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Evidence

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I. INTRODUCTION

Daubert[1] inspired appeals again occupied much of the Eleventh Circuit's time during the survey period. As discussed in detail below, the Eleventh Circuit held in *Carmichael v. Samyang Tire, Inc.*[2] that *Daubert* applies only to witnesses claiming scientific expertise, a decision which sent parties scrambling as they sought to avoid or to invoke *Daubert*. However, after the survey period, the Supreme Court reversed the Eleventh Circuit's decision in *Carmichael*. In *Kumho Tire Co. v. Carmichael*,[3] the Supreme Court held that *Daubert* applies to all expert testimony and is not limited to "scientific" testimony. The Court also held that all four *Daubert* factors (testing, peer review, error rates, and scientific acceptability) need not be satisfied for expert testimony to be admissible. Rather, district courts, in performing their gatekeeping analysis of the reliability of expert testimony, are entitled to great flexibility and their inquiry will be determined by the particular facts of the case.

II. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

In a case of first impression, the Eleventh Circuit considered in *Horton v. Reliance Standard Life Insurance Co.*,[4] whether the common law presumption against suicide should apply in an action brought under the Employment Retirement Income Security Act ("ERISA").[5] In *Horton*

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1. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).
2. 131 F.3d 1433 (11th Cir. 1997).
3. 119 S. Ct. 1167 (1999).
4. 141 F.3d 1038 (11th Cir. 1998).
5. 29 U.S.C. § 1001 (1998).

plaintiff's husband, who died in a private plane crash, brought suit against two insurance carriers that issued life insurance policies to the husband's employer as a part of the employer's benefit plans. The insurance companies claimed that the husband committed suicide.[6] The court first noted that although ERISA does not provide for presumptions, courts are free "to develop a body of federal common law to govern issues in ERISA actions not covered by the Act itself."[7] A court may fashion such common law rules if the rule furthers ERISA's scheme of protecting "the interests of employees and their beneficiaries in employment benefit plans" and ERISA's goal of "uniformity in the administration of employee benefits plans . . . ."[8] The court concluded that the common law presumption against suicide met this standard.[9] Although the court recognized that the presumption favored beneficiaries over the interests of employee benefit plans and insurance companies, the court concluded, after reviewing the history of the common law presumption against suicide, that the presumption was "grounded in tested observations of human behavior and in American legal history."[10] In addition, the court reasoned Congress was presumably aware of this well-established common law rule, and, under such circumstances, the court felt free to apply the rule unless "'a statutory purpose to the contrary is evident.'"[11] Finding no conflict with ERISA's statutory purpose, the court held that the district court properly applied the common law presumption against suicide.[12]

III. RELEVANCY

Rule 404 of the Federal Rules of Evidence 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. Rule 404 primarily bars the introduction of evidence of prior misconduct offered to prove that a party is more likely to have committed the charged offense or engaged in the conduct at issue because of that prior misconduct.[13] Although extrinsic act evidence is not admissible to prove a party's propensity to engage in misconduct, it is admissible "for other purposes, such as proof of motive, opportunity, intent, preparation,

6. 141 F.3d at 1040.
7. *Id.* at 1041.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* (quoting Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991)).
12. *Id.* at 1042.
13. FED. R. EVID. 404.

plan, knowledge, identity, or absence of mistake or accident."[14] The Eleventh Circuit applies a three-part test, often called the *Beechum* test, to determine the admissibility of extrinsic act evidence.[15] First, the extrinsic act evidence must be relevant to an issue other than the defendant's character. Second, the prosecution must prove the defendant committed the extrinsic act. Third, the evidence must survive a Rule 403[16] balancing test, that is, the probative value of the extrinsic act evidence must not be outweighed by its prejudicial effect.[17] In recent years, the author has speculated that the Eleventh Circuit has dramatically lowered its level of scrutiny of evidentiary issues. The Eleventh Circuit's treatment of extrinsic act evidence offers support for this speculation. 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 often concluded that the district courts abused their discretion in admitting extrinsic act evidence. In more recent years, however, Rule 404 has been much less a factor in Eleventh Circuit decisions. This trend continued during the current survey period.

In *United States v. Mills*,[18] defendants, a husband and wife who owned a Medicare services provider, were convicted of making false statements, mail fraud, Medicare fraud, and witness tampering. On appeal, the wife claimed that the district court improperly admitted evidence that she concealed items from customs inspectors years before the charged offense. The district court concluded that the evidence was admissible under Rule 404(b) because it showed the wife's "'propensity' to conceal facts and was thus relevant to [her] intent."[19] On appeal, picking up on this ruling, the Government argued that the customs incident was admissible because it demonstrated the wife's willingness to deceive government agents for personal financial gain. The Eleventh Circuit made short work of the district court's conclusion and the Government's argument.[20]

> Restated, the Government's asserted relevant inference is that we can gather from the customs incident that Margie is disposed to lie to the government; therefore, being a liar, she must have intended to lie [with

14. *Id.*
15. United States v. Mills, 138 F.3d 928 (11th Cir. 1998); United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (*en banc*), *cert. denied*, 440 U.S. 920 (1979).
16. FED. R. EVID. 403.
17. 138 F.3d at 935.
18. *Id.* at 928.
19. *Id.* at 935.
20. *Id.* at 936.

> regard to the acts leading to the charged offenses]. This inference is precisely the one that Rule 404(b) prohibits: it makes an element of the crime (intent to lie) more probable because of the defendant's character (liar).[21]

Thus, the Eleventh Circuit concluded that the district court abused its discretion when it admitted the extrinsic act evidence.[22] This, however, did not require reversal.[23] Because there was overwhelming evidence that the wife intentionally engaged in the conduct giving rise to the charged offenses, the court held the error was harmless.[24]

Judge Hatchett, in dissent, disagreed with the majority's conclusion that the error was harmless.[25] Reviewing the evidence, he concluded there was scant evidence of the wife's specific intent to commit the charged offenses.[26]

> Without the improper character evidence, the government's proof of intent to falsify was essentially limited to [the wife's] business conduct. The customs inspector's testimony, however, vastly expanded the scope of [the wife's] untruthfulness to a context more familiar to the jury than First American. In my view, jurors were much more likely to understand lying to a customs inspector than failing to document travel on a company airplane. At the very least, the customs inspector's testimony uncomfortably invited a jury to connect with, interpret and act upon the notion that [the wife] was liar in general.[27]

Thus, because the Government's evidence of intent was weak, the extrinsic act evidence was likely prejudicial.[28]

Judge Hatchett's point, insofar as it relates to *improperly* admitted extrinsic act evidence, is well taken. However, the fact that the Government's case is weak actually makes it more likely that extrinsic act evidence will be admissible. In *United States v. Calderon*,[29] the Eleventh Circuit acknowledged that the connection between the extrinsic act and the charged offense was remote. However, the court was unwilling to hold that the district court abused its discretion in admitting the testimony.[30] With regard to the third prong of the *Beechum* test, whether the probative value of the evidence is substantial-

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21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 942.
26. *Id.* at 944.
27. *Id.*
28. *Id.*
29. 127 F.3d 1314 (11th Cir. 1997).
30. *Id.* at 1333.

ly outweighed by unfair prejudice, the court noted it was appropriate to consider the Government's need for the evidence.[31] "As we have explained, 'if the government can do without such evidence, fairness dictates that it should; but if the evidence is essential to obtain a conviction, it may come in. This may seem like a "heads I win; tails you lose" proposition, but it is presently the law.'"[32] Thus, the weaker the Government's case, the stronger its argument that shaky extrinsic act evidence is admissible.[33]

In *United States v. McLean*,[34] the Eleventh Circuit reaffirmed that evidence "inextricably intertwined" with the charged offense is not extrinsic act evidence for purposes of Rule 404(b). In *McLean* the court agreed with the Government's contention that the evidence at issue was vital to an understanding of the context of the Government's case and thus, was evidence of the charged offense rather than extrinsic act evidence.[35] This holding was critical because the Government had failed to provide notice of its intent to introduce extrinsic act evidence as required by Rule 404(b), and thus, if the evidence was extrinsic, it could not be admitted.

When character evidence is admissible, Rule 405 provides the methods for proving character.[36] In *Schafer v. Time, Inc.*,[37] plaintiff contended that the district court improperly admitted evidence of his prior acts of misconduct in the trial of his libel claim against *Time*. The Eleventh Circuit disagreed.[38] Under Georgia law, a party who claims his reputation has been injured by libelous statements necessarily places his character in issue.[39] Rule 405(b) provides that "[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of [that person's] conduct."[40] Thus, the Eleventh Circuit held that the

31. *Id.* at 1332.

32. *Id.* (quoting United States v. Pollock, 926 F.2d 1044, 1049 (11th Cir. 1991), *cert. denied*, 502 U.S. 985 (1991)).

33. In *United States v. Hubert*, 138 F.3d 912, 914 (11th Cir. 1998), the Eleventh Circuit also held that the district court erred when it admitted extrinsic act evidence, but it also held that this error was harmless.

34. 138 F.3d 1398 (11th Cir. 1998).

35. *Id.* at 1405.

36. FED. R. EVID. 405.

37. 142 F.3d 1361 (11th Cir. 1998).

38. *Id.* at 1373.

39. *Id.* at 1370.

40. FED. R. EVID. 405(b).

district court did not err in admitting evidence of plaintiff's prior misconduct.[41]

IV. WITNESSES

Rule 609(a)(1) provides that "evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year . . . ."[42] In *United States v. Burston*,[43] the district court allowed defendant to establish that a witness testifying against him had been convicted of a felony but barred defendant from establishing the number and nature of the felony convictions. Noting Rule 609(a) provides that evidence of felony convictions "shall be admitted," the Eleventh Circuit framed the issue as whether admitting evidence that the witness had a felony conviction, but excluding evidence of the nature and number of those convictions, satisfied the requirements of Rule 609.[44] Rule 609, the court reasoned, presumes that felony convictions have some probative value.[45] Given this, it necessarily follows that the extent of this probative value depends upon the nature and number of felony convictions.[46] For example, a murder conviction would have a different impact on a juror's assessment of a witness's credibility than a relatively minor drug conviction.[47] Further, the court noted that other circuits had concluded that Rule 609(a) requires admission of the number and nature of prior convictions.[48] Accordingly, the court held that the district court erred in limiting defendant's examination of the witness.[49] Unfortunately for defendant, however, the court also held the error was harmless.[50]

Rule 609(b) limits the use of felony convictions that are more than ten years old.[51] These convictions are admissible if, among other things, the court concludes that the probative value of the conviction outweighs its prejudicial effect. In *United States v. Pope*,[52] the court held that the district court did not abuse its discretion when it refused to allow

41. 142 F.3d at 1373.
42. United States v. Burston, 159 F.3d 1328, 1334 (11th Cir. 1998).
43. 159 F.3d 1328.
44. *Id.* at 1334-35.
45. *Id.* at 1335.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 1336.
50. *Id.*
51. FED. R. EVID. 609(b).
52. 132 F.3d 684 (11th Cir. 1998).

defendant to impeach a witness with evidence of the witness's twenty-eight year-old conviction, noting that "convictions older than ten years should be admitted for impeachment purposes only very rarely."[53]

Rule 615, which contains the Federal Rules of Evidence's rule of sequestration, has been amended, effective December 1, 1998, to provide that "a person authorized by statute to be present" is not subject to exclusion from the courtroom.[54]

V. OPINIONS AND EXPERT TESTIMONY

The Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[55] continued to hang like a pall over the Eleventh Circuit during the survey period. The Court in *Daubert*, of course, held that the Federal Rules of Evidence preempted decades of court decisions governing the admission of expert testimony when it stated the Rules supplanted the longstanding test for the admissibility of scientific testimony established in *Frye v. United States*.[56] In *Frye*[57] 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.[58] The *Frye* "general acceptance" test, the Supreme Court held, was "incompatible with the Federal Rules of Evidence."[59] However, because the Court in *Daubert* did not enunciate a "definitive checklist or test" but rather structured a loose framework which the Court reckoned would be completed by lower courts, it quickly became apparent that the true effect of the decision would not be known until those lower court decisions made their way up the appellate ladder. Since *Daubert* many of those decisions have been up and down this appellate ladder.[60] The current survey period was no exception.

In *Carmichael v. Samyang Tire, Inc.*,[61] the Eleventh Circuit rejected an attempt to apply *Daubert* to all expert testimony. *Daubert*, the court

53. *Id.* at 687 (citing United States v. Tisdale, 817 F.2d 1552, 1555 (11th Cir. 1987)).
54. FED. R. EVID. 615.
55. 509 U.S. 579 (1993).
56. *Id.* at 585-97.
57. 293 F. 1013 (D.C. Cir. 1923).
58. *Id.* at 1014.
59. 509 U.S. at 589.
60. *See, e.g.*, General Elec. Co. v. Joiner, 522 U.S. 136 (1997), *rev'd* Joiner v. General Elec. Co., 78 F.3d 534 (11th Cir. 1996). As noted in last year's survey, the Supreme Court reversed the Eleventh Circuit's most detailed analysis of *Daubert* to date, holding that the Eleventh Circuit's rigid analysis was not compatible with the abuse of discretion standard that governs appellate review of district court evidentiary decisions.
61. 131 F.3d 1433 (11th Cir. 1997).

held, applies only to witnesses claiming scientific expertise.[62] In *Carmichael* plaintiffs attempted to rely on the testimony of an expert on tire failure to establish that defendant's tire rim caused plaintiffs' vehicle to crash. The district court excluded the expert testimony, reasoning that the testimony did not satisfy *Daubert's* standard for reliability of scientific evidence.[63]

On appeal the Eleventh Circuit first noted that a scientific expert is an expert who relies on the application of scientific principles.[64] A nonscientific expert relies on skill-based or experience-based observations to form his opinions.[65] The court then used a rather unusual example to illustrate the difference:

> The distinction between scientific and non-scientific expert testimony is a critical one. By way of illustration, if one wanted to explain to a jury how a bumblebee is able to fly, an aeronautical engineer might be a helpful witness. Since flight principles have some universality, the expert could apply general principles to the case of the bumblebee. Conceivably, even if he had never seen a bumblebee, he still would be qualified to testify, as long as he was familiar with its component parts.
>
> On the other hand, if one wanted to prove that bumblebees always take off into the wind, a beekeeper with no scientific training at all would be an acceptable witness *if* a proper foundation were laid for his conclusions. The foundation would not relate to his formal training, but to his firsthand observations. In other words, the beekeeper does not know anymore about flight principles than the jurors, but he has seen a lot more bumblebees than they have.[66]

The Eleventh Circuit, "[h]aving clarified the question posed by this case," easily concluded that plaintiffs' expert testimony was not based on scientific principles.[67] Rather, the expert based his opinion on his experience in analyzing failed tires.[68] Based on this experience, which consisted of years of examining tire failures, the expert said he could identify physical evidence that revealed whether a tire failed because of abuse or because of a defect.[69] Accordingly, the Eleventh Circuit held that the district court erred when it applied *Daubert* criteria to

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62. *Id.* at 1435.
63. *Id.* at 1434.
64. *Id.* at 1435.
65. *Id.*
66. *Id.* at 1435-36 (quoting Berry v. City of Detroit, 25 F.3d 1342, 1349-50 (6th Cir. 1994)).
67. *Id.* at 1436.
68. *Id.*
69. *Id.*

determine the admissibility of the expert's testimony.[70] It noted, however, that the testimony could still be excluded under Rule 702 if the court found the testimony was not sufficiently reliable or if it was not of assistance to the jury.[71]

Litigants who had seen their experts' testimony excluded by district courts were quick to take advantage, or at least to attempt to take advantage, of *Carmichael*. In *Michigan Millers Mutual Insurance Corp. v. Benfield*,[72] the district court struck the testimony of defendants' fire origin expert. Before *Carmichael* had been decided, defendants argued, in their briefs to the Eleventh Circuit, that their expert's analysis and testimony was of a scientific nature and was sufficiently reliable to satisfy *Daubert*.[73] When *Carmichael* was decided, however, defendants quickly switched tactics: they argued that their expert's testimony was not based on scientific principles but rather was based on his years of experience and on his skill and experience-based observations. After reviewing the expert's testimony, the Eleventh Circuit concluded that he had in fact based his opinions on scientific principles, and therefore, the district court properly applied *Daubert* to the expert's testimony.[74]

In *United States v. Gilliard*,[75] the Eleventh Circuit faced a more traditional *Daubert* question; whether a polygraph examiner's methodology satisfied the *Daubert* test. The district court held that it did not.[76] The Eleventh Circuit first recognized its decision in *United States v. Piccinonna*[77] which reversed the Eleventh Circuit's longstanding absolute ban on the admission of polygraph evidence. Under *Piccinonna* polygraph evidence may be admissible if the parties stipulate to its admissibility or to impeach or corroborate the testimony of a witness at trial.[78] In *Gilliard* because the Government would not stipulate to the admission of the evidence, defendant sought to use the polygraph to corroborate his trial testimony. The court then examined in some detail various techniques used by polygraph examiners.[79] It noted that the technique used by defendant's examiner, the hybrid control question technique, had only been the subject of one scientific study, a study co-

70. *Id.*
71. *Id.*
72. 140 F.3d 915 (11th Cir. 1998).
73. *Id.* at 920.
74. *Id.*
75. 133 F.3d 809 (11th Cir. 1998).
76. *Id.* at 811.
77. 885 F.2d 1529 (11th Cir. 1989).
78. *Id.* at 1536.
79. 133 F.3d at 812-14.

authored by the examiner.[80] The Government, on the other hand, presented substantial evidence tending to show the technique was not reliable and, specifically, that it increased the number of false negatives, that is, guilty people appearing to be innocent.[81] "Considering the paucity of tests and published studies addressing the validity of the hybrid technique, and Gilliard's failure to show that the hybrid technique has gained general acceptance within the relevant scientific community," the Eleventh Circuit held that the district court did not abuse its discretion in excluding the polygraph evidence.[82]

In *Agro Air Associates, Inc. v. Houston Casualty Co.*,[83] the Eleventh Circuit reaffirmed that lay witnesses may state their opinions if those opinions are rationally based on the witness's perception, and they are helpful to a clear understanding of the witness's testimony. In *Agro* the Eleventh Circuit held that the district court did not abuse its discretion when it permitted lay witnesses to testify why they thought an insured's premium rates increased after an insurer cancelled, fraudulently according to the insured, the insured's policy.[84]

The Eleventh Circuit faced a more difficult issue of lay opinion testimony in *United States v. Pierce*.[85] In *Pierce* defendant contended the district court improperly allowed his employer and his probation officer to testify, after reviewing bank surveillance photographs, that the photographs likely depicted defendant. Defendant argued that this "lay opinion identification testimony" was not admissible because it was not helpful to the jury, that is, the jury was just as qualified to review the photographs and determine whether defendant was the perpetrator shown in the photographs. Moreover, defendant argued, one of the witnesses acknowledged she was not one-hundred percent certain that the individual in the photograph was defendant.[86] The Eleventh Circuit noted that this was an issue of first impression for the Eleventh Circuit.[87] However, the court agreed with a majority of the circuits that, given the right circumstances, lay opinion identification testimony

80. *Id.* at 814.

81. *Id.* at 814-15.

82. In *United States v. Scheffer*, 118 S. Ct. 1261 (1998), the Supreme Court held that a flat prohibition on the admission of polygraph evidence by Military Rule of Evidence 707 did not impinge a defendant's Sixth Amendment right to present a defense to charges against him. *Id.* at 1263. The Court noted "there is simply no consensus that polygraph evidence is reliable: the scientific community and the state and federal courts are extremely polarized on the matter." *Id.* at 1262.

83. 128 F.3d 1452 (11th Cir. 1997).

84. *Id.* at 1456.

85. 136 F.3d 770 (11th Cir. 1998).

86. *Id.* at 773.

87. *Id.* at 772.

may be helpful to the jury and thus, admissible.[88] For example, the witness may be much more familiar with the defendant's appearance and thus, in a better position to testify whether defendant is shown in a photograph. After closely examining the facts of the case, the court concluded that the district court did not abuse its discretion when it allowed the witnesses to express their opinion that defendant was depicted in the photograph.[89]

The Eleventh Circuit's decision in *City of Tuscaloosa v. Harcros Chemicals, Inc.*[90] is perhaps more notable for its harsh criticism of the manner in which the district court resolved evidentiary issues than it is for the actual treatment of those issues. ("The district court's opinion is far from clear . . . ."[91] "[T]he conclusory and disjointed miscellany that constitutes the district court's discussion . . . ."[92] "It is apparent that this problem, along with many others that we identify in this part of the opinion, might have been avoided had the district court simply held a *Daubert* hearing . . . ."[93] "[W]e endeavor to clarify the legal errors that permeate the district court's discussion . . . .").[94] In *Harcros* thirty-nine Alabama municipalities alleged that chlorine distributors engaged in a conspiracy to fix prices for repackaged chlorine. In a lengthy opinion, the district court ruled much of plaintiff's evidence inadmissible and granted summary judgment to all five defendants on plaintiffs' antitrust and fraud claims.[95] Among other things, the district court excluded the testimony of an accountant on the grounds that he was not qualified to testify on opinions based on economic theory.[96] The Eleventh Circuit sarcastically agreed that the accountant was not qualified to render opinions on economic theory but noted that "[n]owhere in his extensive testimony, however, did [the accountant] offer any such opinion."[97] Rather, the accountant offered testimony well within the scope of his qualifications.[98]

The court then turned to the district court's exclusion of evidence offered by a statistician.[99] While the court noted the small portions of

88. *Id.* at 776.
89. *Id.*
90. 158 F.3d 548 (11th Cir. 1998).
91. *Id.* at 564 n.19.
92. *Id.*
93. *Id.* at 564 n.21.
94. *Id.* at 565 n.23.
95. *Id.* at 553.
96. *See* City of Tuscaloosa v. Harcros Chems., Inc., 877 F. Supp. 1504 (N.D. Ala. 1995).
97. 158 F.3d at 563.
98. *Id.*
99. *Id.* at 564.

the statistician's testimony were properly excluded, there was no basis for excluding the testimony in its entirety and, in fact, the district court erroneously interpreted Rule 702 when it excluded the testimony.[100] The district court disapproved of the statistician's methodology because it was based on his subjective judgment, judgment that could not be tested. The statistics themselves, the district court concluded, showed anything but a successful conspiracy.[101] This analysis confounded the Eleventh Circuit.

> We first consider an error that pervades the court's opinion: the confusion and conflation of admissibility issues with issues regarding the sufficiency of the plaintiffs' evidence to survive summary judgment. To put it succinctly, [the statistician's] data and testimony need not 'show a successful conspiracy' to be admitted under Rule 702 as circumstantial evidence of a conspiracy. As expert evidence, the testimony need only *assist* the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. As circumstantial evidence, [the statistician's] data and testimony need not prove the plaintiffs' case by themselves; they must merely constitute one piece of the puzzle that the plaintiffs' endeavor to assemble before the jury.[102]

Thus, the district court, by requiring the statistician's testimony to show a successful conspiracy, misinterpreted Rule 702 and abused its discretion.[103]

To make matters worse, according to the Eleventh Circuit, the district court also misinterpreted Rule 104(b), which allows a district court to determine preliminary questions of fact necessary to apply the Federal Rules of Evidence.[104] This rule, the Eleventh Circuit noted, does not provide a ground for the exclusion of evidence.[105] The district court apparently concluded that the statistician's testimony was not reliable and thus, was not admissible under Rule 104. This, the court held, was improper; the reliability of the testimony should have been addressed under Rule 702 and *Daubert*.[106] Thus, the court concluded, the district court again abused its discretion when it used Rule 104 to exclude the statistician's testimony.[107]

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100. *Id.* at 564-65.
101. *Id.* at 564.
102. *Id.* at 564-65.
103. *Id.* at 565.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*

It would seem that the lesson to be learned from *Harcros* (other than the message that district courts subject themselves to scathing condemnation for loose analysis) is that the resolution of *Daubert* issues requires careful thought and analysis and will likely require a hearing.

VI. HEARSAY

It was an off year for the Eleventh Circuit with regard to hearsay issues; only three decisions merit comment. In two cases, the court illustrated the circumstances that bring a statement by an agent or an employee within the scope of Rule 801(d)(2)(D), which provides that "a statement by the [party's] agent or servant concerning a matter within the scope of his agency or employment [and] made during the existence of the relationship" is not hearsay.[108] In *City of Tuscaloosa v. Harcros Chemicals, Inc.*,[109] the facts of which are discussed above, the district court ruled inadmissible testimony about alleged admissions by Robert Jones, the former chairman, chief executive officer, and president of one of defendant companies. This executive allegedly admitted to friends that he and his company were involved in fixing chlorine prices. The district court, applying Alabama law, excluded the testimony on the grounds it was hearsay and was not admissible because "'the president of a corporation is not the "alter ego" of the corporation,' and that [he] therefore did not 'speak for' the corporation."[110] Applying Alabama law was clearly erroneous because, generally speaking, the Federal Rules of Evidence govern the admissibility of evidence in federal court.[111] Concluding the testimony was admissible under Rule 801(d)(2)(D), the Eleventh Circuit reversed.[112] First, as an executive, Jones was clearly an "agent or servant" of the company.[113] Second, Jones set chlorine prices for his company throughout the period of the alleged conspiracy.[114] Thus, his statements about chlorine pricing practices "'concern[ed] a matter within the scope of [his] agency or employment, made during the existence of the relationship.'"[115]

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108. FED. R. EVID. 801(a)(2)(1).
109. 158 F.3d 548.
110. *Id.* at 558 n.10.
111. *Id. See also* Marc T. Treadwell, *Evidence*, 48 MERCER L. REV. 1607, 1608 (1997).
112. 158 F.3d at 574.
113. *Id.* at 557.
114. *Id.* at 558.
115. *Id.* The Eleventh Circuit agreed with the district court that Jones's statements were not admissible as a co-conspirator's statement pursuant to Rule 801(d)(2)(E) because his statements, which were made to friends on social occasions, were not in furtherance of the conspiracy. *Id.*

On the other hand, in *Zaben v. Air Products & Chemicals, Inc.*,[116] the Eleventh Circuit found that statements by employees were not made within the scope of their authority as employees. In *Zaben* plaintiff claimed his former employer had discriminated against him in violation of the Age Discrimination In Employment Act.[117] In response to defendant's motion for summary judgment, plaintiff relied on evidence of statements made by two low-level supervisors at defendant's plant. Plaintiff claimed these supervisors told him that "'they [meaning higher officials at the company] was [sic] talking about getting rid of the older employees,' and that 'they wanted younger employees to train them the way they wanted them.'"[118] The district court ruled that these statements were hearsay and thus, not admissible.[119] On appeal the Eleventh Circuit acknowledged that statements made by supervisory employees are admissible if their statements are within the scope of authority invested in them by their employer.[120] However, neither of the supervisors, whose alleged statements plaintiff relied upon, possessed any authority to speak for the employer on personnel matters.[121] Thus, their statements were not within the scope of their authority at the company.[122] Accordingly, the Eleventh Circuit affirmed.[123]

Rule 801(d)(2)(E) provides that statements by a party's co-conspirator are admissible if made during the course and in furtherance of the conspiracy.[124] In *United States v. West*,[125] defendant contended that the district court improperly relied on Rule 801(d)(2)(E) when it admitted a notebook in his trial for drug-related charges. Agents discovered the notebook during a raid on a house belonging to one of defendant's alleged co-conspirators. Another co-conspirator told agents the "items in the house" belonged to him or to yet another co-conspirator.[126] At trial an FBI agent testified that the notebook was a ledger containing records of a drug distribution operation.[127] On appeal the Eleventh Circuit noted that before admitting an alleged co-conspirator's

116. 129 F.3d 1453 (11th Cir. 1997).
117. 29 U.S.C. § 621 (1998).
118. 129 F.3d at 1455.
119. *Id.*
120. *Id.* at 1456.
121. *Id.* at 1457.
122. *Id.*
123. *Id.* at 1459.
124. FED. R. EVID. 801(a)(2)(E).
125. 142 F.3d 1408 (11th Cir. 1998).
126. *Id.* at 1411.
127. *Id.*

statement, the district court must determine: (1) a conspiracy existed; (2) the declarant and defendant were part of the conspiracy; and (3) the declarant made the statement during the course of and in furtherance of the conspiracy.[128] The Government argued that circumstantial evidence established a co-conspirator authored the notebook.[129] The Eleventh Circuit disagreed and held that the district court "clearly erred when it failed to make the preliminary factual determinations that rule 801(d)(2)(E) and the case law from this circuit require."[130] The apparent fatal defect was that the district court never identified the author and thus, could not have concluded the author was a member of the conspiracy, and that the entries in the notebook were in furtherance of the conspiracy.[131] Although the court concluded this error was harmless, the court's focus on the district court's failure to identify the author of the notebook concerned Senior Judge Roney who concurred specially.[132] He argued that the fact that the author of the notebook was unknown did not preclude its admissibility.[133] Indeed, Judge Roney argued, all but one circuit addressing the issue, including the Eleventh Circuit, has held that anonymous documents may be admitted under Rule 801(d)(2)(E).[134] Judge Roney specially noted that the majority's discussion on this point was dictum because its discussion was not necessary given its holding that any error was harmless.[135]

VII. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

The Eleventh Circuit's decision in *United States v. Francis*[136] illustrates the broad scope of Rule 1006, which allows the admission of summaries of "voluminous writings, recordings, or photographs which cannot conveniently be examined in court . . . ."[137] In *Francis* federal agents, acting on a tip that defendants were attempting to contract for the assassination of an informant and a prosecutor, recorded defendants' telephone conversations. On appeal from their convictions for conspiring to murder a federal official and using interstate and foreign commerce facilities in commission of murder for hire, defendants argued that the

128. *Id.* at 1413-14.
129. *Id.* at 1414.
130. *Id.*
131. *Id.*
132. *Id.* at 1415.
133. *Id.*
134. *Id.* at 1415-16.
135. *Id.* at 1415.
136. 131 F.3d 1452 (11th Cir. 1997).
137. FED. R. EVID. 1006.

district court erroneously admitted summaries of the wiretapped telephone conversations. The conversations were conducted in Jamaican patois, which is mostly English but also contains West African, Portuguese, French, and Spanish words, with the words arranged in a different order than in standard English. An FBI agent first prepared translated transcripts of the tape recorded conversations. The same agent then prepared summaries of the conversations. At trial the tapes of the conversations, the translated transcripts of the conversations, and the summaries of the conversations were all admitted into evidence.[138] The Eleventh Circuit rejected defendants' argument that the summaries were inadmissible.[139] "To prevent the necessity of playing all seventy-six conversations in their entirety, the court exercised its discretion and admitted the summaries into evidence."[140] The court also rejected defendants' arguments that the summaries were argumentative.[141] Although the court recognized the potential prejudice of summaries prepared by the prosecution, the court was satisfied there had been no "undue editorializing."[142] Further, the court noted that the district court instructed the jury that the summaries had been prepared by the government and that the actual recordings, which were in evidence, were the primary and governing evidence of the contents of the conversations.[143] The district court also made clear to the jury that the summaries were not the court's summaries of the conversations, and if the jury concluded the summaries did not accurately reflect the contents of the conversations, the jury should disregard them.[144] These instructions, the Eleventh Circuit held, were adequate to minimize undue prejudice.[145] Finally, defendants extensively cross-examined the government agent who prepared the summaries, and thus, the court concluded, "neutralized" any possible prejudice.[146]

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138. 131 F.3d at 1454-55.
139. *Id.* at 1459.
140. *Id.* at 1458.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*