

# Evidence

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## I. INTRODUCTION

As you may know, July 11, 2010, marked the fiftieth anniversary of Harper Lee's Pulitzer Prize-winning classic, *To Kill A Mockingbird*,<sup>1</sup> which anecdotally inspired many in the South and beyond to enter the legal profession. Therefore, it is fitting to open this Article with Atticus Finch's oft-quoted closing statement:

The state has not produced one iota of medical evidence . . . that the crime Tom Robinson is charged with ever took place . . .

....

. . . I am confident that you gentlemen will review without passion the evidence you have heard, come to a decision, and restore this defendant to his family. In the name of God, do your duty.

....

. . . In the name of God, believe [Tom Robinson].<sup>2</sup>

This endearing work of literature encapsulates the importance of evidence, which law students often accuse of being boring, but which is the foundation of justice even for those whose property or life are at risk.

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1. HARPER LEE, *TO KILL A MOCKINGBIRD* (Harper Collins Publishers 50th anniversary ed. 2010) (1960).

2. *Id.* at 231, 234.

This Survey provides examples of evidentiary decisions made by Georgia courts from June 1, 2009 to May 31, 2010.<sup>3</sup> Some of the decisions described below represent substantive changes in the law. More of them illustrate ways that existing law can be applied to yield different results.

## II. REVISION OF THE RULES

Attempts to align Georgia's evidence rules more closely with the Federal Rules of Evidence have been delayed at least another year.<sup>4</sup> During the 2009 legislative session, the Georgia House of Representatives introduced House Bill 24,<sup>5</sup> which was designed to "revise, supersede, and modernize provisions relating to evidence."<sup>6</sup> On March 17, 2010, the bill passed the House Judiciary Committee, the scene of previous resistance from legislators, but further consideration of the bill was postponed until the 2010 session.<sup>7</sup> The Senate did not vote on the bill during this year's session.<sup>8</sup> A driving force behind these attempts to amend portions of the Official Code of Georgia Annotated (O.C.G.A.) that govern rules of evidence is the concern about the inconsistencies created by "140 years of judicial gloss" of the statutory rules.<sup>9</sup> In some cases, courts have abandoned the statutes all together and created somewhat of a common law rule in a gradual rejuvenation of Georgia law.<sup>10</sup>

## III. EXPERT TESTIMONY

"If an expert says it can't be done, get another expert." — David Ben-Gurion<sup>11</sup>

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3. For analysis of Georgia evidence law during the prior survey period, see Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 61 MERCER L. REV. 135 (2009).

4. See generally Robert D. Ingram, Introduction, *A Brief Overview of the Proposed New Georgia Rules of Evidence*, 13 GA. B.J. 30, 30 (Aug. 2007) (explaining attempts beginning in 1986 to revise the Georgia rules).

5. Ga. H.R. Bill 24, Reg. Sess. (2009) (unenacted).

6. *Id.*

7. For an overview of the status history of Ga. H.R. Bill 24 see [http://www.legis.ga.gov/legis/2009\\_10/sum/hb24.htm](http://www.legis.ga.gov/legis/2009_10/sum/hb24.htm).

8. See *supra* note 5.

9. Paul S. Milich, *A Brief Overview of the Proposed New Georgia Rules of Evidence*, 13 GA. B.J. 30, 31 (Aug. 2007).

10. *Id.*

11. ROSEMARIE JARSKI, WORDS FROM THE WISE: OVER 6,000 OF THE SMARTEST THINGS EVER SAID 170 (2007).

### A. Qualifications

Great concerns have arisen in the past about the effect that the development of the expert witness industry has had on our court system.<sup>12</sup> These concerns contributed to the passage of O.C.G.A. § 24-9-67.1,<sup>13</sup> which was enacted as part of Georgia's 2005 Tort Reform package.<sup>14</sup>

Courts are continuing to define how this provision should be applied, which has led to many opinions defining and redefining the provision's role in qualification determinations for expert testimony. For an expert to be qualified to testify, the expert must first meet a licensing requirement<sup>15</sup> and a threshold of recent active practice in the specialty of the allegedly negligent practitioner.<sup>16</sup>

During the survey period, the Georgia Court of Appeals provided some insight into the scope of these requirements. In *Craig v. Azizi*,<sup>17</sup> the trial court found the plaintiff's expert unqualified to testify that an anesthesiologist breached the standard of care by administering general anesthetic to the plaintiff before performing an interscalene nerve block.<sup>18</sup> The court of appeals upheld the trial court's ultimate determination that the expert lacked sufficient qualifications, but the court of appeals held that the trial court had abused its discretion in concluding that the expert's time spent working as a resident did not count toward his active practice during three of the five years preceding the injury.<sup>19</sup> The court established that once the expert received a medical degree and began his residency, the clock started on "active practice" in his specialty for purposes of the statute.<sup>20</sup>

Turning to licensing, the court interpreted O.C.G.A. § 24-9-67.1(c)'s requirement of licensure "by an appropriate regulatory agency to practice . . . in the *state* in which such expert was practicing . . . in the

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12. See, e.g., Alfred R. Politzer, *Georgia's Codification of Daubert: Narrowing the Admissibility of Novel Scientific Evidence in Georgia?*, 23 GA. ST. U.L. REV. 481, 487-88 (2006) (discussing the concern that judges face when presented with "novel scientific evidence"); ROGER C. PARK ET AL., EVIDENCE LAW: A STUDENT'S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS 516 (2d ed. 2004) (discussing whether "junk science" would be recognized in courts).

13. O.C.G.A. § 24-9-67.1 (2010).

14. Ga. S. Bill 3, § 7, Reg. Sess., 2005 Ga. Laws 1 (codified at O.C.G.A. § 24-9-67.1).

15. O.C.G.A. § 24-9-67.1(c)(1).

16. *Id.* § 24-9-67.1(c)(2)(A).

17. 301 Ga. App. 181, 687 S.E.2d 198 (2009).

18. *Id.* at 181-82, 687 S.E.2d at 199.

19. *Id.* at 185-86, 187, 687 S.E.2d at 202-03.

20. *Id.* at 185, 687 S.E.2d at 202 (internal quotation marks omitted).

profession” at the time of the alleged negligence<sup>21</sup> to mean that the expert “must be licensed and practicing (or teaching) in one of the states of the United States at the time the alleged negligent act occurred.”<sup>22</sup> Thus, no longer will parties be able to use experts licensed only in Canada or Europe. Furthermore, where an expert is licensed at the time of trial is immaterial.

### B. *Reliable Principles and Methods*

A qualified expert’s testimony must also meet reliability criteria.<sup>23</sup> The code provision, as recently amended by the Georgia Supreme Court, requires proffered expert testimony to be based on reliable principles and methods reliably applied to the facts of the case.<sup>24</sup>

The court of appeals recently applied the statute outside of the realm of the medical malpractice case. In *Giannotti v. Beleza Hair Salon, Inc.*,<sup>25</sup> a hair salon patron claimed that a stylist negligently performed hair-coloring procedures, causing chemical burns.<sup>26</sup> On appeal, the court affirmed the exclusion of expert testimony on effects of hair-coloring products on the following bases: the plaintiff’s expert did not perform tests using the same twenty-volume peroxide used by the defendant; the peroxide used in the expert’s tests was a different brand than that used by the defendant; and the heat source used in the tests differed from that used by the defendant.<sup>27</sup> The court also noted that the expert did not conduct any tests related to the effect of hair products on human hair or skin.<sup>28</sup> Therefore, the court reasoned that the expert had not reliably applied his methods to the facts of the case.<sup>29</sup>

### C. *The Expert’s Personal Practices*

The previous Survey described how the Georgia Supreme Court settled the question about the admissibility of a medical expert’s personal practice.<sup>30</sup> In *Condra v. Atlanta Orthopaedic Group, P.C.*,<sup>31</sup> the

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21. O.C.G.A. § 24-9-67.1(c)(1) (emphasis added).

22. *Craig*, 301 Ga. App. at 186-87, 687 S.E.2d at 203.

23. See O.C.G.A. § 24-9-67.1(c)(1).

24. See *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 658 S.E.2d 603 (2008) (finding unconstitutional the portion of O.C.G.A. § 24-9-67.1 that required the underlying facts to serve as the basis of an expert’s testimony and striking it from the code provision).

25. 296 Ga. App. 636, 675 S.E.2d 544 (2009).

26. *Id.* at 636-37, 675 S.E.2d at 545.

27. *Id.* at 640, 675 S.E.2d at 547.

28. *Id.*

29. See *id.*

30. Treadwell, *supra* note 3, at 146-48.

31. 285 Ga. 667, 681 S.E.2d 152 (2009).

supreme court overruled previous case law and held that evidence of an expert witness's personal practices is admissible as substantive evidence to impeach the expert's testimony regarding the standard of care.<sup>32</sup> Last year, the court of appeals retroactively applied the holding in *Condra to Griffin v. Bankston*,<sup>33</sup> a dental malpractice case.<sup>34</sup> The plaintiff appealed the exclusion of her oral surgeon's deposition testimony that his personal practice was to prescribe penicillin to prevent infection when extracting impacted wisdom teeth. The plaintiff wanted to use this testimony to impeach the dentist's statements at trial that he did not believe administering the antibiotic would have been effective in the plaintiff's case.<sup>35</sup> The court of appeals noted that equities favored retroactive application to prevent inconsistencies and to avoid creating standards for cases that vary according to the date of injury.<sup>36</sup> Even though the expert was not offering his opinion about the standard of care, the decision in *Condra* still applied.<sup>37</sup> The court held that in order to fully evaluate the witness's credibility, the jury should have been allowed to hear evidence of the witness's personal practice.<sup>38</sup>

#### IV. RELEVANCY

##### A. *Similar Acts or Transactions*

Evidence of past similar transactions by the defendant can be admissible in Georgia.<sup>39</sup> However, it is difficult to determine exactly when Georgia courts will find these extrinsic acts of the accused relevant. Perhaps in an effort to provide clarity, the court of appeals recently provided the following explanation of the admissibility requirements:

[T]he State must show (a) sufficient evidence that the similar transaction occurred and (b) sufficient connection or similarity between the similar transaction and the crime alleged so proof of the former tends to prove the latter. . . . [T]he proper focus is on the similarities, not

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32. *Id.* at 669, 681 S.E.2d at 154 (overruling *Johnson v. Riverdale Anesthesia Assocs.*, 275 Ga. 240, 563 S.E.2d 431 (2002)).

33. 302 Ga. App. 647, 691 S.E.2d 229 (2009).

34. *Id.* at 650, 691 S.E.2d at 232.

35. *Id.* at 649, 691 S.E.2d at 231.

36. *See id.* at 650-51, 691 S.E.2d at 232-33.

37. *Id.* at 651, 691 S.E.2d at 233.

38. *Id.* at 652, 691 S.E.2d at 233.

39. *See* O.C.G.A. § 24-2-2 (2010).

the differences, between the separate crime and the crime in question.<sup>40</sup>

In addition, courts must also consider whether the probative value of evidence of other transactions outweighs the risk that the jury will convict the defendant based on other proven examples of “bad acts” rather than on evidence that the defendant committed the crime currently alleged.<sup>41</sup> Of course, these definitions do little to explain how courts will decide whether transactions are substantially similar and how they will weigh the potential prejudicial impact of the evidence. For example, in a recent cocaine trafficking and possession case, the court of appeals held that the trial court erroneously admitted evidence of the defendant’s admission to the arresting officer that he was on probation for another cocaine-related offense.<sup>42</sup> The court concluded that the only possible evidentiary function that admitting evidence of an unspecified prior offense involving cocaine could serve would be to “impugn” the defendant’s character.<sup>43</sup> According to the court, this evidence was an impermissible, tangential reference to the defendant’s character.<sup>44</sup> However, the line between impermissibly impugning and incidentally implicating a defendant’s character has yet to be defined. The same court upheld a trial court’s decision to admit evidence of the defendant’s aggressive behavior and attempt to flee during a traffic stop ten years earlier to show the defendant’s pattern of running from the police and assaulting police officers.<sup>45</sup> The court also determined, however, that the trial court incorrectly admitted the discovery of a powdery substance in the defendant’s vehicle the day after his arrest.<sup>46</sup> The court reasoned that admitting the substance was error because no evidence suggested the substance was illegal, and the defendant was not charged with any drug-related offenses.<sup>47</sup>

It is clear that the rule permitting similar transaction evidence is most liberally applied in criminal cases that involve sexual offenses—particularly offenses against children—to show that the defendant

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40. *Evans v. State*, 300 Ga. App. 180, 182, 684 S.E.2d 311, 313-14 (2009).

41. *See Hampton v. State*, 300 Ga. App. 49, 49, 684 S.E.2d 118, 119 (2009) (quoting *Robinson v. State*, 192 Ga. App. 32, 33, 383 S.E.2d 593, 594 (1989)); *Farley v. State*, 265 Ga. 622, 625, 458 S.E.2d 643, 646-47 (1995).

42. *Hampton*, 300 Ga. App. at 49, 684 S.E.2d at 119.

43. *Id.* at 50, 684 S.E.2d at 119 (quoting *Robinson v. State*, 192 Ga. App. 32, 34, 383 S.E.2d 593, 594 (1989)).

44. *Id.* at 49, 684 S.E.2d at 119 (quoting *Robinson v. State*, 192 Ga. App. 32, 33, 383 S.E.2d 593, 594 (1989)).

45. *Ector v. State*, 298 Ga. App. 847, 848-49, 681 S.E.2d 654, 657 (2009).

46. *Id.* at 848-49, 681 S.E.2d at 656-57.

47. *Id.* at 849, 681 S.E.2d at 657.

has the “bent of mind” to engage in sexual encounters with unconsenting victims.<sup>48</sup> The court of appeals in *Evans* acknowledged a concern that allowing extrinsic evidence to establish bent of mind may violate due process, but it deferred to the supreme court’s decision to deny certiorari on that issue.<sup>49</sup>

### B. Victim Impact Evidence

In death penalty cases, Georgia law permits admission of evidence about a victim’s personal characteristics and the impact of the crime on the victim, the victim’s family, or the community “subsequent to an adjudication of guilt.”<sup>50</sup> In *Keita v. State*,<sup>51</sup> the supreme court examined this rule as it applied to the admissibility of a victim’s funeral program, which bore the victim’s photograph on the cover.<sup>52</sup> In *Keita* the trial court permitted the State to introduce the front cover of the victim’s funeral pamphlet as proof of the victim’s identity.<sup>53</sup> The program “contained a photograph of the victim [with the words] ‘Home Going Celebration,’ a cross,” the location of the service, and the name of the bishop who conducted it.<sup>54</sup> The defendant objected and argued on appeal that the trial court erred in admitting the program cover.<sup>55</sup> The trial court determined, and the supreme court agreed, that the photograph’s potential for prejudice was outweighed by its probative value.<sup>56</sup> Although the court would have preferred to identify the victim in a photograph without the funeral information, the court held no reversible error was committed by admitting the photo that appeared on the funeral booklet.<sup>57</sup>

## V. CHARACTER EVIDENCE

In an “evidentiary anomaly,” Georgia law does not permit admission of character evidence through the opinion of a character witness.<sup>58</sup> However, witnesses may testify about their knowledge of the defendant’s

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48. *See Evans*, 300 Ga. App. at 182, 684 S.E.2d at 313-14.

49. *See id.* at 183, 684 S.E.2d at 314 (citing *Wade v. State*, 295 Ga. App. 45, 47-49, 670 S.E.2d 864, 865-68 (2008), *cert. denied* (2009)).

50. O.C.G.A. § 17-10-1.2(a)(1) (2008 & Supp. 2010).

51. 285 Ga. 767, 684 S.E.2d 233 (2009).

52. *Id.* at 767, 770, 684 S.E.2d at 234, 236.

53. *Id.* at 770, 684 S.E.2d at 236.

54. *Id.*

55. *Id.*

56. *Id.* at 771, 684 S.E.2d at 236.

57. *Id.*

58. *Simpkins v. State*, 149 Ga. App. 763, 765, 256 S.E.2d 63, 65 (1979).

reputation in the community in which the defendant lives.<sup>59</sup> The court of appeals recently emphasized the specificity of this rule in *Warner v. State*.<sup>60</sup>

In a trial for armed robbery, the defendant called his high school football coach as a character witness. The coach testified about the defendant's reputation at school, but he indicated that he was not familiar with the defendant's reputation in the community in which he lived. Jurors were instructed to disregard the testimony.<sup>61</sup> On appeal, the court affirmed the trial court's decision because on direct examination, questions about the character of the accused must refer to the defendant's reputation in the community in which he lives: "Reputation in the business community or in the school community is not the correct test."<sup>62</sup>

Disputes about character evidence also concern what the jury should do with the testimony that is admitted. The court of appeals recently reversed a conviction after the trial court failed to properly instruct the jury about the role of two witnesses' testimony about the defendant's positive reputation in the community.<sup>63</sup> The judge granted the defendant's request for the pattern jury charge on good character evidence, which read as follows:

Good character is a positive, substantive fact and may be sufficient to produce in the minds of a jury a reasonable doubt about the guilt of the defendant. You have the duty to consider any evidence of general good character along with all of the other evidence in the case, and, if in doing so, you should entertain a reasonable doubt about the guilt of the defendant, it would be your duty to acquit.<sup>64</sup>

However, the judge instead instructed the jury that "good character of the accused must be proved by evidence of the accused's reputation. When evidence of good character is admitted, you may consider it in determining whether or not you have a reasonable doubt about the guilt of the accused."<sup>65</sup> The court of appeals held that this instruction misled the jury into thinking that they may not need to consider the evidence of the defendant's good character, by telling them that they "may"

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59. *Warner v. State*, 299 Ga. App. 56, 63, 681 S.E.2d 624, 630-31 (2009) (quoting *Overby v. State*, 125 Ga. App. 759, 760, 681 S.E.2d 910, 911 (1972)).

60. 299 Ga. App. 56, 681 S.E.2d 624 (2009).

61. *Id.* at 62-63, 681 S.E.2d at 630.

62. *Id.* at 63, 681 S.E.2d at 630-31.

63. *Hobbs v. State*, 299 Ga. App. 521, 523-24, 682 S.E.2d 697, 700 (2009).

64. *Id.* at 523 n.9, 682 S.E.2d at 699 n.9.

65. *Id.* at 523, 682 S.E.2d at 699-700.

consider the evidence.<sup>66</sup> Furthermore, the court held that the instruction failed to inform the jury that such evidence may be sufficient to establish reasonable doubt.<sup>67</sup>

## VI. HEARSAY

### A. Generally

A Georgia statute 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>68</sup> This statute differs from the common definition that hearsay is an out-of-court statement offered for the truth of the matter asserted.<sup>69</sup> However, the court of appeals has interpreted the two definitions synonymously.<sup>70</sup> According to their application of the rule against hearsay, courts in Georgia seem to say that hearsay is inadmissible unless the circumstances call for its admissibility.<sup>71</sup> The following sections provide examples of some of the various hearsay admissibility determinations made during the survey period.

### B. The Necessity Exception

Necessity is the hearsay exception that appears in O.C.G.A. § 24-3-1(b): “Hearsay evidence is admitted only in specified cases from necessity.”<sup>72</sup> Evidence admitted under the necessity exception must contain “particularized guarantees of trustworthiness[,] . . . and [must show] that the hearsay statements are more probative and revealing than other available evidence.”<sup>73</sup> If the statements are uncontradicted and made by an unavailable witness to someone from whom the declarant normally sought assistance with problems, then they are admissible under the necessity exception.<sup>74</sup>

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66. *Id.* at 523, 682 S.E.2d at 700.

67. *Id.* at 523-24, 682 S.E.2d at 700 (quoting *Nunnally v. State*, 235 Ga. 693, 704-05, 221 S.E.2d 547, 554 (1975)).

68. O.C.G.A. § 24-3-1 (2010).

69. *See id.*

70. *See* *DI Unif. Servs., Inc. v. United Water Unlimited Atlanta, LLC*, 254 Ga. App. 317, 324, 562 S.E.2d 260, 266 (2002) (quoting *Momon v. State*, 249 Ga. 865, 867, 294 S.E.2d 482, 484 (1982)) (interpreting the statutory definition of hearsay to mean statements made out of court offered for the truth of the matter asserted).

71. *See* *Mills v. Bing*, 181 Ga. App. 475, 477, 352 S.E.2d 798, 799 (1987).

72. O.C.G.A. § 24-3-1(b).

73. *Miller v. State*, 283 Ga. 412, 414, 658 S.E.2d 765, 767 (2008).

74. *Id.*

The supreme court recently held that statements made by a victim to a neighbor before the victim was taken to a hospital qualified for the necessity exception.<sup>75</sup> In *Treadwell v. State*,<sup>76</sup> the key factors weighing in favor of admissibility related to the victim's relationship with the neighbor. The victim was an eighty-one-year-old man who regularly brought his mail to his neighbor to read to him.<sup>77</sup> The two men often shared meals made using vegetables from the victim's garden.<sup>78</sup> For the court, this relationship was sufficient to establish particularized guarantees of trustworthiness.<sup>79</sup>

Similarly in *Devega v. State*,<sup>80</sup> the supreme court upheld the trial court's decision to admit statements made by the victim to his girlfriend about a drug deal with the defendant.<sup>81</sup> The court held that the victim's statements satisfied the necessity exception because the victim was deceased, and his statements were relevant to a meeting with the defendant immediately preceding his death.<sup>82</sup> These facts, coupled with the romantic relationship between the defendant and the witness, provided sufficient guarantees of trustworthiness for the court.<sup>83</sup>

### C. Confrontation Clause

Hearsay admissibility determinations are often intertwined with concerns about the defendant's Sixth Amendment<sup>84</sup> right to confront the witnesses against him. In a recent case before the court of appeals, Neal, an Augusta firefighter, appealed his termination on the grounds that the personnel board should not have admitted the lab report of a random drug test into evidence.<sup>85</sup> The court agreed with Neal.<sup>86</sup> According to the court, Neal's confrontation right was not sufficiently protected by allowing him to cross-examine the medical review officer who reviewed the lab results because the officer testified merely as a conduit for the absent technician's findings.<sup>87</sup> Without sufficient

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75. *Treadwell v. State*, 285 Ga. 736, 739, 684 S.E.2d 244, 248-49 (2009).

76. 285 Ga. 736, 684 S.E.2d 244 (2009).

77. *Id.* at 737, 740, 684 S.E.2d at 247, 249.

78. *Id.* at 740, 684 S.E.2d at 249.

79. *Id.*

80. 286 Ga. 448, 689 S.E.2d 293 (2010).

81. *Id.* at 449, 689 S.E.2d at 297.

82. *Id.*

83. *Id.*

84. U.S. CONST. amend. VI.

85. *Neal v. Augusta-Richmond Cnty. Pers. Bd.*, 304 Ga. App. 115, 115, 695 S.E.2d 318, 319 (2010).

86. *Id.*

87. *Id.* at 117-18, 695 S.E.2d at 321-22.

guarantees of trustworthiness such as testimony about the accuracy or methodology of the tests performed, the lab report was also inadmissible hearsay and devoid of probative value.<sup>88</sup>

*D. Statements of Co-conspirators*

Unlike the Federal Rules of Evidence, Georgia law does not require proof that a statement was made in furtherance of a conspiracy before admitting hearsay under the statement of co-conspirators exception.<sup>89</sup> However, the statute containing the exception also contains an introductory clause that requires the conspiracy to be proven before statements of co-conspirators are admitted.<sup>90</sup> When confronted with an opportunity to resolve the discrepancy between Georgia common law and this code provision, the supreme court adhered to the case law.

In *Thorpe v. State*,<sup>91</sup> the defendant appealed his convictions for murder and related offenses stemming from an attempted robbery. The contested evidence was a witness's testimony about a conversation he participated in with the defendant and his codefendant in which they admitted involvement in the murder.<sup>92</sup> The defendant argued that the State failed to prove a conspiracy existed before offering the hearsay testimony under the co-conspirators exception.<sup>93</sup> The court responded, "Notwithstanding the first clause of the Code section, we have previously held that such hearsay statements are admissible when the State at some point before the close of evidence establishes a prima facie case of conspiracy independent of the co-conspirator statement."<sup>94</sup> Other testimony at trial sufficiently established an agreement between the defendant and two other individuals to commit the robbery.<sup>95</sup> Because Georgia law defines a conspiracy only as "an agreement between two or more persons to commit a crime," the State made a prima facie case of conspiracy through evidence presented at various times and through

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88. *See id.* at 118, 695 S.E.2d at 322.

89. Milich, *supra* note 9, at 33. Under Rule 801(d)(2)(E) of the Federal Rules of Evidence, "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." FED. R. EVID. 801(d)(2)(E).

90. O.C.G.A. § 24-3-5 (2010).

91. 285 Ga. 604, 678 S.E.2d 913 (2009).

92. *Id.* at 604-05, 678 S.E.2d at 916-17.

93. *Id.* at 609-10, 678 S.E.2d at 920.

94. *Id.* at 610, 678 S.E.2d at 920.

95. *Id.*

various witnesses.<sup>96</sup> For the court, the timing was immaterial if the conspiracy was proven.<sup>97</sup>

#### VII. BURDEN OF PROOF

The supreme court held that another portion of the 2005 Tort Reform package passed constitutional muster during the survey period. The plaintiffs in a medical malpractice case challenged the heightened requirement to prove negligence in claims arising out of emergency medical care.<sup>98</sup> The relevant statute provides that in instances of alleged negligence during emergency medical care, “no physician or health care provider shall be held liable unless it is proven by clear and convincing evidence that the physician or health care provider’s actions showed gross negligence.”<sup>99</sup> The court rejected the plaintiffs’ claims that the statute is an impermissible special law, that it deprives certain plaintiffs of their right to a jury trial, and that it is unconstitutionally vague.<sup>100</sup> Rather, the court held that heightening the evidentiary standard was justified because rising health care costs in the state are a sufficiently important problem, and the statute is reasonably related to a solution to that problem.<sup>101</sup>

#### VIII. GUILTY PLEAS

In *Boykin v. Alabama*,<sup>102</sup> the Supreme Court of the United States established that in order for a guilty plea to stand, the defendant must understand that he or she is waiving three constitutionally protected rights,<sup>103</sup> which are the privilege against self-incrimination,<sup>104</sup> the right to trial by jury,<sup>105</sup> and the right to confront one’s accusers.<sup>106</sup> Moreover, to demonstrate the voluntariness of the plea upon the accused’s habeas petition, the State bears the burden of pointing either

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96. *Id.* (quoting *Brooks v. State*, 281 Ga. 14, 15, 635 S.E.2d 723, 727 (2006)) (internal quotation marks omitted).

97. *See id.*

98. *Gliemmo v. Cousineau*, 287 Ga. 7, 8, 694 S.E.2d 75, 77 (2010).

99. O.C.G.A § 51-1-29.5(c) (Supp. 2010).

100. *Gliemmo*, 287 Ga. at 10-11, 13, 694 S.E.2d at 78-80.

101. *See id.* at 11-12, 694 S.E.2d at 79.

102. 395 U.S. 238 (1969).

103. *Id.* at 243.

104. U.S. CONST. amend. V.

105. U.S. CONST. amend. VI.

106. *Id.*

to evidence on the record of the guilty plea hearing or extrinsic evidence if the record is silent.<sup>107</sup>

In *Sentinel Offender Services, LLC v. Harrelson*,<sup>108</sup> the defendant's plea hearing was not recorded, and the evidence of voluntariness was preprinted forms signed by the defendant, in which she waived rights and certified that the waiver was voluntary.<sup>109</sup> The court settled a conflict in Georgia case law, stating that preprinted forms such as these are insufficient evidence that a guilty plea was offered voluntarily.<sup>110</sup>

#### IX. CONCLUSION

Atticus Fitch ideally believed that “[t]he one place where a man ought to get a square deal is in a courtroom.”<sup>111</sup> The evidence presented before those who will ultimately make determinations of guilt, innocence, or liability is a key component of achieving this fairness.

One may think that the statutory rules of evidence represent the final word on a particular facet of the law. However, the cases described in this Survey show that this is not always so.<sup>112</sup> How a court decides which evidence will and will not be heard within its walls can shape the rule itself. Although efforts to conform parts of the O.C.G.A. to the Federal Rules of Evidence are ongoing, the influence of court practice will not likely change. Therefore, it is paramount to understand not only the rules but also their practical application. Such understanding will not only help predict what will be heard and seen by the trier of fact, but it can help predict the outcome of disputes over properties and life.

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107. *Sentinel Offender Servs., LLC v. Harrelson*, 286 Ga. 665, 666-67, 690 S.E.2d 831, 833 (2010) (quoting *State v. Hemdani*, 282 Ga. 511, 511, 651 S.E.2d 734, 735 (2007)).

108. 286 Ga. 665, 690 S.E.2d 831 (2010).

109. *Id.* at 667, 690 S.E.2d at 833.

110. *Id.* at 667, 690 S.E.2d at 833-34. *Contra Moore v. State*, 285 Ga. 855, 856-58, 684 S.E.2d 605, 606-07 (2009) (contrasting examples of Georgia courts' treatment of preprinted forms as evidence of the voluntariness of a guilty plea).

111. LEE, *supra* note 1, at 253.

112. See Milich, *supra* note 9, at 31 (describing the ways Georgia courts have created various common law rules of evidence).