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Trial Practice and Procedure

by Philip W. Savrin*

I. INTRODUCTION

This Article surveys the year 2000 decisions of the Eleventh Circuit Court of Appeals that have a significant impact on issues relating to trial practice and procedure.

II. CONSTITUTIONAL TORTS

A. Title VII and Preemption

In *Dickerson v. Alachua County Commission*,¹ the court considered the first impression issue of whether a Title VII claim preempts a 42 U.S.C. § 1985(3) claim when the same conduct underlies both causes of action. The case was brought by an African-American corrections officer who was demoted after an investigation into an inmate's escape. The complaint had been filed in state court and alleged a civil rights conspiracy under Section 1985(3). After the case was removed to federal court by county-defendants, plaintiff was allowed to amend his complaint to include a claim of racial discrimination under Title VII and state law, among other bases for relief.²

The case proceeded to trial by jury, which returned a special verdict for plaintiff on his Section 1985(3) conspiracy claim. The court denied

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1. 200 F.3d 761 (11th Cir. 2000).
2. *Id.* at 763-64.

defense's motion to dismiss the claim as a matter of law. The county appealed on the basis that plaintiff's Title VII claim preempted a Section 1985(3) conspiracy claim for employment discrimination.³

On appeal the Eleventh Circuit noted that the viability of a Section 1985(3) claim in the face of a Title VII claim was a matter of first impression for the circuit.⁴ For guidance in resolving the issue, the court looked to its previous decision in *Johnson v. City of Fort Lauderdale*⁵ that considered a challenge to Section 1983 claims arising from the same facts as claims arising under 42 U.S.C. § 1981 and Title VII.⁶ In *Johnson* defendants argued that Title VII's comprehensive remedial scheme provided the exclusive remedy for the workplace discrimination alleged by plaintiff.⁷ Defendants in *Johnson* also argued "that if [Section] 1983 could be used to sue for employment discrimination, Title VII's procedural safeguards could be undermined."⁸ After analyzing the structure and legislative history of Title VII and finding that it reflected Congress' intent to retain Section 1983 as a parallel remedy for unconstitutional employment discrimination, the court in *Johnson* rejected defendant's arguments, concluding that the Civil Rights Act of 1991⁹ did not render Title VII and Section 1981 the exclusive remedies for public sector employment discrimination.¹⁰

Similarly, the court reasoned in *Dickerson* that Title VII did not preempt a constitutional cause of action under Section 1985(3).¹¹ However, this was a pyrrhic victory for plaintiff because the court vacated the judgment on the separate basis that Section 1985(3) relief is barred by an intracorporate conspiracy doctrine.¹² In sum, the doctrine does not allow a county to conspire with itself to deny constitutional rights.¹³ Accordingly, plaintiff was not entitled to the relief awarded under Section 1985(3).¹⁴

3. *Id.* at 765.

4. *Id.*

5. 148 F.3d 1228 (11th Cir. 1998).

6. 200 F.3d at 766.

7. *Id.*

8. *Id.*

9. 42 U.S.C. §§ 2000e-2000e-17 (1994).

10. 200 F.3d at 766.

11. *Id.*

12. *Id.* at 770.

13. *Id.*

14. *Id.*

B. Failure to Plead Companion Claim

In *Thigpen v. Bibb County, Georgia Sheriff's Department*,¹⁵ the Eleventh Circuit again addressed the interaction between Title VII and Section 1983, this time answering another question of first impression: Whether Section 1983 claims are procedurally barred by a failure to plead companion Title VII claims.¹⁶

Plaintiffs in *Thigpen* were white Bibb county police officers who brought a Section 1983 action against the sheriff's department, asserting that an employment promotion policy, adopted as part of the settlement of a prior lawsuit and requiring the department to award fifty percent of all annual promotions to black officers, violated their rights to equal protection. Plaintiffs did not raise Title VII claims in their suit. The district court granted summary judgment in favor of defendants and denied plaintiffs' motion for partial summary judgment on liability.¹⁷

On appeal the Eleventh Circuit found that plaintiffs' lack of property interest in the relevant promotions did not preclude their equal protection challenge.¹⁸ Distinguishing between due process claims, in which a property interest is required, and equal protection claims, in which it is not, pursuant to *Wu v. Thomas*,¹⁹ the court held that plaintiffs alleged proper equal protection claims.²⁰

The court then addressed the relationship between Section 1983 equal protection claims and Title VII employment discrimination claims.²¹ The court looked first to the Second Circuit, the only circuit to address the question of whether a Section 1983 claim is viable only if brought with its companion Title VII claim.²² The court used reasoning from its own decision in *Annis v. County of Westchester*²³ and concluded that, because Section 1983 claims are not preempted by Title VII, they need not be brought with Title VII claims.²⁴ Because defendants offered no authority to support the position that plaintiffs are obligated to bring all available causes of action, the Eleventh Circuit followed the Second Circuit, holding that "a [Section] 1983 claim predicated on the violation

15. 223 F.3d 1231 (11th Cir. 2000).

16. *Id.* at 1234.

17. *Id.* at 1234, 1236.

18. *Id.* at 1236-37.

19. 847 F.2d 1480 (11th Cir. 1988).

20. 223 F.3d at 1237.

21. *Id.*

22. *Id.*

23. 36 F.3d 251 (2d Cir. 1994).

24. 223 F.3d at 1239.

of a right guaranteed by the Constitution . . . can be pleaded exclusive of a Title VII claim."²⁵

The court further held that the burden-shifting analysis used in employment discrimination cases was not applicable to the officers' equal protection claims²⁶ and that the denied promotions underlying the equal protection claims were not a "continuing violation" for statute of limitation purposes.²⁷

III. REMOVAL JURISDICTION

A. *Removal and Evidentiary Limitations*

In *Sierminski v. Transouth Financial Corp.*,²⁸ the Eleventh Circuit faced another issue of first impression: Whether the district court's jurisdictional review is limited to the evidence provided at the time the removal is filed or the record can be thereafter supplemented with additional information.²⁹ Factually, plaintiff sued in state court under Florida's Whistle Blower's Act³⁰ after being discharged from employment by defendant.³¹ After defendant removed the case to federal court, plaintiff unsuccessfully moved to remand to state court. Thereafter, summary judgment was entered in favor of defendant. On appeal plaintiff raised the issue of the denial of her motion to remand.³²

The basis for plaintiff's remand motion was that the state court complaint sought less than the jurisdictional amount in controversy for diversity purposes and that defendant had not shown the amount in controversy to meet the statutory minimum.³³ Before the district court ruled on the motion to remand, defendant filed a declaration containing detailed calculations indicating that damages exceeded the statutory minimum. Additionally, defendant sent plaintiff a request to admit that her claim was not worth more than the statutory minimum and argued the motion to remand should be denied because plaintiff had failed to respond to the request. The district court denied the motion for remand based on defendant's calculations and plaintiff's admissions resulting

25. *Id.*

26. *Id.*

27. *Id.* at 1244.

28. 216 F.3d 945 (11th Cir. 2000).

29. *Id.* at 946-47.

30. FLA. STAT. ANN. § 112.3187 (1992 & Supp. 2001).

31. 216 F.3d at 947.

32. *Id.*

33. *Id.* At the time of the decision, the amount in controversy was \$50,000. It has since been increased to \$75,000.

from the failure to respond to the request to admit, as provided by Rule 36 of the Federal Rules of Civil Procedure.³⁴

In analyzing whether the district court properly relied on evidence submitted after removal was filed, the Eleventh Circuit noted that it had no binding precedent.³⁵ The court instead looked to the flexible approaches applied by the Fifth and Seventh Circuits that permit such a procedure.³⁶ The Fifth Circuit, in *Allen v. R & H Oil Co.*,³⁷ allowed the parties in a summary judgment proceeding, to present evidence to determine the amount in controversy if the amount was not apparent in the complaint.³⁸ In *Harmon v. OKI Systems*,³⁹ the Seventh Circuit adopted a similar approach, stating that “the test should simply be whether the evidence sheds light on the situation which existed when the case was removed.”⁴⁰

After assessing the various considerations, the Eleventh Circuit noted that it is preferable for a defendant to include all relevant evidence at the time of removal.⁴¹ However, the court reasoned that “there is no good reason to keep a district court from eliciting or reviewing evidence outside the removal petition.”⁴² Accordingly, the district court’s denial of the remand motion was affirmed.⁴³

B. Removal and Workers’ Compensation

The Eleventh Circuit addressed another issue involving removal, this time in the context of Workers’ Compensation, in the case of *Reed v. Heil Co.*⁴⁴ Plaintiff in *Reed* injured his back while working for defendant and thereafter performed light duty work for two years until his termination by the company.⁴⁵ Following his termination, plaintiff brought suit in Alabama state court alleging that his termination violated: (1) the Americans with Disabilities Act (“ADA”);⁴⁶ (2) an

34. *Id.*

35. *Id.* at 946.

36. *Id.* at 948-49.

37. 63 F.3d 1326 (5th Cir. 1995).

38. 216 F.3d at 948-49.

39. 115 F.3d 477 (7th Cir. 1997).

40. 216 F.3d at 949 (quoting *Harmon*, 115 F.3d at 479-80).

41. *Id.*

42. *Id.* at 949.

43. *Id.* Moreover, the court held, as a matter of first impression, that Title VII’s retaliation analysis could be applied to causation under Florida’s Whistle Blower’s Act and affirmed the district court’s summary judgment decision on the merits. *Id.* at 949-51.

44. 206 F.3d 1055 (11th Cir. 2000).

45. *Id.* at 1056.

46. See 42 U.S.C. §§ 12101-12213 (1999).

Alabama statute barring retaliation against employees who file Workers' Compensation claims;⁴⁷ and (3) constituted a breach of contract. Defendant removed the action to federal court where summary judgment was granted on its behalf on all claims.⁴⁸

In his appeal plaintiff alleged that the district court lacked subject matter jurisdiction under 28 U.S.C. § 1445(c), which bars the removal of claims arising under state Workers' Compensation laws.⁴⁹ The Eleventh Circuit recognized that it had not previously resolved whether a claim of retaliation for filing a Workers' Compensation claim is barred from removal under Section 1445(c) but noted that two circuits had addressed this issue and found federal court jurisdiction lacking.⁵⁰

The Eighth Circuit in *Humphrey v. Sequentia, Inc.*⁵¹ and the Fifth Circuit in *Jones v. Roadway Express, Inc.*⁵² both interpreted the words "arising under" to have the same meaning under Section 1445(c) as they do under 28 U.S.C. § 1331, the statute controlling federal question jurisdiction.⁵³ Following the lead of the Fifth and Eighth Circuits, the Eleventh Circuit concluded that plaintiff's retaliatory discharge claim arose under the state's Workers' Compensation laws for the purposes of Section 1445(c).⁵⁴ Consequently, subject matter jurisdiction was absent, the court concluded, and the retaliatory discharge claim should have been remanded to state court.⁵⁵

IV. INTERVENTION

Another case of first impression in the Eleventh Circuit, which, coincidentally, also touched on Workers' Compensation law, was *Crawford & Co. v. Apfel*.⁵⁶ In *Apfel* an employer and its insurer sought to intervene in the employee's social security disability hearing. The employee had been injured on the job and filed an application for social security disability benefits and supplemental security income. He also filed a Workers' Compensation claim under Florida law, seeking an award of permanent total disability benefits. The social security case

47. See ALA. CODE § 25-5-11.1 (1999).

48. *Id.* at 1056-57.

49. *Id.* at 1058.

50. *Id.* at 1059.

51. 58 F.3d 1238 (8th Cir. 1995).

52. 931 F.2d 1086 (5th Cir. 1991).

53. 206 F.3d at 1059. The Eleventh Circuit distinguished two different circuits' decisions as not applying to the Workers' Compensation context even though they analyzed whether certain common law causes of action arose under Section 1445(c). *Id.* at 1059-60.

54. *Id.* at 1059.

55. *Id.* at 1060-61.

56. 235 F.3d 1298 (11th Cir. 2000).

was heard by an Administrative Law Judge, who had refused to allow the employer and insurer to intervene on the basis that they could be adversely affected by the administrative decision. The decision refusing intervention was upheld by the Appeals Council of the Social Security Administration, based on a finding that the employer and insurer were not proper parties to the administrative hearing under 20 C.F.R. § 404.932(b).⁵⁷

The employer and insurer appealed the intervention decision to the district court. After considerable procedural wrangling, the district court issued its decision reversing the administrative decision and finding that the employer and insurer *were* proper parties to the hearing.⁵⁸

The Social Security Commissioner ("Commissioner") appealed the decision allowing intervention. After determining that it did have appellate jurisdiction over the intervention issue, the Eleventh Circuit turned to the merits.⁵⁹ The court noted that social security disability hearings are inquisitorial and not adversarial in nature.⁶⁰ Additionally, the court indicated that decisions of the Social Security Administration would not be binding under Florida law.⁶¹ After recognizing these substantive concerns, the Eleventh Circuit reversed the district court on a straightforward reading of 20 C.F.R. § 404.932(b), which prohibits corporate entities from being parties to a social security disability hearing.⁶² Thus, notwithstanding the interests of the employer and insurer, intervention should not have been allowed.

V. JURISDICTION

A. *Final Judgment*

In *CSX Transportation v. City of Garden City*,⁶³ the court examined the rule from *Ryan v. Occidental Petroleum Corp.*⁶⁴ in assessing its jurisdiction.⁶⁵ In *CSX Transportation*, CSX sued Garden City seeking indemnification in connection with an accident on its railroad tracks. CSX and Garden City had previously entered into a contract whereby Garden City was allowed access to CSX's rights-of-way to construct

57. *Id.* at 1299-1301.

58. *Id.* at 1301.

59. *Id.* at 1303.

60. *Id.* at 1304.

61. *Id.*

62. *Id.*

63. 235 F.3d 1325 (11th Cir. 2000).

64. 577 F.2d 298 (5th Cir. 1978).

65. 235 F.3d at 1327.

sewer lines. As part of the agreement, Garden City would maintain insurance to indemnify CSX for any accidents resulting from Garden City's use of rights-of-way.⁶⁶

During the course of subsequent construction on the sewer line, a train operated by Amtrak collided with a construction vehicle, causing injuries to train passengers. CSX paid damages to the passengers and sued Garden City for indemnity, pursuant to the parties' agreement. Garden City, in turn, filed a third-party claim against ARCO, the subcontractor whose vehicle had been left on the track.⁶⁷

The district court granted Garden City's summary judgment motion, but the clerk would not close the case because Garden City's third-party complaint against ARCO remained pending. Thereafter, and with the court's approval, Garden City and ARCO voluntarily dismissed ARCO from the case, without prejudice.⁶⁸

CSX appealed the grant of summary judgment, and the Eleventh Circuit began its analysis by addressing jurisdiction.⁶⁹ The Eleventh Circuit, citing *Ryan*, noted that a partial adjudication on the merits followed by a voluntary dismissal without prejudice of any pending claims does not terminate litigation and, therefore, does not satisfy the requirement of finality set forth in 28 U.S.C. § 1291.⁷⁰ Because no final order had been entered, jurisdiction would need to be based on an exception whereby "a series of court orders, considered together, may be said to constitute a final judgment if they effectively terminate the litigation."⁷¹

Having examined the jurisdictional principles, the Eleventh Circuit then revisited the holding in *Ryan*.⁷² In *Ryan* the parties tried to make the case appealable by agreeing to the voluntary dismissal of pending claims.⁷³ In contrast, CSX was not guilty of trying to fabricate jurisdiction; in fact, the court found Garden City and ARCO appeared to have "undertaken to manufacture non-appealability."⁷⁴ *Ryan* did not apply because: (1) CSX did not in any way participate in the voluntary dismissal; (2) CSX did not attempt to manufacture jurisdiction by collusion with the party dismissing the claim; and (3) jurisdiction was

66. *Id.* at 1326.

67. *Id.*

68. *Id.* at 1327.

69. *Id.* at 1302.

70. *Id.*

71. *Id.* (citing *Jetco Elec. Indus., Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973)).

72. *Id.*

73. *Id.*

74. *Id.* at 1328.

accepted.⁷⁵ Very significantly, however, the court intimated that if CSX had been involved in the voluntary dismissal, then jurisdiction might not have existed.⁷⁶

B. Consent to Jurisdiction through Inaction

The case of *Rembert v. Apfel*⁷⁷ involved another jurisdictional issue of first impression for the Eleventh Circuit: Whether an appeal can be taken from a magistrate judge's final order and judgment when the clerk of the district court invited the parties to consent, through inaction, to the magistrate judge's final disposition of their case.⁷⁸ In *Rembert* a social security claimant appealed the denial of benefits to the district court. The appeal was heard before a magistrate judge after the district court clerk sent the parties a "Notice of Assignment to United States Magistrate Judge for Trial," which stated that if the parties did not respond within thirty days requesting reassignment of their case to a district judge, they were deemed to have consented to the trial and disposition of their case before the magistrate judge. Neither party returned the form, and the magistrate judge entered final judgment against the claimant.⁷⁹

The Eleventh Circuit, acting *sua sponte*, questioned whether it had jurisdiction given that consent of the parties to final judgments by magistrate judges is a jurisdictional necessity.⁸⁰ Because it had not resolved the issue of consent by inaction previously, the Eleventh Circuit looked to a Ninth Circuit case, *In re Marriage of Nasca*,⁸¹ which had invalidated implied consent as adequate to confer jurisdiction on the court of appeals.⁸² While the Eleventh Circuit agreed that consent by inaction is not valid (and consequently dismissed the appeal for lack of jurisdiction), it did not delineate the parameters of valid consent.⁸³ The court did, however, note that, while consent need not be in writing, it must be express and on the record.⁸⁴

75. *Id.*

76. *Id.* at 1329. The Eleventh Circuit also analyzed the merits of the summary judgment decision and remanded the case for consideration of evidence supplemented in the record. *Id.* at 1330-31.

77. 213 F.3d 1331 (11th Cir. 2000).

78. *Id.* at 1333.

79. *Id.*

80. *Id.* at 1334.

81. 160 F.3d 578 (9th Cir. 1998).

82. 213 F.3d at 1334.

83. *Id.* at 1335.

84. *Id.* See *General Trading, Inc. v. Yale Materials Handling Corp.*, 119 F.3d 1485 (11th Cir. 1997).

VI. PRISON LITIGATION REFORM ACT

In *Higginbottom v. Carter*,⁸⁵ a *pro se* prison inmate brought a civil rights action that alleged excessive use of force against the state department of corrections and others. The action was dismissed in the district court due to the inmate's failure to exhaust his state administrative remedies as required by the Prison Litigation Reform Act⁸⁶ ("PLRA"), and the inmate appealed.⁸⁷

The Eleventh Circuit held, as a matter of first impression, that the PLRA's exhaustion requirement applies to excessive force claims.⁸⁸ The court reasoned that not only did the plain language of the statute support this finding, citing *Freeman v. Francis*,⁸⁹ but the decision is also supported by the legislative history and purpose of the Act to reduce frivolous lawsuits.⁹⁰ The court has not yet resolved whether the exhaustion requirement is a jurisdictional prerequisite to suit or whether it is more akin to an affirmative defense that must be alleged and proven by defendant. While some courts have found the requirement to be a matter of subject matter jurisdiction, others have found it to be an affirmative defense.⁹¹ Whether exhaustion is a jurisdictional requirement in the Eleventh Circuit remains unresolved.⁹²

VII. ABSTENTION AND REMOVAL OF BANKRUPTCY PROCEEDINGS

In *Christo v. Padgett*,⁹³ the court addressed complex issues of procedure following a case that had been litigated for nearly ten years.⁹⁴ The case had its origins in the Christo family's investments in Bay Bank & Trust ("Bay Bank"), which was owned by a holding company, Florida Bay Banks ("FBB"). In short, FBB defaulted on a loan that caused shares of Bay Bank to be auctioned off by court order. Christo asserted that he had a friend named Kenneth Padgett buy the stock at auction and that Padgett agreed to turn the stock over to him

85. 223 F.3d 1259 (11th Cir. 2000).

86. 18 U.S.C. § 3626 (1994 & Supp. IV 1998).

87. 223 F.3d at 1260.

88. *Id.* at 1260-61.

89. 196 F.3d 641 (6th Cir. 1999).

90. 223 F.3d at 1261.

91. Compare *Underwood v. Wilson*, 151 F.3d 292 (5th Cir. 1998) (holding exhaustion is nonjurisdictional) with *Langford v. Couch*, 50 F. Supp. 2d 544 (E.D. Va. 1999) (holding exhaustion is jurisdictional).

92. See *Alexander v. Hawk*, 159 F.3d 1321, 1325-26 (11th Cir. 1998).

93. 223 F.3d 1324 (11th Cir. 2000).

94. *Id.* at 1328.

at a later date. Padgett, however, denied the existence of any such agreement between the parties.⁹⁵

Christo later filed a Chapter Seven bankruptcy petition, and the Chapter Seven trustee filed a complaint against Padgett alleging breach of an oral contract to turn control of Bay Bank over to the Christos. That suit was settled in an agreement that was contingent on the court's finding that the trustee had succeeded to any claim relating to Bay Bank and Padgett's alleged agreement with Christo.⁹⁶

Subsequently, the Christo family filed a complaint in state court alleging that Padgett had breached his oral contract to purchase Bay Bank on the Christo family's behalf. Padgett removed the case to federal court when it was assigned to Judge Collier, who denied Christo's motion for recusal and deferred ruling on Christo's motion to remand (or to abstain as mandated by 28 U.S.C. § 1334(c)(2)) the case to state court. On July 13, 1998, the district court held an evidentiary hearing and found there was no enforceable agreement between Christo and Padgett. Moreover, the court reasoned that, even if there had been an agreement, Christo's interest would have passed to his bankruptcy estate. After a recommendation from the bankruptcy court, the district court approved the settlement agreement between Padgett and the Trustee. The district court also denied Christo's motion to remand the suit to state court on the grounds of issue preclusion based on the July 13 order.⁹⁷

On appeal the Eleventh Circuit first addressed whether mandatory abstention under 28 U.S.C. § 1334(c)(2) applies to cases removed under 28 U.S.C. § 1452.⁹⁸ The court decided to follow the majority of circuits that hold Section 1334(c)(2) applies to state law claims that have been removed to federal court under Section 1452(a).⁹⁹ The Eleventh Circuit held that it had no jurisdiction to review the district court's decision not to remand under Section 1334(c)(2) because Christo filed his bankruptcy petition several months before the effective date of Section 1334(d) (one of the 1994 amendments to the bankruptcy code), granting appellate review of decision not to abstain, which was prospective only.¹⁰⁰

In sum, the Eleventh Circuit affirmed the district court's (1) denial of Christo's motion to recuse himself,¹⁰¹ (2) approval of the settlement

95. *Id.* at 1328-29.

96. *Id.* at 1329.

97. *Id.* at 1329-30.

98. *Id.* at 1331.

99. *Id.*

100. *Id.* at 1331-32.

101. *Id.* at 1333. Christo's motion for recusal was based upon certain comments the judge made in reference to a campaign by the Christo family opposing outside control of Bay Bank and the judge's prior sentencing of one of the Christo children. *Id.*

agreement; and (3) dismissal of Christo's claims on preclusion grounds.¹⁰²

VIII. CONCLUSION

This year's review of Eleventh Circuit cases contains a significant number of issues of first impression. It is hoped this Article will assist the bench and bar with the ongoing complexities of federal court practice.

102. *Id.* at 1340.