Appellate Practice & Procedure

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This Article reviews the appellate procedural issues that the United States Court of Appeals for the Eleventh Circuit addressed in the cases it decided in the year 2001. Most of the 2001 Eleventh Circuit cases are included, but many are necessarily omitted. Just as the greatest substance of appellate procedure should emphasize the standards of review that the appellate court applies in reviewing the judgments of trial courts, the greatest substance of this Article concentrates on the standards of review that the Eleventh Circuit applied in 2001 and the circumstances to which it applied them. An appellate court should not allow itself to be used by litigants as a forum for retrying the unfavorable result of a trial. Appellate courts can avoid such abuse of the appellate process through strict adherence to the rules and established precedent governing appellate procedure. If they do so, appellate courts will support the legitimacy of the justice system by serving as a mechanism of review and a bulwark against the arbitrariness that would otherwise threaten to unravel the fabric of our justice system. If appellate courts retry cases, rather than review trial proceedings and judgments under established standards, they run the risk of introducing an arbitrary nature into the justice system.

Though the weight of its attention to the appellate process was concentrated on its standards of review, the 2001 Eleventh Circuit cases also afford the practitioner a degree of guidance in navigating the maze of the appellate process. This was particularly noticeable in the 2001 Eleventh Circuit holdings relating to jurisdiction.

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I. THE DOCTRINE OF MOOTNESS AND APPELLATE JURISDICTION

In *Al Najjar v. Ashcroft (Al Najjar III)*,[1] the court held *per curiam* that it was deprived of jurisdiction by its decision in the related case of *Al Najjar v. Ashcroft (Al Najjar II)*.[2] Mootness is a jurisdictional issue and an appeal of moot issues must be dismissed. In *Al Najjar II*, the United States Attorney General appealed the district court's order in *Al Najjar v. Reno (Al Najjar I)*[3] that the government could not hold Al Najjar for alleged association with a terrorist organization during the pendency of his appeal from the Board of Immigration Appeals ("BIA") order affirming Al Najjar's deportation.[4] In *Al Najjar III*, the Eleventh Circuit affirmed the BIA, which constituted a final order of deportation and gave the Attorney General authority to hold Al Najjar without bond during the execution of the deportation order.[5]

The "'case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate.'"[6] In *BellSouth Telecommunications, Inc. v. Town of Palm Beach*,[7] the Eleventh Circuit noted that if statutory law upon which the district court based its decision changes after the district court's entry of its order and prior to the apppellate court's decision, then the appellate court must conduct its review based upon the new law rather than the law relied on by the district court.[8] This could have the effect of rendering the matter in controversy moot, though the court noted in *BellSouth* a live controversy remained.[9] Postjudgment alterations of a statute do not necessarily strip federal courts of jurisdiction and may remove only portions of the question before the court from its jurisdiction, leaving other issues undisturbed.[10]

In *Dow Jones & Co. v. Kaye*,[11] the Eleventh Circuit addressed issues collateral to a state court proceeding in which the trial court entered a gag order after learning that defendants, tobacco companies, were planning press conferences and had already issued press releases

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1. 273 F.3d 1330 (11th Cir. 2001) [hereinafter *Al Najjar III*].
2. 257 F.3d 1262 (11th Cir. 2001) [hereinafter *Al Najjar II*].
3. 97 F. Supp. 2d 1329 (S.D. Fla. 2000) [hereinafter *Al Najjar I*].
4. 257 F.3d at 1275-76.
5. 273 F.3d at 1337-41.
6. Horton v. City of St. Augustine, Fla., 272 F.3d 1318, 1326 (11th Cir. 2001) (quoting Lewis v. Cont'l Bank Corp., 494 U.S. 472, 477 (1990)).
7. 252 F.3d 1169 (11th Cir. 2001).
8. *Id.* at 1178.
9. *Id.* at 1178-79 n.3.
10. *Horton*, 272 F.3d at 1326.
11. 256 F.3d 1251 (11th Cir. 2001).

regarding a highly publicized products liability trial.[12] After the state appellate court sustained the gag order, Dow Jones and several other media entities filed suit against the judge in the federal district court. The district court enjoined the state trial court judge from enforcing the order, and the judge appealed to the Eleventh Circuit.[13] Prior to the Eleventh Circuit's decision, the trial in *Kaye* ended with a $145 billion punitive damages verdict against the tobacco companies.[14] The court held that the issues on appeal were moot because with the appeal from the state trial court to the state appellate court, the state court judge lost jurisdiction to enforce the gag order.[15] Further, the court stated that it would not regard the moot issue as likely to recur because the court would not consider it reasonable to expect the state court judge's decisions in the case to be reversed or remanded.[16] In response to the tobacco companies' request that the court dismiss the appeal and leave the district court's injunction intact, the court quoted its decision in *Bekier v. Bekier*[17] where it stated that "'[w]here a case becomes moot after the district court enters judgment but before the appellate court has issued a decision, the appellate court must dismiss the appeal, vacate the district court's judgment, and remand with instructions to dismiss as moot.'"[18]

II. NOTICE OF APPEAL AND APPELLATE JURISDICTION

Generally, when a party files a notice of appeal, the district court loses jurisdiction over those matters that are contained in the notice of appeal.[19] The notice of appeal must be filed within thirty days of the district court's entry of a final judgment.[20] "The notice of appeal must: (A) specify the party or parties taking the appeal . . .; (B) designate the judgment, order, or part thereof being appealed; and (C) name the court to which the appeal is taken."[21] A document must be liberally construed, and at least when a document is filed by a pro se litigant, the

12. *Id.* at 1253-54.
13. *Id.* at 1254.
14. *Id.*
15. *Id.* at 1254-55.
16. *Id.* at 1255.
17. 248 F.3d 1051 (11th Cir. 2001).
18. 256 F.3d at 1258 (quoting *Bekier*, 248 F.3d at 1056); *see also Al Najjar III*, 273 F.3d at 1340.
19. *See* Doe v. Bush, 261 F.3d 1037, 1064 (11th Cir. 2001).
20. Rinaldo v. Corbett, 256 F.3d 1276, 1278 n.3 (11th Cir. 2001) (citing FED. R. APP. P. 4(a)(1)).
21. FED. R. APP. P. 3(c)(1).

court will determine whether the document is the functional equivalent of a notice of appeal.[22]

In *Rinaldo* the Eleventh Circuit also addressed the question of a party's intent to appeal.[23] The United States Supreme Court has stated that the notice of appeal must specifically state the party's intent to appeal because the notice's purpose is to ensure that the other parties and the courts are given sufficient notice of the appeal.[24] The touchstone of the intent prong, however, is the objective notice that a filing affords other parties and the courts, not the subjective motivation of the party filing the document.[25] Thus a pro se plaintiff's motion for extension of time to file a notice of appeal that was filed within thirty days of the district court's entry of judgment was itself sufficient notice of appeal, even though the district court denied the motion.[26] In denying the motion, the court stated, "'Plaintiff . . . gives this court notice that he intends to appeal the jury's award of damages [of $10] to him and all pretrial orders entered against him and/or in favor of the defendants to the United States Court of Appeals for the Eleventh Circuit.'"[27]

While the notice of appeal is understood as the point at which the trial court's jurisdiction ceases and the appellate court's jurisdiction begins, the notice of appeal does not deprive the district court of all possible jurisdiction over the case. The district court may retain jurisdiction over collateral matters that do not affect the questions presented to the appellate court.[28] Matters that are being considered by the appellate court, however, may not be the subject of a district court order. For example, when the existence of a class is an issue raised in the appeal due to the district court's failure to certify the class, the district court may not enter an order certifying the class after the notice of appeal has been filed.[29] An order granting or denying class certification is not a final order, and any time prior to entry of a final order in a case, the district court may review its certification order.[30]

In *Shin v. Cobb County Board of Education*,[31] the Eleventh Circuit considered a question of first impression regarding whether a motion for

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22. 256 F.3d at 1278.
23. *Id.* at 1279.
24. *Id.* (citing Smith v. Barry, 502 U.S. 644 (1992)).
25. *Id.*
26. *Id.* at 1279-80.
27. *Id.*
28. *See Bush*, 261 F.3d at 1064.
29. *See id.* at 1065.
30. *See, e.g.*, Shin v. Cobb County Bd. of Educ., 248 F.3d 1061, 1065 (11th Cir. 2001).
31. 248 F.3d 1061 (11th Cir. 2001).

reconsideration tolled the time for giving notice of appeal pursuant to Rule 5,[32] under which the court of appeals grants permissive appeals.[33] Rule 4 specifically states the types of motions that will toll the time for filing a notice of appeal,[34] but Rule 5 contains no similar provisions. The court held that because appellate review under Rule 23(f)[35] and Rule 5 of a district court's order on class certification should be an avenue of last resort, a motion for reconsideration of the district court's order on class certification should toll the time within which to file a permissive appeal pursuant to Rule 23(f).[36] Tolling the time requirement gives the district court ample time to review its order, heading off unnecessary appeals.

The Eleventh Circuit stated in *Wooden v. Board of Regents of University System of Georgia*[37] that if a number of plaintiffs join suit against a common defendant, each plaintiff must file a notice of appeal within the requisite period of time.[38] If a party files a motion for reconsideration of the district court's decision within ten days of the district court's entry of judgment, the time for filing a notice of appeal, for that party, is extended thirty days beyond the date of the district court's denial of the motion.[39] The extension is granted regardless of whether the party's motion for reconsideration is specifically designated a motion pursuant to Rule 59, or whether the substantive effect of the motion is that of a motion for reconsideration under Rule 59.[40] The time period for filing the notice of appeal is tolled, however, only for the party or parties who join in the motion for reconsideration.[41] Parties who do not join in the motion for reconsideration remain bound by Rule 4(a)(1).

III. INTERLOCUTORY APPEALS AND APPELLATE JURISDICTION

In *Carringer v. Tessmer*,[42] plaintiff-appellant Carringer filed an interlocutory appeal of the district court's order dismissing her wrongful death claim for lack of standing. The district court did not address

32. FED. R. APP. P. 5.
33. 248 F.3d at 1063.
34. FED. R. CIV. P. 4.
35. FED. R. APP. P. 23(f).
36. 248 F.3d at 1064.
37. 247 F.3d 1262 (11th Cir. 2001).
38. *Id.* at 1273.
39. *Id.* at 1272; *see also* FED. R. CIV. P. 59(b).
40. 247 F.3d at 1272; *see also* FED. R. CIV. P. 59.
41. 247 F.3d at 1272-73.
42. 253 F.3d 1322 (11th Cir. 2001).

Carringer's claims brought pursuant to 42 U.S.C. §§ 1983 and 1988.[43] The court held that it did not have jurisdiction over the interlocutory appeal, quoting *Summit Medical Associates, P.C. v. Pryor*[44] for the proposition that "'the question of standing does not fit within the collateral order doctrine, and, therefore, that Appellants may not as of right take an immediate interlocutory appeal on this issue.'"[45] The court stated that in order for the district court's order dismissing plaintiff's wrongful death claim to be immediately appealable, the district court would have had to issue a Rule 54(b) certification, expressly directing entry of final judgment and expressly making the determination that there would be no just reason for delaying the appeal.[46] The court further noted that when "'the reasons for the entry of judgment are *obvious* and remand to the district court would result only in unnecessary delay in the appeal process,'" the court would not require the explanation that the Rule 54(b) certification would otherwise provide.[47]

IV. FINALITY OF JUDGMENT AND APPELLATE JURISDICTION

In *Corsello v. Lincare, Inc.*,[48] a *qui tam* action, the Eleventh Circuit held that it lacked jurisdiction to hear an appeal from an order of the district court that was not a final decision.[49] All defendants had won motions to dismiss plaintiff's claims with prejudice except one defendant that had filed bankruptcy and enjoyed the protection of the "automatic stay" provision of the Bankruptcy Code.[50] The court held that it did not have jurisdiction to consider Corsello's appeal from the district court's order because if Corsello's claims against one defendant remained pending, then those claims would have to be pursued in the district court when the bankruptcy court lifted the automatic stay.[51] Presumably, the court will have jurisdiction to hear plaintiff's claim if, rather than lifting the stay, the bankruptcy court grants defendant a discharge sufficiently broad to cover any liability it may have from plaintiff's *qui tam* action.

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43. *Id.* at 1322. *See* 42 U.S.C. §§ 1983, 1988 (1994).
44. 180 F.3d 1326 (11th Cir. 1999), *cert denied*, 529 U.S. 1012 (2000).
45. 253 F.3d at 1323 (quoting *Summit Medical*, 180 F.3d at 1334-35).
46. *Id.* at 1323-24; *see also* FED. R. CIV. P. 54(b).
47. 253 F.3d at 1324 n.1 (quoting Ebarnimi v. City of Huntsville Bd. of Educ., 114 F.3d 162, 166 (11th Cir. 1997)).
48. 276 F.3d 1229 (11th Cir. 2001).
49. *Id.* at 1230.
50. *Id.*; *see* 11 U.S.C. §§ 101-1330 (2000).
51. 276 F.3d at 1230.

In *Fogade v. ENB Revocable Trust*,[52] defendant argued on appeal that because the district court had entered an order dismissing the case based on the doctrine of *forum non conveniens*, which is typically regarded as a final order subject to appeal, the time for filing a notice of appeal had started running before the district court entered its order granting plaintiff leave to file a third amended complaint.[53] However, in *Fogade*, the district court did not follow the requirements of Rule 58 in entering the dismissal based on *forum non conveniens*.[54] Rule 58 requires the district court to enter judgment on a separate document, and if the district court does not do so, the time for filing a notice of appeal with respect to the judgment will not begin to run.[55] Accordingly, the time for filing a notice of appeal never began to run, and the district court retained jurisdiction to allow plaintiff to file its third amended complaint up until the time when defendant filed its notice of appeal.[56]

A result similar to that in *Fogade* was reached in *Leal v. Georgia Department of Corrections*.[57] "[A] *pro se* prisoner's notice of appeal in a civil case must either be filed in the district court, or alternatively, placed in the institutional mail system or legal mail system, not later than [thirty] days after the judgment appealed from is entered on the docket."[58] The district court did not enter its order dismissing the case for failure to state a claim pursuant to the requirements of Rule 58, thus the thirty day period did not begin to run.[59] Accordingly, a prisoner's notice of appeal was not untimely when filed more than thirty days after the order dismissing that prisoner's claim.[60]

V. OTHER APPELLATE MATTERS CONSIDERED IN 2001

Arguments that a party wishes to raise on appeal that are not raised in the party's initial brief to the court will be deemed waived, and those issues will not be considered when raised in subsequent briefs to the court.[61] Similarly, in *Al Najjar II*, when petitioners had not raised, in their initial brief, the issue of whether the Attorney General's *in camera*

52. 263 F.3d 1274 (11th Cir. 2001).
53. *Id.* at 1284-85.
54. *Id.* at 1279; *see* FED. R. CIV. P. 58.
55. 263 F.3d at 1285-86.
56. *Id.* at 1286-87 (citing Griggs v. Provident Consumer Disc. Co., 459 U.S. 56 (1982)).
57. 254 F.3d 1276 (11th Cir. 2001).
58. *Id.* at 1277.
59. *Id.*
60. *Id.* at 1278.
61. Lind v. United Parcel Serv., Inc., 254 F.3d 1281, 1283 n.2 (11th Cir. 2001); Maiz v. Virani, 253 F.3d 641, 674 (11th Cir. 2001).

ex parte presentation of classified information linking the petitioner to a terrorist organization improperly influenced the Immigration Judge and later the Board of Immigration Appeals, the court deemed the issue abandoned.[62] The petitioners were not allowed to raise a question for the first time at oral argument before the Eleventh Circuit.[63] Furthermore, litigants bringing cases on appeal from the district courts are not allowed to raise issues on appeal that could or should have been litigated in the trial court.[64] In *Transamerica Leasing, Inc. v. Institute of London Underwriters*,[65] for example, the Eleventh Circuit refused to hear an argument from insurance underwriters that they should have included in their responses to a summary judgment motion made in the district court.[66] Likewise, parties to administrative proceedings will not be allowed to raise questions on appeal to the Eleventh Circuit that they did not present to the administrative bodies from which the appeal is taken.[67]

Though failure to raise an issue that should or could be raised with the district court will bar raising the issue on appeal, failure to raise an issue during proceedings before the district court does not operate alone as an absolute bar to raising the issue on appeal. In *Wright v. Hanna Steel Corp.*,[68] the Eleventh Circuit enumerated the exceptions that will allow a party to raise an issue for the first time on appeal:

> First, an appellate court will consider an issue not raised in the district court if it involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice. Second, the rule may be relaxed where the appellant raises an objection to an order which he had no opportunity to raise at the district court level. Third, the rule does not bar consideration by the appellate court in the first instance where the interest of substantial justice is at stake. Fourth, a federal appellate court is justified in resolving an issue not passed on below . . . where the proper resolution is beyond any doubt. Finally, it may be appropriate to consider an issue first raised on appeal if that issue presents significant questions of general impact or of great public concern.[69]

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62. 257 F.3d at 1282-83 n.12.
63. *Id.*
64. Russell Corp. v. Am. Home Assurance Co., 264 F.3d 1040, 1043 n.1 (11th Cir. 2001).
65. 267 F.3d 1303 (11th Cir. 2001).
66. *Id.* at 1308 n.1.
67. *Al Najjar II*, 257 F.3d at 1282.
68. 270 F.3d 1336 (11th Cir. 2001).
69. *Id.* at 1342 (quoting Narey v. Dean, 32 F.3d 1521, 1526-27 (11th Cir. 1994)).

When a state's defense of sovereign immunity is concerned, the state is not held to the same strict standard in asserting its defense of sovereign immunity that requires litigants to promptly assert their claims or defenses. If the defense of sovereign immunity is available to a defendant-state, the state may assert the defense conditionally, allowing a claim to be decided on its merits rather than on federal constitutional grounds.[70] The state cannot require the federal court to decide the issue on the merits, however, and the appellate court may raise, on its own motion, the state's Eleventh Amendment sovereign immunity.[71] The effect of this would seem to be that, with respect to their own actions, the states have the power to create or destroy federal jurisdiction, even at trial.

The analysis is different when the Indian nations are concerned because, lacking the sovereign status that the states enjoy under the United States Constitution, they are effectively treated as departments of the federal government. Their sovereign immunity is tied to congressional waiver of federal sovereign immunity.[72] If Congress waives federal sovereign immunity from particular actions, it waives the Indian nations' sovereign immunity as well, unless the waiver of sovereign immunity clearly indicates that the Indian nations' sovereign immunity is to be preserved.[73] Thus, the sovereign immunity of the Indian nations is clearly a question of subject matter jurisdiction rather than a vague question of state prerogative, and a question that a federal court, including an appellate court, is obliged to raise *sua sponte*.[74]

The "law of the case" doctrine requires the trial court to adopt the legal determinations of the appellate court in subsequent proceedings on remand unless "'(1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to that issue, or (3) the prior decision was clearly erroneous and would work manifest injustice.'"[75] In *A.A. Profiles, Inc. v. City of Fort Lauderdale*,[76] the district court determined that despite the Eleventh Circuit's earlier determination that plaintiff had suffered an unconstitutional taking, plaintiff had shown no damages because its

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70. McClendon v. Ga. Dep't of Cmty. Health, 261 F.3d 1252, 1257-59 (11th Cir. 2001).

71. *Id.* at 1259.

72. Taylor v. Ala. Intertribal Council Title IV J.T.P.A., 261 F.3d 1032, 1034-35 (11th Cir. 2001); Sanderlin v. Seminole Tribe of Fla., 243 F.3d 1282, 1285 (11th Cir. 2001).

73. 261 F.3d at 1034-35.

74. *Id.* at 1034.

75. A.A. Profiles, Inc. v. City of Fort Lauderdale, 253 F.3d 576, 582 (11th Cir. 2001) (quoting United States v. Robinson, 690 F.2d 869, 872 (11th Cir. 1982)).

76. 253 F.3d 576 (11th Cir. 2001).

enterprise was underfinanced and doomed to fail despite any unconstitutional action defendant may have taken.[77] The Eleventh Circuit regarded the district court's ruling on remand as revisiting, in the guise of ascertaining damages, the issue of whether there had been a taking, and thereby effectively subverted the law of the case doctrine.[78] The court reversed and remanded with instructions to use an alternative method for determining plaintiff's damages.[79]

VII. THE STANDARDS OF REVIEW AS APPLIED BY THE ELEVENTH CIRCUIT IN 2001 STANDARDS OF REVIEW

When a judgment rendered in a bench trial is brought before the court on appeal, the court will review a district court's conclusions of law de novo, but a district court's findings of fact in a bench trial are reviewed under a more deferential standard that requires the appellant to show that a district court's findings of fact are clearly erroneous.[80] Likewise, when reviewing a district court's entry of a preliminary injunction, the court reviews conclusions of law de novo and findings of fact for clear error.[81] The court has instructed,

> Plain error review is an extremely stringent form of review. Only in rare cases will a trial court be reversed for plain error . . . in the jury instructions or verdict form . . . . To meet this stringent standard, a party must prove that the challenged instruction was an incorrect statement of the law and [that] it was probably responsible for an incorrect verdict, leading to substantial injustice. This element is satisfied if a party proves that the instruction will mislead the jury or leave the jury to speculate as to an essential point of law. In other words, the error of law must be so prejudicial as to have affected the outcome of the proceedings.[82]

The court will reverse a district court's grant or denial of a preliminary injunction only on a showing of abuse of discretion.[83]

> [T]he abuse of discretion standard of review recognizes that for the matter in question there is a range of choice for the district court and so long as its decision does not amount to a clear error of judgment [the

77. *Id.* at 580-81.
78. *Id.* at 582.
79. *Id.* at 585.
80. O'Ferrell v. United States, 253 F.3d 1257, 1265 (11th Cir. 2001).
81. *Horton*, 272 F.3d at 1326; Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1260 (11th Cir. 2001).
82. *Maiz*, 253 F.3d at 676-77 (alteration in original) (quoting Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1329-30 (11th Cir.1999)).
83. *Horton*, 272 F.3d at 1326.

> Court of Appeals] will not reverse even if [it] would have gone the other way had the choice been [its own] to make.[84]

In *Griffin v. City of Opa-Locka*,[85] the court articulated the deferential standards employed when the court of appeals reviews a trial court's factual findings.[86] Similarly, a district court's rulings on the admission of evidence will be reviewed for abuse of discretion.[87] Further, if a district court admits evidence in error, the jury's verdict will be reversed only if the party appealing the verdict establishes that the district court's error resulted in a substantial prejudice or manifest injustice.[88]

The standard of review upon which the question of whether the court should have given the jury a limiting instruction *sua sponte* with respect to evidence admitted at trial is clear error, and a district court's decision on remittitur will be reviewed under a highly deferential abuse of discretion standard.[89] Likewise, the court will be "particularly deferential to [a] fact finder's determination of compensatory damage awards for intangible, emotional harms because the harm is so 'subjective and evaluating it depends considerably on the demeanor of the witnesses.'"[90]

The court uses the abuse of discretion standard when reviewing a district court's decision whether to grant leave to amend pleadings.[91] However, a district court's underlying legal conclusion determining that an amendment to a pleading would be futile will be reviewed de novo.[92] "While [the Court] generally accord[s] deference in diversity cases to a district court's interpretation of the law of the state in which it sits, [the court] review[s] de novo a district court's determination of state law."[93] The Eleventh Circuit reviews a district court's grant of attorney fees pursuant to a state's frivolous litigation statute for abuse of discretion.[94]

The general rule of appellate procedure requires the Eleventh Circuit to review for abuse of discretion a district court's determination that a

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84. McMahan v. Toto, 256 F.3d 1120, 1128 (11th Cir. 2001) (citing *In re* Rasbury, 24 F.3d 159, 168 (11th Cir. 1994)).

85. 261 F.3d 1295 (11th Cir. 2001).

86. *Id.* at 1315.

87. U.S. Steel, LLC v. Tieco, Inc., 261 F.3d 1275, 1286 (11th Cir. 2001).

88. *Id.* at 1286.

89. *Griffin*, 261 F.3d at 1301, 1315.

90. *Id.* (quoting Ferrill v. Parker Group, Inc., 168 F.3d 468, 476 (11th Cir. 1999)).

91. Diesel "Repower", Inc. v. Islander Invs., Ltd., 271 F.3d 1318, 1321 (11th Cir. 2001); Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1199 (11th Cir. 2001).

92. *Ziemba*, 256 F.3d at 1199.

93. Davis v. Nat'l Med. Enters., Inc., 253 F.3d 1314, 1319 (11th Cir. 2001).

94. *McMahan*, 256 F.3d at 1129.

plaintiff's amended complaint relates back to the date of the original complaint for purposes of meeting the statute of limitations governing the plaintiff's claim.[95] Whether relation-back is governed by state or by federal law is a threshold legal issue reviewed de novo.[96]

Because the court of appeals must apply the same legal standard in conducting a preemption analysis on appeal that a district court applied in its order on a preemption question, the court of appeals will review a district court's preemption analysis de novo.[97] The court conducts a de novo review of a district court's determination of foreign law.[98] Though a ruling on private law, a district court's interpretation of a contractual "service of suit" clause is nevertheless a decision of law and will be reviewed de novo.[99] The court will conduct a de novo review of a district court's order determining a question of federal subject matter jurisdiction,[100] setting aside a judgment as void,[101] interpreting and applying a statute of limitations,[102] dismissing *sua sponte* a prisoner's pro se 42 U.S.C. § 1983 action,[103] or determining that it lacks subject matter jurisdiction over an issue.[104]

A district court's order granting or denying summary judgment will be reviewed de novo,[105] but its findings of fact, if any, will be reviewed for clear error.[106] When a district court's findings of fact are erroneous, the Eleventh Circuit will remand for appropriate findings.[107] On appeal from a district court's order on summary judgment, the Eleventh Circuit will examine the record in the light most favorable to the

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95. Saxton v. ACF Indus., Inc., 254 F.3d 959, 962 n.4 (11th Cir. 2001).

96. *Id.*

97. *Bellsouth*, 252 F.3d at 1176 (11th Cir. 2001).

98. Escobio v. Am. Int'l Group, Inc., 262 F.3d 1207, 1211 (11th Cir. 2001); Seguros Del Estado, S.A. v. Scientific Games, Inc., 262 F.3d 1164, 1171 (11th Cir. 2001).

99. *Russell Corp.*, 264 F.3d at 1043; *see also Seguros Del Estado*, 262 F.3d at 1179.

100. *Russell Corp.*, 264 F.3d at 1043; *Fogade*, 263 F.3d at 1285; Goodman *ex rel.* Goodman v. Sipos, 259 F.3d 1327 (11th Cir. 2001); Mexiport, Inc. v. Frontier Communications Servs., Inc., 253 F.3d 573, 574 (11th Cir. 2001); Hobbs v. Blue Cross Blue Shield of Ala., 276 F.3d 1236, 1240 (11th Cir. 2001).

101. Burke v. Smith, 252 F.3d 1260, 1263 (11th Cir. 2001).

102. United States v. Am. States Ins. Co., 252 F.3d 1268, 1270 (11th Cir. 2001).

103. *Leal*, 254 F.3d at 1278.

104. Int'l Café, S.A.L. v. Hard Rock Café Int'l (U.S.A.), Inc., 252 F.3d 1274, 1277 (11th Cir. 2001).

105. *Seguros Del Estado*, 262 F.3d at 1173; Groupe Chegaray/V. De Chalus v. P&O Containers, 251 F.3d 1359, 1362 (11th Cir. 2001); Wilson v. Jones, 251 F.3d 1340, 1342 (11th Cir. 2001); Ernie Haire Ford, Inc. v. Ford Motor Co., 260 F.3d 1285, 1290 (11th Cir. 2001); *Escobio*, 262 F.3d at 1211.

106. *Group Chegaray*, 251 F.3d at 1362.

107. United States v. Great Lakes Dredge & Dock Co., 259 F.3d 1300, 1309 (11th Cir. 2001).

nonmovant, drawing any inferences that might reasonably be drawn in favor of the nonmovant.[108] The district court's grant of summary judgment will be upheld based on any evidence in the record.[109] A judgment as a matter of law after the return of the jury's verdict, formerly known as a judgment notwithstanding the verdict, will be reviewed de novo.[110] An order granting a new trial will be reviewed for abuse of discretion.[111] A district court's denial of a motion for summary judgment will not be reviewed at all after that district court has conducted a full trial on the merits.[112]

The court of appeals will review a district court's order for abuse of discretion when that district court allows a voluntary dismissal without prejudice under Rule 41(a)(2),[113] determines that plaintiffs are "similarly situated" as required to create an opt-in class under 29 U.S.C. § 216(b),[114] dismisses a prisoner's complaint as frivolous or malicious under 28 U.S.C. § 1915,[115] denies taxing costs and attorney fees to one of the parties,[116] imposes civil penalties under ERISA,[117] or grants class certification for the purpose of a class action.[118] The court will, however, conduct a de novo review on the question of whether named plaintiffs have standing to assert class action claims.[119] "'[A] district court by definition abuses its discretion when it makes an error of law.'"[120]

The court of appeals will review a district court's order for abuse of discretion when that district court approves, modifies, or refuses to modify a consent decree.[121] Note, however, that the court of appeals will determine the standard of review based not on the name a district

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108. Sledge v. Goodyear Dunlop Tires N. Am., Ltd., 275 F.3d 1014, 1016 n.2 (11th Cir. 2001).

109. O'Neal v. United States, 258 F.3d 1265, 1270 (11th Cir. 2001).

110. Lipphardt v. Durango Steakhouse of Brandon, Inc., 267 F.3d 1183, 1186 (11th Cir. 2001); Milan Express, Inc. v. Averitt Express, Inc., 254 F.3d 966, 982 (11th Cir. 2001).

111. *Lipphardt*, 267 F.3d at 1186.

112. *Lind*, 254 F.3d at 1284.

113. Pontenberg v. Boston Scientific Corp., 252 F.3d 1253, 1256 (11th Cir. 2001); *see* FED. R. CIV. P. 41(a)(2).

114. Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1217 (11th Cir. 2001); *see* 29 U.S.C. § 216(b) (1994).

115. Bilal v. Driver, 251 F.3d 1346, 1348 (11th Cir. 2001); *see* 28 U.S.C. § 1915 (1994).

116. *Hobbs*, 276 F.3d at 1243.

117. *Wright*, 270 F.3d at 1342.

118. Piazza v. Ebsco Indus., Inc., 273 F.3d 1341, 1345 (11th Cir. 2001).

119. *Id.*

120. *Wright*, 270 F.3d at 1342 (alteration in original) (quoting United States v. Pruitt, 174 F.3d 1215, 1219 (11th Cir. 1999)).

121. Reynolds v. Roberts, 251 F.3d 1350, 1355 (11th Cir. 2001).

court gives its order, but on the substantive effect of the order.[122] Thus, when one party has withdrawn its consent prior to the court's entry of the order, the substantive character of the consent decree is in actuality that of an injunction, and it will be reviewed de novo.[123]

122. *Id.* at 1355-58.
123. *Id.*