Evidence

by Marc T. Treadwell*

I. INTRODUCTION

The most significant news during the current survey year continued to be the major legislative developments discussed in last year's survey.[1] Most significantly, the Georgia General Assembly, during its 2005 session, enacted Official Code of Georgia Annotated ("O.C.G.A.") section 24-9-67.1,[2] which purports to adopt, more or less, the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[3] and its progeny, and creates special rules for expert testimony in medical negligence actions. In other words, *Daubert* has now come to Georgia and, as discussed below, there were both legislative and judicial developments regarding Georgia's new expert witness rule during the survery period.

As also discussed in last year's survey,[4] the State Bar of Georgia has proposed that the General Assembly adopt, with some exceptions and variations, the Federal rules of Evidence. The current version of the proposed Rules can be found at the State Bar's website.[5] However, there was no legislative action on the Rules during the 2006 sesssion of the General Assembly.

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* 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. *See* Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 187 (2006). Although Georgia may be inching towards the adoption of the Federal Rules of Evidence, Georgia still does not have a comprehensive evidence code. *See, e.g.,* Marc T. Treadwell, *Evidence,* 44 MERCER L. REV. 214 (1992). This Article, however, will continue in the tradition of past Georgia Survey articles and will follow the organizational format of the Federal Rules of Evidence.
2. O.C.G.A. § 24-9-67.1 (Supp. 2006).
3. 509 U.S. 579 (1993).
4. *See* Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 187 (2005).
5. www.gabar.org/news/report_of_the_evidence_study_committee (June 6, 2005).

II. OBJECTIONS

Georgia's contemporaneous objection rule requires a party to timely object to the introduction of evidence; the failure to do so precludes a party from raising the issue on appeal.[6] The court of appeals decision in *Telcom Cost Consulting, Inc. v. Warren*[7] provides an excellent primer on the contemporaneous objection rule and how the rule interacts with motions in limine and continuing objections. In *Telcom* the plaintiffs argued on appeal that the trial court erred when it allowed a witness to testify about prior consistent out-of-court statements made by another witness. The defendants responded that the plaintiffs had waived their right to appeal that issue because they had not moved in limine to preclude the testimony and they did not object each time the witness testified about the prior consistent statements.[8] When the defendants first asked the witness whether she had discussed the transaction with the declarant, the plaintiffs objected on the grounds that the question called for hearsay.[9] In response to that specific objection, the trial court ruled that the declarant's veracity had been attacked, and thus his prior consistent statements to the witness would be admissible.[10] Thereafter, the plaintiffs raised no further objections.

In response to the defendants' argument that the plaintiffs had waived their right to appeal the admission of the prior consistent statements, the plaintiffs argued that their initial objection and the trial court's ruling on that objection was the "'functional equivalent of a motion in limine denied,'" and thus there was no further need for them to object.[11] The court of appeals first noted that a motion in limine can be used in two ways.[12] First, an attorney can ask the court to prohibit any mention of the disputed evidence in the presence of the jury until the admissibility of the evidence has been determined.[13] Second, an attorney can seek a final ruling on the admissibility of evidence prior to

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6. For a discussion of the contemporaneous objection rule in various situations, see Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 187, 188-89 (2005); Marc T. Treadwell, *Evidence*, 56 MERCER L. REV. 235, 237-39 (2004); Marc T. Treadwell, *Evidence*, 54 MERCER L. REV. 309, 309-11 (2002); Marc T. Treadwell, *Evidence*, 52 MERCER L. REV. 263, 263-65 (2000).

7. 275 Ga. App. 830, 621 S.E.2d 864 (2006).

8. *Id.* at 831, 621 S.E.2d at 866.

9. *Id.* at 832, 621 S.E.2d at 866.

10. *Id.*

11. *Id.*

12. *Id*.

13. *Id*.

the trial.[14] Because the plaintiffs first raised the issue by way of an objection during the trial, the court easily concluded that the plaintiffs had not moved in limine, and thus, their objection and the ruling on that objection did not relieve them of their obligation to continue to object to inadmissible evidence.[15] The court did not elaborate on the plaintiffs' point, but some discussion is appropriate. Generally speaking, if a party has made a proper motion in limine and the court has ruled on that motion, it is not necessary for the party to object to that evidence when it is tendered at trial.[16] However, one should exercise caution when relying on motions in limine to preserve an issue for an appeal. For example, a ruling on a motion in limine may be correct at the time of the ruling, but when the issue arises again at trial—that is, when the evidence is tendered—the record may contain additional facts relevant to the issue. The safer course, it would seem, would be for a party to renew his objection when the disputed evidence is offered at trial to be sure that he has preserved his right to appeal the issue.

Because the plaintiffs in *Telcom* had not moved in limine to seek a final ruling on the admissibility of the evidence in question, they were not relieved of their obligation to object to that evidence when it was tendered.[17] Moreover, when the trial court ruled on the plaintiffs' only objection, it made clear that it was ruling only on the specific question pending at the time. This ruling put the plaintiffs on notice that if the plaintiffs objected to further evidence, an additional objection would be required. Furthermore, the plaintiffs did not raise a proper continuing objection.[18] To have a continuing objection to a line of questioning that would relieve a party from repeatedly objecting, the record must establish that the trial court has granted the party a right to a continuing objection and that the court's ruling covers subsequent questions.

III. JUDICIAL NOTICE

The court of appeals decision in *Ponce v. State*[19] illustrates a problem often encountered by lawyers asking a court to take judicial notice of state regulations. In its first time hearing *Ponce*, the court of appeals reversed the defendant's conviction on the ground that the trial court

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14. *Id.*
15. *Id.*, 621 S.E.2d at 867.
16. Marc T. Treadwell, *Evidence*, 55 MERCER L. REV. 249, 250 (2003); Marc T. Treadwell, *Evidence*, 51 MERCER L. REV. 1165, 1165-66 (2000).
17. 275 Ga. App. at 832, 621 S.E.2d at 867.
18. *Id.*, 621 S.E.2d at 866.
19. 279 Ga. App. 207, 630 S.E.2d 840 (2006).

should have suppressed evidence obtained from a warrantless search of the defendant's commercial truck.[20] The supreme court vacated that decision and instructed the court of appeals to consider whether regulations promulgated by the Public Service Commission ("PSC") authorized the search of the defendant's truck.[21] On remand to the court of appeals, the State argued that two PSC rules authorized law enforcement officers to inspect a commercial vehicle without a warrant or a reasonable suspicion of criminal activity.[22] The court of appeals, however, held that it could not take judicial notice of these regulations because there was no evidence that the rules had been adopted in compliance with and pursuant to Georgia's Administrative Procedures Act ("the Act").[23] Pursuant to O.C.G.A. section 50-13-8,[24] a court can take judicial notice of state rules and regulations only if they were adopted in compliance with the Act.[25] The court's opinion discusses in some detail the court's search of both the secretary of state and PSC websites and its inability to find any indication that the PSC's rules had been adopted in accordance with the requirements of the Act.[26] Because there was no admissible evidence of the PSC rules, and because the court could not take judicial notice of the copies of the rules submitted by the prosecution, the court of appeals again reversed the defendant's conviction.[27]

IV. RELEVANCY

Since the Author began surveying evidence decisions for the Georgia survey in 1988, the most frequently encountered relevancy issue has been whether extrinsic act evidence is relevant. "Extrinsic act evidence" refers to evidence of conduct on occasions other than the occasion at issue that is offered as substantive, as opposed to impeachment, evidence.[28] Generally, extrinsic act evidence is irrelevant and thus inadmissible.[29] Nevertheless, like the rule against hearsay, the rule against extrinsic act evidence is known more for its exceptions than its flat prohibition. Most commonly, evidence of completely separate but

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20. Ponce v. State, 271 Ga. App. 408, 415, 609 S.E.2d 736, 741 (2005).
21. Ponce v. State, 279 Ga. 651, 651, 619 S.E.2d 682, 682-83 (2005).
22. *Ponce*, 279 Ga. App. at 208, 630 S.E.2d at 842.
23. *Id.*; *see generally* O.C.G.A. §§ 50-13-1 to -23 (2006).
24. O.C.G.A. § 50-13-8 (2006).
25. *Id.*
26. *Ponce*, 279 Ga. App. at 209-10, 630 S.E.2d at 843.
27. *Id.* at 210-11, 630 S.E.2d at 843-44.
28. *See* O.C.G.A. § 24-2-2 (1995); FED. R. EVID. 404.
29. *Id.*

nonetheless similar transactions "'may be introduced to prove identity, motive, plan, scheme, bent of mind and course of conduct.'"[30] Criminal defense lawyers from scarcely more than a generation ago would hardly recognize—and likely would be appalled at—the state of today's law of evidence, particularly as it relates to similar transaction evidence. The judiciary, on the other hand, does "'not concede, as suggested by some, that the exceptions have swallowed the rule of inadmissibility of separate crimes.'"[31] That may be true, but concern that the floodgate has been opened to similar transaction evidence has led Georgia's appellate courts to use this precise quote on at least five occasions to douse any such suspicions.

As the admission of similar transaction evidence becomes more routine, it seems that prosecutors sometimes tend to grow lax in satisfying the prerequisites to the admissibility of extrinsic act evidence. This certainly seemed to be the case in *Naillon v. State*.[32] In *Naillon* the defendant contended that the trial court erroneously admitted evidence that he had pleaded guilty to motor vehicle theft during his trial for theft by receiving stolen property, giving false information to an officer, and misrepresenting the identity of a vehicle by improperly transferring a license plate. To prove the prior conviction, the State called an employee of the Department of Corrections Probation Division who authenticated the certified copy of the defendant's conviction; however, the employee could provide no evidence about the facts or circumstances surrounding the conviction. The defendant contended that this evidence was insufficient to establish the requisite similarity between the extrinsic offense and the charged offense.[33] The court of appeals agreed.[34] Specifically, the court held:

> [E]vidence that the defendant committed a prior offense is generally prejudicial, irrelevant, and inadmissible, even if the prior crime is of the same type for which the defendant is being tried. However, evidence of such prior crime may be admitted if "there is some logical connection between the independent act and the crime for which the

30. Franklin v. State, 189 Ga. App. 405, 408, 376 S.E.2d 225, 228 (1988) (citing Sablon v. State, 182 Ga. App. 128, 130, 355 S.E.2d 88, 91 (1987)).

31. Farley v. State, 265 Ga. 622, 626, 458 S.E.2d 643, 647 (1995); *accord* State v. Johnson, 246 Ga. 654, 655, 272 S.E.2d 321, 322 (1980); Millwood v. State, 164 Ga. App. 699, 700, 296 S.E.2d 239, 240 (1982); Bissell v. State, 157 Ga. App. 711, 713, 278 S.E.2d 415, 417 (1981).

32. 276 Ga. App. 799, 625 S.E.2d 73 (2005).

33. *Id.* at 799-800, 625 S.E.2d at 74-75.

34. *Id.* at 800, 625 S.E.2d at 75.

> defendant is being tried, from which it can be said that proof of one tends to establish the other."[35]

It is incumbent upon the State to offer evidence establishing that the extrinsic offense and the charged offense are so similar that proof that a defendant committed the prior offense tends to prove that he committed the charged offense.[36] Simply tendering a certified copy of the prior conviction does not satisfy the state's burden of proving similarity.[37] Therefore, the court of appeals reversed the defendant's conviction.[38]

Extrinsic act evidence can also be relevant in civil cases, although, perhaps ironically, courts seem more reluctant to admit extrinsic act evidence in civil cases than in criminal cases. It would seem 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 typically concern 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 concern issues of negligence or other unintentional acts. 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 propensity is not a permissible use of extrinsic act evidence.

The issue, then, in civil cases as in criminal cases, is whether the extrinsic act is relevant to some issue in the case. The application of the rule against the admissibility of extrinsic act evidence in civil cases was illustrated during the survey year by the court of appeals decision in *Colp v. Ford Motor Co*.[39] In *Colp*, a products liability action, the plaintiffs contended that the details of thirty-seven crashes similar to the crash involving the plaintiffs' Ford Aerostar were admissible in the plaintiffs' product liability claim against Ford for injuries suffered in the crash. The plaintiffs contended that thirty of the incidents were admissible to show that a defect in the latch on the side door of the Aerostar could cause the door to accidentally open during a collision. In

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35. *Id.* (quoting Hudson v. State, 271 Ga. 477, 479, 521 S.E.2d 810, 812 (1999)).
36. *Id.*
37. *Id.*
38. *Id.* at 801, 625 S.E.2d at 75.
39. 279 Ga. App. 280, 630 S.E.2d 886 (2006).

other words, those thirty incidents were tendered to prove that the latch on the door of the plaintiffs' Aerostar failed as a result of a defective design and that the thirty allegedly similar incidents demonstrated that the design was defective. The remaining seven incidents involved claims or complaints of accidental disengagement of latches, and the plaintiffs contended that these seven incidents were relevant to prove Ford's notice of the defective latch.[40]

In products liability actions such as *Colp*, Georgia courts apply the "substantial similarity" test to determine the admissibility of other incidents involving the product at issue.[41] To meet the substantial similarity test, the party seeking to introduce the similar incidents must show that the products involved (1) shared a common design; (2) suffered from a common defect; and (3) that the defects arose from the same causative factors.[42] In *Colp* the trial court, after a two-day hearing, concluded that the plaintiffs had not proved two of these three elements.[43] First, because twenty-eight of the thirty incidents involved a different latch design, the plaintiffs had not proven that those incidents involved a common design.[44] Second, because the plaintiffs' collision was a relatively low speed collision and the other incidents involved higher speed collisions, the trial court concluded the plaintiffs had not proven common causation.[45] The court of appeals granted the plaintiffs' application for interlocutory appeal and in a detailed opinion, affirmed the trial court's order excluding evidence of the other incidents.[46] Essentially, the court of appeals rejected the plaintiffs' argument that the trial court should have accepted testimony of the plaintiffs' expert that the difference in designs between the two types of latches was immaterial because there was no difference in the relevant characteristics of the two designs.[47] The court noted that the defendant's expert testified that the latch in the plaintiffs' car was superior to the latch involved in twenty-eight of the incidents.[48] The court of appeals held that the trial court did not abuse its discretion when it relied on this testimony to conclude that those twenty-eight incidents

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40. *Id.* at 280-82, 630 S.E.2d at 887-88.

41. *See* Cooper Tire & Rubber Co. v. Crosby, 273 Ga. 454, 455, 543 S.E.2d 21, 23-24 (2001); *see also* Marc T. Treadwell, *Evidence*, 53 MERCER L. REV. 295, 300-02 (2001).

42. *Colp*, 279 Ga. App. at 281, 630 S.E.2d at 887.

43. *Id.* at 282, 630 S.E.2d at 888.

44. *Id.* at 282-83, 630 S.E.2d at 888.

45. *Id.* at 283, 630 S.E.2d at 888.

46. *Id.* at 280, 630 S.E.2d at 887.

47. *Id.* at 284-85, 630 S.E.2d at 890.

48. *Id.* at 282, 630 S.E.2d at 888.

were not sufficiently similar.[49] The remaining two incidents offered to prove defect or causation involved a different type of collision, and therefore the trial court acted within its discretion when it held that those incidents did not share a common causation with the plaintiffs' collision.[50] Finally, the court of appeals held that the seven lawsuits were not admissible to prove notice because they involved the older design.[51]

Although the court of appeals decision in *Snider v. Basilo*[52] does not specifically mention extrinsic act evidence, it illustrates one limit on the use of evidence of extrinsic acts in a civil case. In *Snider*, a medical negligence action, the plaintiff contended that the trial court improperly excluded evidence that a nurse employed by one of the defendants had failed the Georgia State Board of Nursing licensing examination three times.[53] Relying on *Williams v. Memorial Medical Center*,[54] the court of appeals disagreed.[55] In *Williams* the court held that because evidence that a physician had failed to pass certification and license examinations did not make it probable that he was negligent in the transaction at issue, the failure to pass these tests was not admissible.[56] Similarly, in *Snider* the court reasoned that the issue was whether the nurse had met the applicable standard of care, and the fact that she had not passed a licensing examination was simply not relevant to that issue.[57]

V. PRIVILEGES

Civil litigants rejoice when an opponent refuses to answer deposition questions or provide other information during discovery on the grounds that the responses may incriminate him. While a party is free to invoke state or federal privileges against incrimination in a civil action, the civil jury can infer that the answer to the question would, in fact, incriminate the witness. Thus, to take an extreme example, in a tort action against an allegedly drunk driver, the plaintiff can ask the defendant whether

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49. *Id.* at 285, 630 S.E.2d at 890.
50. *Id.* at 285-86, 630 S.E.2d at 890.
51. *Id.* at 286, 630 S.E.2d at 891.
52. 276 Ga. App. 315, 623 S.E.2d 521 (2005), *cert. granted.*
53. *Id.* at 315, 317, 623 S.E.2d at 523-24.
54. 218 Ga. App. 107, 460 S.E.2d 558 (1995).
55. *Snider*, 276 Ga. App. at 318, 623 S.E.2d at 525.
56. *Williams*, 218 Ga. App. at 108, 460 S.E.2d at 560-61.
57. *Snider*, 276 Ga. App. at 318-19, 623 S.E.2d at 525. On a related issue concerning extrinsic evidence offered for impeachment rather than for substantive purposes, the court in *Snider* held that the trial court properly prohibited plaintiffs from cross-examining the defendant's expert about the fact that he had been a defendant in a malpractice case. *Id.*

he drank two cases of beer shortly before getting behind the wheel of his car. When the defendant invokes his privilege not to provide information that could be used against him in a criminal action, his invocation of that privilege in the civil case can be used against him and the jury can infer that because he refused to answer the question, he did, in fact, consume two cases of beer.

To avoid this result, civil defendants sometimes attempt to avoid being deposed at all. But, as held during the survey period by the court of appeals in *Dempsey v. Kaminski Jewelry, Inc.*,[58] the defendant must sit for the deposition and invoke his privilege in response to the specific questions that he claims will elicit incriminating information.[59] In *Dempsey* a jeweler sued a former employee who had been criminally charged with stealing jewelry from the jeweler. After filing suit, the jeweler served the defendant with a notice for her deposition. Although the opinion does not say so, the jeweler's attorney no doubt wanted to pose very specific questions to the defendant, force her to invoke her privilege against incrimination in response to those questions, and then use her invocation of the privilege as evidence that she, in fact, stole from her employer. To avoid this, the defendant moved for a protective order, which the trial court denied, but it granted a certificate of immediate review to the court of appeals.[60] On interlocutory appeal, the court of appeals acknowledged that a civil litigant can invoke her privilege against incrimination, but she cannot do so on a "blanket" basis.[61] Rather, in a civil case, the defendant can only invoke his privilege in response to specific questions.[62] This allows a trial court to determine whether the privilege has been properly invoked.[63] Thus, the court of appeals held that the defendant would have to appear for her deposition and answer specific questions about her alleged theft.[64]

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58. 278 Ga. App. 814, 630 S.E.2d 77 (2006).

59. *Id.* at 815-16, 630 S.E.2d at 80 (citing Tennesco, Inc. v. Berger, 144 Ga. App. 45, 48, 240 S.E.2d 586, 588 (1977)).

60. *Id*. at 814-15, 630 S.E.2d at 79.

61. *Id.* at 815-16, 630 S.E.2d at 80.

62. *Id*. at 816, 630 S.E.2d at 80 (citing *Tennesco*, 144 Ga. App. at 48, 240 S.E.2d at 588).

63. *Id.*

64. *Id.*

VI. WITNESSES

A. *Cross-Examination*

Georgia law guarantees litigants the right to a "thorough and sifting cross-examination."[65] Nonetheless, a sharply-divided seven-judge panel of the court of appeals struggled with defining the breadth of that right in *Craft v. State*.[66] In *Craft* the defendant, who allegedly stood in the doorway of his home and masturbated in the presence of two fifteen-year-old school girls, contended that the trial court, by its questioning of a witness, improperly bolstered the credibility of the victims and then, to compound the error, improperly restricted the defendant's cross-examination of that witness.[67]

In the midst of direct examination, the court interjected and asked the witness, the assistant principal at the girls' school, "'Do you know what kind of students these two girls are?'"[68] The witness responded that the girls were polite and well-mannered. The witness also said that one of the girls was a cheerleader, and this prompted the court to ask whether cheerleaders were required to maintain a certain grade point average; the principal replied that they were. On cross-examination, the defendant's attorney attempted to ask the principal about less attractive aspects of the girls' school experiences. When the court restricted this cross-examination, the defendant informed the court that he had documentation that the girls had been disciplined at school on several occasions.[69] The court maintained its ruling that it was not going to allow the defendant "'to make these victims look bad.'"[70]

The court of appeals first held that the court's questioning was improper because it bolstered the credibility of the victims.[71] However, the defendant did not object to this line of questioning at trial, and the court concluded that the trial court's questioning, by itself, did not constitute plain error.[72] Nevertheless, having bolstered the credibility of the victims, the trial court opened the door to a thorough and sifting

65. O.C.G.A. § 24-9-64 (1995).
66. 274 Ga. App. 410, 618 S.E.2d 104 (2005).
67. *Id.* at 410-11, 618 S.E.2d at 105-06.
68. *Id.* at 411, 618 S.E.2d at 106.
69. *Id.* at 412, 618 S.E.2d at 107.
70. *Id.*
71. *Id.*, 618 S.E.2d at 106.
72. *Id.*, 618 S.E.2d at 106-07.

cross-examination of the principal by the defendant, and the abridgment of this right was reversible error.[73]

Only two judges fully concurred in the majority's analysis.[74] Two others concurred in the result but wrote separately to note that they could not "fully endorse the analysis employed" by the majority opinion.[75] However, it is difficult to discern any appreciable difference between the concurring judges' analysis and the majority's analysis. The concurring judges concluded that the court's questioning was improper, but the questioning did not, by itself, constitute plain error.[76] In addition, like the majority opinion, the concurring judges concluded that the court's restriction of the defendant's cross-examination of the principal violated the defendant's right to a thorough and sifting cross-examination.[77] Three judges dissented and argued that the trial judge's questions were not improper and that the trial court permitted sufficient cross-examination of the principal to satisfy the defendant's right to a thorough and sifting cross-examination.[78]

B. Impeachment by Evidence of Character

As discussed above, extrinsic act evidence is generally inadmissible when offered for substantive purposes, although exceptions, such as the similar transaction rule, tend to swallow the general rule. Extrinsic act evidence is also generally inadmissible to impeach or bolster witnesses. As discussed in last year's survey,[79] in 2005 the Georgia General Assembly generally adopted Federal Rule of Evidence 608,[80] which governs the use of character and other extrinsic evidence to impeach a witness.[81] New O.C.G.A. section 24-9-84 provides that evidence of a witness's bad character is admissible only if the evidence refers to the witness's character for truthfulness or untruthfulness.[82] Evidence of the witness's truthful character is "admissible only after the character of the witness for truthfulness has been attacked by reputation evidence

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73. *Id.* at 411-13, 618 S.E.2d at 106-07.
74. *Id.* at 415, 618 S.E.2d at 108.
75. *Id.* (Ruffin, C.J., & Blackburn, J., concurring specially).
76. *Id*.
77. *Id.* at 415-16, 618 S.E.2d at 108-09.
78. *Id.* at 419, 618 S.E.2d at 111 (Andrews, P.J., Johnson, P.J., & Mikell, J., dissenting).
79. Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 187, 200 (2005).
80. O.C.G.A. § 24-9-84 (Supp. 2006).
81. *See generally* Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 187, 200 (2005); O.C.G.A. § 24-9-84.
82. O.C.G.A. § 24-9-84(1).

or otherwise."[83] In attacking general character for truthfulness, the "particular transactions or the opinions of single individuals shall not be inquired of on either side, except upon cross-examination in seeking for the extent and foundation of the witness's knowledge."[84]

It must be remembered, however, that O.C.G.A. section 24-9-84 addresses only impeaching or bolstering a witness's general character for truthfulness or untruthfulness. It does not address the use of extrinsic acts to impeach a witness's specific testimony.[85] However, the line between impeachment of general character and impeachment of specific testimony can be hard to define, and it is unclear what impact new O.C.G.A. section 24-9-84 may have in criminal cases. For example, prior to the adoption of O.C.G.A. section 24-9-84, criminal defendants who opened the door to general bad character evidence could be impeached with evidence of specific instances of misconduct.[86] Before the supreme court decision in *Jones v. State*,[87] an adroit prosecutor could easily place a defendant in a position that opened the door to cross-examination about prior misconduct. Prior to *Jones*, courts routinely held that a defendant placed his character in issue and thus was subject to impeachment with evidence of misconduct if he testified to less than all of his prior criminal conduct. However, in *Jones* the court held that a defendant only places his character in issue when he has made an express election to do so.[88]

During the current survey period, a divided supreme court addressed the limits of *Jones*. In *Harris v. State*,[89] the defendant was asked on direct examination if she had ever been convicted of a felony and she replied that she had not. The trial court then allowed the prosecutor, over objection, to cross-examine the defendant about prior misdemeanor convictions.[90] On appeal, the defendant contended that the trial court should not have allowed the prosecutor to cross-examine the defendant about her misdemeanor convictions because she never testified that she had no misdemeanor convictions.[91] The supreme court acknowledged that *Jones* allows prosecutors to cross-examine defendants about prior convictions when a defendant makes her good character an issue at

83. *Id.* § 24-9-84(2).
84. *Id.* § 24-9-84(4).
85. *See id.* § 24-9-84.
86. Bland v. State, 198 Ga. App. 671, 672, 402 S.E.2d 782, 783 (1991).
87. 257 Ga. 753, 363 S.E.2d 529 (1988).
88. *Id.* at 758, 363 S.E.2d at 533-34.
89. 279 Ga. 522, 615 S.E.2d 532 (2005).
90. *Id.* at 525, 615 S.E.2d at 536.
91. *Id.*

trial.[92] Defendants place their character in issue when they offer evidence about their general good reputation in the community or by adducing evidence of specific acts of good conduct.[93] The prosecution can also use prior convictions to impeach a defendant's specific testimony.[94] What this meant in *Harris*, the court reasoned, was that when the defendant testified she had not been convicted of a felony, the prosecution could have impeached her with evidence tending to establish that she had been convicted of felonies.[95] However, evidence that the defendant had been convicted of misdemeanors did not disprove her testimony that she had not been convicted of felonies, and thus cross-examining her about misdemeanor convictions was improper.[96] Furthermore, the defendant, by testifying that she had not committed a felony, did not imply that she had not engaged in criminal conduct.[97] Had she done so, she would have opened the door to evidence of prior criminal activity.[98] Nonetheless, because it was not highly probable that the error contributed to the judgment, the court concluded that this error was harmless.[99]

In special concurrences, Justices Thompson and Hines maintained that "the majority opinion unfairly hamstrings the State in cross-examining a defendant who implies that he or she has no criminal record."[100] Justice Thompson argued that the defendant's denial that she had been convicted of a felony "implied that she had no prior criminal record" and thus opened the door for cross-examination about the criminal activity.[101] Justice Hines, in a separate concurrence, agreed.[102] According to Justice Hines, the defendant's testimony suggested a "criminal record [that] is less serious than it actually is, [and thus] the State has the right to challenge the accuracy of that testimony."[103]

It would seem that the majority thought that the prosecution was attempting to impeach the defendant's specific testimony. Because the evidence proffered by the prosecution did not impeach that testimony, it

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92. *Id.* at 526, 615 S.E.2d at 536.
93. *Id*.
94. *Id.*, 615 S.E.2d at 537.
95. *Id.*
96. *Id*.
97. *Id*.
98. *Id.* at 526-27, 615 S.E.2d at 536-37.
99. *Id.* at 527, 615 S.E.2d at 538 (citing Clark v. State, 248 Ga. App. 88, 90, 545 S.E.2d 637, 640 (2001)).
100. *Id.* at 529, 615 S.E.2d at 539 (Thompson, J., concurring specially).
101. *Id.* at 530, 615 S.E.2d at 539.
102. *Id.* (Hines, J., concurring specially).
103. *Id.*

was improper.[104] The concurring judges, on the other hand, seem to have concluded that the defendant offered testimony about her general character and that this testimony opened the door for questions about other criminal conduct, even though that conduct did not concern felonies. Which approach is correct, it would seem, depends on which assumption is valid. If the prosecution was attempting to impeach the defendant's specific testimony, then the majority was correct because, as the majority held, questioning the defendant about her misdemeanor convictions did not impeach her testimony that she had no felony convictions. If, on the other hand, the concurring judges correctly assumed that the defendant had placed her character in issue and was contending that she had a good character because she had no felony convictions, then the prosecution properly cross-examined her about instances of misconduct, regardless of whether they were felonies or misdemeanors. Again, the dividing line between evidence offered to impeach character and evidence offered to impeach specific testimony sometimes can be difficult to discern.

C. Competency of Jurors as Witnesses

In Georgia the affidavits of jurors are admissible "to sustain but not to impeach their verdict."[105] The Federal Rules of Evidence take what many would consider a more logical approach: Jurors are not competent to testify except with regard to external or extraneous information or outside influence on their deliberations.[106] The court of appeals decision in *Gaines v. State*[107] illustrates, at least in criminal cases, the advantages of the approach of the Federal Rules.

In *Gaines* the defendant learned after his conviction that a juror who claimed not to know the defendant during voir dire communicated to her fellow jurors extremely prejudicial information about the defendant. The defendant moved for a new trial and in support of this motion adduced testimony by two jurors to the effect that the information provided by the juror in question led them to vote for the defendant's conviction.[108] On appeal from the denial of the defendant's motion for new trial, the court of appeals acknowledged the Georgia rule that testimony of jurors is not admissible to impeach their verdict.[109] However, the court noted that if prejudicial extraneous information is communicated to jurors, a

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104. *Harris*, 279 Ga. at 527, 615 S.E.2d at 537.
105. O.C.G.A. § 17-9-41 (2004); O.C.G.A. § 9-10-9 (1982).
106. FED. R. EVID. 606(b).
107. 274 Ga. App. 575, 618 S.E.2d 197 (2005).
108. *Id.* at 575-76, 618 S.E.2d at 197-98.
109. *Id.* at 576-77, 618 S.E.2d at 198.

criminal defendant may be deprived of his Sixth Amendment right of confrontation.[110] For example, in *Watkins v. State*,[111] the Georgia Supreme Court held that a defendant's right of confrontation was violated when two jurors visited the scene of an alleged crime and presented their findings to their fellow jurors.[112] These jurors became, in effect, unsworn witnesses against the defendant.[113] In such a situation, the rule that jurors are not competent to impeach their verdict must yield to the preservation of a defendant's constitutional right to confront his witnesses.[114] Thus in *Gaines*, juror testimony was admissible to demonstrate that extrajudicial information was injected into the jury's deliberations.[115] Because it was undisputed that this information had influenced jurors, the court of appeals reversed the defendant's conviction.[116]

VII. EXPERT WITNESSES

As discussed in some detail in last year's survey,[117] in 2005 the Georgia General Assembly, as a part of "tort reform" legislation, adopted, more or less, the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[118] now codified at O.C.G.A. section 24-9-67.1.[119] However, the General Assembly, in its wisdom, exempted criminal cases from new O.C.G.A. section 24-9-67.1.[120] Apparently, junk science is acceptable in criminal cases. In its 2006 session, the General Assembly exempted another class of cases from O.C.G.A. section 24-9-67.1.[121] The grandly titled Landowner's Bill of Rights and Private Property Protection Act,[122] which revised Georgia's eminent domain law in response to the United States Supreme Court decision in *Kelo v. City of New London*,[123] included new O.C.G.A. section 22-1-14,[124] which addresses the use of lay or expert testimony to establish the value

110. *See id.* at 577, 618 S.E.2d at 198-99.
111. 237 Ga. 678, 229 S.E.2d 465 (1976).
112. *Id.* at 684, 229 S.E.2d at 470.
113. *Id.*
114. *Id.* at 685, 229 S.E.2d at 470.
115. 274 Ga. App. at 578, 618 S.E.2d at 199.
116. *Id.*, 618 S.E.2d at 199-200.
117. *See* Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 187, 204-05 (2005).
118. 509 U.S. 579 (1993).
119. O.C.G.A. § 24-9-67.1 (Supp. 2006).
120. Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 187, 205 (2005).
121. Ga. H.B. 1313, Reg. Sess. (2005).
122. *Id.*
123. 545 U.S. 469 (2005).
124. O.C.G.A. § 22-1-14 (Supp. 2006).

of condemned properties.[125] O.C.G.A. section 22-1-14(b) provides that O.C.G.A. section 24-9-67.1 does not apply to expert testimony in condemnation cases.[126] Thus, it seems that condemnation cases, like criminal cases, do not warrant the protection *Daubert* supposedly provides from unreliable testimony.

Ironically, while the General Assembly was exempting some testimony on the issue of value from Georgia's new *Daubert* statute,[127] the courts, in other value cases, applied O.C.G.A. section 24-9-67.1 with vigor. In *Moran v. Kia Motors, Inc.*,[128] the plaintiff sought to recover damages allegedly resulting from the breach of an automobile warranty. The trial court excluded the testimony of an expert witness retained by the plaintiff to establish the value of the vehicle in its defective condition.[129] Although not clear from the opinion, it appeared that the case would have been tried prior to the enactment of O.C.G.A. section 24-9-67.1, but the court of appeals nonetheless relied on O.C.G.A. section 24-9-67.1 to affirm the trial court.[130] Contrary to the lengthy *Daubert* analysis typically found in federal cases, the court of appeals *Daubert* discussion consisted of two paragraphs, the bulk of which was devoted to quoting the statute. The plaintiff's expert had based his opinion on repair records and a formula he devised that was based on values listed in the *Kelley Blue Book*. He had relied on this method for approximately one year and had used it in five to ten prior proceedings in which he had testified.[131] The court noted that although this methodology had been relied upon in the automotive field by others, there was no evidence about the method's rate of error and there was no evidence that it had been reviewed by other qualified experts.[132] Based on this, the court of appeals concluded that the trial court did not abuse its discretion when it excluded the expert's testimony.[133]

Georgia law has long taken a rather practical—and liberal—approach to lay opinion testimony on the issue of value. For example, when a homeowner attempts to establish the value of items of personal property destroyed in a fire, it is sufficient if he testifies to the purchase price or replacement cost of the property and the approximate date he acquired

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125. Ga. H.B. 1313.
126. O.C.G.A. § 22-1-14.
127. O.C.G.A. § 24-9-67.1.
128. 276 Ga. App. 96, 622 S.E.2d 439 (2006).
129. *Id.* at 96, 622 S.E.2d at 440.
130. *Id.* at 97, 99, 622 S.E.2d at 440, 442.
131. *Id.* at 97-98, 622 S.E.2d at 441.
132. *Id.* at 98, 622 S.E.2d at 441.
133. *Id.*

the property.[134] However, that may be changing. In *Hill v. Mercedes-Benz USA, LLC*,[135] another automobile breach of warranty case, the court of appeals affirmed a trial court's conclusion that an owner's affidavit was insufficient lay opinion evidence of value.[136] In her affidavit, the owner testified that she was familiar with vehicles generally, with purchasing vehicles, and with the cost of vehicles. She further testified that she had researched the market to compare prices when purchasing the automobile in question and her previous automobiles. She then testified in her affidavit with regard to the alleged defects in the vehicle and concluded that had she known about those defects, she would not have paid more than $10,000 for the vehicle.[137] Interestingly, in an opinion later withdrawn, the court of appeals first held that this affidavit was sufficient to create a jury issue with regard to the diminished value of the automobile.[138] However, in a substitute opinion, the court noted that the owner did not have any specialized knowledge with regard to car repair or how cars were manufactured.[139] Nor was her opinion based on objective information found in published valuation guides.[140] Accordingly, the court held that her lay opinion was not sufficient for the jury to determine the car's value.[141]

In *Tenet Healthcare Corp. v. Gilbert*,[142] the court of appeals addressed the question of whether an expert has to be licensed in order to render expert testimony.[143] The defendant contended that the affidavit attached to the plaintiff's professional negligence action in accordance with O.C.G.A. section 9-11-9.1[144] was insufficient because the doctor giving the affidavit was not licensed at the time he gave it and thus was incompetent to give expert testimony.[145] Applying pre-O.C.G.A. section

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134. Braner v. S. Trust Ins. Co., 255 Ga. 117, 121, 335 S.E.2d 547, 552 (1985); *see also* Hoard v. Whiley, 113 Ga. App. 328, 332, 147 S.E.2d 782, 785 (1966) (applying a somewhat stricter rule in other situations but still holding that lay opinion is admissible to establish value if the witness establishes that he has some knowledge, experience, or familiarity with the value of the property or similar property and that he has had an opportunity to form an opinion as to the value of the property).

135. 274 Ga. App. 826, 619 S.E.2d 353 (2005).

136. *Id.* at 826-27, 619 S.E.2d at 353.

137. *Id.* at 828-29, 619 S.E.2d at 354-55.

138. Hill v. Mercedes-Benz USA, LLC, No. A05A0114, 2005 Ga. App. LEXIS 853, at *9-10 (June 22, 2005) *vacated*, 274 Ga. App. 826, 619 S.E.2d 353.

139. *Hill*, 274 Ga. App. at 829, 619 S.E.2d at 355.

140. *Id.*

141. *Id.* at 830, 619 S.E.2d at 356.

142. 277 Ga. App. 895, 627 S.E.2d 821 (2006).

143. *See id.* at 896-98, 627 S.E.2d at 824-25.

144. O.C.G.A. § 9-11-9.1 (2006).

145. *Tenet Healthcare Corp.*, 277 Ga. App. at 898, 627 S.E.2d at 825.

24-9-67.1 law, the court of appeals rejected this argument, noting that Georgia law does not require that an expert be licensed in order to testify.[146] However, the defendant also argued that O.C.G.A. section 24-9-67.1 should be applied and that it required that the experts be licensed.[147] The court rejected this argument as well.[148] O.C.G.A. section 24-9-67.1 only requires that the expert be licensed at the time of the alleged negligence,[149] and the expert in this case was licensed at the time the allegedly negligent act occurred.[150]

Previous survey articles have chronicled the apparent confusion over whether an expert witness can base his opinion on hearsay.[151] Older cases addressing the issue hold that an expert cannot, to any extent, base his opinion on hearsay, but a line of more recent cases have held to the contrary, the earliest of which was *King v. Browning*.[152] Since then, the Georgia courts appear to be moving in the direction of allowing experts to base their opinions, to some extent, on hearsay. During the current survey period, the court of appeals held in *Nichols v. State*[153] that a doctor may express opinions with regard to a patient's injuries based on hearsay information contained in the patient's medical records.[154]

In this age of *Daubert*, courts spend a lot of time and energy determining whether expert testimony on issues of causation is sufficiently reliable to be admissible. In the context of medical issues, this discussion often centers on whether a medical opinion has been expressed within a reasonable degree of medical probability or certainty. With that in mind, the supreme court's decision in *Bailey v. Edmundson*[155] may come as a surprise to many. In *Bailey*, a will contest case, the trial court admitted a medical narrative from the decedent's oncologist pursuant to O.C.G.A. section 24-3-18.[156] The narrative stated that drugs taken by the decedent "'can cause' altered mental status and agitation."[157] The appellant argued that an opinion that

146. *Id.* at 900, 627 S.E.2d at 826-27.
147. *Id.*, 627 S.E.2d at 827.
148. *Id.*
149. O.C.G.A. § 24-9-67.1.
150. *Tenet Healthcare Corp.*, 277 Ga. App. at 900, 627 S.E.2d at 827.
151. Marc T. Treadwell, *Evidence*, 54 MERCER L. REV. 309, 327-28 (2002); Marc T. Treadwell, *Evidence*, 46 MERCER L. REV. 233, 250-51 (1994).
152. 246 Ga. 46, 268 S.E.2d 653 (1980).
153. 278 Ga. App. 46, 628 S.E.2d 131 (2006).
154. *Id.* at 49, 628 S.E.2d at 134.
155. 280 Ga. 528, 630 S.E.2d 396 (2006).
156. O.C.G.A. § 24-3-18 (Supp. 2006).
157. *Bailey*, 280 Ga. at 532, 630 S.E.2d at 400.

something "could cause" an effect was not relevant because it only expressed a possibility, rather than a probability, that the drugs caused the decedent to experience side effects.[158] The supreme court disagreed.[159] The court acknowledged that an opinion that merely expressed a possibility is not sufficient, by itself, to sustain a party's burden of proof.[160] The burden requires evidence tending to establish by a preponderance of the evidence—i.e., that it is more likely than not—that the drugs caused the side effects. As the court put it, "[E]xpert medical testimony as to the mere possibility of a causal relationship between a given occurrence and a subsequent mental condition, although not sufficient to sustain a burden of proof, is nevertheless clearly admissible."[161] Thus, the oncologist's opinion was admissible even though it established only a possibility rather than a probability.[162] This testimony, along with other evidence, was relevant to a determination of whether the drugs actually impacted the decedent's mental status.[163]

Numerous survey articles written by the Author since 1988 have attempted to analyze dozens of cases in which courts have struggled with the question of whether expert testimony is admissible to prove or disprove that a child was sexually abused. Because this struggle emanated from two apparently conflicting supreme court decisions, *State v. Butler*[164] and *Allison v. State*,[165] the Author referred to this struggle as the *Butler/Allison* debate.[166] The issue in *Butler/Allison* cases is whether an expert has improperly bolstered the credibility of a victim's claims of molestation by testifying, essentially, that a victim was molested.

In 2002 the court of appeals in *Smith v. State*[167] took the *Butler/Allison* debate in a slightly different direction. In *Smith* the court of appeals held that the trial court properly allowed a licensed clinical

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158. *Id.*
159. *Id.*
160. *Id.* (citing Jacobs v. Pilgrim, 186 Ga. App. 260, 262, 367 S.E.2d 49, 52 (1988)).
161. *Id.*
162. *Id.*, 630 S.E.2d at 401.
163. *Id.*
164. 256 Ga. 448, 349 S.E.2d 684 (1986).
165. 256 Ga. 851, 353 S.E.2d 805 (1987).
166. *See* Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 187, 210-211 (2005); Marc T. Treadwell, *Evidence*, 53 MERCER L. REV. 295, 302-303 (2001); Marc T. Treadwell, *Evidence*, 45 MERCER L. REV. 229, 243-244 (1993); *see generally* Marc T. Treadwell, *Evidence*, 44 MERCER L. REV. 213, 216-20 (1992).
167. 257 Ga. App. 88, 570 S.E.2d 400 (2002).

social worker to testify that she believed the victim's claims of abuse.[168] The court reasoned that because the defendant had attacked the victim's credibility, the door had been opened for the social worker to testify that in her opinion, the child was truthful.[169] During the current survey period, the court of appeals returned to this issue in *Patterson v. State*.[170] In *Patterson* the trial court, relying on *Smith*, held that an expert could testify that he believed the victim because the defendant had attacked the victim's credibility.[171] Pursuant to *Smith*, the trial court's ruling was correct, but a unanimous court of appeals found it necessary to overrule *Smith*.[172] Georgia law has long held, the court reasoned, that a witness, even an expert witness, cannot express an opinion on another witness's credibility.[173] *Smith* had been the sole exception to this long-standing principle, and the court concluded that its decision in *Smith* was plainly wrong.[174] Clearly then, one witness, even an expert, cannot express an opinion on the credibility of another witness.

However, as demonstrated by the supreme court's decision in *Harris v. State*,[175] the court's holding in *Patterson* did not impact the main principle to be drawn from the *Butler/Allison* debate. Specifically, experts do not improperly bolster the credibility of a witness or invade the province of a jury when experts testify that their findings are "consistent" with the victim's allegations.[176]

VIII. HEARSAY

A. *Definition of Hearsay*

Georgia has always been a bit schizophrenic with regard to its definition of hearsay. Is a hearsay statement one that is made out of court and offered to prove the truth of the matter asserted therein, as stated in many cases,[177] or is it evidence "which does not derive its value solely from the credit of the witness but rests mainly on the veracity and competency of other persons," as stated in O.C.G.A. section

168. *Id.* at 92, 570 S.E.2d at 405.
169. *Id.*
170. 278 Ga. App. 168, 628 S.E.2d 618 (2006).
171. *Id.* at 169, 628 S.E.2d at 619.
172. *Id.* at 173, 628 S.E.2d at 621.
173. *See id.* at 170, 628 S.E.2d at 619-20.
174. *See id.* at 170-73, 628 S.E.2d at 620-21.
175. 279 Ga. App. 570, 631 S.E.2d 772 (2006).
176. *Id.* at 571, 631 S.E.2d at 775.
177. *See* Marc T. Treadwell, *Evidence*, 44 MERCER L. REV. 213, 235-36 (1992).

24-3-1?[178] The court of appeals decision in *Smith v. State*[179] may add another layer of confusion to the determination of whether testimony is or is not hearsay.

In *Smith* the defendant contended that the trial court erroneously allowed a detective to give hearsay testimony. The defendant's defense was based on alibi—he claimed he was with his girlfriend.[180] The detective, however, had testified at trial that his investigation "revealed" that the defendant was not with his girlfriend at the time of the robbery.[181] The defendant "vociferous[ly]" argued that the detective's testimony was hearsay; the detective clearly was testifying to something he had learned during his investigation.[182] The defendant argued that this testimony must have been based on hearsay because the detective had no personal knowledge of where the defendant was at the time of the crime.[183] The court of appeals, for some reason, was not impressed:

> The officer was asked merely whether, during the course of his investigation, he learned that Smith was not with his girlfriend at the time of the robbery. The officer answered affirmatively. The officer was not asked to repeat the testimony of an out-of-court declarant. As such, no hearsay was elicited, and Smith's contention fails.[184]

Thus, pursuant to *Smith*, if the examiner merely refrains from asking the witness to restate the declarant's out-of-court statement and the witness only testifies to the substance of those statements—that is, what the detective learned during his investigation—there is no hearsay problem.

Smith can be contrasted with the court of appeals decision in *Diaz v. State*,[185] which provides a more meaningful hearsay analysis. In *Diaz* the defendant contended that his conviction was based on inadmissible hearsay, specifically information provided by a confidential informant.[186] However, the court of appeals construed the evidence differently.[187] The court concluded that the witnesses testified not about what the confidential informant said, but rather what the witnesses

178. O.C.G.A. § 24-3-1 (1995).
179. 274 Ga. App. 852, 619 S.E.2d 358 (2005).
180. *Id.* at 854, 619 S.E.2d at 360.
181. *Id.*
182. *Id.*
183. *See id.*
184. *Id.*
185. 275 Ga. App. 557, 621 S.E.2d 543 (2005).
186. *Id.* at 557, 621 S.E.2d at 544.
187. *Id*.

themselves observed and did.[188] Hearsay, the court wrote, is "when a witness at trial offers evidence of what someone else said or wrote, outside of court, and the proponent's use of the evidence essentially asks the jury to assume that the out-of-court declarant was not lying or mistaken when the statement was made."[189] In *Diaz* the witness's testimony did not ask the jury to assume the truth of out-of-court statements; rather, it simply illustrated what was said and observed.[190] This, the court held, was not hearsay.[191] In *Smith*, on the other hand, although the detective did not specifically quote someone who did not testify at trial, his testimony was clearly based on what someone told him and the prosecution wanted the jury to believe that information.[192]

B. Hearsay and the Right of Confrontation

It has been almost three years since the United States Supreme Court in *Crawford v. Washington*[193] dramatically altered the playing field with regard to the use of hearsay in criminal cases. In *Crawford* the defendant contended that the trial court improperly allowed the jury to hear his wife's tape-recorded statement to police officers. The prosecution tendered this evidence after the defendant's wife invoked her spousal privilege, and thus was unable to testify.[194] The trial court and the Washington Supreme Court held that the circumstances of the statement were sufficiently reliable to overcome the defendant's argument that the admission of the out-of-court statement violated his Sixth Amendment[195] right of confrontation.[196] The prosecutors argued that since the Supreme Court's decision in *Ohio v. Roberts*,[197] courts have increasingly allowed the admission of hearsay statements if the statements fell within a "'firmly rooted hearsay exception'" or if they bore "'particularized guarantees of trustworthiness.'"[198] It was the latter language—"particularized guarantees of trustworthiness"—that courts across the country interpreted as a green light to admit hearsay testimony. In Georgia, this bypass around the Sixth Amendment came

188. *Id.* at 559, 621 S.E.2d at 545.
189. *Id.* (quoting Shelton v. State, 260 Ga. App. 855, 857, 581 S.E.2d 378, 380 (2003)).
190. *Id.*
191. *Id.* at 557-58, 621 S.E.2d at 544.
192. *See Smith*, 274 Ga. App. at 854, 619 S.E.2d at 360.
193. 541 U.S. 36 (2004).
194. *Id.* at 40.
195. U.S. CONST. amend. VI.
196. *Crawford*, 541 U.S. at 40-41.
197. 448 U.S. 56 (1980).
198. *Crawford*, 541 U.S. at 40 (quoting *Roberts*, 448 U.S. at 66).

to be known as the necessity exception to the hearsay rule.[199] As discussed in many prior surveys, the rapid expansion of the necessity exception, to exaggerate only a bit, seemed on the verge of supplanting live testimony entirely.[200]

Finally, it seemed, the United States Supreme Court, conservative though it may have been at the time, had had enough and granted certiorari in *Crawford*.[201] The Court concluded that the Sixth Amendment's right of confrontation was not limited to in-court testimony, but also applied to out-of-court "testimonial" statements.[202] Testimonial statements included affidavits, custodial examinations, prior testimony, and "'similar pretrial statements that declarants would reasonably expect to be used prosecutorially.'"[203] Thus, a testimonial out-of-court statement is no longer admissible if the defendant has not had an opportunity to cross-examine the declarant.[204] Since *Crawford*, cases have primarily focused on whether an out-of-court statement is testimonial, which continued to be the case during the survey period.

In *Pitts v. State*,[205] the Georgia Supreme Court granted certiorari to the court of appeals to address the question of whether a recording of a 911 emergency call was testimonial.[206] The court of appeals, in a decision discussed in last year's survey,[207] held with little discussion that 911 calls were not testimonial and were, in any event, admissible as part of the res gestae.[208] The supreme court took a more thorough look at the issue.

First, the supreme court noted that post-*Crawford* cases across the country had reached conflicting results when considering whether 911 calls were testimonial.[209] Some, the court noted, have held that such calls are always testimonial "because it involves a statement to a government officer that an objective person understands could always be used in a future prosecution."[210] Other courts, on the other hand, have held that 911 calls are not testimonial in nature because they are not

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199. *See* Marc T. Treadwell, *Evidence*, 48 MERCER L. REV. 323, 351-54 (1996).
200. *See* Marc T. Treadwell, *Evidence*, 56 MERCER L. REV. 235, 247-48 (2004).
201. *Crawford*, 541 U.S. at 42.
202. *Id.* at 50-51, 68.
203. *Id.* at 51.
204. *Id.* at 59.
205. 280 Ga. 288, 627 S.E.2d 17 (2006).
206. *Id.* at 288, 627 S.E.2d at 18.
207. *See* Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 187, 215-16 (2005).
208. Pitts v. State, 272 Ga. App. 182, 187, 612 S.E.2d 1, 5 (2005), *aff'd*, 280 Ga. 288, 627 S.E.2d 17 (2006).
209. *Pitts*, 280 Ga. at 289, 627 S.E.2d at 19.
210. *Id.*

initiated by law enforcement officers and the caller's statements are not "'in response to structured police interrogation.'"[211] The Georgia Supreme Court declined to follow either of these extreme positions; instead, the court held that the determination of whether a 911 call is testimonial must be made on a case-by-case basis.[212] If the primary purpose of the telephone call is to establish evidentiary facts that an objective person would recognize could be used in a future prosecution, then the call is testimonial.[213] However, if the call is made to report a crime in progress or to seek assistance because of imminent danger, then the caller's statements are not testimonial.[214] The court's analysis seemed similar to the test for the excited utterance exception to the hearsay rule, and indeed the court of appeals, in dicta, had noted that the 911 recording could be admissible as an excited utterance.[215]

In *Pitts* the 911 telephone call was made by a wife who was estranged from her husband. She reported that her husband had broken into her home and that she needed assistance. Although the wife stated during the course of the call that her husband was violating his parole by being in the house, the context of the call made clear that the wife was calling to report criminal activity and to request assistance.[216] Under these circumstances, the court held that the wife's statements to the 911 operator were not testimonial.[217]

Although *Crawford* addressed Washington State's version of a necessity exception to the hearsay rule and *Crawford*'s primary impact in Georgia has been in necessity exception cases, *Crawford* is not limited to testimony admitted pursuant to the necessity exception. Evidence admitted under other hearsay exceptions, even well-established exceptions, can run afoul of *Crawford* if the out-of-court statement is testimonial in nature.

In *Rackoff v. State*,[218] the defendant contended that an inspection certificate attesting to the accuracy of an alcohol breath testing instrument was testimonial in nature, and therefore the admission of the certificate violated his right of confrontation.[219] Under O.C.G.A. section 40-6-392(f),[220] breath-testing instruments must be inspected

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211. *Id.* (quoting People v. Corella, 122 Cal. App. 4th 461, 468-69 (2004)).
212. *Id.*
213. *Id.*
214. *Id.*, 627 S.E.2d at 19-20.
215. *Pitts*, 272 Ga. App. at 187, 612 S.E.2d at 5.
216. *Pitts*, 280 Ga. at 290-91, 627 S.E.2d at 20.
217. *Id.* at 291, 627 S.E.2d at 21.
218. 275 Ga. App. 737, 621 S.E.2d 841 (2005), *cert. granted*.
219. *Id.* at 740-41, 621 S.E.2d at 845.
220. O.C.G.A. § 40-6-392(f) (2004).

and the inspector must prepare a sworn certificate attesting that the instrument is in good working order.[221] The defendant acknowledged that the supreme court in *Brown v. State*[222] held that such certificates were admissible pursuant to the business records exception to the rule against hearsay.[223] The defendant contended, however, that *Crawford* nullified *Brown* because the certificate was testimonial in nature.[224] The court of appeals disagreed.[225] Relying on *Brown*, the court noted that the certificate is simply a record made in the regular course of business, and it is not prepared in anticipation of prosecution against any particular defendant.[226] Therefore, the inspection certificate was not testimonial.[227]

A co-conspirator's statement, though admissible under the co-conspirator exception of the hearsay rule, can run afoul of *Crawford* if the co-conspirator's statement is testimonial. This was the contention made by the defendant in *Bowden v. State*.[228] There, the court of appeals easily rejected this argument, noting that the statements were made during the course of the criminal conspiracy, and although made to an informant, were not made to the police.[229]

Although most cases applying *Crawford* concern the issue of whether the statement is testimonial, Georgia courts have also addressed the second element of *Crawford*: whether the declarant was available for cross-examination. If so, then *Crawford* is not implicated. In *Howell v. State*,[230] the defendant contended that a child's out-of-court statements admitted pursuant to the Child Hearsay Statute[231] violated *Crawford* because the child's statements were testimonial.[232] The statements were clearly testimonial in nature, but the court noted that testimony is admissible pursuant to the Child Hearsay Statute only if (1) the child is available to testify and (2) the prosecution announced during trial that the victim was available for cross-examination.[233] *Howell* illustrates

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221. *Id.*
222. 268 Ga. 76, 485 S.E.2d 486 (1997). See Marc T. Treadwell, *Evidence*, 51 MERCER L. REV. 279, 309-10 (1999) for a discussion of *Brown*.
223. *Rackoff*, 275 Ga. App. at 740, 621 S.E.2d at 845.
224. *Id.* at 740-41, 621 S.E.2d at 845.
225. *Id.* at 741, 621 S.E.2d at 845.
226. *Id*.
227. *Id.*
228. 279 Ga. App. 173, 178, 630 S.E.2d 792, 797 (2006).
229. *Id.* at 180, 630 S.E.2d at 798.
230. 278 Ga. App. 634, 629 S.E.2d 398 (2006).
231. O.C.G.A. § 24-3-16 (1995).
232. *Howell*, 278 Ga. App. at 637, 629 S.E.2d at 403.
233. *Id.* at 636-38, 629 S.E.2d at 403-04.

the dilemma faced by defendants in child molestation cases. Although the victim may be available for cross-examination, it is doubtful that any defense attorney relishes the thought of cross-examining a six-year-old child abuse victim. If, however, the child is available for cross-examination, *Crawford* does not bar the admission of the child's out-of-court statement, no matter how unattractive the prospect of actually cross-examining the child may be.

In *Hardeman v. State*,[234] the defendant contended that the admission of the transcript of a witness's testimony from a probation revocation hearing violated *Crawford*. Again, the testimony was clearly testimonial in nature, and thus the case turned on whether the witness, who invoked his Fifth Amendment[235] right not to testify at the defendant's trial, was available for cross-examination by the defendant's attorney. As it turned out, the defendant's attorney had appeared at a probation revocation hearing and had ample opportunity to cross-examine the witness. O.C.G.A. section 24-3-10[236] allows for the admission of prior testimony in criminal cases if the prior testimony concerned "substantially the same issue and [concerned] substantially the same parties."[237] The witness's testimony at the probation revocation hearing met this standard.[238] In the future, defense attorneys likely should consider whether they should appear at collateral hearings on behalf of clients where they may have an opportunity to cross-examine witnesses who will be unavailable at a subsequent trial.

It must be remembered that *Crawford* did not hold that hearsay exceptions, such as the necessity exception, were invalid; rather, it held that testimonial hearsay could not be admitted if the defendant had not had an opportunity to cross-examine the declarant.[239] Thus, Georgia's necessity exception is still available, albeit on a much more limited basis. Georgia's necessity exception requires the presence of three elements: (1) "the declarant must be unavailable to testify;" (2) "there must be particularized guarantees of the statement's trustworthiness;" and (3) "the statement must be both relevant to a material fact and more probative regarding that fact than any other evidence."[240] The supreme court's decision in *Belmar v. State*[241] illustrates the nature of

234. 277 Ga. App. 180, 626 S.E.2d 138 (2006).
235. U.S. CONST. amend. V.
236. O.C.G.A. § 24-3-10 (1995).
237. *Id.*
238. *See Hardeman*, 277 Ga. App. at 182-83, 626 S.E.2d at 141-42.
239. *Crawford*, 541 U.S. at 59.
240. Marc T. Treadwell, *Evidence*, 55 MERCER L. REV. 249, 265 (2003).
241. 279 Ga. 795, 621 S.E.2d 441 (2005).

the proof necessary to establish that the statement is sufficiently trustworthy. In *Belmar* the trial court admitted the testimony of the victim's mother concerning statements made to her by the victim. However, the State adduced no evidence about the victim's truthfulness or the nature of the mother's relationship with her son.[242] Accordingly, the court held that "[t]he existence of a familial relationship alone is not sufficient to establish the required particularized guarantees of trustworthiness."[243]

C. Prior Statements by Witnesses

Georgia has two rather unique rules regarding the admissibility of prior statements by witnesses. First, in *Gibbons v. State*,[244] the supreme court held that prior inconsistent statements of a witness are admissible as substantive evidence if the witness is subject to cross-examination.[245] Second, pursuant to *Cuzzort v. State*,[246] a prior consistent statement is admissible as substantive evidence if the witness is present at trial and is subject to cross-examination.[247] However, the supreme court somewhat weakened *Cuzzort* in *Woodard v. State*,[248] when it held that prior consistent statements can be admitted only when the veracity of the witness who made the statement has been placed at issue.[249]

The significance of the fact that prior statements can be admitted as substantive evidence is illustrated by the court of appeals decision in *Hambrick v. State*.[250] In *Hambrick* a jury found the defendant guilty of raping, kidnapping, and assaulting his girlfriend. Although the girlfriend told medical personnel and counselors that the defendant had beaten and raped her, she recanted her statements before trial. At trial, she testified that she initiated the altercation with her boyfriend. The prosecution then introduced evidence of the girlfriend's prior statements implicating the defendant through the testimony of physicians and a counselor.[251] The court held that the victim's prior inconsistent

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242. *Id.* at 797, 621 S.E.2d at 443-44.
243. *Id.*, 621 S.E.2d at 444.
244. 248 Ga. 858, 286 S.E.2d 717 (1982).
245. *Id.* at 862, 286 S.E.2d at 721.
246. 254 Ga. 745, 334 S.E.2d 661 (1985).
247. *Id.* at 745, 334 S.E.2d at 662.
248. 269 Ga. 317, 496 S.E.2d 896 (1998).
249. *Id.* at 319-20, 496 S.E.2d at 899.
250. 278 Ga. App. 768, 629 S.E.2d 442 (2006).
251. *Id.* at 768-69, 629 S.E.2d at 444-45.

statements were sufficient evidence to support the defendant's conviction.[252]

The Author has often noted that appellate courts seem to apply a more liberal scope of admissible evidence in criminal cases than in civil cases.[253] This seems to be true in cases where prior statements are admitted pursuant to *Gibbons* and *Cuzzort*—virtually all are criminal cases.[254] However, nothing in *Gibbons*, *Cuzzort*, or their progeny restricts their application to criminal cases, and during the survey period a litigant in a civil case successfully relied on *Woodard* to preserve a significant judgment. In *Ford Motor Co. v. Sasser*,[255] the mother of a child severely injured as a result of an allegedly defective backseat latch brought a products liability action against Ford, the manufacturer of the car. The latch failed during an automobile accident, and when the seat back collapsed forward, it caused severe spinal injuries to the plaintiff's daughter. At trial, Ford contended that the child was not even sitting in the front seat and relied on statements allegedly made by the plaintiff to a law enforcement officer at the scene to prove this point. In response, the plaintiff introduced evidence of prior statements made by the mother that were consistent with her trial testimony that her daughter was sitting in the front seat.[256] On appeal, Ford contended that *Woodard* did not authorize the admission of these prior consistent statements because it had not challenged the veracity of the plaintiff.[257] The court of appeals agreed that a prior consistent statement is admissible only if a witness's veracity has been placed at issue and that this occurs "'only if affirmative charges of recent fabrication, improper influence, or improper motive are raised during cross-examination.'"[258] Unfortunately for Ford, however, the record clearly demonstrated that Ford's counsel had repeatedly accused the plaintiff of, for example, switching her story.[259] Accordingly, the court of appeals held that the trial court properly admitted evidence of the plaintiff's prior consistent statements.[260]

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252. *Id.* at 769, 629 S.E.2d at 445.

253. *See* Marc T. Treadwell, *Evidence*, 55 MERCER L. REV. 249, 270 (2003); Marc T. Treadwell, *Evidence*, 54 MERCER L. REV. 309, 313-14 (2002).

254. *See* Marc T. Treadwell, *Evidence*, 52 MERCER L. REV. 263, 296 n.300 (2000).

255. 274 Ga. App. 459, 618 S.E.2d 47 (2005).

256. *Id.* at 467-68, 618 S.E.2d at 55-56.

257. *Id.*, 618 S.E.2d at 55.

258. *Id.* at 468, 618 S.E.2d at 55 (quoting *Woodard*, 269 Ga. at 320, 496 S.E.2d at 899).

259. *Id.* at 469, 618 S.E.2d at 56.

260. *Id.*

D. Business Records

The business records exception to the hearsay rule allows the admission of certain business records even though those records contain hearsay statements.[261] However, the business records exception does not open the door to all business records. In *Bailey v. Edmundson*,[262] the appellant contended that the trial court improperly excluded business records summarizing statements allegedly made by appellee.[263] The appellant further contended that the summaries of appellee's telephone messages were admissible either as admissions of a party opponent or as the business records of the doctor's office whose employees summarized the conversations.[264] The supreme court disagreed.[265] With regard to the business records exception, the court noted that the exception is intended to apply to routine facts whose accuracy has likely not been affected by bias, judgment, or memory.[266] The court further held that the business records exception does not encompass an employee's version of statements allegedly made in a telephone conversation by another party.[267] Thus, the employee's versions of the appellee's telephone messages were hearsay and were not admissible pursuant to the business records exception of the hearsay rule.[268]

E. Admissions by a Party Opponent

Since 1989 the Author has chronicled the struggle in the Georgia appellate courts over the admissibility of statements by an employee of an opposite party.[269] The 1989 survey discussed the court of appeals decision in *Johnston v. Grand Union Co.*,[270] which held that "an admission against interest by an employee-agent is admissible . . . but only so long as it is not hearsay."[271] The meaning of that statement was unclear in 1989, and it is unclear now. An admission is either hearsay but admissible pursuant to an exception to the rule against

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261. O.C.G.A. § 24-3-14 (1995).
262. 280 Ga. 528, 630 S.E.2d 396 (2006).
263. *Id*. at 533, 630 S.E.2d at 401.
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*
269. Marc T. Treadwell, *Evidence*, 41 MERCER L. REV. 175, 199 (1989).
270. 189 Ga. App. 270, 375 S.E.2d 249 (1988).
271. *Id.* at 271, 375 S.E.2d at 250.

hearsay, or as provided by the Federal Rules of Evidence,[272] it is not hearsay, and thus the rule against hearsay is inapplicable. What is clear is that Georgia courts hold an abiding mistrust of admissions by employees of an opposite party, and this mistrust was again evident during the current survey period.

In *Wynn v. City of Warner Robins*,[273] the plaintiff contended that the trial court improperly excluded a report prepared by defendant's employee. The trial court ruled that the report, although prepared by an employee, was inadmissible hearsay.[274] On appeal, the plaintiff contended that the report should have been admissible as an admission by an agent of an opposite party,[275] relying specifically on O.C.G.A. section 24-3-33,[276] which provides that "[a]dmissions by an agent . . . during the existence and in pursuance of his agency, shall be admissible against the principal."[277] The plaintiff also relied on O.C.G.A. section 10-6-64,[278] which provides that an agent is competent to testify against his principal.[279] O.C.G.A. section 10-6-64, however, goes on to provide that the "declarations of the agent as to the business transacted by him shall not be admissible against his principal unless they were a part of . . . the res gestae, or else the agent is dead."[280]

This latter section, the court held, limits the admissibility of admissions by an employee to those made as part of the res gestae.[281] Moreover, it cannot be admissible as an admission against interest if the employee is not a party to the litigation.[282] Turning to the facts of *Wynn*, the court concluded that the report was not a part of the res gestae.[283] The court further resolved that even if it was part of the res gestae, the report would be inadmissible as an admission against interest because the employee was not a party to the litigation.[284]

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272. FED. R. EVID. 801.
273. 279 Ga. App. 42, 630 S.E.2d 574 (2006).
274. *Id.* at 49-50, 630 S.E.2d at 580-81.
275. *Id.* at 50-51, 630 S.E.2d at 581.
276. O.C.G.A. § 24-3-3 (1995).
277. *Id*.
278. O.C.G.A. § 10-6-64 (2000).
279. *Id*.
280. *Id.*
281. *Wynn*, 279 Ga. App. at 51, 630 S.E.2d at 581.
282. *Id.*
283. *Id.*
284. *Id.*