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Appellate Practice and Procedure

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Appellate Practice and Procedure

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I. INTRODUCTION

This survey Article tracks the 1991 developments in appellate practice and procedure for the United States Court of Appeals for the Eleventh Circuit.

II. JURISDICTION

A. Statutory Foundation of Appellate Jurisdiction and Exceptions Recognized by Case Law

Jurisdiction of the federal appellate courts is controlled by statute. Whenever a district court has rendered a final order, 28 U.S.C. § 1291 authorizes appellate review.[1] However, if an order is interlocutory, jurisdiction derives from 28 U.S.C. § 1292.[2] If these statutory provisions are

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1. 28 U.S.C. § 1291 (1988). An order may become final for purposes of appeal when the litigation is resolved in the district court. One example of finality occurs when the district court dismisses a lawsuit. However, such an order is not final and appealable if leave to amend is allowed, unless the time for amendment has elapsed. Briehler v. City of Miami, 926 F.2d 1001, 1002 (11th Cir. 1991). An order may also be deemed final where the district court directs the entry of final judgment as to one or more but fewer than all the claims or parties pursuant to Federal Rule of Civil Procedure 54(b). The appellate courts give substantial deference to the district court's discretionary determination of finality under the rule. Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365, *reh'g denied*, 706 F.2d 318, *cert. denied*, 464 U.S. 893 (1983). For an interesting case applying Rule 54(b), see Useden v. Acker, 947 F.2d 1563 (11th Cir. 1991) (discussed *infra* at part I(B)).

2. 28 U.S.C. § 1292 (1988). Interlocutory orders which might warrant appellate review include decisions granting, modifying, refusing or dissolving injunctions, *see* Greer v. Rome City Sch. Dist., 950 F.2d 688 (11th Cir. 1991); Haitian Refugee Ctr. v. Baker, 950 F.2d 685

not satisfied, an appellate court is ordinarily without jurisdiction and will not entertain an appeal.[3] However, the United States Supreme Court has established an exception to the finality rule in cases in which a district court finally determines claims of right which are collateral to the rights asserted in the action and too independent from those rights to justify deferred review.[4] This exception is commonly known as the *Cohen*[5] exception or referred to generically as the collateral order doctrine.

Elaborating on the *Cohen* exception, the United States Court of Appeals for the Eleventh Circuit has identified three factors necessary for finding an appealable collateral order: (1) the substance of the order must be independent and easily separable from the substance of other claims, (2) appellate review must be necessary to protect important interests of a party which would otherwise be lost, and (3) the issue of finality should be decided on practical, not narrow, technical grounds.[6] The court of appeals applied this exception to the finality rule in two cases decided in the past year.

In *In re Parklane/Atlanta Joint Venture*,[7] the court of appeals considered whether an order to withdraw reference could be a collateral order and therefore subject to appeal.[8] An order to withdraw reference occurs in bankruptcy litigation when the district court withdraws the bankruptcy court's authority to hear a case.[9] As a general rule, orders to withdraw reference are not appealable final orders unless they satisfy the *Cohen* exception.[10] In this case, however, the court of appeals found that the facts satisfied the first and third requirements of the collateral order exception and concentrated on the second element, whether immediate review was necessary to protect interests of the parties.[11] The court determined that unless an appeal was allowed one of the parties could lose his

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(11th Cir. 1991) (TRO had effect of preliminary injunction); and Haitian Refugee Ctr. v. Baker, 949 F.2d 1109 (11th Cir. 1991). Other interlocutory orders which might warrant appellate review include decisions appointing receivers, refusing to wind up receiverships or directing disposal of property; decisions in admiralty cases in which appeals from final decrees are allowed; or cases in which the district judge certifies that the question is worthy of immediate appeal and the appellate court concurs. 28 U.S.C. § 1292(a), (b) (1988).

3. *See* Greer v. Rome City Sch. Dist., 950 F.2d 688 (11th Cir. 1991); Bank v. Pitt, 928 F.2d 1108 (11th Cir. 1991).

4. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

5. *Id.*

6. Blum v. Bankatlantic Fin. Corp., 925 F.2d 1357, 1360 (11th Cir. 1991) (quoting Diaz v. Southern Drilling Co., 427 F.2d 1118, 1123 (5th Cir.), *cert. denied*, 400 U.S. 878 (1970)).

7. 927 F.2d 532 (11th Cir. 1991).

8. *Id.* at 534.

9. *Id.* at 534 n.1.

10. *See In re* King, 767 F.2d 1508, 1510 (11th Cir. 1985).

11. 927 F.2d at 534.

right to the continued benefit of bankruptcy jurisdiction absent a showing of cause for withdrawal.[12] As a result, the appeal was allowed.

The appellant in the second case did not fare as well. In *Blum v. Bankatlantic Financial Corp.*,[13] a class action lawsuit, defendant sought to appeal an order of the district court denying a motion to require additional notice to class members.[14] On appeal, defendant challenged the notification method used by plaintiff. Defendant had failed to object to the method when initially proposed by plaintiff.[15] Although the court recognized that an appeal of class notice procedures will lie as a collateral order if the notice omits a substantial number of the certified class,[16] the court dismissed the appeal. The court held that the failure to object to the notification procedure worked an estoppel absent concrete evidence of harm to the interests of class members.[17] According to the opinion, no such showing had been made and the collateral order doctrine would not save the otherwise interlocutory appeal.[18]

Rulings by a district court on a public official's defense of qualified immunity have also been treated as immediately appealable orders under the collateral order doctrine.[19] This exception to the finality rule insures that a public official's right to be free from the burden of litigation for official acts is not irretrievably lost by deferring review until after trial.[20] The qualified immunity issue typically arises in the context of a summary judgment proceeding, although it may also take the form of a motion to dismiss for failure to state a claim or a motion for judgment on the pleadings.[21] The decision of a court on questions of absolute immunity may also be reviewed by immediate appeal.[22] There is a split among the cir-

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12. *Id.* at 536.

13. 925 F.2d 1357 (11th Cir. 1991).

14. *Id.* at 1358.

15. *Id.* at 1361, 1363.

16. *Id.* at 1362. *Compare In re* Nissan Motor Corp. Antitrust Litig., 552 F.2d 1088, 1095 (5th Cir. 1977) (allowing appeal where notice insufficient) *with* Bennett v. Behring Corp., 629 F.2d 393 (5th Cir. 1980) (mere possibility of inadequate notice insufficient to show need for protecting class interests).

17. 925 F.2d at 1362-63.

18. *Id.*

19. Courson v. McMillian, 939 F.2d 1479, 1486 (11th Cir. 1991); Ansley v. Heinrich, 925 F.2d 1339, 1348 (11th Cir. 1991).

20. Mitchell v. Forsyth, 472 U.S. 511, 526-27 (1985). *Mitchell* establishes the principles underlying acceptance of immunity decisions as a collateral order for purposes of immediate review. For a discussion of qualified immunity as a defense, *see generally* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

21. *See* Ansley v. Heinrich, 925 F.2d 1339, 1348 (11th Cir. 1991).

22. Nixon v. Fitzgerald, 457 U.S. 731 (1982) (assertion of absolute immunity by former president); Crymes v. DeKalb County, Ga., 923 F.2d 1482 (11th Cir. 1991) (assertion of ab-

cuits as to whether a denial of Eleventh Amendment[23] immunity is an immediately appealable collateral order.[24]

As the court of appeals has recognized, panel decisions on the issue of jurisdiction to review denial of summary judgment based upon qualified immunity are confusing and possibly conflicting.[25]

Discordant panel opinions aside, the court of appeals did take the opportunity last year to eliminate a disturbing case which held that a qualified immunity defense could not be heard by immediate appeal if any other issue remained for trial in the district court. In 1990 the court decided *Green v. Brantley*,[26] a *Bivens* action against federal authorities who claimed qualified immunity. The complaint alleged infringement of both property and liberty interests, but defendants only sought qualified immunity as to the property interest claim, leaving the liberty interest claim for disposition by the district court.[27] The panel dismissed the appeal, stating that since a trial would be necessary regardless of the outcome of the appeal, judicial economy would best be served by avoiding piecemeal litigation.[28] The panel decision was later vacated and rehearing en banc was granted.[29]

On rehearing, the court held that regardless of whether an issue remained for trial in the district court, the court had jurisdiction to consider a qualified immunity appeal in order to narrow the claims that a

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solute immunity by county commission); Harris v. Deveaux, 780 F.2d 911 (11th Cir. 1988) (assertion of absolute immunity by judge).

23. U.S. CONST. amend. XI.

24. Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499, 1508 (11th Cir. 1990). In *Stewart* the court of appeals declined to resolve this issue for purposes of circuit law and opted instead to rely upon pendent jurisdiction to consider whether the Eleventh Amendment afforded immunity to the school board, board members, and superintendent. *Id.* at 1509. The court concluded that the *Cohen* doctrine furnished an adequate basis for the exercise of jurisdiction where a qualified immunity defense was also raised. *Id.* at 1502, 1509. The concept of pendent appellate jurisdiction is discussed further *infra* at part I(A).

25. Williams v. City of Albany, 936 F.2d 1256, 1259 (11th Cir. 1991). *Compare* Peppers v. Coates, 887 F.2d 1493, 1496-97 & n.7 (11th Cir. 1989) (holding factual dispute precludes immediate review) *and* Goddard v. Urrea, 847 F.2d 765, 769 (11th Cir. 1988) (same), *with* McDaniel v. Woodard, 886 F.2d 311 (11th Cir. 1989) (order immediately appealable despite factual dispute as to conduct) *and* Rich v. Dollar, 841 F.2d 1558, 1561 (11th Cir. 1988) (same). As the court recognized in *Howell*, an opportunity to resolve this conflict was lost when Horlock v. Georgia Dep't of Human Resources, 890 F.2d 388 (11th Cir. 1989), settled prior to rehearing en banc. 972 F.2d at 717 n.3. Another discussion of the conflicting cases is contained in the concurring opinion of Chief Judge Tjoflat in Bennett v. Parker, 898 F.2d 1530, 1535-378 (11th Cir. 1990).

26. 895 F.2d 1387 (11th Cir. 1990).

27. *Id.* at 1390.

28. *Id.* at 1393.

29. Green v. Brantley, 941 F.2d 1146, 1147 (11th Cir. 1991).

public official would be required to defend.[30] The court opined that to hold otherwise would disserve the final judgment rule by providing incentive for litigants to invent claims simply to preclude interlocutory appeals, thereby increasing the cost of litigation and the burden on the courts.[31]

Judges Johnson and Kravitch dissented from the majority opinion arguing that any reduction in the trial burden for the public officials was de minimis.[32] Both judges chastised the majority for relying upon cases allowing appeals where damages and injunctive relief claims had been separated for appeal.[33] Nevertheless, after *Green* it appears that appeals will be permitted on qualified immunity issues even though the appellate ruling will not be dispositive of the entire case against the public official.[34]

Though not governed by the collateral order doctrine, a closely related area of jurisdiction concerns cases in which the court considers non-final issues on appeal because of the presence of an order which is appealable.[35] Last year's cases present two extremes of this discretionary exercise of jurisdiction. In *Andrews v. Employees Retirement Plan*,[36] the court considered an order granting the plaintiff attorney fees and costs even though the district court did not consider the amount of such fees and costs. In holding that the amount of an attorney fee award need not be determined prior to its consideration in conjunction with an otherwise appealable order, the court adopted the views of the Sixth and Seventh Circuits.[37]

By contrast, in *Crymes v. DeKalb County*,[38] the court declined to exercise pendent jurisdiction to consider the district court's denial of a motion to dismiss while it simultaneously considered a defense of absolute legislative immunity.[39] Even though both parties eventually agreed that the court should consider the question, the court refused to do so.[40] Moreover, the court declined to delineate the scope of its discretion to exercise

30. *Id.* at 1152.
31. *Id.* at 1150.
32. *Id.* at 1153-54 (Johnson & Kravitch, JJ., dissenting).
33. *Id.* For an example of such a case, see Marx v. Gumbinner, 855 F.2d 783 (11th Cir. 1988), *abrogated on other grounds*, 111 S. Ct. 1934 (1991).
34. James v. City of Douglas, 941 F.2d 1539, 1542 (11th Cir. 1991). The demise of the panel opinion in *Green* may also raise questions about the continuing precedential value of Schopler v. Bliss, 903 F.2d 1373 (11th Cir. 1990), which relied on *Green* to dismiss the appeal in that case.
35. *See* Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499, 1509 (11th Cir. 1990); Myers v. Gilman Paper Corp., 544 F.2d 837, 847 (5th Cir. 1977).
36. 938 F.2d 1245 (11th Cir. 1991).
37. *Id.* at 1248 & n.6.
38. 923 F.2d 1482 (11th Cir. 1991).
39. *Id.* at 1485.
40. *Id.*

jurisdiction over issues pendent to an interlocutory appeal from a denial of absolute immunity, stating simply that under the circumstances of the case it was not warranted.[41]

B. Acquisition of Appellate Jurisdiction: The Filing of the Notice of Appeal

The filing of a timely notice of appeal is a jurisdictional prerequisite for appellate proceedings.[42] Although notices of appeal will be liberally construed, they must be filed in order to afford protection to a party. One example of the importance of a timely notice is found in a case last year which caused a procedural nightmare for one party. In *Pinion v. Dow Chemical, U.S.A.*,[43] a jury verdict was entered against the defendant.[44] The district court adopted two consent orders allowing thirty day extensions for the filing of post-trial motions by the defendant.[45] The defendant filed a motion within the extended time frames, which the court denied.[46] The defendant then filed a notice of appeal within thirty days of the order denying the motion.[47] On appeal, the court raised the question of its jurisdiction sua sponte and examined the district court's authority to expand the time for post-trial motions.[48] The court concluded that the extensions were beyond the authority of the district judge and that jurisdiction was improper unless some exception existed.[49]

The defendant argued that the doctrine of "unique circumstances"[50] should apply since he relied upon the trial court's orders extending the time for filing post-trial motions.[51] The court of appeals disagreed, noting that the doctrine is infrequently invoked,[52] that it is discretionary with the appellate court,[53] and that the attorney should have recognized the inconsistency between the consent orders and Federal Rule of Civil Pro-

41. *Id.* at 1485 n.4.

42. FED. R. APP. P. 4(a)(1); Useden v. Acker, 947 F.2d 1563, 1570 (11th Cir. 1991).

43. 928 F.2d 1522 (11th Cir. 1991).

44. *Id.* at 1524.

45. *Id.* The opposing party joined in the consent order executed by the district court.

46. *Id.* The motions were made under FED. R. CIV. P. 50(b) and 59.

47. 928 F.2d at 1524.

48. *Id.*

49. *Id.* at 1526.

50. This doctrine provides that an untimely appeal may be maintained if based upon a party's reasonable and good faith reliance upon judicial action which occurred within the applicable time frame and the party could have given timely notice if not lulled into inactivity. *Id.* at 1526-27 (quoting Willis v. Newsome, 747 F.2d 605, 606 (11th Cir. 1984)).

51. *Id.* at 1526.

52. *Id.* at 1527.

53. *Id.* at 1532.

cedure 6(b) which precluded such extensions.[54] Judge Johnson dissented from the opinion and argued that the majority implied the need for some assurance from the judicial officer as a prerequisite to application of the doctrine when the case law did not require such an affirmative oral or written statement from the district court.[55] The dissent suggested that it was bad policy to instruct litigants not to follow district court orders and suggested that the facts did not warrant such a windfall to the plaintiffs who had consented to the extensions.[56]

During the past year, the court of appeals on several occasions dealt with the question of whether jurisdiction exists when a notice of appeal is filed prematurely. Under the Federal Rules Of Appellate Procedure, a notice of appeal filed while a motion is pending under Federal Rules of Civil Procedure 50(b), 52(b), or 59 will be of no effect.[57] The notice of appeal "self-destructs" under the rules.[58] However, if a litigant files a notice of appeal prior to entry of judgment, and none of the cited motions remains pending, the premature notice of appeal is cured and is treated as if filed upon the date the judgment is entered.[59]

In *Davis v. Locke*,[60] a prison inmate brought a civil rights suit against prison guards. After a jury verdict against them, defendants filed a notice of appeal while their motion for new trial was still pending.[61] When the motion was denied, defendants amended the premature notice twice to specify the orders they wished to appeal.[62] On appeal, plaintiff urged the court of appeals to dismiss the appeal since the original notice was a nullity and could not be amended.[63] The court recognized that the Eleventh Circuit liberally construes notices of appeal and found that plaintiff would not be prejudiced by the appeal, especially since the amended notices set forth all orders to be appealed.[64] The court then construed the amended notices without reference to the original invalid notice and allowed the appeal.[65]

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54. *Id.* at 1534.

55. *Id.* at 1535-36 (Johnson, J., dissenting).

56. *Id.* at 1538 (Johnson, J., dissenting).

57. FED. R. APP. P. 4(a)(4). Motions for judgment, to amend or make additional findings of fact, to alter or amend the judgment, or for new trial fall into this category.

58. Griggs v. Provident Consumer Discount Corp., 459 U.S. 56, 60 (1982) (Per curiam) (citing 9 JAMES MOORE ET. AL., MOORE'S FEDERAL PRACTICE ¶ 204.12[1], at 4-65 n.17 (2nd ed. 1982)).

59. FED. R. APP. P. 4(a)(2). Kramer v. Unitas, 831 F.2d 994, 997 (11th Cir. 1987).

60. 936 F.2d 1208 (11th Cir. 1991).

61. *Id.* at 1211.

62. *Id.*

63. *Id.*

64. *Id.* at 1211-12.

65. *Id.* at 1212.

The court issued contradictory opinions in two cases dealing with certification of a case for appeal under Federal Rule of Civil Procedure 54(b).[66] In both cases the appellant filed a notice of appeal prior to entry of judgment under the rule. Neither case involved a pending motion described in Federal Rule of Appellate Procedure 4(a)(4).[67] In *Lindsey v. Storey*,[68] the court of appeals correctly held that the entry of judgment under the rule cured the premature notice of appeal and exercised jurisdiction.[69] However, in *Useden v. Acker*,[70] the court initially dismissed the appeal as premature.[71] Upon return of the case to the district court, the judge vacated the certification under Rule 54(b) and re-entered a new certification.[72] When the case reached the court of appeals again, the court reviewed the district court's actions under an abuse of discretion standard and concluded that jurisdiction did exist.[73] Ironically, if the court had held that jurisdiction was proper in the first appeal, there would have been no need for the extensive analysis used by the panel in the second appeal. *Useden* should be viewed as an anomaly and not in accord with prevailing practice.

The court of appeals decided another case involving dismissal of a notice of appeal. In *Jenkins By & Through Jenkins v. Florida*,[74] a final order was entered followed by a timely notice of appeal and a cross-appeal. Defendants subsequently dismissed the direct appeal and the case proceeded only on the cross-appeal.[75] After the appellate ruling the case was returned to the district court for further proceedings.[76] The parties agreed to stipulations and the court ultimately granted summary judgment to plaintiffs, which defendants moved to alter or amend.[77] Upon denial of their motion, defendants attempted to appeal not only that order but the prior order which they had earlier directly appealed.[78] The

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66. *See supra* note 1.

67. Useden v. Acker, 947 F.2d 1563 (11th Cir. 1991); Lindsey v. Storey, 936 F.2d 554 (11th Cir. 1991).

68. 936 F.2d 554 (11th Cir. 1991).

69. *Id.* at 557 n.2.

70. 947 F.2d 1563 (11th Cir. 1991).

71. *Id.* at 1570. Although a motion to amend had been made at the summary judgment hearing, that is not one of the motions which will cause the notice of appeal to be a nullity. *See* FED. R. APP. P. 4(a)(4). The court's misperception of the proper rule is evidenced in a footnote which cites to Rule 4(a)(1) without any mention of Rule 4(a)(2). 947 F.2d at 1570 n.6.

72. 947 F.2d at 1570.

73. *Id.* at 1571.

74. 931 F.2d 1469 (11th Cir. 1991).

75. *Id.* at 1471.

76. *Id.*

77. *Id.*

78. *Id.*

court of appeals rejected that attempt holding that the earlier order became final when defendants dismissed their appeal and that no further appeal would lie from that order.[79]

C. *Miscellaneous Decisions Impacting Appellate Jurisdiction of the Court of Appeals*

An appellate court, like all federal courts, is a court of limited jurisdiction.[80] As a result, every court is under an independent obligation to assure that a concrete controversy exists, even if the parties concede that jurisdiction is proper.[81] Two concerns of a federal court are questions of justiciability and ripeness.[82] In *Fire Fighters Local 2238 v. City of Hallandale*,[83] the court of appeals discussed both issues while reviewing a permanent injunction entered by the district court that precluded implementation of a challenged governmental policy. Justiciability is an amorphous concept that involves not only inquiry into the existence of a case or controversy, but a determination of whether it would be prudent for a federal court to exercise jurisdiction.[84] As to the anticipatory challenge raised in this case, the court looked specifically at the ripeness of the controversy and determined that the claim had not sufficiently matured to warrant redress.[85] In reaching this result, the panel did not preclude another lawsuit once the dispute was ripe for decision.[86]

Another concern that faces appellate courts is the question of mootness. In *Wakefield v. Church of Scientology*,[87] a religious organization attempted to hold plaintiff in contempt for violating the confidentiality of a settlement agreement and a newspaper sought access to the contempt proceedings in order to determine whether their reporters' qualified privilege insulated them from compelled testimony.[88] In making its mootness determination, the court looked to see if further judicial activity was necessary and whether any of the exceptions to the mootness doctrine ap-

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79. *Id.*
80. Fire Fighters Local 2238 v. City of Hallandale, 922 F.2d 756, 759 (11th Cir. 1991).
81. *Id.* at 759.
82. *Id.* at 759-60.
83. 922 F.2d 756 (11th Cir. 1991).
84. *Id.* at 759-60.
85. *Id.* at 763-64.
86. *Id.* at 764 n.7.
87. 938 F.2d 1226 (11th Cir. 1991).
88. *Id.* at 1227. The procedural journey undertaken in this case was long and arduous, involving an expedited appeal, a remand, and a second appeal. While the reader may wish to examine the exact course of the proceeding, its relevance here is not significant, but with one exception: The court recognized that the newspaper had argued different legal theories through the proceedings and on appeal and refused to expand its power of review to use these new theories to overcome the mootness of the controversy. *Id.* at 1230.

plied.[89] Although the court found that the constitutional questions asserted by the newspaper might impact future cases, it nevertheless concluded that no live controversy remained so as to permit the court to issue a decision and no exception saved the appellants.[90]

One exception to traditional mootness analysis in this circuit appears to be the right to secure review of a decision by the district court on whether recusal of a judge was appropriate. Though not a typical mootness situation, a recusal order has many of the same attributes, given that before appellate review the district judge will have already made a final ruling on the case and participated in the proceedings. In *Diversified Numismatics, Inc. v. City of Orlando*,[91] the court of appeals recognized the general rule in this circuit that a party may complain of the district court judge's refusal to recuse on appeal from a final judgment.[92]

Another area that might impact the court's jurisdiction while a case is on appeal is that of the exercise of in rem jurisdiction by the district court. Last year the court of appeals had occasion to consider two civil forfeiture actions in which jurisdiction was based upon a specific res.[93] In *United States v. Certain Real & Personal Property*,[94] the court considered whether it had jurisdiction of an appeal by a person with a partial interest in forfeited property when the property had already been sold pursuant to the district court's order. The court applied mootness principles and found that the interested party failed to heed the district court's instructions as to seeking a stay of the contemplated sale of the property.[95] The court held that it lost control of the res upon its lawful transfer and therefore it no longer had jurisdiction of the appeal.[96]

The other case, *United States v. Four Parcels of Real Property*,[97] dealt with the question of what effect the release of the res to a party had upon the court's jurisdiction when accompanied by a condition that the res be retained within the court's territorial jurisdiction. Typically, if the property is released to a party and taken beyond the territorial jurisdiction of

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89. *Id.* at 1229. Three exceptions exist to the mootness doctrine: (1) issues capable of repetition yet evading review; (2) where the appellant has taken all necessary steps to preserve the status quo; and (3) where the district court's order will have collateral legal consequences. *Id.*

90. *Id.* at 1230. The panel pointed to the unique circumstances of the case and doubted whether it could realistically occur again.

91. 949 F.2d 382 (11th Cir. 1991).

92. *Id.* at 385.

93. United States v. Certain Real & Personal Property, 943 F.2d 1292 (11th Cir. 1991); United States v. Four Parcels of Real Property, 941 F.2d 1428 (11th Cir. 1991).

94. 943 F.2d 1292 (11th Cir. 1991).

95. *Id.* at 1296.

96. *Id.* at 1295.

97. 941 F.2d 1428 (11th Cir. 1991).

the court, the court loses its in rem jurisdiction.[98] The court recognized the existence of a disagreement in the case law between the former Fifth Circuit and the Eleventh Circuit when custody of the res is lost but the property remains within the court's territorial jurisdiction.[99] The court found it unnecessary to resolve this conflict, however, given that the condition exacted by the district court assured custody of the res and protected the court's in rem jurisdiction.[100] The court concluded that under such circumstances the property holder was deemed to be a bailee of the property that was subject to seizure should the losing party prevail on appeal.[101]

One final area with respect to jurisdiction of appellate courts is worth noting. In two cases last year the court of appeals dealt with the "anomalous jurisdiction rule."[102] Under that rule, which relates to the question of intervention,[103] if the appellate court determines that the decision of the district court was correct or within its discretion, jurisdiction evaporates since proper denial of leave to intervene is not a final decision.[104] Thus, the appellate court's jurisdiction is "anomalous" and warrants dismissal of the appeal.

III. STANDARD OF REVIEW

A large number of cases decided in 1991 deal with the topic of what standard the appellate court will utilize in reviewing the district court's decision. Most simply recite the standard in the context of affirming the district court.[105] For instance, in reviewing findings of fact, the appellate court employs the "clearly erroneous"[106] standard.[107] Examples of factual findings subject to this standard are district court findings from a stipu-

98. *Id.* at 1435.

99. *Id.* at 1435-36 (citing United States v. One (1) 1983 Homemade Vessel Named *Barracuda*, 858 F.2d 643 (11th Cir. 1988) (holding jurisdiction proper if res within territorial jurisdiction), and *The Manuel Arnus*, 141 F.2d 585 (5th Cir.), *cert. denied*, 323 U.S. 728 (1944) (holding that jurisdiction improper if released from custody regardless of location of res)).

100. *Id.* at 1436. However, the court expressed the opinion that the rule should be that in rem jurisdiction remains even if the res is released, so long as the property remains within the court's territorial jurisdiction. *Id.* at 1436 n.17.

101. *Id.* at 1436.

102. Worlds v. Department of Health & Rehab. Svs., 929 F.2d 591 (11th Cir. 1991); United States v. South Fla. Water Management Dist., 922 F.2d 704 (11th Cir. 1991).

103. *See* FED. R. CIV. P. 24.

104. 929 F.2d at 592 & n.1.

105. *See, e.g.*, Bauer Lamp Co. v. Shaffer, 941 F.2d 1165 (11th Cir. 1991).

106. Sometimes this is stated that the findings will not be overturned unless the court of appeals is "left with the definite and firm conviction that a mistake has been committed." Cofield v. Alabama Pub. Serv. Comm'n, 936 F.2d 516 (11th Cir. 1991) (quoting United

lated record,[108] findings with respect to a reasonable hourly rate for attorney fees,[109] and findings underlying legal conclusions regarding res judicata and collateral estoppel.[110]

It is not uncommon for the court of appeals to apply two standards of review in close juxtaposition. For example, findings of fact will have a clearly erroneous standard, while application of the law to those findings will be subject to de novo review. In *Richardson v. Alabama State Board of Education*,[111] the court affirmed a district court's findings of fact on a clearly erroneous standard but reviewed the application of res judicata and collateral estoppel on a de novo basis.[112] The court applied a similar process with respect to res judicata in the case of *Adams v. Sewell*,[113] except that factual findings were made by the jury without a special finding with regard to res judicata.[114] In another case, *United States v. Harrell*,[115] the court applied a similar analysis to the question of fishermen's rights of access to navigable waterways.[116]

The district court first reviews challenges to jury findings on a motion for judgment notwithstanding the verdict ("JNOV"),[117] and thereafter the district court and court of appeals use the same standard: the finding will not be overturned unless a reasonable person could not arrive at a contrary verdict.[118]

Another non-intrusive standard is that of abuse of discretion. Generally the appellate court applies this standard to discretionary decisions of the district court, including those regarding Rule 11,[119] grant or denial of an

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States v. Gypsum Co., 333 U.S. 364, 395 (1948)). *See also* Moulds v. Wal-Mart Stores, Inc., 935 F.2d 252, 255 (11th Cir. 1991).

107. The standard for reviewing a district court's finding that race and gender were not dispositive in a reverse discrimination suit was stated as follows: " 'If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.' " Wilson v. Bailey, 934 F.2d 301, 305 (11th Cir. 1991) (quoting Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985)).

108. Connors v. Ryan's Coal Co., 923 F.2d 1461 (11th Cir. 1991).

109. Turner v. Secretary of Air Force, 944 F.2d 804, 808 (11th Cir. 1991).

110. Richardson v. Alabama State Bd. of Educ., 935 F.2d 1240 (11th Cir. 1991).

111. *Id.*

112. *Id.* at 1244.

113. 946 F.2d 757, 762 (11th Cir. 1991).

114. *Id.* at 762.

115. 926 F.2d 1036 (11th Cir. 1991).

116. *Id.* at 1039. *See also* Barnes v. Lacy, 927 F.2d 539 (11th Cir. 1991) and McRae v. Seafarer's Welfare Plan, 920 F.2d 819, 819 (11th Cir. 1991).

117. FED. R. CIV. P. 50(b).

118. *See, e.g.*, Roboserve v. Tom's Foods, Inc., 940 F.2d 1441 (11th Cir. 1991).

119. *See, e.g.*, Fox v. Acadia State Bank, 937 F.2d 1566, 1569 (11th Cir. 1991); United States v. Certain Real & Personal Property, 943 F.2d 1292, 1297 (11th Cir. 1991) (quoting

injunction,[120] discovery motions,[121] denial of a motion for summary judgment,[122] denial of leave to amend a pleading,[123] transfer to another venue,[124] award of attorney fees,[125] denial of permissive intervention,[126] recusal,[127] Rule 60(b) decisions permitting ratification of a judgment by a real party in interest,[128] awards of costs,[129] findings of frivolity under 28 U.S.C. § 1915(d),[130] and rulings on trial matters of any kind.[131]

In determining whether there was an abuse of discretion, the appellate court does not inquire how it "would have ruled if it had been considering the case in the first place, but whether the premise upon which the district court exercised its discretion was correct."[132] If the trial court uses a clearly erroneous principle of law or there is no evidence to support the decision rationally, an abuse of discretion has occurred.[133]

At least one case in 1991 held that abuse of discretion is more likely to exist when the district court has granted a new trial on general weight of

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Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)); Pelletier v. Zweifel, 921 F.2d 1465 (11th Cir. 1991).

120. The abuse of discretion standard applies to the injunction decision as a whole, but findings of fact are reviewed on the clearly erroneous standard and questions of law are reviewed de novo. *See* Ferraro v. Associated Materials, Inc., 923 F.2d 1441, 1444 (11th Cir. 1990); Planned Parenthood Ass'n v. Miller, 934 F.2d 1462, 1471 (11th Cir. 1991); Cable News Network, Inc. v. Video Monitoring Serv., Inc., 940 F.2d 1471 (11th Cir. 1991); Haitian Refugee Center, Inc. v. Baker, 950 F.2d 685, 686 (11th Cir. 1991).

121. Moore v. Armour Pharmaceutical Co., 927 F.2d 1194, 1197 (11th Cir. 1991).

122. Cofield v. Alabama Pub. Serv. Comm'n, 936 F.2d 512 (11th Cir. 1991). Denial of a motion for summary judgment is reviewed by the abuse of discretion standard in cases in which the district court has reason to believe that the better course would be to proceed to a full trial. *Id.* at 515.

123. Sun Bank, N.A. v. E.F. Hutton & Co., 926 F.2d 1030, 1035 (11th Cir. 1991).

124. Brown v. Connecticut Gen. Life Ins. Co., 934 F.2d 1193, 1197 (11th Cir. 1991).

125. Turner v. Secretary of Air Force, 944 F.2d 804, 808 (11th Cir. 1991); Richardson v. Alabama State Bd. of Educ., 935 F.2d 1240, 1248 (11th Cir. 1991) (enhancement of lodestar by 100%).

126. Worlds v. Department of Health & Rehab. Serv., 929 F.2d 591, 595 (11th Cir. 1991) (no clear abuse of discretion).

127. Diversified Numismatics v. City of Orlando, 949 F.2d 382, 384 (11th Cir. 1991).

128. Arabian Am. Oil Co. v. Scarfone, 939 F.2d 1472, 1477 (11th Cir. 1991); Delaney v. St. Paul Fire & Marine Ins. Co., 947 F.2d 1536, 1545 (11th Cir. 1991).

129. Manor Healthcare Corp. v. Lomelo, 929 F.2d 633, 639 (11th Cir. 1991).

130. Sun v. Forrester, 939 F.2d 924 (11th Cir. 1991) (denial of FED. R. CIV. P. 41 voluntary dismissal); Fisher v. Puerto Rico Marine Management, Inc., 940 F.2d 1502 (11th Cir. 1991).

131. *See, e.g.*, T. Harris Young & Assoc. v. Marquette Elections, 931 F.2d 816, 821 (11th Cir. 1991); Adams v. Sewell, 946 F.2d 757, 763 (11th Cir. 1991); Braswell v. ConAgra, 936 F.2d 1169, 1176 (11th Cir. 1991) (in ruling on enforcing pretrial orders the district court will be upheld unless it "so clearly abused its discretion that its action could be deemed arbitrary").

132. Manor Healthcare Corp. v. Lomelo, 929 F.2d 633, 639 (11th Cir. 1991).

133. *See* Moore v. Armour Pharmaceutical Co., 927 F.2d 1194, 1197 (11th Cir. 1991).

the evidence grounds. In the case of *Redd v. City of Phenix City*,[134] the court of appeals held that even though the appropriate standard is abuse of discretion, its review would be "extremely stringent to protect a party's right to a jury trial."[135] The district court had granted JNOV or in the alternative a new trial to municipal defendants on the ground that the evidence was insufficient to support the verdict that the city had fired plaintiff because of his race. The court of appeals reversed, remanded, and pointed out that its review would not have been as stringent had the district court granted a new trial because of "prejudice or due to an excessive jury award."[136]

In the case of *Roboserve, Ltd. v. Tom's Foods, Inc.*,[137] the trial court's grant of a new trial was affirmed and the appellate court indicated that it had applied a deferential standard because it was dealing with a cold record and the district court had the benefit of observing witness demeanor and the like. The appellate court clearly did not apply a stricter scrutiny to the exercise of the trial court's discretion. The court of appeals did indicate, however, that its scrutiny would vary according to the "nature of the issue presented for review."[138] While the result in *Roboserve* is inconsistent with that in *Redd*, the reasoning appears consistent. In *Roboserve* the district court premised the grant of a new trial on its finding that the jury award was so excessive as to shock the court's conscience.[139] The *Redd* panel had been careful to distinguish that ground from the ground of sufficiency of the evidence, which the district court had apparently used to substitute its judgment for that of the jury.[140]

Questions of law present the appellate court with a greater opportunity to change the result of the district court because the standard of review is de novo or plenary.[141] Sometimes the court of appeals expresses this prin-

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134. 934 F.2d 1211 (11th Cir. 1991).

135. *Id.* at 1215.

136. *Id.* The court of appeals explained its holding as paying "tribute to the jury system" and added:

> Our system of justice seeks a jury verdict arising from a trial free of impropriety. See McWhorter v. City of Birmingham, 906 F.2d 674, 677 (11th Cir. 1990). A certain degree of harmless error will not corrupt a jury verdict because the error is just that, harmless. However when prejudice occurs, the jury is stripped of a proper opportunity to deliberate and the trial judge is justified in granting a new trial . . . . The standard used in reviewing excessive jury awards is when the award 'shocks the conscience of the court'. . . . In such cases, the judge is justified in acting when the jury's verdict falls outside the realm of reason.

Id. Accord Insurance Co. of N. Am. v. Valente, 933 F.2d 921, 923 (11th Cir. 1991).

137. 940 F.2d 1441 (11th Cir. 1991).

138. *Id.* at 1447.

139. *Id.*

140. 934 F.2d at 1215 n.3.

141. *See, e.g.*, Williams v. United States, 931 F.2d 805 (11th Cir. 1991).

ciple by stating that it will review the question by applying the same standard that the district court did.[142] Thus, when the appellate court reviews the grant of summary judgment,[143] or JNOV,[144] or a motion to dismiss,[145] it uses the same standard of law that the district court must use.[146] One interesting case in which the court of appeals reversed the district court's refusal to grant a new trial is *Maccabees Mutual Life Insurance Co. v. Morton*.[147] The court of appeals found that since the legal theory on which the jury based its verdict was not apparent, the verdict must be correct on all three possible theories to prevent grant of a new trial.[148] Legal questions reviewed de novo in 1991 were: sufficiency of the evidence,[149] standing,[150] conclusions regarding res judicata and collateral estoppel,[151] scienter requirement for violations of the Securities Exchange Act of 1934, § 10(b),[152] personal jurisdiction under a state long-arm statute,[153] and interpretation of the appellate mandate.[154]

Somewhat related to the issue of which standard of review to apply to questions of law is whether to apply federal law or state law. In cases in which the law of decision is the law of the state where the district court

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142. *See, e.g.*, American Employers Ins. Co. v. Southern Seeding Serv., Inc., 931 F.2d 1453 (11th Cir. 1991).

143. Warren v. Crawford, 927 F.2d 559, 561 (11th Cir. 1991). The rule on summary judgment review in the Eleventh Circuit is somewhat different when it takes place after a jury verdict. The appellate court reviews all the evidence, not just that before the district court when it considered the summary judgment motion. Wenzel v. Boyles Galvanizing Co., 920 F.2d 778, 782 (11th Cir. 1991).

144. Ortega v. Schramm, 922 F.2d 684, 694 (11th Cir. 1991); Hill v. Winn Dixie, 934 F.2d 1518, 1526 (11th Cir. 1991).

145. *See, e.g.*, Municipal Util. Bd. v. Alabama Power Co., 934 F.2d 1493, 1500 (11th Cir. 1991); Taffet v. Southern Co., 930 F.2d 847, 851 (11th Cir. 1991).

146. For instance, in reviewing a grant of summary judgment, the court of appeals reviews the evidence and all the factual inferences in the light most favorable to the party opposing the motion and resolves all factual doubts in favor of the nonmovant. *See* Warren v. Crawford, 927 F.2d 559, 561-62 (11th Cir. 1991); Marine Coatings of Ala., Inc. v. United States, 932 F.2d 1370, 1375 (11th Cir. 1991). In reviewing a grant of JNOV, the court of appeals, like the district court, considers all of the evidence in a light most favorable to the nonmoving party and grants the motion only if a reasonable person could not arrive at a contrary verdict. Hill v. Winn Dixie, 934 F.2d 1518, 1526 (11th Cir. 1991).

147. 941 F.2d 1181 (11th Cir. 1991).

148. *Id.* at 1184.

149. T. Harris Young & Assoc. v. Marquette Elec., 931 F.2d 816, 821 (11th Cir. 1991).

150. Municipal Util. Bd. v. Alabama Power Co., 934 F.2d 1493, 1498-99 (11th Cir. 1991).

151. *See* Adams v. Sewell, 946 F.2d 757, 762 (11th Cir. 1991); Barnes v. Lacy, 927 F.2d 539, 543 (11th Cir. 1991).

152. Magna Inv. Corp. v. John Does One Through Two Hundred, 931 F.2d 38, 39 (11th Cir. 1991).

153. Sun Bank, N.A. v. E.F. Hutton & Co., 926 F.2d 1030, 1035 (11th Cir. 1991).

154. Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp., 943 F.2d 1511, 1517 (11th Cir. 1991).

sits and that law is unsettled, the court of appeals has ruled that it will defer to the district court's interpretation of unsettled law.[155]

IV. Waiver of Right to Appellate Consideration and Harmless Error

One of the long-standing principles of appellate law is that an appellate court ordinarily will not consider a legal issue or theory raised for the first time on appeal.[156] The corollary to this rule is that a party must clearly present a claim, argument, theory, or defense, and afford the district court an opportunity to recognize and rule on it in order to preserve that issue for review.[157] In *Wilson v. Bailey*,[158] the plaintiffs failed to object to the court's decision to conduct a bench trial and thus waived their right to trial by jury.[159] In another case, failure to object to testimony at trial did not preclude review of the issue on appeal. In *Wilkinson v. Carnival Cruise Lines, Inc.*,[160] the court of appeals found that the district court had improperly admitted hearsay statements that were vital to plaintiff's case. Defendant's failure to object at trial was not dispositive because plaintiff had the burden to establish the non-hearsay character of the statement under Federal Rule of Evidence 801(d)(2)(D) and she failed in that burden. In addition, defendant had objected to the statement at other times although apparently she failed to do so at trial.[161] Other waivers include failure to raise a non-jurisdictional defense[162] and failure to argue a point on appeal.[163]

The other side of the coin is an error preserved for appeal but which causes no prejudicial harm to the objecting party. The court of appeals found the following to be harmless: a district court's failure, contrary to statute, to make findings of fact and conclusions of law in a bench trial;[164]

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155. Ferrero v. Associated Materials, Inc., 923 F.2d 1441, 1444 (11th Cir. 1991). *Compare* Farred v. Hicks, 915 F.2d 1530, 1533 (11th Cir. 1990).

156. In Wakefield v. Church of Scientology, 938 F.2d 1226 (11th Cir. 1991), the court criticized a party for its "ever-changing theories . . . during the appellate process." *Id.* at 1229 n.1.

157. *See* Newmann v. United States, 938 F.2d 1258 (11th Cir. 1991).

158. 934 F.2d 301 (11th Cir. 1991).

159. *Id.* at 305.

160. 920 F.2d 1560 (11th Cir. 1991).

161. *Id.* at 1565-67. *See also* National R.R. Passenger Corp. v. Florida, 929 F.2d 1532, 1535 (11th Cir. 1991).

162. Kimbrough v. Bowman Transp., Inc., 920 F.2d 1578, 1581 (11th Cir. 1991).

163. In Picker Int'l, Inc. v. Parten, 935 F.2d 257, 265-66 (11th Cir. 1991) the court of appeals found sufficient argument in the appellate brief to prevent waiver.

164. Tejada v. Dugger, 941 F.2d 1551, 1555 (11th Cir. 1991).

failure to give the correct jury instruction;[165] admission of prejudicial evidence;[166] and refusal to consider an untimely motion for summary judgment.[167]

Law of the Case. The doctrine of law of the case is premised on the values of " 'efficiency, finality and obedience within the judicial system.' "[168] The rule is often stated: "findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal."[169] In 1991 the Eleventh Circuit Court of Appeals applied the doctrine in three cases.

In *Hester v. International Union of Operating Engineers*,[170] in its fourth appellate appearance, the issue was whether plaintiff could invoke law of the case to prevent defendants from raising a certain theory in the trial court after remand. The court of appeals found that the doctrine does not foreclose raising theories not explicitly ruled on by the appellate court; it only forecloses those actually ruled on, not those which might have been raised.[171] The court used similar reasoning in the case of *Luckey v. Miller*[172] and found that law of the case was not as rigid as res judicata and did not bar matters that could have been, but were not, raised in a prior appeal.[173] One exception to this well-established doctrine is the case of *Ad-Vantage Telephone Directory Consultants, Inc. v. GTE Directories Corp.*[174] There, an intervening change in state law, which was the law of decision, rendered the first appellate conclusion with regard to punitive damages incorrect by the time the case again reached the district court. The court of appeals found that it was appropriate for it and the district court to consider the change in the law and adjust its rulings accordingly despite a contrary finding in the former appellate opinion.[175]

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165. Hill v. Winn-Dixie Stores, Inc., 934 F.2d 1518, 1527-28 (11th Cir. 1991); Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560 (11th Cir. 1991).

166. *See* Kimbrough v. Bowman Transp., Inc., 920 F.2d 1578, 1583 (11th Cir. 1991); Wyatt v. Otis Elevator Co., 921 F.2d 1224 (11th Cir. 1991). In Braswell v. Conagra, 936 F.2d 1169, 1176 (11th Cir. 1991) the court found that striking prejudicial testimony "cured" the error.

167. Lemon v. Dugger, 931 F.2d 1465, 1468 (11th Cir. 1991).

168. Litman v. Massachusetts Mut. Life Ins. Co., 825 F.2d 1506, 1511 (11th Cir. 1989). *See also* Hester v. International Union of Operating Eng'rs, 941 F.2d 1574, 1581 n.9 (11th Cir. 1991).

169. Dorsey v. Continental Casualty Co., 730 F.2d 675, 678 (11th Cir. 1984).

170. 941 F.2d 1574 (11th Cir. 1991).

171. *Id.* at 1581 n.9.

172. 929 F.2d 618 (11th Cir. 1991).

173. *Id.* at 621.

174. 943 F.2d 1511 (11th Cir. 1991).

175. *Id.* at 1520.

V. Miscellaneous Issues: Authority of the Court of Appeals

The court of appeals has certain supervisory powers over district courts. In 1991 the Eleventh Circuit Court noted the existence of its power to reassign a case to a different district court judge on remand although it chose not to do so.[176] Another more informal way the court of appeals exercises its supervisory authority is to take certain cases and use them as a vehicle for instruction to the district courts about how to handle certain issues.[177] In *Pelletier v. Zweifel*,[178] the court of appeals found that the district court had abused its discretion in failing to award sanctions for violation of Rule 11.[179] The opinion contains an extensive discussion of how the Racketeering Influence in Corrupt Organizations ("RICO") complaint and subsequent filings by plaintiff in the district court were in violation of Rule 11.[180] The court noted that:

> At a time when the federal courts—which are a scarce dispute resolution resource, indeed—are straining under the pressure of an ever-increasing caseload, we simply cannot tolerate this type of litigation. Particularly with regard to civil RICO claims, plaintiffs must *stop and think* before filing them. If used correctly, the civil RICO provisions may have many salutary effects. When used improperly, as in this case, those provisions allow a complainant to shake down his opponent and, given the expense of defending a RICO charge, to extort a settlement. Such improper use of the civil RICO provisions comes at the expense of the federal judiciary and those who need ready access to the courts.[181]

In addition to directing the district court to impose Rule 11 sanctions, the court of appeals did "not hesitate one whit in awarding [defendant] double costs and a reasonable attorney's fee [sic] for opposing [plaintiff's] appeal."[182] The decision in *Pelletier* is an obvious encouragement to district courts to be more agressive in finding Rule 11 violations and awarding appropriate sanctions.

A final example of the discretionary use of appellate authority is the ability of the court of appeals to consider arguments not raised for the

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176. Clark v. Coats & Clarke, Inc., 929 F.2d 604, 609-10 (11th Cir. 1991).

177. *See, e.g.*, Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc); Pelletier v. Zweifel, 921 F.2d 1465 (11th Cir. 1991).

178. 921 F.2d 1465 (11th Cir. 1991).

179. Fed. R. Civ. P. 11.

180. 921 F.2d at 1513-23.

181. *Id.* at 1522.

182. *Id.* at 1523.

first time on appeal if it involves a pure question of law and failure to consider it would result in a miscarriage of justice.[183]

183. *See, e.g.*, Fane v. Edenfield, 945 F.2d 1514, 1519 n.11 (11th Cir. 1991); Clark v. Coats & Clarke, Inc., 929 F.2d 604, 609 (11th Cir. 1991). In *Fane* the court considered the new argument while in *Clark* it did not. Both involved the review of motions for summary judgment, in which new legal theories on appeal are more likely to be considered. *Id. See also* Bauman v. Savers Fed. Sav. & Loan Assoc., 934 F.2d 1506, 1510-11 (11th Cir. 1991).