Evidence

by Hardy Gregory, Jr.*
and
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This survey includes only a small fraction of the several hundred cases addressing evidentiary issues that were decided in the Georgia appellate courts during the last year. The cases discussed in this article were selected because they either illustrate new developments in the law of evidence or highlight and clarify significant, time-tested principles.

I. Ultimate Jury Issue

In *Smith v. State*,[1] the Georgia Supreme Court appeared to lay to rest any lingering doubts about whether expert opinion testimony, if otherwise admissible, could be offered when it embraced "an ultimate issue" to be decided by the trier of fact.[2] On trial for murder, Josephine Smith claimed she shot her boyfriend in self defense. The trial court refused to allow the defense to present the testimony of a clinical psychologist that indicated that defendant fit the profile of a battered woman[3] and that she thus shot her boyfriend because of her fear that he was about to harm her. The trial court reasoned that the jury was capable of determining,

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1. 247 Ga. 612, 277 S.E.2d 678 (1981).

2. *See* Gregory, *Evidence, Annual Survey of Georgia Law, 1980-1981*, 33 Mercer L. Rev. 129, 140 (1981).

3. Out of the presence of the jury, the expert testified that a battered woman, one who has been abused over a long period of time, will often maintain the relationship with her abuser out of fear that greater harm will come to her if she attempts to extricate herself from the relationship. According to this expert, the primary emotion the battered woman experiences is fear. 247 Ga. at 614, 277 S.E.2d at 680.

without expert opinion, whether defendant acted out of a reasonable fear.[4] The court of appeals affirmed,[5] reciting the rule that an expert witness is not permitted to express an opinion on the very fact to be decided by the jury.[6] The supreme court reversed and announced the proper rule to be that "[e]xpert opinion testimony on issues to be decided by the jury, even the ultimate issue, is admissible where the conclusion of the expert is one which jurors would not ordinarily be able to draw for themselves; i.e., the conclusion is beyond the ken of the average layman."[7] Applying this rule to the facts in *Smith*, the court concluded that the expert's testimony concerning the battered woman syndrome would provide conclusions about a woman who fit that profile "that jurors could not ordinarily draw for themselves."[8] The court held, therefore, that the expert testimony had been improperly excluded.[9] In *Mullis v. State*,[10] the supreme court faced another claim that expert defense testimony concerning the battered woman syndrome had been improperly excluded. In a unanimous decision, the court applied the rule set down during the previous term in *Smith*, but concluded that since "the testimony sought to be admitted related to the reasonable fears of a defendant which could be comprehended by the average juror,"[11] the testimony, therefore, did not meet the *Smith* test.

During the same term, the supreme court decided *Sinns v. State*.[12] At his trial for murder, Sinns sought to introduce the testimony of a clinical psychologist concerning his emotional and mental state at the time he made a confession. The trial court excluded the testimony based on the court of appeals' holding in *Smith*, that a witness is not authorized to express an opinion on the ultimate fact to be decided by the jury.[13] In a four to three per curiam decision, the supreme court affirmed the decision of the trial court. The majority opinion acknowledged the *Smith* rule that

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4. *Id.* at 613, 277 S.E.2d at 679.

5. Smith v. State, 156 Ga. App. 419, 274 S.E.2d 703 (1980), *rev'd*, 247 Ga. 612, 277 S.E.2d 678 (1981).

6. 156 Ga. App. at 419, 274 S.E.2d at 704.

7. 247 Ga. at 619, 277 S.E.2d at 683. The majority opinion noted that adoption of this rule "is in accord with the modern view as exemplified by Rules 702, 704 of the Federal Rules of Evidence." *Id.*

8. *Id.*

9. *Id.*

10. 248 Ga. 338, 282 S.E.2d 334 (1981).

11. *Id.* at 339, 282 S.E.2d at 337. The evidence in this case showed that the victim, defendant's husband, had beaten defendant on previous occasions; however, the evidence also showed that defendant had a history of prior violent attacks on the victim. Taken as a whole, the evidence at trial was not sufficient to demonstrate that defendant fit the profile of a battered woman. *Id.* at 338, 282 S.E.2d at 336-37.

12. 248 Ga. 385, 283 S.E.2d 479 (1981).

13. *Id.* at 387, 283 S.E.2d at 481.

expert opinion testimony, even on the ultimate issue in the case, is admissible when the conclusion drawn by the expert is beyond the ken of the average layman, but maintained that this rule should not be "extended"[14] to the *Sinns* case. "The *Smith* holding was the result of the need to treat a unique and almost mysterious area of human response and behavior. The voluntariness of a confession is not a circumstance akin to the complex subject of battered wife syndrome."[15] Two justices dissented on the ground that the proffered expert testimony went to the weight to be given defendant's confession and was not evidence of the ultimate issue to be proven.[16] A third justice based his dissent on the ground that the admission of expert opinion testimony should not hinge on whether it relates to the ultimate issue to be decided in the case, but should be admitted "unless it amounts to no more than a general belief as to how the case should be decided"[17] and thus tends to suggest to the jury that it "may shift responsibility for making its decision to the witness."[18]

In the wake of the *Sinns* decision, the viability of the rule announced by the supreme court in *Smith* is questionable. *Sinns* appears to restrict the applicability of the *Smith* rule to cases involving the battered woman syndrome and to return to the rule, now rejected in a majority of jurisdictions, that an expert may not express his opinion on the ultimate issue to be resolved in the case.[19]

It seems clear, as Professor Agnor suggests, that the focus of the discussion concerning admission of expert testimony should be on whether the evidence sought to be elicited is a proper inquiry for opinion evidence,[20] rather than whether the expert's testimony goes to the ultimate issue in the case. Furthermore, the expert's opinion on any issue should be admitted if "the subject of the inference [is] so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman,"[21] and if the witness has such skill, knowledge, or experience in the field in question that it appears that "his opinion or inference

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14. *Id.*

15. *Id.*

16. *Id.* (Clarke, J., dissenting). Justice Hill joined Justice Clark in dissent. The dissent points out that it is common to admit expert testimony regarding both opinion on the ultimate issue and the weight to be given evidence in cases in which the issues are handwriting identification, legal or medical malpractice, sanity, and value of property in condemnation cases. *See also* T. GREEN, JR., THE GEORGIA LAW OF EVIDENCE § 113 (1957) [hereinafter cited as GREEN].

17. 248 Ga. at 388, 283 S.E.2d at 482 (Gregory, J., dissenting).

18. *Id. See also* C. MCCORMICK, MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 12 (E. Cleary 2d ed. 1972) [hereinafter cited as MCCORMICK].

19. 247 Ga. at 615, 277 S.E.2d at 680; *see* MCCORMICK, *supra* note 18, § 12, at 27.

20. W. AGNOR, AGNOR'S GEORGIA EVIDENCE, § 9-3 (1976) [hereinafter cited as AGNOR].

21. MCCORMICK, *supra* note 18, § 13, at 29.

will probably aid the trier in his search for truth."[22]

II. RELEVANCY

One commentator has suggested that evidence "may be excluded as 'irrelevant' for either of these two quite distinct reasons: because it is not probative of the proposition at which it is directed, or because that proposition is not provable in the case."[23] In *Daniels v. State*,[24] the court of appeals concluded that evidence in a murder trial showing defendant had been badly scarred in an earlier, unrelated knife fight was not probative of defendant's contention that he had a reasonable belief[25] that deadly force was necessary to protect himself against a perceived knife attack by the victim.[26] The supreme court granted certiorari and reversed,[27] determining that evidence of defendant's knife inflicted scars was relevant to his claim of self defense. The per curiam decision analogized to those murder cases in which the State had been permitted to exhibit the victim's ear[28] or graphic pictures of the victim's remains[29] to the jury. The court concluded that since these evidentiary matters were relevant to show all circumstances surrounding the crime, the scars Daniels incurred in an earlier knife fight were relevant to show the circumstances involved in his fight with the victim. The evidence of Daniels' scars, the majority concluded, would aid the jury in determining whether defendant's actions toward the victim were those of a "reasonable person."[30] A special concurrence in the opinion pointed out that admissibility in the case was not

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22. *Id.*

23. James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 691 (1941); *see also* Gregory, *Evidence, Annual Survey of Georgia Law, 1976-1977*, 29 MERCER L. REV. 145 (1977) (an earlier discussion of this topic). Professor Irving Younger states that "relevance means that the item of proof tendered by the lawyer has some logical tendency to prove what the lawyer says he is trying to prove" while "materiality means that what the lawyer says he is trying to prove has some bearing on an issue in the case." I. Younger, The Law of Evidence: An Outline to Accompany Lectures by Irving Younger, Esq. (1980) (available from the National Practice Institute, Inc., Minneapolis, Minn.).

24. 158 Ga. App. 476, 282 S.E.2d 118, *rev'd*, 248 Ga. 591, 285 S.E.2d 516 (1981).

25. *See* OFFICIAL CODE OF GA. ANN. § 16-3-21(a) (Michie 1982), GA. CODE ANN. § 26-902(a) (Harrison 1977).

26. While defendant maintained that the victim "came after him" with a knife, none of the eyewitnesses to the incident observed a knife in the victim's possession. An unopened knife was found in the victim's right front pants pocket. 158 Ga. App. at 477, 282 S.E.2d at 119.

27. Daniels v. State, 248 Ga. 591, 285 S.E.2d 516 (1981).

28. Green v. State, 246 Ga. 598, 609, 272 S.E.2d 475, 486 (1980) (Hill, J., dissenting), *cert. denied*, 450 U.S. 936 (1981).

29. *See, e.g.*, Godfrey v. State, 243 Ga. 302, 304, 253 S.E.2d 710, 714 (1979), *rev'd on other grounds sub nom.* Godfrey v. Georgia, 446 U.S. 420 (1980).

30. 248 Ga. at 593, 285 S.E.2d at 518.

governed by the State's authority to introduce gruesome photographs or the victim's ear in a criminal case. The determination of admissibility of the latter type of evidence results from a balancing of the relevancy of the evidence against its prejudicial impact.[31] In a murder case, however, when the defendant maintains that the homicide was justifiable, "[t]he law . . . does not take into account the actual fears of the slayer, but considers all the circumstances, with reference to a determination as to whether they were sufficient to excite the fears of a reasonable person."[32] This mythical, objective, reasonable person must be placed under all the relevant circumstances present in the case at hand. While the argument can be made that the court's opinion in *Daniels* opens the door to the admission of every prior occurrence and remote event in the defendant's history, it should be noted that in each instance the prior occurrence will have to pass the test of relevancy before being admitted.[33]

III. Permitting Jurors to Ask Questions

While there is some authority in other jurisdictions for allowing jurors to question witnesses during the trial of a case,[34] this is not the rule in Georgia.[35] One theory underlying this prohibition is that jurors are not schooled in the rules of evidence and may be offended if counsel objects to their questions. The Georgia Supreme Court, however, has in one case upheld the trial court's practice of permitting the jurors to ask questions of the witnesses when the judge announced his intention to invoke the practice, and counsel raised no objections either at that time or when the witnesses were questioned.[36] The court made it clear that it considered the practice to be a dangerous and generally unacceptable one, but that "[t]he failure to object . . . virtually compels the conclusion that . . . counsel approved the procedure."[37]

IV. Habit and Custom

Habit may be described as a regular and uniform response to a repeated, specific situation in which the response may become "semi-auto-

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31. *Id.* at 594, 285 S.E.2d at 519 (Gregory, J., concurring specially).

32. Anderson v. State, 117 Ga. 255, 258, 43 S.E. 835, 836 (1903).

33. "The lapse of time between the prior occurrences and the homicide . . . go[es] to the weight and credit to be accorded the testimony by the jury and not to its admissibility." Milton v. State, 245 Ga. 20, 26, 262 S.E.2d 789, 794 (1980).

34. *See* 159 A.L.R. 347; *cf.* Green, *supra* note 16, § 131.

35. Hall v. State, 241 Ga. 252, 244 S.E.2d 833 (1978); Stinson v. State, 151 Ga. App. 533, 260 S.E.2d 407 (1979).

36. State v. Williamson, 247 Ga. 685, 279 S.E.2d 203 (1981).

37. *Id.* at 686, 279 S.E.2d at 204.

matic."[38] While there is little disagreement among the authorities that proof of the habitual conduct of an individual is relevant to demonstrate that he acted in accordance with that conduct on a particular occasion,[39] many jurisdictions, including Georgia, hold that an individual's habitual failure to use due care when engaging in specific conduct is not admissible to prove he acted negligently on a given occasion.[40] Certain jurisdictions adhering to this rule have carved out an exception when there are no eyewitnesses to the individual's alleged negligent conduct on the occasion in question, but there is evidence that the individual habitually has failed to exercise due care in similar situations.[41]

It has been suggested that the rule excluding evidence of habit evolved because the courts tend to confuse habits with the rule that evidence of a person's character is generally inadmissible to show he acted in a specific manner on a given occasion.[42] There is, however, authority for the proposition that evidence of habit, because of its specific, uniform nature, is more probative of a particular act than is evidence of character.[43] Arguably, the rule excluding evidence of habitual failure to exercise due care in performing a given task could be relaxed to allow the trial court to exercise its discretion to exclude the evidence if it is not shown that the conduct was performed in a sufficiently regular manner or if it is demonstrated that evidence of the habit would result in undue prejudice.[44]

In Georgia, evidence of an individual's habitual acts of negligence is admissible only when the individual dies as a result of the conduct.[45] The Georgia Court of Appeals recently reaffirmed this exception in a case in which plaintiff sought recovery for damages to property allegedly caused by fire from decedent's cigarette.[46] Plaintiff was permitted to testify that the decedent had the habit of chain smoking while drinking and had "many times"[47] become unconscious from alcohol with a lighted cigarette in his hand. Other evidence showed that at the time of his death the decedent had a high alcohol-blood ratio. The court of appeals found plaintiff's testimony "relevant to any inquiry into what caused the fire,"[48] but

38. McCORMICK, *supra* note 18, § 195.

39. *See, e.g.*, AGNOR, *supra* note 19, § 10-18; GREEN, *supra* note 16, § 67; McCORMICK, *supra* note 17, § 195.

40. *See* Sams v. Gay, 161 Ga. App. 31, 32-33, 288 S.E.2d 822, 823 (1982); Hines v. Bell, 104 Ga. App. 76, 81, 120 S.E.2d 892, 896 (1961).

41. Annot., 28 A.L.R.3D 1293 (1969).

42. McCORMICK, *supra* note 18, § 195.

43. GREEN, *supra* note 16, § 67.

44. *See* McCORMICK, *supra* note 18, § 195.

45. Stripling v. Godfrey, 143 Ga. App. 742, 240 S.E.2d 145 (1977).

46. Sams v. Gay, 161 Ga. App. 31, 288 S.E.2d 822 (1982).

47. *Id.* at 32, 288 S.E.2d at 823.

48. *Id.* at 33, 288 S.E.2d at 824.

made it clear that evidence of habitual negligence will be restricted to those cases in which the allegedly negligent party dies.[49]

V. PRESUMPTIONS

In *Williamson v. State*,[50] the Georgia Supreme Court took a new look at the standards of review for presumptions of law in criminal cases. Under attack in that case was the constitutional validity of the presumption that recent, unexplained possession of stolen property permits the jury to infer that the accused perpetrated the theft. Relying on the edicts of the United States Supreme Court[51] that the relationship between the due process clause of the fourteenth amendment[52] and presumptions of law is controlled by whether the presumption in question is "permissive" or "mandatory,"[53] the court in *Williamson* undertook an analysis of the consequences of relying on either type of presumption in a criminal case.[54]

A permissive presumption allows, but does not require, the jury to draw the ultimate fact from the prosecutor's proof of the basic fact.[55] A mandatory presumption, on the other hand, *demands* that the trier of fact find the ultimate fact once proof of the basic fact is established.[56] An examination of the United States Supreme Court decisions analyzing presumptions indicates that in order to survive scrutiny, there must be not only a rational connection between the basic fact proved by the state and the ultimate fact presumed,[57] but it must "be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."[58]

The court in *Williamson* teaches us that "[w]here the ultimate fact is an element of the crime charged, it [proof] may not rest on a mandatory presumption."[59] This is true regardless of whether the presumption is the

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49. *Id.* at 33, 288 S.E.2d at 823-24.

50. 248 Ga. 47, 281 S.E.2d 512 (1981).

51. Ulster County Court v. Allen, 442 U.S. 140 (1979); Leary v. United States, 395 U.S. 6 (1968); Tot v. United States, 319 U.S. 463 (1943).

52. U.S. CONST. amend. XIV.

53. Ulster County Court v. Allen, 442 U.S. 140, 156-57 (1979).

54. 248 Ga. at 54, 281 S.E.2d at 518.

55. Ulster County Court v. Allen, 442 U.S. 140, 156-57 (1979). That is, a permissive presumption allows, but does not require, the jury to draw *B* once the State has proved *A*.

56. *Id.* The United States Supreme Court noted that, in determining whether a presumption is permissive or mandatory, the jury instructions generally will control. *Id.* at 157 n.16.

57. Tot v. United States, 319 U.S. 463, 467 (1943).

58. Leary v. United States, 395 U.S. 36 (1968).

59. 248 Ga. at 56, 281 S.E.2d at 519. *See* Sandstrom v. Montana, 442 U.S. 510 (1978) (reversing the trial court's presumption of intent).

only evidence the State offers to prove the ultimate fact or whether the State offers supplemental evidence to prove that fact.[60] The latter is true because the jury is required to presume the ultimate fact from a mandatory presumption even if there is other evidence presented that tends to prove *or* disprove the ultimate fact.[61]

If the State relies on a permissive presumption as evidence of the defendant's guilt, but offers additional evidence of his guilt, it will be impossible to determine whether the trier of fact drew the permitted inference. On review, therefore, the appellate court will look to all the evidence in the record, including evidence offered in rebuttal of the presumption, to determine whether the State has proved the defendant's guilt beyond a reasonable doubt.[62] When the State's only evidence of a defendant's guilt is the permissive presumption, however, it is not sufficient that the ultimate fact is more likely than not to flow from the basic fact. When the jury finds the defendant guilty on the basis of this evidence alone, it necessarily follows that the jury drew the permitted presumption.[63] In this situation, the supreme court found, to satisfy the test of *Jackson v. Virginia*[64] and *In re Winship*[65]

> the presumed fact must follow from the proved fact *beyond a reasonable doubt*. If the presumption satisfied only the *Leary* test, that is, the presumed fact was "more-likely-than-not" to follow from the proved fact, then the jury, relying on this evidence alone, would be permitted to convict the defendant without finding that he was guilty beyond a reasonable doubt.[66]

In reaching this conclusion, the supreme court addressed a question left open in *Ulster County Court v. Allen*[67] and *Sandstrom v. Montana*.[68]

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60. 248 Ga. at 56, 281 S.E.2d at 519.

61. *Id.*

62. *Id.* It has been suggested that a conviction obtained by the use of a permissive presumption that does not fully comport with due process nonetheless may be upheld under this test when the State presents other evidence from which the jury could find the defendant guilty beyond a reasonable doubt. By looking to all the evidence in the record rather than isolating the permissive presumption, the appellate court may be able to disregard the presumption's constitutional infirmities. *See* Casenote, *A New Standard for Presumptions in Criminal Cases: Ulster County Court v. Allen*, 21 B.C.L. REV. 990 (1980).

63. 248 Ga. at 56, 281 S.E.2d at 519.

64. 443 U.S. 307 (1979).

65. 397 U.S. 358 (1970).

66. 248 Ga. at 56, 281 S.E.2d at 519 (emphasis in original).

67. 442 U.S. 140 (1979).

68. 442 U.S. 510 (1978).

VI. IMPEACHMENT OF OWN WITNESS

Section 38-1801 of the Georgia Code Ann. provides in pertinent part: "[a] party may not impeach a witness voluntarily called by him, except where he can show to the court that he has been entrapped by said witness by a previous contradictory statement."[69] Early Georgia cases interpreting this section held that in order to demonstrate he had been entrapped by his own witness, a party must show he was both surprised and prejudiced by the witness' testimony as opposed to the witness' inconsistent out of court statement.[70] When the requirements of this statute were met, the prior inconsistent statement was admissible for impeachment purposes, "but not as direct evidence to prove the truth of its contents since it contained hearsay."[71] In *Wilson v. State*,[72] the supreme court both obscured the necessity for demonstrating surprise and eliminated the requirement that a party show prejudice in order to claim entrapment.[73] Under the theory of *Wilson*, a party would be allowed to impeach his own witness when the testimony was merely inconsistent with the prior out of court statement.[74] The cases following *Wilson* continued to require some showing of surprise in order to find entrapment under the statute; nevertheless, the courts persistently took a liberal view of what constituted surprise.[75] In *Davis v. State*,[76] the supreme court completely obviated the requirement of showing surprise before a party may impeach his own witness. Under the present rule, a party who offers evidence of a witness' previous statement that is inconsistent with the witness' in-court testimony properly may claim that he has been entrapped within the meaning of section 38-1801 and thereafter may impeach the witness.[77]

Contemporaneously with *Davis*, the supreme court decided *Gibbons v. State*[78] and *Ranger v. State*.[79] In *Gibbons*, the court reexamined the un-

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69. OFFICIAL CODE OF GA. ANN. § 24-9-81 (Michie 1982), GA. CODE ANN. § 38-1801 (Harrison 1981).

70. McDaniel v. State, 53 Ga. 253 (1874); Jackson v. State, 124 Ga. App. 488, 184 S.E.2d 185 (1971).

71. Wisdom v. State, 234 Ga. 650, 655, 217 S.E.2d 244, 249 (1975).

72. 235 Ga. 470, 219 S.E.2d 756 (1975).

73. "Henceforth, for 'entrapment' under . . . Code Ann. § 38-1801 to exist, we will not require that the witness' testimony be a total 'surprise' nor that it be affirmatively damaging." *Id.* at 475, 219 S.E.2d at 760. *See also* OFFICIAL CODE OF GA. ANN. § 24-9-81 (Michie 1982), GA. CODE ANN. § 38-1801 (Harrison 1981).

74. 235 Ga. at 475, 219 S.E.2d at 760.

75. *See, e.g.*, Dixon v. State, 243 Ga. 46, 252 S.E.2d 431 (1979); Ellenburg v. State, 239 Ga. 309, 236 S.E.2d 650 (1977); State v. Westberry, 238 Ga. 648, 235 S.E.2d 140 (1977).

76. 249 Ga. 309, 290 S.E.2d 273 (1982).

77. *Id.* at 314, 290 S.E.2d at 278.

78. 248 Ga. 858, 286 S.E.2d 717 (1982).

derpinnings of the rule restricting the use of a prior inconsistent statement for impeachment purposes and prohibiting use of the statement as direct evidence. The court noted that the traditional reason for this rule is that a prior out-of-court statement of a witness is inadmissible hearsay if it is offered to prove the truth of the matters asserted in the statement.[80] Furthermore, according to this position, the credibility of the witness' out-of-court statement is undermined because the declarant was (a) not under oath, (b) not subject to cross-examination, and (c) not in the presence of the jury when the statement was made.[81]

In *Gibbons*, the court decided that these problems are largely eradicated when the declarant of the out-of-court statement takes the witness stand and is subjected to cross-examination.[82] The court then established the rule that "a prior inconsistent statement of a witness who takes the stand and is subject to cross-examination is admissible as substantive evidence, and is not limited in value only to impeachment purposes."[83] The court in *Gibbons* noted that the salutary effects of allowing the prior statement to be admitted as substantive evidence include protecting the parties from the unpredictable witness, insulating the parties and the witness from attempts to influence testimony, and, ultimately, discovering the truth.[84]

In *Ranger*, a majority of the court agreed that when a prior inconsistent statement is sought to be admitted as substantive evidence under the rule of *Gibbons*, section 38-1801 does not come into play.[85] A special concurrence in *Ranger*[86] pointed out that both *Ranger* and *Davis* permit prior inconsistent statements of one's own witness to be admitted in evidence; the cases differ only in the methods by which they sanction admission. *Ranger* permits the prior inconsistent statement to be admitted as substantive evidence without requiring that it first be considered as impeaching evidence under section 38-1801. *Davis* allows the statement to be entered as impeaching evidence without necessitating a showing of surprise as formerly required; the statement may then be considered as substantive evidence as well, based on the holding of *Gibbons*.[87] The upshot of

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79. 249 Ga. 315, 290 S.E.2d 63 (1982).

80. 248 Ga. at 862, 286 S.E.2d at 721. *See also* McCormick, *supra* note 18, § 251.

81. 248 Ga. at 862, 286 S.E.2d at 721.

82. On cross-examination the declarant will have the opportunity to admit, repudiate, or vary his out-of-court statement. In turn, the jury will have the opportunity to observe the declarant and determine whether it believes his testimony or the out of court statement. *Id.* at 863, 286 S.E.2d at 721.

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

84. *Id.* at 864, 286 S.E.2d at 722.

85. 249 Ga. at 318, 290 S.E.2d at 67.

86. *Id.* at 322, 290 S.E.2d at 69 (Gregory, J., concurring specially).

87. 249 Ga. at 322, 290 S.E.2d at 69 (Gregory, J., concurring specially).

Gibbons, Davis, and *Ranger* is that a party now may use a prior inconsistent statement of his own witness both to impeach that witness and as substantive evidence, without running afoul of section 38-1801.

VII. DISCOVERY

Georgia law provides a criminal defendant with the right of discovery of written scientific reports in the State's possession that the State intends to introduce at trial against the defendant.[88] The defendant's request for a copy of any reports

> shall be made by the defendant in writing at arraignment or within any reasonable time prior to trial: . . . If the scientific report is in the possession of or available to the district attorney, he must comply with this section at least 10 days prior to the trial of the case.[89]

If the State fails to honor the defendant's timely request for copies of scientific reports, the statute provides that the "report [shall be] excluded and suppressed from evidence"[90] in both the State's case in chief and in rebuttal.

While the remedy for the State's failure to comply with the statute is suppression of the requested scientific reports, such reports generally, are not admissible in evidence.[91] Normally, the State will offer the testimony of a properly qualified expert witness on the results of scientific tests he has conducted and on the content of any scientific reports that may be a product of his experiments. After the witness has testified about the results of the scientific experiment, there is little need to introduce the report itself in evidence.[92] The issue unaddressed by the statute, therefore, is whether the State's failure to comply with the requirements of this Code section compels the suppression of the expert's testimony concerning the contents of the scientific report as well as the suppression of the report. Both the court of appeals[93] and the supreme court[94] have held

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88. GA. CODE ANN. § 27-1303 (Harrison Supp. 1982), OFFICIAL CODE OF GA. ANN. § 17-7-211 (Michie 1982) (editorial changes only).

89. *Id.* § 27-1303(a), OFFICIAL CODE OF GA. ANN. § 17-7-211(b).

90. *Id.* § 27-1303(b), OFFICIAL CODE OF GA. ANN. § 17-7-211(c).

91. State v. Madigan, 249 Ga. 571, 292 S.E.2d 406 (1982).

92. *Id.* at 572-73, 292 S.E.2d at 408. The opinion notes that, nonetheless, such reports are "frequently" introduced following expert testimony. If the expert is properly qualified and his testimony is admissible, the report then becomes merely cumulative of the expert's testimony, and any error in admitting it is rendered harmless. *Id.*

93. *See, e.g.,* Madigan v. State, 160 Ga. App. 656, 288 S.E.2d 34 (1981), *rev'd on other grounds,* 249 Ga. 571, 292 S.E.2d 406 (1982); Tanner v. State, 160 Ga. App. 266, 287 S.E.2d 268 (1981).

94. State v. Madigan, 249 Ga. 571, 292 S.E.2d 406 (1982).

that the expert's testimony must be suppressed on timely objection by the defendant. In reaching this conclusion, the court of appeals noted that to hold otherwise would permit the State to avoid the spirit of the statute by refusing to comply with the defendant's request for reports, yet offering in evidence the testimony of an expert on the contents of the reports. This would create the anomalous situation of allowing the State "to do indirectly that which it is prohibited from doing directly."[95] The supreme court, in another case, agreed that the exclusionary sanction of section 27-1303(b)[96] would be rendered meaningless if scientific reports were suppressed, but the expert preparing them was permitted to testify about their contents.[97]

It should be pointed out that for a defendant to suppress successfully the expert's testimony in a case in which the State fails to furnish the defendant a copy of the scientific report "at least 10 days prior to the trial of the case,"[98] the defendant must show that his request for discovery not only is legally sufficient, but that it is timely.[99] A request for discovery under section 27-1303 "should give the state reasonable notice that the defense desires the disclosure of all available scientific reports no later than ten days before trial."[100] Notice will be considered adequate if the defense specifically refers to section 27-1303 in its pleading or if the defense clearly states that all scientific reports "whether inculpatory or exculpatory"[101] should be furnished prior to the ten day limit. Furthermore, the cases make it clear that, notwithstanding that portion of the statute requiring the defendant to make his request for discovery "at arraignment or within any reasonable time prior to trial,"[102] in order to be timely, the request must "*precede* the tenth day before the trial of the case. Otherwise, it would be impossible for the state to comply with the statute."[103]

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95. Tanner v. State, 160 Ga. App. 266, 268, 287 S.E.2d 268, 270 (1981).

96. GA. CODE ANN. § 27-1303(b), OFFICIAL CODE OF GA. ANN. § 17-7-211(c).

97. State v. Madigan, 249 Ga. 571, 573, 292 S.E.2d 406, 408 (1982).

98. GA. CODE ANN. § 27-1303(a), OFFICIAL CODE OF GA. ANN. § 17-7-211(b).

99. State v. Meminger, 249 Ga. 561, 292 S.E.2d 681 (1982).

100. *Id.* at 563, 292 S.E.2d at 683.

101. Both State v. Madigan, 249 Ga. 571, 292 S.E.2d 406 (1982) and State v. Meminger, 249 Ga. 561, 292 S.E.2d 681 (1982) cast doubt on whether a general *Brady* motion, without more, will be sufficient to trigger a request for discovery under this section of the Georgia Code. *Madigan* stands for the proposition that inculpatory scientific reports will not be reached by a *Brady* motion, since the latter applies only to exculpatory evidence. *See* Brady v. Maryland, 373 U.S. 83 (1963) (the prosecution's suppression of requested evidence, which is favorable to an accused, violates due process when such evidence is material either to the guilt or to the punishment of the accused).

102. GA. CODE ANN. § 27-1303(a), OFFICIAL CODE OF GA. ANN. § 17-7-211(b).

103. State v. Meminger, 249 Ga. 561, 564, 292 S.E.2d 681, 684 (1982) (emphasis added). *See also* State v. Madigan, 249 Ga. 571, 574, 292 S.E.2d 406, 409 (1982). While the statute

VIII. Expert Opinion on Motion for Summary Judgment

Despite a number of cases drawing distinctions between the relative values of expert opinion and lay opinion on motion for summary judgment,[104] it appears that a certain amount of confusion exists concerning when opinion evidence is sufficient to authorize the grant of a motion for summary judgment. This issue was addressed recently in *Savannah Valley Production Credit Association v. Cheek*.[105] There, the supreme court reevaluated the seminal cases in this area, *Ginn v. Morgan*[106] and *Howard v. Walker*,[107] in response to a number of certified questions from the Georgia Court of Appeals.

Ginn involved opinion evidence given by nonexpert witnesses on the question of the value of land. The supreme court reached "the solid conclusion that a summary judgment can never issue based solely upon opinion evidence."[108] In making this determination, however, the court in *Ginn* did not consider the distinctions between cases in which either expert or nonexpert opinions are admissible, but not essential, to a party's case, and those cases in which a party must produce the opinion of an expert in order to prevail at trial. When these differences finally were considered in *Howard*, the court held that when the plaintiff has the burden of producing the opinion of an expert in order to prevail at trial and the defendant produces an expert's opinion in his favor on motion for summary judgment, the plaintiff must produce a contrary expert's opinion in opposition to the motion or risk suffering summary judgment. In this situation, when the defendant produces an expert's opinion but the plaintiff does not, there is not an issue of fact to be determined by the jury and the grant of the defendant's motion for summary judgment is appropriate.[109] Later decisions have indicated that the rule of *Howard*

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clearly places the burden on the prosecution to provide the defendant with copies of requested scientific reports "at least 10 days prior to the trial of the case," unless the defendant files his request *prior* to the tenth day preceding trial, the State will not be able to meet its burden. In *State v. Madigan*, for example, defendant filed his notice to produce exactly 10 days before trial, making it impossible for the State to produce the reports "at least 10 days prior to trial." Because defendant failed to file his notice to produce in a timely manner, neither the reports nor the expert testimony about their substance were subject to suppression. 249 Ga. at 574, 292 S.E.2d at 409.

104. *See, e.g.*, Howard v. Walker, 242 Ga. 406, 249 S.E.2d 45 (1978); Ginn v. Morgan, 225 Ga. 192, 167 S.E.2d 393 (1969), and cases cited therein.

105. 248 Ga. 745, 285 S.E.2d 689 (1982).

106. 225 Ga. 192, 167 S.E.2d 393 (1969).

107. 242 Ga. 406, 249 S.E.2d 45 (1978).

108. 225 Ga. at 193-94, 167 S.E.2d at 394.

109. 242 Ga. at 407, 249 S.E.2d at 46. *See also* Gregory, *Evidence, Annual Survey of Georgia Law, 1978-1979*, 31 Mercer L. Rev. 107 (1979); Agnor, *supra* note 20, § 9-8 (Supp. 1981). It is significant to note that in two medical malpractice cases, the court has held that

does not apply when the expert testimony is not essential to the plaintiff's case.[110]

Savannah Valley largely clarified the differences between *Howard* and *Ginn*. *Savannah Valley* made it apparent that the rule of *Howard* applies *only* in those cases in which a contention of fact must be proved by the plaintiff's expert evidence.[111] When an issue is *capable* of proof by either expert or nonexpert opinion evidence, as is the value of land, the rule of *Howard* does not apply, and under *Ginn*, a grant of summary judgment will not be upheld even if it is based on competent expert opinion evidence. In the latter situation, the jury may examine the facts upon which the opinion is based and reach a conclusion different from that drawn by the expert or nonexpert; therefore, summary judgment is not appropriate.[112] The conclusion is inescapable that summary judgment may not issue on the basis of opinion evidence except in those cases in which an expert opinion is essential to proof of a critical issue at trial. Foremost, *Savannah Valley* established that *Ginn* is the rule and *Howard* is the narrow exception to it.

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when the plaintiff bears the burden of producing at trial an expert's opinion that the defendant-physician exceeded the bounds of acceptable professional conduct, on motion for summary judgment the defendant-physician may file an affidavit of *his own* expert opinion. If the plaintiff fails to produce an expert opinion in opposition to the motion, summary judgment to the defendant-physician will be appropriate. Payne v. Golden, 245 Ga. 784, 267 S.E.2d 211 (1980); Parker v. Knight, 245 Ga. 782, 267 S.E.2d 222 (1980).

110. *See, e.g.*, Self v. Executive Comm. of the Ga. Baptist Convention, 245 Ga. 548, 266 S.E.2d 168 (1980).

111. *E.g.*, Parker v. Knight, 245 Ga. 782, 267 S.E.2d 222 (1980). For example, legal and medical malpractice cases fall into this category.

112. 248 Ga. at 747, 288 S.E.2d at 691.