Trial Practice and Procedure

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I. INTRODUCTION

This Article surveys the year 2001 decisions of the Eleventh Circuit Court of Appeals that have a significant impact on issues relating to trial practice and procedure.

II. FEDERAL CIVIL PROCEDURE

A. *Rule 11 Sanctions and Pro Se Parties*

In *Massengale v. Ray*,[1] the court considered an issue of first impression: Whether attorney fees could be awarded to a pro se defendant pursuant to Federal Rule of Civil Procedure 11.[2] The case involved two pro se litigants. The plaintiff, Massengale, filed a diversity action against several defendants and alleged wrongful acquisition of property. In the course of the litigation, Massengale amended his complaint twice and was allowed by the district court to refile his second amended complaint to clearly state a cause of action under either Florida law or

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1. 267 F.3d 1298 (11th Cir. 2001).
2. *Id.* at 1299; *see* FED. R. CIV. P. 11 (1994).

federal law.[3] Before the district court granted Massengale's motion to amend, however, defendant Konler filed a motion for Rule 11 sanctions, arguing that Massengale violated the rule because his pleadings: (1) were filed to harass and cause unnecessary delay; (2) were unsupported by law or evidence; and (3) because "Massengale continued to practice law despite having been disbarred."[4]

Prior to ruling on the Rule 11 motion, the district court dismissed the case with prejudice on Kolner's motion after Massengale failed to comply with the court's order to show cause. Kolner then filed a motion to reinstate his Rule 11 motion for sanctions, and the district court agreed, finding that the motion was based on conduct that occurred prior to the dismissal of the complaint. The district court thereafter adopted a magistrate judge's report and recommendation to award $25,000 in reasonable attorney fees for the time Kolner spent on the case, agreeing that it was the minimum amount that would adequately deter Massengale from future lawsuits.[5]

Massengale appealed the district court's decision, arguing that under *Ray v. United States Department of Justice*,[6] Kolner was not entitled to receive attorney fees because he performed his own legal work.[7] The Eleventh Circuit, reviewing the decision under an abuse of discretion standard, examined the policy behind Rule 11 sanctions.[8] The court noted that the policy behind not awarding attorney fees in *Ray* was the overriding concern that victims retain independent counsel in civil rights cases, not simply because the plaintiff was pro se.[9] The policy behind Rule 11 sanctions in general, however, is not to encourage independent counsel but rather to discourage "'dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.'"[10]

Despite holding that the rationale behind Rule 11 sanctions was deterrence and punishment rather than encouraging litigants to obtain independent counsel, the court nonetheless concluded that pro se

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3. 267 F.3d at 1300.
4. *Id.*
5. *Id.* at 1301.
6. 87 F.3d 1250 (11th Cir. 1996).
7. 267 F.3d at 1302.
8. *Id.*
9. *Id.* The court noted that awarding attorney fees to pro se litigants under the fee shifting provisions of the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (2000), would frustrate the policy underlying 42 U.S.C. § 1988 of encouraging litigants to retain independent counsel. *Id.*
10. *Id.* (quoting Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc)).

litigants are not entitled to attorney fees under the rule.[11] Rule 11, the court noted, allows district courts to impose sanctions upon a party who violates the rule, including "'an order directing payment to the movant of some or all of the reasonable [attorney] fees and other expenses incurred as a direct result of the violation.'"[12] Because a pro se litigant cannot have incurred attorney fees as an "expense" of litigation, a district court cannot award that amount as a part of the sanction.[13]

B. Discovery Sanctions

Another Eleventh Circuit case in 2001 that dealt with the issue of sanctions was *Lipscher v. LRP Publications, Inc.*[14] In *Lipscher,* the court addressed another issue of first impression: Whether Rule 37(b)(2), which allows district courts to impose sanctions for failure to comply with discovery orders, also authorizes sanctions for failure to comply with a discovery protective order.[15] Ultimately the court held that because a "protective order is not an order to 'provide or permit discovery,' . . . such orders do not fall within the scope of Rule 37(b)-(2)."[16]

In *Lipscher*, Law Bulletin Publishing Company ("Law Bulletin") sued a competitor, LRP Publications, Inc. ("LRP"), alleging claims under the Lanham Act as well as state law claims of breach of contract and unfair competition. The action was removed to federal court whereupon the district court entered a directed verdict for LRP on the Lanham Act claim and the jury returned a verdict for Law Bulletin on the breach of contract claim with an award of nominal damages. Both sides appealed.[17]

In the underlying lawsuit, Law Bulletin accused LRP of covertly obtaining subscriptions of its jury verdict reporter by posing as a law firm and thereafter using the publication as the basis for its Illinois jury verdict newsletter.[18] Discovery in the case was difficult because, as the district court noted, when competitors are engaged in litigation "it often appears that part of the strategy is to find out what the competitor is doing and using that for [one's] economic advantage in the future."[19]

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11. *Id.*
12. *Id.* (quoting FED. R. CIV. P. 11(c)(2)).
13. *Id.* at 1302-03.
14. 266 F.3d 1305 (11th Cir. 2001).
15. *Id.* at 1322; *see* FED. R. CIV. P. 37(b)(2) (1994).
16. 266 F.3d at 1322 (quoting FED. R. CIV. P. 37(b)(2)).
17. *Id.* at 1309.
18. *Id.* at 1308.
19. *Id.* at 1309.

As a result, the district court limited discovery to liability, stayed discovery on matters relating to damages, and granted a protective order to LRP regarding its implementation of third party jury verdict publications.[20]

After the jury's verdict for Law Bulletin, a second round of discovery began to determine the issue of damages. After more discovery disputes, the district court granted LRP's motion for summary judgment on damages and awarded Law Bulletin nominal damages only.[21]

Law Bulletin appealed the district court's dismissal of its state law and Lanham Act claims as well as the nominal damage award. LRP filed a cross-appeal, arguing that the district court erred by refusing to dismiss the breach of contract claims based on Copyright Act preemption and by denying its request for attorney fees and costs as a prevailing party under the Lanham Act.[22]

After affirming the district court's other holdings, the Eleventh Circuit addressed the issue of first impression: Whether Rule 37(b)(2) allows sanctions to be awarded for violations of protective orders.[23] The district court sanctioned Law Bulletin and its legal counsel for failure to return documents that were subject to a protective order, awarding LRP its attorney fees, costs, and expenses in connection with its motion for such sanctions.[24] Law Bulletin argued on appeal that: (1) the protective order was ambiguous; (2) Law Bulletin's failure to return documents was "substantially justified;" and (3) Rule 37 applies only to cases in which a party fails to comply with court-ordered discovery as opposed to a protective order.[25]

The Eleventh Circuit's analysis on the issue began and ended with Law Bulletin's third argument invoking Rule 37.[26] Despite LRP's argument that the Advisory Committee Notes to Rule 37 indicated that protective orders were within the scope of Rule 37 sanctions, the court was not persuaded.[27] The court reasoned that "the Notes refer to Rule 26(c) [protective orders] only in connection with rules authorizing 'orders *for discovery*.'"[28] Because a "protective order is not 'an order to provide

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20. *Id.*
21. *Id.* at 1309-10.
22. *Id.*
23. *Id.* at 1322.
24. *Id.* at 1321.
25. *Id.*
26. *Id.* at 1322-23.
27. *Id.* at 1323.
28. *Id.* (quoting FED. R. CIV. P. 37(b)(2)).

or permit discovery,'" the court held that "such orders do not fall within the scope of Rule 37(b)(2)."[29]

III. CIVIL RIGHTS

In *Rayburn v. Hogue*,[30] the Eleventh Circuit addressed yet another issue of first impression: Whether foster parents contracting with the Department of Family and Children's Services ("DFACS") are state actors for purposes of liability under 42 U.S.C. § 1983.[31] The case arose as a result of plaintiffs' allegations of sexual, mental, and physical abuse at the hands of their foster parents and other foster children in the home. Plaintiffs brought claims under § 1983 against DFACS and the Hogues (the foster parents) for violations of their substantive and procedural due process rights under the Fifth and Fourteenth Amendments, as well as state law claims for breach of contract, negligence, and intentional infliction of emotional distress.[32]

In their answer, defendants denied all claims and raised the defenses of qualified immunity, state sovereign and official immunity, and failure to state a claim. Furthermore, the Hogues argued that they were not state actors for Fourteenth Amendment purposes, and that even if they were, the law was not clearly established.[33] Defendants then moved for and were granted summary judgment "on all counts, with the exception of the Fourteenth Amendment substantive due process claim against the Hogues."[34] Even though the district court found that the Hogues were state actors, it found that they were not entitled to qualified immunity because: (1) the law was clearly established in regard to foster parents, and (2) there was a jury question about whether the Hogues had actual knowledge about the alleged abuse of plaintiffs.[35]

On appeal the Eleventh Circuit addressed whether the Hogues were state actors for § 1983 purposes.[36] Quoting *Harvey v. Harvey*,[37] the court noted that "'[o]nly in rare circumstances can a private party be viewed as a 'State actor' for section 1983 purposes.'"[38] The Eleventh Circuit then addressed each of the relative tests for state actors and

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29. *Id.* (quoting FED. R. CIV. P. 37(b)(2)).
30. 241 F.3d 1341 (11th Cir. 2001).
31. *Id.* at 1347-48.
32. *Id.* at 1345-46.
33. *Id.* at 1346. State actors are entitled to immunity if the law they are alleged to have violated was not clearly established at the time of the violation. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 1347.
37. 949 F.2d 1127 (11th Cir. 1992).
38. 241 F.3d at 1347 (quoting *Harvey*, 949 F.2d at 1130).

agreed with the district court that: (1) the state did not encourage the Hogues' action ("State compulsion test"), and (2) foster care is not traditionally an exclusive state prerogative ("public function test").[39] The Eleventh Circuit, however, disagreed with the district court to the extent that the court held "'the State had so far insinuated itself into a position of interdependence with the [Hogues] that it was a joint participant in the enterprise'" ("nexus/joint action test").[40]

The court reasoned that in order for a private party to be considered a state actor under the nexus/joint action test, the private party and the governmental entity must be so intertwined that a "'symbiotic relationship'" exists.[41] Further, quoting *American Manufacturers Mutual Insurance Co. v. Sullivan*,[42] the court noted that such a "symbiotic relationship must involve the 'specific conduct of which the plaintiff[s] complain[],'" and, that conduct must have been encouraged or sanctioned by the state.[43] While acknowledging that the State of Georgia regulates foster parents to a certain extent, the court noted that the state certainly did not encourage child abuse and in fact forbids it.[44] Additionally, citing *Blum v. Yaretsky*,[45] the court noted that mere regulation by the state is not sufficient to render a private party a state actor for § 1983 purposes.[46] Thus, the Eleventh Circuit determined that foster parents are not subject to liability under § 1983 and accordingly vacated the district court's decision.[47]

IV. REMOVAL JURISDICTION

In *Whole Health Chiropractic & Wellness, Inc. v. Humana Medical Plan, Inc.*,[48] the Eleventh Circuit faced another issue of first impression: "[W]hether the Federal Removal Statute[49] permits a district court's *sua sponte* remand of a case because of a defect in the removal procedure."[50]

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39. *Id.*

40. *Id.* (quoting NBC, Inc. v. Communications Workers of Am., 860 F.2d 1022, 1026-27 (11th Cir. 1998)).

41. *Id.* at 1348 (quoting Jackson v. Metro. Edison Co., 419 U.S. 345 (1974)).

42. 526 U.S. 40 (1999).

43. 241 F.3d at 1348 (quoting *Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 51 (internal citations omitted)).

44. *Id.*

45. 457 U.S. 991 (1982).

46. 241 F.3d at 1348.

47. *Id.* at 1349.

48. 254 F.3d 1317 (11th Cir. 2001).

49. 28 U.S.C. § 1441 to 1452 (1994).

50. 254 F.3d at 1318.

In *Whole Health*, the original plaintiff, Medical Re-Hab Center, filed the case in state court on its own behalf as well as those similarly situated, alleging that Humana Medical Plan, Inc. ("Humana") violated a Florida statute for failing to make interest payments on medical bills that were not paid until more than forty-five days after receiving notice of the loss. Humana moved to dismiss on the grounds that as an HMO, it was not governed by Florida insurance laws. Thereafter, the plaintiff amended the complaint to add Whole Health Chiropractic & Wellness, Inc. as the plaintiff and Humana Health Insurance Company of Florida, Inc ("HHIC") as a defendant. The amended complaint identified a patient of Whole Health as a participant in and beneficiary of an employee welfare plan of HHIC.[51] More than a year after the original complaint was filed, defendants filed a notice of removal pursuant to 28 U.S.C. § 1441(b), alleging that the employee benefit plan was governed by ERISA[52] and therefore the claim arose under federal law.[53]

"The district court, acting *sua sponte*, remanded the case to the Florida court" based on a determination that "because the case had been pending in the state court for over one year before removal, the time for removing the case to federal court had expired."[54] Thereafter, the district court denied defendants' motion to reconsider, reasoning that it had no jurisdiction "because it had remanded the action due to 'a defect in the removal process.'"[55] Defendants appealed.[56]

The Eleventh Circuit first addressed its jurisdiction to review the district court's order.[57] Examining the removal statute, the court observed that 28 U.S.C. § 1447(d) provides that an action remanding a case to the state court from which it was removed is not reviewable.[58] However, the court also observed that the Supreme Court in *Thermtron Products, Inc. v. Hermansdorfer*[59] held that only orders issued under §§ 1447(c) and 1447(d) must be read together, and only remands made under § 1447(c) and invoking the specific grounds therein (upon a motion that "'removal was improvident and without jurisdiction[)] are immune

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51. *Id.*
52. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 to 1461 (1994 & Supp. 1999).
53. 254 F.3d at 1318.
54. *Id.*
55. *Id.* at 1318-19.
56. *Id.* at 1319.
57. *Id.*
58. *Id.*
59. 423 U.S. 336 (1976), abrogated on other grounds in Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996).

from review under § 1447(d).'"[60] The Eleventh Circuit reasoned that because § 1447(c) does not expressly authorize *sua sponte* remand orders, it likewise does not bar review of that order.[61]

The court, having resolved the jurisdictional issue, turned to the question of first impression: Whether the Federal Removal Statute allows a district court to *sua sponte* remand a case because of a defect in the removal procedure.[62] The court noted that the Third, Fifth, Sixth, and Seventh Circuits have held that § 1447(c) does not authorize such a *sua sponte* remand within the thirty day limit for a motion for remand.[63] The court relied specifically upon the reasoning of those circuits,[64] holding that Congress's use of the language "'[a] motion to remand . . . must be made,' [in § 1447(c)] in connection with remand based on a procedural defect . . . indicates that the district court must wait for a party's motion before remanding a case based on procedural defect."[65] The court thus held that the district court had exceeded its authority under § 1447(c) and remanded the case for further proceedings.[66]

V. PREEMPTION

In *BellSouth Telecommunications, Inc. v. Town of Palm Beach*,[67] the Eleventh Circuit again addressed an issue of first impression, this time in connection with section 253 of the Telecommunications Act of 1996 ("the Act").[68] In *BellSouth*, the court resolved two questions of first impression regarding the Act: "(1) What is the preemptive scope of [section] 253; and (2) who may seek enforcement of the provisions of [section] 253[.]"[69]

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60. 254 F.3d at 1319 (quoting Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. at 346).

61. *Id.*

62. *Id.*

63. *Id.* at 1319-20.

64. *Id.* at 1320. *See In re* FMC Corp. Packaging Sys. Div., 208 F.3d 445, 451 (3d Cir. 2000) (holding that a district court's remand order was reviewable because the court exceeded its authority under § 1447(c) by *sua sponte* remanding the action within thirty days of removal based on procedural defect) (citing Page v. City of Southfield, 45 F.3d 128 (6th Cir. 1995). *See also* In the Matter of Cont'l Cas. Co., 29 F.3d 292 (7th Cir. 1994) (same); In re Allstate Ins. Co., 8 F.3d 219 (5th Cir. 1993) (same).

65. 254 F.3d at 1321.

66. *Id.*

67. 252 F.3d 1169 (11th Cir. 2001).

68. Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of 47 U.S.C.).

69. 252 F.3d at 1175.

The plaintiff in *BellSouth* was the local telephone service provider for two Florida cities at the time the Act was passed. The cities, Palm Beach and Coral Springs, both passed ordinances in response to the Act on the assumption that the Act directed them to change the way they regulated telecommunication providers. Both ordinances dealt with the structure of the cities' franchising and licensing of telecommunication providers' use of public rights of way in accordance with the Act.[70]

BellSouth filed suit against both cities on the ground that state law as well as section 253 of the Act preempted the local ordinances. Both cities thereafter filed counterclaims, Coral Springs for breach of contract and Palm Beach for compensation under the terms of the ordinance. All parties moved for summary judgment. The district court upheld some sections of the ordinances but found that others were preempted by state or federal law or both, thereby granting BellSouth's motions and dismissing the cities' counterclaims.[71] In the case of *Palm Beach City*, the court "found that the preempted sections were severable, and allowed the [remaining] sections of the ordinance to stand."[72]

Both cities appealed the court's findings of preemption and the dismissal of their counterclaims.[73] "BellSouth cross-appealed, [arguing] that the district court erred in upholding sections of the ordinances, or in the alternative, that the [ordinance] sections were not severable, and, therefore, the ordinances should have been struck down in their entirety."[74]

To avoid reaching constitutional questions unnecessarily, the Eleventh Circuit first determined whether state law preempted the ordinances.[75] The court examined each section in isolation due to the severability clauses in each ordinance and found several sections to be preempted by Florida law.[76] Because sections of both ordinances remained after the state law analysis, the court then considered BellSouth's claim that the ordinances were preempted by section 253 of the Act.[77]

Acknowledging that subsection (a) of section 253 imposes a substantive limitation on state and local authority to regulate telecommunications on its face, the court then examined subsections (b) and (c) to

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70. *Id.* at 1175-76.
71. *Id.* at 1176.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 1177-85.
77. *Id.* at 1185-86. Section 253 is titled "Removal of Barriers to Entry" and is codified at 47 U.S.C. § 253 (Supp. 1999).

determine if an exception existed to that limitation.[78] Several district courts had interpreted those subsections "as imposing substantive limitations on state and local authority in the telecommunications field."[79] The Eleventh Circuit, however, read subsections (b) and (c) as defining exceptions to subsection (a) by virtue of the initial phrase in both.[80] The court further justified its reasoning that subsections (b) and (c) were exceptions to subsection (a) by citing to the Federal Communications Commission's ("FCC") construction of the Act, which posits a similar interpretation, and the legislative history surrounding the Act's adoption.[81]

The Eleventh Circuit implemented the four part test from *Cort v. Ash*,[82] and thereafter addressed the question of whether section 253 implies a federal cause of action.[83] Going beyond the plain language of the Act, the court looked to the legislative history, specifically the remarks of Senator Gorton, to answer this question.[84] In doing so, the court reasoned that the enforcement provision of the Act, subsection (d), "serves a single purpose—it establishes different forums based on the subject matter of the challenged statute or ordinance."[85] Hence, the court held that a private cause of action in federal district court does exist under section 253.[86] This private cause of action allows plaintiffs

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78. *Id.* at 1186-87. Subsections (b) and (c) read as follows:

> (b) . . . Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. (c) . . . Nothing in this section affects the authority of a State or local government to manage the public rights-of-ways or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

47 U.S.C. § 253(b) to (c).

79. 252 F.3d at 1187.

80. *Id.* at 1187-88.

81. *Id.* at 1188-89.

82. 422 U.S. 66 (1975). The four factors from *Cort* are: (1) whether the plaintiff is one of the class for whose benefit the statute was enacted; (2) whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and (4) whether the cause of action is one traditionally relegated to state law, in an area basically the state's concern. *Id.* at 78.

83. 252 F.3d at 1189.

84. *Id.* at 1190-91.

85. *Id.* at 1191.

86. *Id.*

to "seek preemption of a state or local statute" when that statute or ordinance "purports to address the management of the public rights-of-way."[87] The cases were then remanded to the district court for a determination on whether the ordinances violated subsection (a).[88]

VI. BURDEN OF PROOF IN DISABILITY DETERMINATIONS

In *Doughty v. Apfel*,[89] the Eleventh Circuit held that the claimant bears the burden of proving that drug or alcohol addiction is "not a contributing factor material to [a] disability determination."[90] In *Doughty*, the plaintiff appealed the district court's ruling, which affirmed the Social Security Commissioner's denial of his petition for supplemental security income and disability insurance income.[91] The Commissioner denied the plaintiff's application pursuant to the Contract with America Advancement Act of 1996 ("CAAA"),[92] which amended the Social Security Act[93] to preclude the award of benefits when alcohol or drug addiction is determined to be a contributing factor material to the disability.[94]

The plaintiff applied for disability in 1994 alleging that he had been disabled since 1989 as a result of anxiety related disorders. Following the denial of his applications, plaintiff argued in a hearing before an Administrative Law Judge ("ALJ") that he quit his job as a baker because he began to experience dizzy spells and was afraid he would hurt himself. While acknowledging that he had a history of alcohol abuse, plaintiff denied that drinking had ever caused him to miss work or to be arrested. The plaintiff did testify, however, that he was on a waiting list for entry into a drug and alcohol treatment center at the time of his ALJ hearing. Further, the plaintiff's medical records revealed that he suffered from alcohol dependence rather than panic disorder or agoraphobia. Thereafter, the ALJ denied benefits, holding that while the plaintiff's alcoholism was disabling, it was also a material contributing factor to his determination and therefore precluded benefits under the CAAA.[95]

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87. *Id.*
88. *Id.* at 1192.
89. 245 F.3d 1274 (11th Cir. 2001).
90. *Id.* at 1280.
91. *Id.* at 1275.
92. Pub. L. No. 104-121, § 105(a)(1), 110 Stat. 847, 852-55 (1996) (codified as amended at 42 U.S.C. § 423(d)(2)(C) (1997)).
93. 42 U.S.C. § 423(d)(2)(c) (1997).
94. 245 F.3d at 1275.
95. *Id.* at 1276-78.

The plaintiff appealed the ALJ's decision to the district court, arguing that the ALJ had the burden of justifying the decision that alcohol use was a contributing factor material to the determination of disability. The district court upheld the ALJ's decision and plaintiff appealed to the Eleventh Circuit.[96] The Eleventh Circuit acknowledged that the burden is primarily on the claimant to prove that he is disabled and looked to a Fifth Circuit decision for its holding that the claimant also bears the burden of proof as to the materiality determination.[97]

In *Brown v. Apfel*,[98] the Fifth Circuit articulated several reasons for placing the burden on the plaintiff; however, the Eleventh Circuit was perhaps most influenced by the pragmatic reasoning behind the holding.[99] The Fifth Circuit reasoned that the claimant

> "is the party best suited to demonstrate whether she would still be disabled in the absence of drug or alcohol addiction. We are at a loss to discern how the Commissioner is supposed to make such a showing, the key evidence for which will be available most readily to the claimant."[100]

Therefore, the Eleventh Circuit affirmed the ALJ's decision, finding that there was sufficient evidence to support the determination and that plaintiff had failed to meet his burden of proof as to the materiality of contributing factors under section 423(d)(2)(C).[101]

VII. CONCLUSION

This year's review of Eleventh Circuit cases contains a significant number of issues of first impression. It is hoped this Article will assist the bench and bar with the ongoing complexities of federal court practice.

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96. *Id.* at 1278.
97. *Id.* at 1278-79.
98. 192 F.3d 492 (5th Cir. 1999).
99. 245 F.3d at 1280.
100. *Id.* (quoting Brown v. Apfel, 192 F.3d at 498).
101. *Id.* at 1281.