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Top 20 Takeaways for Trial and Appellate Lawyers From the Eleventh Circuit's *Chiquita* Opinion

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A recent 104-page opinion from the Eleventh Circuit Court of Appeals in *Carrizosa v. Chiquita Brands International Inc.* provides a tutorial on a wide variety of federal evidentiary, summary judgment, expert, and preservation issues. Although some of the issues are specific to the Torture Victim Protection Act, the decision nonetheless is a must-read for all trial and appellate lawyers. To whet your appetite, here is a list of some of the top issues addressed by the court:

1. Although some record materials were filed by the appellants under seal, they "referred to and quoted from" some of them in their publicly filed briefs and so the court did as well in its decision.

2. The non-moving party on summary judgment must be given an opportunity to address "new arguments or facts" raised for the first time in a reply brief in support of the motion.

3. Inadmissible evidence that can be reduced to an admissible form at trial should be considered at summary judgment.

4. Although a hearsay statement can be considered on summary judgment if it could be reduced to admissible evidence at trial, it is not enough to show the mere possibility that unknown witnesses will testify to it at trial.

5. By raising an argument only in a "cursory fashion, and only in her reply brief" on appeal, the appellant abandoned the argument and the appellate court did not address it.

6. Appellate courts generally should not take judicial notice of matters on appeal, as that evidence was not considered by the trial court.

7. “Parties opposing summary judgment are appropriately charged with the responsibility of marshaling and presenting their evidence before summary judgment is granted, not afterwards.”

8. A court may disregard testimony on summary judgment that is not based on personal knowledge.

9. Expert social science opinions must adhere to “the same standards of intellectual rigor that are demanded in her professional work.”

10. Appellants failed to file an unredacted version of their expert report under seal in the record on appeal, as they “could and should have” done, and the court accordingly was “hard-pressed to reverse the district court’s rulings” on that issue.

11. When an expert is not applying his or her experience and a reliable methodology, the testimony should be excluded.

12. Where the trial court did not perform a balancing test, the appellate court could not affirm the exclusion of evidence on that basis.

13. The court provided an extensive discussion of the standard for using *modus operandi* evidence to point fingers at a third party.

14. Pursuant to the invited error doctrine, a party may not challenge as error “a ruling or other trial proceeding invited by that party.”

15. The trial court does not abuse its discretion by refusing to engage in a “guessing game” to determine the scope of a party’s arguments.

16. An appellate court will not consider an issue not raised in the trial court and raised for the first time on appeal.

17. The court quoted Sherlock Holmes in describing circumstantial evidence.

18. An appellant abandons a claim when he or she "raises it in a perfunctory manner without supporting arguments and authority."

19. In parsing the distinction between actual waiver and preservation, the court explained that although an appellee "may not have necessarily 'waived'" the issue, by failing to present "arguments and authorities supporting" the issue, she "certainly did not properly raise and preserve it either."

20. "[A]ny pleading issues 'dissipate' when the district court evaluates the sufficiency of the evidence at summary judgment."

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