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John E. Hall Jr.

W. Scott Henwood

Leesa Guarnotta

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Evidence

by John E. Hall, Jr.*

W. Scott Henwood**

and Leesa Guarnotta***

I. INTRODUCTION

In the sixth year since the implementation of Georgia's new Evidence Code,¹ the Georgia Supreme Court must still remind lower courts and litigators to rely upon the new Code and its subsequent case law when addressing evidentiary issues arising after 2013.² This Article highlights some of the continuing changes to Georgia's evidence rules based on the new Georgia Evidence Code, Official Code of Georgia Annotated (O.C.G.A.) Title 24.³ This Article period spans from June 1, 2018 to May 31, 2019. Specifically, this Article addresses: (1) the consequences of straying from the new Code; (2) new interpretations of Rule 404(b);⁴ and (3) reinterpreting what is admissible evidence in relation to pre-arrest silence, parties as evidence, and identity testimony in child sexual abuse cases.

*Founding Partner, Hall Booth Smith, P.C., Atlanta, Georgia. Mercer University (B.A., 1981); Mercer University School of Law (J.D., 1984). Member, Mercer Law Review (1982–1984); Student Writing Editor (1983–1984). Member, State Bar of Georgia.

** Of Counsel, Hall Booth Smith, P.C., Atlanta, Georgia. Georgia State University (B.B.A., 1976); Woodrow Wilson College of Law (J.D., 1978). Former Reporter of Decisions, Georgia Supreme Court and Georgia Court of Appeals. Member, State Bar of Georgia.

*** Associate, Hall Booth Smith, P.C., Atlanta, Georgia. Georgia State University (B.A., 2016); Mercer University School of Law (J.D., magna cum laude, 2019). Member, Mercer Law Review (2017–2019). Member, State Bar of Georgia.

1. See Ga. H.R. Bill 24, Reg. Sess., 2011 Ga. Laws 99 (codified at O.C.G.A. tit. 24). For an analysis of evidence during the prior survey period, see John E. Hall, Jr., W. Scott Henwood & L. Whit Carmon II, *Evidence, Annual Survey of Georgia Law*, 70 MERCER L. REV. 97 (2018).

2. Beck v. State, 305 Ga. 383, 386, 825 S.E.2d 184, 186–87 (2019).

3. O.C.G.A. tit. 24 (2019).

4. O.C.G.A. § 24-4-404(b) (2019).

II. EMPHASIZING THE IMPORTANCE OF FOLLOWING THE NEW CODE

A. Not Applying the New Code

As with most new rules, it will take courts and attorneys time to adjust to the new Evidence Code. These adjustments do not come without consequences, as seen in *Beck v. State*.⁵ Dallas Beck was convicted of felony murder, among other crimes, in 2014 after a local basketball game escalated into a confrontation. One of Beck's arguments on appeal was that the jurors considered extrajudicial information about sentencing, which denied him a fair trial.⁶

Eleven jurors testified about the issue at the hearing for a new trial. Of those eleven, three "testified that the jury discussed sentencing during deliberations." Two of those three testified that such discussions did not affect their verdicts. The third, however, testified that the discussions did affect the verdict. One of the three jurors denied that the sentencing information was from another juror, but could not remember who gave the jury the information or how they got it. The other eight jurors denied considering sentencing during deliberations. The trial court denied the motion for a new trial, finding that the sentencing discussions did not affect the verdict and that the one juror who testified otherwise was not credible given the inconsistencies in her testimony.⁷

O.C.G.A. § 24-6-606(b)⁸ provides that

Upon an inquiry into the validity of a verdict . . . a juror shall not testify . . . as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the jury deliberations . . . concerning the juror's mental processes in connection therewith; provided, however, that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the juror's attention . . .⁹

As stated by the Georgia Supreme Court, "The difference between the old and new Evidence Codes matters in this case."¹⁰ However, there

5. 305 Ga. 383, 825 S.E.2d 184 (2019).

6. *Id.* at 383–85, 825 S.E.2d at 184–86.

7. *Id.* at 385, 825 S.E.2d at 186.

8. O.C.G.A. § 24-6-606(b) (2019).

9. *Id.*

10. *Beck*, 305 Ga. at 386, 825 S.E.2d at 187. *See, e.g.*, *Spencer v. State*, 260 Ga. 640, 643–44, 398 S.E.2d 179, 185 (1990) (holding juror testimony not admissible without evidence racial bias materially affected the jury's decision).

was no mention of Rule 606 in the hearing or the filings associated with the hearing.¹¹

The supreme court noted that the trial court had evidence with which it could conclude that extraneous prejudicial information was introduced to the jury.¹² Notwithstanding, the trial court did not make any findings of whether the juror who testified about information being given to them was credible.¹³ Instead, as the supreme court noted, the trial court relied only on whether the information was prejudicial.¹⁴ However, under Rule 606(b), the juror testimony as to whether the information was prejudicial is barred.¹⁵ Accordingly, the supreme court vacated the trial court's denial and remanded the issue for consideration under Rule 606.¹⁶

B. Relying on Cases Decided Before the New Code

Even in cases where the trial court applied the new Evidence Code, decisions may go awry where the court applies precedent established by cases prior to 2013, as in *Barrett v. Burnette*.¹⁷ *Barrett* arose out of a negligence suit in which Barrett claimed, among other things, that Burnette was driving under the influence after Barrett hit Burnette's parked car. Witnesses and Barrett testified that Burnette's car was in the middle of the road without the emergency flashers on. Burnette, on the other hand, testified that he pulled off the roadway and turned on the flashers after discovering he had a flat tire. He then walked to his house to call a wrecker service. About forty-five minutes after the call, the wrecker service called Burnette about the accident. Burnette rode with his mother to the accident scene.¹⁸

Prior to trial, Burnette moved to exclude evidence of his DUI citation that was ultimately dismissed and any evidence as to whether he was legally impaired prior to, during, or after the collision. Although Barrett did not object to the exclusion of the citation, he argued that testimony as to Burnette's blood alcohol level and his and the trooper's observations of Burnette's conduct at the scene should be admissible. In support of admission, Barrett argued that Burnette was too drunk to

11. *Beck*, 305 Ga. at 386, 825 S.E.2d at 187.

12. *Id.*

13. *Id.*

14. *Id.* at 387, 825 S.E.2d at 187.

15. *Id.*

16. *Id.*

17. 348 Ga. App. 838, 824 S.E.2d 701 (2019); *see also* *State v. Orr*, 305 Ga. 729, 827 S.E.2d 892 (2019), discussed *infra* note 49.

18. *Barrett*, 348 Ga. App. at 838, 824 S.E.2d at 702.

move his car, so he left it in the middle of the road. Burnette countered by saying he had two beers while home and had not driven for about forty-five minutes when he returned to the scene.¹⁹

The trial court excluded all evidence relating to Burnette's intoxication citing that under O.C.G.A. § 24-4-403,²⁰ the danger of unfair prejudice substantially outweighed the evidence's probative value.²¹ The court had three foundations for its findings: (1) *Shelter Mutual Insurance Company v. Bryant*,²² which stated, in that case, "[I]t may have been a better choice to omit the evidence [of intoxication] due to its inflammatory nature because of the general public's appreciation of the dangers of drinking and driving;"²³ (2) the tenuous probative value of the positive breath test considering the time Burnette was away from his car; and (3) the fact that the DUI charge was dismissed.²⁴ Ultimately, the jury found both Burnette and Barrett 50% at fault. On appeal, Barrett argued the trial court erred in granting Burnette's motion in limine.²⁵

In its opinion, the Georgia Court of Appeals described Rule 403 as an extraordinary remedy.²⁶ The court went on to explain that "the question of whether a motorist's consumption of alcohol impaired his driving capabilities and entered into the proximate cause of the collision is best left for the jury's resolution."²⁷ The court then turned to the core issue of the case—the location of the car—which hinged upon Burnette's credibility.²⁸ The court reasoned that since Burnette's intoxication at the time of parking was highly relevant, the trial court's ruling was overly broad.²⁹ Accordingly, the court of appeals reversed the trial court's judgment over Judge Markle's dissent that the trial court correctly applied the Rule 403 balancing test.³⁰ Although *Barrett* is physical precedent only,³¹ it serves to remind courts and attorneys that

19. *Id.* at 839, 824 S.E.2d at 702–03.

20. O.C.G.A. § 24-4-403 (2019).

21. *Barrett*, 348 Ga. App. at 839, 824 S.E.2d at 703.

22. 220 Ga. App. 526, 469 S.E.2d 792 (1996).

23. *Barrett*, 348 Ga. App. at 840, 824 S.E.2d at 703.

24. *Id.* at 840–41, 824 S.E.2d at 703.

25. *Id.* at 839, 824 S.E.2d at 703.

26. *Id.* at 840, 824 S.E.2d at 703.

27. *Id.* (quoting *Gwinnett Cty. v. Sargent*, 321 Ga. App. 191, 193, 738 S.E.2d 716, 718 (2013)).

28. *Id.* at 841, 824 S.E.2d at 704.

29. *Id.*

30. *Id.* at 842, 824 S.E.2d at 704.

31. *Id.*

they should be cautious when relying on cases that applied Georgia's old Evidence Code.

III. REINTERPRETING RULE 404(B) EVIDENCE

As both the Federal Rules of Evidence and Georgia's Evidence Code continue to develop, there are bound to be some inconsistencies in how the rules of evidence are interpreted and implemented. These inconsistencies are exemplified in *State v. Atkins*.³² Denzel Atkins was charged with murder, among other crimes, in December 2015 following a police investigation after a shooting victim, Elijah Wallace, was found on Fulton County Road. According to Atkins's accomplice, Harold Foster, Atkins and Foster borrowed a car to meet Wallace. After Atkins and Wallace got into an argument in the car, Atkins shot Wallace and drove a few blocks before dumping Wallace's body on the roadside.³³

At trial, the State sought to introduce a 2013 Candler County murder indictment against Atkins to prove intent, motive, identity, and lack of accident or mistake under Rule 404(b). According to Rasheen Jones, he and Atkins were going to buy marijuana from Perry Herbert when Atkins forced Herbert into a vehicle at gunpoint. After some driving, Atkins forced Herbert out of the vehicle and shot him. Atkins was later acquitted after denying his presence for the crime.³⁴

The trial court found sufficient proof from which a jury could find Atkins committed at least some of the prior acts by a preponderance of the evidence, that there was a legitimate purpose for the other acts evidence, and that the prejudicial impact of the evidence would not substantially outweigh any probative value.³⁵ Nevertheless, the trial court excluded the evidence about Herbert's murder "out of an abundance of caution"³⁶ because there was not sufficient evidence Atkins participated in Herbert's murder.³⁷

32. 304 Ga. 413, 819 S.E.2d 28 (2018).

33. *Id.* at 413–14, 819 S.E.2d at 30.

34. *Id.* at 415, 819 S.E.2d at 30–31.

35. *Id.* at 422–23, 819 S.E.2d at 35–36.

36. *Id.* at 423, 819 S.E.2d at 36. The Georgia Supreme Court held exclusion for "an abundance of caution" was another ground to vacate and remand the trial court's decision since it is not one of the enumerated Rule 403 grounds for exclusion. *Id.*

37. *Id.* at 415–16, 819 S.E.2d at 31.

A. *Rejecting the Application of Collateral Estoppel to Rule 404(b) Evidence*

In line with the Federal Rules of Evidence, for other acts evidence to be admissible, Georgia's Evidence Code requires a trial court to find that

- (1) the other acts evidence is relevant to an issue other than the defendant's character, (2) the probative value is not substantially outweighed by undue prejudice under O.C.G.A. § 24-4-403 . . . and (3) there is sufficient proof that a jury could find by a preponderance of the evidence that the defendant committed the acts.³⁸

The trial court went beyond these three requirements, implicitly relying on *Moore v. State*.³⁹ According to *Moore*, other acts evidence is barred where it would relitigate facts from a prior trial.⁴⁰

However, as the Georgia Supreme Court noted, in *Dowling v. United States*,⁴¹ the Supreme Court of the United States expressly declined to extend collateral estoppel to otherwise admissible other acts evidence because a lower standard of proof is required.⁴² Despite *Dowling*, the Georgia Supreme Court acknowledged that the trial court did not err in relying on *Moore* at the time of the trial court's decision.⁴³ Nevertheless, the Georgia Supreme Court vacated and remanded the order after disapproving *Moore*.⁴⁴

B. *Rejecting the Doctrine of Chances as a Separate Purpose*

In addition to seeking to admit the 2013 indictment to prove intent, motive, identity, and lack of accident or mistake under Rule 404(b), the State argued the prior act would be admissible under the doctrine of

38. *Id.* at 416, 819 S.E.2d at 32.

39. 254 Ga. 674, 333 S.E.2d 605 (1985). *Moore* is based upon the holding of the Supreme Court of the United States in *Ashe v. Swenson*, where the Court held that the doctrine of collateral estoppel is embodied in the guarantee against double jeopardy "It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."

Id. at 675, 333 S.E.2d at 607 (quoting *Ashe v. Swenson*, 397 U.S. 436, 443 (1970)).

40. *Id.* at 675, 333 S.E.2d at 607.

41. 493 U.S. 342 (1990).

42. *Atkins*, 304 Ga. at 420, 819 S.E.2d at 34.

43. *Id.* at 421, 819 S.E.2d at 35.

44. *Id.* at 421, 425, 819 S.E.2d at 34–35, 37.

chances.⁴⁵ According to the State, “[T]he doctrine of chances is a legitimate, non-character purpose of Rule 404(b) evidence.”⁴⁶ The Georgia Supreme Court disagreed, refusing to endorse the doctrine for purposes beyond proving intent, knowledge, identity, or lack of accident or mistake.⁴⁷

IV. REINTERPRETING “ADMISSIBLE EVIDENCE”

A. Pre-Arrest Silence

In *State v. Orr*,⁴⁸ the Honorable Justice David Nahmias stated, “[T]he new Evidence Code . . . precludes courts from promulgating or perpetuating judge-made exclusionary rules of evidence.”⁴⁹ It is this principle that will now allow the admission of a criminal defendant’s pre-arrest silence based on the facts of the specific case.⁵⁰ This contradicts the previous rule under *Mallory v. State*,⁵¹ which precluded a criminal defendant’s failure to come forward or silence prior to arrest since it would always be “far more prejudicial than probative.”⁵²

Otto Orr was tried for family violence battery and cruelty to children in 2015 after an argument with his wife ended in Orr striking and kicking his wife several times in front of their son. At trial, Orr claimed he acted in self-defense and described his wife as a drug addict who would attack him when angry. In response, the State questioned witnesses and Orr as to why Orr never reported the abuse or his injuries. Orr stated that he was afraid calling the police would cause the Division of Family and Children Services to “always be involved in his family’s life.”⁵³

Orr’s attorney did not object to the references of silence until the State’s closing, but the objection was denied. Ultimately, the jury found Orr guilty of both charges. With new counsel, Orr filed a motion for new trial, citing to *Mallory*. Subsequently, the Georgia Court of Appeals held that *Mallory* was valid until the Georgia Supreme Court ruled

45. *Id.* at 424, 819 S.E.2d at 37. “The doctrine of chances explains . . . that ‘highly unusual events are highly unlikely to repeat themselves.’” *Id.* at 423–24, 819 S.E.2d at 36 (quoting *United States v. York*, 933 F.2d 1343, 1350 (7th Cir. 1991)).

46. *Id.* at 423, 819 S.E.2d at 36.

47. *Id.* at 424–25, 819 S.E.2d at 37.

48. 305 Ga. 729, 827 S.E.2d 892 (2019).

49. *Id.* at 729, 827 S.E.2d at 894.

50. *Id.* at 739, 827 S.E.2d at 901.

51. 261 Ga. 625, 409 S.E.2d 839 (1991).

52. *Id.* at 630, 409 S.E.2d at 843.

53. *Orr*, 305 Ga. at 731, 827 S.E.2d at 895.

otherwise. Accordingly, the trial court applied *Mallory* to Orr's motion for a new trial. Finding the State's argument as a harmful violation of *Mallory*, the trial court granted Orr a new trial. On appeal by the State, the court of appeals again held that evidence of pre-arrest silence was barred by *Mallory* until the supreme court ruled otherwise.⁵⁴ The supreme court granted certiorari on the issue.⁵⁵

In its opinion, the supreme court carefully distinguished between the admissibility of the pre-arrest silence at issue and post-arrest silence.⁵⁶ The court then explained that, under the old Evidence Code, pre-arrest silence was admissible, which led to *Mallory*'s categorical exclusion of such evidence.⁵⁷ As noted by the supreme court, *Mallory* was not based on the United States Constitution, the Georgia Constitution, the old Evidence Code, or the common law.⁵⁸ Rather, the rule was an exercise of "judicial lawmaking: a rule excluding a certain type of evidence based on the Court's view of good policy, operating only prospectively."⁵⁹ The court stated that, as a judicial law, *Mallory* was abrogated by the new Evidence Code since the new Code established rules embodying the risks of prejudice.⁶⁰ Specifically,

Only one rule, however, authorizes the exclusion of relevant evidence based on the court's evaluation of the "prejudice" such evidence could cause: OCGA § 24-4-403 ("Rule 403"), which grants the trial court discretion to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue

54. *Id.* at 731–32, 827 S.E.2d at 895–96.

55. *Id.* at 732, 827 S.E.2d at 896.

56. *Id.* at 733, 827 S.E.2d at 896.

[W]hen the government did not induce the defendant to remain silent by advising him of his right to remain silent as required by *Miranda v. Arizona*, 384 U.S. 436, 467–468 . . . and when the defendant then waives his privilege against compelled self-incrimination by testifying at trial, "the State may comment at trial upon the fact that he did not come forward voluntarily" without violating the federal Constitution.

Id. at 733, 827 S.E.2d at 896–97 (quoting *Mallory*, 261 Ga. at 629, 409 S.E.2d at 842); *see also id.* at 733 n.2, 827 S.E.2d at 897 n.2.

57. *Id.* at 733–34, 827 S.E.2d at 897.

58. *Id.* at 734, 827 S.E.2d at 897. Since *Mallory* is not constitutionally required or required by other law, the court also noted that it does not fall within the exceptions of O.C.G.A. § 24-4-402 (2019). *Id.* at 738, 827 S.E.2d at 900.

59. *Id.* at 735, 827 S.E.2d at 898.

60. *Id.* at 736–37, 827 S.E.2d at 898–99. "[C]ourts are to look to the substantive law of evidence in Georgia as it existed on December 31, 2012, only when not displaced by the new code." *Id.* (quoting *State v. Almanza*, 304 Ga. 553, 556, 820 S.E.2d 1, 5 (2018)).

delay, waste of time, or needless presentation of cumulative evidence.”⁶¹

Further, the court took notice of the fact that, without *Mallory*, determining the admissibility of pre-arrest silence will become more difficult.⁶² The court cautioned the lower courts from affording such evidence too much probative value, while also reminding courts of the extreme nature of exclusion under Rule 403.⁶³ With the abrogation of *Mallory*'s bright-line rule against admission of pre-arrest silence, the court vacated the decisions of the trial court and the court of appeals and remanded the case.⁶⁴

B. Extending the Rule Against Parties as Evidence

As explained in *Kesterson v. Jarrett*,⁶⁵ although mental or physical condition could be presented like any other piece of evidence, parties themselves cannot.⁶⁶ There, the Georgia Supreme Court held that parties may not be excluded based on the physical manifestations of their injuries.⁶⁷ This survey period, the Georgia Court of Appeals expanded this principle to controlling how a party presents in the courtroom beyond physical manifestations of injury.

In *Harp v. State*,⁶⁸ Antwain Harp appealed the denial of his motion for a new trial following his conviction for armed robbery. In addition to his argument of insufficient evidence, Harp argued that the trial court abused its discretion when it required him to wear civilian clothing. On the first day of trial, Harp appeared wearing his National Guard uniform. After an objection by the State, the trial court prohibited Harp from wearing his uniform and allowed him to change.⁶⁹ Finding no Georgia case on point, the court relied on *State v. Marquez*,⁷⁰ which held

61. *Id.* at 737, 827 S.E.2d at 899 (quoting O.C.G.A. § 24-4-403).

62. *Id.* at 739, 827 S.E.2d at 901. The court also considered possible rules under which pre-arrest silence would be admissible. *Id.* at 738–41, 827 S.E.2d at 900–02.

63. *Id.* at 742–43, 827 S.E.2d at 903.

64. *Id.* at 739, 743, 827 S.E.2d at 900, 903. The court also advised lower courts in the future to first determine if the new Evidence Code has abrogated a rule from the former Code, as the court of appeals had done many times before. *Id.* at 739–40 n.9, 827 S.E.2d at 900–01 n.9.

65. 291 Ga. 380, 728 S.E.2d 557 (2012).

66. *Id.* at 392–93, 728 S.E.2d at 566–67.

67. *Id.* at 394–95, 728 S.E.2d at 568. For a more detailed discussion of *Kesterson*, see John E. Hall, Jr., W. Scott Henwood & Alex Battey, *Evidence, Annual Survey of Georgia Law*, 65 MERCER L. REV. 125 (2013).

68. 347 Ga. App. 610, 820 S.E.2d 449 (2018).

69. *Id.* at 610–13, 870 S.E.2d at 450–52.

70. 193 P.3d 578 (N.M. Ct. App. 2008).

that “wearing the uniform was an attempt to influence the jury without introducing evidence or allowing cross-examination.”⁷¹

On appeal, the court of appeals determined that no Georgia precedent was directly on point.⁷² However, the court distinguished *Carver v. State*⁷³ from the present case.⁷⁴ The court explained that the witness in *Carver* was allowed to wear his uniform because his testimony explained that he was deployed during the time the defendant believed the witness was stealing from the defendant.⁷⁵ Whereas, in the present case, Harp was not subject to cross-examination, and his service was extraneous to the issues of the trial.⁷⁶ Ultimately, the court of appeals agreed with the trial court that Harp’s uniform “could be construed as an attempt to influence the jury in a manner not based on witness testimony or other evidence of his guilt or innocence.”⁷⁷

C. Identity Testimony in Child Sexual Abuse Cases

On occasion, there will be cases where a rule under the new Evidence Code is, in substance, the same as a rule under the old Evidence Code. This survey period was the first time the Georgia Supreme Court had to consider such an occasion.⁷⁸ While this may seem to be a welcome occasion to litigators and judges, it can actually make determining admissibility more difficult where federal case law and state case law differ in application. The Georgia Supreme Court discussed this difficulty in *State v. Almanza*.⁷⁹

The supreme court granted certiorari to address whether the hearsay exception under Rule 803(4),⁸⁰ statements made for the purposes of medical diagnosis or treatment, applies to identifications of alleged sexual abusers of child victims.⁸¹ Primarily, the court sought to address the discord between the federal case law, which held such evidence admissible in certain circumstances, and Georgia case law, which held

71. *Harp*, 347 Ga. App. at 613, 820 S.E.2d at 452 (citing *Marquez*, 193 P.3d at 581).

72. *Id.* at 614, 820 S.E.2d at 452.

73. 324 Ga. App. 422, 750 S.E.2d 735 (2013).

74. *Harp*, 347 Ga. App. at 614, 820 S.E.2d at 452.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Almanza*, 304 Ga. at 558, 820 S.E.2d at 6.

79. 304 Ga. 553, 820 S.E.2d 1 (2018).

80. O.C.G.A. § 24-8-803(4) (2019).

81. *Almanza*, 304 Ga. at 553, 820 S.E.2d at 3.

such evidence inadmissible.⁸² Ultimately, the court followed federal precedent and held that “Rule 803(4) permits the admission of identity in child sexual abuse cases when reasonably pertinent to medical diagnosis or treatment.”⁸³

In *Almanza*, the child–victim, Almanza’s stepdaughter, told her mother that Almanza molested her twice about a year earlier. In turn, the victim’s mother reported the victim’s accusations to the police, leading to Almanza’s arrest. At police instruction, the victim’s mother took the victim to the pediatric emergency room for an exam. The doctor who treated the victim testified that “he obtained all of his information from the mother, only questioned the mother, and did not recall the child saying anything before, during, or after the exam.” In addition, the victim’s regular pediatrician testified that, at a subsequent appointment to treat the victim’s viral symptoms, he received all the information about the alleged molestation from the mother and that the child did not say anything during the appointment.⁸⁴

Prior to Almanza’s trial for “child molestation, incest, aggravated sexual battery, statutory rape, and aggravated child molestation,” the State was unable to locate the victim or her mother.⁸⁵ This led the State to file a motion in limine to determine whether the mother’s statements to both doctors would be admissible. The trial court found any identification of Almanza as the abuser inadmissible. The court of appeals affirmed and stated such statements of identity are categorically inadmissible under Rule 803(4). In its decision, the court of appeals relied on interpretations of the old Evidence Code’s exception and United States Court of Appeals for the Eleventh Circuit precedent distinguishing causation from attribution of fault, “questioned the relevance of precedent addressing the admission of identity in child sexual abuse cases,” and rejected *United States v. Renville*’s⁸⁶ admissibility test.⁸⁷

The Georgia Supreme Court began its opinion by explicitly referencing the Georgia General Assembly’s intent in enacting the new Evidence Code to “adopt the Federal Rules of Evidence, as interpreted by the Supreme Court of the United States.”⁸⁸ The court held that Georgia’s old evidence rules should only be considered when addressing

82. *Id.*

83. *Id.*

84. *Id.* at 554, 820 S.E.2d at 3.

85. *Id.* at 554, 820 S.E.2d at 4.

86. 779 F.2d 430 (8th Cir. 1985).

87. *Almanza*, 304 Ga. at 554–55, 820 S.E.2d at 4.

88. *Id.* at 555, 820 S.E.2d at 4 (quoting 2011 Ga. Laws 99, 100, § 1).

an issue not covered by the Federal Rules.⁸⁹ Therefore, “if a rule in the new Evidence Code is materially identical to a Federal Rule of Evidence, we look to federal case law.”⁹⁰

Next, the court acknowledged that Rule 803(4) is materially identical under both Georgia’s old Code and the Federal Rule.⁹¹ In fact, whether the statements “shall not be excluded”⁹² or “are not excluded”⁹³ was the only textual difference.⁹⁴ The court emphasized that “[t]he fact that the words of the medical treatment and diagnosis hearsay exception remain substantively unchanged between the old and new Evidence Code is inconsequential; because the state rule mirrors Federal Rule 803(4), it is now read as interpreted by the federal appellate courts.”⁹⁵

The court then turned to construe Rule 803(4).⁹⁶ In doing so, the court determined that the Eleventh Circuit precedent distinguishing between statements of causation and fault were not controlling because they did not declare identification statements as always inadmissible and did not deal with child sexual abuse cases.⁹⁷ Without controlling Eleventh Circuit precedent, the court turned to the Advisory Committee Notes to Federal Rule 803(4).⁹⁸ The court took note of the federal circuit’s exclusion of child sexual abuse cases from the general rule that identity is relevant only to fault as opposed to medical diagnosis.⁹⁹ This exclusion is premised on the principle that treatment following child abuse includes treating emotional and psychological injuries, which often depends on the abuser’s identity.¹⁰⁰ In addition, the identity of the abuser is necessary to prevent continued physical and emotional injury.¹⁰¹

Next, the court looked to the *Renville* test, which requires (1) that the declarant has the motive to promote treatment in making the statement and (2) that a physician could reasonably rely upon the statement for treatment or diagnosis.¹⁰² The ultimate goal of the test is to “ensure

89. *Id.* at 556, 820 S.E.2d at 4–5.

90. *Id.* at 556, 820 S.E.2d at 5.

91. *Id.* at 557, 820 S.E.2d at 5.

92. O.C.G.A. § 24-8-803(4) (2019) (formerly O.C.G.A. § 24-3-4 (2011)).

93. FED. R. EVID. 803(4).

94. *Almanza*, 304 Ga. at 557–58, 820 S.E.2d at 5–6.

95. *Id.* at 558, 820 S.E.2d at 6.

96. *Id.*

97. *Id.* at 559, 820 S.E.2d at 6–7.

98. *Id.* at 559, 820 S.E.2d at 7.

99. *Id.* at 559–60, 820 S.E.2d at 7.

100. *Id.* at 560, 820 S.E.2d at 7.

101. *Id.*

102. *Id.* at 561, 820 S.E.2d at 8.

that [a] hearsay statement has a sufficient guarantee of trustworthiness while excluding statements beyond the scope of the rule.”¹⁰³ There is nothing in Rule 803(4) or the *Renville* test that prevents a parent from making the statement related to medical treatment.¹⁰⁴

After adopting the *Renville* test as the Georgia standard and rejecting the argument that Rule 820 affects Rule 803(4), the court reversed the court of appeals and remanded the case.¹⁰⁵ Finally, the court noted other possible barriers to the admission of identifications of alleged sexual abusers of child victims.¹⁰⁶ Specifically, the court cautioned about double hearsay, whether a doctor’s visit at the instruction of police is for the purpose of medical diagnosis, and if police involvement creates a Confrontation Clause¹⁰⁷ issue.¹⁰⁸

V. CONCLUSION

As evidenced in this survey period, jurists should be wary when relying on their previous understanding of Georgia’s old Evidence Code. However, litigators and judges may take comfort in the fact that they were given guidance as to how to apply the new Code. As this survey period shows, federal case law provides ample direction in evidentiary matters still uncharted by Georgia’s new Code.

103. *Id.*

104. *Id.* at 562 n.10, 820 S.E.2d at 8 n.10.

105. *Id.* at 563–64, 820 S.E.2d at 9.

106. *Id.* at 561–63, 820 S.E.2d at 8–9.

107. U.S. CONST. amend. VI.

108. *Almanza*, 304 Ga. at 564 nn.13–14, 820 S.E.2d at 9 nn.13–14.

