Mercer Law Review

Volume 72
Number 1 *Annual Survey of Georgia Law*

Article 9

12-2020

Evidence

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I. INTRODUCTION

Even after the seventh year since the implementation of Georgia's new Evidence Code,[1] Georgia's evidence rules continue to evolve as appellate courts face new issues and delve into more nuanced areas of the rules. This Article details some of this evolution of the new Georgia Evidence Code, Official Code of Georgia Annotated (O.C.G.A.) Title 24,[2] by addressing developments of Georgia's evidence rules from the period of June 1, 2019, through May 31, 2020. Specifically, this Article addresses (1) limitations on the attorney-client privilege; (2) admissibility of witness testimony as it relates to late-identified witnesses, witness competency, and co-conspirator statements; (3) the Confrontation Clause[3] as it relates to child hearsay and non-verbal conduct; and (4) limitations of relevant evidence as it relates to Georgia's Rape Shield Law and evidence of victim seatbelt use in criminal trials.

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[1] *See* Ga. H.R. Bill 24, Reg. Sess., 2011 Ga. Laws 99 (codified at O.C.G.A. tit. 24). For an analysis of evidence during the prior survey period, see John E. Hall, Jr., W. Scott Henwood & L. Guarnotta, *Evidence*, *Annual Survey of Georgia Law*, 71 MERCER L. REV. 103 (2019).

[2] O.C.G.A. tit. 24 (2020).

[3] U.S. CONST amend. VI.

II. LIMITATIONS ON THE ATTORNEY-CLIENT PRIVILEGE

O.C.G.A. Section 24-5-501(a)(2)[4] codifies one of the oldest, most sacred common law privileges—attorney-client communications. However, in *Hill, Kertscher & Wharton, LLP v. Moody*,[5] the Georgia Supreme Court expanded the existing implied waiver of the longstanding attorney-client privilege as it relates to legal malpractice claims by implying the waiver to those communications with attorneys not named in the malpractice action.[6] While it is longstanding law that a client implicitly waives the attorney-client privilege of an underlying matter when suing for legal malpractice on that matter, *Moody* presented the novel issue of whether this waiver applies to those communications with other attorneys in the same matter whom the client chose not to sue.[7]

In *Moody*, Daryl Moody and two associated businesses (collectively referred to as "Moody") obtained Hill, Kertsher & Wharton, LLP's (HKW) advice regarding the termination of the president of a company Moody recently invested in. HKW also represented Moody in a suit initiated by the former president in California following his termination. During this representation, HKW failed, *inter alia*, to assert a lack of personal jurisdiction defense as requested by Moody. Subsequently, Moody retained Holland & Knight LLP (Holland & Knight), a firm that also handled Moody's corporate work, to disqualify HKW from the California action and assume representation of Moody following HKW's dismissal. Ultimately, the trial court ruled in favor of the former president in the California suit. This ruling led to the present legal malpractice action against HKW, in which Moody failed to name Holland & Knight as a party.[8]

In defense to the legal malpractice allegations, HKW stated that Moody directed HKW to follow Holland & Knight's instructions prior to the initiation of the disqualification action. Accordingly, HKW served a non-party request for production of documents on Holland & Knight regarding Holland & Knight's work for Moody as it related to Moody's corporate matters, the disqualification suit, and the California suit. Both Holland & Knight and Moody objected to this request on the basis of attorney-client privilege and work-product doctrine. HKW responded by arguing that Moody implicitly waived any attorney-client privilege with respect to all counsel involved in the underlying matter, including Holland & Knight. The trial court agreed with HKW, but granted

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[4] O.C.G.A. § 24-5-501(a)(2) (2020).

[5] 308 Ga. 74, 839 S.E.2d 535 (2020).

[6] *Id.* at 74, 839 S.E.2d at 536.

[7] *Id.*

[8] *Id.* at 74–75, 839 S.E.2d at 536–37.

Moody's request for a certificate of immediate review.[9] On appeal, the Georgia Court of Appeals reversed the trial court's decision stating that "the Supreme Court of Georgia has indicated implied waivers of the attorney/client privilege should be narrowly drawn."[10] The court of appeals noted that although both Holland & Knight and HKW represented Moody in the matters underlying the present legal malpractice action, Holland & Knight was retained after HKW's alleged malfeasance. Accordingly, there was no basis for waiver of Moody and Holland & Knight's attorney-client privilege.[11]

After a grant of certiorari, the Georgia Supreme Court reversed the Georgia Court of Appeals' holding.[12] The court stated that the appellate court erred in rejecting the trial court's finding that Holland & Knight represented Moody in connection with the corporate actions, the disqualification action, and the California suit.[13] Given Holland & Knight's involvement with all three matters, it is possible its actions may have affected the causation, reliance, and damages necessary for Moody's legal malpractice action. Thus, the court determined that, despite failing to name Holland & Knight as a party, Moody waived the attorney-client privilege as to Holland & Knight as well.[14] To hold otherwise would allow a client to "use as a sword the protection which the Legislature awarded them as a shield."[15]

III. ADMISSIBILITY OF WITNESS TESTIMONY

A. Late-Identified Witnesses

In *Lee v. Smith*,[16] the Georgia Supreme Court overruled the Georgia Court of Appeals' holding in *Moore v. Cottrell*,[17] which affirmed a trial court's exclusion of expert testimony based solely on the late identification of the expert.[18] In doing so, the court enumerated, for the

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[9] *Id.* at 75–76, 839 S.E.2d at 537–38.

[10] Moody v. Hill, Kertscher & Wharton, LLP, 346 Ga. App. 129–30, 813 S.E.2d 790,91 (2018).

[11] *Hill, Kertscher & Wharton, LLP*, 308 Ga. at 77, 839 S.E.2d at 538.

[12] *Id.* at 81, 839 S.E.2d at 540–41.

[13] *Id.* at 80, 839 S.E.2d at 540.

[14] *Id.* at 79, 839 S.E.2d at 536–40.

[15] *Id.* (quoting Pappas v. Holloway, 114 Wash.2d 198, 208, 787 P.2d 30, 36 (1990)).

[16] 307 Ga. 815, 838 S.E.2d 870 (2020).

[17]334 Ga. App. 791, 780 S.E.2d 442 (2015).

[18] In *Moore*, following the deadline for expert disclosure pursuant to a consent case management order, Defendant Cottrell successfully moved to exclude Plaintiffs Dennis and Lisa Moore's expert. Cottrell then moved for summary judgment. Plaintiffs opposed this motion with the affidavit of a different expert. The trial court struck the new expert's affidavit as untimely and granted the summary judgement motion. 334 Ga. App. at 792,

first time, the factors trial courts must consider prior to witness exclusion.[19]

In *Lee*, the plaintiff disclosed a new expert on plaintiff's newly stated future lost earnings claim on the final day for witness disclosure as set by the scheduling order. A week later, Lee identified his anticipated rebuttal witness. At a pretrial hearing, the trial court excluded Lee's rebuttal expert's testimony based on Lee's failure to identify the witness as required by the scheduling order. Lee argued that his failure to comply with the scheduling order was a result of Smith's failure to identify his witnesses until the last day allowed by the scheduling order. Nevertheless, the court of appeals affirmed the trial court's exclusion.[20]

The supreme court granted certiorari and reversed the appellate court's decision.[21] The court acknowledged a trial court's discretion to set deadlines and sanction a party for noncompliance with these deadlines.[22] Notwithstanding, the court noted that trial courts may not impose harsher sanctions than necessary to vindicate the court's authority.[23] To determine whether a sanction is appropriate, the court looked to other jurisdictions to establish the factors a trial court must consider before excluding a late-identified witness.[24] After this review, the court determined trial courts should consider

> (1) the explanation for the failure to disclose the witness, (2) the importance of the testimony, (3) the prejudice to the opposing party if the witness is allowed to testify, and (4) whether a less harsh remedy than the exclusion of the witness would be sufficient to ameliorate the prejudice and vindicate the trial court's authority.[25]

B. Witness Competency

In *Little v. Jim-Lar Corporation*,[26] the Georgia Court of Appeals addressed, for the first time specifically under Georgia law, the effect a guardianship proceeding has on a witness's competency under Georgia's new Evidence Code. In *Little*, both Myra Little and her guardian and conservator brought an action for negligence after Little suffered an allergic reaction when Defendant, Jim-Lar Corporation, served Little

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780 S.E.2d at 445. The court of appeals upheld the trial court's rulings by citing to the expert disclosure deadline set out in the scheduling order. *Id.* at 794, 780 S.E.2d at 446.

[19] *Lee*, 307 Ga. at 824, 838 S.E.2d 877.

[20] *Id.* at 815–20, 838 S.E.2d at 873–76.

[21] *Id.* at 820, 838 S.E.2d at 875.

[22] *Id.* at 820–21, 838 S.E.2d at 875.

[23] *Id.* at 821, 838 S.E.2d at 875.

[24] *Id.* at 823, 838 S.E.2d at 877.

[25] *Id.* at 824, 838 S.E.2d at 877.

[26] 352 Ga. App. 764, 835 S.E.2d 794 (2019).

peach pie instead of apple pie. In a verified response to Defendant's interrogatories, Little, not her guardian, provided a description of the incident. However, the trial court did not consider Little's verified responses in adjudicating Jim-Lar Corporation's summary judgment motion. Instead, the trial court found the responses inadmissible due to Little's incompetence. On appeal, Little argued that the trial court improperly excluded her interrogatory responses as she had not yet received a guardian and, accordingly, was not incompetent at the time of verification.[27]

In affirming the trial court's decision, the court of appeals noted that the requirement for appointment of a guardian under O.C.G.A. § 29-4-1(a)[28] is that the court determines "the adult lacks sufficient capacity to make or communicate significant responsible decisions concerning his or her health or safety."[29] However, this is not the standard used to determine whether an individual is a competent witness under the Evidence Code. Rather the court referred to O.C.G.A. § 24-6-601,[30] which states that "*every* person is competent to be a witness."[31] Further, the court referred to federal precedent that allows even those individuals who are not mentally competent to testify.[32] In such circumstances, the rules rely on jurors to evaluate the witness's testimony.[33]

Despite the general competency rule created by O.C.G.A. § 24-6-601, the court noted that a trial court has the discretion to rule a witness incapable of testifying.[34] This authority is independent of a separate guardianship proceeding, regardless of which stage of the proceeding the witnesses are at when they offer their testimony.[35] Accordingly, without a transcript of the trial court's hearing on Little's competency, the court of appeals affirmed the exclusion of Little's interrogatory responses.[36]

C. Statements of a Co-Conspirator

In *Womack v. State*,[37] the Georgia Court of Appeals answered another question of first impression—whether the subsequent acquittal of a

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[27] *Id.* at 764–66, 835 S.E.2d at 795–97.

[28] O.C.G.A. § 29-4-1(a) (2019).

[29] *Id.*

[30] O.C.G.A. § 24-6-601 (2019).

[31] *Id.* (emphasis added).

[32] *Little*, 352 Ga. App. at 766, 835 S.E.2d 797.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] 353 Ga. App. 801, 840 S.E.2d 41 (2020).

co-conspirator who made hearsay statements retroactively affects a co-defendant's trial.[38] Ultimately, the court answered this question in the negative.[39]

Womack is the result of an alleged armed robbery by Xavier Womack, Jakeith Robinson, and Leon Tollette that ended in the death of a security guard. Tollette pleaded guilty to several charges and was sentenced to death. Robinson was then acquitted of malice murder, felony murder, and aggravated assault; however, the jury did not reach a verdict on the remaining armed robbery and firearm charges. Robinson was re-tried with Womack.[40] At trial, Robinson's girlfriend testified that Robinson stated, "[W]e just tried to rob a Brinks truck and someone was shot and [Tollette] got caught."[41] Both Womack and Robinson were found guilty of armed robbery alone. After trial, Robinson's armed robbery conviction was reversed on the grounds of collateral estoppel and issue preclusion. Following this reversal, Womack filed an extraordinary motion for a new trial, arguing Robinson's statements should not have been admitted against him as Robinson was not a co-conspirator. The trial court denied this motion based on precedent from the United States Court of Appeals for the Fifth Circuit.[42] The court of appeals then granted Womack's application for discretionary appeal.[43]

On appeal, the court applied the co-conspirator hearsay exception as it appeared at the time of trial, which stated, "[a]fter the fact of conspiracy is proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all."[44] Next, the court adopted the Eleventh Circuit's ruling in *United States v. Hernandez-Miranda*,[45] which stated, "the admission of testimony under the co-conspirator exception to the hearsay rule is not rendered retroactively improper by subsequent acquittal of the alleged co-conspirator."[46] Moreover, the court cited the Fifth Circuit's ruling in *United States v. Cravero*,[47] which stated that even where a co-conspirator is acquitted prior to the present co-conspirator's trial, the co-conspirator's statement is admissible provided the state "establishes a prima facie case of the existence of a conspiracy and introduces . . . slight evidence" of

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[38] *Id.* at 805, 840 S.E.2d at 45.

[39] *Id.* at 806, 840 S.E.2d at 46.

[40] *Id.* at 801, 840 S.E.2d at 43.

[41] *Id.* at 802, 840 S.E.2d at 43 (alterations in original) (quoting *Womack v. State,* 273 Ga. App. 300, 302, 614 S.E.2d 909, 912 (2005)).

[42] *Id.* at 801–04, 840 S.E.2d at 43–45.

[43] *Id.* at 804, 840 S.E.2d at 45.

[44] *Id.* (alteration in original) (quoting O.C.G.A. § 24-3-5 (2010)).

[45] 78 F.3d 512 (11th Cir. 1996).

[46] *Id.* at 513 (quoting *United States v. Kincade*, 714 F.2d 1064–65 (11th Cir. 1983)).

[47] 545 F.2d 406 (5th Cir. 1976).

connection between the declarant and the defendant.[48] Accordingly, the court of appeals affirmed the denial of Womack's extraordinary motion for new trial.[49]

Despite the court's reliance on the 1999 co-conspirator hearsay exception, the holding in *Womack* is instructive to cases under Georgia's new Evidence Code as the Code provides a less stringent standard for prosecutors since a "conspiracy need not be charged" for a statement to be admissible as a statement by a co-conspirator.[50]

IV. CONFRONTATION CLAUSE

A. Child Hearsay

In contrast to cases analyzed in last year's Article which emphasized the need for attorneys to rely on Georgia's new Evidence Code,[51] the Georgia Court of Appeals interpreted the child hearsay rule and its enforceability pursuant to the Confrontation Clause under the former rule established in Georgia's old Evidence Code in *Allison v. State*.[52]

In *Allison*, Defendant Brandon James Allison was convicted of child molestation, enticing a child for indecent purposes, and false imprisonment. At trial, the trial court admitted a video recording of the child victim's interview into evidence. The interview, which was conducted prior to any criminal charges, provided details of the event that the six-year-old child could not recall during her trial testimony. In fact, the child did not recall the subject of the interview. Nevertheless, the child testified that she knew why she was in the courtroom, and that she understood the need to tell the truth. Defendant Allison declined any cross-examination. After his conviction, Allison appealed arguing that the video interview was improperly admitted since, given the child's inability or unwillingness to remember, the court should have found the child "unavailable" pursuant to O.C.G.A. § 24-8-804.[53] O.C.G.A. § 24-8-804 stands for the general proposition that, unless the statement fits into the exceptions enumerated by the Rule or may be admissible under O.C.G.A. § 24-8-803,[54] an out of court statement used for the truth of the matter asserted is inadmissible where the declarant is

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[48] *Id.* at 418–19.

[49] *Womack*, 353 Ga. App. at 806, 840 S.E.2d at 46.

[50] O.C.G.A. § 24-8-801(d)(2)(E) (2020).

[51] 71 MERCER L. REV. 103 (2019).

[52] 356 Ga. App. 256, 846 S.E.2d 222 (2020).

[53] *Id.* at 256–58, 846 S.E.2d at 225–26 (citing O.C.G.A. § 24-8-804 (2019)).

[54] O.C.G.A. § 24-8-803 (2020).

unavailable.[55] A declarant is "unavailable" pursuant to O.C.G.A. § 24-8-804 when the declarant:

> (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
>
> (2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
>
> (3) Testifies to a lack of memory of the subject matter of the declarant's statement;
>
> (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance or, in the case of exceptions under paragraph (2), (3), or (4) of subsection (b) of this Code section, the declarant's attendance or testimony, by process or other reasonable means.[56]

In rejecting Allison's argument, the Georgia Court of Appeals noted that Allison's hearsay argument was, in actuality, an argument under the Confrontation Clause.[57] In addressing the issue of whether Allison had an opportunity to confront the evidence against him, the court cited to O.C.G.A. § 24-8-820(a)[58] that states:

> A statement made by a child younger than 16 years of age describing any act of sexual contact or physical abuse performed with or on such child by another . . . shall be admissible in evidence by the testimony of the person to whom made if the proponent of such statement provides notice to the adverse party prior to trial of the intention to use such out-of-court statement and such child testifies at the trial, unless the adverse party forfeits or waives such child's testimony as provided in this title, and, at the time of the testimony regarding the out-of-court statements, the person to whom the child made such statement is subject to cross-examination regarding the out-of-court statements.[59]

The court further stated that the testimony required by O.C.G.A. § 24-8-820(a) is not subject to O.C.G.A. § 24-8-804's definition of

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[55] O.C.G.A. § 24-8-804 (2019).

[56] O.C.G.A. § 24-8-804 (2019).

[57] 356 Ga. App. at 259, 846 S.E.2d at 226.

[58] O.C.G.A. § 24-8-820(a) (2019).

[59] *Id.*

unavailability.[60] Rather, O.C.G.A. § 24-8-804's definition is limited to those instances in which a litigant seeks to introduce hearsay from an unavailable witness.[61]

Thus, without a statutory definition or specific federal equivalent of O.C.G.A. § 24-8-820(a), the court of appeals turned to case law from Georgia's old Evidence Code.[62] Pursuant to this precedent, a child is "available" whenever the child takes the stand regardless of the child's response.[63] Here, since the child took the stand and Allison had an opportunity to cross-examine the child, there was no violation of the Confrontation Clause.[64]

B. Adult Non-Verbal Conduct

The Georgia Court of Appeals returned to reliance on the Federal Rules of Evidence in *State v. Gilmore*,[65] wherein the court held, for the first time specifically under Georgia law, that nonverbal conduct can be considered a statement.[66]

In *Gilmore*, the State tendered video of an informant purchasing methamphetamine from Gilmore. The informant, who obtained the video using a video camera attached to his key ring, committed suicide prior to Gilmore's trial. Thus, a police officer testified as to the video's reliability. The trial court determined that the movements in the video were nonverbal testimonial statements and excluded the video in accordance with the Confrontation Clause.[67]

On appeal, the court of appeals upheld the trial court's decision, noting that the informant's unavailability was undisputed.[68] After citing to case law supporting Federal Rule 801's definition of a statement as including assertive, nonverbal conduct, the court determined that the informant's actions at the request of police were clearly intended to show that Gilmore was selling methamphetamine.[69] Thus, the video was a statement offered for the truth of the matter asserted.[70] The court continued that because the informant's movements were knowingly and purposely made to confirm police suspicion, and because a reasonable

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[60] *Allison*, 356 Ga. App. 258, 846 S.E.2d at 226.

[61] O.C.G.A. § 24-8-804 (2019).

[62] *Allison*, 356 Ga. App. 258, 846 S.E.2d at 226.

[63] *Id.* at 259, 846 S.E.2d at 227.

[64] *Id.* at 260, 846 S.E.2d at 227.

[65] 355 Ga. App. 536, 844 S.E.2d 877 (2020).

[66] *Id.* at 538–39, 844 S.E.2d at 880.

[67] *Id.* at 536–37, 844 S.E.2d at 878.

[68] *Id.* at 539, 844 S.E.2d at 879.

[69] *Id.* at 538–39, 844 S.E.2d at 880.

[70] *Id.* at 539, 844 S.E.2d at 880.

witness might believe the informants actions were going to be used against Gilmore at trial, the video was testimonial in nature subject to the Confrontation Clause.[71]

V. LIMITATIONS OF RELEVANT EVIDENCE

A. Georgia's Rape Shield Law

In accordance with the Federal Rules of Civil Procedure's eye toward admissibility, Georgia's Rape Shield Law under the new Evidence Code, although not adopted from the federal Rule, provides three additional exceptions to the general exclusion of evidence of a sexual assault victim's past sexual behavior.[72] Conversely, in *State v. Burns*,[73] the Supreme Court of Georgia limited the admissibility of such evidence by overruling *Smith v. State*'s[74] rule requiring admissibility of such evidence where the evidence is of prior false accusations by the victim and adopting a traditional balancing test approach.[75]

In *Burns*, the appellant was convicted of incest, aggravated sodomy, and aggravated sexual battery after the discovery of the victim's social media message detailing the encounter. At trial, Burns proffered evidence of another statement by the victim alleging that her brother's best friend tried to rape her, which the victim later admitted was a lie. Burns argued that the Rape Shield Statute did not protect evidence of previous false accusations of sexual abuse because such false accusations pertain to the witness' credibility. The Georgia Court of Appeals agreed with Burns and reversed the trial court's order excluding the evidence

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[71] *Id.* at 540, 844 S.E.2d at 880–81.

[72] Under the previous rule, O.C.G.A. § 24-2-3, evidence of a victim's past sexual behavior was only admissible if it was "directly involved the participation of the accused and [the court] finds that the evidence expected to be introduced supports an inference that the accused could have reasonably believed that the complaining witness consented to the conduct complained of in the prosecution." Under the new Rape Shield Law, codified at O.C.G.A. § 24-4-412, in addition to the exception under the previous rule, evidence of past sexual behavior is also admissible where it provides:

> (1) Evidence of specific instances of a victim's or complaining witness's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
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> . . .
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> (3) Evidence of specific instances of a victim's or complaining witness's sexual behavior with respect to the defendant or another person if offered by the prosecutor; and
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> (4) Evidence whose exclusion would violate the defendant's constitutional rights.

[73] 306 Ga. 117, 829 S.E.2d 367 (2019).

[74] 259 Ga. 135, 377 S.E.2d 158 (1989).

[75] *Burns*, 306 Ga. at 125, 829 S.E.2d at 374 (2019).

citing to the *Smith* holding that a false allegation of sexual misconduct does not involve the victim's past sexual history.[76]

On appeal, the Georgia Supreme Court criticized the court of appeals' holding and described the *Smith* decision as overly broad and lacking nuance.[77] The court further explained that the *Smith* holding is based on an interpretation of the Sixth[78] and Fourteenth Amendments[79] that was improper.[80] Rather, despite the Confrontation Clause and Due Process Clause,[81] a defendant does not have "an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."[82]

Thus, the court held that the traditional balancing test could be done to determine whether such evidence ought to be allowed in.[83] Under the traditional balancing test, the court would weigh the danger of unfair prejudice and the evidence's probative value to determine if the evidence should be admitted.[84]

B. Seatbelt Use in a Criminal Trial

In *State v. Mondor*,[85] the Georgia Supreme Court held, as a matter of first impression, that evidence that the victim was not wearing a seatbelt at the time of an accident is not relevant evidence to prove causation in a criminal trial.[86]

In *Mondor*, the respondent was driving on Highway 75 in Marietta, Georgia when he collided with another vehicle causing a multi-car collision that resulted in the victim's death. The victim was not wearing a safety belt and was ejected from the vehicle after it overturned on the highway. Mondor was charged with first-degree vehicular manslaughter predicated upon a hit-and-run offense. Mondor, in a pre-trial motion, argued that the victim's failure to wear a seatbelt should be admissible as evidence at trial because the statutory bar on such evidence was unconstitutional. He argued that the statute's bar on seatbelt use

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[76] *Burns v. State*, 345 Ga. App. 822, 824, 813 S.E.2d 425, 426 (2018), reconsideration denied (May 21, 2018), cert. granted (Nov. 15, 2018), *aff'd* but criticized, 306 Ga. 117, 829 S.E.2d 367 (2019).

[77] *See Burns*, 306 Ga. at 122–23, 829 S.E.2d at 373.

[78] U.S. CONST amend. VI.

[79] U.S. CONST amend. XIV.

[80] *Burns*, 306 Ga. at 121, 829 S.E.2d at 372.

[81] U.S. CONST amend. XIV, § 1.

[82] *Burns*, 306 Ga. at 122, 829 S.E.2d at 372.

[83] *Id.* at 125–26, 829 S.E.2d at 375.

[84] *Id.* at 125, 829 S.E.2d at 375.

[85] 306 Ga. 338, 830 S.E.2d 206 (2019).

[86] *Id.* at 350, 830 S.E.2d at 216.

evidence prevented him from putting on a full defense at trial. The trial court declined to except Mondor from the bar on seatbelt use evidence.[87]

On appeal, the Georgia Supreme Court examined, for the first time, whether the seatbelt use evidence was relevant to causation in a criminal trial.[88] As an initial matter, the court noted that if the evidence was not relevant, then there was no reason to confront the constitutional challenge.[89] Next, the court turned to Georgia's law on proximate causation in a criminal case to determine that a victim's failure to wear a seatbelt in the present case was not an intervening cause.[90] Accordingly, a victim's failure to wear a seatbelt is generally irrelevant to causation in a criminal case.[91] Thus, the court affirmed the exclusion of Mondor's evidence that the victim was not wearing a seatbelt.[92]

VI. CONCLUSION

As Georgia's appellate courts traverse nuanced areas of the new Evidence Code, this survey period shows that, even in the face of Constitutional challenges, Georgia's courts will continue to interpret evidentiary rules with an eye towards admissibility. Only time will tell whether the courts will become more liberal in the admission of evidence in the wake of COVID-19-related bench trials.

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[87] *Id.* at 338–39, 830 S.E.2d at 209.

[88] *Id.* at 346–48, 830 S.E.2d at 213–15. The court noted that the Georgia Court of Appeals has case law on this point, but that the issue was new to the Georgia Supreme Court. *Id.* at 348, 830 S.E.2d at 215.

[89] *Id.* at 350, 830 S.E.2d at 216.

[90] *Id.* at 349, 830 S.E.2d at 215–16.

[91] *Id.*

[92] *Id.* at 349, 830 S.E.2d at 216.