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Evidence

by Marc T. Treadwell*

I. INTRODUCTION

The most significant news during the current survey period, as in the past several survey periods, continued to be the judiciary's struggles with "tort reform" legislation enacted by the Georgia General Assembly in 2005, most notably Official Code of Georgia Annotated (O.C.G.A.) § 24-9-67.1,¹ which purports to adopt, more or less, the United States Supreme Court's decision in *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*² If the *Daubert* decisions discussed in this survey are any indication, Georgia's appellate courts are far from reaching a consensus on the proper application and interpretation of Georgia's *Daubert* statute.

As discussed in many prior surveys,³ Georgia continues to creep, both through legislative enactments and initiatives of the State Bar of Georgia, toward the adoption of some form of the Federal Rules of Evidence. The 2008 version of the proposed Georgia Rules of Evidence can be found at the State Bar's website.⁴ Although the proposed Georgia Rules of Evidence did not receive serious attention in the 2008 session of the General Assembly, a study committee was formed to thoroughly review the proposed rules. The committee, which consists of

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1. O.C.G.A. § 24-9-67.1 (Supp. 2007).

2. 509 U.S. 579 (1993).

3. See, e.g., Marc T. Treadwell, *Evidence*, 59 MERCER L. REV. 157 (2007); Marc T. Treadwell, *Evidence*, 58 MERCER L. REV. 151, 151 (2006); Marc T. Treadwell, *Evidence*, 41 MERCER L. REV. 175, 175 (1989). See also Marc T. Treadwell, *An Analysis of Georgia's Proposed Rules of Evidence*, 26 GA. ST. B.J. 173, 173-84 (1990).

4. EVIDENCE STUDY COMMITTEE, REPORT OF THE EVIDENCE STUDY COMMITTEE OF THE STATE BAR OF GEORGIA: PROPOSED NEW RULES OF EVIDENCE (2005), available at http://www.gabar.org/public/pdf/news/proposed_new_evidence_rules.pdf.

members of the House and Senate Judiciary Committees, has appointed advisory members to assist in its examination of the proposed rules. The Committee Chair, Representative Wendell Willard, has announced that the committee will not recommend any major substantive changes in the rules as proposed by the State Bar of Georgia. Such changes, according to Representative Willard, should be the subject of separate legislation. By the time this survey is published, the proposed rules, with any changes recommended by the study committee, likely will have been introduced in the 2009 session of the General Assembly.

II. PRESUMPTIONS

The destruction of evidence by a party may give rise to a presumption that the evidence would have been harmful to that party,⁵ a presumption generally referred to as the spoliation presumption.⁶ During the survey period, Georgia's appellate courts addressed spoliation issues in two cases, both of which involved video evidence.

In *Baxley v. Hakiel Industries, Inc.*,⁷ the Georgia Supreme Court granted certiorari to consider whether the Georgia Court of Appeals properly affirmed the grant of summary judgment to a bar in a dram shop case.⁸ In *Baxley* the plaintiff was seriously injured when she was struck by a drunk driver, who had been drinking at the defendants' bars shortly before the collision. The court of appeals concluded that although there was an issue of fact regarding whether the motorist was visibly intoxicated, there was no evidence that the defendants knew or should have known that the driver would soon be driving a vehicle; this knowledge is a prerequisite to liability under the Dram Shop Act.⁹ However, at one of the bars, three video cameras recorded events while the driver was in the bar. The manager of the bar learned of the accident the day after it occurred and launched an investigation that consisted of interviewing employees who had worked on the night that the driver was in the bar. However, the manager claimed that he did not think it necessary to preserve the video recordings. The plaintiff argued that the trial court should have applied the spoliation presumption and given the plaintiff the benefit of an inference that the destroyed tapes would have been prejudicial to the bar and thus should have

5. *Lane v. Montgomery Elevator Co.*, 225 Ga. App. 523, 525, 484 S.E.2d 249, 251 (1997).

6. *See generally* Marc T. Treadwell, *Evidence*, 49 MERCER L. REV. 149, 151-52 (1997).

7. 282 Ga. 312, 647 S.E.2d 29 (2007).

8. *See id.* at 314, 647 S.E.2d at 29-30.

9. O.C.G.A. § 51-1-40 (2000).

denied the bar's summary judgment motion.¹⁰ The supreme court agreed and reversed the court of appeals decision.¹¹

The supreme court noted that the bar manager was aware of the incident and of the fact that the motorist was in the bar and had interacted with bar employees.¹² Yet, the manager failed to preserve the recordings that may have revealed whether bar employees had reason to know that the drunken patron would be driving an automobile.¹³ "Thus, because [the bar's] manager was aware of the potential for litigation and failed to preserve whatever videotaped evidence may have been captured as to whether [the drunk driver] would soon be driving, a rebuttable presumption arose against [the bar]."¹⁴

The court of appeals decision in *Wal-Mart Stores, Inc. v. Lee*¹⁵ provides an excellent illustration of the remedies available to the trial court when a party fails to preserve evidence. In *Lee* the plaintiff claimed that Wal-Mart negligently failed to provide security at its store and that, as a result, the plaintiff was the victim of a criminal assault. The assault was captured on Wal-Mart's unmonitored surveillance cameras, and Wal-Mart provided the recordings from those cameras to the prosecutor who used the recordings to obtain convictions of the perpetrators. At the conclusion of the criminal proceedings, prosecutors returned the recordings to Wal-Mart. Wal-Mart then re-used the recordings, destroying the evidence of the assault on the plaintiff. The plaintiff contended that Wal-Mart's re-use of the tapes constituted spoliation and therefore warranted the imposition of severe sanctions. The trial court agreed and made detailed factual findings in support of its conclusion.¹⁶

First, the trial court reasoned that although litigation had not been commenced at the time the tapes were re-used, Wal-Mart had previously received a letter from the plaintiff's former counsel seeking to settle the claims against Wal-Mart.¹⁷ The trial court noted that it is not neces-

10. *Baxley*, 282 Ga. at 312-13, 647 S.E.2d at 29-30.

11. *Id.* at 314, 647 S.E.2d at 30.

12. *Id.* at 313, 647 S.E.2d at 30.

13. *Id.* at 313-14, 647 S.E.2d at 30.

14. *Id.* at 314, 647 S.E.2d at 30.

15. 290 Ga. App. 541, 659 S.E.2d 905 (2008).

16. *Id.* at 542-43, 659 S.E.2d at 907-08.

17. *Id.* at 544, 659 S.E.2d at 908. Apparently, the plaintiff's former counsel did not send an actual "spoliation letter," which should always be done whenever an opposing party has possession of critical evidence. Such a letter puts a party on notice of the potential claim and requests that the party preserve evidence. Fortunately for the plaintiff, the trial court found that the plaintiff's attempt to settle the claim was sufficient to inform Wal-Mart that the plaintiff was contemplating litigation. *Id.*, 659 S.E.2d at 908-09.

sary for litigation to actually be pending at the time of the destruction of the evidence; the threat of litigation is sufficient to put a party on notice that physical evidence should be preserved. Second, Wal-Mart's contention that the tapes were re-used in the normal course of business ran counter to Wal-Mart's record retention policy, which required that evidence involving potential claims be preserved for seven years. The destruction of the evidence clearly prejudiced the plaintiff because it depicted not only the assault but events leading up to the assault, including an attempted assault approximately twenty minutes before the assault on the plaintiff.¹⁸ Although the trial court specifically declined to conclude that Wal-Mart had acted in bad faith, it noted that the destruction of the videotape was "disturbing."¹⁹

With regard to sanctions, the trial court was creative. First, the court ruled that the recollections of the plaintiff and her mother about the events depicted on the videotape would be accepted as stipulated facts. Wal-Mart could not contradict those facts. However, it could, through expert testimony, interpret the significance of those facts. Second, the plaintiff would enjoy the benefit of the spoliation presumption. Therefore, the jury would be charged that the spoliation of the tape recordings created a rebuttable presumption that the evidence would have been harmful to Wal-Mart.²⁰

The court of appeals affirmed, rejecting Wal-Mart's main contention that because the trial court made no express finding of bad faith, sanctions were inappropriate.²¹ The court of appeals noted that Wal-Mart could cite "no authority requiring such a finding before the imposition of those sanctions involved here."²² While a trial court must consider many factors, including the degree of culpability by the party destroying the evidence, there is no requirement that the court find the party acted in bad faith.²³

18. *Id.* at 545, 659 S.E.2d at 909.

19. *Id.* Regarding the question of whether bad faith is a necessary prerequisite of the imposition of sanctions for spoliation, see Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 1083, 1091 (2006); Marc T. Treadwell, *Evidence*, 49 MERCER L. REV. 1027, 1031-32 (1998).

20. *Lee*, 290 Ga. App. at 545, 659 S.E.2d at 909.

21. *See id.* at 546, 659 S.E.2d at 909.

22. *Id.*

23. *See id.*

III. RELEVANCY

A. *Extrinsic Act Evidence*

Since the Author began surveying evidence decisions for Mercer Law Review's *Annual Survey of Georgia Law* in 1988, the most frequently encountered relevancy issue, by far, has been whether extrinsic act evidence is admissible. "Extrinsic act evidence," a term used more frequently by federal courts, generally refers to evidence of conduct on occasions other than the occasion at issue. It is offered as substantive evidence, as opposed to impeachment evidence.²⁴ Georgia courts tend to use the phrase "similar transaction evidence" when referring to extrinsic act evidence, although as discussed in last year's survey,²⁵ it is not necessary that extrinsic act evidence be similar to be admissible.²⁶ Rather, the question is whether there is a "sufficient connection or similarity between the independent offense or act and the crime charged so that proof of the former tends to prove the latter."²⁷

Technically, extrinsic act evidence is irrelevant and thus inadmissible except pursuant to recognized exceptions.²⁸ In criminal cases, however, the admission of extrinsic act evidence has become routine, and the affirmation of trial court rulings admitting extrinsic act evidence is the norm. Thus, trial court admittance of extrinsic act evidence is generally only noteworthy when Georgia appellate courts reverse trial courts' decisions, as the court of appeals did in *Usher v. State*.²⁹

In *Usher* the defendant contended that the trial court erroneously admitted evidence of his prior burglaries during his trial for aggravated assault against a person sixty-five years of age or older.³⁰ The prosecution contended that the defendant broke into the home of the elderly victim, assaulted her, attempted to rape her, and stole the victim's money. The prosecution tendered evidence of the prior burglaries to prove identity. In both of the prior burglaries, the defendant broke into unoccupied houses and stole jewelry.³¹ While it is appropriate to use extrinsic act evidence to prove identity, courts apply a more stringent

24. See O.C.G.A. § 24-2-2 (1995); FED. R. EVID. 404.

25. See Marc T. Treadwell, *Evidence*, 58 MERCER L. REV. 151, 155-56 (2006).

26. *Id.*

27. *Young v. State*, 281 Ga. 750, 752, 642 S.E.2d 806, 808 (2007) (emphasis added) (quoting *Williams v. State*, 261 Ga. 640, 642, 409 S.E.2d 649, 651 (1991)).

28. See O.C.G.A. § 24-2-2; FED. R. EVID. 404.

29. 290 Ga. App. 710, 659 S.E.2d 920 (2008).

30. See O.C.G.A. § 16-5-21(d) (2007).

31. *Usher*, 290 Ga. App. at 710-11, 659 S.E.2d at 922-23.

standard for admittance than when extrinsic act evidence is offered to prove motive or intent.³² Specifically, “the prior bad act and the charged offense must be ‘so nearly identical in method so as to earmark both the prior act and [the charged] offense as the handiwork of the accused.’”³³

The Georgia Court of Appeals held that the defendant’s prior burglaries did not meet this stringent standard.³⁴ While the prior burglaries involved entering homes and taking personal property belonging to women over the age of fifty, the similarities ended there.³⁵ The crimes were not “so unusual and nearly identical in method as to earmark the crimes as the handiwork of a particular person.”³⁶ Thus, the trial court clearly erred when it admitted evidence of the burglaries.³⁷ Because the admissible evidence establishing the defendant as the perpetrator was minimal and admission of the burglaries was harmful, the court reversed the defendant’s conviction.³⁸

The court of appeals decision in *Bell v. State*³⁹ is noteworthy for a most unusual reason—the contrite admission by the prosecution that the trial court erred and that the conviction should be reversed. Before admitting extrinsic act evidence, Uniform Superior Court Rule 31.3⁴⁰ requires the prosecution to provide the defendant with notice that it intends to use evidence of similar transactions.⁴¹ In *Bell* the prosecution provided this notice the day before trial. At the start of trial, the defendant moved in limine to exclude the evidence, contending that the prosecution had not complied with Rule 31.3. However, the trial court refused to convene a hearing to determine the admissibility of the similar transaction evidence. To add insult to injury, while the jury was deliberating, the prosecution provided a second notice of its intent to introduce evidence of similar transactions and presented the trial court with an order, which the judge signed, shortening the time to provide such notice. Notwithstanding such trial tactics, the prosecution was a model of professionalism on appeal. Appellate counsel for the State

32. *Id.* at 712, 659 S.E.2d at 923 (quoting *Jones v. State*, 236 Ga. App. 330, 333, 511 S.E.2d 883, 886 (1999)).

33. *Id.* (alteration in original) (quoting *Cole v. State*, 216 Ga. App. 68, 70, 453 S.E.2d 495, 497 (1994)).

34. *See id.* at 713, 659 S.E.2d at 924.

35. *See id.* at 712-13, 659 S.E.2d at 924.

36. *Id.* at 713, 659 S.E.2d at 924.

37. *Id.*

38. *Id.*

39. 291 Ga. App. 294, 661 S.E.2d 649 (2008).

40. GA. UNIF. SUPER. CT. R. 31.3.

41. *Id.*

candidly acknowledged that the prosecution had not given proper and timely notice.⁴² The court of appeals noted “with admiration and appreciation the State’s succinct brief and honorable request that ‘the relief sought by Appellant should be granted.’ This honest and forthright approach represents the best standards of the bar and deserves to be highly commended.”⁴³ True enough, but one wonders about the absence of such commendable conduct at the trial level.

As the admission of extrinsic act evidence becomes more routine, it seems that prosecutors sometimes grow lax, lazy might be a better word, with regard to laying the necessary foundation for the admission of extrinsic act evidence. For example, as discussed in a recent survey,⁴⁴ the prosecution must offer sufficient evidence establishing the similarity or connection between the extrinsic offense and the charged offense; simply tendering a certified copy of the conviction of the extrinsic offense is not sufficient.⁴⁵ In child molestation cases, however, courts are particularly liberal in the admission of similar transaction evidence and have allowed prosecutors to prove the requisite similarity through a certified copy of the prior molestation conviction, on the theory, apparently, that any act of child molestation is sufficiently similar to be admissible in the trial for a subsequent act of child molestation.⁴⁶

In *Washington v. State*,⁴⁷ however, the defendant, who had raped and sodomized his victim, was not charged with child molestation because his victim was sixteen years old. Although the evidence against the defendant, which included DNA evidence, was overwhelming, the prosecution felt it necessary to tender the defendant’s 1991 conviction for child molestation. Other than the certified copy of the conviction, the prosecution offered no evidence establishing the similarity between the charged offense and the extrinsic offense.⁴⁸ On appeal, the court of appeals acknowledged supreme court authority holding that a certified copy of a conviction is not sufficient to establish the requisite similarity between a charged and an extrinsic offense,⁴⁹ and the court further noted that the sole exception to this rule had been child molestation cases.⁵⁰ However, because both offenses involved forcible sexual acts

42. *Bell*, 291 Ga. App. at 295-96, 661 S.E.2d at 650.

43. *Id.* at 296, 661 S.E.2d at 650.

44. Marc T. Treadwell, *Evidence*, 58 MERCER L. REV. 151, 155 (2006).

45. *Id.*

46. *See, e.g.*, *Lee v. State*, 241 Ga. App. 182, 525 S.E.2d 426 (1999).

47. 286 Ga. App. 268, 648 S.E.2d 761 (2007).

48. *Id.* at 268, 648 S.E.2d at 762-63.

49. *Id.* at 270, 648 S.E.2d at 763 (quoting *Williams v. State*, 261 Ga. 640, 642, 409 S.E.2d 649, 652 (1991)).

50. *Id.*

on teenage girls, the court was “unwilling to apply a different standard of proof for similar transaction evidence in a sexual assault case merely because the victim was 16 and not 15.”⁵¹ Accordingly, the court of appeals affirmed the defendant’s conviction.⁵²

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, in which freedom and potentially life itself are at stake, courts would be more circumspect in the admission of highly 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 involve intentional conduct and, therefore, raise issues such as motive, scheme, or identity. Thus, for example, proof that a defendant intentionally committed a similar offense may tend to identify him as the perpetrator of the charged offense, or a similar offense could be probative of motive to commit the charged offense. Civil cases, on the other hand, typically involve 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.⁵³ The question, whether in a civil or criminal case, is whether the extrinsic act evidence is relevant to a legitimate issue in the case.⁵⁴ While the issues in play in criminal cases make it more likely that extrinsic act evidence may be relevant, sometimes civil cases involve such issues as well. For example, as illustrated in the court of appeals decision in *Wal-Mart Stores, Inc. v. Lee*,⁵⁵ evidence of prior crimes on a store’s premises, if sufficiently similar, is admissible to prove that the store was on notice that customers were at risk of being assaulted.⁵⁶ Thus, in *Lee* the court of appeals held that the trial court properly admitted evidence of similar crimes to establish that Wal-Mart should have taken precautions that likely would have prevented the assault on the plaintiff on Wal-Mart’s premises.⁵⁷

51. *Id.*, 648 S.E.2d at 763-64.

52. *Id.* at 270-71, 648 S.E.2d at 764.

53. *See id.*

54. *Id.*

55. 290 Ga. App. 541, 659 S.E.2d 905 (2008).

56. *Id.* at 548-49, 659 S.E.2d at 911.

57. *Id.*

B. Admission of Fault

As a part of its 2005 tort reform legislation, the Georgia General Assembly enacted a special rule for admissions of mistake or error by medical providers. Section 24-3-37.1 of the O.C.G.A.⁵⁸ states that “any and all statements, affirmations, gestures, activities, or conduct expressing benevolence, regret, apology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of benevolence . . . shall be inadmissible as evidence and shall not constitute an admission of liability or an admission against interest.”⁵⁹ The new statute goes far beyond the traditional rule that statements or expressions of sympathy or benevolence cannot be used as admissions against interest. Overturning a rule applied “for over 200 years in all American courts,” as the drafters of the proposed new Georgia Rules of Evidence would put it, the General Assembly concluded that clear admissions of mistake and error are no longer admissible.⁶⁰

The statute received its first appellate test in *Airasian v. Shaak*⁶¹ and passed muster with little discussion. In *Airasian* the plaintiff contended that the trial court should have admitted evidence that an obviously shaken defendant told the patient’s wife that complications from the patient’s surgery were his fault.⁶² The court of appeals was not impressed: “Clearly, [the defendant’s] alleged actions and statements fall within the plain meaning of the statute.”⁶³ Accordingly, the court of appeals concluded the trial court properly excluded the doctor’s admission from evidence.⁶⁴ However, the court expressly refused to address any constitutional challenges,⁶⁵ leaving the door open for a constitutional challenge to the statute.⁶⁶

58. O.C.G.A. § 24-3-37.1 (Supp. 2008).

59. *Id.*

60. See EVIDENCE STUDY COMM., STATE BAR OF GA., PROPOSED NEW RULES OF EVIDENCE (2005) [hereinafter EVIDENCE STUDY] available at http://www.gabar.org/news/proposed_new_georgia_rules_of_evidence. The proposed new Georgia Rules of Evidence retains O.C.G.A. § 24-3-37.1, which would be recodified as section 24-4-420, but would delete statements regarding mistake or error from the statute’s coverage. EVIDENCE STUDY at 49-50, 130. The quote is taken from the comment to proposed O.C.G.A. § 24-4-420, which continues, “Moreover, to repeal the party admission rule only in medical malpractice cases and only when offered against the defendant seems not only unjustified but raises constitutional issues of due process and equal protection.” EVIDENCE STUDY at 49-50.

61. 289 Ga. App. 540, 657 S.E.2d 600 (2008).

62. *Id.* at 540, 657 S.E.2d at 601.

63. *Id.* at 541, 657 S.E.2d at 602.

64. *Id.*

65. *Id.* at 542, 657 S.E.2d at 602.

66. See *supra* text accompanying note 59.

C. Miscellaneous Relevancy Issues

Consistent with the broadening scope of admissible discovery in criminal cases over recent years, it is now well established that facts and circumstances surrounding an arrest are admissible even though the facts and circumstances may only be marginally related to the charged offense and are highly prejudicial.⁶⁷ In child molestation cases in particular, as previously noted, the scope of relevant evidence is broad, and appellate courts are loathe to reverse convictions. Nevertheless, prosecutors and trial courts sometimes push the envelope, such as it is, too far. Twice during the survey period, Georgia's appellate courts concluded that trial courts abused their discretion when they admitted irrelevant and prejudicial evidence.

In *Nichols v. State*,⁶⁸ a case that may perhaps bear some relationship to recent developments regarding rights of gun owners, the defendant contended that the trial court abused its discretion when it admitted at his murder trial evidence of firearms found at his home when he was arrested. The evidence at trial established that the defendant and his victim got into an argument, which progressed to the point of a near physical altercation when the victim threw punches at the defendant. The defendant then drew a handgun and fired nine shots at the victim, striking him four times, once in the back. The victim ran, and the defendant, who apparently was obese and sometimes used a cane or a wheelchair, nevertheless managed to chase the victim as he ran away. The victim collapsed some distance away and died. The defendant and his companion then drove home, packed, and fled to Florida. They were arrested at the defendant's home immediately after returning from Florida nine days later.⁶⁹

A search of the defendant's house at the time of his arrest led to the discovery of an assault rifle, a twelve-gauge shotgun, and ammunition. The trial court agreed with the prosecution that the firearms were admissible as part of the circumstances of the search and the *res gestae* of the arrest. The prosecution also argued that the possession of a firearm demonstrated the defendant's violent propensities.⁷⁰ Although the supreme court agreed that the circumstances connected with a defendant's arrest are generally admissible even though such evidence may impugn a defendant's character, the court nevertheless held that the trial court abused its discretion when it admitted evidence of the

67. Marc T. Treadwell, *Evidence*, 59 MERCER L. REV. 157, 162-63 (2007).

68. 282 Ga. 401, 651 S.E.2d 15 (2007).

69. *Id.* at 402, 651 S.E.2d at 17.

70. *Id.* at 403, 651 S.E.2d at 17.

firearms found at the defendant's home.⁷¹ It was undisputed that the firearms were not involved with the shooting in any way.⁷² Moreover, although the firearms were found incident to the arrest, the arrest occurred nine days after the event, and thus the temporal connection between the shooting and the firearms was tenuous.⁷³ Simply put, the court concluded, the possession by the defendant at his house of a rifle, shotgun, and ammunition was not probative of any issue connected to the shooting.⁷⁴ Further, the error was harmful because there was evidence that the victim was the aggressor.⁷⁵ While the evidence would authorize a verdict of malice murder and aggravated assault, the evidence did not demand convictions; therefore, the court was unwilling to conclude that there was no reasonable probability that the jury's verdict would have been different had the firearms not been introduced into evidence.⁷⁶

In *Herring v. State*,⁷⁷ a child molestation case, the court of appeals concluded that the prosecution and trial court had exceeded even the broad scope of relevant evidence in child molestation cases and reversed the defendant's conviction.⁷⁸ In *Herring* the defendant was charged with aggravated child molestation and aggravated sexual battery arising from his alleged sexual contact with his five-year-old niece while the defendant was babysitting his niece and his seven-year-old nephew. The evidence, although sufficient to sustain the defendant's conviction, was not overwhelming, and the prosecution sought to buttress its case by suggesting that the defendant was sexually immature, sexually frustrated, viewed pornography, and masturbated while viewing pornography. The trial court denied the defendant's motion in limine to exclude this evidence, but it also recommended that the defendant renew the motion at an appropriate time. Before opening statement, the prosecutor informed the court that he intended to explore the "sexual frustration theory," and the trial court, over the defendant's objection, allowed the prosecution to proceed. After opening statement, the trial court had second thoughts and ruled that evidence of the defendant's virginity and masturbation was not admissible. The prosecution moved for a mistrial because those issues had been discussed in opening, but

71. *Id.*, 651 S.E.2d at 17-18.

72. *Id.* at 404, 651 S.E.2d at 18.

73. *Id.* at 403, 651 S.E.2d at 18.

74. *Id.* at 404, 651 S.E.2d at 18.

75. *Id.* at 405, 651 S.E.2d at 19.

76. *Id.*

77. 288 Ga. App. 169, 653 S.E.2d 494 (2007).

78. *Id.* at 169-70, 653 S.E.2d at 496.

presumably for tactical reasons, the defendant did not join in that motion. Instead of granting a mistrial, the court gave a curative instruction. Inexplicitly, however, while cross-examining the defendant, the prosecution established that the defendant looked at pornography on the internet and sometimes masturbated. On appeal from his conviction, the defendant argued that evidence showing he viewed pornography and masturbated was irrelevant and highly prejudicial.⁷⁹ The court of appeals agreed.⁸⁰ Although evidence of lustful disposition in child molestation cases can be admissible, the evidence must be sufficiently related to the charged offense.⁸¹ There was no evidence that the defendant viewed child pornography or that he ever viewed pornography in the presence of children.⁸² Thus, the trial court correctly ruled that the evidence was inadmissible.⁸³ However, the prosecution, when it cross-examined the defendant, ignored this ruling, and the trial court erred when it allowed the State to proceed with its examination, even in the absence of an objection at trial by the defendant.⁸⁴

In *Johnson v. Riverdale Anesthesia Associates, P.C.*,⁸⁵ a case discussed in a prior survey,⁸⁶ a sharply divided supreme court held that in a medical negligence case, an expert could not be cross-examined about how he personally would have treated the plaintiff, even though, according to the plaintiff's offer of proof, the expert would have testified that he would have treated the decedent in accordance with the standard of care advocated by the plaintiff's expert.⁸⁷ The majority concluded that evidence of the defendant's personal practice was not relevant to establish the standard of care required of the medical profession generally.⁸⁸ Nor was the testimony admissible to impeach the expert because how the expert would have treated the patient was irrelevant to the issue of the standard of care generally.⁸⁹ The majority rejected

79. *Id.* at 170-72, 653 S.E.2d at 496-98.

80. *Id.* at 170, 653 S.E.2d at 496.

81. *See id.* at 173-74, 653 S.E.2d at 498.

82. *Id.*

83. *Id.* at 174, 653 S.E.2d at 498.

84. *Id.* Although prudent practice requires a contemporaneous objection, the fact that the defendant had moved in limine to exclude the evidence was sufficient to preserve his objection for appeal. *Id.* at 173, 653 S.E.2d at 498 (quoting *Lewis v. State*, 279 Ga. 69, 73 n.17, 608 S.E.2d 602, 608 n.17 (2005)). However, see Marc T. Treadwell, *Evidence*, 58 MERCER L. REV. 151, 152-53 (2006); Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 1083, 1089-90 (2006) (discussing the risk in relying on a motion in limine to preserve objections).

85. 275 Ga. 240, 563 S.E.2d 431 (2002).

86. Marc T. Treadwell, *Evidence*, 54 MERCER L. REV. 309, 317-18 (2002).

87. *Johnson*, 275 Ga. at 242, 563 S.E.2d at 433.

88. *Id.*

89. *Id.*

the dissent's argument that the fact that the expert would have treated the patient differently than what he contended was the applicable standard of care was clearly admissible to impeach his standard of care testimony.⁹⁰

During the survey period, the court of appeals, in *Condra v. Atlanta Orthopaedic Group, P.C.*,⁹¹ rejected the argument that O.C.G.A. § 24-9-67.1,⁹² the *Daubert*⁹³ statute, effectively overruled *Johnson*.⁹⁴ Section 24-9-67.1(f) of the O.C.G.A. provides that in order that "the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states," Georgia courts should draw upon *Daubert v. Merrill Dow Pharmaceuticals, Inc.*⁹⁵ and its progeny in the application of O.C.G.A. § 24-9-67.1.⁹⁶ Presumably, although the court of appeals opinion does not say as much, the plaintiffs were relying upon federal authority to the effect that standard of care experts could be cross-examined with regard to their personal practice.⁹⁷ The court of appeals rejected this argument, reasoning that the *Daubert* statute applies only "to the threshold question of whether a proposed expert witness is competent to testify" and does not address whether evidence is relevant as to the applicable standard of care.⁹⁸

IV. WITNESSES

A. *Prior Statements By a Witness*

Georgia has two rather unique rules regarding the admissibility of prior statements by witnesses, rules that implicate both impeachment and hearsay principles. First, in *Gibbons v. State*,⁹⁹ the Georgia Supreme Court held that prior inconsistent statements of a witness are admissible as substantive evidence if the witness is subject to cross-examination.¹⁰⁰ Second, pursuant to *Cuzzort v. State*,¹⁰¹ a prior consistent statement is admissible as substantive evidence if the witness

90. *See id.* at 242-44, 563 S.E.2d at 433-44.

91. 292 Ga. App. 276, 664 S.E.2d 281 (2008).

92. O.C.G.A. § 24-9-67.1 (Supp. 2008).

93. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

94. *Condra*, 292 Ga. App. at 279, 664 S.E.2d at 283.

95. 509 U.S. 579 (1993).

96. O.C.G.A. § 24-9-67.1 (f).

97. *See Condra*, 292 Ga. App. at 278, 664 S.E.2d at 283.

98. *Id.*

99. 248 Ga. 858, 286 S.E.2d 717 (1982).

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

101. 254 Ga. 745, 334 S.E.2d 661 (1985).

is present at trial and is subject to cross-examination.¹⁰² However, the supreme court significantly limited *Cuzzort* in *Woodard v. State*,¹⁰³ which held that prior consistent statements can be admitted only when the veracity of the witness who made the statement has been placed at issue.¹⁰⁴ In *Woodard* the supreme court concluded that *Cuzzort* had been “improperly construed to permit the admission *per se* of a witness’s prior consistent statement—regardless of whether the witness’s veracity actually has been called into question during cross-examination.”¹⁰⁵ Instead, the court continued, prior consistent statements are admissible “only where (1) the veracity of a witness’s trial testimony has been placed in issue at trial; (2) the witness is present at trial; and (3) the witness is available for cross-examination.”¹⁰⁶

Notwithstanding this seemingly clear statement limiting the use of prior consistent statements, the supreme court held in *Manning v. State*¹⁰⁷ that “[a] party may introduce a prior consistent statement of a forgetful witness where the witness testifies at trial and is subject to cross-examination.”¹⁰⁸ Thus, when the prosecution’s witness testified on direct examination that he was unable to remember details about a car he had seen near the crime scene, the trial court properly allowed the prosecution to elicit testimony from a law enforcement officer about the witness’s statement made to the officer the day of the crime.¹⁰⁹ Although the court in *Manning*, in a “see also” citation, referenced *Woodard*, it did not acknowledge *Woodard*’s requirement that the veracity of the witness be placed at issue before a prior consistent statement can be admitted.¹¹⁰

This apparent inconsistency continued during the current survey period. First, in *Forde v. State*,¹¹¹ the Georgia Court of Appeals strongly reaffirmed *Woodard* and held that the defendant’s trial counsel was ineffective when the counsel failed to object to the admission of a victim’s videotaped statement recounting the defendant’s alleged acts of sexual abuse.¹¹² The prosecution argued that the statement was admissible as a prior consistent statement, but the court of appeals,

102. *Id.* at 745, 344 S.E.2d at 662.

103. 269 Ga. 317, 496 S.E.2d 896 (1998).

104. *Id.* at 319-20, 496 S.E.2d at 899.

105. *Id.* at 320 n.14, 496 S.E.2d at 899 n.14.

106. *Id.* (citing *Robertson v. State*, 268 Ga. 772, 778, 493 S.E.2d 697, 704 (1997)).

107. 273 Ga. 744, 545 S.E.2d 914 (2001).

108. *Id.* at 745, 545 S.E.2d at 916.

109. *Id.*

110. *See id.*

111. 289 Ga. App. 805, 658 S.E.2d 410 (2008).

112. *Id.* at 809, 658 S.E.2d at 414.

citing *Woodard*, soundly rejected this argument, noting that the prosecution “misconstrue[d]” the supreme court’s holding in *Woodard*, which made clear that not only are prior consistent statements admissible only when the witness’s veracity has been questioned but also only when the statement was made before any alleged motive to fabricate testimony.¹¹³ In *Forde* the defendant contended that while the victim had fabricated her accounts of sexual abuse and thus placed the victim’s veracity at issue, the motive to fabricate had existed long before the time of the victim’s videotaped statement.¹¹⁴ Thus, even though the victim’s veracity was at issue, her prior consistent statement was still not admissible because it was made after the time that the defendant contended she had developed a motive to fabricate.¹¹⁵

However, in two other cases decided during the survey period, the court of appeals held that prior consistent statements were admissible even though there was no allegation or even suggestion that the witnesses had fabricated their testimony. First, in *Waters v. State*,¹¹⁶ the child victim testified at trial that she could not remember whether the defendant’s alleged act of molestation hurt.¹¹⁷ This was critical because to prove aggravated child molestation, the prosecution had to demonstrate that the molestation caused an injury.¹¹⁸ Testimony that the molestation “hurt” would be sufficient to establish physical injury.¹¹⁹ Thus, the victim’s testimony that she could not remember potentially created a fatal defect to the prosecution’s case. However, the trial court admitted the victim’s videotaped statement in which she stated, “it hurt.”¹²⁰ Citing *Manning*, the court of appeals held that “it is well established that [a] party may introduce a prior consistent statement of a forgetful witness where the witness testifies at trial and is subject to cross-examination.”¹²¹ Then, in *Williams v. State*,¹²² the court of appeals held that the trial court properly admitted a taped

113. *Id.* at 808, 658 S.E.2d at 413.

114. *Id.*, 658 S.E.2d at 413-14.

115. *Id.*

116. 288 Ga. App. 260, 653 S.E.2d 849 (2007).

117. *Id.* at 260, 653 S.E.2d at 850.

118. *Id.*; O.C.G.A. § 16-6-4(c) (2007).

119. *Waters*, 288 Ga. App. at 260-61, 653 S.E.2d at 850 (quoting *Baker v. State*, 228 Ga. App. 32, 33, 491 S.E.2d 78, 80 (1997)).

120. *Id.*

121. *Id.* at 261, 653 S.E.2d at 850 (alteration in original) (quoting *Manning*, 273 Ga. at 745, 545 S.E.2d at 916).

122. 291 Ga. App. 279, 661 S.E.2d 658 (2008).

statement of a witness to an armed robbery who testified at trial that she could not remember all the details of the incident.¹²³

Thus, it would appear that Georgia courts recognize two rules for prior consistent statements. In the case of a forgetful witness, prior consistent statements, simply put, are admissible.¹²⁴ It is unclear how a statement can be consistent with a witness's trial testimony that he does not remember. For witnesses other than those who are forgetful, prior consistent statements are admissible only if they meet the *Woodard* criteria.¹²⁵

B. *Foundation for Admission of Prior Statements*

The admissibility of prior statements by witnesses has been discussed in every *Annual Survey of Georgia Law Evidence* article by the Author. Over the years, the *Evidence* survey has typically addressed these cases in the section of the survey devoted to hearsay, although in recent years, that discussion has been found in the witness section of the survey.¹²⁶ The reason for this is that the Author's survey articles generally attempt to follow the format of the Federal Rules of Evidence, and the Federal Rules make a sharp distinction between impeachment with prior statements and the admissibility of prior statements as substantive evidence. Article Six of the Federal Rules generally addresses impeachment issues, and Rule 613¹²⁷ specifically addresses impeachment of witnesses with prior statements.¹²⁸ Article Eight addresses the admissibility of hearsay evidence for substantive purposes. Thus, in federal court, the answer to the question of whether and how a witness can be impeached with a prior statement is found in Rule 613, while the admissibility of a witness' prior statement to prove the truth of the matter asserted therein is found in Article Eight.

Georgia courts, however, are not always careful in the distinction between the use of prior statements for impeachment and for substantive purposes. This is likely due to Georgia's unique rules regarding the admissibility of prior statements discussed above. Because prior statements, whether consistent or inconsistent, are admissible both as impeachment and as substantive evidence if the witness is subject to cross-examination, Georgia courts rarely bother themselves with the

123. *Id.* at 280, 661 S.E.2d at 659.

124. *E.g.*, *Waters*, 288 Ga. App. 260, 653 S.E.2d 849.

125. *E.g.*, *Forde*, 289 Ga. App. 805, 658 S.E.2d 410.

126. See Marc T. Treadwell, *Evidence*, 59 MERCER L. REV. 157, 169-70 (2007); Marc T. Treadwell, *Evidence*, 58 MERCER L. REV. 151, 177-78 (2006).

127. FED. R. EVID. 613.

128. See *id.*

question of whether the statements are being used to impeach or to prove a substantive point.¹²⁹ During the current survey year, however, two appellate decisions specifically addressed the procedure for impeaching a witness with a prior statement. The Author mentions the above to say that in this Survey and henceforth, discussion of prior statements by witnesses will be returned to the witness section of the article unless they raise only hearsay issues.

The procedure for impeaching a witness with a prior inconsistent statement in Georgia courts differs sharply from the procedure prescribed by Federal Rule of Evidence 613. O.C.G.A. § 24-9-83¹³⁰ requires that before impeaching a witness with his prior inconsistent statement, other than sworn testimony, “the time, place, person, and circumstances attending the former statements shall be called to his mind with as much certainty as possible. [And if they] are in writing . . . they shall be shown to him or read in his hearing.”¹³¹ Rule 613 is directly contrary and does not require that the statement be shown to the witness, although, upon request, the statement must be shown to opposing counsel.¹³² Although, the strict requirements of O.C.G.A. § 24-9-83 may often be ignored in practice, they still have some bite, as illustrated by the supreme court’s decision in *Edmond v. State*.¹³³

In *Edmond* the defendant claimed that the trial court improperly allowed a witness to testify that the defendant’s mother told the witness that the defendant had admitted killing the victim.¹³⁴ The trial court admitted the witness’s testimony about the mother’s prior statement because in her testimony, the mother said the defendant had told her that the victim was “okay” when he last saw her.¹³⁵ However, the mother was never asked about her inconsistent statement to the witness during her testimony. Consequently, the defendant contended that the foundation for the admission of the prior inconsistent statement, as required by O.C.G.A. § 24-9-83, had not been met.¹³⁶ The supreme court agreed.¹³⁷ The court noted that a prior inconsistent statement of a witness who is available for cross-examination may be admitted as substantive evidence or as impeachment evidence if the foundation

129. See *Gibbons*, 248 Ga. 858, 286 S.E.2d 717; *Cuzzort*, 254 Ga. 745, 334 S.E.2d 661.

130. O.C.G.A. § 24-9-83 (1995).

131. *Id.*

132. FED. R. EVID. 613(a).

133. 283 Ga. 507, 661 S.E.2d 520 (2008).

134. *Id.* at 510, 661 S.E.2d at 524.

135. *Id.*

136. *Id.*

137. *Id.*

requirements of O.C.G.A. § 24-9-83 are satisfied.¹³⁸ Here, they were not, and therefore the trial court erred when it admitted the witness's testimony about the mother's prior inconsistent statement.¹³⁹ Interestingly, the court effectively held that the foundation requirements of O.C.G.A. § 24-9-83, which heretofore appeared to have been limited to impeachment evidence, apply to prior inconsistent statements regardless of whether they are offered for substantive purposes or for impeachment purposes.¹⁴⁰

Although, O.C.G.A. § 24-9-83 requires that prior witness statements be shown or read to the witness,¹⁴¹ the supreme court in *Byrum v. State*¹⁴² made clear that this requirement does not apply to videotaped statements.¹⁴³ In *Byrum* a prosecution witness testified that he, rather than the defendant, shot all three victims and that the defendant had nothing to do with any of the crimes for which he was charged. However, in a videotaped statement, the witness said that the defendant had shot one of the victims. The witness admitted making the statement but explained that he had lied because, at the time, he thought the defendant had turned him in. The court then allowed the prosecution to play the videotaped statement for the jury. On appeal, the defendant contended that the videotape should not have been played for the jury because the witness had not reviewed the videotape prior to trial.¹⁴⁴ The supreme court first held that the foundation requirements of O.C.G.A. § 24-9-83 had been met.¹⁴⁵ The purpose of the foundation requirements is to allow the witness an opportunity to explain the allegedly inconsistent statement.¹⁴⁶ The court held that the examination of the witness was sufficient to apprise the witness of the time, place, and circumstances of his prior inconsistent statement.¹⁴⁷ Second, the court rejected the argument that the statement had to be shown to the witness, refusing to extend the requirement that written statements be shown to a witness to include video statements made by the witness.¹⁴⁸

138. *Id.*

139. *Id.*

140. *See id.* at 510-11, 661 S.E.2d at 524.

141. O.C.G.A. § 24-9-83.

142. 282 Ga. 608, 652 S.E.2d 557 (2007).

143. *Id.* at 610-11, 652 S.E.2d at 560.

144. *Id.* at 610, 652 S.E.2d at 560-61.

145. *Id.*, 652 S.E.2d at 560.

146. *Id.* (quoting *Duckworth v. State*, 268 Ga. 566, 567-68, 492 S.E.2d 201, 202 (1997)).

147. *Id.*

148. *Id.* at 610-11, 652 S.E.2d at 560.

C. Impeachment by Evidence of Conviction

Unless carefully read, the court of appeals decision in *Laukaitis v. Basadre*¹⁴⁹ may well add to the confusion surrounding the impeachment of witnesses with evidence of their convictions of crimes. This confusion may have been alleviated, but not eliminated, by the General Assembly's adoption, more or less, of Federal Rule of Evidence 609,¹⁵⁰ codified at O.C.G.A. § 24-9-84.1.¹⁵¹ In *Laukaitis* the plaintiff contended that the trial court improperly allowed her to be impeached with her deposition testimony concerning charges, not convictions, of driving under the influence. Prior to trial, the plaintiff moved in limine to exclude any evidence that she had been convicted of a DUI because the defendant had not listed certified copies of any DUI convictions as exhibits in the pretrial order. In response, the defendant represented that the plaintiff had admitted to numerous DUI convictions, as opposed to mere charges of driving under the influence. Consequently, the trial court ruled that the plaintiff could be impeached with her deposition testimony if at trial she denied using alcohol. Although there was no evidence that the plaintiff was under the influence of alcohol at the time of the collision, the trial court ruled that evidence of alcohol abuse could be admitted if the defense adduced evidence tending to establish that the cognitive impairments the plaintiff claimed she suffered as a result of her injury could have been caused by alcohol abuse.¹⁵²

After the plaintiff testified at trial on cross-examination that she did not drink, the defendant asked whether it was true that she had multiple DUIs. As her attorney objected, the plaintiff answered negatively. The trial court then ruled that the plaintiff had opened the door to impeachment by contradicting her deposition testimony stating she had been charged with driving under the influence on multiple occasions.¹⁵³ The court of appeals reversed.¹⁵⁴ The narrow holding, or at least what appears to be the holding, in *Laukaitis* is relatively straightforward: The trial court should not have allowed the defendant to impeach the plaintiff with her testimony that she had been charged with driving under the influence.¹⁵⁵ The court stated,

149. 287 Ga. App. 144, 650 S.E.2d 724 (2007).

150. FED. R. EVID. 609.

151. O.C.G.A. § 24-9-84.1 (Supp. 2008).

152. *Laukaitis*, 287 Ga. App. at 145-46, 650 S.E.2d at 725-26.

153. *Id.*, 650 S.E.2d at 726.

154. *Id.* at 148, 650 S.E.2d at 728.

155. *Id.* at 147, 650 S.E.2d at 727.

Although common sense would suggest that multiple DUI arrests provide some indication of a drinking or drug problem on the part of the arrestee, our law does not countenance proof of commission of an act by evidence that a person has been arrested for or charged with the act even multiple times.¹⁵⁶

However, in the process of reaching this conclusion, the court recited a “strictly applied” rule to the effect that the only way to impeach a witness with evidence of a conviction is through the use of a certified copy of the conviction.¹⁵⁷ Thus, a witness cannot be impeached by cross-examination about the conviction.¹⁵⁸ However, a certified copy of the conviction is necessary only when the conviction is being used to impeach the witness’s general credibility; if the intent is to demonstrate bias on the part of the witness or to disprove a witness’s specific testimony, the witness can be impeached by asking him on cross-examination about his prior convictions.¹⁵⁹

In *Laukaitis* the defendant never attempted to impeach the plaintiff’s general character by demonstrating that she had been convicted of a felony or of any crime involving dishonesty or false statements.¹⁶⁰ Rather, the defendant was attempting, albeit improperly, to impeach the plaintiff’s specific testimony that she did not have an alcohol problem.¹⁶¹ If the plaintiff had been convicted, as opposed to merely charged, of multiple DUIs, and if her trial testimony that she had no DUI convictions was relevant to an issue in the case, then she would have been subject to impeachment with prior testimony acknowledging her DUI convictions.¹⁶² Incidentally, the caveat that the conviction be relevant also should have presented a problem for the defense in *Laukaitis*. While a guilty plea can be admissible as an admission, a determination by a court or jury that a defendant is guilty of a crime is generally not admissible to prove that the defendant committed the crime.¹⁶³

156. *Id.*

157. *Id.* at 146, 650 S.E.2d at 726 (quoting *Rolland v. State*, 235 Ga. 808, 811, 221 S.E.2d 582, 585 (1976)).

158. *Id.* at 147, 650 S.E.2d at 727.

159. *See Smith v. State*, 276 Ga. 263, 577 S.E.2d 548 (2003); *see also* Marc T. Treadwell, *Evidence*, 55 MERCER L. REV. 249, 255-56 (2003).

160. *See* O.C.G.A. § 24-9-84.1.

161. *Laukaitis*, 287 Ga. App. at 147, 650 S.E.2d at 727.

162. *Id.* at 146, 650 S.E.2d at 726.

163. *See Waszczak v. City of Warner Robins*, 221 Ga. App. 528, 528, 471 S.E.2d 572, 574 (1996); Marc T. Treadwell, *Evidence*, 48 MERCER L. REV. 323, 339-40 (1996).

Federal Rule of Evidence 609(a)(1)¹⁶⁴ provides that a criminal defendant can be impeached with certain crimes “if the court determines that the probative value of admitting th[e] evidence outweighs its prejudicial effect to the accused.”¹⁶⁵ However, when the Georgia General Assembly enacted the Georgia counterpart, O.C.G.A. § 24-9-84.1(a)(2),¹⁶⁶ it provided that a criminal defendant could be impeached with a conviction only if the “probative value of admitting the evidence *substantially* outweighs its prejudicial effect to the defendant.”¹⁶⁷ For witnesses other than criminal defendants, the General Assembly provided in O.C.G.A. § 24-9-84.1(a)(1)¹⁶⁸ that convictions are admissible to impeach “if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the witness,”¹⁶⁹ reinforcing the impression, based upon the clear language of the statute, that the General Assembly required a tougher standard for the admission of convictions to impeach criminal defendants than for other witnesses.

The defendant in *Newsome v. State*¹⁷⁰ took this one step further, arguing that the General Assembly, by including the word “substantially” in subsection (a)(2),¹⁷¹ effectively incorporated the balancing test found in subsection (b). This balancing test addresses convictions more than ten years old and includes an even stricter test for admissibility that requires the court to determine whether “in the interests of justice, . . . the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.”¹⁷² The defendant argued that the General Assembly, by using “substantially” in section (a)(2), intended to incorporate the strict standard of section (b) for stale convictions.¹⁷³ The court of appeals disagreed, concluding that the most stringent balancing test for convictions more than ten years old is limited to such stale convictions.¹⁷⁴ For convictions less than ten years old, a criminal defendant only enjoys the benefit of the

164. FED. R. EVID. 609(a)(1).

165. *Id.*

166. O.C.G.A. § 24-9-84.1(a)(2) (Supp. 2008).

167. *Id.* (emphasis added).

168. O.C.G.A. § 24-9-84.1(a)(1) (Supp. 2008).

169. *Id.*

170. 289 Ga. App. 590, 657 S.E.2d 540 (2008).

171. *See id.* at 593, 657 S.E.2d at 543; O.C.G.A. § 24-9-84.1(a)(2).

172. O.C.G.A. § 24-9-84.1(b).

173. *Newsome*, 289 Ga. App. at 593, 657 S.E.2d at 543.

174. *Id.*

“substantially outweighs” balancing test, which at least in theory offers criminal defendants more protection than Rule 609.¹⁷⁵

The supreme court’s decision in *Lindsey v. State*¹⁷⁶ illustrates another significant change wrought by the Criminal Justice Act of 2005¹⁷⁷ and perhaps helps explain why criminal defense attorneys fight for a balancing test with more teeth for the admission of convictions. *Lindsey* provided the court with an opportunity, perhaps its last opportunity, to apply the principle embodied by old O.C.G.A. § 24-9-20,¹⁷⁸ that a criminal defendant testifying on his own behalf could not be cross-examined or impeached by evidence of bad character (for example prior convictions) unless he first puts his character in issue.¹⁷⁹ This principle has long been a part of Georgia law, but it was strengthened in 1988 by the supreme court’s decision in *Jones v. State*,¹⁸⁰ in which the court held that a defendant only places his character in issue when he makes an express election to do so.¹⁸¹ Thus, as recognized in *Lindsey*, inadvertent statements by a defendant about his own good conduct do not put his character in issue to the extent that the prosecution could impeach his character with evidence of prior criminal convictions.¹⁸² However, the Criminal Justice Act of 2005 amended O.C.G.A. § 24-9-20 and deleted the prohibition against the introduction of bad character evidence against a criminal defendant when the defendant has not put his character in issue.¹⁸³ Now, presumably, the admissibility of a testifying defendant’s prior criminal history shall be subject only to O.C.G.A. § 24-9-84.1.

V. OPINION TESTIMONY

A. *Expert Opinion*

As discussed in the previous three *Evidence* survey articles,¹⁸⁴ in 2005 the Georgia General Assembly, as a part of comprehensive tort

175. See O.C.G.A. § 24-9-84.1(a)(2).

176. 282 Ga. 447, 651 S.E.2d 66 (2007).

177. 2005 Ga. Laws 20.

178. O.C.G.A. § 24-9-20 (1995).

179. See *Lindsey*, 282 Ga. at 449, 651 S.E.2d at 69.

180. 257 Ga. 753, 363 S.E.2d 529 (1988).

181. *Id.* at 758, 363 S.E.2d at 533-34.

182. *Lindsey*, 282 Ga. at 449, 651 S.E.2d at 70.

183. See 2005 Ga. Laws 20; O.C.G.A. § 24-9-20 (Supp. 2008).

184. Marc T. Treadwell, *Evidence*, 59 MERCER L. REV. 157, 172 (2007); Marc T. Treadwell, *Evidence*, 58 MERCER L. REV. 151, 165-67 (2006); Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 187, 204-05 (2005).

reform legislation, enacted O.C.G.A. § 24-9-67.1,¹⁸⁵ adopting, more or less, the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹⁸⁶ which in turn has been codified as Federal Rule of Evidence 702.¹⁸⁷ For reasons unstated, but likely having more to do with politics than anything else, the General Assembly exempted criminal cases from O.C.G.A. § 24-9-67.1.¹⁸⁸ Then, in its 2006 session, the General Assembly exempted most condemnation cases from the scope of O.C.G.A. § 24-9-67.1.¹⁸⁹

The anticipated constitutional challenge to this disparate treatment was resolved during the survey period by the supreme court in *Mason v. The Home Depot U.S.A., Inc.*¹⁹⁰ In *Mason* the plaintiffs raised several constitutional challenges to O.C.G.A. § 24-9-67.1, contending primarily that the statute violated the guarantees of equal protection afforded by the constitutions of the United States¹⁹¹ and Georgia¹⁹² because the statute placed more stringent requirements for the admission of expert testimony in tort actions than in criminal and civil condemnation cases. To mount this challenge, the plaintiffs first had to prove that they were similarly situated to the class or classes that were being treated differently from them.¹⁹³ The majority of the supreme court held that the plaintiffs could not meet this burden, concluding that civil litigants are not similarly situated to criminal defendants.¹⁹⁴

The plaintiffs also contended that O.C.G.A. § 24-9-67.1 violated their due process rights because subsections (a) and (b)(1) are contradictory.¹⁹⁵ As discussed in last year's survey,¹⁹⁶ subsection (a) authorizes an expert to give an opinion even if the facts and data supporting the opinion are not admissible,¹⁹⁷ while subsection (b)(1) requires that the expert's opinion be based on facts that are or will be admitted into evidence.¹⁹⁸ The trial court conceded this internal contradiction, but rather than striking the entire statute, the court simply severed the

185. O.C.G.A. § 24-9-67.1 (Supp. 2008).

186. 509 U.S. 579 (1993).

187. FED. R. EVID. 702.

188. See O.C.G.A. § 24-9-67.1.

189. See *id.*

190. 283 Ga. 271, 658 S.E.2d 603 (2008).

191. U.S. CONST. amend. XIV.

192. GA. CONST. art. I, § 1, para. 2.

193. *Mason*, 283 Ga. at 273, 658 S.E.2d at 606.

194. *Id.*

195. *Id.* at 275, 658 S.E.2d at 607.

196. Marc T. Treadwell, *Evidence*, 59 MERCER L. REV. 157, 172 (2007).

197. O.C.G.A. § 24-9-67.1(a).

198. *Id.* § 24-9-67.1(b)(1).

contradictory language from subsection (b)(1).¹⁹⁹ The supreme court agreed that these two provisions “cannot be harmonized and, read together, they render the statute unconstitutionally vague.”²⁰⁰ However, the supreme court agreed that the inconsistent language could be severed rather than voiding the entire statute.²⁰¹ With no explanation with regard to which of the two conflicting provisions should remain in the statute, the supreme court affirmed the trial court’s holding striking subsection (b)(1).²⁰²

The issue of whether experts can base their opinions on hearsay has long vexed Georgia’s appellate courts.²⁰³ However, *Mason* should make clear that experts in civil cases in Georgia courts, like experts in federal courts, can base their opinions on hearsay if the hearsay evidence is “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.”²⁰⁴

At this juncture, it is appropriate to leave *Mason* for a moment and address the issue of expert witness reliance on hearsay in both civil and criminal cases. First, the Georgia Court of Appeals decision in *Chancey v. Peachtree Pest Control Co.*,²⁰⁵ decided before *Mason*, should not be read to limit the ability of experts to rely, under appropriate circumstances, on hearsay notwithstanding some problematic language in the opinion. In *Chancey* the plaintiffs contended that they were injured when the defendants negligently mixed and applied a pesticide. At trial, the defendants’ expert witness testified about, and the trial court admitted, a summary of a laboratory report purportedly establishing the safety of the pesticide. The expert testified that he authorized the independent laboratory to perform the study and prescribed the methodology for the study. Although the persons performing the study reported to him, the expert was not present for the testing.²⁰⁶ The court of appeals reversed.

Those portions of a laboratory report that contain “the opinions or conclusions of a third party not before the court . . . are inadmissible hearsay until a proper foundation has been laid, i.e., the person who

199. *Mason*, 283 Ga. at 275, 658 S.E.2d at 607.

200. *Id.*, 658 S.E.2d at 608.

201. *Id.*

202. *See id.* at 276, 658 S.E.2d at 608.

203. Marc T. Treadwell, *Evidence*, 58 MERCER L. REV. 151, 168 (2006); Marc T. Treadwell, *Evidence*, 54 MERCER L. REV. 309, 327-28 (2002); Marc T. Treadwell, *Evidence*, 46 MERCER L. REV. 283, 250-51 (1994).

204. O.C.G.A. § 24-9-67.1(a).

205. 288 Ga. App. 767, 655 S.E.2d 228 (2007).

206. *Id.* at 768-69, 655 S.E.2d at 230.

entered such opinions or conclusions upon the record must qualify as an expert and relate the facts upon which the entry was based.”²⁰⁷

Read in isolation, the court’s holding suggests that no expert may base his opinion on laboratory reports, which invariably contain conclusions, unless the laboratory technician also testifies at trial. However, this holding should be considered in the factual context of *Chancey*. In *Chancey* the expert was not reaching his own conclusions in reliance on facts and data “of a type reasonably relied upon by experts”²⁰⁸ in his field; rather, he was simply a mouthpiece for others who actually reached the conclusion that the pesticide was safe.²⁰⁹

But what about criminal cases? Given that the *Daubert* statute does not apply to criminal cases (and civil condemnation cases), will courts be more suspect of experts relying on hearsay or will they follow the recent trend of cases, albeit a very uneven trend, that has increasingly allowed experts to rely on hearsay to some extent? The court addressed this issue in one criminal case decided during the survey period, *Cobb v. State*.²¹⁰ In *Cobb*, another opinion that some might argue was influenced by recent decisions expanding rights of gun owners, the defendant contended that the State’s firearms expert improperly testified about a .45 caliber pistol holster found in his apartment. The State contended that the victim was shot by a .45 caliber pistol and thus wanted to show that a holster for a .45 caliber pistol was found in the defendant’s apartment. However, the State’s firearms expert did not know from her own personal knowledge whether the holster was for a .45 caliber pistol, so she called the company that made the holster and was told, based on the model number of the holster, that it was for a Colt .45 pistol with a three and a half inch barrel.²¹¹ The trial court initially sustained the defendant’s hearsay objection to this line of questioning, but when the prosecutor rephrased his question and asked the firearms expert “what she had learned about the holster based on ‘any learned documents or consulting with other experts in the field,’” the trial court permitted the expert to testify about what she learned from the manufacturer.²¹² This, the supreme court held, was error: “An expert may not give an opinion that is based entirely on the hearsay reports, knowledge, or

207. *Id.* at 769, 655 S.E.2d at 231 (ellipsis in original) (quoting *Sticher v. State*, 209 Ga. App. 423, 424, 433 S.E.2d 660, 661 (1993)).

208. O.C.G.A. § 24-9-67.1(a).

209. *Chancey*, 288 Ga. App. at 769, 655 S.E.2d at 230-31.

210. 283 Ga. 388, 658 S.E.2d 750 (2008).

211. *Id.* at 390, 658 S.E.2d at 752.

212. *Id.*

opinions of other experts.”²¹³ Thus, an expert cannot simply act “as a conduit for the opinions of others.”²¹⁴ Viewed in context, the supreme court’s conclusion is clearly correct and should not be read as any limitation on the ability of an expert, in proper circumstances, to express opinions based upon hearsay testimony. In *Cobb* this is not what the state firearms expert did; rather, she simply parroted information she learned from a third-party.²¹⁵

Returning to the supreme court’s decision in *Mason*, the court also rejected the argument that the General Assembly’s instruction in subsection (f) of O.C.G.A. § 24-9-67.1,²¹⁶ that Georgia courts “may draw from the opinions of the United States Supreme Court” in *Daubert* and other cases,²¹⁷ constituted an improper usurpation of judicial authority.²¹⁸

Thus, at the end of the survey year period, O.C.G.A. § 24-9-67.1 remained constitutionally intact except for the requirement of subsection (b)(1) that expert’s opinions be based on admissible evidence.²¹⁹

Aside from the fact that O.C.G.A. § 24-9-67.1 treats civil cases differently than criminal cases, perhaps the most controversial and confusing requirement of the statute is that “[i]n the case of a medical malpractice action, [an expert must have] actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given.”²²⁰ As reported in last year’s survey,²²¹ the court of appeals held in *Cotten v. Phillips*²²² that this provision did not impose a strict requirement that an expert practice in the same specialty as the defendant doctor.²²³ Thus, the trial court in *Cotten* properly allowed a vascular surgeon to render opinions with regard to an orthopedic surgeon’s care of the plaintiff because the relevant issue involved the orthopedist’s treatment of the plaintiff’s vascular condition.²²⁴ The court reached a similar conclusion in *MCG Health, Inc. v. Barton*.²²⁵

213. *Id.* at 390-91, 658 S.E.2d at 752 (citing *Leonard v. State*, 269 Ga. 867, 870-71, 506 S.E.2d 853, 857 (1998)).

214. *Id.* at 391, 658 S.E.2d at 752 (quoting *Leonard*, 269 Ga. at 871, 506 S.E.2d at 857).

215. *Id.*, 658 S.E.2d at 752-53.

216. O.C.G.A. § 24-9-67.1(f) (Supp. 2008).

217. *Id.*

218. *See Mason*, 283 Ga. at 276-77, 658 S.E.2d at 608-09.

219. O.C.G.A. § 24-9-67.1(b)(1).

220. *Id.* § 24-9-67.1(c)(2).

221. Marc T. Treadwell, *Evidence*, 59 MERCER L. REV. 157, 175-76 (2007).

222. 280 Ga. App. 280, 633 S.E.2d 655 (2006).

223. *Id.* at 285, 633 S.E.2d at 659.

224. *Id.*

225. 285 Ga. App. 577, 647 S.E.2d 81 (2007); *see also* Marc T. Treadwell, *Evidence*, 59 MERCER L. REV. 157, 177 (2007).

Unfortunately, any clarity brought to the issue by *Cotten* and *MCG Health* may have been undercut during the current survey year. In *Nathans v. Diamond*,²²⁶ the plaintiffs contended that the trial court erroneously held that their expert, a pulmonologist, was not qualified to testify that the defendant, an otolaryngologist, breached the standard of care.²²⁷ Citing *Cotten*, the supreme court agreed it is not necessary that the expert be engaged in the same specialty as the defendant.²²⁸ Still, however, the statute requires that:

the expert must have “regularly engaged in the active practice” of the area of specialty “in which the opinion is to be given” and must have done so “with sufficient frequency to establish an appropriate level of knowledge . . . in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue.”²²⁹

In *Nathans* the plaintiffs contended that the defendant breached the standard of care because he did not obtain the appropriate informed consent regarding the potential risks and complications of the otolaryngology surgery performed on the plaintiff.²³⁰ Thus, it was necessary, the court said, for the expert to have the requisite experience with regard to that type of otolaryngology surgery and the risks associated with it.²³¹ The court held that the record did not establish that the expert had the required experience.²³² Justices Hunstein and Carly dissented, criticizing the majority for first agreeing that the expert did not have to practice in the same specialty but then assuming “that the plaintiff’s expert must have practiced in the single specialty in which the defendant physician was practicing when the alleged malpractice occurred.”²³³ Here, the dissent argued, the plaintiffs did not contend that the defendant negligently performed the surgery but rather contended that he did not inform the plaintiff of the potential risks and complications of the surgery.²³⁴ The dissent concluded that the record did establish that the expert had sufficient knowledge of the potential

226. 282 Ga. 804, 654 S.E.2d 121 (2007).

227. *Id.* at 805, 654 S.E.2d at 123.

228. *Id.* at 806, 654 S.E.2d at 123 (quoting *Cotten*, 280 Ga. App. at 284, 633 S.E.2d at 658).

229. *Id.* (ellipsis in original) (quoting O.C.G.A. § 24-9-67.1(c)(2)(A)).

230. *Id.* at 806-07, 654 S.E.2d at 123-24.

231. *Id.* at 807, 654 S.E.2d at 124.

232. *Id.*

233. *Id.* at 809, 654 S.E.2d at 125 (Carley, J., concurring in part and dissenting in part).

234. *Id.* at 810-11, 654 S.E.2d at 126.

pulmonary risks and complications from the procedure to satisfy the requirements of O.C.G.A. § 24-9-67.1.²³⁵ The majority, the dissent concluded, thus “disregards the analysis of the very Court of Appeals opinions [*Cotten* included] which it cites.”²³⁶

The court of appeals also seemed to have trouble with *Cotten* and *MCG Health*. In *Spacht v. Troyer*,²³⁷ the plaintiffs claimed that the defendants, who were neonatologists and pediatric otolaryngologists, were negligent in the diagnosis and treatment of their child, who had a vascular ring. To satisfy the affidavit requirements of O.C.G.A. § 9-11-9.1,²³⁸ the plaintiffs relied on a pediatric surgeon. Essentially, the pediatric surgeon testified that a child with a vascular ring must be diagnosed immediately and referred to a pediatric surgeon. The defendants countered that the pediatric surgeon was not competent, under O.C.G.A. § 24-9-67.1, to testify that they breached the standard of care and the trial court agreed.²³⁹ According to the plaintiffs’ complaint, the relevant area of practice involved the diagnosis of a vascular ring. In his affidavit, the plaintiff’s expert testified that he had over thirty years of experience in the diagnosis and management of children with vascular rings.²⁴⁰ However, O.C.G.A. § 24-9-67.1(c)(2)-(A)²⁴¹ requires that the expert have the requisite experience “for at least three of the last five years.”²⁴² Apparently, because the plaintiffs’ expert’s affidavit did not specifically state when he had this experience, other than saying that he had been doing it for over thirty years, the trial court held that he was not qualified to testify regarding the defendants’ breach of the standard of care.²⁴³ The court of appeals agreed.²⁴⁴

Because the expert

does not state when during his 30 years of practice he diagnosed the condition . . . [,] we cannot conclude that the trial court’s findings that it was unable to determine from the record that [the expert] had made even one diagnosis of a “vascular ring” within five years of March 12, 2002, and consequently, that [the expert] was not competent to offer an

235. *Id.* at 811, 654 S.E.2d at 126.

236. *Id.*

237. 288 Ga. App. 898, 655 S.E.2d 656 (2007).

238. O.C.G.A. § 9-11-9.1 (Supp. 2008). Expert affidavits filed pursuant to O.C.G.A. § 9-11-9.1 must meet the requirements of the *Daubert* statute. O.C.G.A. § 24-9-67.1.

239. *Spacht*, 288 Ga. App. at 898, 655 S.E.2d at 657.

240. *Id.* at 899-900, 655 S.E.2d at 657-58.

241. O.C.G.A. § 24-9-67.1(c)(2)(A) (Supp. 2008).

242. *Id.*

243. *Spacht*, 288 Ga. App. at 901-02, 655 S.E.2d at 659.

244. *Id.* at 903, 655 S.E.2d at 660.

opinion as a practicing expert, constituted an abuse of its discretion.²⁴⁵

Nor, according to the court of appeals, did the trial court err when it concluded that the expert was not competent to testify as a teaching expert.²⁴⁶ Section 24-9-67.1(c)(2)(B) of the O.C.G.A.²⁴⁷ allows employed faculty of accredited medical schools to testify as experts if they have been teaching “with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue.”²⁴⁸ Here, although the expert stated in his affidavit that he had been an assistant professor at two institutions for well over twenty years, there was “no mention whatsoever as to whether [the expert] was *employed* by an educational institution in 2002 and in the five years prior to that and no mention of his having taught the subject necessary to be deemed an expert within five years of March 12, 2002.”²⁴⁹

Judge Phipps dissented.²⁵⁰ He noted that the court of appeals had “repeatedly” held that O.C.G.A. § 24-9-67.1 “does not require an expert to have knowledge and experience in or to actively practice in the same area of practice or specialty as the defendant . . . [y]et the majority plainly applies a more stringent standard here because [the expert] is not a neonatologist or pediatric otolaryngologist.”²⁵¹ The expert’s affidavit, according to Judge Phipps, established that he regularly worked with neonatologists and pediatric otolaryngologists, managed surgical problems in children, and had over thirty years of experience in diagnosing and managing children with vascular rings.²⁵² Turning to *MCG Health*, Judge Phipps noted that the court allowed an emergency room physician to testify that a urologist breached the standard of care based on the expert’s testimony that he had over twenty years of emergency room experience, which included experience diagnosing testicular injuries such as that suffered by the plaintiffs’ son.²⁵³ The

245. *Id.*

246. *Id.* at 904, 655 S.E.2d at 660-61.

247. O.C.G.A. § 24-9-67.1(c)(2)(B) (Supp. 2008).

248. *Spacht*, 288 Ga. App. at 904, 655 S.E.2d at 660 (emphasis omitted) (quoting O.C.G.A. § 24-9-67.1(c)(2)(B)).

249. *Id.*, 655 S.E.2d at 661.

250. *Id.* at 905, 655 S.E.2d at 661.

251. *Id.* (Phipps, J., concurring in part and dissenting in part) (internal footnote omitted).

252. *Id.*

253. *Id.* at 905-06, 655 S.E.2d at 661.

expert in *Spacht* essentially said the same thing.²⁵⁴ Judge Phipps disagreed that O.C.G.A. § 24-9-67.1(c)(2)(A) requires that the expert state specifically when in three of the five years preceeding the alleged malpractice that he diagnosed vascular rings.²⁵⁵ He noted that the evidence established that vascular rings were an uncommon disorder (raising, perhaps, the possibility that for rarely occurring conditions, no one could ever satisfy the “three of five” test), but that the expert clearly stated that he had longstanding experience in diagnosing and managing vascular rings.²⁵⁶ That experience, according to Judge Phipps, should have been sufficient.²⁵⁷

There were also significant developments during the survey year with regard to the impact of O.C.G.A. § 24-9-67.1 on expert causation opinions. In *Shiver v. Georgia & Florida Railnet, Inc.*,²⁵⁸ the plaintiff, who alleged that he suffered respiratory ailments as the result of occupational exposure to hazardous dust and fumes, contended that the trial court improperly excluded the testimony of his treating physician on the grounds that the physician’s opinion was not sufficiently reliable to satisfy the requirements of O.C.G.A. § 24-9-67.1.²⁵⁹ According to the court of appeals, the trial court correctly noted that the plaintiff could have proved that his condition was the result of on the job exposure to chemicals by one of two methods: “(1) ‘dose/response relationship’ or ‘threshold phenomenon;’ and (2) ‘differential diagnosis.’”²⁶⁰ The plaintiff’s treating physician testified he used the differential diagnosis method to arrive at his conclusion that the plaintiff’s condition was caused by exposure to chemicals in the workplace. The differential diagnosis method requires that the expert consider all relevant and potential causes of the condition and then eliminate causes, based on physical examination, clinical tests, and appropriate history.²⁶¹ Unfortunately for the plaintiff, his treating physician was unaware that the plaintiff had experienced respiratory ailments in the past as the result of chemical exposure while working for another employer.²⁶² Based on these facts, the court of appeals agreed with the trial court that the treating physician’s causation opinions did not satisfy the

254. *Id.*

255. *Id.* at 906, 655 S.E.2d at 662.

256. *Id.*

257. *Id.*

258. 287 Ga. App. 828, 652 S.E.2d 819 (2007).

259. *Id.* at 828, 652 S.E.2d at 820.

260. *Id.* at 829, 652 S.E.2d at 820 (quoting *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 262 (6th Cir. 2001)).

261. *Id.*, 652 S.E.2d at 820-21 (quoting *Hardyman*, 243 F.3d at 260).

262. *Id.*, 652 S.E.2d at 821.

requirements for a reliable differential diagnosis.²⁶³ Because the treating physician was unaware of the plaintiff's prior relevant history, he could not rule out all other possible causes of the plaintiff's condition.²⁶⁴ Therefore, the court of appeals affirmed the trial court's exclusion of the physician's causation testimony.²⁶⁵

The plaintiffs' expert in *Hawkins v. OB-GYN Associates, P.A.*²⁶⁶ suffered a similar fate. In *Hawkins* the plaintiffs' retained expert contended that he used the differential diagnosis method to arrive at the conclusion that the defendant improperly managed the plaintiffs' son's shoulder dystocia during delivery, thereby causing nerve injury. Initially, over the defendant's objection, the trial court allowed the expert to express his opinion, based upon a differential diagnosis, that the defendant's negligence caused the child's injuries. However, the trial court subsequently granted the defendant's motion for directed verdict on the grounds that the expert's opinion did not satisfy the requirements of O.C.G.A. § 24-9-67.1, and in the absence of the expert testimony, there was insufficient evidence of causation to create a jury issue.²⁶⁷ The court of appeals affirmed, noting that although the expert ruled *out* various causes of the child's injuries, he did not reliably rule *in* his diagnosis that the injuries were caused by the defendant's excessive use of traction during the delivery.²⁶⁸ The defendant and other witnesses who were present during delivery testified that the defendant did not use excessive traction.²⁶⁹ Thus, the expert's opinion that there was excessive traction, according to the court of appeals, was contrary to all evidence in the record.²⁷⁰

This analysis is interesting. Apparently, the court concluded that because the defendant and other delivery room staff testified that the defendant was not negligent, there was no factual basis for the plaintiffs' expert to testify that notwithstanding the defendant's protestation of innocence, the child's injuries could only have been caused by excessive traction.²⁷¹ Next, the court noted that the expert admitted that his theories of causation had not been peer reviewed and were contrary to established text and authorities.²⁷² Apart from the deficiencies in the

263. *Id.* at 830, 652 S.E.2d at 821.

264. *Id.*

265. *Id.*

266. 290 Ga. App. 892, 660 S.E.2d 835 (2008).

267. *Id.* at 893, 660 S.E.2d at 837.

268. *Id.* at 893-94, 895, 660 S.E.2d at 838-39.

269. *Id.* at 893, 660 S.E.2d at 839.

270. *Id.* at 894, 660 S.E.2d at 838.

271. *See id.* at 894-95, 660 S.E.2d at 839.

272. *Id.* at 894, 660 S.E.2d at 838.

expert's causation testimony, the court continued, the expert's testimony was also insufficient to establish a breach of the standard of care.²⁷³ The court of appeals analysis in this regard is also interesting. As noted, the expert, using the differential diagnosis method, contended that the child's injuries were caused by the defendant's use of excessive traction. Because excessive traction is a breach of the standard of care, the expert contended, the defendant was negligent.²⁷⁴ However, because the defendant and others in the delivery room testified that excessive traction was not used, there was no factual basis for the expert's conclusion that excessive traction was used and therefore there was no basis for the conclusion that the defendant was negligent.²⁷⁵

The court of appeals decision in *Beasley v. Northside Hospital, Inc.*,²⁷⁶ illustrates a particularly vexing causation dilemma for plaintiffs in personal injury actions. In *Beasley* the plaintiff suffered permanent nerve damage as the result of a carotid endarterectomy.²⁷⁷ The plaintiff's expert testified that the defendant's physician negligently performed the surgery and that the plaintiff's injuries were "proximately caused by the surgical procedure."²⁷⁸ However, as the result of operating room staff negligence during the procedure, the plaintiff slipped from the operating table and fell a short distance before being caught.²⁷⁹ In his deposition, the plaintiff's expert testified that the fall "could have played a role" in the plaintiff's injury, but that it was more likely that the injury was caused by the physician's negligence.²⁸⁰ The expert did not testify that the fall, within a reasonable degree of medical probability, caused the plaintiff's injuries. Based on this testimony, the hospital moved for summary judgment, contending that there was insufficient expert testimony to establish that the hospital employees' negligence proximately caused or contributed to the plaintiff's injury.²⁸¹ The trial court granted the motion, and the court of appeals affirmed.²⁸² However, the court of appeals was much more charitable in its analysis than it was in the differential diagnosis opinions discussed above.²⁸³

273. *Id.* at 895, 660 S.E.2d at 839.

274. *Id.* at 893, 660 S.E.2d at 837.

275. *Id.* at 894, 660 S.E.2d at 838.

276. 289 Ga. App. 685, 658 S.E.2d 233 (2008).

277. *Id.* at 685, 658 S.E.2d at 234.

278. *Id.* at 687, 658 S.E.2d at 235.

279. *Id.* at 686, 658 S.E.2d at 235.

280. *Id.* at 687, 658 S.E.2d at 235.

281. *Id.*

282. *Id.* at 685, 658 S.E.2d at 234.

283. *Id.*

The expert can meet the causation requirement by stating, for example, that the only apparent cause of the plaintiff's injuries was the defendant's action, by presenting overwhelming testimony of experience that, in the absence of the alleged negligence, the patient's condition could have been prevented from worsening, or by stating that the injuries "could have been avoided" in conjunction with a specific explanation regarding what precautions should have been taken by the defendant and a statement that the failures proximately caused the injuries.²⁸⁴

Here, however, the expert testimony did nothing more than establish the possibility that the hospital's negligence caused or contributed to the plaintiff's injuries.²⁸⁵ That, as a matter of law, is insufficient to satisfy a plaintiff's burden of proving, by a preponderance of the evidence, that a defendant's negligence caused the plaintiff's injury.²⁸⁶

Here is the dilemma, demonstrated by *Beasley*, for plaintiffs in situations where two or more negligent defendants may have contributed to an injury. Clearly, the hospital's employees in *Beasley* were negligent, and their negligence may have played a role in the plaintiff's injury.²⁸⁷ Pursuant to O.C.G.A. § 51-12-33,²⁸⁸ which abolished joint and several liability, each negligent party is responsible only for the consequences of his negligence, as determined by the jury.²⁸⁹ *Beasley* demonstrates that a plaintiff cannot recover for the negligence of a defendant unless he can establish, by a preponderance of the evidence, that the defendant's negligence contributed to his injury.²⁹⁰ Yet, can the physician still argue that the jury should reduce its award for the plaintiff's injuries because the negligence of the operating room staff, to some extent, caused the plaintiff's injuries?²⁹¹

The court of appeals' point in *Beasley*—that expert testimony stating an injury "could have been avoided" had appropriate action been taken—is illustrated by the court of appeals opinion in *Allen v. Family Medical Center, P.C.*²⁹² In *Allen* the plaintiff contended that the trial court improperly granted summary judgment to the defendant on the grounds that the plaintiffs' expert affidavit did not sufficiently establish

284. *Id.* at 688-89, 658 S.E.2d at 236 (footnote omitted) (quoting *Allen v. Family Med. Ctr.*, 287 Ga. App. 522, 524-25, 652 S.E.2d 173 (2007)).

285. *Id.* at 689, 658 S.E.2d at 237.

286. *Id.* at 690, 658 S.E.2d at 237.

287. *See Beasley*, 289 Ga. App. 685, 658 S.E.2d 233.

288. O.C.G.A. § 51-12-33 (2000 & Supp. 2008).

289. *See id.*

290. *See Beasley*, 289 Ga. App. at 689-90, 658 S.E.2d at 237.

291. *See id.* at 688, 658 S.E.2d at 236.

292. 287 Ga. App. 522, 652 S.E.2d 173 (2007).

causation. The plaintiff alleged that she suffered nerve damage as the result of an improper injection by a nurse. In support of her complaint, the plaintiff attached the affidavit of a registered nurse who opined that the nurse giving the injection breached the standard of care and the affidavit explained, in some detail, that if the nurse had performed the procedure in an appropriate way, the plaintiff's injury could have been avoided.²⁹³ The trial court relied on *Cannon v. Jeffries*,²⁹⁴ which held that expert testimony establishing only that negligence may have contributed to an injury is not sufficient.²⁹⁵ However, the court of appeals in *Allen* concluded that *Cannon* was not analogous.²⁹⁶ Rather, the plaintiff's expert's testimony that the injury could have been avoided satisfied the rule that "there can be no recovery for medical negligence involving an injury to the patient where there is no showing to any reasonable degree of medical certainty or probability that the injury could have been avoided."²⁹⁷ Thus, the expert's testimony that the injury could have been avoided had the defendant acted appropriately was sufficient.²⁹⁸

However, even expert testimony that is stated in terms of possibilities can sometimes be sufficient to satisfy the plaintiff's burden of proof. In *Rodrigues v. Georgia-Pacific Corp.*,²⁹⁹ the plaintiff contended that the trial court improperly granted the defendant summary judgment on his complaint alleging that he suffered injuries as the result of exposure to chlorine. While working as a contractor at the defendant's plant, the plaintiff was suddenly exposed to a large volume of chlorine. He immediately became ill and his condition grew worse over the following days. When treated at an emergency room several days later, he still smelled of chlorine. The emergency room physician concluded that the plaintiff had developed pneumonia as a result of chlorine inhalation. The defendant moved for summary judgment, relying upon affidavit testimony from its expert that chlorine could not cause the type pneumonia experienced by the plaintiff. The expert concluded that the plaintiff's pneumonia was most likely caused by his years of heavy smoking.³⁰⁰ In fact, the plaintiff's treating physician had diagnosed

293. *Id.* at 523-24, 652 S.E.2d at 174-75.

294. 250 Ga. App. 371, 551 S.E.2d 777 (2001).

295. *Id.* at 373, 551 S.E.2d at 779.

296. *Allen*, 287 Ga. App. at 525, 652 S.E.2d at 176.

297. *Id.* at 525, 652 S.E.2d at 176 (quoting *Miranda v. Fulton DeKalb Hosp. Auth.*, 284 Ga. App. 203, 205, 644 S.E.2d 164, 167 (2007)).

298. *Id.*

299. 290 Ga. App. 442, 661 S.E.2d 141 (2008).

300. *Id.* at 442-43, 661 S.E.2d at 142.

the plaintiff with “tobacco pneumonia.”³⁰¹ In response to the defendant’s expert, the plaintiff submitted an affidavit from the emergency room physician in which she stated that to a reasonable degree of medical certainty the plaintiff’s pneumonia was “substantially contributed to by his exposure to chlorine or chlorine dioxide.”³⁰² She then explained in detail the process by which chlorine exposure could substantially contribute to the development of pneumonia, particularly if the patient was a smoker. However, at her subsequent deposition, the expert described the causal link between the plaintiff’s chlorine exposure and pneumonia in terms of possibility rather than probability. The trial court granted the defendant’s motion, concluding that although the physician’s affidavit established the causal link to a reasonable degree of medical certainty, her subsequent deposition testimony expressing a causation opinion only in terms of possibilities undercut her affidavit.³⁰³ The court of appeals, however, reversed for two reasons.³⁰⁴

First, the emergency room physician’s affidavit was sufficient to establish, to a reasonable degree of medical certainty, that the plaintiff’s pneumonia was caused by chlorine exposure.³⁰⁵ Even though her deposition testimony did not go as far, the substance of her affidavit testimony did not change.³⁰⁶ Second, expert testimony couched in terms of possibilities, rather than probabilities, may be sufficient to satisfy a party’s burden of proof if the expert testimony is supplemented by appropriate nonexpert testimony or evidence.³⁰⁷ Here, the evidence established that the defendant was in apparent good health, that he immediately became ill after exposure to chlorine, and that his illness continuously worsened until he sought medical treatment.³⁰⁸ The fact that the plaintiff was a smoker, as pointed out by the defendant, actually established that he was more susceptible to bacterial pneumonia and thus buttressed the evidence establishing that the plaintiff’s pneumonia was caused by his chlorine exposure.³⁰⁹ In response to the

301. *Id.* at 443, 661 S.E.2d at 142.

302. *Id.*

303. *Id.* at 443-44, 661 S.E.2d at 142-43.

304. *Id.* at 445, 661 S.E.2d at 143.

305. *Id.*

306. *See id.* at 445-46, 661 S.E.2d at 143-44. The court noted that the contradictory testimony rule, sometimes called the *Prophecy* rule, applies only to parties and does not include expert witnesses. *Id.* at 445, 661 S.E.2d at 144. Thus, the *Prophecy* rule did not justify discarding the expert’s more favorable affidavit testimony. *See id.*; *Prophecy Corp. v. Charles Rossignol, Inc.*, 256 Ga. 27, 343 S.E.2d 680 (1986).

307. *Rodrigues*, 290 Ga. App. at 446, 661 S.E.2d at 144.

308. *Id.*

309. *Id.*

defendant's motion for reconsideration, the court of appeals distinguished its decision in *Beasley*, noting that the expert in *Beasley* could offer "no assessment of the likelihood that the hospital's alleged negligence caused [plaintiff's] injuries, no basis for the expert's conclusion, and no expression of probability that the expert's conclusion [was] accurate."³¹⁰ The defendant also argued, on motion for reconsideration, that the court of appeals failed to apply O.C.G.A. § 24-9-67.1.³¹¹ The court rejected this argument, noting that it was first raised in the motion for reconsideration and thus was not timely.³¹² Nevertheless, in ruling on the motion for reconsideration, the court reiterated that nonexpert evidence can supplement expert testimony regarding a possible connection between an injury and a defendant's culpable conduct.³¹³

Section 24-9-67.1(d) of the O.C.G.A.³¹⁴ addresses the procedural aspects of a *Daubert* motion to exclude testimony.³¹⁵ Any hearing and ruling on a motion to exclude testimony on the grounds that it does not satisfy the requirements of O.C.G.A. § 24-9-67.1 "shall be completed no later than the final pretrial conference contemplated under Code Section 9-11-16."³¹⁶ Subsection (d) has thus far received uneven treatment from the appellate courts. In *Ford Motor Co. v. Gibson*,³¹⁷ the supreme court refused to consider a contention that the trial testimony of the plaintiff's experts did not satisfy O.C.G.A. § 24-9-67.1 because the defendant's motion to exclude the plaintiff's expert was filed after the final pretrial conference.³¹⁸ Yet, in *Hawkins v. OB-GYN Associates, P.A.*,³¹⁹ discussed above, the court of appeals rejected an argument that the trial court improperly excluded the causation testimony of one of the plaintiff's experts.³²⁰ The court summarily rejected the plaintiff's argument that the defendant's objections to the testimony should "have been resolved prior to trial pursuant to a *Daubert* motion."³²¹ The court noted that the defendant's objections to the testimony were made

310. *Id.* at 448, 661 S.E.2d at 145 (Miller, J., concurring) (alterations in original) (quoting *Beasley*, 289 Ga. App. 685, 689, 658 S.E.2d 233, 236 (2008)).

311. *Id.*

312. *Id.*, 661 S.E.2d at 146.

313. *Id.* at 449, 661 S.E.2d at 146.

314. O.C.G.A. § 24-9-67.1(d) (Supp. 2008).

315. *See id.*

316. *Id.*

317. 283 Ga. 398, 659 S.E.2d 346 (2008).

318. *Id.* at 403, 659 S.E.2d at 351.

319. 290 Ga. App. 892, 660 S.E.2d 835 (2008).

320. *See id.* at 894-95, 660 S.E.2d at 839-40.

321. *Id.* at 895, 660 S.E.2d at 839.

during the videotaped deposition of the expert and “were properly reserved until trial and timely ruled upon at trial outside the presence of a jury.”³²² The court did not address subsection (d)’s requirement that the motion and ruling be completed prior to the final pretrial conference.

Georgia has long given special dispensation to opinion testimony offered by law enforcement officers investigating traffic conditions. As discussed most recently in the 2004 *Evidence* survey,³²³ a qualified investigating police officer can express expert opinions with regard to the cause of an accident he or she investigated. For example, an investigating officer can testify that one of the parties ran a red light.³²⁴ It appears that this rule may have survived the enactment of O.C.G.A. § 24-9-67.1. In *Fortner v. Town of Register*,³²⁵ the court of appeals concluded that an officer who had investigated a collision between a truck and a train properly testified about his conclusion that the plaintiff disregarded a stop sign.³²⁶ It has long been recognized, the court held, that a police officer with proper training and experience can testify about the cause of motor vehicle collisions³²⁷ even if he is not trained to reconstruct traffic accidents.³²⁸

As discussed, O.C.G.A. § 24-9-67.1 does not apply to criminal cases.³²⁹ The difference between the standard of admissibility for expert opinions in criminal cases is illustrated by the court of appeals decision in *Jackson v. State*.³³⁰ In *Jackson* the court held that the trial court properly allowed a law enforcement officer, based on his experience with people who had been stabbed or cut, to testify that many people in that situation do not actually remember being injured.³³¹ The point was important because during the brief altercation between the defendant and his victim, there was no indication or acknowledgement by the victim that he had been stabbed. In fact, the victim did not appear to be seriously injured, and he left the scene and walked home. Later, he was found with several stab wounds, one of which caused his

322. *Id.*

323. Marc T. Treadwell, *Evidence*, 56 MERCER L. REV. 235, 246 (2004).

324. *Id.*

325. 289 Ga. App. 543, 657 S.E.2d 620 (2008).

326. *Id.* at 546, 657 S.E.2d at 623.

327. *Id.* at 545, 657 S.E.2d at 622 (quoting *Massee v. State Farm Mut. Auto. Ins. Co.*, 128 Ga. App. 439, 443, 197 S.E.2d 459, 462 (1973)).

328. *Id.*, 657 S.E.2d at 623 (citing *Jefferson Pilot Life Ins. Co. v. Clark*, 202 Ga. App. 385, 391-92, 414 S.E.2d 521, 527 (1991)).

329. See O.C.G.A. § 24-9-67.1(a).

330. 291 Ga. App. 287, 661 S.E.2d 665 (2008).

331. *Id.* at 288, 661 S.E.2d at 666-67.

death.³³² Accordingly, the prosecution sought to establish, through the police officer's expert testimony, that many people get stabbed and do not remember, which explained why the victim was unaware he had been stabbed.³³³ Although it is doubtful that such testimony could ever withstand a *Daubert* challenge, the court of appeals easily concluded that the police officer could render expert testimony because his opinion was "beyond the ken of the average laymen."³³⁴

However, in *Bly v. State*,³³⁵ the supreme court took a somewhat different view on the admissibility of opinion testimony by a police officer. In *Bly* the defendant, who had been charged with assaulting a police officer, claimed that the trial court improperly allowed another officer to express an opinion that the police officer victim had acted properly. The court of appeals held that this testimony was admissible as a lay opinion.³³⁶ The supreme court disagreed with that conclusion.³³⁷ Lay opinion testimony is appropriate when a witness states his impressions or opinions based upon observed facts and circumstances.³³⁸ Typically, lay opinion testimony is allowed when the witness is testifying about a matter, based on his perceptions and observations, that can be more accurately described as an opinion rather than trying to testify to the facts that form the opinion (for example, the speed of an automobile).³³⁹ However, because the police officer did not actually observe the events at the scene, he could not give lay opinion testimony.³⁴⁰ Neither, the supreme court held, was the testimony admissible as an expert opinion.³⁴¹ There was no evidence establishing the basis for his expert opinion and, in any event, the matter was not one beyond the ken of lay jurors.³⁴²

332. *Id.* at 287, 661 S.E.2d at 666.

333. *Id.* at 288, 661 S.E.2d at 666.

334. *Id.* (quoting *Caldwell v. State*, 245 Ga. App. 630, 633, 538 S.E.2d 531, 534 (2000)).

335. 283 Ga. 453, 660 S.E.2d 713 (2008).

336. *Id.* at 456, 660 S.E.2d at 716.

337. *See id.* at 457, 660 S.E.2d at 717.

338. *Id.* at 456, 660 S.E.2d at 716 (quoting *McMichen v. Moattar*, 221 Ga. App. 230, 232, 470 S.E.2d 800, 802 (1996)).

339. *Id.*

340. *Id.*

341. *Id.* at 458, 660 S.E.2d at 717.

342. *Id.*

B. Lay Opinion

In *Carter v. State*,³⁴³ a decision discussed in a previous survey,³⁴⁴ the full court of appeals, rejecting prior authority, held that jurors can decide for themselves whether a video depicts an alleged perpetrator, and thus, it is error for a lay witness to express an opinion that a defendant is depicted on a videotape.³⁴⁵ During the current survey year, the court of appeals in *Grimes v. State*³⁴⁶ reversed a defendant's conviction because the trial court allowed witnesses to testify, based on a surveillance videotape and photographs taken from the surveillance videotape, that the videotape depicted the defendant.³⁴⁷

However, the supreme court apparently holds a somewhat different view. In *Dawson v. State*,³⁴⁸ the supreme court held that the trial court did not err when it allowed a lay witness to express an opinion regarding the identity of an individual appearing on a surveillance videotape and photographs derived from that videotape.³⁴⁹ Although the supreme court acknowledged the court of appeals decision in *Carter*, it distinguished *Carter* factually: "In the case at bar, the quality of the videotape and the still photos were such that it was not within the ability of average jurors to decide by 'thinking for themselves and drawing their own conclusions.'"³⁵⁰ Thus, perhaps oddly, the poorer the quality of the videotape and the less clearly it depicts the defendant, the more likely it is that nonexpert witnesses will be allowed to give opinion testimony with regard to whether the videotape depicts the defendant.³⁵¹

Georgia courts have long recognized a practical principle governing opinion testimony of value in cases brought by homeowners to recover for the destruction or damage of their personal property. Specifically, when a homeowner seeks to recover under an insurance policy the value of personal property destroyed in a fire, it is sufficient proof of value for the homeowner to testify as to either the purchase price or replacement cost of the personal property and the approximate date the property was purchased.³⁵² This testimony is sufficient to allow a jury to place a

343. 266 Ga. App. 691, 598 S.E.2d 76 (2004).

344. Marc T. Treadwell, *Evidence*, 56 MERCER L. REV. 235, 246-47 (2004).

345. *Id.*; *Carter*, 266 Ga. App. at 693, 598 S.E.2d at 78-79.

346. 291 Ga. App. 585, 662 S.E.2d 346 (2008).

347. *Id.* at 585, 662 S.E.2d at 349.

348. 283 Ga. 315, 658 S.E.2d 755 (2008).

349. *Id.* at 321, 658 S.E.2d at 761.

350. *Id.* (quoting *Mitchell v. State*, 283 Ga. App. 456, 459, 641 S.E.2d 674, 677 (2007)).

351. *See id.*

352. Marc T. Treadwell, *Evidence*, 58 MERCER L. REV. 151, 166-67 (2006).

value on the damaged or destroyed personal property.³⁵³ The practical wisdom of this rule is evident; if homeowners had to meet a *Daubert*-like standard to prove the value of their property, there likely would be very few homeowners who would enjoy the proceeds of their insurance policies.

This principle was reaffirmed during the survey period in *Allstate Indemnity Co. v. Payton*.³⁵⁴ In *Payton* the homeowner and her daughter prepared a detailed inventory of property destroyed by a fire. The estimated total cost of the property destroyed was \$16,705. The discounted actual cash value of the estimated total cost was \$11,276, a value arrived at by using a discount percentage. After a verdict for the plaintiff, Allstate contended on appeal that the plaintiff's evidence of value was insufficient because the homeowner did not testify about the approximate purchase date of the myriad items of household property on the list.³⁵⁵ The court of appeals was not impressed: "The value of items such as a 'red velvet living room suite' and 'antique coffee tables' is within the general ken of a jury, and the trial court did not err in refusing to grant a directed verdict to Allstate."³⁵⁶

VI. HEARSAY

A. *Hearsay and the Right of Confrontation*

It has been almost four years since the United States Supreme Court in *Crawford v. Washington*³⁵⁷ 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 unavailable to testify.³⁵⁸ 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 Amendment³⁵⁹ right of confrontation.³⁶⁰ Prosecutors argued

353. *Id.*

354. 289 Ga. App. 202, 656 S.E.2d 554 (2008).

355. *Id.* at 202-03, 656 S.E.2d at 554-55.

356. *Id.* at 205, 656 S.E.2d at 556.

357. 541 U.S. 36 (2004).

358. *Id.* at 40.

359. U.S. CONST. amend. VI.

360. *Crawford*, 541 U.S. at 41; U.S. CONST. amend. VI.

that since the Supreme Court's decision in *Ohio v. Roberts*,³⁶¹ courts have allowed the admission of hearsay statements if the statements fell within a "firmly rooted hearsay exception" or if they bore "particularized guarantees of trustworthiness."³⁶² It was the latter language, "particularized guarantees of trustworthiness,"³⁶³ that courts across the country interpreted as a green light to admit hearsay testimony. In Georgia, this bypass around the Sixth Amendment came to be known as the necessity exception to the hearsay rule.³⁶⁴ 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.³⁶⁵

In *Crawford*, however, the Supreme Court granted certiorari and 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.³⁶⁶ Testimonial statements include affidavits, custodial examinations, prior testimony, and "similar pretrial statements that declarants would reasonably expect to be used prosecutorially."³⁶⁷ Thus, a testimonial out-of-court statement is no longer admissible if the defendant has not had an opportunity to cross-examine the declarant.³⁶⁸ Cases applying *Crawford* have primarily focused on whether an out-of-court statement is testimonial, which continued to be the case during this survey period.

The Georgia Court of Appeals opinion in *Davis v. State*³⁶⁹ describes a classic example of testimonial hearsay, so classic that the prosecution conceded that the admission of the hearsay testimony violated the defendant's constitutional right of confrontation. In *Davis* the trial court admitted a police officer's testimony recounting a victim's statement to the police officer identifying the defendant as the perpetrator. The trial court allowed the police officer to testify about the victim's statement because the victim died prior to trial.³⁷⁰ The victim's statement was clearly testimonial because it was "made with (t)he involvement of government officers in the production of testimonial evidence," which

361. 448 U.S. 56 (1980) *overruled by Crawford*, 521 U.S. 36.

362. *Crawford*, 541 U.S. at 40 (quoting *Roberts*, 448 U.S. at 66).

363. *Id.* (quoting *Roberts*, 448 U.S. at 66).

364. Marc T. Treadwell, *Evidence*, 48 MERCER L. REV. 323, 351-54 (1996).

365. Marc T. Treadwell, *Evidence*, 56 MERCER L. REV. 235, 247-48 (2004).

366. *Crawford*, 541 U.S. at 50-51, 68.

367. *Id.* at 51 (internal quotation marks omitted).

368. *Id.* at 59.

369. 289 Ga. App. 526, 657 S.E.2d 609 (2008).

370. *Id.* at 526, 657 S.E.2d at 610.

includes police interrogations.’³⁷¹ Thus, the court reversed the defendant’s conviction.³⁷²

In *Gifford v. State*,³⁷³ the court of appeals addressed another situation involving seemingly obvious testimonial hearsay; however, the prosecution in *Gifford*, unlike the prosecution in *Davis*, did not acknowledge as much. In *Gifford* a store clerk provided various statements to the police implicating the defendant in a convenience store robbery. Unfortunately, the clerk died before trial, and the trial court permitted a police officer to testify regarding the clerk’s statements to police following the robbery. Not surprisingly, the defendant, after his conviction, contended on appeal that the admission of the store clerk’s statements through the testimony of the police officer violated his right to confront the witnesses against him.³⁷⁴ The court of appeals agreed, concluding that the statements, because they were made to police officers during the course of an investigation, constituted testimonial hearsay and thus should not have been admitted.³⁷⁵

The court of appeals decision in *Delgado v. State*³⁷⁶ illustrates that the critical inquiry is not necessarily to whom the out-of-court statements were made but rather the context in which they were made.³⁷⁷ In *Delgado* the trial court admitted a tape-recorded statement by the minor victim recounting the defendant’s attempts to sexually molest her. The victim testified at trial, and therefore the admission of her statements on the videotape did not implicate *Crawford*. However, the victim also recounted statements made by her cousin and aunt during the course of the events. These statements, the defendant contended, were hearsay, and because the declarants did not testify at trial, their admission violated his Sixth Amendment right of confrontation.³⁷⁸ The court of appeals agreed, despite the fact that the hearsay statements were made to the victim and not to the police.³⁷⁹ Although the statements by the aunt and cousin were not made directly to the police, “they were relayed by the victim on an audiotape made in the context of a formal investigation. The audiotape was created under ‘circumstances which would lead an objective witness reasonably to believe’ that any

371. *Id.* at 526-27, 657 S.E.2d at 610 (alteration in original) (quoting *Jenkins v. State*, 278 Ga. 598, 605, 604 S.E.2d 789, 795 (2004)).

372. *Id.* at 526, 657 S.E.2d at 610.

373. 287 Ga. App. 725, 652 S.E.2d 610 (2007).

374. *Id.* at 725-26, 652 S.E.2d at 611-12.

375. *Id.* at 726, 652 S.E.2d at 612.

376. 287 Ga. App. 273, 651 S.E.2d 201 (2007).

377. *See id.* at 277, 651 S.E.2d at 204-05.

378. *Id.* at 275-76, 651 S.E.2d at 203-04.

379. *Id.* at 276, 277, 651 S.E.2d at 204-05.

and all statements contained therein would be available for use at a later trial.³⁸⁰ However, given the other evidence establishing the defendant's guilt, the court concluded that the admission of this testimony or hearsay was harmless error.³⁸¹

As illustrated by the Georgia Supreme Court's decision in *Hester v. State*,³⁸² not all incriminating statements made by victims to police constitute testimonial hearsay.³⁸³ In *Hester* a police officer testified that when he arrived at the scene he saw the defendant running from one house to another. When the officer ordered the defendant to come to him, the defendant returned to the house he was leaving. When the officer entered the house, he saw the defendant standing over the victim, whose head was wrapped in a bloody rag. The officer ordered the defendant to step outside and remain in the company of another officer while he checked on the victim.³⁸⁴ The victim, in response to the officer's questions, said (referring to the defendant) that the "bitch hit me in the head with a big piece of glass."³⁸⁵ Later, the victim told a paramedic the same thing. The victim later died.³⁸⁶

The trial court allowed both the police officer and the paramedic to testify about the statements made by the victim, and on appeal, the defendant contended that their testimony violated *Crawford*.³⁸⁷ The supreme court noted that the United States Supreme Court, in *Davis v. Washington*,³⁸⁸ held that statements made to police officers are nontestimonial if made "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."³⁸⁹ If, on the other hand, there is not an ongoing emergency and "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution," then the statements are testimonial.³⁹⁰ In *Hester* the Georgia Supreme Court held that, given the circumstances, the victim's statements to the police officer were not intended to establish events that had happened in the past but rather were intended to resolve the

380. *Id.* at 277, 651 S.E.2d at 205 (quoting *Crawford*, 541 U.S. at 52).

381. *Id.* at 276, 651 S.E.2d at 204.

382. 283 Ga. 367, 659 S.E.2d 600 (2008).

383. *See id.* at 372, 659 S.E.2d at 605.

384. *Id.* at 369-70, 659 S.E.2d at 603.

385. *Id.* at 370, 659 S.E.2d at 603.

386. *Id.*

387. *Id.*

388. 547 U.S. 813 (2006).

389. *Hester*, 283 Ga. at 370, 659 S.E.2d at 604 (quoting *Davis*, 547 U.S. at 822).

390. *Id.* (quoting *Davis*, 547 U.S. at 822).

existing emergency.³⁹¹ Therefore, the victim's statements to the police officer were not testimonial.³⁹² The statements made to the paramedic did not implicate *Crawford* at all because the paramedic's role was to provide emergency treatment, and the victim's statements made to the paramedic were "made for purposes of medical diagnosis or treatment" and thus admissible pursuant to O.C.G.A. § 24-3-4.³⁹³ *Crawford* does not bar the admission of hearsay statements made for the purpose of medical diagnosis and treatment.³⁹⁴

The issue of whether 911 telephone calls are testimonial in nature has been a recurrent issue since *Crawford* was decided. As discussed in a previous survey,³⁹⁵ the supreme court held in *Pitts v. State*³⁹⁶ that whether a 911 call is testimonial should be determined on a case-by-case basis.³⁹⁷ 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.³⁹⁸ 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.³⁹⁹ In *Key v. State*,⁴⁰⁰ the court of appeals addressed whether *Crawford* should have barred the admission of a rather unusual 911 call.⁴⁰¹ In *Key* the defendant, who had been charged with driving under the influence of alcohol to the extent that he was a less safe driver,⁴⁰² contended that a lengthy 911 recording by an alleged witness to the defendant's drunken driving should not have been admitted.⁴⁰³ During the sixteen-minute recording, a caller described in great detail the defendant's erratic driving on Interstate 85 north of Atlanta.⁴⁰⁴

391. *Id.* at 370-71, 659 S.E.2d at 604 (quoting *Davis*, 547 U.S. at 827, 828).

392. *Id.* at 371, 659 S.E.2d at 604 (quoting *Davis*, 547 U.S. at 828).

393. *Id.* (quoting *Thomas v. State*, 288 Ga. App. 602, 609, 654 S.E.2d 682, 688 (2007)); O.C.G.A. § 24-3-4 (1995).

394. *Thomas*, 288 Ga. App. at 608, 654 S.E.2d at 687. *Thomas*, which was also decided during the survey period, held that statements by the victim of a sexual assault to an examining physician and nurse did not constitute testimonial hearsay but rather were statements made for the purposes of medical diagnosis and treatment and therefore were admissible pursuant to O.C.G.A. § 24-3-4. *Thomas*, 288 Ga. App. at 609, 654 S.E.2d at 688.

395. Marc T. Treadwell, *Evidence*, 58 MERCER L. REV. 151, 173-74 (2006).

396. 280 Ga. 288, 627 S.E.2d 17 (2006).

397. *Id.* at 289, 627 S.E.2d at 19.

398. *Id.*

399. *Id.*, 627 S.E.2d at 19-20.

400. 289 Ga. 317, 657 S.E.2d 273 (2008).

401. *See id.* at 319, 657 S.E.2d at 276.

402. *See* O.C.G.A. § 40-6-391(a)(1) (2007 & Supp. 2008).

403. *Key*, 289 Ga. App. at 317, 657 S.E.2d at 275.

404. *Id.* at 318, 657 S.E.2d at 276.

Eventually, as the defendant attempted to exit the interstate, the caller drove in front of the defendant's vehicle "to stop it before there was an accident."⁴⁰⁵ The caller can then be heard talking to someone, presumably the defendant, and instructing him to stop driving.⁴⁰⁶ The driver then left, and the tape ended as the caller stated, "I'm not going to allow this punk to hurt somebody . . . he's drunk."⁴⁰⁷

Because the defendant had refused to submit to a breath test, the tape recording, with its vivid description of the defendant's drunken driving, was of critical importance.⁴⁰⁸ Acknowledging *Pitts*, the court of appeals noted that the admissibility of 911 calls must be made on a case-by-case basis.⁴⁰⁹ Although the recording could be described as testimonial, given its detailed description of what the defendant was doing, the primary purpose of the call was to prevent immediate harm to the public rather than to establish evidentiary facts for a future prosecution.⁴¹⁰ The fact that the caller repeatedly said that the driver of the vehicle was drunk did not turn his statements into testimonial statements.⁴¹¹ Clearly, the court concluded, the caller was attempting to convey the urgency of the situation to dispatchers.⁴¹² Thus, *Crawford* did not bar the admission of the recording.⁴¹³

A somewhat humorous example of nontestimonial statements to a law enforcement officer is found in *Stewart v. State*.⁴¹⁴ In *Stewart* deputy sheriffs intending to serve a protective order and a warrant for probation violation stumbled upon what appeared to be the defendant's drug trafficking operation.⁴¹⁵ While the deputies were in the defendant's apartment, the phone repeatedly rang.⁴¹⁶ In response to the first several calls, a deputy simply told callers requesting a "hook-up" that "now is not a good time."⁴¹⁷ After a while, the deputy began engaging callers in conversation and in response to their requests for "either \$30 or \$40 . . . worth," the deputy told them to "go ahead and come on

405. *Id.*

406. *Id.*

407. *Id.* (ellipsis in original).

408. *Id.* at 322, 657 S.E.2d at 278-79.

409. *Id.* at 319, 657 S.E.2d at 276 (quoting *Pitts*, 280 Ga. at 289, 627 S.E.2d at 19).

410. *Id.* at 320, 657 S.E.2d at 277.

411. *Id.*

412. *Id.*

413. *Id.*

414. 285 Ga. App. 760, 647 S.E.2d 411 (2007).

415. *Id.* at 760, 647 S.E.2d at 413.

416. *Id.* at 761, 647 S.E.2d at 413.

417. *Id.*

over.”⁴¹⁸ People, presumably the callers, subsequently arrived at the apartment but promptly left after encountering the deputies. The trial court ruled that one of the deputy’s testimony about the unknown callers’ statements was admissible as part of the *res gestae*.⁴¹⁹

Although previous surveys have questioned whether the *res gestae* exception (which as Judge Ruffin put it, is the “grand octopus of the law, which stretches its clinging tentacles to anything and everything a party says during the commission of an act, or so near thereto [and] has been both a reliable and unreliable exception to the hearsay rule”⁴²⁰) can be used to circumvent *Crawford*,⁴²¹ clearly the statements made by the callers to the deputy were not testimonial. Whether the statements should have been admitted pursuant to the *res gestae* exception may be another question, but they were not made with the expectation that they would be used in further proceedings.

The question of whether the *res gestae* doctrine trumps *Crawford* was addressed, in an odd sort of way, by the court of appeals during the survey period in *Cuyuch v. State*⁴²² and by the Georgia Supreme Court shortly after the conclusion of the survey period, in its opinion reversing the court of appeals decision in *Cuyuch*.⁴²³ The odd thing about the decisions is that the court of appeals majority opinion never once mentions *Crawford* and the unanimous supreme court decision never mentions the *res gestae* doctrine. In *Cuyuch* the defendant contended that the trial court erroneously admitted out of court statements identifying him as the perpetrator of an assault. The victim, a sixteen-year-old who had been stabbed, approached a police officer and told the police officer that his roommate had cut him. At a nearby house, officers found the defendant and a third man. The third man, who apparently did not speak English, told officers through an interpreter that the defendant had stabbed the victim. He directed the officers to a knife that he said the defendant used. Neither the victim nor the witness testified, but the trial court allowed police officers to recount what they had heard from the victim and the witness.⁴²⁴

On appeal, the court of appeals noted that the defendant contended the trial court erred “in admitting the alleged double hearsay of a translator, who was translating a witness’s statements, in violation of

418. *Id.*

419. *Id.* at 761-62, 647 S.E.2d at 413-14; O.C.G.A. § 24-3-3 (1995).

420. *White v. State*, 265 Ga. App. 117, 117, 592 S.E.2d 905, 906 (2004).

421. Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 187, 215 (2005).

422. 286 Ga. App. 629, 649 S.E.2d 856 (2007).

423. *Cuyuch v. State*, 284 Ga. 290, 667 S.E.2d 85 (2008).

424. *Cuyuch*, 286 Ga. App. at 630-31, 649 S.E.2d at 857-58.

his Sixth Amendment rights.⁴²⁵ However, the court of appeals opinion never again mentions the Sixth Amendment, concluding only that the witness's statements through the translator were admissible as part of the *res gestae*.⁴²⁶ A unanimous supreme court, relying on *Crawford*, reversed.⁴²⁷ While the supreme court did not mention the *res gestae* doctrine or the court of appeals reliance on the *res gestae* doctrine, its opinion makes clear that simply labeling a statement part of the *res gestae* does not cure Sixth Amendment infirmities.⁴²⁸ The question is whether or not the statements are testimonial in nature.⁴²⁹ With regard to the victim's statements, the court assumed that his statement that he had been cut by his roommate who was still at his home were made to enable officers to address an emergency and thus were not testimonial.⁴³⁰ However, the victim's identification of defendant at the crime scene was, to the court, clearly testimonial because it was intended "to establish past facts with a view to a future prosecution."⁴³¹

With regard to the witness's statements, the court acknowledged that the officers asking the questions thought they were dealing with an ongoing emergency.⁴³² The question, however, is not whether the officers, when asking questions, thought they were dealing with an emergency, but whether the declarant, when answering those questions, is providing information to allow the officer to deal with an ongoing emergency or whether he is describing past events that implicate someone. Clearly, the witness's statements were not made to avert any emergency created by the defendant because the uncontradicted testimony established that the defendant was calmly sitting on the couch watching television throughout the exchange.⁴³³ The witness's statements leading the officers to the knife and establishing that the defendant used the knife to stab the victim were not intended to allow the officers to address an emergency situation, but rather provided a description of past events and identified the defendant as the perpetrator of a past crime.⁴³⁴ In effect, the witness was providing testimony

425. *Id.* at 629, 649 S.E.2d at 857.

426. *Id.* at 634, 649 S.E.2d at 860.

427. *Cuyuch*, 284 Ga. at 290, 667 S.E.2d at 87.

428. *See id.*

429. *Id.* at 293, 667 S.E.2d at 89.

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.* at 294, 667 S.E.2d at 89.

434. *Id.*

against the defendant.⁴³⁵ Consequently, the witness's statements were testimonial in nature and thus inadmissible.⁴³⁶

As noted in last year's survey,⁴³⁷ the court of appeals in *Little v. State*,⁴³⁸ dodged a *Crawford* challenge to the admissibility of out-of-court testimonial statements made to a police officer by holding that the statements were admissible to explain the conduct of the police officer.⁴³⁹ Georgia courts, quite properly, have long been skeptical of the "explain conduct" exception to the hearsay rule in criminal cases.

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. If the hearsay rule is to remain a part of our law, then § OCGA [sic] 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.⁴⁴⁰

Simply put, virtually any statement by an anonymous declarant can be said to explain the conduct of law enforcement, and surely the "explain conduct" exception was never intended to warrant the wholesale admission of these prejudicial and suspiciously self-serving statements.

Yet the court of appeals, during the current survey period, returned to the explain conduct exception in *Jennings v. State*⁴⁴¹ to reject a contention that the trial court, in violation of *Crawford*, admitted testimonial hearsay.⁴⁴² In *Jennings* the defendant contended that the victim should not have been allowed to testify that he gave the defendant's name to investigating officers. The defendant contended that the victim somehow got his name through unidentified sources, presumably law enforcement sources. Thus, the defendant contended that the victim's testimony identifying the defendant by name was hearsay because it was not based on the victim's personal knowledge of

435. *Id.*

436. *Id.*

437. Marc T. Treadwell, *Evidence*, 59 MERCER L. REV. 157, 186 (2007).

438. 280 Ga. App. 60, 633 S.E.2d 403 (2006).

439. *Id.* at 64, 633 S.E.2d at 406.

440. *Teague v. State*, 252 Ga. 534, 536, 314 S.E.2d 910, 912 (1984) (emphasis in original); *see also Britton v. State*, 257 Ga. App. 441, 442, 571 S.E.2d 451, 453 (2002) (reversing the defendant's conviction because the trial court, on the basis of explaining conduct, erroneously admitted testimony that an anonymous informant told a detective the defendant would be driving a particular vehicle and would have concealed money and drugs under a false bottom in the defendant's console).

441. 285 Ga. App. 774, 648 S.E.2d 105 (2007).

442. *Id.* at 774, 648 S.E.2d at 106.

the defendant's name. The trial court reasoned that the testimony identifying the defendant by name was not offered to prove the truth of a matter (for example, that the defendant was the perpetrator) but to explain why the police included the defendant's photograph in the lineup.⁴⁴³ Because *Crawford* “does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted,” a statement offered to explain conduct does not violate the Sixth Amendment.⁴⁴⁴ Because the opinion does not state specifically how the victim obtained the defendant's name, it is difficult to say whether the victim's testimony disclosing the name was testimonial hearsay. However, the victim was clearly recounting an out-of-court statement by some unidentified party.⁴⁴⁵ While this hearsay may explain why officers put the defendant's photograph in the lineup, it surely can be questioned why it was necessary to explain the officer's conduct in that regard.

On the other hand, the court of appeals in *Doyal v. State*,⁴⁴⁶ relying on *Teague v. State*,⁴⁴⁷ held that a trial court erroneously admitted a police officer's testimony that he told the defendant that he had received information that she was selling drugs.⁴⁴⁸ While it may have been true that the statement was made in the defendant's presence, “the fact that the officer made the statement in [the defendant's] presence was not relevant to any material issue in the case.”⁴⁴⁹

The Sixth Amendment right of confrontation reaffirmed in *Crawford* applies, of course, only to criminal proceedings.⁴⁵⁰ During the current survey period, the court of appeals returned to the issue of whether *Crawford* applies to probation revocation proceedings. In *Ware v. State*,⁴⁵¹ the court of appeals granted the defendant's application for discretionary appeal to consider whether the trial court, in violation of *Crawford*, improperly admitted hearsay evidence during her revocation hearing.⁴⁵² In *Ware* the defendant's husband, the alleged victim, asserted his marital privilege and refused to testify, and thus the only testimony supporting the defendant's probation revocation was provided

443. *Id.* at 776, 648 S.E.2d at 107.

444. *Id.* (quoting *Crawford*, 541 U.S. at 59 n.9).

445. *See id.* at 775-76, 648 S.E.2d at 107.

446. 287 Ga. App. 667, 653 S.E.2d 52 (2007).

447. 252 Ga. 534, 314 S.E.2d 910 (1984).

448. *Doyal*, 287 Ga. App. at 669, 653 S.E.2d at 55.

449. *Id.*, 653 S.E.2d at 56.

450. U.S. CONST. amend VI.

451. 289 Ga. App. 860, 658 S.E.2d 441 (2008).

452. *Id.* at 860, 658 S.E.2d at 443.

by a police officer.⁴⁵³ Relying on the Georgia Supreme Court's decision in *Williams v. Lawrence*,⁴⁵⁴ the trial court held that *Crawford* is not applicable to probation revocation proceedings and that the testimony was admissible as part of the res gestae and, perhaps, pursuant to the necessity exception to the hearsay rule.⁴⁵⁵ The court of appeals acknowledged that the defendants in revocation proceedings are not entitled to "the full panoply of procedural safeguards associated with a criminal trial."⁴⁵⁶ Thus, the court of appeals agreed that the confrontation clause did not necessarily require the exclusion of the hearsay evidence admitted by the trial court.⁴⁵⁷ However, the supreme court in *Williams* also held that a defendant in a revocation proceeding does have due process rights that include a limited right of confrontation.⁴⁵⁸ Thus, although the right of confrontation in probation revocation proceedings may be less vigorous than the Sixth Amendment's right to confront witnesses, the court must consider whether the hearsay evidence violates the defendant's due process rights.⁴⁵⁹ In *Ware* the trial court simply held that *Crawford* did not apply to revocation proceedings but did not consider whether there was good cause for not allowing the defendant to confront the witness providing evidence against her in her revocation proceeding.⁴⁶⁰ This, the court concluded, was error.⁴⁶¹ The trial court "should have considered the secondary issue of whether there was good cause for not allowing the confrontation and ensured that [the defendant] had been afforded the minimum protections of due process."⁴⁶²

B. Necessity Exception

Although the case of *Crawford* dramatically limited the scope of Georgia's necessity exception, the necessity exception can still be used in situations when *Crawford* is not applicable.⁴⁶³ Georgia courts apply a three-part test to determine the admissibility of statements under the necessity exception: "[1] the declarant must be unavailable to testify; [2]

453. *Id.*

454. 273 Ga. 295, 540 S.E.2d 599 (2001).

455. *Ware*, 289 Ga. App. at 861, 658 S.E.2d at 444.

456. *Id.* at 861, 658 S.E.2d at 444 (quoting *Meadows v. Settles*, 274 Ga. 858, 859, 561 S.E.2d 105, 107 (2002)).

457. *Id.* at 862, 658 S.E.2d at 444.

458. *Id.*; *Williams*, 273 Ga. at 298, 540 S.E.2d at 603.

459. *Ware*, 289 Ga. App. at 862, 658 S.E.2d at 444.

460. *Id.*

461. *Id.*

462. *Id.* at 863, 658 S.E.2d at 445.

463. See *Miller v. State*, 283 Ga. 412, 415 n.9, 658 S.E.2d 765, 767 n.9 (2008).

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."⁴⁶⁴ The supreme court's decision in *Navarrete v. State*⁴⁶⁵ provides a good illustration of necessity exception analysis. In *Navarrete*, a highly publicized case arising from the murder of a Fort Benning soldier by his fellow soldiers, the defendant contended that the trial court improperly admitted the hearsay testimony of an Army medic about a conversation he had with the victim while both were deployed to Iraq.⁴⁶⁶ The medic testified that the victim sought treatment for a wound to the back of his hand. According to the medic, the victim said that the defendant and a codefendant assaulted him and threatened to kill him. At the time of the conversation with the medic, the victim was extremely intoxicated. When the medic advised the victim to report the incident, he refused and said that if asked about the incident, he would lie rather than tell anybody the truth.⁴⁶⁷ The medic testified that at the time, he was not concerned enough to report the incident because he "thought it was just a 'drunk thing' and not really serious."⁴⁶⁸

The defendant contended that the victim's alleged statement to the medic was not sufficiently trustworthy to be admitted pursuant to the necessity exception, and the supreme court agreed.⁴⁶⁹ Even assuming, the court reasoned, that there was a sufficiently close relationship between the medic and the victim which would suggest that the victim would confide in the medic, other factors undercut the trustworthiness of the statement.⁴⁷⁰ First, the victim was drunk, and even the medic did not take the matter seriously; second, the victim's statement suggested that he was drunk at the time of his injury as well; third, the victim acknowledged that he would lie about the incident rather than tell the truth, an indication to the court that the victim lacked veracity.⁴⁷¹ Accordingly, considering the "totality of the circumstances," the court concluded that the trial court abused its discretion when it admitted the victim's hearsay statement.⁴⁷² The error, however, was harmless.⁴⁷³

464. Marc T. Treadwell, *Evidence*, 55 MERCER L. REV. 249, 265 (2003).

465. 283 Ga. 156, 656 S.E.2d 814 (2008).

466. *Id.* at 156, 656 S.E.2d at 816.

467. *Id.* at 158, 656 S.E.2d at 817-18.

468. *Id.* at 159, 656 S.E.2d at 818.

469. *Id.*

470. *Id.*

471. *Id.* at 159-60, 656 S.E.2d at 818.

472. *Id.* at 160, 656 S.E.2d at 819.

473. *Id.* at 161, 656 S.E.2d at 819.

In 2001, three years before the United States Supreme Court decision in *Crawford*, the Georgia Supreme Court put a stop, or so it seemed, to a practice that likely would not have survived *Crawford*'s prohibition against the use of testimonial hearsay. Prior to 2001, Georgia courts had long recognized that “[a] law enforcement officer is permitted to testify to a vocal fact of identification witnessed by himself without its being subject to a hearsay objection.”⁴⁷⁴ Thus, an investigator could testify that witnesses picked a defendant from a lineup even though those witnesses did not testify at trial.⁴⁷⁵ In *White v. State*,⁴⁷⁶ the supreme court overruled this longstanding precedent.⁴⁷⁷ “In the absence of some other viable hearsay exception, such as ‘necessity’ or ‘res gestae,’ a law enforcement officer may not testify to a pre-trial identification of the accused unless the person who actually made the identification testifies at trial and is subject to cross-examination.”⁴⁷⁸ During the current survey period, the court of appeals in *Wyche v. State*⁴⁷⁹ reaffirmed this principle, holding that the trial court erred when it allowed a police officer to testify that two witnesses, neither of whom testified at trial, identified the defendant during a photographic lineup.⁴⁸⁰

The supreme court, however, struggled a bit with this issue in *Hall v. State*.⁴⁸¹ In *Hall* a police detective testified that a witness picked the defendant's photograph from a photographic lineup. The witness testified at trial but was unable, in court, to identify the defendant as the assailant. The witness, who testified before the detective, was not questioned about his out-of-court identification.⁴⁸² With no discussion other than a lengthy quote from its decision *In re L.J.P.*,⁴⁸³ the court held that the trial court did not err when it allowed the detective to testify about the witness's out-of-court identification of the defendant.⁴⁸⁴ In *L.J.P.* the court held that a witness's out-of-court identification of a defendant is admissible if the witness is available for cross-

474. *White v. State*, 244 Ga. App. 54, 55, 537 S.E.2d 364, 366 (2000) (quoting *Harper v. State*, 213 Ga. App. 444, 449, 445 S.E.2d 303, 308 (1994)).

475. *See Harper*, 213 Ga. App. at 449, 445 S.E.2d at 308.

476. 273 Ga. 787, 546 S.E.2d 514 (2001).

477. *Id.* at 787, 546 S.E.2d at 516.

478. *Id.* at 788, 546 S.E.2d at 516.

479. 291 Ga. App. 165, 661 S.E.2d 226 (2008).

480. *Id.* at 167, 661 S.E.2d at 229.

481. 282 Ga. 294, 647 S.E.2d 585 (2007).

482. *Id.* at 295-96, 647 S.E.2d at 587.

483. 277 Ga. 135, 137, 587 S.E.2d 15, 18 (2003).

484. *Hall*, 282 Ga. at 296, 647 S.E.2d at 587.

examination.⁴⁸⁵ The key point, as the supreme court in *White* made clear, is that the witness is available for cross-examination.⁴⁸⁶ Although not mentioned in *Hall*, the defendant likely argued that because the witness was not asked about his out-of-court identification and was excused before the detective testified, he was not, in fact, available for cross-examination. However, even if the court had acknowledged this argument, it is unlikely that the court's conclusion would have been any different. As courts have repeatedly held with regard to child hearsay, the confrontation clause does not require an effective cross-examination; it only requires that the witness be available for cross-examination.⁴⁸⁷

VII. AUTHENTICATION

Section 24-4-48 of the O.C.G.A.⁴⁸⁸ provides a procedure for the authentication of videotapes and other media when a person who can provide personal authentication is unavailable.⁴⁸⁹ The Georgia General Assembly enacted O.C.G.A. § 24-4-48 in 1996 allegedly to legislatively overrule the “silent witness” theory for admitting videotapes.⁴⁹⁰ The somewhat controversial silent witness theory appeared briefly in Georgia as the result of the Georgia Court of Appeals sharply divided decision in *State v. Berky*,⁴⁹¹ a decision discussed in some detail in a prior survey.⁴⁹² In *Berky* a majority of the court of appeals held that a videotape allegedly depicting the defendant driving under the influence of alcohol was admissible even though the police officer who shot the videotape had died and thus was unavailable to authenticate the videotape at trial.⁴⁹³ Adopting the silent witness theory, the court held that to authenticate the videotape, only three things are required: “(1) expert testimony establishing that the videotape had not been altered or manipulated; (2) testimony establishing the date and place the videotape was taken; and (3) testimony establishing the

485. *In re L.J.P.*, 277 Ga. at 137, 587 S.E.2d at 18.

486. *Id.* at 136, 587 S.E.2d at 17; *White*, 273 Ga. at 788, 546 S.E.2d at 516.

487. *E.g.*, *In re S.S.*, 281 Ga. App. 781, 782, 637 S.E.2d 151, 153 (2006); Marc T. Treadwell, *Evidence*, 59 MERCER L. REV. 157, 188-89 (2007).

488. O.C.G.A. § 24-4-48 (Supp. 2008).

489. *See id.*

490. *See* *Ross v. State*, 262 Ga. App. 323, 327, 585 S.E.2d 666, 670 (2003). The silent witness theory “requires authentication of a videotape where no witness is available to testify.” *Mobley v. State*, 255 Ga. App. 263, 264, 564 S.E.2d 851, 853 (2002).

491. 214 Ga. App. 174, 447 S.E.2d 147 (1994), *vacated*, 266 Ga. 28, 463 S.E.2d 891 (1995).

492. Marc T. Treadwell, *Evidence*, 47 MERCER L. REV. 127, 150-51 (1995).

493. *Berky*, 214 Ga. App. at 177, 447 S.E.2d at 150.

identity of the relevant participants depicted.”⁴⁹⁴ Writing for four dissenting judges, Judge Banke criticized the majority for abandoning a “well-settled rule of evidence, apparently in reaction to the pathetic event of the arresting officer’s subsequent death in the line of duty.”⁴⁹⁵ Although the Georgia Supreme Court granted certiorari in *Berky*, it vacated the court of appeals decision on jurisdictional grounds and did not reach the issue of whether the court of appeals properly adopted the silent witness rule.⁴⁹⁶

On remand to the court of appeals, which typically yields only a brief opinion acknowledging that the court is bound to vacate its opinion because of reversal by the supreme court, Judge Blackburn, writing for four court of appeals judges, wrote a fairly lengthy opinion critical of the supreme court’s ruling on the jurisdictional issue but also commenting on the status of the silent witness theory.⁴⁹⁷ Judge Blackburn noted that in view of the supreme court’s decision, it would not be possible for the prosecution to appeal the court of appeals’ adoption of the silent witness theory.⁴⁹⁸ However, Judge Blackburn acknowledged the interim enactment of O.C.G.A. § 24-4-4: “Although not before us in the present case, we are pleased to note that the 1996 legislature passed and the Governor signed House Bill 1235 . . . which provides for the admissibility of photographs, motion pictures, videotapes, and audio recordings where the authenticating witness is unavailable.”⁴⁹⁹

While the court of appeals may have welcomed the enactment of O.C.G.A. § 24-4-48, it is clear that the statute rejects the silent witness theory and allows only two avenues for the admission of videotapes and other media when authentication witnesses are unavailable.⁵⁰⁰ Section 24-4-48(c) of the O.C.G.A.⁵⁰¹ addresses videotapes made automatically, such as store surveillance cameras.⁵⁰² Section 24-4-48(b)⁵⁰³ addresses all other circumstances when an authenticating witness is unavailable, providing that when necessitated by the unavailability of an authenticating witness, videotapes and other media are only admissible “when the court determines, based on competent evidence presented to

494. *Id.* at 176, 447 S.E.2d at 149.

495. *Id.* at 177, 447 S.E.2d at 150 (Banke, J., dissenting).

496. *Berky v. State*, 266 Ga. 28, 463 S.E.2d 892 (1995).

497. *State v. Berky*, 222 Ga. App. 151, 473 S.E.2d 590 (1996).

498. *Id.* at 153, 473 S.E.2d at 591.

499. *Id.*

500. *See* O.C.G.A. § 24-4-48(b)-(c).

501. O.C.G.A. § 24-4-48(c) (Supp. 2008).

502. *See id.*

503. O.C.G.A. § 24-4-48(b) (Supp. 2008).

the court, that such items tend to show reliably the fact or facts for which the items are offered.”⁵⁰⁴

Subsection (b), until the current survey period, has not received any substantive attention. In *Smith v. State*,⁵⁰⁵ the trial court admitted a tape allegedly made by the defendant of his molestation victims. The tape consisted of three segments. The first and third segments depicted two of the victims, both of whom testified at trial, while they were awake. The second segment depicted one of the victims sleeping while partially nude. That segment focused on both the child’s breasts and vaginal area. The trial court admitted the videotape based on testimony from an investigator who identified the victim in the second segment and who testified that she recognized the defendant’s voice, which was heard during the second segment.⁵⁰⁶ Further, an investigator testified the defendant told her that during the second segment, “he was trying to figure out how to use the camera, ‘especially the zoom in and the zoom out,’” thus acknowledging that he shot the videotape.⁵⁰⁷ The defendant did not testify at trial, and therefore he clearly was not available to authenticate the videotape.⁵⁰⁸

The court of appeals held that the officer’s testimony was sufficient to meet the requirements of O.C.G.A. § 24-4-48(b), at least with regard to the second segment.⁵⁰⁹ However, O.C.G.A. § 24-4-48 could not serve as the basis for the authentication of the first and third segments because the victims were awake and thus presumably could have authenticated those portions of the videotape.⁵¹⁰ Because an authenticating witness was available, O.C.G.A. § 24-4-48 did not apply.⁵¹¹ Unfortunately for the defendant, he only objected to the admission of the videotape as a whole and not to the specific segments. Because one portion of the videotape was admissible and because the defendant only objected to the admissibility of the videotape in its entirety rather than those particular segments that were not properly authenticated, it was not error to admit the entire videotape.⁵¹² Thus, the court of appeals applied to videotapes the rule that has long applied when a document contains both admissible and inadmissible information.⁵¹³ In those

504. *Id.*

505. 285 Ga. App. 658, 647 S.E.2d 346 (2007).

506. *Id.* at 658-59, 647 S.E.2d at 348.

507. *Id.* at 660, 647 S.E.2d at 349 (internal quotation marks omitted).

508. *Id.* at 659, 647 S.E.2d at 348.

509. *Id.*

510. *Id.* at 660, 647 S.E.2d at 349.

511. *Id.*

512. *Id.*

513. *See id.*

□

circumstances, a party must object to the specific portions of the document that are inadmissible, and absent such an objection, it is not error to admit the document as a whole.⁵¹⁴

514. See *Corbett v. State*, 266 Ga. 561, 564, 468 S.E.2d 757, 761 (1996); see also Marc T. Treadwell, *Evidence*, 49 *MERCER L. REV.* 149, 151 (1997).