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Trial Practice and Procedure

by Benton J. Mathis, Jr.*
and
Leigh C. Lawson**

I. INTRODUCTION

This Article surveys the 1991 decisions of the Eleventh Circuit Court of Appeals that made a significant impact upon the area of trial practice and procedure. One of the most important developments in this area of law occurred in the case Wright v. Preferred Research, Inc. In Wright the Eleventh Circuit examined closely Federal Rule of Civil Procedure 58 and, in a case of first impression, held that when a district court amends a judgment, Rule 58 did not require that a separate document, setting out the terms of the remitted judgment, be entered before the time for the appeal begins to run. Another case of particular interest to practicing attorneys is Pelletier v. Zweifel. In Pelletier the court of appeals reversed a district court's ruling and imposed double costs and attorney fees against a party for filing a frivolous complaint and a subsequent frivolous appeal. In addition, in Johns v. Jarrard, the Eleventh Circuit addressed the responsibility of federal trial judges in relation to answering

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1. 937 F.2d 1556 (11th Cir. 1991).
3. 937 F.2d at 1560-61.
5. 921 F.2d at 1520-21, 1523.
6. 927 F.2d 551 (11th Cir. 1991).
questions of a jury and the consequences when a judge’s statements mislead the jury.7

II. FEDERAL COURT POWER

A. Application and Interpretation of State Law

When dealing with unsettled questions of state law, the Eleventh Circuit continues to defer to the district court’s interpretation of the state law where the district court sits. The Eleventh Circuit reiterated this principle in Ferrero v. Associated Materials, Inc.8 In Ferrero defendant hired plaintiff as a building products salesman and plaintiff signed an employment contract that included a covenant not to compete. After working for defendant for approximately fourteen years, plaintiff resigned, and defendant initiated proceedings to enforce the covenant not to compete.9

Official Code of Georgia Annotated ("O.C.G.A.") section 13-8-2.1,10 which allowed Georgia courts to "blue pencil" a covenant not to compete so that it can be enforceable and not overreaching or unconscionable, had just become effective at the time of this appeal.11 No dispute about this new statute existed between the parties; if the new statute applied retroactively, the statute would save the covenant not to compete from being void under Georgia law. Plaintiff argued that this statute could not be applied retroactively because there was no authority to support that position and, therefore, the covenant not to compete was void. Upon review of the legislative history, however, the district court held the statute could be retroactively applied and reformulated the covenant not to compete. Plaintiff appealed the district court’s finding to the court of appeals.12

The Eleventh Circuit upheld the district court’s interpretation that the statute was retroactive.13 The court stated "[w]hile findings of law are ordinarily reviewable de novo, this court will defer to a district court’s interpretation of unsettled questions of the law of the state where the court sits."14 Therefore, since the district court in Georgia had determined that the "blue penciuning" provision of the statute was to be applied retroactively, the Eleventh Circuit deferred to its judgment.

7. Id. at 554.
8. 923 F.2d 1441 (11th Cir. 1991).
9. Id. at 1443.
11. 923 F.2d at 1445.
12. Id. at 1445-46.
13. Id. at 1449.
14. Id. at 1444.
In another case that involved questions of state law interpretation, the Eleventh Circuit deferred its decision pending the outcome of certification of the controlling question to the state's highest court. In *Miles v. Ashland Chemical Co.*, the issue was whether Georgia courts followed the discovery rule for the tolling of the statute of limitations so that the statute would not begin to run until the plaintiff discovered or should have discovered that the defendant was at least partially responsible for the decedent's death. The Eleventh Circuit stated that because this case dealt with the question of state law that implicated substantial public policy concerns and there was no controlling precedent from a Georgia court, the issue should be certified to the Georgia Supreme Court before a federal court ruled on the issues.

In *Regan v. United States Small Business Administration*, the Eleventh Circuit addressed the issue of whether to formulate a federal rule or adopt a state rule of decision when determining the enforcement of Small Business Administration ("SBA") loan guarantees. The court stated in determining whether to formulate a federal rule or adopt a state rule of decision, "a court must consider: (1) whether a federal program is such that it requires a uniform national rule; (2) whether application of state law would frustrate the specific objectives of the federal program; and (3) whether application of a federal rule would disrupt commercial relationships predicated on state law.

The Eleventh Circuit cited previous decisions that had applied state rules of decision to actions involving the SBA loan guarantee. The Fifth Circuit held in prior cases that the "adoption of a state law would not hinder the administration of the SBA, [nor was] a national rule for priority on contractual liens necessary." In light of these cases, the Eleventh Circuit reversed the trial court for its failure to incorporate state rules of decision as the applicable federal law to the SBA guaranty.

As can be seen by the cases above, the interpretation and the applicability of state law in federal courts is still an issue that the Eleventh Circuit continues to address on a regular basis. When faced with situations

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15. 924 F.2d 1026 (11th Cir. 1991).
16. Id. at 1028.
17. Id. at 1027.
18. 926 F.2d 1078 (11th Cir. 1991).
19. Id. at 1080-81.
20. Id. (quoting Federal Deposit Ins. Corp. v. Jenkins, 888 F.2d 1537, 1545 (11th Cir. 1989)).
22. 926 F.2d at 1081.
23. Id. at 1082.
requiring federal courts to construe principles of state law, the federal courts look to the decisions of the state's highest court. In those situations where the state's highest court has not addressed a particular question, the federal court will usually turn to the decisions of intermediate appellate courts. If there is an indication that the state's highest court would decide the issue otherwise, however, the federal court may certify a question to the state court. Conversely, the Eleventh Circuit has continually reiterated that federal law continues to be determinative of procedural issues arising in actions pending in the federal court.

B. Personal Jurisdiction

This year, not unlike prior years, the Eleventh Circuit has continued to address the issue of when a federal court may constitutionally exercise personal jurisdiction over a defendant. In a factually interesting case by the court this term, *Sun Bank, N.A. v. E.F. Hutton & Co.*, defendant Bunstein was vice president of sales at E.F. Hutton based in Massachusetts. Stevens was one of Bunstein's customers whose business, located in Florida, specialized in preparing and completing Navy contracts. In order to obtain working capital, Stevens approached Sun Bank about a loan. Sun Bank contacted several references that Stevens suggested would be able to attest to his financial well-being. One of the persons they contacted was Bunstein, who Stevens told Sun Bank was the manager of the securities listed on his personal financial statement.

Sun Bank called Bunstein on two separate occasions approximately eight months apart. During these conversations, Bunstein told Sun Bank that Stevens' accounts averaged nearly one million dollars. Bunstein also told Sun Bank that all of the accounts were in Stevens' name and Stevens owned the securities outright. The trial court found that Bunstein knew these statements were false when he made them to Sun Bank.

Sun Bank sued both Bunstein and his employer, E.F. Hutton, alleging that it had relied upon Bunstein's fraudulent misrepresentations when it lent Stevens approximately $670,000. The trial court found for Sun Bank.

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25. See Geary Distrib., 931 F.2d at 1434.
26. Id. at 1434-35.
28. 926 F.2d 1030 (11th Cir. 1991).
29. Id. at 1032.
30. Id.
and Bunstein and his employer appealed contending that the district court lacked personal jurisdiction over Bunstein. 31

In analyzing whether the district court had personal jurisdiction over Bunstein, the Eleventh Circuit initially looked to whether the defendant could have been properly served with process under the applicable Florida long-arm statute. 32 In a lengthy discussion regarding the Florida long-arm statute, the court concluded that Florida law provided for jurisdiction over Bunstein. 33 The court then turned its attention to whether Florida could constitutionally exercise jurisdiction over Bunstein. In determining the issue of personal jurisdiction, the court stated two factors were paramount: (1) whether there are sufficient minimum contacts with the forum to allow the forum to constitutionally assert jurisdiction over defendant; and (2) whether the assertion of such jurisdiction would offend “traditional notions of fair play and substantial justice.” 34

Relying on Burger King Corp. v. Rudzewicz, 35 the Eleventh Circuit reiterated the principle that critical to any constitutional inquiry into personal jurisdiction is foreseeability. 36 “To be subject to the jurisdiction of a foreign state, the defendant must purposely establish sufficient minimum contacts with that state ‘that he should reasonably anticipate being haled into court there.’ ” 37 The court emphasized that the reason behind the “purposeful availment” requirement was to ensure that a defendant would not be brought into a “jurisdiction solely as the result of any ‘random, fortuitous, or attenuated contacts with the forum.’ ” 38

Since the two phone calls made between the parties were at the instigation of plaintiff in Florida, the Eleventh Circuit held that Bunstein had not purposely availed himself of the privilege of conducting activities within Florida, nor had Bunstein purposefully directed his activities at Florida residents. 39 Rather, Bunstein’s original Massachusetts customer, Stevens, had simply moved to Florida and sought a loan from a Florida bank and told that bank to call Bunstein of Massachusetts for a reference. Bunstein in no way sought out any contacts with the State of Florida. Thus, the court held that the two telephone calls were merely a fortuitous contact and failed to constitute sufficient minimum contacts with the Florida forum to support the district court’s exercise of personal juris-

31. Id.
32. Id. at 1033 (citing Madara v. Hall, 916 F.2d 1510, 1514 (11th Cir. 1990); Alexander Proudfoot Co. World Headquarters L.P. v. Thayer, 877 F.2d 912, 919 (11th Cir. 1989)).
33. Id. at 1033-34.
34. Id. at 1034 (citing Madara, 916 F.2d at 1515-16).
36. 926 F.2d at 1034.
37. Id. (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).
38. Id. (quoting Burger King v. Rudzewicz, 471 U.S. 462, 475 (1985)).
39. Id.
diction over defendant. In addition, the court emphasized that two phone calls, even if initiated by defendant, would not have been sufficient minimum contacts to meet the due process test for personal jurisdiction.

C. Abstention

In two cases consolidated for appeal, Taffet v. Southern Co. and Carr v. Southern Co., the Eleventh Circuit this term addressed the applicability of the "clear statement doctrine," the "Burford abstention" doctrine and the "primary jurisdiction doctrine," all issues of first impression. In both Taffet and Carr, customers of the utility company brought Racketeer Influenced and Corrupt Organization Act ("RICO") and related state actions against the utility, which the customers alleged had engaged in fraud resulting in higher rates. Essentially, plaintiffs alleged that defendant utility company engaged in improper accounting procedures that resulted in greater profits to the company and consequently influenced the rates the utilities could charge their customers. In both Alabama and Georgia the utilities may charge only the rates established by the state and the states set the rates according to the profitability of the utility. The smaller the utility's income, the more likely the state will approve a rate hike. Defendants argued that the RICO statute did not apply to utilities based upon the "clear statement doctrine." The "clear statement doctrine" is a type of statutory construction principle, and it states that "a federal court should not apply a federal statute to an area of traditional state concern unless Congress had articulated its desire in clear and definite language to alter the delicate balance between the state and federal power by application of the statute to that area."

The Eleventh Circuit declared that the only way the doctrine could apply to the case at hand was to assume that rate making was traditionally a function of state agencies. Defendants argued in essence that, if a district court was going to be able to award plaintiffs any monetary damages, it would have to correctly calculate the rates assuming plaintiffs had not been defrauded and this calculation would be an infringement upon the state's traditional realm of control. The Eleventh Circuit, however, nar-

40. Id.
41. Id.
42. 930 F.2d 847 (11th Cir. 1991).
43. Id. at 849.
45. 930 F.2d at 850.
46. Id. at 850-51.
47. Id. (citations omitted).
48. Id. at 852.
49. Id.
rowed the application of the “clear statement doctrine” by finding that the doctrine was only useful where the statute in question was ambiguous on its face or where an application of the doctrine would suggest an interpretation of the statute that would follow the state statute’s clear language and legislative history. Consequently, the court found RICO to be totally unambiguous on its face. The Eleventh Circuit stated that the statute specifically prohibited “any person” from violating its proscriptions and defined the word “person” as “‘any individual or entity capable of holding a legal or beneficial interest in property.’” Thus, since the utility was considered to be a legal entity, RICO would apply to the public utility.

The court also addressed the issue of whether plaintiff's complaint should be dismissed on the grounds of the “Burford abstention doctrine.” Under the Burford abstention doctrine, a federal court will abstain from interfering with the proceedings of state administrative agencies when there are difficult questions of state law involved that invoke substantial public policy concerns or where the exercise of any federal intervention into the question would disrupt the state's effort to establish a coherent policy with respect to a matter of substantial concern. The Eleventh Circuit held that the Burford abstention doctrine was not applicable and should not be applied because these cases were essentially RICO actions with pendent state law fraud claims and, as such, both primarily involved federal questions. Since the presence of a federal basis for jurisdiction existed, the justification needed for the court to abstain under the Burford doctrine would be greatly increased according to United States Supreme Court precedent. Consequently, the court held that any concerns in relation to interfering with any state law public policy were not great enough to invoke the Burford abstention doctrine and, therefore, plaintiffs' claims should not be dismissed upon those grounds.

The third and final defense defendants utilized was that plaintiffs’ claims should be dismissed based upon the “primary jurisdiction doctrine.” Under the “primary jurisdiction doctrine,” the judicial process is

50. Id.
51. Id.
52. Id. (quoting 18 U.S.C. § 1961(3) (1988)).
53. Id.
54. Id. (citing Burford v. Sun Oil Co., 319 U.S. 315 (1943)).
55. Id. at 853 (citing New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350 (1989)).
56. Id.
57. Id.; see also Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).
58. 930 F.2d at 854.
59. Id.
suspended pending the referral of the unresolved state issues to the administrative body that had been established by the state and had special expertise in the given subject area. The Eleventh Circuit held, however, that the essential issue to be litigated in these cases did not involve utility rate making, which was traditionally reserved for state public service commissions; rather, the issue was whether the utilities committed fraud and violated the RICO Act. The Eleventh Circuit stated the issue of appropriate rate making would only come into play on the issue of damages after there had been a determination as to liability and, consequently, plaintiffs' claims in both Taffet and Carr were remanded for trials on the merits.

III. TRIALS

A. Pretrial Conference

In the case of In re Novak, the Eleventh Circuit addressed the value of a pretrial conference and a new and interesting issue involving the district court's authority to require nonparties to participate in the pretrial conference. Plaintiff in this case filed a legal malpractice claim against David Hammock and his law firm in the United States District Court for the Southern District of Georgia. Mr. Hammock's law firm was insured by Continental Casualty Company ("CNA"). Under the policy terms, CNA hired local counsel, Clay Ratterree, to defend the suit on Hammock's behalf. Ratterree's performance was supervised by CNA from its Atlanta branch office. Ratterree had been authorized to enter into settlement negotiations on behalf of CNA, but had no power to settle the case without CNA's expressed approval.

Trial was scheduled for Monday, November 13, 1989, in Savannah, Georgia. On Thursday, November 8, the district court conducted a pretrial conference. The following day the judge met with counsel for a settlement conference. At this conference, Ratterree offered plaintiff $150,000 to settle the case, pursuant to CNA's instructions. Plaintiff's counsel rejected the offer and stated that his client needed more money. In response, Ratterree indicated that he had to take the matter up with CNA in Atlanta. The district court then instructed Ratterree to find out who at CNA had full settlement authority for this particular case. Ratterree told the court that Mr. Novak had the last word on settlement for this

60. Id.
61. Id.
62. Id. at 854, 857.
63. 932 F.2d 1397 (11th Cir. 1991).
64. Id. at 1398-99.
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The court then issued an order directing Novak to appear before it for a settlement conference in Savannah on November 13.\(^{65}\)

Novak met with Ratterree and told him that CNA would make a good faith effort to settle the case and authorized Ratterree to offer the plaintiff $225,000. Believing that this would satisfy his obligation under the order requesting his appearance, Novak did not appear before the district court. On November 14, the court issued an order directing Novak to appear before it and to show cause why he should not be held in contempt of court. Novak challenged the authority of the district court’s order on jurisdictional grounds.\(^{66}\)

In an exhaustive discussion, the Eleventh Circuit held that the district court had not exceeded its power in requesting that Novak appear before it.\(^{67}\) The court noted that the value of the pretrial conference had not diminished since the adoption of Rule 16 of the Federal Rules of Civil Procedure.\(^{68}\) On the contrary, the rules were extensively rewritten and expanded in 1983 to meet the challenges of modern litigation and to more accurately reflect actual practice.\(^{69}\) The advisory committee, which amended the pretrial conference rules, recognized it was commonplace to discuss settlement at pretrial conferences.\(^{70}\) Accordingly, Rule 16 was amended to provide that in any action, “the court may in its own discretion direct the attorneys for the parties and any unrepresented parties to appear for the conferences before trial for such purposes as . . . facilitating the settlement of the case.”\(^{71}\)

The Eleventh Circuit emphasized that “settlement conferences are valuable tools for district courts [because] . . . they provide neutral forums to foster settlement, which, in turn, ‘eases crowded court dockets and results in savings to the litigants and the judicial system.’”\(^{72}\) In addition, settlement conferences allow courts to efficiently manage their dockets.\(^{73}\) Since settlement conferences were determined to be such a valuable tool for the district courts, the Eleventh Circuit held that a district court had the inherent power to issue such orders necessary to facilitate any activity authorized by the statute or rule.\(^{74}\) This inherent authority at the district court level extended to the district judge directing the unrepresented

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65. Id.
66. Id.
67. Id. at 1408.
68. Id. at 1404.
69. Id. (citing Fed. R. Civ. P. 16 advisory committee notes).
70. Id. (citing Fed. R. Civ. P. 16 advisory committee notes).
71. Id. (quoting Fed. R. Civ. P. 16(a)); see also Fed. R. Civ. P. 16(c)(7).
72. 932 F.2d at 1404 (quoting Fed. R. Civ. P. 16 advisory committee notes).
73. Id.
74. Id. at 1406.
party with settlement authority, in this case Novak, to appear before the court.\footnote{Id. at 1408.}

\subsection*{B. New Trial, Judgement Not Withstanding The Verdict}

In the case of \textit{Shessel v. Murphy},\footnote{920 F.2d 784 (11th Cir. 1991).} the Eleventh Circuit discussed the appropriateness of ordering only a partial new trial under Federal Rule of Civil Procedure 59(a).\footnote{Fed. R. Civ. P. 59(a).} In \textit{Shessel} a driver of a golf cart and his wife brought a personal injury suit against the driver of an automobile that collided with their cart. The district court directed a verdict in the golf cart driver’s favor on the issue of comparative negligence, and the jury returned a verdict in favor of the golf cart driver and his wife. The personal representative of the estate of the automobile driver appealed.\footnote{920 F.2d at 785-86.}

The Eleventh Circuit held the trial judge erred in directing a verdict in the favor of the golf cart driver and his wife on the issue of comparative negligence.\footnote{Id. at 787.} The Eleventh Circuit stated a reasonable person could have concluded that the golf cart driver was partially responsible for the accident because there was evidence he had been driving his cart without his lights on at night and was on the main road rather than the cart path at the time the accident occurred.\footnote{Id. at 787.} Defendant contended that, since the district court had erred in directing the verdict against her on the issue of comparative negligence, she should be granted a new trial as to all issues and not just comparative negligence. Plaintiffs argued that the original jury verdict on damages should stand and that, if any retrial was necessary, the retrial should only be on the issue of comparative negligence and the court could simply reduce the original award to reflect the comparative negligence, if any, found at the new trial.\footnote{Id. See Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494 (1931).}

The Eleventh Circuit agreed with defendant in this case and held that a new trial was required on all issues, not merely comparative negligence.\footnote{Id. at 787.} The court stated that “[a] partial new trial under Fed. R. Civ. P. 59(a) may not properly be held unless it clearly appears that the issue to be retried is so distinct and separable from the other issues that a trial of it alone may be had without injustice.”\footnote{Id. at 787.} Even though there was no award of nominal damages in this case, nor any manifest jury confusion, the Eleventh Circuit held the “improper direction of the verdict as to the
issue of comparative negligence may well have affected the jury when it deliberated on the damages it finally chose to award.\textsuperscript{84}

This term, the importance of reflecting in the record the reason for a district court's refusal to grant a new trial or a judgment notwithstanding the verdict ("JNOV"), was emphasized by the case of \textit{American Employers Insurance Co. v. Southern Seeding Services, Inc.}\textsuperscript{85} In \textit{American Employers}, the liability insurer brought a declaratory judgment action against the insured, and the insured counterclaimed for bad faith in the handling of the underlying lawsuit. The district court judge declared that the actual insurance policy in question did not provide coverage for the insured, but entered a judgment on the jury verdict on the bad faith claim and awarded the insured \$400,000 in compensatory damages and \$750,000 in punitive damages. The insurer then sought a motion for a new trial or, in the alternative, a JNOV. The court denied both motions without any comment and the insurer appealed.\textsuperscript{86}

During the pendency of the appeal of \textit{American Employers}, an Alabama case, \textit{Pacific Mutual Life Insurance Co. v. Haslip},\textsuperscript{87} was decided by the United States Supreme Court on the issue of a due process challenge to a punitive damage award. In \textit{American Employers}, as in \textit{Haslip}, the insurer argued that the punitive damage award against them violated due process.\textsuperscript{88} The Eleventh Circuit relied heavily on the findings and holdings of the Supreme Court in \textit{Haslip}. In \textit{Haslip} the United States Supreme Court "declined to 'draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable' " punitive damage award.\textsuperscript{89} For a punitive damage award to be acceptable, it has to also be acceptable under state law. The Supreme Court stated that general concerns of reasonableness and adequate guidance from the trial court were factors that entered into the constitutional analysis.\textsuperscript{90}

In the instant case, the Eleventh Circuit held that the post-trial review of the punitive damage award did not meet the \textit{Haslip} standard.\textsuperscript{91} The district court had denied defendant's motion for a JNOV or, in the alternative, a new trial and remittitur of excessive award without any comment.\textsuperscript{92} The Eleventh Circuit held that, by failing to reflect in the record its reasoning for the denial of the motion, the district court made no de-

\textsuperscript{84} 920 F.2d at 787.
\textsuperscript{85} 931 F.2d 1453 (11th Cir. 1991).
\textsuperscript{86} Id. at 1454.
\textsuperscript{87} 111 S. Ct. 1032 (1991).
\textsuperscript{88} 931 F.2d at 1454.
\textsuperscript{89} Id. at 1456 (quoting Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. at 1043).
\textsuperscript{90} Id. (citing \textit{Haslip}, 111 S. Ct. at 1043).
\textsuperscript{91} Id. at 1458.
\textsuperscript{92} Id.
termination whether the verdict was within the limits set by the state law and, therefore, violated defendant’s due process rights.93

In another very interesting case this term, the Eleventh Circuit discussed the procedural requirements for granting a JNOV and the legal requirements behind granting a new trial in Redd v. City of Phenix City.94 In Redd a black police lieutenant sued the city for discrimination in failing to promote him to chief of police and eventually discharging him from the department. The district court directed the verdict in favor of the city on the officer’s promotion claim, and after the jury found for the officer on the discharge claim, the district court granted the city a JNOV or, in the alternative, a new trial. The police officer appealed the trial court’s granting of the JNOV.95

Upon review of the record, the Eleventh Circuit determined that “the district judge granted the city’s motion for a JNOV even though at the close of all the evidence [the city] failed to move for a directed verdict.”96 The Eleventh Circuit noted that this action on the part of the district court was contrary to Federal Rule of Civil Procedure 50(b)97 and relevant case law.98 “The advisory note to 50(b) unequivocally states a ‘motion for a judgment not withstanding the verdict will not lie unless it was preceded by a motion for a directed verdict made at the close of all the evidence.’”99 The Eleventh Circuit reiterated this was a particularly clear and mechanical rule of the law and, therefore, even though the city did not comply with this procedural requirement, the district judge could not “wave his magic wand dismissing [this] procedural requirement as a technicality.”100 Consequently, the Eleventh Circuit reversed the district court’s granting of the JNOV.101

The Eleventh Circuit then addressed the issue of whether there was sufficient evidence in Redd to award a new trial to the city since the district court had granted in the alternative of the JNOV a new trial.102 The Eleventh Circuit declared “[w]hen a district court grants a new trial because the verdict is against the weight of the evidence, this court’s review will be extremely stringent to protect a party’s right to a jury trial.”103

93. Id.
94. 934 F.2d 1211 (11th Cir. 1991).
95. Id. at 1213-14.
96. Id.
97. Fed. R. Civ. P. 50(b). It is important to note, however, that Federal Rule of Civil Procedure 50(b) was amended, effective December 1, 1991.
98. 934 F.2d at 1214.
99. Id. (quoting Fed. R. Civ. P. 50(b)).
100. Id.
101. Id.
102. Id.
103. Id. at 1215.
The Eleventh Circuit further stated that “[t]his [principle was] particularly true when the new trial [was] premised upon sufficiency of the evidence as opposed to some factor which may have infected the evidence itself.” The court held that when there was some support for a jury’s verdict, it was irrelevant what the district court judge would have individually concluded. “[T]he district judge should not substitute his own credibility choices and inferences for the reasonable credibility choices and inferences made by the jury . . . .” The Eleventh Circuit also found that there was ample testimony suggesting bad faith on the City’s part in its failure to consider plaintiff for the position of captain. The court reiterated the principle that “[d]irect evidence [was] not required to prove an employer’s explanation for the employee’s discharge pretextual; circumstantial evidence [was] sufficient.” Since there was ample evidence to support the jury’s finding that the City had acted with an improper motive, the district court’s grant of a new trial was also reversed.

IV. Sanctions

As evidenced by the review of the cases below, this term the Eleventh Circuit continued to assess costs against nonprevailing parties and order various sanctions against litigious parties whenever deemed necessary.

A. Fees And Costs

In Manor Healthcare Corp. v. Lomelo, the Eleventh Circuit addressed for the first time the issue of whether a prevailing party to a lawsuit could recover costs paid by a personal entity that was not a party to the lawsuit. In Manor Healthcare Corp., a nursing home brought suit against a mayor and the city alleging that the mayor and the president of the city council extorted $30,000 from the town while acting on behalf of the city in a zoning matter. The city moved for summary judgment, and the district court granted the motion and awarded costs to the city. Plaintiff appealed the summary judgment and the award of costs.

104. Id.
105. Id.
106. Id. (quoting Rosenfield v. Wellington Leisure Prods., Inc., 827 F.2d 1493, 1498 (11th Cir. 1987)).
107. Id.
108. Id. at 1215-16 (citations omitted).
109. Id. at 1217.
110. 929 F.2d 633 (11th Cir. 1991).
111. Id. at 635.
Plaintiffs argued that, since the cost of defending the action was actually paid by the city's insurance company, the city was not entitled to costs under Federal Rule of Civil Procedure 54(d), which states that costs are not recoverable if paid by a person or entity not a party to the proceeding.\(^\text{112}\) The city, on the other hand, argued that, since they were the prevailing party in the lawsuit, they were entitled to costs under Rule 54(d).\(^\text{113}\) In addition, the city pointed out that, if plaintiff had prevailed in this case, the insurance company would have been obligated to pay plaintiff's litigation costs and there would have been no question concerning whether the insurance company was truly a party to the litigation within the meaning of Rule 54(d).\(^\text{114}\)

The Eleventh Circuit had not previously addressed the issue of whether a prevailing party to a lawsuit could recover costs paid by a personal entity not a party to the lawsuit.\(^\text{115}\) The court noted, however, that the Florida Supreme Court recently addressed the issue in *Aspen v. Bailus*.\(^\text{116}\) The Florida court held that a party was not precluded from recovering costs when someone other than a named party paid or advanced those costs.\(^\text{117}\) The Florida court found it unnecessary to inquire into the source of funds used for the initial payment of costs in order to award a taxable cost to a winning party.\(^\text{118}\)

The Eleventh Circuit agreed with the Florida court's finding and further reasoned that, to adopt plaintiff's argument and prevent the city from regaining its costs would not only violate the presumption under Rule 54(d) that a prevailing party is entitled to its costs, it "would also allow plaintiffs to bring lawsuits against insured defendants without incurring litigation costs after losing on the merits."\(^\text{119}\) As a consequence, the Eleventh Circuit held that plaintiff, as a nonprevailing party, should not benefit from the city's insurance coverage, and that the district court did not abuse its discretion in awarding the city its costs.\(^\text{120}\)

**B. In Forma Pauperis**

In *Cofield v. Alabama Public Service Commission*,\(^\text{121}\) the Eleventh Circuit discussed the scope and type of limits that could be placed on in

\(^{112}\) Id. at 638-39.

\(^{113}\) Id. at 639.

\(^{114}\) Id.

\(^{115}\) Id.

\(^{116}\) 564 So. 2d 1081 (Fla. 1990).

\(^{117}\) Id. at 1083.

\(^{118}\) Id.

\(^{119}\) 929 F.2d at 639.

\(^{120}\) Id.

\(^{121}\) 936 F.2d 512 (11th Cir. 1991).
forma pauperis plaintiffs. In Cofield plaintiff, a prison inmate, filed over 100 cases in districts throughout Alabama. He filed the underlying lawsuit against prison officials and AT&T in June of 1986. After defendants were granted summary judgment, the district court, sua sponte, issued an order to show cause why Cofield should not be sanctioned for his overly litigious behavior. After a hearing was held on the issue, the district court ordered all actions filed by Cofield then pending in the Northern District of Alabama dismissed as frivolous. In addition, the district court ordered that Cofield send all future pleadings to a judge for prefiling approval and pay full filing fees. Cofield appealed.

The Eleventh Circuit held that a federal court may limit the filing of frivolous lawsuits on a case-by-case basis. In this regard, the Eleventh Circuit stated the dismissal of Cofield’s lawsuits on the ground that they were frivolous was proper. Moreover, since the Eleventh Circuit had held previously that courts could take more creative actions to discourage hyperactive litigators as long as some access to the courts is allowed, the Eleventh Circuit upheld the district court’s restriction of requiring Cofield to submit to prefiling approval because this process would not totally prevent Cofield’s access to the courts. The Eleventh Circuit, however, overturned the trial court’s ruling requiring Cofield to pay full filing fees in the future. The Eleventh Circuit stated that by requiring Cofield to pay all fees, the trial court essentially adopted a presumption of frivolity in Cofield’s future cases and such a presumption was inappropriate because it could have the effect of closing the courthouse doors to him. The court noted that an individual’s right of access to the courts is fundamentally important, but may be balanced against the traditional right of courts to manage their dockets and limit abusive filings.

C. Rule 11

In Pelletier v. Zweifel, an alleged shareholder brought an action against the corporation’s former attorney and former president alleging violations of the Racketeer Influenced and Corrupt Organization Act
The district court granted defendants' motion to dismiss several of plaintiff's claims on the grounds that plaintiff failed to state a claim for which relief could be granted. In addition, the court granted summary judgment for defendant. After the district court granted defendants' motion, defendants moved the court, pursuant to Federal Rule of Civil Procedure 11, to impose sanctions on plaintiff because the claims plaintiff had brought were baseless and in bad faith. The district court denied defendants' motion for sanctions. Plaintiff appealed the district court's grant of defendants' motion to dismiss, and defendants cross appealed the court's denial of their motion for Rule 11 sanctions. The Eleventh Circuit affirmed the district court's order of dismissal and of summary judgment, but reversed the court's denial of defendant's Rule 11 motion. The Eleventh Circuit stated three types of conduct warranted the imposition of Rule 11 sanctions: (1) when a party files a pleading that has no reasonable factual basis; (2) when the party files a pleading that is based on a legal theory that has no reasonable chance of success and that cannot be advanced as a reasonable argument to change existing laws; and (3) when the party files a pleading in bad faith for an improper purpose.

Upon close review of the merits of plaintiff's complaint, the court found that plaintiff "brought this suit purely to harass [defendant] and, in the process, to extract a settlement from him." In Pelletier the Eleventh Circuit stated: "A district court . . . must impose sanctions sua sponte whenever it finds a complaint to be frivolous. The [district court] below operated under an erroneous view of the law: it should have conducted—on its own initiative—a much more searching inquiry into the merits of [plaintiff's] complaint." The court reversed the district court's denial of rule 11 sanctions.

Next, the court addressed the issue of whether the sanctions in this case should fall upon plaintiff and his attorney equally, or whether it should be apportioned between them in relation to their individual culpability. The Eleventh Circuit concluded that plaintiff and his attorney were equally culpable and, therefore, the sanctions should be "borne by them equally—they should be liable, jointly and severely, for the full

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132. Id. at 1470.
133. Id.
134. Id. at 1523.
135. Id. at 1514; see also United States v. Milam, 855 F.2d 739, 742 (11th Cir. 1988); Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987).
136. 921 F.2d at 1517.
137. Id. at 1514.
138. Id.
139. Id. at 1522.
monetary amount of the sanction imposed.”140 The Eleventh Circuit noted that from the beginning, the district court judge had warned plaintiff and his attorney that they were “‘treading on mighty dangerous grounds’” and asked them whether they were “‘familiar with Rule 11.’”141 Despite the warnings, plaintiff and his attorney continued to prosecute the claim. The Eleventh Circuit found that plaintiff and his attorney continued to press on with the claim not only with no evidence of fraud, but also strong evidence that the claim was meritless.142 Based on this finding, the Eleventh Circuit awarded defendant double costs and reasonable attorney fees in accordance with Federal Rule of Appellate Procedure 38 for opposing plaintiff’s appeal.143

As evidenced by Pelletier, the Eleventh Circuit took a strong stand regarding the impropriety of parties filing frivolous complaints or frivolous appeals. In dealing with Rule 11 determinations by a district court, the Eleventh Circuit applies an abuse of discretion standard of review.144 Pelletier makes clear that the Eleventh Circuit will closely scrutinize any district court ruling regarding Rule 11 sanctions and not hesitate to overturn the district court’s finding if it determines the district court abused its discretion regarding the Rule 11 sanctions.

V. JUDGMENTS

A. Entry of Judgments and Timeliness of Appeals

In Wright v. Preferred Research, Inc.,145 the Eleventh Circuit addressed the question of whether Federal Rule of Civil Procedure 58146 requires a separate document be entered setting out the terms of an altered judgment before the time for an appeal begins to run.147 In relevant part, Rule 58 provides that “[e]very judgment shall be set forth on a separate document.”148

In Wright the district court entered a jury verdict awarding plaintiff $7,000 in compensatory damages and $1,500,000 in punitive damages.149 The judgment was set forth on a separate document in accordance with Rule 58. Defendant then filed motions for JNOV, a new trial, and a stay

140. Id.
141. Id.
142. Id. at 1523.
143. Id. (citing Fed. R. App. P. 38).
144. Id. at 1514.
145. 937 F.2d 1556 (11th Cir. 1991).
147. 937 F.2d at 1558.
149. 937 F.2d at 1557.
of the proceedings. The district court granted defendant’s motion to stay the proceedings pending the disposition of defendant’s other motions. If plaintiff refused to consent, the court stated it would award a new trial on the issue of defendant’s damages. Plaintiff consented to the remittitur and at the same time filed a motion to reconsider the remittitur order.

Prior to the court ruling on plaintiff’s motion to reconsider the remittitur order, defendant filed a notice of appeal. The district court denied plaintiff’s motion to reconsider the remittitur order. The remitted judgment was not entered on a separate document until eleven months later. Defendant failed to file another notice of appeal until twelve days after this remitted judgment was entered on a separate document in compliance with Rule 58.

Essentially, plaintiff contended that the remitted judgment became final on the day the court denied plaintiff’s motion to reconsider the order of remittitur and, therefore, defendant filed its notice of appeal some three weeks before the judgment was even final. In addition, plaintiff argued that defendant filed the second notice of appeal too late because it was not filed until eleven months after the court’s order denying plaintiff’s motion to reconsider the order of remittitur.

Defendant argued that because the remitted judgment was not entered in compliance with Rule 58 until eleven months after the initial judgment was entered, the time for appeal did not begin to run until that date. Therefore, defendant filed the second notice of appeal in a timely manner.

The Eleventh Circuit succinctly stated the issue on appeal to be: “When a district court amends a judgment, for example by remitting the amount of the judgment, does Fed. R. of Civ. Pro. 58 require that a separate document setting out the terms of the remitted judgment be entered before the time for appeal begins to run?” If the remitted judgment needed to be placed on a separate document in order for the time for appeal to begin to run, then defendants in this case filed their notice of appeal in a timely manner. However, if the remitted judgment did not have to be entered on a separate document prior to the time for the ap-

150. Id.
151. Id.
152. Id. at 1558.
153. Id.
154. Id.
155. Id.
peal to begin to run, then the Eleventh Circuit was without jurisdiction to
decide the case because defendant’s notice of appeal was not timely.156

The Eleventh Circuit noted “'[t]he sole purpose of the separate docu-
ment requirement, which was added to Rule 58 in 1963, was to clarify
when the time for appeal . . . begins to run.’”157 After reviewing the deci-
sions of other circuits regarding this issue, the Eleventh Circuit stated
that there were three possible interpretations of Rule 58:

First, we might embrace an interpretation that requires the district court
to enter a new separate document whenever any change, however minor,
is made to the original judgment. Second, we could opt for an interpreta-
tion that would require another separate document only when the court
makes a significant change to the judgment. Third, we could interpret
Rule 58 to require no additional separate document when an otherwise
final judgment is amended.158

After reviewing all of the options, the Eleventh Circuit adopted the
third option that required “no second separate document when a district
court amends a judgment.”159 The court chose this option because it
would not detract from the certainty that Rule 58 seeks to provide.160 The
court also reasoned that, if the time for filing an appeal began to run
upon the entry of a final judgment, regardless of whether it was altered at
a later date, the parties would have a certain date under which to calcu-
late when their notices of appeals must be filed.161 Consequently, the
Eleventh Circuit dismissed defendant’s appeal for lack of jurisdiction.162

B. Summary Judgment

This term did not mark any significant change in the law regarding
summary judgment. The case of Easterwood v. CSX Transportation,
Inc.163 is worth noting because the Eleventh Circuit reversed the district
court’s award of summary judgment on the grounds that the record did
not reflect the fact that defendant requested a summary judgment.164 The
Eleventh Circuit stated that a district court could not grant summary
judgment upon its own initiative.165 Rather, the district court could only

156. Id.
157. Id. at 1559 (quoting Bankers Trust Co. v. Mallis, 435 U.S. 381, 384 (1978)).
158. Id. at 1560.
159. Id. at 1560-61.
160. Id. at 1561.
161. Id.
162. Id.
163. 933 F.2d 1548 (11th Cir. 1991).
164. Id. at 1556.
165. Id.
grant summary judgment if a party moves for a summary judgment on that issue.\textsuperscript{166}

The case of \textit{Brown v. American Honda Motor Co.} \textsuperscript{167} is also noteworthy because of the discussion regarding the general presumption against using summary judgment to resolve the largely factual question concerning discriminatory intent in a civil rights claim.\textsuperscript{168} Further, \textit{Courson v. McMillian} \textsuperscript{169} contains a detailed discussion of the standard for a summary judgment motion based on qualified immunity.\textsuperscript{170} The Eleventh Circuit "requires a defendant to establish his entitlement to qualified immunity as a matter of law by showing that no genuine issues of material fact relating to the implicated legal questions exist."\textsuperscript{171} In other words, there has to be no genuine issues of material fact in relation to whether the defendant's conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known.\textsuperscript{172}

VI. SERVICE OF PROCESS

Under Federal Rule of Civil Procedure 4(c)(2)(C),\textsuperscript{173} a summons and complaint may be served upon a competent adult by

[M]ailing a copy of the summons and of the complaint . . . to the person to be served, together with two copies of a notice and acknowledgement conforming substantially to Form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgement of service under this subdivision of this Rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph . . . \textsuperscript{174}

During this term the Eleventh Circuit reexamined Rule 4(c)(2)(C) in \textit{Schnabel v. Wells}.\textsuperscript{175} In \textit{Schnabel} plaintiff brought an action against defendant two days before the expiration of the statute of limitations.\textsuperscript{176} Plaintiff served the copy of the summons and complaint upon defendant by certified mail, return receipt requested, along with a cover letter instructing defendant to contact his insurance carrier and advising defend-
ant to file his answer in a timely manner. Defendant filed a timely answer and asserted several defenses to the lawsuit, including the defense of insufficient service of process. At no time during the discovery process did plaintiff ever attempt to effectuate personal service on defendant. Several months after discovery had begun, defendant filed a motion for summary judgment on the grounds that service of process had never been perfected and, therefore, the statute of limitations barred plaintiff's claim.177

The Eleventh Circuit upheld the district court's grant of summary judgment to defendant and stated that rule 4(c)(2)(C)(ii) mandated the district court's ruling.178 "If a defendant receives mail service, but chooses not to respond, the plaintiff must effect personal service."179 The Eleventh Circuit emphasized further that, even though defendant had actual notice of the lawsuit, the requirements of proper service under rule 4 must still be followed.180

Another interesting case involving the procedural requirements under Rule 4 was Prisco v. Frank.181 In Prisco a discharged postal employee filed a discrimination claim against the United States Postal Service.182 Plaintiff mailed the complaint to the United States Attorney's office rather than delivering it to the United States Attorney's office as required by Rule 4(d)(4).183 Rule 4(d)(4) requires a plaintiff to serve a copy of the summons and complaint upon the United States by delivering a copy of the summons and the complaint to the United States attorney for the district in which the action is brought.184 The plaintiff must also send copies by registered or certified mail to the United States Attorney General in Washington, D.C.185 Since plaintiff in this case did not follow the requirements of Rule 4(d), defendant moved for dismissal on the grounds that service of process had not been perfected. The district court granted defendant's motion, and plaintiff appealed.186

Plaintiff argued on appeal that the improper service of process on his part should be excused for "good cause" under Federal Rule of Civil Procedure 4(j).187 Rule 4(j) states:

177. Id.
178. Id. at 728.
179. Id. (emphasis added).
180. Id.
181. 929 F.2d 603 (11th Cir. 1991).
182. Id. at 604.
184. Id.
185. Id.
186. 929 F.2d at 604.
If the service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant.\textsuperscript{188}

The Eleventh Circuit upheld the trial court’s dismissal of plaintiff’s complaint by noting that the courts utilized the good cause standard under Rule 4(j) only when some outside factor, such as reliance on faulty advice, was the reason for the improper service.\textsuperscript{189} In this case, however, plaintiff simply neglected to perfect service of process and, therefore, the court properly dismissed the complaint.\textsuperscript{190}

\textbf{VII. Discovery}

During this term the Eleventh Circuit addressed various issues involved in the discovery process. One of the more interesting issues, due to the power it grants to district judges, was discussed in \textit{Avirgan v. Hull}.\textsuperscript{191} In \textit{Avirgan} plaintiffs argued that the trial court erred in restricting discovery to a certain time period and also erred in restricting discovery to a certain subject matter. Plaintiffs alleged that these restrictions deprived them of the opportunity to conduct adequate discovery and requested that the court allow more discovery.\textsuperscript{192}

The Eleventh Circuit stated that when “a significant amount of discovery has been obtained, and it appears that further discovery will not be helpful in resolving the issues, a request for further discovery is properly denied.”\textsuperscript{193} The Eleventh Circuit reiterated that a district judge has wide discretion in determining the scope and the length of discovery, and in this case, the court held the district judge was correct to limit the scope and had not abused his discretion.\textsuperscript{194}

Another case in which plaintiff requested the court to re-open discovery was \textit{Brown v. American Honda Motor Co.}\textsuperscript{195} In \textit{Brown} a black applicant for ownership of an automobile dealership was rejected and sued the manufacturer for discrimination. Nearly a year after discovery closed, plaintiff requested that the district court re-open discovery to allow plaintiff to inquire into a specific agreement between the Equal Employ-

\begin{footnotes}
\item 188. \textit{Id.}
\item 189. 929 F.2d at 607.
\item 190. \textit{Id.}
\item 191. 932 F.2d 1572 (11th Cir. 1991).
\item 192. \textit{Id.} at 1575.
\item 193. \textit{Id.} at 1580.
\item 194. \textit{Id.} at 1580-81.
\item 195. 939 F.2d 946 (11th Cir. 1991).
\end{footnotes}
ment Opportunity Commission and a manufacturer of defendant (a non-party). The district court denied plaintiff's motion to re-open discovery, and plaintiff appealed.\(^{196}\)

The Eleventh Circuit held that the district court did not err in denying plaintiff's motion to re-open discovery.\(^{197}\) The court relied on previous case law which held that a plaintiff may not compel discovery from a defendant's related corporations or separate units of the same corporation absent a showing of ""particularized need and relevance.""\(^{198}\) The Eleventh Circuit reiterated that the scope and extent of discovery was within the trial court's discretion.\(^{199}\) The court held the particular agreement plaintiff wanted to inquire into was not clearly relevant to the litigation and would not justify overturning the district court's ruling and allowing it to be discoverable.\(^{200}\) Therefore, the Eleventh Circuit stated the trial judge correctly held that discovery in this case be confined to the local units of the corporation.\(^{201}\)

VIII. Judges

In the case of *Wilkinson v. Carnival Cruise Lines, Inc.*,\(^{202}\) the Eleventh Circuit discussed the judge's obligation in relation to jury instructions. In *Wilkinson* a passenger of the cruise line sued the cruise line for injuries she received when an automatic sliding door ran over her toes. Following a jury trial, the court entered judgment on a jury verdict in favor of the passenger.\(^{203}\) The cruise line appealed on several issues, one of which was that the trial court erred in failing to give the following requested instruction: "Should the jury find that the plaintiff would have suffered psychiatric injuries from a non-liability cause even if she had not suffered any injuries on board the [cruise line], that any damages awarded must be reduced to reflect that likelihood."\(^{204}\)

The Eleventh Circuit held the refusal of the trial court to give the cruise line's requested jury instructions regarding the passenger's susceptibility to psychiatric injury was not an abuse of the district court's discretion.\(^{205}\) The court discussed the law regarding the trial judge's obliga-

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\(^{196}\) Id. at 948.

\(^{197}\) Id. at 954.

\(^{198}\) Id. (quoting Marshall v. Westinghouse Elec. Corp., 576 F.2d 588, 592 (5th Cir. 1978)).

\(^{199}\) Id.

\(^{200}\) Id.

\(^{201}\) Id.

\(^{202}\) 920 F.2d 1560 (11th Cir. 1991).

\(^{203}\) Id. at 1562.

\(^{204}\) Id. at 1569.

\(^{205}\) Id. at 1570.
tion to submit various requested instructions to the jury. The Eleventh Circuit stated "[t]he trial judge's refusal to give the requested instruction [was] not error where the substance of that proposed instruction was covered by another instruction which was given." The court went on to state:

If a requested instruction is refused and is not adequately covered by another instruction, the court will first inquire as to whether the requested instruction is a correct statement of the law. In such a scenario, if the requested instruction does accurately reflect the law, the next step is to assess whether the instruction addresses an issue that is properly before the jury. Even if both of these criteria are met, there must still be a showing of prejudicial harm that resulted from the failure of the trial court to give the requested instruction before the judgment will be disturbed on that ground.

In this case, the district court decided that the general language of another charge that was the standard aggravation charge dealing with "'any aggravation of an existing disease'" adequately covered the issue of plaintiffs susceptibility to psychiatric injury. The Eleventh Circuit agreed with the district court's finding and also found noteworthy the fact that defendant had fully and forcefully argued this particular point in its closing argument. Thus, after viewing the record and the instructions as a whole, the Eleventh Circuit held that the district court's denial of the requested instruction was proper.

Also during this term the Eleventh Circuit, in Johns v. Jarrard, reviewed extensively the responsibility of a trial judge to assist and guide the jury to a just result. In Johns the parents of an infant who died in a hospital brought a wrongful death action against the emergency room physician, the corporation that supplied the emergency room physician, and the on-call surgeon. Apparently, the physician on call had written on the emergency room record "rule out ruptured viscus." Despite all the efforts of the doctors, the infant died at the hospital, and an autopsy revealed she had died from a lacerated liver.

206. Id. at 1569-70.
207. Id. at 1569 (citing Pesaplastic, C.A. v. Cincinnati Millicron Co., 750 F.2d 1516, 1525 (11th Cir. 1985)).
208. Id. at 1569-70 (citations omitted).
209. Id. at 1570 (quoting the district court).
210. Id.
211. Id.
212. 927 F.2d 551 (11th Cir. 1991).
213. Id. at 553.
214. Id. at 552-53.
215. Id. at 553.
During the jury’s deliberations, the jury asked the judge the following question: “In the testimony it was mentioned that Dr. Fisher in his diagnosis ruled out a ruptured viscus. Was he asking or telling Dr. Thomasson that a ruptured viscus should be ruled out?” The district judge initially refused to answer the jury’s question, but then asked the jury to rephrase it. Subsequently, the judge answered the question by saying “no.” The jury eventually returned a verdict for defendants and plaintiff appealed alleging that the judge’s statement misled the jury and resulted in an improper verdict.

The Eleventh Circuit stated: “[i]t is the inescapable duty of the trial judge to . . . guide, direct, and assist [the jury] toward an intelligent understanding of the legal and factual issues involved in their search for truth.” The Eleventh Circuit also noted a district court could comment on the evidence and ask questions of witnesses as well as elicit facts that had not been adduced or clarified when they were presented. However, the responsibility of a federal trial judge not to mislead the jury, when responding to their question, when it is clear that the jury is confused on a specific subject, is extremely high. In this case, the Eleventh Circuit found the district court’s response to the jury’s question misleading. The Eleventh Circuit stated that the jury was focusing on a “non-issue” and, therefore, the district court should have given supplemental instructions designed to address the jury’s apparent confusion and refocus their attention on the central issue in the case. Instead, by replying “no” to the jury’s question the district court created an issue when none had previously existed. Thus, the Eleventh Circuit held that plaintiff was entitled to a new trial on the merits.

IX. Conclusion

As is evident by this year’s decisions, the Eleventh Circuit continues to guard procedural safeguards with a great deal of care. With the increased volume of cases every year, simply following the rules of the game has become of great importance to all practitioners. Some of the cases de-
cided this term dealt with clarifying exactly what the rules are and others dealt with reiterating the old standards and requirements of practicing in federal court. Litigators in the future will not only have to be aggressive, intelligent, and articulate, they will have to continue to be extremely proficient in mastering the rules of the game.