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Trial Practice and Procedure

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Trial Practice & Procedure

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I. INTRODUCTION

This Article surveys the 1994 decisions of the Eleventh Circuit Court of Appeals that have a significant impact on issues related to trial practice and procedure.

II. PARTIES

A. *Standing*

In *Church v. City of Huntsville*,[1] homeless persons brought a class action under 42 U.S.C. § 1983 against the City of Huntsville, alleging that the city had a policy of arresting them, in violation of their constitutional rights, as a part of a concerted effort to drive them out of the city.[2] Plaintiffs sought an injunction restraining the allegedly unlawful arrests.[3] The district court granted preliminary injunctive relief, and the city appealed.[4]

Before reaching the merits of the injunction, the Eleventh Circuit addressed the issue of whether the plaintiffs had standing to assert their claims.[5] The City of Huntsville had not challenged the plaintiffs' standing in the district court. Standing, however, is not simply a pleading requirement, but "an indispensable part of the plaintiff's case"

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1. 30 F.3d 1332 (1994).
2. *Id.* at 1335.
3. *Id.*
4. *Id.*
5. *Id.*

that goes to the subject matter jurisdiction of the court.[6] Therefore, each element of standing must be supported "with the manner and degree of evidence required at the successive stages of the litigation."[7]

On a motion for summary judgment, the court explained, standing (if challenged) must be proven by plaintiffs through affidavits or other evidence.[8] The same rule applies on a preliminary injunction motion.[9] In *Huntsville* however, the court of appeals reasoned that the plaintiffs did not present evidence to support standing possibly because standing had not been challenged by Huntsville.[10] Under these circumstances, the court concluded that standing in the preliminary injunction context would be adjudged by the pleadings, with any evidence viewed favorable to the plaintiffs.[11] In so ruling, the court expressly reserved deciding "the degree of evidence necessary to support standing at the preliminary injunction stage when the plaintiff is on notice that standing is contested."[12]

B. Real Party in Interest

In *ECI Management Corp. v. Scottsdale Insurance Co.*,[13] an apartment complex operator (ECI) sued Scottsdale Insurance Company for failing to defend and indemnify ECI against a lawsuit brought by a tenant.[14] ECI, who was named as an insured on another policy with Allstate Insurance Company, settled the tenant's suit using Allstate's funds pursuant to a loan receipt.[15] ECI then filed a diversity action against Scottsdale in federal court alleging breach of contract and bad faith refusal to honor its insurance contract.[16]

Scottsdale successfully moved the district court to substitute Allstate as the real party in interest under Rule 17.[17] Following a jury trial, judgment was entered in favor of Scottsdale, and ECI and Allstate appealed.[18]

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6. *Id.* at 1336 (quoting Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992)).
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 1336 n.1.
13. 23 F.3d 354 (11th Cir. 1994).
14. *Id.* at 355.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 355-56.

One of the errors alleged on appeal was that Allstate should not have been added as a party because it was not a "real party in interest."[19] The Eleventh Circuit noted that although the real party analysis is a matter of federal procedure, state law identifies the true owner of the legal interest.[20] The court found that, under Georgia law, ECI was the real party in interest.[21] Nevertheless, the court affirmed the judgment of the district court because it found the addition of Allstate harmless.[22]

III. PLEADINGS

A. *Retroactivity of Amendments*

In *Hunt v. Department of Air Force Division of USA*,[23] Hunt sued the Department of the Air Force claiming she received personal injuries while shopping at a commissary.[24] Plaintiff filed the complaint on the last day allowed following exhaustion of administrative remedies, but incorrectly named the Air Force instead of the United States.[25] Although plaintiff served the complaint within 14 days on the Attorney General, the United States was not served properly until 184 days after the complaint was filed, when Hunt served, in addition, the United States Attorney.[26]

The district court dismissed the complaint without prejudice for plaintiff's failure to perfect service of process within 120 days of filing the complaint (as required by Federal Rule of Civil Procedure 4(j)) and did not allow the United States to be added as a party retroactively.[27] On appeal, the Eleventh Circuit affirmed the dismissal on untimely service grounds, even though it found error in the district court's retroactivity analysis.[28] Specifically, under Federal Rule of Civil Procedure 15(c), Hunt should have been allowed to amend her complaint to name the United States because the Attorney General had notice of the action before the expiration of the 120 day period provided under

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19. *Id.* at 356.
20. *Id.* (quoting DM II, Ltd. v. Hospital Corp. of America, 130 F.R.D. 469 (N.D. Ga. 1989)); U.S. Fire Ins. Co. v. Farris, 146 Ga. App. 177, 245 S.E.2d 868 (1978).
21. 23 F.3d at 356 (citing U.S. Fire Ins. Co. v. Farris, 146 Ga. App. 177, 245 S.E.2d 868); Southeast Transp. Corp. v. Hogan Livestock Co., 133 Ga. App. 825, 212 S.E.2d 638 (1975).
22. 23 F.3d at 356-57.
23. 29 F.3d 583 (11th Cir. 1994).
24. *Id.* at 587.
25. *Id.*
26. *Id.*
27. *Id.* at 588.
28. *Id.* at 589.

Rule 4(j).[29] The error was deemed harmless, however, because the complaint was not served within 120 days of the complaint.[30]

In deciding *Hunt*, the Eleventh Circuit construed Rule 4(j), which mandated dismissal of a complaint served outside the 120 day period unless "good cause" excused the delay.[31] Federal Rule of Civil Procedure 4(m), which superseded Rule 4(j), which now requires a district court to extend the 120 day period if good cause is shown and allows a district court discretion to extend the period even in the absence of good cause.[32] Practitioners are therefore cautioned that the holding in *Hunt* might be different under a Rule 4(m) analysis.

B. Undue Delay

In *Jones v. Childers*,[33] the Eleventh Circuit discussed the discretion of courts to bar amendments to pleadings due to undue delay. Jones, on the advice of Talent Service, Inc.(TSI), purchased interests as a limited partner in a research project.[34] TSI told Jones the investment would be a tax shelter and that an IRS audit was a mere formality.[35] TSI's advice proved wrong, however, as the IRS audit resulted in deficiency notices that Jones eventually settled for $90,000.[36]

In 1987, Jones sued TSI to recover damages arising from its advice.[37] In 1992, less than one week before a pretrial conference, TSI moved to amend their answer to add estoppel, waiver, ratification, and failure to mitigate damages, among others, as affirmative defenses.[38] The district court denied the amendments as untimely.[39]

At trial, Jones was awarded over half a million dollars in damages.[40] On appeal, TSI argued that the district court abused its discretion in denying TSI's motion to amend.[41] The Eleventh Circuit disagreed. Although it acknowledged that leave to amend should be freely granted, it noted as well that "undue delay" is a factor to be considered in the

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29. *Id.*
30. *Id.*
31. *Id.* at 588-89.
32. FED. R. CIV. P. 4(m).
33. 18 F.3d 899 (11th Cir. 1994).
34. *Id.* at 902.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 909.
39. *Id.*
40. *Id.*
41. *Id.*

district court's exercise of discretion.[42] In *Jones* the motion to amend was made four years after the original answer, after discovery had been completed, and after a trial date had been set.[43] Because the amendment would have further complicated an already complex case and likely delayed the trial, the Eleventh Circuit affirmed the district court's denial.[44]

C. *Statute of Limitations*

The decision in *Tucker v. Southern Wood Piedmont Co.*,[45] addresses the interplay between state statute of limitations and a federal law establishing accrual date for actions involving exposure to hazardous substances.[46] The plaintiff sued for damages to property resulting from defendant's wood preservative.[47] Defendant moved to dismiss, arguing that plaintiff's damages should be restricted by the state statute of limitations to those damages occurring during the four years immediately preceding the lawsuit.[48] The district court denied the motion because federal law provides a discovery rule for environmental torts brought under state law.[49]

The Eleventh Circuit affirmed the district court, finding that the scope of the federal discovery rule is not restricted to a statement of whether an action may be brought, but also defines the period when damages can be recovered.[50] The court reasoned that in the context of a continuing tort, the time limit for recovery of damages and time when an action can be brought are indistinguishable:

> To conclude that the statute of limitations is tolled until the injury is discovered, but that Plaintiffs may only recover for damage done to their property within the immediately preceding period of the statute of limitations[,] is illogical .... Such a result would result in depriving plaintiffs of their day in court for the full extent of their injury.[51]

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42. *Id.* (quoting Foman v. Davis, 371 U.S. 178 (1962)).
43. *Id.*
44. *Id.*
45. 28 F.3d 1089 (11th Cir. 1994).
46. *Id.* at 1089.
47. *Id.*
48. *Id.* at 1090.
49. *Id.*
50. *Id.* at 1091.
51. *Id.* at 1093.

IV. DISCOVERY

A. Attorney-Client Privilege

In *Cox v. Administrator United States Steel & Carnegie*,[52] the Eleventh Circuit discussed many aspects of the attorney-client privilege and its exceptions. In *Cox* union members sued their union and their employer, USX Corporation, claiming USX improperly obtained, and union negotiators improperly gave, concessions in negotiating a collective bargaining agreement.[53] During discovery in this complicated case, the district court made certain rulings on the scope of the attorney-client privilege.[54] Those rulings were then raised on appeal from a summary judgment order.[55]

The Eleventh Circuit first noted that the purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[56] Despite this lofty goal, the privilege has a number of exceptions, including the "Garner doctrine," the "crime-fraud exception," and waiver.[57]

The Garner doctrine[58] states that stockholders in a corporation can discover communications between the corporation and its attorneys upon a showing of "good cause," which is determined by the application of nine factors.[59] The Eleventh Circuit did not reach an analysis of all those factors in *Cox*, however, because two of those factors precluded disclosure of the communications: only a small percentage of the union's members were part of the plaintiff class, and the interests of the plaintiff class were adverse to those *not* in the class.[60] The Eleventh Circuit also added that the Garner doctrine does *not* apply to attorney work product.[61]

Next, the Eleventh Circuit addressed the crime-fraud exception. Under this rule, courts apply a two pronged test: whether the client

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52. 17 F.3d 1386 (11th Cir. 1994), *cert. denied*, USX Corp. v. Cox, 115 S. Ct. 900 (1995).
53. 17 F.3d at 1392.
54. *Id.*
55. *Id.*
56. *Id.* at 1414 (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).
57. *Id.* at 1414-18.
58. The Garner doctrine takes its name from the Fifth Circuit's decision in Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970).
59. 17 F.3d at 1414.
60. *Id.* at 1414-15.
61. *Id.* at 1423.

sought advice of counsel to further criminal or fraudulent conduct, and whether the attorney furthered such conduct.[62] Unlike the Garner doctrine, this exception does apply to attorney work product.[63] On the facts presented in *Cox*, however, the Eleventh Circuit found the exception inapplicable because there was no evidence that the attorneys furthered any criminal or fraudulent conduct.[64]

The third exception discussed in *Cox* is waiver. The privilege belongs to the client, and can be waived in three instances: (1) when a client testifies concerning portions of the attorney-client communication, (2) when a client places the attorney-client relationship directly at issue, and (3) when a client asserts reliance on an attorney's advice as an element of a claim or defense.[65] In *Cox* the union's lawyers had testified during a criminal matter involving the content of the communications.[66] The Eleventh Circuit noted that "courts generally have not found a waiver where the party attacking the privilege has not been prejudiced."[67] On the facts presented, the court declined to find waiver absent a showing by the plaintiffs that the testimony of the lawyers in the criminal matter prejudiced them.[68] The Eleventh Circuit also found that waiver, like the Garner doctrine, does not apply to attorney work product such that an attorney's mental impressions cannot be waived by implication.[69]

In sum, the Eleventh Circuit in *Cox* comprehensively reviewed the bases for the attorney-client privilege, both as to communications and work product. Although the privilege continues to be a strong defense to disclosure, there are a number of exceptions that can apply, with communications being more vulnerable to disclosure than work product.

B. Federal Rule of Civil Procedure 37 Sanctions

In *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*,[70] the Eleventh Circuit sent a strong message on the imposition of discovery sanctions under Rule 37. BankAtlantic retained Paine Webber as a financial advisor in an attempt to avoid a hostile takeover and as broker for interest rate swaps. After entering into two interest rate swaps on

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62. *Id.* at 1416.
63. *Id.* at 1422.
64. *Id.*
65. *Id.* at 1418 (quoting Sedco Int'l S.A. v. Cory, 683 F.2d 1201, 1206 (8th Cir.), *cert. denied*, 459 U.S. 1017 (1982) (brackets omitted)).
66. *Id.* at 1417.
67. *Id.*
68. *Id.*
69. *Id.* at 1422-23.
70. 12 F.3d 1045 (11th Cir. 1994).

Paine Webber's advice, BankAtlantic suffered losses allegedly in excess of $30 million. BankAtlantic then sued Paine Webber to recover for its losses.[71]

During discovery, BankAtlantic requested the production of documents from Paine Webber and its affiliates.[72] Eventually, the district court ordered Paine Webber to produce specified documents.[73] BankAtlantic then sought sanctions for an alleged violation of that order.[74] The court expressly ordered Paine Webber to produce certain documents concerning previous lawsuits and further ordered Paine Webber and its counsel to compensate BankAtlantic for its time and expenses in filing the motion, preparing for a new trial date, and expediting discovery.[75]

Although final judgment and substantial costs were eventually entered in favor of Paine Webber, sanctions in the amount of $350,078.80 were awarded in favor of BankAtlantic.[76] On appeal, among other issues, Paine Webber's counsel argued that the district court abused its discretion in imposing sanctions against counsel absent a finding of willful violation of the discovery order, and Paine Webber contended that the sanctions violated due process and that interest on the award should run from date of final judgment and not the date sanctions were allowed.[77]

The Eleventh Circuit found, in the first instance, that the district court acted within its discretion in awarding sanctions.[78] In so ruling, the court rejected counsel's argument that Rule 37 sanctions are permissible only upon a showing of willfulness or bad faith.[79] The court relied in part on *Societe Internationale Pour Participations Industielles et Commerciales, S.A. v. Rogers*,[80] where the Supreme Court found no distinction between 'failure' and 'refusal' to comply with a discovery order for purposes of sanctions:[81]

> For purposes of subdivision (b)(2) of Rule 37, we think that a party "refuses to obey" simply by failing to comply with an order. So construed the Rule allows a court all the flexibility it might need in framing an order appropriate to a particular situation. Whatever its

71. *Id.* at 1046-47.
72. *Id.* at 1047.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 1048.
77. *Id.*
78. *Id.* at 1050.
79. *Id.*
80. 357 U.S. 197 (1958)
81. *Id.*

> reasons, petitioner did not comply with the production order. Such reasons, and the willfulness or good faith of petitioner, can hardly affect that fact of noncompliance and are relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply.[82]

Although counsel relied upon the client's representations of the nonexistence of such documents, the Eleventh Circuit upheld the district court's finding that counsel "did not make all reasonable efforts to comply with the court's order" even though it had "full access to the files."[83] Therefore, counsel did not show "substantial justification" for noncompliance with the discovery order.[84]

The Eleventh Circuit ruled further that the imposition of sanctions against Paine Webber complied with due process requirements because the district court's order put Paine Webber on notice of the necessity to produce the documents and the award was "just" under the circumstances.[85]

As for the interest calculation, the Eleventh Circuit found that Rule 37 allows interest "'payable from the date the judgment was entered in the district court.'"[86] Rule 54(a), in turn, "defines 'judgment' as including a decree and any order from which an appeal lies."[87] The court of appeals then construed the date of judgment, for interest purposes, to be the date of the sanction order and not the final judgment.[88] Interest on costs awarded to Paine Webber, however, accrued on the date final judgment was entered.[89]

V. PRETRIAL ATTACHMENTS

In *Rosen v. Cascade International, Inc.*,[90] the Eleventh Circuit, in a strongly worded opinion, made clear that a court has no authority as part of a preliminary injunction to freeze a defendant's assets pending

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82. Familias Unidas v. Briscoe, 544 F.2d 182, 191-92 (5th Cir. 1976) (quoting Rogers, *supra*, 357 U.S. at 207-08).

83. 12 F.3d at 1050.

84. *Id.* at 1050. *See BankAtlantic v. Blyth Eastman Paine Webber, Inc.*, 127 F.R.D. 224 233, *appeal dismissed*, Atlantic Federal Sav. & Loan Ass'n of Ft. Lauderdale v. Blythe Eastman Paine Webber, Inc., 890 F.2d 371 (1989).

85. 12 F.3d at 1050-52.

86. *Id.* at 1053 (*quoting* FED. R. APP. PRO. 37). 890 F.2d 371 (1989).

87. 12 F.3d at 1053.

88. *Id.*

89. *Id.* at 1052 (citing 28 U.S.C. § 1961 (1992)).

90. 21 F.3d 1520 (1994).

trial where the plaintiff seeks money damages only and the assets are not the subject of the litigation.[91]

In *Rosen* plaintiff brought a class action to recover money damages for alleged fraud and violations of securities laws.[92] The district court, in the context of a preliminary injunction, found that plaintiffs were likely to prevail on the merits, and froze Defendant Moses' assets, allowing him to withdraw reasonable sums from his bank accounts to meet his personal living and business expenses only.[93]

Moses appealed the order to the Eleventh Circuit.[94] In soundly reversing that part of the district court's preliminary injunction, the court of appeals relied on the Supreme Court's decision in *DeBeers Consolidated Mines, Ltd. v. United States*,[95] whose meaning it found to have been "tortured" by the district court.[96] In *DeBeers* the federal government brought an equitable action to restrain violations of the antitrust laws, and obtained a preliminary injunction from the district court that froze the defendants' property to secure payment of contempt fines should the defendants violate a final order that had not yet been entered.[97] The Supreme Court invalidated the preliminary injunction for two reasons: (1) the injunction was of a different "character" than the equitable relief sought in the action ("the prohibition of certain conduct, not the payment of money damages"); and (2) the government's right to the frozen assets were not the subject of the litigation.[98]

The district court in *Rosen* had read *DeBeers* to mean that assets of a defendant could be frozen where money damages are sought if necessary to protect the recovery of such damages.[99] In so reading *DeBeers*, the district court relied on *Hoxworth v. Blinder, Robinson & Co.*,[100] a case decided by the Third Circuit.[101] As stated above, the Eleventh Circuit characterized this reading of *DeBeers* as "tortured" and stated the rule as follows: preliminary injunctive relief freezing a defendant's assets in order to establish a fund with which to satisfy a potential judgment for

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91. *Id.* at 1531.
92. *Id.* at 1524.
93. *Id.* at 1525-26.
94. *Id.* at 1526.
95. 325 U.S. 212 (1945).
96. 21 F.3d at 1529.
97. *Id.* at 1527.
98. *Id.* at 1527-28. *See also* ITT Community Dev. Corp. v. Barton, 569 F.2d 1351 (5th Cir. 1978).
99. 21 F.3d at 1527.
100. 903 F.2d 186 (3d Cir. 1990).
101. 21 F.3d at 1528-29.

money damages is simply not an appropriate exercise of a federal district court's authority.[102]

Although assets cannot be frozen in a money damages case as part of a preliminary injunction under Federal Rule of Civil Procedure 65, *Rosen* did not hold that "'a federal court is powerless to protect a potential future damages remedy against a recalcitrant defendant with highly liquid assets, no matter how wrongful its conduct, how bad the injury it caused, or how brazen its attempt to evade judgment by secreting assets.'"[103] In proper circumstances, assets can be frozen prior to judgment under Federal Rule of Civil Procedure 64, which provides that, except as otherwise provided by the Constitution or an applicable federal statute, district courts can fashion "'all remedies . . . for the purpose of securing satisfaction of the judgement ultimately to be entered in the action . . . [as] are available under the circumstances and in the manner provided by the law of the state in which the district court is held."[104] The Eleventh Circuit then reviewed Florida law and found no basis for freezing Moses' assets.[105] Accordingly, the preliminary injunction was vacated.[106]

VI. HABEAS CORPUS

A. *Summary Judgment Notice*

Last year's issue of this article surveying 1993 Eleventh Circuit trial practice and procedure cases discussed *McBride v. Sharpe*,[107] wherein the Eleventh Circuit vacated the entry of summary judgment due to the district court's failure to provide the habeas corpus petitioner with advance, ten-day notice of the court's intent to grant or deny summary judgment.[108] In 1994, the Eleventh Circuit reheard the case *en banc* and affirmed the district court's judgment.[109]

The Eleventh Circuit changed its course upon a closer analysis of Habeas Corpus Rule 8(a), which allows district courts to rule on habeas corpus petitions without making factual inquiries outside the record.[110]

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102. *Id.* at 1530.
103. *Id.*
104. *Id.*
105. *Id.* at 1531.
106. *Id.*
107. 981 F.2d 1234 (11th Cir.), *vacated*, 999 F.2d 502 (1993), *rehearing en banc*, 25 F.3d 962 (1994), *cert. denied*, 115 S. Ct. 489 (1994).
108. 981 F.2d at 1236.
109. 25 F.3d 962 (11th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 489 (1994).
110. 25 F.3d at 970.

The court contrasted Habeas Corpus Rule 8(a) with the ten-day notice requirement of Federal Rule of Civil Procedure 56(c), and decided that the latter rule does not apply when a habeas petition is "ripe for disposition" without further factual development.[111] The Eleventh Circuit then considered the merits of the district court's decision, and affirmed its judgment.[112]

B. Abuse of the Writ

In *Macklin v. Singletary*,[113] Macklin had been tried and convicted in Florida of numerous violent crimes and sentenced to three life terms.[114] Macklin filed a direct appeal, and subsequently filed eight collateral challenges to his convictions in state and federal courts.[115]

In this third habeas corpus petition in federal court, the one on review in *Macklin*, the State argued for dismissal based on the "abuse of the writ" doctrine and on the merits.[116] The district court denied relief on the merits without reaching the abuse of writ issue.[117]

Macklin appealed the denial of his petition to the Eleventh Circuit and, among other defenses, the State again argued for dismissal based on the abuse of the writ doctrine.[118] The Eleventh Circuit noted that under that doctrine, a court cannot decide new habeas claims unless the petitioner shows "cause and prejudice" for not asserting it in a prior petition.[119] The court of appeals acknowledged that it is "sometimes . . . easier to skip over an abuse of the writ issue and deny a claim on the merits."[120] The court also cited an earlier decision where it did the same thing.[121] Nevertheless, the court admonished district courts to resist that temptation, and held that "a court of appeals has discretion to affirm on abuse of the writ grounds a district court's denial of a habeas petition on the merits."[122] After analyzing the record, the court

111. *Id.* at 970, 973.
112. *Id.* at 973.
113. 24 F.3d 1307 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1122 (1995).
114. 24 F.3d at 970.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* (quoting Sawyer v. Whitley, 112 S. Ct. 2514, 2518 (1992)); McCleskey v. Zant, 499 U.S. 467 (1991).
120. *Id.*
121. *Id.* *See* Jones v. White, 992 F.2d 1548, 1558 1565 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 448 (1994).
122. 24 F.3d at 1311.

then dismissed Macklin's third habeas corpus petition on that procedural ground.[123]

VII. FEDERAL RULE OF CIVIL PROCEDURE 11 SANCTIONS

In *Worldwide Primates, Inc. v. McGreal*,[124] a company engaged in the commercial wildlife trade sued McGreal, an animal rights activist who had sent two letters to one of Worldwide's clients criticizing Worldwide's capture and detention practices.[125] Worldwide sued McGreal in Florida state court, alleging tortious interference with a business relationship.[126] McGreal, a South Carolina resident, removed the action to federal court based on diversity jurisdiction and then moved to dismiss under Rule 12(b)(6).[127] Worldwide opposed the motion, which was denied.[128] McGreal then moved for summary judgment.[129] After failing to timely oppose that motion, Worldwide sought dismissal because its president had been indicted for violating federal laws relating to the sale of animals, and the continued prosecution of the civil suit could jeopardize the criminal proceedings.[130]

The district court allowed the dismissal, but not before McGreal had moved for sanctions under Rule 11 on the ground that the tortious interference claim was baseless and brought solely to harass her for exercising her right to free speech.[131] The district court denied sanctions, and McGreal appealed.[132]

In reversing, the Eleventh Circuit first ruled that although Rule 11 sanctions could not attach to the complaint (because it had been filed in *state* court) sanctions could be imposed based upon any federal court filings subsequent to removal.[133] Because Worldwide's opposition to the motion to dismiss "continued" the litigation, Rule 11 sanctions could be imposed if the lawsuit was baseless.[134] Having found that the district court had authority to impose sanctions, the Eleventh Circuit then carefully reviewed the record and found that the district court had abused its discretion in denying sanctions, and remanded the case for

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123. *Id.*
124. 26 F.3d 1089 (11th Cir. 1994).
125. *Id.* at 1090.
126. *Id.* at 1089.
127. *Id.*
128. *Id.*
129. *Id.* at 1091.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* *See* Griffen v. City of Oklahoma City, 3 F.3d 336, 339 (10th Cir. 1993).
134. 26 F.3d at 1091.

further proceedings, including a consideration of sanctions against Worldwide's counsel.[135]

VIII. POST-JUDGMENT MOTIONS

A. Federal Rules of Civil Procedure 59 and 60

In *Hertz Corp. v. Alamo Rent-A-Car, Inc.*,[136] Hertz sued Alamo and Value Rent-A-Car, Inc., among other rental car companies, claiming unfair trade practices.[137] The district court dismissed the case without prejudice and granted Hertz leave to file an amended complaint within twenty days.[138] When no amendment was filed by Hertz, Value timely moved under Federal Rule of Civil Procedure 59(e) for a dismissal with prejudice.[139] After the ten-day limit on Rule 59(e) motions expired, Alamo moved for dismissal with prejudice as well.[140] Both motions were granted.[141]

After Alamo's motion was granted, it moved for an award of attorney's fees and costs. Hertz opposed that motion. Several months later, while Alamo's sanctions motion was pending, Hertz moved under Federal Rule of Civil Procedure 60(b) to set aside the dismissal with prejudice because Alamo's Rule 59(e) motion was untimely.[142] The district court denied Hertz's motion for two reasons: (1) it had authority to dismiss with prejudice under Federal Rules of Civil Procedure 41(b) and 60(b) as a sanction against Hertz for not filing an amended complaint; and (2) it had jurisdiction to grant the Rule 59(e) motions based on Value's timely motion.[143]

The Eleventh Circuit disagreed with both bases, and vacated the dismissal with prejudice.[144] First, the court found that Hertz was not *required* to file an amended complaint; instead, leave to amend is *permissive*.[145] Consequently, Hertz's failure to amend its complaint did not justify altering the dismissal.[146]

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135. *Id.* at 1091-93.
136. 16 F.3d 1126 (11th Cir. 1994).
137. *Id.* at 1126.
138. *Id.*
139. *Id.* at 1128.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*

Second, the Eleventh Circuit ruled that the timeliness of Value's Rule 59(e) motion did not salvage the untimeliness of Alamo's Rule 59(e) motion.[147] The timeliness of a Rule 59(e) motion is jurisdictional and cannot be extended even by order of the district court.[148] Further, the court of appeals explained that the district court's reasoning would give no contours at all to time deadlines for Rule 59(e) motions when there are multiple defendants.[149]

The Eleventh Circuit then concluded that Hertz's Rule 60(b) motion was timely, and given the finality of the dismissal without prejudice, the district court lacked jurisdiction to alter or amend the judgment.[150]

B. *General Verdicts*

In *Richards v. Michelin Tire Corp.*,[151] the Eleventh Circuit reaffirmed certain rules pertaining to general verdicts. When a plaintiff obtains a general verdict on more than one theory of recovery, the evidence must be sufficient to support all theories of recovery for the general verdict to stand.[152] The basis for this rule is that, in the absence of special verdicts from the jury, there is no way to be assured that the jury's verdict was not predicated solely on the invalid claim.[153] Because the evidence in *Richards* was insufficient to support all theories of recovery, the case was remanded for a new trial.[154]

IX. IMMUNITY

A. *Health Care Quality Improvement Act*

In *Bryan v. James E. Holmes Regional Medical Center*,[155] the Eleventh Circuit summarized the procedure to be followed when a party asserts immunity under the Health Care Quality Improvement Act, 42 U.S.C. §§ 11101 et seq. ("HCQIA").[156] In enacting this statute, Con-

147. *Id.* at 1129.
148. *Id.*
149. *Id.*
150. *Id.* at 1133.
151. 21 F.3d 1048 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 902 (1995).
152. 21 F.3d at 1055.
153. *Id. See* Prudential Ins. Co. v. Morrow, 339 F.2d 411, 412-13 (5th Cir. 1964); Crist v. Dickson Welding, Inc., 957 F.2d 1281, 1286 (5th Cir.), *cert. denied*, 113 S. Ct. 187, 121 (1992).
154. 21 F.3d at 1059. *See* Smith v. Southern Airways, Inc., 556 F.2d 1347-48 (5th Cir. 1977); Lee v. Wal-Mart Stores, Inc., 943 F.2d 554, 560 (5th Cir. 1991).
155. 33 F.3d 1318 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1363 (1995).
156. 33 F.3d at 1321 (citing 42 U.S.C. § 11101 (1988 & Supp. IV 1992)).

gress intended to encourage hospitals to use a peer review system to evaluate and discipline staff doctors.[157] In furtherance of that goal, "HCQIA grants limited immunity, in suits brought by disciplined physicians, from liability for money damages to those who participate in professional peer review activities."[158] The immunity protects doctors and hospitals from immunity for acts they reasonably believed were in accordance with due process and other HCQIA requirements.[159] The purpose of this broad immunity is to prevent courts from usurping the professional judgments of hospitals and health care professionals.[160]

In *Bryan* a physician who had been subject to a lengthy peer review process sued the hospital that terminated his staff privileges.[161] The hospital consistently asserted HCQIA immunity as a defense to liability, including as a basis for summary judgment.[162] The district court denied the summary judgment motion, in part finding that a jury would need to resolve the immunity question.[163] The case then proceeded to trial, and the jury awarded Bryan almost $4.2 million in damages against the hospital.[164]

The hospital appealed on several grounds, including HCQIA immunity.[165] The Eleventh Circuit concluded that the district court's submission of the immunity question to the jury was improper.[166] Relying on legislative history, the court determined that HCQIA immunity is a matter of law for the court to decide.[167] Procedurally, the Eleventh Circuit analogized to qualified immunity rules in civil rights cases and established the following guidelines:

> A district court should consider the issue of HCQIA immunity from damages at the summary judgment stage. If it determines that the defendant is not entitled to such protection, then the merits of the case should be submitted to the jury without reference to the immunity issue. If there are disputed subsidiary issues of fact concerning HCQIA immunity, such as whether the disciplined physician was given adequate notice of the charges and the appropriate opportunity to be heard, the court may ask the jury to resolve the subsidiary factual

157. *Id.*
158. *Id.*
159. *Id.* at 1322.
160. *Id.* at 1337.
161. *Id.* at 1321.
162. *Id.*
163. *Id.* at 1330-31.
164. *Id.* at 1321.
165. *Id.*
166. *Id.*
167. *Id.* at 1337.

> questions by responding to special interrogatories .... Under no circumstances should the ultimate question of whether the defendant is immune from monetary liability under HCQIA be submitted to the jury.[168]

The Eleventh Circuit then reviewed the evidence closely and determined that the hospital was entitled to immunity as a matter of law.[169] Consequently, the multi-million dollar verdict in favor of the physician was reversed.[170]

B. Qualified Immunity

In *Lassiter v. Alabama A & M University*,[171] the Eleventh Circuit, sitting *en banc*, gave sharper teeth to the qualified immunity defense in civil rights cases. The qualified immunity defense, in general, protects public officers from liability for money damages in individual capacity lawsuits for acts taken in the reasonable, good faith, belief that no "clearly established" federal constitutional or statutory rights were being violated.[172] In *Lassiter* the Eleventh Circuit wrote that qualified immunity is the "usual rule," and that district courts should think "long and hard before stripping defendants of immunity."[173]

Furthermore, for the law to be "clearly established to the point that qualified immunity does not apply, the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that what he is doing violates federal law."[174] The Eleventh Circuit cautioned lower courts not to permit plaintiffs to discharge their burden by referring to general rules and to the violation of abstract rights.[175] The court further stated that the subjective intent of government defendants plays no part in the qualified immunity analysis, as the touchstone is whether the conduct was objectively reasonable under the circumstances.[176]

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168. *Id.* at 1333.
169. *Id.* at 1337.
170. *Id.*
171. 28 F.3d 1146 (11th Cir. 1994)(en banc).
172. *Id.* at 1149.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 1150.

Following *Lassiter*, suits against public officials in their individual capacities should proceed only against "the plainly incompetent officer or one who was knowingly violating the law . . . ."[177]

X. CONCLUSION

As this survey of 1994 trial practice and procedure cases demonstrates, the Eleventh Circuit continues to demand high standards of professionalism from attorneys that appear in its courts, and is not hesitant to affirm sanctions for violating court orders and discovery norms. While the court tends to give considerable leeway to district courts in matters within their discretion, the court has reversed verdicts, some in considerable amounts, for abuses of discretion as well as on principles of law. At the same time, errors that did not effect the outcome of the case are deemed harmless. Eleventh Circuit watchers will be particularly interested in decisions from 1995, as the district courts' interpretations of the sweeping amendments to the federal rules continue to percolate up to the appellate court.

177. *Id.*