

# Evidence

by Marc T. Treadwell\*

## I. INTRODUCTION

Every Georgia attorney and trial court judge ought to set aside the time to read every Georgia appellate court opinion on the subject of evidence (or, for that matter, any other selected subject) rendered during a given period of a year. The feel that one acquires for the attitude of the appellate courts of Georgia is interesting. Most though, will not have the time for such projects, so that to read someone else's selections and comments may be of some benefit. It will not, however, give the "feel" that one acquires through an individual reading of the cases.<sup>1</sup>

This was former Georgia Supreme Court justice, former superior court judge, and preeminent trial lawyer Hardy Gregory Jr.'s introduction to his 1978 survey of evidence decisions for the *Mercer Law Review*. As always, Justice Gregory got it right; there is no substitute for reading cases. Today, the sheer volume of cases and our technological ability to ferret out key words makes it even less likely we read an entire case, much less all cases in a given area. This Survey, although perhaps a helpful tool to get you part of the way to where you want to be, is no substitute for a lawyer's own careful reading of the law. Perhaps the

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\* Partner in the firm of Adams, Jordan & Treadwell, Macon, Georgia. Valdosta State University (B.A., 1978); Mercer University, Walter F. George School of Law (J.D., cum laude, 1981). Member, Mercer Law Review (1979-1981); Fifth Circuit Survey Editor (1980-1981). Member, State Bar of Georgia.

The Author wishes to express his gratitude to his longtime assistant, Heatherlee Hammonds. Ms. Hammonds has keyed approximately twenty of the Author's survey articles, and she has become at least as proficient as many law students and more proficient than most lawyers in the intricacies of citation form. Her expert assistance makes the task much easier, and for that, I am truly grateful.

1. Hardy Gregory Jr., *Evidence, Annual Survey of Georgia Law*, 30 MERCER L. REV. 91 (1978).

best examples of this difficulty are cases interpreting and applying Georgia's *Daubert*<sup>2</sup> statute.<sup>3</sup> While the Author has spent a lot of time, perhaps too much time, trying to summarize these decisions, to truly understand or get a feel for what the courts are doing in this critical area, one must read the cases. This Article surveys developments in Georgia evidence law during the period of June 1, 2008 to May 31, 2009.<sup>4</sup>

## II. PRESUMPTIONS

The destruction of evidence by a party can give rise to a presumption that the evidence would have been harmful to that party,<sup>5</sup> a presumption generally referred to as the "spoliation" presumption or the "adverse inference" presumption.<sup>6</sup> As discussed in last year's survey, trial courts can also impose additional sanctions for spoliation of evidence.<sup>7</sup> During the current survey period, the Georgia Court of Appeals returned to the issue of whether a finding of bad faith or misconduct is a necessary prerequisite to the imposition of spoliation sanctions. This question has been frequently raised in Georgia's appellate courts and the United States Court of Appeals for the Eleventh Circuit, but it is now settled that bad faith is unnecessary to impose sanctions, although the degree of a party's culpability is a factor the trial court should take into account.<sup>8</sup>

In *AMLI Residential Properties, Inc. v. Georgia Power Co.*,<sup>9</sup> the plaintiff contended that its property had been destroyed by a fire that resulted from Georgia Power Company's negligence in maintaining and operating electrical equipment that provided power to the plaintiff's building. During a series of inspections conducted to determine the cause of the fire, the plaintiff focused on two ground rods. The plaintiff

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2. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

3. O.C.G.A. § 24-9-67.1 (Supp. 2009).

4. For analysis of Georgia evidence law during the prior survey period, see Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 60 MERCER L. REV. 135 (2008).

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, Eleventh Circuit Survey*, 49 MERCER L. REV. 1027, 1031-32 (1998); Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 49 MERCER L. REV. 149, 151-52 (1997).

7. Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 60 MERCER L. REV. 135, 136-38 (2008).

8. See Marc T. Treadwell, *Evidence, Eleventh Circuit Survey*, 57 MERCER L. REV. 1083, 1091 (2006); Marc T. Treadwell, *Evidence, Eleventh Circuit Survey*, 49 MERCER L. REV. 1027, 1031-32 (1998).

9. 293 Ga. App. 358, 667 S.E.2d 150 (2008).

concluded that it would be necessary to excavate one of the ground rods for testing and informed Georgia Power of its intention to do so. However, before the scheduled excavation, a contractor retained by the plaintiff removed a portion of one ground rod. At the scheduled excavation, an excavator was unable to remove the remainder of the ground rod. Still, the plaintiff did not inform Georgia Power that a portion had already been removed. The plaintiff then conducted metallurgical testing on the removed portion, and its experts concluded that although the ground rod was exposed to heat, it was not exposed to fire, a conclusion that implicated Georgia Power. Because the plaintiff did not inform Georgia Power of the removal or the destructive testing of the ground rod, Georgia Power moved in limine to preclude the plaintiff from introducing any evidence relating to the ground rod. Georgia Power then moved for summary judgment, contending that the plaintiff could not establish causation without any evidence relating to the ground rod. The trial court granted both motions.<sup>10</sup>

On appeal, the plaintiff argued that spoliation sanctions were not appropriate because neither its experts nor its attorneys acted in bad faith.<sup>11</sup> The court of appeals disagreed, noting that exclusionary sanctions for spoliation of evidence may be appropriate even when a party has not acted in bad faith.<sup>12</sup> However, the degree of culpable conduct is a factor in the determination of whether sanctions are appropriate.<sup>13</sup> The court contrasted, on the one hand,

“the accidental, random, or unintended dissipation of evidence by persons having no interest in its preservation,” and those cases where “a party knowledgeable of litigation strategy, tactics, and policies who invokes the aid and jurisdiction of the Court and its processes . . . acted *unfairly* to preclude the opportunity of an adversary to be apprised of the existence of a defense to a plaintiff’s claims.”<sup>14</sup>

In *AMLI* the court of appeals concluded that the plaintiff’s removal of the ground rod and its subsequent destructive testing, without notice to Georgia Power, was wrongful even though not found to be in bad

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10. *Id.* at 358–61, 667 S.E.2d at 152–53.

11. *Id.* at 361, 667 S.E.2d at 154.

12. *Id.* at 363, 667 S.E.2d at 155.

13. *Id.* at 363 n.2, 667 S.E.2d at 155 n.2.

14. *Id.* at 363, 667 S.E.2d at 155 (alteration in original) (quoting *N. Assurance Co. v. Ware*, 145 F.R.D. 281, 284 (D. Me. 1993)). The court of appeals in *Chapman v. Auto Owners Insurance Co.* relied on *Ware* to formulate Georgia’s five-factor test for the imposition of sanctions for spoliation. 220 Ga. App. 539, 542, 469 S.E.2d 783, 785 (1996).

faith.<sup>15</sup> Considering the relative culpability of the parties, spoliation sanctions were appropriate.<sup>16</sup>

### III. RELEVANCY

#### A. *Extrinsic Act Evidence*

Since the Author began surveying evidence decisions for the *Annual Survey of Georgia Law* in 1988,<sup>17</sup> the most frequently encountered evidence issue has almost certainly been whether “extrinsic act evidence” is relevant. Extrinsic act evidence is evidence of conduct on occasions other than the occasion at issue, and it is offered as substantive evidence, as opposed to impeachment evidence.<sup>18</sup> Generally, extrinsic act evidence is irrelevant and, thus, inadmissible.<sup>19</sup> This makes sense; generally, defendants should be convicted based on evidence of what they did on the occasion at issue, not upon what they did five, ten, or fifteen years earlier. Nevertheless, like the rule against hearsay, the rule against extrinsic act evidence is known more for its exceptions than its flat prohibition. Most commonly, evidence of completely separate but nonetheless similar transactions “may be introduced to prove identity, motive, plan, scheme, bent of mind and course of conduct.”<sup>20</sup> This can make sense as well; if a defendant committed an act that is so similar to the charged offense that evidence of the prior events tends to prove he committed the charged offense, then that evidence should be admitted. However, criminal defense lawyers from scarcely more than a generation or two ago would hardly recognize the state of today’s law regarding extrinsic act evidence. Georgia’s appellate courts, however, “do not

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15. *AMLI*, 293 Ga. App. at 364, 667 S.E.2d at 155.

16. *Id.*, 667 S.E.2d at 156. Although the court in *AMLI* relied in part on the fact that the evidence was destroyed by the plaintiff, who had the burden of proof, exclusionary spoliation sanctions are not limited to parties bearing the burden of proof. See Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 60 MERCER L. REV. 135, 136–38 (2008) (discussing the severe sanctions imposed against defendants who destroyed evidence).

17. Marc T. Treadwell, *Evidence, Eleventh Circuit Survey*, 39 MERCER L. REV. 1259 (1988).

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

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

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

concede, as suggested by some, that the exceptions have swallowed the rule of inadmissibility of separate crimes.”<sup>21</sup>

During the current survey year, the criminal defense bar made its strongest, but nevertheless unsuccessful, effort yet to limit the use of extrinsic act evidence. First, in *Wade v. State*,<sup>22</sup> the defendant in a DUI case tried to present the court of appeals with a tailor-made opportunity to change Georgia’s extrinsic act evidence rule. The defendant agreed to a bench trial on stipulated facts precisely so she could appeal the admission of evidence of a prior conviction for driving under the influence of alcohol “to show [the defendant’s] bent of mind and course of conduct.”<sup>23</sup> The defendant’s appeal to the court of appeals found a sympathetic ear. The court acknowledged that Georgia law had evolved to the point that evidence of similar transactions was admissible to show, among other things, bent of mind.<sup>24</sup> The defendant argued such evidence was particularly prejudicial in a DUI case “because the State does not need evidence of a prior act to show motive, intent, identity, plan, scheme, or other generally accepted rationale for admitting such evidence.”<sup>25</sup>

The court of appeals acknowledged that Georgia is the only state to allow the admission of similar transaction evidence to prove bent of mind and quoted Justice Sears’s concern that “a person’s ‘bent of mind is dangerously close to being his character, and a person’s course of conduct could easily show nothing more than a mere propensity to act in a certain manner.’”<sup>26</sup> Justice Sears’s use of the word “propensity” is significant. Federal courts, in determining whether extrinsic act evidence is admissible under Federal Rule of Evidence 404(b),<sup>27</sup> often look to see if the extrinsic act is merely propensity evidence, the admission of which is not allowed.<sup>28</sup> Georgia takes a different view. In *Carr v. State*,<sup>29</sup> Judge Eldridge noted that Georgia courts have

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21. *Farley v. State*, 265 Ga. 622, 626, 458 S.E.2d 643, 647 (1995) (quoting *State v. Johnson*, 246 Ga. 654, 655, 272 S.E.2d 321, 322 (1980)).

22. 295 Ga. App. 45, 670 S.E.2d 864 (2008).

23. *Id.* at 46, 670 S.E.2d at 865.

24. *Id.* at 47, 670 S.E.2d at 865.

25. *Id.*, 670 S.E.2d at 866.

26. *Id.* at 48, 670 S.E.2d at 866 (quoting *Farley*, 265 Ga. at 630, 458 S.E.2d at 650 (Sears, J., concurring specially)).

27. FED. R. EVID. 404(b).

28. See Marc T. Treadwell, *Evidence, Eleventh Circuit Survey*, 57 MERCER L. REV. 1083, 1092 (2006).

29. 251 Ga. App. 117, 553 S.E.2d 674 (2001).

specifically held that “‘propensity’ can be a sufficient basis for the admission of a similar transaction.”<sup>30</sup>

In *Wade* the court of appeals seemed to agree that the pendulum had swung too far, and the court openly questioned whether the broad admission of evidence of conduct on other occasions should continue.<sup>31</sup> However, as the court explained, its hands were tied. “Nevertheless, we are not authorized to depart from the precedent of the Supreme Court of Georgia authorizing the bent of mind rationale for admitting similar transaction evidence,” and thus, the court affirmed the defendant’s conviction.<sup>32</sup> Clearly, the court of appeals was asking the Georgia Supreme Court to grant certiorari and fix the problem, but the supreme court, without comment, denied certiorari on April 28, 2009.<sup>33</sup>

However, a sharply divided supreme court weighed in on the issue in *Payne v. State*.<sup>34</sup> In *Payne* the defendant, who was convicted of molesting his eleven-year-old stepdaughter on multiple occasions, contended that the trial court erred when, to prove bent of mind and course of conduct, it admitted evidence that in 1994 he sexually assaulted a woman with whom he had previously lived.<sup>35</sup> The court of appeals affirmed the defendant’s conviction, and the supreme court granted certiorari.<sup>36</sup> Noting the similarity between the two offenses—the victims were females with whom the defendant had a prior relationship, both crimes were committed in the defendant’s home or a place where he had lived, both involved similar sexual acts, and both victims were restrained and threatened with physical violence—a four-justice majority of the supreme court held that the prior offense was sufficiently similar to be admissible to show the defendant’s bent of mind and course of conduct.<sup>37</sup>

In an opinion written by then-President Justice Hunstein, three justices strongly dissented,<sup>38</sup> decrying the erosion of the general rule prohibiting the admission of extrinsic act evidence and calling the majority’s opinion an example of “the extent to which this limited

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30. *Id.* at 121, 553 S.E.2d at 677 (Eldridge, J., concurring specially).

31. 295 Ga. App. at 48, 670 S.E.2d at 866–67.

32. *Id.* at 48–49, 670 S.E.2d at 866–67.

33. See Supreme Court of Georgia, Computerized Docketing System and Case Types, [http://www.gasupreme.us/docket\\_search/results\\_one\\_record.php?docr\\_case\\_num=S09C9568](http://www.gasupreme.us/docket_search/results_one_record.php?docr_case_num=S09C9568) (last visited Nov. 17, 2009).

34. 285 Ga. 137, 674 S.E.2d 298 (2009).

35. *Id.* at 137–38, 674 S.E.2d at 299.

36. *Id.* at 137, 674 S.E.2d at 299.

37. *Id.* at 138, 139, 674 S.E.2d at 300.

38. *Id.* at 139–40, 674 S.E.2d at 300 (Hunstein, P.J., dissenting).

exception has been stretched over time.”<sup>39</sup> While the dissent acknowledged that appellate courts have repeatedly held that the exception for extrinsic act evidence could be construed broadly in cases of sexual assault, it also stated that “we have never approved such an expansive construction as the majority adopts herein.”<sup>40</sup> Quoting *Farley v. State*,<sup>41</sup> just as the court of appeals did in *Wade*, the dissent worried that “bent of mind and course of conduct have evolved into amorphous catch-phrases, difficult to define and slippery in application.”<sup>42</sup>

In fact, Georgia courts have repeatedly noted that the bent of mind involved in sex crimes against children is unique, and a sexual assault against an adult woman cannot be used to prove a lustful disposition for children.<sup>43</sup> The question is, or is supposed to be, whether there is some logical connection between the alleged similar transaction and the charged offense so that the similar transaction tends to prove the defendant committed the charged offense, rather than simply to prove his bad character.<sup>44</sup> The dissent could not accept that a stale conviction for sexually assaulting a woman tended to prove the defendant molested his eleven-year-old stepdaughter.<sup>45</sup> Clearly, the fact the defendant was convicted of a prior sexual assault, regardless of the circumstances of the assault, would likely prejudice the jury against him.<sup>46</sup> The likelihood of prejudice was particularly acute in *Payne*, the dissent noted, because of the scant evidence—other than the victim’s changing stories—that the defendant was guilty of child molestation.<sup>47</sup>

By the end of the survey year, and notwithstanding the court of appeals effort in *Wade* and the strong dissent in *Payne*, the exceptions to the rule barring extrinsic act evidence remained as broad as ever.

Extrinsic act evidence can also be relevant in civil cases, although courts are generally much more reluctant to admit extrinsic act evidence in civil than in criminal cases. Superficially, this reluctance might seem odd; in criminal cases, in which freedom and potentially lives are at stake, one might suppose courts would be more circumspect in the admission of highly prejudicial extrinsic act evidence than in civil cases, which typically involve only monetary damages. However, upon closer

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39. *Id.* at 140, 674 S.E.2d at 301.

40. *Id.*

41. 265 Ga. 622, 458 S.E.2d 643 (1995).

42. 285 Ga. at 141, 674 S.E.2d at 302 (internal quotation marks omitted) (quoting *Farley*, 265 Ga. at 630, 458 S.E.2d at 650 (Sears, J., concurring specially)).

43. *Id.*, 674 S.E.2d at 301.

44. *See id.* at 142, 674 S.E.2d at 302.

45. *See id.*

46. *Id.*

47. *Id.*

scrutiny, it is evident why this is the case. Criminal cases typically involve intentional conduct and thus bring into play issues such as motive, scheme, identity, or intent. Thus, proof 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 a motive to commit the charged offense. Civil cases, on the other hand, typically involve issues of negligence or other unintentional acts. As a result, there are fewer legitimate reasons for the admission of extrinsic act evidence.

The question in either a civil or criminal case is whether the extrinsic act evidence is relevant to a legitimate issue in the case.<sup>48</sup> While the issues in play in criminal cases make it more likely that extrinsic act evidence may be relevant, civil cases can involve such issues as well. For example, as held during the survey period, evidence in a civil sexual harassment suit that an employee had sexually harassed others is admissible to demonstrate that the employer knew or should have known its employee posed a risk of repeating his misconduct.<sup>49</sup> Similarly, as acknowledged by the court of appeals during the survey period, in a civil suit against a bar for negligently failing to provide security, evidence of prior similar criminal activity on the premises can be admissible to prove the bar had received notice of the need to provide security.<sup>50</sup> However, the prior acts must be sufficiently similar.<sup>51</sup> Thus, the court of appeals held that evidence of criminal activity outside the bar was irrelevant to the plaintiff's claim that the bar failed to provide security against criminal activity inside the bar.<sup>52</sup>

Although the *res gestae* doctrine is typically thought of as an exception to the rule against hearsay, it also permits the admission of evidence of conduct that is not directly related to the transaction at issue but, nevertheless, has a sufficient temporal connection to the transaction at issue to be admitted as part of the *res gestae*.<sup>53</sup> The court of appeals illustrated this point, somewhat humorously, in *In re J.W.B.*<sup>54</sup> In *In re J.W.B.* the defendant, a juvenile who was adjudicated delinquent for certain violent behavior, contended that the trial court erred when it allowed witnesses to testify that the juvenile "dropped his pants in front

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48. See O.C.G.A. § 24-2-1 to -2 (1995).

49. *Ferman v. Bailey*, 292 Ga. App. 288, 290, 664 S.E.2d 285, 287-88 (2008).

50. *Vega v. La Movida, Inc.*, 294 Ga. App. 311, 312, 670 S.E.2d 116, 119 (2008).

51. *Id.*

52. *Id.* at 314, 670 S.E.2d at 120.

53. Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 57 MERCER L. REV. 187, 190 (2005).

54. 296 Ga. App. 131, 673 S.E.2d 630 (2009).

of female witnesses” after the altercation giving rise to the delinquency charges.<sup>55</sup> Not so, the court of appeals held.<sup>56</sup>

It is well settled in this state that acts are pertinent as a part of the *res gestae* if they are done pending the hostile enterprise, and if they bear upon it, are performed whilst it is in continuous progress to its catastrophe, and are of a nature to promote or obstruct, advance or retard it, or to evince essential motive or purpose in reference to it.<sup>57</sup>

In other words, dropping trou after a fight is part of the *res gestae*.<sup>58</sup>

### B. *Prejudice Versus Probative Value*

Federal Rule of Evidence 403<sup>59</sup> provides the overarching evidentiary principle that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.”<sup>60</sup> Although Georgia’s evidence code<sup>61</sup> does not contain an explicit general balancing test similar to Rule 403,<sup>62</sup> Georgia courts nevertheless sometimes apply such a test. For example, in *Ross v. State*,<sup>63</sup> the Georgia Supreme Court adopted the reasoning of the United States Supreme Court in *Old Chief v. United States*,<sup>64</sup> which limited, in very narrow circumstances, the generally broad right of the prosecution to present all facts relevant to the case.<sup>65</sup>

In *Old Chief*, the United States Supreme Court, relying on Rule 403, held that in a firearms possession case it is error for a trial court to admit evidence of the circumstances and nature of a defendant’s prior felony conviction upon which the firearm charge is based if that evidence would prejudice the jury.<sup>66</sup> In *Ross*, which also involved charges of

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55. *Id.* at 132, 673 S.E.2d at 631.

56. *Id.* at 133, 673 S.E.2d at 632.

57. *Id.* (internal quotation marks omitted) (quoting *Sypho v. State*, 175 Ga. App. 833, 834, 334 S.E.2d 878, 880 (1985)).

58. *Id.*

59. FED. R. EVID. 403.

60. *Id.*

61. O.C.G.A. tit. 24 (1995 & Supp. 2009).

62. *See id.* However, O.C.G.A. § 24-9-84.1 (Supp. 2009), which governs the use of convictions to impeach witnesses, incorporates a Rule 403 balancing test. *Id.*; *see also infra* text accompanying notes 130–46.

63. 279 Ga. 365, 614 S.E.2d 31 (2005). For additional discussion of this case, see Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 57 MERCER L. REV. 187, 197–98 (2005).

64. 519 U.S. 172 (1997); *Ross*, 279 Ga. at 368, 614 S.E.2d at 34.

65. *See Old Chief*, 519 U.S. at 191–92.

66. *Id.* at 190–92.

weapon possession by a convicted felon, the Georgia Supreme Court acknowledged that the State has a broad right to choose the evidence it wants to present to the jury and that “a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the [State] chooses to present it.”<sup>67</sup> However, in the very narrow circumstance when the prosecution simply needs to prove a person’s status as a convicted felon, there is no need for the jury to know the nature of the felony conviction.<sup>68</sup>

During the survey period, the defendant in *Mims v. State*<sup>69</sup> attempted to use *Ross* and *Old Chief* to exclude highly prejudicial evidence.<sup>70</sup> The defendant, a youth pastor, faced multiple charges arising from his rape of a minor who participated in his church youth group. Tragically, the minor became pregnant. After she underwent an abortion, investigators performed DNA testing on the aborted fetal material, which confirmed that the defendant impregnated the minor. To avoid the admission of this evidence, the defendant offered to stipulate that he engaged in sex with the minor. The defendant argued that this eliminated the need to admit DNA testing of the fetal material. Since that evidence was unnecessary, the defendant argued, there was no need for the jury to know the victim became pregnant and underwent an abortion. The defendant argued that this fell within the scope of *Ross*’s and *Old Chief*’s narrow exception to the broad right of prosecutors to present their case to the jury as they think best.<sup>71</sup> The court of appeals disagreed, noting that no case had extended *Ross* beyond the crime of possession of a firearm by a convicted felon.<sup>72</sup> In short, the court reiterated that criminal defendants cannot stipulate their way around the admission of prejudicial evidence outside the exception from *Old Chief*.<sup>73</sup> If the evidence is relevant to the prosecution’s case, the prosecution is entitled to present that evidence to the jury.<sup>74</sup>

### C. Relevancy, Generally

For those who primarily represent plaintiffs in tort actions, the Georgia Supreme Court’s decision in *Johnson v. Riverdale Anesthesia*

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67. 279 Ga. at 367, 614 S.E.2d at 33 (alteration in original) (quoting *Old Chief*, 519 U.S. at 186–87).

68. *Old Chief*, 519 U.S. at 191; *Ross*, 279 Ga. at 367, 614 S.E.2d at 34.

69. 291 Ga. App. 777, 662 S.E.2d 867 (2008).

70. *Id.* at 780–81, 662 S.E.2d at 870–71.

71. *Id.* at 777–81, 662 S.E.2d at 868–71.

72. *Id.* at 781, 662 S.E.2d at 871.

73. *See id.*

74. *See id.*

*Associates, P.C.*,<sup>75</sup> holding that a medical malpractice expert's personal practices are inadmissible,<sup>76</sup> and the Georgia General Assembly's adoption of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>77</sup> including "super" *Daubert* requirements for medical malpractice actions,<sup>78</sup> are two of the most troubling developments of the decade. Given these developments, some may find it ironic that the Georgia Supreme Court, relying on section 24-9-67.1 of the Official Code of Georgia Annotated (O.C.G.A.)<sup>79</sup>—Georgia's *Daubert* statute—has overruled *Johnson*.<sup>80</sup>

In *Johnson* a divided supreme court held that an expert witness in a medical negligence case could not be cross-examined about how he personally would have treated the plaintiff.<sup>81</sup> The defendant's expert in *Johnson* testified on direct examination that the defendant's conduct in the care of the plaintiff's wife met the applicable standard of care. The trial court refused to allow the plaintiff to cross-examine the expert about how he personally would have treated the decedent. According to the plaintiff's offer of proof, the expert would have testified that he personally would have treated the decedent in accordance with the standard of care advocated by the plaintiff's expert.<sup>82</sup> According to the dissent, the plaintiff also wanted to cross-examine the expert about how he taught his medical students to treat patients in similar situations.<sup>83</sup> A six-justice majority held that the trial court properly limited the plaintiff's cross-examination of the expert.<sup>84</sup> First, the court held that the testimony would not be relevant to establish the applicable standard of care because the standard of care is determined by the degree of care and skill required of a physician as ordinarily employed by the medical

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75. 275 Ga. 240, 563 S.E.2d 431 (2002).

76. *Id.* at 243, 563 S.E.2d at 434.

77. 509 U.S. 36 (1993).

78. As discussed below and in prior surveys, O.C.G.A. § 24-9-67.1 (Supp. 2009) codified the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 36 (1993) and added additional requirements for the admission of expert testimony in medical malpractice actions. See O.C.G.A. § 24-9-67.1; Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 60 MERCER L. REV. 135, 157, 160–70 (2008); Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 59 MERCER L. REV. 157, 172 (2007); Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 58 MERCER L. REV. 151, 168–69 (2006); Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 57 MERCER L. REV. 187, 205 (2005).

79. O.C.G.A. § 24-9-67.1 (Supp. 2009).

80. See *Condra v. Atl. Orthopaedic Group, P.C.*, 285 Ga. 667, 669, 681 S.E.2d 152, 154 (2009).

81. 275 Ga. at 242–43, 563 S.E.2d at 433–34.

82. *Id.* at 241, 563 S.E.2d at 432–33.

83. *Id.* at 244, 563 S.E.2d at 435 (Carley, J., dissenting).

84. *Id.* at 242, 563 S.E.2d at 433 (majority opinion).

profession generally.<sup>85</sup> Thus, the majority reasoned, what one doctor would do in a particular situation is not relevant to establish the standard of care required of the medical profession generally.<sup>86</sup> Nor was the testimony admissible to impeach the expert; how the expert would have treated the patient personally was irrelevant to the issue of the standard of care generally.<sup>87</sup>

Three justices dissented, arguing that the expert's personal practices were relevant to impeach the expert's testimony concerning the standard of care.<sup>88</sup> Clearly, the dissent argued, the fact that the expert would have treated the patient differently than what he contended was the applicable standard of care was admissible to impeach his testimony.<sup>89</sup> His testimony became particularly important impeachment evidence in view of the fact, not discussed by the majority, that the expert testified on direct examination that nothing could have been done to make the procedure safer for the plaintiff's wife.<sup>90</sup>

As reported in last year's survey,<sup>91</sup> the court of appeals in *Condra v. Atlanta Orthopaedic Group, P.C.*<sup>92</sup> returned to this issue and rejected the plaintiffs' argument that O.C.G.A. § 24-9-67.1 effectively overruled *Johnson*.<sup>93</sup> Specifically, the plaintiffs relied on O.C.G.A. § 24-9-67.1(f), which provides that so "the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states,"<sup>94</sup> Georgia courts should draw upon *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>95</sup> and its progeny when applying O.C.G.A. § 27-9-67.1.<sup>96</sup> The plaintiffs contended that under *Daubert* analysis, the expert's personal practices would be relevant to test the reliability of the expert's opinions.<sup>97</sup> The court of appeals rejected this argument, reasoning that the *Daubert* statute applied only "to the threshold question of whether a proposed expert witness is competent to testify"

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85. *Id.* at 242–43, 563 S.E.2d at 433–34.

86. *Id.*, 563 S.E.2d at 433.

87. *Id.*, 563 S.E.2d at 433–34.

88. *Id.* at 244, 563 S.E.2d at 434–35 (Carley, J., dissenting).

89. *Id.*, 563 S.E.2d at 435.

90. *See id.*

91. Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 60 MERCER L. REV. 135, 147 (2008).

92. 292 Ga. App. 276, 664 S.E.2d 281 (2008).

93. *Id.* at 279, 664 S.E.2d at 283.

94. O.C.G.A. § 24-9-67.1(f).

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

96. O.C.G.A. § 24-9-67.1(f); *Condra*, 292 Ga. App. at 278, 664 S.E.2d at 282–83.

97. *Condra*, 292 Ga. App. at 278, 664 S.E.2d at 282–83.

and did not address whether evidence is relevant to the applicable standard of care.<sup>98</sup>

The supreme court granted certiorari to address the question of whether the trial court properly prohibited plaintiffs “from inquiring at trial into the personal practices of defendants’ expert witnesses with respect to the medical treatment at issue.”<sup>99</sup> In reversing the court of appeals, the supreme court’s holding was both broad and clear—“evidence regarding an expert witness’ personal practices, unless subject to exclusion on other evidentiary grounds, is admissible both as substantive evidence and to impeach the expert’s opinion regarding the applicable standard of care.”<sup>100</sup> The court’s decision to reverse course on this issue was predicated primarily on the new *Daubert* statute, which places much emphasis on an expert’s “*actual professional knowledge and experience*” based on being “*regularly engaged in . . . [t]he active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge.*”<sup>101</sup> Given this language, the court held “there can be no dispute as to the relevance, post-Tort Reform Act,<sup>[102]</sup> of an expert’s personal experience and practice to the threshold inquiry into the expert’s qualifications.”<sup>103</sup> Indeed, “it would defy logic to find such experience categorically irrelevant in assessing the credibility of the expert’s testimony.”<sup>104</sup>

In a rather unusual way, the court also relied on the Georgia General Assembly’s “exhortation” that Georgia courts should look to *Daubert* for guidance when interpreting Georgia’s *Daubert* statute.<sup>105</sup> Specifically, the supreme court turned to almost forgotten language in *Daubert* that emphasized the importance of cross-examination, rather than judicial gatekeeping, in determining the reliability and credibility of expert testimony.<sup>106</sup> That this portion of *Daubert* is less well-known is understandable. When the United States Court of Appeals for the Eleventh Circuit first looked at *Daubert* in *Joiner v. General Electric Co.*,<sup>107</sup> it looked at this same language and read *Daubert* to mean that

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98. *Id.*, 664 S.E.2d at 283.

99. *Condra*, 285 Ga. at 667, 681 S.E.2d at 152.

100. *Id.* at 669, 681 S.E.2d at 154.

101. *Id.* at 669–70, 681 S.E.2d at 154 (alteration in original) (quoting O.C.G.A. § 24-9-67.1(c)(2)(A)).

102. 2005 Ga. Laws 1 (codified as amended in scattered sections of the O.C.G.A.).

103. *Condra*, 285 Ga. at 670, 681 S.E.2d at 154.

104. *Id.*

105. *Id.*, 681 S.E.2d at 155.

106. *Id.* at 671, 681 S.E.2d at 155 (citing *Daubert*, 509 U.S. at 589–97).

107. 78 F.3d 524 (11th Cir. 1996), *rev’d*, 522 U.S. 136 (1997).

it was no longer necessary for expert evidence to satisfy the burdensome general acceptance test; rather, it would be sufficient if the evidence was “scientifically legitimate, and not ‘junk science’ or mere speculation.”<sup>108</sup> The Eleventh Circuit concluded that *Daubert* meant that judges were not to assume the role of juries and weigh facts.<sup>109</sup> This initial reading of *Daubert* was perhaps understandable. After all, it was in *Daubert* that the United States Supreme Court rejected pharmaceutical industry concerns that the abandonment of the general acceptance test would open the door to junk science:

In this regard respondent seems to us to be overly pessimistic about the capabilities of the jury and of the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence . . . . These conventional devices, rather than wholesale exclusion under an uncompromising “general acceptance” test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702.<sup>110</sup>

Of course, as we know now, *Daubert* was intended to do anything but lower the threshold for admissibility of expert opinion, and the Supreme Court reversed *Joiner*.<sup>111</sup>

Thus, it is interesting that in response to the General Assembly’s exhortation to draw from *Daubert*, the Georgia Supreme Court turned to *Daubert*’s emphasis on the right and effectiveness of cross-examination: “The right of . . . cross-examination . . . is a substantial right, the preservation of which is essential to [a] proper administration of justice, and extends to all matters within the knowledge of the witness, the disclosure of which is material to the controversy.”<sup>112</sup> Now it seems the question is whether the Georgia Supreme Court has signaled an intent to follow *Daubert*’s view on cross-examination as the more effective method to scuttle junk science, rather than *Daubert*’s emphasis on the role of the judicial gatekeeper.

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108. *Id.* at 530.

109. *Id.*

110. *Daubert*, 509 U.S. at 596.

111. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 147 (1997).

112. *Condra*, 285 Ga. at 671, 681 S.E.2d at 155 (first and second alterations in original) (quoting *News Publ’g Co. v. Butler*, 95 Ga. 559, 559, 22 S.E. 282, 282 (1895)).

## IV. WITNESSES

A. *Examination and Impeachment of Witnesses Generally*

The testimony of one witness bolstering the testimony or credibility of another witness is generally admissible.<sup>113</sup> Perhaps the most notable exception, which is discussed below, is the admission of prior consistent statements to rebut a charge of recent fabrication.<sup>114</sup> Otherwise, Georgia courts frown heavily on bolstering testimony, and during the survey period, the court of appeals again made this clear. In *Walker v. State*,<sup>115</sup> the trial court permitted a witness in the defendant's trial for child molestation to testify that the victim told her what happened.<sup>116</sup> As the victim gave her account, the witness testified she thought: "And I'm looking at her and I know her. I'm like now this child is telling me the truth."<sup>117</sup> The defendant's trial counsel did not object to this testimony, but on appeal, the defendant contended that the testimony was inadmissible and that the failure of his trial counsel to object constituted ineffective assistance of counsel.<sup>118</sup> The court of appeals agreed.<sup>119</sup> It is well-established, the court held, that the credibility of the witness is always a matter for the jury's determination, and a witness's testimony cannot be bolstered by the opinion of another expert that the witness has told the truth.<sup>120</sup> Accordingly, the court reversed the defendant's conviction.<sup>121</sup>

Bolstering can take many forms, as illustrated by the court of appeals opinion in the rather unusual case of *Axelburg v. State*.<sup>122</sup> In *Axelburg* the defendant was charged with molesting the sixteen-year-old babysitter of his children. The babysitter reported that she woke to discover the defendant lying beside her with his fingers in her vagina. The defendant claimed that he was sleepwalking at the time of the incident, if in fact it happened, and thus, he lacked the intent necessary to commit the crime of molestation. When the defendant learned of the

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113. See, e.g., Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 48 MERCER L. REV. 323, 342-43 (1996).

114. See *infra* text accompanying notes 151-55.

115. 296 Ga. App. 531, 675 S.E.2d 270 (2009).

116. *Id.* at 534, 675 S.E.2d at 273.

117. *Id.*

118. *Id.* at 534-35, 675 S.E.2d at 273.

119. *Id.* at 535, 675 S.E.2d at 273.

120. *Id.*

121. *Id.*

122. 294 Ga. App. 612, 669 S.E.2d 439 (2008).

babysitter's accusations, he and his wife went to the sheriff's office and voluntarily submitted to an interrogation. During the course of that interrogation, the defendant, although still claiming he was sleepwalking, admitted that he awoke and found himself standing over the babysitter with his hand inside her. During the lengthy interrogation, the defendant provided many more details about what he remembered and his sleepwalking condition. At his trial, the court admitted the entire videotape of the interrogation, including the questions and comments of the interrogator.<sup>123</sup> Typically, an interrogator's questions in the interview are admissible, even though they may be hearsay, to put into context the answers given by the person being interrogated.<sup>124</sup> In *Axelburg*, however, the interrogator did much more than merely ask questions. He claimed to be a former sleepwalker himself, and repeatedly accused the defendant of lying, stating that he was a certified forensic interviewer and could tell with some expertise that the defendant was lying.<sup>125</sup> In effect, the interrogator was offering a purported expert opinion on the defendant's sleepwalking defense and his credibility.<sup>126</sup> Because the defendant's credibility and the resolution of conflicting expert testimony about sleepwalking were the key issues in the case, the interrogator's statements impermissibly bolstered the testimony of prosecution experts and invaded the province of the jury, which alone can determine witness credibility.<sup>127</sup> Accordingly, the court of appeals agreed that the trial court erred when it failed to redact the interrogator's inadmissible comments from the video.<sup>128</sup>

### *B. Impeachment with Evidence of Convictions*

Among other things, the Criminal Justice Act of 2005<sup>129</sup> enacted O.C.G.A. § 24-9-84.1,<sup>130</sup> which largely, but not completely, adopts Federal Rule of Evidence 609<sup>131</sup> regarding the use of convictions to impeach witnesses.<sup>132</sup> Like Rule 609, O.C.G.A. § 24-9-84.1 incorporates a Federal Rule of Evidence 403<sup>133</sup> balancing test as a prerequisite

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123. *Id.* at 612–13, 669 S.E.2d at 441.

124. *See, e.g.*, Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 48 MERCER L. REV. 323, 347–50 (1996).

125. *Axelburg*, 294 Ga. App. at 616, 669 S.E.2d at 443.

126. *Id.* at 618, 669 S.E.2d at 445.

127. *Id.*

128. *Id.* at 615–16, 669 S.E.2d at 443.

129. 2005 Ga. Laws 20.

130. O.C.G.A. § 24-9-84.1 (Supp. 2009).

131. FED. R. EVID. 609.

132. *See* O.C.G.A. § 24-9-84.1.

133. FED. R. EVID. 403.

to admitting convictions to impeach witnesses.<sup>134</sup> Under O.C.G.A. § 24-9-84.1, a witness other than a criminal defendant can be impeached with evidence of a conviction punishable by death or imprisonment of one year or more (essentially a felony) if the “probative value of admitting the evidence outweighs its prejudicial effect to the witness.”<sup>135</sup> A criminal defendant can be impeached with evidence of such a crime only if the probative value of the conviction “substantially outweighs its prejudicial effect to the defendant.”<sup>136</sup> Although this balancing requirement is fairly straightforward, it markedly departs from prior Georgia law, which essentially permitted the use of any felony or misdemeanor involving moral turpitude to impeach a witness.<sup>137</sup>

The court of appeals opinion in *Whatley v. State*<sup>138</sup> sends a clear message to judges and lawyers slow to recognize the new requirements of O.C.G.A. § 24-9-84.1. In *Whatley* the prosecution repeatedly impeached the defendant’s witnesses with evidence of their prior convictions over the repeated objections from the defendant’s attorney that the court had not engaged in the new balancing test.<sup>139</sup> In response to these objections, the trial judge informed defense counsel that her objection was not valid and that the relevant inquiry is merely whether “the offenses involve moral turpitude,”<sup>140</sup> clearly indicating that the judge was not quite current on the law. The court of appeals agreed that the trial court erred when it “expressly refuse[d]” to engage in the required balancing test.<sup>141</sup>

Similarly, the court of appeals reversed the defendant’s conviction in *Abercrombie v. State*<sup>142</sup> because the trial court, when it admitted the defendant’s 1998 conviction for entering an automobile, did not make express findings to support its conclusion that the probative value of the defendant’s prior conviction substantially outweighed its prejudicial effect.<sup>143</sup> In making this determination, the trial court should consider “the kind of felony involved, the date of the conviction, and the importance of the witness’s credibility.”<sup>144</sup> In *Abercrombie* the trial

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134. O.C.G.A. § 24-9-84.1(a)(1), (3).

135. *Id.* § 24-9-84.1(a)(1).

136. *Id.* § 24-9-84.1(a)(2).

137. O.C.G.A. § 24-9-84 (1995), amended by 2005 Ga. Laws 20, 27–29.

138. 296 Ga. App. 72, 673 S.E.2d 510 (2009).

139. *Id.* at 73–74, 673 S.E.2d at 511.

140. *Id.* at 74, 673 S.E.2d at 512.

141. *Id.*

142. 297 Ga. App. 522, 677 S.E.2d 719 (2009).

143. *Id.* at 523–24, 677 S.E.2d at 720–21.

144. *Id.* at 524, 677 S.E.2d at 721 (quoting *Quiroz v. State*, 291 Ga. App. 423, 428, 662 S.E.2d 235, 240 (2008)).

court concluded that the prior conviction was admissible simply because it had probative value.<sup>145</sup> The court of appeals held that the trial court was not authorized to determine the admissibility of a prior conviction by any standard other than O.C.G.A. § 24-9-84.1(a)(2), which requires a determination that the probative value of the conviction substantially outweighs its prejudicial effect to the defendant.<sup>146</sup>

### C. *Prior Statements by Witnesses*

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*,<sup>147</sup> 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.<sup>148</sup> Second, pursuant to *Cuzzort v. State*,<sup>149</sup> a prior consistent statement is admissible as substantive evidence if the witness is present at trial and subject to cross-examination.<sup>150</sup> However, the supreme court significantly limited *Cuzzort* in *Woodard v. State*,<sup>151</sup> holding that prior consistent statements are admissible only when the veracity of the witness who made the statement has been placed at issue.<sup>152</sup> In *Woodard* the supreme court concluded that *Cuzzort* was “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.”<sup>153</sup> 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.”<sup>154</sup> “Even then, the prior consistent statement may be admitted as nonhearsay only if it was made before the motive or influence came into existence or before the time of the alleged recent fabrication.”<sup>155</sup>

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145. *Id.*

146. *Id.*; see also O.C.G.A. § 24-9-84.1(a)(2).

147. 248 Ga. 858, 286 S.E.2d 717 (1982).

148. *Id.* at 863, 286 S.E.2d at 721–22.

149. 254 Ga. 745, 334 S.E.2d 661 (1985).

150. *Id.* at 745, 334 S.E.2d at 662.

151. 269 Ga. 317, 496 S.E.2d 896 (1998).

152. *Id.* at 319–20, 496 S.E.2d at 899.

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

154. *Id.* at 320, 496 S.E.2d at 899 (citing *Robertson v. State*, 268 Ga. 772, 777, 493 S.E.2d 697, 703 (1997)).

155. *Phillips v. State*, 241 Ga. App. 764, 766, 527 S.E.2d 604, 607 (2000), discussed in Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 52 MERCER L. REV. 263,

Although the appellate courts have not been entirely consistent in their application of *Woodard*,<sup>156</sup> they clearly sent the message to prosecutors and trial judges during the survey period that *Woodard* means exactly what it says. For example, in *Cash v. State*,<sup>157</sup> the Georgia Court of Appeals summarily reversed the defendant's conviction for aggravated child molestation, something appellate courts rarely do.<sup>158</sup> In *Cash* the trial court admitted, pursuant to the child hearsay statute,<sup>159</sup> the victim's out-of-court statements that bolstered the alleged victim's somewhat incomplete trial testimony. On appeal, the defendant contended that the victim's prior statements were not admissible because the victim was fifteen years old at the time of the alleged molestation, and the child hearsay statute applies only to statements by victims who are younger than fifteen. The prosecution, apparently acknowledging that the statement did not meet the requirements of the child hearsay statute, argued on appeal that the statements were nevertheless admissible as prior consistent statements pursuant to *Woodard* because the defendant attacked the victim's credibility in his opening statement by alleging that the victim's father prompted her to fabricate her allegations. However, the defendant's claim of fabrication was based on animosity arising from a custody dispute between the defendant and the victim's sister, who had been married to the defendant. This custody dispute began before the alleged molestation, and thus, the victim's prior consistent statements were not made prior to the time the motive to fabricate arose.<sup>160</sup> The court of appeals agreed; the victim's pretrial statements were nothing more than hearsay introduced to bolster the victim's story, and the court reversed the defendant's conviction.<sup>161</sup>

Similarly, relying on *Woodard*, the supreme court held in *Duggan v. State*<sup>162</sup> that the trial court erroneously admitted a witness's prior consistent statement during the defendant's trial for murder.<sup>163</sup> In *Duggan* the trial court admitted as substantive evidence a pretrial statement made to police on the night of the crime from a witness related to the victim. There was no evidence to suggest this statement

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295-96 (2000).

156. See Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 60 MERCER L. REV. 135, 148-50 (2008).

157. 294 Ga. App. 741, 669 S.E.2d 731 (2008).

158. *Id.* at 746-47, 669 S.E.2d at 735.

159. O.C.G.A. § 24-3-16 (1995).

160. *Cash*, 294 Ga. App. at 742-45, 669 S.E.2d at 732-34.

161. *Id.* at 746-47, 669 S.E.2d at 735.

162. 285 Ga. 363, 677 S.E.2d 92 (2009).

163. *Id.* at 366, 677 S.E.2d at 94.

was made prior to any motive to fabricate; on the contrary, the statement was made *after* the death of the victim's stepbrother.<sup>164</sup> Accordingly, the supreme court easily concluded that the admission of the statement was error.<sup>165</sup> However, given the overwhelming evidence of guilt, the error was harmless.<sup>166</sup>

Both *Gibbons* and *Cuzzort* require that the declarant be available for cross-examination.<sup>167</sup> During the survey period, the supreme court addressed this requirement in a rather unusual context. In *Soto v. State*,<sup>168</sup> the State called as a witness the defendant's alleged co-defendant, who had entered a guilty plea prior to trial. The co-defendant testified that although the defendant had been with him, the defendant waited nearby while he alone killed the victim. The testimony was inconsistent with his prior statements implicating the defendant. Then the co-defendant abruptly refused to testify any further. The trial court allowed the State to impeach the co-defendant with testimony from a police officer and a fellow prisoner recounting the statements made to them by the co-defendant.<sup>169</sup> The supreme court easily concluded that the statement to the police officer was testimonial and therefore inadmissible pursuant to *Crawford v. Washington*.<sup>170</sup> Regarding the prisoner's testimony, the prosecution contended that the co-defendant's statements were admissible as prior inconsistent statements. The defendant, however, argued that the co-defendant's prior inconsistent statements were not admissible because the co-defendant was not available for cross-examination.<sup>171</sup> This presented the supreme court

with a difficult question: When, on direct examination, a witness gives testimony that exonerates a defendant, can the State introduce contradictory out-of-court statements to impeach him, when the

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164. *Id.*, 677 S.E.2d at 94–95.

165. *Id.*, 677 S.E.2d at 95.

166. *Id.*; see also *Connelly v. State*, 295 Ga. App. 765, 768, 673 S.E.2d 274, 277 (2009) (holding that the trial court erroneously, but harmlessly, admitted a prior consistent statement because the statement was made after the alleged motive to give false testimony arose).

167. *Cuzzort*, 254 Ga. at 745, 334 S.E.2d at 662; *Gibbons*, 248 Ga. at 863, 286 S.E.2d at 721–22; Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 60 MERCER L. REV. 135, 147–48 (2008).

168. 285 Ga. 367, 677 S.E.2d 95 (2009).

169. *Id.* at 368, 677 S.E.2d at 97–98.

170. 541 U.S. 36 (2004); *Soto*, 285 Ga. at 369, 677 S.E.2d at 98. For further discussion of *Crawford*, see *infra* text accompanying notes 235–45.

171. *Soto*, 285 Ga. at 370, 677 S.E.2d at 98–99.

statements inculcate the defendant and the witness refuses to answer further questions posed by either the State or the defendant?<sup>172</sup>

The supreme court previously addressed a similar, but not identical, question in *Barksdale v. State*.<sup>173</sup> In *Barksdale* the supreme court held that the trial court erred when, in reliance on *Gibbons* and *Cuzzort*, it permitted the prosecution to play the videotaped testimony of a co-defendant incriminating the defendant after the co-defendant refused to testify, claiming that the co-defendant feared retribution.<sup>174</sup> The court held that the co-defendant's refusal to testify meant there was no trial testimony—consistent or inconsistent—with the pretrial statement.<sup>175</sup> Consequently, the witness's prior statement could not be permitted as a prior inconsistent statement.<sup>176</sup> In *Soto* the prosecution argued that *Barksdale* did not bar the admission of the statement because the co-defendant testified, to a point, at trial.<sup>177</sup> Acknowledging *Barksdale* was not entirely on point, the court noted that *Barksdale* nevertheless reinforced the principle that prior inconsistent statements are not admissible if the defendant did not have an opportunity for effective cross-examination.<sup>178</sup> In *Soto*, once the witness ceased testifying during his direct examination, he was unavailable for cross-examination, and therefore the admission of the prior statement was error.<sup>179</sup>

#### V. EXPERT WITNESSES

As discussed in the previous four editions of the *Annual Survey of Georgia Law*,<sup>180</sup> in 2005 the General Assembly, as a part of tort reform legislation,<sup>181</sup> enacted O.C.G.A. § 24-9-67.1<sup>182</sup> to adopt, more or less, the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>183</sup> which in turn has been codified as Federal

172. *Id.* at 369, 677 S.E.2d at 98.

173. 265 Ga. 9, 453 S.E.2d 2 (1995).

174. *Id.* at 10–11, 453 S.E.2d at 3–4.

175. *Id.* at 11, 453 S.E.2d at 4.

176. *Id.*

177. 285 Ga. at 370, 677 S.E.2d at 98–99.

178. *Id.*, 677 S.E.2d at 99.

179. *Id.*

180. Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 60 MERCER L. REV. 135, 156 (2008); Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 59 MERCER L. REV. 157, 172 (2007); Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 58 MERCER L. REV. 151, 165 (2006); Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 57 MERCER L. REV. 187, 205 (2005).

181. 2005 Ga. Laws 1 (codified as amended in scattered sections of the O.C.G.A.).

182. O.C.G.A. § 24-9-67.1 (Supp. 2009).

183. 509 U.S. 579 (1993).

Rule of Evidence 702.<sup>184</sup> The “more or less” is significant. On the “less” side, the General Assembly, for reasons unstated (but likely having more to do with politics than anything else), exempted criminal cases from the new *Daubert* statute<sup>185</sup> and then exempted most condemnation cases from the statute in the 2006 session.<sup>186</sup> On the “more” side, the General Assembly adopted “super *Daubert*”<sup>187</sup> rules for professional negligence cases, particularly medical negligence cases.<sup>188</sup> As discussed in previous surveys<sup>189</sup> and this year below, the super *Daubert* rules primarily implemented a “three of five” rule, requiring that experts in medical negligence cases have requisite and certain experience within three of the five years preceding the date of the incident at issue.<sup>190</sup> Perhaps the most significant *Daubert* case during the survey year was *Condra v. Atlanta Orthopaedic Group, P.C.*,<sup>191</sup> discussed above.<sup>192</sup> In *Condra* the Georgia Supreme Court held that the new *Daubert* statute effectively overruled case law that said the personal practices of an expert were irrelevant in medical negligence cases.<sup>193</sup> In the process, *Condra* perhaps reinvigorated language in *Daubert* emphasizing the crucial role of cross-examination in the determination of the the credibility and reliability of experts.<sup>194</sup>

However, the court of appeals decision in *Hamilton-King v. HNTB Georgia, Inc.*<sup>195</sup> also goes to the heart of the ongoing *Daubert* debate—just how far can the trial court go in excluding expert testimony before it invades the province of the jury? In *Hamilton-King* the plaintiffs brought suit against a general contractor and construction designer, alleging negligence in the design and construction of a road-widening project on Interstate 95 in southern Georgia. To support their claims, the plaintiffs relied on a civil engineer who expressed various opinions with regard to the flow of traffic over a 900-foot bridge that was

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184. FED. R. EVID. 702.

185. See 2005 Ga. Laws at 8 (codified at O.C.G.A. § 24-9-67.1(a)).

186. 2006 Ga. Laws 39, 47 (codified at O.C.G.A. § 22-1-14(b) (Supp. 2009)).

187. “Super *Daubert*” is not a technical term, but seems to have become the preferred short hand reference for Georgia attorneys for the additional requirements imposed by Georgia’s *Daubert* statute.

188. 2005 Ga. Laws at 8–9 (codified as amended at O.C.G.A. § 24-9-67.1(b)–(c)).

189. Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 60 MERCER L. REV. 135, 162–64 (2008); Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 59 MERCER L. REV. 157, 175–77 (2007).

190. See O.C.G.A. § 24-9-67.1(c)(2)(A)–(D).

191. 285 Ga. 667, 681 S.E.2d 152 (2009).

192. See *supra* text accompanying notes 92–112.

193. 285 Ga. at 669–70, 681 S.E.2d at 154.

194. See *id.* at 671, 681 S.E.2d at 155.

195. 296 Ga. App. 864, 676 S.E.2d 287 (2009).

under construction. Primarily, the expert opined there were insufficient shoulders and lighting to provide refuge for motorists whose vehicles became disabled on the bridge. Had the project been properly designed and implemented, the expert testified, the collision that resulted in the death and injuries of the plaintiffs and their decedents would never have happened. The defendants moved to exclude the expert's testimony, claiming that he was not qualified to render opinions because he lacked experience in designing or reviewing traffic control patterns. Further, they contended that his opinions were unreliable because they were not based on industry standards or publications.<sup>196</sup> Although the trial court found the expert was qualified to testify about traffic control measures, the court concluded that his opinions were not properly supported by the Manual on Uniform Traffic Control Devices,<sup>197</sup> the standard industry manual. Moreover, because there were no prior similar incidents, the trial court concluded that the expert's opinions were not properly tested and that there was no evidence to show his opinions were generally accepted.<sup>198</sup> Pulling straight from traditional *Daubert* analysis,

the trial court concluded that the opinions of Mr. Thomas, which he concedes to be products of his exercise of "engineering judgment" and which, under the evidence presented, cannot be validated against accepted standards, tested, or reviewed, are not reliable, as that term is used in [O.C.G.A.] § 24-9-67.1(b)(2) and (3), and they are therefore inadmissible.<sup>199</sup>

The court of appeals addressed each of the bases for the trial court's conclusion. First, although it was true that the expert did not point to a specific provision of the industry standards manual, his opinions were based on his engineering judgment as shaped by the manual.<sup>200</sup> The manual itself notes that it is not a substitute for engineering judgment, nor is the manual the sole source of engineering and design standards.<sup>201</sup>

The court of appeals also rejected the trial court's conclusion that the expert's opinions could not be validated because there were no prior

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196. *Id.* at 864–65, 676 S.E.2d at 288–89.

197. FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES (2003 ed., rev. Dec. 2007), available at <http://mutcd.fhwa.dot.gov/pdfs/2003r1r2/mutcd2003r1r2complet.pdf>.

198. *Hamilton-King*, 296 Ga. App. at 864–66, 676 S.E.2d at 289.

199. *Id.* at 866, 676 S.E.2d at 289.

200. *Id.* at 867, 676 S.E.2d at 290.

201. *Id.* at 867–68, 676 S.E.2d at 290; FED. HIGHWAY ADMIN., *supra* note 197, § 1A.09.

similar incidents.<sup>202</sup> The court noted that the trial court apparently relied on the suggestion<sup>203</sup> in O.C.G.A. § 24-9-67.1(f) that Georgia courts draw from *Daubert* and its progeny and, thus, applied the standard *Daubert* analysis found in federal court decisions.<sup>204</sup> Specifically, the trial court considered whether the theory or technique at issue could be and had been tested, whether it had been subjected to peer review and publication, whether its potential rate of error was acceptable, and whether it had been generally accepted in the community.<sup>205</sup> Because the General Assembly only suggested and did not command Georgia courts to follow *Daubert* and because even federal courts recognize the flexibility of *Daubert* analysis, the court concluded that “while the *Daubert* factors may bear on a judge’s determination regarding the admissibility of an engineering expert’s testimony, those factors ‘may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert’s particular expertise, and the subject of his testimony.’”<sup>206</sup> This flexible approach to *Daubert* analysis led the court of appeals to reject the trial court’s rigid conclusion that the expert testimony had not been properly tested, stating “we cannot require evidence of numerous fatal car accidents on this highway before allowing an expert to testify about safety measures that could have been implemented to prevent the first such injury.”<sup>207</sup> The court of appeals also rejected the trial court’s conclusion that the expert’s theories were inadmissible because there was no demonstrated error rate, holding that “this ‘failure’ [was not] sufficient to exclude Thomas’s testimony.”<sup>208</sup>

The court of appeals decision in *CSX Transportation, Inc. v. McDowell*<sup>209</sup> may come as a relief to trial court judges who, perhaps unlike their federal counterparts, lack the time and resources to engage in lengthy *Daubert* hearings and analysis. In *McDowell* the defendant argued that the trial court erred when it denied its *Daubert* motion because “the trial court failed to expressly demonstrate that it carried

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202. *Hamilton-King*, 296 Ga. App. at 868–69, 676 S.E.2d at 291.

203. Note that in *Hamilton-King*, the court of appeals viewed O.C.G.A. § 24-9-67.1(f) to be a “suggestion,” 296 Ga. App. at 868, 676 S.E.2d at 290, while the supreme court viewed the same language to be an “exhortation” in *Condra*, 285 Ga. at 670, 681 S.E.2d at 155.

204. *Hamilton-King*, 296 Ga. App. at 868, 676 S.E.2d at 290.

205. *Id.*

206. *Id.*, 676 S.E.2d at 290–91 (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 138 (1999)).

207. *Id.*, 676 S.E.2d at 291.

208. *Id.* at 868–69, 676 S.E.2d at 291.

209. 294 Ga. App. 871, 670 S.E.2d 543 (2008).

out its role as gatekeeper.”<sup>210</sup> The court of appeals easily rejected this contention, noting that O.C.G.A. § 24-9-67.1 does not require a trial court to put on the record the bases for its gatekeeping decision, and the court of appeals saw no reason to impose such a requirement.<sup>211</sup> A trial court, the court of appeals noted, is generally presumed to have performed its duties and, “[a]ccordingly, we will presume that, when presented with a motion to exclude expert testimony as inadmissible under [O.C.G.A.] § 24-9-67.1, a trial court engages in the contemplated analysis in ruling thereupon.”<sup>212</sup>

Notwithstanding the court’s approval of flexible analysis in *Hamilton-King*, the formalistic application of the super *Daubert* requirements continued during the survey period, and as in previous years,<sup>213</sup> the super *Daubert* requirements were problematic for plaintiffs in medical negligence actions. For example, in *Dawson v. Leder*,<sup>214</sup> the court of appeals held that the trial court properly excluded the testimony of the plaintiff’s trauma and critical care expert because the issue in the case did not involve critical care medicine generally but instead specifically involved management of compromised airways in post-surgical patients.<sup>215</sup> Notwithstanding the expert’s general experience, the court noted the admission by the expert that “she had never managed the airway of a patient who had undergone a surgery similar to that which the decedent had undergone, nor had she performed a similar surgical procedure.”<sup>216</sup> Moreover, the expert acknowledged that post-surgical airway maintenance is generally handled by anesthesiologists and that she did not have anesthesiology training.<sup>217</sup> Accordingly, the court of appeals affirmed the trial court’s determination that the plaintiff’s expert was not qualified to testify.<sup>218</sup>

Although most, and perhaps all, medical negligence *Daubert* appellate cases have involved physicians, the super *Daubert* requirements do not apply to physicians only. Rather, they apply to all medical negligence cases, and nursing negligence usually falls within the confines of

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210. *Id.* at 872, 670 S.E.2d at 545.

211. *Id.* at 872–73, 670 S.E.2d at 545.

212. *Id.* at 873, 670 S.E.2d at 545.

213. *See, e.g.*, Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 60 MERCER L. REV. 135, 160–70 (2008).

214. 294 Ga. App. 717, 669 S.E.2d 720 (2008).

215. *Id.* at 719–20, 669 S.E.2d at 723.

216. *Id.* at 720, 669 S.E.2d at 723.

217. *Id.*

218. *Id.*

“medical malpractice.”<sup>219</sup> In *Houston v. Phoebe Putney Memorial Hospital, Inc.*,<sup>220</sup> a trial court struck the affidavit of the plaintiff’s nurse expert, concluding that it was insufficient under O.C.G.A. § 9-11-9.1,<sup>221</sup> which requires the plaintiff to attach the affidavit of an expert who meets the requirements of O.C.G.A. § 24-9-67.1 to his complaint.<sup>222</sup> In *Houston* the plaintiff’s expert opined in her affidavit that the hospital triage nurse breached the standard of care “by not accurately triaging Mr. Houston and not assuring that he was seen by a physician in a timely manner.”<sup>223</sup> As it turned out, the plaintiff was experiencing a stroke, and he contended that he suffered significantly more harm than he would if he had been timely treated.<sup>224</sup> The trial court, without the benefit of an evidentiary hearing and based simply on the complaint and the affidavit, struck the affidavit, finding that the plaintiff’s expert “was not competent to testify because her affidavit and curriculum vitae reflected that she had no experience working as a triage nurse in an emergency room.”<sup>225</sup> The court of appeals reversed.<sup>226</sup>

The court of appeals first noted the significance of the posture of the case at the time of the court’s ruling.<sup>227</sup> Because O.C.G.A. § 9-11-9.1 is simply an initial pleading requirement, and an affidavit filed pursuant to O.C.G.A. § 9-11-9.1 must be construed most favorably to the plaintiff, any doubts must be resolved in favor of the plaintiff.<sup>228</sup> Even conclusory statements in the affidavit about the expert’s qualifications can be sufficient to establish the expert’s competency.<sup>229</sup> Given this standard, the court easily concluded that the expert’s statements that she was qualified to express the opinions in her affidavit and that she had experience triaging patients, although conclusory, were sufficient to meet the requirements of O.C.G.A. § 9-11-9.1.<sup>230</sup> Moreover, the fact that she

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219. The *Daubert* statute does not define *medical malpractice*, but every other definition of *medical malpractice* in the O.C.G.A. includes nursing negligence. See O.C.G.A. § 9-3-70 (2007); O.C.G.A. § 9-9-60 (2007); O.C.G.A. § 9-11-8 (2006). *But see* O.C.G.A. § 33-3-27 (2000).

220. 295 Ga. App. 674, 673 S.E.2d 54 (2009).

221. O.C.G.A. § 9-11-9.1 (2006 & Supp. 2009); *Houston*, 295 Ga. App. at 675–76, 673 S.E.2d at 56.

222. O.C.G.A. § 9-11-9.1(a).

223. 295 Ga. App. at 675, 673 S.E.2d at 56.

224. *Id.*

225. *Id.* at 676, 673 S.E.2d at 56.

226. *Id.* at 680, 673 S.E.2d at 59.

227. *Id.* at 677, 673 S.E.2d at 57.

228. *Id.*

229. *Id.*

230. *Id.* at 678–79, 673 S.E.2d at 58.

did not work as a triage nurse in an emergency room was not dispositive.<sup>231</sup> The court said it is not necessary that the expert have experience “in the same area of practice/specialty as the defendant[.]”<sup>232</sup> According to the court, the relevant area of nursing practice was not the triage of patients in emergency rooms, but rather the assessment and triage of acute patients, and the plaintiff’s expert established experience in this area.<sup>233</sup> Accordingly, and again emphasizing the “early point in the proceedings,” the court held that the plaintiff’s expert met the requirements of O.C.G.A. § 9-11-9.1.<sup>234</sup>

## VI. HEARSAY

### A. *Hearsay and the Right of Confrontation*

It has been almost five years since the United States Supreme Court in *Crawford v. Washington*<sup>235</sup> 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.<sup>236</sup> 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 admitting the out-of-court statement violated his Sixth Amendment<sup>237</sup> right of confrontation.<sup>238</sup> The prosecutors argued that since the Supreme Court’s decision in *Ohio v. Roberts*,<sup>239</sup> courts had allowed the admission of hearsay statements if the statements fell within a “firmly rooted hearsay exception’ or bear ‘particularized guarantees of trustworthiness.’”<sup>240</sup> As discussed in many prior surveys, this bypass around the Sixth Amendment became known in Georgia as the “necessity” exception to the hearsay rule.<sup>241</sup> To exag-

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231. *Id.* at 679, 673 S.E.2d at 58.

232. *Id.* (alteration in original) (quoting *Nathans v. Diamond*, 282 Ga. 804, 806, 654 S.E.2d 121, 123 (2007)).

233. *Id.*

234. *Id.* at 679–80, 673 S.E.2d at 58–59.

235. 541 U.S. 36 (2004).

236. *Id.* at 40.

237. U.S. CONST. amend. VI.

238. *Crawford*, 541 U.S. at 40–41.

239. 448 U.S. 56 (1980).

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

241. *E.g.*, Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 48 MERCER L. REV. 323, 351, 354 (1996).

gerate only a bit, the rapid expansion of the necessity exception seemed on the verge of supplanting live testimony entirely.<sup>242</sup>

In *Crawford*, however, the Supreme Court concluded that the Sixth Amendment's right of confrontation is not limited to in-court testimony but also applies to out-of-court "testimonial" statements.<sup>243</sup> Testimonial statements include affidavits, prior testimony, custodial examinations, and "similar pretrial statements that declarants would reasonably expect to be used prosecutorially."<sup>244</sup> Thus, a testimonial out-of-court statement is no longer admissible if the defendant has not had an opportunity to cross-examine the declarant.<sup>245</sup>

Previous surveys have questioned whether the res gestae exception can be used to circumvent *Crawford*.<sup>246</sup> As Judge Ruffin put it, the res gestae exception 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."<sup>247</sup> Justice Weltner also had a colorful description of the res gestae doctrine:

*Res gestae* is a Gordian Knot, which no one has succeeded in untying. Lacking an Alexander, it remains as yet unsevered.

This brief survey should be sufficient to demonstrate the futility of attempting now still another definition, for like Joel Chandler Harris'[s] tar baby, striking another blow means getting stuck another time!<sup>248</sup>

As discussed in last year's survey,<sup>249</sup> the question of whether the res gestae doctrine trumps *Crawford* was addressed, in an odd sort of way, in *Cuyuch v. State*<sup>250</sup> by the court of appeals, and then by the supreme court's decision reversing the court of appeals.<sup>251</sup> What the Author described as odd was the fact that the court of appeals majority opinion

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242. Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 60 MERCER L. REV. 135, 174–75 (2008); Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 59 MERCER L. REV. 157, 181–82 (2007); Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 56 MERCER L. REV. 235, 247–48 (2004).

243. *Crawford*, 541 U.S. at 50–51, 68–69.

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

245. *Id.* at 68.

246. *E.g.*, Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 57 MERCER L. REV. 187, 215 (2005).

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

248. *Andrews v. State*, 249 Ga. 223, 227, 290 S.E.2d 71, 74 (1982).

249. Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 60 MERCER L. REV. 135, 180–82 (2008).

250. 286 Ga. App. 629, 649 S.E.2d 856 (2007).

251. *Cuyuch v. State*, 284 Ga. 290, 290, 667 S.E.2d 85, 87 (2008).

relied on the res gestae doctrine to admit what appeared to be a testimonial statement, but the court of appeals never once mentioned *Crawford*; and the unanimous supreme court decision reversing the court of appeals never once mentioned the res gestae doctrine.<sup>252</sup> Thus, at the end of the last survey period the question remained: Does the res gestae doctrine trump *Crawford*?

The answer, perhaps, came during the current survey period in *Thomas v. State*.<sup>253</sup> In *Thomas* the defendant contended that the trial court violated *Crawford* when it admitted the hearsay statements of various witnesses who implicated the defendant in the death of his former wife.<sup>254</sup> First, a neighbor, noting the victim's car parked askew with the victim inside, asked the victim what had happened. The victim responded that her ex-husband shot her. Other neighbors soon arrived, and they also began questioning the victim and providing the victim's answers, which incriminated the defendant, to a 911 operator. Eventually, a deputy sheriff arrived, and the victim also told him that her ex-husband shot her. Still later, the victim told emergency medical personnel that her ex-husband shot her.<sup>255</sup> The principal issue before the supreme court was whether the statements were testimonial.<sup>256</sup> The question of whether 911 calls and similar statements made during the course of an emergency are testimonial was discussed in previous surveys.<sup>257</sup> Generally, statements made during the course of an emergency, even if made to police officers, are not testimonial.<sup>258</sup> Such statements are not made to establish or prove a past fact but rather to convey information in circumstances requiring police assistance.<sup>259</sup> In *Thomas* the supreme court easily concluded that the statements were not testimonial in nature.<sup>260</sup> It was at that point the court shed some light on whether the res gestae doctrine trumps *Crawford*. Having determined the statements in question were non-testimonial, the court noted that traditional rules of evidence must be considered.<sup>261</sup> Because

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252. Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 60 MERCER L. REV. 135, 180 (2008).

253. 284 Ga. 540, 668 S.E.2d 711 (2008).

254. *Id.* at 542, 668 S.E.2d at 714.

255. *Id.* at 541, 668 S.E.2d at 713.

256. *See id.* at 542–43, 668 S.E.2d at 714–15.

257. Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 60 MERCER L. REV. 135, 177–79 (2008); Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 59 MERCER L. REV. 157, 183–84 (2007).

258. *See, e.g., Thomas*, 284 Ga. at 543, 668 S.E.2d at 714.

259. *Id.*

260. *Id.*, 668 S.E.2d 715.

261. *Id.* at 543–44, 668 S.E.2d 715.

the statements were hearsay, they were admissible only if they fell within an exception to the hearsay rule.<sup>262</sup> In *Thomas* the court found such an exception—the res gestae doctrine.<sup>263</sup> Thus, it seems implicit in *Thomas* that the res gestae doctrine does not permit the admission of testimonial hearsay statements in criminal cases. Like almost all exceptions to the hearsay rule, it is subject to a defendant's Sixth Amendment right to confront the witnesses against him.<sup>264</sup> Accordingly, statements that fall within the res gestae doctrine may be less likely to be testimonial by their very nature, but if they are in fact testimonial, *Crawford* bars their admission.

The extent to which experts can rely on hearsay to reach their opinions has been a recurring issue in Georgia. The courts have increasingly allowed experts to base their opinions on hearsay, particularly since the enactment of Georgia's *Daubert* statute,<sup>265</sup> which specifically allows this practice.<sup>266</sup> As it was bound to do, this issue arose during the survey period in the context of a criminal case in which an expert relied on the results of laboratory tests performed by someone other than the testifying expert. In *Dunn v. State*,<sup>267</sup> the defendant contended that the trial court improperly allowed a laboratory supervisor to testify that a white substance found in the defendant's possession contained methamphetamines. However, the supervisor did not actually perform the test establishing the composition of the substance. Rather, the actual testing was done by a technician. The prosecution contended that the supervisor's testimony was admissible because the supervisor reviewed the data from the testing and came to an independent conclusion that the substance contained methamphetamines.<sup>268</sup>

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262. *Id.*

263. *Id.*

264. *Crawford*, 541 U.S. at 53–54. In *Crawford* the Supreme Court held that common law exceptions to the right of confrontation existing at the time of the framing of the Constitution remain exceptions to the Sixth Amendment. *Id.*

The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the “right . . . to be confronted with the witnesses against him,” Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.

*Id.* at 54.

265. O.C.G.A. § 24-9-67.1 (Supp. 2009).

266. *Id.*; Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 60 MERCER L. REV. 135, 158 (2008); Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 58 MERCER L. REV. 151, 168 (2006).

267. 292 Ga. App. 667, 665 S.E.2d 377 (2008).

268. *Id.* at 667–69, 665 S.E.2d at 378–79.

The court of appeals noted that courts across the country have struggled with this issue since the Supreme Court's decision in *Crawford*.<sup>269</sup> Some courts have found that laboratory reports are essentially business or public records, and their admission does not impinge the right of confrontation.<sup>270</sup> Other courts have reached an opposite conclusion, ruling that a laboratory technician's test results are testimonial and thus inadmissible.<sup>271</sup> A third group of courts followed the reasoning of decisions holding that 911 calls are non-testimonial because they are "a contemporaneous recordation of observable events rather than the documentation of past events" and, thus, do not run afoul of *Crawford*.<sup>272</sup>

In *Dunn* the laboratory technician's report of his conclusions was not submitted to the jury, and according to the court of appeals, the State conceded that the admission of the report would have violated the defendant's Sixth Amendment rights.<sup>273</sup> However, the court of appeals reasoned that the supervisor's testimony was properly admitted because she "came to her own independent conclusion that the substance was methamphetamine based on the chemical 'fingerprint' from the GCMS test."<sup>274</sup> The court then noted the evolving Georgia authority allowing experts to base their opinions on hearsay.<sup>275</sup> True enough, but this seemed to miss the defendant's point. The question was not whether the test results were hearsay and admissible pursuant to an exception allowing an expert to rely on hearsay, but whether they were testimonial statements that violated the defendant's Sixth Amendment rights when admitted.

Although not entirely clear, the court's opinion suggests that it was persuaded by the reasoning of the 911 cases and that routine laboratory test results and conclusions of laboratory personnel based on laboratory tests are not testimonial. Quoting from one of those cases, the court reasoned that "the critical inquiry is not whether it might be reasonably anticipated that a statement will be used at trial but the circumstances under which the statement was made."<sup>276</sup> Thus, presumably, the circumstances surrounding laboratory tests suggest the tests are more the recordation of observable events than documentation of past events.

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269. *Id.* at 670, 665 S.E.2d at 380.

270. *Id.* (citing *Commonwealth v. Verde*, 827 N.E.2d 701, 705 (Mass. 2005)).

271. *Id.* (citing *State v. Laturner*, 163 P.3d 367, 374–75 (Kan. Ct. App. 2007)).

272. *Id.* (quoting *People v. Geier*, 161 P.3d 104, 139 (Cal. Ct. App. 2007)).

273. *Id.* at 670–71, 665 S.E.2d at 380.

274. *Id.* at 671, 665 S.E.2d at 380.

275. *Id.*

276. *Id.* at 672, 665 S.E.2d at 381 (quoting *Geier*, 161 P.3d at 140).

### B. Definition of Hearsay

If only as a matter of historical oddity, it is appropriate every few years or so for this Survey to note Georgia's rather schizophrenic approach to the definition of hearsay. If asked the definition of hearsay, most Georgia lawyers almost certainly would say hearsay is an out-of-court statement offered to prove the truth of the matter asserted therein. In fact, this is the definition of hearsay used most frequently by Georgia courts.<sup>277</sup> However, this is not Georgia's statutory definition of hearsay. Rather, O.C.G.A. § 24-3-1<sup>278</sup> defines hearsay as "that which does not derive its value solely from the credit of the witness but rests mainly on the veracity and competency of other persons."<sup>279</sup> Thus, a testifying witness's out-of-court statement is hearsay under the common definition of hearsay (although likely admissible pursuant to many exceptions for prior statements by a witness), but such a statement would not be hearsay under the statutory definition because it does not rest on the "veracity and competency" of someone other than the testifying witness.<sup>280</sup>

The court of appeals decision in *Boivin v. State*<sup>281</sup> illustrates just how fine the distinction can be when determining whether an out-of-court statement is hearsay. In *Boivin* the defendant was convicted of stealing a utility trailer. The defendant admitted to possessing the trailer, which turned out to be stolen, but he contended that he purchased, or was in the process of purchasing, the trailer from someone who identified himself as the owner. The defendant parked the trailer on property he leased from Mark Gibby.<sup>282</sup> Gibby, suspicious about the defendant's story that he had purchased the trailer from "someone named 'Mike' for \$600 or \$700," alerted a friend who in turn alerted authorities after determining that the trailer was in fact stolen.<sup>283</sup> After the trailer was returned to its true owner, someone who identified himself as Mike visited Gibby, claimed that the trailer was his, and

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277. See, e.g., Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 44 MERCER L. REV. 213, 235-36 (1992).

278. O.C.G.A. § 24-3-1 (1995).

279. *Id.*

280. *Id.* See Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 52 MERCER L. REV. 263, 287 (2000), for a discussion of *Bowers v. State*, 241 Ga. App. 122, 526 S.E.2d 163 (1999), in which the court of appeals relied on the statutory definition of hearsay to affirm the admission of the witness's prior statement over the objection that it was an out-of-court statement and thus hearsay. 241 Ga. App. at 124, 526 S.E.2d at 165-66.

281. 298 Ga. App. 411, 680 S.E.2d 415 (2009).

282. *Id.* at 412, 680 S.E.2d at 417.

283. *Id.*

asked where it was. Gibby, perhaps feeling responsible for the defendant's plight, managed to get Mike's tag number and reported it to the police who at that point had no interest in pursuing any leads in the matter, presumably because they had already arrested the defendant.<sup>284</sup>

Prior to Gibby's testimony at trial, the trial court granted the State's motion to exclude any testimony by Gibby about Mike.<sup>285</sup> After his conviction, the defendant contended on appeal that Gibby's testimony about his conversation with Mike was not hearsay, and the court of appeals agreed.<sup>286</sup> Quoting both the statutory and the traditional definitions of hearsay, the court of appeals noted that a statement is hearsay only when a jury is asked to assume or believe that the declarant was being truthful when he made the statement.<sup>287</sup> Here, the defendant was not attempting to prove through Gibby that Mike was telling the truth about his ownership of the trailer.<sup>288</sup> Instead, the defendant offered the statement because it was consistent with his explanation of how he came to have the trailer: that someone named Mike "claim[ed] to own the trailer and [took] actions consistent with his claims."<sup>289</sup> The only declarant the jury would be asked to believe was Gibby, not Mike.<sup>290</sup> Thus, it was Gibby's veracity, not Mike's, that was at issue.<sup>291</sup> Accordingly, the court reversed the defendant's conviction.<sup>292</sup>

Another example of fine distinctions is found in the court of appeals opinion in *Troutman v. State*.<sup>293</sup> In *Troutman* the defendant was accused of robbing a taxi driver who was dispatched to pick up a fare. After the taxi driver picked up two men at the address to which she was dispatched, one of the men pulled a gun and took the driver's cash. The taxi driver then intentionally wrecked the taxi, and the two perpetrators fled. Police later apprehended two men, and the taxi driver identified them as the robbers. After his conviction, the defendant contended on appeal that the trial court erroneously admitted a detective's testimony that after confiscating the defendant's cell phone, he redialed a recent number and discovered that the victim's employer, Decatur's Best Taxi

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284. *Id.* at 413, 680 S.E.2d at 418.

285. *Id.*

286. *Id.* at 413–14, 680 S.E.2d at 418.

287. *Id.* at 414, 680 S.E.2d at 418–19.

288. *Id.*, 680 S.E.2d at 419.

289. *Id.*

290. *See id.*

291. *See id.*

292. *Id.*

293. 297 Ga. App. 196, 676 S.E.2d 836 (2009).

Service, was called from the defendant's phone on the night of the robbery. Initially, the detective made that determination by simply calling the number, whereupon he was told he had called Decatur's Best Taxi Service. In addition, the detective said he went to the taxi service's business office to confirm that the telephone number in question was the taxi service's number.<sup>294</sup>

The court of appeals summarily rejected the argument that the detective's testimony was hearsay.<sup>295</sup> The court reasoned that "the officer's statement that the phone number was for the taxi service is not hearsay, but is a statement of undisputed fact."<sup>296</sup> That reasoning probably was not particularly satisfying to the defendant, whose point clearly was that the detective was simply repeating what he was told, and the prosecution was asking the jury to believe that the out-of-court statement was true.<sup>297</sup> The court of appeals, however, looked at the situation a little differently.<sup>298</sup> The detective was testifying about the results of his investigation, and "the value of the officer's testimony rested on his own veracity and competence," not on the truthfulness of what he was told.<sup>299</sup> This view likely did not satisfy the defendant either. Relying on out-of-court statements, the detective reached a conclusion about whose number was dialed and then asked the jury to believe that his investigation was credible because the information given to him by the out-of-court declarants was credible. It may be that the court's first explanation—that the testimony was not hearsay because it was a matter of undisputed fact—is the best explanation. Some matters are simply so clearly reliable and fundamental that we should not let the hearsay rule stand in the way of the search for truth.

### C. Admission in Pleadings

Most lawyers, particularly lawyers who primarily have a civil practice, are familiar with the general rule that factual allegations in pleadings constitute judicial admissions, regardless of whether the pleading is signed by the party.<sup>300</sup> Less well-known, however, is the fact that this principle does not necessarily apply in criminal cases. In *Carter v. State*,<sup>301</sup> the defendant attempted to introduce, during the testimony

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294. *Id.* at 196–98, 676 S.E.2d at 838.

295. *Id.* at 198, 676 S.E.2d at 839.

296. *Id.*

297. *See id.*, 676 S.E.2d at 838–39.

298. *See id.*, 676 S.E.2d at 839.

299. *Id.*

300. *See Morris v. Mullis*, 264 Ga. App. 428, 438, 590 S.E.2d 823, 832 (2003).

301. 296 Ga. App. 598, 675 S.E.2d 320 (2009).

of a witness, a motion to suppress filed by the witness's attorney in a criminal action against the witness.<sup>302</sup> Although the motion was not signed or verified by the defendant, she testified that her attorney reviewed the motion with her and that the information contained in the motion was true "to the best of [her] knowledge."<sup>303</sup> The trial court refused to admit the pleading even though it contained a factual allegation contrary to the witness's testimony at trial.<sup>304</sup> On appeal, the court of appeals noted that while pleadings are admissible in civil cases, they are not admissible in criminal cases unless it is demonstrated that the accused has authorized the allegations in the pleadings.<sup>305</sup> In *Carter* the court of appeals acknowledged the witness's testimony that she reviewed the motion with her attorney and that it was true to the best of her knowledge, but the witness "was not specifically asked about any particular statement contained in the motion such that it can be said that she authorized the specific statement in question."<sup>306</sup> Accordingly, the court of appeals held that the trial court did not abuse its discretion when it refused to admit the motion.<sup>307</sup>

#### D. Statements by Coconspirators

Pursuant to O.C.G.A. § 24-3-5,<sup>308</sup> a statement by one conspirator during the pendency of the conspiracy is admissible against his coconspirators,<sup>309</sup> and O.C.G.A. § 24-3-52<sup>310</sup> emphasizes that a conspirator's confession made after the enterprise ends is admissible only against himself.<sup>311</sup> Case law, however, qualifies this rule somewhat by holding that while a conspirator's confession to law enforcement incriminating a coconspirator ends the conspiracy and makes the confession admissible against the coconspirator, a confession made to someone other than a law enforcement officer does not end the conspiracy.<sup>312</sup> Also, as discussed at some length in a previous survey, even

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302. *Id.* at 599, 675 S.E.2d at 321.

303. *Id.* at 600, 675 S.E.2d at 321 (alteration in original).

304. *Id.* at 599-600, 675 S.E.2d at 321.

305. *Id.* at 600, 675 S.E.2d at 321-22.

306. *Id.* at 601, 675 S.E.2d at 322.

307. *Id.*

308. O.C.G.A. § 24-3-5 (1995).

309. *Id.*

310. O.C.G.A. § 24-3-52 (1995).

311. *Id.*

312. *See Fetty v. State*, 268 Ga. 365, 371, 489 S.E.2d 813, 819 (1997).

though the primary conspiracy may have ended, statements made during the concealment phase of a conspiracy may still be admissible.<sup>313</sup>

In *O'Neill v. State*,<sup>314</sup> a divided supreme court struggled with the issue of when a conspiracy ends. In the case below, styled *Bryant v. State*,<sup>315</sup> the court of appeals affirmed the defendant's conviction, holding that the evidence sufficiently supported the defendant's conviction for possession of methamphetamines.<sup>316</sup> The supreme court granted certiorari to consider whether a statement by the defendant's coconspirator was admissible.<sup>317</sup> This issue was critical because the defendant's conviction was based on circumstantial evidence, and absent the coconspirator's statement, the evidence was not sufficient to sustain the defendant's conviction.<sup>318</sup> The defendant was arrested with two companions in a motel room. The defendant was unconscious at the time of the bust, but his companions admitted to ownership of methamphetamines and other illegal drugs found during a search of the room.<sup>319</sup> According to the majority, one of the companions, after being arrested, stated that the defendant's unconscious state was the result of marital problems and "drinking or smoking [methamphetamines] the entire night."<sup>320</sup> According to the court of appeals, this statement, along with the fact that the defendant was unconscious in the motel room in close proximity to drugs, was sufficient to sustain the defendant's conviction.<sup>321</sup> To a majority of the supreme court, it was clear that the statement incriminating the defendant was made to law enforcement officers after the declarants had been taken into custody.<sup>322</sup> Accordingly, the conspiracy ended, and the statement was not admissible against the defendant.<sup>323</sup> Absent the statement, the court held, there was insufficient evidence to support the defendant's conviction.<sup>324</sup>

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313. Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 55 MERCER L. REV. 249, 272-73 (2003).

314. 285 Ga. 125, 674 S.E.2d 302 (2009).

315. 288 Ga. App. 863, 655 S.E.2d 707 (2007), *rev'd*, 285 Ga. 125, 674 S.E.2d 302 (2009).

316. *Id.* at 868, 655 S.E.2d at 711.

317. *O'Neill*, 285 Ga. at 125, 674 S.E.2d at 303.

318. *See id.*

319. *Id.* at 125-26, 674 S.E.2d at 304.

320. *Id.* at 126, 674 S.E.2d at 304 (quoting *Bryant*, 288 Ga. App. at 868, 655 S.E.2d at 711).

321. *Bryant*, 288 Ga. App. at 868, 655 S.E.2d at 711.

322. *O'Neill*, 285 Ga. at 126-27, 674 S.E.2d at 304-05.

323. *Id.* at 127, 674 S.E.2d at 305.

324. *Id.*

Justices Carley, Thompson, and Hines dissented.<sup>325</sup> In an opinion authored by Justice Hines, the dissent noted that the defendant agreed to a bench trial and that in a bench trial, a trial court is presumed to have considered only admissible evidence.<sup>326</sup> Moreover, according to the dissent, it was not clear that the incriminating statement by the companion was made after the three men were taken into custody, noting testimony that the men were not “formally arrested” until some time later.<sup>327</sup> Given the presumption that the trial court considered only admissible evidence and the deference appellate courts must give to finders of fact, the dissent argued that there was sufficient evidence to support the conviction and that the majority simply “parsed the evidence and substituted its judgment for that of the trial court.”<sup>328</sup>

The coconspirator exception, like most rules of evidence, has been liberally construed in favor of the prosecution in recent years, but that does not mean the necessary foundations for the admission of evidence can be ignored. With regard to the coconspirator exception, it is fundamental that before the prosecution can successfully tender an alleged coconspirator’s statement, it must first prove there was a conspiracy.<sup>329</sup> Apparently, the prosecution overlooked this elementary requirement in *Fisher v. State*<sup>330</sup> when the prosecution successfully tendered the statement of one defendant bragging about a robbery he and the defendant committed together.<sup>331</sup> However, other than the alleged coconspirator’s statement, there was no evidence of a conspiracy.<sup>332</sup> Before a coconspirator’s statement can be admitted, the prosecution must make a prima facie case that a conspiracy existed based on evidence other than the coconspirator’s statement.<sup>333</sup> In *Fisher* the prosecution made no effort to prove such a conspiracy.<sup>334</sup> Therefore, the trial court erred when it admitted the alleged coconspirator’s statement.<sup>335</sup>

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325. *Id.* at 129, 674 S.E.2d at 306 (Hines, J., dissenting).

326. *Id.* at 130–31, 674 S.E.2d at 307.

327. *Id.* at 131, 674 S.E.2d at 307.

328. *Id.* at 132, 674 S.E.2d at 308.

329. *Fisher v. State*, 295 Ga. App. 501, 503, 672 S.E.2d 476, 478 (2009).

330. 295 Ga. App. 501, 672 S.E.2d 476 (2009).

331. *Id.* at 502, 672 S.E.2d at 478.

332. *Id.* at 503, 672 S.E.2d at 478.

333. *Id.* at 503–04, 672 S.E.2d 478.

334. *Id.* at 503, 672 S.E.2d at 478.

335. *Id.*

*E. The "Explain-Conduct" Exception to the Hearsay Rule*

This year, the "explain-conduct" exception to the hearsay rule, codified at O.C.G.A. § 24-3-2,<sup>336</sup> has earned a subsection of its own in this Article. Perhaps the best definition of the explain-conduct exception is found in the supreme court's decision in *Momon v. State*.<sup>337</sup> First, the court noted that the explain-conduct exception is technically not an exception to the rule against hearsay; rather, it is nonhearsay because it is not offered to prove the truth of the out-of-court statement.<sup>338</sup> Concerned about overly broad interpretations of O.C.G.A. § 24-3-2, the supreme court in *Momon* adopted the following rule:

When, in a legal investigation, the conduct and motives of the actor are matters concerning which the truth must be found (i.e., are relevant to the issues on trial), then information, conversations, letters and replies, and similar evidence known to the actor are admissible to explain the actor's conduct. But where the conduct and motives of the actor are not matters concerning which the truth must be found (i.e., are irrelevant to the issues on trial) then the information, etc., on which he or she acted shall not be admissible under [O.C.G.A. § 24-3-2].<sup>339</sup>

As *Crawford* increasingly limits the admission of testimonial hearsay, it seems that prosecutors are looking to other means to get out-of-court statements before juries. The explain-conduct exception theoretically avoids *Crawford* problems because the out-of-court statement, even if testimonial, is not offered to prove the truth of the statement. For example, as noted in a recent survey,<sup>340</sup> the court of appeals in *Little v. State*<sup>341</sup> dodged a *Crawford* challenge to the admissibility of out-of-court statements made to a police officer by holding that the statements were admissible to explain the conduct of the police officer.<sup>342</sup> Yet, *Little* flies in the face of a long line of Georgia cases, beginning with *Momon*, that denounce the use of the explain-conduct exception to admit out-of-court statements made to police officers. As the supreme court said in *Teague v. State*,<sup>343</sup>

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336. O.C.G.A. § 24-3-2 (1995).

337. 249 Ga. 865, 294 S.E.2d 482 (1982).

338. *Id.* at 867, 294 S.E.2d at 484.

339. *Id.* (citations omitted).

340. Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 59 MERCER L. REV. 157, 184-85 (2007).

341. 280 Ga. App. 60, 633 S.E.2d 403 (2006).

342. *Id.* at 63, 633 S.E.2d at 405.

343. 252 Ga. 534, 314 S.E.2d 910 (1984).

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 [O.C.G.A. §] 24-3-2 . . . must be contained within its proper limit. Otherwise, the repetition of the rote words “to explain conduct” can become imprima-tur for the admission of rumor, gossip, and speculation.<sup>344</sup>

Yet, in the current survey period, the court of appeals again turned to the explain-conduct exception to affirm the admission of out-of-court statements made to police officers. In *Stubbs v. State*,<sup>345</sup> a robbery victim testified at trial, but for some reason not explained in the opinion, he did not provide a description of the clothing worn by the men who stole his truck. Subsequently, during the testimony of a police officer, the trial court permitted the police officer to testify about the description of the clothing given by the victim in a pretrial statement, ruling that the testimony was admissible as a prior inconsistent statement.<sup>346</sup> This, the court of appeals acknowledged, was clear error because no foundation was laid for the admission of the statement as a prior inconsistent statement.<sup>347</sup> The court of appeals nevertheless affirmed the defendant’s conviction on the ground that the statement, although inadmissible as a prior inconsistent statement, was admissible to explain the officer’s conduct when he subsequently searched the defendant’s residence for the clothing described by the victim.<sup>348</sup> The court of appeals made no effort to explain why the officer’s conduct was relevant; nor did the court distinguish *Teague* and other cases holding that the explain-conduct exception can only rarely warrant the admission of hearsay statements to explain police officer conduct.<sup>349</sup>

Also during the survey period, the court of appeals in *Johnson v. State*<sup>350</sup> affirmed the admission of hearsay testimony by an officer who

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344. *Id.* at 536, 314 S.E.2d at 912; *see also* Britton v. State, 257 Ga. App. 441, 442, 571 S.E.2d 451, 452–53 (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 that the defendant would be driving a particular vehicle and would have concealed money and drugs under a false bottom in the vehicle’s console).

345. 293 Ga. App. 692, 667 S.E.2d 905 (2008).

346. *Id.* at 694–95, 667 S.E.2d at 908.

347. *Id.* at 694, 667 S.E.2d at 908.

348. *Id.* at 695, 667 S.E.2d at 908. The court of appeals also held that the statement was part of the *res gestae* and thus admissible. *Id.* But, as discussed above, this would seem to raise *Crawford* issues. *See supra* text accompanying notes 246–64.

349. *See Stubbs*, 293 Ga. App. at 695, 667 S.E.2d at 908.

350. 293 Ga. App. 32, 666 S.E.2d 452 (2008).

received, during a morning briefing, a description of a suspect and stolen pickup truck used in an armed robbery.<sup>351</sup> This time, the court acknowledged that only rare circumstances warrant the admission of hearsay to explain police conduct.<sup>352</sup> Quoting *Morrow v. State*,<sup>353</sup> the court reasoned that “[t]his situation is one of the rare instances in which hearsay was properly used to explain the officer’s conduct.”<sup>354</sup> Further, the court noted, “The issue before the court with regard to this testimony was not whether Johnson committed the armed robbery or stole the pickup truck, but whether the briefing provided the officer with a reasonable and articulable suspicion justifying his investigation upon spotting the vehicle in the abandoned parking lot.”<sup>355</sup> Yet in *Morrow*, the officer’s conduct, and thus the reasons for his conduct, was clearly relevant. The parties in *Morrow* “stipulated that the trial court would determine [the defendant’s] guilt or innocence based on the evidence presented at the motion to suppress hearing.”<sup>356</sup> One of the issues at the motion to suppress hearing was whether evidence should have been suppressed because the arresting officer did not have a warrant or probable cause to make an arrest. Thus, the issue before the court at the suppression hearing truly was whether the officer had a reasonable and articulable suspicion that would justify his investigation of the defendant. Because the reasons for the officer’s conduct were relevant to an issue before the court, evidence that explained his conduct was properly submitted.<sup>357</sup> In *Johnson*, although the court of appeals quoted or paraphrased *Morrow* in some detail, the court did not explain why the reasons for the officer’s conduct were relevant to any issue in the case.<sup>358</sup>

*Stubbs* and *Johnson* can be contrasted with the court of appeals decision in *Deloatch v. State*.<sup>359</sup> In *Deloatch* the defendant contended, among other things, that the trial court erroneously admitted a detective’s testimony about his discussions with a witness at the scene and that based upon this discussion, the detective concluded that the defendant was a suspect.<sup>360</sup> The trial court ruled that the hearsay

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351. *Id.* at 35, 666 S.E.2d at 456.

352. *Id.*

353. 257 Ga. App. 707, 708, 572 S.E.2d 58, 59 (2002).

354. *Johnson*, 293 Ga. App. at 35, 666 S.E.2d at 456 (quoting *Morrow*, 257 Ga. App. at 708, 572 S.E.2d at 59).

355. *Id.*

356. *Morrow*, 257 Ga. App. at 707 n.1, 572 S.E.2d at 59 n.1.

357. *Id.* at 708, 572 S.E.2d at 59.

358. *See Johnson*, 293 Ga. App. at 35–36, 666 S.E.2d at 456.

359. 296 Ga. App. 65, 673 S.E.2d 576 (2009).

360. *Id.* at 71, 673 S.E.2d at 581.

testimony implicating the defendant was admissible because it “pertained to the officer’s investigation,” which the court of appeals concluded meant the trial court thought the hearsay testimony was admissible to explain the officer’s conduct.<sup>361</sup> The court of appeals had no difficulty concluding that the admission of the hearsay testimony was error, stating that in *Teague*, “the Court noted that only in ‘rare instances’ would there be a need to explain police conduct.”<sup>362</sup>

In *Vega v. State*,<sup>363</sup> the defendant argued that the trial court improperly excluded testimony by the investigating officer about a hearsay statement made to him. The defendant argued that this testimony should have been admitted under the explain-conduct exception because it explained why the officer failed to investigate potentially exculpatory evidence. Acknowledging that some such testimony is admissible only in rare instances, the defendant argued that this rule should be applied only to the prosecution and should not hinder a defendant’s ability to fully flesh out all circumstances of the case.<sup>364</sup> The supreme court did not bite; *Momon* and *Teague*, the court held, apply to both the prosecution and the defense.<sup>365</sup>

Finally, in *Character v. State*,<sup>366</sup> the supreme court dealt with the explain-conduct exception not in the context of testimony by law enforcement officers, but in the context of witness testimony recounting statements made by one of the deceased’s victims. In *Character*, which involved a group of truly nasty characters (pardon the pun, but it helps to make the point of the case), the defendants appealed their convictions for numerous crimes, including two murders and an aggravated assault. The circumstances leading up to the crimes involved thefts of dice-game proceeds and various romantic entanglements among the cast of characters. The end result was a shootout at the Poole Palace that left two dead and one injured.<sup>367</sup>

For purposes of this discussion, the relevant issue on appeal was whether the trial court improperly allowed a witness to testify about the victim’s statements to the witness concerning the theft of the dice-game proceeds. The prosecution contended that evidence of prior difficulties among the parties was relevant, and the trial court allowed the

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361. *Id.*

362. *Id.* (quoting *Teague*, 252 Ga. at 536, 314 S.E.2d at 912).

363. 285 Ga. 32, 673 S.E.2d 223 (2009).

364. *Id.* at 34–35, 673 S.E.2d at 226.

365. *Id.* at 35, 673 S.E.2d at 226.

366. 285 Ga. 112, 674 S.E.2d 280 (2009).

367. *Id.* at 112 n.1, 674 S.E.2d at 282 n.1.

testimony pursuant to the necessity exception to the hearsay rule.<sup>368</sup> On appeal, the supreme court easily dismissed a *Crawford* objection, noting that the statements by the victims to the witness were not testimonial.<sup>369</sup> Next, the court addressed whether the testimony was hearsay and concluded that because the out-of-court statement was offered to explain conduct and not to prove the truth of the matter asserted in the statement, the testimony was not hearsay.<sup>370</sup> Thus, the question then became whether the testimony was admissible under O.C.G.A. § 24-3-2.<sup>371</sup> Just as the reasons for the conduct of a law enforcement officer are rarely relevant, the reasons for the conduct of a victim also generally are not relevant: “[A] victim’s conduct is not a matter ‘concerning which the truth must be found’ and . . . the victim’s out-of-court statements to a third party are thus not admissible to explain the victim’s motives or conduct.”<sup>372</sup> If, however, the defendant knew of the statements made by the victim, then those statements perhaps could have influenced the defendant’s conduct or motives and, in that event, they may be relevant. For such conversations to be admissible under O.C.G.A. § 24-3-2 and *Momon*, the actor must know about the conversations for them to be potentially relevant to explain the actor’s conduct or motive.<sup>373</sup> In the case of a law enforcement officer, as discussed above, the reasons for an officer’s actions, including his conduct and motive, are rarely relevant.<sup>374</sup> In the case of a victim, the reasons for the victim’s conduct are not relevant, but it is possible that a victim’s statements, if known to the defendant, might have influenced the defendant’s conduct or motives.

However, the court pointed to its own decision in *Perry v. State*<sup>375</sup> as a potential problem with the *Momon* rule. In *Perry*, “a garden variety case involving prior difficulties in which the victim told her friends about the defendant’s prior abuse of her,”<sup>376</sup> the supreme court held that the victim’s out-of-court statements were admissible to explain the motive for the killing even though the defendant was unaware of the conversations.<sup>377</sup> In *Character* the court was satisfied that *Perry* was incorrectly decided and overruled *Perry* to the extent that it held a victim’s out-of-

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368. *Id.* at 113, 674 S.E.2d at 282.

369. *Id.* at 115, 674 S.E.2d at 283–84.

370. *Id.*, 674 S.E.2d at 284.

371. *Id.*

372. *Id.*

373. *Id.* at 116, 674 S.E.2d at 284.

374. *See supra* text accompanying notes 350–62.

375. 255 Ga. 490, 339 S.E.2d 922 (1986).

376. *Character*, 285 Ga. at 116, 674 S.E.2d at 284.

377. *Perry*, 255 Ga. at 493, 339 S.E.2d at 924.

court statements are admissible even if they are unknown to the defendant.<sup>378</sup> In addition, to the extent *Perry* suggested that a victim's conduct is a relevant matter concerning which the truth is to be found and that a victim's statements are admissible to explain that conduct, such a holding was overruled as well.<sup>379</sup>

The bottom line is, or should be, that the explain-conduct exception only allows the admission of out-of-court statements (1) made to police officers if the reason for the officer's conduct is relevant to an issue in the case and (2) made by victims if relevant to the defendant's conduct, which is only true if the statements are known to the defendant.

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378. *Character*, 285 Ga. at 116–17, 674 S.E.2d at 285.

379. *Id.* at 117, 674 S.E.2d at 285.