Evidence
Marc T. Treadwell
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by Marc T. Treadwell

I. INTRODUCTION

The survey period saw a number of cases raising significant evidentiary issues but no startling developments. Two areas in particular should be noted. As suggested in last year's survey, lawyers engaged in civil litigation should continue to be aware of decisions addressing the admissibility of collateral source payments and the remedies available when a party improperly injects the issue of collateral source payments. All trial lawyers, especially those engaged in criminal practice, should take note of the continued evolution of the "necessity" exception to the hearsay rule.

Perhaps the most striking development came not from the appellate courts but rather from the General Assembly. Official Code of Georgia Annotated ("O.C.G.A.") section 24-3-18, which became effective July 19, 1997, is Georgia's newest exception to the hearsay rule. It provides for the admission of medical records even though they contain opinions, diagnoses, and conclusions.

II. OBJECTIONS

In Sharpe v. Department of Transportation, the supreme court emphatically reaffirmed the requirement that a contemporaneous objection is necessary to preserve an alleged error for appellate review. In Sharpe the Department of Transportation ("DOT") did not object to defendant's expert testimony at the time it was given. Rather, the DOT

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4. Id. at 268, 476 S.E.2d at 723.

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moved to strike the testimony at the close of evidence. The court of appeals held that the testimony was "illegal" evidence and could be attacked by a motion to strike. Thus, the court of appeals held the DOT did not waive its right to challenge the testimony by its failure to make a contemporaneous objection. The supreme court granted certiorari and reversed.

The court first recognized that the "contemporaneous objection rule has long been a mainstay of Georgia trial practice." However, if the evidence in question is "illegal" evidence, then a party need not make a contemporaneous objection but rather may move to strike the evidence. This exception to the contemporaneous objection rule applies primarily to hearsay evidence and is based on Georgia's unique principle that hearsay evidence has no probative value even if it comes into evidence without objection. The scope of "illegal" evidence has also been recognized to include evidence obtained in violation of a criminal defendant's constitutional rights. However, the evidence at issue—expert testimony concerning the value of property—was not hearsay evidence and did not impinge constitutional rights. Nevertheless, the court of appeals held that the evidence was illegal because it concerned the wrong measure of damages. The supreme court rejected this expansion of the illegal evidence exception to the contemporaneous objection rule.

That, however, was not the reason the court granted certiorari. Rather, the court took the opportunity to re-examine the illegal evidence exception and concluded that the time had come to abolish motions to strike as a means of challenging evidence. The court stated:

Accordingly, we overrule Patton v. Bank of Lafayette [which sanctioned the use of a motion to strike to attack illegal evidence] and

5. Id.
8. 267 Ga. at 271, 476 S.E.2d at 725.
9. Id. at 267, 476 S.E.2d at 723.
10. Id. at 268, 476 S.E.2d at 723.
11. Id.
12. Id.
13. Id.
15. 267 Ga. at 268, 476 S.E.2d at 723.
16. Id.
17. Id.
disallow the use of a motion to strike made at any point before the jury retires as a procedural tool to object to evidence, except in those limited instances where the evidence was inadmissible because it was obtained in violation of a criminal defendant's constitutional rights.\footnote{19}

Implicit in the court's holding was a renunciation of the principle that hearsay, even though not objected to, has no probative value and therefore cannot support a verdict.

In \textit{Corbett v. State},\footnote{20} the supreme court reaffirmed that when a document contains both admissible and inadmissible information, a party must object to the specific portions of the document that are inadmissible.\footnote{21} In \textit{Corbett} the trial court admitted hospital records pursuant to the business records exception to the rule against hearsay.\footnote{22} However, under Georgia law, the business records exception does not allow the admission of opinions.\footnote{23} Although defendant objected to the records on this ground, he did not, despite a request from the trial judge, identify those portions of the records he claimed were objectionable.\footnote{24} The supreme court held that defendant thus waived a hearsay objection to the inadmissible portions of the hospital records.\footnote{25}

\section*{III. Presumptions}

The destruction of evidence by a party may give rise to a presumption that the evidence would have been harmful to that party. This principle is often referred to as the spoliation presumption.\footnote{26} The court of appeals decision in \textit{Lane v. Montgomery Elevator Co.}\footnote{27} demonstrates the utility of this presumption. In \textit{Lane} plaintiff was injured when the elevator she was using malfunctioned. Montgomery, the installer and maintainer of the elevator, contended that plaintiff had failed to produce any evidence that it was negligent and therefore it was entitled to

\begin{footnotes}
\footnotetext{19. 267 Ga. at 271, 476 S.E.2d at 725.}
\footnotetext{20. 266 Ga. 561, 468 S.E.2d 757 (1996).}
\footnotetext{21. Id. at 565, 468 S.E.2d at 761.}
\footnotetext{22. Id.}
\footnotetext{24. 266 Ga. at 565, 468 S.E.2d at 761.}
\footnotetext{25. Id.}
\footnotetext{26. In last year's survey, the author discussed the court of appeals decision in \textit{Chapman v. Auto Owners Insurance Co.}, 220 Ga. App. 539, 469 S.E.2d 783 (1996), in which the court held that if a party destroys material evidence, the trial court is authorized to either dismiss the case or to prevent that party's expert witnesses from testifying about the evidence. \textit{Id.} at 542-43, 469 S.E.2d at 786. Such a drastic remedy is appropriate when the mere presumption that the evidence would be harmful is insufficient to cure the prejudice created by the destruction of the evidence.}
\footnotetext{27. 225 Ga. App. 523, 484 S.E.2d 249 (1997).}
\end{footnotes}
summary judgment. The trial court agreed. On appeal, a six judge majority of the court of appeals reversed.

The majority noted that state law prohibited Montgomery from repairing, altering, or placing the elevator back in service prior to an appropriate government inspection. Because there was evidence that Montgomery repaired the elevator and placed it back in service prior to such an inspection, the court held that plaintiff could rely on the spoliation presumption to resist Montgomery’s motion for summary judgment. Such conduct would constitute a form of spoliation of evidence, because by working on the elevator, the evidence would have been tampered with, altered, or destroyed. Thus, the plaintiff was entitled to the benefit of the presumption that the “destroyed” evidence was harmful to Montgomery, and this presumption, although rebuttable, was sufficient to defeat Montgomery’s motion for summary judgment.

The spoliation presumption has some rather logical limitations. Thus, in Georgia Board of Dentistry v. Pence, the court of appeals rejected a dentist’s contention that disciplinary proceedings against her should have been dismissed because the patient whose treatment was at issue sought treatment from another dentist who repaired the first dentist’s work. The first dentist, Pence, argued that because her expert could not inspect her allegedly shoddy dental work, the evidence could not be used against her. The court rejected this contention for two reasons. First, the court noted that in the typical case of spoliation, the destruction of the evidence occurred during the litigation or at a time when litigation had been threatened or contemplated. Second, the spoliation presumption is applicable to the destruction of inanimate objects. Here, the alleged “spoliation” involved the treatment of a human being. “Carrying Pence’s argument to its logical extreme, a tortfeasor could accuse a victim’s physician or surgeon of ‘spoliation’ for treating the injuries inflicted by the tortfeasor.” The court of appeals was not prepared to take the spoliation presumption this far.

28. Id. at 523, 484 S.E.2d at 250.
29. Id. at 527, 484 S.E.2d at 253.
30. Id. at 525, 484 S.E.2d at 251.
31. Id. at 525-27, 484 S.E.2d at 251-53.
32. Id. at 525, 484 S.E.2d at 251.
33. Id. at 525-27, 484 S.E.2d at 251-53.
35. Id. at 608, 484 S.E.2d at 442-43.
36. Id., 484 S.E.2d at 443.
37. Id.
38. Id.
39. Id.
IV. RELEVANCY

A. Generally

In *Larocque v. State*, defendant contended that the trial court improperly admitted evidence of his mere presence at various locations in his trial for rape, false imprisonment, sexual battery, and battery. At trial defendant denied that he was present at locations that were near the victim's home and place of employment. The State then elicited testimony from other witnesses that defendant was present at those locations. The court of appeals acknowledged that evidence of threats or threatening conduct directed at witnesses may be relevant to prove that a defendant intended to obstruct justice or avoid punishment. If sufficiently probative, that evidence is admissible as an admission by conduct. However, evidence of defendant's mere presence at locations near the victim did not constitute evidence of threats or threatening conduct. Thus, the evidence was not relevant, and its potential prejudicial effect required reversal of defendant's conviction.

Chief Judge Beasley, Judge Andrews, and Judge Smith dissented. They contended that defendant had not properly objected to the evidence and that, even if he had, the evidence was relevant because it tended to show attempts to intimidate the victim. Whether defendant's conduct actually constituted attempts to intimidate the victim was a matter for the jury, but the evidence was sufficiently probative to be relevant.

B. Relevancy of Extrinsic Act Evidence

No evidentiary issue is more problematic or controversial than the determination of the relevancy of extrinsic act evidence. Evidence is "extrinsic" when it concerns conduct on occasions other than the one at

40. 224 Ga. App. 92, 479 S.E.2d 450 (1996), rev'd, No. S97G0631, 1997 WL 566211 (Ga. Sept. 15, 1997). After the survey period, the supreme court reversed the court of appeals decision in *Larocque*. However, the supreme court did not reverse on the grounds that the intimidation evidence was relevant, but rather on the grounds that defendant had not properly objected to the intimidation evidence.
41. 224 Ga. App. at 92, 479 S.E.2d at 450.
42. Id. at 93, 479 S.E.2d at 451.
43. Id.
44. Id. at 92, 479 S.E.2d at 450.
45. Id. at 93, 479 S.E.2d at 451.
46. Id. at 98, 479 S.E.2d at 454 (Beasley, J., dissenting).
47. Id.
48. Id. at 97, 479 S.E.2d at 453.
issue. As a general rule, extrinsic act evidence is inadmissible. 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, such 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 may also be admissible to impeach or
bolster a witness. An example is when evidence of a felony conviction
is used to impeach a witness’s character.

For years Georgia courts routinely and liberally admitted evidence of
similar, but totally unrelated, transactions in criminal cases. However,
as discussed in previous surveys, the Georgia Supreme Court in
Stephens v. State and Williams v. State substantially tightened the
rules governing the admissibility of extrinsic act evidence in criminal
cases. 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. Rather, the
prosecution must offer evidence proving the requisite degree of similarity
or connection between the extrinsic act and the charged offense. 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. First, the
prosecution must prove the relevance of the independent transaction to
a legitimate issue. Second, the prosecution must prove that the
defendant committed the independent offense or act. Third, the
prosecution must prove a sufficient connection or similarity between the
independent transaction and the charged offense. The trial court
must make a specific determination that the prosecution has carried its
burden of proving each of the three elements.

Notwithstanding Williams and Stephens, however, courts have
continued to allow prosecutors a largely free hand in the use of similar
transaction evidence. In last year’s survey, the author questioned

51. Marc T. Treadwell, Evidence, 45 MERCER L. REV. 229, 231 (1993); Marc T.
52. 261 Ga. at 468, 405 S.E.2d at 485.
53. Id. at 469, 405 S.E.2d at 486.
54. 261 Ga. at 642, 409 S.E.2d at 651.
55. Id.
56. Id.
57. Id.
58. Id.
whether a change may be in the offing. This speculation was based on the concurring opinions of Justices Fletcher and Sears in *Farley v. State* attacking the routine admission of similar transaction evidence. However, if a change is in the offing, it seems it will be slow in coming.

During the current survey period, Justice Fletcher revisited this subject in a concurring opinion in *Smith v. State*. In *Smith* the supreme court, with little discussion, rejected defendant's contention that similar transaction evidence was not sufficiently similar to the charged offense to be admissible. Justice Fletcher, again joined by Justice Sears, concurred but worried that the majority opinion "continues the confusing and unfair practice of allowing evidence of other crimes so long as the identity of the defendant as the perpetrator of the independent act is proved by 'sufficient' evidence." Justice Fletcher wrote that this vague language needed clarification. He urged the court to require the prosecution to prove that a defendant committed the extrinsic act by clear and convincing evidence. If the supreme court follows Justice Fletcher's lead, the Georgia standard for the admissibility of extrinsic act evidence would be more stringent than the federal standard. In *Huddleston v. United States*, the United States Supreme Court resolved a conflict among the circuits and held that the prosecution need not prove by clear and convincing evidence that a defendant committed the extrinsic act. Rather, the preponderance of the evidence standard applies.

In a shorter concurrence in *Sheppard v. State*, Justice Fletcher, again joined by Justice Sears, accused the majority of "improper analysis of 'other transactions' evidence." In *Sheppard* the supreme court rejected defendant's argument that the prejudicial effect of extrinsic act evidence outweighed its probative value. The court reasoned that a

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61. Id. at 627-31, 458 S.E.2d at 646-51 (Fletcher, J., concurring).
63. Id. at 364, 478 S.E.2d at 380.
64. Id. at 365, 478 S.E.2d at 381 (Fletcher, J., concurring).
65. Id.
66. Id.
68. Id. at 682.
71. Id. at 280, 476 S.E.2d at 764 (Fletcher, J., concurring).
72. 267 Ga. at 280, 476 S.E.2d at 764.
trial court’s conclusion that the evidence is relevant implicitly constitutes a finding that the prejudice caused by the evidence does not outweigh the probative value of the evidence. Justice Fletcher argued that the prejudice caused by the extrinsic act evidence should be a factor in determining the admissibility of the evidence but not its relevancy. Thus, the court should first decide whether the evidence is relevant and, if it is, it must “balance the probative value of the evidence against its prejudicial effect.”

The supreme court opinion in *McGee v. State* perhaps sheds some light on the division of the court on this issue. In *McGee* the court held that the trial court improperly admitted extrinsic act evidence but held that this error was harmless. Justices Hunstein and Benham concurred specially to note their disagreement with the holding that there was error. Justice Hunstein wrote that the court too vigorously examined the differences between the charged offense and the extrinsic act rather than focusing on their similarities.

Although a majority of the supreme court seems unwilling as yet to restrain the use of similar transaction evidence, the court of appeals was willing to take a harder look. In *Tam v. State*, defendant contended that the trial court did not make the necessary *Williams* determination prior to the admission of similar transaction evidence. However, the record did not include a transcript of the *Williams* hearing and the State argued that, because defendant failed to provide a transcript, the court of appeals must assume that the trial court’s *Williams* determination was correct. The court rejected this argument:

Because the admission of evidence of similar offenses is the *exception* rather than the rule, the State has the burden of ensuring that the requirements of *Williams* are met before such evidence may be admitted—and this includes ensuring that the trial court’s determination that the State has made the necessary showings is on the record.

73. *Id.*, 476 S.E.2d at 763-64.
74. *Id.*, 476 S.E.2d at 764 (Fletcher, J., concurring).
75. *Id.*
76. 267 Ga. 560, 480 S.E.2d 577 (1997).
77. *Id.* at 564, 480 S.E.2d at 581.
78. *Id.* at 566, 480 S.E.2d at 583 (Hunstein, J., concurring).
79. *Id.* at 567, 480 S.E.2d at 583.
81. *Id.* at 102, 483 S.E.2d at 145.
82. *Id.* at 102-03, 483 S.E.2d at 142 (emphasis added).
The court of appeals also applied rigid scrutiny to extrinsic act evidence in *Penson v. State*. In *Penson* the trial court admitted evidence of an unsolved vacant house fire that occurred after the charged offenses of burglary and arson. Specifically, the trial court permitted the State to adduce evidence that defendant was seen at the scene of the subsequent fire. The State adduced no other evidence that defendant set the fire. The court of appeals held that this evidence was insufficient to allow the court to make the *Williams* determination and, therefore, reversed defendant's conviction.

C. Relevancy of Subsequent Remedial Measures

Evidence of subsequent remedial measures is generally inadmissible in negligence actions. Thus, in *Royals v. Georgia Peace Officer Standards & Training Council*, the trial court ruled that plaintiff could not adduce evidence that defendants, after the death of plaintiff's decedent during rigorous training as a law enforcement officer, instituted measures to warn participants in training exercises of the physical demands of the exercises. Plaintiff contended that defendants failed to warn her husband of the risk associated with the course and, thus, should be held responsible for his wrongful death.

On appeal plaintiff contended that the trial court should have admitted the evidence because it was relevant to prove the existence of a duty to screen and warn course participants. Plaintiff also argued that the evidence was admissible to impeach defendants' contentions that warnings were not feasible, were unnecessary, had never been given, and would not be given in the future. The court of appeals first acknowledged that evidence of subsequent remedial measures may be admitted for impeachment purposes. However, the court noted that

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84. Id. at 255, 474 S.E.2d at 107.
85. Id. at 256, 474 S.E.2d at 107.
86. Id. at 256-57, 474 S.E.2d at 107-08. In *Harris v. State*, 222 Ga. App. 52, 54, 473 S.E.2d 232, 234 (1996), the court of appeals affirmed the admission of extrinsic act evidence but nevertheless devoted considerable discussion to this issue, perhaps signaling a stricter scrutiny of extrinsic act evidence.
89. Id. at 400, 474 S.E.2d at 221-22.
90. Id. at 400-01, 474 S.E.2d at 222.
91. Id.
92. Id. at 401, 474 S.E.2d at 222.
this exception to the general rule is very narrow: "A trial court must apply this exception most judiciously to preserve continued viability of the strong public policy against the introduction of evidence of remedial measures for purposes of proving negligence . . . ."93 The determination of whether evidence of subsequent remedial measures can be used to impeach a party's testimony is a matter left to the sound discretion of the trial court and will not be reversed "absent manifest abuse."94 Here, the court held that the trial court did not abuse its discretion.95 The court also rejected plaintiff's contention that the evidence was admissible to prove a duty on the part of defendants to screen and warn course applicants.96 Even assuming that the evidence had some probative value in this regard, the court concluded this probative value was substantially outweighed by the potential for prejudicial effect—that the evidence would be viewed as an admission of negligence.97

D. Relevancy of Collateral Source Payments

In Warren v. Ballard,98 a case discussed in some detail in last year's survey,99 the supreme court held that a party does not "open the door" to the admission of evidence that he has health insurance when he testifies that he suffered financial hardship because of his medical bills.100 The court reasoned that a party can only be impeached on a material issue.101 Because anxiety over medical bills is not an item of damages, testimony about anxiety is not relevant to a material issue and, thus, a party cannot impeach a party who testifies he has suffered this anxiety.102 During the current survey period, the court of appeals applied Warren in Worthy v. Kendall.103 In Worthy plaintiff contended that the trial court erred in admitting evidence of his receipt of disability benefits. The trial court admitted this evidence after plaintiff's counsel asked plaintiff, "[H]ow have y'all handled the finances on [one] income?"104 Although plaintiff's testimony inaccurately suggested that

93. Id.
94. Id. at 402, 474 S.E.2d at 222-23.
95. Id.
96. Id., 474 S.E.2d at 223.
97. Id.
100. 266 Ga. at 409-10, 467 S.E.2d at 893-94.
101. Id. at 410, 467 S.E.2d 893.
102. Id.
104. Id. at 325, 474 S.E.2d at 629.
he had no income, the issue was not material.\textsuperscript{105} Bound by \textit{Warren}, the court of appeals agreed with plaintiff and reversed.\textsuperscript{106}

The court of appeals also applied \textit{Warren} in \textit{Bennett v. Terrell}.\textsuperscript{107} In \textit{Bennett} the court admitted testimony by plaintiff’s doctor that she would be seeking no further treatment because she would soon be settling her case. The trial court concluded that this statement was relevant to defendant’s assertion that plaintiff was seeking medical treatment only to boost the value of her claim against defendant.\textsuperscript{108} Plaintiff then argued that she should be allowed to explain that her statement to her doctor was based on the fact that she did not have medical insurance or means to pay her bill and was intended to inform the doctor that he would soon be paid for his treatments.\textsuperscript{109} The court of appeals concluded that the explanation basically related to plaintiff’s financial resources and that under \textit{Warren} the evidence is not admissible even to explain other evidence.\textsuperscript{110}

The supreme court’s conclusion in \textit{Warren}, although based on impeccable logic—certainly a party can only be impeached on a relevant issue—is troubling as a practical matter. Even though testimony suggesting the absence of health insurance coverage or anxiety resulting from medical bills may be legally irrelevant, it is practically of great significance. Similarly, testimony by an insured defendant that he could not afford to pay any judgment entered against him would be extremely prejudicial to a plaintiff. If in both situations the only remedy is to object to this testimony, it is questionable whether a mere instruction from the trial court to disregard the testimony will be effective to cure the resulting prejudice.

\section*{E. Relevancy of Prior Sexual Behavior}

\textit{O.C.G.A.} section 24-2-3\textsuperscript{111} prohibits the admission of evidence relating to the prior sexual behavior of a rape victim unless the behavior directly involved the accused and the evidence at issue supports an inference that the accused could have reasonably believed that the victim consented to the sexual activity.\textsuperscript{112} Although the statute refers
only to rape prosecutions, it has been held to apply to child molestation cases.\textsuperscript{113}

During the present survey period, defendant in Green v. State\textsuperscript{114} contended that his Sixth Amendment right of confrontation was impinged when the trial court barred defendant from asking a thirteen year-old victim whether she was sexually active at the time of the alleged assault. Defendant argued that the victim had a motive to falsely accuse him because she was pregnant and did not want her parents to know that she had engaged in consensual sex; thus, she fabricated the attack.\textsuperscript{115} The court of appeals rejected defendant's argument.\textsuperscript{116} The court reasoned that the Sixth Amendment right to confront and cross-examine witnesses is not absolute and in appropriate situations must bow to other concerns.\textsuperscript{117} The policy served by the Rape Shield Statute\textsuperscript{118} is one of those concerns:

\begin{quote}
[T]o allow the introduction of evidence of a witness' past sexual behavior for the purpose of showing that she may have been pregnant at the time the allegations were made and may have therefore made up the charges in an effort to justify or explain the pregnancy, would be to permit defendants to circumvent the Rape Shield Statute and thwart the intent of the legislature in enacting the statute.\textsuperscript{119}
\end{quote}

The Rape Shield Statute does not prohibit evidence that a rape or molestation victim has previously falsely accused others of sexual misconduct.\textsuperscript{120} In Peters v. State,\textsuperscript{121} the trial court refused to allow defendant to cross-examine a ten year-old victim about her prior allegedly false allegations of molestation made against other men. The trial court also refused to allow defendant to cross-examine the victim about her distrust of men.\textsuperscript{122} The court of appeals acknowledged that the Rape Shield Statute permits the introduction of evidence of prior false allegations.\textsuperscript{123} However, before the evidence can be admitted, the trial court must, out of the presence of the jury, make a threshold determination that a reasonable probability of falsity exists.\textsuperscript{124} In

\begin{enumerate}
\item Id. at 436, 472 S.E.2d 1 (1996).
\item Id. at 436, 472 S.E.2d at 1.
\item Id. at 437, 472 S.E.2d at 2.
\item Id. at 436-37, 472 S.E.2d at 2.
\item O.C.G.A. § 24-2-3.
\item 221 Ga. App. at 437, 472 S.E.2d at 2.
\item Id. at 839, 481 S.E.2d at 900.
\item Id.
\end{enumerate}
Peters defendant did not offer any evidence that the prior allegations were false, and the trial court refused to conduct a hearing because defendant had not filed a motion seeking to introduce the evidence and had not made the required threshold showing. The court of appeals held that defendant was not required to make a threshold showing before he was entitled to a hearing. Rather, once defendant raised the issue, the trial court was obligated to conduct a hearing. Accordingly, the court of appeals remanded the case to the trial court to conduct a hearing to determine whether defendant could adduce evidence sufficient to show a reasonable probability that the victim's prior allegations were false.

V. PRIVILEGES

In Johnson v. State, defendant contended that the trial court improperly admitted incriminating photographs depicting sexual activity between defendant's wife and a thirteen year-old girl. Defendant, who took the pictures, contended that the pictures were privileged attorney-client communications because he gave the photographs to his divorce attorney to use in his divorce action. When defendant was subsequently charged with child molestation, the divorce attorney showed the photographs to the district attorney. The divorce attorney, who at the time was unaware that defendant had taken the photographs, thought the photographs would compromise the credibility of defendant's wife and thus weaken the case against defendant. When the district attorney demanded that the photographs be turned over, the divorce attorney obtained a court order sealing the photographs. However, the court subsequently unsealed the photographs and allowed them to be used as evidence.

Defendant contended that the photographs were confidential communications protected by the attorney-client privilege. The court of appeals disagreed, concluding that the photographs were not communications but rather were "tangible evidence of a similar crime." Had the photographs been found in defendant's possession,
they could have been confiscated. The fact that defendant gave the photographs to his attorney did not make them privileged.

VI. OPINION TESTIMONY

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 matter of expert testimony have become sufficiently established to be admissible in court. In Orkin Exterminating Co. v. McIntosh, the court of appeals refused to adopt the Daubert test and reaffirmed the so-called Harper test traditionally applied by Georgia courts requiring a determination that the evidence in question has reached a "scientific stage of verifiable certainty." In Carr v. State, the Georgia Supreme Court used the Harper test to determine whether the trial court properly admitted evidence in defendant's convictions of malice, murder, and first degree arson.

In Carr the prosecution contended that defendant injured his wife to prevent her escape from a fire he had set in their home. The State argued that defendant had used an accelerant to start the fire and offered evidence that a dog trained to give an alert when he smelled certain hydrocarbons had given an alert at the home. Defendant contended that this evidence was inadmissible because it had not reached a scientific stage of verifiable certainty. The trial court ruled that the Harper test was not applicable. The supreme court first noted that the type of evidence constituting scientific test evidence that should be subjected to the Harper test had not been addressed. However, in the many cases in which Harper had been applied to determine the admissibility of scientific tests, all involved expert opinion based on analysis of data. In Carr the dog's handler testified, based

133. Id.
134. Id.
136. 293 F. 1013 (D.C. Cir. 1923).
137. 509 U.S. at 579.
139. Id. at 593, 452 S.E.2d at 165 (quoting Harper v. State, 249 Ga. 519, 525, 292 S.E.2d 389, 395 (1982)).
141. Id. at 703, 482 S.E.2d at 317.
142. Id. at 702, 482 S.E.2d at 317.
143. Id. at 703, 482 S.E.2d at 317.
144. Id.
Evidentiary upon his analysis of the dog's behavior, that an accelerant was present.

Thus, dog alert evidence is similar to any other scientific test data in that an expert is required to render an opinion based on analysis of data. Therefore, the court held that dog alert testimony should be subjected to the Harper test.

Although the trial court held a lengthy pretrial hearing at which the State presented evidence on the dog's and its handler's training and experience and general information on the use of dogs to detect accelerants, the supreme court held that this evidence did not prove with verifiable certainty that dog alert evidence was an accurate and reliable means of determining whether accelerants were present. Thus, the court held that the trial court improperly admitted the dog alert evidence.

The court of appeals returned to a recurrent issue during the survey period—the extent to which police officers can give opinion testimony in civil suits arising from accidents they investigated. In McMachen v. Moattar, the trial court permitted the investigating officer to testify that defendant did not contribute to or cause the collision at issue. The court of appeals acknowledged that in Jefferson Pilot Life Insurance Co. v. Clark, it had held that an investigating officer may testify concerning the cause of a motor vehicle collision. However, Clark also stands for the proposition that the subject of the officer's opinion must first be a proper one for expert testimony. Expert testimony is admissible only when the subject matter is beyond the ken of laymen. Thus, whether an investigating officer may testify as to the cause of a collision depends upon the particular facts of the case. In McMachen the officer's opinion was unnecessary because the collision was fairly simple and jurors would have been able to draw their own conclusions as to who was at fault.

145. Id. at 702, 482 S.E.2d at 316.
146. Id. at 703, 482 S.E.2d at 317.
147. Id.
148. Id. at 704, 482 S.E.2d at 318.
149. Id. at 704-05, 482 S.E.2d at 318. Carr is also significant and interesting for its denunciation of gross prosecutorial misconduct by a former high profile assistant district attorney. "We conclude that the conduct of the prosecuting attorney in this case demonstrated her disregard of the notions of due process and fairness, and was inexcusable." Id. at 711, 482 S.E.2d at 322.
151. Id. at 230, 470 S.E.2d at 801.
153. 221 Ga. App. at 230, 470 S.E.2d at 801.
154. Id., 470 S.E.2d at 802.
155. Id.
The court of appeals also addressed plaintiff's contention that the trial court erred in admitting opinion testimony from eyewitnesses that defendant could not have avoided the collision.\textsuperscript{156} The court acknowledged that its earlier opinions addressing this issue were apparently inconsistent.\textsuperscript{157} However, lay opinion testimony is admissible when the matter at issue is so complex or so difficult to describe that a recitation of facts is not adequate to convey to the jury the true point of a witness's testimony.\textsuperscript{158} In this situation a witness may express impressions or opinions based upon the facts and circumstances observed by the witness.\textsuperscript{159} In \textit{McMichen} the witness testified in detail about what he saw, but his opinion that the accident was unavoidable was not apparent from that testimony.\textsuperscript{160} It is interesting that the collision was so simple that the investigating officer's opinion testimony was not admissible, but the lay witness's observations were so complex that his opinion testimony was admissible.

The court of appeals returned to this issue in \textit{Xiong v. Lankford}.\textsuperscript{161} In \textit{Xiong} plaintiff's child was killed when he was struck by defendant's vehicle. The trial court allowed lay witnesses to testify in response to hypothetical questions that the accident was unavoidable. The court did not cite \textit{McMichen} nor hold that the admissibility of such evidence is dependent upon the complexity of the matter at issue or the ability of witnesses to describe the event without expressing opinions. Rather, citing O.C.G.A. section 24-9-65\textsuperscript{162} for the arguably improper proposition that any witness may give opinion testimony once a sufficient foundation is laid, the court held that the evidence provided a sufficient foundation for the witnesses' opinions.\textsuperscript{163} Because the witnesses had sufficient opportunity to form opinions, their testimony expressing those opinions was admissible.\textsuperscript{164} Moreover, the court reasoned that the witnesses did not express opinions on the ultimate issue of negligence but rather only testified that, in their opinion, they could not have seen the child under the circumstances.\textsuperscript{165}

\begin{itemize}
\item \textsuperscript{156} Id. at 232, 470 S.E.2d at 802.
\item \textsuperscript{157} Id. at 231, 470 S.E.2d at 802.
\item \textsuperscript{158} Id. at 230, 470 S.E.2d at 802.
\item \textsuperscript{159} Id.
\item \textsuperscript{160} Id. at 232, 470 S.E.2d at 803.
\item \textsuperscript{161} 226 Ga. App. 126, 485 S.E.2d 534 (1997).
\item \textsuperscript{162} O.C.G.A. § 24-9-65 (1995).
\item \textsuperscript{163} 226 Ga. App. at 128, 485 S.E.2d at 536.
\item \textsuperscript{164} Id.
\item \textsuperscript{165} Id. at 129, 485 S.E.2d at 537.
\end{itemize}
The supreme court addressed the issue of the permissible scope of both expert and lay opinion testimony in Johnson v. Knebel. In Johnson the court of appeals affirmed the admission of an accident reconstructionist's opinion that a plaintiff's injuries were caused by an initial impact rather than a subsequent impact. This opinion, the accident reconstructionist testified, was not based upon tests and examinations, but rather was based solely on his review of photographs. The trial court ruled this was admissible expert opinion testimony. The court of appeals, however, concluded that the reconstructionist's testimony was admissible as the opinion of a lay witness. Although the reconstructionist's opinion was not based upon his professional qualifications and thus was not expert testimony, he was able as a lay witness to give an opinion as long as he stated the basis of his opinion.

The supreme court granted certiorari and reversed. The court first noted that lay witnesses may give opinion testimony only when their opinion is based on their own observations and when the opinion is necessary for the witness to convey those observations to the jury. The opinion of a lay witness is not admissible when the jury may readily reach its own opinion because all of the facts and circumstances upon which the opinion is based are capable of being clearly defined or described. Even though the trial court admitted the reconstructionist's testimony as an expert opinion, the court of appeals concluded that the testimony was admissible as a lay opinion. This, the supreme court held, was error. Before an expert can give lay opinion testimony, the trial court should take precautionary measures to ensure that the expert does not opine on matters outside the scope of his expertise or on facts of which he has no personal knowledge. Further, the jury should be informed which portion of the expert's testimony is given as an expert witness and which portion is given as a lay witness. The trial court, because it admitted the testimony as expert testimony, did not take the precautionary measures and thus the court of appeals

167. Id. at 853, 485 S.E.2d at 452.
168. Id. at 854, 485 S.E.2d at 453.
169. Id.
170. Id.
171. Id. at 853, 485 S.E.2d at 452.
172. Id. at 855, 485 S.E.2d at 453.
173. Id.
174. Id. at 853, 485 S.E.2d at 452.
175. Id.
176. Id. at 855, 485 S.E.2d at 453.
177. Id.
could not properly find that the testimony was admissible lay testimony.\textsuperscript{178}

Moreover, even if the trial court had admitted the testimony as the opinion of a lay witness and taken appropriate measures to ensure that the jury knew the reconstructionist was not testifying as an expert, the testimony still would have been inadmissible.\textsuperscript{179} A lay witness can state an opinion only when the opinion is based upon his own observations and when the witness cannot adequately explain to the jury the conclusion to be drawn from his observations.\textsuperscript{180} "In other words, the jury, being apprised of the same information as the lay witness, when possible will be allowed to think for itself and draw its own conclusions from such information."\textsuperscript{181} The reconstructionist's opinion that the first collision caused the plaintiff's injuries was based solely upon his review of photographs and was not admissible because the photographs were in evidence and the jury was just as qualified and capable as the reconstructionist to draw conclusions from those photographs.\textsuperscript{182}

Arguably, \textit{Moore v. Graham}\textsuperscript{183} pushes the bounds of proper opinion testimony. In \textit{Moore} the investigating officer testified that plaintiffs exaggerated their injuries.\textsuperscript{184} Again citing O.C.G.A. section 24-9-65,\textsuperscript{185} the court held that the officer had extensive experience in accident investigation and, based upon his firsthand knowledge of the accident, had a sufficient basis to express an opinion as to whether plaintiffs exaggerated their injuries.\textsuperscript{186}

In \textit{Corbett v. State},\textsuperscript{187} defendant attempted to rely on opinion testimony from its expert, a medical doctor. The trial court, after voir dire of the witness, qualified the witness as a medical expert except in the field of pathology.\textsuperscript{188} The supreme court held that this was error.\textsuperscript{189} The witness was a trained physician licensed to practice medicine in Georgia, and he was thus qualified under Georgia law to testify on pathological matters.\textsuperscript{190} Similarly, in \textit{Carr v. State}, the supreme court held that the trial court erred in ruling that defendant's

\textsuperscript{178} Id. at 856, 485 S.E.2d at 454.
\textsuperscript{179} Id.
\textsuperscript{180} Id.
\textsuperscript{181} Id. at 857, 485 S.E.2d at 454.
\textsuperscript{182} Id. at 858-59, 485 S.E.2d at 455.
\textsuperscript{184} Id. at 618, 472 S.E.2d at 154.
\textsuperscript{186} 221 Ga. App. at 618, 472 S.E.2d at 154.
\textsuperscript{187} 266 Ga. 561, 468 S.E.2d 757 (1996).
\textsuperscript{188} Id. at 563, 468 S.E.2d at 759.
\textsuperscript{189} Id.
\textsuperscript{190} Id., 468 S.E.2d at 760.
fire investigator was not qualified to testify on the use of dogs to detect the presence of accelerants because he was not trained as a dog handler.\textsuperscript{191} Citing \textit{Corbett}, the Court held that when a witness is qualified as an expert in a field, he is qualified to testify regarding the whole field.\textsuperscript{192}

VII. HEARSAY

A. \textit{Legislative Developments}

Prior to July 1, 1997, Georgia law sharply limited the use of medical reports as evidence. For example, Georgia’s business records exception to the hearsay rule, the primary means of curing hearsay objections to documentary evidence, does not allow the admission of opinions or diagnoses contained in medical records.\textsuperscript{193} Thus, portions of medical records containing opinions or conclusions cannot be admitted into evidence upon proper objection.\textsuperscript{194} Georgia law is much more narrow than the business records exception in the Federal Rules of Evidence that authorizes the admission of business records containing opinions or diagnoses.\textsuperscript{195}

However, a newly enacted statute may dramatically broaden the use of medical records in personal injury litigation. The 1997 session of the General Assembly enacted O.C.G.A. section 24-3-18,\textsuperscript{196} which provides that in personal injury cases, a “medical report in narrative form which has been signed and dated” by a healthcare professional is admissible to prove diagnoses, prognoses, and interpretations of tests or examinations.\textsuperscript{197} The statute requires the party propounding the medical report to give notice to the adverse party sixty days prior to trial.\textsuperscript{198} The adverse party then may object to the report on grounds other than hearsay within fifteen days of its receipt.\textsuperscript{199} In addition, the adverse party has the right to cross-examine the author of the report.\textsuperscript{200} The report itself “shall be presented to the jury as depositions are presented

\begin{footnotes}
\item[191] 267 Ga. at 708, 482 S.E.2d at 320.
\item[192] \textit{Id}.
\item[195] FED. R. EVID. 803(6).
\item[196] O.C.G.A. § 24-3-18 (Supp. 1997).
\item[197] \textit{Id} § 24-3-18(a).
\item[198] \textit{Id}.
\item[199] \textit{Id}.
\item[200] \textit{Id}.
\end{footnotes}
to the jury," which presumably means that the propounding party will read the report to the jury. The report will not "go out with the jury as documentary evidence."

O.C.G.A. section 24-3-18 became effective July 1, 1997; thus, there are not yet appellate decisions available to assist in the interpretation of the statute. However, the statute raises several issues. Perhaps the first that will be addressed by the courts is whether the statute applies retroactively. Because it is a rule of evidence, it seems logical that it will be considered procedural in nature and, thus, can be applied retroactively. This, however, is not necessarily a safe assumption. For example, the supreme court held that the provision of the Tort Reform Act of 1987 abolishing the collateral source rule and thus making evidence of collateral source payment admissible was a substantive change in the law and could apply only to causes of action accruing on or after the effective date of the statute. Also, the courts will likely be called upon to determine what constitutes a "medical report in narrative form." For example, is a letter to a plaintiff's attorney outlining a physician's treatment of the plaintiff and her diagnoses and conclusions a "medical report?"

Some hint of the practical effect of O.C.G.A. section 24-3-18 may be found in workers' compensation cases. O.C.G.A. section 34-9-102 provides for the admission of medical reports in workers' compensation claims and is similar, although not identical, to O.C.G.A. section 24-3-18. In the typical workers' compensation case, the claimant's attorney relies on the medical report at the hearing, and the employer must depose the treating physician in order to cross examine the physician about the opinions contained in the report. Thus, as a practical matter, O.C.G.A. section 34-9-102 shifts the economic burden of convening the physician's deposition to the defense. O.C.G.A. section 24-3-18 may well have a similar effect. On the other hand, workers' compensation cases are not tried before a jury, and plaintiffs' attorneys could conclude that reading a medical report to a jury will not have the same impact as live or videotaped testimony. Of course, a plaintiff's attorney, in an effort to save expense, could announce the intention to rely on a medical report and then, when the defense convenes the deposition, take the opportunity to conduct a direct examination of the physician. In that event, the parties will no doubt dispute the order in which the physician's

201. Id. § 24-3-18(b).
202. Id.
deposition testimony will be presented. Can a plaintiff conduct a direct examination of a physician at a deposition convened by the defendant and then use that examination in plaintiff's case-in-chief?

Undoubtedly, O.C.G.A. section 24-3-18 will spawn these and other issues and will be the subject of much litigation. Perhaps all that can be said with certainty is that the General Assembly has released an unknown element onto the field of personal injury litigation.

B. The Necessity Exception

Last year's survey chronicled the dramatic evolution of Georgia's necessity exception to the rule against hearsay.206 This exception to the hearsay rule, which can be traced to the supreme court decision in McKissick v. State,207 allows the admission of hearsay evidence that would never have been admissible under even the broadest interpretations of previously recognized exceptions to the hearsay rule. Not surprisingly, prosecutors have heartily embraced the necessity exception. During the current survey, defense attorneys also attempted to exploit the exception. Because the necessity exception is so new, its boundaries are ill-defined, and thus, appellate courts are frequently asked to rule on whether trial courts properly admitted or excluded such evidence.

As discussed below, O.C.G.A. section 24-3-1(b)208 has been cited as the basis for the necessity objection, but it seems 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."209 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, the courts began reading O.C.G.A. section 24-3-1(b) expansively rather than restrictively.210 In McKissick the Georgia Supreme Court noted that "O.C.G.A. § 24-3-1(b) permits the use of hearsay evidence 'in specified cases from necessity.'"211 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

208. O.C.G.A. § 24-3-1(b) (1995).
209. Id. (emphasis added).
211. 263 Ga. at 189, 429 S.E.2d at 657 (quoting O.C.G.A. § 24-3-1(b) incompletely).
that hearsay evidence could be admitted in the absence of a statutory exception if "necessity" and 'particularized guarantees of trustworthiness' are established.212

In Dix v. State,213 the Georgia Supreme Court appeared to expand the necessity exception. In Dix defendant was convicted of murdering his former wife. At trial the wife's divorce attorney testified that his client told him that defendant had choked her, threatened to kill her, dry fired a gun at her head, and said that no restraining order would stop him.214 The court declined to adopt a "bright line rule" that statements of a client to a divorce attorney are admissible under the necessity exception to the hearsay rule.215 However, examining the circumstances of the statements at issue, the court held that the statements were sufficiently trustworthy to be admitted.216 In a concurring opinion, Judge Hunstein went further; she argued that a client's statements made in the course of the attorney-client relationship are always sufficiently trustworthy to be admitted unless there is evidence establishing a reason for the client to give false information to the attorney.217

The utility of the necessity exception to prosecutors is demonstrated by the Georgia Supreme Court decision in Farmer v. State.218 In Farmer defendant's wife asserted her marital privilege and refused to testify at defendant's probation revocation hearing at which the State sought to revoke defendant's probation based upon an alleged assault on his wife. After the wife refused to testify, the State called a magistrate court clerk who testified that the wife had come to his office to pay overdue fines on an unrelated matter. The wife claimed that she had not paid the fines because she had been hospitalized with injuries inflicted by her husband. The clerk then asked the wife whether she wanted to "do something about it,"219 and when the wife said that she did, the wife executed an affidavit providing details of the husband's assault.220 The trial court permitted the clerk to testify to the contents of the wife's statements and her affidavit, ruling that the testimony was evidence admissible as prior testimony given under oath of an unavailable witness and that the evidence was admissible as substantive

212. Id. (quoting Mallory v. State, 261 Ga. 625, 627, 409 S.E.2d 839, 841 (1991)).
214. Id. at 429, 479 S.E.2d at 741.
215. Id. at 431, 479 S.E.2d at 742.
216. Id., 479 S.E.2d at 743.
217. Id. at 433, 479 S.E.2d at 743 (Hunstein, J., concurring).
219. Id. at 869, 472 S.E.2d at 71.
220. Id.
evidence pursuant to *Gibbons v. State*—Georgia's rather unique rule that allows the admission of prior inconsistent statements as substantive evidence.

On appeal the supreme court summarily held that the evidence was not admissible either as prior testimony or as a prior inconsistent statement. The evidence was not admissible as prior testimony because pursuant to that exception of the hearsay rule, the party against whom the testimony is being offered must have had an opportunity to cross-examine the unavailable witness at the prior hearing. Because defendant did not have that opportunity, the clerk's testimony about the wife's statements was not admissible as prior testimony. The evidence was not admissible as a prior inconsistent statement because the wife did not testify at the probation revocation hearing about the assault and thus gave no in-court testimony that was inconsistent with her prior statement. Consequently, there was nothing for the prior statement to be inconsistent with, and therefore, her prior statements were not admissible.

The State, however, argued that the evidence was admissible pursuant to the necessity exception to the hearsay rule. The court acknowledged this possibility, but because the trial court made no findings with regard to the trustworthiness of the evidence at issue, the court remanded the case to the trial court for further consideration of this issue. Justices Carley, Thompson, and Hines dissented. They argued that the undisputed facts surrounding the circumstances under which the wife made her statements established, as a matter of law, the circumstantial trustworthiness of her statements and that her statements were thus admissible pursuant to the necessity exception.

Not to be outdone, defense attorneys have turned to the necessity exception as a means of admitting hearsay evidence that would never be admitted under traditional hearsay analysis. In *Turner v. State*, defendant unsuccessfully tendered a letter written by defendant's half-brother to defendant's mother. In the letter, the half-brother admitted that he had committed the crime and that defendant was not present when the crime was committed. The half-brother did not testify at

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221. *Id.*; 248 Ga. 858, 286 S.E.2d 717 (1982).
222. 248 Ga. at 862, 286 S.E.2d at 721.
223. 266 Ga. at 870, 472 S.E.2d at 72.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.* at 873, 472 S.E.2d at 74 (Carley, J., dissenting).
defendant’s trial because he invoked his constitutional privilege against self-incrimination.\textsuperscript{230}

The supreme court, prompted somewhat by the constitutional implications of refusing to admit evidence critical to a defendant’s defense,\textsuperscript{231} held that the trial court should have analyzed whether the letter was admissible pursuant to the O.C.G.A. section 24-3-1(b) necessity exception.\textsuperscript{232} Accordingly, the court remanded the case for a determination.\textsuperscript{233}

In Nelson v. State,\textsuperscript{234} a defendant attempting to rely on the necessity exception found a less receptive audience. In Nelson the trial court refused to admit a statement given by a confidential informant to defendant’s attorney two weeks after defendant’s arraignment. The confidential informant did not testify at trial. However, narcotics agents testified that the confidential informant told them that defendant had supplied the informant with cocaine.\textsuperscript{235} The court of appeals held that the passage of time rendered the statement insufficiently trustworthy to be admitted under the necessity exception.\textsuperscript{236} Further, the confidential informant had given a contrary statement to authorities.\textsuperscript{237} Under these circumstances, the court held that the trial court did not err in excluding the evidence.\textsuperscript{238}

The court of appeals holding that the passage of time rendered the statement insufficiently trustworthy is notable because it appears to conflict with the view of at least some justices on the supreme court. In Farmer, discussed above, three dissenting justices concluded that the “passage of time . . . is immaterial, since, unlike the res gestae exception, there is no requirement that statements admitted under the ‘necessity’ exception be characterized by ‘spontaneity.’”\textsuperscript{239} Also, the court of appeals’ point that the informant’s statement conflicted with his previous statement was no doubt exasperating to defendant’s attorney. Of course, the State was inconsistent; that was the reason defendant tendered the statement.

In sum it seems that in a remarkably short period of time, the necessity exception to the hearsay rule has become firmly established in

\begin{itemize}
\item \textsuperscript{230} Id. at 153, 476 S.E.2d at 257.
\item \textsuperscript{231} See Chambers v. Mississippi, 410 U.S. 284 (1973).
\item \textsuperscript{232} 267 Ga. at 155, 476 S.E.2d at 258.
\item \textsuperscript{233} id. at 156, 476 S.E.2d 259.
\item \textsuperscript{234} 226 Ga. App. 93, 485 S.E.2d 582 (1997).
\item \textsuperscript{235} id. at 93, 485 S.E.2d at 583.
\item \textsuperscript{236} id. at 94, 485 S.E.2d at 583.
\item \textsuperscript{237} id.
\item \textsuperscript{238} id.
\item \textsuperscript{239} 266 Ga. at 872, 472 S.E.2d at 73 (Carley, J., dissenting).
\end{itemize}
Georgia although criminal defense attorneys may argue that it has been more firmly established for prosecutors than it has for defendants. Indeed, it can be questioned whether the sometimes loose analysis of hearsay evidence admitted under the necessity exception satisfies the rigid requirements of the confrontation clause. In this regard, it is ironic that, thus far, the necessity exception has been applied more frequently in criminal cases, in which the confrontation clause applies, rather than in civil cases, in which the confrontation clause does not stand as an impediment to the admission of hearsay statements.

C. Prior Out-of-Court Statements

Georgia has two rather unusual rules regarding the admissibility of prior statements by witnesses. In *Gibbons v. State*, the supreme court held that prior inconsistent statements of a witness are admissible as substantive evidence if the witness is subject to cross-examination. In *Cuzzort v. State*, 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 accused if the witness is present at the trial and subject to cross-examination.

Both *Gibbons* and *Cuzzort* require that the person making the out-of-court statement testify at trial. Thus, the State in *Render v. State* could not avail itself of *Cuzzort* or *Gibbons* to support the admission of an out-of-court statement made by a witness who did not testify. Rather, the State argued that the out-of-court statement, which incriminated defendant, was admissible to explain the conduct of the arresting officer. Acknowledging that a statement offered to explain conduct, rather than to prove the truth of the statement, may be admissible as non-hearsay, the supreme court noted that the officer's conduct must first be a relevant issue. In a criminal prosecution, the circumstances that would justify the admission of an out-of-court statement of a non-testifying defendant to explain an officer's conduct

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241. Id. at 862, 286 S.E.2d at 721.
244. 254 Ga. at 745, 334 S.E.2d 662.
245. 248 Ga. at 864, 286 S.E.2d at 722; 254 Ga. at 745, 334 S.E.2d at 662.
247. Id. at 849, 483 S.E.2d at 571.
248. Id.
are "rare."\textsuperscript{249} All officers are bound to investigate criminal activity, and thus, evidence purporting to explain why an officer investigated a matter is not relevant.\textsuperscript{250} The court gave no credit to the State's argument that the statement incriminating defendant was relevant to prove why the officer continued his investigation when the defendant denied his involvement. If this made evidence relevant, then virtually any fact uncovered in an investigation would be admissible in evidence because virtually any fact can explain an officer's conduct in an investigation. Accordingly, the supreme court reversed defendant's conviction.\textsuperscript{251}

D. Miscellaneous

In \textit{McGaha v. State},\textsuperscript{252} the court of appeals addressed the distinction between authentication of a document and the admission of a document containing hearsay. In \textit{McGaha} defendant argued that a document was admissible pursuant to O.C.G.A. section 24-7-20,\textsuperscript{253} which provides a method of authenticating a public record. This statute is somewhat similar to O.C.G.A. section 24-7-8,\textsuperscript{254} which provides procedures for authenticating medical records. These statutes, the court held, do nothing more than provide a means for authenticating documents.\textsuperscript{255} They do not render hearsay in the documents admissible.\textsuperscript{256}

\textsuperscript{249} \textit{Id.} (quoting \textit{Teague v. State}, 252 Ga. 534, 536, 314 S.E.2d 910, 914 (1984)).
\textsuperscript{250} \textit{Id.} at 850, 483 S.E.2d at 573.
\textsuperscript{251} \textit{Id.} at 849, 483 S.E.2d at 572.
\textsuperscript{253} O.C.G.A. § 24-7-20 (1995).
\textsuperscript{254} \textit{Id.} § 24-7-8.
\textsuperscript{255} 221 Ga. App. at 441, 471 S.E.2d 534.
\textsuperscript{256} \textit{Id.}, 471 S.E.2d at 534-35.