

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-40781  
Conference Calendar

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RICHARD JAMES RANDLE,

Plaintiff-Appellant,

versus

MICKEY HUBERT, Sheriff,

Defendant,

B.T. BEDDINGFIELD, ETC., ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Eastern District of Texas  
USDC No. 6:93-CV-449  
- - - - -

(January 25, 1995)

Before POLITZ, Chief Judge, and HIGGINBOTHAM and DeMOSS,  
Circuit Judges.

PER CURIAM:\*

Richard James Randle's only argument is that the district court erred in denying his request for a jury trial because "[a]ppellant had no earlier hint by the United States Magistrate Judge that a trial was being contemplated so soon upon the heels of the evidentiary hearing." Fed. R. Civ. P. 38(b) requires that a party demand a trial by jury on any issue triable of right by a

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\* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

jury "by serving upon the other parties a demand therefor in writing . . . not later than ten days after service of the last pleading directed to such issue." "A complaint raises an issue only once within Rule 38(b)'s meaning--when it introduces it for the first time." Fredieu v. Rowan Cos., Inc., 738 F.2d 651, 653 (5th Cir. 1984) (internal quotation omitted). A party's failure to serve and file a demand as required by subparagraph (b) of Rule 38 "constitutes a waiver by the party of trial by jury." Fed. R. Civ. P. 38(d). After waiver, the court in its discretion upon motion may order a jury trial on any or all of the issues. Fed. R. Civ. P. 39(b).

Randle's original complaint, filed in August 1993, contained no demand for a jury trial; not until March 14, 1994, did Randle file a demand. By failing to comply with the requirements of Rule 38(b), Randle waived his ability to demand a jury trial of right. The district court denied Randle's demand for a jury trial as untimely filed. Even if Randle's demand were construed as a Rule 39(b) motion (though Randle's argument does not challenge the district court's discretion under Rule 39(b)), "it is not an abuse of discretion to deny a Rule 39(b) motion when the failure to make a timely demand for a jury trial results from mere inadvertence on the part of the moving party." Fredieu, 738 F.2d at 654 (internal quotation and citation omitted); see also Farias v. Bexar County Bd. of Trustees For Mental Health Mental Retardation Servs., 925 F.2d 866, 873 (5th Cir.) (despite general principle that a court should grant a jury trial in the absence of strong and compelling reasons to the contrary, "we adhere to a

long line of precedent in finding no abuse of discretion . . . when the failure to make a timely jury demand results from mere inadvertence on the part of the moving party"), cert. denied, 112 S. Ct. 193 (1991). Randle concedes that he did not take any action until after the magistrate judge set the matter for trial, approximately seven months after the issues were raised in the complaint, and does not articulate any reason for his inadvertence. Inadvertence alone does not relieve a party from waiver. Id. The magistrate judge's decision was not an abuse of discretion.

Randle's appeal has presented no issue of arguable merit, rendering the appeal frivolous. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983); 5th Cir. R. 42.2. The appeal is DISMISSED.