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Evidence

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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 more to district court judges' evidentiary decisions.[1] This trend can be contrasted with the activism displayed by Eleventh Circuit judges in decisions discussed in earlier survey articles.[2] However, the 1996 Eleventh Circuit decision in *Joiner v. General Electric Co.*[3] bucked this trend and applied a very rigid level of scrutiny to a trial court decision to exclude expert testimony.[4] During the current survey period,[5] the Supreme Court reversed *Joiner* because of its heightened level of scrutiny.[6] It would seem that the Supreme Court has sent a clear message that the abuse of discretion standard of review governing evidentiary issues truly requires an "abuse" of discretion.

II. ARTICLE 1: GENERAL PROVISIONS

Rule 103 of the Federal Rules of Evidence ("Rule 103") requires a party to timely object to rulings on evidence and, if the ruling excludes evidence, make an appropriate offer of proof.[7] During the survey period,

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1. *See, e.g.*, Marc T. Treadwell, *Evidence*, 48 MERCER L. REV. 1607 (1997).

2. *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).

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

4. *Id.* at 533.

5. This Article surveys significant evidence decisions of the Eleventh Circuit Court of Appeals rendered between January 1 and December 31, 1997.

6. *See* General Electric Co. v. Joiner, 118 S. Ct. 512 (1997).

7. FED. R. EVID. 103.

the Eleventh Circuit twice reaffirmed that an unsuccessful motion in limine does not preserve an objection for purposes of a later appeal.[8] Thus, a party must still timely object at trial to the admission of the evidence. Under certain circumstances, however, a motion in limine may preserve an error for appellate review. The Eleventh Circuit found these circumstances in *Judd v. Rodman*.[9] In *Judd* plaintiff claimed that defendant wrongfully transmitted genital herpes to her. The trial court denied plaintiff's motion in limine to exclude evidence of her prior sexual history. Knowing that defendant would tender this evidence, plaintiff introduced the evidence herself.[10] Clearly, plaintiff was attempting to minimize the prejudicial effect of the evidence. The Eleventh Circuit concluded that "this constituted valid trial strategy and, as a result, . . . Judd did not waive her objection."[11]

If a party does not timely and properly object, an appellate court will reverse a trial court's evidentiary rulings only if the trial court committed "plain error."[12] In *United States v. Quinn*,[13] the prosecution contended that the plain error standard should govern defendant's appeal from the district court's evidentiary rulings because defendant failed to make an offer of proof.[14] However, the Eleventh Circuit noted that Rule 103(a)(2) does not necessarily require a formal offer of proof to preserve an objection.[15] "Where the substance of the evidence is apparent to the court from its context, an appellant is entitled to ordinary appellate review of a ruling excluding evidence."[16] The Eleventh Circuit concluded that the substance of the disputed evidence was apparent to the district court, and thus an offer of proof was not necessary.[17]

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8. Judd v. Rodman, 105 F.3d 1339, 1342 (11th Cir. 1997); Goulah v. Ford Motor Co., 118 F.3d 1478, 1483 (11th Cir. 1997). Georgia courts grant motions in limine somewhat higher status. "Where a motion in limine to exclude certain evidence is denied, the movant need not renew his objection when the disputed evidence is offered at trial, in order to preserve the movant's right to appeal the denial of the motion." *See also* Reno v. Reno, 249 Ga. 855, 295 S.E.2d 94, 95 (1992); Harley-Davidson Motor Co. v. Daniel, 244 Ga. 284, 286, 260 S.E.2d 20, 22 (1979). *Compare* Vickery v. PPG Indus., 210 Ga. App. 339, 340, 436 S.E.2d 68, 69 (1993) ("The rule announced in *Harley-Davidson Motor Co.*, is inapplicable where a motion in limine does not seek a pretrial final ruling on the admissibility of evidence.").

9. 105 F.3d 1339, 1342 (11th Cir. 1997).

10. *Id.* at 1340-41.

11. *Id.* at 1342.

12. United States v. Mendez, 117 F.3d 480, 485 (11th Cir. 1997).

13. 123 F.3d 1415 (11th Cir. 1997).

14. *Id.* at 1420.

15. *Id.* (citing FED. R. EVID. 103(a)(2)).

16. *Id.*

17. *Id.* at 1420-21.

III. ARTICLE II: JUDICIAL NOTICE

The Eleventh Circuit decision in *Shahar v. Bowers*[18] addressed a rather unusual, and high profile, attempt to apply the doctrine of judicial notice. Shahar claimed that Georgia Attorney General Michael Bowers improperly withdrew an offer of employment after he learned of Shahar's lesbian "marriage."[19] On May 30, 1997, the Eleventh Circuit rendered its en banc decision affirming the judgment entered against Shahar.[20] Shortly thereafter, news media accounts reported that Bowers had admitted to having an adulterous affair with a Law Department employee. Shahar then petitioned the Eleventh Circuit for rehearing and moved to supplement the record with evidence of Bowers's affair. Specifically, she asked the Eleventh Circuit to take judicial notice of the media reports.[21] For various reasons, the Eleventh Circuit denied Shahar's motion.[22] With regard to Shahar's request that the court take judicial notice of the media reports, the majority en banc opinion denying the motion for rehearing noted that the "taking of judicial notice of facts is, as a matter of evidence law, a highly limited process."[23] Shahar, the majority reasoned, had asked the court to take judicial notice of Bowers's private, as opposed to his official, conduct. Shahar "has shown us no case—and we have found none—where a federal court of appeals took judicial notice of the unofficial conduct of one person based upon newspaper accounts (or the person's campaign committee's press release) about that conduct."[24] Shahar did not ask the court to take judicial notice of the fact that the media reported Bowers had an affair or even that a Bowers press release said that Bowers had an affair. Rather, Shahar was asking the court to take judicial notice that Bowers had had an affair. The Eleventh Circuit was "not inclined to extend the doctrine of judicial notice as far as [Shahar] asks us to take it."[25]

Judges Birch, Barkett, and Godbold dissented. In their dissenting opinion, they characterized the facts much differently than the majority and concluded that judicial notice was "obviously appropriate."[26] First,

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18. 120 F.3d 211 (11th Cir. 1997).
19. Shahar v. Bowers, 114 F.3d 1097, 1099 (11th Cir. 1997).
20. *Id.* at 1110-11.
21. *Shahar*, 120 F.3d at 212.
22. *Id.* at 213-14.
23. *Id.* at 214.
24. *Id.*
25. *Id.*
26. *Id.* at 215 (Birch, J., dissenting). The dissent brushed aside procedural roadblocks to Shahar's motion for reconsideration, noting that Bowers's public statement acknowledging the affair was not released until a few days after the court's en banc decision affirming

"Bowers['s] public statement" as the dissent put it, was relevant to whether Bowers's professed concern over public perception of sexual misconduct in the Department of Law was a bona fide reason for withdrawing his job offer to Shahar.[27] Further, Bowers's affair was relevant to whether he acted "as a nondiscriminatory decision maker."[28] The dissent sharply disputed the majority's conclusion that Shahar had asked the court to take judicial notice of a newspaper account. Rather, she wanted the court to take judicial notice of what the dissent said was a statement by Bowers admitting the affair and asking public forgiveness.[29]

The Eleventh Circuit applied the doctrine of judicial notice a little more freely in *Harris v. H & W Contracting Co.*[30] In *Harris* plaintiff claimed that defendant discriminated against her on the basis of her Graves' disease and thus violated the Americans With Disabilities Act ("ADA").[31] The district court concluded that plaintiff could not show that she had a disability within the meaning of the ADA and thus granted defendant's motion for summary judgment. The central issue on appeal was whether plaintiff's disability from her Graves' disease, which was transitory and could be totally controlled with the proper medication, constituted an impairment that substantially limited one or more of her major life activities. Because plaintiff's symptoms were transitory, defendant argued, her Graves' disease did not substantially limit her life activities.[32] The Eleventh Circuit first held that the question of whether an impairment limits major life activities must be decided without regard to mitigating measures such as medicines.[33] Defendant argued that the district court nevertheless properly granted summary judgment because plaintiff failed to adduce evidence that, absent medication, her condition would limit her major activities.[34] The Eleventh Circuit rejected this argument as well, in part based upon judicial notice of medical texts discussing Graves' disease.[35] The court

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the dismissal of Shahar's claim. This, the dissenters wrote, was "to say the least . . . suspicious," and thus the equities warranted allowing Shahar to supplement the record. *Id.* The Eleventh Circuit noted that Bowers had claimed the high moral ground during the litigation by arguing that Shahar was unfit because she was violating Georgia's sodomy laws. Yet, at the same time, Bowers was breaking Georgia's adultery fornication laws. *Id.*

27. *Id.*
28. *Id.*
29. *Id.*
30. 102 F.3d 516 (11th Cir. 1996).
31. *Id.* at 517, 519 (citing 42 U.S.C. §§ 12101-12213 (1994)).
32. *Id.* at 518, 520.
33. *Id.* at 521.
34. *Id.*
35. *Id.* at 522.

then examined plaintiff's deposition testimony concerning her condition and concluded that this was sufficient to create an issue of fact as to whether plaintiff's condition would substantially limit her life activities if left untreated.[36]

The opinion is perhaps more interesting for what it does not say rather than for what it does say. Clearly, plaintiff should have adduced expert evidence tending to establish that she suffered from Graves' disease and that unless medicated her condition would be disabling. The Eleventh Circuit, however, rescued plaintiff from her dilemma by effectively constructing expert testimony from judicially noticed scientific facts and lay testimony.[37]

IV. ARTICLE III: PRESUMPTIONS

In *Bashir v. Amtrak*,[38] the estate of a pedestrian killed after being struck by a train brought a wrongful death action against the railroad. The railroad argued that plaintiff's claim was preempted by the Federal Railroad Safety Act of 1970[39] because the train was traveling less than the eighty-miles-per-hour speed limit established by federal law. The district court granted defendant's motion for summary judgment because the undisputed evidence established that the train was traveling seventy miles per hour. On appeal plaintiff claimed that because the train's speed recorder tape could not be found, the district court should have applied the adverse inference rule and found that an issue of fact existed as to whether the train was speeding. The district court acknowledged that an adverse inference may be drawn from a party's failure to preserve evidence.[40] However, in the Eleventh Circuit, this inference can be applied only when the evidence is unavailable because of a party's bad faith.[41] Thus, the court of appeals would not "infer that the missing speed tape contained evidence unfavorable to appellees unless the circumstances surrounding the tape's absence indicate bad faith, such as tampering with the evidence."[42]

Instead, the Eleventh Circuit carefully examined the evidence and concluded that "under the particular circumstances" of this case, the

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36. *Id.* at 524.
37. *See id.* at 522.
38. 119 F.3d 929 (11th Cir. 1997).
39. 49 U.S.C. §§ 20101-20153 (1994).
40. 119 F.3d at 930-32.
41. *Id.* at 931. Georgia law is not dependent upon a finding of bad faith. The mere absence of the evidence may give rise to an adverse inference. Lane v. Montgomery Elevator Co., 225 Ga. App. 523, 525, 484 S.E.2d 249, 251 (1997).
42. *Bashir*, 119 F.3d at 931.

district court properly did not draw an adverse inference from the missing tape.[43] First, the court noted that the train crewmen, none of whom had control over the tape, all testified that the train was traveling no more than seventy miles per hour,[44] even when the tape was not missing. The Eleventh Circuit thought it unlikely that the crewmen would lie about the speed of the train when they knew the tape was available and would reveal the true speed of the train.[45] Although not discussed by the Eleventh Circuit, it would seem just as likely that the tape was destroyed because it did not support the crewmen's testimony that the train was only going seventy miles per hour. The Eleventh Circuit acknowledged, and seemed a little concerned by, the fact that the absence of the tape was wholly unexplained.[46] There was no evidence, for example, that the tape had been innocently or routinely destroyed; it was simply missing. However, the Eleventh Circuit concluded that the "exceedingly strong" evidence that the train was in fact traveling at seventy miles per hour was sufficient to overcome this concern.[47] In its conclusion, the Eleventh Circuit reinforced that its agreement with the district court was based on the "particular circumstances of this case."[48]

V. ARTICLE IV: RELEVANCY

In recent years the author has speculated that the Eleventh Circuit has dramatically lowered its level of scrutiny of evidentiary issues.[49] Arguably, Rule 403 of the Federal Rules of Evidence ("Rule 403") is the clearest indicator of this shift. Rule 403 allows a trial court, under some circumstances, to exclude relevant evidence, most notably when the danger of unfair prejudice substantially outweighs the probative value of the evidence.[50] When the author first began surveying Eleventh Circuit evidentiary decisions in 1986, Rule 403 was fertile ground for appeals, and the Eleventh Circuit did not hesitate to immerse itself deeply in minute factual examinations to determine whether district courts had properly admitted or excluded evidence. Most frequently, the Eleventh Circuit employed Rule 403 to reverse convictions in criminal cases on the ground that prejudicial evidence should not have been admitted. In recent years, however, Rule 403 is rarely a factor in

43. *Id.*
44. *Id.*
45. *Id.* at 932-33.
46. *Id.* at 932.
47. *Id.*
48. *Id.*
49. *See, e.g.*, Marc T. Treadwell, *Evidence*, 48 MERCER L. REV. 1607 (1997).
50. FED. R. EVID. 403.

Eleventh Circuit decisions, and when it is mentioned, it is hardly the tool for rigid scrutiny it once was.

For example, in *Goulah v. Ford Motor Co.*,[51] a product liability action, plaintiff contended that the trial court improperly excluded testimony that a Ford supervisor said it was "'acceptable to kill people.'"[52] The opinion does not elaborate on the context of this statement, but it presumably was offered by plaintiff to demonstrate that Ford gave insufficient consideration to safety issues. With no discussion the Eleventh Circuit affirmed the district court's exclusion of the evidence as highly prejudicial and thus inadmissible under Rule 403.[53]

In *United States v. Noriega*,[54] the Eleventh Circuit's Rule 403 analysis was more detailed, but the result was the same. In *Noriega* defendant contended that the district court improperly barred him from adducing evidence that he worked for various United States intelligence agencies. Defendant wanted to prove that he had received ten million dollars from these agencies. The prosecution would only acknowledge that Noriega received $320,000. Defendant further wanted to introduce evidence of the details of his activities on behalf of these agencies to demonstrate that it was more likely that he had received more than the relatively paltry sum acknowledged by the government.[55] The Eleventh Circuit acknowledged the relevancy of this evidence but agreed with the district court that evidence regarding the nature of defendant's assistance to United States intelligence agencies "would have shifted unduly the focus of the trial from allegations of drug trafficking to matters of geo-political intrigue."[56] Thus, the district court did not abuse its discretion when it determined that the slight probative value of the evidence was outweighed by the confusion of issues its admission would have caused.[57]

Rule 404 of the Federal Rules of Evidence ("Rule 404") is the principal rule of evidence addressing the admissibility of "extrinsic act evidence" or evidence of acts and transactions other than the one at issue.[58] It is primarily intended to prevent the introduction of propensity or "bad act" evidence, which is evidence of prior misconduct offered solely to prove that a party is more likely to have committed the offense or

51. 118 F.3d 1478 (11th Cir. 1997).
52. *Id.* at 1483-84.
53. *Id.* at 1484 (citing FED. R. EVID. 403).
54. 117 F.3d 1206 (11th Cir. 1997).
55. *Id.* at 1215-16.
56. *Id.* at 1217.
57. *Id.*
58. FED. R. EVID. 404.

engaged in the conduct at issue. Extrinsic act evidence is admissible, however, "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[59]

If Rule 403 is the clearest indicator of the Eleventh Circuit's increased deference to district court evidentiary rulings, then Rule 404 runs a close second. In its more activist days (or at least when it was more active with regard to evidentiary issues), the Eleventh Circuit frequently engaged in micro-Rule 404(b) analysis and freely concluded that district courts abused their discretion in admitting extrinsic act evidence. In more recent years, however, Rule 404, like Rule 403, has been much less a factor in Eleventh Circuit decisions. This trend continued during the current survey period.

In *United States v. Butler*,[60] defendant contended that the district court improperly admitted evidence of his 1987 conviction for possession of cocaine. The district court concluded the conviction was relevant to prove intent. However, defendant argued that because he had been charged with conspiracy to distribute drugs, his conviction for possession of drugs for personal use was not relevant to prove his intent to sell drugs.[61] The issue of whether evidence of prior personal drug use is relevant in a subsequent, unrelated prosecution for the sale of drugs was an issue of first impression for the Eleventh Circuit. Other circuits, the court noted, were split.[62] With little discussion, but "after considering the rationales enunciated by the various courts of appeals," the Eleventh Circuit concluded that "the logical extension of our current jurisprudence is to admit evidence of prior personal drug use to prove intent in a subsequent prosecution for distribution of narcotics."[63]

In *United States v. Smith*,[64] the Eleventh Circuit reaffirmed that evidence "inextricably intertwined" with the charged offense is not extrinsic act evidence for purposes of Rule 404(b).[65] In *Smith* the district court admitted evidence of defendant's participation in another bank robbery committed the same day as the charged bank robbery.[66] After examining the "strong links" between the two bank robberies, the Eleventh Circuit concluded that the two offenses were inextricably

59. *Id.*
60. 102 F.3d 1191 (11th Cir. 1997).
61. *Id.* at 1195.
62. *Id.*
63. *Id.* at 1196.
64. 122 F.3d 1355 (11th Cir. 1997).
65. *Id.* at 1359 (citing Fed. R. Evid. 404(b)).
66. *Id.*

intertwined, and thus Rule 404(b) did not preclude the admission of evidence of the first bank robbery.[67]

The admissibility of extrinsic act evidence is also frequently an issue in civil cases. At first glance, it would seem that courts should be more reluctant to admit what is often highly prejudicial extrinsic act evidence in criminal cases, when freedom and sometimes life are at stake, than in civil cases. Yet, as it turns out, courts are much less likely to admit evidence of other transactions in civil cases. Closer examination reveals a logical basis for this disparate treatment. Civil cases rarely involve issues of intent, motive, scheme, or other matters that come into play in cases of intentional misconduct. Rather, civil cases typically involve situations in which the degree of intent is much lower, certainly much less malevolent, and is often completely absent. For example, evidence of a prior automobile accident in a negligence case involving an unrelated subsequent accident only serves to prove the improper and prejudicial point that a defendant, because of negligence on a prior occasion, was more likely negligent on the occasion at issue. In a criminal case on the other hand, evidence of a prior burglary involving facts similar to the charged offense may tend to prove a defendant's motive, intent, or plan in committing the charged offense. If so, the prosecutor is not using the prior offense to show a defendant's proclivity toward criminal conduct (criminal defense lawyers, no doubt, scoff at this notion) but rather is using the evidence to show notice, intent, or plan. Generally, however, the principles governing the admissibility of extrinsic act evidence are the same for both criminal and civil cases although some decisions have suggested that Rule 404(b) does not apply in civil cases. In fact, it is not unusual for courts to address extrinsic act issues in civil cases and never mention Rule 404.

This was the case in *Heath v. Suzuki Motor Corp.*[68] In *Heath* plaintiff contended that defendant's vehicle was defective because of its propensity to roll over. After a jury verdict in favor of defendant, plaintiff contended on appeal that the district court improperly allowed defendant to introduce evidence of other rollover incidents involving dissimilar vehicles.[69] The Eleventh Circuit acknowledged that the

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67. *Id.* at 1360.

68. 126 F.3d 1391 (11th Cir. 1997).

69. *Id.* at 1393. Plaintiff argued that these other incidents were inadmissible under Georgia law because Georgia law required that the extrinsic evidence must be substantially similar to the incident or transaction at issue. *Id.* The Eleventh Circuit rejected the argument that Georgia law governed this issue. "Under this circuit's controlling precedent regarding diversity jurisdiction cases, the admissibility of evidence is a procedural issue, and therefore is governed by the Federal Rules of Evidence." *Id.* at 1396.

evidence of rollover incidents involving dissimilar vehicles was not substantially similar to the incident at issue.[70] However, the court concluded that the "substantial similarity" doctrine was not applicable. Typically, the Eleventh Circuit noted, evidence of other incidents is offered to prove notice, the nature or magnitude of the danger involved, a party's ability to correct a defect, causation, the standard of care, or other similar issues. When offered for these purposes, the extrinsic incident must be substantially similar to the incident at issue. However, defendant did not offer the evidence to reenact the accident at issue. Rather, defendant used the evidence in an attempt to demonstrate how rollovers occur.[71] "The introduction into evidence of these three dissimilar incidents for the purposes of illustrating the physical principles behind rollover accidents was not unduly confusing to the jury or prejudicial to the plaintiff."[72]

In *Goulah v. Ford Motor Co.*,[73] also a product liability action, plaintiff attempted to introduce evidence of defendant's misconduct in an investigation involving an unrelated defect. Plaintiff argued that defendant's conduct in this investigation was admissible under Rule 404(b) to establish Ford's modus operandi. Specifically, plaintiff argued that evidence that defendant had destroyed, altered, and withheld documents during the extrinsic investigation was relevant to prove that Ford had engaged in similar misconduct in its investigation of the defect at issue. The district court refused to admit this evidence.[74] The Eleventh Circuit noted that the extrinsic investigation occurred six years before the investigation in issue.[75] Moreover, it was particularly significant to the Eleventh Circuit, although the opinion does not indicate why, that the engineer who had testified to Ford's alleged misconduct in the extrinsic investigation left Ford's employment two years before the subsequent investigation. For these reasons the Eleventh Circuit agreed that even if the evidence was admissible under Rule 404(b), the district court properly excluded the evidence under Rule 403.[76]

Rule 407 of the Federal Rules of Evidence ("Rule 407") bars the admission of evidence of subsequent remedial measures to prove a party's liability for injuries.[77] In *Wood v. Morbark Industries, Inc.*,[78]

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70. *Id.* at 1396.
71. *Id.*
72. *Id.*
73. 118 F.3d 1478 (11th Cir. 1997).
74. *Id.* at 1481-82, 1484.
75. *Id.*
76. *Id.*
77. FED. R. EVID. 407.

a decision discussed in last year's survey,[79] the Eleventh Circuit adopted the view of the majority of circuits and held that Rule 407 applies to strict product liability actions.[80] The split among the circuits has been resolved by an amendment to Rule 407 that became effective December 1, 1997. Rule 407 now provides that subsequent remedial measures are not admissible "to prove . . . a defect in a product, a defect in a product's design, or a need for a warning or instruction."[81] Thus, it is now clear that in federal courts, evidence of subsequent remedial measures is not admissible in strict product liability actions. Georgia practitioners should be aware that Georgia's rule against subsequent remedial measures does not apply to strict liability actions.[82] The new Rule 407 also makes clear that it applies only to remedial measures made after the occurrence that produced the damages giving rise to the action.

The Federal Rules' version of a rape shield statute is found in Rule 412 of the Federal Rules of Evidence ("Rule 412").[83] In 1994 the Supreme Court amended Rule 412 to make it applicable to civil proceedings involving alleged sexual misconduct. Thus, evidence that a victim of sexual misconduct engaged in other sexual behavior, or evidence offered to prove the victim's "sexual predisposition," is inadmissible. However, such evidence may be admitted if "its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."[84]

The Eleventh Circuit had its first opportunity to apply new Rule 412 in a civil case in *Judd v. Rodman*.[85] In *Judd* plaintiff contended that her former sexual partner wrongfully gave her genital herpes. The district court admitted evidence of plaintiff's prior sexual activity and her employment as a nude dancer. On appeal plaintiff contended that this evidence should have been excluded under Rule 412.[86] The Eleventh Circuit first noted that although Rule 412 had been applied in civil cases relating to rape and sexual harassment, no case had determined whether Rule 412 applied to a case relating to a sexually

78. 70 F.3d 1201 (11th Cir. 1995).
79. Treadwell, *supra* note 49, at 1615.
80. *Wood*, 70 F.3d at 1206-07.
81. FED. R. EVID. 407.
82. General Motors Corp. v. Moseley, 213 Ga. App. 875, 877, 447 S.E.2d 302, 306 (1994).
83. FED. R. EVID. 412.
84. FED. R. EVID. 412(b)(2).
85. 105 F.3d 1339 (11th Cir. 1997).
86. *Id.* at 1340-41.

transmitted disease.[87] However, the Eleventh Circuit skirted the issue of whether Rule 412 should apply to these cases. Instead, the court assumed the applicability of Rule 412 and analyzed the disputed evidence to determine whether its admission substantially prejudiced plaintiff.[88] The Eleventh Circuit first considered the evidence of plaintiff's prior sexual history. The court noted that a key issue in the case was whether plaintiff contracted the disease from defendant.[89] Expert testimony at trial established that the herpes virus could be dormant for long periods of time and that an infected person could be asymptomatic. Thus, evidence of plaintiff's prior sexual relationships was "highly relevant."[90]

The Eleventh Circuit then turned to the evidence that plaintiff had worked as a nude dancer. The court noted that plaintiff testified she felt "dirty" after she contracted herpes.[91] The district court found that plaintiff's employment as a nude dancer before and after she contracted herpes was probative of her claim for damages for emotional distress because it suggested an absence of change in her body image following the herpes infection.[92] The Eleventh Circuit concluded that the district court did not abuse its discretion in making this determination.[93]

VI. ARTICLE V: PRIVILEGES

In *Inspector General v. Glenn*,[94] the Inspector General of the United States Department of Agriculture subpoenaed appellants to produce various documents as a part of an investigation of questionable disaster program payments. The district court rejected appellants' contention that the documents were protected from disclosure by the accountant-client privilege.[95] The Eleventh Circuit agreed, noting that although Georgia law recognizes an accountant-client privilege, federal law does not.[96] Appellants, however, argued that the Inspector General was attempting to establish that various program participants committed fraud under Georgia law and that Georgia law should thus apply.[97] Presumably, appellants were relying on Rule 501 of the Federal Rules

87. *Id.* at 1341.
88. *Id.* at 1342.
89. *Id.*
90. *Id.* at 1343.
91. *Id.*
92. *Id.*
93. *Id.*
94. 122 F.3d 1007 (11th Cir. 1997).
95. *Id.* at 1008-09.
96. *Id.* at 1012.
97. *Id.*

of Evidence ("Rule 501"), which provides that "in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the privileges of a witness, person, government, state or political subdivision thereof shall be determined in accordance with state law."[98] The Eleventh Circuit rejected this argument as well because "specific claims involving questions of state law have not arisen."[99]

VIII. ARTICLE VII: OPINIONS AND EXPERT TESTIMONY

Last year's survey discussed in some detail the Eleventh Circuit decision in *Joiner v. General Electric Co.*,[100] which exhaustively discussed the Supreme Court landmark decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[101] The Court held in *Daubert* that the Federal Rules of Evidence supplanted the long-standing test for the admissibility of expert testimony established in *Frye v. United States*.[102] In *Frye* the court held that the admissibility of expert testimony is determined by whether the subject matter of the testimony has been generally accepted as reliable in the relevant scientific community.[103] The *Frye* "general acceptance" test, the Supreme Court held, was "incompatible with the Federal Rules of Evidence."[104]

In *Joiner* the Eleventh Circuit acknowledged that evidentiary rulings are subject to the abuse of discretion standard but noted that the Federal Rules of Evidence favor the admissibility of expert testimony.[105] Thus, the court felt it appropriate to apply "a particularly stringent standard of review to the trial judge's exclusion of expert testimony."[106] Upon applying this exacting standard of review, the Eleventh Circuit concluded that the district court erred in excluding the expert testimony.[107]

The Supreme Court granted certiorari in *General Electric Co. v. Joiner* and reversed.[108] The Court focused on the Eleventh Circuit's suggestion that *Daubert* somehow altered the abuse of discretion standard

98. FED. R. EVID. 501.
99. *Glenn*, 122 F.3d at 1012.
100. 78 F.3d 524 (11th Cir. 1996). *See* Treadwell, *supra* note 49, at 1619-23.
101. 509 U.S. 579 (1993).
102. *Id.* at 589 (citing Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)).
103. 293 F. at 1014.
104. 509 U.S. at 589.
105. 78 F.3d at 529.
106. *Id.*
107. *Id.* at 534.
108. 118 S. Ct. 512 (1997).

governing evidentiary rulings.[109] *Daubert*, the Court noted, did not address the standard of review on appeal.[110] Now, however, the Court was prepared to hold that the abuse of discretion standard applied to rulings regarding expert testimony and concluded that the Eleventh Circuit's analysis in *Joiner* was incompatible with this standard.[111]

The Eleventh Circuit struggled with its own *Daubert* inspired appeal in *United States v. Smith*.[112] In *Smith* defendant contended the district court erred in excluding expert testimony regarding the unreliability of eyewitness testimony. Defendant acknowledged the Eleventh Circuit's longheld disdain for expert testimony attacking the credibility of witnesses but argued that a reexamination of this issue was mandated by *Daubert*.[113] *Daubert*, defendant argued, "lower[ed] the standard for admissibility of expert evidence and thus opened the door for admitting expert testimony regarding eyewitness reliability."[114] The Eleventh Circuit acknowledged that the *Frye* test was "more restrictive" than the two-part *Daubert* test but nevertheless concluded that expert testimony on witness reliability is inadmissible.[115] The Eleventh Circuit did not question whether the testimony was based on scientific knowledge and thus satisfied the first prong of *Daubert* but concluded that it did not meet the second prong—whether the expert testimony would "'assist the trier of fact to understand or determine a fact in issue.'"[116] The court concluded that expert testimony regarding the reliability of eyewitnesses was not needed because the jury could "determine the reliability of eyewitness identification with the tools of cross examination."[117]

In *Carter v. Decisionone Corp.*,[118] the Eleventh Circuit considered the permissible scope of lay opinion testimony. Although its discussion was brief, the effect of its holding may prove to be significant. In *Carter* plaintiff contended that defendant terminated her employment because of her sex and age. Three former employees of defendant testified that, in their opinions, defendant discriminated against plaintiff because of her gender and age. Defendant contended that not one of these witnesses was qualified as an expert able to give an opinion about the

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109. *Id.* at 517.
110. *Id.*
111. *Id.*
112. 122 F.3d 1355 (11th Cir. 1997).
113. *Id.* at 1357-58.
114. *Id.* at 1358 (citations omitted).
115. *Id.*
116. *Id.* (quoting *Daubert*, 509 U.S. at 592).
117. *Id.*
118. 122 F.3d 997 (11th Cir. 1997).

ultimate issue in the case.[119] The Eleventh Circuit first noted that defendant waived its objection because it failed to object to the testimony at trial.[120] Because defendant did not object, the plain error standard of review applied.[121] Rule 701 of the Federal Rules of Evidence ("Rule 701"), the Eleventh Circuit noted, permits lay witnesses to give opinion testimony if their opinions are "rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony."[122] Thus, it was not necessary that the witnesses be qualified as experts. Further, the court noted, Rule 704(a) abolished the common-law prohibition against witnesses expressing opinions on the ultimate issue in the case.[123] All of the witnesses expressed their opinions after first testifying to facts relating to defendant's treatment of plaintiff. Under these circumstances, the Eleventh Circuit held, the district court did not commit "plain error."[124]

IX. ARTICLE VIII: HEARSAY

Several amendments to Article VIII became effective December 1, 1997, the most significant of which was to the Rule 801 of the Federal Rules of Evidence ("Rule 801")[125] definition of statements that are not hearsay. The changes to Rule 801 were made in response to issues raised and not completely addressed by the Supreme Court in *Bourjaily v. United States*.[126] Newly amended Rule 801(d)(2)(E) codifies the holding of *Bourjaily* that a coconspirator's statement shall be considered in determining the existence of the conspiracy and the declarant's participation in the conspiracy.[127] The amendment also provides that the statement of an agent or employee shall be considered in determining the declarant's authority to make a statement under Rule 801(d)(2)(C) and whether there exists an agency or an employment relationship under Rule 801(d)(2)(D).[128] However, the amendment further provides that the agent's, employee's, or coconspirator's statement by itself cannot

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119. *Id.* at 1001, 1004.
120. *Id.* at 1004.
121. *Id.* at 1005.
122. *Id.* (citing FED. R. EVID. 701).
123. *Id.* (citing FED. R. EVID. 704(a)).
124. *Id.*
125. FED. R.EVID 801.
126. 483 U.S. 171 (1987). For discussion of *Bourjaily* and its effect on Eleventh Circuit decisions, *see* Marc T. Treadwell, *Evidence*, 40 MERCER L. REV. 1291, 1313-14 (1989); Marc T. Treadwell, *Evidence*, 41 MERCER L. REV. 1357, 1374 (1990); Marc T. Treadwell, *Evidence*, 42 MERCER L. REV. 1451, 1473-75 (1991).
127. *Bourjaily*, 483 U.S. at 180; FED. R. EVID. 801(d)(2)(E).
128. FED. R. EVID. 801(d)(2)(C), (D).

establish the agency, the employment relationship, or the conspiracy.[129]

Rule 804 of the Federal Rules of Evidence ("Rule 804") was amended to provide that a hearsay statement is admissible if it is "offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."[130] The residual hearsay exceptions formerly found in Rule 803(24) of the Federal Rules of Evidence have been combined with Rule 804(b)(5) and recodified as Rule 807.[131] This amendment made no substantive changes to the residual exceptions.

The Eleventh Circuit is frequently called upon to address the inherent conflict between hearsay evidence and the Confrontation Clause of the Sixth Amendment. Hearsay statements potentially impinge a criminal defendant's constitutional rights because, by definition, the defendant is not "confronted with the witnesses against him."[132] In previous surveys, the author has addressed in some detail the Eleventh Circuit's, and on occasion the Supreme Court's, struggle to bring the coconspirator exception to the hearsay rule into conformity with the Confrontation Clause.[133] During the current survey period, the Eleventh Circuit twice faced Confrontation Clause challenges to purported hearsay testimony but was able to deflect these challenges.

In *Cargill v. Turpin*,[134] a state court murder trial, defendant contended that his Sixth Amendment right to confront witnesses against him was violated by the admission of out of court statements of alleged coconspirators. The district court denied defendant's petition for writ of habeas corpus, and defendant appealed to the Eleventh Circuit.[135] The Eleventh Circuit noted that not all hearsay evidence violates the Confrontation Clause.[136] If the evidence falls within a "'firmly rooted hearsay exception,'" the hearsay statement is deemed to be sufficiently reliable to satisfy constitutional concerns.[137] Georgia's coconspirator

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129. *Id.*

130. FED. R. EVID. 804(b)(6).

131. FED. R. EVID. 807.

132. U.S. CONST. amend. VI.

133. *See* Marc T. Treadwell, *Evidence*, 44 MERCER L. REV. 1209, 1226-27 (1993); Marc T. Treadwell, *Evidence*, 46 MERCER L. REV. 1377, 1386-87 (1995). Although statements of a coconspirator are frequently said to be admissible as an exception to the hearsay rule, statements of a coconspirator are, under the Federal Rules of Evidence, nonhearsay. *See* FED. R. EVID. 801(d)(2)(E).

134. 120 F.3d 1366 (11th Cir. 1997).

135. *Id.* at 1372.

136. *Id.* at 1373 n.14.

137. *Id.* at 1373 (quoting *Bourjaily*, 483 U.S. at 182); Marc T. Treadwell, *Evidence*, 46 MERCER L. REV. 1377, 1386-87 (1995).

exception to the hearsay rule is broader than its federal counterpart, and the United States Supreme Court has stated in dicta that Georgia's exception is not so firmly established as to give rise to a presumption of reliability.[138] Thus, the reliability of a coconspirator's statement must be independently evaluated. Defendant contended that the statements did not bear sufficient indicia of reliability to satisfy the Sixth Amendment.[139] However, the Eleventh Circuit avoided this issue entirely. It held that the statements were not hearsay because they were not offered to prove the truth of the matters asserted in the statements.[140] Rather, the statements were admitted to put into context defendant's alleged confession. Specifically, the prosecution claimed that the statements were necessary to demonstrate the circumstances surrounding, and the voluntariness of, defendant's confession.[141] Therefore, the statements were not hearsay, and it was not necessary to engage in Confrontation Clause analysis.[142]

The Eleventh Circuit employed a similar tactic in *United States v. Schlei*,[143] a case that bears reading for its bizarre facts. The case, which involved the sale of forged Japanese government bonds and bank notes, raised claims of a two-billion-dollar secret fund created by General Douglas McArthur and promises by vice presidential candidate Richard M. Nixon to return Okinawa and control of the "M fund" to Japan in exchange for Japanese support in the 1960 presidential election. Defendant Schlei contended that he thought the bonds and notes were genuine and therefore he should not have been convicted of fraud. The district court admitted the deposition testimony of a witness deposed in Tokyo in connection with another criminal proceeding. Schlei was present at this deposition as a "consultant" for defendants in that proceeding. After the deposition, Schlei allegedly made statements to an assistant U.S. attorney suggesting that he knew the bonds and notes were forged. Schlei contended that the admission of the testimony violated his constitutional right to confront witnesses against him.[144] However, the Eleventh Circuit held that the statement was not offered to prove the truth of the matter asserted in the statement.[145] Rather, the deposition was offered to demonstrate Schlei's state of mind

138. *Id.* (citing *Bourjaily*, 483 U.S. at 183; Horton v. Zant, 941 F.2d 1449, 1464 (11th Cir. 1991)).
139. *Id.*
140. *Id.* at 1375.
141. *Id.*
142. *Id.*
143. 122 F.3d 944 (11th Cir. 1997).
144. *Id.* at 953-56, 965, 981.
145. *Id.* at 981.

regarding whether he believed the bonds and notes were valid. Therefore, it was unnecessary to address Schlei's claim that his right to confront witnesses was impinged by hearsay evidence.[146]

A statement by a coconspirator is not hearsay if the statement is made by the coconspirator during the course of and in furtherance of the conspiracy. In *United States v. Castleberry*,[147] defendant asserted that the district court improperly admitted calendar entries made by an alleged coconspirator. Defendant contended that the statements could not have been made in furtherance of the conspiracy because the entries apparently were made prior to January 1, 1988, the beginning date of the conspiracy according to the indictment.[148] However, the Eleventh Circuit noted that the Grand Jury's indictment did not restrict the beginning date of the conspiracy to January 1, 1988, but rather the indictment specified that the conspiracy began "'on a date which is unknown to the Grand Jury, but which occurred on or before January 1, 1988.'"[149] There was evidence that some acts of the conspiracy occurred prior to January 1, 1988. This, the Eleventh Circuit held, was sufficient to satisfy the requirements that the statements must have been made "during the course" of the conspiracy.[150]

146. *Id.*
147. 116 F.3d 1384 (11th Cir. 1997).
148. *Id.* at 1390.
149. *Id.* at 1384.
150. *Id.* at 1391 (quoting FED. R. EVID. 801(d)(2)(E)).