FIFTH CIRCUIT SURVEY: EVIDENCE

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I. INTRODUCTION

While the Fifth Circuit does not write a great many opinions about the Federal Rules of Evidence (FRE), it has issued a handful of important recent decisions on evidentiary issues. By their nature, discrete evidentiary issues are rarely the primary focus of federal appellate review, including in the Fifth Circuit. Broadly speaking, the law of evidence is well settled and as a practical matter, federal district courts enjoy considerable discretion in making evidentiary rulings. Since the last edition of the *Texas Tech Law Review Fifth Circuit Survey* dedicated to evidence, however, the Fifth Circuit ruled on several fundamental evidence issues, including reliance on hearsay in an affidavit and the contours of the relevance rules.[1] It also detailed some important proof considerations on the common issue of whether a piece of correspondence was received.[2] The Fifth Circuit has also held that FRE 404(b) applies only to persons and not to inanimate objects, and has confirmed that cumulative evidentiary error can—in rare instances—be so severe as to warrant reversal of a jury verdict.[3]

While the Fifth Circuit's evidentiary opinions during the relevant time were both pragmatic and thoughtful, it is impossible to identify any particular trend or unifying theme in the court's recent evidence jurisprudence.

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1. *See infra* notes 9-14, 94-95 and accompanying text.
2. *See infra* notes 81-84 and accompanying text.
3. *See infra* notes 90-91, 104-05 and accompanying text.

A. United States v. $92,203.00 in U.S. Currency

In *United States v. $92,203.00 in U.S. Currency*, the Fifth Circuit ruled that hearsay testimony was not admissible as summary judgment evidence in civil forfeiture proceedings.[4] In 2000, Congress amended the Civil Asset Forfeiture Reform Act (CAFRA) to require that the Government establish by a preponderance of the evidence that property is subject to forfeiture.[5] Accordingly, evidentiary issues in civil forfeiture proceedings are of increased importance, as the Government must marshal its proof in order to obtain forfeiture of assets in the hands of criminals.

Roberto Garcia-Baeza was convicted of a single count of violating 31 U.S.C. § 5332, which makes it a crime to knowingly conceal more than $10,000.00 in cash in order to evade the federal currency reporting requirements (a crime commonly referred to as "structuring").[6] In subsequently seeking the civil forfeiture of the $92,203.00 in unreported cash allegedly found on Garcia-Baeza's person, the Government relied solely on an affidavit from an Immigration and Customs Enforcement (ICE) agent that began with the statement: "[T]he following information was either gathered in the course of my official duties or I know this information of my own personal knowledge."[7] The Government sought and obtained summary judgment against defendant Garcia-Baeza—and achieved the forfeiture of the $92,203.00—based exclusively on the ICE agent's affidavit.[8]

On appeal to the Fifth Circuit, the defendant-appellant asserted that the Government's affidavit was inadmissible under FRE 602 because the ICE agent's testimony was not based on personal knowledge.[9] The Fifth Circuit agreed and held that the affidavit was clearly not based on personal knowledge but instead was primarily comprised of hearsay.[10] Because the ICE agent was not present when the defendant was initially pulled over, any information regarding the events could only be obtained through hearsay.[11] Any law enforcement officers' statements to the ICE agent were hearsay, and hearsay within hearsay is inadmissible unless both parts are shown to be admissible.[12] The Fifth Circuit concluded that "by enacting CAFRA, Congress intended to end the practice of reliance on hearsay in civil forfeiture decisions."[13] Because the Government's only summary judgment

4. United States v. $92,203.00 in U.S. Currency, 537 F.3d 504, 510 (5th Cir. July 2008).
5. *Id.* at 508.
6. *Id.* at 506.
7. *Id.* at 507.
8. *Id.* at 506.
9. *Id.* at 508.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 510.

evidence was hearsay and not admissible, the Fifth Circuit reversed the grant of summary judgment and remanded the civil forfeiture case for further proceedings.[14]

The importance of *$92,203.00 in U.S. Currency* is that, in the wake of CAFRA, the Government cannot rely on inadmissible or improper evidence in civil forfeiture proceedings but must instead treat such cases like other civil litigation and carry its burden via a preponderance of *admissible* evidence.

B. Hinojosa v. Butler

In *Hinojosa v. Butler*, the Fifth Circuit ruled that the district court abused its discretion when it did not allow the plaintiff in a civil suit to cross-examine the arresting San Antonio police officer who invoked his privilege under the Fifth Amendment regarding prior conduct.[15] Plaintiff Ralph Hinojosa filed suit against the City of San Antonio and an individual police officer, Israel Butler, to recover damages on the grounds that the officer used excessive force to subdue Hinojosa and showed deliberate indifference to Hinojosa's injuries.[16] At trial, although the district court ruled Hinojosa could question officer Butler about prior conduct, Hinojosa was required to ask questions outside the presence of the jury.[17] The district court's basis for preventing cross-examination of the officer in the presence of the jury was that the officer planned to invoke his Fifth Amendment rights.[18] After the jury returned a verdict in favor of the defendant police officer, Hinojosa appealed, claiming that the district court erred by refusing to allow him, under FRE 608(b), to cross-examine the officer in front of the jury regarding his prior conduct.[19]

The Fifth Circuit recognized that although a jury may not draw an adverse inference against a defendant merely based on his choice to remain silent in a criminal trial, the rule is different in a civil case.[20] It is a well settled fact that the Fifth Amendment does not forbid an adverse inference against a defendant in a civil action when the person refuses to testify in response to probative evidence.[21] Generally, the decision on whether to admit a witness's invocation of the Fifth Amendment into evidence is left to the discretion of the district court; however, the district court did not offer a valid reason for requiring Hinojosa's questioning of Officer Butler to take

14. *Id.* The opinion does not address whether the introductory statement could have been sufficient in another context, such as the verification of discovery responses. *See id.* at 507-10.

15. Hinojosa v. Butler, 547 F.3d 285, 292, 295 (5th Cir. Oct. 2008).

16. *Id.* at 289.

17. *Id.* at 290.

18. *Id.*

19. *Id.* at 291.

20. *See id.*

21. *Id.*

place outside the jury's presence.[22] The Fifth Circuit concluded that the district court had erroneously "conflate[d]" the standard governing a criminal defendant's invocation of the Fifth Amendment with the separate civil standard and assumed the officer's planned invocation prevented any cross-examination before the jury on the prior conduct.[23]

Although the district court's ruling was founded on an erroneous interpretation of the law, the burden remained on Hinojosa to show harmful error.[24] The Fifth Circuit reiterated its familiar maxim that "[w]e will reverse for an error in an evidentiary ruling only where the ruling has harmed the complaining party."[25] Although Hinojosa provided no reason for the district court to conclude the officer's invocation might have compelled a different verdict concerning Hinojosa's deliberate indifference claim, the Fifth Circuit concluded that the excessive force claim turned on the credibility of the witness.[26] Whether the jury believed the officer used excessive force against Hinojosa depended on the officer's characterization of Hinojosa's behavior and whether Hinojosa posed a credible threat.[27] Because Hinojosa sought to present evidence that Officer Butler had a habit of dishonesty in performing his duties as a police officer, the jury would have been permitted to conclude the officer was dishonest, and his version of the events should be discounted.[28] Because of the central importance of witness credibility to the case, the Fifth Circuit held that "[w]e cannot conclude with confidence that the district court's erroneous refusal to allow Hinojosa to cross-examine Butler on his prior conduct was harmless."[29] Accordingly, the Fifth Circuit reversed the jury's verdict and granted Hinojosa a new trial on his excessive force claim against Officer Butler.[30]

C. Baker v. Canadian National/Illinois Central Railroad

In *Baker v. Canadian National/Illinois Central Railroad*, the Fifth Circuit reiterated the standard for harmful evidentiary error and held that the district judge acted within his discretion or committed only harmless error on a series of evidentiary rulings.[31] Plaintiff Charles Baker filed suit against the Illinois Central Railroad Company after its train struck Baker's

22. *Id.* at 291-92.
23. *Id.* at 292.
24. *Id.*
25. *Id.* (quoting Farace v. Indep. Fire Ins. Co., 699 F.2d 204, 221 (5th Cir. 1983)).
26. *Id.* at 293-94.
27. *Id.* at 294.
28. *Id.* at 294-95.
29. *Id.* at 295.
30. *Id.* at 295-96.
31. *See* Baker v. Canadian Nat'l/Ill. Cent. R.R., 536 F.3d 357, 366 (5th Cir. July 2008).

dump truck.[32] The case proceeded to trial, and the jury ruled in favor of the defendant railroad.[33]

Baker appealed to the Fifth Circuit on several distinct grounds, including challenging multiple evidentiary rulings.[34] First, Baker challenged the district court's exclusion under FRE 407 of the railroad's subsequent installation of lights and gates at the railroad crossing where the accident occurred.[35] The Fifth Circuit noted that "[t]he evidentiary rules generally ban the admission of evidence concerning subsequent remedial measures."[36] Baker argued, however, that the district court should have admitted this evidence for impeachment purposes after the defendant railroad's engineer, a lay witness, stated that "gates are probably not as safe as just a stop sign and crossbuck."[37] The Fifth Circuit disagreed, holding that "when the decision to admit or exclude evidence of a design change is a close call, a district court's decision to exclude the evidence is within its discretion."[38]

Next, appellant Baker challenged the district court's exclusion of evidence of a prior accident involving a car stalled on the railroad tracks.[39] The Fifth Circuit recognized that even if the trial judge should have admitted the evidence of the prior accident on the railroad tracks and allowed the jury to determine the degree of similarity, it was harmless error because the jury would not have ruled any differently based on a single prior and dissimilar accident.[40]

Invoking FRE 403, Baker also challenged the district court's decision to allow the defendant railroad to admit surveillance videotapes showing Baker gambling at a casino.[41] The railroad offered these video tapes as "both substantive evidence of Baker's post-accident condition and impeachment evidence challenging Baker's witnesses who described his mental and physical condition."[42] Baker challenged the admission of these tapes, arguing that they were unfairly prejudicial because they showed him engaging in a behavior (gambling) that many people consider immoral.[43] The Fifth Circuit disagreed, noting that FRE 403 should be used sparingly and holding that the video's probative value in contradicting statements regarding Baker's post-accident quality of life (including testimony that

32. *Id.* at 360.
33. *Id.* at 362.
34. *See id.* at 366.
35. *Id.* at 366-67.
36. *Id.* at 366.
37. *Id.* at 367.
38. *Id.* (relying on Hardy v. Chemetron Corp., 870 F.2d 1007, 1011 (5th Cir. 1989)).
39. *Id.*
40. *See id.* at 368.
41. *Id.* at 368-69.
42. *Id.* at 369.
43. *Id.*

Baker could not count money, make change, or be in crowds after the accident) heavily outweighed any hypothetical juror's possible moral aversion to gambling.[44] Therefore, the district court did not abuse its discretion by admitting the surveillance footage.[45]

D. Compaq Computer Corp. v. Ergonome Inc.

In *Compaq*, Ergonome claimed that Compaq's *Safety and Comfort Guide* unlawfully infringed on a copyright held by Ergonome in *Preventing Computer Injury: The HAND Book*, a manual describing ergonomically correct hand positions for computer use and ways to avoid repetitive stress injuries.[46] Compaq filed a declaratory judgment action that it did not infringe on a copyright held by Ergonome when Compaq produced and distributed a safety guide with each computer it sold.[47] After a seven-day jury trial, the jury concluded that any copying in Compaq's manual was *de minimus* and constituted fair use, and the district court entered judgment in favor of Compaq.[48]

Ergonome appealed based on, *inter alia*, purported evidentiary errors by the district court, but the Fifth Circuit ruled that the district court did not abuse its discretion by excluding certain evidence under FRE 403.[49] More specifically, Ergonome unsuccessfully sought to introduce evidence of three different events: (1) past lawsuits against Compaq for repetitive stress injuries, (2) the exact number of copies of the Compaq safety guide distributed, and (3) the proposed volume discount Ergonome quoted to Compaq for copies of Ergonome's handbook.[50] Ergonome claimed the evidence concerning past lawsuits was necessary to prove the commercial motive for copying Ergonome's handbook, but the district court concluded Ergonome's true reason for seeking to introduce the evidence was to paint Compaq in a negative light.[51] On appeal, Ergonome challenged the district court's exclusion of each of these three types of evidence.[52]

Applying FRE 403, the Fifth Circuit ruled that the district court did not abuse its discretion in excluding the evidence concerning repetitive stress injury (RSI) suits against Compaq and in any event, "the exclusion was harmless, because even without the RSI lawsuit evidence, the jury was presented with ample evidence of Compaq's commercial use, or 'motive,'

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44. *Id.*
45. *Id.*
46. Compaq Computer Corp. v. Ergonome, Inc., 387 F.3d 403, 406 (5th Cir. 2004).
47. *Id.* at 407.
48. *Id.* at 406.
49. *Id.* at 406, 409-10.
50. *Id.* at 408.
51. *Id.* at 408-09.
52. *Id.* at 408.

relevant to the first statutory fair use factor."[53] The Fifth Circuit also held that excluding the exact number of copies distributed and the details of the volume discount proposed was not an abuse of discretion, and any error was harmless because the jury was well aware that Compaq sold millions of computers and that Ergonome had proposed and desired to include a copy of its handbook with each Compaq computer sold.[54]

Compaq confirms the inherent difficulty in an evidentiary appeal, as the burden is on the appellant to show not only an abuse of discretion by the district court but also the tangible harm that flows from that abuse of discretion.

E. Paz v. Brush Engineered Materials, Inc.

In *Paz*, a group of employees sued Brush Wellman, Inc. (Brush) to recover compensatory and punitive damages for the alleged personal injuries suffered from exposure to beryllium-containing products at the Stennis Space Center.[55] The district court granted summary judgment in favor of Brush.[56] The employees subsequently appealed and raised two evidentiary points of error, contending that the district court abused its discretion by (1) excluding two biopsy slides from evidence and (2) excluding the expert testimony and report offered by the plaintiffs' medical expert.[57]

First, the Fifth Circuit affirmed the district court's decision to exclude the biopsy slides due to the plaintiff employees' violation of the district court's discovery order.[58] Although the district court entered a discovery order requiring plaintiffs to provide any tissue slides or samples to Brush by November 14, 2006, the plaintiff employees did not produce the slides or samples until May 2007.[59] In excluding the biopsy slides, the district court followed the *Barrett* four-part test for excluding evidence due to the violation of a discovery order.[60] The *Barrett* test examines the following: (1) explanation for failing to comply with the discovery order, (2) prejudice to the opposing party, (3) possibility of curing such prejudice by granting a continuance, and (4) importance of the witness's testimony.[61] The district court found that the plaintiff employees failed to offer a persuasive explanation and that the introduction of the slides would prejudice Brush

53. *Id.* at 409.
54. *Id.*
55. Paz v. Brush Engineered Materials, Inc., 555 F.3d 383, 386 (5th Cir. Jan. 2009).
56. *Id.*
57. *Id.* at 387.
58. *Id.* at 390-91.
59. *Id.* at 387.
60. *See id.* at 390 (citing Barrett v. Atl. Richfield Co., 95 F.3d 375, 380 (5th Cir. 1996)).
61. *Barrett*, 95 F.3d at 380.

because a continuance would result in further delay and expense.[62] The Fifth Circuit affirmed the continuing vitality of the *Barrett* test and held that the district court did not abuse its discretion in excluding the two biopsy slides in light of the clear language of its discovery order.[63]

Second, the Fifth Circuit also affirmed the district court's exclusion of the plaintiffs' medical expert because her report was based on false assumptions and failed to satisfy the *Daubert* standard.[64] The district court excluded the testimony and report of plaintiffs' expert because it was based on false assumptions and unreliable evidence.[65] The plaintiffs' expert assumed another doctor made additional cuts that noted the granulomas, but the other doctor's testimony confirmed he made no additional cuts.[66] The district court also excluded the expert's testimony and report that claimed multi-nucleated giant cells alone could lead to the diagnosis because the expert's assertion had not been tested or subjected to peer review and was not generally accepted in the medical community.[67] The Fifth Circuit agreed and ruled that the district court did not abuse its discretion in finding that the expert's testimony and report should be excluded because they were unreliable and based on erroneous information.[68]

F. Duron v. Albertson's L.L.C.

In *Duron*, plaintiff Margarita Duron filed suit against Albertson's alleging discrimination based on national origin and retaliation for filing an Equal Employment Opportunity Commission (EEOC) charge.[69] Prior to the suit, the EEOC and the Louisiana Commission on Human Rights (LCHR) reviewed and dismissed the plaintiff's charge and sent an EEOC "right-to-sue" letter advising Duron she would have to file a lawsuit within ninety days of receipt.[70] This right-to-sue letter reflected October 4, 2004, as the date mailed.[71] Duron did not comply with the statutory ninety-day deadline and instead filed suit against Albertson's after this period was closed.[72] Based on Duron's failure to file suit, Albertson's moved for summary judgment, which the district court granted.[73] The district court held, as a matter of law, Duron's failure to rebut the presumption of receipt of the

62. *Paz*, 555 F.3d at 390.
63. *Id.* at 391.
64. *Id.* at 388 (citing Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993)).
65. *Id.*
66. *Id.*
67. *See id.* at 389.
68. *Id.*
69. Duron v. Albertson's L.L.C., 560 F.3d 288, 289 (5th Cir. Feb. 2009).
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 290.

letter rendered her lawsuit untimely.[74] Duron appealed to the Fifth Circuit contending that she had produced sufficient evidence to create a fact issue concerning the date of her receipt of the EEOC right-to-sue letter.[75]

The Fifth Circuit reversed the grant of summary judgment to Albertson's holding that Duron's evidence was sufficient to overcome the presumption that she had received the right-to-sue letter.[76] The Fifth Circuit assigned considerable importance to a sworn affidavit in which Duron denied receiving the right-to-sue letter and also stated that she and her attorney called the EEOC several times to inquire on the status of her case.[77] The Fifth Circuit also noted that Albertson's never produced any business records or other physical evidence to show the EEOC sent Duron the notice of the right to sue.[78] Additionally, Albertson's did not produce any evidence that it received a copy of the right-to-sue letter but instead, relied on the notice of right-to-sue letter that had "10/4/04" written in the "Date Mailed" field.[79] In contrast, plaintiff Duron offered sworn affidavit testimony that she did not receive the letter until August 2006 and presented evidence that she and her counsel made several attempts to contact the EEOC to inquire on the status of her case.[80] The Fifth Circuit reiterated that when the mailing of a document is at issue, "[e]vidence of non-receipt can be used to establish that the notice was never mailed."[81] Hence, in *Duron*, the Fifth Circuit held that the plaintiff's "evidence of non-receipt" was sufficient to create a fact issue that precluded summary judgment, particularly in light of Albertson's failure to come forward with strong evidence of the mailing and receipt of the EEOC's right-to-sue letter.[82] The Fifth Circuit explained that when critical evidence is so weak or tenuous on an essential fact that it could not support a judgment, summary judgment is improper.[83] The Fifth Circuit closed by noting "that if the EEOC had followed its former practice of sending right-to-sue letters by certified mail, this dispute would, in all likelihood, have never arisen."[84]

In sum, *Duron* presents a valuable summary of the Fifth Circuit's evidentiary standards for confirming the mailing and receipt of letters, and these standards are potentially relevant in any case that involves a "mail box rule" or other factual issue centered on the date a letter was dispatched or received.

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74. *Id.*
75. *Id.*
76. *Id.* at 291.
77. *Id.* at 289-91.
78. *Id.* at 291.
79. *Id.*
80. *Id.*
81. *Id.* (quoting Custer v. Murphy Oil USA, Inc., 503 F.3d 415, 419 (5th Cir. 2007)).
82. *Id.*
83. *Id.* (quoting Alton v. Tex. A&M Univ., 168 F.3d 196, 199 (5th Cir. 1999)).
84. *Id.*

G. Brazos River Authority v. GE Ionics, Inc.

The Brazos River Authority (BRA) sued GE Ionics alleging that an electrodialysis reversal component manufactured by GE Ionics malfunctioned and caused a fire at BRA's water treatment plant at Lake Granbury.[85] After a jury returned a verdict in favor of GE Ionics, BRA filed an appeal claiming that the district court improperly excluded a wide variety of evidence during the jury trial and that the district court's cumulative evidentiary error was harmful.[86]

First, BRA argued that the district court incorrectly applied FRE 404(b) by excluding evidence meant to prove action in conformity with character as to an inanimate object.[87] The district court excluded evidence of similar fires at other water treatment facilities around the country on the basis of FRE 404(b).[88] The Fifth Circuit recognized that FRE 404(b) is generally applied only in the criminal law context, and its application has been limited to civil cases when the focus is on essentially criminal aspects.[89] More importantly, the Fifth Circuit recognized that FRE 404(b) applies only to persons and does not apply to inanimate objects:

> BRA argues that the district court incorrectly applied Federal Rule of Evidence 404(b), by excluding, as to an inanimate object as distinguished from a natural person, evidence meant to prove action in conformity with character. We agree this was serious error. Specifically, the court erred in excluding evidence of fires at other facilities on the basis of rule 404(b).
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> As BRA correctly points out, the propensities of a particular person to act a certain way are not at issue in this case, which involves the properties and functions of inanimate objects (EDR components) at various facilities. The rule talks about the character of a "person," and there is no person whose character BRA is trying to prove.[90]

In short, the Fifth Circuit reasoned that only people have "character" and as such, FRE 404(b) can only be applied to persons, not inanimate objects, such as the electrodialysis reversal component at issue in BRA's suit.[91]

After determining that it was error for the district court to exclude evidence of similar occurrences on the basis of FRE 404(b), the Fifth

85. Brazos River Auth. v. GE Ionics, Inc., 469 F.3d 416, 422 (5th Cir. 2006).
86. *Id.* at 422-23, 425.
87. *Id.* at 423.
88. *Id.*
89. *Id.*
90. *Id.*
91. *See id.*

Circuit analyzed whether the error was harmless.[92] It agreed with BRA that a "crushing majority of the evidence of other fires was excluded" and therefore, the evidence was not merely cumulative because the number of other fires might have been more dramatic and more persuasive to the jury.[93] GE Ionics argued in the alternative that even if the evidence was erroneously excluded under FRE 404(b), the evidence was properly excluded under FRE 402 and 403.[94] The Fifth Circuit noted that the evidence was not irrelevant under FRE 402 because the excluded documents showed that most fires occurred in the same flammable stack siding as at BRA.[95] Although GE Ionics urged the district court to exclude the evidence of other fires because the circumstances of the BRA fire were unique, the law in the Fifth Circuit with respect to non-product liability cases is that the degree of similarity "goes to the weight of the evidence (for the jury), not to admissibility."[96] The Fifth Circuit also ruled that the evidence should not be excluded under FRE 403 because there was no unfair prejudice.[97] Although there was some prejudice by requiring a defendant to explain how other fires were dissimilar, the burden is not unfair when the similarities are not insignificant and the trial court has broad discretion in the admission of evidence.[98]

BRA also argued that the district court erroneously excluded evidence showing GE Ionics investigation and recognition of problems under FRE 407.[99] BRA contended that FRE 407 only applies to measures implemented after the injury for which the plaintiff sues; that the remedial measure must actually be taken; and that post-accident plans, investigations, and testing are not subsequent remedial measures.[100] BRA sought recovery for the failure of the product to achieve its intended purpose of desalinating water and not for the recovery of damages caused by the fire.[101] The Fifth Circuit agreed with BRA that the evidence should have been admitted to rebut GE Ionics's theory of causation.[102] It offered a succinct explanation of the circumstances under which evidence of a subsequent remedial measure may be admitted without violating FRE 407:

> Rule 407 does not preclude the admission of subsequent remedial measures on grounds other than to prove culpability. Defendants countered BRA's breach of warranty contention by arguing that the fires

92. *Id.*
93. *Id.* at 424.
94. *Id.* at 425.
95. *Id.*
96. *Id.* at 426.
97. *Id.* at 427.
98. *Id.*
99. *Id.* at 427-28.
100. *Id.* at 428.
101. *Id.*
102. *See id.*

> resulted from poor maintenance. This court has long recognized that subsequent remedial measures can be introduced on the issue of causation if that is in controversy.
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> Similarly, some of the evidence excluded in the instant case also serves to rebut Ionic's defense that the fires were caused by poor maintenance. ***The admission of the evidence was not barred by rule 407, and it should have been admitted to rebut defendant's theory of causation.***[103]

Based on the multiple, distinct evidentiary errors committed by the district court and satisfied that these errors were harmful, the Fifth Circuit reversed the jury's verdict in favor of GE Ionics and remanded for a new trial.[104] As such, *Brazos River Authority* represents a rare victory for an appellant raising primarily evidentiary errors, and it confirms that cumulative evidentiary error can be so severe as to warrant the reversal of a jury verdict.[105] *Brazos River Authority*, however, remains the exception to the rule, as prevailing on an appeal that only raises evidentiary errors remains an uphill fight in the Fifth Circuit.

103. *Id.* at 429 (emphasis added).
104. *See id.* at 431-32.
105. *Id.*