Evidence

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by Marc T. Treadwell*

I. INTRODUCTION

The survey period saw a number of cases raising significant evidentiary issues. For example, lawyers engaged in civil litigation should be aware of decisions addressing the admissibility of collateral source payments and offers to pay medical bills in tort actions. Also, the court of appeals struggled with the question of whether the forfeiture of a bond posted in response to a traffic citation is admissible in a subsequent civil action as an admission of liability. With regard to criminal law, decisions rendered during the survey period suggest that at least some members of the supreme court will be taking a more restrictive view of the range of admissible similar transaction evidence. Also, both the supreme court and the court of appeals continue to skeptically view expert testimony in criminal cases. All litigators may find decisions on Georgia's relatively new necessity exception to the hearsay rule interesting.

II. RELEVANCY

A. Generally

Basic relevancy analysis is rarely seen in appellate decisions, perhaps because such a simple issue rarely merits serious attention on appeal. The court of appeals decision in DeCastro v. State,1 however, is an exception and its discussion of the concept of relevant evidence is instructive. The opinion does not, however, include a definition of relevancy; thus, it is appropriate to note that for Georgia courts the

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generally accepted test for relevancy is whether the evidence renders the desired inference more probable than it would be without the evidence.\(^2\)

In *DeCastro*, the trial court admitted a photograph of defendant taken shortly after his arrest, a photograph which even the prosecution agreed made defendant appear "‘ominous.’"\(^3\) The trial court expressed strong reservations about the photograph, but admitted it nonetheless. The court of appeals acknowledged that in Georgia, just as under the Federal Rules of Evidence, relevant evidence may be excluded if its probative value is substantially outweighed by its prejudicial impact.\(^4\) The court, however, based its conclusion on the more fundamental question of whether the photograph was relevant to begin with.\(^5\) The prosecution argued that the photograph, which was taken at the time of defendant's arrest, was admissible because "all circumstances surrounding an arrest are relevant for whatever value the jury may wish to place on them."\(^6\) The court acknowledged that the facts and circumstances surrounding an arrest may be admissible as part of the res gestae.\(^7\) The photograph, however, was taken a week after defendant’s arrest and, thus, was not admissible as a part of the res gestae.\(^8\) Moreover, the photograph did not depict some circumstance relevant to the offense such as a mug shot of an intoxicated driver suggesting that the driver is still under the influence of alcohol. Finally, identity was not in issue and, therefore, the photograph was not admissible for that reason.\(^9\) The court summarily rejected the State's argument that the photograph was admissible because "the jury was entitled to know how DeCastro appeared to the victim at the time of the offense," because the photograph was taken some time after the offense (although the opinion does not say whether defendant's appearance changed in that one week period), and because there was no evidence that defendant's appearance frightened or intimidated the victim, who had lived with defendant for seven years.\(^10\)

The court seemed to take offense at the prosecution's central argument for the admission of the photograph: that defendant, who was well-groomed at trial, had "‘cleaned up his act big time’" and that the jury should be allowed to consider this fact.\(^11\) The court noted that this

\(^3\) 221 Ga. App. at 84, 470 S.E.2d at 750.
\(^4\) See FED. R. EVID. 403.
\(^5\) 221 Ga. App. at 84, 470 S.E.2d at 750.
\(^6\) Id. at 85, 470 S.E.2d at 750.
\(^7\) Id. at 85-86, 470 S.E.2d at 751.
\(^8\) Id. at 86-87, 470 S.E.2d at 751-52.
\(^9\) Id. at 86, 88, 470 S.E.2d at 751-52.
\(^10\) Id. at 87, 470 S.E.2d at 752.
\(^11\) Id. at 85, 470 S.E.2d 750.
argument came "perilously close" to injecting defendant's character into evidence. While the court acknowledged that a defendant's appearance may be relevant based upon the facts of a particular case, the fact that defendant appeared at trial in a suit, clean-shaven, and with a short hair cut was not relevant to any issue in defendant's case. Accordingly, the court reversed defendant's conviction.

In Shelter Mutual Insurance Co. v. Bryant, the court of appeals addressed the issue of whether, in a civil case arising from an automobile collision, the uninsured defendant's intoxication was relevant when plaintiffs' uninsured motorist carrier admitted liability and when plaintiffs did not seek punitive damages. The court concluded that this evidence was admissible because it was "inextricably linked" to the collision and to defendant's negligence. The uninsured motorist carrier argued, however, that because it had admitted liability, negligence was not in issue and evidence of negligence was, therefore, not admissible. The court of appeals disagreed. Although this removed the issue of negligence, the jury still had to decide issues of proximate cause and damages. The court concluded that defendant's intoxication was relevant to these issues as well, apparently because it related to the fact that defendant was driving far in excess of the speed limit, lost control of his vehicle, crossed the center line, and ricocheted off a tree. The court also found support for its conclusion in Official Code of Georgia Annotated ("O.C.G.A.") section 40-6-392(a) which provides that in any civil action arising from a driver's intoxication, "evidence of the amount of alcohol or drug in a person's blood . . . shall be admissible."

Chief Judge Beasley, in a concurring opinion, appeared troubled by the court's analysis. She began by noting that "there was not a clear distinction made between an admission of negligence and an admission of liability." If a defendant admits negligence, he has acknowledged only the breach of a legal duty. If he admits liability, he acknowledges that he has breached a duty and that this breach proximately caused plaintiff's damages. Chief Judge Beasley's examination of the record, however, seemed to establish that defendant admitted liability and, 

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12. Id. at 87, 470 S.E.2d at 752.
13. Id.
14. Id. at 88, 470 S.E.2d at 753.
16. Id. at 528, 469 S.E.2d at 794.
17. Id. at 529, 469 S.E.2d at 795.
18. Id. at 528, 469 S.E.2d at 795.
19. Id. at 529, 469 S.E.2d at 796 (quoting O.C.G.A. § 40-6-392(a) (1994 & Supp. 1996)).
20. Id. at 529-30, 469 S.E.2d at 795.
therefore, the only issue submitted to the jury was one of damages. She
concluded that evidence of defendant's intoxication was not a "necessary
ingredient" of the jury's resolution of the issue of damages and that the
better course of action might have been to reject the evidence.21 However, Chief Judge Beasley concluded that its admission was not an
abuse of discretion.22 Further, Chief Judge Beasley did not seem to
agree with the majority's reliance on O.C.G.A. section 40-6-392(a) and
noted that although the statute authorizes the admission of alcohol tests
as evidence in civil actions, the evidence must first be relevant to a
material issue.23

B. Relevancy of Extrinsic Act Evidence

1. Similar Transaction Evidence. The determination of the
relevancy of extrinsic act evidence is perhaps the most problematic of all
evidentiary issues. In the nine years this author has surveyed Georgia
appellate decisions, this issue has been the single most frequently
addressed evidentiary issue. Accordingly, some background discussion
is appropriate.

Evidence is extrinsic when it concerns conduct on occasions other than
the one at issue. As a general rule, extrinsic act evidence is inadmissi-
ble. Like the rule against hearsay, however, the rule against extrinsic
act evidence is known more for its exceptions than its flat prohibition.
Extrinsic act evidence may be admissible for a substantive purpose, as
when a prosecutor tenders evidence of a similar transaction, usually a
prior criminal offense, to prove a defendant's motive to commit the
charged offense. Extrinsic act evidence also may be admissible to
impeach or bolster a witness, as when opposing counsel uses evidence of
a felony conviction to impeach a witness's character.

Finally, evidence which may appear to be extrinsic may not, in the
sometimes arcane world of evidence, actually be extrinsic. For example,
the res gestae doctrine, although typically thought of as an exception to
the rule against hearsay, is often used to admit evidence that, although
not directly related to the transaction at issue, is close enough.

For years, Georgia courts have routinely and liberally admitted
evidence of similar, but totally unrelated, transactions in criminal cases.
However, as discussed in previous surveys, the Georgia Supreme Court

21. Id. at 530, 469 S.E.2d at 796.
22. Id. at 531, 469 S.E.2d at 796.
23. Id.
in *Stephens v. State*\(^{24}\) and *Williams v. State*\(^{25}\) tightened the rules governing the admissibility of extrinsic act evidence in criminal cases.\(^{26}\) In *Stephens*, the supreme court held that the prosecution cannot rely solely on a certified copy of a prior conviction when seeking to use that conviction as similar transaction evidence.\(^{27}\) Rather, the prosecution must offer evidence proving the requisite degree of similarity or connection between the extrinsic act and the charged offense.\(^{28}\) In *Williams*, the supreme court, in a dramatic departure from prior practice, held that the prosecution must prove, prior to trial, three elements before similar transaction evidence can be admitted.\(^{29}\) First, the prosecution must prove the relevance of the independent transaction to a legitimate issue.\(^{30}\) Second, the prosecution must prove that the defendant committed the independent offense or act.\(^{31}\) Third, the prosecution must prove a sufficient connection or similarity between the prior act or offense and the charged offense.\(^{32}\) The trial court must then make a specific determination that the prosecution has carried its burden of proving each of the three elements.\(^{33}\)

Notwithstanding *Williams* and *Stephens*, courts routinely and liberally continue to admit extrinsic act evidence in criminal cases. However, a change may be in the offing. In *Farley v. State*,\(^{34}\) the trial court admitted evidence of defendant's prior conviction of aggravated battery in his trial for simple battery and felony murder. The majority affirmed defendant's conviction, finding that defendant's prior conviction was sufficiently similar to the charged offense to make it relevant to rebut his claim of justification.\(^{35}\) The majority reasoned that the prior offense demonstrated defendant's bent of mind or course of conduct in precipitating violent encounters as opposed to acting in self-defense.\(^{36}\) The majority also rejected defendant's contention that his conviction should be reversed because the trial court failed to expressly find that the

\(^{27}\) 261 Ga. at 468, 405 S.E.2d at 485.
\(^{28}\) *Id.* at 469, 405 S.E.2d at 486.
\(^{29}\) 261 Ga. at 642, 409 S.E.2d at 651.
\(^{30}\) *Id.*
\(^{31}\) *Id.*
\(^{32}\) *Id.*
\(^{33}\) *Id.* at 643, 409 S.E.2d at 652.
\(^{35}\) *Id.* at 626, 458 S.E.2d at 647.
\(^{36}\) *Id.*
probative value of the evidence outweighed its prejudicial impact.\textsuperscript{37} The court of appeals concluded that the trial court's determination that the evidence was relevant "necessarily constitutes an implicit finding that the probative value of that evidence outweigh[ed] its prejudicial impact."\textsuperscript{38} The court refused to follow the apparent mandate of \textit{Adams v. State}\textsuperscript{39} requiring such an express determination because only four of nine judges concurred; therefore, the holding was only a "physical precedent."\textsuperscript{40}

In separate concurring opinions in \textit{Farley}, Justices Fletcher and Sears argued that the admission of the extrinsic act evidence was error, albeit harmless error.\textsuperscript{41} Justice Fletcher wrote that the majority "has taken whatever little viability remained in the rule that a defendant's prior bad acts are generally inadmissible."\textsuperscript{42} Justice Fletcher further argued that mere similarity is rarely sufficient to justify the admission of similar transaction evidence.\textsuperscript{43} Rather, there must be a logical connection between the prior act and the charged offense.\textsuperscript{44} Intent is an element in virtually every offense and allowing prior crimes to show intent solely because of similarity would, Justice Fletcher thought, eviscerate the general rule against the admission of extrinsic act evidence.\textsuperscript{45} The court, Justice Fletcher concluded, had allowed "the exceptions to swallow the rule."\textsuperscript{46}

Justice Fletcher also attacked the majority's assertion that a finding of relevance necessarily implied a balancing of probative value and prejudicial impact.\textsuperscript{37} Prejudice is not a consideration in the determination of relevancy, but rather, becomes a factor only after the court finds the evidence relevant.\textsuperscript{48}

Justice Sears attacked the majority's "slavish adherence to precedent, the direction of which badly needs re-examining by this court."\textsuperscript{49} She, too, accused the majority of allowing the exception to swallow the rule.

\textsuperscript{37} \textit{Id.} at 625, 458 S.E.2d at 646.
\textsuperscript{38} \textit{Id.}
\textsuperscript{40} \textit{Farley}, 265 Ga. at 625-26, 458 S.E.2d at 647.
\textsuperscript{41} \textit{Id.} at 627-31, 458 S.E.2d at 647-51.
\textsuperscript{42} \textit{Id.} at 627, 458 S.E.2d at 647.
\textsuperscript{43} \textit{Id.}, 458 S.E.2d at 648.
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.}
\textsuperscript{47} \textit{Id.}
\textsuperscript{48} \textit{Id.} This is consistent with the Federal Rules of Evidence approach which, after defining relevancy in Federal Rule of Evidence 401, provides, in Rule 403, that relevant evidence may be excluded if its prejudicial impact outweighs its probative value.
\textsuperscript{49} 265 Ga. at 628, 458 S.E.2d at 648.
"[I]t is critical to the sanctity of jurisprudence in this state that this Court narrow its application of the exception to the rule prohibiting independent crime evidence, remembering that the exception is contrary to the fundamental and important prohibition against character evidence. To illustrate her point, Justice Sears examined the prior offense admitted in Farley. She acknowledged that the similarities between the two crimes—defendant kicked or hit his opponents in the head as they lay on the ground—implicated defendant's character, but that was Justice Sears' point. The evidence tended to show mere propensity to act in a certain manner. She saw no circumstance in the prior act that was so unique that it tended to prove that defendant committed the second crime. Rather, it simply showed his bad character.

Justice Fletcher authored a similar, but milder, special concurrence in Simmons v. State in which he again advocated "a narrower analysis [that] would provide more guidance in the consideration of this confused area of evidentiary law. Whether a majority of the supreme court will accept Justices Fletcher's and Sears' pleas for a more circumspect analysis of extrinsic act evidence remains to be seen.

Although the court of appeals decision in Ricks v. State early in the survey period could not have been motivated by Justices Fletcher's and Sears' concurring opinions, it perhaps reflects the willingness of at least some judges of the court of appeals to view extrinsic act evidence more restrictively. In Ricks, the trial court admitted evidence of defendant's prior convictions for purse-snatching in his trial for armed robbery. In the charged offense, defendant allegedly gained access to the home of a friend's mother and then brandished a knife to force the victim to give him money and jewelry. Defendant then locked the victim and her grandson in a bathroom. The court of appeals found no similarities between the prior offenses and the charged offense that would justify the admission of evidence of the prior offenses. These prior offenses were sudden, unarmed robberies in public places against unknown victims. The charged offense, on the other hand, involved a lengthy, armed

50. Id. at 629, 458 S.E.2d at 649.
51. Id. at 629-30, 458 S.E.2d at 649-50.
52. 266 Ga. 223, 466 S.E.2d 205 (1996).
53. Id. at 230, 266 S.E.2d at 212.
55. Id. at 666, 458 S.E.2d at 863.
56. Id. at 667, 458 S.E.2d at 864.
assault in a home against a victim known to defendant. Accordingly, the court of appeals reversed defendant's conviction.57

The admissibility of extrinsic act evidence is also frequently an issue in civil cases. Perhaps incongruously, courts are much more willing to admit extrinsic act evidence in criminal cases than in civil cases. Some, no doubt, would argue that courts should be more reluctant to admit highly prejudicial extrinsic evidence in criminal cases when life and freedom are at stake than in civil cases. There is, however, some logic to this disparate treatment. Civil cases rarely involve issues of intent, motive, scheme, or other issues that come into play in cases involving intentional misconduct. Rather, civil cases typically involve situations in which the degree of intent is much less, certainly much less malevolent, and is often completely absent, as in a typical negligence case. For example, evidence of a prior automobile accident in a negligence case involving an unrelated subsequent accident would serve only to prove the improper and prejudicial point that a defendant, because of negligence on a prior occasion, was more likely negligent on the occasion at issue. In a criminal case, on the other hand, evidence of a prior burglary involving facts similar to the charged offense, may tend to prove defendant's motive, intent, or plan in committing the charged offense. If so, the prosecutor is not using the prior transaction to show a defendant's proclivity toward criminal conduct (criminal defense lawyers, no doubt, scoff at this notion), but, rather, is presenting the evidence as relevant to the legitimate issue of motive, intent, or plan. Generally, however, the rule governing the admissibility of extrinsic act evidence is the same for both criminal and civil cases. Evidence of similar or related transactions is not admissible to prove that a person acted in conformity with some prior conduct, but may be admissible to prove identity, motive, plans, scheme, bent of mind, notice, or course of conduct, all of which, again, are generally not relevant issues in a civil case.

In recent years, the admissibility of extrinsic act evidence has become a hot topic because of claims brought by assault victims against the proprietors of the establishment where the assault occurred. During last year's survey period, the court of appeals, in Matt v. Days Inns of America, Inc.,58 reversed summary judgment entered in favor of defendant in an action to recover for injuries suffered when a man was shot while a guest at defendant's motel.59 Plaintiffs alleged that defendant was negligent because it failed to provide adequate security.

57. Id. at 666-67, 458 S.E.2d at 863-64.
59. Id. at 796, 443 S.E.2d at 294.
Plaintiffs argued that the criminal attack was foreseeable by virtue of prior criminal activity at the motel. The plaintiffs adduced considerable evidence of prior criminal activity on the motel's premises and in the areas immediately surrounding the motel. However, the trial court ruled that these criminal acts were not sufficiently similar to the attack at issue to provide notice to defendant that such an attack was possible.60

A majority of the court of appeals held that the trial court viewed this similar transaction evidence much too restrictively.61 It is not necessary, the majority reasoned, that the prior criminal acts be identical or virtually identical. The issue is not whether the defendant had reason to believe that a gun would be used in an attack, which would make only prior offenses involving guns admissible, but, is “whether the prior crimes should have put an ordinarily prudent person on notice that the hotel's guests were facing increased risks.”62 The majority criticized the two dissenting judges' restrictive tests for admissibility, calling them a “'free bite' analysis" that would absolve a landowner of any responsibility for an attack by a human because the perpetrators in the prior criminal offenses wielded knives.63 The court of appeals formulated a straightforward test for determining the admissibility of evidence of prior criminal activity: “[T]he test is whether the prior criminal activity was sufficiently substantially similar to demonstrate the landowner's knowledge that conditions on his property subjected his invitees to unreasonable risk of criminal attack so that the landowner had reasonable grounds to apprehend that the present criminal act was foreseeable.”64

During the present survey period, the supreme court granted certiorari and affirmed the court of appeals. With little discussion, the supreme court held that the court of appeals “applied the appropriate standard in reversing the trial court's grant of summary judgment to Days Inns.”65

The court of appeals returned to this issue twice during the survey period. In Piggly Wiggly Southern, Inc. v. Snowden,66 defendant contended that the trial court improperly admitted evidence of prior criminal acts on its premises in a civil action brought by a plaintiff who

60. Id. at 792-93, 443 S.E.2d at 291-92.
61. Id. at 794-95, 443 S.E.2d at 293.
62. Id. at 794, 443 S.E.2d at 293.
63. Id. at 795, 443 S.E.2d at 293.
64. Id.
was stabbed, beaten, robbed, abducted, and sexually assaulted in defendant's unlit parking lot. The court noted that prior similar crimes are admissible to prove that a proprietor should have foreseen the danger of a criminal assault. It is not necessary that the prior crimes be identical to the assault in question; rather, they need only be sufficiently similar to put the proprietor on notice that a criminal act was foreseeable. Thus, the court of appeals concluded that similarity of details is not essential. Instead, the relevant inquiry is whether the acts are similar in their nature, not in their details. Thus, a prior incident involving a personal attack may be sufficiently similar, but a prior incident involving an offense against property or public morals would not be sufficiently similar. In Snowden, defendant's assistant manager testified about prior purse-snatchings and about harassment of customers by loiterers. Although these prior incidents were not as serious as the assault on plaintiff, they nevertheless involved confrontational attacks on persons, and thus, were sufficiently similar to put defendant on notice of the unreasonable danger of criminal attack; the differences were merely of degree.

The court of appeals seemed to take a less expansive view of the scope of admissible evidence in such cases as Sailors v. Esmail International, Inc. In Sailors, the trial court refused to admit evidence of incidents occurring in defendant's lounge or hotel and only admitted evidence of crimes involving fights or personal injury that occurred in the parking lot. A majority of the court of appeals held that the trial court did not abuse its discretion in excluding such evidence. Judge McMurray dissented and noted that the excluded evidence involved seventy-five separate criminal incidents, over eighteen of which involved violence or the threat of violence. Judge McMurray argued that the location of the prior acts was not determinative. Rather, the issue was whether the acts were sufficiently similar to place defendant on notice that its invitees were subject to assault. Moreover, Judge McMurray argued

67. Id. at 148, 150, 464 S.E.2d at 222-23.
68. Id. at 148-49, 464 S.E.2d at 222-23.
69. Id. at 148, 464 S.E.2d at 222.
70. Id. at 149, 464 S.E.2d at 223.
71. Id.
72. Id.
73. Id.
75. Id. at 812, 459 S.E.2d at 467.
76. Id. at 814, 459 S.E.2d at 469.
77. Id. at 815-16, 459 S.E.2d at 470 (McMurray, J., dissenting).
78. Id. at 815, 459 S.E.2d at 469.
79. Id., 459 S.E.2d at 469-70.
that the prior criminal offenses were admissible to prove that defendant’s security was inadequate.  

2. Evidence of Character as Substantive Evidence. Previous surveys have chronicled the demise of Georgia’s historical prohibition against the admission of evidence of specific acts of violence by a victim against a third person to prove the victim’s bad character. Arguably, the supreme court answered the one remaining question in the evolution during this survey period. Before addressing this issue, some background discussion is appropriate. In Lolley v. State, the supreme court reaffirmed the long-standing prohibition against the admission of evidence of a victim’s acts of violence against third parties. In a concurring opinion, Justice Weltner, joined by Justices Bell and Hunt, argued that cases excluding such evidence should be re-examined. Justice Weltner argued that in certain situations, such evidence is relevant. For example, a defendant attempting to justify his assault should be permitted to prove his knowledge of the victim’s past violent acts to support his defense that he reasonably believed his assault was justified. However, Justice Weltner also argued that such evidence should be admissible even if the defendant had no knowledge of the victim’s violent acts. Justice Weltner’s opinion was not based upon a similar or related transaction analysis, but rather was based expressly upon a character evidence analysis: “It is more probable that a person will act in accordance with his character (disposition) than that he will act contrary to it.” In his dissent, Justice Gregory, joined by Chief Justice Clarke, argued that the evidence should have been admitted as similar transaction evidence rather than as character evidence. In subsequent decisions, the supreme court appeared to be moving toward Justice Weltner’s decision. In Chandler v. State, a majority of the Court found Justice Weltner’s concurring opinion in Lolley persuasive and held that “evidence of specific acts of violence by a victim against

80. Id. at 816, 459 S.E.2d at 470.
82. Id. at 606, 385 S.E.2d at 286.
83. Id. at 608, 385 S.E.2d at 287-88.
84. Id., 385 S.E.2d at 288.
85. Id. at 609, 385 S.E.2d at 288.
86. Id. at 609-10, 385 S.E.2d at 288 (quoting Henderson v. State, 234 Ga. 827, 830 n.1, 218 S.E.2d 612, 615 n.1 (1975)).
87. Id. at 611, 385 S.E.2d at 289.
third persons shall be admissible where the defendant claims justifica-

However, Justice Benham, joined by presiding Justice Smith, con
curred specially to note their disagreement with Justice Weltner’s concur-

Justice Benham carefully distinguished the majority’s holding in Chandler from Justice Gregory’s dissent in Lolley, which only addressed the issue of whether the proffered evidence was admissible as similar transaction evidence. 90 He claimed Justice Weltner’s concurring opinion in Lolley, on the other hand, allows a party to place a victim’s character in issue, and “is a move to replace trial by evidence with trial by character assassination.”91 Justice Benham concluded that “this revolutionary change in the law of evidence is a throwback to frontier days and gives judicial sanction to a new defense to murder: the victim ‘needed killing.’”92

Justice Benham’s concurring opinion in Chandler perhaps raised some question whether evidence of a victim’s prior bad acts is admissible as character evidence or rather is admissible as similar transaction evidence. If the latter, then the evidence would be admissible only if a defendant knew of the prior incident. It is this question that the court of appeals answered to its satisfaction during the current survey period. In Ochle v. State,93 the court reversed defendant’s conviction because the trial court failed to admit evidence of a prior near-altercation involving the victim.94 The court expressly acknowledged that such evidence is admissible to prove a victim’s “‘character for violence,’ his ‘violent nature,’ or his tendency to ‘act in accordance with his charac-

C. Relevancy of Prior Sexual Behavior

In Benton v. State,96 the supreme court reaffirmed that evidence of prior false accusations of misconduct must be admitted if the trial court determines that a reasonable probability of falsity exists.97 In Benton, the victim of the alleged sexual assault, at a hearing in a prosecution arising from a prior alleged sexual assault, recanted her allegations, admitting that she made the false accusations under pressure by her

89. Id. at 407, 405 S.E.2d at 673.
90. Id. at 409, 405 S.E.2d at 674.
91. Id. (Benham, J., concurring).
92. Id.
94. Id. at 73, 459 S.E.2d at 563-64.
95. Id. (quoting Lolley, 259 Ga. at 608-09, 385 S.E.2d at 288).
97. Id. at 649, 461 S.E.2d at 204.
mother. The court found that the offer of proof was sufficient to meet the standard of Smith v. State and, therefore, the court reversed defendant's conviction.

D. Relevancy of Collateral Source Payments

Since the Georgia General Assembly's unsuccessful attempt to make evidence of payment of an expense from a collateral source (e.g., insurance benefits) relevant, the issue of collateral source payments has proved a vexing one for the courts. Discussion of this ordeal in previous surveys has illustrated the tortuous path taken by the courts, often with conflicting results. During the current survey period, the supreme court granted certiorari in two cases and addressed both cases in a single opinion. This perhaps brought some certainty, although certainly not satisfaction, to the issue. In Warren v. Ballard, the supreme court addressed the two court of appeals decisions on the issue of when a plaintiff opens the door to the admission of collateral source evidence. In Ballard v. Warren, the trial court ruled that the defense could not cross-examine a plaintiff about collateral source payments after plaintiff testified on direct examination that she was responsible for her medical expenses and was continuing to make payments for this treatment. The court of appeals held that the trial court erroneously prevented the defense from establishing on cross-examination that the plaintiff had received collateral source payments, reasoning that the plaintiff's testimony gave the false impression that she had suffered financial hardship.

In Luke v. Suber, a plaintiff testified that when he was told that his child would be in the hospital for a month, he responded that he could not afford the charges that would result. Plaintiff also testified that he received a bill for these charges even though doctors had told him not to worry about the expenses. The trial court concluded that this

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98. Id. at 650, 461 S.E.2d at 204.
100. 265 Ga. at 650, 461 S.E.2d at 205.
104. Id. at 25, 456 S.E.2d at 591.
testimony could be impeached by proof of insurance coverage. The court of appeals reversed.

In *Warren v. Ballard*, the supreme court, in flawlessly logical reasoning, noted first that a party may only be impeached on a material issue. Accordingly, a party giving false testimony on an immaterial issue is not subject to impeachment on that issue. Thus, to the supreme court, the question was whether testimony regarding anxiety over payment of medical bills relates to a material issue. The court concluded that it did not because no recovery may be had for anxiety or worry over the payment of medical bills. Consequently, testimony on this subject does not relate to a material issue and, therefore, such testimony is not subject to impeachment.

Turning to the cases at hand, the court noted that in both *Warren* and *Suber*, the plaintiffs' testimony suggesting a lack of insurance coverage did not relate to a material issue. Consequently, the defendants should have objected to this testimony and, upon proper objection, the trial court should have excluded the testimony and, if appropriate, given curative instructions. Because neither defendant objected, they waived their objections to this irrelevant testimony. Thus, the supreme court reversed the court of appeals in *Warren* and affirmed the court in *Luke*. Justice Sears dissented and, in an opinion joined by presiding Justice Fletcher, argued that evidence of financial hardship is relevant to the issue of a plaintiff's mental pain and suffering if the financial hardship is an immediate consequence of the plaintiff's injury.

The supreme court's conclusion can hardly be satisfying to the defense bar. They would argue that although testimony suggesting the absence of insurance coverage and the anxiety resulting from medical bills may be legally irrelevant, it is practically of great significance. If a plaintiff's testimony suggests that plaintiff has no insurance coverage and is personally responsible for medical expenses, then a defendant's only relief is to object, rather than to impeach. Plaintiffs, thus, will have an effective tool to enhance the value of their cases. However, in the
opinion of the author, the supreme court's resolution of this issue is
correct as both a legal and a practical matter. If testimony suggesting
an absence of insurance coverage opens the door to evidence of insur-
ance, how much will the door be opened and when will it be closed? If
a plaintiff had available only five thousand dollars in medical payments
coverage and was otherwise uninsured, would plaintiff be able to prove
the specifics of any insurance coverage? The supreme court's resolution
nips this problem in the bud. Moreover, no doubt trial judges, upon
proper objection, will find a way to communicate effectively to jurors that
a plaintiff or plaintiff's lawyer has improperly injected an issue in the
case.

In addition, the issue is not necessarily a one-way street. For
example, if insured defendants were to testify that they could not afford
to pay any judgment entered against them, the court's opinion clearly
would preclude a plaintiff from impeaching defendants with evidence of
their insurance coverage.

Also during the survey period, the court of appeals reaffirmed the
principle that the admission of collateral source evidence is not
reversible error when a jury reaches a defense verdict because such
evidence relates only to the issue of damages and, if a defendant prevails
on the issue of liability, it must be presumed that the jurors did not
reach the issue of damages.118 This, of course, is a sore point for the
plaintiff's bar who understandably assume that such evidence could have
a profound impact even on jurors who reach a defense verdict.

E. Offers of Compromise or Payment

The court of appeals continues to struggle with the issue of whether
an offer to pay an injured party's medical expenses is relevant as an
admission of liability. In Rosequist v. Pratt,117 a decision discussed in
a previous survey,118 the court rejected a trial court's reasoning that
such offers amount to an attempt to settle a claim and, thus, are
inadmissible.119 The court nevertheless affirmed the trial court
because the offer was not an admission of liability, but was rather "a
voluntary offer of assistance made on the impulse of benevolence or
sympathy."120 This issue was again presented to the court of appeals
during the current survey period.

119. 201 Ga. App. at 46, 410 S.E.2d at 318.
120. Id. (quoting Gray v. Delta Airlines, Inc., 127 Ga. App. 45, 53, 192 S.E.2d 521, 526
(1972)).
In *Neubert v. Vigh*, plaintiff sought to recover damages for injuries suffered by her son in a collision with a car driven by defendant's son. Plaintiff contended that defendant was liable for the negligence of his son. However, the trial court granted summary judgment in favor of defendant, apparently because the son took the car without defendant's permission while defendant was out of town and the son had been staying with another family. On appeal, plaintiff contended summary judgment was improper because defendant's offer to pay medical bills constituted an admission of liability. The majority, in a full court opinion, acknowledged authority that offers to pay medical bills constitute admissions of liability. Although this authority had not been overruled, the court noted that "more recent cases demonstrate that it is not controlling." Relying on *Rosequist* and other authority, the court noted that voluntary offers of assistance motivated by benevolence or sympathy are not relevant to prove an admission of liability. With no meaningful substantive discussion, the majority held that defendant's statements fell in the latter category. The majority did note that defendant was not actually involved in the collision, perhaps suggesting that a different result might have been reached had the offer been made by a party actually causing a plaintiff's injuries.

In a special concurrence, Chief Judge Beasley and Judge Ruffin arrived at the same result, but with different reasoning. They noted that plaintiff did not challenge the trial court's conclusion that, as a matter of law, defendant could not be liable for his son's negligence. Rather, plaintiff argued, in effect, that even though defendant could not be legally liable, he could nevertheless be held liable because his offer to pay medical expenses was an admission of liability. Judge Beasley found no authority for this position. "An admission of liability has efficacy only if there is liability. If there is none, then the statements of the alleged tortfeasor constitute merely expressions of sympathy, benevolence, or an acceptance of moral responsibility." Chief Judge Beasley noted that the father's statements could be either based on sympathy or benevolence or could be an admission of liability; a jury

122. Id. at 694, 462 S.E.2d at 809.
123. Id.
124. Id.
125. Id., 462 S.E.2d at 809-10.
126. Id.
127. Id. at 695, 462 S.E.2d at 810.
128. Id.
129. Id.
would have to decide which was the case. However, because it was uncontroverted that the father breached no duty, it was not necessary for a jury to make that determination.

Presiding Judge McMurray dissented. He worried that the majority’s opinion could be read to hold that any offers to pay medical bills were inadmissible as an admission of liability because they are deemed to be based on benevolence or sympathy. This, Judge McMurray wrote, was not the law. Rather, the law recognizes that such statements may either be construed as admissions of liability or as expressions of sympathy depending on the facts of the particular cases. In some cases, it can be held as a matter of law that they constitute expressions or statements of sympathy. Here, however, Judge McMurray found a jury issue as to whether defendant’s offers to pay medical expenses were an admission of liability or an expression of sorrow or sympathy.

F. Admissions Against Interest

In Cannon v. Street, the court of appeals, with little discussion, rendered a decision of great significance to personal injury lawyers. In Cannon, defendant was charged with running a red light. Rather than contesting the charge, he paid a fine and failed to appear at the hearing. In a civil action arising from the offense, the trial court granted plaintiff’s motion for partial summary judgment on the issue of defendant’s liability. Defendant appealed, contending, among other things, that a factual issue existed with regard to his negligence, specifically, whether he ran the red light. The court of appeals disagreed, holding that when defendant posted a cash bond and failed to appear in court to contest the charge against him, he effectively admitted he “ran the red light as alleged in the traffic citation.”

Before plaintiff’s lawyers celebrate Cannon, they should consider Waszczak v. Warner Robins, which was decided after the conclusion of the survey period, but which will nevertheless be addressed. In Waszczak, defendant was also charged with failure to yield the right-of-way and paid a fine. Nevertheless, the trial court did not admit

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130. Id.
131. Id. at 696, 462 S.E.2d at 811.
132. Id.
133. Id. at 697, 462 S.E.2d at 811.
135. Id. at 213-14, 469 S.E.2d at 345.
136. Id. at 214, 469 S.E.2d at 345.
The court of appeals acknowledged that a guilty plea, as opposed to a guilty adjudication, is admissible in a civil action. Here, however, defendant appeared in court initially, but subsequently paid the fine before he was scheduled to reappear in court. This, for some reason, was significant to the court which characterized defendant's conduct as something less than a total failure to appear in court, which was the case in Cannon. The court further distinguished Cannon on the grounds that the defendant in Cannon acknowledged his guilt in ways other than merely paying the fine. The court distinguished O.C.G.A. section 40-13-58, which provides that a party is deemed to have pleaded guilty when he posts a cash bond and subsequently forfeits the bond by failing to appear, because defendant appeared in court initially. The fact that defendant's traffic citation bore the stamp "collateral forfeited" and the municipal court clerk testified that this was a bond forfeiture and an admission of guilt, did not sway the court; the court said, "[t]here are many reasons why an individual may choose to pay the fine rather than appear in court."

In the opinion of the author, Cannon and its progeny, on the one hand, and Waszczak on the other hand, cannot be distinguished. Surely, it cannot be significant that the defendant in Cannon paid his fine before his first appearance in court and the defendant in Waszczak paid his fine after an initial appearance, but before his second appearance. In both cases, the defendants paid fines rather than contesting the charges against them.

III. Privileges

Georgia courts rendered two decisions during the survey period addressing the marital privilege, neither of which broke new ground. In Helton v. State, the court of appeals held that the marital privilege does not bar the admission of testimony by a witness who overheard communications between spouses. In Frazier v. State, defendant asserted that communications with his common-law wife were privileged and, therefore, his wife's testimony was improperly admitted. However, the trial court found that defendant had not carried his burden of...
proving that the witness was defendant's wife.\textsuperscript{147} The court of appeals affirmed, noting that it was defendant's burden to prove the existence of a common-law marriage and that the trial court's conclusion in this regard is subject to the any evidence standard of review.\textsuperscript{148} The court concluded that some evidence supported the trial court's conclusion that the witness was not defendant's common-law wife and, therefore, her testimony was properly admitted.\textsuperscript{149}

IV. WITNESSES

A. Examination and Impeachment of Witnesses Generally

Two decisions by the court of appeals during the survey period underscore the need for lawyers to be mindful that they do not "open the door" to the admission of otherwise inadmissible evidence. In Charlton v. State,\textsuperscript{150} the officer who arrested defendant for driving under the influence (DUI) failed to advise defendant of his rights relating to alcohol tests. Accordingly, the trial court refused to admit the results of the tests at defendant's subsequent trial. However, defendant, in the presentation of his case, adduced expert testimony to the effect that, given defendant's testimony that he drank only four beers earlier in the day, the amount of alcohol in his body at the time of his arrest would have been only a trace. The trial court then allowed the State to rebut this evidence with testimony from its own expert who agreed that if defendant had only drank four beers, the amount of alcohol in his system would have been negligible. However, because he registered .08 grams on the alcohol test administered at the time of his arrest, he would have had to have consumed seven or eight beers rather than the four he admitted to.\textsuperscript{151}

The court of appeals rejected defendant's contention that the trial court improperly admitted the results of the alcohol test to rebut his expert testimony.\textsuperscript{152} The parameters of permissible impeachment evidence, the court noted, are extremely broad.\textsuperscript{153} "The right to impeach a defendant or witness, as set forth in O.C.G.A. section 24-9-82, is one of the cornerstones of the adversarial process. Even evidence which violates constitutional standards of due process, such as unlawful-\textsuperscript{147} Id. at 768-69, 467 S.E.2d at 340.
\textsuperscript{148} Id. at 770, 467 S.E.2d at 341.
\textsuperscript{149} Id.
\textsuperscript{151} Id. at 842-43, 459 S.E.2d at 456.
\textsuperscript{152} Id. at 844, 459 S.E.2d at 457.
\textsuperscript{153} Id., 459 S.E.2d at 456.
ly obtained confessions, may be admitted for impeachment purposes."

The court concluded that the intoximeter results were admissible to impeach defendant's testimony regarding the amount of beer he drank. Also, the test results were admissible to impeach the testimony of defendant's expert that his alcohol concentration would not have been in excess of .05 grams at the time of his arrest.

Charlton may be troubling to criminal defense lawyers. Clearly, the defense of any DUI charge will involve a contention that a defendant had not consumed sufficient alcohol to be convicted. However, under the reasoning of Charlton, this defense could allow the prosecution to tender the results of a suppressed alcohol test. Perhaps Charlton will not be read so broadly. For example, it may be significant in Charlton that the defendant relied upon expert testimony concerning the precise amount of alcohol concentration that was clearly inconsistent with the suppressed intoximeter result.

In Hudson v. State, defendant contended that his trial counsel was ineffective because he failed to object properly to the admission of evidence concerning defendant's apparent homosexual encounters with young boys. The trial court refused to admit this evidence during the State's case-in-chief, but when defendant testified that he was not a homosexual, the trial court allowed the State to rebut this testimony with the previously excluded evidence. The court of appeals held that defendant's trial counsel's "unsuccessful attempt to exclude this relevant impeachment testimony" did not constitute ineffective assistance.

The court of appeals decision in Price v. State illustrates the strong bias of Georgia law against bolstering a witness' credibility through the testimony of another witness. In Price, defendant, who was convicted of molesting and sodomizing his step-daughters, contended that the trial court improperly allowed a social worker to testify about her observations of and conversations with the children's mother. The social worker testified that the mother initially did not believe her daughters' claims, but, after watching a videotape of their statements, concluded they were telling the truth. The court of appeals rejected

154. Id.
155. Id., 459 S.E.2d at 456-57.
156. Id., 459 S.E.2d at 457.
158. Id. at 671-72, 462 S.E.2d at 776-77.
159. Id. at 673, 462 S.E.2d at 777.
160. Id.
162. Id. at 177, 469 S.E.2d at 334.
defendant's contention that this testimony was hearsay because the mother testified at trial and was subject to cross-examination.\textsuperscript{163} However, the court of appeals agreed that this testimony constituted improper bolstering of the children's credibility.\textsuperscript{164}

B. Impeachment by Evidence of Character

As discussed above, extrinsic act evidence is supposedly generally inadmissible when offered for substantive purposes. Such evidence is also inadmissible to impeach or bolster witnesses. This principle, however, is subject to many exceptions. For example, Georgia law permits the use of general bad character evidence to impeach a witness other than a criminal defendant.\textsuperscript{165} Even criminal defendants who open the door to general bad character evidence can be impeached with evidence of specific instances of misconduct.\textsuperscript{166} Before the supreme court decision in \textit{Jones v. State},\textsuperscript{167} an adroit prosecutor could easily place a defendant in a position which opened the door to cross-examination about prior misconduct. Prior to \textit{Jones}, courts routinely held that a defendant places his character in issue and thus is subject to impeachment with character evidence if he testifies to less than all of his prior criminal conduct. In \textit{Jones}, the court held that a defendant only places his character in issue when he makes an express election to do so.\textsuperscript{168}

This was the case in \textit{Campbell v. State}.\textsuperscript{169} On direct examination, defendant testified about his charitable and community activities. The prosecution then successfully sought a ruling that defendant had placed his character at issue and tendered evidence of defendant's prior traffic convictions.\textsuperscript{170} Relying on \textit{Jones}, defendant argued that he did not intentionally place his character at issue, but the court of appeals easily rejected this argument.\textsuperscript{171} Although defendant contended that the evidence in question was introduced simply to show that he was active in the community, it clearly was intended to prove his good character and, thus, opened the door to the evidence of his prior misconduct.

\textsuperscript{163} \textit{Id.}
\textsuperscript{164} \textit{Id.}, 469 S.E.2d at 335.
\textsuperscript{165} O.C.G.A. § 24-9-84 (1994).
\textsuperscript{167} 257 Ga. 753, 363 S.E.2d 529 (1988).
\textsuperscript{168} \textit{Id.} at 758, 363 S.E.2d at 534.
\textsuperscript{170} \textit{Id.} at 105, 470 S.E.2d at 504.
\textsuperscript{171} \textit{Id.} at 106, 470 S.E.2d at 504-05.
In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the United States Supreme Court, in a dramatic departure from prior practice, overruled *Frye v. United States*, rejecting the longstanding *Frye* test for determining whether novel or experimental test procedures or other matters that are the subject of expert testimony have become sufficiently established to be admissible in court. In *Orkin Exterminating Co. v. McIntosh*, discussed in last year's survey, the court of appeals refused to adopt the *Daubert* test and reaffirmed the test traditionally applied by Georgia courts which requires a determination that the evidence in question has reached a "'scientific stage of verifiable certainty.'"

During the current survey period, the Georgia Court of Appeals, in *Jordan v. Georgia Power Co.*, reaffirmed that *Daubert* has not been adopted in Georgia. In *Jordan*, plaintiffs contended that the trial court erred in allowing defendant's experts to testify regarding "'consensus in the scientific community.'" The court of appeals agreed and reversed.

The court's reasoning suggests two bases for its conclusion. First, in its discussion of *Daubert*, the court noted that the admissibility of expert testimony in Georgia is not determined "by simply calculating the consensus in the scientific community." Thus, the court seemed to suggest that "consensus" testimony is irrelevant. Second, an expert may not base his opinion upon the opinions of others, although an expert may base his opinion upon facts testified to by other witnesses.

For a number of years, the author has attempted to catalogue the numerous cases in which the courts have struggled with the issue of whether expert testimony is admissible in criminal cases to prove or

173. 293 F. 1013 (D.C. Cir. 1923).
174. 299 F. 1013 (D.C. Cir. 1923).
179. Id. at 692-93, 466 S.E.2d at 604.
180. Id. at 692, 466 S.E.2d at 604.
181. Id. at 696, 466 S.E.2d at 607.
182. Id. at 693, 466 S.E.2d 605 (quoting Harper v. State, 249 Ga. 519, 525, 292 S.E.2d 389, 396 (1982)).
183. Id.
184. Id.
disprove that a victim or defendant suffered from one of various syndromes such as abused child syndrome. As discussed in last year's survey, Judge Andrews blasted efforts to bring "soft science" such as battered wife syndrome, abused child syndrome, post traumatic stress syndrome, and even urban survival syndrome into the courtroom. However, Judge Andrews acknowledged that the supreme court opened the door to at least some testimony of this nature, and the court of appeals had no power to close it. Rather, "the best we can do is to continue to screen out other dubious syndromes as they are imagined and promoted by individuals who need to explain away their conduct." Judge Andrews' commentary may seem a little harsh, but the court of appeals, and now the supreme court, seems intent upon narrowing the scope of admissible syndrome evidence. For example, the supreme court, in Johnson v. State, affirmed the trial court's refusal to admit expert testimony that defendant, a male, suffered symptoms of posttraumatic stress disorder and that defendant's actions were "activated and driven by the same psychological dynamics as those in the battered woman syndrome." The court seemed to want to make clear that evidence of the battered woman syndrome is admissible in cases in which a wife is charged with the murder of her husband because of unique social and economic factors and would not be extended to other situations in which a defendant claims justification for his conduct.

Consistent with this newly found disdain for soft science, the court of appeals seemed to delight in reversing defendant's conviction in Flowers v. State because of the admission of expert testimony based on something called a "credibility enhancement technique." Surely, it would seem that an expert seeking to ply his trade as an expert witness would find a better name for his technique. Such a name almost assures that a court will find that the expert's testimony constitutes improper bolstering of a witness. The credibility enhancement technique clearly, and almost admittedly, amounted to nothing more than an opinion that

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187. Id.
188. Id. at 184, 450 S.E.2d at 439.
190. Id. at 625, 469 S.E.2d at 153.
191. Id. at 627, 469 S.E.2d at 154.
193. Id. at 815, 468 S.E.2d at 201.
a victim was telling the truth and, thus, was an improper attempt to bolster the victim's credibility. The court of appeals decision in Drummond v. Gladson is significant for two reasons. First, it arguably lends some support to the proposition that a party must tender an expert witness and that the trial court must find that the expert is, in fact, an expert before that expert can render opinion testimony. As noted in last year's survey, there is no explicit requirement under Georgia law that a party "tender an expert" or obtain a court's ruling that a witness is qualified to testify as an expert.

Second, the opinion perhaps sheds some light on a recurrent issue—the extent to which investigating police officers can give opinion testimony in civil suits arising from accidents they investigated. In Drummond, the trial court admitted a diagram prepared by the investigating officer that indicated plaintiff was driving his vehicle on the wrong side of the road. With little discussion, the court held that the trial court did not abuse its discretion in admitting this exhibit. In a special concurrence, Chief Judge Beasley, joined by Judge Ruffin, elaborated. The trial court did not permit the officer to testify about his conclusions regarding the path of the motorcycle prior to the collision because that would amount to an opinion as to who was at fault. This testimony was properly excluded. The court instructed the police officer to testify about the path of the vehicle based on factors other than the physical evidence at the scene. The exhibit at issue, on the other hand, simply depicted the skid marks which the officer testified that he observed at the scene.

194. Id. at 816, 468 S.E.2d at 202.
198. Id. at 522, 465 S.E.2d at 688.
199. Id. at 523-25, 465 S.E.2d at 689-90 (Beasley, C.J., concurring).
200. Id. at 523-24, 465 S.E.2d at 689.
201. Id. at 524, 465 S.E.2d at 689.
202. Drummond also includes an interesting debate concerning whether it is necessary to file a complete copy of a trial transcript. The majority of the three judge panel chastised the plaintiffs for not filing the entire transcript. However, Chief Judge Beasley and Judge Ruffin, in their concurring opinion, praised the plaintiffs for filing only those portions of the transcript necessary to a resolution of the sole issue on appeal. The rationale for allowing an appeal to proceed with less than an entire trial transcript is compelling. Transcripts are expensive and often only a small portion of the transcript is relevant to issues on appeal. Clearly, however, given the split of appellate opinion, lawyers should continue to file transcripts in their entirety.
VI. SEQUESTRATION

The rule of sequestration in Georgia is generally applied strictly, even to the point, in some cases, that parties are sequestered from the courtroom. In *Tidwell v. State,* the court of appeals was not as willing to apply the rule quite so rigidly. In *Tidwell,* defendant, who was charged with child molestation, contended that the trial court erred when it allowed the victim's mother to remain in the courtroom during the victim's testimony even though the mother later testified. The court of appeals noted that O.C.G.A. section 24-9-61 provides for sequestration of witnesses “only ‘as far as practicable and convenient, but no mere irregularity shall exclude a witness.’” The court did not quote the portion of O.C.G.A. section 24-9-61 that grants parties “the right to have the witnesses of the other party examined out of the hearing of each other.” In addition, the court cited *Lee v. State* for the proposition that a trial court has discretion to make exceptions to the rule, but did not acknowledge that *Lee* involved a witness who was not subject to the rule of sequestration. Nevertheless, the court held that “under the facts of this case, we find no abuse of the court's discretion.”

VII. HEARSAY

A. Statements by Co-Conspirators

In *Bundrage v. State,* the supreme court struggled with a complicated factual scenario that presented difficult evidentiary issues. In *Bundrage,* the State contended Bundrage was one of three men who committed a murder. One conspirator pled guilty to lesser charges and cooperated with law enforcement authorities. The authorities recorded a telephone conversation between this conspirator and the third conspirator in which the third conspirator implicated Bundrage. Over Bundrage's objection, the trial court admitted a tape of the recorded call

205. *Id.* at 238, 464 S.E.2d at 839.
206. *Id.* at 239, 464 S.E.2d at 839.
209. 219 Ga. App. at 239, 464 S.E.2d at 839.
210. *Id.*
into evidence.\textsuperscript{212} The supreme court first addressed whether the third conspirator’s statements on the tape were properly admitted.\textsuperscript{213} Statements of co-conspirators are admissible pursuant to O.C.G.A. section 24-3-5 if the statements are made during the course of the conspiracy. A statement is considered to have been made during the course of the conspiracy if it is made during the concealment phase of the conspiracy.\textsuperscript{214} Because the third conspirator was still attempting to conceal his role in the conspiracy, the supreme court reasoned that his statements were admissible pursuant to the co-conspirator exception to the hearsay rule.\textsuperscript{215} The court then noted that the cooperating conspirator’s statements did not affect the admissibility of the third conspirator’s statements because the cooperating conspirator “could have related [the statements] if he had been a witness.”\textsuperscript{216} The import of this reasoning is not clear, and, as discussed below, it disturbed two dissenting justices.

The court then turned to the statements by the cooperating conspirator that were a part of the recorded conversation. Because the co-conspirator was not a participant in the conspiracy at the time of his statements, the co-conspirator exception to the hearsay rule would not provide a basis for the admission of his statements.\textsuperscript{217} Citing Professor Green’s treatise on evidence, the court noted that these statements were offered only for the limited purpose of showing the content of the third conspirator’s statements.\textsuperscript{218} Statements offered merely as a part of the circumstances of an occurrence are not offered to prove the truth of the statements and, therefore, are not hearsay.\textsuperscript{219} Moreover, out-of-court statements may be admissible to explain conduct and motives and, if offered for this purpose, are not hearsay.

It follows that [the third conspirator’s] statements in the recorded call would be admissible as part of reciprocal and integrated utterances between him and [the cooperating conspirator], for the limited purpose of putting [the cooperating conspirator’s] responses in context and

\textsuperscript{212} Id. at 813-14, 462 S.E.2d at 721.
\textsuperscript{213} Id. at 813, 462 S.E.2d at 721.
\textsuperscript{214} Id.
\textsuperscript{215} Id. at 813-14, 462 S.E.2d at 721.
\textsuperscript{216} Id. at 814, 462 S.E.2d at 721.
\textsuperscript{217} Id. at 813-14, 462 S.E.2d at 721.
\textsuperscript{218} Id. at 814, 462 S.E.2d at 721 (citing THOMAS F. GREEN, JR., GEORGIA LAW OF EVIDENCE § 288 (4th ed. 1994)).
\textsuperscript{219} Id. (citing GREEN, supra note 218, at § 288).
making [these] statements intelligible to the jury and recognizable as
the statements of a co-conspirator.220

Justices Sears and Fletcher, although concurring in the majority's
result, expressed disapproval of the majority's reasoning. In her
concurring opinion, Justice Sears interpreted the majority opinion to
advance two bases for the admission of the co-conspirator's state-
ment.221 First, the majority found the statement to be admissible as
a statement by a co-conspirator. Justice Sears agreed with this conclu-
sion.222 Second, she read the majority opinion to hold that the co-
conspirator's statement was also admissible because the cooperating co-
conspirator could have testified to these statements if he had been called
as a witness.223 Justice Sears found this reasoning "unnecessary and
dangerous."224 It was unnecessary because the co-conspirator's state-
ments were admissible pursuant to the co-conspirator's exception to the
hearsay rule. It was "dangerous because it implies that the fact that a
person could have testified in court is an exception to the hearsay rule
and renders out-of-court statements admissible."225 Justice Sears
expressed concern that the majority's opinion, and the authority upon
which it relied, could be interpreted to create a broad exception to the
hearsay rule, an exception that would render an out-of-court statement
admissible for no reason other than that the declarant could have come
into court and testified.226

Turning to the cooperating co-conspirator's statements, Justice Sears
could not agree with the majority's reasoning that these statements were
admissible under O.C.G.A. section 24-3-2 for the limited purpose of
placing the third conspirator's statements in context and not to prove the
truth of the cooperating co-conspirator's statements.227 Justice Sears
found the majority's reliance on Green to be misplaced because these
statements were not part of the surrounding circumstances of an
occurrence.228 Nor could she agree with the reasoning that these
statements were admissible to explain the third conspirator's conduct or

220. Id. The court relied upon a federal case, United States v. Gutierrez-Chavez, 842
F.2d 77, 81 (5th Cir. 1988), to support this proposition. The Eleventh Circuit has reached
a similar conclusion. See United States v. Byrom, 910 F.2d 725, 732 (11th Cir. 1990),
221. 265 Ga. at 816, 426 S.E.2d at 722-23.
222. Id., 426 S.E.2d at 723.
223. Id. at 816-17, 426 S.E.2d at 723.
224. Id. at 816, 426 S.E.2d at 722-23.
225. Id., 462 S.E.2d at 723.
226. Id. at 816-17, 462 S.E.2d at 723.
227. Id. at 817-18, 462 S.E.2d at 723-24.
228. Id., 462 S.E.2d at 724.
motives. Finally, she could not agree with the majority’s reliance on *United States v. Gutierrez-Chavez* because these statements did more than put the third conspirator’s statements in context. Justice Sears quoted portions of the recorded conversation indicating that the statements, by themselves, established nothing. Only if one accepted the cooperating conspirator’s statements to be true would the third conspirator’s statements have any significance.

Nevertheless, Justice Sears agreed with the majority’s result because she concluded that the cooperating conspirator’s statements were admissible as adoptive admissions. Although Georgia law does not expressly recognize an adoptive admission exception to the hearsay rule such as that found in Federal Rule of Evidence 801(d)(2)(b), Justice Sears noted that O.C.G.A. section 24-3-36 provides that “[a]cquiescence or silence, when the circumstances require an answer, a denial, or other conduct, may amount to an admission.” In any event, Justice Sears noted that the statutory exceptions to the rule against hearsay are not exhaustive, and a statement may be admitted in the absence of an express hearsay exception if there is a great necessity for the statement to be admitted and the statement is sufficiently trustworthy.

Justice Sears recognized one potential problem with her analysis. In *Jarrett v. State*, a decision discussed in last year’s survey, the supreme court held that O.C.G.A. section 24-3-36 does not allow the admission of hearsay statements based on a defendant’s silence. Justice Sears distinguished *Jarrett* because the statements were not being admitted based on defendant’s silence, but rather, on the basis of the third conspirator’s silence. In short, Justice Sears concluded that the cooperating conspirator’s statements were admissible because the third conspirator adopted these statements as his own, and the third conspirator’s statements were admissible against defendant pursuant to the co-conspirator exception to the hearsay rule.
B. The Necessity Exception

The evolution of what can now be termed Georgia's necessity exception to the rule against hearsay is both remarkable and troubling. It is remarkable because it dramatically increases the instances in which hearsay statements may be admitted even though they do not fall within a firmly established exception to the hearsay rule. It is troubling for the same reason, particularly in criminal cases, where the admission of such statements seems to raise troubling constitutional issues.

As discussed below, O.C.G.A. section 24-3-1(b) has been cited as the basis for the necessity objection, but it would seem that this provision provides, at best, shaky support for the far-reaching decisions of the court of appeals and supreme court. By its terms, O.C.G.A. section 24-3-1(b) appears to limit the use of hearsay evidence, noting that hearsay evidence is admissible "only in specified cases from necessity."242 Ten years ago, research would have indicated that the specified cases referred to firmly established statutory and common law exceptions to the hearsay rule. However, beginning with McKissick v. State,243 the courts began reading O.C.G.A. section 24-3-1(b) expansively rather than restrictively. In McKissick, the court noted that O.C.G.A. section 24-3-1(b) "permits the use of hearsay evidence 'in specified cases from necessity.'"244 Missing from the court's quotation of the statute, of course, is the word only. In McKissick, the court went on to note that the statutory exceptions to the hearsay rule were not exhaustive and that hearsay evidence could be admitted in the absence of a statutory exception if "'necessity' and 'particularized guarantees of trustworthiness' are established."245

Also left unsaid in McKissick was the fact that its rationale was based upon confrontation clause analysis intended to determine when hearsay evidence can be admitted without violating a defendant's constitutional rights. As discussed in previous surveys addressing Georgia and Eleventh Circuit evidence decisions, a hearsay statement, even though admissible pursuant to some exception to the hearsay rule, may nevertheless violate a defendant's right to confront the witnesses providing evidence against him.246 The supreme court has held that

242. O.C.G.A. § 24-3-1(b) (1994) (emphasis added).
244. 263 Ga. at 189, 429 S.E.2d at 657 (quoting O.C.G.A. § 24-3-1(b)).
245. Id. (quoting Mallory v. State, 261 Ga. 625, 627, 409 S.E.2d 839, 841 (1991)).
hearsay evidence may be admitted in criminal trials if it is necessary and if the statement has "particularized guarantees of trustworthiness."247 Trustworthiness is generally established by the fact that the hearsay statement falls within a firmly established exception to the hearsay rule. It is difficult to see how the new necessity exception can be considered firmly established. However, the fact that the hearsay statement is not admissible pursuant to a firmly established exception is not a fatal constitutional flaw. The statement may, nevertheless, be admissible if the requisite trustworthiness can be established.248 The problem is the court's recent fondness for the necessity exception raises constitutional issues that the Georgia courts typically do not address.

For example, during the current survey period, the trial court, in Drane v. State,249 admitted statements made by defendant's common-law wife to law enforcement authorities. In a terse opinion, the supreme court found that the statements were both necessary and trustworthy and, thus, were admissible.250 Their admission was necessary because the wife invoked her marital privilege not to testify. The statements were trustworthy because they were made to a Georgia Bureau of Investigation agent during an "official investigation"251 and because the wife never disavowed her statements.262

More thoughtful analysis is found in Fenimore v. State.253 In Fenimore, defendant was tried and convicted of credit card fraud based on allegations that he took advantage of an intoxicated customer to place charges on his credit card that the customer did not actually incur. The customer committed suicide prior to trial.254 The evolution of the necessity exception is demonstrated by the court of appeals statement that "the State sought to invoke OCGA § 24-3-1(b)'s unavailable-witness exception to the hearsay rule as a basis for admitting transcripts of taped statements made by" the customer.255 Thus, O.C.G.A. section 24-3-1(b) can now be cited as the basis for the necessity exception to the hearsay rule. Turning to the customer's statements, the court acknowledged that the necessity requirement was satisfied because the

248. See, e.g., United States v. Deeb, 13 F.3d 1532 (11th Cir. 1994).
250. Id. at 664, 461 S.E.2d at 224-25.
251. Id., 461 S.E.2d at 225.
252. Id.
254. Id. at 735-36, 463 S.E.2d at 56-57.
255. Id. at 736, 218 S.E.2d at 56.
customer was dead.\textsuperscript{256} However, the court carefully analyzed the circumstances surrounding the statements and concluded that they did not satisfy the trustworthiness requirement.\textsuperscript{257} The court tracked the constitutional analysis of \textit{Ohio v. Roberts}\textsuperscript{258} and \textit{Idaho v. Wright}\textsuperscript{259} noting that because the statements did not fall within a firmly established hearsay exception, careful analysis was required.\textsuperscript{260} These circumstances, the court found, did not sufficiently indicate reliability to satisfy the trustworthiness requirement.\textsuperscript{261} Although the statements were, to some extent, corroborated by other non-hearsay evidence, the court, quoting \textit{Wright}, found that corroboration did not establish trustworthiness, but rather is relevant to the issue of whether the admission of the hearsay statement was harmful error.\textsuperscript{262} The error in this case, the court held, was not harmless and, therefore, reversed defendant's conviction.\textsuperscript{263}

The supreme court found harmless error in \textit{Jordan v. State}.\textsuperscript{264} In \textit{Jordan}, the trial court admitted testimony regarding statements allegedly made by the deceased victim concerning defendant's threats against the victim.\textsuperscript{265} The court acknowledged the necessity exception to the hearsay rule and the necessity of the statements because of the victim's death, but nevertheless found that they were not sufficiently trustworthy to satisfy the necessity exception.\textsuperscript{266} This error, however, was harmless.\textsuperscript{267}

The utility of the necessity exception to prosecutors is demonstrated by the supreme court's decision in \textit{Luallen v. State}.\textsuperscript{268} In \textit{Luallen}, the trial court permitted a police officer to testify that defendant's husband said in defendant's presence that defendant killed the victim. Defendant remained silent when this statement was made. The trial court admitted this hearsay testimony pursuant to the hearsay exception that allows the admission of a statement made in a party's presence.\textsuperscript{269}

\textsuperscript{256} \textit{Id.} at 737, 218 S.E.2d at 57.
\textsuperscript{257} \textit{Id.} at 739, 218 S.E.2d at 58.
\textsuperscript{258} 448 U.S. 56 (1980).
\textsuperscript{259} 497 U.S. 805 (1990).
\textsuperscript{260} \textit{Fenimore}, 218 Ga. App. at 737, 463 S.E.2d at 57.
\textsuperscript{261} \textit{Id.} at 739, 218 Ga. App. at 58.
\textsuperscript{262} \textit{Id.}
\textsuperscript{263} \textit{Id.}
\textsuperscript{264} 266 Ga. 499, 467 S.E.2d 568 (1996).
\textsuperscript{265} \textit{Id.} at 500, 467 S.E.2d at 570.
\textsuperscript{266} \textit{Id.} at 500-01, 467 S.E.2d at 570.
\textsuperscript{267} \textit{Id.} at 501, 467 S.E.2d at 570.
\textsuperscript{268} 266 Ga. 174, 465 S.E.2d 672 (1996).
\textsuperscript{269} \textit{Id.} at 178, 465 S.E.2d at 676.
However, the supreme court, following *Jarrett v. State*,\(^{270}\) held that this exception cannot be used to admit hearsay against a criminal defendant.\(^{271}\) Nevertheless, the court found another basis for the admission of the statement: the necessity exception.\(^{272}\) The husband did not testify at trial and, therefore, the necessity requirement was satisfied. The trustworthiness requirement was satisfied because the husband "gave the statement immediately upon meeting the sergeant in order to initiate an official investigation into the victim's death; there is no indication the husband ever recanted or sought to change his statement; and his statement recounts matters later corroborated by other evidence."\(^{273}\)

Thus, it seems that in a remarkably short period of time the necessity exception to the hearsay rule has become firmly established in Georgia. Surely, however, it can be questioned whether the sometimes loose analysis of hearsay evidence entered pursuant to the necessity exception satisfies the rigid requirements of the confrontation clause. It is also ironic that the necessity exception appears to be exclusively applied in criminal cases where the confrontation clause stands as an impediment to the admission of hearsay statements. This is not true in civil cases where the confrontation clause does not stand as such an impediment. One can argue that if hearsay evidence can be so freely admitted in criminal cases then, surely, in civil cases, the hearsay rule has been substantially abrogated.

C. Prior Out-of-Court Statements

Georgia has two rather unusual rules regarding the admissibility of prior statements by witnesses. In *Gibbons v. State*,\(^{274}\) the supreme court held that prior inconsistent statements of a witness are admissible as substantive evidence if the witness is subject to cross-examination.\(^{275}\) In *Cuzzort v. State*,\(^{276}\) the supreme court, in apparent frustration over the inability to secure convictions in child molestation cases prior to the enactment of the Child Hearsay Statute, held that a prior consistent statement is admissible as substantive evidence against an

\(^{270}\) 265 Ga. 28, 453 S.E.2d 461.
\(^{271}\) *Luallen*, 266 Ga. at 178, 465 S.E.2d at 676.
\(^{272}\) *Id.*
\(^{273}\) *Id.* at 179, 465 S.E.2d at 676.
\(^{274}\) 248 Ga. 858, 286 S.E.2d 717 (1982).
\(^{275}\) *Id.* at 862, 286 S.E.2d at 721.
accused if the witness is present at the trial and subject to cross-

During the survey period, the supreme court, in Brown v. State, relied upon Gibbons to affirm defendant's murder conviction. In Brown, the statement at issue was made by defendant's co-conspirator, but was made after the termination of the conspiracy. Thus, defendant contended that O.C.G.A. section 24-3-52, the co-conspirator exception to the hearsay rule, barred the admission of the statement. The supreme court disagreed. O.C.G.A. section 24-3-52 applies to hearsay statements by a co-conspirator who does not testify at trial. If the co-conspirator testifies, O.C.G.A. section 24-3-52 is not applicable. Thus, if the co-conspirator testifies inconsistently with his prior statement, the prior statement is admissible, pursuant to Gibbons, as substantive evidence. Defendant contended, however, that a prior inconsistent statement may not be admitted when the witness simply testifies that he does not remember the events in question. Indeed, in Johnson v. State the supreme court held that "where a witness merely states that he does not remember, he cannot be impeached by the showing of former statements with respect to the facts which he claims not to remember." Acknowledging the holding of Johnson, the supreme court concluded that it simply did not apply because, upon examination of the co-conspirator's trial testimony, his testimony amounted to more than a simple inability to remember.

D. Miscellaneous

Adams v. State is a case that makes you want to scratch your head in bewilderment. In defendant's prosecution for forgery, the trial court admitted affidavits from officials of various companies allegedly victimized by defendant. The affidavits were obtained by "fraud
investigators" acting on behalf of the banks that paid forged checks. The affidavits were admitted as business records based upon testimony by the investigators that they were made in the normal course of the banks' business at or near the time of the alleged forgeries. Although not clear from the opinion, defendant apparently objected to the affidavits on the grounds that the prosecution had not laid a proper foundation for their admissibility as business records. However, as noted by the court of appeals, there was a more "fundamental" problem: how in the world can an affidavit be admissible to begin with, apart from the question of whether or not it is a business record? Clearly, an affidavit cannot be admitted in lieu of a witness' testimony. In criminal cases, the admission of testimonial affidavits implicates the confrontation clause. However, even in a civil case, it is difficult to see how an affidavit can be admitted in lieu of a witness' testimony. While business records may be admitted, the fact that the records are business records must be first established by testimony and the "fraud investigators" certainly could not establish that affidavits implicating defendant were prepared in the normal course of business.

VIII. AUTHENTICATION

In State v. Berky, a decision discussed in depth in last year's survey, a closely divided court of appeals held that a videotape allegedly depicting defendant driving under the influence of alcohol was admissible even though the police officer who shot the videotape had died and, thus, was unavailable to authenticate the videotape at trial. The court adopted what has been called the "silent witness" rationale for admitting the evidence. To authenticate the videotape, the court held that it was only necessary to establish, through expert testimony, these three things: that the videotape had not been altered, the date and place the videotape was taken, and the "identity of the relevant participants depicted." Writing for four dissenting judges, Judge Banke criticized the majority for abandoning a "well-settled rule of evidence, apparently in reaction to the pathetic event of the arresting officer's subsequent death in the line of duty."

287. Id. at 707, 459 S.E.2d at 183.
288. Id.
289. Id.
292. 214 Ga. App. at 177, 447 S.E.2d at 150.
293. Id.
294. Id. at 176, 447 S.E.2d at 149.
295. Id. at 178, 447 S.E.2d at 150.
In *Freeman v. State*, another decision discussed in last year's survey, the court of appeals, relying on *Berky* and the silent witness theory, held that a trial court properly admitted a television news videotape of a drug transaction in which defendant was allegedly involved. Judge Smith concurred specially and criticized the majority for its "tacit expansion" of the silent witness rule. Judge Smith argued that *Berky* should be limited to cases of necessity, and it was not necessary to apply *Berky* to the present case. "Any expansion of the rule in *Berky* should be both explicit and required by the facts of the case presented."

The supreme court granted certiorari in *Berky* and, during the current survey period, vacated the court of appeals decision on the grounds that the court of appeals did not properly have jurisdiction of the State's interlocutory appeal. Thus, although the court vacated the court of appeals decision in *Berky*, it did so on grounds unrelated to the evidentiary issue of whether the videotape had been properly authenticated.

The General Assembly has now addressed this issue, perhaps definitively. The General Assembly enacted O.C.G.A. section 24-4-48 which allows the admission of photographs, motion pictures, videotapes, and audio recordings when the authenticating witness is unavailable. The statute provides that, subject to any other valid objection, photographs and other recordings are admissible in the absence of an authenticating witness if the trial court determines "that such items tend to show reliably the fact or facts for which the items are offered." The statute also addresses photographs and recordings made automatically, as when the device taking the photograph or making the recording is not being operated by a person. Such photographs and recordings are also admissible if the trial court determines that they tend to show reliably the fact or facts for which the items are offered. However, the propounder of such a photograph or recording must also establish that the recording or photograph contains the date and time that it was made and that such date and time was made

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298. 216 Ga. App. at 320-21, 454 S.E.2d at 197.
299. Id. at 322, 454 S.E.2d at 198 (Smith, J., concurring).
300. Id.
301. Id.
303. Id. at 29-30, 463 S.E.2d at 892.
304. O.C.G.A. § 24-4-48(b) (Supp. 1996).
305. Id. § 24-4-48(c).
contemporaneously with the events depicted in the photograph or recording. Finally, the statute does not provide the exclusive method of introducing into evidence photographs and recordings.

IX. MISCELLANEOUS

The court of appeals decision in Chapman v. Auto Owners Insurance Co. does not concern substantive evidence principles, but is nevertheless noteworthy. In Chapman, plaintiff Auto Owners brought a subrogation action against defendant to recover damages for a covered fire loss. Ten days after filing suit, Auto Owners’ experts destroyed evidence critical to the determination of the cause of the fire. Defendant moved to either dismiss the complaint or to preclude Auto Owners’ experts from testifying about the destroyed evidence. However, the trial court concluded that such a drastic remedy was not authorized by Georgia law. Rather, the only remedy authorized by law was to charge jurors that they could conclude that Auto Owners’ failure to produce the evidence raised a presumption that the evidence, if available, would have been harmful to Auto Owners. The court of appeals, acknowledging that this was an issue of first impression, held that if a party destroys material evidence, a trial judge is authorized to either dismiss the case or to prevent that party’s expert witnesses from testifying about the evidence.

Holmes v. State is a good demonstration of how an effective cross-examination can backfire. In Holmes, defendant was accused of murder in connection with a drug transaction. A key issue at trial was whether the murder occurred in a motel room or outside the motel room. On cross-examination, defendant attacked a detective for the detective’s failure to lift fingerprints or take blood samples from inside the motel room. Upon redirect, the officer testified that defendant’s girlfriend told him that the altercation between defendant and the victims took place outside the motel room. The court held that this testimony was admissible to explain conduct, such as why the detective did not take fingerprints or blood samples from inside the motel room.

306. Id.
308. Id. at 539-40, 469 S.E.2d at 784.
309. Id. at 542-43, 469 S.E.2d at 786.
311. Id. at 531, 468 S.E.2d at 358-59.
312. Id., 468 S.E.2d at 359.
Holmes v. Bogino\textsuperscript{313} provides a good practice pointer for preparing witnesses. In Bogino, a landlord sought to recover interest on past due rent. The trial court accepted the tenant's argument that testimony by a witness on behalf of the landlord concerning the applicable interest rate was hearsay. However, the witness's testimony did not affirmatively demonstrate that he was basing his testimony on hearsay.\textsuperscript{314} Presumably, the witness simply testified what the interest rate was rather than testifying, for example, that the interest rate was based on materials he had reviewed. Accordingly, the court of appeals held that testimony was not objectionable pursuant to "the rule that where a witness testifies to a fact, the presumption is that he is testifying from his own knowledge in the absence of anything to the contrary."\textsuperscript{315}

\begin{footnotes}
\footnotetext{313}{219 Ga. App. 858, 467 S.E.2d 197 (1996).}
\footnotetext{314}{Id. at 859, 467 S.E.2d at 198.}
\footnotetext{315}{Id.}
\end{footnotes}