Evidence

by Marc T. Treadwell*

I. INTRODUCTION

This is the fourteenth year the author has surveyed Georgia Evidence decisions. Although this was a fairly uneventful year, the appellate courts continued to radically expand the scope of hearsay exceptions, at least in criminal cases. Whether one agrees or disagrees with these changes, one thing is clear—Georgia hearsay law today is markedly different than it was fourteen years ago.

II. OBJECTIONS

Three years ago, the author discussed the decision of the court of appeals in *Putnam v. State*[1] that reversed defendant's conviction on the grounds that a witness improperly testified that a victim had been molested, even though defendant did not contemporaneously object to that testimony.[2] Although the majority opinion in *Putnam* did not expressly employ a "plain error" analysis, Judge Beasley, in a concurring opinion, criticized the majority for "shortcutting the normal process by using the 'plain error' rule which the United States Supreme Court created . . . ."[3] According to Judge Beasley, no Georgia case had applied the plain error rule under the circumstances in *Putnam*, and she was unwilling to establish that precedent in Georgia.[4] She made clear that

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1. 231 Ga. App. 190, 498 S.E.2d 340 (1998).
2. *Id.* at 192-93, 498 S.E.2d at 343. *See* Marc T. Treadwell, *Evidence*, 50 MERCER L. REV. 229, 229-30 (1998).
3. 231 Ga. App. at 194, 498 S.E.2d at 344 (Beasley, J., concurring specially).
4. *Id.*

by concurring specially in the judgment, the majority's opinion had no precedential effect.[5]

During the current survey period, the court of appeals decision in *Gosnell v. State*[6] addressed the same issue and made clear it was applying a plain error analysis.[7] Under the plain error rule, the failure to object to the admission or exclusion of evidence results in a waiver of the objection except in cases of plain error. "'Plain error is that which is so clearly erroneous as to result in a likelihood of a grave miscarriage of justice or which seriously affects the fairness, integrity or public reputation of a judicial proceeding.'"[8] In *Gosnell* the full three judge panel joined in the opinion and thus removed any doubt with regard to the precedential impact of the plain error standard.[9]

In *Paul v. State*,[10] the supreme court held that a defendant could rely on the plain error standard to appeal a trial judge's improper comments in violation of section 17-8-57 of the Official Code of Georgia Annotated ("O.C.G.A.").[11] Although not strictly involving the admissibility of evidence, *Paul* certainly suggests that the plain error standard is now firmly ensconced in Georgia.

Motions in limine, although valuable tools to resolve evidentiary issues prior to trial or out of the presence of the jury, are fraught with pitfalls of their own. For example, as reported in last year's survey,[12] a motion in limine does not necessarily relieve a party from making appropriate objections at trial. During the current survey period, the court of appeals held in *Pena v. State*[13] that a party filing a motion in limine is obligated to evoke a ruling on the motion by the trial court, and the failure to do so results in a waiver of any objection.[14]

III. PRIVILEGES

The facts of *Tenet Healthcare Corp. v. Louisiana Forum Corp.*[15] might be fodder for a John Grisham novel. An attorney approached Tenet Healthcare with previously unknown information suggesting that

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5. *Id. See* GA. CT. OF APP. R. 33(a).
6. 247 Ga. App. 508, 544 S.E.2d 477 (2001).
7. *Id.* at 510-11, 544 S.E.2d at 479-80.
8. *Id.* at 510, 544 S.E.2d at 480 (quoting Buice v. State, 239 Ga. App. 52, 56, 520 S.E.2d 258, 262 (1999)).
9. *Id.* at 508, 544 S.E.2d at 477.
10. 272 Ga. 845, 537 S.E.2d 58 (2000).
11. *Id.* at 849, 537 S.E.2d at 61 (citing O.C.G.A. § 17-8-57 (1997)).
12. Marc T. Treadwell, *Evidence*, 52 MERCER L. REV. 263, 264–65 (2000).
13. 247 Ga. App. 211, 542 S.E.2d 630 (2000).
14. *Id.* at 218, 542 S.E.2d at 636-37.
15. 273 Ga. 206, 538 S.E.2d 441 (2000).

Louisiana Forum was indebted to Tenet Healthcare's predecessor. The attorney claimed his client, who wanted to remain anonymous, would provide Tenet Healthcare with full details of the debt if Tenet Healthcare would share the proceeds of any recovery with the client and hire him, the attorney, to pursue the claim. Tenet Healthcare agreed and the attorney filed suit against Louisiana Forum. During discovery, Louisiana Forum moved to compel Tenet Healthcare to disclose the client's identity. At a hearing on the motion to compel, Tenet Healthcare officials claimed they did not know the identity of the client. The attorney informed the court that he knew the client's identity, but he refused to disclose that information on the grounds of attorney-client privilege and his duty to keep client information confidential. The trial court, however, was more concerned with Louisiana Forum's predicament of having to defend the lawsuit without having an opportunity to challenge the credibility of the source of the information giving rise to Tenet Healthcare's claim, particularly in view of the fact that the source had a financial interest in the claim. Accordingly, the trial court ordered the attorney to disclose the identity of the client within ten days. The court of appeals denied Tenet Healthcare's application for interlocutory review,[16] but the supreme court granted certiorari.[17]

The supreme court first noted that the identity of a client is generally not protected from disclosure by the attorney-client privilege.[18] Although Georgia courts have not addressed whether there are any exceptions to this rule, the court acknowledged that other jurisdictions protect a client's identity if the disclosure of the client's name could expose the client to criminal prosecution, the so-called last link exception, or if disclosing the client's identity would reveal the substance of confidential attorney-client communications.[19] The court held that neither exception, even if recognized in Georgia, was applicable.[20] There was no evidence that the client would be subjected to criminal prosecution, and the substance of the client's communications, involving the existence of the indebtedness, had already been disclosed.[21] The supreme court thereby affirmed the trial court's order requiring the attorney to identify his client.[22]

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16. *Id.* at 207, 538 S.E.2d at 443-44.
17. *Id.*
18. *Id.* at 209, 538 S.E.2d at 445.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 212, 538 S.E.2d at 447.

IV. RELEVANCY

A. *Relevancy of Extrinsic Act Evidence*

In the years the author has surveyed Georgia appellate decisions, the determination of the relevancy of extrinsic act evidence has been the most frequently addressed evidentiary issue. In recent years, however, and particularly during the current survey period, the number of appeals involving significant extrinsic act decisions has decreased. (During the current survey period, the necessity exception to the hearsay rule rose to the top of the charts as the most frequently addressed evidentiary issue on appeal.) Perhaps this means that the rules governing the admission of extrinsic act evidence have become sufficiently settled so that repeated adjustment and fine tuning of those principles by appellate courts is unnecessary. If so, this is not good news for criminal defendants, because it is clear that the scope of admissible extrinsic act evidence, particularly similar transaction evidence in criminal cases, has expanded dramatically. As the court of appeals noted during the survey period:

> The law on similar transactions has come a long way from the seminal decision in *Bacon v. State*,[23] which prohibited introducing a prior crime "*even though it be a crime of the same sort* . . ." as circumstantial evidence of felonious intent. Now, however, it is permissible for the State to introduce a similar crime precisely to show that the accused "*has a propensity for initiating and continuing unprovoked [violent] encounters* . . . ." This falls into the category of showing malice, intent, motive, course of conduct, and bent of mind.[24]

While the scope of admissible similar transaction evidence may have expanded, courts have placed procedural restrictions on the use of such evidence in recent years, as discussed in more detail in last year's survey.[25] However, these restrictions only apply to similar transactions and not other forms of extrinsic act evidence. For example, during the current survey period the court of appeals reaffirmed that the procedural prerequisites for the admission of similar transaction evidence do not

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23. 209 Ga. 261, 71 S.E.2d 615 (1952).

24. Davis v. State, 244 Ga. App. 708, 712, 536 S.E.2d 596, 600 (2000) (quoting Bacon v. State, 209 Ga. 261, 262, 71 S.E.2d 615, 617 (1952) and Farley v. State, 265 Ga. 622, 624, 458 S.E.2d 643, 645 (1995)).

25. Treadwell, *supra* note 12, at 266–68.

apply to evidence of prior difficulties between a defendant and his victim.[26]

Criminal defense lawyers, who undoubtedly think that the liberal admission of similar transaction evidence overwhelmingly benefits the prosecution, may take some comfort in *Stobbart v. State*.[27] In *Stobbart* defendant appealed his conviction, contending the trial court improperly barred the admission of evidence of his victim's prior violent acts and reputation for violence, which defendant argued justified his fatal assault. The trial court concluded that defendant had not made a prima facie case of justification to warrant the admission of the evidence.[28] The supreme court acknowledged that a defendant seeking to introduce evidence of a victim's violent acts must show that the victim was the aggressor, that the victim assaulted the defendant, and that the defendant was honestly trying to defend himself.[29] In *Stobbart* the evidence showed that the victim, who owned the towing company where defendant worked, argued with defendant at a tavern. After leaving the tavern, defendant saw the victim take a pistol from the victim's automobile and place it in his pants. Later that evening, defendant returned to his apartment and found the victim there. They argued again and, at one point, the victim stopped defendant from leaving the apartment. During the argument, defendant testified he could see the victim's gun.[30] The supreme court held that these facts were sufficient to establish a prima facie case of justification and, the trial court erred when it refused to allow the admission of evidence of the victim's prior violent acts and reputation for violence.[31]

Defendants often claim that similar transactions committed years before the charged offense are too remote in time to be relevant. Typically, these arguments fall on deaf ears. In *Slakman v. State*,[32] however, the supreme court, after reversing defendant's conviction on other grounds, sided with defendant and held that evidence of defendant's physical and verbal abuse of his first wife twenty years before the alleged murder of his third wife was too remote in time to be admissible at defendant's retrial.[33] In so holding, the court stated the passage of

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26. McCrickard v. State, 249 Ga. App. 715, 549 S.E.2d 505 (2001); Appling v. State, 246 Ga. App. 556, 541 S.E.2d 129 (2000).

27. 272 Ga. 608, 533 S.E.2d 379 (2000).

28. *Id.*, 533 S.E.2d at 381-82.

29. *Id.* at 610, 533 S.E.2d at 382.

30. *Id.*

31. *Id.*

32. 272 Ga. 662, 533 S.E.2d 383 (2000).

33. *Id.* at 668, 533 S.E.2d at 389.

time is "'one of the more important factors to weigh in considering the admissibility' of similar transactions evidence."[34]

In *Salcedo v. State*,[35] the supreme court held the doctrine of collateral estoppel bars the admission of extrinsic act evidence concerning an issue resolved in defendant's favor at a prior trial.[36] Thus, if a defendant has been acquitted of an offense arising from a similar transaction, evidence of that similar transaction is not admissible at a subsequent trial. As reported in last year's survey, the applicability of collateral estoppel depends on what facts were at issue at the prior trial and whether they were resolved in defendant's favor.[37] In the current survey period, the defendant in *Gardner v. State*[38] was acquitted of charges arising from a similar transaction *after* his conviction for the charged offense. Evidence of the similar transaction was admitted at defendant's trial for the charged offense. On appeal, defendant contended his conviction should be overturned because his subsequent acquittal rendered evidence of the similar transaction inadmissible.[39] The supreme court held the doctrine of collateral estoppel only operates to preclude the relitigation of issues that have been *previously* resolved.[40] Thus, when a defendant is acquitted of charges arising from a similar transaction after his trial for the charged offense, he cannot rely on the doctrine of collateral estoppel.

The scope of admissible extrinsic act evidence is generally more narrow in civil cases than in criminal cases. During the current survey period, the supreme court appeared to narrow even more the scope of admissible extrinsic act evidence in civil cases. In *Crosby v. Cooper Tire & Rubber Co.*,[41] a case discussed in last year's survey,[42] the court of appeals reversed a verdict in favor of defendant on the ground that the trial court improperly struck portions of plaintiff's expert witness testimony.[43] Initially, the supreme court denied certiorari but granted it several months later. The court granted certiorari not to address the grounds for the court of appeals reversal, but rather to address an

34. *Id.* at 669, 533 S.E.2d at 390 (quoting Mullins v. State, 269 Ga. 157, 158, 496 S.E.2d 252, 254 (1998)).
35. 258 Ga. 870, 376 S.E.2d 360 (1989).
36. *Id.* at 871, 376 S.E.2d at 361.
37. Treadwell, *supra* note 12, at 271.
38. 273 Ga. 809, 546 S.E.2d 490 (2001).
39. *Id.* at 810, 546 S.E.2d at 492.
40. *Id.*
41. 240 Ga. App. 857, 524 S.E.2d 313 (1999).
42. Treadwell, *supra* note 12, at 264.
43. 240 Ga. App. at 858-59, 524 S.E.2d at 317.

evidentiary issue that likely would recur at the second trial.[44] At the first trial, the trial court refused to admit "adjustment statistics," which consisted of consumer claims for tire defects honored by defendant. The trial court accepted defendant's argument that plaintiff had not adduced evidence demonstrating a substantial similarity between the incidents comprising the adjustment statistics and the incident giving rise to plaintiff's claim.[45] The court of appeals held that the trial court erred in this regard, but the supreme court agreed with the trial court.[46] With no discussion of the purposes for which plaintiff was offering the adjustment statistics, the supreme court simply held the rule of substantial similarity applied and, thus, plaintiff had to demonstrate each incident comprising the adjustment statistics was substantially similar to the incident at issue.[47]

Justice Hunstein, joined by Chief Justice Benham, dissented and argued the court of appeals properly concluded the evidence was admissible for the purposes offered.[48] Plaintiff wanted to use the evidence, Justice Hunstein argued, to demonstrate defendant's tires failed for many different reasons, some of which related to consumer abuse.[49] Defendant contended, however, consumer abuse caused plaintiff's tire failure, along with other reasons which were related to manufacturing defects.[50]

The court of appeals, Justice Hunstein continued, did not, as the majority suggested, renounce the substantial similarity test. Rather, the court "simply recogniz[ed] what every experienced trial judge knows, mainly, that there are no bright-line hard-and-fast rules applicable to every case when it comes to the admissibility of evidence of similar occurrences. What constitutes 'substantially similar' evidence does indeed shift between the extremes of absolutely identical to 'barely sufficient to be substantially similar,' with all gradations in-between."[51] Finally, Justice Hunstein objected to what she suspected was the majority's attempt to create a stricter standard for the admission of relevant similar transactions in product liability cases than in other cases: "Even in criminal cases, where a person's life and liberty are at stake, the courts only require that there be a 'sufficient connection or

44. Cooper Tire & Rubber Co. v. Crosby, 273 Ga. 454, 543 S.E.2d 21 (2001).
45. *Id.* at 455, 543 S.E.2d at 23.
46. *Id.* at 456, 543 S.E.2d at 24.
47. *Id.*
48. *Id.* at 460-61, 543 S.E.2d at 27 (Benham, C.J. & Hunstein, J., dissenting).
49. *Id.* at 458, 543 S.E.2d at 25.
50. *Id.*
51. *Id.* at 459-60, 543 S.E.2d 26.

similarity between the independent offense or act in the crime charged so that proof of the former tends to prove the latter.'"[52]

V. OPINION TESTIMONY

In almost every survey article written by the author since 1988, the author has attempted to analyze the numerous cases in which the courts have struggled with the question of whether expert testimony is admissible to prove or disprove that a child was sexually abused. Because this struggle emanated from two apparently conflicting supreme court decisions, *State v. Butler*[53] and *Allison v. State*,[54] the author has referred to this struggle as the *Butler/Allison* debate. In last year's survey,[55] the author discussed the court of appeals decision in *Odom v. State*,[56] in which the court chided both prosecutors and defense lawyers for never ending *Butler/Allison* appeals.[57] The court charged that defense lawyers improperly challenged every aspect and instance of such testimony, and prosecutors were guilty of asking open ended questions that allowed their experts to cross an impermissible line by testifying a child was, in fact, molested.[58] Perhaps the court of appeals' chastisement had its desired effect. The number of *Butler/Allison* appeals dropped dramatically during the survey period and no case merits discussion.

As reported in previous surveys,[59] Georgia has refused to force state trial courts to assume the gatekeeper role required of federal district courts by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[60] Rather, Georgia applies the so called *Harper* test[61] to determine the admissibility of novel scientific evidence. A party relying on novel scientific evidence must prove the procedure or technique has reached a scientific stage of verifiable certainty.[62] This test is satisfied if the procedure or technique at issue has been recognized in a substantial number of other jurisdictions or if the party offering the evidence can adduce evidence

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52. *Id.* at 460, 543 S.E.2d at 27 (quoting Williams v. State, 261 Ga. 640, 642, 409 S.E.2d 649, 651 (1991)).

53. 256 Ga. 448, 349 S.E.2d 684 (1986).

54. 256 Ga. 851, 353 S.E.2d 805 (1987).

55. Treadwell, *supra* note 12, at 282-84.

56. 243 Ga. App. 227, 531 S.E.2d 207 (2000).

57. *Id.* at 228, 531 S.E.2d at 209.

58. *Id.*

59. Marc T. Treadwell, *Evidence*, 51 MERCER L. REV. 279, 292 (1999).

60. For a discussion of the role of gatekeeper status required of Federal district courts, see *Daubert*, 509 U.S. 579 (1993).

61. *See* Harper v. State, 249 Ga. 519, 292 S.E.2d 389 (1982).

62. *Id.*

establishing that the procedure or technique has reached the requisite stage of development.[63] Although it is generally acknowledged that *Harper* demands a lower level of scrutiny, this does not mean that any and all scientific evidence is admissible.[64] During the current survey period, the court of appeals reaffirmed, based on the record before it, that penile plethysmography, a procedure that involves placing a measuring gauge on a subject's penis to determine whether the subject is aroused by certain stimuli and thus prone to sexually deviant behavior, has not reached the level of scientific certainty that would allow it to be admissible in Georgia courts.[65] Interestingly, and perhaps as a jab at federal courts, the court of appeals referred to the superior court's "role as a gatekeeper."[66]

Of course expert testimony must also concern matters beyond the ken of the average juror, and the court also concluded defendant had not established the subject of penile plethysmography testimony was beyond the average juror's ability to understand.[67] However, in *Foster v. State*,[68] the supreme court rejected defendant's claim that the trial court improperly allowed the prosecution's expert, a crime scene reconstructionist, to testify about the various reasons why a perpetrator might move or cover his victim's body.[69] The expert testified, for example, that a perpetrator may want to depersonalize the victim because of a close relationship between the perpetrator and the victim. Defendant, the victim's former husband, objected on the grounds that this testimony was not beyond the ken of the average juror.[70] The supreme court disagreed and affirmed defendant's conviction.[71]

VI. HEARSAY

A. *Introduction*

The growth and expansion of exceptions to the rule against hearsay during recent years has been nothing short of phenomenal, or at least what passes for phenomenal in the field of evidence. Primarily in criminal cases, Georgia appellate courts have whittled down the rule

63. *Id.*
64. Treadwell, *supra* note 59, at 293.
65. Leftwich v. State, 245 Ga. App. 695, 696, 538 S.E.2d 779, 781 (2000).
66. 245 Ga. App. at 695, 538 S.E.2d at 781.
67. *Id.* at 696, 538 S.E.2d at 781.
68. 273 Ga. 34, 537 S.E.2d 659 (2000).
69. *Id.* at 35, 537 S.E.2d at 660.
70. *Id.*
71. *Id.*

against hearsay to the point that it seems virtually *any* out of court statement is either potentially admissible pursuant to some exception, the newest and broadest being the "necessity" exception discussed below, or is not hearsay at all, such as statements deemed to be a part of the res gestae. It seems to the author that many of the appellate decisions expanding the use of what appears to be hearsay evidence involves heinous acts such as child molestation. Arguably, courts want to give prosecutors the tools they need to convict such criminals. Although the contrary position that the prosecution, with the resources of the State at its disposal, does not need bent and twisted evidence rules to secure convictions, can be argued just as forcefully. Regardless of one's opinion, the effect of these appellate rulings is wide ranging and is certainly not limited to cases where the prosecution needs help in securing a just conviction. These new hearsay rules apply equally to criminal defendants, the prosecution, and parties in civil cases.

The current survey period saw one stark exception to this trend. In last year's survey, the author discussed the court of appeals decisions that strongly criticized Georgia Supreme Court precedent allowing law enforcement officers to testify that criminal defendants were identified at some point by individuals who did not testify at trial.[72] In those decisions, the court of appeals concluded such testimony was hearsay, but the court felt it was bound by the supreme court's decision in *Haralson v. State*[73] that held testimony of this nature was not inadmissible hearsay.[74] In one case, the court of appeals suggested that "[i]t may be time for the Supreme Court to reconsider *Haralson* or at least limit its application to cases in which the identifying witness is available for cross-examination."[75] In *White v. State*,[76] however, the court of appeals, not as concerned about this practice, summarily affirmed defendant's conviction, noting simply that "'[a] law enforcement officer is permitted to testify to a vocal fact of identification witnessed by himself without its being subject to a hearsay objection.'"[77]

During the current survey period, the supreme court agreed this principle needed reexamination and granted certiorari to the court of appeals in *White*.[78] It was time, the court concluded, to reexamine and

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72. Treadwell, *supra* note 12, at 298–99.

73. 234 Ga. 406, 216 S.E.2d 304 (1975).

74. *Id.* at 406, 216 S.E.2d at 304.

75. Neal v. State, 211 Ga. App. 829, 830, 440 S.E.2d 717, 719 (1994).

76. 244 Ga. App. 54, 537 S.E.2d 364 (2000).

77. *Id.* at 55, 537 S.E.2d at 366 (quoting Harper v. State 213 Ga. App. 444, 449, 445 S.E.2d 303, 308 (1994)).

78. 273 Ga. 787, 546 S.E.2d 514 (2001).

restrict the holding in *Haralson*.[79] "In the absence of some other viable hearsay exception, such as 'necessity' or 'res gestae,' a law enforcement officer may not testify to a pre-trial identification of the accused unless the person who actually made the identification testifies at trial and is subject to cross-examination."[80]

In *White*, the supreme court also took advantage of an opportunity to limit the use of out of court statements to explain an officer's conduct.[81] Courts sometimes admit a police officer's testimony that a declarant, known or unknown, identified defendant as the perpetrator in order to explain the police officer's conduct, i.e., why the officer arrested defendant. This, no doubt, was particularly exasperating to defense lawyers who surely were asking why the reasons for an officer's conduct were relevant. They likely held the cynical view that this was simply a ploy to get the out of court statement, defendant committed the crime, before the jury. This was the point made last year in *Brown v. State*.[82] In a dissenting opinion, tracing the evolution of the principle that an anonymous tip is admissible to explain an officer's conduct, Judge Barnes argued the officer's conduct in such circumstances was not relevant to any issue in a case.[83]

In *White* the supreme court agreed and mildly chastised the court of appeals for misconstruing its decision in *Momon v. State*[84] as support for this proposition.[85] Only in the rarest instances will the conduct of an investigating officer need to be explained.[86] Just because an officer receives an anonymous tip or hears an unidentified bystander identify a defendant as the perpetrator of a crime, the door is not opened for the admission of those out of court statements to explain why the officer initiated or conducted an investigation.[87]

B. The Necessity Exception

The author and other commentators have recently marveled at the rapid expansion of the necessity exception.[88] Whether this is a good

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79. *Id.* at 787-88, 546 S.E.2d at 515-16.
80. *Id.*, 546 S.E.2d at 516.
81. *Id.*
82. 245 Ga. App. 149, 537 S.E.2d 421 (2000).
83. *Id.* at 156, 537 S.E.2d at 427 (Barnes, J., dissenting).
84. 249 Ga. 865, 294 S.E.2d 482 (1982).
85. 273 Ga. at 787, 546 S.E.2d at 515.
86. *Id.*
87. *Id.*
88. *See* Paul Vignos, *The New "Necessity Exception" to the Hearsay Rule in Georgia: A New Rule of Inclusion*, 16 GA. ST. U. L. REV. 573 (2000); Franklin J. Hogue & Laura D. Hogue, *Criminal Law*, 51 MERCER L. REV. 209 (1999).

thing or a bad thing depends on where one sits. Criminal defense lawyers likely think that the courts tend to turn more readily to the necessity exception when the prosecution is tendering the hearsay evidence than when the defense lawyer is.

Hearsay evidence is admissible pursuant to the necessity exception if the proponent can show that the evidence is "necessary" and that the out of court statements bear "'particularized guarantees of trustworthiness.'"[89] In *Chapel v. State*,[90] the supreme court held that in addition to necessity and trustworthiness, the party offering the evidence must also show that "the statement is relevant to a material fact and that the statement is more probative on that material fact than other evidence that may be procured and offered."[91] However, as reported in last year's survey, the *Chapel* prong arguably is ignored when it becomes inconvenient.[92]

In most necessity exception cases, the declarant is deceased and therefore the unavailability prong is not in dispute. The declarant is also "unavailable" if he has invoked a privilege against testifying. In addition, as reported in a previous survey,[93] the supreme court held in a plurality opinion that a declarant is unavailable if the proponent has made reasonable, but unsuccessful efforts to locate the witness and secure his attendance at trial.[94] During the current survey year, the supreme court, this time in a unanimous opinion, took this one step further. In *Cook v. State*,[95] the prosecution knew the declarant was living in Louisiana and twice unsuccessfully asked Louisiana courts to order the declarant to return to Georgia to testify. The trial court held that this was sufficient to establish the witness' unavailability for purposes of the necessity exception.[96] The court reasoned that the prosecution's "inability to secure the witness' presence at trial is similar to its inability to do so when a witness cannot be compelled to testify because the witness has invoked a privilege or when a witness is deliberately hiding."[97]

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89. McKissick v. State, 263 Ga. 188, 189, 429 S.E.2d 655, 657 (1993) (quoting Mallory v. State, 261 Ga. 625, 627, 401 S.E.2d 839, 841 (1991)).
90. 270 Ga. 151, 510 S.E.2d 802 (1998).
91. *Id.* at 155, 510 S.E.2d at 807.
92. Treadwell, *supra* note 12, at 289.
93. Treadwell, *supra* note 59, at 299.
94. Holmes v. State, 271 Ga. 138, 516 S.E.2d 61 (1999) (plurality opinion).
95. 273 Ga. 574, 543 S.E.2d 701 (2001).
96. *Id.* at 576, 543 S.E.2d at 704.
97. *Id.*

Before *Cook* was decided, the court of appeals addressed a similar issue in *Battle v. State*.[98] However, in *Battle*, it did not appear that the State had exhausted all available means to force the declarant to return to Georgia to testify. Rather, at the time of the evidentiary hearing to determine the admissibility of the declarant's out of court statement, the State had not yet been successful in "enlist[ing] the assistance of local Arkansas authorities . . . ."[99] Nonetheless, the court held that the State sufficiently established that the witness was unavailable.[100]

In *Gardner v. State*,[101] the supreme court had an opportunity to give trial courts clear guidance on what proof is necessary to establish that a missing witness is unavailable. In *Gardner* the trial court admitted a videotaped statement of a witness who was subpoenaed to testify but did not appear in the courtroom.[102] Defendant argued that because the prosecution only tried to find the witness for one day, it had not shown the diligence necessary to satisfy the unavailability requirement.[103] The supreme court skirted the issue, holding that admission of the statement, even if error, was harmless.[104]

Arguably, one danger of the necessity exception is that it fosters the admission of hearsay evidence, not out of necessity, but rather out of convenience. The court of appeals addressed this danger in *Ledford v. State*,[105] discussed in last year's survey.[106] In *Ledford* the court reversed defendant's conviction for inhalation of toluene because the prosecution relied on the ingredients label of a spray can to prove that defendant inhaled the substance.[107] The label, the court held, was hearsay.[108] To prove that the can contained toluene, the prosecution needed only to call a crime lab technician as a witness and "[t]he fact that it would be easier to introduce the can does not rise to the level of showing 'necessity' pursuant to the necessity exception to the hearsay rule."[109]

Indeed, this appears to be the point of the *Chapel* prong to the necessity exception; if the State can get other evidence that is more

98. 244 Ga. App. 771, 536 S.E.2d 761 (2000).
99. *Id.* at 774, 536 S.E.2d at 764.
100. *Id.*
101. 273 Ga. 809, 546 S.E.2d 490.
102. *Id.* at 813-14, 546 S.E.2d at 494-95.
103. *Id.*
104. *Id.*
105. 239 Ga. App. 237, 520 S.E.2d 225 (1999).
106. Treadwell, *supra* note 12, at 291.
107. *Id.*
108. 239 Ga. App. at 241, 520 S.E.2d at 229.
109. *Id.* at 240, 520 S.E.2d at 227.

probative of the point the State wishes to prove than the hearsay evidence, the State should get that evidence. However, the rapid expansion of the necessity exception appears to have given the impression to trial courts that convenience is a factor. For example, in *Hammett v. State*,[110] the trial court admitted a victim's hearsay statement regarding the monetary value she placed on her stolen lawnmower. Clearly, the State could readily obtain other evidence with regard to the value of the lawnmower and, in fact, there was such evidence.[111] Again, however, the court held that even if the trial court erred in admitting the statement, the error was harmless.[112]

The determination of the trustworthiness of the out of court statement, which must be shown by virtue of the inherent trustworthiness of the statement rather than corroborating evidence, is necessarily a fact sensitive inquiry.[113] However, it is almost a certainty that a statement by a deceased victim recounting acts of abuse or violence by the defendant against the victim is admissible under the necessity exception.[114] Other indicia of trustworthiness are statements of extreme importance and urgency, such as statements expressing concern for immediate safety,[115] statements made in the course of an official investigation,[116] and statements made to a person in whom a declarant has great trust and confidence.[117] However, statements made to short time acquaintances, friends, and to divorce attorneys have been held to not be sufficiently trustworthy.[118]

For whatever reason, defendants who attempt to rely on the necessity exception are not as successful in proving the trustworthiness of the out of court statements. For example, in *McCulley v. State*,[119] the court held that a declarant's suicide note claiming responsibility for the crime allegedly committed by defendant "lacked the requisite degree of reliability and trustworthiness to authorize its admission under the

110. 246 Ga. App. 287, 539 S.E.2d 193 (2000).

111. *Id.* at 291, 539 S.E.2d at 197.

112. *Id.* Defendant in *Hammett* also complained that the trial court erred when it concluded that the victim was unavailable to testify based on the prosecutor's statement in her place that the victim was deceased. *Id.* at 288, 539 S.E.2d at 195-96.

113. Johnson v. State, 247 Ga. App. 660, 544 S.E.2d 496 (2001).

114. *See* Givens v. State, 273 Ga. 818, 546 S.E.2d 509 (2001); Campos v. State, 273 Ga. 119, 538 S.E.2d 447 (2000).

115. *See* Alexander v. State, 273 Ga. 311, 540 S.E.2d 196 (2001).

116. *See* Johnson v. State, 273 Ga. 345, 541 S.E.2d 357 (2001).

117. *Slakman*, 272 Ga. at 668, 533 S.E.2d at 389.

118. *Id.*

119. 273 Ga. 40, 537 S.E.2d 340 (2000).

necessity exception."[120] In *Villegas v. State*,[121] defendant unsuccessfully attempted to tender the out of court statement of a victim that would show the victim's brother, who was also a victim and deceased, pointed a gun at the defendant and therefore the defendant acted in self defense.[122] The trial court refused to admit the statement and the supreme court affirmed, noting that the statement was made months after the events at a time when both defendant and victim were inmates and that the victim had prior convictions for forgery and providing false information.[123] Finally, because the statements were not corroborated by other witnesses and were not made in the course of an official investigation, the supreme court concluded the trial court was authorized to find the statements did not bear sufficient indicia of trustworthiness.[124]

The civil cases in which appellate courts have applied the necessity exception can be counted on one hand, and only one civil case did so during the current survey period. In *Langlois v. Wolford*,[125] a defendant in a negligence action contended that the trial court should have declared a mistrial after the jury heard evidence of the out of court statement of an eyewitness about the collision at issue. The witness was a companion of defendant and had been drinking with him before and after the collision. At the time of trial, defendant was a fugitive.[126] This, the court held, was sufficient to establish the unavailability of the witness.[127] The statement was sufficiently trustworthy because it was made shortly after the collision and during the course of an official investigation. Further, the statement was against defendant's interest, was never recanted, and was corroborated by other evidence.[128] Thus, the court of appeals held the statement was admissible and therefore admission of the statement was not grounds for a mistrial.[129]

In *Heard v. Lovett*,[130] the supreme court applied the necessity exception analysis but was reluctant to state expressly that it was employing the necessity exception. In *Heard* the propounder of a will argued the probate court improperly excluded the decedent's statements

120. *Id.* at 42, 537 S.E.2d at 344.
121. 273 Ga. 824, 546 S.E.2d 504 (2001).
122. *Id.* at 827, 546 S.E.2d at 507.
123. *Id.*
124. *Id.*
125. 246 Ga. App. 209, 539 S.E.2d 565 (2000).
126. *Id.* at 214, 539 S.E.2d at 570.
127. *Id.* at 214-15, 539 S.E.2d at 570-71.
128. *Id.*
129. *Id.* at 215, 539 S.E.2d at 571.
130. 273 Ga. 111, 538 S.E.2d 434 (2000).

concerning the disposition of his property.[131] The supreme court acknowledged there was no specific exception for the statement at issue,[132] although it quoted O.C.G.A. section 24-3-1(b), the traditional foundation for the necessity exception.[133] Thus, the court concluded it needed "to decide whether the statements attributed to the Decedent fall within an additional hearsay exception which is not specifically set forth in the Code."[134] Although the court suggested a possible exception for a decedent's statements in probate proceedings, it appeared to ground its conclusion that the statements were admissible on a necessity exception analysis.[135]

C. *Res Gestae*

In prior survey articles, the author has joined those who criticize "that near—insoluble enigma of our law, which we call *res gestae*."[136] The court of appeals decision in *Lewis v. State*[137] demonstrates the extreme breadth of the res gestae exception. In *Lewis* defendant was charged with robbing a group of golfers. Because one of the golfers was out of town at the time of trial, the trial court allowed a police officer to read the missing witness' statement into evidence. The trial court found that the witness gave the statement approximately forty-five minutes after the occurrence of the crime, that he was still excited and upset because of the crime, and that he had not discussed what he would tell the police with any of the other victims.[138] Based on this, the trial court concluded that the victim's statement was "' free from afterthought and device' and thus was admissible as part of the res gestae.[139] The court of appeals affirmed.[140] Thus, the critical testimony of an eyewitness to defendant's alleged crime was admitted notwithstanding defendant's lack of opportunity to cross-examine the witness.[141]

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131. *Id.* at 112, 538 S.E.2d at 436.

132. *Id.*

133. O.C.G.A. section 24-3-1(b) (1995) provides that "[h]earsay evidence is admitted only in specified cases from necessity."

134. 273 Ga. at 112, 538 S.E.2d at 436.

135. *Id.*

136. Andrews v. State, 249 Ga. 223, 225, 290 S.E.2d 71, 73 (1982).

137. 249 Ga. App. 812, 549 S.E.2d 732 (2001).

138. *Id.* at 812-14, 549 S.E.2d at 734-35.

139. *Id.* at 814, 549 S.E.2d at 735.

140. *Id.*, 549 S.E.2d at 734.

141. *Id.*

D. Prior Out of Court Statements

Georgia has two rather unusual rules regarding the admissibility of prior statements by witnesses. First, in *Gibbons v. State*,[142] the supreme court held that prior *inconsistent* statements of a witness are admissible as substantive evidence if the witness is subject to cross examination.[143] During the current survey year, the supreme court rejected a plea to limit *Gibbons* by adopting the Federal Rule which allows the admission of prior inconsistent statements only if given under oath.[144]

Second, pursuant to *Cuzzort v. State*,[145] a prior *consistent* statement is admissible as substantive evidence against an accused if the witness is present at the trial and subject to cross examination.[146] As reported in the surveys for the previous three years, the supreme court drastically weakened *Cuzzort* in *Woodard v. State*.[147] The court held that prior consistent statements should be admitted only when the veracity of the witness who made the statement has been placed at issue.[148] The court's pronouncement was clear: "Unless a witness's veracity has affirmatively been placed in issue, the witness's prior consistent statement is pure hearsay evidence, which cannot be admitted merely to corroborate the witness, or to bolster the witness's credibility in the eyes of a jury."[149] In previous surveys, the author suggested that the court of appeals had been slow in its recognition of *Woodard* and, even when acknowledging *Woodard*, watered down considerably its requirement that a witness' veracity be affirmatively attacked before the prior consistent statement can be admitted.[150]

During the current survey year, the supreme court also seemed to have some reservation about *Woodard*. In *Blackmon v. State*,[151] defendant charged that a witness' prior consistent statement was erroneously admitted because he did not attack the witness' truthfulness on cross examination.[152] However, the supreme court held that the "suggestion" of the cross examination was that the witness' "trial

142. 248 Ga. 858, 286 S.E.2d 717 (1982).
143. *Id.* at 863-64, 286 S.E.2d at 722.
144. Fed. R. Evid. 801(d).
145. 254 Ga. 745, 334 S.E.2d 661 (1985).
146. *Id.* at 747-48, 334 S.E.2d at 664.
147. 269 Ga. 317, 496 S.E.2d 896 (1998).
148. *Id.* at 320, 496 S.E.2d at 899-900.
149. *Id.*
150. Treadwell, *supra* note 59, at 303.
151. 272 Ga. 858, 536 S.E.2d 148 (2000).
152. *Id.* at 859, 536 S.E.2d at 149.

testimony lacked veracity and had been fabricated . . . ."[153] Because the court did not state specifically the questions posed on cross examination, it is impossible to tell the extent to which defendant attacked the witness' credibility. However, the court's opinion seems to say that the mere "suggestion" that the witness is testifying contrary to his pretrial statement is sufficient to allow the admission of the pretrial statement.[154]

Nothing in *Cuzzort* limits its holding to criminal cases,[155] and in *Kephart v. Kephart*,[156] appellant asked the supreme court to hold *Cuzzort* specifically applies to a civil proceeding.[157] Although the court did not hold one way or the other, the court's opinion suggests that it would be reluctant to apply *Cuzzort* to a self-serving declaration of a party to a civil proceeding.

In *Spann v. State*,[158] the court of appeals addressed a particularly problematic application of *Gibbons*. The court decided whether the prior statement of a witness is admissible as a prior inconsistent statement, pursuant to *Gibbons*, if that witness testifies at trial that he no longer remembers a fact.[159] As discussed in last year's survey,[160] the court of appeals held in *Bischoff v. Payne*[161] when a witness merely states he or she does not remember a fact, as opposed to denying a fact, then he or she cannot be impeached with prior statements which suggest that the witness did, at least at one time, recall what he or she now claims he or she cannot remember.[162] Instead, the appropriate response is to refresh the recollection of the witness with the prior statement.[163] In *Spann*, however, the court of appeals reached a seemingly different result.[164] Three witnesses who had given pretrial statements testified they could not remember some of the events described in their previous statements.[165] Although acknowledging a witness' mere statement that he or she does not remember an event does not open the door to the admission of a prior statement, the court held, "given the distinguishable

153. *Id.*
154. *Id.*
155. 254 Ga. 745, 334 S.E.2d 661.
156. 273 Ga. 9, 536 S.E.2d 504 (2000).
157. *Id.* at 11, 536 S.E.2d at 506.
158. 248 Ga. App. 419, 546 S.E.2d 368 (2001).
159. *Id.* at 420, 546 S.E.2d at 369.
160. Treadwell, *supra* note 12, at 279.
161. 239 Ga. App. 824, 522 S.E.2d 257 (1999).
162. *Id.* at 826-27, 522 S.E.2d at 259.
163. *Id.*
164. 248 Ga. App. at 421-22, 546 S.E.2d at 370.
165. *Id.* at 419-20, 546 S.E.2d at 369.

facts of the instant case," the statements were admissible.[166] The court's opinion suggests that the circumstances indicated the witnesses were feigning their memory loss and, under those circumstances, the statements were admissible.

E. Child Hearsay Statute

Georgia's Child Hearsay Statute permits a witness to testify about statements made by a child describing sexual conduct or physical abuse.[167] For the child's statement to be admissible, the child must be "available to testify," and the court "must [find] that the circumstances of the statement provide sufficient indicia of reliability."[168] In response to the court of appeals decision in *Ward v. State*[169] (holding that an incompetent child was not available to testify)[170] the General Assembly, in 1989, amended the competency statute to provide: "[I]n all cases involving child molestation, and in all other criminal cases in which a child was a victim of or a witness to any such crime, any child shall be competent to testify."[171] In 1990, however, the General Assembly again amended O.C.G.A. section 24-9-5 to provide that a child is automatically competent to testify with regard to acts of molestation only "in criminal cases."[172] Thus, as held during the current survey period in *Woodruff v. Woodruff*,[173] a party seeking to invoke the Child Hearsay Statute in a civil case must demonstrate the availability of the child to testify and a child cannot be presumed competent to testify.[174]

F. Statements Made for Purposes of Medical Diagnosis or Treatment

In *Allen v. State*,[175] the court of appeals, addressing an issue of first impression, held statements made to a licensed professional counselor for purposes of medical diagnosis or treatment can fall within Georgia's exception to the hearsay rule.[176] Thus, the court affirmed the trial court's decision admitting such evidence.[177] However, defendant also contended that if the statement was admissible, then he should have

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166. *Id.* at 421, 546 S.E.2d at 370.
167. O.C.G.A. § 24-3-16 (2000).
168. *Id.*
169. 186 Ga. App. 503, 368 S.E.2d 139 (1988).
170. *Id.* at 504, 368 S.E.2d at 141.
171. 1989 Ga. Laws 1639, 1640.
172. 1990 Ga. Laws 1795.
173. 272 Ga. 485, 531 S.E.2d 714 (2000).
174. *Id.* at 486-87, 531 S.E.2d at 715-16.
175. 247 Ga. App. 10, 543 S.E.2d 45 (2000).
176. *Id.* at 12, 543 S.E.2d at 48.
177. *Id.*

been allowed to impeach the statement with evidence of two prior inconsistent statements made by the victim to law enforcement officers. The trial court refused, reasoning the statements were not admissible unless the defendant could show the statements met the requirements of the Child Hearsay Statute.[178] This raised another issue of first impression: Whether a hearsay declarant whose statements have been admitted under the medical diagnosis or treatment exception can be impeached with evidence of other statements made by the declarant.[179] The court noted that statements made to a medical provider are admitted because of their supposed inherent trustworthiness because a person speaking to a medical provider for the purpose of receiving medical treatment will convey accurate information to the provider.[180] Clearly, the party opposing the admission of the statement should be allowed reasonable opportunity to show the statement is not trustworthy.[181] However, because the declarant is not present in court, the opposing party cannot attack the declarant on cross examination.[182] Therefore, impeachment with other inconsistent statements is essentially the only method available to the opposing party to attack the declarant.[183] Accordingly, the court held a party must be given the opportunity to impeach the credibility of a declarant whose statement is admitted under the medical diagnosis or treatment exception to the hearsay rule.[184] Adopting the approach of the Federal Rules of Evidence, the court held the declarant can be impeached with any evidence that would be admissible for impeachment purposes if the declarant had testified as a witness.[185]

178. O.C.G.A. § 24-3-4 (2000).
179. 247 Ga. App. at 13-14, 543 S.E.2d at 48.
180. *Id.* at 12-13, 543 S.E.2d at 48.
181. *Id.* at 14, 543 S.E.2d at 49.
182. *Id.*
183. *Id.*
184. *Id.* at 13-14, 543 S.E.2d at 48.
185. *Id.* at 13, 543 S.E.2d at 48. *See* FED. R. EVID. 806.