further factual record.[39]

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31. Fed. R. Civ. P. 39(a). *See supra* note 6 for expressed language.

32. Fed. R. Civ. P. 39(a).

33. *Id.* This determination may be made upon motion or *sua sponte*. *Id.*

34. *See, e.g.*, Lovelace v. Dall, 820 F.2d 223, 228 (7th Cir. 1987)(per curiam)(objection waived if not timely made; issues cannot be raised on appeal if not raised first in district court). The principal concern is judicial economy; court judgments should have meaning and effect instead of being a futile exercise where one party can overturn the verdict no matter what the result. *Id.*

35. *Id.*

36. 625 F.2d 830, 831 (9th Cir. 1980)(government permitted to raise for the first time on appeal whether the Border Patrol's two stops of defendant's vehicles constituted "fixed checkpoint stops" in a prosecution involving the transport of illegal aliens).

37. *Gabriel*, 625 F.2d at 832.

38. 760 F.2d 1039 (9th Cir. 1985)(as a general rule, court of appeals will not consider an issue for the first time on appeal, although it has the power to do so).

39. *Bolker*, 760 F.2d at 1042.

### C. PALMER REQUIRED SPECIFIC CONDUCT TO EVINCE JURY WAIVER

In *Palmer v. United States*[40] a timely jury trial demand was made but the district court proceeded with a bench trial.[41] The jury trial issue emerged on appeal even though objection had not been made to the district court's failure to acknowledge the jury demand.[42]

On appeal, the Ninth Circuit held that the jury demand was not properly withdrawn because an oral or written stipulation to withdraw was not made as Rule 39(a)[43] expressly required, and without more, the right to object was not withdrawn by submitting to a bench trial.[44] However, the Ninth Circuit did not hold that a formal stipulation was the only device for the parties to waive a prior jury trial demand.[45] Rather, the court concluded that "[c]onduct of the parties which evinces consent and appears on the record is sufficient to constitute a proper withdrawal and waiver."[46] Since the record was completely silent on the matter, the Ninth Circuit found no waiver.[47]

The Ninth Circuit in *Palmer* relied upon extra-jurisdictional law from the Fourth and Second Circuits for its literal application of Rule 39(a).[48] In *Millner v. Norfolk & Western Railway*,[49] the Fourth Circuit held that even though objection

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40. 652 F.2d 893 (9th Cir. 1981).

41. *Palmer*, 652 F.2d at 895.

42. *Id.*

43. FED. R. CIV. P. 39(a). *See supra* note 6 for the expressed language.

44. *Palmer*, 652 F.2d at 896. The court also found that the driver was entitled to a jury trial under the seventh amendment. Even though the issue of contribution was an equitable issue, the Government's claim against the driver required determination of the extent to which the driver's negligence contributed to plaintiff's injuries. It was also necessary to determine the relative fault between the driver and the Government, and whether the Government had in fact satisfied the judgment against it in plaintiff's original negligence action. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. 643 F.2d 1005 (4th Cir. 1981)(right to jury trial or withdrawal of timely jury demand was not waived by plaintiff's participation in evidentiary hearing before the court, notwithstanding want of express objection). The Fourth Circuit found that aside from the fact that the technical requirements of FED. R. CIV. P. 39 were not met, a waiver could not be implied on general equitable principles because the motion was one "to

was not made, a jury trial was not waived by a plaintiff's participation in an evidentiary hearing before the district court.[50] There, the court held that under the circumstances, plaintiff could not be fairly charged with notice that dispositive issues of fact on which he had demanded a jury trial were to be adjudicated by the court.[51]

The Second Circuit, in *Rosen v. Dick*,[52] held that one defendant's jury demand was effective as to the plaintiff-trustee in a bankruptcy proceeding who was served with the demand.[53] The jury demand was also effective for the claims against a co-defendant and cross-claims between the defendants insofar as it encompassed issues involving the other defendant.[54] However, beyond that, the second defendant had waived whatever jury trial rights that could have been asserted by failing to adhere to the requirements of Rule 39(a).[55]

In *DeGioia v. United States Lines Co.*,[56] the Second Circuit found that a third-party defendant did not waive the right to a jury trial by failing to assert its original demand.[57] Specifically, the district court determined that a jury trial right was still binding on an indemnity issue where the named-defendant was entitled to indemnification from a third-party defendant.[58] The Second Circuit affirmed, even though the third-party defendant had temporarily acquiesced in not continuing to pursue its origi-

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dismiss" and there was no indication that matters at issue would be adjudicated. *Millner*, 643 F.2d at 1011.

50. *Id.*

51. *Id.* at 1011 & n.1.

52. 639 F.2d 82 (2d Cir. 1980)(a general jury demand includes issues covered in later pleadings because the demander has already told opponent that he wants a jury trial; however, this principle does not permit a party to demand a jury trial on issues raised subsequently with which he is not connected, nor on issues for which he could not have demanded a jury trial in the first place).

53. *Rosen*, 639 F.2d at 90.

54. *Id.*

55. *Id. See supra* note 6 for Rule 39(a) requirements.

56. 304 F.2d 421 (2d Cir. 1962)(failure of a third-party defendant to serve a co-third-party defendant with a copy of the answer containing a claim for jury trial and submission of the common issue of liability of both third-party defendants to a jury was not prejudicial to the co-third-party defendant, despite actual knowledge and acquiescence to the demand for a jury trial).

57. *DeGioia*, 304 F.2d at 424 & n.1.

58. *Id.*

nal demand for a jury trial.[59]

## D. Erosion Of The Palmer Rationale

### 1. The Ninth Circuit

Following *Palmer*, the Ninth Circuit shifted from a literal interpretation of Rules 38(d) and 39(a).[60] In *Reid Bros. Logging v. Ketchikan Pulp Co.*,[61] the Ninth Circuit held that defendant's continued efforts to defeat plaintiff's jury demand showed that defendant was not relying on his own right to a jury trial.[62] The court determined defendant's actions constituted waiver of its right to substitute its own jury trial demand for plaintiff's when plaintiff withdrew its jury request.[63]

The Ninth Circuit further distanced itself from the literal interpretation approach of *Palmer* in *Pope v. Savings Bank of Puget Sound*.[64] *Pope* was distinguished from *Palmer* because the appellant's conduct was found to be "much more than silence," and thus, amounted to waiver of the jury demand.[65]

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59. *Id.*

60. *See* White v. McGinnis, 903 F.2d 699, 701 (9th Cir. 1990).

61. 699 F.2d 1292 (9th Cir.)(defendant's consistent efforts to defeat plaintiff's jury request demonstrated that defendant was not relying on that request and constituted waiver of defendant's right to object when plaintiff eventually withdrew its jury request), *cert. denied*, 464 U.S. 916 (1983).

62. *Reid Bros. Logging*, 699 F.2d at 1304.

63. *Id.* at 1303-04.

64. 850 F.2d 1345 (9th Cir. 1988)(plaintiff's counsel knowingly consented to waiver of the right to jury trial because (1) he stated that he was done with the jury; and then (2) continued to participate in the trial without objection for over one-and-a-half hours after the jury had departed).

65. *Pope*, 850 F.2d at 1355. Appellant had informed the district court that he had rested "the first part of his case and not the part of the case which [was] to be tried to the court on the foreclosure action." *Id.* The trial judge then informed counsel that he would discharge the jury before lunch. After lunch, appellant moved to reconvene the jurors, asserting that they had been improperly discharged. *Id.* The trial judge denied the motion and the Ninth Circuit affirmed on appeal. *Id.* at 1354-55.

The Ninth Circuit acknowledged that appellant's conduct was little more than actual knowledge that the trial court intended to dismiss the jury. However, "the totality of the circumstances [t]here manifests that the attorney slept on his client's rights." *Id.* at 1355. The appellant's attorney had unsuccessfully argued that the reason that he had not objected to the judge's improper discharge of the jury was that he did not know if it was permissible to raise such an objection. *Id.* However, the appellate panel discounted the attorney's argument by determining that one may "not use decorum and respect for the court as a double-edged sword to resurrect voluntarily relinquished rights." *Id.* at 1355 n.29.

In contrast to *Palmer's* literal compliance with Rule 39(a), the court in *Pope* did not discuss the necessity of a stipulation withdrawing the jury demand.[66] Instead, *Palmer* was cited for the proposition that conduct can evince consent to withdrawal and waiver.[67] Thus, unlike the circumstances in *Palmer*, objection was both proper and necessary to protect a client's important right.[68]

2. Other Circuits

Decisions from other circuits illustrate the same dissatisfaction with *Palmer* that the Ninth Circuit identified in *White*.[69] For example, the Second Circuit held, in *Royal American Managers, Inc. v. IRC Holding Co.*,[70] that a stock purchaser waived his right to a jury trial by participating without objection in a bench trial that involved issues not submitted to a jury.[71] The Seventh Circuit held, in *Lovelace v. Dall*,[72] that an inmate waived his previously asserted jury demand because he failed to object to a bench trial in a *pro se* civil action.[73] In *United States v. 1966 Beechcraft Aircraft Model King Air*,[74] claimants in the Fourth Circuit waived their right to a jury in a forfeiture proceeding for two reasons.[75] First, claimants had participated in the bench trial.[76] Second, claimants had failed to object to the

66. *Id.* at 1355.

67. *Id.*

68. *Id.*

69. *See White*, 903 F.2d at 703, in which the court discussed this dissatisfaction.

70. 885 F.2d 1011 (2d Cir. 1989)(participation in a bench trial without objection constitutes waiver of a jury trial right).

71. *Royal American Managers, Inc.*, 885 F.2d at 1018.

72. 820 F.2d 223 (7th Cir. 1987)(per curiam)(judicial economy and fairness to the winning party require that the jury demand waiver rule should be applied to *pro se* parties).

73. *Lovelace*, 820 F.2d at 228-29. The Seventh Circuit did concede, however, that exceptional circumstances might arise where a *pro se* litigant's silence during a bench trial does not waive the jury demand despite there being no other ground for a remand. *Id.* at 229 n.4.

74. 777 F.2d 947 (4th Cir. 1985)(the right to a jury is waived after making an initial demand for a jury trial by participating in a bench trial and failing to object to the court's decision to determine factual issues).

75. *Beechcraft*, 777 F.2d at 950-51.

76. *Id.* at 950-51. Unlike the plaintiff in Millner v. Norfolk & Western Ry., 643 F.2d 1005 (4th Cir. 1981), who had no notice that the trial court was deciding dispositive issues of fact in an evidentiary hearing, in *Beechcraft*, defendants were clearly aware that the district court was planning to decide dispositive issues of fact without a jury. *Beechcraft*, 777 F.2d at 951.

district court's decision to determine dispositive issues of fact.[77] The Eighth Circuit, in *Allen v. Barnes Hospital*,[78] found that a *pro se* complainant waived the right to a jury trial in a wrongful termination suit when objection was not made to submission of the case to the judge instead of a jury.[79]

## IV. THE COURT'S ANALYSIS

### A. Majority Opinion

The Ninth Circuit held that a civil litigant's knowing participation in a bench trial without objection constituted waiver of a timely jury demand.[80] The majority acknowledged the *Palmer* standard,[81] but explained that subsequent Ninth Circuit cases[82] deviated from *Palmer's* literal application of Rule 39(a).[83] The majority also noted a similar approach in other circuits,[84] remarking that support for the *Palmer* analysis had become narrowly circumscribed within those circuits.[85]

In overruling *Palmer*, the Ninth Circuit majority decided that Rule 39(a) is designed to protect against some careless statement or ambiguous document from being held as a waiver when one was not intended.[86] However, if the parties have acquiesced to a bench trial, the Ninth Circuit will "not upset an otherwise valid bench trial simply because the letter of Rule 39(a) has not been followed."[87]

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77. *Beechcraft*, 777 F.2d at 951.

78. 721 F.2d 643 (8th Cir. 1983)(per curiam)(failure to object to submission of an employment action to a judge instead of a jury waived the right to a jury trial).

79. *Allen*, 721 F.2d at 644.

80. White v. McGinnis, 903 F.2d 699, 700 (9th Cir. 1990).

81. *Id.* at 700.

82. Reid Bros. Logging v. Ketchikan Pulp Co., 699 F.2d 1292, 1303-05 (9th Cir. 1983); Pope v. Savings Bank of Puget Sound, 850 F.2d 1345, 1355 (9th Cir. 1988). *See supra* notes 60-67 and accompanying text.

83. Fed R. Civ. P. 39(a); *see* note 6 for expressed language; *White*, 903 F.2d at 703.

84. See *White*, 903 F.2d at 703. The Second and Fourth Circuits also departed from a strict interpretation of Fed. R. Civ. P. 39(a). *White*, 903 F.2d at 703.

85. *Id.*

86. *Id.*

87. *Id.*

## B. CONCURRENCE

Judge Alarcon, concurring, would have overruled *Palmer* on other grounds, reasoning that if a party were permitted to raise the jury trial issue for the first time on appeal, the trial judge would be effectively "ambushed."[88] He found persuasive the reasoning by the *Palmer* dissent[89] that it is dispositive if an issue is not preserved for appeal because then it is unnecessary to decide whether participation in a bench trial without objection constitutes waiver of a timely jury demand.[90]

Judge Alarcon relied on reasoning set forth in *Lovelace v. Dall*[91] and *Westinghouse Electric Corp. v. Weigel*[92] which suggested that an error asserted on appeal should not be considered if a substantive or procedural issue were not raised in the lower court since the potential error might have been avoided had the issue been previously raised.[93] Ultimately, Judge Alarcon agreed with the majority's decision[94] because the defendant knew a jury trial had not been granted.[95] However, he noted that the mistake had not been brought to the court's attention so there had been no opportunity to correct the error.[96] By prohibiting correction of the error, a litigant would be prevented from asserting an issue on appeal that for strategic reasons he might have intentionally ignored in the district court.[97]

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88. White v. McGinnis, 903 F.2d 699, 704 (Alarcon, J., concurring)(quoting Palmer v. United States, 652 F.2d 893, 897 (9th Cir. 1981)).

89. Palmer v. United States, 652 F.2d 893, 897 (9th Cir. 1981)(Chambers, J., dissenting).

90. *White*, 903 F.2d at 704.

91. 820 F.2d 223 (7th Cir. 1987)(per curiam). *See supra* note 34 and accompanying text.

92. 426 F.2d 1356 (9th Cir. 1970)(per curiam). *See supra* note 18 and accompanying text.

93. *White*, 903 F.2d at 704.

94. *Id.*

95. *Id.*

96. *Id.* "A party will not be allowed to speculate with the court by letting error go unremarked and then seek a new trial on the basis of the error if the outcome of the case is unfavorable to him." *Id.* (quoting 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2472, at 455 (1st ed. 1971)).

97. *White*, 903 F.2d at 705 (citing Partenweederei, MS Belgrano v. Weigel, 313 F.2d 423, 425 (9th Cir. 1962)(per curiam)). This strategy sets the scope of the lawsuit, thereby preventing piecemeal litigation and consequent waste of time of both trial and appellate courts. It also gives the appellate court the benefit of the district court's wisdom. *Id.*

Diverging from the majority, Judge Alarcon did not perceive that White failed to propound a legal issue, but rather he failed to object to an obvious procedural error.[98] Judge Alarcon did not believe, nor did the majority suggest, that it had been demonstrated that justice demanded reversal since White failed to object to the absence of a jury.[99] Except for *Palmer*, Judge Alarcon was unable to find precedent to support the notion that an issue could be raised on appeal when the appellant had known of the error but had not objected at the trial court level.[100] In affirming the district court, Judge Alarcon reasoned that the majority's rationale might encourage litigants to remain silent in the face of clear error, await judgment of the court, and then raise the issue on appeal.[101]

### C. DISSENT

The dissent would have reaffirmed *Palmer*, as it disagreed with the majority's approach that preservation of the right to a jury trial should not be "formalistic" or "rigid."[102] Judge Kozinski for the dissent criticized the majority's opinion as "engrafting a judicially-created exception onto the statutory language"[103] of Rules 38(d) and 39(a).[104]

He emphasized that the language of Rules 38(d) and 39(a) is clear and unambiguous.[105] There was neither a written nor oral

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98. *White*, 903 F.2d at 705. The majority had agreed to consider the merits because of its previous ruling that it would entertain legal issues not raised below which were purely legal and where the record was fully developed. *Id.* (citing United States v. Gabriel, 625 F.2d 830, 832 (9th Cir. 1980)).

In, In re Southland Supply, Inc., 657 F.2d 1076 (9th Cir. 1981)(general rule that appellate courts will not review issues not objected to at trial except to prevent manifest injustice also applies in bankruptcy proceedings appeals), the Ninth Circuit determined that it would not review an objection to a trial procedure not raised below "unless necessary to prevent manifest injustice." *White*, 903 F.2d at 705 (citing In re Southland Supply, Inc., 657 F.2d 1076, 1079 (9th Cir. 1981)).

99. *White*, 903 F.2d at 705.

100. *Id.*

101. *Id.*

102. White v. McGinnis, 903 F.2d 699, 705 (9th Cir. 1990)(Kozinski, J., dissenting, with whom Schroeder, J. and Fletcher, J. joined).

103. *Id.*

104. *Id.*

105. *White*, 903 F.2d at 706. A timely jury demand "may not be withdrawn without the consent of the parties" and consent may only be expressed either "by written stipulation," or "by an oral stipulation made in open court and entered on the record." *Id.*

stipulation consenting to a bench trial in *White*.[106] Thus, the dissent opined that the court should have followed the clear mandate of the Rules as interpreted by *Palmer* to reverse the district court.[107]

Judge Kozinski asserted that there should be a literal approach to rules and statutes.[108] He buttressed his arguments[109] by focusing on other language within Rule 38 which provides that the seventh amendment jury trial right shall be strictly preserved to the parties.[110] The dissent explained that this language was to prevent the inadvertent forfeiture of the protections built

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(quoting FED. R. CIV. P. 38(d) and 39(a)).

Judge Kozinski's reasoning was founded on a recent United States Supreme Court case which determined that the process of statutory interpretation starts with the statute's language. *See* Hallstrom v. Tillamook County, 110 S. Ct. 304, 308 (1989). In *Hallstrom*, the Court held that the language of the Resource Conservation and Recovery Act, 42 U.S.C. section 6972(a)(1) (1988), was explicitly clear that it was mandatory that any person must notify the Environmental Protection Agency, in the state in which the violation of the Act occurred, and the alleged violator must be given 60 days before commencing the litigation. *Id.* Since the Federal Rules of Civil Procedure were created by the Supreme Court under the Rules Enabling Act (28 U.S.C. § 2072) (1988), the courts are required to treat the Federal Rules as they would statutes. *Id. See also* Bethesda Hosp. Ass'n v. Bowen, 108 S. Ct. 1255, 1258 (1988)(administrative regulations governing reimbursement of malpractice insurance costs were held valid because strained statutory interpretation by the Secretary was inconsistent with the express language of the statute).

106. *White*, 903 F.2d at 706.

107. *Id.*

108. *Id.* Judge Kozinski cited two recent Supreme Court cases to support that there should be a literal approach to rules and statutes. *Id.* at 706 (citing Hallstrom v. Tillamook County, 110 S. Ct. 304 (1988) and Guidry v. Sheet Metal Workers Nat'l Pension Fund, 110 S. Ct. 680 (1990)(a constructive trust on union official's pension benefits in favor of the union is not warranted, even though the official had embezzled funds from the union). " '[I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.' " *Id.* (quoting Hallstrom v. Tillamook County, 110 S. Ct. 304, 311 (1988), quoting Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980)). "[C]ourts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text." *White*, 903 F.2d at 706 (quoting Guidry v. Sheet Metal Workers Nat'l Pension Fund, 110 S. Ct. 680, 687 (1990)).

109. *White*, 903 F.2d 706. Judge Kozinski conceded that the result in *Palmer* appeared to be a "triumph of form over substance" in that plaintiff sat silent during the proceedings and raised his objection only after the outcome proved unsatisfactory to him. However, Judge Kozinski believed that the majority's flexible interpretation of the rule in response to apparent exigencies of a particular case could work greater unfairness upon larger numbers of litigants. *Id.*

110. *Id.* FED. R. CIV. P. 38(a) states in pertinent part: "[T]he right of trial by jury as declared by the Seventh Amendment to the Constitution . . . shall be preserved to the parties *inviolate*."(emphasis added).

into Rules 38 and 39 and the constitutional right to a jury trial itself.[111]

Judge Kozinski noted that the defendant as well as the plaintiff, could have informed the district court of its error.[112] He emphasized that defendant was represented by counsel at all times, and knew the plaintiff had requested a jury.[113] Therefore, he argued that deprivation of plaintiff's rights was not entirely plaintiff's fault, as the majority and concurrence concluded.[114]

Judge Kozinski conceded that by reaffirming *Palmer*, as he proposed, the Ninth Circuit would be alone in adhering to the literal language of Rules 38(d) and 39(a).[115] However, he noted several previous Ninth Circuit decisions bolstered his position.[116]

Judge Kozinski emphasized that the Ninth Circuit's en banc decision in *United States v. Fernandez-Angulo*,[117] which was decided immediately prior to *White*, supported his analysis.[118] In *Fernandez-Angulo*, it was held that a remand for resentencing was required when a district court failed to make findings

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111. *White*, 903 F.2d at 706.

112. *Id.*

113. *Id.* Judge Kozinski also suggested that the elementary research by the defendant would have revealed that plaintiff's right was not waived by acquiescence or mute assent. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* Judge Kozinski cited the following cases as partial support for his argument: Purba v. INS, 884 F.2d 515, 517-18 (9th Cir. 1989)(a deportation hearing had to be physically "before" an immigration judge). United States v. Buzard, 884 F.2d 475, 475-76 (9th Cir. 1989)(courts lack authority to extend time for filing notice of appeal under FED. R. APP. P. 4(b) upon a showing of "excusable neglect"). *Buzard* was rendered because FED. R. CRIM. P. 49(c) expressly states that a clerk's failure to notify a party of entry of judgment is no excuse. *White*, 903 F.2d at 707.

Also, United States v. Eccles, 850 F.2d 1357, 1359-60 (9th Cir. 1988), held that the government was not permitted to pursue an interlocutory appeal of a suppression ruling unless the certificate required in 18 U.S.C. § 3731 was filed on time. United States v. Avendano-Camacho, 786 F.2d 1392, 1394 (9th Cir. 1986), exemplified that deadlines for filing notice of appeal were mandatory, and an exception could not be created for attorney neglect.

Further, in International Ass'n of Ironworkers' Local Union 75 v. Madison Indus., 733 F.2d 656, 658-59 (9th Cir. 1984), the Ninth Circuit upheld the rule that 28 U.S.C. § 1291 required notice of appeal to be filed within 30 days of judgment on the merits even though attorneys' fees remained unresolved. Finally, in United States v. Armored Trans., Inc., 629 F.2d 1313, 1316-17 (9th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981), FED. R. CRIM P. 6(g) was literally construed to require that the grand jury's term was to begin on the impanelment date, regardless of the first day of service.

117. United States v. Fernandez-Angulo, 897 F.2d 1514 (9th Cir. 1990)(en banc).

118. *White*, 903 F.2d at 707.

pursuant to FED. R. CRIM. P. 32(c)(3)(D).[119] The Ninth Circuit rejected a "practical interpretation" that would have avoided resentencing because such a determination would have also glossed over the specific language and clear mandate of the Rule.[120]

Judge Kozinski's principal criticism of the majority's analysis centered on the injustice a plaintiff would suffer by relying on *Palmer*.[121] He argued that the majority's approach was not only inconsistent with *Fernandez-Angulo*, but also raised serious questions as to the proper method of interpreting and applying federal rules of procedure in the Ninth Circuit.[122] Contrary to *Fernandez-Angulo*, which held Rule 32's plain language binding,[123] *White v. McGinnis*, through a different en banc panel of judges, treated the literal language of Rules 38 and 39 as little more than obstacles to be overcome in depriving plaintiff of his constitutional right to a jury trial.[124]

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119. United States v. Fernandez-Angulo, 897 F.2d at 1515-16. After appellant Fernandez-Angulo pled guilty, a pre-sentence report was prepared stating that he was experienced in the drug trade and had initiated the negotiations leading to the crimes to which he had pled guilty. At sentencing, the district court failed: (1) to resolve the disputed factual matters; (2) to state that the contested factual matters would not be taken into account in sentencing the defendant; and (3) to append to the presentence report a written record of any findings or determinations which resolved the controverted matters. *Id.* at 1515.

FED. R. CRIM. P. 32(c)(3)(D) provides:

> If the comments of the defendant and defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons.

120. See *Fernandez-Angulo*, 897 F.2d at 1516, in which the Ninth Circuit asserted, "[s]trict compliance with the rule is required." *Id.* While noting that other circuits had split on the question, the Ninth Circuit concluded that "the brightline [it] adopt[ed] imposes no onerous burden on district courts and is most faithful to the language of the Rule." *Id.*

121. *White*, 903 F.2d at 708. Plaintiff-appellant White "discharged fully" the Federal Rules of Civil Procedure and the law of the Ninth Circuit in securing his right to a jury trial. *Id.*

122. *Id.*

123. 897 F.2d at 1515-16.

124. *White*, 903 F.2d at 708. Both *White* and *Fernandez-Angulo* involved a defend-

## V. CRITIQUE

The holding in *White v. McGinnis* presents a danger. If Rules 38 and 39 are interpreted non-literally, courts may liberally construe other rules and statutes in the name of substance over procedure.

More significantly, the holding creates uncertainty as to whether the Ninth Circuit will follow a liberal or literal application of a given procedural rule. Such confusion will likely produce a flurry of unnecessary appeals premised on inconsistent statutory and constitutional interpretation.

Notably, *White* was the first Ninth Circuit court case that did not involve affirmative conduct amounting to a stipulation of jury trial waiver.[125] The plaintiff's conduct in *White*, according to the majority, was "nothing more than silence"[126] because he did not actively participate in the bench trial.[127]

The majority regarded *White* as an opportunity, therefore, to align the Ninth Circuit with the case law of its sister circuits.

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ant's failure to call the district court's attention to its noncompliance with procedural rules. *White* 903 F.2d at 708 n.4. The dissent stressed that the Ninth Circuit should conform to its own guiding principals rather than those of other circuits, reasoning that the rules pertaining to trial conduct can differ somewhat among circuits, even among districts, without creating unfairness for the litigants in either jurisdiction according to the dissent. *Id.* at 708. However, unfairness arises where settled rules change within a jurisdiction. *Id.* The dissent also asserted that adhering to the rule set down in *Palmer* would have minimal impact since waiver of the right to a civil jury trial had not come up on appeal in the Ninth Circuit since *Palmer* in 1981, and only 14 appellate decisions nationwide had raised this issue in the previous 41 years. *Id.*

125. *White*, 903 F.2d 699, 708 (9th Cir. 1990). In both Reid Bros. Logging v. Ketchikan Pulp Co., 699 F.2d 1292 (9th Cir.), *cert. denied*, 464 U.S. 916 (1983), and Pope v. Savings Bank of Puget Sound, 850 F.2d 1345 (9th Cir. 1988), the respective parties waived the right to trial by jury by performing affirmative acts which formed part of the trial record and which the court could plausibly interpret as an oral or written stipulation. *White*, 903 F.2d at 703.

In *Pope*, the plaintiff knowingly consented to waiver of the right to a jury trial where counsel stated that he was done with the jury. *White*, 903 F.2d at 708. In *Reid Bros. Logging*, defendant's consistent efforts to defeat plaintiff's jury request, i.e. filing a motion to strike the jury demand in an appearance before the district court judge, demonstrated that defendant was not relying on that request and constituted a waiver of the defendant's rights to object when plaintiff eventually determined to withdraw its jury request. *White*, F.2d at 708.

126. *White*, 903 F.2d at 699-700.

127. *Id.*

For that reason, the majority rejected the formalistic approach to civil jury trial waiver advanced by *Palmer* and adopted a "nothing more than silence" definition of plaintiff's conduct, to significantly modify the meaning of Rules 38(d) and 39(a).[128] Seemingly, this remedy was fashioned to halt the potential procedural abuse by a party who could unsuccessfully argue the merits of his case, but then unjustly avail himself of another opportunity to present the substantive issues in another forum.

Our legal system militates against relitigation of claims and issues which have been tried and decided.[129] However, an equally compelling policy dictates that to implement Congress's specific intent, it is the statute's specific language, and interpretation of rules based on congressional statutes, that should govern.[130]

Appellate decisions should not be based on whether a purely legal issue was raised and whether the record was fully developed, as the majority in *White* required.[131] As Judge Alarcon suggested in his concurring opinion, if an issue is not raised at trial, it ordinarily should not be argued on appeal.[132] This is the most balanced approach to the dilemma courts face when a party appears accidentally or purposefully to rely on a procedural error to gain a substantive advantage.[133] Adherence to this established policy preserves expectations that rules and statutes will be construed in a strict, literal, and consistent manner.[134]

Failure to object should waive the issue on appeal, whether for jury trial or other error.[135] This approach is clearly the most practical from the standpoint of judicial economy. Litigants would then be obligated to remedy error in the trial court where the case had originated.

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128. *Id.*

129. *See* Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339 (1948), for a more complete discussion of res judicata.

130. *See* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc. 447 U.S. 102, 108 (1980)(the starting point for interpreting statutory language should be the statute itself).

131. *White*, 903 F.2d at 700 n.4 (citing United States v. Gabriel, 625 F.2d 830, 832 (9th Cir. 1980)).

132. *Id. See supra* note 96 and accompanying text.

133. *White*, 903 F.2d at 700 n.4.

134. *See supra* note 97 and accompanying text.

135. 9 C.WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2472, at 455 (1st ed. 1971).

The dissenting opinion in *White*, if ever adopted, also presents a potential danger. The dissent in *White* concluded that it is the *defendant's* as well as the plaintiff's obligation to raise the trial court's procedural error.[136] The dissent disagreed with creating an exception to the Federal Rules of Civil Procedure.[137] Also, it appeared to advance the proposition that both parties might have the duty to inform the trial court of its procedural error under pain of reversal on appeal.[138] Such a suggestion undermines the principle of adversarial confrontation.

The Ninth Circuit in *White*, by overturning *Palmer*, did align itself with other circuits.[139] However, *Palmer's* demise is inconsistent with the Ninth Circuit's history of strict and literal adherence to rules and statutes.[140] *White* also conflicts with United States Supreme Court cases which discourage judicial exceptions that are contrary to procedural requirements specified by the legislature.[141]

## VI. CONCLUSION

The Ninth Circuit in *White v. McGinnis*[142] established an inconsistent basis of literal/non-literal interpretation of the Federal Rules of Civil Procedure. The court attempted to fashion a

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136. *White*, 903 F.2d at 707.

137. *Id.* at 705-06.

138. *See White*, 903 F.2d at 707.

139. *See* Wool v. Real Estate Exch., 179 F.2d 62, 63 (D.C. Cir. 1949)(where counsel for defendant acquiesced in action of the trial judge in dismissing the jury after some of the evidence was in and then proceeding to decide the case himself as an equity judge, alleged right to a jury trial was waived); Allen v. Barnes Hosp., 721 F.2d 643, 643-44 (8th Cir. 1983)(*see supra* note 78 and accompanying text); Lovelace v. Dall, 820 F.2d 223, 227-28 (7th Cir. 1987)(*see supra* note 34 and accompanying text); Sewell v. Jefferson County Fiscal Court, 863 F.2d 461, 464-66 (6th Cir. 1988)(by failing to object at time trial court granted motion to continue jury trial or remove case from jury trial docket and continue case for trial before the judge, plaintiff waived right to a jury trial), *cert. denied*, 110 S. Ct. 75 (1989); Southland Reship, Inc. v. Flegel, 534 F.2d 639, 643-44 (5th Cir. 1976)(at hearing where defense counsel stated that jury trial had been requested on damage claims, only right to jury trial on liability issues was waived); United States v. 1966 Beechcraft Aircraft Model King Air, 777 F.2d 947, 950-51 (4th Cir. 1985)(*see supra* note 74 and accompanying text); Royal Am. Managers, Inc. v. IRC Holding Corp., 885 F.2d 1011, 1018-19 (2d Cir. 1989)(*see supra* note 70 and accompanying text).

140. White v. McGinnis, 903 F.2d at 706.

141. *Id.* at 707 (citing Hallstrom v. Tillamook County, 110 S. Ct. at 311 quoting Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980)). *See also* Guidry v. Sheet Metal Workers Nat'l Pension Fund, 110 S. Ct. 680 (1990).

142. 903 F.2d 699 (9th Cir. 1990).

remedy to prevent the party from utilizing the trial court's procedural error to realize a substantive windfall,[143] and to conform with the approach taken by sister circuits. However, a litigant's perception of how the court will interpret procedural rules will be most assuredly obscured by this decision.

Portions of the majority's opinion suggest evolution from a formalistic approach to preserving the jury trial right.[144] However, the strict adherence to procedural requirements promulgated most notably by the Ninth Circuit in *United States v. Fernandez-Angulo*,[145] and by the Supreme Court in *Hallstrom v. Tillamook County*[146] and *Guidry v. Sheet Metal Workers National Pension Fund*,[147] seems likely to generate new controversies in which the courts will debate to what extent, if any, rules of procedure should be followed literally and take precedence over substance.

*Herber Carlton Leney, Jr.**

143. *White*, 903 F.2d at 700. Plaintiff knowingly participated in a bench trial and then appealed the adverse verdict, based on non-waiver of his jury trial rights. *Id.*

144. *Id.* at 701-03.

145. 897 F.2d 1514 (9th Cir. 1990)(en banc). *See supra* notes 117-24 and accompanying text.

146. 110 S. Ct. 304 (1989). *See supra* notes 105-08 and accompanying text.

147. 110 S. Ct. 680 (1990). *See supra* note 108 and accompanying text.

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