Mercer Law Review

Volume 73
Number 1 *Annual Survey of Georgia Law*

Article 10

12-2021

Evidence

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I. INTRODUCTION

The 2020 Coronavirus (COVID-19) pandemic brought with it many firsts, including a year-long moratorium on civil and criminal jury trials. As of June 2021, many counties across the state expected continued stays of civil jury trials. Nevertheless, Georgia's appellate courts continued to develop Georgia's evidence laws in the eighth year since the implementation of Georgia's new Evidence Code.[1] This Article discusses the developing evolution of the new Georgia Evidence Code, Official Code of Georgia Annotated (O.C.G.A.) Title 24, by addressing developments of Georgia's evidence rules from the period of June 1, 2020, through May 31, 2021.[2] Specifically, this Article addresses: (1) exceptions to the rule against hearsay; (2) rejections of the former Evidence Code; and (3) continued adoption of federal interpretations.

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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 & Leesa M. Guarnotta, *Evidence, Annual Survey of Georgia Law*, 71 MERCER L. REV. 103 (2019).

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

II. POSSIBLE EXPANSION OF HEARSAY OBJECTIONS

Other firsts developed in response to the COVID-19 pandemic include the development of COVID-19 vaccines, the expansive use of Emergency Use Authorizations in preventing and mitigating the spread of COVID-19, and the particularity of certain personal protective devices. These firsts are likely to lead to litigation or otherwise serve as issues critical in the defense of COVID-19 liability cases. Accordingly, information contained on the label of such products and how to admit such information into evidence becomes important. The Court of Appeals of Georgia left the question of admissibility of product labels open in the case of *Childers v. State*.[3]

Childers arose out of a 2019 police operation to inspect retail establishments' compliance with laws preventing the sale of vape products to underaged individuals. Specifically, Childers, the clerk at OLE 5 Vapor, sold products containing nicotine salt to two underage operatives without asking for proof of age, resulting in her furnishing a vapor product to a minor pursuant to O.C.G.A. § 16-12-171(a)(1)(A).[4] During Childers's bench trial, the judge admitted into evidence a photo of the bottle's label identifying the contents as "nicotine salt" over Childers's motion *in limine*. The trial court stated that the photo was admissible under O.C.G.A. § 24-8-803,[5] with reference to a specific hearsay exception. Childers was convicted and sentenced to twelve months of probation.[6]

On appeal, the Court of Appeals of Georgia first endeavored to determine which hearsay exception would permit admission of the photo.[7] The court determined that the admission was pursuant to subsection 17, market reports and commercial publications, based on the trial court's reference to a decision in another case.[8] In *Ledford v. State*,[9] which was decided under the old Evidence Code,[10] evidence of a spray paint can's label was inadmissible under a hearsay exception,[11] despite

3. 358 Ga. App. 568, 855 S.E.2d 766 (2021).

4. O.C.G.A. § 16-12-171(a)(1)(A).

5. O.C.G.A. § 24-8-803 (2021).

6. *Childers*, 358 Ga. App. at 570, 855 S.E.2d at 768.

7. *Id.*

8. *Id.* at 570–71, 855 S.E.2d at 768–69.

9. 239 Ga. App. 237, 520 S.E.2d 255 (1999).

10. *Childers*, 358 Ga. App. at 571, 855 S.E.2d. at 769. The old evidence code did not include the "market reports and commercial publications" hearsay exception.

11. *Ledford*, 239 Ga. App. at 241, 520 S.E.2d at 229.

the dissent's argument for admission under the "necessity" exception and reference to label exceptions from other exemptions.[12]

Next, the court of appeals in *Childers* acknowledged that "[w]hether the label on the container of a vapor product comes within an exception to the general rule against hearsay is a matter of first impression in Georgia."[13] However, the court declined to rule on the priority of the admission.[14] Instead, the court upheld Childers's conviction based on independent testimony, stating only that any error in admitting the label was harmless.[15]

Although not a conclusive ruling, *Childers* and *Ledford*, along with the new Evidence Code's admission of the "market reports and commercial publications," created a strong argument for admissibility of labels as an exception under O.C.G.A § 24-8-803(17).

III. OBJECTIONS: USE THEM OR LOSE THEM

"Raise it or waive it" is a phrase often first introduced to attorneys in their first-year civil procedure class. But what if you already have a motion *in limine* excluding specific evidence from your trial, does that satisfy the "raise it" requirement? The Supreme Court of Georgia addressed this question in *Williams v. Harvey*.[16]

Williams arose out of a collision leading to Williams's traumatic brain injury, onset of seizures, and multiple fractures. Prior to trial, the parties filed several motions *in limine*, including Defendants' motion to exclude "[s]tatements, contentions, arguments, inferences, or proffer of any evidence to elicit sympathy for the Plaintiff or any individual." Although the trial court reserved ruling on this motion, it stated that "any statements, arguments, or evidence offered predominantly to overly inflame the emotions of the jury or to [e]licit excessive or undue sympathy, hostility, or prejudice for or against either party is prohibited."[17]

During closing arguments, both parties renewed their opening arguments' suggested verdict values. The plaintiff claimed $3.4 million

12. *Id.* at 244–45, 520 S.E.2d at 231 (Pope, P.J., dissenting).

13. *Childers*, 358 Ga. App at 572, 855 S.E.2d at 770.

14. *Id.*

15. *Id.* at 576, S.E.2d 772–73. In addressing the sufficiency of the evidence, the court did not require chemical testing nor expert opinion by comparison to open container cases and narcotic cases. *Id. See also*, Moore v. State, 354 Ga. App. 145, 154, 840 S.E.2d 519, 528 (2020); Ayiteyfio v. State, 308 Ga. App. 286, 289, 707 S.E.2d 186, 188 (2011); Yates v. State, 263 Ga. App. 29, 30, 587 S.E.2d 180, 181–82 (2003).

16. 311 Ga. 439, 858 S.E.2d 479 (2021).

17. *Id.* at 439–442, 858 S.E.2d at 482–484.

in special damages and $20 million for pain and suffering, and the defense countered with special damages being between $4.1 million and $5.1 million and for pain and suffering between $1.5 million to $2.5 million. Following an $18 million verdict, the defense moved for a new trial, arguing *inter alia* that plaintiff's closing argument violated the golden rule as prohibited by the trial court's earlier order. The trial court denied the motion and found no violation of the golden rule.[18]

The Court of Appeals of Georgia disagreed and reversed the judgment, characterizing plaintiff's comparison of a nursing home life care plan option to a "death warrant[,]" as a clear violation of the trial court's order.[19] The court of appeals relied on case law under the old evidence code to hold that motions *in limine* preserve issues for appeal even without contemporaneous objections.[20]

The Supreme Court of Georgia granted certiorari to determine whether a ruling on a motion *in limine* is sufficient to preserve appeal despite the absence of contemporaneous objections.[21] To answer this question, the court turned to the Advisory Committee's Note on the 2000 amendments to Federal Rules of Evidence 103(b) which states:

> Even where the court's ruling is definitive, nothing in the amendment prohibits the court from revisiting its decision when the evidence is to be offered. If the court changes its initial ruling, or if the opposing party violates the terms of the initial ruling, objection must be made when the evidence is offered to preserve the claim of error for appeal. The error, if any, in such a situation occurs only when the evidence is offered and admitted.[22]

The court held that Georgia's adoption of the new Evidence Code, patterned after the federal rules and guided by federal interpretation, abrogated prior Georgia law that did not require contemporaneous objection to preserve errors ruling for a violation of a motion *in limine*.[23] Accordingly, the defense was required to object contemporaneously regardless of the ruling on its motion *in limine*.[24] The court added that requiring contemporaneous objection:

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18. *Id.* at 440–441, 858 S.E.2d at 483.

19. *Id.* at 442, 858 S.E.2d at 484.

20. *Id.* (citing Cent. of Ga. Ry. Co. v. Swindle, 260 Ga. 685, 687, 398 S.E.2d 365, 367 (1990)).

21. *Id.* at 439, 858 S.E.2d at 482.

22. *Id.* at 444, 858 S.E.2d at 485 (alterations in original) (quoting FED. R. EVID. 103(b) Advisory Committee's Note to the 2000 amendments).

23. *Id.* at 445, 858 S.E.2d at 486.

24. *See id.* at 447, 858 S.E.2d at 487.

> [Allows the trial court] to take remedial action, including providing curative instructions to the jury and admonishing counsel for the violation if necessary . . . . [which] is preferable and far more efficient than the alternative, in which the aggrieved party can sit back and make no objection in the hope of either a successful verdict or, in the event of a loss, persuading the trial court or the appellate court to reverse much later in a motion for new trial or on appeal.[25]

Additionally, the court refused to extend the meaning of "objection made" to pretrial rulings on motions *in limine*.[26] The court also refused to extend appellate review for plain error beyond death penalty criminal cases.[27] Regardless of its decision on contemporaneous objections, the court stated that the underlying motion *in limine* was too vague to be enforceable.[28]

Interestingly, approximately one year after its decision in *Harvey v. Williams*,[29] and yet prior to the Supreme Court of Georgia's decision in *Williams*, the Court of Appeals of Georgia had also held that failures to make contemporaneous objections to violations of motions *in limine* did not preserve issues for appeal.[30] In *Kennison v. Mayfield*, following a collision resulting in Keith Mayfield's death, the trial court granted Kennison's motions *in limine* to exclude references to her driving record, prior collisions, and prior traffic offenses. Nevertheless, during Kennison's cross examination, the plaintiff raised Kennison's traffic citations, suspension of her driver's license, and arrest for driving under the influence of alcohol. The defense objected to some of the questions on grounds of improper character evidence, relevance, and extrinsic evidence. However, the defense did not object to questions on arrests or suspensions of license.[31]

The Court of Appeals of Georgia stated that because the defense did not raise the objections, it did not preserve those issues for appeal.[32] But what if, even in the absence of both a motion *in limine* and a contemporaneous objection, the trial court exercises its gate keeping function to preclude otherwise inadmissible evidence? The Georgia Court

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25. *Id.* (internal citations omitted).

26. *Id.* at 447–448, 858 S.E.2d at 487.

27. *Id.* In its reasoning, the court acknowledged that it has extended this rule to civil cases in limited circumstances before but stated that it is now overruling these cases. *Id.* at 451, 858 S.E.2d at 490.

28. *Id.* at 452–453, 858 S.E.2d at 491.

29. 354 Ga. App. 766, 841 S.E.2d 386 (2020).

30. Kennison v. Mayfield, 359 Ga. App. 52, 60, 856 S.E.2d 738, 745 (2021).

31. *Id.* at 52–61, 856 S.E.2d at 741–46.

32. *Id.* at 60–61, 856 S.E.2d at 745–46.

of Appeals addressed this issue in *Forsyth County v. Mommies Properties LLC*.[33]

In *Mommies Properties LLC,* Mommies Properties LLC (Mommies) appealed four decisions to the Forsyth Zoning Board of Appeals (ZBA). The four appeals included the appeal of a decision to implement a stop work order, an appeal of a decision requiring an erosion control plan for grassing the property, an appeal of a second stop work order, and an appeal of a decision denying Mommies a building permit. On all four appeals, the ZBA found in favor of Forsyth County (the County).[34]

Following the decisions of the ZBA, Mommies appealed to the superior court, which reversed the four ZBA decisions. Moreover, the superior court denied the County's motions for reconsideration in each case. The County then filed four applications for discretionary appeal, which the court of appeals granted. In all four claims on appeal, the County asserted that the trial court erred when it concluded that "all hearsay evidence presented in front of the ZBA, without objection, was not competent evidence, and in finding that the evidence could not support the ZBA's decision."[35] The court of appeals agreed.[36]

The superior court noted that its review of the lower court on certiorari is limited to alleged errors of law and determining whether "any evidence" supported the ZBA's decision. The superior court noted that "'[t]he factual findings of the [ZBA] are conclusive to the extent that they are supported by competent evidence,' and '[c]ompetent evidence is that which is admissible.'" However, the superior court cited a pre-2013 case that held "hearsay evidence, presented during an administrative proceeding, is not competent or appropriate evidence." The court of appeals held that the superior court's reliance on this pre-2013 case conflicted with the new Evidence Code.[37]

It reasoned that the superior court's ruling in the 2013 case where "all hearsay evidence, whether objected to or not, is inadmissible," clearly conflicted with the new Evidence Code.[38] Under O.C.G.A. § 24-8-802, "[h]earsay shall not be admissible except as provided by this article; provided, however, that if a party does not properly object to hearsay, the objection shall be deemed waived, and the hearsay evidence shall be legal evidence and admissible."[39] The court of appeals reviewed the ZBA

33. 359 Ga. App. 175, 855 S.E.2d 126 (2021).
34. *Id.* at 175–176, 855 S.E.2d at 129.
35. *Id.* at 176–184, 855 S.E.2d at 129–34.
36. *Id.*
37. *Id.* at 184, 855 S.E.2d at 134.
38. *Id.*
39. O.C.G.A. § 24-8-802 (2021).

hearing in which Mommies appeared *pro se*.[40] At the hearing, Mommies never objected to the application of the evidentiary rules or the procedures adopted, and was provided an opportunity to cross examine the County's witnesses.[41] Because *pro se* litigants are held to the same rules of practice and procedures as lawyers and rely on the new Evidence Code, this court held that the superior court erred by unilaterally disregarding the unobjected-to hearsay evidence heard before the ZBA.[42] Therefore, under the new Evidence Code, unobjected-to hearsay is admissible.

VI. REDEFINING "SUFFICIENT FACTS AND DATA" UNDER THE NEW EVIDENCE CODE

In further deviation from Georgia's prior Evidence Code and to better align the new Evidence Code with the federal code, the Court of Appeals of Georgia in *Emory University v. Willcox*[43] expanded the admissibility of expert opinions by limiting the scope of "sufficient facts and data."[44]

In *Willcox*, the Administrator of Corlett Evans's estate alleged that Evans died as a result of complications of the paraplegia that was wrongfully caused during a hospitalization. In support of this allegation, the plaintiff's expert opined that Evans "would not have died with the conditions which took her life had she not become paralyzed in June 2015." Defendants moved to exclude this opinion as it was not based "upon sufficient facts or data" because the plaintiff's expert did not review any of the decedent's medical records from before the hospitalization in question. The defendants argued that the prior records would have shown the decedent's uncontrolled diabetes could have contributed to the paralysis and death. In support of his opinion, the plaintiff's expert testified that he was generally aware of the decedent's pre-existing conditions when he formed his opinion. The trial court ultimately denied the defendants' motion to exclude this evidence.[45]

On appeal, the defendants argued that the trial court abused its discretion in allowing the testimony to opinions regarding medical causation that was not based "upon sufficient facts or data" as required by O.C.G.A. § 24-7-702(b).[46] Under O.C.G.A. § 24-7-702(b), the testimony of a qualified expert is admissible if: "(1) [it] is based upon sufficient facts

40. *Mommies Properties LLC*, 359 Ga App. at 185, 855 S.E.2d at 134.
41. *Id.* at 185–186, 855 S.E.2d at 135.
42. *Id.* at 186–188, 855 S.E.2d at 135–137.
43. 355 Ga. App. 542, 844 S.E.2d 889 (2020).
44. *Id.* at 542, 844 S.E.2d at 891.
45. *Id.* at 542–544, 844 S.E.2d at 891–893.
46. *Id.* at 542, 844 S.E.2d at 891.

or data; (2) [it] is the product of reliable principles and methods; and (3) the [expert] witness has applied the principles and methods reliably to the facts of the case."[47]

In its opinion, the Court of Appeals of Georgia acknowledged that this language is "materially identical to both Federal Rule of Evidence 702 and to former O.C.G.A. § 24-9-67.1(b)."[48] Accordingly, the court looked not to former Georgia case law, but to federal case law.[49] The court noted that the "sufficiency of [an] expert's basis for opinion is part of [the] opinion's ultimate reliability" that presents "a jury question as to the weight which should be assigned [to] the opinion."[50] Accordingly, the court rejected prior Georgia case law that stated "an incomplete medical history" makes an opinion "inherently unreliable."[51] Instead, the court of appeals affirmed the trial court's admission of the expert testimony based on the trial court's broad discretion and the creation of a jury question.[52]

VIII. CONCLUSION

As the world faced countless uncertainties, Georgia's appellate courts provided at least one area of consistency for litigators in Georgia: when in doubt, turn to federal case law. Indeed, this Survey period confirms, as discussed in last year's Survey, that the new Evidence Code strongly favors admissibility. In the future, the onus will be on litigators to actively prevent admission of improper evidence, even where pre-motion practice would have previously satisfied this duty.

47. O.C.G.A. § 24-7-702(b) (2021).

48. *Willcox*, 355 Ga App. at 542, 844 S.E.2d at 891.

49. *See id.*

50. *Id.* at 545, 844 S.E.2d at 893 (quoting Toyo Tire N. Am. Mfg., Inc. v. Davis, 333 Ga. App 211, 217, 775 S.E.2d 796, 801 (2015)).

51. *Id.*

52. *Id.* at 546, 844 S.E.2d at 894.