Evidence

**by John E. Hall, Jr.*
and W. Scott Henwood****

> Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence. John Adams[1]

I. INTRODUCTION

The biggest story in Georgia Evidence law this year[2] is undoubtedly the Georgia General Assembly's decision to align Georgia's evidence code with the Federal Rules of Evidence.[3] Proponents of House Bill 24 describe the former rules, many of which have been on the books for more than 150 years, as archaic and inconsistent.[4] Paul S. Milich, professor of law at Georgia State University College of Law and the reporter for the State Bar of Georgia committee that proposed the new rules of evidence for Georgia, described the way the outdated rules impeded the modern practice of law in Georgia: "Our 19th-century

---

* Founding Partner in the firm of Hall, Booth, Smith & Slover, P.C., Atlanta, Georgia. Mercer University (B.A., 1981); Mercer University, Walter F. George School of Law (J.D., 1984). Member, Mercer Law Review (1982-1984); Student Writing Editor (1983-1984). Member, State Bar of Georgia.

** Of Counsel for the firm of Hall, Booth, Smith & Slover, P.C., Atlanta, Georgia. Georgia State University (B.B.A., 1976); Woodrow Wilson College of Law (J.D., 1978). Former reporter of decisions for the Georgia Supreme Court and Georgia Court of Appeals. Member, State Bar of Georgia.

1. John Adams, Argument in Defense of the British Soldiers in the Boston Massacre Trials (Dec. 4, 1770), *in* 3 LEGAL PAPERS OF JOHN ADAMS 269 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

2. For an analysis of Georgia evidence law during the prior survey period, see John E. Hall, Jr. & W. Scott Henwood, *Evidence, Annual Survey of Georgia Law*, 62 MERCER L. REV. 125 (2010).

3. Ga. H.R. Bill 24, Reg. Sess.

4. Paul S. Milich, *Court Rules will Benefit Public*, ATLANTA J. CONST., May 25, 2011, http://www.ajc.com/opinion/court-rules-will-benefit-957487.html.

evidence rules do not fit the 21st century very well. Phones did not exist when Georgia's evidence code was written in 1860, let alone cars, videos, computers, or even Facebook."[5] With this change, Georgia joins forty-three other states that have adopted the Federal Rules of Evidence, including all states bordering Georgia.[6] Attorneys practicing in Georgia may have some studying to do to become familiar with the new code; however, the Bill's supporters argue that this should not be a problem since many attorneys have experience in federal court or remember some of the rules from their law school days.[7]

These changes represent the culmination of a twenty-year struggle to conform Georgia's code to the Federal Rules of Evidence, which began when Governor Nathan Deal, then leader of the Senate, carried the proposed changes to a unanimous vote in the Senate, only to be defeated in the House.[8] Because the new legislation becomes effective January 1, 2013,[9] it does not affect cases that are surveyed in this article, which were decided from June 1, 2010 to May 31, 2011. However, judges have already started to take note of the forthcoming changes.[10]

II. BEST EVIDENCE RULE

As supporters of Georgia's adoption of the Federal Rules of Evidence have noted, Georgia courts have struggled to apply the Georgia Rules of Evidence in determining the admissibility of various types of electronic evidence.[11] One area of evidence law in which Georgia has struggled with technological advances is the application of the Best Evidence Rule, which governs the version of documents that can be used as evidence when the contents of the documents are at issue.[12] The Georgia version

---

5. *Id.*

6. *Id.*

7. John Gramlich, *Georgia Rewrites its Trial Rules, Replacing a 19th Century System*, STATELINE (May 26, 2011), http://www.stateline.org/live/printable/story?contentId=577213.

8. Milich, *supra* note 4.

9. Ga. H.R. Bill 24, § 1, Reg. Sess.

10. *See* Bethel v. Fleming, 310 Ga. App. 717, 723 n.6, 713 S.E.2d 900, 905 n.6 (2011). The court in *Bethel* noted the following:

> The General Assembly recently amended the Georgia Code to substantially revise, supersede, and modernize provisions relating to evidence "to adopt the Federal Rules of Evidence, as interpreted by the Supreme Court of the United States and the United States circuit courts of appeal as of January 1, 2013 . . . ." See House Bill 24, Ga. L. 2011, p. 1, § 1. Although the amended code sections do not apply in this case, we nevertheless note that they are consistent with our conclusion here. See House Bill 24, Ga. L. 2011, p. 3, § 2.

Id.

11. *See* Milich, *supra* note 4.

12. *See, e.g.*, Baptiste v. State, 288 Ga. 653, 656, 706 S.E.2d 442, 445 (2011).

of the rule codified in section 24-5-4 of the Official Code of Georgia Annotated (O.C.G.A.),[13] reads:

> (a) The best evidence which exists of a writing sought to be proved shall be produced, unless its absence shall be satisfactorily accounted for.
> (b) Written evidence of a writing is considered of higher proof than oral evidence. In all cases where the parties have reduced their contract, agreement, or stipulation to writing and have assented thereto, such writing is the best evidence of the same.[14]

The Federal Rules of Evidence similarly require production of the original writing to prove its contents.[15] However, in contrast to Georgia's articulation of the original writing requirement, the federal version provides for the use of electronically duplicated copies as acceptable versions of the original.[16] For example, computer printouts are included in the definition of original: "If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original.'"[17] The Georgia Supreme Court recently interpreted the lack of a similar provision regarding computer printouts to mean that, under Georgia's articulation of the Best Evidence Rule, printouts from computers, notwithstanding their accuracy, are not "originals."[18]

In *Baptiste v. State*,[19] Gerard George Baptiste objected at a pretrial hearing for his felony murder trial to the admission of evidence collected during searches of his residence and vehicle. In response to this objection, the prosecution produced copies of warrants issued for the searches at issue. Attached to the copies of the warrants was an unsigned, unsworn affidavit by the county investigator.[20] The investigator testified that the original warrants and his original signed affidavit had been "retained and sealed" by the issuing judge, who was now unable to locate the original documents.[21] The investigator also testified that, in the presence of the assistant district attorney and a

---

13. O.C.G.A. § 24-5-4 (2010).
14. *Id.*
15. FED. R. EVID. 1002. The rule states: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress." *Id.*
16. *Id.* at 1001(4).
17. *Id.* at 1001(3).
18. *Baptiste*, 288 Ga. at 656, 706 S.E.2d at 445.
19. 288 Ga. 653, 706 S.E.2d 442 (2011).
20. *Id.* at 655, 706 S.E.2d at 444.
21. *Id.*

detective, he retrieved the unsigned version of the affidavit from a computer in the sheriff's office on which the original affidavit was composed.[22] He also confirmed the accuracy of the unsworn version of the document, affirming that it contained the following:

> [I]nformation identical to that contained in the affidavit he had executed before the issuing judge in order to obtain the warrant for appellant's truck and, with the deletion of the last 6 1/4 lines, was identical to the affidavit he had executed before the issuing judge to obtain the warrant for appellant's residence.[23]

The trial court found that this version of the affidavit was a satisfactory "duplicate original" and denied the motion to suppress.[24]

Baptiste appealed, and the Georgia Supreme Court held that the affidavit printed from the sheriff's computer did not satisfy the Best Evidence Rule in Georgia.[25] Justice Benham noted that Georgia's evidence rules did not explicitly allow printouts from computers as duplicate originals, and to qualify as such, the document produced by the prosecution should have been made "by the same pen stroke at the same time . . . or [the document is] not a copy executed at the same time as the 'original' of the document."[26] The supreme court held, however, that the trial court did not abuse its discretion in admitting the unsworn affidavit because Georgia's evidence code permits the admission of secondary evidence upon a showing that the original document was lost or unavailable.[27] Given the officer's testimony about the sealed, and now unavailable, original warrants and affidavits, the court reasoned that the trial court did not commit error in permitting the secondary evidence.[28]

III. CHARACTER EVIDENCE

A. *Similar Transactions*

As noted in the previous survey,[29] Georgia is the only jurisdiction in the United States that allows admission of a criminal defendant's past

22. *Id.* at 656, 706 S.E.2d at 444-45.
23. *Id.* at 655-56, 706 S.E.2d at 444.
24. *Id.* at 656, 706 S.E.2d at 445 (internal quotation marks omitted).
25. *Id.*
26. *Id.*
27. *Id.* (quoting McGee v. State, 260 Ga. 178, 178, 391 S.E.2d 400, 402 (1990)).
28. *Id.* at 656-57, 706 S.E.2d at 445.
29. Hall & Henwood, *supra* note 2.

crimes or acts to serve as evidence of the defendant's "bent of mind" toward the conduct at issue in the case.[30]

During the survey period, the Georgia Court of Appeals has once again noted its disapproval of admitting this type of evidence, referring to the need for the Georgia General Assembly or the Georgia Supreme Court to amend the rule. For example, in *Steele v. State*,[31] the defendant argued that the use of a prior DUI conviction to show his bent of mind or course of conduct, when it was not needed to supply proof of a missing element to the prosecution's case, violated the rule against character evidence.[32] The court of appeals noted that there were concerns with using similar transaction evidence to prove bent of mind, but that they were bound to follow precedent in allowing its admission: "Only the Supreme Court of Georgia or the Georgia General Assembly has the authority to depart from this state's established (and unique) rule on the admissibility of similar transaction evidence."[33]

B. Unsavory Groups

In a rare move, the Georgia Supreme Court recently reversed a murder conviction because of improperly admitted character evidence. In *Boring v. State*,[34] Courtney Boring was convicted of murdering her mother in February 2007.[35] The supreme court reversed the conviction, but not for lack of evidence of Boring's guilt in her mother's slaying.[36] In fact, Chief Justice Hunstein noted in her opinion that the evidence "was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that appellant was guilty of the crimes of which she was convicted."[37] However, the court held that it was reversible error for the trial court to admit character evidence suggesting that the defendant was under "satanic influences."[38] At trial, the prosecution introduced various evidence collected by police officers from the fifteen-year-old's bedroom.[39] Evidence admitted over the defense's objection included:

---

30. Wade v. State, 295 Ga. App. 45, 48, 670 S.E.2d 864, 866 (2008); *see also* Hall & Henwood, *supra* note 2, at 130-31.
31. 306 Ga. App. 870, 703 S.E.2d 5 (2010).
32. *Id.* at 871-73, 703 S.E.2d at 7-8.
33. *Id.* at 873, 703 S.E.2d at 8.
34. 289 Ga. 429, 711 S.E.2d 634 (2011).
35. *Id.* at 429 & n.1, 711 S.E.2d at 635 & n.1.
36. *See id.* at 432, 711 S.E.2d at 637.
37. *Id.*
38. *Id.* (internal quotation marks omitted).
39. *Id.*

> photographs of appellant with dyed black hair and dark make-up; a document bearing the words of a "curse" to be recited "while burning the letter over a black candle"; and seven different inscriptions, one typewritten and the rest handwritten on the bedroom walls, of song lyrics and quotations attributed to various singers and other artists, bearing themes of anguish, enslavement, atheism, and violence.[40]

In its analysis, the supreme court noted that it has, in past cases, admitted evidence of membership in "unsavory" or unpopular groups, despite the evidence's incidental bearing on the defendant's character, when a sufficient connection existed between the crime involved and the beliefs or practices of the group.[41] For example, the court has upheld the admission of evidence regarding a defendant's membership in a satanic cult when there was evidence that the killing was the result of a satanic ritual.[42] In *Boring*, however, the court determined that there was no such nexus between the crime and the girl's alleged gothic lifestyle.[43] Thus, the prosecution's use of the evidence was an impermissible attempt to draw the jury's attention to the defendant's beliefs, which the jury would likely find unsavory or immoral, rather than a permissible effort to establish a motive.[44] The supreme court's decision was a strong statement about the effect character evidence can have on a trial, but it also exemplifies the thin and often blurry line between admissible and impermissible character evidence in Georgia.

IV. FOURTH AMENDMENT SEARCH AND SEIZURE

A. *Cell Phone Data*

Much of the case law discussing evidentiary issues involves the suppression or admission of evidence gathered by law enforcement officers that implicates the Fourth Amendment constitutional protection against unreasonable search and seizure.[45] This has become particularly relevant after the United States Supreme Court's decision in *Arizona v. Gant*.[46] In *Gant*, the Supreme Court held that

---

40. *Id.*

41. *Id.* at 433-34, 711 S.E.2d at 638 (citing Clark v. State, 271 Ga. 6, 9, 515 S.E.2d 155, 159 (1999)).

42. *Id.* (citing McIntyre v. State, 266 Ga. 7, 11, 463 S.E.2d 476, 481 (1995)).

43. *Id.* at 434-35, 711 S.E.2d at 638.

44. *Id.* at 434-35, 711 S.E.2d at 638-39.

45. *See* U.S. CONST. amend. IV.

46. 556 U.S. 332, 129 S. Ct. 1710 (2009).

> when an officer lawfully arrests the occupant or recent occupant of an automobile, and "when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle," the officer may search the passenger compartment of the automobile for such evidence as an incident of the arrest. . . .[47]

Since the Supreme Court's decision in *Gant,* lower courts have grappled with its scope, particularly in cases where there is no imminent risk that evidence will be destroyed.[48]

During the survey period, the Georgia Court of Appeals applied "[t]he most restrictive plausible interpretation" of that decision and found that the warrantless search of electronic data stored on a defendant's cell phone was reasonable as part of a search of a defendant's vehicle incident to arrest.[49] In *Hawkins v. State*,[50] the defendant (Hawkins) was arrested on multiple charges after sending text messages regarding drug sales to a cell phone that a mother had turned over to police because she was concerned that her son was receiving drug-related messages. Officers continued to correspond with Hawkins, who believed she was communicating with the son, and set up a time and place to meet for what she believed was a drug sale. When Hawkins arrived at the restaurant, she was arrested and officers searched her vehicle with her consent and incident to her arrest. In the car, officers located the cell phone in Hawkins's purse and downloaded the messages exchanged with her that day. Hawkins challenged the search and seizure of the cell phone, claiming that it violated her Fourth Amendment rights.[51]

Rejecting her claim, the court of appeals noted that when officers are authorized to search a vehicle for a specific piece of evidence, they are also permitted to search any container that might reasonably contain the object for which they are searching.[52] The court then reasoned that a cell phone should be treated like a container in the context of an authorized warrantless search for evidence.[53] Further, the court held that the officer did not exceed the scope of his authority to search the phone since he merely searched for and downloaded the messages sent to the phone in his possession.[54] Therefore, the court held, the search

---

47. Hawkins v. State, 307 Ga. App. 253, 255, 704 S.E.2d 886, 889 (2010) (quoting *Gant*, 129 S. Ct. at 1714).
48. *See, e.g., Hawkins*, 307 Ga. App. at 255-56, 704 S.E.2d at 889.
49. *Id.* at 256, 704 S.E.2d at 889-90.
50. 307 Ga. App. 253, 704 S.E.2d 886 (2010).
51. *Id.* at 253-55, 704 S.E.2d at 888-89.
52. *Id.* at 255-56, 704 S.E.2d at 889-90.
53. *Id.* at 258, 704 S.E.2d at 891.
54. *Id.* at 259, 704 S.E.2d at 892.

of the cell phone did not violate Hawkins's Fourth Amendment rights, and the text messages were admissible.[55] Cell phones differ substantially from traditional containers in that they lack the finite capacity to hold tangible objects.[56] Therefore, the court urged that application of the principles for traditional container searches to cell phones should be done with "great care and caution."[57] However, this decision could serve as an important tool for officers gathering electronic evidence, and it serves as an example of Georgia courts' attempt to define the scope of *Gant*.

B. The Exclusionary Rule

Part of the Fourth Amendment protection against unreasonable search and seizure is the exclusionary rule, which restricts admission of evidence obtained during unlawful searches.[58] The purpose of the rule is to deter unconstitutional searches by limiting the ability of the prosecution to use the resulting evidence against the defendant; however, this rule is not unlimited: "Because the rule is not constitutionally mandated and because of its broad deterrent purpose, it consistently has been applied only 'where its remedial objectives are thought most efficaciously served.'"[59] To determine when to apply the exclusionary rule to proceedings other than criminal trials, the United States Supreme Court has adopted a balancing test in which the likelihood of deterring unconstitutional searches is weighed against the potential harm of excluding the evidence.[60]

On the last day of the survey period, the Georgia Supreme Court applied this balancing test and refused to extend the exclusionary rule to probation revocation proceedings. In *State v. Thackston*,[61] the supreme court reversed the court of appeals grant of a motion to suppress unconstitutionally collected evidence during a probation revocation hearing.[62] The supreme court reasoned that because the goal of the probation system is to rehabilitate offenders, it is vital to the administration of that system that all relevant and reliable evidence be heard during revocation proceedings.[63] Further, the court held that the

---

55. *Id.*
56. *Id.* at 257-58, 704 S.E.2d at 891.
57. *Id.*
58. United States v. Calandra, 414 U.S. 338, 347 (1974).
59. State v. Thackston, No. S10G1337, 2011 WL 2118928, at *1 (Ga. May 31, 2011).
60. *Id.* at *2 (citing Illinois v. Krull, 480 U.S. 340, 347-48 (1987)).
61. No. S10G1337, 2011 WL 2118928 (Ga. May 31, 2011).
62. *Id.* at *1.
63. *Id.* at *2-3.

exclusionary rule's application to criminal proceedings sufficiently deterred unconstitutional searches, and the potential deterrent effect of extending the rule to revocation proceedings was outweighed by the need to thoroughly evaluate as much evidence as possible about the probationer's readiness to reintegrate into society.[64] This decision brings Georgia in line with the majority of jurisdictions that have declined to extend the application of the exclusionary rule to probation revocation proceedings, and it overruled all Georgia cases to the contrary.[65]

V. CHILD CUSTODY CASES

During the survey period, the Georgia Supreme Court had the opportunity to clarify a narrow, but important, area of evidentiary law. In *Pace v. Pace*,[66] the court held that in making final determinations of child custody decisions, lower courts should not rely on evidence introduced at preliminary hearings.[67] In *Pace*, the husband filed for divorce, and, during the preliminary hearing, the court awarded temporary physical custody of the couple's minor son to the husband and joint legal custody to both parties. At the bench trial in which the divorce decree was entered, the husband was granted sole legal and physical custody of the child, and the wife subsequently appealed.[68] The supreme court held that despite the lack of guidance from the statute and the court rules regarding child custody determinations, it was reversible error for the trial court to rely on the testimony proffered at the preliminary hearing without notifying the parties.[69]

---

64. *Id.* at *3.

65. *Id.* The court noted:

> We also overrule the following cases to the extent they hold illegally seized evidence is inadmissible in probation revocation hearings: *Colvert v. State*, 237 Ga. App. 670, 516 S.E.2d 377 (1999) (vacating and remanding where trial court revoked probation based on evidence that may have been subject to suppression); *Owens v. State*, 153 Ga. App. 525, 265 S.E.2d 856 (1980) (reversing revocation of probation based on improper admission of illegally seized evidence at revocation hearing); *Adams v. State*, 153 Ga. App. 41, 264 S.E.2d 532 (1980) (holding illegally seized evidence inadmissible in revocation hearing); *Porter v. State*, 142 Ga. App. 481, 236 S.E.2d 172 (1977) (same); *Giles v. State*, 149 Ga. App. 263, 254 S.E.2d 154 (1979).

Id. n.2.

66. 287 Ga. 899, 700 S.E.2d 571 (2010).

67. *Id.* at 901, 700 S.E.2d at 573.

68. *Id.* at 899-900, 700 S.E.2d at 572.

69. *Id.* at 900-01, 700 S.E.2d at 572-73.

VI. PLAINTIFFS AS EVIDENCE

Decisions on admissibility of evidence very often require examination of the effect the evidence will have on the jury. Weighing the probative value of a particular piece of evidence against the potential for unfair prejudice is essential to many admissibility determinations. Limiting the presence of a party in the courtroom during trial now requires a related analysis in Georgia.[70]

Generally, civil parties have the right to be present at all stages of trial.[71] However, this right may be limited in certain circumstances without violating due process, such as when the presence of a severely injured or disabled plaintiff before the jury could unfairly prejudice the defendant's case.[72] Until the current survey period, Georgia courts had not examined the circumstances under which a defendant could seek to have an injured plaintiff excluded from the courtroom without running afoul of that plaintiff's constitutionally protected rights.[73]

In *Kesterson v. Jarrett*,[74] the Georgia Court of Appeals followed the lead of the United States Court of Appeals for the Sixth Circuit and outlined circumstances in which a plaintiff's presence at trial is not a right, such as when "the plaintiff functions almost as an exhibit, as a piece of evidence," rather than a meaningful participant in the proceeding.[75] In *Kesterson*, the parents, Catherine and Ross Kesterson, individually and on behalf of their daughter, Kyla, brought a medical malpractice case alleging that Kyla was deprived of oxygen immediately preceding her birth, which resulted in neurological injuries. In response to the defendants' motion to exclude Kyla from the courtroom, the trial court concluded that Kyla would be introduced to the jury during voir dire, and then her presence would be limited absent a finding by the court that her presence was essential and relevant, with the court reserving the right to remove Kyla from the courtroom if her presence became disruptive or prejudicial to the defendant. The plaintiffs requested that Kyla be allowed in the courtroom during the testimony of three witnesses. The court denied their request with respect to two of the witnesses. The plaintiffs appealed this ruling after the jury found

---

70. Kesterson v. Jarrett, 307 Ga. App. 244, 249-50, 704 S.E.2d 878, 883-84 (2010), *cert. granted.*

71. Cox v. Yates, 96 Ga. App. 466, 466, 100 S.E.2d 649, 651 (1957).

72. *Kesterson*, 307 Ga. App. at 249, 704 S.E.2d at 883.

73. *See id.*

74. 307 Ga. App. 244, 704 S.E.2d 878 (2010).

75. *Id.* at 248-50, 704 S.E.2d at 883-84.

for the defense.[76] The court of appeals concluded that while the trial court did not thoroughly examine and explain their decision to exclude Kyla, the error was harmless.[77] However, the court provided instructions for trial courts on how to handle requests to exclude injured plaintiffs in the future:

> [W]hen, after an evidentiary hearing upon a written motion and after an opportunity to observe the plaintiff, the court makes the following factual findings in a written order: (1) the plaintiff is severely injured; (2) the plaintiff attributes those injuries to the conduct of the defendant(s); (3) there is a substantial likelihood that the plaintiff's presence in the courtroom will cause the jury to be biased toward the plaintiff based on sympathy rather than the evidence such that the jury would be prevented or substantially impaired from performing its duty; (4) the plaintiff is unable to communicate with counsel or to participate in the trial in any meaningful way; and (5) the plaintiff is unable to comprehend the proceedings.[78]

In conducting the inquiry, courts should examine the plaintiff in person, on video, or through other reliable means to evaluate the above factors objectively.[79] The holding of the court of appeals recognizes that plaintiffs can serve evidentiary purposes, and their ability to assist counsel should be weighed against the risk that their presence impairs the fact-finding mission of the jury.

VII. CONCLUSION

Major changes are on the horizon for Georgia's evidence code. It remains uncertain exactly how those changes will affect judges and attorneys practicing in the state. However, given the importance of the rules of evidence in shaping litigation, it is clear the effect will be substantial.

---

76. *Id.* at 244-47, 704 S.E.2d at 880-82.
77. *Id.* at 250-51, 704 S.E.2d at 884.
78. *Id.* at 250, 704 S.E.2d at 884.
79. *Id.* at 250 n.6, 704 S.E.2d at 884 n.6.

***