Evidence

by Marc T. Treadwell*

I. INTRODUCTION

This survey period saw no dramatic developments. The necessity exception to the hearsay rule continued to catch within its net statements that, a generation ago, would never have seen the light of a courtroom day. However, there were hints that some appellate justices and judges are becoming increasingly uncomfortable with the broad scope of the necessity exception. With regard to expert testimony, Georgia courts continued their refusal to adopt *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[1] perhaps because of a reluctance to impose on trial court judges the tremendous burden of microscopic analysis of proffered expert testimony.

II. OBJECTIONS

Motions in limine are invaluable tools for resolving evidentiary issues out of the presence of jurors. Little is accomplished by a successful objection to proffered evidence when the jury has already heard the evidence. Used properly, motions in limine can exclude objectionable evidence before trial. However, as discussed in previous surveys, motions in limine have to be used with an eye on preserving objections for appeal, a point made by the court of appeals this survey period in *Hand v. Pettitt*.[2]

In *Hand*, a civil suit for battery, plaintiff, during his opening statement, referred to defendant's noxious conduct on occasions other than the occasion at issue. Somewhat after the horse had left the barn, defendant moved in limine to exclude the evidence. The trial court

---

* Partner in the firm of Adams, Jordan & Treadwell, Macon, Georgia. Valdosta State University (B.A., 1978); Walter F. George School of Law, Mercer University (J.D., cum laude, 1981). Member, State Bar of Georgia.

1. 509 U.S. 579 (1993).
2. 258 Ga. App. 170, 573 S.E.2d 421 (2002).

denied the motion.[3] The court of appeals noted that a motion in limine can be used in two ways.[4] First, an attorney can ask the court to prohibit any mention of the evidence in the presence of the jury until the admissibility of the evidence has been determined.[5] Second, an attorney can seek a final ruling on the admissibility of evidence.[6] In the case of the latter, the trial court should deny the motion unless there are no circumstances under which the evidence would be admissible, and thus, the movant carries a heavy burden.[7] "The trial court has an absolute right to refuse to decide the admissibility of evidence, allegedly violating some ordinary rule of evidence, prior to trial, because the evidence has not been tendered in the context of evidence already admitted, which may make the evidence admissible for certain purposes."[8] In *Hand* the court of appeals concluded that defendant, when he moved in limine to exclude the evidence after the jury had heard the evidence during opening statements, was in effect seeking an absolute pretrial ruling on the admissibility of the evidence.[9] In other words, defendant was asking the trial court to find that the evidence was not admissible under any circumstances.[10] The court of appeals concluded that defendant could not meet his heavy burden of establishing that the evidence at issue was not, under any conceivable scenario, admissible.[11]

III. JUDICIAL NOTICE

Lawyers are accustomed to simply citing the statutes and cases upon which they rely, and it is all too easy to forget that Georgia courts cannot always take judicial notice of legislative or judicial materials. This lesson was learned the hard way in *Collier v. Merck*.[12] In *Collier* defendant appealed his conviction in a county recorder's court for violating a county ordinance. On writ of certiorari to the court of appeals, defendant contended that the evidence was insufficient to warrant his conviction.[13] However, the court of appeals did not address this issue because the record did not contain the substance of the

3. *Id.* at 171, 573 S.E.2d at 425.
4. *Id.* at 172, 573 S.E.2d at 425.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 173, 573 S.E.2d at 426.
9. *Id.* at 172, 573 S.E.2d at 426.
10. *Id.*
11. *Id.* at 173, 573 S.E.2d at 426.
12. 261 Ga. App. 831, 584 S.E.2d 1 (2003).
13. *Id.* at 831, 584 S.E.2d at 2.

ordinance defendant had allegedly violated.[14] The court noted that neither a superior court nor an appellate court could take judicial notice of a local ordinance.[15] Rather, it is incumbent upon the party seeking to prove the terms of the ordinance to ensure that the substance of the ordinance is contained in the record.[16]

IV. PRIVILEGES

Georgia law recognizes a clergy privilege: "[E]very communication made by any person professing religious faith, seeking spiritual comfort, or seeking counseling"[17] to a member of the clergy shall be deemed privileged.[18] In *Morris v. State*,[19] defendant contended that the trial court improperly denied his motion in limine seeking to exclude from evidence his conversations with one Reverend Boyd.[20] On appeal, the supreme court sided with the trial court.[21] The evidence showed that defendant had known the Reverend for years, long before he became a clergyman, and considered him to be a father figure. Indeed, the Reverend was never defendant's pastor.[22] The supreme court also relied on the fact that when defendant called Reverend Boyd, the Reverend asked defendant why he called, and defendant responded "'because you're the only father figure I've ever had.'"[23] This suggests that the supreme court relied on the substance of the communications to decide that the communications did not fall within the clergy privilege.[24] In any event, the supreme court held that the trial court properly concluded that defendant's statements to Reverend Boyd were not subject to the protection of the clergy privilege because they were not made to the Reverend in his capacity as a clergyman.[25]

---

14. *Id.*
15. *Id.*
16. *Id.*
17. O.C.G.A. § 24-9-22 (1995).
18. *Id.*
19. 275 Ga. 601, 571 S.E.2d 358 (2002).
20. *Id.* at 602, 571 S.E.2d at 359.
21. *Id.*
22. *Id.*
23. *Id.*, 571 S.E.2d at 360.
24. *Id.*
25. *Id.*

V. RELEVANCY

A. *Relevancy of Extrinsic Act Evidence*

The use of extrinsic act evidence—evidence of what someone did on an occasion other than the one at issue—is now routinely admitted in criminal cases. As discussed in last year's survey,[26] even the seemingly sacrosanct principle that extrinsic act evidence cannot be used to prove a defendant's propensity to commit criminal acts has been called into question.[27] In *Carr v. State*,[28] Judge Eldridge argued that "'propensity' can be a sufficient basis for the admission of a similar transaction."[29] Perhaps drawing a distinction too fine to be meaningful to defendants and their attorneys, Judge Eldridge wrote that propensity evidence is permissible when offered to show course of conduct or intent, and the "evil to be avoided is . . . admission of a similar transaction simply to 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."[30] Defense lawyers likely will lament that if extrinsic act evidence can be offered to prove propensity, then any meaningful obstacle to the use of such evidence has been removed. However, two decisions rendered during the survey period may suggest, at least on the part of some appellate judges, a reluctance to adopt the continued and expanded use of extrinsic act evidence.

In *Mika v. State*,[31] defendant argued that the trial court improperly admitted evidence of his conviction for selling cocaine some eight years prior to the current charged offense of selling cocaine.[32] The majority held that the first offense was sufficiently similar to the charged offense to be admissible similar transaction evidence.[33] The "mere" lapse of time between the two offenses did not render the prior offense too remote to be admissible.[34] In a dissenting opinion, Judge Phipps, joined by Judge Miller, strongly criticized the majority.[35] The majority, Judge

---

26. Marc T. Treadwell, *Evidence*, 54 MERCER L. REV. 309 (2002).
27. Carr v. State, 251 Ga. App. 117, 121, 553 S.E.2d 674, 677 (2001) (Eldridge, J., concurring specially), *discussed in* Treadwell, 54 MERCER L. REV., *supra* note 26, at 312.
28. 251 Ga. App. 117, 553 S.E.2d 674 (2001).
29. *Id.* at 121, 553 S.E.2d at 677 (Eldridge, J., concurring specially).
30. *Id.*, 553 S.E.2d at 677-78 (Eldridge, J., concurring specially).
31. 256 Ga. App. 546, 568 S.E.2d 818 (2002).
32. *Id.* at 547, 568 S.E.2d at 821.
33. *Id.* at 548, 568 S.E.2d at 821.
34. *Id.*
35. *Id.* at 553, 568 S.E.2d at 824 (Phipps, J., dissenting).

Phipps wrote, did not analyze the prior offense in the light of the purpose for which it was admitted, i.e., to show defendant's intent, course of conduct, bent of mind, and modus operandi.[36] A proper analysis, Judge Phipps argued, revealed that the evidence was not admissible for those purposes.[37] Defendant did not contend that he lacked the intent to commit the crime, but rather he denied that he committed the act of selling cocaine. Consequently, intent and bent of mind were not disputed issues, and the prior offense was not relevant to prove intent or bent of mind.[38] With regard to course of conduct, the admission of extrinsic act evidence contemplates continuous conduct closely connected to the charged offense, and an eight-year old offense hardly met this criterion.[39] For similar transaction evidence to be relevant to prove modus operandi, the prior offense must be "'so nearly identical in method [as the crime charged] as to earmark them as the handy work of the accused,'"[40] and the two offenses were not that similar.[41] To Judge Phipps, the "real role which the extrinsic crime evidence played at trial was simply to show that Mika had sold cocaine before, thereby permitting the jury to infer that he had done so again."[42]

The contention that intent can be removed as an issue, and thus as a basis for the admission of extrinsic act evidence, has arisen before. In *Evans v. State*,[43] the trial court admitted similar transaction evidence to establish intent to engage in the sale of cocaine and to establish state of mind.[44] In a dissenting opinion, Judges Beasley and Cooper argued that the charged offense—sale of cocaine—did not require specific intent, and thus, intent was not an issue.[45] State of mind was also not an issue because defendant did not dispute that a drug sale took place; rather, defendant contended that he did not participate in the sale. Thus, the similar transaction evidence was not sufficiently relevant to a legitimate issue to outweigh its inherent prejudicial impact.[46] Interestingly, the United States Court of Appeals for the Eleventh

---

36. *Id.* at 555, 568 S.E.2d at 826 (Phipps, J., dissenting).
37. *Id.*
38. *Id.*
39. *Id.* at 554, 568 S.E.2d at 825 (Phipps, J., dissenting).
40. *Id.* at 555, 568 S.E.2d at 826 (quoting Felker v. State, 252 Ga. 351, 360, 314 S.E.2d 621 (1984)) (Phipps, J., dissenting).
41. *Id.* (Phipps, J., dissenting).
42. *Id.* (Phipps, J., dissenting).
43. 209 Ga. App. 606, 434 S.E.2d 148 (1993).
44. *Id.* at 607, 434 S.E.2d at 149.
45. *Id.* at 608, 434 S.E.2d at 150 (Beasley, J., dissenting).
46. *Id.*

Circuit has consistently rejected this argument, holding that a plea of not guilty generally makes an issue of intent and thus warrants the introduction of extrinsic act evidence.[47]

The court of appeals decision in *Pitts v. State*[48] also prompted a vigorous dissent. In *Pitts* the defendant, who was charged with various drug offenses, argued that his trial attorney should have moved for a mistrial after a co-defendant, in response to questioning from her lawyer, testified that defendant sold drugs for a living.[49] A majority of the court of appeals rejected this contention, concluding that the evidence was admissible, even though the trial court sustained defendant's objection to the evidence.[50] The majority reasoned that because defendant was charged with trafficking, which implied that he sold cocaine, the evidence that defendant sold drugs for a living was relevant to establish that he was a drug trafficker.[51] The evidence was not extrinsic act evidence, the court continued, but rather was evidence that "went to the gravamen of the charges against him . . . ."[52]

Arguably, this holding pushes the envelope, and it certainly pushed Judges Barnes and Ellington to dissent. "We are unable to see any purpose for the testimony other than as inadmissible evidence of Pitts's *propensity* to sell drugs."[53] The dissenters simply did not accept the contention that a general statement that a defendant sold drugs for a living could go to the "gravamen" of the charges against defendant.[54] Clearly, the evidence was extrinsic act evidence, and there was no basis for its admission as character evidence, similar transaction evidence, or as part of the *res gestae*.[55]

In *Putnam v. State*,[56] Judge Eldridge authored a decision illustrating his contention that similar transaction evidence can be admissible as propensity evidence.[57] In *Putnam* the defendant was charged with vehicular homicide, with reckless driving as the underlying offense. Defendant also pleaded guilty to two speeding counts in the indictment.

---

47. *See, e.g.*, Marc T. Treadwell, *Evidence*, 38 MERCER L. REV. 1253, 1259-60 (1987); Marc T. Treadwell, *Evidence*, 40 MERCER L. REV. 1291, 1299 (1989); Marc T. Treadwell, *Evidence*, 43 MERCER L. REV. 1173, 1175-76 (1992).
48. 260 Ga. App. 553, 580 S.E.2d 618 (2003).
49. *Id.* at 560, 580 S.E.2d at 626.
50. *Id.*
51. *Id.* at 563, 580 S.E.2d at 628.
52. *Id.*
53. *Id.* at 567, 580 S.E.2d at 631 (Ellington, J., dissenting).
54. *Id.*, 580 S.E.2d at 630 (Ellington, J., dissenting).
55. *Id.*, 580 S.E.2d at 631 (Ellington, J., dissenting).
56. 257 Ga. App. 902, 572 S.E.2d 412 (2002).
57. *Id.* at 902-04, 572 S.E.2d at 414-16.

At trial, the court admitted evidence of his eleven prior acts of speeding as similar transaction evidence. On appeal, defendant contended that because he pleaded guilty to the speeding counts in the indictment, his prior speeding convictions were no longer relevant and that they were not sufficiently similar to the charged offense.[58] Judge Eldridge rejected these contentions.[59] First, speeding can be a factor in proving the offense of reckless driving.[60] Thus, the evidence of his prior speeding convictions was potentially relevant.[61] In his analysis of the prior convictions, Judge Eldridge repeatedly used language suggesting that prior speeding convictions were admissible if they showed a propensity or habit of speeding.[62] Speeding convictions "can demonstrate a course of conduct wherein a defendant routinely drives his car in a manner exhibiting a disregard for the safety of persons or property."[63] Defendant's numerous speeding convictions "demonstrated a repeated pattern of ignoring posted safe speeds, thereby exhibiting a disregard for the safety of persons or property."[64]

B. Relevancy of Subsequent Remedial Measures

In Georgia, evidence of subsequent remedial measures is generally inadmissible in negligence actions,[65] but in *McCorkle v. Department of Transportation*,[66] plaintiffs contended that the trial court improperly used this rule to exclude admissible evidence. In *McCorkle* the trial court refused to admit a Department of Transportation ("DOT") memorandum recommending certain improvements, including the installation of a traffic light at an intersection where a fatal collision had occurred. Plaintiffs contended that the memorandum did not constitute a subsequent remedial measure because the traffic light had not been installed.[67] However, the court noted that although the DOT did not follow the precise recommendations of the memorandum, it did embark

---

58. *Id.*
59. *Id.*
60. *Id.* at 903, 572 S.E.2d at 415.
61. *Id.*
62. *Id.* at 903-04, 572 S.E.2d at 415-16.
63. *Id.* at 903, 572 S.E.2d at 415.
64. *Id.* at 904, 572 S.E.2d at 416.
65. General Motors Corp. v. Moseley, 213 Ga. App. 875, 880, 447 S.E.2d 302, 308 (1994), *discussed in* Marc T. Treadwell, *Evidence*, 47 MERCER L. REV. 127, 137-38 (1995). The Georgia rule differs from FED. R. EVID. 407, which bars the admission of evidence of subsequent remedial measures in both negligence and strict liability actions. Wood v. Morbark Indus., Inc., 70 F.3d 1201 (11th Cir. 1995).
66. 257 Ga. App. 397, 571 S.E.2d 160 (2002).
67. *Id.* at 399, 571 S.E.2d at 163.

on a safety improvement program that would eventually result in the installation of a traffic light at the intersection; although, at the time of trial, more than three years after the collision, the light had not been installed.[68] With no further discussion, the court of appeals held that the trial court did not abuse its discretion in excluding the memorandum.[69] The court's opinion suggests, although it certainly did not hold, that if a defendant proposes but chooses not to implement a subsequent remedial measure, then that proposal may be admissible.

VI. WITNESSES

A. *Impeaching One's Own Witness*

Georgia law provides that a party may impeach his own witness "where he can show to the court that he has been entrapped by said witness by a previous contradictory statement."[70] However, "entrapment" does not mean surprise, and a party may impeach his own witness with a prior inconsistent statement even though he knows in advance that the witness's testimony will conflict with the prior statement.[71] The court of appeals illustrated this principle in *Black v. State*.[72] In *Black* the defendant, who was charged with child molestation, contended that the trial court improperly allowed the prosecution to impeach the testimony of his mother. The prosecution called defendant's mother to examine her about the events of the evening of the alleged molestation. When the mother denied that defendant had admitted the molestation to her, the prosecution called two investigators who testified that defendant's mother told them defendant had admitted touching the victim.[73] There can be little doubt the prosecution called the mother to the stand as a vehicle to secure the admission of her statement to the investigators. However, the court of appeals held that the prosecution did not need to establish that it was surprised by the mother's testimony to gain the right to impeach her testimony.[74] "Entrapment" simply means "'at the time of the questioning, [a party] has knowledge of a prior statement by one of [its] witnesses which contradicts testimony that witness has just given.'"[75]

---

68. *Id.*
69. *Id.*, 571 S.E.2d at 164.
70. O.C.G.A. § 24-9-81 (1995).
71. Pryor v. State, 198 Ga. App. 588, 402 S.E.2d 338 (1991).
72. 261 Ga. App. 263, 582 S.E.2d 213 (2003).
73. *Id.* at 268, 582 S.E.2d at 218.
74. *Id.*
75. *Id.* (quoting Park v. State, 230 Ga. App. 274, 280, 495 S.E.2d 886, 893 (1998)).

B. Impeachment by Evidence of Conviction

The supreme court's decision in *Smith v. State*[76] illustrates the fine, but significant, distinction between using a conviction to impeach general credibility and using a conviction to demonstrate a particular point, e.g., bias. In *Smith* the defendant attempted to cross-examine a prosecution witness about a first offender conviction. The prosecution objected, contending that if defendant intended to impeach the witness with evidence of a conviction, defendant had to introduce a certified copy of the conviction.[77] On the surface, the prosecution's objection was sound. It is well-established under Georgia law that the sole means of impeaching the general credibility of a witness with a conviction is by tendering a certified copy of the conviction.[78] However, there were two problems with the prosecution's objection. First, because a sentence under the First Offender Act[79] does not require an adjudication of guilt, such a sentence cannot be used as a conviction to impeach a witness's general credibility.[80] Second, as defendant pointed out to the trial court, he was not attempting to impeach the witness's general credibility but rather was using the first offender sentence to demonstrate the witness's bias.[81] Nevertheless, the trial court agreed with the prosecution and forced defendant to tender a certified copy of the witness's first offender sentence.[82] The consequences of this decision were grave. Defendant intended to introduce no evidence and, thus, gain the right to give the concluding argument to the jury. However, because of the trial court's decision forcing him to tender a copy of the first offender sentence, he lost that right.[83]

On appeal, the supreme court acknowledged the first offender sentence was not admissible to impeach the witness's general credibility.[84] The supreme court also acknowledged that defendant had a constitutional right to demonstrate the witness's bias against him and that this included the right to cross-examine the witness about his criminal

---

76. 276 Ga. 263, 577 S.E.2d 548 (2003).
77. *Id.* at 264, 577 S.E.2d at 549.
78. Love v. State, 199 Ga. App. 482, 483, 405 S.E.2d 308, 310 (1991).
79. O.C.G.A. §§ 42-8-62 to -65 (1997 & Supp. 2002).
80. *Smith*, 276 Ga. at 264, 577 S.E.2d at 549 (citing Matthews v. State, 268 Ga. 798, 801, 493 S.E.2d 137, 140 (1997)); *see also* Marc T. Treadwell, *Evidence*, 43 MERCER L. REV. 257, 270 (1991).
81. *Smith*, 276 Ga. at 264-65, 577 S.E.2d at 549-50.
82. *Id.* at 264, 577 S.E.2d at 549.
83. *Id.*
84. *Id.*

history.[85] Thus, the supreme court agreed that defendant should have been allowed to cross-examine the witness without being forced to tender a certified copy of the first offender sentence.[86] The trial court erroneously deprived defendant of the right to give the concluding argument to the jury.[87] Generally, the right to close to the jury is vigorously protected and "harm is presumed when it is erroneously abridged."[88] However, the supreme court concluded that the evidence against defendant was so overwhelming that depriving him of this valuable right was not harmful.[89]

C. "Opening the Door"

Just as extrinsic act evidence is generally inadmissible (subject to many exceptions that have nearly swallowed the rule) when offered for substantive purposes, such evidence also is inadmissible to impeach or bolster witnesses.[90] As an exception to this rule, Georgia law permits the use of general bad character evidence to impeach a witness other than a criminal defendant.[91] Even criminal defendants who "open the door" to general bad character evidence can be impeached with evidence of specific instances of misconduct.[92] Prior to the supreme court's decision in *Jones v. State*,[93] an adroit, or for that matter, a not-so-adroit prosecutor could easily maneuver defendants into a situation in which they could be impeached with evidence of their misconduct.[94] For example, before *Jones*, a defendant who protested on cross-examination that he would not commit a particular act because he was not that type of person subjected himself to impeachment with evidence of his criminal record.[95] *Jones* ended this practice.[96]

However, defendants can still find themselves faced with the difficult dilemma of being forced to choose whether to forgo the introduction of evidence to avoid opening the door to evidence of their prior misconduct. For example, in *Dyer v. State*,[97] defendant, on direct examination,

---

85. *Id.* at 265, 577 S.E.2d at 550.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. Jones v. State, 257 Ga. 753, 363 S.E.2d 529 (1988).
91. O.C.G.A. § 24-9-84 (1995).
92. Bland v. State, 198 Ga. App. 671, 672, 402 S.E.2d 782, 783 (1991).
93. 257 Ga. 753, 363 S.E.2d 529 (1988).
94. *Bland*, 198 Ga. App. at 672, 402 S.E.2d at 783.
95. *Id.*
96. *Jones*, 257 Ga. at 758, 363 S.E.2d at 533.
97. 261 Ga. App. 289, 585 S.E.2d 81 (2003).

testified that he fled from police not because he had committed the charged offense but rather because he was on probation for prior criminal conduct. The trial court then allowed the prosecution to cross-examine defendant about the conduct that had placed him on probation.[98] The court of appeals affirmed.[99] The court reasoned that because defendant testified that he was on probation, the prosecution was entitled to a thorough and sifting cross-examination with regard to that prior offense, which, unfortunately for defendant, proved to be the offense of unlawful flight from police.[100]

Similarly, in *Leary v. State*,[101] defendant, who was charged with stealing rent payments that he was supposed to be collecting from apartment tenants, testified that when he applied for the job, he advised his prospective employer not to hire another applicant because the other applicant was a thief. The prosecution then impeached defendant with his own prior theft conviction.[102] On appeal, the court of appeals reasoned that when defendant testified that the other applicant was a thief, he left the jury with the impression that he was not a thief.[103] This, the court held, entitled the prosecution to impeach defendant with evidence of his own prior theft conviction.[104]

VII. OPINION TESTIMONY

Since *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[105] federal courts have struggled mightily with their new gatekeeper role in scrutinizing expert evidence. Georgia courts have in the past resisted appeals to follow the United States Supreme Court's lead and require Georgia courts to subject proffered expert testimony to rigorous pretrial examination. During the current survey period, the court of appeals again stood fast. In *Orkin Exterminating Co. v. Carder*,[106] defendant contended that plaintiff's expert testimony was not sufficiently grounded in science to be admissible. Plaintiff's expert subjected plaintiff to "challenge testing" to determine whether there was a link between plaintiff's exposure to pesticides applied by defendant and plaintiff's symptoms. The expert likened this testing to a cardiologist conducting

98. *Id.* at 289, 585 S.E.2d at 82.
99. *Id.*
100. *Id.* at 291, 585 S.E.2d at 83.
101. 256 Ga. App. 639, 569 S.E.2d 593 (2002).
102. *Id.* at 641, 569 S.E.2d at 595.
103. *Id.* at 642, 569 S.E.2d at 596.
104. *Id.*, 569 S.E.2d at 595.
105. 509 U.S. 579 (1993).
106. 258 Ga. App. 796, 575 S.E.2d 664 (2002).

a stress test using a treadmill–exposure to show signs of strain on the heart. In the case of pesticides, the expert simply exposed defendant to various agents, including the pesticides at issue, to see whether defendant's symptoms occurred.[107]

Georgia courts apply the so-called *Harper* test[108] to determine the admissibility of scientific evidence. A party relying on novel scientific evidence must prove the procedure or technique has reached a scientific stage of verifiable certainty.[109] This test is satisfied if the procedure or technique at issue has been recognized in a substantial number of other jurisdictions, or if the party offering the evidence can adduce evidence establishing that the procedure or technique has reached the requisite stage of development.[110] The trial court must make this determination from evidence presented by the parties, or on treatises, or the rationale of cases in other jurisdictions.[111] If a procedure has been recognized in a substantial number of courts, the trial court may take judicial notice that the procedure has been established with verifiable certainty.[112]

In *Orkin* the plaintiff produced evidence that his expert's procedure met the certainty and reliability standard and that it had gained general acceptance in the scientific community. However, defendant argued that the tests were not "double blinded," meaning neither the subject nor the person conducting the tests knew whether a placebo was being used; the expert's methodology had not been tested by others; the expert failed to establish a written protocol for the testing; the test results had not been published in professional literature; and the test results had not been subject to peer review. The trial court acknowledged that such factors are routine in *Daubert* analysis, but refused to apply them because Georgia had rejected the *Daubert* test.[113] Accordingly, the court of appeals concluded that the trial court acted within its discretion when it concluded that the testing procedure was sufficiently reliable and that the absence of safeguards or controls or complaints about the expert's methodology all related to the weight the jury should give the expert's testimony rather than its admissibility.[114]

---

107. *Id.* at 797, 575 S.E.2d at 667.
108. *See* Harper v. State, 249 Ga. 519, 292 S.E.2d 389 (1982).
109. *Id.* at 525, 292 S.E.2d at 395.
110. *Id.*
111. *Id.*
112. *Id.* at 526, 292 S.E.2d at 395.
113. *Orkin*, 258 Ga. App. at 799-800, 575 S.E.2d at 668.
114. *Id.* at 800-01, 575 S.E.2d at 669. The supreme court granted certiorari on April 29, 2003 to the court of appeals in *Orkin*, leading to speculation that the court might be willing to reconsider its refusal to adopt *Daubert*. However, the court dismissed the writ

During this survey period, the supreme court and the court of appeals continued their attempts to draw the line between permissible and impermissible non-physician expert testimony on medical issues. As reported in previous surveys,[115] the courts have held, with some qualification, that non-medical experts can express opinions on causation of injuries.[116] However, as demonstrated during the current survey period, that principle can hardly be considered well-entrenched. In *Adams v. State*,[117] the trial court refused to allow a licensed clinical social worker to testify about opinions she formed after she evaluated defendant. She would have testified that defendant suffered from paranoid-type schizophrenia, but the trial court excluded her testimony on the grounds that whether defendant had a mental disorder was a medical opinion, and only a medical doctor could give such testimony.[118] The supreme court, however, noted that the expert had been licensed by the Composite Board of the State of Georgia and that her license allowed her to make diagnostic impressions.[119] Further, she had considerable experience in assessing patients to determine their mental status.[120] This, the supreme court held, authorized her to express her opinions concerning her evaluation of defendant.[121] The fact that she was not a medical doctor was a factor affecting the weight, not the admissibility, of her opinion.[122] Three justices disagreed, arguing that social workers were not competent to give psychiatric diagnoses.[123] They disputed the majority's conclusion that state law permitted the social worker to make diagnoses, noting that the applicable statute only permitted the social worker to perform a "'psychosocial evaluation.'"[124] Using a dictionary, they noted that "psychosocial" simply meant "'of or pertaining to the interaction between social and psychological factors.'"[125] They were especially concerned about the impact of the majority's decision.[126] They feared that, "as a

---

of certiorari.

115. Marc T. Treadwell, *Evidence*, 50 MERCER L. REV. 229, 246-47 (1998); Treadwell, 54 MERCER L. REV., *supra* note 26, at 328-29.

116. Treadwell, 50 MERCER L. REV., *supra* note 115, at 246-47; Treadwell, 54 MERCER L. REV., *supra* note 26, at 328-39.

117. 275 Ga. 867, 572 S.E.2d 545 (2002).

118. *Id.* at 868, 572 S.E.2d at 547.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 870, 572 S.E.2d at 548 (Carley, J., concurring specially).

124. *Id.* (quoting O.C.G.A. § 43-10A-12 (2002)).

125. *Id.*, 572 S.E.2d at 549 (Carley, J., concurring specially).

126. *Id.* at 871, 572 S.E.2d at 549 (Carley, J., concurring specially).

result of [the] opinion, trial courts [would] be reluctant to exercise their discretion to prevent a witness from expressing an expert opinion on any issue even if such witness is not qualified by experience or training to so testify."[127]

In *Moresi v. Evans*,[128] plaintiff contended that the trial court improperly prevented his expert witness, a pharmacologist, from testifying about the cause of plaintiff's medical problems.[129] Plaintiff argued, and the court agreed, that a pharmacologist is competent to testify regarding the scientific effect of a particular drug.[130] However, contrary to plaintiff's contention, the court of appeals held that the trial court allowed the pharmacologist to testify about the effect on the bladder of a depressed autoimmune system.[131] Indeed, the expert testified that there was a causal relationship between the medication plaintiff took and the symptoms she experienced. However, the trial court did not permit the expert to testify about the effect of a depressed central nervous system on a person's bladder, reasoning that this was a matter for medical testimony.[132] "[H]e can testify as to direct causation of the drugs but we would not get into chain reaction testimony from this expert."[133] The court's holding is narrow, and perhaps not particularly illuminating: The trial court "did not abuse its discretion in refusing to allow the pharmacologist to testify about the medical effect of a depressed central nervous system on [plaintiff's] other organs."[134] Clearly, Georgia courts have held that non-medical experts can express opinions on medical causation issues.[135] Whether such testimony is limited to "direct causation" is an issue that is unresolved.

The supreme court's decision in *Hines v. State*[136] illustrates the proper scope of lay opinion testimony.[137] In *Hines* the defendant, who was charged with murder after he mistakenly shot a friend while turkey hunting, contended the trial court improperly allowed a Department of Natural Resources ranger to testify, as a lay witness, that "he would not teach students in his hunter safety classes that [defendant's conduct]

127. *Id.*
128. 257 Ga. App. 670, 572 S.E.2d 327 (2002).
129. *Id.* at 675, 572 S.E.2d at 332.
130. *Id.*
131. *Id.* at 675, 575 S.E.2d at 332.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 674, 575 S.E.2d at 332; *see also Adams*, 275 Ga. at 868, 572 S.E.2d at 547.
136. 276 Ga. 491, 578 S.E.2d 868 (2003).
137. *Id.* at 493, 494, 578 S.E.2d at 872, 873.

was 'permissible or allowable.'"[138] The trial court allowed this testimony after ruling that the ranger could not testify as an expert.[139]

This ruling, the supreme court held, was error.[140] Lay witnesses may give opinion testimony if the testimony is based upon their own observations and their opinions are necessary to convey those same observations to the jury.[141] If the witness can describe the facts to the jury sufficiently for the jury to reach its own opinion, lay opinion testimony is not necessary.[142] In *Hines* the ranger's testimony was not necessary to convey his observations.[143] Rather, he testified as an expert, i.e., based on his experience he formed an opinion that defendant's conduct was improper.[144] However, the court concluded that the witness was qualified as an expert to express such an opinion.[145] Thus, although the court erroneously held that he was not an expert and erroneously allowed him to testify as a lay witness, a reversal was not required because the ranger was, in fact, an expert.[146]

VIII. HEARSAY

A. *Definition of Hearsay*

As discussed below, and in many prior surveys,[147] the necessity exception has nearly eviscerated the rule against hearsay. Now, it appears the definition of hearsay itself, or at least the commonly accepted definition of hearsay, is being narrowed.

If asked the definition of hearsay, most Georgia lawyers almost certainly would say that hearsay is an out-of-court statement offered to prove the truth of the matter asserted therein. In fact, this is the definition of hearsay used most frequently by Georgia courts.[148] However, this is not Georgia's statutory definition of hearsay, which defines hearsay as "that which does not derive its value solely from the credit of the witness but rests mainly on the veracity and competency of

---

138. *Id.* at 494, 578 S.E.2d at 873.
139. *Id.* at 493, 494, 578 S.E.2d at 872, 873.
140. *Id.* at 494, 578 S.E.2d at 873.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *See generally* Treadwell, 54 MERCER L. REV., *supra* note 26, at 309; Marc T. Treadwell, *Evidence*, 53 MERCER L. REV. 295 (2001); Marc T. Treadwell, *Evidence*, 52 MERCER L. REV. 263 (2000); Marc T. Treadwell, *Evidence*, 51 MERCER L. REV. 279 (1999).
148. *See, e.g.*, Marc T. Treadwell, *Evidence*, 44 MERCER L. REV. 213, 235-36 (1992).

other persons."[149] Thus, a testifying witness's out-of-court statement is hearsay under the common definition of hearsay, but it would not necessarily be hearsay under the statutory definition because the statement does not rest on the "veracity and competency" of someone other than the witness.[150] However, Georgia's statutory definition has been more of a historical oddity than a rule of evidence.

It may be that Georgia courts are returning to the statutory definition. Last year's survey[151] discussed *Armstead v. State*,[152] in which the court held that a hearsay statement was admissible because the declarant testified at trial.[153] During the current survey period, the court of appeals relied on *Armstead* to hold that hearsay evidence is admissible when the declarant testifies at trial.[154] In *Conley v. State*,[155] the court of appeals, relying on *Armstead*, recognized that "the modern trend regarding hearsay evidence is to allow the out of court declaration where the declarant is present and may be cross-examined."[156]

Thus, the rule against hearsay is under assault from two fronts. First, exceptions, particularly the necessity exception, to the hearsay rule are being expanded, and second, even if an exception applies, Georgia appears to have recognized the principle that a hearsay statement can nevertheless be admitted if the declarant testifies at trial.[157] Ironically, in doing so, Georgia courts have, in fact if not expressly, resurrected the long thought dead statutory definition of hearsay.

B. The Necessity Exception

For those interested in the historical development of Georgia's necessity exception, previous surveys can be reviewed, particularly a 1996 survey, which chronicled the early days of the exception.[158] For practitioners, it may be sufficient to know that the necessity exception, for good or ill, is here to stay, and it has dramatically changed the landscape of hearsay testimony.[159] However, the necessity exception

---

149. O.C.G.A. § 24-3-1 (1995).
150. *Id.*
151. Treadwell, 54 MERCER L. REV., *supra* note 26, at 332-33.
152. 255 Ga. App. 385, 565 S.E.2d 579 (2002).
153. *Id.* at 386, 565 S.E.2d at 580.
154. Conley v. State, 257 Ga. App. 563, 564, 571 S.E.2d 554, 555 (2002).
155. 257 Ga. App. 563, 571 S.E.2d 554 (2002).
156. *Id.* at 564, 571 S.E.2d at 555.
157. *Id.*
158. Marc T. Treadwell, *Evidence*, 48 MERCER L. REV. 323, 351-54 (1996).
159. One change, perhaps everyone can agree, is positive. The availability of the necessity exception means that courts less frequently resort to the *res gestae* exception, and

is still relatively young and in need of fine-tuning. Thus, during this survey, as during previous periods, the appellate courts spent considerable time attempting to define the parameters of the necessity exception. Most notably, there was a hint that perhaps the courts are contemplating reining in the widespread use of the necessity exception.

In *Phillips v. State*,[160] the trial court admitted a videotaped statement made by a victim to the police.[161] Citing the now well-established elements of the necessity exception—the declarant must be unavailable to testify; there must be particularized guarantees of the statement's trustworthiness; and the statement must be both relevant to a material fact and more probative regarding that fact than any other evidence—the supreme court concluded that the trial court erroneously admitted the statement.[162] The witness could not be located despite a diligent search, and thus, he was unavailable.[163] However, the court found that the prosecution failed to establish that the statement contained particularized guarantees of trustworthiness.[164]

> Merely because Ridaux made his statement to police within hours of the shooting and never recanted or contradicted his statement does not, standing alone, demonstrate that the statement was sufficiently trustworthy to warrant its admission under the necessity exception. Only where "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross examination would be of marginal utility" does the hearsay rule not bar admission of the hearsay statement at trial.[165]

Moreover, the videotaped statement was no more probative than the testimony of other witnesses.[166] Thus, the hearsay failed to meet two of the criteria for admission under the necessity exception.[167]

Perhaps attempting to send a message, the supreme court cautioned trial courts about the widespread use of the necessity exception to admit hearsay evidence:

> The criteria for admission of hearsay evidence under the necessity exception are not mere niceties. Unless a party moving for a hearsay

---

the only thing certain about that exception is that nothing is certain or clear; it is an inexplicable enigma. *Andrews v. State*, 249 Ga. 223, 225, 290 S.E.2d 71, 73 (1982).

160. 275 Ga. 595, 571 S.E.2d 361 (2002).

161. *Id.* at 597, 571 S.E.2d at 365.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* (quoting Idaho v. Wright, 497 U.S. 805, 820 (1990)).

166. *Id.*

167. *Id.* at 598, 571 S.E.2d at 365.

> statement's admission comes forward and establishes that all three criteria are clearly satisfied, the trial court must deny admission and the prohibition against hearsay evidence must be upheld.[168]

As is often the case, however, the fact that there was other evidence more probative of the statement also meant that the erroneous admission of the statement was harmless.[169]

The court in *Phillips* appeared to call into question the long line of cases that have held that hearsay statements are trustworthy simply because they were made to police. In *Yancey v. State*,[170] the supreme court took direct aim at those cases. In *Yancey* the trial court admitted a videotaped statement made by a witness to police during an official investigation. The trial court found further signs of trustworthiness from the fact that the witness initialed each page of the statement, he gave the statement without being threatened and with the benefit of *Miranda*[171] warnings, and he did not recant his statement before trial (he did recant after trial). At the time of trial, the witness could not be located, and the videotaped statement was admitted based upon the testimony of the detective who interviewed the witness.[172] His testimony, and the circumstances surrounding the giving of the testimony, led the supreme court to question just how trustworthy the statement was.[173] The witness was under suspicion for the crime of murder when he was called in for questioning. The detective said the witness was reluctant to talk and refused to take a polygraph examination. Finally, the witness's brother and mother were also potential suspects.[174] On the other hand, the supreme court noted that many cases have held that statements given to police were not sufficiently trustworthy, and the court proceeded to examine that line of cases.[175] Acknowledging that it had "struggled" with the significance to attach to what it called "the 'official investigation' factor,"[176] the court concluded that each case must be decided on the basis of its facts.[177] The implication appears to be that the mere fact that a statement is given during the course of a police investigation does not necessarily satisfy the trustworthiness requirement.

---

168. *Id.*
169. *Id.*, 571 S.E.2d at 366.
170. 275 Ga. 550, 570 S.E.2d 269 (2002).
171. Miranda v. Arizona, 384 U.S. 436 (1996).
172. *Yancey*, 275 Ga. at 551-52, 570 S.E.2d at 271.
173. *Id.* at 556, 570 S.E.2d at 274.
174. *Id.*
175. *Id.* at 553, 570 S.E.2d at 272.
176. *Id.* at 554, 570 S.E.2d at 273.
177. *Id.* at 555, 570 S.E.2d at 273.

The supreme court also warned courts about citing corroborating evidence as indicia of reliability.[178] Such evidence is really a factor in determining whether admission of the hearsay statement was harmless.[179]

The court then turned to a subject rarely addressed by Georgia appellate courts–whether the admission of the hearsay statement violated defendant's Sixth Amendment right to confront his witnesses.[180] As pointed out in a previous survey,[181] the necessity exception test is crafted from confrontation clause analysis intended to determine when hearsay evidence can be admitted without violating a defendant's constitutional rights.[182] A hearsay statement, even though admissible pursuant to some exception to the hearsay rule, may nevertheless violate a defendant's right to confront the witnesses providing evidence against him.[183] The United States Supreme Court has held that hearsay evidence may be admitted in criminal trials if it is necessary and if the statement has "particularized guarantees of trustworthiness."[184] Trustworthiness is generally established by the fact that the hearsay statement falls within a firmly established exception to the hearsay rule.[185] However, the fact that the hearsay statement is not admissible pursuant to a firmly established exception is not a fatal constitutional flaw.[186] The statement may, nevertheless, be admissible if the requisite trustworthiness can be established.[187]

In *Yancey* the Georgia Supreme Court acknowledged that the necessity exception is not a firmly rooted exception to the hearsay rule, and thus, the prosecution had to establish the trustworthiness of the statement.[188] Just as the prosecution could not establish the trustworthiness of the statement for purposes of admission under the necessity exception, it also could not establish the trustworthiness of a statement for purposes of confrontation clause analysis.[189]

---

178. *Id.*
179. *Id.*
180. *Id.* at 555-56, 570 S.E.2d at 273-74.
181. Treadwell, 48 MERCER L. REV., *supra* note 158, at 323, 351-53.
182. *Id.*
183. *See, e.g.*, Marc T. Treadwell, *Evidence*, 42 MERCER L. REV. 223, 251-52 (1990); Marc T. Treadwell, *Evidence*, 45 MERCER L. REV. 229, 247-48 (1993).
184. *See, e.g.*, White v. Illinois, 502 U.S. 346, 363 (1992) (Thomas, J., dissenting); Bourjaily v. United States, 483 U.S. 171, 201 (1987) (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)).
185. *See, e.g.*, United States v. Deeb, 13 F.3d 1532, 1536 (11th Cir. 1994).
186. *Id.* at 1536-37.
187. *Id.*
188. *Yancey,* 275 Ga. at 557, 570 S.E.2d at 275.
189. *Id.*

The supreme court's decision in *Yancey* perhaps suggests that Georgia courts, in their necessity exception analysis, should also consider the constitutional issues of admitting hearsay evidence. At the very least, as a result of *Yancey*, defense attorneys are likely to be more prone to raise federal constitutional challenges to hearsay evidence.

In *Myers v. State*,[190] the supreme court took on another supposed indication of reliability–the fact that a hearsay statement is made to a trusted confidant.[191] In *Myers* the statement was made by the victim to a neighbor, who was a friend of the victim. However, there was no evidence the declarant and the neighbor had a relationship in which the victim placed great confidence in the witness and turned to the witness for help with personal problems.[192] The evidence was simply insufficient to establish the "close confidant" indication of reliability, and therefore, the trial court erroneously admitted the statement pursuant to the necessity exception.[193] Again, however, there was cumulative evidence on the same point, so the admission of the statement was harmless error.[194]

However, it would be far too much to suggest that the necessity exception has reached its high water mark, a point made by a sharply divided supreme court in *Wright v. State*.[195] In *Wright* the defendant, who was convicted of charges, including murder, stemming from the death of his wife and friend, contended that the trial court improperly admitted statements made by his wife.[196] Some of the statements were made to friends, and the supreme court found that those statements met the confidant test.[197] However, the trial court also admitted notes made by the wife after defendant filed for divorce. Because these notes were made in contemplation of the divorce litigation, defendant argued they were inherently untrustworthy.[198] While acknowledging that such statements can be dubious, the court held that they were not necessarily untrustworthy and, in any event, their admission was harmless.[199]

---

190. 275 Ga. 709, 572 S.E.2d 606 (2002).
191. *Id.* at 712, 572 S.E.2d at 610.
192. *Id.*
193. *Id.*
194. *Id.* at 713, 572 S.E.2d at 610.
195. 276 Ga. 454, 579 S.E.2d 214 (2003).
196. *Id.* at 457-58, 579 S.E.2d at 219.
197. *Id.* at 458, 579 S.E.2d at 219.
198. *Id.* at 459, 579 S.E.2d at 220.
199. *Id.*

Three justices dissented.[200] Chief Justice Fletcher, citing *Yancey*, argued that the statements of friends were inadmissible because there was other more probative evidence introduced at trial on the same subject matter.[201] In a separate opinion, Justice Sears criticized the majority for using corroborating evidence to establish the trustworthiness of the victim's notes about the upcoming divorce litigation.[202] As the court held in *Yancey*, Justice Sears argued, corroborating evidence should not be used to determine admissibility.[203] Moreover, the fact that the statements were made in connection with the impending divorce, if anything, established that they were not trustworthy–spouses in the throes of divorce may be inclined to make self-serving statements that tend to portray the marital relationship in an inaccurate or biased light, a point that can hardly be argued.[204]

The court of appeals also seemed to be concerned about the rapid expansion of the hearsay exception and, in *Lighten v. State*,[205] perhaps intended to send a message of its own. In *Lighten* the defendant contended that the trial court erroneously admitted an audiotaped statement from his uncle. The uncle made the statement to police more than four months after the events in question and at a time when he hoped to benefit from making the statement.[206] Even though the statement was made to police, it was not sufficiently trustworthy to be admitted under the necessity exception.[207] While the prosecution pointed to corroborating evidence, the court, citing *Yancey*, responded that the supreme court had held that corroboration is not an appropriate factor in determining admissibility.[208] However, as the court also said in *Yancey*, corroboration evidence is a factor in determining whether the admission of the statement was harmless, and, sure enough, in *Lighten*, the fact that there was other evidence of the same facts led the court of appeals to conclude that the erroneous admission of the hearsay was harmless.[209]

---

200. *Id.* at 463-66, 579 S.E.2d at 223-25. Chief Justice Fletcher, Presiding Justice Sears, and Justice Carley each filed dissenting opinions. *Id.*

201. *Id.* at 463, 579 S.E.2d at 223 (Fletcher, C.J., dissenting).

202. *Id.* at 464, 579 S.E.2d at 223 (Sears, J., dissenting).

203. *Id.*

204. *Id.*

205. 259 Ga. App. 280, 576 S.E.2d 658 (2003).

206. *Id.* at 283, 576 S.E.2d at 662.

207. *Id.* at 284, 576 S.E.2d at 662.

208. *Id.*

209. *Id.* at 286, 576 S.E.2d at 663.

It is an anomaly, at least to some, that the necessity exception is freely used in criminal cases, but only sparingly used in civil cases,[210] a point illustrated in *Torstenson v. Doe*.[211] In *Torstenson* the plaintiff contended that a piece of metal flew from a truck and struck the windshield of her van. Unfortunately, the truck left the scene and the identity of the driver was unknown. Thus, plaintiff attempted to recover from her uninsured motorist carrier. To establish that the event actually happened, and thus implicate the uninsured motorist carrier, plaintiff relied upon statements made by her husband, an eyewitness to the incident.[212] Unfortunately, the husband had died. Accordingly, plaintiff offered "virtually identical affidavits" from two of her adult children.[213] Plaintiff contended that these affidavits were admissible under the necessity exception.[214] Quoting from the trial court's careful review of the affidavits, the court noted that the "'affidavits give the court no details or flavor of the declarations to determine if they meet the high standard of being a 'circumstantial guaranty of trustworthiness' or 'something the law considers the substitute for the oath of the declarant in his cross examination.'"[215] The court of appeals added that "the statements were made to family members rather than to a disinterested third-party such as the police . . . and that the statements were in the [husband's] self interest."[216] Considering the totality of the circumstances, the court of appeals concluded that the trial court did not abuse its discretion when it concluded that the affidavits were not sufficiently trustworthy to be admissible under the necessity exception.[217]

Of course, during the survey period, there were also routine necessity exception cases or at least routine in the sense that the courts, with little discussion, admitted hearsay evidence that just a few years ago would have been inadmissible.[218]

---

210. Compare this treatment with extrinsic act evidence where the same phenomenon exists.

211. 257 Ga. App. 389, 571 S.E.2d 432 (2002).

212. *Id.* at 389-90, 571 S.E.2d at 433.

213. *Id.* at 390, 571 S.E.2d at 435.

214. *Id.* at 391, 571 S.E.2d at 434.

215. *Id.* at 392, 571 S.E.2d at 435.

216. *Id.*

217. *Id.*

218. *See generally* Barrett v. State, 257 Ga. App. 444, 445-46, 571 S.E.2d 202, 205 (2003) (holding that trustworthiness was established by the fact that the statement was made to police during the course of an official investigation); Pullin v. State, 258 Ga. App. 37, 41, 572 S.E.2d 722, 726 (2002) (holding that trustworthiness was established by the fact that the declarant and the witness confided in one another albeit for a very short period of time); Watkins v. State, 276 Ga. 578, 580, 581 S.E.2d 23, 26 (2003) (holding that

C. Statements of Co-Conspirators

In *Arevalo v. State*,[219] the supreme court arguably, and certainly in the minds of the dissenting justices, significantly expanded the co-conspirator exception to the hearsay rule.[220] In *Arevalo* the defendant, his brother, and a third person robbed and then shot employees of a restaurant where defendant had previously been employed. After his arrest, defendant admitted his participation in the armed robbery but claimed the third accomplice was the triggerman. At trial, the court admitted, pursuant to the co-conspirator exception, a letter allegedly written by defendant's brother and sent to defendant. The prosecution used this letter to support its argument that defendant actually shot the victims.[221] Before addressing defendant's contention that the letter did not fall within the co-conspirator exception, the supreme court considered whether the state had properly "authenticated" the letter.[222] Noting that a document can be authenticated by circumstantial evidence, the court concluded that the totality of the circumstances sufficiently established that defendant's brother authored the letter.[223] Justice Thompson, joined by Justice Sears, dissented from this holding, but the court dismissed their arguments because, in the view of the majority, the dissenters raised "chain of custody" issues and defendant did not object to the letter on that basis.[224]

Justice Thompson's dissent adds a few more facts to the mix.[225] The prosecutor allegedly received a photocopy of the letter from an attorney, who in turn received the letter from a client housed in the same jail as either defendant or his brother, it was not clear which. Neither this inmate nor defendant's brother testified at trial, and the only evidence adduced to authenticate the letter was the testimony of an investigator from the prosecutor's office. According to this investigator, the inmate told him that he had delivered letters for defendant's brother.[226] The

---

trustworthiness was established by the declarant's and the witness's "close, trusting and loving relationship"); Hill v. State, 258 Ga. App. 339, 341, 574 S.E.2d 394, 397 (2002) (holding that trustworthiness was established by the fact that the statement was made to the declarant's son).

219. 275 Ga. 392, 567 S.E.2d 303 (2002).

220. *See id.* at 399-401, 567 S.E.2d at 310-11 (Fletcher, C.J., dissenting); *id.* at 402-04, 567 S.E.2d at 311-12 (Thompson, J., dissenting).

221. *Id.* at 391-92, 395-96, 567 S.E.2d at 305, 307.

222. *Id.* at 395, 567 S.E.2d at 307.

223. *Id.* at 395, 396, 567 S.E.2d at 307.

224. *Id.* at 396, 567 S.E.2d at 307.

225. *Id.* at 402-03, 567 S.E.2d at 311-12 (Thompson, J., dissenting).

226. *Id.* at 402, 567 S.E.2d at 312 (Thompson, J., dissenting).

investigator further testified that when the brother was confronted with the letter, he appeared "'kind of shocked'" and acknowledged that the letter was a correct copy of the letter he had written to his brother.[227] As Justice Thompson pointed out, all of this testimony was hearsay and should not have been admissible to authenticate the letter.[228] Justice Thompson also noted that the inmate arguably had his own agenda—to obtain favorable treatment for his own crimes.[229] Putting aside the hearsay evidence, Justice Thompson concluded that "the totality of the admissible circumstantial evidence of the letter's authenticity . . . [was] insufficient to authorize the letters introduction into evidence."[230]

The difference between the majority and Justice Thompson may well be one of semantics. To the majority, Justice Thompson's point that the state failed to offer admissible evidence establishing how a copy of the letter came to be in prosecution's possession, and whether defendant's brother actually wrote the letter, all related to whether the state had proven a chain of custody.[231] However, Justice Thompson never mentioned chain of custody; to him, the "totality of the circumstances" simply failed to authenticate the letter.[232] For the majority, the contents of the letter itself provided sufficient circumstantial evidence to authenticate the letter.[233] Given the additional facts provided by Justice Thompson's dissent, it appears that the majority's threshold for authentication was rather low.

The majority then turned to the issue of whether the letter was admissible as a statement of a co-conspirator.[234] First, the majority reasoned there was a conspiracy between defendant, his brother, and their accomplice to commit the armed robbery, and the murders occurred during the course of this conspiracy.[235] The majority acknowledged that before the letter was written, both brothers admitted their involvement in the armed robbery and identified their accomplice as an additional participant;[236] therefore, that conspiracy was over.[237] However, neither brother implicated the other in the murders, but

227. *Id.* at 403, 567 S.E.2d at 312 (Thompson, J., dissenting).
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.* at 396, 567 S.E.2d at 307.
232. *Id.* at 403, 567 S.E.2d at 312 (Thompson, J., dissenting).
233. *Id.* at 396, 567 S.E.2d at 307.
234. *Id.*, 567 S.E.2d at 308.
235. *Id.*
236. *Id.*
237. *Id.*

rather contended that their accomplice was the triggerman.[238] "Thus, while the conspiracy to commit an armed robbery with [the accomplice] may have been over, a conspiracy between the Arevalo brothers with regard to the murders was still very much ongoing."[239] Because a conspiracy continues so long as the participants attempt to conceal the conspiracy, the conspiracy between defendant and his brother was ongoing.[240]

This reasoning confounded Chief Justice Fletcher, who contended that the majority had "unwisely extend[ed] the already expansive hearsay exception for co-conspirator's statements under state law to allow the admission of an out of court statement made after the conspiracy ended."[241] Chief Justice Fletcher noted that it was well-established that a conspiracy ends when one conspirator incriminates another; thus, this conspiracy ended when the brothers were arrested, confessed, and implicated both themselves and their accomplice.[242] Chief Justice Fletcher found no support for the majority's theory that there were two conspiracies, one involving the armed robbery and another between the brothers to blame their accomplice for the murder.[243]

D. Business Records Exception

As discussed in previous surveys,[244] Georgia's business record exception[245] does not permit the admission of opinions or diagnoses contained in medical records.[246] However, in *Kohl v. Tirado*,[247] the court held that medical records containing opinions and diagnoses may be admitted if "'the proper foundation is laid, i.e., the person who entered such diagnostic opinions and conclusions upon the record must qualify as an expert and relate the facts upon which the entry was based.'"[248] In *Kohl* the doctor, whose records were admitted pursuant

---

238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.* at 399-400, 567 S.E.2d at 310 (Fletcher, C.J., dissenting).
242. *Id.* at 400, 567 S.E.2d at 310 (Fletcher, C.J., dissenting).
243. *Id.*
244. *See, e.g.*, Treadwell, 47 MERCER L. REV., *supra* note 65, at 127, 149.
245. O.C.G.A. § 24-3-14 (1995).
246. *See, e.g.*, Marc T. Treadwell, *Evidence*, 49 MERCER L. REV. 149, 167 (1997). In this regard, Georgia's hearsay exception for business records is much narrower than the business records exception in the Federal Rule of Evidence, which allows the admission of business records containing opinions or diagnoses. FED. R. EVID. 803(6).
247. 256 Ga. App. 681, 569 S.E.2d 576 (2002).
248. *Id.* at 683-84, 569 S.E.2d at 578 (quoting Cassano v. Pilgreen's, Inc., 117 Ga. App. 260, 261, 160 S.E.2d 439, 440 (1968)).

to the business record exception, testified at trial, so the opinions and diagnoses in his medical records were admissible.[249]

E. Adoptive Admissions

In *White v. State*,[250] the supreme court reached what many will regard, including dissenting Justices Fletcher and Hunstein, as an unusual result in the case of an alleged adoptive admission. In *White* the defendant's neighbor testified about a conversation she had with defendant's wife in the presence of defendant. At some point during the conversation, defendant signaled his wife to stop talking.[251] This, the trial court and the supreme court agreed, was "an adoptive admission" of the wife's incriminating statements.[252] Defendant "actively responded to Josephine's statements by gesturing for her to keep quiet, thereby arguably acknowledging that the inculpatory statements were true and that the information should not be disclosed."[253] Chief Justice Fletcher essentially called for a reality check; the fact that defendant gestured to his wife to stop talking does not naturally mean that he agreed with what his wife was saying.[254] "In fact, the usual human experience would consider such a gesture to mean that the husband *disagrees* with his wife's comments."[255]

F. Miscellaneous

Perhaps contrary to the general trend expanding the scope of exceptions to the hearsay rule, Georgia courts continue to adhere to the principle that hearsay evidence is generally not admissible to explain a law enforcement officer's conduct.[256] In *Teague v. State*,[257] the supreme court unequivocally ruled that prosecutors could not use the "explain conduct" exception of the hearsay rule to admit hearsay evidence:

> At heart, a criminal prosecution is designed to find the truth of what a defendant did, and, on occasion, of why he did it. It is most unusual that a prosecution will properly concern itself with *why* an investigating officer did something.

---

249. *Id.* at 683, 569 S.E.2d at 578.
250. 276 Ga. 583, 581 S.E.2d 18 (2003).
251. *Id.* at 587, 581 S.E.2d at 22.
252. *Id.*
253. *Id.* at 587, 588, 581 S.E.2d at 22.
254. *Id.* at 589, 581 S.E.2d at 23 (Fletcher, C.J., concurring specially).
255. *Id.*
256. Teague v. State, 252 Ga. 534, 536-37, 314 S.E.2d 910, 912 (1984).
257. 252 Ga. 534, 314 S.E.2d 910 (1984).

> If the hearsay rule is to remain a part of our law, then O.C.G.A. section 24-3-2 . . . must be contained within its proper limit. Otherwise, the repetition of the rote words "to explain conduct" can become imprimatur for the admission of rumor, gossip, and speculation.[258]

During the current survey period, the court of appeals, in *Britton v. State*,[259] relied on *Teague* to reverse defendant's conviction.[260] In *Britton* the trial court admitted testimony that an anonymous informant told a detective that defendant would be driving a particular vehicle and would have concealed money and drugs under a false bottom in the vehicle's console. Based on this information, the law enforcement officers located defendant's vehicle. Defendant consented to the search of his vehicle and officers found cocaine, cash, and a gun in a space beneath the console. Defendant contended that the trial court improperly admitted the anonymous caller's hearsay statements.[261] The court of appeals agreed and reversed.[262]

However, in two other cases, the court of appeals held that *Teague* did not require the exclusion of hearsay evidence offered to explain police conduct.[263] In *Morrow v. State*,[264] the trial court admitted a law enforcement officer's testimony that he was dispatched to a scene because of two unruly, intoxicated males. When the officer arrived, the drunks were gone, but the dispatcher provided the officer with a description of their vehicle, including the license plate number. Based on this information, the police officer stopped defendant's truck. Defendant was convicted of driving under the influence of alcohol. On appeal, defendant contended that the information provided by the dispatcher to the law enforcement officer was not admissible.[265] The court of appeals disagreed, concluding that this was one of the "'rare instances'" contemplated by *Teague* that warranted the admission of hearsay to explain police conduct.[266] The difference appeared to be the issue on which the hearsay evidence was offered. In *Morrow* that issue was whether the law enforcement officer had a reasonable and articulable suspicion to justify stopping defendant's vehicle.[267] The informa-

---

258. *Id.* at 536, 314 S.E.2d at 912.
259. 257 Ga. App. 441, 571 S.E.2d 451 (2002).
260. *Id.* at 442-43, 571 S.E.2d at 453.
261. *Id.* at 442, 571 S.E.2d at 452.
262. *Id.* at 442, 443, 571 S.E.2d at 453.
263. Morrow v. State, 257 Ga. App. 707, 708, 572 S.E.2d 58, 59 (2002); Penland v. State, 258 Ga. App. 659, 663, 574 S.E.2d 880, 883 (2002).
264. 257 Ga. App. 707, 572 S.E.2d 58 (2002).
265. *Id.* at 708, 572 S.E.2d at 59.
266. *Id.* (quoting Scruggs v. State, 227 Ga. App. 35, 36, 488 S.E.2d 110, 111 (1997)).
267. *Id.*

tion provided by the dispatcher was found admissible to explain why the stop was justified.[268]

Similarly, in *Penland v. State*,[269] the court of appeals held that the nature of the issue warranted the admission of evidence to explain police conduct.[270] In *Penland* the defendant was charged with obstruction of a law enforcement officer, and the court reasoned that to prove that charge, the prosecution had to demonstrate that the police were acting in the lawful discharge of their official duties and, consequently, that they had reasonable grounds to stop defendant.[271] Accordingly, hearsay evidence was admissible to explain that the officers were lawfully discharging their official duties when they stopped defendant.[272]

268. *Id.*
269. 258 Ga. App. 659, 574 S.E.2d 880 (2002).
270. *Id.* at 661, 574 S.E.2d at 882.
271. *Id.* at 659, 660, 574 S.E.2d at 882.
272. *Id.* at 663, 574 S.E.2d at 883.