Appellate Practice & Procedure

by K. Todd Butler*

I. INTRODUCTION

This Article reviews cases decided in 2003 by the United States Court of Appeals for the Eleventh Circuit that have the greatest bearing on issues of federal appellate procedure for attorneys practicing in the Eleventh Circuit. Topics reviewed include parties' designation of matters appealed in the Notice of Appeal; parties' actions taken during or prior to trial to preserve issues for appeal; the interlocutory jurisdiction of appellate courts; the lack of appellate jurisdiction resulting from the mootness of issues appealed; and the invited error and judicial estoppel rules.

II. NOTICE OF APPEAL

An appeal of right is initiated when the appellant files a Notice of Appeal with the clerk of the district court that rendered the decision and from which appeal is sought pursuant to Rule 3 of the Federal Rules of Appellate Procedure.[1] The "[N]otice of [A]ppeal deprives the district court of jurisdiction over all issues" that are subject to the appeal as noticed pursuant to Rule 3.[2] Lacking jurisdiction, the district court may take no further action on the case, other than action in furtherance of the appeal or action with respect to matters collateral to the appeal.[3] In *Mahone v. Ray*,[4] the Eleventh Circuit held that after the filing of a Notice of Appeal, the district court retains jurisdiction to deny motions

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1. FED. R. APP. P. 3(a)(1).
2. Mahone v. Ray, 326 F.3d 1176, 1179 (11th Cir. 2003).
3. *Id.*
4. 326 F.3d 1176 (11th Cir. 2003).

made pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.[5] However, the district court does not have jurisdiction to enter an order granting the same motion; the district court can only indicate to the appellate court that it believes the arguments raised are meritorious.[6]

Rule 3 provides additional instructions regarding Notices of Appeal, including instructions on matters of content, service, and payment of fees.[7] For example, an appellant must "designate the judgment, order, or part thereof being appealed" in the Notice of Appeal.[8] In *Whetstone Candy Co. v. Kraft Foods, Inc.*,[9] plaintiff-appellant's notice of appeal designated the district court's summary judgment as the judgment from which it was appealing, but it did not designate an order dismissing a co-defendant for lack of personal jurisdiction.[10] By specifically including the summary judgment in the Notice of Appeal and failing to list the dismissal of a co-defendant, the appellant effectively deprived the appellate court of jurisdiction over the co-defendant dismissal issue.[11] Note, however, if the Notice of Appeal clearly shows that appellant's "overriding intent" was to effectuate an appeal of a judgment, order, or any part of the judgment or order, technical failure to make designations in the notice will not defeat the appeal.[12]

III. PRESERVATION OF ISSUES FOR APPEAL

In *Burke v. Ruttenberg*,[13] the State of Wisconsin Investment Board ("SWIB") appealed an order of the District Court for the Northern District of Alabama allocating attorney fees in a securities class action suit. In an effort to reduce the amount of attorney fees, SWIB argued on appeal that, because it was the party with the greatest financial interest in the relief sought and because it otherwise satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure,[14] it

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5. *Id.* at 1180. Rule 60(b) of the Federal Rules of Civil Procedure provides for relief from judgments or orders for various reasons including, but not limited to, discovery of mistakes or discovery of fraud, misrepresentation, or misconduct by one of the adverse parties. FED. R. CIV. P. 60(b).

6. *Mahone*, 326 F.3d at 1180.

7. FED. R. APP. P. 3.

8. FED. R. APP. P. 3(c)(1)(B).

9. 351 F.3d 1067 (11th Cir. 2003).

10. *Id.* at 1079.

11. *Id.* at 1079-80. *See also* Granite State Outdoor Adver., Inc. v. City of Clearwater, 351 F.3d 1112, 1115 n.2 (11th Cir. 2003).

12. *See* Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734, 738-39 n.1 (5th Cir. 1980).

13. 317 F.3d 1261 (11th Cir. 2003).

14. FED. R. CIV. P. 23.

should have been appointed lead plaintiff.[15] The district court had appointed a committee of lead plaintiffs, in which SWIB participated, to direct the litigation. SWIB wanted its contract with its own attorneys to govern the allocation of attorney fees because then SWIB could force a reduction in the amount of attorney fees accordingly. SWIB attempted to force the reduction after it consented to the settlement obtained by the attorneys for the lead plaintiffs' committee.[16] The Eleventh Circuit held that by consenting to the settlement, SWIB failed to adequately preserve any right to appeal the settlement.[17] However, the Eleventh Circuit remanded the case to the district court because a district court order allocating attorney fees among counsel for lead plaintiff's committees in securities class action lawsuits should contain findings of fact and the court's rationale for the allocation.[18]

When district courts deny qualified immunity to government officials in cases arising out of official action or inaction in performing discretionary duties, government officials are entitled to immediate interlocutory review under 28 U.S.C. § 1291.[19] Nevertheless, the government official can waive the affirmative defense of qualified immunity by failing to properly preserve it for appeal or by waiving it at trial.[20] In *Bogle v. McLure*,[21] defendants tried to establish the defense of qualified immunity, which "offers complete protection for government officials sued in their individual capacity if their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[22] Defendants argued that reasonable public officials in their positions would not have known that the actions forming the basis of the 42 U.S.C. § 1983[23] action against them violated the clearly established constitutional rights of plaintiffs.[24] The Eleventh Circuit denied this argument because defendants waived the right to appeal the district court's refusal to grant them qualified immunity.[25] In fact, defendants stipulated at trial that they "never

15. 317 F.3d at 1263. SWIB's argument was based on 15 U.S.C. § 78u-4(a)(3)(B) (2000). *Id.*

16. *Id.*

17. *Id.* Presumably, jurisdiction to hear the appeals would be based on 28 U.S.C. § 1292(b) (2000). *Id.*

18. *Id.*

19. Mitchell v. Forsyth, 472 U.S. 511, 524-25 (1985); 28 U.S.C. § 1291 (2000).

20. Bogle v. McLure, 332 F.3d 1347, 1355 n.5 (11th Cir. 2003).

21. 332 F.3d 1347 (11th Cir. 2003).

22. *Id.* at 1355 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

23. 42 U.S.C. § 1983 (1996).

24. 332 F.3d at 1355 n.5.

25. *Id.*

argued that [they] didn't know that transferring people based on their race is against the law," and they knew "absolutely" that "it was a violation of federal law to transfer people on the basis of their race."[26] By stipulating that they knew that their conduct would constitute a violation of plaintiff's constitutional rights, defendants waived the right to appeal.[27]

Failure to object to the district court's procedure for enforcing an injunction will be deemed a waiver of an appeal based on the defective procedure because the objection is necessary to preserve the issue for appeal.[28] However, a party that undertakes to comply with an injunction, and does not specifically object to entry of the injunction, does not necessarily waive its right to appeal.[29] In *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.*,[30] defendant-appellant did not object to the prohibitory portion of an injunction, stating instead that it had "no problem with [it]" because it was not engaging in the activity the injunction prohibited.[31] Plaintiff-appellee argued the appeal was mooted by appellant's consent to the injunction,[32] but the Eleventh Circuit held appellant's consent was substantively a denial of wrongdoing.[33] Appellant's affirmative denial that it was engaging in the enjoined activity preserved the issue for appeal, even though appellant had offered no opposition to the district court's injunctive order.[34]

Similar to *Bogle*,[35] the Eleventh Circuit's holding in *Russell v. North Broward Hospital*,[36] stands for the proposition that on appeal, a party may not argue a case to the appellate court different from the one argued to the district court.[37] In *Russell* plaintiff had been disciplined for unscheduled absences on three occasions over the course of two and one-half years prior to suffering an on-the-job injury on May 31, 2000. At least some of plaintiff's absences prior to her injury appear to have been related to bouts of depression and migraine headaches. Because of the injury, plaintiff missed approximately thirty hours of work from May

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26. *Id.*
27. *Id.*
28. *See* Reynolds v. McInnes, 338 F.3d 1201, 1209 (11th Cir. 2003).
29. *See* Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A., 320 F.3d 1205, 1209 n.2 (11th Cir. 2003).
30. 320 F.3d 1205 (11th Cir. 2003).
31. *Id.* at 1209-10 n.2.
32. *Id.*
33. *Id.*
34. *Id.*
35. 332 F.3d at 1355 n.5.
36. 346 F.3d 1335 (11th Cir. 2003).
37. *Id.* at 1341 (citing Irving v. Mazda Motor Corp., 136 F.3d 764, 769 (11th Cir. 1998)).

31, 2000 to June 9, 2000. On June 12, 2000, plaintiff was terminated for excessive absenteeism. At trial plaintiff attempted to prove, under the Family and Medical Leave Act ("FMLA"),[38] that she was terminated in retaliation for exercising an alleged right to be absent from work that accrued to her after her injury.[39] Plaintiff also alleged that defendant retaliated against her for filing a claim under the Florida Workers Compensation Act, and she amended her complaint to allege a claim under 42 U.S.C. § 1983.[40] The jury returned a verdict for the employer based in part on the trial court's instruction that under 29 U.S.C. § 2611(11) and 29 C.F.R. § 825.114,[41] a serious medical condition warranting excused absence under FMLA required "three consecutive calendar days, 72 hours or more" of incapacity.[42] The district court denied plaintiff's motion for judgment as a matter of law or, in the alternative, for a new trial.[43]

On appeal plaintiff argued that if the discipline she received prior to her injury contributed to defendant's decision to terminate her, the reprimands and suspension were nevertheless illegally imposed on her for exercising her FMLA rights.[44] Plaintiff's argument on appeal would have effectively changed the entire posture of the case.[45] Under FMLA an employee may have either an "interference" claim or a "retaliation" claim.[46] Plaintiff originally had alleged a retaliation claim, which is more difficult to prove because retaliation claims require an employee-plaintiff to show state of mind or that the employer was "motivated by an impermissible retaliatory or discriminatory animus."[47] Interference claims are easier to establish because they require a plaintiff to show only that she was entitled to and denied a benefit.[48] Though plaintiff's trial counsel suggested that the FMLA claim had ties to the employer's progressive discipline policy, counsel nevertheless acknowledged on the record that no FMLA claim was being asserted for the discipline imposed

38. 29 U.S.C. §§ 2601-2654 (2000).
39. 346 F.3d at 1338-40.
40. *Id.* at 1339.
41. 29 C.F.R. § 825.114 (1995).
42. 346 F.3d at 1337, 1340.
43. *Id.*
44. *Id.* at 1340-41.
45. *Id.* at 1341.
46. *Id.* at 1340.
47. *Id.*
48. *Id.*

for illness-related absences prior to the May 31, 2000 injury.[49] Accordingly, the appellate court refused to hear plaintiff's argument.[50]

Bogle and *Russell* both stand for the general rule that "'a federal appellate court does not consider an issue not passed upon below.'"[51] However, courts have held that when an issue was not brought to the attention of the trial court, the appellate court may nevertheless review the issue if the proper resolution of the case is beyond any doubt[52] or if injustice might otherwise result.[53]

IV. INTERLOCUTORY JURISDICTION

In 2003 the Eleventh Circuit decided a number of cases addressing its jurisdiction to review interlocutory appeals. Emphasis was on the court's jurisdiction under 28 U.S.C. § 1291[54] to review decisions denying a government agent qualified immunity, and the court's jurisdiction under 28 U.S.C. § 1292(b)[55] to review denials of class certifications.

In *Cottone v. Jenne*,[56] defendants filed a Rule 12(b)(6)[57] motion to dismiss, claiming qualified immunity as government officials sued for the consequences of action they took or failed to take while performing discretionary duties. The District Court for the Southern District of Florida denied defendants' motion.[58] The Eleventh Circuit held that it had jurisdiction over defendants' appeal from an order denying their motion to dismiss based on qualified immunity.[59] Likewise, in *Gonzalez v. Reno*[60] and *Dalrymple v. Reno*,[61] cases arising out of the Elian Gonzalez affair,[62] the Eleventh Circuit held it had jurisdiction over United States Attorney General Janet Reno's appeal of the District Court for the Southern District of Florida's orders denying her motions

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49. *Id.* at 1341.
50. *Id.*
51. Iraola & CIA, S.A. v. Kimberly-Clark Corp., 325 F.3d 1274, 1284-85 (11th Cir. 2003) (quoting United States Equal Employment Opportunity Comm'n v. W & O, Inc., 213 F.3d 600, 620 (11th Cir. 2000)); *see also* McGinnis v. Ingram Equip. Co., 918 F.2d 1491, 1495 (11th Cir. 1990) (en banc).
52. *Iraola*, 325 F.3d at 1284-85 (citing Turner v. City of Memphis, 369 U.S. 350, 353 (1962)).
53. *Id.* (citing Hormel v. Helvering, 312 U.S. 552, 557 (1941)).
54. 28 U.S.C. § 1291 (2000).
55. 28 U.S.C. § 1292(b) (2000).
56. 326 F.3d 1352 (11th Cir. 2003).
57. FED. R. CIV. P. 12(b)(6).
58. 326 F.3d at 1357.
59. *Id.* at 1357 n.5.
60. 325 F.3d 1228 (11th Cir. 2003).
61. 334 F.3d 991 (11th Cir. 2003).
62. *Gonzalez*, 325 F.3d at 1228; *Dalrymple*, 334 F.3d at 991.

to dismiss based on qualified immunity.[63] The Eleventh Circuit's jurisdiction in each of these cases was based on 28 U.S.C. § 1291.[64] As the United States Supreme Court pointed out in *Mitchell v. Forsyth*,[65] when a party raises the affirmative defense of qualified immunity, or the right not to stand trial at all, the order has to be reviewed before trial.[66] Otherwise, the order cannot be effectively reviewed at all.[67] As a rule, an appeal under 28 U.S.C. § 1291 must be from an order concluding the litigation.[68] The Eleventh Circuit, as a court of limited jurisdiction, will review an appeal to ensure that it is under § 1291 and that it is brought from a final order.[69] The court will dismiss the appeal if it is not.[70] Under the collateral order doctrine, however, section 1291 gives the courts of appeal jurisdiction over orders if they "(1) 'conclusively determine the disputed question'; (2) 'resolve an important issue completely separate from the merits of the action'; and [are] (3) 'effectively unreviewable on appeal from a final judgment.'"[71]

The denial of class certification is not a final order over which a federal appellate court has jurisdiction under 28 U.S.C. § 1291,[72] but a plaintiff seeking class certification may nevertheless request the appellate court's discretionary jurisdiction under 28 U.S.C. § 1292(b).[73] Furthermore, discretionary jurisdiction of the appeal may lie even if the legally cognizable interest of the plaintiff seeking class representative status has been rendered moot.[74] The legally cognizable interest in the

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63. *Gonzalez*, 325 F.3d at 1233; Dalrymple, 334 F.3d at 994.

64. *Gonzalez*, 325 F.3d at 1233; *Dalrymple*, 334 F.3d at 994. 28 U.S.C. § 1291 provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

65. 472 U.S. 511 (1985).

66. *Id.* at 525.

67. *Id.*

68. *See* SEC v. Carrillo, 325 F.3d 1268, 1271 (11th Cir. 2003).

69. *See id.*

70. *See id.*

71. United States *ex rel.* Sarasola v. Aetna Life Ins. Co., 319 F.3d 1292, 1300-01 (11th Cir. 2003) (citing Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)).

72. *Coopers & Lybrand*, 437 U.S. at 468-69 (citing 28 U.S.C. § 1291).

73. *Id.* at 474-75 (citing 28 U.S.C. § 1292(b) (2000)).

74. *See* Cameron-Grant v. Maxim Healthcare Serv., Inc., 347 F.3d 1240, 1245-47 (11th Cir. 2003) (citing United States Parole Comm. v. Geraghty, 445 U.S. 388 (1980); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980)).

traditional sense may no longer exist, but the plaintiff seeking class representative status may nevertheless retain a legally cognizable interest in his procedural right to represent a class of similarly situated persons.[75] Of course, a district court's order denying class certification cannot be reviewed on appeal until the order is actually entered.[76] If the district court enters an order effectively mooting the legally cognizable interests of a plaintiff seeking class representative status, the district court must nevertheless determine the question of class certification before entering an order dismissing the case.[77]

In *Cameron-Grant v. Maxim Healthcare Services, Inc.*,[78] the Eleventh Circuit considered whether it had jurisdiction over a plaintiff's appeal under 28 U.S.C. § 1292(b) in an action brought pursuant to the Fair Labor Standards Act ("FLSA").[79] The court further determined whether it had jurisdiction analogous to its jurisdiction to review an order denying class certification even after the plaintiff and class representative's legally cognizable interest has been mooted.[80] A plaintiff can have no procedural interest in class certification under Rule 23 in a FLSA action because FLSA precludes Rule 23 actions by requiring all employee-party plaintiffs to a FLSA action to consent in writing to being a party plaintiff and to file that consent in the court where the FLSA action is pending.[81] Nevertheless, plaintiff in *Cameron-Grant*, along with three other named plaintiffs, moved for an order permitting court supervised notice to be given to other potential plaintiffs regarding their potential right to opt in as co-plaintiffs.[82] Such an order would have the effect of permitting a class action under FLSA, though not under Rule 23.[83] Prior to the court entering an order on their motion, three of the named plaintiffs dismissed their claims with prejudice, and defendant stipulated it would pay the remaining plaintiff's unpaid wages and overtime pay. After the district court denied the motion for court supervised notice to potential plaintiffs, plaintiff settled all of his remaining claims against defendant, and the district court entered an

75. *See id.*
76. Martinez-Mendoza v. Champion Int'l Corp., 340 F.3d 1200, 1216 (11th Cir. 2003).
77. *Id.* at 1215-16.
78. 347 F.3d 1240 (11th Cir. 2003).
79. *Id.* at 1242; 29 U.S.C. §§ 201-19 (2003).
80. 347 F.3d at 1245-47.
81. 29 U.S.C. § 216(b) (1996); *but see Martinez-Mendoza*, 340 F.3d at 1215-16 (remanding question of class certification to district court in FLSA case).
82. 347 F.3d at 1243.
83. *Id.* at 1243 n.2 (citing Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208 (11th Cir. 2001)).

order dismissing the case with prejudice.[84] The Eleventh Circuit held that it did have jurisdiction of the appeal, observing that the opt-in requirement of a class action derived from 29 U.S.C. § 216(b)[85] makes it "a fundamentally different creature than the Rule 23 class action."[86] Rule 23 contemplates a procedural right to bring an action that might affect otherwise uninvolved persons, while § 216(b) requires all persons who may be affected to take affirmative steps to become involved in the action.[87]

Because Congress provided detailed instructions in 15 U.S.C. § 78u-4(a)(3)(B) for selecting lead plaintiffs in securities class actions, the Eleventh Circuit also suggested that district courts should consider certifying related issues for interlocutory appeal.[88]

V. MOOTNESS

The doctrine of mootness requires the appellate court to determine whether, in a case on appeal, the issues presented are still "live," or whether the parties to the appeal still have a legally cognizable interest in the court ruling on the issue.[89] If the justiciability doctrine of mootness is not satisfied, it will deprive a federal court, including a court of appeals, of jurisdiction.[90] If the case "'no longer presents a live controversy with respect to which the court can give meaningful relief," the case is moot.[91] Events occurring subsequent to the Notice of Appeal that deprive the appellate court of the ability to give such meaningful relief deprive the court of jurisdiction.[92] There are, of course, a number of policy considerations that may allow a federal court to retain jurisdiction of an issue, despite an apparent inability to provide meaningful relief to the plaintiff in particular.[93] Such considerations include continuing collateral consequences of the matter appealed from

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84. *Id.* at 1244.

85. 29 U.S.C. § 216(b) (1996).

86. 347 F.3d at 1249 (citing LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 288 (5th Cir. 1975)).

87. *Id.*

88. Burke v. Ruttenberg, 317 F.3d 1261, 1263 (11th Cir. 2003); 15 U.S.C. § 78u-4(a)(3)(B) (2000).

89. Granite State Outdoor Adver., Inc. v. City of Clearwater, 351 F.3d 1112, 1119 (11th Cir. 2003) (citing Powell v. McCormack, 395 U.S. 486, 496 (1969)).

90. *Id.*

91. De La Teja v. United States, 321 F.3d 1357, 1362 (11th Cir. 2003) (quoting Ethredge v. Hail, 996 F.2d 1173, 1175 (11th Cir. 1993)).

92. *Id.* (citing Al Najjar v. Ashcroft, 273 F.3d 1330, 1336 (11th Cir. 2001)).

93. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION §§ 2.5.2-2.5.4, at 128-39 (2d ed. 1994).

and wrongs that the doctrine of mootness would enable to be repeated because they would never be subject to review.[94]

Changes in the law provide one example of events subsequent to the Notice of Appeal that can render a case moot.[95] Such changes can include legislative repeal of statutes, expiration of statutes that contain built-in expiration dates, or judicial decisions overruling earlier judicial decisions in which the appellant claimed a defense or an enforceable right.[96] However, a case is not rendered moot simply due to a change in the law on which an appellant's claim was based.[97] In *Granite State Outdoor Advertising, Inc. v. City of Clearwater*,[98] defendant repeatedly denied plaintiff's applications for permits to erect signs that were substantially larger than signs allowed by defendant's ordinances. Plaintiff sought injunctive relief alleging that defendant's ordinances unconstitutionally restricted commercial speech. The district court denied relief, and on appeal, defendant argued that plaintiff's claim had been rendered moot because the city changed the allegedly unconstitutional ordinance.[99] However, the Eleventh Circuit held that the issue remained alive, and plaintiff continued to have a justiciable interest in the controversy because plaintiff had requested damages.[100] Also, if adjudication of an issue is required to prevent legislative reenactment of an unconstitutionally objectionable law, then the doctrine of mootness does not deprive the federal court of jurisdiction.[101]

VI. INVITED ERROR AND JUDICIAL ESTOPPEL

"'It is a cardinal rule of appellate review that a party may not challenge as error a ruling or other trial proceeding invited by that party.'"[102] This "cardinal rule" is known as the "invited error" rule.[103] In 2003 the Eleventh Circuit addressed this issue in two cases:

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94. *See id.*
95. *See id.* § 2.5.1, at 125-26.
96. *See id.*
97. *See Granite State Outdoor Adver., Inc.*, 351 F.3d at 1119.
98. 351 F.3d 1112 (11th Cir. 2003).
99. *Id.* at 1114-15, 1119.
100. *Id.* at 1119.
101. *Id.* (citing City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982)); *see also* CHEMERINSKY, *supra* note 93, at § 2.5.4.
102. Birmingham Steel Corp. v. Tenn. Valley Auth., 353 F.3d 1331, 1340 n.5 (11th Cir. 2003) (quoting Ford *ex rel*. Estate of Ford v. Garcia, 289 F.3d 1283, 1293-94 (11th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003)); Glassroth v. Moore, 335 F.3d 1282, 1290 (11th Cir. 2003) (quoting United States v. Ross, 131 F.3d 970, 988 (11th Cir. 1997)).
103. *See Birmingham Steel Corp.*, 353 F.3d at 1340.

Birmingham Steel Corp. v. Tennessee Valley Authority[104] and *Glassroth v. Moore*.[105]

A party does not invite error simply by arguing alternative positions in the course of trial.[106] In *Birmingham Steel* plaintiff obtained certification as representative of a class of industrial customers having Economy Surplus Power ("ESP") contracts with the Tennessee Valley Authority ("TVA").[107] During the litigation and after the order certifying the class, plaintiff, as class representative, filed a petition for protection under Chapter 11 of the United States Bankruptcy Code.[108] Defendant moved to decertify the class because the Notice of Class Action approved by the district court specifically stated that recipients of the notice were not included in the class if they were in bankruptcy. In the alternative, defendant moved to stay proceedings until a substitute class representative could be found. Counsel for the class argued that the class should not be decertified because, even though the notice excluded bankrupt companies, the TVA's bankrupt ESP customers were not excluded from the definition of the class. In the alternative, counsel for plaintiff and the class argued that the definition of the class should be amended to include such customers.[109]

At the decertification hearing, the district court focused on questions related to difficulties that might arise from the legal and practical problems associated with a bankruptcy liquidator serving as class representative. The district court also addressed issues related to identifying and substituting a new class representative. The court recognized that having certified the class, the court was obligated to allow class counsel a reasonable amount of time to identify a substitute class representative. However, rather than emphasizing the court's obligation to allow class counsel time to identify a new class member willing to be substituted as class representative, counsel for the class focused on the difficulties associated with finding a new class representative. One argument was that current TVA customers who were members of the class would be unwilling to risk souring their ongoing business relationship with TVA by becoming a class representative. The district court then entered an order decertifying the class and indicated, with regard to substitution of a new class representative, that no party

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104. 353 F.3d 1331 (11th Cir. 2003).
105. 335 F.3d 1282 (11th Cir. 2003).
106. *Birmingham Steel Corp.,* 353 F.3d at 1341.
107. *Id.* at 1333.
108. *Id.*; 11 U.S.C. §§ 101-1330 (2000).
109. 353 F.3d at 1333.

had asked to allow a different class member to serve as class representative.[110]

Counsel for the class moved for an order staying, or otherwise delaying, decertification until other class members could be notified and given an opportunity to intervene as a substituted class representative.[111] The district court denied the motion, noting that there was no motion to substitute a new class representative for plaintiff, and in earlier arguments, "class counsel had repeatedly emphasized how slim were the chances that a new representative could be found."[112] On appeal defendant argued that the earlier argument of class counsel regarding the difficulty of finding a substituted class representative constituted either "invited error" or "judicial estoppel."[113] The Eleventh Circuit noted that the class counsel expressed pessimism about the possibility of identifying a substituted class representative.[114] Class counsel had nevertheless alerted the district court that it would take the position that the class should have a reasonable opportunity to seek a substituted representative if it were determined that Birmingham Steel could not continue as class representative.[115] No invited error or judicial estoppel resulted from the mere fact that class counsel had focused its attention on "vigorously" opposing defendant's argument that the class should be decertified because Birmingham Steel was no longer a suitable class representative.[116]

In *Glassroth* the Eleventh Circuit was presented with a scenario in which invited error did in fact prevent an appellant from maintaining an appeal.[117] The case involved the now famous affair of "Roy's Rock" in which former Alabama Supreme Court Chief Justice Roy Moore installed a monument to the Ten Commandments in the rotunda of the Alabama Supreme Court building. While deciding whether the monument should be removed from the rotunda for violating the Establishment Clause of

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110. *Id.* at 1334.

111. *Id.* at 1334-35.

112. *Id.* at 1335.

113. *Id.* at 1340-41. Judicial estoppel is an equitable doctrine that "'prohibit[s] parties from deliberately changing positions according to the exigencies of the moment.'" *Id.* at 1340-41 n.6 (quoting New Hampshire v. Maine, 532 U.S. 742, 749-50 (2001)). "In the Eleventh Circuit, the inconsistent positions must have been made under oath and must have been calculated to make a mockery of the judicial system." *Id.* (citing Salomon Smith Barney, Inc. v. Harvey, 260 F.3d 1302, 1308 (11th Cir. 2001), *vacated on other grounds*, 537 U.S. 1085 (2002)) (citing Taylor v. Food World, Inc., 133 F.3d 1419, 1422 (11th Cir.1998)).

114. *Id.* at 1341-42.

115. *Id.*

116. *Id.* at 1341.

117. 335 F.3d at 1289-90.

the First Amendment of the United States Constitution,[118] the district court judge hearing the matter went to the rotunda to view the monument. The court entered judgment finding that the monument was in fact for the nonsecular purpose of advancing religion, which had the effect of requiring the monument to be removed. Chief Justice Moore refused to remove the monument within the court-imposed thirty-day period, requiring the court to enter an order enjoining the Chief Justice's defiance.[119]

On appeal counsel for Chief Justice Moore argued that the district court judge inappropriately based his determination that the monument violated the Establishment Clause on the judge's view of the monument.[120] The Eleventh Circuit first pointed out that it is appropriate for the judge or jury, as fact finders, to obtain evidence from a view of a scene.[121] Caveats include a requirement that fact finders should not undertake an uninvited view of a scene outside the knowledge or presence of counsel, and evidence obtained from a view should not serve as the basis of findings of fact should the case be decided on summary judgment.[122] More importantly, the Chief Justice's counsel had urged the district court judge to visit the Alabama Supreme Court rotunda to view the monument, stating that it was "incumbent upon" and "necessary" for the judge to visit the rotunda to see the monument and observe the scene.[123] The court noted:

> Counsel for the Chief Justice agreed with [plaintiffs'] statement about how the view should be conducted, and he made clear that the whole point was for the district court judge to be able to gather facts about the monument and its setting, saying: . . . "[the judge is] a jury. You have to walk in and see what you see . . . just like a juror would."[124]

The Eleventh Circuit held that such action was not simply invited error but "invited error with a parking space."[125]

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118. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend I.

119. 335 F.3d at 1288.

120. *Id.* at 1289.

121. *Id.* at 1289-90.

122. *Id.* at 1289.

123. *Id.* at 1290.

124. *Id.*

125. *Id.*