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Evidence

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by Marc T. Treadwell*

I. INTRODUCTION

Previous surveys have addressed the trend—or at least what the author perceives to be the trend—of the Eleventh Circuit Court of Appeals in recent years to defer to district court judges' evidentiary decisions. This recent trend can be contrasted with the activism displayed by Eleventh Circuit judges in decisions discussed in earlier survey articles.[1] The effects of this more recent trend are fewer cases in which the Eleventh Circuit devotes extensive examination of evidentiary issues and, when evidentiary issues are addressed, marked deference to district court judges. Although this trend appeared to continue during the current survey period,[2] two decisions stand in contrast. The Eleventh Circuit's Rule 404(b) analysis in *United States v. Utter*,[3] recalls the days when the Eleventh Circuit frequently, and seemingly routinely, reversed convictions because of the improper admission of Rule 404(b) evidence. In *Joiner v. General Electric Co.*,[4] the Eleventh Circuit intensively scrutinized a district court's reasons for excluding expert testimony pursuant to the Supreme Court's recent decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[5] and concluded that this reasoning did not pass muster.

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1. *See, e.g.*, Marc T. Treadwell, *Evidence*, 38 MERCER L. REV. 1253 (1986); Marc T. Treadwell, *Evidence*, 39 MERCER L. REV. 1259 (1987); Marc T. Treadwell, *Evidence*, 40 MERCER L. REV. 1291 (1988).

2. This Article surveys significant evidence decisions of the United States Supreme Court, Eleventh Circuit Court of Appeals, and the district courts within the Eleventh Circuit, rendered between January 1 and December 31, 1996.

3. 97 F.3d 509 (11th Cir. 1996).

4. 78 F.3d 524 (11th Cir. 1996).

5. 509 U.S. 579 (1993).

II. ARTICLE I: GENERAL PROVISIONS

Rule 101 provides that the Federal Rules of Evidence "govern proceedings in the courts of the United States."[6] However, this rule of general application is subject to exceptions, particularly in diversity cases or other cases in which state law provides the rule of decision. In some cases, the Rules themselves provide express exceptions. Rule 302 provides that the effect of presumptions of fact in civil actions governed by state law must be determined in accordance with that state's law.[7] Similarly, privilege and competency issues are resolved by the law of the state providing the rule of decision.[8]

Even in the absence of express exceptions, the Rules sometimes must yield to state law. In diversity actions, substantive issues are decided in accordance with state law and procedural issues are governed by federal procedural law. Thus, the admissibility of evidence, because it is a procedural matter, is governed by the Federal Rules of Evidence.[9] However, the Rules do not apply to every evidentiary issue in diversity cases. A state rule of evidence may apply if it concerns a matter of "substantive law." For example, the parol evidence rule and issues relating to burden of proof are considered substantive, and thus governed by state law.[10] Similarly, res ipsa loquitur, although a rule of evidence, is also a matter of substantive law, and thus must be followed by a district court in a diversity action.[11] Unfortunately, the determination of whether a state rule of evidence is substantive or procedural is not always easy.

The dividing line can be said to be the point at which evidentiary rules reflect state policy. For example, the Tenth Circuit has held that a state law prohibiting the admission of evidence of failure to use a seat belt is not simply a rule of evidence which "we could then ignore," but rather is a statement of substantive law "'concerned with the channelling of behavior outside the courtroom, and where, as in this case, the behavior in question is regulated by state law rather than by federal law, state law should govern even if the case happens to be in federal court.'"[12]

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6. FED. R. EVID. 101.
7. FED. R. EVID. 302.
8. FED. R. EVID. 501, 601.
9. Borden, Inc. v. Florida E. Coast Ry., 772 F.2d 750 (11th Cir. 1985).
10. *See* Wynfield Inns v. Edward Leroux Group, Inc., 896 F.2d 483 (11th Cir. 1990); General Motors Acceptance Corp. v. Marlar, 761 F.2d 1517 (11th Cir. 1985).
11. Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734 (5th Cir. 1980).
12. Gardner v. Chrysler Corp., 89 F.3d 729, 736 (10th Cir. 1996) (quoting Barron v. Ford Motor Co., 965 F.2d 195, 199 (7th Cir.), *cert. denied*, 506 U.S. 1001 (1992)).

It is beyond the scope of this Article to discuss in depth the many difficult issues raised by conflicts between state evidentiary rules and the Federal Rules of Evidence. It is, however, appropriate to note the difficulty the Eleventh Circuit, and district courts within the Eleventh Circuit, have faced with regard to one particular area of conflict—legislation modifying state rules of evidence to accomplish "tort reform." At least two Alabama district courts, one of which was affirmed by the Eleventh Circuit without opinion, have held that collateral source rules (rules determining whether a jury may be told that a plaintiff has received payment from "collateral sources," e.g., health insurance), which arguably are substantive to the extent they affect the scope of recoverable damages, are really rules of evidence, and thus inapplicable in diversity actions.[13] However, when a third Alabama district court held that the state legislature's tort reform motivated modification of the collateral source rule was procedural, and thus not applicable in federal court, the Eleventh Circuit, in *Bradford v. Bruno's, Inc.*,[14] reversed, holding that collateral source rules are substantive law and must be applied in diversity cases.[15]

During the current survey period, the Eleventh Circuit revisited *Bradford*[16] to address plaintiff's motion for rehearing in which plaintiff asked the court to hold its opinion in abeyance pending the outcome of state court litigation attacking the constitutionality of the modification of the collateral source rule. As it turned out, the Alabama Supreme Court held the statute unconstitutional.[17] Accordingly, the Eleventh Circuit withdrew its opinion. In a substituted opinion, the court held that the district court's decision not to apply the new collateral source rule was correct even though its reasoning was not and, therefore, affirmed the district court.[18]

Notwithstanding the Eleventh Circuit's substitute opinion, it would appear that the Eleventh Circuit has quelled the Northern District of Alabama's revolt. Thus, for the moment at least, district courts are bound to apply state collateral source rules. However, this raises more questions than it answers. For example, the Georgia rule governing the admissibility of subsequent remedial measures differs from Rule 407, the Federal Rules provision governing the admissibility of subsequent

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13. Craig v. F.W. Woolworth Co., 866 F. Supp. 1369 (N.D. Ala. 1993), *aff'd*, 38 F.3d 573 (11th Cir. 1994); Killian v. Melser, 792 F. Supp. 1217 (N.D. Ala. 1992).

14. 41 F.3d 625 (11th Cir. 1995), *withdrawn*, 94 F.3d 621 (11th Cir. 1996).

15. 41 F.3d at 626.

16. Bradford v. Bruno's, Inc., 94 F.3d 621 (11th Cir. 1996).

17. American Legion Post No. 57 v. Leahey, 681 So. 2d 1337 (Ala. 1996).

18. *Bradford*, 94 F.3d at 623.

remedial measures.[19] Given the policy concerns undergirding the question of whether evidence of subsequent remedial measures should be admitted, it certainly could be argued that Georgia's decision to allow or not allow such evidence is "substantive." Similarly, Rule 409 flatly prohibits the admission of evidence that a party paid or offered to pay medical, hospital, or similar expenses, but Georgia law, although currently in a state of some confusion, arguably allows the admission of such evidence in some circumstances as an admission of liability.[20] Again, Georgia's rule is based on policy intended to "channel behavior," that is, to encourage, or at least not discourage, citizens to compensate those they have injured. Practitioners should be aware of the issues, and opportunities, presented by conflicts between the Federal Rules of Evidence and state evidentiary rules.

Rule 106, sometimes called the "rule of completeness," permits a party to insist on the introduction of an entire document when the adverse party has introduced only a portion of the document.[21] Although Rule 106 mentions documents only, the same standard applies to conversations.[22] In *United States v. Range*,[23] defendant contended that the district court improperly barred him from cross-examining the arresting officer to establish that defendant stated to the arresting officer that a codefendant had committed certain acts. Defendant argued that because the government introduced a portion of his statement through the arresting officer's testimony, he should have been allowed, pursuant to Rule 106, to introduce the remaining portion. The Eleventh Circuit disagreed, concluding that the remainder of the defendant's statements were not relevant.[24] The Eleventh Circuit also noted that the admission of the remainder of the statement would have deprived the codefendant of his Sixth Amendment right to confront the witnesses against him.[25] This dilemma, the Eleventh Circuit noted, restricts the scope of Rule 106.[26] "When multiple defendants are involved and statements have been redacted to avoid *Bruton* problems, the 'rule of completeness' is 'violated only when the statement in its edited form . . . effectively distorts the meaning of the statement or excludes information

19. *Compare* General Motors Corp. v. Moseley, 213 Ga. App. 875, 447 S.E.2d 302 (1994) *with* Wood v. Morbark Indus., 70 F.3d 1201 (11th Cir. 1995).

20. *See* Rosequist v. Pratt, 201 Ga. App. 45, 410 S.E.2d 316 (1991); Neubert v. Vigh, 218 Ga. App. 693, 462 S.E.2d 808 (1996).

21. FED. R. EVID. 106.

22. *See* United States v. Haddad, 10 F.3d 1252, 1258 (7th Cir. 1993).

23. 94 F.3d 614 (11th Cir. 1996).

24. *Id.* at 620-21.

25. *Id.* at 621.

26. *Id.*

substantially exculpatory of the nontestifying defendant.'"[27] The Eleventh Circuit concluded that the portion of defendant's statement admitted by the district court did not distort defendant's statement in its entirety and, therefore, Rule 106 did not require the admission of the remainder of the statement.[28]

III. ARTICLE III: PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Federal common law recognizes the presumption that an item properly mailed was received by the addressee. In *Konst v. Florida East Coast Railway*,[29] the Eleventh Circuit addressed the issue of whether this presumption could be invoked in the context of the claims procedures for filing claims against rail carriers. In *Konst*, plaintiffs claimed that they filed their claim for damages to their belongings against the railroads transporting the belongings within the nine-month statute of limitations. The railroads contended they never received the claim. They contended, and the district court agreed, that the presumption of receipt is not applicable because the "applicable federal regulation requires that claims be *filed* with the carrier."[30] Thus, the railroads and the district court distinguished "filing" from "receipt." However, the Eleventh Circuit noted that the regulations imposed requirements on the railroads based upon the receipt of the claim: "[h]aving determined that the governing regulations contemplate receipt as the trigger for processing a claim, we see no reason that the presumption of receipt should not apply in this case."[31] Although the court acknowledged that some courts had held that the presumption of receipt could not be implied in cases involving filing requirements, the Eleventh Circuit found those cases distinguishable on their facts, and thus reversed the district court.[32]

Federal common law also recognizes the adverse inference presumption in civil cases when witnesses invoke their Fifth Amendment rights not to incriminate themselves.[33] Thus, although a witness may invoke the Fifth Amendment in civil proceedings, the jury or the court, as trier of fact, may infer that the witness's testimony would be harmful to the witness. In *United States v. Two Parcels of Real Property*,[34] appellants

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27. *Id.* (quoting United States v. Lopez, 898 F.2d 1505, 1511 n.11 (11th Cir. 1990)).
28. *Id.*
29. 71 F.3d 850 (11th Cir. 1996).
30. *Id.* at 853.
31. *Id.*
32. *Id.* at 854-55.
33. *See* Baxter v. Palmigiano, 425 U.S. 308, 318 (1976); United States v. Premises Located at Route 13, 946 F.2d 749, 756 (11th Cir. 1991).
34. 92 F.3d 1123 (11th Cir. 1996).

contended that this presumption could not be invoked in forfeiture cases. Appellants relied upon recent decisions holding that "so-called civil forfeiture is no longer civil and that the criminal rule should apply."[35] However, the Eleventh Circuit relied on the Supreme Court's holding in *United States v. Ursery*[36] that the double jeopardy clause is not implicated by civil in rem forfeitures. Thus, forfeiture proceedings are sufficiently civil in nature to allow the use of the adverse inference presumption.

IV. ARTICLE IV: RELEVANCY AND ITS LIMITS

Rule 404 is the principal rule of evidence governing the admissibility of "extrinsic act evidence"—evidence of acts and transactions other than the one at issue.[37] The rule is intended to prevent the admission of evidence of misconduct on other occasions solely to prove that a defendant is more likely to have committed the charged offense.[38] As noted in a previous survey,[39] the level of scrutiny in Rule 404(b) determinations has seemingly become increasingly relaxed over the years. Earlier surveys addressed cases in which the Eleventh Circuit reviewed extrinsic act evidence in minute and painstaking detail, a review arguably inconsistent with the abuse of discretion standard of review applicable to evidentiary determinations. More recently, however, the Eleventh Circuit seems to have taken a markedly different course, and now generally defers to the discretion of district court judges.

Arguably, however, the Eleventh Circuit's decision in *United States v. Utter*[40] departs from this more relaxed scrutiny. In *Utter*, defendant, who was convicted of charges arising from a fire at his business, contended that the district court improperly admitted extrinsic act evidence. The Eleventh Circuit agreed and reversed defendant's conviction.[41] In its analysis, the Eleventh Circuit first acknowledged

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35. *Id.* at 1129.

36. 116 S. Ct. 2135 (1996).

37. FED. R. EVID. 404. Rule 404 governs the admissibility of extrinsic act evidence offered for substantive purposes. *Id.* If the extrinsic act evidence is offered to impeach or bolster a witness, then the admissibility of the evidence is determined by the rules found in Article VI, principally Rule 608, which addresses the use of character evidence and evidence of specific instances of conduct. FED. R. EVID. 608.

38. Although Rule 404(b) is not limited by its terms to criminal cases, the Rule is rarely mentioned in civil cases, although the admissibility of extrinsic act evidence is frequently an issue in civil cases. For example, a plaintiff in a personal injury case may proffer evidence of prior accidents to demonstrate a defendant's notice of a defective condition. *See, e.g.*, Hessen v. Jaguar Cars, 915 F.2d 641 (11th Cir. 1990).

39. Marc T. Treadwell, *Evidence*, 44 MERCER L. REV. 1173, 1209-10 (1992).

40. 97 F.3d 509 (11th Cir. 1996).

41. *Id.* at 516.

the three-part *Beechum*[42] test applied by the Eleventh Circuit when considering the admission of extrinsic act evidence.[43] First, the extrinsic act evidence must be relevant to an issue other than a defendant's character.[44] Second, the prosecution must prove a defendant committed the extrinsic act.[45] The prosecution need not prove this element beyond a reasonable doubt; proof by a preponderance of the evidence is sufficient.[46] Third, the evidence must not contravene Rule 403, meaning that the probative value of the extrinsic act evidence must not be substantially outweighed by its prejudicial effect.[47]

In *Utter*, the district court admitted the testimony of a tenant of defendant that the defendant threatened to "burn her out" in connection with a rent dispute, a matter unrelated to the arson-related charges against defendant.[48] The prosecution argued that the evidence was relevant to demonstrate defendant's reaction to financial stress, apparently that he reacted to stress by starting fires. The Eleventh Circuit concluded that this evidence simply showed defendant's alleged propensity to commit arson and was not relevant to any issue at defendant's trial.[49] Specifically, the threat did not relate to insurance fraud, the alleged scheme underlying the charged offense.[50] Thus, the Eleventh Circuit concluded that the district court abused its discretion in admitting this testimony.[51]

The prosecution also tendered, and the district court admitted, the testimony of defendant's girlfriend concerning a fire at defendant's previous home. At a pretrial hearing, the government represented that the girlfriend would testify that defendant paid someone to burn his home.[52] At trial, however, the girlfriend claimed she could not recall

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42. United States v. Beechum, 582 F.2d 898 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979).

43. *Beechum* has been applied by the Eleventh Circuit since its creation, and was adopted by the Eleventh Circuit en banc in *United States v. Miller*, 959 F.2d 1535, 1538 (11th Cir.) (en banc), *cert. denied*, 506 U.S. 942 (1992).

44. *Miller*, 959 F.2d at 1538.

45. *Id.*

46. Huddleston v. United States, 485 U.S. 681, 689 (1988).

47. *Miller*, 959 F.2d at 1538.

48. 97 F.3d at 513.

49. *Id.* at 515.

50. *Id.*

51. *Id.*

52. The government also argued that this testimony was "inextricably intertwined" with the charged offense and, thus, was not extrinsic act evidence subject to Rule 404(b) analysis. 97 F.3d at 514. This argument was based on defendant's failure to reveal the previous fire in an application for insurance for the property burned in the charged offense. The Eleventh Circuit rejected this argument because defendant never procured insurance

defendant's statements about the prior fire. Accordingly, the government offered no proof that defendant started the fire in his former home, and thus, the evidence did not satisfy the second prong of the *Beechum* test—the prosecution failed to prove that defendant committed the extrinsic act.[53] Finding this evidence highly prejudicial and concluding that the government's case against defendant was "extremely close," the Eleventh Circuit concluded that the admission of this evidence was harmful error.[54]

Judge Cox dissented.[55] With regard to the evidence of the prior fire, Judge Cox argued that the district court's initial determination that the evidence was admissible, based upon the prosecution's representation that the girlfriend would testify that defendant paid someone to burn his home, was clearly not an abuse of discretion.[56] Judge Cox could not fault the district court for the girlfriend's apparent "lapse of memory."[57] Thus, the district court's pretrial determination that the evidence was admissible was correct, and because that was the error complained of, defendant's conviction should not have been reversed.[58]

The tenant's testimony that defendant threatened to "burn her out" was offered for the limited purpose of supporting the credibility of witnesses who had testified about defendant's threats to burn his business.[59] Because the testimony of these witnesses was uncontradicted, Judge Cox concluded that the tenant's testimony was relatively inconsequential and could not have substantially influenced the jury.[60]

Finally, Judge Cox disagreed that the case against defendant was close. He viewed the evidence, when viewed in the light most favorable to the government, as "substantial."[61]

Essentially, the difference between the majority and the dissent seems to be one of degree. The majority evaluated the evidence in great detail; the dissent would defer to the trial court's discretion. In other Rule 404(b) decisions during the survey period, the Eleventh Circuit employed

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pursuant to that application. Rather, the insurance in question was procured by defendant's mortgagor. *Id.*

53. *Id.* at 514.

54. *Id.* at 515. Arguably, this reasoning is inconsistent with previous Eleventh Circuit pronouncements that extrinsic act evidence is more likely to be admitted when the government has a greater need, i.e., a weaker case.

55. *Id.* at 516.

56. *Id.* at 516-17.

57. *Id.* at 517.

58. *Id.*

59. *Id.* at 518.

60. *Id.*

61. *Id.*

a more relaxed review of district court decisions to admit extrinsic act evidence.[62]

The Eleventh Circuit's decision in *Wood v. Morbark Industries, Inc.*[63] should be studied carefully by personal injury lawyers, and merits extended discussion. In *Wood*, plaintiff alleged that defendant's defective wood chipper caused the death of her husband. Specifically, she contended that the chipper's infeed chute was too short. The district court granted defendant's motion in limine to exclude "evidence of post-accident design changes that lengthened the infeed chute."[64] However, during the trial, defendant's counsel repeatedly elicited testimony implying that the shorter chute was the safest chute available and was still in use by the decedent's employer and other employers. At one point during the trial, the district court ruled that defendant had opened the door to evidence of subsequent remedial measures and allowed plaintiff to elicit testimony from the decedent's employer that, although it continued to use the wood chipper, a longer chute had been added. However, at a later point in the trial, the court rebuked plaintiff's counsel when he attempted to demonstrate, after defendant's expert testified that the shortest chute was the "safest length chute you could possibly put on the machine,"[65] that defendant was now selling chippers with longer chutes. The district court also instructed the jury to disregard any testimony concerning longer chutes. The jury found for defendant and, on appeal, the Eleventh Circuit reversed.[66]

First, however, the Eleventh Circuit rejected plaintiff's argument that Rule 407 does not apply in strict liability cases, but rather is limited to actions based on negligence.[67] The court acknowledged that other circuits were split on this issue, and that the Eleventh had yet to tackle it.[68] For now, the court was content to let the matter be. Perhaps indicating some desire to limit the application of Rule 407 in strict liability cases, however, the court narrowed its holding: "[c]onfronted with this precise issue today, we hold that Rule 407 does not apply in strict products liability cases when the plaintiff alleges that a product is defective because the design is unreasonably dangerous."[69]

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62. United States v. Tokars, 95 F.3d 1520, 1537 (11th Cir. 1996); United States v. Key, 76 F.3d 350, 354 (11th Cir. 1996); United States v. Paradies, 98 F.3d 1266, 1291 (11th Cir. 1996).

63. 70 F.3d 1201 (11th Cir. 1995).

64. *Id.* at 1203.

65. *Id.* at 1205.

66. *Id.* at 1209.

67. *Id.* at 1206-07.

68. *Id.* at 1207.

69. *Id.* at 1206.

Plaintiff also argued that the Eleventh Circuit should follow Florida law governing the admission of evidence of subsequent remedial measures because this issue presents "a matter of state policy."[70] The court rejected this argument, holding that the Federal Rules apply to procedural matters, including the admissibility of evidence.[71]

However, the court agreed that the district court abused its discretion in its handling of plaintiff's efforts to rebut defendant's implications that the shorter chute was still in service, had not been modified, and was the safest chute available.[72] Although the district court correctly allowed plaintiff to respond to defendant's earlier abuse of its order in limine prohibiting the admission of subsequent remedial efforts, it incorrectly restricted plaintiff's efforts to respond to defendant's expert's testimony that the shorter chute was the "safest length chute you could possibly put on the machine."[73] In response, plaintiff's counsel should have been allowed to ask why this "supposedly safest design possible was modified after the accident involving [plaintiff's decedent]."[74] Although the mere failure to allow an impeachment, by itself, would not be enough to show an abuse of the trial court's discretion, the exclusion of the evidence in conjunction with a direction to the jury to ignore such evidence from any witness amounted to an abuse of discretion.[75]

The Eleventh Circuit's refusal in *Morbark* to limit Rule 407 to negligence actions underscores a key difference between Rule 407 and Georgia's Rule of Evidence governing subsequent remedial measures. In *General Motors Corp. v. Moseley*,[76] the Georgia Court of Appeals held that evidence of subsequent remedial measures is admissible in strict liability actions.[77] Accordingly, lawyers representing plaintiffs in products liability actions in which diversity jurisdiction is present should be aware of the opportunities to expand the scope of admissible evidence, and defendants' attorneys considering removal should be aware of possible risk.

V. ARTICLE V: PRIVILEGES

It has long been held that the Fifth Amendment privilege against self-incrimination cannot be invoked by corporations, and thus cannot protect

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70. *Id.* at 1207.

71. *Id.* at 1207-08. (Arguably, this conflicts with the Eleventh Circuit's decision in *Bradford*, discussed above).

72. *Id.* at 1208.

73. *Id.* (citations omitted).

74. *Id.*

75. *Id.*

76. 213 Ga. App. 875, 447 S.E.2d 302 (1994).

77. *Id.* at 882, 447 S.E.2d at 309-10.

a custodian of corporate records from producing those records.[78] However, the line between an individual's right to invoke the Fifth Amendment and the principle that corporations cannot invoke the privilege is not always bright.[79] In *In re Grand Jury Subpoena dated April 9, 1996 (FGJ 96-02) v. Smith*,[80] the Eleventh Circuit addressed the issue of whether a corporate records custodian who is not in possession of the records may be compelled to testify regarding their location. In *Smith*, a subpoenaed corporate records custodian testified before a grand jury that she did not have the records. When asked where the records were, she invoked her Fifth Amendment right not to incriminate herself. The district court ordered the custodian to testify and, when she refused, held her in civil contempt.[81]

On appeal, the Eleventh Circuit noted that a corporate records custodian may not refuse to produce subpoenaed documents even though those documents may incriminate the corporation.[82] Nor may the custodian refuse to produce corporate records that may incriminate the custodian.[83] Even when the act of producing the records incriminates the custodian, the custodian still must comply with a subpoena ordering the production of those records.[84] However, although the custodian may not refuse to produce the records, he cannot be compelled to answer questions pertaining to the whereabouts of those records.[85] The district court distinguished this latter principle, established in *Curcio v. United States*,[86] on the grounds that the witness in *Curcio* appeared before the grand jury pursuant to a personal subpoena and not in his capacity as the records custodian. This distinction did not impress the Eleventh Circuit. The court concluded that the fact that the subpoena in *Curcio* was addressed to the witness personally, rather than to the corporation, was not material to the Supreme Court's holding.[87] Rather, the Supreme Court clearly created a distinction between the act of production, which cannot be avoided, and giving oral testimony, which is

78. Bellis v. United States, 417 U.S. 85 (1974).
79. *See, e.g.*, *In re* Grand Jury No. 86-3 (Will Roberts Corp.), 816 F.2d 569 (11th Cir. 1987).
80. 87 F.3d 1198 (11th Cir. 1996).
81. *Id.* at 1199.
82. *Id.* at 1200.
83. *Id.*
84. *Id.*
85. *Id.* at 1201.
86. 354 U.S. 118 (1957).
87. 87 F.3d at 1202.

subject to the Fifth Amendment privilege against self-incrimination.[88] Accordingly, the Eleventh Circuit reversed.[89]

Also during the survey period, the Supreme Court held that communications between a patient and psychotherapist are privileged under Rule 501.[90]

VI. ARTICLE VI: WITNESSES

Federal Rule of Evidence 610 prohibits the use of religion to impeach a witness's credibility.[91] However, as illustrated in *United States v. Beasley*,[92] Rule 610 does not render evidence of religious beliefs generally inadmissible. In *Beasley*, defendants were convicted of racketeering charges arising from the activities of their religious cult. Central to the government's case was defendants' manipulation of religious beliefs to exhort their followers to commit crimes. Accordingly, the district court admitted extensive evidence of the defendants' religious beliefs and practices.[93] This evidence, involving as it did racist demagoguery, was highly prejudicial to the defense. The Eleventh Circuit acknowledged that religious beliefs are not admissible to impeach a witness's credibility, but also acknowledged that such beliefs are admitted when probative of an issue in a criminal prosecution.[94] Here, evidence of defendants' religious beliefs was "highly relevant to the jury's understanding of the existence, motives, and objectives of the . . . conspiracy and the means by which it was conducted."[95] Accordingly, the Eleventh Circuit affirmed defendants' convictions.[96]

VII. ARTICLE VII: OPINIONS AND EXPERT TESTIMONY

As discussed in previous surveys, the Supreme Court held in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[97] that the Federal Rules of Evidence preempted decades of court decisions governing the admission of expert testimony.[98] Because the Court in *Daubert* did not enunciate a "definitive checklist or test," but rather structured a loose framework

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88. *Id.*
89. *Id.* at 1199.
90. Jaffee v. Redmond, 116 S. Ct. 1923 (1996).
91. FED. R. EVID. 610.
92. 72 F.3d 1518 (11th Cir. 1996).
93. *Id.* at 1524-25.
94. *Id.* at 1527.
95. *Id.*
96. *Id.* at 1530.
97. 509 U.S. 579 (1993).
98. Marc T. Treadwell, *Evidence*, 45 MERCER L. REV. 1291, 1298-99 (1994); Marc T. Treadwell, *Evidence*, 46 MERCER L. REV. 1377, 1385 (1995).

to be applied by district judges,[99] it seemed clear that the true effect of the decision would likely be unknown until decisions made their way up the appellate ladder. This has proved to be the case, and during the current survey, the Eleventh Circuit rendered its most important decision to date interpreting *Daubert*. This decision merits detailed discussion.

In *Joiner v. General Electric Co.*,[100] plaintiff alleged that his lung cancer was caused by exposure to PCBs and brought suit against the parties allegedly responsible for his PCB exposure. Defendants moved for summary judgment and the district court granted summary judgment after concluding that plaintiff's expert testimony was inadmissible.[101] On appeal, the Eleventh Circuit acknowledged that *Daubert* established a "gatekeeper" role for district courts in assessing the admissibility of expert testimony.

> This "gatekeeping" role calls for the trial judge to make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid, i.e., whether it is reliable; and whether that reasoning or methodology properly can be applied to the facts in issue," i.e., whether it is relevant to the issue involved. Proffered scientific evidence must satisfy both prongs to be admissible.[102]

As gatekeeper, the district court must first examine the reasoning or methodology undergirding the expert's opinion and assess whether it is sufficiently reliable.[103] However, the district court must "be careful not to cross the line between deciding whether the expert's testimony is based on 'scientifically valid principles' and deciding upon the correctness of the expert's conclusions."[104] Second, the district court must determine whether the methodology or reasoning assists the trier of fact in understanding the matter at issue.[105]

At that point, the Eleventh Circuit took an interesting turn. Many have thought that *Daubert* heightened the level of scrutiny for expert evidence, and the gatekeeper role assigned to district judges increased their authority to dispatch experts from the courtroom. Not so, said the Eleventh Circuit. On the contrary, the Supreme Court intended in "*Daubert* to loosen the strictures of [the common law 'general acceptance' test] and make it easier to present legitimate conflicting views of experts

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99. *Daubert*, 509 U.S. at 593.
100. 78 F.3d 524 (11th Cir. 1996).
101. *Id.* at 528.
102. *Id.* at 530 (quoting *Daubert*, 509 U.S. at 580).
103. *Id.*
104. *Id.*
105. *Id.*

for the jury's consideration."[106] It is no longer necessary that expert evidence satisfy the "general acceptance" test.[107] Rather, it is only necessary that the evidence be "scientifically legitimate, and not 'junk science' or mere speculation."[108] Certainly in this role judges are not to assume the role of juries and weigh facts. "Keeping *Daubert*'s lower threshold in mind," the Eleventh Circuit turned to the facts of *Joiner*.[109]

The Eleventh Circuit's statement of the standard of admissibility arguably presaged its ultimate conclusion. Although acknowledging that rulings on admissibility of evidence are subject to the abuse of discretion standard, the court noted that the Federal Rules of Evidence favored the admissibility of expert testimony and "appl[ied] a particularly stringent standard of review to the trial judge's exclusion of expert testimony."[110] Moreover, the district court's interpretation of a rule of evidence is not subject to the abuse of discretion standard, but rather presents a question of law subject to plenary review.[111]

Applying the first prong of *Daubert*, the Eleventh Circuit proceeded to determine whether the district court properly identified the bases of the experts' opinions and whether the methods, procedures, and information used by the experts were reliable. Upon reviewing these bases, the Eleventh Circuit concluded that "each utilized scientifically reliable methods and procedures in gathering and assimilating all of the relevant information in forming their respective opinions."[112] The Eleventh Circuit, focusing on the district court's conclusion that "the studies simply do not support the experts' opinion that PCBs *more probably than not* promoted Joiner's lung cancer," criticized the district court for ruling on the correctness of the experts' opinions rather than on their reliability.[113]

The second prong of *Daubert* essentially involves a relevancy analysis—whether the experts' reasoning and methodology fit the facts of the case. The district court concluded, in part, that the experts' opinions were not relevant because the experts assumed that Joiner was exposed to furans and dioxins, derivatives of PCBs. The district court apparently concluded that plaintiff's experts' opinions were contingent

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106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 529.
111. *Id.*
112. *Id.* at 532.
113. *Id.* at 524 (quoting Joiner v. General Elec. Co., 864 F. Supp. 1310, 1326 (N.D. Ga. 1994)).

upon exposure to furans and dioxins and because there was insufficient evidence to establish such exposure, summary judgment on this issue was appropriate. The Eleventh Circuit's review of the evidence established, at least to its satisfaction, that the experts' opinions were not necessarily contingent upon exposure to furans and dioxins.[114] In any event, the Eleventh Circuit found evidence, based upon one expert's testimony that conditions existed that would have led to the breakdown of PCBs into furans or dioxins, that plaintiff was exposed to those toxins.[115] Thus, this was an issue of disputed fact and could not be resolved by summary judgment.

In a special concurrence, Judge Birch agreed that the district court's role is limited to establishing that expert opinions have some minimal level of reliability and probative value.[116] It is not the role of district courts, Judge Birch wrote, to weigh the evidence.[117]

Judge Smith, in dissent, sharply criticized the majority from start to finish, beginning with the majority's statement of the standard of review which Judge Smith felt was not sufficiently "precise."[118] Although Judge Smith agreed that the exclusion of expert testimony required a "particularly stringent" review on appeal, this did not change the abuse of discretion standard.[119] Rather, this simply meant that the court should undertake a searching review of the record but continue to apply the abuse of discretion standard.[120] And while he agreed that the question of whether the trial court applied the proper *Daubert* standard was a question of law subject to plenary or de novo review,[121] the question of whether the district court properly concluded that the proffered evidence satisfied *Daubert* is subject to the abuse of discretion standard.[122]

Next, Judge Smith criticized the majority for examining the proffered expert testimony as a whole rather than examining separately each proffered opinion. Thus, for example, the opinions that furans and dioxins were present and that furans and dioxins caused plaintiff's

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114. *Id.* at 529.
115. *Id.* at 528.
116. *Id.* (Birch, J., concurring specially).
117. *Id.*
118. *Id.* at 535 (Smith, J., dissenting).
119. *Id.*
120. *Id.*
121. Actually, Judge Smith criticized the use of the term "de novo" for not accurately describing the review process. He preferred the phrase "complete and independent review." *Id.* at 536.
122. *Id.*

cancer should be analyzed separately.[123] The district court properly examined each opinion and the majority unfairly criticized the district court for not viewing the bases of the experts' opinions as a whole.[124] Judge Smith's apparent point was that the proponent of the evidence should shoulder the burden of proving, for example, that each study supports the particular opinion rather than "bombard[ing] the court with innumerable studies and then, with blue smoke and sleight of hand, leap[ing] to the conclusion."[125] This point, that the party producing the evidence should be prepared to support it, proved to be the central theme of Judge Smith's dissent.

With regard to the majority's conclusion that the district court abused its discretion when it concluded that there was insufficient evidence to establish that plaintiff was exposed to furans or dioxins and, in particular, that plaintiff failed to show that PCBs were exposed to conditions that would have produced furans and dioxins, Judge Smith returned to his point that the proponent of the expert testimony must point to the facts establishing that the evidence satisfies *Daubert*.[126] Although Judge Smith conceded that the majority found a "minor passage" from one expert's affidavit stating that such conditions were present, he did not feel that the district court should be reversed for "overlooking [this] minor passage."[127] Noting that plaintiff did not cite this evidence at the district court, or on appeal, and that it "would have been forever lost had it not been for the diligent, searching eye of the majority,"[128] Judge Smith did not think it fair to castigate the district court for not conducting its own exacting search.

> I am not prepared to encourage litigants to inundate the courts with raw data and force the courts to process the data to determine why certain evidence is admissible. The litigants and their experts should know their evidence better than anyone—they should be their own advocates for its admission.[129]

Thus, Judge Smith concluded that the trial court did not abuse its discretion when it determined that plaintiffs failed to meet their burden of proving that the experts' opinions that furans and dioxins were present satisfied *Daubert*.[130] For the same reason, their opinions that

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123. *Id.* at 537.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 538.

plaintiff's cancer was caused by exposure to furans and dioxins did not "fit" the case, and thus was not relevant and failed to satisfy the second prong of *Daubert*.[131]

With regard to the district court's alternative ground for summary judgment—that the studies relied upon by the experts did not fit the facts of the case, and thus were not relevant, Judge Smith would also affirm.[132] Examining the studies, Judge Smith again concluded that plaintiffs simply failed to meet their burden. "It is incumbent on the proponent of scientific evidence to fill the analytical gap between a proffered study and the particular facts of the case"[133] and plaintiffs did not meet this burden. With regard to the majority's focus on the district court's statement that the studies "'do not support the experts' position that PCBs *more probably than not* promoted Joiner's lung cancer,'"[134] Judge Smith thought the majority was simply too picky. "By directing attention away from the trial court's choice of terminology and towards its actual analysis, I conclude that the trial court did not abuse its discretion in ruling each study inadmissible."[135] The actual analysis, Judge Smith wrote, showed that the trial court did not assess the correctness of the experts' opinions but simply whether they "fit" the facts of the case.[136]

The disagreement between the majority and the dissent regarding the precise details of proper *Daubert* analysis notwithstanding, *Joiner* is most significant for its pronouncement that *Daubert* expands the scope of permissible expert testimony. However, if the vigorous debate between the majority and the dissent is any indication, *Joiner* undoubtedly will not be the last word on this issue.

VIII. ARTICLE VIII: HEARSAY

For only the second survey period since the author has been analyzing Eleventh Circuit decisions, the Eleventh Circuit rendered no significant decision addressing the inherent conflict between the admission of hearsay evidence and the confrontation clause of the Sixth Amendment. Interestingly, the first time was during the previous survey. However, this conflict lingers on the edges of every criminal case in which evidence from an unavailable declarant is admitted, and criminal law practitio-

131. *Id.*
132. *Id.*
133. *Id.* at 539.
134. *Id.* (quoting *Joiner*, 864 F. Supp. at 1326).
135. *Id.* at 540.
136. *Id.*

ners should keep abreast of the Eleventh Circuit's treatment of this issue. These decisions are chronicled in past survey articles.

Rule 801(d)(1)(B) provides that a statement is not hearsay if it is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."[137] In last year's survey,[138] the author discussed the Supreme Court's decision in *Tome v. United States*,[139] resolving a conflict among the circuits with regard to Rule 801(d)(1)(B). The Eleventh Circuit had long recognized that a prior consistent statement could be admitted pursuant to Rule 801(d)(1)(B) even though the prior statement was made after the declarant developed a motive to fabricate.[140] However, in *Tome*, the Supreme Court held that a prior consistent statement is not admissible to rebut a charge of recent fabrication unless the statement was made before the alleged fabrication was made.[141]

During the current survey, the Eleventh Circuit addressed this issue in *United States v. Paradies*.[142] In *Paradies*, the district court, before the Supreme Court's decision in *Tome*, held that prior consistent statements made after the alleged motivation to fabricate arose were admissible pursuant to Rule 801(d)(1)(B). On appeal, the parties agreed that, in view of the subsequent decision in *Tome*, this determination was error. However, the Eleventh Circuit nevertheless affirmed, because in its view, the evidence was not offered to prove the truth of the matters asserted in the statements but rather was offered to rehabilitate the witness's testimony.[143] Accordingly, the Eleventh Circuit affirmed defendants' convictions.[144]

Rule 803(3) provides that a statement evidencing a declarant's "state of mind, motion, sensation, or physical condition" is admissible as an exception to the hearsay rule.[145] In *United States v. Tokars*,[146] Rule 803(3) proved to be an effective weapon for the prosecution. In *Tokars*, a highly publicized drug and racketeering case involving an Atlanta attorney who allegedly contracted for the murder of his wife, the district court admitted numerous statements by the wife to friends and relatives.

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137. FED. R. EVID. 801(d)(1)(B).
138. Marc T. Treadwell, *Evidence*, 47 MERCER L. REV. 837, 845-46 (1996).
139. 115 S. Ct. 696 (1995).
140. *See, e.g.*, United States v. Anderson, 782 F.2d 908, 915-16 (11th Cir. 1986).
141. 115 S. Ct. at 705.
142. 98 F.3d 1266 (11th Cir. 1996).
143. *Id.* at 1291.
144. *Id.* at 1292.
145. FED. R. EVID. 803(3).
146. 95 F.3d 1520 (11th Cir. 1996).

These statements generally concerned the wife's desire to divorce defendant and her belief that she could gain custody of her children because she had documents incriminating defendant. Defendant argued that a homicide victim's state of mind is not generally relevant, and should only be admitted when a defendant raises a defense of self-defense, suicide, or accidental death. The Eleventh Circuit disagreed, concluding that the wife's state of mind was relevant to defendant's motive to kill.[147] The Eleventh Circuit apparently was satisfied that the evidence established defendant was sufficiently aware of his wife's state of mind to provide him with this motive. Accordingly, the Eleventh Circuit affirmed.[148]

IX. ARTICLE IX: CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

The best evidence rule of the Federal Rules of Evidence is found in the eight rules set forth in Article X. Although the best evidence rule is often cited as the basis for any objection to the use of a copy of a document or to testimony related to a document, the actual application of the best evidence rule is relatively narrow. For example, in *United States v. Castro*,[149] a witness testified that a local government received in excess of ten thousand dollars in federal grants. Defendants contended that the best evidence rule barred this testimony and that the prosecution should have tendered documents itemizing federal funds received. The Eleventh Circuit disagreed, noting that Rule 1002 applies when a party seeks to establish the contents of documents.[150] Here, the government simply sought to prove that the county received substantially more than ten thousand dollars in federal grants, and not necessarily the exact amount or details surrounding those and other grants.[151] Therefore, the best evidence rule was not implicated.[152]

In *United States v. Bueno-Sierra*,[153] the Eleventh Circuit addressed a recurring issue in the application of the business records exception to the rule against hearsay.[154] In *Bueno-Sierra*, the district court admitted a document prepared by one company and maintained in the records of a second company on the basis of the testimony of a records custodian

147. *Id.* at 1535.
148. *Id.* at 1542.
149. 89 F.3d 1443 (11th Cir. 1996).
150. *Id.* at 1455.
151. *Id.*
152. *Id.*
153. 99 F.3d 375 (11th Cir. 1996).
154. FED. R. EVID. 803(6).

from the second company. Defendants contended that the government could not establish the elements of the business records exception because the custodian had no knowledge of who prepared the documents. The district court admitted the documents on the basis of the Eleventh Circuit's decision in *Baxter Healthcare Corp. v. Healthdyne, Inc.*,[155] a decision discussed in a previous survey.[156] The Eleventh Circuit, however, had vacated its decision in *Baxter Healthcare* because the parties withdrew their appeal,[157] and presumably for this reason, the Eleventh Circuit did not rely on its initial opinion in *Baxter Healthcare* in deciding *Bueno-Sierra*.

Nevertheless, the reference to *Baxter Healthcare* is interesting because the Eleventh Circuit in *Baxter Healthcare* distinguished its decision in *T. Harris Young & Associates v. Marquette Electronics*,[158] a decision also addressed in a previous survey.[159] In *T. Harris Young*, the Eleventh Circuit held that out-of-court statements of customers recounting disparaging comments allegedly made by defendant employees were not admissible under the business records exception because it was not the regular course of the customer's business to report to defendant's employees.[160] In *Baxter Healthcare*, the Eleventh Circuit distinguished *T. Harris Young* on the grounds that the out-of-court declarants were not acting in the regular course of their business.[161] At that time, the author suggested that the difference between *T. Harris Young* and *Baxter Healthcare*, both of which involved customer complaints, was that counsel in *Baxter Healthcare* was astute enough to elicit testimony that the complaining customers were acting in the regular course of their respective businesses, although it seemed that this testimony would be hearsay.[162]

In *Bueno-Sierra*, it seemed that the documents at issue suffered from the same defect as the customer complaints in *T. Harris Young*, where there was no evidence that the company whose custodian tendered the documents prepared the documents or had knowledge of the circumstances surrounding the preparation of the documents. However, the Eleventh Circuit held that the business records exception is not limited to documents about which the business has firsthand knowledge of the

155. 944 F.2d 1573 (11th Cir. 1991), *vacated*, 956 F.2d 226 (11th Cir. 1992).
156. *See* Marc T. Treadwell, *Evidence*, 43 MERCER L. REV. 1173, 1190-92 (1992).
157. 99 F.3d at 378.
158. 931 F.2d 816 (11th Cir.), *cert. denied*, 502 U.S. 1013 (1991).
159. *See* Marc T. Treadwell, *Evidence*, 43 MERCER L. REV. 1173, 1190-92 (1992).
160. 931 F.2d at 828.
161. 944 F.2d at 1577.
162. Marc T. Treadwell, *Evidence*, 43 MERCER L. REV. 1173, 1191-92 (1992).

facts sought to be proved by the admission of the documents.[163] Rather, it is sufficient to establish "that it was the business practice of the recording entity to obtain such information from persons with personal knowledge and the business practice of the proponent to maintain the records produced by the recording entity."[164] The Eleventh Circuit did acknowledge that 803(6) does not necessarily cure double hearsay problems and "each link in the chain of possession must satisfy the requirements of the business records exception or some other exception to the hearsay rule."[165] Here, the custodian testified that the documents in question were regularly maintained in his company's office and that other companies regularly submitted such documents to his company. Finally, the custodian testified, although the basis of this knowledge was not stated, that these companies personally prepare the documents in question. Based on these facts, the Eleventh Circuit concluded that the district court properly admitted the documents pursuant to the business records exception.[166]

163. 99 F.3d at 379.
164. *Id.*
165. *Id.* at 379 n.10.
166. *Id.* at 379.