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Evidence

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by Marc T. Treadwell*

I. INTRODUCTION

This year's survey must begin, as have most recent surveys, with a lament over the decreasing number of noteworthy Eleventh Circuit decisions addressing evidentiary issues.[1] In stark contrast to the days when the Eleventh Circuit rigorously examined district court evidentiary decisions and freely reversed those decisions, the Eleventh Circuit now studiously defers to district court judges.[2] The abuse of discretion standard, which has always been the standard of review of a district court's evidentiary rulings, has become the standard of review in practice as well as in name.[3]

However, the Eleventh Circuit's decision in *Bearint v. Dorel Juvenile Group, Inc.*[4] illustrates a facet of the abuse of discretion standard of review that is not always appreciated. In *Bearint* the Eleventh Circuit noted that although the abuse of discretion standard governs all evidentiary appeals, a district court, *per se,* abuses its discretion when the district court bases an evidentiary ruling on an erroneous interpretation of law.[5] A district court's determinations of law are subject to a *de novo* standard of review.[6] Thus, the difficulty of satisfying the abuse of discretion standard can effectively be avoided if a party can prove that

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1. Marc T. Treadwell, *Evidence*, 54 MERCER L. REV. 1487 (2003); Marc T. Treadwell, *Evidence*, 53 MERCER L. REV. 1399 (2002); Marc T. Treadwell, *Evidence*, 52 MERCER L. REV. 1403 (2001).
2. Treadwell, *supra* note 1, 52 MERCER L. REV. at 1403.
3. Treadwell, *supra* note 1, 54 MERCER L. REV. at 1488.
4. 389 F.3d 1339 (11th Cir. 2004).
5. *Id.* at 1345.
6. *Id.*

the district court, when it admitted disputed evidence, relied on an erroneous interpretation of law.[7]

II. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Several amendments to the Federal Rules of Evidence are scheduled to become effective December 1, 2006. At the time of publication, the proposed Rules were pending before the Advisory Committee. Current information on the status of the proposed Rules can be found at the United States Courts' website.[8]

Rule 404(a),[9] which governs the use of character evidence offered to prove conduct, will be amended to clarify that character evidence is generally not admissible in civil cases.[10]

Apparently, at the behest of the Criminal Division of the Department of Justice, Rule 408,[11] which addresses the admissibility of evidence of conduct and statements made in compromise negotiations, will be amended to expand the use of settlement discussions in criminal cases.[12] The logic of the proposed amendment is questionable, especially if one accepts that statements made during settlement discussions, accompanied as they often are by puffing and grandstanding, are dubious evidence of fault. In any event, public policy favors compromise; therefore, statements made during compromise negotiations should not be admissible. It is reasonable to question why those statements would be more probative in a criminal case than in a civil case.

Current Rule 606(b)[13] broadly bars the admission of juror testimony about jury verdicts.[14] The Rule allows two exceptions: jurors may testify regarding "[(1)] extraneous prejudicial information . . . improperly brought to the jury's attention or [(2)] whether any outside influence was improperly brought to bear upon any juror."[15] The proposed amendment would also allow jurors to testify on the issue of "whether the verdict recorded is the result of a clerical mistake."[16]

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7. *Id.*
8. www.uscourts.gov/rules/newrules6.html.
9. FED. R. EVID. 404(a).
10. Proposed amendments to FED. R. EVID. 101(a) *available at* www.uscourts.gov/rules/newrules6.html.
11. FED. R. EVID. 408.
12. www.uscourts.gov/rules/comment2005/EVMay04.pdf#page=24.
13. FED. R. EVID. 606(b).
14. *Id.*
15. *Id.*
16. www.uscourts.gov/rules/comment2005/EVMay04.pdf#page=16.

Rule 609[17] governs the use of convictions to impeach a witness's credibility. Currently, a witness can be impeached with a conviction if the crime "involved dishonesty or false statement."[18] The proposed amendment would require the admission of a conviction to impeach a witness's credibility if the conviction was for a crime "that readily can be determined to have been a crime of dishonesty or false statement."[19] Although the difference in language is subtle, the proposed amendment purports to resolve the conflict of how to determine whether a conviction involves dishonesty or false statement.[20] Specifically, the conflict is whether the court is limited to examination of the elements of the crime or whether the court must admit a conviction, even though the specific elements of the crime do not require proof of deceit.[21] The Committee opted to expand Rule 609(a)(2) to permit automatic impeachment "if the underlying act of deceit can be determined from information such as the charging instrument."[22]

III. ARTICLE II: JUDICIAL NOTICE

Children of all ages, particularly those acquainted with the wildly popular Dippin' Dots, will appreciate the Eleventh Circuit's decision in *Dippin' Dots, Inc. v. Frosty Bites Distribution, LLC*.[23] In *Dippin' Dots*, plaintiff Dippin' Dots contended that defendant Frosty Bites had unlawfully infringed on its product and logo design. Among other things, Dippin' Dots contended that the district court improperly took judicial notice that the color of ice cream indicates its flavor.[24]

Pursuant to Rule 201,[25] a court may take judicial notice of facts that are not subject to reasonable dispute.[26] A fact is not subject to reasonable dispute if "it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[27] While the court cautioned that judicial notice of facts

17. FED. R. EVID. 609.
18. *Id.* 609(a)(2).
19. www.uscourts.gov/rules/comment2005/EVMay04.pdf#page+19.
20. www.uscourts.gov/rules/comment2005/EVMay04.pdf#page+22 (According to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Committee Note).
21. *Id.*
22. www.uscourts.gov/rules/newrules6.html.
23. 369 F.3d 1197 (11th Cir. 2004).
24. *Id.* at 1204.
25. FED. R. EVID. 201.
26. *Id.*
27. *Id.* 201(b).

should be a "'highly limited process'" because it bypasses traditional evidentiary rules, it nevertheless determined that judicial notice relating to certain facts about ice cream is appropriate.[28]

Dippin' Dots fate was likely sealed by honest, but harmful, concessions made by its attorney:

> THE COURT: — would you agree that I could take judicial notice that chocolate ice cream is, generally speaking, brown, vanilla is white, strawberry is pink?
> [COUNSEL]: I think you could do that, I think you could, sir, but I think it would be appropriate to acknowledge that sometimes it's not. Chocolate can be white. I mean, that's not an uncommon occurrence. Certainly with M&M's, chocolate comes sometimes in a blue color.
> THE COURT: I'm just talking about ice cream.
> [COUNSEL]: Yes, sir.
> THE COURT: Ice cream is, generally speaking, chocolate is brown, vanilla is white, and strawberry is pink.
> [COUNSEL]: That's correct, sir, but it's not necessarily so.[29]

Clearly, in the "territorial jurisdiction of the trial court," the district court concluded, and the Eleventh Circuit affirmed, that the color of ice cream clearly suggests its flavor.[30]

IV. ARTICLE IV: RELEVANCY AND ITS LIMITS

Rule 404[31] is the principal rule of evidence governing the admissibility of "extrinsic act evidence" or evidence of acts and transactions other than the one at issue. Rule 404 is primarily intended to bar the introduction of propensity evidence, or evidence of misconduct on other occasions, offered to prove that a party is more likely to have engaged in the conduct at issue simply because of what he did on another occasion.[32] 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, plan, knowledge, identity, or absence of mistake or accident."[33]

Extrinsic act evidence is a favorite weapon of prosecutors. For example, prosecutors frequently introduce evidence of a defendant's prior drug conviction to prove his intent to commit a subsequent drug offense.

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28. *Dippin' Dots*, 369 F.3d at 1205 (quoting Shahar v. Bowers, 120 F.3d 211, 214 (11th Cir. 1997)).
29. *Id.*
30. *Id.*
31. FED. R. EVID. 404.
32. *Id.*
33. *Id.* 404(b).

As the Eleventh Circuit has lowered its scrutiny of district court evidentiary decisions, defendants are rarely successful in their challenge to the prosecution's use of evidence regarding their prior bad acts. This survey year, however, saw a rare exception—the Eleventh Circuit held in two cases that district courts erroneously refused to admit extrinsic act evidence offered by defendants.[34]

In *United States v. Stephens*,[35] defendant claimed the district court improperly prevented him from introducing evidence of an informant's other drug transactions.[36] Defendant in *Stephens*, who had no prior criminal record, was charged with selling drugs after a series of unsuccessful attempts by law enforcement officers to catch him actually selling drugs on video and audiotape. The sting transactions were attempted after the arrest of a career criminal, Robinson, to whom defendant had become a father figure. Notwithstanding defendant's many attempts to help Robinson over the years, Robinson, apparently in an effort to avoid lengthy prison time, claimed that defendant had sold him drugs. Robinson agreed to cooperate with law enforcement by becoming a confidential informant against defendant. A series of almost comical attempts followed where Robinson would somehow manage to thwart efforts to catch defendant dealing drugs on tape.[37] Reading the Eleventh Circuit's opinion, one gets the impression that defendant was not selling drugs and that Robinson was simply "playing" the Georgia Bureau of Investigation ("GBI").

During the last attempt, Robinson opened the hood of his car to block a camera's view of Robinson and defendant. In response, agents rushed to the scene and found marked money and drugs in defendant's possession. Defendant claimed he had just found the money and drugs on the ground outside his house.[38]

At trial, defendant attempted to prove that Robinson set him up to avoid a lengthy prison term. In his opening statement, defendant's attorney claimed he would adduce evidence of Robinson's other drug transactions to demonstrate how Robinson could have had access to drugs, which he could have then planted on defendant. The district court, however, ruled that this extrinsic evidence was inadmissible.[39]

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34. *See* United States v. Stephens, 365 F.3d 967 (11th Cir. 2004); United States v. Carrasco, 381 F.3d 1237 (11th Cir. 2004).

35. 365 F.3d 967 (11th Cir. 2004).

36. *Id.* at 970.

37. *Id.* at 970-72.

38. *Id.* at 972.

39. *Id.* at 973.

The Eleventh Circuit's Rule 404(b) discussion is surprisingly short. It noted that Rule 404(b) only bars the use of extrinsic act evidence when it is offered "to prove the character of a person in order to show action in conformity" with the extrinsic acts.[40] The Eleventh Circuit held that defendant was not offering the evidence to show conformity with the prior conduct but rather "to show that Robinson could have obtained the methamphetamine he turned over to the Government from a source other than [defendant]."[41] Because the evidence was offered for reasons other than to prove conformity, Rule 404(b) did not require or permit the exclusion of this evidence.[42]

Although it seemed that the Eleventh Circuit's Rule 404(b) analysis was sufficient to resolve the appeal, the court nevertheless addressed defendant's contention that the evidence was also admissible pursuant to Rule 404(a)(3).[43] Rule 404(a)(3) provides that evidence of character, like extrinsic act evidence, "is not admissible for the purpose of proving action in conformity therewith on a particular occasion except . . . [e]vidence of the character of a witness, as provided in [R]ules 607, 608 and 609."[44] Defendant argued that the exceptions found in Rules 607,[45] 608,[46] and 609[47] allowed him to introduce extrinsic act evidence about Robinson. The problem, however, was that Robinson was dead, and thus, did not testify at trial.[48] Defendant argued that Robinson was "essentially a witness since so much of the Government's case hinged around him."[49] The Eleventh Circuit rejected this argument because it concluded that "witness," as used in the rules allowing impeachment, "refer[s] solely to someone whose testimony is actually offered as evidence at trial, and not merely someone with extensive knowledge of or involvement in the events at issue."[50] Nevertheless, Rule 404(a) did not exclude the admission of the evidence because it was not offered to prove conformity with prior conduct but rather to prove access to drugs.[51]

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40. *Id.* at 974.
41. *Id.* at 975.
42. *Id.*
43. *Id.*
44. *Id.*
45. FED. R. EVID. 607.
46. FED. R. EVID. 608.
47. FED. R. EVID. 609.
48. *Stephens*, 365 F.3d at 975.
49. *Id.*
50. *Id.*
51. *Id.* at 976.

In *United States v. Carrasco*,[52] another noteworthy Rule 404(b) case, the Eleventh Circuit addressed Rule 404(b)'s requirement that the prosecution provide advance notice of its intention to use extrinsic act evidence.[53] In *Carrasco* the prosecution introduced evidence of defendant's alleged involvement in the drug trade years before the acts that gave rise to the present charge against defendant. The district court overruled defendant's objection to this evidence, initially on the erroneous ground that the extrinsic act evidence was offered as rebuttal evidence and was not covered by Rule 404(b). Later, the district court ruled that the Government's "generalized notice" was sufficient to satisfy the Rule 404(b) notice requirement.[54] The Eleventh Circuit disagreed and held that "the Government['s] [failure] to give the required Rule 404(b) notice, went to the heart of [defendant's] defense, his intent," and the admission of that evidence was in error.[55]

V. ARTICLE VII: OPINION TESTIMONY

Certainly, there are many who believe that the United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[56] assigning district court judges the role of gatekeeper to keep "junk science" out of the courtroom,[57] and the subsequent codification of *Daubert* into the Federal Rules of Evidence[58] were beneficial developments. However, it can be argued forcefully that whatever benefits have been realized have come at high costs. District courts spend days, sometimes weeks, on *Daubert* hearings, and appellate courts render lengthy and often conflicting decisions trying to define the proper gatekeeping role for district judges.[59] Consequently, many questions exist as to whether *Daubert* has been worth the judicial resources it has cost.

As a not so incidental aside, Georgia courts have repeatedly refused to adopt *Daubert*,[60] a decision that seems prudent if for no other reason than the relatively limited resources available to Georgia courts. Nevertheless, the Georgia General Assembly, in its wisdom, has told

52. 381 F.3d 1237 (11th Cir. 2004).
53. *Id.* at 1240-41.
54. *Id.* at 1239.
55. *Id.* at 1241.
56. 509 U.S. 579 (1993).
57. *Id.* at 592–95.
58. FED. R. EVID. 702.
59. *See, e.g.*, United States v. Frazier, 322 F.3d 1262, 1264-65 (11th Cir. 2003).
60. *See, e.g.*, Norfolk S. Ry. v. Baker, 237 Ga. App. 292, 294, 514 S.E.2d 448, 451 (1999).

Georgia judges to march in lockstep with their federal counterparts.[61] Effective February 16, 2005, the General Assembly essentially codified *Daubert* into Georgia law and even suggested to the Georgia judiciary that they should adhere to federal precedent interpreting *Daubert*.[62] Given the experience of federal judges in their *Daubert* travails, Georgia judges are in for a long ride.

For those who question the wisdom of *Daubert*, the Eleventh Circuit's struggle with expert testimony in a seemingly routine criminal case should provide ammunition for their cause.[63] As reported in last year's survey,[64] a divided Eleventh Circuit panel held, over a strong dissent, in *United States v. Frazier*[65] that the district court abused its discretion when it excluded testimony of defendant's forensic investigator.[66] Defendant in *Frazier*, who was charged with rape, wanted to adduce expert testimony that because investigators did not find defendant's hair, blood, saliva, or semen on the victim's body, there was no forensic evidence to substantiate the victim's claim that she had been raped.[67] The district court, in response to the prosecution's *Daubert* motion, ruled that the expert could not "draw any inferences based on the absence of evidence supporting [the victim's] allegations of sexual assault."[68]

Faced with this ruling, defendant's attorney chose not to put the expert on the stand, but rather established through cross-examination of laboratory technicians that defendant's hair and bodily fluids were not found on the victim's body. In rebuttal, however, the prosecution elicited expert testimony from the laboratory technicians that the absence of hair and bodily fluids did not necessarily mean that defendant had not raped the victim.[69] In other words, the prosecution, through the testimony of its experts, adduced the converse of the expert testimony that defendant tried to get before the jury.

On appeal, a majority of the panel concluded that the district court disallowed the expert's testimony because the expert lacked the necessary scientific qualifications to render the disputed opinions.[70] Specifically, the district court found that the expert's lack of education and training, notwithstanding his extensive experience, rendered him

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61. H.R. 572, 145th Gen. Assem., Reg. Sess. (Ga. 2005).
62. O.C.G.A. § 24-9-67 (2005).
63. *See Frazier*, 322 F.3d at 1262.
64. Marc T. Treadwell, *Evidence*, 55 MERCER L. REV. 1219, 1228 (2004).
65. 322 F.3d 1262 (11th Cir. 2003).
66. *Id.* at 1269.
67. *Id.* at 1264.
68. *Id.*
69. *Id.* at 1264-65.
70. *Id.* at 1266.

incompetent to testify as an expert.[71] The Eleventh Circuit panel disagreed, concluding that an expert can be qualified to render opinions by virtue of his experience, despite a lack of training.[72]

In a sharply worded dissent, Judge Marcus argued that the majority had "eviscerate[d] the critical gatekeeping role played by the trial court in determining the admissibility of expert opinion testimony and unapologetically substitute[d] it[s] own reliability assessment for that of the district court['s] . . . ."[73]

The Eleventh Circuit, sitting *en banc*, vacated the decision, and in a sixty-four page opinion affirmed defendant's conviction.[74] This time Judge Marcus wrote the majority opinion.[75] The majority agreed that an expert could be qualified by virtue of his experience, but that "does not mean that experience, standing alone, is a sufficient foundation rendering reliable *any* conceivable opinion the expert may express."[76] Indeed, the majority concluded that the panel opinion misunderstood the basis for the district court's exclusion of defendant's expert testimony.[77] Had the district court based its conclusion simply on its belief that experience could not qualify an expert, that conclusion would have been erroneous.[78] Instead, according to the majority, the district court excluded the testimony not because the expert "lacked a scientific background, but because he failed to establish that his opinions were methodologically reliable or sound."[79] Essentially, the district court found the testimony not to be reliable.

Turning to the question of whether the district court abused its discretion in reaching this conclusion, the Eleventh Circuit attached particular significance to the semantics of the expert's testimony, specifically, that the presence of hair or seminal fluid "'would be expected.'"[80] The majority struggled with the term "expected," pondering whether it meant more likely than not, substantially more likely than not, or virtually certain to happen.[81] The majority concluded that it was simply not possible to tell from the expert's testimony what he

71. *Id.*
72. *Id.* at 1267.
73. *Id.* at 1274 (Marcus, J., dissenting).
74. United States v. Frazier, 387 F.3d 1244, 1261 (11th Cir. 2004).
75. *Id.*
76. *Id.* at 1261.
77. *Id.* at 1264.
78. *Id.*
79. *Id.*
80. *Id.* at 1264-65.
81. *Id.* at 1265.

meant by expected.[82] Conceding that it meant a probability, the court thought "the probability it expresses is unclear, imprecise and ill defined."[83]

With regard to the third prong of the *Daubert* analysis—whether the testimony will assist the trier of fact in understanding the evidence—the majority determined there was fault for the same reason.[84]

> Again, because Tressel's opinion was imprecise and unspecific, the members of the jury could not readily determine whether the "expectation" of finding hair or seminal fluid was a virtual certainty, a strong probability, a possibility more likely than not, or perhaps even just a possibility. As a result, Tressel's imprecise opinion easily could serve to confuse the jury, and might well have misled it.[85]

Judge Tjoflat concurred, but wrote a lengthy opinion explaining "[t]he analytical model I use in reaching this result . . . differs from the model the court uses."[86] Judge Birch, who had written the majority opinion in the panel decision, strongly dissented, noting that "[t]his is the classic case that law students study to understand the adage 'hard facts make bad law.'"[87] Judge Birch believed that the district court's and the majority's fatal flaw lay in the insistence that defendant's expert, admittedly qualified by virtue of his experience, nevertheless could not testify because he could not offer scientific data to support his opinions.[88]

> What physician, for example, would be laughed out of a medical conference for asserting without supporting statistical data that he would expect the cause of classic flu-like symptoms to be, of all things, the flu? Yet, this is precisely what the district court did in response to Mr. Tressel's testimony based on the rather uncontroversial assumption in his field that an experienced forensic investigator would expect to find hair or semen transfer in a sexual assault of prolonged duration in cramped quarters where, as here, evidence was gathered from an uncontaminated and confined crime scene. This ruling—requiring an experience-based expert to substantiate his conclusions with scientific data or studies—was an abuse of discretion.[89]

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82. *Id.*
83. *Id.*
84. *Id.* at 1266.
85. *Id.*
86. *Id.* at 1273 (Tjoflat, J., concurring).
87. *Id.* at 1284 (Birch, J., dissenting).
88. *Id.* at 1300 (Birch, J., dissenting).
89. *Id.* (Birch, J., dissenting).

Then, to make matters worse, the district court allowed the prosecution's experience-based expert witnesses to testify, without requiring them to support their opinions with scientific studies, that the lack of such evidence in a rape case was not unusual.[90]

The Eleventh Circuit opinion in *McDowell v. Brown*[91] may indicate how Georgia's newly passed "tort reform" legislation[92] could impact expert testimony in medical negligence claims brought in Georgia courts.[93] In *McDowell*, plaintiff, a former inmate at a Dekalb County jail, brought a medical negligence claim against a contractor providing medical services at the jail. Plaintiff claimed that he had been permanently injured by defendant's failure to timely refer him for treatment of a spinal abscess. Specifically, plaintiff contended that defendant's nurses and other medical care providers, who had settled with plaintiff, did not timely react to plaintiff's symptoms, which resulted in an inordinate delay in surgery for his spinal abscess. With regard to the claim based on defendant's nurses' negligence, the district court granted summary judgment to defendant on the ground that plaintiff's treating physicians were not competent to testify with regard to a nursing standard of care because they were physicians, not nurses.[94]

On appeal from the grant of summary judgment to defendant, the Eleventh Circuit concluded that the district court abused its discretion when it ruled that plaintiff's physicians were not competent to testify with regard to the standard of care that should have been exercised by defendant's nurses.[95] The Eleventh Circuit reasoned that, pursuant to Rule 601,[96] Georgia law provides the rule of decision with regard to competency issues and Georgia law clearly provides that physicians can testify to the standard of care for nurses.[97]

Unfortunately for plaintiff, the Eleventh Circuit did not stop there. The district court found that plaintiff's experts were "qualified to testify as to the issue of causation, i.e., the nature of the spinal epidural abscess and McDowell's resulting paralysis,"[98] and although there was no

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90. *Id.* at 1301 (Birch, J., dissenting).
91. 392 F.3d 1283 (11th Cir. 2004).
92. S.B. 3, 145th Gen. Assem., Reg. Sess. (Ga. 2005).
93. *McDowell*, 392 F.3d at 1283.
94. *Id.* at 1288.
95. *Id.* at 1297.
96. FED. R. EVID. 601.
97. *McDowell*, 392 F.3d at 1296. *See* Howard v. City of Columbus, 219 Ga. App. 569, 573, 466 S.E.2d 51 (1995).
98. *McDowell*, 392 F.3d at 1298.

indication that defendant appealed that ruling, the Eleventh Circuit proceeded to address whether plaintiff's expert causation testimony met *Daubert*'s reliability requirement.[99] Essentially, each of plaintiff's experts testified that the delay in treating the spinal abscess worsened plaintiff's condition.[100] The Eleventh Circuit ruled that this testimony was not reliable because the experts could not cite scientific studies supporting, to the satisfaction of the Eleventh Circuit, their causation opinions.[101] For example, one expert relied on a study addressing delays of forty-eight hours in treatment.[102] Because the delay in plaintiff's treatment was twenty-four hours, relying on this study ran "afoul of [*Allison v. McGhan Medical Corp.*'s[103]] admonition that a theory should not 'leap' from an accepted scientific premise to an unsupported one."[104] On top of that, the Eleventh Circuit noted that the expert had "not tested his own theory nor determined any error rate associated with it."[105]

In short, the Eleventh Circuit held plaintiff "offered no reliable evidence that earlier medical intervention would have prevented or diminished his injury."[106] The Eleventh Circuit did not address how plaintiff could have obtained scientific studies demonstrating that delay in the treatment of a spinal cord abscess can cause injury, additional injury, or increased disability. It would seem obvious that no ethical physician would withhold treatment to a patient suffering from a spinal abscess in order to gage the impact of delayed medical care.

In a more routine but significant decision, the Eleventh Circuit held in *Prieto v. Malgor*[107] that expert witness disclosure requirements apply to employees of a party who intend to express expert opinions.[108] In *Prieto* the employee/expert had no personal knowledge of the facts at issue. Rather, he simply reviewed, like any expert, information provided

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99. *Id.* It should be noted that the context of the district court's ruling is not clear from the opinion. However, the district court apparently did not expressly reach the issue of causation with regard to defendant's nurses but it did rule, in response to motions filed by the settling defendants, that plaintiff's experts' causation testimony did not satisfy *Daubert*. *Id.* at 1301. In any event, and whether appealed or not, the Eleventh Circuit felt compelled to address the issue.

100. *Id.* at 1299-1301.

101. *Id.* at 1299-1302.

102. *Id.* at 1300.

103. 184 F.3d 1300 (11th Cir. 1999).

104. *McDowell*, 392 F.3d at 1300.

105. *Id.*

106. *Id.* at 1302.

107. 361 F.3d 1313 (11th Cir. 2004).

108. *Id.* at 1317-18.

by his employer and formed opinions based on that review.[109] This situation was not analogous to an example found in the Advisory Committee notes to Rule 26,[110] which involved a treating physician who, when simply expressing opinions in the course of the treatment of his patient, was not necessarily an expert witness.[111]

VI. ARTICLE X: CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1006[112] provides that "contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation."[113] The Eleventh Circuit decision in *Peat, Inc. v. Vanguard Research, Inc.*[114] demonstrates that Rule 1006 does not open the door for the admission of all summaries of voluminous evidence.[115]

In *Peat* plaintiff contended that defendant had misappropriated its trade secrets. Relying on Rule 1006, the trial court admitted plaintiff's exhibit 145, which plaintiff claimed was a list of its trade secrets. However, defendant argued that the exhibit was hearsay, and that it was not admissible as a business record pursuant to Rule 803(6)[116] because the exhibit was not prepared in the ordinary course of business, but rather was prepared specifically for use at trial.[117] The district court admitted the exhibit finding that it was a "'classic summary' because the contents were voluminous and could not be examined in court . . . ."[118]

On appeal the Eleventh Circuit first noted that summaries offered pursuant to Rule 1006 must be carefully scrutinized.[119] Because the summary is admissible as substantive evidence, an inaccurate or argumentative summary could severely prejudice a party.[120] While it is not necessary that the documents upon which the summary is based be admitted into evidence, it is necessary that those documents be

109. *Id.* at 1318-19.
110. FED. R. CIV. PROC. 26.
111. *Prieto*, 361 F.3d at 1319.
112. FED. R. EVID. 1006.
113. *Id.*
114. 378 F.3d 1154 (11th Cir. 2004).
115. *Id.*
116. FED. R. EVID. 803(6).
117. *Peat*, 378 F.3d at 1158.
118. *Id.* at 1159.
119. *Id.* at 1159-60.
120. *Id.* at 1159.

admissible under the Federal Rules of Evidence.[121] "In other words, Rule 1006 is not a back-door vehicle for the introduction of evidence which is otherwise inadmissible."[122] This conclusion by the court illustrated the fatal defect in exhibit 145.[123] The information upon which the exhibit was based was hearsay—the information consisted of out of court statements made by someone other than the declarant, and they were introduced to prove the truth of the matter asserted in the exhibit.[124] The court agreed that the underlying materials or information on which the exhibit was based were not business records because they were prepared during the course of, and for use in, the lawsuit.[125] Consequently, the district court abused its discretion when it admitted exhibit 145.[126]

121. *Id.* at 1160.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 1161.
126. *Id.*