

Evidence

by Marc T. Treadwell*

I. OBJECTIONS

It is a basic but often overlooked fact that a party seeking to appeal a trial court's evidentiary ruling excluding evidence must not only make a contemporaneous objection, but must also make an appropriate proffer. For example, in *Pittman v. State*,¹ the trial court, after the prosecution invoked the rule of sequestration, ruled that if defendant's expert remained in the courtroom during the prosecution's case, he could not testify. Defendant chose to keep the expert in the courtroom. Defendant argued on appeal that the trial court had discretion to permit witnesses to remain in the courtroom to assist a party in the presentation of his case. Defendant had a valid point; it did not appear that the trial court exercised any discretion when it subsequently excluded the testimony of the expert after he sat at counsel's table during the prosecution's case in chief.² Rather, the mere fact that the witness was in the courtroom was sufficient for the trial court to conclude "that the ends of justice would not be met if the expert witness were permitted to testify after being in the courtroom."³ However, defendant did not make a proffer of what the expert would have said had he testified. Consequently, the supreme court found no grounds for reversal.⁴

In *Sharpe v. Department of Transportation*,⁵ a case discussed in a previous survey,⁶ the supreme court expanded the contemporaneous objection rule by abolishing the use of a subsequent motion to strike to

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1. 274 Ga. 260, 553 S.E.2d 616 (2001).
2. *Id.* at 262, 553 S.E.2d at 619.
3. *Id.*, 553 S.E.2d at 620.
4. *Id.* at 263, 553 S.E.2d at 620.
5. 267 Ga. 267, 476 S.E.2d 722 (1996).
6. Marc T. Treadwell, *Evidence*, 49 MERCER L. REV. 149, 149-51 (1997).

attack “illegal evidence.”⁷ Although a motion to strike can still be used to challenge previously admitted evidence that, in light of subsequent evidence, may no longer be admissible, it must clearly appear that the motion is based on subsequent developments. In *Bryan v. Brown Childs Realty Co.*,⁸ defendant did not initially object to testimony by plaintiff’s expert on the issue of damages. After a subsequent witness testified about other matters and the court considered two unrelated issues, defendant moved to strike the expert’s testimony. However, the subsequent evidence did not relate to the expert’s testimony, and thus, there clearly was no evidence admitted after his testimony that revealed a defect in the testimony. Therefore, the contemporaneous objection rule barred defendant’s belated effort to attack the expert’s testimony.⁹

Georgia law recognizes one other exception to the contemporaneous objection rule—an exception that is likely an accident of stare decisis. Hearsay evidence, even if not objected to, is wholly without probative value and cannot support a verdict.¹⁰ Thus, a party can successfully appeal a verdict that is based on hearsay even though he did not object when the hearsay was admitted.¹¹ In a previous survey, the author suggested that this exception to the contemporaneous objection rule might soon meet its demise.¹² That speculation was based on *Sharpe*, the decision abolishing motions to strike illegal evidence. The author speculated that it seemed implicit in the holding in *Sharpe* that the court also would reject the principle that unobjected to hearsay has no probative value.¹³ That has not yet happened, although the current survey period saw uneven application of this exception. In two cases, the court reversed convictions based on hearsay evidence notwithstanding the absence of an objection.¹⁴ In both cases, the court adhered to the principle that hearsay evidence simply has no probative value.¹⁵ However, in *Howard v. State*,¹⁶ the court of appeals, when faced with the same situation, seemed to apply the contemporaneous objection rule: “Although Howard objected at trial to the admission of the letter on the ground the letter was not properly authenticated, the hearsay basis now

7. 267 Ga. at 271, 476 S.E.2d at 725.

8. 252 Ga. App. 502, 556 S.E.2d 554 (2001).

9. *Id.* at 506-07, 556 S.E.2d at 560.

10. *Dep’t of Transp. v. Sharpe*, 267 Ga. 267, 268, 476 S.E.2d 722, 723 (1996).

11. *Id.*

12. Marc T. Treadwell, *Evidence*, 51 MERCER L. REV. 279, 279-80 (1999).

13. Treadwell, *supra* note 6, at 280.

14. *Priebe v. State*, 250 Ga. App. 725, 553 S.E.2d 5 (2001); *Baker v. State*, 252 Ga. App. 695, 556 S.E.2d 892 (2001).

15. 250 Ga. App. at 726-27, 553 S.E.2d at 7; 252 Ga. App. at 699, 556 S.E.2d at 897.

16. 252 Ga. App. 465, 556 S.E.2d 536 (2001).

urged was not raised. Under such circumstances, there remains nothing for appellate review."¹⁷ Stare decisis is a hard doctrine to overcome, but surely it is only a matter of time before the supreme court rules that the contemporaneous objection rule also applies to hearsay evidence.

II. RELEVANCY

A. *Relevancy of Extrinsic Act Evidence*

In the fifteen years the author has surveyed Georgia appellate decisions, the determination of the relevancy of extrinsic act evidence has been the most frequently addressed evidentiary issue. The issue usually arises when prosecutors attempt to introduce evidence of a defendant's conduct on other occasions, claiming that, for example, evidence of a defendant's prior crime is relevant to a legitimate issue. Deeply rooted in our judicial heritage is the principle that a person should not be convicted because of his character or because of his conduct on other occasions.¹⁸ No one can reasonably contend that evidence of a defendant's bad character should be admissible to prove that he committed the charged offense. Though logically relevant—a person of bad character is more likely to commit a crime than one of exemplary character—the extreme prejudicial effect of such evidence demands its exclusion. Similarly, evidence of specific extrinsic acts or transactions is not admissible to prove that a person, on the occasion in question, acted in conformity with his conduct on other occasions.¹⁹ Notwithstanding the general rule that extrinsic act evidence is inadmissible, such evidence, particularly evidence of allegedly similar crimes, is routinely admitted;²⁰ the exceptions have truly swallowed the rule, or so it surely seems to defense attorneys.

Although the use of similar transaction evidence in criminal cases has expanded considerably, one principle has always seemed clear—evidence of a defendant's conduct on other occasions is not admissible to prove his

17. *Id.* at 469, 556 S.E.2d at 540.

18. *See, e.g.*, *Walraven v. State*, 250 Ga. 401, 297 S.E.2d 278 (1982).

19. *Id.* at 401, 297 S.E.2d at 278; *see also* FED. R. EVID. 404(b).

20. This trend has not been entirely even. As discussed in previous surveys, the Georgia Supreme Court, in *Stephens v. State*, 261 Ga. 467, 405 S.E.2d 483 (1991), and *Williams v. State*, 261 Ga. 640, 409 S.E.2d 649 (1991), tightened the rules governing the admissibility of similar transaction evidence in criminal cases. *See* Marc T. Treadwell, *Evidence*, 45 MERCER L. REV. 229, 231 (1993); Marc T. Treadwell, *Evidence*, 44 MERCER L. REV. 213, 216-20 (1992). Also, some supreme court justices have questioned the broad use of similar transaction evidence. *See* Marc T. Treadwell, *Evidence*, 48 MERCER L. REV. 323, 327 (1996); Treadwell, *supra* note 6, at 154-56 (discussing Justices Fletcher's and Sears's frequent criticism of the expanding use of similar transaction evidence).

“propensity” to commit criminal acts.²¹ However, even that core principle was called into question during the current survey period. In *Carr v. State*,²² the trial court admitted, during defendant’s trial for burglary, evidence of allegedly similar burglaries committed or attempted by defendant. The trial court then charged the jury that it could consider this evidence “as proof of [defendant’s] ‘predisposition to commit the crime.’”²³ This jury charge was based on the decision in *Zinn v. State*,²⁴ which held that a defendant’s propensity to commit a crime was relevant to rebut a claim of entrapment.²⁵ In *Carr*, however, defendant did not claim entrapment, and thus, *Zinn* was not applicable.²⁶

This led the court to a discussion about the permissible purposes of extrinsic act evidence. The court acknowledged that similar transaction evidence is highly prejudicial and, thus, it is admissible only for limited purposes.²⁷ A clearly improper purpose would be to demonstrate “a propensity to commit criminal acts in general or a certain type crime in particular.”²⁸ This improper use of extrinsic act evidence, the court held, “goes to the very heart of the reason why similar transaction evidence is generally inadmissible.”²⁹ Indeed, “the primary aim of this rule [barring the admission of extrinsic act evidence] is to avoid the forbidden inference of propensity.”³⁰

However, Judge Eldridge, concurring specially and in the judgment only, wrote a separate opinion and argued that “‘propensity’ can be a sufficient basis for the admission of a similar transaction.”³¹ Citing examples of similar transaction evidence properly admitted to prove a defendant’s propensity, Judge Eldridge stated:

[It] is not a forbidden concept when establishing the admissibility of a similar transaction when it goes to show conduct and/or intent with regard to the commission of the indicted offense The evil to be avoided is, as in this case, admission of a similar transaction simply to

21. See *Carr v. State*, 251 Ga. App. 117, 119, 553 S.E.2d 674 (2001).

22. 251 Ga. App. 117, 553 S.E.2d 674 (2001).

23. *Id.* at 119, 553 S.E.2d at 676.

24. 134 Ga. App. 51, 213 S.E.2d 156 (1975).

25. *Id.* at 51-52, 213 S.E.2d at 157.

26. 251 Ga. App. at 119, 553 S.E.2d at 676.

27. *Id.*

28. *Id.* (emphasis added) (quoting *King v. State*, 230 Ga. App. 301, 304, 496 S.E.2d 312, 314 (1998)).

29. *Id.* at 120, 553 S.E.2d at 676.

30. *Id.*, 553 S.E.2d at 676-77 (quoting *Smith v. State*, 232 Ga. App. 290, 291, 501 S.E.2d 523, 525 (1998)).

31. *Id.* at 121, 553 S.E.2d at 677.

demonstrate a predisposition to commit an offense that the defendant committed in the past, i.e., he did it before, so he did it this time as well.³²

It often seems that even when defendants can convince appellate courts that similar transaction evidence was erroneously admitted, their victory is pyrrhic. In *Vaughan v. State*,³³ defendant, who was charged with the sale of cocaine, contended the trial court erroneously admitted evidence of his 1997 conviction for possession of cocaine.³⁴ The court of appeals agreed that the possession charge was not sufficiently similar to the sale charge to be admitted as a similar transaction, rejecting the State's contention that it was admissible to demonstrate identity.³⁵ However, the court also found that the error was harmless; the evidence of defendant's guilt was so overwhelming that the inadmissible evidence likely did not contribute to his conviction.³⁶

In *Thomas v. State*,³⁷ defendant also convinced the court of appeals that the trial court erroneously admitted allegedly similar transaction evidence.³⁸ In *Thomas* defendant was charged with offenses arising from an assault on a pizza delivery man—an assault motivated by defendant's desire to get an order of chicken wings and four large pizzas. At defendant's trial, the trial court admitted evidence that defendant had committed an armed robbery of a convenience store. This act, the prosecution contended, demonstrated a common scheme or plan and thus was admissible for a legitimate purpose.³⁹ The court of appeals was not impressed. "We cannot, however, fathom any similarity between the two acts so as to demonstrate a coherent 'scheme or plan,' especially since—contrary to the State's representation at the Uniform Superior Court Rule 31.3(B) hearing—the instant act did not involve an 'attempt to obtain money forcefully from people.'"⁴⁰ Again, however, the court also found that the evidence of defendant's guilt was so overwhelming that the error was harmless.⁴¹

Extrinsic act evidence can also be relevant in civil cases, although, perhaps ironically, courts are much more reluctant to admit extrinsic act evidence in civil cases than they are in criminal cases. It would seem

32. *Id.*, 553 S.E.2d at 677-78.

33. 251 Ga. App. 221, 553 S.E.2d 335 (2001).

34. *Id.* at 221, 553 S.E.2d at 336.

35. *Id.* at 223, 553 S.E.2d at 337-38.

36. *Id.* at 223-24, 553 S.E.2d at 338.

37. 253 Ga. App. 58, 557 S.E.2d 483 (2001).

38. *Id.* at 59, 557 S.E.2d at 485.

39. *Id.* at 58-59, 557 S.E.2d at 485.

40. *Id.* at 59, 557 S.E.2d at 486.

41. *Id.* at 61, 557 S.E.2d at 487.

that in criminal cases, when freedom and potentially life itself are at stake, the courts would be more circumspect in the admission of prejudicial extrinsic act evidence than in civil cases, which typically involve only monetary damages. There is, however, a logical basis for this dichotomy. Criminal cases invariably involve intentional conduct and, therefore, raise issues such as motive, scheme, or identity. Thus, for example, proof that a defendant intentionally committed a similar offense may tend to identify him as the perpetrator of the charged offense. Civil cases, on the other hand, typically involve issues of negligence, and the fact that someone was negligent on a prior occasion would prove nothing in a suit arising from a subsequent allegedly negligent act, except, perhaps, that the defendant was prone to be negligent, and that is not a permissible use of extrinsic act evidence. However, it would seem that if a civil case involved intentional misconduct, as in a case arising from fraud, then extrinsic act evidence should be as freely admissible as it is in criminal cases.

The court of appeals addressed this issue in *First Bancorp Mortgage Corp. v. Giddens*.⁴² In *Giddens* First Bancorp Mortgage Corp. ("Bancorp") sued its attorneys for losses arising out of the default of a mortgage underwritten by Bancorp. Bancorp contended that its attorneys had engaged in "flip sales," a scheme involving the sale of property twice, the second time for a substantially higher price. Bancorp contended that if it had known of the flip sales, it would not have underwritten the mortgages. Bancorp produced expert evidence to the effect that the closing attorneys should have been aware of the flip sales and that those sales should have alerted them to the fact that something was amiss. Accordingly, they should have, at that point, informed Bancorp. At trial, the court refused to admit evidence of other lawsuits filed against defendants alleging essentially the same closing practices. Bancorp argued that those lawsuits were admissible as similar transaction evidence.⁴³ The court of appeals disagreed, noting first that in negligence cases, similar acts are rarely admissible, although they may be admissible to demonstrate, for example, course of conduct or bad faith.⁴⁴ Still, the trial court should admit such evidence only if the evidence will not unduly prejudice a party, and the trial court is given broad discretion in this regard.⁴⁵ Here, the court concluded, admission of evidence of the other lawsuits would have raised a substantial risk of creating undue prejudice or confusion, and the court of appeals could not

42. 251 Ga. App. 676, 555 S.E.2d 53 (2001).

43. *Id.* at 677-78, 555 S.E.2d at 56.

44. *Id.* at 678, 555 S.E.2d at 56-57.

45. *Id.*, 555 S.E.2d at 57.

say that the trial court abused its discretion.⁴⁶ No doubt criminal defense attorneys yearn for such a stringent analysis of similar transaction evidence in their cases.

B. Relevancy of Prior Sexual Behavior

Georgia's rape shield statute prohibits the admission of evidence relating to the prior sexual behavior of a rape victim unless the behavior directly involves the accused and the evidence supports an inference that the accused could have reasonably believed the victim consented to the sexual activity.⁴⁷ In *Williams v. State*,⁴⁸ defendant argued that he should have been allowed to introduce evidence of the victim's previous rape to support his argument that the victim, as a result of the previous rape, would have been wary of strange men, and thus, she must have consented to sexual intercourse with defendant.⁴⁹ The court of appeals acknowledged that some inroads have been made in the rape shield statute, but it rejected defendant's contention that the rape shield statute does not bar evidence that a witness was the unwilling victim of a prior crime.⁵⁰ Defendant was free to explore fully the issue of consent, but he could not demonstrate consent by introducing evidence of the victim's prior rape.⁵¹

C. Relevancy of Collateral Source Payments

It appears that there is a fine line between admissible and inadmissible evidence of insurance benefits available to plaintiffs—a line perhaps too fine to provide any meaningful distinction. As discussed in previous surveys, a party does not “open the door” to the admission of evidence that he has health insurance when he testifies that he suffered financial hardship because of his medical bills.⁵² Similarly, evidence of a party's disability benefits is not admissible even after a plaintiff testifies inaccurately that he has no income.⁵³

During the current survey period, the court of appeals, in *Matheson v. Stilkenboom*,⁵⁴ addressed the issue of whether the trial court erroneously-

46. *Id.*

47. See O.C.G.A. § 24-2-3 (1995).

48. 251 Ga. App. 137, 553 S.E.2d 823 (2001).

49. *Id.* at 139, 141, 553 S.E.2d at 825-26.

50. *Id.* at 140-41, 553 S.E.2d at 825-26.

51. *Id.* at 141, 553 S.E.2d at 826.

52. Treadwell, 48 MERCER L. REV., *supra* note 20, at 335-37; Treadwell, *supra* note 6, at 158-59.

53. Treadwell, 48 MERCER L. REV., *supra* note 20; Treadwell, *supra* note 6.

54. 251 Ga. App. 693, 555 S.E.2d 73 (2001).

ly permitted defendant to cross-examine plaintiff regarding her medical insurance coverage.⁵⁵ On direct examination, plaintiff, apparently in an attempt to explain her delay in seeking treatment, testified that she did not go to the doctor earlier because she could not afford the treatment.⁵⁶ The court of appeals concluded that plaintiff opened the door for impeachment with evidence of insurance, reasoning that unlike previous cases, the evidence of insurance coverage was relevant to a material issue, i.e., the reason plaintiff delayed seeking medical attention.⁵⁷

On the other side of the equation—whether a defendant’s liability insurance coverage can be relevant—a divided court of appeals panel came to a contrary result. In *Chambers v. Gwinnett Community Hospital, Inc.*,⁵⁸ plaintiff contended that she should have been able to impeach defendant’s expert witnesses with evidence that they were insured by the same liability carrier that insured defendant, MAG Mutual Insurance Co. (“MAG”), an insurance company that insures most Georgia doctors. Plaintiff argued that witnesses can always be impeached with evidence of their financial interest in a case and that the witnesses, as policyholders in a mutual insurance company, had a financial interest in the outcome of the case.⁵⁹ This argument, the court of appeals noted, ran afoul of the well-established principle that evidence of a defendant’s liability insurance coverage is admissible only in the rarest of circumstances.⁶⁰ Here, the court determined that the evidence of financial interest by the witnesses was slight; plaintiff could only show that any judgment against defendant would be paid by MAG, and because MAG was a mutual insurance company, its policyholders were potentially responsible for its losses.⁶¹ In the court of appeals’s view, however, this was only “an inchoate and financially insignificant interest in the outcome of this particular case.”⁶² The court concluded that there must be a showing of a more substantial financial interest in a case to warrant the introduction of admittedly prejudicial evidence of liability insurance coverage.⁶³ Three of the seven judges dissented and joined in an opinion written by Judge Blackburn, who argued that the witnesses’ financial interest in the outcome of the case was sufficient to

55. *Id.* at 695, 555 S.E.2d at 75.

56. *Id.*

57. *Id.* at 696, 555 S.E.2d at 75.

58. 253 Ga. App. 25, 557 S.E.2d 412 (2001).

59. *Id.* at 26, 557 S.E.2d at 415.

60. *Id.*

61. *Id.* at 26-28, 557 S.E.2d at 415-16.

62. *Id.* at 26, 557 S.E.2d at 415-16.

63. *Id.* at 28, 557 S.E.2d at 417.

allow plaintiff to impeach their testimony with evidence that they were insured by MAG.⁶⁴ The fact that MAG policyholders were potentially liable for indemnification against loss suffered as a result of payments by MAG gave policyholders a significant financial stake in the company.⁶⁵ To the extent this evidence would be prejudicial to defendant, Judge Blackburn wrote, he had only himself and his lawyers to blame; they chose the experts.⁶⁶

D. Miscellaneous Relevancy Issues

In *Johnson v. Riverdale Anesthesia Associates, P.C.*,⁶⁷ a case closely watched by attorneys handling medical negligence cases, a divided supreme court held that an expert witness in a medical negligence case could not be cross-examined about how he personally would have treated plaintiff.⁶⁸ In *Johnson* defendant's expert testified on direct examination that defendant's conduct in the care of plaintiff's wife met the applicable standard of care. The trial court refused to allow plaintiff to cross-examine the expert about how he personally would have treated the decedent. According to plaintiff's offer of proof, the expert would have testified on cross-examination that he personally would have treated the decedent in accordance with the standard of care advocated by plaintiff's expert.⁶⁹ According to the dissent, plaintiff also wanted to cross-examine the expert about how he taught his medical students to treat patients in similar situations.⁷⁰ A six-justice majority held that the trial court properly limited plaintiff's cross-examination.⁷¹ First, the court held that the testimony would not have been relevant to establish the applicable standard of care because the standard of care is determined by the degree of care and skill required of a physician as ordinarily employed in the medical profession generally.⁷² Thus, the court reasoned, what one doctor would have done in a particular situation is not relevant to establish the standard of care required of the medical profession generally.⁷³ Nor was the testimony admissible to impeach the expert.⁷⁴ How the expert would have treated the patient

64. *Id.* at 31, 557 S.E.2d at 419 (Blackburn, J., dissenting).

65. *Id.*, 557 S.E.2d at 418-19 (Blackburn, J., dissenting).

66. *Id.* at 32, 557 S.E.2d at 419 (Blackburn, J., dissenting).

67. 275 Ga. 240, 563 S.E.2d 431 (2002).

68. *Id.* at 240, 563 S.E.2d at 432.

69. *Id.* at 245, 563 S.E.2d at 435 (Carley, J., dissenting).

70. *Id.* (Carley, J., dissenting).

71. *Id.* at 242, 563 S.E.2d at 433.

72. *Id.* at 241-42, 563 S.E.2d at 433.

73. *Id.* at 242, 563 S.E.2d at 433.

74. *Id.*

personally was irrelevant to the issue of the standard of care generally, and it “is axiomatic that a witness may not be impeached with irrelevant facts or evidence, and cross-examination should be confined to matters that are relevant to the case.”⁷⁵

Three justices dissented and forcefully argued that the trial court improperly limited plaintiff’s attempt to impeach the expert.⁷⁶ The dissent noted that plaintiff did not offer the testimony to establish the applicable standard of care, but rather to impeach the expert’s testimony concerning what the standard of care was.⁷⁷ Clearly, the dissent argued, the fact that the expert would have treated the patient differently than what he contended was the applicable standard of care was admissible to impeach his testimony.⁷⁸ This testimony became particularly important impeachment evidence in view of the fact, not discussed by the majority, that the expert testified on direct examination that there was nothing that could have been done to make the procedure safer for plaintiff’s decedent.⁷⁹

In *Long Leaf Industries, Inc. v. Mitchell*,⁸⁰ the court of appeals held that regulations promulgated by the Occupational Safety and Health Administration (“OSHA”) are relevant to establish a landowner’s knowledge of a defective condition.⁸¹ In *Mitchell* plaintiff brought suit against a landowner for injuries he suffered as a result of a defective condition on the landowner’s premises. He contended that the landowner should have been aware of the defective condition because the condition did not comply with OSHA regulations.⁸² Although the landowner’s violation of the regulations did not establish negligence per se, presumably because plaintiff was not an employee of defendant, the court held that the regulations were relevant to establish that defendant knew or should have known of the defective condition.⁸³

In *Crane Bros. v. May*,⁸⁴ plaintiff sought to recover damages, including punitive damages, for injuries arising from an assault by defendant’s employee. At trial, defendant attempted to introduce evidence that the employee had been criminally prosecuted and convicted for his conduct.

75. *Id.*

76. *Id.* at 243-45, 563 S.E.2d at 434-35 (Carley, J., dissenting).

77. *Id.* at 244-45, 563 S.E.2d at 434-35 (Carley, J., dissenting).

78. *Id.* at 245, 563 S.E.2d at 435 (Carley, J., dissenting).

79. *Id.* (Carley, J., dissenting).

80. 252 Ga. App. 343, 556 S.E.2d 242 (2001).

81. *Id.* at 347, 556 S.E.2d at 245.

82. *Id.* at 343, 347, 556 S.E.2d at 243, 245.

83. *Id.* at 347, 556 S.E.2d at 245.

84. 252 Ga. App. 690, 556 S.E.2d 865 (2001).

The trial court excluded the evidence.⁸⁵ On appeal, the court noted that an individual who is sued for punitive damages may introduce evidence of his criminal punishment for the conduct at issue to mitigate his liability for punitive damages.⁸⁶ Defendant argued that because plaintiff was attempting to hold it vicariously liable for its employee's torts, it should be allowed to raise any defense available to that employee, including evidence of the employee's conviction. Plaintiff argued that the evidence was not admissible because defendant had not been prosecuted and had not suffered the consequences of the criminal prosecution. Although not entirely clear from the opinion, plaintiff's theory of liability apparently was based entirely on principles of respondeat superior. Thus, plaintiff did not claim that defendant negligently retained the employee or otherwise committed independent acts of negligence.⁸⁷ Because plaintiff was seeking to hold defendant vicariously liable for punitive damages based on the employee's conduct, "[i]t follows that punitive damages are not awarded to punish the employer, who was not sued for any direct wrong it committed. Rather, punitive damages are intended to punish the wrongful conduct of the employee for which the employer is vicariously liable."⁸⁸ Consequently, to the extent that the employee has been otherwise punished, the employer should be allowed to introduce evidence of that punishment to mitigate its liability for the employee's misconduct.⁸⁹

In *Bowen v. State*,⁹⁰ the court of appeals held that a victim can be cross-examined about the victim's claim pending before the Georgia Crime Victim's Emergency Fund.⁹¹ The court accepted defendant's argument that the pendency of the claim essentially gave the victim a financial interest in the outcome of defendant's trial.⁹² The court noted that existing law permits a victim to be cross-examined about a civil claim against a defendant arising from the conduct that is the subject of the defendant's criminal trial.⁹³ However, the court further noted that there is no requirement that the defendant must be the source of the compensation.⁹⁴ Rather, the focus is on the witness's financial inter-

85. *Id.* at 690-91, 556 S.E.2d at 866.

86. *Id.* at 691, 556 S.E.2d at 866.

87. *Id.*, 556 S.E.2d at 867.

88. *Id.* at 692, 556 S.E.2d at 867.

89. *Id.*

90. 252 Ga. App. 382, 556 S.E.2d 252 (2001).

91. *Id.* at 383, 556 S.E.2d at 253.

92. *Id.* at 384, 556 S.E.2d at 254.

93. *Id.* at 383, 556 S.E.2d at 253.

94. *Id.*, 556 S.E.2d at 254.

est.⁹⁵ The court acknowledged the State's argument that payment from the fund was not dependent on the conviction of defendant, but concluded that defendant's conviction would have strengthened the victim's claim.⁹⁶

In a wrongful death action, the measure of damages is "the full value of the life of the decedent, as shown by the evidence."⁹⁷ In *Brock v. Wedincamp*,⁹⁸ the court of appeals attempted to provide some guidance with regard to the scope of relevant evidence to establish the full value of a person's life.⁹⁹ In *Brock* plaintiff moved in limine to exclude evidence that the decedent had two abortions, that she had given up two children for adoption, that she had missed work due to her pregnancy, and that her sexual practices could possibly reduce her life expectancy. The trial court ruled that if plaintiff introduced evidence that the decedent was a good mother, was a good person, or that she liked children, then defendants could introduce evidence that the decedent had had one abortion and had given up two children for adoption. The trial court ruled evidence of one other abortion inadmissible.¹⁰⁰ The court of appeals granted plaintiff's request for an interlocutory appeal and reversed.¹⁰¹

The court held first that the trial court improperly ruled that evidence of the decedent's abortion and adoptions were relevant to the determination of the full value of the decedent's life.¹⁰² Moreover, even if they were somehow relevant, the prejudicial impact of such evidence would have outweighed its probative effect.¹⁰³ Furthermore, plaintiff would not have opened the door to such testimony by presenting evidence that the decedent was a good mother.¹⁰⁴

[W]e find that it would be an abuse of the trial court's discretion if it allowed Wedincamp to present evidence of the decedent's abortions, adoptions, or sex life merely because the plaintiff presented some evidence that the decedent "was a good mother, or a good person, or liked or wanted to work with children." Such a decision assumes that this evidence will be inconsistent with being a good mother, a good

95. *Id.*

96. *Id.* at 383-84, 556 S.E.2d at 254.

97. O.C.G.A. § 51-4-2(a) (2000).

98. 253 Ga. App. 275, 558 S.E.2d 836 (2002).

99. *Id.* at 276, 558 S.E.2d at 838-39.

100. *Id.* at 275-76, 558 S.E.2d at 838.

101. *Id.* at 275, 558 S.E.2d at 838.

102. *Id.* at 281-83, 558 S.E.2d at 841-43.

103. *Id.*

104. *Id.*

person, or one who liked or wanted to work with children, and nothing has shown this to be true.¹⁰⁵

Next, the court ruled that the trial court erroneously held that defendants could introduce evidence that plaintiff missed time from work because of her various pregnancies.¹⁰⁶ Plaintiff had offered to stipulate that the decedent missed periods of work, but defendant wanted to prove that the decedent, who was unmarried, missed work because she was pregnant. Defendant wanted the jury to know why the decedent missed work so that he could argue that had she lived, she would have missed work for similar reasons.¹⁰⁷ The court of appeals held that the probative value of this testimony was far outweighed by the prejudicial effect of her status as a pregnant, unmarried woman.¹⁰⁸

Finally, defendant argued that the trial court abused its discretion when it ruled that he could not introduce evidence of the decedent's promiscuity to establish that her sexual habits might have shortened her life expectancy. The evidentiary basis for this argument was vague testimony by a physician that one having unprotected sex with multiple partners is at greater risk of earlier death than a person in a monogamous relationship.¹⁰⁹ The court of appeals held that this testimony was too speculative to justify the admission of evidence of the decedent's sexual practices.¹¹⁰

III. PRIVILEGES

In a highly publicized case, *Atlanta Journal-Constitution v. Jewell*,¹¹¹ the court of appeals addressed the issue of whether Georgia recognizes or should recognize a privilege for communications between a newspaper reporter and confidential sources.¹¹² Defendant newspaper first argued that the court should recognize a testimonial privilege for journalists under the First Amendment of the United States Constitution, but the court of appeals, noting that the United States Supreme Court has refused to recognize or create such a privilege,¹¹³ saw no reason to create such a privilege.¹¹⁴ The court also noted that the Georgia

105. *Id.* at 282-83, 558 S.E.2d at 842.

106. *Id.* at 283-84, 558 S.E.2d at 843.

107. *Id.* at 283, 558 S.E.2d at 843.

108. *Id.* at 284, 558 S.E.2d at 843.

109. *Id.* at 284-85, 558 S.E.2d at 844.

110. *Id.* at 285, 558 S.E.2d at 844.

111. 251 Ga. App. 808, 555 S.E.2d 175 (2001).

112. *Id.* at 810, 555 S.E.2d at 179.

113. *See* *Branzburg v. Hayes*, 408 U.S. 665 (1972).

114. 251 Ga. App at 810, 555 S.E.2d at 179.

General Assembly had addressed the issue and had refused to create a privilege for journalists when the journalist or his employer is a party to the proceedings.¹¹⁵ Although the court recognized no applicable privilege, it did acknowledge that general discovery principles, including the use of protective orders to restrict the discovery of sensitive information, could limit a party's ability to discover information about journalists' confidential informants.¹¹⁶

In *Trammel v. Bradberry*,¹¹⁷ the court of appeals addressed the issue of whether the involuntary commitment to a state mental health facility pursuant to the Official Code of Georgia Annotated ("O.C.G.A.") section 24-9-21¹¹⁸ waived the privilege for communications between a patient and a psychiatrist.¹¹⁹ The court held that such a commitment did constitute a waiver of the privilege.¹²⁰ In the process, the court provided a very helpful summary of the various ways the privilege for psychiatric communications can be waived,¹²¹ and although a discussion of those principles is beyond the scope of this survey, *Trammel* should be noted as a source.

IV. WITNESSES

A. *Impeachment Generally*

Three cases decided during the survey period illustrate the critical, although often unrecognized (sometimes with devastating results), distinction between impeaching a witness's general credibility or character and impeaching specific testimony. In *Hinton v. State*,¹²² defendant contended that the prosecution improperly impugned his character when it introduced evidence of a prior fondling incident during defendant's trial for child molestation.¹²³ However, the court noted that the victim's mother, who was defendant's sister, testified on behalf of defendant at trial and on cross-examination said that defendant had never acted inappropriately with any of her children.¹²⁴ The prosecu-

115. *Id.* at 810-11, 555 S.E.2d at 179-80; *see also* O.C.G.A. § 24-9-30 (1995) (establishing a qualified privilege for persons engaged in the gathering and dissemination of news; however, it applies only "where the one asserting the privilege is not a party.").

116. 251 Ga. App. at 811-12, 555 S.E.2d at 180.

117. 256 Ga. App. 412, 568 S.E.2d 715 (2002).

118. O.C.G.A. § 24-9-21 (1995).

119. 256 Ga. App. at 422, 568 S.E.2d at 724-25.

120. *Id.* at 422-24, 568 S.E.2d at 724-25.

121. *Id.*, 568 S.E.2d at 725-26.

122. 253 Ga. App. 69, 557 S.E.2d 481 (2001).

123. *Id.* at 69, 557 S.E.2d at 482.

124. *Id.* at 69-70, 557 S.E.2d at 482-83.

tion then proceeded to cross-examine the mother about a complaint made by her husband concerning defendant's fondling of their son.¹²⁵ The court held that the mother's testimony that her brother had never acted inappropriately with her children opened the door for the prosecution to impeach her with evidence of the prior incident.¹²⁶ The court rejected defendant's argument that the cross-examination was launched with the intent of getting the mother to testify in a manner that would allow the State to introduce evidence of the prior incident.¹²⁷

Although the prosecution's cross-examination in *Newton v. State*¹²⁸ seemed to push the envelope of permissible cross-examination, the court of appeals affirmed.¹²⁹ In *Newton* defendant testified during his trial for shoplifting that he did not know what his alleged accomplice was doing while the accomplice was in the store. When the accomplice pulled merchandise from under his coat as he left the store, defendant assumed they were stolen because he had not seen the accomplice purchase anything. Nevertheless, defendant still denied knowing that the pants were stolen when the alleged accomplice gave him the pants.¹³⁰ The prosecutor then asked, "Well, you do know that Steve Heard is a shoplifter, don't you? You knew before this day that he was a shoplifter?"¹³¹ When defendant denied having such knowledge, the prosecution introduced evidence of an indictment of the accomplice and defendant for another shoplifting incident. Thus, by getting defendant to testify that he did not know his alleged accomplice had a previous conviction for shoplifting, the prosecution was able to get before the jury the fact that both had been indicted previously for shoplifting.¹³² The court of appeals held this was permissible because the evidence contradicted defendant's previous testimony.¹³³

In *Scruggs v. State*,¹³⁴ defendant testified that he was not a drug dealer and that he had never possessed drugs with an intent to distribute them.¹³⁵ The court held that this opened the door for the

125. *Id.* at 70, 557 S.E.2d at 483.

126. *Id.*

127. *Id.*

128. 251 Ga. App. 198, 552 S.E.2d 896 (2001).

129. *Id.* at 201, 552 S.E.2d at 898.

130. *Id.* at 198-99, 552 S.E.2d at 897.

131. *Id.* at 200, 552 S.E.2d at 897-98.

132. *Id.*, 552 S.E.2d at 898.

133. *Id.* at 200-01, 552 S.E.2d at 898.

134. 253 Ga. App. 136, 558 S.E.2d 731 (2001).

135. *Id.* at 136, 558 S.E.2d at 732.

prosecution to cross-examine him about his conviction for possession of drugs with the intent to distribute.¹³⁶

The point is that much inadmissible prejudicial evidence can become admissible if an artful cross-examiner can elicit the right testimony.

B. Impeachment by Evidence of Conviction

The supreme court and the court of appeals decided two cases involving impeachment by evidence of misconduct that some may find incongruent, perhaps humorously so. In the supreme court case, *Mullins v. Thompson*,¹³⁷ attorneys fared well. The majority in *Mullins* held that a lawyer testifying as a witness may not be impeached by evidence that he made false statements to a client in violation of the Rules of Professional Conduct¹³⁸ for which his license to practice law had been suspended for six months.¹³⁹ The majority simply reasoned that Georgia permits a party to be impeached by evidence of criminal misconduct only if that conduct led to a felony conviction or a conviction of a misdemeanor involving moral turpitude.¹⁴⁰ Acknowledging that the lawyer's suspension reflected moral shortcomings, the court concluded that the suspension did not constitute a conviction of a crime of moral turpitude.¹⁴¹ In a dissenting opinion, Justice Fletcher, joined by Justice Hunstein, argued that Georgia should follow other jurisdictions and allow the impeachment of an attorney who has been suspended for knowingly making false statements in the representation of his clients.¹⁴²

Doctors, on the other hand, did not fare as well in the court of appeals. In *Latimore v. Department of Transportation*,¹⁴³ plaintiff claimed that the trial court improperly allowed defendant to cross-examine his treating physician about the suspension of his medical license. The doctor denied any such suspension, and defendant then tendered certified copies of documents from the Composite State Board of Medical Examiners establishing that the physician's license had been suspended and that he had been placed on probation.¹⁴⁴ The court did not reach the issue, as the supreme court did in *Mullins*, of whether the suspen-

136. *Id.* at 137, 558 S.E.2d at 733.

137. 274 Ga. 366, 553 S.E.2d 154 (2001).

138. GA. BAR RULES Rule 4-102(d), Standard 45(b) (1992).

139. 274 Ga. at 366, 553 S.E.2d at 155.

140. *Id.*

141. *Id.*

142. *Id.* at 368, 553 S.E.2d at 156 (Fletcher, J., dissenting).

143. 250 Ga. App. 360, 552 S.E.2d 439 (2001).

144. *Id.* at 361, 552 S.E.2d at 440.

sion of the license constituted a criminal conviction of a nature that could be used to impeach a witness. Rather, the court reasoned that a witness may be impeached with evidence of a collateral matter if that collateral matter is indirectly material to the issue in the case.¹⁴⁵ The conduct leading to the physician's disciplinary action involved deficiencies in the physician's medical treatment of patients. This constituted evidence relating to his credentials and competency and was related to his testimony about his medical treatment of plaintiff.¹⁴⁶ Therefore, the court held that the trial court properly allowed defendant to impeach the doctor with evidence of the disciplinary actions against him.¹⁴⁷

C. Miscellaneous Impeachment Issues

In *Vogleson v. State*,¹⁴⁸ the court of appeals held that a defendant has a constitutionally protected right to impeach the testimony of an accomplice by inquiring about the accomplice's plea agreement with the State, including the prison time the accomplice could avoid by agreeing to cooperate with the State.¹⁴⁹ During the current survey period, the court of appeals twice relied on *Vogleson* to reverse convictions of defendants who were not allowed to cross-examine accomplices about the maximum prison time they theoretically could have received if they had not pled guilty and cooperated with the prosecution.¹⁵⁰ In one case, *Perez v. State*,¹⁵¹ Judge Eldridge lodged a strong dissenting opinion in which Judge Andrews joined. Judge Eldridge argued first that *Vogleson*, by pointing to the sentence an accomplice could have received, necessarily allows a defendant to inform the jury of the sentence he will receive.¹⁵² This effect of *Vogleson*, although not intended, contravened long established precedent holding that the sentence a defendant may receive is completely irrelevant to a jury's determination of a defendant's guilt.¹⁵³ Second, Judge Eldridge accused the court of endorsing "a strategy [that] misleads a jury into believing that the statutory sentence authorized by an indicted offense is identical to the amount of 'prison time' an accomplice avoided by pleading to a lesser offence and testifying

145. *Id.*

146. *Id.*

147. *Id.*

148. 250 Ga. App. 555, 552 S.E.2d 513 (2001).

149. *Id.* at 558-59, 552 S.E.2d at 516.

150. *Perez v. State*, 254 Ga. App. 872, 564 S.E.2d 208 (2002); *Green v. State*, 254 Ga. App. 881, 564 S.E.2d 731 (2002).

151. 254 Ga. App. 872, 564 S.E.2d 208.

152. *Id.* at 878, 564 S.E.2d at 213 (Eldridge, J., dissenting).

153. *Id.* at 878-79, 564 S.E.2d at 213-14 (Eldridge, J., dissenting).

for the state.”¹⁵⁴ However, the actual sentence imposed is determined by the State Board of Pardons and Paroles, and in most cases, Judge Eldridge argued, the actual prison sentence is considerably less than the sentence authorized.¹⁵⁵ Thus, *Vogleson* allows a defendant to suggest to the jury that a defendant avoided serving the difference between his actual sentence and the maximum sentence, an inference that simply is not true. Nevertheless, unless the supreme court steps in, *Vogleson* remains the law.

V. OPINION TESTIMONY

As reported in previous surveys,¹⁵⁶ Georgia has refused to force state trial courts to assume the gatekeeper role required of federal district courts by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁵⁷ Rather, Georgia applies the so-called *Harper* test¹⁵⁸ to determine the admissibility of novel scientific evidence. Pursuant to *Harper v. State*,¹⁵⁹ a party relying on novel scientific evidence must prove the procedure or technique used has reached a scientific stage of verifiable certainty.¹⁶⁰ This test is satisfied if the procedure or technique at issue has been recognized in a substantial number of jurisdictions or if the party offering the evidence can adduce supporting evidence establishing that the procedure or technique has reached the requisite stage of development.¹⁶¹ Although it is generally acknowledged that *Harper* demands a lower level of scrutiny, this does not mean any and all scientific evidence is admissible. During the current survey period, the court of appeals rejected a contention that something called the “Widmark formula” had met the test of reliability and accuracy.¹⁶² The Widmark formula supposedly estimates a defendant’s blood alcohol content and is used as a defense in DUI cases.¹⁶³ However, defendant’s expert admitted that the Widmark formula has a twenty percent margin of error.¹⁶⁴ This evidence, the court of appeals held, failed to satisfy the

154. *Id.* at 879, 564 S.E.2d at 214 (Eldridge, J., dissenting).

155. *Id.* at 879-80, 564 S.E.2d at 214-15 (Eldridge, J., dissenting).

156. Treadwell, *supra* note 12, at 292.

157. 509 U.S. 579 (1993).

158. *See Harper v. State*, 249 Ga. 519, 292 S.E.2d 389 (1982).

159. 249 Ga. 519, 292 S.E.2d 389 (1982).

160. *Id.* at 525, 292 S.E.2d at 395.

161. *Id.* at 526, 292 S.E.2d at 396.

162. *Evans v. State*, 253 Ga. App. 71, 558 S.E.2d 51 (2001).

163. *Id.* at 75, 558 S.E.2d at 54-55.

164. *Id.* at 77-78, 558 S.E.2d at 56.

verifiable certainty necessary to produce reliable results.¹⁶⁵ Therefore, the Widmark formula did not satisfy the *Harper* test.¹⁶⁶

Previous survey articles have chronicled the apparent confusion over whether an expert witness can base his opinion on hearsay.¹⁶⁷ Historically, most cases addressing the issue seem to hold that an expert cannot, to any extent, base his opinion on hearsay, but a line of cases holds to the contrary,¹⁶⁸ the most notable of which had been *King v. Browning*.¹⁶⁹ However, in 1998, the supreme court held in *Leonard v. State*¹⁷⁰ that “[i]n cases in which an expert’s opinion is based *in part* on hearsay, the testimony may be admitted.”¹⁷¹ In a previous survey discussing *Leonard*, the author posed this question: “At what point does an expert’s opinion become so based on hearsay that it becomes inadmissible?”¹⁷² During the current survey period, the court of appeals did not address that question specifically, but it did hold, in *Fulmore v. CSX Transportation, Inc.*,¹⁷³ that an expert may rely on hearsay, including reports of others, in formulating his opinions.¹⁷⁴ Thus, notwithstanding the long line of cases holding that experts may not base their opinions on hearsay, it now appears well settled that they can.

In *Johnson v. State*,¹⁷⁵ a decision discussed in a previous survey,¹⁷⁶ the supreme court weighed in on an issue that is attracting increasing attention—the reliability of eyewitness testimony and whether a defendant should be able to adduce expert testimony attacking eyewitness identifications.¹⁷⁷ In *Johnson* the supreme court held that when eyewitness identification is a critical element of the case against a defendant and there is no substantial corroboration of the eyewitness’s identification, then expert testimony on the reliability of eyewitness identifications may be admissible, depending on the facts of the case.¹⁷⁸ Trial courts, the court held, should not exclude expert testimony without

165. *Id.* at 78, 558 S.E.2d at 56.

166. *Id.*

167. *See, e.g.*, Marc T. Treadwell, *Evidence*, 46 MERCER L. REV. 233, 250-51 (1994).

168. *Id.*

169. 246 Ga. 46, 268 S.E.2d 653 (1980).

170. 269 Ga. 867, 506 S.E.2d 853 (1998).

171. *Id.* at 870, 506 S.E.2d at 856.

172. Treadwell, *supra* note 12, at 297.

173. 252 Ga. App. 884, 557 S.E.2d 64 (2001).

174. *Id.* at 889, 557 S.E.2d at 70-71.

175. 272 Ga. 254, 526 S.E.2d 549 (2000).

176. Marc T. Treadwell, *Evidence*, 52 MERCER L. REV. 263, 285-86 (2000).

177. 272 Ga. at 254, 526 S.E.2d at 551.

178. *Id.* at 257, 526 S.E.2d at 552-53.

“carefully weighing whether the evidence would assist the jury in assessing the reliability of eyewitness testimony and whether expert eyewitness testimony is the only effective way to reveal any weakness in an eyewitness identification.”¹⁷⁹

The court of appeals addressed this issue during the current survey period in *Brodes v. State*.¹⁸⁰ In *Brodes* the trial court blocked defendant’s effort to introduce expert testimony regarding deficiencies of eyewitness identifications. The prosecution admitted that its case depended on eyewitness testimony and that it had no other corroborating evidence.¹⁸¹ Given these facts, the court of appeals held that the trial court abused its discretion when it refused to allow plaintiff’s expert testimony.¹⁸²

Plaintiff’s lawyers in “minimum impact” cases often face a difficult hurdle—convincing a jury that their client suffered significant injuries notwithstanding relatively minor damage to the vehicles. In *Cromer v. Mulkey Enterprises, Inc.*,¹⁸³ plaintiff contended that she suffered numerous injuries, incurred medical expenses totaling \$222,968, and was permanently disabled as the result of a motor vehicle collision in which the property damage to her car was estimated to be between \$600 and \$750. To convince the jury that her serious injuries were caused by the seemingly minor collision, plaintiff attempted to rely on the testimony of a physicist who professed to be an expert in the field of biomechanics, which the expert testified is the application of mechanics to anatomy. Plaintiff claimed that this expert, based upon his experience and the studies of others, could explain how a low-speed collision could cause serious personal injuries. The expert, plaintiff noted, had been qualified as an expert in the field of biomechanics in similar cases in five other states and several federal courts. Nevertheless, the trial court ruled that the expert could not testify that plaintiff’s various injuries were caused by the collision.¹⁸⁴ Although the trial court gave several grounds for its ruling, the court of appeals concluded that the trial court essentially ruled the testimony inadmissible because the expert was not qualified to testify to the ultimate fact in issue, i.e., whether the collision caused plaintiff’s injuries, and because the testimony was cumulative.¹⁸⁵ The court held first that a properly qualified expert could

179. *Id.*

180. 250 Ga. App. 323, 551 S.E.2d 757 (2001).

181. *Id.* at 324-25, 551 S.E.2d at 759.

182. *Id.* at 325, 551 S.E.2d at 759.

183. 254 Ga. App. 388, 562 S.E.2d 783 (2002).

184. *Id.* at 388-91, 562 S.E.2d at 783-86.

185. *Id.* at 392, 562 S.E.2d at 786.

testify on those issues even though the witness was not a medical doctor.¹⁸⁶ Nevertheless, the court of appeals affirmed the trial court's ruling.¹⁸⁷ The court held that there was insufficient evidence in the record to establish that the field of biomechanics had reached a scientific stage of verifiable certainty.¹⁸⁸ Moreover, the court found no evidence in the record that the expert's expertise included an ability to testify that a particular act caused a certain injury.¹⁸⁹ In other words, the expert's testimony was potentially admissible, but plaintiff failed to establish an appropriate foundation for the admission of the testimony.

VI. HEARSAY

A. *The Necessity Exception*

In previous surveys, the author has "marveled" at the evolution of Georgia's necessity exception to the hearsay rule.¹⁹⁰ However, the time for marveling has long passed. Regardless of one's opinion on the wisdom of the incredible expansion of the use of hearsay testimony, particularly in criminal cases, the necessity exception is now firmly ensconced. During the current survey period, the necessity exception was applied by the supreme court and court of appeals in twenty-six cases, and all courts turn more and more to the easily satisfied elements of the necessity exception rather than relying on more traditional exceptions to the hearsay rule.

Hearsay evidence is admissible pursuant to the necessity exception if the proponent can show that the evidence is "necessary" and that the out of court statement bears "'particularized guarantees' of 'trustworthiness.'"¹⁹¹ In *Chapel v. State*,¹⁹² the supreme court held that in addition to necessity and trustworthiness, the party offering the evidence must also show that the "statement is relevant to a material fact and that the statement is more probative on that material fact than other evidence that may be procured and offered."¹⁹³ This point was underscored during the survey period in *Willis v. State*,¹⁹⁴ in which the

186. *Id.*, 562 S.E.2d at 786-87.

187. *Id.* at 393, 562 S.E.2d at 787.

188. *Id.*

189. *Id.*

190. *See, e.g.*, Treadwell, *supra* note 176, at 288.

191. *McKissick v. State*, 263 Ga. 188, 189, 429 S.E.2d 655, 657 (1993) (quoting *Mallory v. State*, 261 Ga. 625, 627, 409 S.E.2d 839, 841 (1991)).

192. 270 Ga. 151, 510 S.E.2d 802 (1998).

193. *Id.* at 155, 510 S.E.2d at 807.

194. 274 Ga. 699, 558 S.E.2d 393 (2002).

supreme court held that the trial court erroneously admitted hearsay evidence of defendant's prior violent confrontations with the victim when other witnesses testified, based on personal knowledge, of similar confrontations.¹⁹⁵ The error, however, was harmless.¹⁹⁶

With regard to the trustworthiness requirement, the courts continued to hold that statements made to the police in the course of an official investigation¹⁹⁷ and statements made to close friends or confidants are sufficiently trustworthy.¹⁹⁸ The court of appeals may have pushed the already bulging envelope in *Smalls v. State*.¹⁹⁹ In *Smalls* the trial court allowed, under the necessity exception, a police officer to read to the jury a statement made by a victim of a previous crime committed by defendant. Evidence of the previous crime was tendered as a similar transaction.²⁰⁰ The court held that because defendant pled guilty to the prior crime, he admitted the facts as alleged by the victim, and this satisfied the trustworthiness requirement.²⁰¹

In most necessity exception cases, the declarant is deceased and, therefore, the unavailability prong is not in dispute. Sometimes, however, the witness simply cannot be located. As discussed in last year's survey,²⁰² the supreme court has held that the prosecution sufficiently established a declarant's unavailability when it showed the court that the declarant was living in Louisiana and that it had twice unsuccessfully asked Louisiana courts to order the declarant to return to Georgia to testify.²⁰³ During the current survey year, in *Mathis v. State*,²⁰⁴ the court of appeals held that a defendant seeking to introduce the statement of a missing declarant had not sufficiently established that the declarant was unavailable.²⁰⁵ After defendant's attorney unsuccessfully attempted to locate the witness, he learned from the prosecution that the witness had moved to Michigan, but beyond that could not be located.²⁰⁶ This, the court held, was not a sufficient

195. *Id.* at 700, 558 S.E.2d at 395.

196. *Id.*

197. *Ginn v. State*, 251 Ga. App. 159, 553 S.E.2d 839 (2001).

198. *McPherson v. State*, 274 Ga. 444, 553 S.E.2d 569 (2001); *Chapman v. State*, 273 Ga. 865, 548 S.E.2d 278 (2001).

199. 251 Ga. App. 516, 554 S.E.2d 273 (2001).

200. *Id.* at 517, 554 S.E.2d at 276.

201. *Id.* at 518, 554 S.E.2d at 276.

202. Marc T. Treadwell, *Evidence*, 53 MERCER L. REV. 295, 306 (2001).

203. *See Cook v. State*, 273 Ga. 574, 543 S.E.2d 701 (2001).

204. 251 Ga. App. 706, 555 S.E.2d 86 (2001).

205. *Id.* at 707, 555 S.E.2d at 87-88.

206. *Id.*, 555 S.E.2d at 88.

showing of unavailability.²⁰⁷ The court noted that defendant offered no evidence of any efforts to locate the declarant's new address, such as simply calling directory assistance or asking the declarant's mother, who lived in Georgia, where he lived.²⁰⁸ Although the attorney represented to the trial court that the prosecution had been unable to locate the declarant, he did not explain what efforts the prosecution had made to find the declarant.²⁰⁹ Finally, the court noted, defendant never sought a continuance or asked for assistance to locate the declarant.²¹⁰ Accordingly, the court of appeals held that defendant had not sufficiently established the declarant's unavailability to make his statement admissible under the necessity exception.²¹¹

Perhaps because admission of hearsay evidence under the hearsay exception is so easy, it can breed sloppiness. For example, in *Yates v. State*,²¹² the trial court admitted a hearsay statement based on the prosecutor's representation that "she's not here, she's dead, she can't testify."²¹³ This, the court held, was error.²¹⁴ Obviously, the unavailability of the witness by itself does not authorize the admission of the evidence. The prosecution must also establish that the statement is sufficiently trustworthy.²¹⁵

In *Dodd v. Scott*,²¹⁶ the court of appeals addressed the impact of the interests of those making and those hearing out of court statements.²¹⁷ Relying on one of the earliest necessity exception cases, the court held that whether the statement may benefit the witness claiming to have heard the statement is immaterial to the determination of the trustworthiness of the statement.²¹⁸ However, if the statement benefits the declarant, i.e., it is a self-serving declaration, that can be a factor in determining the trustworthiness of the statement.²¹⁹ Generally, self-serving declarations are not admissible, and the court held that the subsequent death of the declarant does not change this rule.²²⁰

207. *Id.* at 708, 555 S.E.2d at 88.

208. *Id.* at 707, 555 S.E.2d at 88.

209. *Id.*

210. *Id.* at 708, 555 S.E.2d at 88.

211. *Id.*

212. 274 Ga. 312, 553 S.E.2d 563 (2001).

213. *Id.* at 317, 553 S.E.2d at 568.

214. *Id.* at 318, 553 S.E.2d at 568.

215. *Id.*, 553 S.E.2d at 568-69.

216. 250 Ga. App. 32, 550 S.E.2d 444 (2001).

217. *Id.* at 36, 550 S.E.2d at 449.

218. *Id.* (citing *Swain v. C & S Bank*, 258 Ga. 547, 550, 372 S.E.2d 423, 425-26 (1988)).

219. *Id.*

220. *Id.* at 36-37, 550 S.E.2d at 449.

Therefore, the court held that a statement by the decedent that advanced the decedent's interests was not sufficiently trustworthy to be admissible under the necessity exception.²²¹

B. *Prior Out of Court Statements*

Georgia has two rather unusual rules regarding the admissibility of prior statements by witnesses. First, in *Gibbons v. State*,²²² the supreme court held that prior inconsistent statements of a witness are admissible as substantive evidence if the witness is subject to cross-examination.²²³ Second, pursuant to *Cuzzort v. State*,²²⁴ a prior consistent statement is admissible as substantive evidence if the witness is present at trial and subject to cross-examination.²²⁵ However, the supreme court significantly weakened *Cuzzort* in *Woodard v. State*.²²⁶ In *Woodard* the court held that prior consistent statements should be admitted only when the veracity of the witness who made the statement has been placed at issue.²²⁷

Even after *Woodard*, Georgia still freely admits prior statements by witnesses. Judged even by this liberal standard, however, it is difficult to understand the court of appeals decision in *Armstead v. State*.²²⁸ In *Armstead* defendant contended that the trial court erroneously allowed a police officer to testify concerning license plate numbers given to him by the alleged victim.²²⁹ The court rejected defendant's appeal, holding simply that because the alleged victim testified at trial and was subjected to a thorough and sifting cross-examination, his hearsay statement was admissible.²³⁰ However, there is no principle of Georgia law that allows the admission of a hearsay statement simply because the declarant testified at trial. In support of its holding, the court of appeals cited *Dowdy v. State*²³¹ and *Watson v. State*.²³² The court in *Dowdy* affirmed the admission of a prior statement on the basis of *Cuzzort*.²³³ The court in *Watson* affirmed the admission of both prior inconsistent

221. *Id.*

222. 248 Ga. 858, 286 S.E.2d 717 (1982).

223. *Id.* at 862, 286 S.E.2d at 721.

224. 254 Ga. 745, 334 S.E.2d 661 (1985).

225. *Id.*, 334 S.E.2d at 662.

226. 269 Ga. 317, 496 S.E.2d 896 (1998).

227. *Id.* at 320, 496 S.E.2d at 899.

228. 255 Ga. App. 385, 565 S.E.2d 579 (2002).

229. *Id.* at 389, 565 S.E.2d at 582.

230. *Id.*

231. 215 Ga. App. 576, 451 S.E.2d 528 (1994).

232. 214 Ga. App. 650, 448 S.E.2d 718 (1994).

233. 215 Ga. App. at 577, 451 S.E.2d at 530.

and consistent statements on the basis of *Cuzzort* and *Gibbons*.²³⁴ Beyond citing *Cuzzort* and *Gibbons*, the court in neither case reasoned why the prior statements were admissible. Read literally, the court's decision in *Armstead* stands for the proposition that a hearsay statement is admissible simply if the declarant testified at trial.²³⁵ However, it likely would not be wise to rely on *Armstead* for this proposition. Prior statements should be analyzed pursuant to *Gibbons* and *Cuzzort* to see if they satisfy the elements of admission as prior consistent or prior inconsistent statements.

C. Business Records Exception

In *Brown v. State*,²³⁶ the supreme court granted certiorari to reconsider the issue of whether the narrative portion of a police report is admissible pursuant to the business records exception.²³⁷ Although a long line of cases had held that police reports are admissible, the court concluded that information in police reports is not sufficiently reliable to be considered a business record.²³⁸

Unlike the business world where objective information may be gathered in the stream of commerce, police work is often heavily influenced by the beliefs, impressions, and, at times, hunches of the investigating officer. It is because of these difficulties that police report narratives do not fit easily within the business records exception to the hearsay rule. Thus, while the narrative portion of a police report may meet the technical requirements of the statute, it does not have the reliability inherent in other documents that courts have traditionally considered to be business records.²³⁹

The court noted that information in the non-narrative portions of the police report may be more reliable and made clear that it was not addressing the admissibility of those aspects of a police report.²⁴⁰

Although the court's decision in *Evans v. State*²⁴¹ did not turn on the business records exception, it did involve a police report, and like *Armstead*, it demonstrates the risk of accepting judicial pronouncements at face value. In *Evans* the trial court admitted a police officer's report after defendant extensively cross-examined the police officer in an effort

234. 214 Ga. App. at 651, 448 S.E.2d at 719.

235. 255 Ga. App. at 389, 565 S.E.2d at 582.

236. 274 Ga. 31, 549 S.E.2d 107 (2001).

237. *Id.* at 32, 549 S.E.2d at 108; *see also* O.C.G.A. § 24-3-14 (1995).

238. 274 Ga. at 33, 549 S.E.2d at 109.

239. *Id.*

240. *Id.* at 33 n.2, 549 S.E.2d at 109 n.2.

241. 253 Ga. App. 71, 558 S.E.2d 51 (2001).

to impeach the officer. On appeal defendant contended that the report was hearsay and should not have been submitted.²⁴² The court of appeals rejected defendant's argument on several grounds, the first of which was that "[s]ince the officer testified and was subject to cross-examination, her report was not hearsay."²⁴³ The court cited *Harkness v. State*²⁴⁴ in support of this proposition.²⁴⁵ In fact, in *Harkness* the court, in one sentence, rejected a defendant's contention that the court admitted hearsay testimony, noting that the statements at issue either explained the officer's conduct²⁴⁶ or "were prior statements made by witnesses present at trial, under oath, and subject to cross-examination."²⁴⁷ In support of the latter proposition, the court of appeals cited *Moak v. State*.²⁴⁸ The court in *Moak* held that statements by various witnesses, both consistent or inconsistent, are admissible pursuant to Georgia's unique rules holding that prior statements can be admissible as substantive evidence.²⁴⁹ Thus, the court's decision in *Evans* should not be read to stand for the proposition that police reports are not hearsay. Rather, portions of the report may be admissible pursuant to *Cuzzort* or *Gibbons*. Of course, this would not apply to statements by others contained in the report.

D. Dying Declarations

The broad use of the necessity exception to the hearsay rule has virtually squeezed out the dying declaration exception to the hearsay rule. Given the ease of gaining admission of hearsay statements under the necessity exception, there is no reason to resort to the more rigid dying declaration exception. Nevertheless, there was one case in the survey period that applied the dying declaration exception. In *Morgan v. State*,²⁵⁰ defendant contended that the trial court improperly admitted a statement made by a victim shortly before his death. While in the hospital, the victim told a police officer that defendant had shot him.²⁵¹

242. *Id.* at 71, 558 S.E.2d at 52.

243. *Id.* at 74, 558 S.E.2d at 54.

244. 225 Ga. App. 864, 869, 485 S.E.2d 810, 815 (1997).

245. 253 Ga. App. at 74 n.1, 558 S.E.2d at 54 n.1.

246. 225 Ga. App. at 869, 485 S.E.2d at 815. This clearly is no longer good law. See Treadwell, *supra* note 202, at 305.

247. 225 Ga. App. at 869, 485 S.E.2d at 815.

248. 222 Ga. App. 36, 41, 473 S.E.2d 576, 581 (1996).

249. *Id.* See *Gibbons v. State*, 248 Ga. 858, 286 S.E.2d 717 (1982) and *Cuzzort*, 254 Ga. 745, 334 S.E.2d 661. The Author has frequently written about the principles of *Gibbons* and *Cuzzort*. See, e.g., Treadwell, *supra* note 176, at 293-95.

250. 275 Ga. 222, 564 S.E.2d 192 (2002).

251. *Id.* at 224, 564 S.E.2d at 196.

However, the victim asked the officer if he was going to die, and although the victim had suffered a gunshot wound to the abdomen, the police officer compassionately responded “no, that the doctor was working on him now.”²⁵² Noting that the dying declaration exception requires that the soon to be deceased must have been “conscious of his condition,”²⁵³ defendant argued that because of the police officer’s statement, the victim was not aware that he was about to die.²⁵⁴ The supreme court was not impressed. The deceased need not be certain of his death, the court reasoned, but rather must only be aware of the gravity of his condition.²⁵⁵ The facts that the victim asked whether he was going to die, knew that he had been shot, and was in great pain were sufficient to establish that he realized death was impending.²⁵⁶ Therefore, the trial court properly admitted his statement.²⁵⁷

E. Statements by Co-Conspirators

O.C.G.A. section 24-3-5 provides that a statement by one co-conspirator during the pendency of the conspiracy is admissible against his co-conspirators.²⁵⁸ If the co-conspirator’s statements are otherwise admissible, the trial court, before admitting the statements, must evaluate the reliability of the statements using four indicia of reliability:

(1) the absence of an express assertion about a past fact; (2) the declarant had personal knowledge of the identity and roles of the participants in the crime, and cross-examination of the declarant would not have shown that the declarant was unlikely to know whether the defendant was involved in the crime; (3) the possibility that the declarant’s statement was founded on faulty recollection was remote; and (4) the circumstances under which the declarant gave the statement suggests that the declarant did not misrepresent the defendant’s involvement in the crime.²⁵⁹

In *Smith v. State*,²⁶⁰ defendant argued that an alleged co-conspirator’s statement was inadmissible because it constituted an express

252. *Id.*

253. *Id.* (quoting O.C.G.A. § 24-3-6 (1995)).

254. *Id.*

255. *Id.* at 224-25, 564 S.E.2d at 196.

256. *Id.*

257. *Id.* at 225, 564 S.E.2d at 196.

258. O.C.G.A. § 24-3-5 (1995).

259. *Copeland v. State*, 266 Ga. 664, 665, 469 S.E.2d 672, 674-75 (1996) (citing *Dutton v. Evans*, 400 U.S. 74, 88-89 (1970)).

260. 253 Ga. App. 131, 558 S.E.2d 455 (2001).

assertion about past facts.²⁶¹ Acknowledging this to be the case, the court of appeals nevertheless affirmed defendant's conviction, reasoning that the statement was sufficiently reliable when measured against the other three indicia of reliability.²⁶² Thus, the mere fact that a co-conspirator's statement constitutes an assertion about a past fact does not preclude its admissibility.²⁶³

F. Admissions by a Party Opponent

The struggle in Georgia appellate courts over the admissibility of statements by an employee of an opposite party continues. This is an issue the author has focused on since 1989 when the court of appeals announced that "an admission against interest by an employee-agent is admissible . . . but only so long as it is not hearsay."²⁶⁴ The meaning of the court's statement was unclear then, and it is unclear now. An admission is either hearsay but admissible pursuant to an exception to the rule against hearsay or, as provided by the Federal Rules of Evidence,²⁶⁵ it is not hearsay, and thus the rule against hearsay is inapplicable. However, it is clear that the Georgia courts hold an abiding mistrust of admissions by employees of an opposite party, and that mistrust was evident during the current survey period.

In *HCP III Woodstock, Inc. v. Healthcare Services Group, Inc.*,²⁶⁶ a nursing home sought to recover damages incurred as the result of a fire at its nursing home. The nursing home contended that the fire was caused by clothes dryers maintained by a subcontractor. When the subcontractor moved for summary judgment, the nursing home attempted to rely on a statement made by the subcontractor's employee that implicated the subcontractor. The trial court held that the statement by the subcontractor's employee was hearsay and granted the subcontractor's motion for summary judgment. On appeal the nursing home contended that the statement was admissible as an admission by a party opponent.²⁶⁷ The court of appeals disagreed, saying the employee was "but a mere employee. And, as a 'mere employee [he has]

261. *Id.* at 132, 135, 558 S.E.2d at 457, 459.

262. *Id.* at 135, 558 S.E.2d at 459.

263. *See also* *Ottis v. State*, 269 Ga. 151, 496 S.E.2d 264 (1998) (discussed in Marc T. Treadwell, *Evidence*, 50 MERCER L. REV. 229, 255-256 (1998)).

264. *Johnston v. Grand Union Co.*, 189 Ga. App. 270, 271, 375 S.E.2d 249, 250 (1988) (citations omitted); *see* Marc T. Treadwell, *Evidence*, 41 MERCER L. REV. 175, 199 (1989).

265. FED. R. EVID. 801.

266. 254 Ga. App. 242, 562 S.E.2d 225 (2002).

267. *Id.* at 242-44, 562 S.E.2d at 226-27; *see also* O.C.G.A. § 24-3-31 (1995).

no authority to bind [Healthcare] by his statement.”²⁶⁸ While the court acknowledged that the statement could be admissible if it had been a part of the *res gestae*, it was not admissible as an admission of a party opponent.²⁶⁹

In *Kmart Corp. v. Morris*,²⁷⁰ plaintiff was more fortunate. In that case, plaintiff was injured when struck by a malfunctioning automatic door. To establish defendant’s knowledge that the door was not working properly, plaintiff successfully proffered a statement made to plaintiff’s husband by an unidentified employee. In this statement, the employee explained why the door was malfunctioning. The trial court ruled that the statement was admissible pursuant to the *res gestae* exception to the hearsay rule.²⁷¹

A statement falls within the *res gestae* if it accompanies an act or is “so nearly connected therewith in time as to be free from all suspicion of device or afterthought.”²⁷² Previous surveys have failed utterly to bring any clarity to “that near-insoluble enigma of our law, which we call *res gestae*.”²⁷³ It is unfortunate that Georgia courts, lacking a clear exception to the hearsay rule for admissions by employees in the course and scope of their business, must turn to the *res gestae* doctrine. In *Kmart* the court of appeals rejected defendant’s argument that statements by unidentified employees in premises liability cases can never fall within the *res gestae*.²⁷⁴ Although many cases have held that statements by unidentified employees are not admissible, the determination of whether a particular statement is admissible depends upon the facts of the particular case.²⁷⁵ Here, the statement by the unidentified employee was made before plaintiff left the store to go to the hospital. Given the context, the trial court was authorized to find that the statement was within the *res gestae*. Moreover, the court noted that the statement’s reliability—providing as it did a clear explanation

268. 254 Ga. App. at 245, 562 S.E.2d at 227 (quoting *Sutton v. Winn Dixie Stores, Inc.*, 233 Ga. App. 424, 426, 504 S.E.2d 245, 248 (1998)).

269. *Id.*

270. 251 Ga. App. 753, 555 S.E.2d 106 (2001).

271. *Id.* at 753-54, 555 S.E.2d 107-08; *see also* O.C.G.A. § 24-3-3 (1995).

272. O.C.G.A. § 24-3-3.

273. *Andrews v. State*, 249 Ga. 223, 225, 290 S.E.2d 71, 73 (1982) (emphasis in original); *see also* Treadwell, *supra* note 176, at 301; Marc T. Treadwell, *Evidence*, 47 MERCER L. REV. 127, 145-47 (1995).

274. 251 Ga. App. at 754, 555 S.E.2d at 108.

275. *Id.* at 754-55, 555 S.E.2d at 108.

for the event—appeared undisputed.²⁷⁶ Therefore, the court affirmed the trial court's admission of the statement.²⁷⁷

The appellate courts' treatment of admissions by employees of party opponents stands in ironic contrast to the liberal and expanding use of the necessity exception. On the one hand, the courts are extremely reluctant to admit statements that fall within a long recognized exception to the hearsay rule, at least in other jurisdictions. However, the necessity exception is used to admit a broad range of statements that have never fallen within a firmly rooted exception to the hearsay rule.

G. Child Hearsay Statute

The Child Hearsay Statute,²⁷⁸ which provides for the admission of out of court statements made by children in sexual abuse cases, became effective in 1986, and in previous surveys, the author has discussed the numerous appellate decisions interpreting and, to be blunt, judicially legislating the statute.²⁷⁹ These appellate decisions, with some assistance from the Georgia General Assembly, have taken the statute to its present workable form, and there have been few decisions of significance in recent years interpreting the statute. The only case meriting note this year is *Baker v. State*,²⁸⁰ which provides procedural practice pointers. In *Baker* defendant contended that the trial court erred when it admitted the victim's hearsay statement because there was nothing in the record to establish that the child was available to testify—a statutory prerequisite to the admission of the child's statement.²⁸¹ However, while the record did not demonstrate that the child was available, there was also nothing in the record showing that defendant had sought testimony from the child.²⁸² The court took this opportunity to outline the procedure that defendant should have followed.²⁸³ The procedure outlined by the court allows a defendant to avoid the predicament of calling the child victim to testify—a fact of which the jury would likely take a dim view of. At the request of either party, the trial court should call the victim as a witness and inform the jury that the court, rather than the parties, was calling the child as a

276. *Id.* at 755, 555 S.E.2d at 108-09.

277. *Id.*, 555 S.E.2d at 109.

278. O.C.G.A. § 24-3-16 (1995).

279. *See, e.g.*, Treadwell, *supra* note 202, at 373; Treadwell, *supra* note 176, at 299-300; Treadwell, *supra* note 12, at 302-04.

280. 252 Ga. App. 238, 555 S.E.2d 899 (2001).

281. O.C.G.A. § 24-3-16 (1995).

282. 252 Ga. App. at 240, 555 S.E.2d at 901.

283. *Id.* at 240-41, 555 S.E.2d at 901 (quoting *Sosebee v. State*, 257 Ga. 298, 299, 357 S.E.2d 562, 563 (1987)).

witness.²⁸⁴ Here, defendant did not inquire about the child's availability and did not request the court to call the child as a witness. Therefore, defendant could not establish that the victim was unavailable to testify at trial.²⁸⁵

H. Miscellaneous

Federal Rule of Evidence 106 allows parties to introduce summaries of voluminous writings, recordings, and photographs.²⁸⁶ During the survey period, the court of appeals suggested in *In re A.A.*²⁸⁷ that summaries of voluminous records are not admissible.²⁸⁸ To the extent this was the intended holding of the court of appeals, there exists contrary authority. For example, in *Tyner v. Sheriff*,²⁸⁹ the court of appeals held that summaries of books and records are admissible if the books and records themselves are available to the court and the parties.²⁹⁰

VII. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Like the requirement of a contemporaneous objection and an appropriate offer of proof, the rules regarding the authentication of documents are so basic that they are sometimes overlooked. The supreme court's decision in *Johnson v. State*²⁹¹ is a good primer in proper authentication. In *Johnson* defendant claimed that the prosecution did not properly authenticate a letter allegedly written by him to a co-defendant, noting in particular that his handwriting had not been identified by an expert.²⁹² The supreme court disagreed, noting that a letter can be authenticated by circumstantial evidence.²⁹³ Here, the co-defendant testified that the letter and its envelope came from defendant, defendant's name and address appeared in the return address, and the letter contained information that would have been known only by someone privy to information involving defendant's alleged crimes. Although the letter was signed with a nickname, three

284. *Id.*

285. 252 Ga. App. at 240-41, 555 S.E.2d at 901.

286. FED. R. EVID. 106.

287. 252 Ga. App. 167, 555 S.E.2d 827 (2001).

288. *Id.* at 168, 555 S.E.2d at 829.

289. 164 Ga. App. 360, 297 S.E.2d 114 (1982).

290. *Id.* at 360, 297 S.E.2d at 115 (citing *Vaughn & Co. v. Saul*, 143 Ga. App. 74, 79, 237 S.E.2d 622, 627 (1977)).

291. 273 Ga. 872, 548 S.E.2d 292 (2001).

292. *Id.* at 872-73, 548 S.E.2d at 293.

293. *Id.* at 873, 548 S.E.2d at 293.

witnesses identified that nickname as defendant's nickname.²⁹⁴ This, the court held, was sufficient to authenticate the letter.²⁹⁵

In *Almond v. State*,²⁹⁶ the court of appeals dealt summarily with an issue that likely will be raised again. Defendant claimed that the trial court erred when it admitted photographs taken by a digital camera.²⁹⁷ Although the opinion does not elaborate on the basis of defendant's contention, defendant likely argued that such photographs can be more easily altered than conventional photographs. The supreme court, noting that defendant could cite no authority for his argument, held that the authentication rules for digital photographs are the same as those for conventional photographs.²⁹⁸ Thus, because the prosecution elicited testimony that the photographs were fair and truthful representations of what they purported to depict, a proper foundation for their admission had been laid.²⁹⁹

294. *Id.*

295. *Id.*

296. 274 Ga. 348, 553 S.E.2d 803 (2001).

297. *Id.* at 349, 553 S.E.2d at 805.

298. *Id.*

299. *Id.*