# ELEVENTH CIRCUIT: SURVEY OF RECENT DECISIONS

## *A. Immigration Law: Asylum Eligibility*

In *Mu Ying Wu v. United States Attorney General*,[1] the Eleventh Circuit Court of Appeals reviewed a Board of Immigration Appeals' (BIA) decision to deny asylum and other relief to Mu Ying Wu and her husband, Ru Cheng Zhan.[2] In their appeal to the BIA, Wu and Zhang contended that they would be subjected to forced sterilization and economic persecution if the United States returned them to China.[3] The Court made a factual review of the BIA's decision in the light most favorable to the BIA.[4] The Eleventh Circuit held that there was substantial evidence to support the determination that the petitioners failed to meet their burdens of demonstrating a fear of forcible sterilization or economic persecution.[5] As a result, the Eleventh Circuit Court of Appeals affirmed the BIA decision and denied Wu and Zhang's petition.[6]

Both Mu Ying Wu and Ru Cheng Zhang, petitioners, entered the United States illegally and were ordered to leave the United States; however, both remained illegally.[7] They subsequently married and had three children.[8] Wu and Zhang filed applications for asylum in 2004 and 2005, respectively, claiming they would be sterilized if they returned to China because the birth of their children in the United States violated China's family planning policy.[9] They each reopened their motions in 2007 with the addition of various documents in support of their asylum application: (1) a 2006 Tingjiang Document that purported to be from the Birth Control Office and ordered the sterilization

---

[1] 745 F.3d 1140 (11th Cir. 2014).
[2] *Id.* at 1156–58.
[3] *Id.* at 1151.
[4] *Id.* at 1152.
[5] *Id.* at 1155–58.
[6] *Id.* at 1158.
[7] *Mu Ying Wu*, 745 F.3d at 1143.
[8] *Id.*
[9] *Id.* at 1143–44.

of either Wu or Zhang when they returned to China, (2) a document that claimed that the town they would return to had a policy of forcible sterilization, and (3) statements from an aunt and cousin in the town that claimed they had been sterilized.[10] The BIA granted their motions to reopen and remanded their cases to an Immigration Judge (IJ) for a merits hearing.[11] The two cases were consolidated in May 2008.[12]

At the hearing before the IJ, "the Department of Homeland Security ("DHS") filed background evidence concerning China's family planning law," including evidence specific to the local area that the appellants would return to after removal.[13] The DHS evidence demonstrated that China's policy forbade forced sterilization, although the policy required a social compensation fee when a couple had more than one child.[14] Further, the evidence demonstrated that the local province had no reported forced sterilizations within the past ten years.[15]

The IJ "determined . . . that Wu's 2006 Tingjiang Document—indicating that Wu and Zhang would be sterilized—was entitled to 'little or no weight.'"[16] "The IJ also found that Wu had not presented any evidence of a Chinese national returning with two or more U.S.-born children and being forcibly sterilized."[17] As for the possibility of economic persecution, evidence presented by DHS displayed that a child born in the United States to Chinese residents is not counted for enforcing birth policy rules.[18] The IJ concluded, "[T]he evidence was insufficient to establish that the [social compensation fee] would be so severe as to rise to the level of future economic persecution."[19] Therefore, the IJ concluded that Wu and Zhang failed to show an objectively reasonable well-founded fear of future persecution.[20]

After the IJ denied Wu and Zhang's applications for relief,

---

[10] *Id.* at 1144.
[11] *Id.* at 1145.
[12] *Id.*
[13] *Mu Ying Wu*, 745 F.3d at 1145.
[14] *Id.*
[15] *Id.* at 1146.
[16] *Id.* at 1149.
[17] *Id.* at 1150.
[18] *Id.*
[19] *Mu Ying Wu*, 745 F.3d at 1150.
[20] *Id.* at 1150–51.

Wu and Zhang filed a notice of appeal with the BIA.[21] The BIA dismissed the appeal and agreed with the IJ that Wu failed to meet the burden of proof for asylum and that there was no well-founded fear of persecution.[22] The BIA reached this conclusion by applying a three-part test in which Wu failed to show: "'(1) the births [of her children] violated family planning policies in [her] local province or municipality, (2) the family planning policies are being enforced, and (3) current local family planning enforcement efforts would give rise to a well-founded fear of persecution due to the violation.'"[23] The BIA also concluded that the evidence presented did not show that penalties or sanctions imposed by the government would rise to the level of persecution.[24] As a result, the BIA found that Wu failed to meet her burden of proof for asylum and withholding of removal.[25]

The Eleventh Circuit agreed with the decisions of the BIA and IJ and denied the petition for review.[26] The court first turned to the IJ's determination that the 2006 Tingjiang Document was unauthenticated.[27] The court reviewed the IJ's decision to use 8 C.F.R. § 287.6 and other means to gauge the authenticity of the document.[28] That regulation provides in pertinent part: "'[A]n official record . . . shall be evidenced by an official publication thereof, or by a copy attested by an officer so authorized.'"[29] The court of appeals declined to determine whether Section 287.6 is the exclusive method for authenticating the document; however, the court did conclude that Wu and Zhang failed to authenticate the document by any means.[30] Therefore, the court determined that the respondents failed to show that the IJ and BIA made an error in finding the 2006 Tingjiang Document unauthenticated.[31]

The Eleventh Circuit then turned to the decisions made by the BIA and IJ regarding asylum eligibility.[32] The court agreed

---

[21] *Id.* at 1151.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 1152.
[25] *Mu Ying Wu*, 745 F.3d at 1152.
[26] *Id.* at 1158.
[27] *Id.* at 1153.
[28] *Id.* at 1153–54.
[29] *Id.* at 1153 (alteration in original) (quoting 8 C.F.R. § 287.6(b) (2014)).
[30] *Id.* at 1154.
[31] *Mu Ying Wu*, 745 F.3d at 1154.
[32] *Id.* at 1156–57.

with the BIA and IJ that Wu failed to meet her burden regarding a threat of forcible sterilization or economic persecution so as to qualify for asylum.[33] The court found that Wu failed to show an objectively well-founded fear of persecution and did not meet the requisite three-part test cited in *In re J-H-S-*.[34] Specifically, the court focused on the evidence that U.S. born children are not counted under the Chinese family planning policy when the children are not registered as permanent residents in China and that there was no evidence that the U.S. born children would result in forcible sterilization of the parents.[35] As for Wu and Zhang's economic persecution argument, the Eleventh Circuit noted that there must be evidence to show an objectively reasonable fear of economic persecution that would reduce the alien to "an impoverished existence."[36] The court examined Wu and Zhang's estimated annual income and found that Wu and Zhang did not show an objectively reasonable fear of economic persecution.[37]

The Eleventh Circuit also briefly dealt with other cases, some cited by Wu, where the court previously overturned BIA decisions to reopen a petition for asylum.[38] In these cases, the court of appeals overturned decisions made by the BIA where the BIA denied petitions for asylum based on a distinction between Chinese born and U.S. born children.[39] However, the court distinguished *Wu* from these other cases based on the fact that those other decisions reversing the BIA were based on lack of evidence that a distinction existed, rather than a broad ruling on a distinction between Chinese and U.S. born children.[40]

Following this decision, lower courts considering asylum eligibility should take care to consider each case individually and implement the tests and standards established by the Eleventh Circuit in their analyses.[41] The Eleventh Circuit did not change the standards for asylum eligibility, specifically that an alien

---

[33] *Id.* at 1155–56.

[34] *Id.* at 1155. *See* J-H-S-, 24 I. & N. Dec. 196 (B.I.A. 2007).

[35] *Mu Ying Wu*, 745 F.3d at 1155–56.

[36] *Id.* at 1156 (quoting T-Z-, 24 I. & N. Dec. 163, 174 (B.I.A. 2007)).

[37] *Id.* at 1156–57.

[38] *Id.* at 1157–58. *See* Zhang v. U.S. Att'y Gen., 572 F.3d 1316 (11th Cir. 2009); Jiang v. U.S. Att'y Gen., 568 F.3d 1252 (11th Cir. 2009); Li v. U.S. Att'y Gen., 488 F.3d 1371 (11th Cir. 2007).

[39] *Mu Ying Wu*, 745 F.3d at 1157–58.

[40] *See id.*

[41] *See id.* at 1158.

must show an objectively well-founded fear of persecution. However, the court did reaffirm the applicable standards and emphasized that lower courts must consider all of the evidence in light of the particular circumstances of each case.

*Stewart James Alvis*

### *B. Entrapment*

In *United States v. Isnadin*,[42] the Eleventh Circuit Court of Appeals held that three criminal codefendants charged with multiple drug- and firearm-related counts stemming from a federal sting operation were not entitled to a supplemental jury instruction that if the defendants were entrapped as to one count, they were "necessarily" entrapped into committing each remaining offense in the indictment.[43] The application of such an "all or nothing" entrapment instruction was a matter of first impression for the Eleventh Circuit.[44]

In December 2011, an undercover agent from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), posing as a disgruntled courier for a drug trafficking syndicate, approached the defendants with an offer to rob the organization of up to twenty kilos of cocaine held in a fictitious Florida stash house.[45] The agent told the defendants that firearms were required to complete the heist because armed gunmen guarded the stash.[46] ATF agents arrested the defendants several weeks after initiating contact, and the government subsequently charged them with multiple offenses, including conspiracy to commit a Hobbs Act[47] robbery, attempted possession of cocaine, and conspiracy to carry firearms in relation to a drug trafficking crime.[48]

During deliberations, the jury asked the court whether a

---

[42] 742 F.3d 1278 (11th Cir. 2014)
[43] *Id.* at 1298–99.
[44] *Id.* at 1299.
[45] *Id.* at 1286.
[46] *Id.* at 1287–88.
[47] 18 U.S.C. § 1951(a) (2012).
[48] *Isnadin*, 742 F.3d at 1284–85.

finding of entrapment as to Count 1 (the robbery charge) attached to each of the remaining counts.[49] The trial court instructed the jury to consider entrapment separately as to each count over the defendants' objections.[50] On appeal, the defendants argued this instruction constituted reversible error because the robbery and additional charges that flowed from it were an intertwined, single "course of conduct," and but for the induced opportunity to rob the stash house, the attendant drug- and firearm-related crimes would not have manifested.[51] The defendants advanced a passage from a former Fifth Circuit opinion[52] in support of their position that an entrapment finding should extend to all counts in a "course of conduct" case; however, the Eleventh Circuit deemed the passage dicta and concluded that the district court did not err in allowing the jury to consider entrapment separately as to each count.[53]

The court further reasoned that although the defendants proved that a federal agent induced them into committing all of the charged offenses, the government produced sufficient evidence of the defendants' "predispositions" to commit the crimes at issue in order to overcome the entrapment defenses and sustain the convictions.[54] The court noted that "[t]he entrapment defense involves two separate elements: (1) Government inducement of the crime, *and* (2) lack of predisposition on the part of the defendant."[55] Thus, the court maintained that even if each count constituted a single "course of conduct," the government was still able to produce predisposition evidence so that the jury could determine "whether the defendant was an 'unwary innocent' or, instead an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime."[56]

The court ultimately found enough evidence in the record

---

[49] *Id.* at 1293.

[50] *Id.* at 1295–96.

[51] *Id.* at 1298–99.

[52] United States v. Wells, 506 F.2d 924, 926 (5th Cir. 1975).

[53] *Isnadin*, 742 F.3d at 1300 ("The *Wells* decision simply does not stand for the proposition that [the defendants] assert: that when a so-called 'course of conduct' exists, it is necessary to give an all or nothing entrapment defense instruction.").

[54] *See id.* at 1302, 1304.

[55] *Id.* at 1297 (citing Mathews v. United States, 485 U.S. 58, 63 (1988); United States v. Costales, 5 F.3d 480, 487 (11th Cir. 1993)).

[56] *See id.* at 1298, 1300–02 (quoting *Mathews*, 485 U.S. at 68 ) (internal quotation marks omitted).

to affirm all of the defendants' convictions.[57] One defendant who did not have contact with the undercover agent but was recruited and induced into aiding in the robbery by his co-defendants sought to raise the defense of "derivative" or "vicarious" entrapment, but the Eleventh Circuit reiterated its position that even an ingenuous argument of derivative entrapment is not a cognizable defense.[58]

The Eleventh Circuit's rejection of the defendants' "course of conduct" rule regarding entrapment defenses is consistent with similar holdings from the Second, Sixth, and Ninth Circuits.[59] Ultimately, the holding does not substantially change entrapment defense analyses in the Eleventh Circuit. *Isnadin* merely maintains that even when all counts against a criminal defendant constitute parts of a singular "course of conduct" and the defendant is induced into committing each charged crime, the "predisposition" element of the entrapment defense is not eliminated.[60] According to the court: "Because of the subjective, fact-intensive nature of the predisposition inquiry, it may well be that the facts of a given case indicate that an individual defendant is predisposed to commit some crimes, but not others."[61]

*Walker M. Beauchamp*

### *C. Jurisdiction in Qui Tam Settlements*

In *Mamma Mia's Trattoria, Inc. v. Original Brooklyn Water Bagel Co.*[62] the Eleventh Circuit Court of Appeals held that appellate jurisdiction did not exist over a district court Enforcement Order enjoining claims barred by a qui tam settlement, because the order was not final and was merely an interpretation of the original injunction.[63] *Mamma Mia's Trattoria, Inc.* is an important case because it establishes that qui tam settlements enjoining future litigation could effectively bar not only the named parties to

---

[57] *Id.* at 1309.

[58] *Id.* at 1308 ("The law of this circuit is that '[a] defendant cannot avail himself of an entrapment defense unless the initiator of *his* criminal activity is acting as an agent of the [G]overnment.'" (alteration in original) (quoting United States v. Mers, 701 F.2d 1321, 1340 (11th Cir. 1983))).

[59] *Isnadin*, 742 F.3d at 1300–01.

[60] *See id.* at 1299–1301.

[61] *Id.* at 1302.

[62] 768 F.3d 1320 (11th Cir. 2014).

[63] *Id.* at 1321–22.

the lawsuit, but also any party attempting to bring litigation concerning the barred matters, as the named party has standing to act on behalf of the United States and the general public.[64]

The Original Brooklyn Water Bagel Co. (OBWB Co.) settled a qui tam suit brought by Mamma Mia's Trattoria, Inc. (Mamma Mia's) alleging false advertising regarding a 14-step water purification system.[65] The system purports to create water like that of the unfiltered water in Brooklyn and uses the water to create the perfect Brooklyn Bagel.[66] OBWB Co. claimed the products sold were unique due to this patented system.[67] However, Mamma Mia's brought suit under 35 U.S.C. § 292—which prohibits advertising any unpatented article as patented[68]—alleging that OBWB Co. had no patent rights recognized by the United States but repeatedly advertised otherwise.[69] The qui tam action settled and the district court entered a Final Consent Judgment barring "any future litigation alleging violations of 35 U.S.C. § 292 or any other statute or law related to false marking or false advertising" regarding the water treatment technology "marked, manufactured, sold, distributed, advertised, or promoted" before the suit settled.[70] A year later, a suit was brought in state court against OBWB Co. by Bersin Bagel Group, LLC, (Bersin) wherein Bersin alleged OBWB Co. made misrepresentations regarding store location and potential profits, as well as the patented system, to induce Bersin to invest.[71] OBWB Co. claimed the Final Consent Judgment in the qui tam case barred the suit.[72] The district court agreed and entered an Enforcement Order barring Bersin's claims and enjoining the action because the claims were related to the patent.[73]

Bersin appealed the Enforcement Order, arguing the Final Consent Judgment did not bar its claims, the district court lacked jurisdiction, and the Anti-Injunction Act prohibited the enjoining of its state court case.[74] However, OBWB Co. argued

---

[64] *See id.* at 1329.
[65] *Id.* at 1322–23.
[66] *Id.*
[67] *Id.* at 1322.
[68] *Mamma Mia's Trattoria, Inc.*, 768 F.3d at 1322 (quoting 32 U.S.C. § 292 (2012)).
[69] *Id.* at 1323.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.* at 1323–24.
[74] *Mamma Mia's Trattoria, Inc.*, 768 F.3d at 1324.

that the Eleventh Circuit did not have jurisdiction to hear the appeal.[75] The Court agreed, finding that appellate jurisdiction would only apply under 28 U.S.C. § 1291 to a final judgment of a district court, or under 28 U.S.C. § 1292(a)(1) to interlocutory challenges regarding the granting, modifying, or dissolving of injunctions.[76] The Court found neither section applies to Bersin's appeal.[77] The Enforcement Order is not considered a final decision under Section 1291 because a final order "'ends the litigation on the merits and leaves nothing for the court to do but execute its judgment.'"[78] Orders regarding injunction enforcement cannot be considered final orders for appellate purposes unless the violating party has been held in contempt or sanctioned for violating an injunction.[79]

Having determined it lacked jurisdiction under Section 1291, the Court next examined whether it had jurisdiction under Section 1292(a)(1) over orders that modify injunctions.[80] However, the court noted that orders, clarifying or interpreting injunctions, such as the Enforcement Order, are not modifications and thus no jurisdiction exists to review an appeal.[81] The analysis for jurisdiction under Section 1292(a)(1) is two-pronged, requiring there be "an underlying decree of an injunctive character" and for the order to "have changed the underlying decree in a jurisdictionally significant way."[82] Looking to the actual effect in order to determine if the Enforcement Order was a modification or clarification, in order to modify, the order must change the parties' legal relationship or rights, or the reach of the underlying injunction.[83] If an order intended to be a clarification misrepresents the injunction, the underlying decree may be effectively modified if the relationship of the parties changes; however the misrepresentation must be blatant, as the

---

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* at 1325 (quoting Crawford & Co. v. Apfel, 235 F.3d 1298, 1302 (11th Cir. 2000)).

[79] *Id.*

[80] *Mamma Mia's Trattoria, Inc.*, 768 F.3d at 1326.

[81] *Id.*

[82] *Id.* (quoting Sierra Club v. Marsh, 907 F.2d 210, 212 (1st Cir. 1990)) (internal quotation marks omitted).

[83] *Id.* at 1327.

appellate court cannot analyze the merits of the case without jurisdiction.[84]

The Court held the Enforcement Order was a clarification, not a modification, because no misinterpretation of the injunction existed.[85] The original injunction was broad, barring all future litigation, and the enforcement order was a reasonable interpretation of the injunction, barring Bersin's claims as being substantially based on the false advertisement of the patented filtration system.[86] The district court, by simply determining Bersin's suit related to the barred claims, did not misinterpret the injunction.[87] Further, declaring Bersin's claims were barred under the injunction where "any future litigation" was barred is not a misinterpretation, as Mamma Mia's brought the qui tam claim on behalf of the general public.[88] Therefore, without an appealable modification to the injunction, the court lacked jurisdiction.[89] Without jurisdiction, the Court refused to address the merits of the claim.[90] Judge Evan's dissenting opinion, however, addressed the merits of the action, ultimately finding the Enforcement Order enjoining Bersin's claim should be reversed.[91] Evans found the court has jurisdiction over the Enforcement Order appeal under both 28 U.S.C. § 1291 as a final order, despite the lack of contempt or sanction,[92] and under Section 1292(a)(1), where the Enforcement Order modified the scope of the injunction, as Bersin was not a party to the settlement and did not bring a qui tam suit.[93]

*Mamma Mia's Trattoria, Inc.* established a new limit on the appellate jurisdiction of the circuit court. Where settlement of a qui tam action resulted in the underlying decree, further orders clarifying specific claims as barred are not considered modifications in order to establish jurisdiction under 28 U.S.C. § 1292(a)(1).[94] Such an order does not modify the rights and relationships of the parties, or the scope of the injunction, despite

---

[84] *Id.*

[85] *Id.* at 1328.

[86] *Mamma Mia's Trattoria, Inc.*, 768 F.3d at 1328–29.

[87] *Id.* at 1329.

[88] *Id.* at 1322, 1329.

[89] *Id.* at 1329–30.

[90] *Id.*

[91] *Id.* at 1339 (Evans, J., dissenting).

[92] *Mamma Mia's Trattoria, Inc.*, 768 F.3d at 1330–31.

[93] *Id.* at 1331.

[94] *Id.* at 1326–27, 1330.

the newest party not being party to the settlement, because a party bringing a qui tam action is authorized to act and settle on behalf of the general public.[95] Without a final order, the Eleventh Circuit lacked jurisdiction to hear the appeal and dismissed Bersin's misrepresentation claims.[96]

*Rae Bolton*

### *D. Sentence Enhancement for Sexting by Registered Sex Offenders*

In *United States v. Mathis*[97] the Eleventh Circuit Court of Appeals held that a smartphone could be considered a computer for the purpose of calculating a sentencing enhancement under federal sentencing guidelines[98] for sexual exploitation of a minor.[99] The court of appeals agreed with the district court's two-level sentencing enhancement and upheld Arnold Maurice Mathis's 480-month sentence.[100] In addition the court held that even if the sentencing enhancement was not warranted, any error used in computing the enhancement was harmless since Mathis's sentence would have been within the same range with or without the enhancement.[101] Determining whether a smartphone fell within the meaning of a computer as defined by 18 U.S.C. § 1030(e)(1) was a matter of first impression for the Eleventh Circuit.[102]

In 2004, Mathis, an approximately 34-year-old man, met Jarvis J., a 14-year-old boy.[103] At the time, Mathis was a registered sex offender, having entered a plea of nolo contendere to lewd and lascivious assault of a child in 1995.[104] Mathis held himself out to Jarvis to be a pastor and promised to provide Jarvis with mentorship and financial assistance.[105] Mathis also gave Jarvis money to purchase a cell phone and told Jarvis to call

---

[95] *See id.* at 1329.
[96] *Id.* at 1330.
[97] 767 F.3d 1264 (11th Cir. 2014).
[98] U.S. Sentencing Guidelines Manual § 2G2.1 (2014).
[99] *Mathis*, 767 F.3d at 1283.
[100] *Id.* at 1282–85.
[101] *Id.* at 1284.
[102] *Id.* at 1283.
[103] *Id.* at 1268.
[104] *Id.* at 1271.
[105] *Mathis*, 767 F.3d at 1268.

him.[106] The relationship quickly became sexual with Mathis engaging not only in explicit phone calls with Jarvis, but also sexual acts.[107] Seven years later Jarvis informed the police about his encounters with Mathis.[108] After recording a phone call between Jarvis and Mathis during which Mathis acknowledged he had engaged in sexual conduct with Jarvis, law enforcement officers arrested Mathis and seized his cell phone, a Sprint smartphone.[109] The phone was searched twice for information relating to the relationship between Mathis and Jarvis, and the searches also elicited information about Mathis's involvement with two other young boys.[110]

Mathis was indicted on four counts of sexual misconduct.[111] Prior to trial, Mathis moved to suppress evidence from the search of his cell phone, arguing that the affidavit in support of the search warrant was misleading because it indicated that Mathis had used the phone to commit crimes against Jarvis, even though during his involvement with Jarvis Mathis had a different cell phone.[112] The magistrate judge issued a report and recommendation, which was adopted by the district court, "concluding Mathis's motion to suppress should be denied because [law enforcement] did not recklessly mislead the state court judge who issued the search warrant, and because law enforcement acted in good faith reliance on the warrant when searching Mathis's cell phone."[113] At trial the motion to suppress was again denied, and the jury convicted Mathis on each count.[114]

In preparing Mathis's Presentence Investigation Report, the probation officer calculated the sentence using a combined adjusted offense level based in part on a two-level enhancement for Mathis's use of a computer[115] and an elevated criminal history category[116] based on his prior sex offense conviction.[117] Based

---

[106] *Id.*
[107] *Id.* at 1268–69.
[108] *Id.* at 1269.
[109] *Id.*
[110] *Id.* at 1269–70.
[111] *Mathis*, 767 F.3d at 1270.
[112] *Id.*
[113] *Id.* at 1271.
[114] *Id.* at 1271, 1273.
[115] U.S. Sentencing Guidelines Manual § 2G2.1 (2014).
[116] U.S. Sentencing Guidelines Manual § 4B1.5 (2014).
[117] *Mathis*, 767 F.3d at 1273.

on his combined adjusted offense level and criminal history category, Mathis's advisory guidelines range was 360 months to life imprisonment with a consecutive 10-year statutory mandatory minimum term because of his prior sex offense conviction, and Mathis was also subject to statutorily enhanced penalties based on his prior conviction.[118] Mathis objected to the sentencing enhancements, was overruled by the district court, and was sentenced to 480-months imprisonment.[119]

The Eleventh Circuit determined that the district court had properly calculated Mathis's sentence using the enhancement process.[120] In order for a defendant's sentence to be properly enhanced under U.S.S.G. § 2G2.1(b)(6), a defendant must have, for the purpose of producing sexually explicit material, used "a computer or an interactive computer service to . . . persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct, or to otherwise solicit participation by a minor in such conduct."[121] On appeal Mathis argued that based on such a definition, the enhancement would apply only when the Internet was used in the commission of the offense.[122] The Eleventh Circuit turned to an Eighth Circuit opinion when deciding the issue of whether a smartphone should be considered a computer.[123] In *United States v. Kramer*, the Eighth Circuit held that under the definition of a computer given in the federal sentencing guidelines,[124] a computer could encompass any device that uses a data processor.[125] The Eleventh Circuit stated that nothing in the statutory definition of a computer requires Internet capabilities, and "[w]e will not rewrite the statutory definition to exclude Mathis's use of a smartphone."[126] The Court of Appeals also relied on a Seventh Circuit decision[127] noting that as the scope of the statute grows, Congress may be

---

[118] *Id.*

[119] *Id.* at 1274.

[120] *Id.* at 1283–85.

[121] *Id.* at 1282–83.

[122] *Id.* at 1283.

[123] *Mathis,* 767 F.3d at 1283.

[124] As applicable here, the Federal Sentencing Guidelines adopt the meaning of "computer" as that term is described in 18 U.S.C. § 1030. U.S. Sentencing Guidelines Manual § 2G2.1 cmt. n.1 (2011); *see* 18 U.S.C. § 1030(e)(1) (2012).

[125] *See* United States v. Kramer, 631 F.3d 900, 902 (8th Cir. 2011).

[126] *Mathis,* 767 F.3d at 1283.

[127] United States v. Mitra, 405 F.3d 492 (7th Cir. 2005).

prompted to amend it, but such a decision was not for the judiciary to decide.[128]

In upholding the district court's conviction and sentence of Mathis, the Eleventh Circuit held that a smartphone could be considered a computer for determining a sentencing enhancement and that use of the Internet in the commission of the offense is not required.[129] Because Mathis used a smartphone to conduct illegal sexual contact and conduct with minors, the sentencing enhancement applied to his offenses even though the Internet was not used in the commission of his offenses.[130] This decision gives courts a wide range of discretion to determine which devices and activities could potentially be used in determining sentencing enhancements for sex offenders. *Mathis* makes clear that simply using a device with Internet capabilities, whether or not the Internet is actually used, to communicate with minors might warrant a sentencing enhancement.

*Caroline Collins*

### *E. Ship Owners' Vicarious Liability for Physician Negligence*

In *Franza v. Royal Caribbean Cruises, Ltd.*[131] the Eleventh Circuit Court of Appeals held that a cruise line could be held liable for the purported negligence of a ship's medical personnel under the doctrine of respondeat superior and the theory of apparent agency.[132] In doing so, the court of appeals refused to follow the longstanding *Barbetta* rule as applied in the Second, Fifth, and Ninth Circuits.[133] The *Barbetta* rule effectively carves out an exception in maritime law in which shipowners are not held liable under the doctrine of respondeat superior for the negligence of a ship's doctor in the treatment of a ship's passengers.[134] Further, the court of appeals determined that Franza pleaded facts sufficient to establish a plausible actual and apparent agency re-

---

[128] *Mathis,* 767 F.3d at 1283 (citing *Mitra*, 405 F.3d at 495).
[129] *Id.* at 1283.
[130] *See id.*
[131] 772 F.3d 1225 (11th Cir. 2014).
[132] *Id.* at 1228.
[133] *Id.* at 1235; *see also* Barbetta v. S/S Bermuda Star, 848 F.2d 1364 (5th Cir. 1988).
[134] *Barbetta*, 848 F.2d at 1372.

lationship between Royal Caribbean and its medical personnel.[135] Consequently, the Eleventh Circuit Court of Appeals reversed the lower court's decision and remanded the case because Royal Caribbean Cruises Ltd. could be held vicariously liable for the purported negligence of its medical personnel.[136]

Pasquale Vaglio passed away due to a severe head injury he sustained while traveling with Royal Caribbean Cruises, Ltd.[137] Vaglio, a passenger on the "Explorer of the Seas," fell and suffered a traumatic head injury while attempting to board a trolley "at or near the dock" during the ship's port call in Bermuda.[138] Vaglio was taken to the ship's infirmary where one of the onboard nurses examined him and determined that Vaglio might have suffered a concussion; she required no extra diagnostic scans, sent Vaglio back to his room, and advised Vaglio's wife to monitor his condition.[139] Vaglio's condition worsened and he returned to the infirmary.[140] Four hours after his initial exam, the ship's onboard doctor examined Vaglio and ordered that Vaglio be transferred to King Edward Memorial Hospital in Bermuda.[141] By the time Vaglio arrived at the hospital, six hours after his initial examination, his life was beyond saving.[142]

Franza, Vaglio's daughter, brought suit in the United States District Court for the Southern District of Florida seeking to hold Royal Caribbean Cruises, Ltd. vicariously liable for the purported negligent actions of the ship's onboard medical personnel under the theories of actual and apparent agency.[143] The district court initially dismissed the actual agency claim as a matter of law by applying the *Barbetta* rule and dismissed the apparent agency claim as inadequately pleaded.[144] In this case, however, the court of appeals addressed these two issues of first impression and determined that a passenger may utilize principles of actual and apparent agency to implicate a cruise line for an injury received through the negligent medical care of a ship's

---

[135] *Franza*, 772 F.3d at 1236–38, 1249.
[136] *Id.* at 1254.
[140] *Id.* at 1227–28.
[138] *Id.* at 1228.
[139] *Id.* at 1229.
[140] *Id.*
[141] *Franza*, 772 F.3d at 1229.
[142] *Id.*
[143] *Id.* at 1228–30.
[144] *Id.* at 1230.

onboard doctor or nurse.[145]

The Eleventh Circuit addressed each claim separately. In regard to Franza's actual agency claim, the court acknowledged the *Barbetta* rule, but determined that the "existence of an agency relationship is a question of fact under the general maritime law" and should not be barred as a matter of law.[146] Addressing its decision not to follow the *Barbetta* rule, the court outlined and rejected the three basic arguments in favor of the rule.[147] First, the *Barbetta* rule relies on the foundation that no third party principal could be vicariously liable for the actions of a doctor because of the lack of control a principal retains in regard to the doctor-patient relationship.[148] This argument fails because today most doctors practice within the confines of agency relationships.[149] Additionally, principals are able to retain the requisite control over doctors and nurses through proper training, hiring, practicing guidelines, and disciplinary measures.[150]

Second, the *Barbetta* rule rests on the assumption that medical advice is outside the scope of a cruise line's expertise.[151] However, "under basic agency principals, the scope of an employer's vicarious liability is not limited to negligence arising from its primary business," but is regularly found in regard to actions taken by agents working within the scope and authority of their employment.[152] Further, the Eleventh Circuit stated, "no principal from maritime tort law justifies treating shipowners so differently from ordinary employers."[153] Third, the *Barbetta* rule relies on the argument that a shipowner is never physically close enough to exercise "sufficiently immediate" control over the ship's medical personnel.[154] The court rejected this argument as well, stating that while physical separation may affect liability in some cases, advances in modern technology "enable[] effective communication between shore based principals and

---

[145] *Id.* at 1228.
[146] *Id.* at 1235–36.
[147] *Franza*, 772 F.3d at 1238–48.
[148] *Id.* at 1239–43; *Barbetta*, 848 F.2d at 1369.
[149] *Franza,* 772 F.3d at 1240.
[150] *Id.* at 1240–41; Harris v. Miller, 438 S.E.2d 731, 737 (N.C. 1994).
[151] *Franza,* 772 F.3d at 1243.
[152] *Id.* at 1244.
[153] *Id.* at 1246.
[154] *Id.* at 1247.

onboard medics."[155]

Further, the court addressed Franza's apparent agency claim.[156] The court determined that Franza "plausibly and adequately pled all three elements of apparent agency."[157] Royal Caribbean represented to Vaglio, through its promotional materials, that the cruise medical personnel were authorized agents of Royal Caribbean and Vaglio relied on his belief that the ship's medical personnel were employed by the cruise line.[158] The Court determined that Franza's pleading was sufficient to defeat Royal Caribbean's motion to dismiss and subsequently reversed the district court's dismissal.[159]

This decision has established a new standard for reviewing claims of medical negligence under maritime law. The court determined that the exception carved out under the *Barbetta* rule is no longer sound law and chose to follow the same agency principles that the Eleventh Circuit has followed in other types of maritime tort cases.[160] Consequently, cruise lines will no longer be able to assert immunity from liability and passengers will now be able to hold cruise lines vicariously liable for the actions of the ship's onboard medical personnel.

*Erin Godwin*

### *F. Forum Substitution in Arbitration Agreements*

In *Inetianbor v. CashCall, Inc.*[161] the Eleventh Circuit Court of Appeals held that when a forum selection clause in an arbitration agreement is central to a contract and reflects the parties' will and intent, substitute arbitration cannot be compelled when the agreed forum is unavailable.[162] The issue presented before the court was whether Section 5 of the Federal Arbitration Act[163] allowed for arbitral substitution when an arbitration forum clause is integral to the terms of the contract.[164] The issue before

---

[155] *Id.* at 1248.
[156] *Id.* at 1249–54.
[157] *Franza*, 772 F.3d at 1251.
[158] *Id.* at 1252–53.
[159] *Id.* at 1254.
[160] *Id.* at 1238.
[161] 768 F.3d 1346 (11th Cir. 2014).
[162] *Id.* at 1353–54.
[163] 9 U.S.C. § 5 (2012).
[164] *Inetianbor*, 768 F.3d at 1349–50. *See* 9 U.S.C. § 5 (2012).

was not an issue of first impression.[165] The Eleventh Circuit found that the arbitral forum agreement between Mr. Inetianbor and CashCall, Inc. (CashCall) was integral to the contractual agreement.[166] Further, because the integral arbitral forum was unavailable to the parties, a substitute arbiter could not be appointed under the terms of the contract.[167] The court's holding established a consistent position on the issue with respect to a majority of the circuit courts.[168]

In declining to compel arbitration, the Eleventh Circuit affirmed the district court's holding.[169] Originally, Mr. Inetianbor borrowed money from a financial group and made payments on his loan to CashCall over the course of twelve months.[170] CashCall determined the loan was in default and allegedly reported the default to credit agencies.[171] Mr. Inetianbor sued CashCall for defamation, usury violations, and a violation of the Fair Credit Reporting Act.[172] CashCall filed a motion to compel arbitration and the district court granted the request.[173] Mr. Inetianbor complied but the agreed upon arbitrator, the Cheyenne River Sioux Tribal Nation, informed the district court that the Tribe "does not authorize Arbitration."[174] CashCall assured the court that the Tribe would hear contractual arbitration matters, and the district court issued a second order to compel arbitration.[175] Again, Mr. Inetianbor tried to comply with the order compelling arbitration, but the Tribe was unavailable as an arbitrator.[176] The district court subsequently refused to compel arbitration.[177] CashCall appealed, arguing that arbitration was not precluded because the forum selection clause was not integral to the contract and that the district court erred in finding the forum

---

[165] *Inetianbor*, 768 F.3d at 1349.
[166] *Id.* at 1350.
[167] *Id.* at 1354.
[168] *See id.* at 1350 (explaining that the rule established in this case is consistent with the majority rule in the circuit courts).
[169] *Id.* at 1354.
[170] *Id.* at 1348.
[171] *Inetianbor*, 768 F.3d at 1348.
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.* at 1348–49.
[176] *Id.* at 1349.
[177] *Inetianbor*, 768 F.3d at 1349.

unavailable.[178]

The Eleventh Circuit reviewed the district court's decision *de novo* and ultimately affirmed the lower court's decision.[179] The court explained that arbitral substitution would only be appropriate if the forum selection clause was not integral to the contract.[180] Accordingly, the court first looked at whether the forum selection agreement was integral to the loan contract.[181] The court determined that the language of the contract evidenced the parties' intent to make the forum selection clause an integral part of the contract.[182] The court explained that it is not the court's duty to twist the intent of an agreement between parties to fit the federal policy favoring arbitration.[183] Therefore, because the forum selection clause was integral and not separable from the agreement to arbitrate, the court refused to compel substitute arbitration.[184]

The court next discussed the fact that the selected forum was actually unavailable.[185] CashCall argued that the forum did not require the Tribe's involvement, and the district court erred in finding the arbitration unavailable.[186] The Eleventh Circuit, however, found ample evidence within the substance of the agreement to indicate the Tribe's necessary involvement in arbitration.[187] In a concurring opinion, Judge Restani asserted that the forum selection clause was itself a sham consideration and unconscionable by its nature.[188] On these grounds, he explained that district courts should have the discretion to invalidate the agreement on equitable grounds regardless to whether Section 5 of the Federal Arbitration Act allows arbitral substitution in this case.[189]

The Eleventh Circuit affirmed the district court's ruling and

---

[178] *Id.*

[179] *Id.* at 1350.

[180] *See id.* at 1350–54.

[181] *Id.* at 1350.

[182] *Id.* The court explained that five out of nine paragraphs of the loan agreement specified the Cheyenne River Sioux Tribal Nation would act as arbitrators. *Inetianbor*, 768 F.3d at 1351.

[183] *Id.* at 1352 (quoting Doe v. Princess Cruise Lines, Ltd., 657 F.3d 1204, 1214 (11th Cir. 2011)).

[184] *Id.* at 1353–54.

[185] *See id.* at 1353–54.

[186] *Id.* at 1353.

[187] *Id.*

[188] *Inetianbor*, 768 F.3d at 1355–56 (Restani, J., concurring).

[189] *See id.* at 1354–56.

refused to compel both arbitration and substitute arbitration.[190] The court reasoned that the forum selection clause was central to the agreement between the parties and that a substitute arbitrator would undermine that agreement.[191] Therefore, because the selected forum was unavailable, the court refused to compel substitute arbitration.[192] This case will stand as precedent for future arbitration disputes involving forum selection clauses. This case sets forth a rule that when a forum selection clause is central to an arbitration agreement, as evidenced by the intent of the parties, a court will not compel substitute arbitration under Section 5 of the Federal Arbitration Act.[193] Future contracting parties will need to be diligent in designating specific forums and clearly express whether substitute arbitration is acceptable.

*Jonathan Green*

### *G. Ineffective Assistance of Counsel: Failure to Challenge Court Prayer*

In *Bates v. Secretary, Florida Department of Corrections*,[194] the Eleventh Circuit Court of Appeals held that failing to raise an objection to the unfairness of a local minister giving a prayer prior to the commencement of voir dire in a capital murder trial or raise objection to the victim's husband implying in his testimony that the victim had been a member of the same minister's church does not give rise to an ineffective assistance of counsel claim.[195] The Eleventh Circuit additionally affirmed the lower court's rejection of Bates' contention that his due process right to a fair capital sentencing proceeding was violated based on the trial judge's failure instruct the jury of available alternatives to the death penalty and of Bates' other consecutive sentences being served.[196] Thus, the court of appeals affirmed the United States District Court for the Northern District of Florida's denial of federal habeas relief for ineffective assistance of counsel and

---

[190] *Id.*
[191] *Id.* at 1350–54 (majority opinion).
[192] *Id.* at 1354.
[193] *See id.* 1350–54.
[194] 768 F.3d 1278 (11th Cir. 2014).
[195] *Id.* at 1288–90, 1299–1300; *see* 28 U.S.C. § 2254 (2012).
[196] *Bates*, 768 F.3d at 1300–05.

violation of the right to a fair sentencing proceeding.[197]

Kayle Bates was tried and convicted of first-degree murder in January of 1983.[198] The Supreme Court of Florida affirmed Bates' convictions[199] and death sentence.[200] Thereafter, Bates was denied state habeas relief for an ineffective counsel claim.[201] Bates petitioned for federal habeas relief, but his petition was denied by the United States District Court for the Northern District of Florida.[202] Bates then appealed the district court's denial to the Eleventh Circuit Court of Appeals.[203] The Eleventh Circuit reviewed Bates' habeas petition de novo and affirmed the district court's decision.[204]

The Eleventh Circuit first reviewed Bates' claim of ineffective counsel citing the failure to object to a prayer conducted by a local minister prior to voir dire and the victim's husband's testimony.[205] Prior to Bates' capital murder trial in 1983, in the presence of the jury venire, the judge invited a minister of First Baptist Church in Bay County, Florida, to deliver a prayer to open the proceedings.[206] Later, in the course of the victim's husband's testimony, the husband stated that the last time he saw his wife was at the First Baptist Church during her funeral service.[207] Bates was later convicted of capital murder based on the "overwhelming" evidence presented against him at trial.[208]

In his petition, Bates argued that the prayer violated the Establishment Clause because there was no constitutional basis for injecting religion into the proceedings and that the prayer, combined with the husband's testimony, violated his due process right to a fair trial.[209] Bates proposed that, because his counsel failed to object to the prayer when it was delivered before voir

---

[197] *Id.* at 1306.
[198] *Id.* at 1285, 1291.
[199] *Id.* at 1285.
[200] *Id.*
[201] *See id.* at 1285–86; Bates v. State, 3 So. 3d 1091, 1106–07 (Fla. 2009).
[202] *See Bates*, 768 F.3d at 1283, 1287.
[203] *Id.* at 1287.
[204] *Id.* at 1287, 1306.
[205] *Id.* at 1288–93.
[206] *Id.* at 1284.
[207] *See id.* at 1292.
[208] *Bates*, 768 F.3d at 1284–85.
[209] *Id.* at 1288.

dire or after the victim's husband's testimony, he received constitutionally ineffective assistance of counsel.[210]

In reviewing Bates' ineffective counsel claim, the Eleventh Circuit noted that a party asserting a claim for ineffective counsel must show that counsel's conduct was not within the boundaries of reasonable professional assistance, such that "'no competent counsel would have taken the action that his counsel did take.'"[211] The court reasoned that Bates' counsel could have made a reasonable strategic decision to not interrupt the victim's husband's testimony and move for a mistrial because such an action by counsel, when made without good cause, would likely undermine his arguments in Bates' favor thereafter.[212] Additionally, the court noted that an unsuccessful objection made after the husband's testimony could conflict with the contemporaneous objection rule and, moreover, might highlight to the jury the implication that the victim was a member of the church, which may have otherwise been unremarkable.[213] Thus, a reasonable attorney could make the choice not to raise an objection to the prayer or victim's husband's testimony.[214]

Next, the court stated that the Establishment Clause is not a trial right and could not be used on its own to challenge a defendant's conviction.[215] The court rejected Bates' argument that his counsel was ineffective for failing to raise an Establishment Clause claim.[216] Given that Bates offered no evidence that the prayer or victim's husband's testimony resulted in prejudice against him or that a competent lawyer would have moved for a mistrial at any point in the proceedings because of these events, Bates' Establishment Clause argument was not one for consideration by the court.[217] As the court stated, "[Bates' Establishment Clause] argument simply misses the mark: the sectarian aspects of a trial are relevant only to the extent they make the trial unfair, and on the fairness question the Establishment Clause has nothing to teach us."[218] Thus, the Eleventh Circuit affirmed the

---

[210] *Id.*

[211] *Id.* (quoting Gissendaner v. Seabolt, 735 F.3d 1311, 1323 (11th Cir. 2013)).

[212] *See id.* at 1296–98.

[213] *Id.* at 1296–97.

[214] *Bates*, 768 F.3d at 1297–98.

[215] *Id.* at 1289.

[216] *Id.* at 1290.

[217] *See id.* at 1289–90, 1295.

[218] *Id.* at 1290.

United States District Court for the Northern District of Florida's denial of Bates' ineffective counsel claim by finding that his counsel did not act unreasonably in the circumstances.

The Eleventh Circuit additionally affirmed the district court's denial of Bates' sentencing challenge, holding that the trial court's failure to instruct the jury of the possibility of life without parole, Bates' agreement to waive parole eligibility, and Bates' other consecutive sentences did not violate his right to a fair sentencing hearing.[219] The Court denied Bates' argument based on the fact that a 1994 amendment to the Florida sentencing statute[220] did not retroactively apply to Bates' 1983 sentencing.[221] Thus, the trial judge's failure to properly instruct the jury according to the 1994 amendment was not a violation of Bates' rights at his murder trial.[222]

Following this decision by the Eleventh Circuit, petitioners for federal habeas corpus relief should be conscious of the basis of an ineffective counsel claim, particularly when asserting the claim based on rights which are not considered trial rights, if the proposed failure of a defendant's counsel is not strongly evidenced to prejudice against the defendant. Furthermore, when an amendment to a sentencing law does not apply retroactively, it cannot be used to challenge the outcome of an earlier trial.

*Kyle Heslop*

### *H. Hearing Before Ultimate Decision-Maker Not Required for Employee Due Process*

In *Laskar v. Peterson* the Eleventh Circuit Court of Appeals held that an employee's procedural due process right to "a meaningful opportunity to be heard" prior to termination does not mandate that the employee's pre-termination hearing be conducted before the "ultimate decision-maker."[223] The court's decision explicitly addressed an area of confusion in case law in the Eleventh and other circuits, in which employees were provided with pre-termination hearings conducted in the presence

---

[219] *Id.* at 1300–07.

[220] FLA. STAT. § 775.082 (1994).

[221] *Bates*, 768 F.3d at 1303; *see* Simmons v. South Carolina, 512 U.S. 154, 156 (1994); *see also* Ramdass v. Angelone, 530 U.S. 156, 165 (2000).

[222] *Bates*, 768 F.3d at 1303–04.

[223] 771 F.3d 1291, 1297–99 (11th Cir. 2014) (internal quotation marks omitted).

of the final decision-maker in regard to the dismissal of the relevant employee.[224]

In reaching its holding, the court considered the following relevant facts. Joy Laskar was a tenured professor as well as the director of the Georgia Electronic Design Center at the Georgia Institute of Technology (Institute).[225] In May of 2010, after evidence was discovered indicating that Laskar misappropriated Institute resources, Laskar's employment was suspended without pay.[226] Thereafter, following numerous preliminary procedures, dismissal proceedings were initiated against Laskar.[227] On October 6, 2010, the Institute sent Laskar a letter that provided notice of the charges alleged against him.[228] Five months later, Laskar was afforded a pre-termination hearing conducted by a Faculty Hearing Committee.[229] The Committee prepared and delivered a final report to "Bud" Peterson, the President of the Institute who was not present at the mentioned hearing, recommending that Laskar be dismissed from his positions at the Institute.[230] After reviewing the report and hearing record, Peterson terminated Laskar's employment with the Institute.[231] Laskar appealed Peterson's decision to the Board of Regents who upheld the decision following a meeting at which Laskar was not present.[232]

In response to his dismissal, Laskar sought review of the Board of Regents' decision from the Superior Court of Fulton County, Georgia.[233] The court found that it lacked jurisdiction to review the process by which Laskar was terminated and dismissed Laskar's petition.[234] Subsequently, the Georgia Court of Appeals affirmed the superior court's decision in finding that it lacked jurisdiction to review the relevant termination proceedings.[235]

In May of 2013, Laskar filed an action in the United States

---

[224] *Id.*
[225] *Id.* at 1293.
[226] *Id.* at 1294.
[227] *Id.*
[228] *Id.*
[229] *Laskar*, 771 F.3d at 1294.
[230] *Id.*
[231] *Id.* at 1294–95.
[232] *Id.* at 1295.
[233] *Id.*
[234] *Id.*
[235] *Laskar*, 771 F.3d at 1295.

District Court for the Northern District of Georgia claiming that the procedure by which his employment was terminated failed to meet the requirements of the Due Process Clause of the Fourteenth Amendment.[236] The district court found that Laskar was afforded adequate procedural due process in that Laskar received notice of the charges alleged against him and a pre-termination hearing prior to being dismissed.[237] Accordingly, the district court dismissed Laskar's claim.[238] Laskar appealed the district court's decision to the Eleventh Circuit.[239]

On appeal, Laskar asserted that an employee's procedural due process right to "a meaningful opportunity to be heard" before termination of employment mandates that an employee be afforded a pre-termination hearing in the presence of the "ultimate decision-maker."[240] Under such reasoning, Laskar argued that his procedural due process rights were violated when his pre-termination hearing was conducted before faculty members instead of directly before Peterson or the Board of Regents.[241] Further, the appellees made an ancillary argument that the district court lacked subject matter jurisdiction to hear the matter for two reasons: first, the doctrine of res judicata barred Laskar's procedural due process claim, and second, Laskar's procedural due process claim was not actionable in federal court because Laskar failed to avail himself of state remedies to the proposed constitutional violations.[242]

In direct response to Laskar's argument, the Eleventh Circuit ruled that while procedural due process requires that an employee receive a pre-termination hearing, such a requirement does not "as a matter of law, [require] a pre-termination hearing . . . before the 'ultimate decision-maker' in order to satisfy procedural due process."[243] Taking the appellee's subject matter jurisdiction arguments in turn, the court stated that when reviewing a case under Georgia law, res judicata only applies when the identity of the subsequent cause of action is identical to that of the original.[244] The court also noted that under the doctrine

---

[236] *Id.*

[237] *Id.* at 1296.

[238] *Id.*

[239] *Id.*

[240] *Id.* at 1296, 1298 (internal quotation marks omitted).

[241] *Laskar*, 771 F.3d at 1296.

[242] *Id.* at 1299.

[243] *Id.* at 1298.

[244] *Id.* at 1299–1300 (citing Starship Enters. of Atlanta, Inc. v. Coweta Cnty., 708

of res judicata dismissing an action for lack of jurisdiction does not bar "'a subsequent action in a court of competent jurisdiction on the merits of the cause of action originally involved.'"[245] Further, in addressing the availability of adequate state remedies, the court noted that a procedural due process claim is actionable in federal court if a state fails to make means available to remedy a violation or, in other terms, "'fails to remedy [an] inadequacy.'"[246]

Under the above mentioned rules, the court held that Laskar's due process rights were not violated when he was provided with a pre-termination hearing, despite the fact that the "ultimate decision-maker" was not present.[247] Additionally, the court found that the district court had subject matter jurisdiction over the action.[248] Specifically, the court noted that Laskar's action was not barred by the doctrine of res judicata because the prior state action was dismissed for want of jurisdiction and was not identical to the subsequent federal due process claim.[249] Finally, the court concluded that Laskar's procedural due process claim was actionable in federal court when the district court reasonably concluded that the Georgia state court failed to provide Laskar with a remedy by summarily dismissing his complaint without considering its merits.[250] Ultimately, the Eleventh Circuit affirmed the district court's dismissal of Laskar's complaint.[251] In doing so, the court established that an employee's procedural due process right to a pre-termination hearing does not require that such a hearing be conducted in the presence of the "ultimate decision-maker."[252]

*J.D. Marsh*

*I. Sentencing Guidelines: Balancing Section 3553(a) Factors*

---

F.3d 1243, 1254–55 (11th Cir. 2013)).

[245] *Id.* at 1300 (citing Sewell v. Merrill Lynch, 94 F.3d 1514, 1518 (11th Cir. 1996)).

[246] *Id.* (citing McKinney v. Pate, 20 F.3d 1550, 1560, 1563 (11th Cir. 1994)).

[247] *Laskar*, 771 F.3d at 1299.

[248] *Id.* at 1301.

[249] *Id.* at 1300.

[250] *Id.* at 1300–01.

[251] *Id.* at 1301.

[252] *See id.* at 1298–99.

In *United States v. Hayes*[253] the Eleventh Circuit Court of Appeals held that a concurrent three-year probationary sentence for bribery and conspiracy to commit money laundering was substantively unreasonable given the factors set forth in 18 U.S.C. § 3553(a).[254] Furthermore, the court noted the sentence conveyed a message that "would be white-collar criminals stand to lose little more than a portion of their ill-gotten gains and practically none of their liberty" and thus did not serve as a general deterrent.[255] Accordingly, the Eleventh Circuit vacated the sentence and remanded the case for resentencing.[256]

James Winston Hayes ran ACCESS Group Software, LLC (ACCESS), a computer software company in Alabama that sold educational software to the Alabama Department of Postsecondary Education ("ADPE") and more than twenty-five two-year colleges and technical schools.[257] From 2002 to 2006, Hayes paid over $600,000 in bribes to the ex-Chancellor of ADPE, Roy Johnson, in an effort to ensure that ACCESS would continue to receive government contracts from ADPE.[258] To conceal the payments, Hayes falsified contracts and mortgages, and reimbursed third parties.[259] During those four years, ACCESS received more than $14 million in gross income from ADPE, resulting in profits of approximately $5 million.[260] When the government began investigating corruption at ADPE, Hayes retained counsel and fully cooperated in the investigation.[261] Hayes provided bank records and other documentation of illicit financial dealings, allowed his office and vehicle to be wired for audio recording, and personally wore a recording device in meetings with several other targets of the investigation.[262]

In 2007, Hayes was charged with bribing an official of an agency receiving federal funding[263] and conspiring to commit

---

[253] 762 F.3d 1300 (11th Cir. 2014).
[254] *Id*. at 1302–04.
[255] *Id*. at 1310–11.
[256] *Id*. at 1311.
[257] *Id*. at 1302.
[258] *Id*.
[259] *Hayes*, 762 F.3d at 1302.
[260] *Id*.
[261] *Id*.
[262] *Id*.
[263] *Id*. at 1302; *see also* 18 U.S.C. § 666(a)(2) (2012).

money laundering.[264] The Government also sought criminal forfeiture.[265] In 2008, Hayes pleaded guilty to the charges and consented to forfeiture.[266] A presentence investigation report was prepared for use at Hayes' sentencing by the probation office.[267] The report indicated that Hayes scored a total offense level of 33 and had a criminal history category of I, which resulted in an advisory guidelines range of 135- to 168-months of imprisonment.[268] The district court adopted the advisory range at the initial sentencing hearing after neither party objected to the calculation.[269] Subsequently, pursuant to Section 5K1.1 of the U.S. Sentencing Guidelines, the Government filed a motion for downward departure from the advisory guidelines based on Hayes' compliance and substantial assistance with the investigation.[270] The Government recommended that the district court depart from an offense level of 33 to an offense level of 25, which carried a corresponding advisory guideline range of 57- to 71-months of imprisonment.[271] The Government then recommended a 60-month custodial sentence for Hayes based upon a totality of the circumstances and the Section 3553(a) factors.[272]

Pursuant to *United States v. McVay*,[273] the district court heard the Government's Section 5k1.1 motion for downward departure,[274] and the court granted the motion at the first sentencing hearing.[275] However, the court departed to an offense level of 22, further than the Government recommended.[276] At a second hearing, the district court concluded that it had sufficient information on all of the Section 3553(a) factors, and after consideration of said factors, noted its authority to impose a sentence outside of the advisory guidelines under *Booker*.[277] The district

---

[264] *Hayes*, 762 F.3d at 1302; *see also* 18 U.S.C. § 1956(h) (2012).
[265] *Hayes*, 762 F.3d at 1302.
[266] *Id.*
[267] *Id.* at 1303.
[268] *Id*.
[269] *Id*.
[270] *Id*. at 1304.
[271] *Hayes*, 762 F.3d at 1304.
[272] 18 U.S.C. § 3553(a) (2012); *Hayes*, 762 F.3d at 1305.
[273] 447 F.3d 1348 (11th Cir. 2006).
[274] *Hayes*, 762 F.3d at 1305.
[275] *Id.*
[276] *Id*. at 1304–05.
[277] *Id*. at 1305–06. *See also* United States v. Booker, 543 U.S. 220, 234 (2005) (noting that the § 3553 sentencing guidelines permit departures from the sentencing ranges therein).

court sentenced Hayes to concurrent terms of three years' probation with 6- to 12-months of home confinement, ordered him to pay $628,454.28 in restitution, and to forfeit $5 million in addition to special fines.[278] The Government challenged the procedural and substantive reasonableness of the sentence, asserting that the district court abused its discretion in applying the probationary sentence.[279]

On appeal, the Eleventh Circuit did not consider the reasonableness of the Section 5K1.1 departure, but did determine that the district court committed a "clear error of judgment in balancing the [Section] 3553(a) factors" and that its significant variance downward from the advisory guidelines to probation was substantively unreasonable.[280] In reviewing this case, the court recognized that the district court did consider the Section 3553(a) factors.[281] However, the district court never explained how or why it reached the decision to depart downward to probation.[282] On one hand, the district court concluded that Hayes' crimes were serious, that white-collar offenses need to be deterred, and prison sentences are likely the best deterrent.[283] On the other hand, the district court considered Hayes' age and health and that Hayes was remorseful for his crimes, not likely to commit future crimes, and not a risk to the public.[284] The court also recognized that the district court took into account the potential for sentencing disparity between similarly-situated offenders.[285] However, none of these factors should be considered individually and sentencing disparity alone does not justify the variance.[286]

In holding for the Government, the court determined that the district court improperly balanced the Section 3553(a) factors and committed clear error in significantly departing from the advisory guidelines and imposing a sentence of probation.[287] The court noted that a sentence of probation is not always unreasonable for defendants found guilty of bribery or corruption

---

[278] *Hayes*, 762 F.3d at 1306.
[279] *See id*.
[280] *Id*. at 1306–07.
[281] *See id.* at 1307.
[282] *See id*.
[283] *Id.* at 1307.
[284] *Hayes*, 762 F.3d at 1308.
[285] *Id.* at 1306.
[286] *Id.* at 1308.
[287] *Id.* at 1307.

but, in considering the totality of the circumstances, the downward variance in this case could not stand.[288] While Judge Tjoflat argued in dissent that the Government deliberately led the court to abandon the advisory guidelines and thus was the cause of the error,[289] the majority disagreed. Pursuant to Section 5K1.1, one permissible way to calculate a departure is to reduce the defendant's offense level, as was done in this case.[290]

The decision of this case does not alter the standard that a district court should apply when considering a departure or variance from the sentencing guidelines under Section 5K1.1; rather, it provides some guidance to ensure that all trial courts are balancing the factors appropriately when determining the extent of a departure. Following this decision, district courts should ensure that they consider all of the Section 3553(a) factors when considering a downward variance under Section 5K1.1. Trial courts should also properly weigh the factors against one another rather than considering one factor, or a set of factors, "in a vacuum."[291]

*Caleigh Miller*

*J. Bad Faith in Insurance Settlement*

In *AirTran Airways v. Elem*[292] the Eleventh Circuit upheld summary judgment for AirTran Airways (AirTran) where the appellants, Brenda Elem (Elem) and her lawyer, conspired to hide settlement fees Elem received after a car wreck.[293] AirTran Airways claimed the appellants' conduct violated the Employee Retirement Income Security Act of 1974.[294] *AirTran Airways v. Elem* is significant because it examines a corporation's ability to recover benefits paid in the presence of conspiracy and deception.

In 2007, Elem was involved in a car accident, and AirTran, Elem's employer, paid $131,704.28 for her medical costs because of her participation in a self-funded welfare benefit plan.[295]

---

[288] *See id*. at 1309.
[289] *Id*. at 1311 (Tjoflat, J., dissenting).
[290] *Hayes*, 762 F.3d at 1309 (majority opinion).
[291] *Id.* at 1308.
[292] 767 F.3d 1192 (11th Cir. 2014).
[293] *Id.* at 1195.
[294] *Id.*
[295] *Id.*

When Elem accepted the money from AirTran, she acknowledged AirTran had first claim to any money paid out by a third party, regardless of whether the third party paid her damages in full or in part.[296] Elem was advised that if she sued the driver of the other vehicle, she would have to reimburse AirTran.[297] Elem contacted AIG in order to settle the claim with the driver, and she was informed there was a $25,000 limit on the driver's policy and that AIG would agree to pay that amount to Elem if "her plan 'waive[d] their subrogation lien' or to [Elem] and the plan if the plan did not waive the lien."[298]

Elem hired Mark Link (Link) and sued the third-party driver.[299] Link was made aware of the lien in favor of AirTran and the offer of $25,000 from AIG.[300] Elem later settled her suit against the third-party driver for $500,000, but Link asked that there be two releases: one for $25,000, and another for $475,000 for the claim of bad faith against the third party.[301] Link also demanded the $25,000 release not mention the additional release for $475,000.[302] Link notified AirTran that there had been a settlement for $25,000, and that there were no plans to pursue additional recovery.[303] In order to provide proof of the settlement, Link intended to attach a copy of the check for $25,000 but, instead, attached the check for $475,000.[304] After viewing the check for $475,000, the plan administrator for AirTran demanded full reimbursement.[305]

On cross-motions for summary judgment, the district court granted summary judgment in favor of AirTran and awarded attorney's fees in the amount of $145,723.28 and costs of $3,692.52.[306] Link and Elem refused to pay, and AirTran responded by filing a motion to enforce judgment under Federal Rule of Civil Procedure 70.[307] AirTran later filed to hold Elem and Link in contempt of court but withdrew the motion after

---

[296] *Id.*

[297] *Id.*

[298] *AirTran Airways, Inc.*, 767 F.3d at 1195.

[299] *Id.* at 1196.

[300] *Id.*

[301] *Id.*

[302] *Id.*

[303] *Id.*

[304] *AirTran Airways, Inc.*, 767 F.3d at 1196.

[305] *Id.*

[306] *Id.*

[307] *Id.*

Link paid in full.[308]

On appeal, the Eleventh Circuit reviewed three arguments made by Elem and Link. First, Elem and Link argued AirTran failed to seek equitable relief but, instead, sought a legal remedy in the form of money damages.[309] The court found that "AirTran filed suit to enforce its equitable lien over 'specifically identifiable funds' that Elem had in her 'possession.'"[310] Elem's possession of the funds made them specifically identifiable, thus summary judgment was proper.[311] The appellants also claimed that AirTran cannot recover against Link and his firm as third-party attorneys, that AIG funded the $475,000 portion of the settlement and can no longer be a responsible party under the plan, that AirTran did not disclose the details of the plan, and that since the plan administrator provided health care services, AirTran cannot sue for reimbursement.[312] The court found all four of these additional arguments unpersuasive.[313]

Second, the Defendants argued that the district court abused its discretion in awarding attorney's fees and costs to AirTran.[314] The Eleventh Circuit applied the five-factor *Freeman* standard which examines bad faith, ability to pay, the deterring effect of awarding attorney's fees, the intention of benefitting participants and beneficiaries of an ERISA plan, and the merits of parties' positions in making its determination; the court held that the award was proper.[315] The court noted that it rarely encounters "such a textbook example of 'bad faith.'"[316]

Finally, Elem and Link argued the enforcement of payment was inappropriate under Federal Rule of Civil Procedure 70.[317] The court found Elem and Link's appeal regarding the district court's Rule 70 order no longer justiciable because the issue was moot.[318] The court stated that it could no longer decide the issue

---

[308] *Id.*

[309] *Id.* at 1197.

[310] *AirTran Airways, Inc.*, 767 F.3d at 1197.

[311] *Id.* at 1198.

[312] *Id.* at 1199.

[313] *Id.*

[314] *Id.* at 1202.

[315] *Id.* at 1201–02*; see also* Freeman v. Continental Ins. Co., 996 F.2d 1116, 1119 (11th Cir. 1993).

[316] *AirTran Airways, Inc.*, 767 F.3d at 1202.

[317] *Id.*

[318] *Id.*

because Elem and Link complied with the order.[319]

In conclusion, the Eleventh Circuit affirmed the district court's granting of summary judgment and the award of attorney's fees and costs.[320] The court dismissed the appeal of the Rule 70 order because it was moot.[321]

Objectively, this case is significant because it shows that settlement funds do not have to be able to be traced back to the agreement to be enforceable.[322] Once the funds are identified, the existing equitable lien plan becomes enforceable.[323] However, this case exhibits a very specific example of bad faith, and other courts could reach a different outcome where bad faith may not be as clear. In its application of the *Freeman* standard, the Eleventh Circuit looks to deter others from exploiting such welfare plans through acts of deception and conspiracy.

*Cody Walker*

### *K. Lone Pine Order May Not Be Issued Before Dismissal Determination Under Twombly*

In *Adinolfe v. United Technologies Corp.*,[324] the Eleventh Circuit Court of Appeals unanimously held that a district court should not issue a *Lone Pine*[325] order—requiring a plaintiff to produce factual support for their claims—before a determination that those claims can survive a motion to dismiss under *Twombly* and successive cases.[326] Faced with an issue of first impression, the Eleventh Circuit overruled the district court's decision to dismiss the plaintiffs' case as it was based upon legal analysis presented in the *Lone Pine* filings.[327]

---

[319] *Id.*

[320] *Id.* at 1203.

[321] *Id.*

[322] *AirTran Airways, Inc.*, 767 F.3d at 1198.

[323] *Id.* at 1197–99.

[324] (*Adinolfe I*), 768 F.3d 1161 (11th Cir. 2014).

[325] *See* Lore v. Lone Pine Corp., No. L-33606-85, 1986 WL 637507, at *4 (N.J. Super. Ct. Law Div. Nov. 18, 1986) (demonstrating that case management orders may be entered in mass tort cases and other complex matters requiring plaintiffs to provide some factual support for their claims, including expert testimony, or risk dismissal of the claims).

[326] *See Adinolfe I*, 768 F.3d at 1164, 1168 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (1990)).

[327] *See id.* at 1164 (describing the district court's use of the *Lone Pine* order as "a pre-discovery case management tool").

This appeal was the result of two consolidated toxic tort cases, *Pinares v. United Technologies Corp.*[328] and *Adinolfe v. United Technologies Corp.*,[329] both dismissed with prejudice by the district court.[330] The plaintiffs in both lawsuits are property owners of "The Acreage," a residential community in Palm Beach County, Florida, which contains approximately 17,000 parcels.[331] The plaintiffs sued United Technologies Corporation, an aerospace engineering and manufacturing firm, for damages allegedly resulting from groundwater contamination caused by chemicals that migrated through an underground aquifer from United Technologies plant to The Acreage, approximately six miles away.[332] Of the 384 individual plaintiffs in the *Adinolfe II* lawsuit, more than 300 claimed that their properties were contaminated, and the others alleged that their property would likely become contaminated or damaged by the proximity to the chemicals.[333] While the majority of the plaintiffs in *Adinolfe II* generally claimed damages for diminution of their property value, the plaintiff in *Pinares* alleged she developed cancer as a result of exposure to chemicals that migrated from the United Technologies plant to The Acreage.[334] Both lawsuits asserted claims of negligence, strict liability, nuisance, and statutory claims under Florida Statutes Section 376.313(3).[335]

After United Technologies moved to dismiss the initial complaints, it requested the district court enter *Lone Pine* case management orders in each case requiring the plaintiffs to produce evidence of contamination and causation, as well as expert reports before discovery.[336] *Lone Pine* orders "usually require plaintiffs in mass tort cases to provide some factual support, in-

---

[328] Pinares v. United Techs. Corp., No. 10-80883-CIV, 2011 WL 240512 (S.D. Fla. Jan. 19, 2011).

[329] Adinolfe v. United Techs. Corp. (*Adinolfe II*), No. 10-80840-CIV, 2011 WL 240470 (S.D. Fla. Jan. 18, 2011).

[330] *Adinolfe I*, 768 F.3d at 1164.

[331] *See id.* at 1164, 1166.

[332] *Id.* at 1164.

[333] *See id.* at 1170. The plaintiffs were broken down into three labeled categories: the "contamination" plaintiffs, the "proximity" plaintiffs, and the "anticipated contamination" plaintiffs. *Id.* at 1167.

[334] *Id.* at 1164–65.

[335] *Adinolfe I*, 768 F.3d at 1167.

[336] *Id.* at 1165.

cluding expert testimony, for their claims or run the risk of having those claims dismissed."[337] The district court ultimately granted the *Lone Pine* requests, and required the plaintiffs to produce all evidence that supported the prima facie elements of causation and contamination for their property damage claims, as well as expert opinions on numerous issues.[338] The district court stated at a hearing for United Technologies' motion to dismiss that it did not want to discuss the *Lone Pine* filings, but rather wanted to make its determination of dismissal on the requirements set forth in *Twombly*;[339] however, both parties frequently brought up and discussed the *Lone Pine* filings.[340] The district court ultimately dismissed the plaintiffs' second amended complaints with prejudice, basing the decision on the plaintiffs providing inadequate evidence of contamination and causation, as well as the plaintiffs' failure to allege that the contamination in their groundwater exceeded regulatory safety standards.[341]

On appeal, the Eleventh Circuit reversed the district court's dismissal and found that the *Lone Pine* orders were inappropriately issued before determining that the complaints contained enough facts to survive a motion to dismiss under *Twombly*.[342] The court stated that courts are not to weigh potential evidence when considering motions to dismiss under Federal Rule of Civil Procedure 12(b)(6), and that *Lone Pine* orders should not be used as "pseudo-summary judgment motions" when cases are not yet at issue and prior to discovery.[343] Further stating that if procedural safeguards, such as summary judgment notice requirements and the right to discovery, are not observed, *Lone Pine* orders "might become the practical equivalent of a heightened, court-imposed quasi-pleading standard."[344]

The Eleventh Circuit also disagreed with the district court's finding that the plaintiffs did not sufficiently allege actual contamination or a causal connection to United Technologies plant,

---

[337] *Id.* at 1167.

[338] *Id.* at 1165.

[339] *See generally* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007) (stating that a complaint is only required to have enough facts to state a claim for relief that is plausible on its face).

[340] *Adinolfe I*, 768 F.3d at 1166–67.

[341] *See id.* at 1171.

[342] *See id.* at 1168.

[343] *Id.*

[344] *Id.*

stating that the plaintiffs sufficiently pleaded that test wells revealed the presence of pollutants on The Acreage that were also found at the plant.[345] Additionally, the court held that the plaintiffs did not have to allege that the contaminants on their properties exceeded regulatory limits, and that regulatory standards are not an "all-purpose benchmark for determining as a matter of law how much one can reasonably contaminate another's private property, much less a threshold issue that plaintiffs must preemptively address at the pleading stage to state tort claims under Florida law."[346] In conclusion, the court stated that plaintiffs who have not alleged actual contamination of their properties might still sue for economic harm under Florida law.[347]

The Eleventh Circuit's decision in this case addressed for the first time the use of *Lone Pine* orders in mass toxic tort cases.[348] In holding that *Lone Pine* orders may not be issued until after dismissal of the claims has been assessed under the standard set forth in *Twombly*, the court's opinion placed restriction on the use of such orders in future proceedings.[349]

*Tara Bush*

### *L. Failure to Accommodate Under FHA: Service Dogs*

In *Bhogaita v. Altamonte Heights Condo. Ass'n*, the Eleventh Circuit found that appellant Altamonte Heights Condominium Association, Inc. ("the Association") violated disability provisions of the Federal and Florida Fair Housing Acts, 42 U.S.C. § 3604(f)(3)(b) (the "FHA") and Florida statute § 760.23(9)(b) by failing to accommodate appellee Ajit Bhogaita's disability.[350] The Association's failure to accommodate was illustrated by its demand that Bhogaita remove his emotional support dog from his condominium because the dog's weight exceeded the Association's weight limit of twenty-five pounds.[351] This case is signif-

---

[345] *See id.* at 1172–73.

[346] *Adinolfe I*, 768 F.3d at 1173–74.

[347] *See id.* at 1176.

[348] *See id.* at 1167.

[349] *Id.* at 1168.

[350] Bhogaita v. Altamonte Heights Condo. Ass'n, 765 F.3d 1277, 1281 (11th Cir. 2014); 42 U.S.C. § 3604(f)(3)(b) (2012); FLA. STAT. ANN. § 760.23(9)(b) (West 2014).

[351] *Bhogaita*, 765 F.3d at 1281.

icant in light of the increased awareness of mental illnesses suffered by military members, including Post Traumatic Stress Disorder ("PTSD") and other related disabilities.

Bhogaita purchased a condominium managed by the Association in 2001, and his emotional support dog, Kane, moved in seven years later.[352] After Bhogaita had lived in the condominium with Kane for two years, the Association demanded that the dog be removed because he was kept in violation of a rule prohibiting occupants from housing dogs that weighed more than twenty-five pounds.[353] Bhogaita and the Association interacted via letters for seven months, during which time Bhogaita provided adequate information to the Association indicating that he suffered from a mental illness due to an incident that occurred while serving in the military.[354] The letters also indicated that the emotional support dog, Kane, alleviated the difficulties caused by that mental illness, including "limitations regarding social interaction and coping with stress and anxiety."[355] The Association even received letters from Bhogaita's treating psychiatrist, which "described the nature and cause of Bhogaita's PTSD diagnosis, stat[ing] that Bhogaita was substantially impaired in the major life activity of working, and explain[ing] that the dog alleviated Bhogaita's symptoms."[356]

Despite this showing, the Association repeatedly requested additional information and intimate details regarding Bhogaita's disability and his need for a support dog that weighed over twenty-five pounds.[357] Bhogaita eventually filed a complaint with the United States Department of Housing and Urban Development and the Florida Commission on Human Relations.[358] The complaint resulted in a favorable decision allowing him to keep his dog, and Bhogaita later brought suit against the Association.[359]

The district court dismissed Bhogaita's disability discrimination claim but proceeded in hearing his reasonable accommodation claim.[360] Without considering whether the Association

---

[352] *See id.*

[353] *Id.*

[354] *See id.* at 1281–83.

[355] *Id.* at 1281.

[356] *Id.* at 1286–87.

[357] *Bhogaita*, 765 F.3d at 1281–83.

[358] *Id.* at 1283.

[359] *Id.*

[360] *Id.* at 1283–84.

had refused Bhogaita's request for accommodation, a jury found that "Bhogaita was disabled and requested an accommodation for his disability, that the accommodation was necessary and reasonable, and that Bhogaita suffered damages because of the Association's refusal to accommodate."[361] The jury awarded Bhogaita $5,000 in compensatory damages, and the district court ordered the Association to pay $127,512 in attorneys fees.[362] The Eleventh Circuit affirmed the district court's judgment on the jury verdict, denial of the Association's motion for judgment as a matter of law, and award of attorney fees.[363]

Several issues were presented before the court on appeal. The court first noted the four elements of a failure-to-accommodate claim: (1) the individual is "disabled within the meaning of the FHA, (2) [the individual] requested a reasonable accommodation, (3) the requested accommodation was necessary to afford him an opportunity to use and enjoy his dwelling, and (4) the defendants refused to make the accommodation."[364]

First, the court stated that Bhogaita was entitled to partial summary judgment on the refusal-to-accommodate element.[365] The court noted that a reasonable fact finder could not have concluded that the Association was still undertaking meaningful review when six months passed after Bhogaita requested the accommodation.[366] The only response from the Association was a request for additional information from Bhogaita and a warning that a lack of cooperation by Bhogaita would result in civil action being taken against him.[367] Quoting a Fifth Circuit decision in 2000, the court reasoned that "failure to make a timely determination after meaningful review amounts to constructive denial of a requested accommodation, 'as an indeterminate delay has the same effect as an outright denial.'"[368] The letters from Bhogaita's psychiatrist contained all the information the Association needed to make that determination.[369]

Second, there was sufficient evidence to show that

---

[361] *Id.* at 1284.

[362] *Id.*

[363] *Bhogaita*, 765 F.3d at 1281.

[364] *Id.* at 1285.

[365] *Id.* at 1285–86.

[366] *See id.* at 1286.

[367] *Id.*

[368] *Id.* (quoting Groome Res. Ltd. v. Parish of Jefferson, 234 F.3d 192, 199 (5th Cir. 2000)).

[369] *Bhogaita*, 765 F.3d at 1286.

Bhogaita's disability fell within the meaning of the FHA.[370] The FHA defines a disability as "'a physical or mental impairment which substantially limits one or more of such person's major life activities.'"[371] The court noted that Bhogaita provided enough evidence to illustrate that his mental illness, PTSD, left him unable to work in a broad class of jobs.[372] Third, Bhogaita provided sufficient evidence to show the requested accommodation of keeping Kane at the condominium was necessary to provide an opportunity for the use and enjoyment of his condominium.[373] The court noted that a necessary accommodation is one that "alleviates the effects of a disability," that Kane alleviated the effects of Bhogaita's mental illness, and that having Kane was necessary to the use and enjoyment of his dwelling.[374]

Fourth, the court held that the jury instruction on the failure-to-accommodate claim did not warrant a reversal; specifically, the instruction on "major life activities" was not overbroad.[375] Fifth, the district court did not abuse its discretion in allowing Kane to be present in the courtroom.[376] The court noted that "[a] district court abuses its discretion to admit relevant evidence when its decision rests on a clearly erroneous factfinding, 'an errant conclusion of law, or an improper application of law to fact,'" and the district court did none of these in allowing the dog to remain in the courtroom.[377] Lastly, the court held that the district court did not err in awarding attorneys' fees because Bhogaita's award of $5,000 was not nominal, classifying Bhogaita as a prevailing party entitled to attorneys' fees under the FHA.[378]

Bhogaita's request for accommodations to keep Kane in violation of the twenty-five pound limitation was a necessary accommodation in order for Bhogaita to enjoy and use his condominium. The Eleventh Circuit affirmed the jury's decision that

---

[370] *Id.* at 1287.
[371] *Id.* (quoting 42 U.S.C. § 3602(h) (2012)).
[372] *Id.* at 1288.
[373] *Id.* at 1289.
[374] *Id.* at 1288–89.
[375] *Bhogaita*, 765 F.3d at 1289.
[376] *Id.* at 1290.
[377] *Id.* at 1291.
[378] *See id.*

entitled Bhogaita to damages as a result of the Association's failure to accommodate Bhogaita and his mental illness.[379] This decision is an important illustration of the FHA's accommodation requirement as applied to the challenges individuals face when living with mental illness, particularly those who have served in the military, and provides a framework to follow in future failure-to-accommodate claims.

*Sarah Chamberlain*

### *M. Flood Insurance Requirement for Lenders Above FHA Requirement*

In *Feaz v. Wells Fargo Bank*, the Eleventh Circuit held that a standard covenant present in mortgage contracts unambiguously allows mortgage lenders to require their borrowers to obtain flood insurance in amounts beyond what federal law requires.[380] Prior to this decision, courts had been divided over how to interpret the covenant, in particular, whether the flood insurance amounts required by federal law were to be construed as setting a minimum or maximum amount that a borrower could be required to obtain.[381] *Feaz* settled this question.

Feaz obtained an FHA-insured mortgage for $61,928 from Magnolia Mortgage for a home located in a special flood hazard area.[382] She signed a standard-form FHA Model Mortgage contract containing the "fourth uniform covenant" (Covenant 4) that is required by federal law.[383] Covenant 4 requires flood insurance in "an amount at least equal to either the outstanding balance of the mortgage . . . or the maximum amount of the [National Flood Insurance Program] insurance available with respect to the property improvements, whichever is less."[384] Feaz took out $63,000 in flood insurance, which was more than the principal amount but less than the replacement value of the home.[385] Wells Fargo acquired the mortgage in June 2003, and Feaz renewed her flood insurance each year for the next four

---

[379] *See id.*

[380] 745 F.3d 1098, 1101 (11th Cir. 2014).

[381] *See id.*

[382] *Id.* at 1103.

[383] *Id.*

[384] 24 C.F.R. § 203.16a(c) (2014).

[385] *Feaz*, 745 F.3d at 1103.

years.[386] In June 2007, Wells Fargo sent Feaz a "Flood Insurance Coverage Deficiency Notification" requiring her to increase her flood insurance coverage to the lesser of $250,000 or the replacement value of the home.[387] In the event Feaz failed to increase her coverage within forty-five days, the flood insurance amount would be force-placed by Wells Fargo.[388] After Feaz failed to comply with the requirement, Wells Fargo force-placed the insurance and passed the premium cost to Feaz.[389]

Feaz filed a law suit claiming that Wells Fargo breached the mortgage contract, an implied covenant of good faith and fair dealing, certain fiduciary obligations, and unjustly enriched itself by demanding and then force-placing more flood insurance than is required by federal law.[390] The United States District Court for the Southern District of Alabama held in favor of Wells Fargo and dismissed Feaz's complaint.[391] Feaz appealed, and the United States submitted an amicus brief arguing the covenant was unambiguous and clearly allows mortgage lenders to require borrowers obtain more flood insurance than required by federal law.[392] The United States argued further that their interpretation was important to the goals of the federal housing policy.[393] The Eleventh Circuit applied traditional principles of contract interpretation to the issue and looked at Covenant 4 in its broader context.[394] The court found Feaz's claims failed because the covenant is unambiguous and the only reasonable interpretation of the provision is that a mortgage lender is permitted to require their borrowers obtain flood insurance in amounts higher than is federally required.[395]

The Eleventh Circuit noted that Covenant 4 allows the lender to set insurance requirements to cover "any hazards," including floods.[396] The court further noted that the sentence relating to the federal requirement was "a separate and independent requirement that the borrower maintain the federally

---

[386] *Id.*
[387] *Id.* at 1103–04.
[388] *Id.* at 1104.
[389] *Id.*
[390] *Id.*
[391] *Feaz*, 745 F.3d at 1104.
[392] *Id.*
[393] *Id.*
[394] *Id.* at 1104–06.
[395] *Id.* at 1106.
[396] *Id.*

required minimum amount of flood insurance in addition to—not in lieu of—what the lender requires."[397] This interpretation was considered by the court to be consistent with the provision in the mortgage contract allowing the lender to do whatever is necessary to protect the value of the property.[398] The court also noted the consistency with this interpretation and the overall federal statutory scheme and policy intent.[399] The court found there was no underlying breach of contract, dismissed Feaz's claim for breach of the duty of good faith and fair dealing, dismissed her breach of fiduciary claim, and held that there is no generalized fiduciary duty placed upon lenders under Alabama law.[400]

After the Eleventh Circuit's decision in *Feaz*, it is clear that a lender may require a borrower to maintain flood insurance coverage in an amount equal to the replacement value of the home, even if that amount is greater than the minimum amount required by federal regulations.[401] This decision provides certainty for mortgage lenders as to the interpretation of Covenant 4 and the insurance requirements they may place on borrowers in order to protect the value of the property mortgaged.

*Amanda Coolidge*

*N. Third Party Garnishments under Antiterrorism Act*

In *Stansell v. Revolutionary Armed Forces of Colombia*, the Eleventh Circuit upheld the district court's grant of garnishments against third parties with ties to a terrorist organization responsible for kidnapping American citizens.[402] The appellees[403] filed suit against the Revolutionary Armed Forces of Colombia (FARC) and other related individuals under the Antiterrorism

---

[397] *See Feaz*, 745 F.3d at 1106.

[398] *Id.*

[399] *See id.* at 1107–08.

[400] *Id.* at 1110–11.

[401] *See id.* at 1101.

[402] 771 F.3d 713, 722 (11th Cir. 2014).

[403] Keith Stansell, Marc Gonsalves, Thomas Howes, and Thomas Janis were captured in Colombia by members of FARC during a counter-narcotics reconnaissance mission. *Id.* Janis was immediately executed; Stansell, Gonsalves, and Howes were held in Colombia for over five years before their rescue. *Id.* Janis was survived by his wife (and personal representative), Judith G. Janis, and four children, who joined the others as plaintiffs. *Id.*

Act,[404] and the district court entered default judgment after the defendants' failure to appear.[405] The appellees sought to enforce the nine-figure judgment against agencies or instrumentalities of FARC pursuant to the Terrorism Risk Insurance Act of 2002 (TRIA).[406]

Under TRIA, a party seeking execution of a judgment must establish that there is a valid judgment for a claim based on an act of terrorism and that the assets sought are "blocked assets" as defined in TRIA.[407] The execution also must not exceed the amount of compensatory damages.[408] Additionally, a party seeking execution of a judgment against an agency or instrumentality of a terrorist organization must prove that the group or organization is in fact an agency or instrumentality of the terrorist organization.[409] The court therefore reviewed the determination of blocked assets and the claimants' statuses as agencies or instrumentalities of FARC.[410]

The district court held that the claimants' assets were blocked assets as required under TRIA because the claimants were designated as Specially Designated Narcotics Traffickers (SDNTs) by the Department of the Treasury Office of Foreign Assets Control (OFAC).[411] Some of the claimants, however, argued that their removal from the SDNT list during the appeals process was effective to render their assets unreachable under TRIA.[412] The Eleventh Circuit stated that SDNT de-listing does

---

[404] 18 U.S.C. § 2333 (2012).

[405] *Stansell*, 771 F.3d at 722.

[406] *Id.* The TRIA provides:

> [T]he blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

Terrorism Risk Insurance Act of 2002, Pub. L. No. 107–297, § 201(a), 116 Stat. 2322, 2337 (codified as amended at 28 U.S.C. § 1610 (2012)).

[407] *Stansell*, 771 F.3d at 723 (citing Weininger v. Castro, 462 F. Supp. 2d 457, 479 (S.D.N.Y. 2006)). A blocked asset is "'any asset seized or frozen by the United States under section 5(b) of the Trading with the Enemy Act [(TWEA)] or under sections 202 and 203 of the International Emergency Economic Powers Act [(IEEPA)].'" *Id.* (alterations in original) (quoting 28 U.S.C. § 1610).

[408] *Id.* (citing *Weininger*, 462 F. Supp. 2d at 479).

[409] *Id.*

[410] *Id.*

[411] *See id.*

[412] *Stansell*, 771 F.3d at 723.

not affect garnishment proceedings commenced before removal, and upheld the district court's determination that the assets were blocked assets.[413]

TRIA does not provide a definition for an agency or instrumentality of a terrorist organization.[414] Claimants argued that the definition of agency or instrumentality as provided in the Foreign Sovereign Immunities Act (FSIA)[415] should apply because Section 201 of TRIA is codified as a note to the Foreign Sovereign Immunities Act.[416] The court held that applying the definition in FSIA would effectively remove non-state terrorist organizations from the reach of TRIA, contrary to Congressional intent.[417] The court upheld the district court's determination that the claimants were agencies or instrumentalities of FARC because the claimants were part of FARC's money laundering operations.[418]

The claimants also argued that their due process rights were violated because they were not given notice or the opportunity for a hearing prior to attachment.[419] The court found that the claimants were entitled to due process and that due process required actual notice of the proceedings.[420] The court noted that agencies or instrumentalities cannot be assumed to have constructive notice of proceedings against them because the agency or instrumentality designation is made by the district court and is not established at the commencement of the proceedings.[421] However, the court specified that attachment was not a substantial interference with the claimants' assets because, as blocked assets, there were already other restrictions on the assets in place.[422] Due process requires that the claimants have notice and an opportunity to be heard, but that requirement is only prior

---

[413] *Id.* at 733. Only one appellant succeeded on the de-listing argument: Appellees failed to procure a valid writ of garnishment against that appellant's bank, which held the blocked assets, before appellant was removed from the SDNT list. *Id.* at 747–48.

[414] *Id.* at 730.

[415] 28 U.S.C. § 1603(b) (2012).

[416] *Stansell*, 771 F.3d at 730.

[417] *Id.* at 730–32 (citing Hausler v. JP Morgan Chase Bank, 740 F. Supp. 2d 525, 531 (S.D.N.Y. 2010)).

[418] *Id.* at 732, 742, 739 n.19, 745–46.

[419] *Id.* at 725.

[420] *Id.* at 726–27.

[421] *Id.* at 727.

[422] *Stansell*, 771 F.3d at 729.

to execution of the garnishment and not necessarily before attachment.[423]

The court concluded that, although there were faults within the district court's proceedings, they were not substantial enough to justify overturning the district court's decisions.[424] The garnishments against the third-party agencies or instrumentalities of FARC were upheld to satisfy the default judgment against FARC.[425]

*Lindsey Drexler*

### *O. Retroactivity of Amendment to Statute of Repose*

In *Bryant v. United States*,[426] the Eleventh Circuit Court of Appeals held that the 2014 amendment[427] to North Carolina's statute of repose[428] could not be applied retroactively when, the claims were untimely under the original statute of repose.[429] Further, the court of appeals noted that the original North Carolina statute of repose[430] did not contain an exception for latent diseases.[431] The court remanded the case to the district court for further proceedings consistent with its opinion.[432] In its decision, the court of appeals determined that the North Carolina legislature was without authority to direct the courts to retroac-

---

[423] *Id.*

[424] *Id.* at 748. The court did, however, overturn one judgment against an appellant whose improperly garnished assets did not meet the definition of blocked assets under TRIA. *Id.*

[425] *See id.* at 722–24, 748.

[426] 768 F.3d 1378 (11th Cir. 2014).

[427] N.C. GEN. STAT. ANN. § 130A-26.3 (West 2014); *see also* 2014 N.C. Sess. Laws 2014-17; 2014 N.C. Sess. Laws 2014-44.

[428] N.C. GEN. STAT. ANN. § 1-52(16) (West 2014).

[429] *See Bryant*, 768 F.3d at 1385.

[430] The court included the relevant language from the statute at the time the plaintiffs brought their claim:

Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action . . . shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

*Id.* at 1380–81 (alteration in original) (quoting N.C. GEN. STAT. § 1-52(16)).

[431] *Id.* at 1385.

[432] *Id.* at 1386.

tively apply the amendment to the North Carolina statute of repose,[433] finding the legislative intent of the amendment was to alter the original statute,[434] irrespective of the General Assembly's expressed intention to the contrary.[435]

This interlocutory appeal stems from multi-district litigation brought by multiple plaintiffs alleging that their exposure to toxic drinking water while living on a military base in North Carolina caused them to suffer from various health problems.[436] The district court requested that the Eleventh Circuit determine whether CERCLA preempted the North Carolina statute of repose, and whether the North Carolina statute of repose exempted latent diseases.[437] However, before oral arguments, the United States Supreme Court decided *CTS Corporation v. Waldburger*, holding that CERCLA did not preempt the North Carolina statute of repose.[438] North Carolina's legislature expressed its dissatisfaction with the Supreme Court's interpretation of North Carolina law,[439] and quickly enacted an amendment to the North Carolina statute of repose.[440] This amendment exempted all actions involving an injury caused by contaminated groundwater from the 10-year filing deadline.[441] The amendment included the express directive to retroactively apply the amendment to all actions "filed, arising, or pending" on or after the statutes' effective date.[442]

The court of appeals determined the purpose for the amendment to the statute of repose was to alter the original statute's substantive content, and could not be retroactively applied.[443] The court considered if the amendment was intended to alter or clarify a statute.[444] Instead of relying only on the legislature's declarations as to the purpose of the amendment,[445]

---

[433] *See id.* at 1383, 1385.
[434] *Id.* at 1385.
[435] *See Bryant*, 768 F.3d at 1385.
[436] *Id.* at 1379.
[437] *Id.* at 1380.
[438] *Id.* (citing CTS Corp. v. Waldburger, 134 S. Ct. 2175 (2014)).
[439] *See id.* at 1384.
[440] *Id.* at 1381–82.
[441] *See Bryant*, 768 F.3d at 1380–82 (comparing the 2010 and 2014 versions of the statute).
[442] *Id.* at 1382 (citing 2014 N.C. Sess. Laws 2014-44 § 1(c)).
[443] *See id.* at 1383, 1385.
[444] *Id.* at 1383–85.
[445] *Id.* at 1383–84.

the court of appeals compared the original and amended statutes.[446] When comparing the statutes, the court reasoned that "'an amendment to an unambiguous statute indicates the intent to change the law.'"[447] The court established that the original statute of repose was unambiguous, and did not include any indication that the statute contained a latent disease exception.[448] Without indication of the existence of an exception under the original statute, the Eleventh Circuit found that the amendment altered the statute by creating an exception.[449] The court of appeals, likening the statute of repose to a statute of limitation, determined that the statute of repose creates a limitation on a plaintiff's substantive rights.[450] The court reasoned that, because the amendment enlarges the plaintiff's rights, its retroactive application would have the effect of divesting the Government's vested rights.[451] To avoid the impermissible divesting of rights, the court of appeals held that the plaintiff's claims in *Bryant* were subject to the original North Carolina statute of repose, which, consistent with its unambiguous, plain-text reading,[452] does not contain an exception for latent diseases.[453]

The Eleventh Circuit Court of Appeals held that the amendment to the North Carolina statute of repose, which created an exception to the statute's 10-year filing limitation, cannot be applied retroactively.[454] The court of appeals determined that the amendment altered the previous statute's substantive content, and were the amendment to apply retroactively the Government would be divested of its vested rights.[455] Thus, the court held that the original North Carolina statute of repose applies to the plaintiff's claims, but does not contain an exception for latent diseases.[456]

---

[446] *Id.* at 1385; *see also* Ray v. N. C. Dept. of Transp., 727 S.E.2d 675, 682 (N.C. 2012).

[447] *Bryant*, 768 F.3d at 1385 (citing Childers v. Parker's Inc., 162 S.E.2d 481, 484 (N.C. 1968)).

[448] *Bryant*, 768 F.3d at 1385.

[449] *Id.*

[450] *See id.* (citing McCrater v. Stone & Webster Eng'g Corp., 104 S.E.2d 858, 860 (N.C. 1958)).

[451] *Id.*

[452] *Bryant*, 768 F.3d at 1381, 1385.

[453] *Id.* at 1385.

[454] *Id.*

[455] *Id.*

[456] *Id.*

Following this decision, the court of did not create a new standard, nor significantly change the standards applied when determining the purpose of an amendment. However, to legislators and practicing attorneys this case's holding serves as an important reminder that the legislature's intent as to the purpose of an amendment, even if expressly written into the text of the enacted statute, is not dispositive.

*Amy Frederickson*

*P. City Pension Plans*

In *Taylor v. City of Gadsden*, the Eleventh Circuit held that a city did not violate the Contract Clause of the federal or state constitutions when it increased the contributions rate paid by firefighters who had accrued more than ten years of creditable service into a state-administered retirement fund.[457] The Eleventh Circuit affirmed the district court's ruling dismissing the case because no contractual rights were ever created indicating that the City could never change the contribution rates of the firefighters, thereby making a Contract Clause challenge impossible.[458] The court concluded that "[t]he city was free to amend the employee contribution rate without constitutional consequence."[459]

The plaintiffs, firefighters employed by the City of Gadsden, originally filed suit in the Northern District of Alabama in response to an increase in employee pension contributions that the City implemented in 2011.[460] The City of Gadsden raised the employee pension contribution percentage pursuant to a local option specified in an Act passed by the Alabama legislature in order to help rescue the Employee Retirement System of Alabama from potential default.[461] The plaintiffs alleged that the percentage increase in pension contributions "[i]mpaired the terms of their employment contracts, in violation of both the United States Constitution and the Alabama Constitution."[462] Specifically, the plaintiffs argued that the city's adoption of the

---

[457] 767 F.3d 1124, 1135–36 (11th Cir. 2014).

[458] *See id.* at 1127, 1133–35.

[459] *Id.* at 1135–36.

[460] Taylor v. City of Gadsden, 958 F. Supp. 2d 1287, 1290, 1301–02 (N.D. Ala. 2013), *aff'd*, 767 F.3d 1124 (11th Cir. 2014).

[461] *Taylor*, 767 F.3d at 1130.

[462] *Id.* at 1126–27.

pension contribution increase "was overbroad in that it applied to firefighters who ha[d] over ten years of creditable service and [were] thus 'vested' in the rights of the pension program."[463] The district court, however, did not agree with the plaintiffs' arguments or constitutional claims and dismissed the case with prejudice.[464] The plaintiffs then appealed the case to the Eleventh Circuit.[465]

The Eleventh Circuit began its analysis by determining whether the City's action violated the Contract Clause of the state and federal constitutions.[466] The court ruled that the Contract Clause did not apply to the City's increase in employee pension contribution rates because "the contribution rate increase was not 'an exercise of legislative power'"; instead, the City's action was merely a "'particular item of business coming within [its] official cognizance . . . relating to the administrative business of the municipality.'"[467] By implementing the local option expressed in the Act passed by the state legislature, the City did not pass any law and acted as a private party would have when faced with a decision concerning the best method to manage its affairs; thus, never subjecting itself to the Contract Clause.[468]

The Eleventh Circuit then went on to discuss the rationale behind its decision. First, the court stated that even if the Contract Clause were applicable, the plaintiffs' claims still would have failed because the plaintiffs did not show that their contractual rights were impaired by the City's action.[469] The court noted that no written agreement between the plaintiff firefighters and the City was ever produced, and the statutory text of Alabama Code § 36-27 does not suggest that the contribution rate for employees is immune from change.[470] In fact, the plaintiffs had notice of the potential for a change in the employee contribution rate because the Employee Retirement System of Alabama's 2002 Employee Handbook, which all of the plaintiffs had access

---

[463] *Id.* at 1131.

[464] *Id.*

[465] *Id.*

[466] *See id.* at 1132.

[467] *See Taylor*, 767 F.3d at 1132–33 (quoting New Orleans Waterworks Co. v. La. Sugar-Ref. Co., 125 U.S. 18, 31–32 (1888)).

[468] *Id.* at 1133 (citing Horwitz-Matthews, Inc. v. City of Chicago, 78 F.3d 1248, 1250 (7th Cir. 1996)).

[469] *Id.* at 1136.

[470] *Id.* at 1133–34.

to, specifically stated this fact.[471] Also, "the City did not alter plaintiffs' pension *benefits*; instead, it altered their pension obligations."[472] The increased contribution rate did not divest plaintiffs of any compensation for work already performed or any previously earned pension benefits, but instead only affected the plaintiffs' anticipated compensation, which the City is free to amend.[473] The court concluded that the plaintiffs had "no contractual right to a static, inviolable 6% contribution rate" and "[t]he City was free to amend the employee contribution rate without constitutional consequence."[474]

Finally, the court ruled that "at most . . . the City ha[d] breached a contract, not impaired one."[475] The Court cited authority from the the Seventh Circuit, noting that "we must distinguish 'between a measure that leaves the promisee with a remedy in damages for breach of contract and one that extinguishes the remedy.'"[476] The court reasoned that if the City had violated the plaintiffs' contractual rights, then the City would have been liable for damages; however, because the State did not pass legislation that prevented the City from performing its obligations under such contract, the State's Act and the City's action did not deny the plaintiffs any possible damage remedies.[477]

The Eleventh Circuit's affirmation of the district court's dismissal of the plaintiffs' case based on the fact that no Contract Clause challenge existed[478] will most likely protect localities from similar future litigation when making decisions to change pension contribution rates in order to prevent pension funds from potential default.[479] The poor status of pension funds is a common theme in most cities across the United States; therefore this decision may help encourage cities to adopt local options set out in state legislative acts that may revive state pension funds without the risk of potential Contract Clause challenges.

---

[471] *See id.* at 1134.

[472] *Id.* at 1135.

[473] *Taylor*, 767 F.3d at 1135; *see also* Dodge v. Bd. of Educ., 302 U.S. 74, 78–79 (1937); Mississippi *ex rel.* Robertson v. Miller, 276 U.S. 174, 178–79 (1928).

[474] *Taylor*, 767 F.3d at 1135–36.

[475] *Id.* at 1136.

[476] *Id.* (quoting Horwitz-Matthews, Inc. v. City of Chicago, 78 F.3d 1248, 1250 (7th Cir. 1997)).

[477] *Id.*

[478] *Id.* at 1133.

[479] *See id.*

*Elise Gilbert*

*Q. Eleventh Amendment Immunity: School Boards*

In *Walker v. Jefferson County Board of Education*,[480] the Eleventh Circuit Court of Appeals upheld its decision in *Stewart v. Baldwin County Board of Education*[481] by holding that Alabama county school boards are not arms or alter egos of the state for the purposes of Eleventh Amendment immunity from federal claims stemming from school boards' employment-related decisions.[482] The court found that the *Stewart* opinion had not been overruled or abrogated; therefore, it was still binding precedent.[483] Thus, the Eleventh Circuit reversed and remanded one of the cases finding opposite of this holding, and affirmed the other case that also held that school boards are not entitled to Eleventh Amendment immunity.[484]

*Walker* consolidated and addressed two appeals involving federal employment claims against the respective school boards of Alabama's Jefferson County and Madison City.[485] In the first case, *Walker v. Jefferson County Board of Education*,[486] the plaintiffs, several 240-day employees, "sued the Jefferson County Board of Education, alleging that the Board's practice of dividing their annual salaries by 260 days [rather than 240 days] to obtain their hourly and overtime rates violated the Fair Labor Standards Act."[487] The plaintiffs sought to recover "wages . . . , overtime compensation, and liquidated damages."[488] In the second case, *Weaver v. Madison City Board of Education*,[489] the plaintiff, a member of the U.S. Army Reserve, "sued his former employer, the Madison City Board of Education, alleging that after his . . . tour

---

[480] 771 F.3d 748 (11th Cir. 2014).
[481] 908 F.2d 1499, 1510 (11th Cir. 1990).
[482] *Walker*, 771 F.3d at 757.
[483] *Id.* at 750.
[484] *Id.* at 757.
[485] *Id.* at 750–51.
[486] No. 2:13-CV-00524-RDP, 2013 WL 4056224, at *1 (N.D. Ala. Aug. 12, 2013), *rev'd*, 771 F.3d 748 (11th Cir. 2014).
[487] *Walker*, 771 F.3d at 750 (citing 23 U.S.C. § 201 (2012)).
[488] *Id.*
[489] 947 F. Supp. 2d 1308 (N.D. Ala. 2013), *aff'd sub nom.* Walker v. Jefferson Cnty. Bd. of Educ., 771 F.3d 748 (11th Cir. 2014).

of duty . . . , the Board refused to reinstate him to his prior position."[490] The plaintiff claimed that "by reducing his responsibilities, status, and salary . . . , the Board violated the Uniformed Services Employment and Reemployment Rights Act."[491]

In the *Walker* case[492] the defendant, the Jefferson County Board of Education, filed a motion to dismiss on Eleventh Amendment immunity grounds.[493] The district court granted the motion to dismiss, holding that the Board was "an arm of the state and therefore entitled to assert Eleventh Amendment immunity" from the suit.[494] The district court essentially concluded that "*Stewart* did not constitute binding precedent."[495] According to the Eleventh Circuit panel, the district court instead mistakenly relied on the same reasoning used by the Eleventh Circuit in *Versiglio v. Board of Dental Examiners of Alabama*[496] by following a line of cases where "the Alabama Supreme Court [declared] that school boards have sovereign immunity under the Alabama Constitution from lawsuits based on state tort and contract law."[497]

In *Weaver*,[498] the defendant, the Madison City Board of Education, also filed a motion to dismiss on Eleventh Amendment immunity grounds.[499] The district court denied the motion to dismiss, ruling that the Eleventh Circuit's decision in *Stewart* was binding.[500] Additionally, the court found that even if the decision in *Stewart* was not binding, "the result would be the same."[501]

The *Walker* plaintiffs appealed the grant of the Jefferson County Board's motion to dismiss.[502] The *Weaver* defendant school board appealed the denial of its motion to dismiss.[503] In

---

[490] *Walker*, 771 F.3d at 750–51.

[491] *Id.* at 751 (citing 38 U.S.C. § 4301 (2012)).

[492] Walker v. Jefferson Cnty. Bd. of Educ., No. 2:13-CV-00524-RDP, 2013 WL 4056224, at *1 (N.D. Ala. Aug. 12, 2013), *rev'd*, 771 F.3d 748 (11th Cir. 2014).

[493] *Walker*, 771 F.3d at 750.

[494] *Id.*

[495] *See id.*

[496] 686 F.3d 1290 (11th Cir. 2012) (deferring to state court decisions in the federal courts' first-impression determination of immunity for the state *dental* board).

[497] *See Walker*, 771 F.3d at 750.

[498] Weaver v. Madison City Bd. of Educ., 947 F. Supp. 2d 1308 (N.D. Ala. 2013), *aff'd sub nom.* Walker v. Jefferson Cnty. Bd. of Educ., 771 F.3d 748 (11th Cir. 2014).

[499] *See Walker*, 771 F.3d at 751.

[500] *Id.* (citing *Weaver*, 947 F. Supp. 2d at 1314–24).

[501] *Id.* (citing *Weaver*, 947 F. Supp. 2d at 1314–24).

[502] *Id.* at 750.

[503] *Id.* at 751.

finding that school boards are not arms or alter egos of the state and holding that Eleventh Amendment immunity therefore does not apply, the Eleventh Circuit reversed and remanded the district court's dismissal of the complaint in *Walker* and affirmed the district court's dismissal of the Board's motion to dismiss in *Weaver*.[504]

The Supreme Court has interpreted the Eleventh Amendment to not limit the sovereign immunity that states enjoy, but rather to only be available to states and arms of the states.[505] In *Stewart*, the Eleventh Circuit applied a three-factor test to determine whether the Eleventh Amendment immunity applied to school boards.[506] The factors include: "(1) how the state law defines the entity; (2) the degree of state control over the entity; and (3) the entity's fiscal autonomy."[507] In *Stewart*, after applying the three-part test, the court concluded there were six reasons that Alabama school boards are denied Eleventh Amendment immunity.[508]

In determining whether the school boards were arms or alter egos of the state where Eleventh Amendment immunity applies, the court first looked to whether *Stewart* had either been abrogated or overruled.[509] The court concluded that the Supreme Court had not decided any cases that abrogated its decision in *Stewart*.[510] The court also found that the Eleventh Circuit had not overruled *Stewart*, although later decisions have split the part three of the three-factor test into two parts that determine "where the entity derives its funds and who is responsible for judgments against the entity."[511]

Secondly, the court looked into the Boards' argument to determine whether state law has changed regarding how school boards are characterized, which would make *Stewart* no longer

---

[504] *See id.* at 757.

[505] *Walker*, 771 F.3d at 751 (citing Va. Office for Prot. & Advocacy v. Stewart, 131 S. Ct. 1632, 1637 (2011); N. Ins. Co. of N.Y. v. Chatham Cnty., Ga., 547 U.S. 189, 193 (2006)).

[506] *See id.* (citing Stewart v. Baldwin Cnty. Bd. of Educ., 908 F.2d 1499, 1509 (11th Cir. 1990)).

[507] *Id.* (quoting *Stewart*, 908 F.2d at 1509) (internal quotation marks omitted).

[508] *See id.* at 751–52.

[509] *See id.* at 752.

[510] *Id.* at 752.

[511] *Walker*, 771 F.3d at 752–53 (citing Manders v. Lee, 338 F.3d 1304, 1309 (11th Cir. 2003) (en banc); Ross v. Jefferson Cnty. Dep't of Health, 701 F.3d 655, 660–61 (11th Cir. 2012)).

binding.[512] The Boards relied on the holding in *Versiglio*, which found that "the Board of Dental Examiners was entitled to Eleventh Amendment immunity from a claim asserted under the [Fair Labor Standards Act]."[513] The court in that case reasoned that it did not want a state agency to be "immune from a suit under state law but not federal law," and it made clear that it still gave "great deference" to how the entity in question has been characterized in state courts.[514]

In the present case, the court rejected the Boards' argument and declined to read *Versiglio* in a sweeping manner that would collapse the entire four-part test into one factor that looked only to whether the state courts grant state law immunity to the entity for suits based on state law.[515] Because this reading conflicted with prior decisions, the court was obligated to follow its earlier decision, *Stewart*.[516] The Eleventh Circuit also noted that even at the time it decided *Stewart*, "Alabama courts had already held that school boards were state entities entitled to sovereign immunity from tort suits based on state law."[517] In *Stewart* the court made it clear that providing boards of education with sovereign immunity does not require a similar treatment under the Eleventh Amendment.[518]

Finally, the court reasoned that even if the Boards' interpretation of *Versiglio* was accurate, the outcome would still be the same in the present case.[519] In an Alabama Supreme Court case decided after *Stewart*, the court applied the four-factor test and

---

[512] *See id.* at 753.

[513] *Id.* (citing Versiglio v. Bd. of Dental Exam'rs of Ala., 686 F.3d 1290, 1292 (11th Cir. 2012)).

[514] *Id.* (quoting *Versiglio*, 686 F.3d at 1292) (internal quotation marks omitted).

[515] *See id.* at 754.

[516] *See Walker*, 771 F.3d at 754. The Eleventh Circuit panel maintains that the district court in *Weaver* rightly refused to read *Versiglio* as altering the Eleventh Circuit's Eleventh Amendment immunity analysis—"[h]ow the state courts treat an entity is only one part of the first factor of the *Stewart* and *Manders* analysis. Within the first factor the court also weighs how state statutes treat the particular entity." *Id.* (alterations in original) (quoting Weaver v. Madison City Bd. of Educ., 947 F. Supp. 2d 1308, 1311 (N.D. Ala. 2013), *aff'd sub nom.* Walker v. Jefferson Cnty. Bd. of Educ., 771 F.3d 748 (11th Cir. 2014)) (internal quotation marks omitted).

[517] *Id.* (citing Brown v. Covington Cnty. Bd. of Educ., 524 So. 2d 623, 625 (Ala. 1988)).

[518] *Id.* at 754–55 (citing Stewart v. Baldwin Cnty. Bd. of Educ., 908 F.2d 1499, 1510 n.6 (11th Cir. 1990)).

[519] *See id.* at 755–56 ("Even assuming that *Versiglio* . . . now requires us to give more weight to how state courts treat the entity in question, the Boards' attempt to sink *Stewart* with a *Versiglio II* broadside fares no better.").

held "that a local school board is 'not an arm of the [s]tate for the purposes of § 1983 liability and is not entitled to Eleventh Amendment immunity.'"[520] Therefore, even if *Versiglio* were read more broadly, "the result would be the same" since its holding in *Madison* agrees with the Eleventh Circuit's holding in *Stewart*.[521]

In conclusion, *Walker v. Jefferson County Board of Education* made it clear that Alabama county school boards are not arms or alter egos of the state for the purposes of enjoying Eleventh Amendment immunity from federal claims stemming from employment-related decisions made by the school boards.[522] Following this decision, courts should apply the four-factor test to determine if the entity in question qualifies as an arm or alter ego of the state where Eleventh Amendment immunity should apply. Alabama county school boards will not receive immunity from federal claims stemming from employment-related decisions made by the school boards under the *Stewart* test.

*Julie Ann Musolf*

### *R. Ineffective Assistance of Counsel: Pre-trial Investigation*

In *DeBruce v. Commissioner, Alabama Department of Corrections*,[523] the Eleventh Circuit Court of Appeals held that where trial counsel fails to undertake reasonable investigation into mitigating factors for the sentencing phase of a criminal trial, the defendant is unconstitutionally deprived of effective assistance of counsel.[524] In reaching its holding, the Eleventh Circuit noted the bifurcation between the guilt phase of the trial and the penalty phase.[525] Upon consideration of the factual circumstances and the failure of trial counsel to correctly understand the law,[526] the Eleventh Circuit affirmed in part,[527] reversed in part, and remanded the case.[528] The holding of the Eleventh Circuit is

[520] *See id.* at 755–56 (alteration in original) (quoting *Ex parte* Madison Cnty. Bd. of Educ., 1 So. 3d 980, 989–90, (Ala. 2008)).
[521] *See Walker*, 771 F.3d at 756.
[522] *Id.* at 757.
[523] 758 F.3d 1263 (11th Cir. 2014).
[524] *Id.* at 1279.
[525] *Id.* at 1267, 1273.
[526] *See id.* at 1273–74.
[527] *Id.* at 1279.
[528] *Id.*

important for both trial counsel and defendants, in that it clarifies the responsibilities of trial counsel in conducting a pre-trial investigation into possible mitigating factors.

Petitioner DeBruce's case originated out of a fatal shooting at an AutoZone store in August 1991.[529] Following petitioner's conviction at the trial level, petitioner appealed to the Alabama Court of Criminal Appeals; the appeals court affirmed DeBruce's conviction.[530] The Alabama Supreme Court later affirmed the holding of the Alabama Court of Criminal Appeals.[531] Petitioner's petition for a writ of habeas corpus was denied by the United States District Court for the Northern District of Alabama, leading to the Eleventh Circuit Appeal.[532]

After conducting a factual inquiry into the pre-trial investigation conducted by trial counsel,[533] the Eleventh Circuit found that trial counsel had failed to conduct a reasonable investigation under the standards set forth in *Strickland v. Washington*.[534] The Eleventh Circuit reversed the district court's denial of DeBruce's petition, holding that trial counsel failed to provide effective assistance of counsel by neglecting to conduct a thorough pre-trial investigation into possible mitigating factors.[535]

In reaching its holding, the Eleventh Circuit relied upon the following factual circumstances. First, trial counsel, Mathis, spoke only to two individuals in preparation for the sentencing phase: petitioner DeBruce and his mother, Jessie DeBruce.[536] Jessie DeBruce testified that petitioner had completed high school and attended college at the University of Alabama.[537] This testimony directly conflicted with a pre-trial report created

---

[529] *See* DeBruce v. State, 651 So. 2d 599, 602 (Ala. Crim. App. 1993).

[530] *Id.* at 602, 623.

[531] *Ex parte* DeBruce, 651 So. 2d 624, 635 (Ala. 1994).

[532] *DeBruce*, 758 F.3d at 1265.

[533] *See generally id.* at 1270–79. A pre-trial report indicated that "DeBruce . . . had attempted suicide on four occasions[,] . . . refused special education, and had dropped out of school at the age of sixteen, having advanced only to the seventh grade." *Id.*

[534] *Id.* at 1271–72 (citing Strickland v. Washington, 466 U.S. 668, 690–91 (1984)). The court undertook this analysis as the first part of the broader *Strickland* determination whether counsel provided constitutionally ineffective assistance: DeBruce had to show "both that his counsel's performance was deficient and that the deficiency prejudiced his defense." *Id.* at 1267 (citing *Strickland*, 466 U.S. at 687).

[535] *See id.* at 1279.

[536] *DeBruce*, 758 F.3d at 1270.

[537] *Id.*

by a social worker at Mathis' request, which indicated petitioner dropped out of high school.[538] The Eleventh Circuit found that Mathis' failure to attempt to resolve the inconsistencies between the mother's testimony and the report was unreasonable under the circumstances.[539]

Petitioner further argued that trial counsel should have presented the evidence used by petitioner at his state collateral hearing, and that failure to do so deprived petitioner of effective assistance of counsel.[540] This evidence included various possible mitigating factors, including: petitioner's exposure to violence during childhood, low-average intelligence, and history of experiencing seizures.[541] The Eleventh Circuit relied on all of the above facts in finding that petitioner was deprived of effective assistance of counsel.[542]

The Eleventh Circuit held that the failure of trial counsel to conduct a reasonable pre-trial investigation into mitigating factors for the sentencing phase of the trial constituted ineffective assistance of counsel, and reversed the Alabama Court of Criminal Appeals.[543] The Eleventh Circuit held that the Alabama Court of Criminal Appeals "unreasonably applied *Strickland* in holding that the omitted evidence . . . had no reasonable probability of reducing DeBruce's sentence."[544] The Eleventh Circuit found that the omitted mitigating evidence could likely have affected the jury's verdict.[545] Additionally, the failure of counsel to conduct the investigation was not the result of a reasonable professional decision to cease investigation, but the result of trial counsel's "inattention."[546]

---

[538] *Id.* at 1271.

[539] *Id.* at 1273–74.

[540] *See id.* at 1269–70.

[541] *Id.* at 1270.

[542] *DeBruce*, 758 F.3d at 1270–72; *see also supra* note 534 and accompanying text (describing the effective counsel analysis).

[543] *DeBruce*, 758 F.3d at 1278–79. Following its determination that assistance of counsel was constitutionally deficient, the Eleventh Circuit evaluated whether DeBruce suffered prejudice at his sentencing as a result. *Id.* at 1275–78.

[544] *Id.* at 1278.

[545] *See id.* at 1277–78 (citing Rompilla v. Beard, 545 U.S. 374, 393 (2005) ("[U]ndiscovered 'mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [a defendant's] culpability' where the original sentencing strategy included a plea for mercy.")) (determining that counsel fatally lacked a "compelling [evidentiary] basis on which to argue for clemency" as a result of the omission).

[546] *Id.* at 1272.

The holding of the Eleventh Circuit in *DeBruce* provides some clarification to what constitutes proper conduct in assistance of counsel claims. The Eleventh Circuit establishes the necessity of a reasonable pre-trial investigation of mitigating factors for use at the sentencing phase of trial. However, the factual circumstances present in this case clearly lent support to petitioner's claim.[547] Petitioner's counsel was certainly aware of the inconsistencies between the testimony of petitioner's mother and the report prepared for counsel.[548] Despite this knowledge, counsel made no attempts to resolve the inconsistency and presented the much less favorable testimony of the mother to the jury.[549]

In conclusion, the Eleventh Circuit has provided some clarity to this area of the law. Yet, there are still no bright-line rules for trial counsel to heed in order to avoid future assistance of counsel claims.[550] Clearly, trial counsel must make reasonable efforts to resolve inconsistencies in mitigating evidence to be presented to the jury. The lessons from assistance of counsel cases seem to focus on one issue: pre-trial investigation. Those involved with future criminal cases should take heed, and make all reasonable efforts to conduct a pre-trial investigation in order to avoid any future ineffective assistance of counsel claims.

*Landon Taylor Phillips*

### *S. Loss of Consortium: Evidence of Alcohol Abuse*

In *Aycock v. R.J. Reynolds Tobacco Co.*,[551] the Eleventh Circuit Court of Appeals held that the district court's exclusion of evidence pertaining to alcohol abuse in a loss of consortium case against a tobacco company constituted an abuse of discretion.[552] Under the Federal Rules of Evidence,[553] the court of appeals

---

[547] *See id.* at 1270–72.

[548] *DeBruce*, 758 F.3d at 1271.

[549] *Id.* at 1270–71.

[550] *Cf.* Waldrop v. Thomas, No. 3:08-CV-515-WKW, 2015 WL 476227, at *21–22 (M.D. Ala. Feb. 5, 2015) (distinguishing DeBruce and deferring to the state court's denial of an ineffective counsel claim in a case where counsel was found not to have missed any "troubling leads" from the pretrial competency report).

[551] 769 F.3d 1063 (11th Cir. 2014).

[552] *See id.* at 1072.

[553] *Id.* at 1068–69 (citing Fed. R. Evid. 401, 403).

held that the evidence of alcohol abuse was relevant to determining legal cause of death, comparative fault, and damages, and that the relevant evidence was not unfairly prejudicial.[554] The court of appeals reversed and remanded the case for a new trial as a result of the district court's abuse of discretion.[555]

Thelma Aycock and her husband Richard Aycock were married for over fifty years, during which time Richard Aycock had an addiction to both cigarette smoking and alcohol.[556] After Richard Aycock passed away in 1996, Thelma Aycock brought suit on behalf of Richard Aycock under Florida law.[557] Prior to trial, the district court granted Thelma Aycock's motion in limine to exclude evidence of her husband's alcohol consumption on the grounds that it was both irrelevant and unfairly prejudicial.[558] The district court enforced the motion in limine throughout the trial, allowing evidence of Richard's alcohol consumption to be heard solely in regard to compensatory damages.[559] Thelma Aycock was granted a judgment against R.J. Reynolds Tobacco Company (hereinafter, Reynolds) in the amount of $4,277,500 in compensatory damages.[560] The jury allocated 72.5% of the fault to Reynolds and 27.5% to Richard Aycock.[561] After the district court denied Reynolds' motion for a new trial, Reynolds appealed to the Eleventh Circuit.[562]

The court of appeals noted that, under Florida law, the burden of proving causation in a negligence action is on the plaintiff.[563] Thus, the court of appeals held that the district court improperly shifted the burden of causation to Reynolds by excluding evidence related to Richard Aycock's alcohol consumption, and said that "the decision to exclude that evidence should not stand."[564] The court of appeals also determined that the actions of the district court constituted an abuse of discretion because the court applied the incorrect legal standard by requiring evidence offered by Reynolds be "to a reasonable medical

---

[554] *Id.* at 1070–72.
[555] *Id.* at 1073.
[556] *Id.* at 1066.
[557] *Aycock*, 769 F.3d at 1067.
[558] *Id.*
[559] *Id.*
[560] *Id.* at 1068.
[561] *Id.*
[562] *Id.*
[563] *Aycock*, 769 F.3d at 1069.
[564] *Id.* at 1070.

certainty" instead of the correct "'more likely than not' standard."[565]

The court of appeals determined that evidence of Richard Aycock's alcohol abuse was relevant to cause of death, comparative fault, and damages because the evidence had a high probative value, making the evidence more essential.[566] After determining that the evidence of alcohol abuse was relevant, the court of appeals decided that the evidence was not unfairly prejudicial.[567] In doing so, the court noted that the evidence was directly relevant to multiple aspects of the case because Richard Aycock's alcohol consumption could have produced his illness, influenced comparative fault findings, and affected damages owed to Thelma Aycock.[568] The court of appeals noted that the evidence posed no risk of unfair prejudice because the jury already knew about Richard Aycock's alcohol addiction.[569] In addition to challenging the district court's motion in limine, Reynolds also challenged the district court's refusal to delay proceedings to allow Reynolds their counsel of choice.[570] However, the court of appeals declined to decide this issue because of Reynolds' success on other grounds.[571]

The Eleventh Circuit Court of Appeals ultimately held that the district court abused its discretion in granting Thelma Aycock's motion in limine to exclude evidence of Richard Aycock's alcohol abuse under Rule 403 of the Federal Rules of Evidence because the evidence had a high probative value and did not pose a risk of unfair prejudice to Thelma Aycock.[572] As a result, the court of appeals ruled in favor of Reynolds and remanded the case to the district court for a new trial.[573] This decision solidifies a defendant's ability to enter evidence of other possible causes of death in a loss of consortium case brought under Florida law.[574]

*Cydney L. Reynolds*

---

[565] *Id.*
[566] *Id.* at 1070–72.
[567] *Id.* at 1072.
[568] *Id.*
[569] *Aycock*, 769 F.3d at 1072.
[570] *See id.*
[571] *Id.*
[572] *Id.*
[573] *Id.*
[574] *See id.*

### *T. Retroactivity: Amendment to Statute Providing Sovereign Immunity to Alabama Jailers*

In *Johnson v. Conner*[575] the Eleventh Circuit Court of Appeals held that the recently amended Alabama Code § 14-6-1, which extends sovereign immunity to Alabama jailers, does not—and cannot—apply retroactively.[576] Since Section 14-6-1 is a substantive statute that "'create[s], enlarge[s], diminish[es], or destroy[s] vested rights'"[577] the presumption against retroactivity applies.[578] Thus, the Eleventh Circuit Court of Appeals affirmed the district court's denial of appellant's motion to dismiss.[579] This was a case of first impression, specifically addressing the issue of whether the newly amended Section 14-6-1 "applies to a claim filed *after* the statute's effective date, but in which the underlying conduct giving rise to the claim occurred *before* the statute's effective date."[580]

Alquwon Johnson was an inmate at the Barbour County Jail, and he suffered from mental illness.[581] Ryan Conner was a jailer at the Barbour County Jail and was responsible for Mr. Johnson's safety and for administering Mr. Johnson's prescribed daily medications.[582] On June 4, 2011, Alquwon Johnson committed suicide inside his jail cell by hanging himself with a bed sheet.[583]

On August 8, 2011, Sherrie Johnson, acting as Alquwon Johnson's personal representative, filed suit against Ryan Conner and various other Barbour County personnel and entities,[584] alleging that "despite their knowledge of Alquwon's mental illness, [the defendants] violated state and federal law by failing to take appropriate precautions . . . following Alquwon's previous but unsuccessful suicide attempt at the Jail on May 6, 2011."[585] Appellants filed a motion to dismiss based on the newly

---

[575] (*Johnson II*), 754 F.3d 918 (11th Cir. 2014).

[576] *Id.* at 919, 923.

[577] *Id.* at 921 (quoting Ala. Ins. Guar. Ass'n v. Mercy Med. Ass'n, 120 So. 3d 1063, 1068 (Ala. 2013)).

[578] *See id.*

[579] *Id.* at 923.

[580] Johnson v. Conner (*Johnson I*), 720 F.3d 1311, 1314 (11th Cir. 2013).

[581] *Johnson II*, 754 F.3d at 919.

[582] *See id.*

[583] *Id.*

[584] *Id.*

[585] *Johnson I*, 720 F.3d at 1312–13.

amended Section 14-6-1, but the district court denied appellants' motion.[586] Consequently, appellants filed an interlocutory appeal challenging the district court's denial of jailer immunity pursuant to Section 14-6-1.[587] After certifying two questions to the Alabama Supreme Court,[588] the Eleventh Circuit Court of Appeals affirmed the district court's ruling to deny the appellants' motion to dismiss.[589]

On June 14, 2011, Alabama Code § 14-6-1 was amended to include the Jailer Liability Protection Act, which extends sovereign immunity to jailers in Alabama.[590] Appellants argued that the legislature intended for the new amendment to apply retroactively because the statute was created in response to *Ex parte Shelley*[591]—a case that denied jailer immunity—and because the statute stripped the court of subject-matter jurisdiction.[592] However, in Alabama, "'[r]etrospective application of an act is disfavored unless 1) the act expressly states that it is to be applied retrospectively; 2) the Legislature clearly intended the act to have retrospective application; or 3) the act is of a remedial [as opposed to substantive] nature.'"[593]

In the instant case, the Eleventh Circuit Court of Appeals found that Section 14-6-1 is silent on the subject of retroactivity and does not expressly address any retroactive application in relation to jailer immunity.[594] Additionally, the court reasoned that Section 14-6-1 is a substantive statute because by creating a new immunity, the statute inherently creates and destroys parties' rights to sue and be sued, respectively.[595] The court found that the newly amended statute does not "allocate jurisdiction,"[596] rather, "it removes the right to bring suit against jailers in any forum"[597] and even though the statute may be framed in

---

[586] *Johnson II*, 754 F.3d at 919.
[587] *See id.*
[588] *See Johnson I*, 720 F.3d at 1316.
[589] *Johnson II*, 754 F.3d at 923.
[590] *Id.* at 920.
[591] 53 So. 3d 887 (Ala. 2009), *superseded by statute*, Ala. Code § 14-6-1 (West 2014).
[592] *Johnson II*, 754 F.3d at 921.
[593] *Id.* at 920 (quoting *Ex parte Ala. Health Care Auth.*, 814 So. 2d 260, 262 (Ala. 2001)).
[594] *Id.*
[595] *See id.* at 920–21.
[596] *Id.* at 921.
[597] *Id.*

jurisdictional terms, it is inherently substantive in nature.[598] Following the federal framework laid out in *Hughes Aircraft Co. v. United States* ex rel. *Schumer*,[599] which applied the presumption in favor of a prospective application of substantive statutes, the court upheld Alabama's presumption against the retroactive application of Section 14-6-1.[600]

The Eleventh Circuit Court of Appeals also addressed appellants' alternative argument that the date which the court should consider should be the date the appellees filed suit (August 8, 2011), not the date the incident occurred (June 4, 2011).[601] In holding for the appellees, the court stated that it must apply the law at the time of the incident because "a litigant has 'a vested interest in a particular cause of action' *once the injury occurs*."[602] The court pointed to the fact that appellants provided no law or legal precedent that would support any argument favoring a distinction of dates different from when the injury, which gave rise to the cause of action, occurred.[603]

The holding in this case establishes the bright line rule that jailer immunity, pursuant to Alabama Code § 14-6-1 and its amendments, cannot be applied retroactively in Alabama.[604] Alabama's general rule prohibits statutes from applying retroactively unless such retroactivity is expressly stated in the statute, implied from legislative intent, or the statute is remedial in nature.[605] The Eleventh Circuit Court of Appeals noted that when a statute is determined to affect a party's substantive rights, it is presumed to apply only prospectively.[606] Consequently, when considering jailer immunity under Alabama Code § 14-6-1, courts should look to the law at the time of the incident, not the time of filing, and apply Section 14-6-1 prospectively rather than retrospectively.[607] This ruling leaves the courthouse doors open for inmate-litigants who are entitled to a legal remedy because they were wrongfully injured by an Alabama jailer prior to June

---

[598] *See Johnson II*, 754 F.3d at 921.
[599] 520 U.S. 939 (1997).
[600] *Johnson II*, 754 F.3d at 921.
[601] *Id.* at 922–23.
[602] *Id.* at 922 (emphasis added) (quoting Reed v. Brunson, 527 So. 2d 102, 114 (Ala. 1988)).
[603] *See id.* at 923.
[604] *Id.* at 919, 923.
[605] *Id.* at 920.
[606] *Johnson II*, 754 F.3d at 921.
[607] *Id.* at 922–23.

14, 2011.

*Kyle A. Scholl*

*U. Panel Recusal and Scope of "Victim Class"*

In *In re Moody*,[608] the Eleventh Circuit Court of Appeals held that: (1) the mere fact that a panel of circuit court judges were randomly assigned to serve on the same circuit court as Judge Robert S. Vance, a judge that a petitioner is convicted murdering in 1989, is not, by itself, a reasonable basis to question the panel's impartiality and warrant the panel's recusal under 28 U.S.C. § 455(a);[609] and (2) as a panel of judges who were appointed to the Eleventh Circuit "10, 21, and 23 years after Judge Vance's death," the judges were not members of a "victim class" to the petitioner's crimes, and any interest that the panel may have in the petitioner's habeas corpus hearing is too remote and weak in degree to be substantially affected by the hearing's outcome and thus is not disqualifying under 28 U.S.C. § 455(b)(4).[610] Utilizing a similar analysis, the court of appeals reached the same conclusion regarding the recusal of a district judge within the Eleventh Circuit.[611] As a result, the Eleventh Circuit Court of Appeals denied both petitioner's motion for recusal of the judicial panel and mandamus petition.[612]

In 1972, a jury found Walter Leroy Moody, Jr. guilty of possession of an "unregistered destructive device."[613] After failing to overturn his conviction,[614] Moody mailed a tear-gas explosive device to the NAACP's Atlanta Office and issued a "Declaration

---

[608] 755 F.3d 891 (11th Cir. 2014) (per curiam), *cert. denied sub nom.* Moody v. Thomas, 135 S. Ct. 437 (2014) (mem.).

[609] *See id.* at 894–97. "In relevant part, 28 U.S.C. § 455(a) provides that '[a]ny . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.'" *Id.* at 894 (alteration in original) (quoting 28 U.S.C. § 455(a) (2012)).

[610] *See id.* at 897–98. "Under § 455(b)(4), recusal is required whenever a judge has 'any . . . interest that could be substantially affected by the outcome of the proceeding.'" *Id.* at 894 (alteration in original) (quoting 28 U.S.C. § 455(b)(4) (2012)).

[611] *See id.* at 898–99 (answering "many of the same arguments" raised by Moody regarding Judge Coogler's recusal as Moody raised regarding the Eleventh Circuit panel's recusal).

[612] *In re Moody*, 755 F.3d at 899.

[613] *Id.* at 893 (citing United States v. Moody, 474 F.2d 1346 (5th Cir. 1973) (table decision affirming conviction)).

[614] *See id.* at 893 (citing Moody v. United States, 874 F.2d 1575 (11th Cir. 1989)).

of War" to the Eleventh Circuit, "accusing the Circuit of deliberate misconduct and rank bias."[615] Furthermore, Moody constructed four additional package bombs.[616] Moody mailed the first bomb to the home of Eleventh Circuit Judge Robert S. Vance in Alabama, who was killed when he opened the package on December 16, 1989.[617] With the second package bomb, Moody killed Robert Robinson, a civil rights attorney in Savannah, Georgia.[618] Moody sent the third package bomb to the Eleventh Circuit headquarters in Atlanta, but a security guard discovered the device.[619] The fourth package bomb, sent to the NAACP's Jacksonville, Florida office, was not opened due to employees' awareness of the other package bombs.[620]

In 1990, the federal government charged Moody with, inter alia, the murders of Mr. Robinson and Judge Vance.[621] "All judges then sitting on the Eleventh Circuit entered an order recusing themselves from all cases 'relating to the investigation of the murder of [Judge] Vance' in which Mr. Moody was a party."[622] As a result, Chief Justice Rehnquist appointed a judge from the District of Minnesota to preside over the case, and that judge "granted Mr. Moody's motion for a change of venue, and moved the trial to St. Paul."[623] The federal jury in Minnesota convicted Moody,[624] and he appealed to Eleventh Circuit.[625] "On appeal, the Eleventh Circuit—with a panel comprised of three judges from the Fourth Circuit—affirmed Mr. Moody's convictions and sentences . . . ."[626]

---

[615] *Id.* (citing United States v. Moody, 977 F.2d 1425, 1428 (11th Cir. 1992)). *See generally* Moody v. State, 888 So. 2d 532, 540–45 (Ala. Crim. App. 2003) (detailing the background facts and timeline of events surrounding the murders).

[616] *In re Moody*, 755 F.3d at 893.

[617] *Id.*

[618] *Id.*

[619] *Id.*

[620] *See id.*

[621] *Id.*

[622] *In re Moody*, 755 F.3d at 893 (alteration in original) (quoting United States v. Moody, 977 F.2d 1420, 1423 (11th Cir. 1992)). "That recusal order is still in effect for all judges who were members of the Eleventh Circuit at that time . . . ." *Id.* at 893 n.1. "All district judges in the Northern District of Georgia also recused themselves . . . ." *Id.* at 893–94.

[623] *Id.* at 894 (citing United States v. Moody, 762 F. Supp. 1485 (N.D. Ga. 1991)).

[624] The jury "convicted Mr. Moody of 71 counts, [and] Judge Devitt sentenced him to seven life terms and 400 years, to be served concurrently with each other." *Id.*

[625] United States v. Moody, 977 F.2d 1425, 1428 (11th Cir. 1992).

[626] *In re Moody*, 755 F.3d at 894.

Following Moody's federal conviction, "the State of Alabama then charged Mr. Moody with the capital murder of Judge Vance."[627] The jury found Moody guilty and the trial court sentenced him to death.[628] "The Alabama Court of Criminal Appeals affirmed [the conviction], and the Alabama Supreme Court denied [Moody's petition for] review."[629] After exhausting his avenues for post-conviction relief in the state court system,[630] Moody sought a federal remedy by petitioning for a writ of habeas corpus in the Northern District of Alabama.[631] Moody also petitioned the Eleventh Circuit for a writ of mandamus ordering the recusal of the district judge hearing his habeas petition and the transfer of the habeas petition to a district judge outside of the Eleventh Circuit.[632] Furthermore, Moody separately petitioned for the recusal of all appellate judges in the Eleventh Circuit and the transfer of his mandamus petition to another circuit.[633] Relying significantly on the Seventh Circuit's sua sponte self-recusal in *In re Nettles*,[634] Moody argued that the specific facts of his case "necessitate[d] the recusal of all circuit judges on, and all district and magistrate judges within, the Eleventh Circuit."[635] Specifically, Moody asserted:

> [A]llowing any such judges to rule on his habeas corpus petition would create an appearance of partiality within the meaning of 28 U.S.C. § 455(a), and also violate § 455(b)(4) by allowing them to sit on a case in which they have an "interest that could be substantially affected by the outcome."[636]

Addressing Moody's motion for the recusal of the Eleventh Circuit panel under Section 455(a), the court of appeals iterated that "recusal under [Section] 455(a) turns on 'whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain

---

[627] *Id.*

[628] *Id.*

[629] *Id.* (citing Moody v. State, 888 So. 2d 532 (Ala. Crim. App. 2003), *cert. denied*, 888 So. 2d 605 (Ala. 2004)).

[630] *See id.* (citing Moody v. State, 95 So. 3d 827 (Ala. Crim. App. 2011) (affirming the dismissal of Moody's Rule 32 petition)). *See also* Moody v. Thomas, No. 2:212-CV-4139-LSC, 2015 WL 733849, at *7 (N.D. Ala. Feb. 20, 2015) (providing a succinct procedural history of Moody's Alabama state court cases).

[631] *In re Moody*, 755 F.3d at 894.

[632] *Id.* at 892–93.

[633] *Id.* at 893.

[634] 394 F.3d 1001 (7th Cir. 2005).

[635] *In re Moody*, 755 F.3d at 893, 896.

[636] *Id.* at 893 (quoting 28 U.S.C. § 455(b)(4) (2012)).

a significant doubt about the judge's impartiality.'"[637] As none of the judges on the current panel served on the Eleventh Circuit at the time of Judge Vance's murder, nor had a personal relationship with Judge Vance, the court rejected that the *Nettles* decision was controlling over the current circumstances and determined that the facts at hand did not support recusal under Section 455(a).[638] The court reasoned:

> The only fact distinguishing this panel from a randomly-assigned panel comprised of judges from another circuit is that we happen to be assigned to the Eleventh Circuit, on which Judge Vance sat at the time of his death in 1989. We conclude that under the unique facts of this case such a tenuous connection would not, standing alone, raise significant doubt in the mind of an informed, objective, and disinterested lay observer about our ability to fairly decide cases involving Mr. Moody.[639]

Following its rejection of Moody's Section 455(a) recusal argument, the Eleventh Circuit also denied recusal under Section 455(b)(4).[640] In support of its denial, the Eleventh Circuit adopted a two factor analysis to decide if an interest is "'substantially affected by the outcome'" within the context of Section 455(b)(4).[641] The determination is contingent upon the "'interaction of two variables: the remoteness of the interest and its extent or degree.'"[642] Applying this test, the court again emphasized that no personal or professional relationship between Judge Vance and the judges on the panel ever existed.[643] Furthermore, the panel rejected the notion that they automatically became "prospective members of the so-called 'victim class'" simply by their appointment to the Eleventh Circuit, especially when each of the panel judge's appointments occurred at least a decade after Judge Vance's death.[644] Thus, if the panel judges

---

[637] *Id.* at 894 (quoting United States v. Scrushy, 721 F.3d 1288, 1303 (11th Cir. 2013)).

[638] *See id.* at 896–98. The judges on the panel were the only Eleventh Circuit judges who did *not* recuse themselves, either under the original recusal order or voluntarily for other reasons. *Id.* at 893 n.1.

[639] *Id.* at 897 (citing Clemens v. U.S. Dist. Court for the Cent. Dist. of Cal., 428 F.3d 1175, 1179-80 (9th Cir. 2005) (distinguishing *In re Nettles*)).

[640] *See In re Moody*, 755 F.3d at 897–98.

[641] *See id.* at 897 (quoting 28 U.S.C. § 455(b)(4)).

[642] *See id.* (quoting Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 753 (1973) (*cited with approval in In re* Va. Elec. Power Co., 539 F.2d 357, 368 (1976)).

[643] *Id.* at 897–98.

[644] *Id.* at 898.

had any interest at all, it was too remote and tenuous to support judicial disqualification.[645]

Finally, in denying Moody's petition for a writ of mandamus, the Eleventh Circuit applied the same analysis to the federal district judge.[646] The district judge had no connection to Judge Vance or the initial investigation and prosecution Moody, was not appointed to a federal judicial seat at the time of Judge Vance's death, and "was never personally subjected to the threats that were sent to Eleventh Circuit judges sitting at the time Judge Vance was murdered."[647] Accordingly, the Eleventh Circuit denied both Moody's petition for recusal of the circuit panel and his mandamus petition requiring the recusal of the district judge.[648] Consequently, the Eleventh Circuit's opinion in *In re Moody* reinforces the axiom that "'a judge, having been assigned to a case, should not recuse himself on unsupported, irrational, or highly tenuous speculation'"[649] because "'there is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is.'"[650]

*Bret Thompson*

---

[645] *Id*.

[646] *See In re Moody*, 775 F.3d at 898–99.

[647] *Id.* at 898.

[648] *Id.* at 899. Following this decision by the Eleventh Circuit, the district court's evaluation of Moody's habeas petition proceeded and was denied. Moody v. Thomas, No. 2:212-CV-4139-LSC, 2015 WL 733849, at *8, *83 (N.D. Ala. Feb. 20, 2015).

[649] *In re Moody*, 755 F.3d at 895 (quoting United States v. Greenough, 782 F.2d 1556, 1558 (11th Cir. 1986)).

[650] *Id.* (quoting United States v. Burger, 964 F.2d 1065, 1070 (10th Cir. 1992)).