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Evidence

by Marc T. Treadwell*

I. INTRODUCTION

The most significant news during the current survey period continued to be the judiciary's efforts to come to terms with the "tort reform" legislation enacted by the General Assembly in 2005, particularly Official Code of Georgia Annotated ("O.C.G.A.") section 24-9-67.1,[1] which purports to adopt, more or less, the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[2] As discussed below, it is beginning to appear that Georgia courts will follow a somewhat different course than that followed by federal courts in their interpretation of *Daubert* and *Daubert*'s codification in Federal Rule of Evidence 702.[3]

As discussed in many prior surveys,[4] Georgia continues to creep, both through legislative enactments and State Bar of Georgia initiatives, toward the adoption of the Federal Rules of Evidence. As this Article was being written, the State Bar of Georgia was once again pushing the General Assembly to adopt a new evidence code that would be based on the Federal Rules of Evidence.[5] The current version of the Georgia

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1. O.C.G.A. § 24-9-67.1 (Supp. 2007).
2. 509 U.S. 579 (1993).
3. FED. R. EVID. 702.
4. *See, e.g.*, Marc T. Treadwell, *Evidence*, 58 MERCER L. REV. 151, 151 (2006); Marc T. Treadwell, *Evidence*, 41 MERCER L. REV. 175, 175 (1989); *see also* Marc Treadwell, *An Analysis of Georgia's Proposed Rules of Evidence*, 26 GA. ST. B.J. 173, 173-84 (1990).
5. EVIDENCE STUDY COMMITTEE, REPORT OF THE EVIDENCE STUDY COMMITTEE OF THE STATE BAR OF GEORGIA: PROPOSED NEW RULES OF EVIDENCE 4 (2005), *available at* http://www.gabar.org/public/pdf/news/proposed_new_evidence_rules.pdf.

Rules of Evidence can be found at the State Bar's website.[6] Off and on for almost twenty years, the State Bar has unsuccessfully advocated the adoption of a new evidence code. It seems that while most trial lawyers may generally favor the adoption of a new evidence code, all lawyers can find a particular provision in the proposed code that is unpalatable. For example, prosecutors—who purportedly stopped the legislature from extending O.C.G.A. section 24-9-67.1 to criminal cases—likely will oppose any further attempts to subject their expert witnesses to a *Daubert* or *Daubert*-like standard, which is what the proposed code will do.

Nevertheless, Georgia evidence law more closely resembles the Federal Rules of Evidence than it did when the State Bar first proposed the adoption of the Federal Rules of Evidence. For example, in 2005 the General Assembly enacted new O.C.G.A. section 24-9-81,[7] which is nearly identical to Federal Rules of Evidence 607,[8] new O.C.G.A. section 24-9-84,[9] which is based on Federal Rules of Evidence 608,[10] and O.C.G.A. section 24-9-84.1,[11] which mostly adopts Federal Rule of Evidence 609.[12] Also, as noted *Daubert* has come to Georgia, if not quite the same *Daubert* seen in federal court. Incidentally, this survey Article, in its discussion of Georgia evidence law and decisions, has always tracked the organizational format of the Federal Rules of Evidence.

II. RELEVANCY

A. *Extrinsic Act Evidence*

Since this Author began surveying evidence decisions for Mercer Law Review's *Annual Survey of Georgia Law* in 1988, the most frequently encountered relevancy issue has been whether extrinsic act evidence is admissible. "Extrinsic act evidence," a term used more frequently by federal courts, generally refers to evidence of conduct on occasions other than the occasion at issue that is offered as substantive, as opposed to

6. State Bar of Georgia—Legal Resources by Subject, http://www.gabar.org/member_essentials/legal_resources_by_subject (select "Georgia Code"; then select "Title 24").

7. O.C.G.A. § 24-9-81 (Supp. 2007).

8. FED. R. EVID. 607.

9. O.C.G.A. § 24-9-84 (Supp. 2007).

10. FED. R. EVID. 608.

11. O.C.G.A. § 24-9-84.1 (Supp. 2007).

12. FED. R. EVID. 609; *see also* Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 187, 200-01 (2005).

impeachment, evidence.[13] Georgia courts mostly use the phrase "similar transaction evidence" when referring to extrinsic act evidence.[14] However, as pointed out by the Georgia Supreme Court in *Young v. State*,[15] that phrase does not always accurately describe the type of extrinsic act evidence that can be admitted.[16] In *Young* the court acknowledged that although most cases, and even the Uniform Superior Court Rules,[17] refer to "similar" transaction evidence, more than just similar extrinsic evidence can be admissible.[18] As stated in the seminal case of *Williams v. State*,[19] the test is whether "'there is a sufficient *connection or similarity* between the independent offense or act and the crime charged so that proof of the former tends to prove the latter.'"[20] Thus, it is not just similar transactions that may be admissible; acts or transactions that are sufficiently *connected* to the charged offense may also be admissible.[21]

Generally, extrinsic act evidence is irrelevant and thus inadmissible.[22] Nevertheless, like the rule against hearsay, the rule against extrinsic act evidence is known more for its exceptions than its prohibition. The supreme court's decision in *Williams* likely sets forth the most cited test for the admission of extrinsic act evidence in Georgia.[23] The court in *Williams* held that the prosecution must prove three elements before similar transaction can be admitted.[24] First, the prosecution must prove the relevance of the independent transaction to a legitimate issue.[25] Second, the prosecution must prove that the defendant committed the independent offense or act.[26] Third, the prosecution must prove a sufficient connection or similarity between the prior act or offense and the charged offense.[27] The trial court must

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13. *See* O.C.G.A. § 24-2-2 (1995); FED. R. EVID. 404.
14. *E.g.*, Young v. State, 281 Ga. 750, 752, 642 S.E.2d 806, 808 (2007).
15. 281 Ga. 750, 642 S.E.2d 806 (2007).
16. *Id.* at 752, 642 S.E.2d at 808.
17. GA. UNIF. SUPER. CT. R. 31.3.
18. *Young*, 281 Ga. at 752, 642 S.E.2d at 808.
19. 261 Ga. 640, 409 S.E.2d 649 (1991).
20. *Young*, 281 Ga. at 752, 642 S.E.2d at 808 (quoting *Williams*, 261 Ga. at 642, 409 S.E.2d at 651 (emphasis added by court)).
21. *See id.*
22. *See* O.C.G.A. § 24-2-2; FED. R. EVID. 404.
23. *See generally Williams*, 261 Ga. at 642, 409 S.E.2d at 651.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*

then make a specific determination that the prosecution has carried its burden of proving each of these three elements.[28]

In *Young* the prosecution contended that the defendant killed the victim because the victim knew about the defendant's involvement in a previous murder. There was evidence that the pistol used in the first murder was also used in the second murder. Contending that evidence of the first murder was relevant similar transaction evidence, the prosecution gave notice, pursuant to Georgia Uniform Superior Court Rule 31.3,[29] of its intent to introduce evidence of the previous murder. The trial court applied the *Williams* test and concluded that the evidence did not meet the test's standards, apparently because the evidence was not sufficiently similar to the charged offense to be admissible as similar transaction evidence. However, the trial court ruled that the evidence was nevertheless admissible to prove the defendant's motive to commit the charged offense.[30] On interlocutory appeal, the supreme court concluded that although the trial court's analysis of the extrinsic act evidence was defective, the result was correct.[31] As discussed above, the question is whether the extrinsic act evidence is sufficiently similar *or* connected.[32] In *Young* the first murder was clearly not similar to the second murder, but according to the prosecution's theory, it was connected.[33] The court held that there was sufficient evidence to establish a connection between the two offenses because the defendant was allegedly concerned his victim might be a "snitch" and tell authorities about the defendant's involvement in the first murder.[34]

Although typically it is the prosecution that wants to introduce extrinsic act evidence, the defense sometimes seeks to introduce evidence of extrinsic conduct by victims. For example, in *McWilliams v. State*,[35] the defendant contended that the trial court should have admitted evidence of the alleged victim's history of illegal drug use and prostitution.[36] On appeal, the supreme court acknowledged that although the character of a murder victim is generally irrelevant, evidence of a propensity for violence on the part of a victim can be admissible to support the defense of justification.[37] However, the defendant did not

28. *Id.*
29. GA. UNIF. SUPER. CT. R. 31.3.
30. *Young*, 281 Ga. at 752, 642 S.E.2d at 808.
31. *Id.*
32. *Williams*, 261 Ga. at 642, 409 S.E.2d at 651.
33. 281 Ga. at 752-53, 642 S.E.2d at 808-09.
34. *Id.* at 753, 642 S.E.2d at 809.
35. 280 Ga. 724, 632 S.E.2d 127 (2006).
36. *Id.* at 725, 632 S.E.2d at 129.
37. *Id.*

claim justification, and therefore that exception to the general rule was not applicable.[38] What the defendant did contend was that the trial court improperly excluded evidence that the victim was under the influence of drugs and alcohol at the time of his death.[39] The defendant adduced evidence from an expert that the combination of alcohol and cocaine intoxication "in some people, produces strange behavior, including aggression."[40] The supreme court reasoned that this was sufficient to prove a causal connection between evidence of the victim's history of intoxication and the victim's behavior, and thus the evidence should have been admitted.[41] The error, however, was not prejudicial, and therefore the supreme court affirmed the defendant's conviction.[42]

Extrinsic act evidence can also be relevant in civil cases, although, perhaps ironically, courts seem more reluctant to admit extrinsic act evidence in civil cases than in criminal cases. It would seem that in criminal cases, when freedom and potentially life itself are at stake, the courts would be more circumspect in the admission of prejudicial extrinsic act evidence than in civil cases, which typically involve only monetary damages. There is, however, a logical basis for this dichotomy. Criminal cases typically concern intentional conduct and therefore raise issues such as motive, scheme, identity, or other state of mind issues. Thus, for example, proof that a defendant intentionally committed a similar offense may tend to identify him as the perpetrator of the charged offense. Civil cases, on the other hand, typically do not involve state of mind issues, but rather involve issues of negligence or other unintentional acts. The fact that someone was negligent on a prior occasion would prove nothing in a suit arising from a subsequent allegedly negligent act, except perhaps that the defendant was prone to be negligent, and propensity is generally not a permissible use of extrinsic act evidence. As in criminal cases, the issue in civil cases is whether the extrinsic act is relevant to some issue in the case.

Perhaps contrary to the general impression that it is more difficult to get extrinsic act evidence admitted in civil cases than in criminal cases, the court of appeals took an expansive view of the use of extrinsic act evidence in *Kellett v. Kumar*.[43] In *Kellett* the plaintiffs contended that the defendants breached fiduciary duties arising from the parties'

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38. *Id.* at 725-26, 632 S.E.2d at 129-30.
39. *Id.* at 726, 632 S.E.2d at 130.
40. *Id.*
41. *Id.*
42. *Id.* at 727, 632 S.E.2d at 130.
43. 281 Ga. App. 120, 635 S.E.2d 310 (2006).

nursing home partnership.[44] Over the defendants' objection, the trial court allowed the plaintiffs to cross-examine one defendant about a prior lawsuit in which it was alleged that he had breached fiduciary duties arising from a similar agreement involving another nursing home.[45] On appeal, the court of appeals acknowledged that extrinsic act evidence is generally inadmissible in civil cases.[46] However, the court noted that "'such evidence may under certain limited circumstances be admissible to establish, among other things, a course of conduct or bad faith.'"[47] With little discussion, other than noting that both cases involved similar allegations, the court of appeals held that the trial court "did not abuse its discretion by admitting the former case as evidence demonstrating [the defendant's] course of conduct."[48] Thus, it was permissible for the plaintiff to introduce allegations by a nonparty in a previous lawsuit to prove that the defendant engaged in similar acts in the pending lawsuit. This would seem to be a very relaxed standard for the admission of extrinsic act evidence whether in a civil case or a criminal case.

B. Prejudicial Impact vs. Probative Value

Although Georgia does not have a codified counterpart to Federal Rule of Evidence 403,[49] which permits a trial court to exclude relevant evidence if the prejudicial impact of that evidence outweighs its probative value, Georgia courts nevertheless recognize this principle, and trial judges have the discretion to exclude evidence on the ground that it is just too prejudicial to be admitted.[50]

In *Adkins v. State*,[51] the defendant understandably, but unsuccessfully, attempted to avail himself of this principle.[52] At the time of his arrest, the defendant, who was charged in a fatal drive-by shooting, had the remarkable misfortune to be wearing a hat which bore the phrase "'Fuck everybody.'"[53] Of course, the prosecution very much wanted the jury to be able to see the hat. Noting that the circumstances surrounding an arrest are admissible if relevant and that the defendant was

44. *Id.* at 121, 635 S.E.2d at 312.
45. *Id.* at 124, 635 S.E.2d at 314.
46. *Id.*
47. *Id.* (quoting Wood v. D.G. Jenkins Homes, Inc., 255 Ga. App. 572, 572, 565 S.E.2d 886, 888 (2002)).
48. *Id.* at 125, 635 S.E.2d at 314.
49. FED. R. EVID. 403.
50. For a discussion of this principle, see Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 187, 197-98 (2005).
51. 280 Ga. 761, 632 S.E.2d 650 (2006).
52. *See id.* at 763, 632 S.E.2d at 654.
53. *Id.*

wearing clothing similar to descriptions of clothing worn by the perpetrators, the supreme court held that the trial court could, in its discretion, either admit the evidence or, if the court thought it unduly prejudicial, exclude it.[54] Accordingly, the court did not abuse its discretion when it admitted the hat.[55]

C. *Miscellaneous Relevancy Issues*

On its face, the court of appeals decision in *Dees v. Logan*[56] is baffling.[57] Only if one knows the procedural posture of the case at trial, which unfortunately the court of appeals did not disclose in its opinion, does the holding make sense. In *Dees* the plaintiffs sued the driver of a car that struck their car. Because the defendant had only the minimal liability insurance coverage of $25,000, the plaintiffs also joined their underinsured motorist carrier as a party. Prior to trial, the plaintiffs entered into a settlement with the defendant's liability carrier pursuant to Official Code of Georgia Annotated ("O.C.G.A.") section 33-7-11(a)(1),[58] which allows a plaintiff to settle with a liability carrier and still pursue claims against his underinsured motorist carrier.[59] Under these circumstances, a plaintiff still has to prove that the tortfeasor was negligent and that this negligence proximately caused his or her damages.[60] However, under most policies, punitive damages cannot be recovered from an uninsured or underinsured motorist carrier.[61] In *Dees* the trial court granted the underinsured motorist carrier's motion in limine to exclude evidence that the defendant was intoxicated. After trial, the plaintiff appealed this ruling.[62] The court of appeals ruled that because punitive damages cannot be recovered from an uninsured or underinsured motorist carrier, evidence of the defendant's intoxication was not relevant.[63] Based on the information disclosed in the opinion,

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54. *Id.*
55. *Id.*
56. 281 Ga. App. 837, 637 S.E.2d 424 (2006), *rev'd on other grounds*, No. S0760290, 2007 WL 4124536, at *2 (Ga. Nov. 21, 2007).
57. *Dees* received much attention from the trial bar because of its holding on the right of an uninsured motorist carrier to offset a jury's verdict by amounts received by the plaintiff in workers' compensation and Social Security disability benefits. Nevertheless, the supreme court reversed the court of appeals on this issue. *Dees*, 2007 WL 4124536, at *2.
58. O.C.G.A. § 33-7-11(a)(1) (2000).
59. *Id.*; *Dees*, 281 Ga. App. at 837, 637 S.E.2d at 426.
60. *Dees*, 281 Ga. App. at 838, 637 S.E.2d at 426.
61. *Id.* at 839, 637 S.E.2d at 427.
62. *Id.* at 837, 637 S.E.2d at 426.
63. *Id.* at 838, 637 S.E.2d at 426.

the holding does not make sense. While evidence of intoxication is relevant to prove conduct that would support an award of punitive damages, it is also probative of negligence and thus clearly relevant in a negligence action. The opinion, as written, suggests that in negligence actions, evidence of the underinsured motorist's drunkenness is not admissible if the plaintiff settles with the underinsured motorist's liability carrier.

However, what was not in the opinion was that the underinsured motorist carrier admitted the defendant's negligence prior to trial. Thus, there was no issue of either negligence or willful misconduct. In light of this fact, the court of appeals opinion makes sense. Because the underinsured motorist carrier admitted the defendant's negligence and because the underinsured motorist carrier cannot be held responsible for punitive damages, the fact that the defendant was intoxicated was not relevant to any remaining issue in the case.

The court of appeals decision in *H.D. McCondichie Properties v. Georgia Department of Transportation*[64] may be as noteworthy for what it does not say as for what it does. In *McCondichie*, a condemnation action, the property owner subpoenaed one of the Department of Transportation ("D.O.T.") appraisers to testify at trial when the D.O.T. announced that it would not itself call the witness. The D.O.T. then moved in limine to prevent the property owner from eliciting testimony that the expert had originally been hired to provide by the D.O.T.[65] In a brief discussion, the court reasoned that the only relevant issue was appropriate compensation for the condemned property, and according to the court, the "issue of who hired a particular expert had nothing to do" with that issue.[66] Clearly, however, the property owner's intention was to bolster the credibility of the expert by establishing that the D.O.T. had first hired the expert. This would imply that the D.O.T. thought the expert was qualified to determine the value of the condemned property. However, none of this was mentioned in the court's opinion.

It is rare for an appellate court to reverse a defendant's conviction on the grounds that the trial court admitted irrelevant evidence. Either the court determines the trial court did not abuse its discretion when it admitted the evidence, or the court finds that the error, if any, was not prejudicial and thus harmless. The supreme court's decision in *Kell v. State*[67] is one of the few exceptions to this pattern. In *Kell* the defendant was charged with the murder of his landlord. On direct examina-

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64. 280 Ga. App. 197, 633 S.E.2d 558 (2006).
65. *Id.* at 197, 633 S.E.2d at 559.
66. *Id.* at 198, 633 S.E.2d at 559.
67. 280 Ga. 669, 631 S.E.2d 679 (2006).

tion by the prosecutor, the defendant's wife provided testimony corroborating the defendant's version of events. The defendant's wife denied that the defendant had threatened her or attempted to coerce her in letters he had written to her after his arrest. Subsequently, the prosecutor cross-examined the defendant's brother about allegations that the brother had assaulted the wife in order to retrieve the allegedly threatening letters. Apparently, the letters were never found. The prosecution argued that this evidence was admissible because it tended to prove that the defendant had attempted to influence the wife's testimony.[68]

On appeal, the supreme court acknowledged that evidence of a defendant's attempt to intimidate a witness is relevant because it provides circumstantial evidence of guilt.[69] Even if there is no evidence that a defendant himself coerced or attempted to coerce a witness, evidence of coercion can still be relevant if the prosecution can show that the coercion was done with a defendant's authorization.[70] Here, however, the supreme court held there was neither evidence that the defendant authorized his brother's alleged attempt to influence the wife's testimony nor was there evidence that the defendant authorized his brother to retrieve the incriminating letters.[71] According to the court, the mere fact that they were siblings was not sufficient to establish that the brother was acting with the defendant's authorization.[72] The prosecution, however, argued that even in the absence of evidence of authorization, the evidence was nevertheless relevant because it still tended to show that the wife, as a result of the intimidation, testified falsely. Thus, even though there was no evidence that the defendant authorized the coercion, the prosecution still contended that it could argue that the wife's testimony was false as a result of coercion.[73] The court pointed out two problems with this argument. First, there was no evidence that the altercation between the brother and the wife had anything to do with the wife's testimony.[74] Second, in closing, the prosecution did not limit its argument to its contention that the wife's testimony was false; rather, the prosecution specifically argued that the defendant and his family had tampered with the evidence by coercing

68. *Id.* at 670-71, 631 S.E.2d at 680-81.
69. *Id.* at 671, 631 S.E.2d at 681.
70. *Id.*
71. *Id.* at 672, 631 S.E.2d at 681-82.
72. *Id.*
73. *Id.*, 631 S.E.2d at 682.
74. *Id.*

the wife and destroying the allegedly threatening letters.[75] However, because there was absolutely no evidence that the letters contained threats, the court held that the evidence of the brother's altercation with the wife over the allegedly threatening letters was not relevant and the admission of that evidence, and the State's argument about that evidence, prejudiced the defendant, particularly in view of the circumstantial nature of the case against the defendant.[76]

III. WITNESSES

A. *Impeachment With Evidence of Convictions*

Among other things, the Criminal Justice Act of 2005[77] enacted O.C.G.A. section 24-9-84.1,[78] which largely adopted Federal Rule of Evidence 609[79] regarding the use of convictions to impeach witnesses. Although prior Georgia law governing the use of convictions to impeach witnesses, which had never been codified, was similar to the new O.C.G.A. section 24-9-84.1, there are at least two significant differences. First, O.C.G.A. section 24-9-84.1, like Rule 609, prohibits the use of a conviction that is more than ten years old unless the court determines that the probative value of the conviction substantially outweighs its prejudicial effect.[80] Prior Georgia law had no such temporal limitation. In *Hinton v. State*,[81] the trial court ruled that the defendant could not impeach two prosecution witnesses with evidence of their convictions because the convictions were more than ten years old. On appeal from his conviction, the defendant contended that this limitation on his right to confront his witnesses violated his Sixth Amendment rights and his right under Georgia law to a thorough and sifting cross-examination.[82] The supreme court, noting that O.C.G.A. section 24-9-84.1(b) was identical to Rule 609(b), cited federal authority concluding that convictions over ten years old generally do not have significant probative value.[83] Moreover, the statute did not conclusively bar all such convictions but allowed a trial judge to admit older convictions if "'the

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75. *Id.* at 672-73, 631 S.E.2d at 682.
76. *Id.* at 673, 631 S.E.2d at 682.
77. Ga. H.R. Bill 170, Spec. Sess. (2005).
78. O.C.G.A. § 24-9-84.1 (Supp. 2007).
79. FED. R. EVID. 609.
80. O.C.G.A. § 24-9-84.1(b); FED. R. EVID. 609(b).
81. 280 Ga. 811, 631 S.E.2d 365 (2006).
82. *Id.* at 818-19, 631 S.E.2d at 373.
83. *Id.* at 819, 631 S.E.2d at 373 (citing United States v. Cathey, 591 F.2d 268, 275 (5th Cir. 1979)).

probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.'"[84] Given the likelihood that older convictions have little probative value and the fact that probative convictions could, in the discretion of the trial court, still be admitted, the supreme court held that the prohibition of O.C.G.A. section 24-9-84.1(b) against the use of convictions more than ten years old did not violate the defendant's constitutional rights.[85]

The second significant difference between O.C.G.A. section 24-9-84.1 and prior Georgia law involves the nature of crimes that can be used as evidence to impeach a witness. Under prior Georgia law, a witness could be impeached by evidence of a felony conviction or a misdemeanor conviction involving "moral turpitude."[86] Under the new law, a witness, other than a criminal defendant, can be impeached with evidence of a conviction punishable by death or imprisonment of one year or more—essentially a felony—and with evidence of conviction of any crime, regardless of the punishment, if the crime involves "dishonesty or making a false statement."[87]

The court of appeals decision in *Adams v. State*[88] highlights the difference between a crime of moral turpitude and a crime of dishonesty or false statement. In *Adams* the defendant claimed that the trial court erred when it allowed the prosecution to impeach his credibility with a misdemeanor conviction for theft by receiving stolen property. Because the case was tried after the effective date of O.C.G.A. section 24-9-84.1, the defendant contended that the conviction was not admissible because it did not involve dishonesty or making a false statement.[89] The court acknowledged that under prior Georgia law, crimes such as theft and shoplifting were considered crimes of moral turpitude and thus such misdemeanor convictions could be used to impeach a witness.[90] However, the court reasoned, if the Georgia General Assembly had "intended for the new law to be applied in the same manner as the existing law, it seems logical that it would have used the same language."[91] Consequently, the court endeavored to determine exactly what constituted a crime of dishonesty or false statement under the new O.C.G.A. section 24-9-84.1.[92]

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84. *Id.*, 631 S.E.2d at 374 (quoting O.C.G.A. § 24-9-84.1(b)).
85. *Id.* at 819-20, 631 S.E.2d at 374.
86. *E.g.*, Mullins v. Thompson, 274 Ga. 366, 366, 533 S.E.2d 154, 155 (2001).
87. O.C.G.A. § 24-9-84.1(a)(3).
88. 284 Ga. App. 534, 644 S.E.2d 426 (2007).
89. *Id.* at 537, 644 S.E.2d at 430.
90. *Id.* at 539, 644 S.E.2d at 432.
91. *Id.*
92. *Id.* at 540, 644 S.E.2d at 432.

Turning to federal case law interpreting Rule 609(a)(2), the court noted that the Eleventh Circuit Court of Appeals made clear that crimes such as theft, robbery, or shoplifting were not crimes involving dishonesty or making a false statement within the meaning of Rule 609.[93] Similarly, looking at the conference committee notes on Rule 609,[94] the former Fifth Circuit held that crimes of dishonesty and false statement included "'crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.'"[95] The court of appeals concluded that the focus in federal courts was on the witness's propensity for dishonesty while testifying.[96] However, the court acknowledged that some states that had adopted Rule 609 had not always agreed with the federal courts' interpretation of what constituted crimes of dishonesty and false statement.[97] Again, however, the court reasoned that if the General Assembly had intended Georgia law to remain unchanged, it would not have used different language to describe the types of misdemeanors that could be used to impeach a witness.[98] Indeed, the court noted, the Georgia Supreme Court in *Hinton* had turned to federal law to assist in its interpretation of O.C.G.A. section 24-9-84.1.[99] Accordingly, the court concluded that in Georgia, as in federal courts, a misdemeanor conviction for theft by receiving stolen property is not a crime involving dishonesty within the meaning of O.C.G.A. section 24-9-84.1(a)(3) and that the trial court erred when it allowed the prosecution to impeach the defendant with a conviction of that crime.[100] Alas, however, the court concluded that the error was harmless.[101]

In *Todd v. Byrd*,[102] the court of appeals addressed a factual scenario that will rarely be encountered, but when it is, the court's decision may provide clear guidance. In *Todd* the defendant submitted a deposition transcript of its employee in support of a motion for summary judgment.

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93. *Id.* at 537, 644 S.E.2d at 430 (citing United States v. Ashley, 569 F.2d 975, 979 (Former 5th Cir. 1978)).

94. FED. R. EVID. 609 conference committee's note.

95. *Adams*, 284 Ga. App. at 538, 644 S.E.2d at 430 (quoting H.R. REP. NO. 93-1597 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7103).

96. *Id.*, 644 S.E.2d at 431.

97. *Id.* at 539, 644 S.E.2d at 431-32.

98. *Id.*, 644 S.E.2d at 432.

99. *Id.* at 540, 644 S.E.2d at 432.

100. *Id.*

101. *Id.* at 541, 644 S.E.2d at 433.

102. 283 Ga. App. 37, 640 S.E.2d 652 (2006).

In an apparent effort to impeach the deposition testimony of the employee, the plaintiff tendered evidence of the employee's conviction, subsequent to her deposition testimony, for obstructing a law enforcement officer. On appeal, the defendant contended that the trial court erred when it refused to rule on its motion to strike evidence of the conviction.[103] It is likely that the trial court did not rule on the motion because it did not see a need to waste judicial resources addressing an issue of witness credibility in the context of ruling on a motion for summary judgment, given that credibility issues have no bearing on summary judgment rulings.

Nevertheless, the defendant felt it necessary to raise this issue on appeal, and perhaps surprisingly, the court of appeals addressed the issue even though it conceded "that in most instances it would be impossible practically for a witness to be impeached by a conviction occurring after the witness testifies."[104] While the court acknowledged that in common parlance courts have held that witnesses may be impeached with "'prior convictions,'" there is no express limitation in O.C.G.A. section 24-9-84.1 to *prior* convictions.[105] Therefore, in the unlikely event that a witness testifies, and subsequent to his testimony he is convicted of a crime, the witness can be impeached with the subsequent conviction.[106]

Actually, situations in which the court's holding in *Todd* can be applied may be more common than the court realized. More and more frequently, the testimony of witnesses is preserved prior to trial by videotaped depositions. In such a case, if the witness is convicted of a felony or a crime involving dishonesty or making a false statement subsequent to his deposition, then when the deposition is used at trial, the conviction, pursuant to the court's holding in *Todd*, can be used to impeach the witness's videotaped deposition testimony.

B. Prior Statements By Witnesses

Georgia has two rather unique rules regarding the admissibility of prior statements by witnesses, rules that implicate both impeachment

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103. *Id.* at 48, 640 S.E.2d at 661-62.

104. *Id.*, 640 S.E.2d at 662. Judge Andrews, in an opinion dissenting from the majority's ruling on this issue, noted that the issue, involving as it did matters of evidence at trial, was not a factor in the court's summary judgment ruling and thus should not have been considered by the court of appeals. *Id.* at 53, 640 S.E.2d at 665 (Andrews, J., dissenting).

105. *Id.* at 48, 640 S.E.2d at 662 (majority opinion).

106. *See id.*

and hearsay principles. First, in *Gibbons v. State*,[107] the supreme court held that prior inconsistent statements of a witness are admissible as substantive evidence if the witness is subject to cross-examination.[108] Second, pursuant to *Cuzzort v. State*,[109] a prior consistent statement is admissible as substantive evidence if the witness is present at trial and is subject to cross-examination.[110] However, the supreme court somewhat weakened the rule established in *Cuzzort* when it held in *Woodard v. State*[111] that prior consistent statements can be admitted only when the veracity of the witness who made the statement has been placed at issue.[112]

The significance of the fact that prior statements can be admitted as substantive evidence, instead of merely for impeachment purposes, is illustrated by the court of appeals decision in *Meeks v. State*.[113] In *Meeks* the defendant contended that there was insufficient evidence to support his conviction for assaulting his mother. At trial, the victim testified that she did not remember her son beating her. The State then introduced evidence of her prior statement to law enforcement officers, which confirmed that the defendant had beaten her. The defendant contended that this "impeachment" evidence could not support the jury's guilty verdict.[114] The court of appeals disagreed, reaffirming well-established authority—such as *Gibbons*—that a prior inconsistent statement can be used as substantive evidence upon which the jury can rely in reaching its verdict.[115]

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107. 248 Ga. 858, 286 S.E.2d 717 (1982).
108. *Id.* at 862, 286 S.E.2d at 721.
109. 254 Ga. 745, 334 S.E.2d 661 (1985).
110. *Id.* at 745-46, 334 S.E.2d at 662-63.
111. 269 Ga. 317, 496 S.E.2d 896 (1998).
112. *Id.* at 319-20, 496 S.E.2d at 899.
113. 281 Ga. App. 334, 636 S.E.2d 77 (2006).
114. *Id.* at 335, 636 S.E.2d at 79.
115. *Id.* at 336-37, 636 S.E.2d at 80; *see also* Cummings v. State, 280 Ga. 831, 632 S.E.2d 152 (2006) (holding that the defendant was not entitled to an instruction by the trial court to the jury that a witness's prior inconsistent statement could be considered only for purposes of impeachment). In both *Meeks* and *Cummings* the appellate courts held that it is not necessary that the witness actually deny the truth of the prior statement. *Meeks*, 281 Ga. App. at 336-37, 636 S.E.2d at 80; *Cummings*, 280 Ga. at 832, 632 S.E.2d at 154. It is sufficient, as in *Meeks*, if the witness claims that she does not remember making the prior statement or, as in *Cummings*, if the witness disputes the truth of the statement rather than denying making the statement. *Meeks*, 281 Ga. App. at 336-37, 636 S.E.2d at 80; *Cummings*, 280 Ga. at 882, 632 S.E.2d at 154.

C. Cross-Examination

Georgia law guarantees litigants the right to a "thorough and sifting cross-examination."[116] Of course, the confrontation clause of the Sixth Amendment guarantees a criminal defendant the right to confront the witnesses testifying against him.[117] The court of appeals reinforced these valuable rights during the survey period in *Wright v. State*.[118] In *Wright* the defendant contended that he should have been allowed to cross-examine a prosecutor during a hearing on the defendant's contention that a second trial on the charges against him was barred by the doctrine of double jeopardy.[119] The defendant's first trial ended in a mistrial after the prosecutor elicited improper testimony. The prosecution argued that double jeopardy had not attached because the first trial ended as a result of the defendant's motion for mistrial.[120] The defendant responded that the prosecutor "deliberately goaded" the defendant's lawyer into moving for a mistrial by eliciting improper testimony.[121] At the hearing on the defendant's motion to bar further prosecution, the trial court refused to allow the defendant to cross-examine the prosecutor. However, the trial court allowed the prosecutor to explain, by stating in her place, the reasons she asked the question that led to the improper testimony. Based on this, and taking into account the prosecutor's experience, the trial court concluded that the prosecutor's question was not improper and thus the prosecution did not goad the defendant into moving for a mistrial.[122] The court of appeals held this to be error.[123] According to the court, "statements in place" by an attorney constitute evidence.[124] Clearly, the trial court relied on the prosecutor's statement to support its decision to deny the defendant's double jeopardy plea.[125] Consequently, the trial court's refusal to allow the defendant to cross-examine the prosecutor denied the defendant the right to confront witnesses offering testimony against him.[126]

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116. O.C.G.A. § 24-9-64 (1995).
117. U.S. CONST. amend. VI.
118. 284 Ga. App. 169, 643 S.E.2d 538 (2007).
119. *Id.* at 170, 643 S.E.2d at 539-40; O.C.G.A. § 16-1-8(a) (2007).
120. *Wright*, 284 Ga. App. at 170, 643 S.E.2d at 539-40.
121. *Id.*, 643 S.E.2d at 540.
122. *Id.* at 171, 643 S.E.2d at 540.
123. *Id.*, 643 S.E.2d at 541.
124. *Id.*, 643 S.E.2d at 540 (citing Ga. Bldg. Servs., Inc. v. Perry, 193 Ga. App. 288, 300, 387 S.E.2d 898, 908 (1989)).
125. *Id.*
126. *Id.*

IV. OPINION TESTIMONY

As discussed in the previous two articles in Mercer Law Review's *Annual Survey of Georgia Law*,[127] in 2005 the Georgia General Assembly enacted O.C.G.A. section 24-9-67.1[128] as part of "tort reform" legislation, adopting, more or less, the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[129] which in turn has been codified as Federal Rule of Evidence 702.[130] It is common for Georgia lawyers when referring to new O.C.G.A. section 24-9-67.1 to say simply *Daubert* or the *Daubert* statute. However, it is beginning to become evident that Georgia courts are not applying Georgia's *Daubert* statute in quite the same way that federal courts have interpreted and applied *Daubert*.

The first question in Georgia *Daubert* analysis is whether O.C.G.A. section 24-9-67.1 applies at all. For reasons likely having more to do with politics than anything else, and certainly not for any stated reason, the General Assembly exempted criminal cases from O.C.G.A. section 24-9-67.1.[131] Then, in its 2006 session, the General Assembly exempted most condemnation cases from the scope of O.C.G.A. section 24-9-67.1.[132] Thus, for purposes of this Article, criminal and civil cases involving expert testimony issues must be addressed separately.

Apart from the confusion created by the application of O.C.G.A. section 24-9-67.1 to some types of cases but not to others, the statute is internally inconsistent in at least one respect. Subsection (a) authorizes an expert to give an opinion even if the facts and data supporting the opinion are not admissible, while subsection (b)(1) requires that the expert's opinion be based on facts that will be admitted into evidence.[133] Although Georgia's appellate courts have not addressed this issue, at least one trial court has resolved the conflict by striking the requirement in O.C.G.A. section 24-9-67.1(b)(1) that an expert's opinions must be based on facts that will be admitted into evidence.[134]

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127. Marc T. Treadwell, *Evidence*, 58 MERCER L. REV. 151, 165-67 (2006); Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 187, 204-05 (2005).

128. O.C.G.A. § 24-9-67.1 (Supp. 2007).

129. 509 U.S. 579 (1993).

130. FED. R. EVID. 702; 2005 Ga. Laws 1, § 7.

131. O.C.G.A. § 24-9-67.1(a).

132. O.C.G.A. § 22-1-14(b) (Supp. 2007); 2006 Ga. Laws 39, § 5.

133. O.C.G.A. § 24-9-67.1(a)-(b)(1).

134. Mason v. Home Depot U.S.A., Inc., No. 97-A-5105-1 (St. Ct. of Cobb County Aug. 6, 2006).

The irony of applying *Daubert* in civil cases but not in criminal cases is illustrated by the court of appeals decision in *Carlson v. State*.[135] In *Carlson* the trial court revoked the defendant's probation after a test on a substance found in the defendant's possession suggested that the substance was marijuana. On appeal, the defendant contended that the test results should have been excluded because the person performing the test was not qualified to testify as an expert under O.C.G.A. section 24-9-67.1. Acknowledging that O.C.G.A. section 24-9-67.1 applies only to civil cases, the defendant argued that probation cases were civil in nature and thus subject to the new statute.[136] The court of appeals disagreed.[137]

The court of appeals acknowledged authority suggesting that probation cases are "'somewhat . . . of a civil nature.'"[138] The court, however, was not persuaded by this authority because the court had previously held in 2004 that the long established *Harper v. State*[139] test for the admissibility of expert testimony applied to probation proceedings.[140] The court's point is unclear; prior to the enactment of O.C.G.A. section 24-9-67.1 in 2005, the *Harper* test governed the admissibility of expert testimony in all cases—civil and criminal. Thus, in 2004 *Harper* would have applied to probation proceedings regardless of whether such proceedings were considered criminal or civil. Nevertheless, in *Carlson* the court held, as a matter of first impression, that Georgia's *Daubert* statute does not apply to probation proceedings.[141] Thus, no criminal defendants, including those in probation proceedings, can enjoy the "protection" afforded civil litigants by O.C.G.A. section 24-9-67.1.[142]

Speaking of the *Harper* test and of expert testimony in probation proceedings, in *Mann v. State*,[143] the court of appeals faced the question of whether the Roche "On Track" drug test had reached a scientific state of verifiable certainty, making it admissible pursuant to *Harper*. In *Mann* the trial court revoked the defendant's probation based on

135. 280 Ga. App. 595, 634 S.E.2d 410 (2006).

136. *Id.* at 596, 634 S.E.2d at 412.

137. *Id.* at 598, 634 S.E.2d at 414.

138. *Id.*, 634 S.E.2d at 413 (alteration in original) (internal quotation marks omitted) (quoting Sellers v. State, 107 Ga. App. 516, 518, 130 S.E.2d 790, 791 (1963)).

139. 249 Ga. 519, 292 S.E.2d 389 (1982).

140. Grinstead v. State, 269 Ga. App. 820, 821-22, 605 S.E.2d 417, 419 (2004); *see also* Marc T. Treadwell, *Evidence*, 55 MERCER L. REV. 249, 260 (2003) (explaining the *Harper* test).

141. *Carlson*, 280 Ga. App. at 598, 634 S.E.2d at 414.

142. *See id.*

143. 285 Ga. App. 39, 645 S.E.2d 573 (2007).

evidence of a positive On Track test result.[144] Pursuant to the *Harper* test, a trial court's determination with regard to whether a test or principle has reached a scientific state of verifiable certainty can be based on several things,, including evidence admitted at trial, learned treatises, or the rationale of cases in other jurisdictions.[145] With regard to recognition by other courts of a test's scientific status, a judge may judicially notice decisions of other courts on the issue.[146] However, one case is not enough.[147]

This issue—the admissibility of On Track results—is one with which the court of appeals has had some experience in recent years. In *Grinstead v. State*,[148] discussed in Mercer Law Review's 2005 *Annual Survey of Georgia Law*,[149] the defendant contended that the trial court abused its discretion when it admitted the positive results of the On Track test. In *Grinstead* the probation officer who administered the test admitted on cross-examination that he did not have the expertise to testify about the accuracy of the test. Applying the *Harper* test, the trial court relied on *Cheatwood v. State*[150] to conclude that the On Track test had reached a stage of scientific certainty.[151] However, the court of appeals in *Grinstead* noted that in *Cheatwood* the test had been used to determine the presence of marijuana and cocaine, not morphine and methamphetamine, which were the drugs at issue in *Grinstead*.[152] Accordingly, the court held that there was not sufficient evidence in *Grinstead* to establish the scientific reliability of the On Track test.[153]

In *Mann* the trial court also relied on *Cheatwood* to admit the positive On Track result.[154] In *Cheatwood* there was expert testimony supporting the reliability of the On Track test.[155] Pretermitting the question of whether *Cheatwood*, standing alone, could have provided the trial court in *Mann* with some support for its decision to admit the test results, the court of appeals held that the trial court did not properly

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144. *Id.* at 39, 645 S.E.2d at 574.
145. *Id.* at 41, 645 S.E.2d at 576.
146. *Id.*
147. *Id.* (citing Grinstead v. State, 269 Ga. App. 820, 605 S.E.2d 417 (2004)).
148. 269 Ga. App. 820, 605 S.E.2d 417 (2004).
149. Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 187, 208 (2005).
150. 248 Ga. App. 617, 548 S.E.2d 384 (2001).
151. *Grinstead*, 269 Ga. App. at 821, 605 S.E.2d at 418.
152. *Id.* at 823, 605 S.E.2d at 419-20.
153. *Id.*, 605 S.E.2d at 420.
154. 285 Ga. App. at 41, 645 S.E.2d at 576. *Cheatwood* was discussed by the author in Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 187, 208-09 (2005).
155. 248 Ga. App. at 620, 548 S.E.2d at 387.

take judicial notice of *Cheatwood*.[156] Before a court can take judicial notice, certain formalities are required, including the requirement that the court notify the parties of its intention to take judicial notice and provide them with an opportunity to be heard on the issue.[157] Because the trial court failed to notify the parties, *Cheatwood* was not properly before the court.[158] Thus, there was no evidence admissible to establish that the On Track test had reached a scientific state of verifiable certainty; therefore, the trial court erred when it considered the results of the test in determining whether the defendant's probation should have been revoked.[159]

Perhaps the most significant decision involving O.C.G.A. section 24-9-67.1 during the survey period was *Cotten v. Phillips*.[160] In *Cotten* the plaintiff contended that his orthopedic surgeon negligently failed to recognize a post-surgical vascular problem, and as a result, the plaintiff's leg was amputated. When the plaintiff filed his lawsuit, he attached an affidavit, as required by O.C.G.A. section 9-11-9.1,[161] of a physician attesting to at least one act of negligence on the part of the defendant. However, the physician who gave the affidavit was a vascular surgeon, not an orthopedic surgeon. The defendant contended that under O.C.G.A. section 24-9-67.1, a vascular surgeon is not qualified to opine on whether an orthopedic surgeon has met the standard of care.[162] Specifically, the defendant relied on the requirement of O.C.G.A. section 24-9-67.1 that "'[i]n the case of a medical malpractice action, [an expert must have] actual professional knowledge and experience *in the area of practice or specialty in which the opinion is to be given*.'"[163] The trial court concluded that O.C.G.A. section 24-9-67.1 did not impose a strict specialty requirement for experts but rather recognized the potential overlap of specialty or practice areas. Thus, even though the defendant was an orthopedic surgeon, the issue was what should have been done in view of the plaintiff's vascular issues, and a vascular surgeon was qualified to render opinions on that issue.[164]

The court of appeals agreed.[165] Looking at the limited legislative history available, the court concluded that the trial court's interpretation

156. 285 Ga. App. at 41-43, 645 S.E.2d at 576-77.
157. *Id.* at 42, 645 S.E.2d at 576.
158. *Id.*, 645 S.E.2d at 577.
159. *Id.* at 42-43, 645 S.E.2d at 577.
160. 280 Ga. App. 280, 633 S.E.2d 655 (2006).
161. O.C.G.A. § 9-11-9.1 (2007).
162. *Cotten*, 280 Ga. App. at 282, 633 S.E.2d at 657.
163. *Id.* (quoting O.C.G.A. § 24-9-67.1(c)(2)).
164. *Id.* at 283, 633 S.E.2d at 657.
165. *Id.*, 633 S.E.2d at 657-58.

of O.C.G.A. section 24-9-67.1 was consistent with the General Assembly's intent.[166] The court noted that the General Assembly rejected a proposed amendment to the statute that would have imposed a strict specialty requirement.[167] Additionally, the court of appeals noted that the General Assembly, when it enacted O.C.G.A. section 24-9-67.1, specifically instructed Georgia courts to take into account *Daubert* and its progeny when interpreting the new statute.[168] In what may have been a gentle tweak at the General Assembly in response to this legislative direction to follow *Daubert* and thus presumably tighten the rules on expert testimony, the court noted that federal courts applying *Daubert* had rejected a strict specialty requirement.[169] Therefore, because the area of practice in issue was vascular, the vascular surgeon was qualified to render an opinion on whether the orthopedic surgeon breached the standard of care.[170]

The court of appeals returned to this issue in *MCG Health, Inc. v. Barton*.[171] In *MCG Health*, the plaintiffs claimed that the defendants' urologists were negligent when they failed to timely treat an injury to the plaintiffs' son's testicle. The plaintiffs attached to their complaint an affidavit from an emergency room physician who testified that the urologists were negligent because they failed to recognize and timely treat the injury. After discovery, the defendant moved to exclude from evidence any testimony by the emergency room physician that the urologists breached the standard of care.[172] The trial court denied the motion, and the court of appeals granted the defendants' application for interlocutory review.[173] Citing *Cotten* the court of appeals affirmed.[174] The court noted that the plaintiffs' expert contended that the urologists were negligent because they failed to appreciate the emergent nature of the injury.[175] Specifically, the expert testified that salvaging the testicle required expedited treatment and that a patient presenting to an emergency room with acute scrotal pain must receive diagnostic treatment as soon as possible to rule out the possibility of

166. *Id.* at 283-84, 633 S.E.2d at 658.
167. *Id.* at 284-85, 633 S.E.2d at 658.
168. *Id.* at 286, 633 S.E.2d at 659 (citing O.C.G.A. § 24-9-67.1(f)).
169. *Id.*
170. *Id.*; *see also* Abramson v. Williams, 281 Ga. App. 617, 619, 636 S.E.2d 765, 767 (2006) (holding that an orthopedist was qualified to give expert testimony in support of a medical malpractice action against a neurologist).
171. 285 Ga. App. 577, 647 S.E.2d 81 (2007).
172. *Id.* at 580, 647 S.E.2d at 84.
173. *Id.*
174. *Id.* at 582, 647 S.E.2d at 86.
175. *Id.* at 584, 647 S.E.2d at 87.

testicular torsion. Although the defendants were urologists, the issue was not one of urological surgery, but rather whether the urologist acted timely when the plaintiffs' son presented to the emergency room.[176]

In *MCG Health*, the defendants, in addition to attacking the sufficiency of the plaintiffs' standard of care expert testimony, also challenged the plaintiffs' expert testimony on causation under O.C.G.A. section 24-9-67.1.[177] Some would argue that the brunt of *Daubert* has been most strongly felt on causation issues, a point that can be illustrated by the Eleventh Circuit's decision in *McDowell v. Brown*.[178] In *McDowell* the plaintiff claimed that he had been permanently injured by the defendants' failure to timely refer him for treatment of a spinal abscess.[179] Although the Eleventh Circuit held that the plaintiff's experts were qualified to testify on the issue of causation, the court decided that the experts' specific testimony that the plaintiff was injured as a result of the delay in treatment was not sufficiently reliable to satisfy *Daubert* because the experts could not cite specific studies supporting their causation opinions.[180] For example, one expert relied on a study addressing forty-eight hour delays in treatment.[181] Because the delay in the plaintiff's treatment was twenty-four hours and not forty-eight, the court held that the forty-eight hour delay studies could not be used to support the expert's testimony about the consequences of a twenty-four hour delay in treatment.[182] Moreover, the plaintiff's experts had not tested their theories or determined any error rates associated with their theories.[183]

In short, the Eleventh Circuit mechanically applied the standard *Daubert* analysis, requiring methodologies supported by peer reviewed studies and proven error rates.[184] The Eleventh Circuit did not address how the plaintiff could have obtained scientific studies demonstrating that a twenty-four hour delay in the treatment of a spinal cord abscess could cause injury, and it is doubtful that there are studies to cover every conceivable aspect of medicine. It would seem, rather, that perhaps based on studies addressing similar but not identical

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176. *See id.*, 647 S.E.2d at 88.

177. *Id.* at 583, 647 S.E.2d at 87.

178. 392 F.3d 1283 (11th Cir. 2004). For a more detailed discussion of *Brown*, see Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 187, 206-07 (2005); Marc T. Treadwell, *Evidence*, 56 MERCER L. REV. 1273, 1283-84 (2004).

179. 392 F.3d at 1285.

180. *Id.* at 1301-02.

181. *Id.* at 1299.

182. *Id.* at 1300.

183. *Id.*

184. *See id.* at 1298-1300.

situations, physicians with appropriate experience can reliably opine that the failure to timely treat a condition will likely result in injury or additional injury. In the Eleventh Circuit, it appears they cannot.[185]

In *MCG Health*, the defendant raised an argument similar to that raised by the defendant in *McDowell*.[186] The plaintiffs' expert testified that if testicular torsion is not treated within twelve hours from the time the patient first begins experiencing symptoms, "the chances of salvaging the testicle become more remote."[187] The defendant contended that because its urologists did not examine the plaintiffs' child until nearly eleven hours after his injury, the plaintiffs' expert testimony did not sufficiently establish that if treatment had been commenced at an earlier point, the testicle could have been saved.[188] The court of appeals noted, however, that there was evidence from the defendant's own chief of urology that there is a fifty percent chance of salvaging some testicular function up to twelve hours after the injury.[189] Similarly, the defendants argued that because the plaintiffs' expert could not testify about what exact point the testicle became unsalvageable, the testimony that earlier treatment likely would have salvaged some testicular function was too speculative; the court of appeals rejected that argument as well.[190]

Had the Georgia Court of Appeals analyzed these issues as the Eleventh Circuit did in *McDowell*, the court likely would have questioned whether there were peer reviewed studies and methodologies with acceptable error rates establishing that treatment at one point rather than treatment at another point more likely than not would have changed the outcome. The Georgia Court of Appeals, however, chose a more traditional analysis, at least more traditional in Georgia law.[191] Given that the expert testimony was in dispute, the court concluded that the defendant's arguments about the sufficiency of that expert testimony "'are better made to a jury, not to an appellate court considering a summary judgment order.'"[192] With regard to the argument that the plaintiffs' expert's inability to place the exact point at which the testicle

185. *See id.*
186. *MCG Health*, 285 Ga. App. at 580, 647 S.E.2d at 84.
187. *Id.* at 582, 647 S.E.2d at 86.
188. *Id.*
189. *Id.*
190. *Id.* at 583, 647 S.E.2d at 87.
191. *See generally id.* at 582-84, 647 S.E.2d at 86-88.
192. *Id.* at 583, 647 S.E.2d at 86 (quoting Wasdin v. Mager, 274 Ga. App. 885, 889, 619 S.E.2d 384, 387 (2005)).

was beyond salvage, the court simply held that this did not render the expert's testimony mere speculation.[193]

That is not say, however, that Georgia's appellate courts will not carefully scrutinize expert testimony as required by O.C.G.A. section 24-9-67.1. In *Smith v. Liberty Chrysler-Plymouth Dodge, Inc.*,[194] the plaintiff sought to recover for injuries he suffered in an automobile accident. The plaintiff claimed that the accident was caused by a defect in his vehicle, specifically, a loose tie rod that caused him to lose control of the vehicle. To support his claim, the plaintiff relied on two experts. The first expert was the plaintiff's son-in-law who had some training as an accident reconstructionist. The second expert was an experienced, although not certified, mechanic who had no training in accident reconstruction. The defendants moved for summary judgment contending that the plaintiff's experts' testimony was insufficient to establish that any defect in the car caused the plaintiff's injuries. The trial court granted the motion, and the plaintiff appealed.[195] The court first determined that the "relevant area of expertise in this case includes not only accident reconstruction, but also knowledge of a vehicle's mechanics and the role of a mechanical failure in the cause of an accident."[196] The court determined that neither of the plaintiff's experts were qualified to render an opinion in this area.[197] Although the plaintiff's son-in-law had experience with some aspects of accident reconstruction, he did not have sufficient knowledge or experience to determine whether a mechanical failure in a vehicle could cause a driver to lose control.[198] Although the second expert was an experienced mechanic, he had no experience in accident reconstruction or analyzing and determining the consequences of a mechanical failure.[199] Because neither expert was qualified to testify that a loose tie rod could have caused the plaintiff to lose control of the vehicle, the trial court did not err when it granted the defendant's motion for summary judgment.[200]

Georgia law has long held that expert opinion is not admissible when the issue is one that the jury can understand by themselves. This principle was tested during the survey period in *Hadden v. ARE Properties, LLC.*[201] In *Hadden* the widow of a hunter who had been

193. *Id.* at 583-84, 647 S.E.2d at 87.
194. 285 Ga. App. 606, 647 S.E.2d 315 (2007).
195. *Id.* at 606-07, 647 S.E.2d at 316-17.
196. *Id.* at 608, 647 S.E.2d at 318.
197. *Id.* at 609, 647 S.E.2d at 318.
198. *Id.*
199. *Id.*
200. *Id.*, 647 S.E.2d at 319.
201. 280 Ga. App. 314, 633 S.E.2d 667 (2006).

accidentally shot sought to recover damages from the hunting club where the shooting occurred. In support of her claim, the widow offered the affidavit testimony of an expert on the standard of care required of hunters and hunting club owners and operators. The trial court apparently did not rely on the affidavit, instead ruling that the decedent was a mere licensee and that the undisputed evidence failed to establish a breach of any duty owed to a licensee.[202] Exercising de novo review, the court of appeals concluded that the affidavit was inadmissible.[203] The court held that the standard of care of hunters and hunting clubs was not a matter beyond the ken of jurors and that expert testimony would be unnecessary to assist jurors in their determination of the issues.[204] In short, the court determined that jurors were competent to decide whether hunters and hunting clubs exercised ordinary care.[205]

Judge Barnes, however, was uncomfortable with the majority's consideration of the affidavit, which she found unnecessary.[206] She agreed that the decedent was a licensee and that the case could be decided on that issue alone.[207] Noting that the two cases cited by the majority in support of its holding that the affidavit was inadmissible were physical precedent only, she pointedly noted that her special concurrence made *Hadden* a mere physical precedent as well, a case that could "not be cited as binding precedent."[208]

Finally, several decisions addressing opinion testimony merit brief note. In *Nelson v. State*,[209] the court of appeals held that a psychologist could testify even though she was unlicensed.[210] The court held that Georgia courts have long recognized that the question is whether a proposed expert has sufficient learning and experience, and merely being licensed—or not licensed—is not necessarily determinative of whether a witness has that learning and experience.[211] In *Rodriguez v. State*,[212] the court of appeals held that a licensed registered nurse was sufficiently qualified to testify that an alleged molestation victim's

202. *See id.* at 315, 633 S.E.2d at 669.
203. *Id.* at 316, 633 S.E.2d at 669.
204. *Id.* at 316-17, 633 S.E.2d at 670.
205. *Id.*
206. *Id.* at 318, 633 S.E.2d at 670-71 (Barnes, J., concurring).
207. *Id.* at 317-18, 633 S.E.2d at 671.
208. *Id.* at 318, 633 S.E.2d at 671 (citing GA. CT. APP. R. 33(a)).
209. 279 Ga. App. 859, 632 S.E.2d 749 (2006).
210. *Id.* at 866, 632 S.E.2d at 756.
211. *Id.*
212. 281 Ga. App. 129, 635 S.E.2d 402 (2006).

vaginal injuries were consistent with penetration by a finger.[213] The nurse in question had considerable experience and training with regard to the examination of victims of sexual assault.[214] In *Mitchell v. State*,[215] the court of appeals reaffirmed that a jury does not need expert testimony to determine whether or not a picture depicts a defendant.[216] Jurors are fully capable of looking at the picture and at the defendant and making that determination for themselves.[217]

V. HEARSAY

A. *Hearsay and the Right of Confrontation*

It has been almost four years since the United States Supreme Court in *Crawford v. Washington*[218] altered the playing field with regard to the use of hearsay in criminal cases. In *Crawford* the defendant contended that the trial court improperly allowed the jury to hear his wife's tape recorded statement to police officers. The prosecution tendered this evidence after the defendant's wife invoked her spousal privilege, and thus was unavailable to testify. The trial court and the Washington Supreme Court held that the circumstances of the statement were sufficiently reliable to overcome the defendant's argument that the admission of the out-of-court statement violated his Sixth Amendment right of confrontation.[219] Prosecutors argued that since the United States Supreme Court's decision in *Ohio v. Roberts*,[220] courts have allowed the admission of hearsay statements if the statements fell within a "'firmly rooted hearsay exception'" or if they bore "'particularized guarantees of trustworthiness.'" [221] It was the latter language—particularized guarantees of trustworthiness—that courts across the country interpreted as a green light to admit hearsay testimony. In Georgia, this bypass around the Sixth Amendment came to be known as the necessity exception to the hearsay rule.[222] As discussed in many prior surveys, the rapid expansion of the necessity exception (to

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213. *Id.* at 131-32, 635 S.E.2d at 405.
214. *Id.*
215. 283 Ga. App. 456, 641 S.E.2d 674 (2007).
216. *Id.* at 458-59, 641 S.E.2d at 677.
217. *Id.* at 459, 641 S.E.2d at 677.
218. 541 U.S. 36 (2004).
219. *Id.* at 40-41.
220. 448 U.S. 56 (1980).
221. *Crawford*, 541 U.S. at 40 (quoting *Roberts*, 448 U.S. at 66).
222. *See* Marc T. Treadwell, *Evidence*, 48 MERCER L. REV. 323, 351-54 (1996).

exaggerate only a bit) seemed on the verge of supplanting live testimony entirely.[223]

In *Crawford*, however, the United States Supreme Court granted certiorari and concluded that the Sixth Amendment's right of confrontation was not only limited to in court testimony, but also applied to out-of-court "testimonial" statements.[224] Testimonial statements include affidavits, custodial examinations, prior testimony, and "'similar pretrial statements that declarants would reasonably expect to be used prosecutorially.'"[225] Thus, a testimonial out-of-court statement is no longer admissible if the defendant has not had an opportunity to cross-examine the declarant.[226] Cases applying *Crawford* have primarily focused on whether an out-of-court statement is testimonial, which continued to be the case during this survey period.

The issue of whether 911 telephone calls are testimonial in nature has been a recurrent issue since *Crawford*. As discussed in last year's survey,[227] the Georgia Supreme Court held in *Pitts v. State*[228] that 911 calls may or may not be testimonial in nature.[229] If the primary purpose of the telephone call is to establish evidentiary facts that an objective person would recognize could be used in a future prosecution, then the call is testimonial.[230] However, if the call is made to report a crime in progress or to seek assistance because of imminent danger, then the caller's statements are not testimonial.[231] The court of appeals revisited this issue during the current survey period.

In *Kimbrell v. State*,[232] the defendant contended that the trial court should have excluded the substance of a telephone call to 911 by a "concerned citizen" reporting "a white male driving a red Harley-Davidson motorcycle wearing only a pair of black boxer shorts."[233] Citing the court of appeals decision in *Pitts v. State*[234] (the supreme court opinion in *Pitts* is not mentioned), the court of appeals in *Kimbrell* simply held that 911 calls are not testimonial because they are neither made for the purpose of proving a past event nor premeditated, but

223. *See* Marc T. Treadwell, *Evidence*, 56 MERCER L. REV. 235, 247-48 (2004).
224. 541 U.S. at 50-51, 68.
225. *Id.* at 51-52.
226. *Id.* at 59.
227. Marc T. Treadwell, *Evidence*, 58 MERCER L. REV. 151, 173-74 (2006).
228. 280 Ga. 288, 627 S.E.2d 17 (2006).
229. *Id.* at 289, 627 S.E.2d at 19-20.
230. *Id.*, 627 S.E.2d at 19.
231. *Id.*, 627 S.E.2d at 19-20.
232. 280 Ga. App. 867, 635 S.E.2d 237 (2006).
233. *Id.* at 867, 635 S.E.2d at 238.
234. 272 Ga. App. 182, 612 S.E.2d 1 (2005).

rather they are made to prevent or stop an ongoing crime.[235] In fact, they are admissible as part of the res gestae.[236] Accordingly, the court of appeals rejected the defendant's contention that *Crawford* barred the admission of the 911 caller's statement.[237]

As broad as the res gestae doctrine is,[238] it does have its limits, even in the context of 911 calls. In *Orr v. State*,[239] the defendant contended that the trial court improperly admitted a 911 recording in which an unknown party, who was not even the caller but who could be heard in the background, stated the defendant's name. The prosecution contended that the recording, including the statement of the unknown person stating the defendant's name, was admissible as part of the res gestae.[240] The supreme court acknowledged that statements made at the scene of an incident can be admissible as part of the res gestae when the statements are "'free from all suspicion of device or afterthought and are not merely the expression of opinions or conclusions.'"[241] However, there was no evidence that the declarant had personal knowledge that the defendant was at the scene.[242] While the res gestae exception "'dispenses with the presence of the declarant in court and with the administering of an oath,'" there still must be some evidence that the declarant was truly a witness, or in other words, that he or she had personal knowledge.[243] Because the State failed to show that the unknown declarant had personal knowledge, the admission of the 911 tape was error, and because of the prosecution's otherwise relatively weak case, the court concluded that this error was harmful.[244]

Although *Crawford* left many unanswered questions with regard to what types of statements are considered testimonial, the United States Supreme Court was clear that statements to police officers are invariably testimonial in nature.[245] Almost without a doubt, the Supreme Court was thinking about statements made to police officers in their official

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235. *Kimbrell*, 280 Ga. App. at 868, 635 S.E.2d at 239 (citing *Pitts*, 272 Ga. App. at 186, 612 S.E.2d at 4-5).

236. *Id.*

237. *Id.*

238. *See* Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 187, 215 (2005); Marc T. Treadwell, *Evidence*, 56 MERCER L. REV. 235, 250 (2004).

239. 281 Ga. 112, 636 S.E.2d 505 (2006).

240. *Id.* at 112, 636 S.E.2d at 507.

241. *Id.* at 113, 636 S.E.2d at 507 (quoting Dolensek v. State, 274 Ga. 678, 679, 558 S.E.2d 713, 715 (2002)).

242. *Id.*

243. *Id.* (quoting *Dolensek*, 274 Ga. at 679, 558 S.E.2d at 715-16).

244. *Id.*

245. 541 U.S. at 53.

capacity, and that was the conclusion reached by the Georgia Supreme Court in *Turner v. State*,[246] a high profile case involving the poisoning death of the defendant's husband. During the defendant's trial, the trial court admitted into evidence statements made by the defendant's husband, who was a police officer, to fellow officers.[247] Apparently, the defendant's husband had reason to believe that his wife wished him harm, and he told his fellow officers that if he "ended up dead," then his wife would probably be his murderer.[248] The trial court admitted evidence of the husband's statements pursuant to the necessity exception.[249]

On appeal, the defendant contended that because the statements were made to police officers, they were testimonial in nature under *Crawford*.[250] The supreme court disagreed.[251] Although the statements were made to police officers, they were made in the context of one coworker speaking to another as a close friend. The husband was not being interrogated and there was no reasonable expectation that the statements would be used at trial.[252] This latter point can be debated. It would seem that the husband was letting his fellow police officers know that if anything happened to him, they should suspect that his wife murdered him. In any event, it is clear that the statements were not made as part of a police interrogation. In short, the mere fact that statements were made to a police officer does not make them testimonial; the relevant inquiry is whether the statements were made as part of a police interrogation.[253]

The court of appeals decision in *Little v. State*[254] seems to test the limits of *Crawford*'s prohibition against the use of out-of-court testimonial statements. In *Little* the trial court permitted a police officer to, in effect, testify about statements made by a confidential informant who did not testify at trial. Based upon information provided by the confidential informant, a narcotics officer arranged a drug buy with the defendant in a Wal-Mart parking lot. The officer testified that he knew what type of vehicle the defendant would be driving, that the defendant's vehicle matched the description he had been given, and that the officer

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246. 281 Ga. 647, 641 S.E.2d 527 (2007).
247. *Id.* at 647, 641 S.E.2d at 529.
248. *Id.*
249. *Id.* at 649-50, 641 S.E.2d at 531.
250. *Id.* at 649, 641 S.E.2d at 530-31.
251. *Id.* at 651, 641 S.E.2d at 531-32.
252. *Id.*, 641 S.E.2d at 531.
253. *Id.*; *see also* Gresham v. Edwards, 281 Ga. 881, 883, 644 S.E.2d 122, 124 (2007) (holding that *Crawford* did not apply to evidence offered at a preliminary hearing).
254. 280 Ga. App. 60, 633 S.E.2d 403 (2006).

had told the informant what drugs he wanted the defendant to bring to the Wal-Mart.[255] While the testimony did not actually repeat statements made by the informant, the court of appeals acknowledged that the "jury could infer from the exchanges that the officer was guided to [the defendant] by the informant's descriptions of the seller and her car."[256] However, the court dodged the question of whether this testimony constituted the admission of out-of-court testimonial statements by holding that the informant's statements were not offered to prove the truth of those statements but rather to explain the officer's conduct.[257] Because *Crawford* "'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted,'" the admission of the informant's statement to explain the officer's conduct was not error.[258] It is interesting that the court of appeals relied upon the "explain conduct" exception to the hearsay rule to uphold the defendant's conviction because in *Teague v. State*,[259] the Georgia Supreme Court unequivocally ruled that prosecutors could not use the explain conduct exception to the hearsay rule to admit hearsay evidence.[260]

> At heart, a criminal prosecution is designed to find the truth of what a defendant did, and, on occasion, of why he did it. It is most unusual that a prosecution will properly concern itself with *why* an investigating officer did something.
>
> If the hearsay rule is to remain a part of our law, then O.C.G.A. [section] 24-3-2 . . . must be contained within its proper limit. Otherwise, the repetition of the rote words "to explain conduct" can become imprimatur for the admission of rumor, gossip, and speculation.[261]

B. *The Necessity Exception*

Although *Crawford* dramatically limited the scope of Georgia's necessity exception (no longer are law enforcement officers routinely allowed to testify with regard to what unavailable witnesses told them), the necessity exception can still be applied in situations where *Crawford*,

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255. *Id.* at 63, 633 S.E.2d at 405.
256. *Id.*
257. *Id.*
258. *Id.* at 64, 633 S.E.2d at 406 (quoting *Crawford*, 549 U.S. at 59 n.9).
259. 252 Ga. 534, 314 S.E.2d 910 (1984).
260. *Id.* at 536, 314 S.E.2d at 912.
261. *Id.*; *see also* Britton v. State, 257 Ga. App. 441, 442, 571 S.E.2d 451, 453 (2002) (reversing the defendant's conviction because the trial court, on the basis of explaining conduct, erroneously admitted testimony that an anonymous informant told a detective the defendant would be driving a particular vehicle and would have concealed money and drugs under a false bottom in the vehicle's console).

for whatever reason, is not applicable.[262] Georgia's necessity exception requires the presence of three elements: "[1] the declarant must be unavailable to testify; [2] there must be particularized guarantees of the statement's trustworthiness; and [3] the statement must be both relevant to a material fact and more probative regarding that fact than any other evidence."[263]

In *Holton v. State*,[264] the defendant contended that the trial court improperly relied on the necessity exception to admit a statement made by an unavailable witness. In *Holton* the defendant admitted that she shot her husband's former wife in 1983, but she claimed the shooting was accidental.[265] At the time of the shooting, the defendant's brother, a former Army medic, was in the house. Shortly after the shooting, the defendant's husband asked the brother why he did not render assistance to the victim given his medical training.[266] The brother responded, "'[W]ell [the defendant] slammed the door and said, "leave the bitch lay."'"[267] It was this statement, recounted by the husband, that the trial court admitted pursuant to the necessity exception. The brother died long before the trial and was thus unavailable to testify. But the necessity exception also requires that the statement bear particular guarantees of trustworthiness.[268] The trial court found this guarantee of trustworthiness by virtue of the fact that the declarant and the husband were in-laws.[269] The supreme court was troubled by this conclusion, noting that the mere fact of familial relationship is not sufficient by itself to establish trustworthiness.[270] On the contrary, the declarant and the defendant's husband had only known each other for a short period of time, and there was no evidence that they were confidants.[271] Accordingly, the supreme court determined that there were not sufficient guarantees of trustworthiness to render the declarant's statements admissible pursuant to the necessity excep-

262. *See* Marc T. Treadwell, *Evidence*, 55 MERCER L. REV. 249, 265 (2003).

263. *Id.*

264. 280 Ga. 843, 632 S.E.2d 90 (2006).

265. *Id.* at 844, 632 S.E.2d at 92. Although the defendant was arrested shortly after the shooting, a grand jury refused to indict her. The case was reopened nearly twenty years later at the instigation of the victim's family. *Id.* at 844-45, 632 S.E.2d at 93.

266. *Id.* at 846, 632 S.E.2d at 94.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

tion.[272] The error in admitting the statement, however, was harmless.[273]

C. *Medical Narratives*

In 1997 the Georgia General Assembly enacted O.C.G.A. section 24-3-18,[274] 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 and examinations.[275] In the years since, there have been few decisions providing guidance on exactly what is meant by the term "medical narrative." Does the statute require a narrative specifically prepared for use as evidence, or can an office note or a radiology report constitute a medical narrative? In *Lott v. Ridley*,[276] the court of appeals provided some definitive answers to these questions.

In *Lott* the trial court admitted reports from two physicians tendered by the plaintiff pursuant to O.C.G.A. section 24-3-18. One report appeared to be a narrative prepared by the physician, or perhaps the plaintiff's attorney for the physician, specifically for use at trial. The physician addressed the plaintiff's injuries, his diagnosis, the treatment he provided the plaintiff, and his prognosis in narrative form. Although the physician used medical terminology, he apparently explained the meaning of the medical terms in lay terms. The report from the second physician was not a narrative at all but rather a copy of the physician's office notes. The notes contained many undefined medical terms and unexplained test results.[277]

After a verdict for the plaintiff, the court of appeals held that the narrative report from the first physician was clearly admissible.[278] The second report, however, did not satisfy the requirements of O.C.G.A. section 24-3-18.[279] According to the court, the "bare recitation of the doctor's unedited records clearly is not a medical narrative . . . [because it] 'does not set forth the relevant information in prose language that is more readily understandable to laymen.'"[280] The plaintiff made no effort, the court concluded, to present the doctor's records to the jury in

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272. *Id.*
273. *Id.* at 847, 632 S.E.2d at 94.
274. O.C.G.A. § 24-3-18 (Supp. 2007).
275. *Id.*
276. 285 Ga. App. 513, 647 S.E.2d 292 (2007).
277. *Id.* at 514, 647 S.E.2d at 294.
278. *Id.*
279. *Id.* at 515, 647 S.E.2d at 294.
280. *Id.* (quoting Bell v. Austin, 278 Ga. 844, 847, 607 S.E.2d 552, 574 (2005)).

a format that would make them readily understandable.[281] Accordingly, the trial court abused its discretion when it admitted the second doctor's office notes.[282]

It would seem the lesson from *Lott* is that unless office notes are narratives using terminology understandable to lay persons, a standard that physician office notes rarely meet, lawyers seeking the admission of medical information pursuant to O.C.G.A. section 24-3-18 should prepare for the doctor to sign a narrative that contains only information relevant to the medical conditions at issue and that explains the information in a way that is understandable to a jury.[283]

D. *Child Hearsay*

Georgia's child hearsay statute permits a witness to testify about statements made by a child describing sexual conduct or abuse.[284] For the child's statement to be admissible, the child must be "available to testify," and "the court [must find] that the circumstances of the statement provide sufficient indicia of reliability."[285] Over the years, Georgia's appellate courts have struggled to define at what point an understandably reluctant child victim is unavailable to testify and thus not subject to cross-examination. For example, in *In re B.W.*,[286] which was discussed in a previous survey,[287] a juvenile court judge refused to allow the cross-examination of a child even though the child's statements had previously been admitted pursuant to the child hearsay statute. On appeal, even the prosecution was forced to agree that the child's unavailability for cross-examination rendered her out-of-court statements inadmissible and of no probative value.[288] Similarly, in *Hines v. State*,[289] the court of appeals held that a child was unavailable for cross-examination when the child would not take the stand and the trial court excused the child without him ever being sworn and examined as a witness.[290]

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281. *Id.*

282. *Id.*

283. Also during the survey period, the court held that medical narratives, admissible pursuant to O.C.G.A. section 24-3-18, are not limited to use at trial, but can also be used in support of, or in opposition to, a motion for summary judgment. Dalton v. City of Marietta, 280 Ga. App. 202, 204, 633 S.E.2d 552, 554 (2006).

284. O.C.G.A. § 24-3-16 (1995).

285. *Id.*

286. 268 Ga. App. 862, 602 S.E.2d 869 (2004).

287. Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 187, 218 (2005).

288. *In re B.W.*, 268 Ga. App. at 862, 602 S.E.2d at 870.

289. 248 Ga. App. 752, 548 S.E.2d 642 (2001).

290. *Id.* at 754, 548 S.E.2d at 644.

During the current survey period, the court of appeals dealt with a similar, but slightly different, scenario. In *In re S.S.*,[291] through the testimony of a victim's mother, sister, and an investigating officer, the juvenile court admitted evidence of statements made by the child about acts of molestation committed by the defendant. The defendant then sought to cross-examine the victim. Because the matter was pending in juvenile court, there was no jury, and the juvenile court judge, presumably to avoid unnecessary trauma to the child, suggested that the examination take place in chambers.[292] Although the proceedings in chambers were not transcribed, the judge later announced that "it was not in the best interest of the child to be questioned, 'given the fact that we can't get any information out of the young lady.'"[293] The defendant then moved to dismiss the delinquency petition on the grounds that no evidence of molestation was admissible because the child was unavailable for cross-examination.[294] The juvenile court judge denied the motion, finding that the child was in fact available, although "'as far as—as whether or not she's going to give us any information, it appears that . . . she's not going to talk to us.'"[295]

After the juvenile court adjudicated the defendant delinquent, the defendant appealed and, relying on *Hines*, contended that the child was not available as required by the child hearsay statute.[296] However, the court of appeals distinguished *Hines*, holding that it is only necessary that the child be available for cross-examination.[297] Even if the child is uncommunicative or unresponsive, a defendant still has had an opportunity to confront the child, and that is sufficient to satisfy the availability requirement of the child hearsay statute. The point is that the fact-finder, in this case the juvenile court judge, had an opportunity to observe the child, including the child's refusal to testify, and thus could assess the child's credibility.[298] Accordingly, the court of appeals affirmed the defendant's delinquency adjudication.[299]

291. 281 Ga. App. 781, 637 S.E.2d 151 (2006).
292. *Id.* at 782, 637 S.E.2d at 152.
293. *Id.*, 637 S.E.2d at 153.
294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.* at 783, 637 S.E.2d at 153.
299. *Id.* at 784, 637 S.E.2d at 154.

E. Statements by Co-Conspirators

According to O.C.G.A. section 24-3-5,[300] a statement by one co-conspirator during the pendency of the conspiracy is admissible against his co-conspirators.[301] If the co-conspirator's statements are otherwise admissible, the trial court, before admitting the statements, must evaluate the reliability of the statements using four indicia of reliability:

> (1) the absence of an express assertion about a past fact; (2) the declarant had personal knowledge of the identity and roles of the participants in the crime and cross-examination of the declarant would not have shown that the declarant was unlikely to know whether the defendant was involved in the crime; (3) the possibility that the declarant's statement was founded on faulty recollection was remote; and (4) the circumstances under which the declarant gave the statement suggest that the declarant did not misrepresent the defendant's involvement in the crime.[302]

In *Smith v. State*,[303] the defendant argued that an alleged co-conspirator's statement was inadmissible because it constituted an express assertion about past facts.[304] Acknowledging this to be the case, the court of appeals nevertheless affirmed the defendant's conviction, reasoning that the statement was sufficiently reliable when measured against the other three indicia of reliability.[305] Thus, the mere fact that a co-conspirator's statement constitutes an assertion about a past fact does not preclude its admissibility.[306]

While it is necessary that the statements by a co-conspirator be made during the pendency of the conspiracy, it is now well established that statements made to conceal the fact that there has been a criminal conspiracy are still considered to have been made during the conspiracy.[307] However, it is sometimes difficult to tell when the concealment phase has ended, as illustrated by the supreme court's decision in *Brooks v. State*.[308] In *Brooks* the defendants, who had been charged with

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300. O.C.G.A. § 24-3-5 (1995).

301. *Id.*

302. Copeland v. State, 266 Ga. 664, 665, 469 S.E.2d 672, 674-75 (1996) (citing Dutton v. Evans, 400 U.S. 74, 88-89 (1970)).

303. 253 Ga. App. 131, 558 S.E.2d 455 (2001).

304. *Id.* at 134, 558 S.E.2d at 459.

305. *Id.*

306. *See id.*; *see also* Ottis v. State, 269 Ga. 151, 496 S.E.2d 264 (1998), discussed in Marc T. Treadwell, *Evidence*, 50 MERCER L. REV. 229, 255-56 (1998).

307. Marc T. Treadwell, *Evidence*, 55 MERCER L. REV. 249, 273 (2003).

308. 281 Ga. 14, 635 S.E.2d 723 (2006).

murder, contended that the trial court erroneously admitted statements made by their alleged co-conspirators while those co-conspirators were in jail. The opinion does not say whether the co-conspirators were in jail for the offense that was the object of the conspiracy. Certainly, however, while in jail, those conspirators were not actively participating in the conspiracy. Accordingly, the defendants argued that the co-conspirators' jailhouse statements were made after the conspiracy ended, and because the co-conspirators were talking about their participation in the alleged conspiracy, they clearly were not in a concealment phase of the conspiracy.[309] The court of appeals disagreed.[310] Just because the co-conspirators were talking to third parties did not necessarily mean they were not still trying to conceal the fact of the conspiracy.[311] Nor does the concealment phase of the conspiracy end simply because one or more conspirators is jailed.[312] The significant fact was that the co-conspirators were "still hiding their identities from the police, and [their statements] were thus made during the concealment phase of the conspiracy."[313]

Next, the defendants argued that even if the statements met the criteria of Georgia's co-conspirator exception to the hearsay rule, admitting the statements would violate their confrontation clause rights because the statements did not bear sufficient indicia of reliability, primarily because the jailhouse statements, like the statements on issue in *Smith*, were assertions of past facts.[314] The supreme court acknowledged that this one criterion did not support the reliability of the statements, but consideration of the remaining criteria of reliability provided sufficient evidence to uphold the admission of the statements.[315] The co-conspirators were speaking of matters within their personal knowledge, and their statements were consistent with each other and with the physical evidence at the crime scene. Most importantly, the co-conspirators implicated themselves in their statements, a factor that weighed heavily in favor of reliability.[316]

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309. *Id.* at 16, 635 S.E.2d at 727.
310. *Id.*, 635 S.E.2d at 728.
311. *Id.*, 635 S.E.2d at 727-28.
312. *Id.*, 635 S.E.2d at 728.
313. *Id.* at 17, 635 S.E.2d at 728.
314. *Id.* at 16, 635 S.E.2d at 727.
315. *Id.* at 17, 635 S.E.2d at 728.
316. *Id.* at 18, 635 S.E.2d at 728-29. The defendants also argued that the admission of co-conspirator statements was improper pursuant to *Crawford*, but the supreme court easily dismissed that contention because their statements were not testimonial in nature. *Id.*

VI. AUTHENTICATION

As the court of appeals put it during the survey period, electronic evidence, such as emails and text messages, presents "unique opportunities for fabrication."[317] However, as the court of appeals also made clear, electronic evidence is still subject to the same standards of authentication that apply to other evidence.[318]

In *Simon v. State*,[319] the defendant contended that the trial court erroneously admitted email correspondence allegedly between the defendant and his minor victim. The evidence consisted of printouts of various email messages. However, only one of the emails contained the defendant's email address. According to detectives, the defendant admitted that he had exchanged emails with the victim.[320] The victim herself testified that the printout was an "accurate representation" of her email correspondence with the defendant.[321] Looking at the totality of the evidence tending to authenticate the printout, the court of appeals concluded that the trial court did not abuse its discretion when it admitted the evidence.[322]

In *Hammontree v. State*,[323] even less authenticating evidence was sufficient to warrant the admission of electronic evidence. In *Hammontree*, during the defendant's trial for child molestation, the trial court admitted a transcript of an instant message conversation between the defendant and his victim.[324] Such electronic evidence, the court of appeals ruled, can be authenticated in the same way that a videotape is authenticated.[325] In the case of a videotape, it can be authenticated by the person who prepared the videotape or by a person who witnessed the events portrayed in the videotape and is able to testify that the videotape accurately portrays what the witness saw.[326] At the defendant's trial, the victim testified that she was a participant in the exchange of instant messages, and she confirmed that the transcript accurately reflected the messages exchanged. She further testified that the transcript was printed from her computer in her presence. However,

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317. Simon v. State, 279 Ga. App. 844, 847, 632 S.E.2d 723, 726 (2006).
318. *Id.*
319. 279 Ga. App. 844, 632 S.E.2d 723 (2006).
320. *Id.* at 847, 632 S.E.2d at 726-27.
321. *Id.*, 632 S.E.2d at 726.
322. *Id.* at 848, 632 S.E.2d at 727.
323. 283 Ga. App. 736, 642 S.E.2d 412 (2007).
324. *Id.* at 739, 642 S.E.2d at 415.
325. *Id.*
326. *Id.* (citing Ford v. State, 274 Ga. App. 695, 697, 617 S.E.2d 262, 265-66 (2005)).

the instant messages were not sent from the defendant's account, but rather they were sent from an account maintained by his son. However, the son testified that he did not send the messages, and the messages contained information that provided some indication that they were written by the defendant.[327] Under these circumstances, the court held that the trial court did not abuse its discretion when it admitted the printout of the instant messages.[328]

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327. *Id.*
328. *Id.* at 740, 642 S.E.2d at 415.

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