Evidence

Marc T. Treadwell

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr

Part of the Evidence Commons

Recommended Citation
Treadwell, Marc T. (1991) "Evidence," Mercer Law Review: Vol. 43 : No. 1 , Article 10. Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol43/iss1/10

This Survey Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.
Evidence

by Marc T. Treadwell*

I. INTRODUCTION

The most significant development in Georgia evidence law during the survey period, as in the past two survey periods, was the continued effort to adopt a new Georgia evidence code based upon the Federal Rules of Evidence. The State Bar of Georgia is firmly committed to the adoption of the Georgia Rules of Evidence and has vigorously lobbied for the proposed rules in each of the past two sessions of the Georgia General Assembly. Although no organized opposition has arisen to the proposed rules, the rules have yet to be adopted. In the 1991 session of the General Assembly, as in the 1990 session, the rules were approved by the Senate, but bogged down in the House Judiciary Committee for the remainder of the session. The rules will carry over to the 1992 session.

II. OBJECTIONS

The court of appeals decision in King v. State1 provides a good example of the need for precise objections, although it can be argued that few objections would meet the rigid standard applied by the court in King. In King defendant contended the trial court improperly restricted his cross-examination of the alleged victim concerning the victim's prior arrest. On appeal, defendant argued this evidence was admissible to demonstrate the victim's possible motive for cooperating with the prosecution. Prior to trial, the trial court ruled that the victim could be impeached only with certified copies of prior convictions. Defendant contended, however, that he did not want to impeach the victim's general credibility with evidence of prior criminal activity, which is properly done only through the use of a certified copy of a conviction. Rather, defendant wanted this evidence

* Partner in the firm of Chambless, Higdon & Carson, Macon, Georgia. Valdosta State College (B.A., 1978); Walter F. George School of Law (J.D., cum laude, 1981). Member, State Bar of Georgia.
to demonstrate a specific motive. The court of appeals did not reach this substantive issue concluding that there was "nothing in the record to support the assertion that the trial court's grant of the motion erroneously served to preclude appellant from cross-examining the victim as to the possible existence of a specific 'deal' for his trial testimony." The court held that the bare ruling of the trial court was not error; a felony conviction cannot be proved through cross-examination when it is offered to impeach the general credibility of the witness. Apparently the court thought defendant should have more clearly specified his reason for wanting to cross-examine the victim about his arrest. In her dissenting opinion, Judge Beasley, joined by Judges Deen and Banke, argued that the trial court's ruling improperly curtailed defendant's right of cross-examination. Judge Beasley, concluding that the majority viewed the facts "too narrowly," thought the trial court's ruling pre-empted defendant's attempt to attack the witness' credibility by demonstrating a specific motive to testify against defendant. While it is arguable that the majority drew too fine a line, it is nevertheless important to make clear the purpose for which evidence is being offered. The testimony defendant sought to elicit was clearly inadmissible to impeach general credibility. On the other hand, it was clearly admissible to demonstrate the possibility of a specific motive for offering testimony adverse to defendant. The court's message is that lawyers must clearly make this point to the trial judge.

III. RELEVANCY

A. Relevancy of Extrinsic Act Evidence

Extrinsic act evidence is perhaps the most problematic area of evidence law. Extrinsic act evidence includes any evidence of conduct on occasions other than the one at issue, and is generally inadmissible. However, this kind of evidence is admissible for many legitimate purposes. Unfortunately, the determination of whether extrinsic act evidence falls within one of the many of the exceptions to the general rule can be exceedingly confusing. Although the Georgia appellate courts have done an excellent job of analyzing extrinsic act evidence, the absence of a clear statutory framework makes it difficult to obtain quick and precise answers to extrinsic act evidence issues.

2. Id. at 770, 391 S.E.2d at 771.
3. Id.
4. Id.
5. Id. at 772, 391 S.E.2d at 772 (Deen, Banke & Beasley, JJ., dissenting).
6. Id. (Deen, Banke & Beasley, JJ., dissenting).
The first step in extrinsic act evidence analysis is obviously to determine whether the proffered evidence is actually extrinsic. For example, the *res gestae* doctrine, although generally considered an exception to the hearsay rule, also permits the introduction of evidence of acts other than the precise act at issue. Furthermore, as discussed in prior surveys, if the date of an offense is not an essential averment in the indictment, then any similar events that defendant committed within the applicable period of limitations are covered in the indictment. Thus, the state can introduce evidence of such offenses even though they are completely separate from the one actually charged. This principle was reaffirmed during the present survey period.

If the proffered evidence is extrinsic, the second inquiry is whether the evidence is being offered as substantive evidence or to impeach or bolster a witness. For example, evidence of character, which is extrinsic because it is based on acts other than the one at issue, may be admissible for a substantive purpose, such as to prove a victim's violent disposition, or to impeach a witness. Examples of extrinsic act evidence used to impeach a witness are found below in the discussion of evidentiary issues concerning witnesses. The use of extrinsic act evidence for substantive purposes is discussed in this section.

### B. Evidence of Similar and Related Transactions

Evidence of similar or related transactions is now commonly admitted in criminal cases. Appellate reports are replete with perfunctory affirmances of convictions in which prosecutors relied heavily on evidence of other offenses allegedly committed by the defendant in order to obtain those convictions. In these cases the courts rarely break new ground, generally restating the principles governing admissibility of similar and related transaction evidence. Such evidence is not admissible to prove that a person acted in conformity with his prior conduct, but may be admissible to prove identity, motive, plan, scheme, bent of mind, or course of conduct. However, even if extrinsic act evidence is relevant to a legitimate issue, it is not automatically admissible. Prosecutors must first

12. See infra notes 116-34 and accompanying text.
13. See infra notes 14-62 and accompanying text.
prove to the satisfaction of the court that a defendant committed the extrinsic act, the extrinsic act is sufficiently similar or related to the charged offense so that proof of the extrinsic act tends to prove an element of the charged offense, and the probative value of the evidence outweighs its prejudicial impact.

Although Georgia courts permit the liberal use of similar or related transaction evidence, this tolerance has its limits. In Cross v. State, the prosecution introduced evidence of the positive results of a drug test. The State contended that this evidence was admissible as evidence of similar conduct. Defendant, however, was not charged with drug possession, but rather was charged with the sale of illegal drugs. The court concluded that the admission of such evidence "would be taking the issue of the similarity of acts too far." Evidence of the use of a drug does not prove motive, intent, plan, or scheme to sell the drug, and it is not sufficiently similar to the offense of selling illegal drugs. Accordingly, the court reversed defendant's conviction.

In Proulx v. State, the court of appeals held that a plea of nolo contendere in a similar transaction does not bar admission of evidence of the offense. Although the plea itself is not admissible, the prosecution still may prove the facts constituting the offense. Similarly, in Tilley v. State, the court of appeals held that the State may introduce evidence of a similar offense that resulted in a first offender plea. Again, although the plea itself is inadmissible, the State may prove the facts constituting the offense.

Evidence of similar or related transactions can also be admissible in civil cases, although, ironically enough, courts are generally much more circumspect in admitting this evidence in civil cases. Perhaps this is because similar or related transaction evidence is generally admitted in criminal cases because it is relevant to a scienter related issue. In many

---

15. The reasonable doubt standard does not apply to related or similar transaction evidence.


17. Id. at 715, 397 S.E.2d 125 (1990).

18. Id. at 715, 397 S.E.2d at 126.

19. Id.

20. Id.

21. Id. at 715-16, 397 S.E.2d at 126-27.

22. Id. at 303, 396 S.E.2d 688 (1990).

23. Id. at 303, 396 S.E.2d at 689.

24. Id.

25. Id. at 303, 396 S.E.2d at 689.

26. Id. at 99, 397 S.E.2d at 507.

27. Id. at 98, 397 S.E.2d at 507.
civil cases, for example, a negligence case, scirent is not an issue and thus the most frequently used premise for the admission of similar or related transaction evidence is not present. However, if a party's knowledge or state of mind is a relevant issue, then extrinsic act evidence may be admissible in civil cases. For example, a plaintiff who alleges that a proprietor knew or should have known of the likelihood of a criminal attack on the proprietor's premises may introduce evidence of similar prior transactions to demonstrate notice.28

C. Evidence of Character of Substantive Evidence

In very limited situations, evidence of character is admissible as substantive evidence. For example, criminal defendants sometimes seek to introduce evidence of a victim's character in order to explain their own conduct. Although Georgia law permits a defendant to adduce evidence of the victim's general reputation for violence and evidence of prior specific threats or assaults against the defendant,29 Georgia has historically prohibited the admission of evidence of specific acts of violence by a victim against third persons.30 Last year's survey noted, however, that the Georgia Supreme Court appeared to be on the verge of changing this long established principle.31 In a case decided after the present survey period, but one nevertheless too significant to ignore in this Article, the supreme court acted to reverse this trend in certain circumstances.32

The evolution of the supreme court's position on this issue is fascinating and merits some detailed discussion. As reported in last year's survey,33 the supreme court in Lolley v. State34 reaffirmed the longstanding prohibition against the admission of evidence of a victim's acts of violence against third parties.35 In a concurring opinion, Justice Weltner, joined by Justices Bell and Hunt, argued that cases excluding such evidence should be re-examined.36 Justice Weltner argued that in certain situations such evidence would be relevant. For example, according to Justice Weltner, a defendant attempting to justify his assault should be permitted to prove

33. See Treadwell, supra note 31, at 231-34.
35. Id. at 607, 385 S.E.2d at 286-87.
36. Id. at 607-10, 385 S.E.2d at 287-89 (Weltner, Bell & Hunt, JJ., concurring).
his knowledge of the victim's violent acts to support his defense that he reasonably believed his assault was justified. However, Justice Weltner also argued that such evidence should be admissible even if the defendant had no knowledge of the victim's violent acts. Significantly, Justice Weltner's opinion was not based upon a similar or related transaction analysis, but rather was based expressly upon a character evidence analysis: "It is more probable that a person will act in accordance with his character (disposition) than that he will act contrary to it." In his dissent, Justice Gregory, joined by Chief Justice Clarke, argued that the evidence should have been admitted as similar transaction evidence rather than as character evidence.

Shortly after Lolley, the supreme court in Hill v. State, reaffirmed the majority holding in Lolley. Again, Justices Weltner and Bell concurred. Justice Weltner wrote that in Lolley "[t]wo justices dissented to the continued application of the rule that the violent character of a deceased may not be shown by evidence of specific acts of violence against third persons." Justice Weltner concluded that although the three justices in Lolley concurred, rather than dissented (because the trial court properly applied the law then in existence), it was apparent that a majority of the supreme court was prepared to abrogate the admissibility of evidence of specific acts of violence against third parties. Actually, as noted above, the dissent in Lolley did not question the majority's statement that the character of the victim may not be proved by admission of evidence of acts against third parties. Rather, the dissent concluded that the evidence would be admissible to demonstrate a similar transaction. Thus, at that point, it was not clear that the majority of the supreme court favored a change in the law. Indeed, Justice Gregory's opinion in Chapman v. State suggested that his dissent in Lolley could not be interpreted as an expression of disapproval of the general rule.

During the present survey period, the supreme court, in Stoudemire v. State, touched on this issue again. Defendant was convicted of felony murder and contended that the trial court erred in refusing to admit evi-

37. Id. at 610, 385 S.E.2d at 288 (Weltner, Bell & Hunt, JJ., concurring).
38. Id. at 609, 385 S.E.2d at 288 (Weltner, Bell & Hunt, JJ., concurring).
39. Id. at 609-10, 385 S.E.2d at 288 (quoting Henderson v. State, 234 Ga. 827, 830 n.1, 218 S.E.2d 612 (1975)).
40. Id. at 610, 385 S.E.2d at 289 (Clarke, C.J. & Gregory, J., dissenting).
41. Id. at 657, 386 S.E.2d at 133 (Weltner & Bell, JJ., concurring).
42. Id. (Weltner & Bell, JJ., concurring).
43. Id. (Weltner & Bell, JJ., concurring).
44. See supra text accompanying note 37.
 evidence of a prior altercation between the victim and a third person.\textsuperscript{48} Justice Benham, writing for the majority, acknowledged that "several members of this court have expressed interest in giving consideration to the admission of evidence of specific acts of violence perpetrated by the victim against third parties . . . ."\textsuperscript{49} However, Justice Benham noted that even if the law were changed, the change would apply only to cases in which a defendant contended that his conduct was justified in view of the victim's character.\textsuperscript{50} In \textit{Stoudemire} defendant argued, however, that the victim's death was an accident.\textsuperscript{51} In such a case, the evidence was clearly inadmissible. In his dissent, Justice Hunt argued that the evidence was admissible to show that defendant acted reasonably, but not to prove the victim's violent character.\textsuperscript{52}

These opinions set the stage for the supreme court's decision in \textit{Chandler v. State}.\textsuperscript{53} In \textit{Chandler} defendant asserted the defense of justification and contended the trial court erred by refusing to admit evidence of the victim's prior violent acts involving third parties.\textsuperscript{54} Relying upon \textit{Hill}, the Georgia Supreme Court held "this enumeration has no merit . . . and therefore presents no reason to reverse the judgment in this case."\textsuperscript{55} Nevertheless, Justice Bell, writing for the majority, continued that the supreme court now found Justice Weltner's concurring opinion in \textit{Lolley} "persuasive." Justice Bell added, "[w]e . . . hold that, as of the date this opinion is published in the advance sheets (September 12, 1991), evidence of specific acts of violence by a victim against third persons shall be admissible where the defendant claims justification."\textsuperscript{56} The court then proceeded to dictate the procedure to be followed by parties wishing to introduce such evidence.\textsuperscript{57}

Justice Benham, joined by presiding Justice Smith, concurred specially to note his disagreement with Justice Weltner's concurrence in \textit{Lolley}.\textsuperscript{58} Justice Benham carefully distinguished the majority's holding with Justice Gregory's dissent in \textit{Lolley}, which only addressed the issue of whether the proffered evidence was admissible as a similar transaction.\textsuperscript{59} Justice Weltner's concurring opinion in \textit{Lolley}, on the other hand, allows

\begin{itemize}
\item\textsuperscript{48} \textit{Id.} at 49, 401 S.E.2d at 483.
\item\textsuperscript{49} \textit{Id.} at 50, 401 S.E.2d at 483.
\item\textsuperscript{50} \textit{Id.}
\item\textsuperscript{51} \textit{Id.}
\item\textsuperscript{52} \textit{Id.} at 51, 401 S.E.2d at 484 (Hunt, J., dissenting).
\item\textsuperscript{53} 261 Ga. 402, 405 S.E.2d 669 (1991).
\item\textsuperscript{54} \textit{Id.} at 407, 405 S.E.2d at 673.
\item\textsuperscript{55} \textit{Id.}
\item\textsuperscript{56} \textit{Id.}
\item\textsuperscript{57} \textit{Id.} at 407-08, 405 S.E.2d at 673-74.
\item\textsuperscript{58} \textit{Id.} at 408, 405 S.E.2d at 674 (Benham, J., concurring).
\item\textsuperscript{59} \textit{Id.} at 409, 405 S.E.2d at 674 (Benham, J., concurring).
\end{itemize}
a party to place a victim's character in issue,"60 "and is a move to replace trial by evidence with trial by character assassination."61 Justice Benham, pulling no punches, concluded that "this revolutionary change in the law of evidence is a throwback to frontier days and gives judicial sanction to a new defense to murder: the victim 'needed killing.'"62

D. Relevancy of Insurance Coverage

Without question, Denton v. Con-Way Southern Express, Inc.63 is one of the most significant evidence decisions rendered by the supreme court in some time. Prior to July 1, 1987, one of the best known principles of Georgia law was that a defendant could not introduce evidence that a collateral source had paid plaintiff's damages. Thus, for example, a defendant could not introduce evidence that a plaintiff's insurance company had paid his medical expenses.64 This principle, known as the Collateral Source Rule, was one of the casualties of the so-called Tort Reform Act of 1987.65 The abolition of the Collateral Source Rule had a profound effect upon all civil trial lawyers who prosecute or defend personal injury claims. Lawyers representing plaintiffs, in particular, chaffed at the idea that a plaintiff's insurance coverage could be relevant but that a defendant's liability insurance was not. For this reason, the supreme court in Denton held that Official Code of Georgia Annotated ("O.C.G.A.") section 51-12-1(b) violated the equal protection clause of the Georgia Constitution.66

While the general principle that insurance coverage is irrelevant has been restored, it is always possible, as with much otherwise inadmissible evidence, for a party to open the door to the introduction of insurance coverage. For example, in Bridges v. Schier,67 plaintiff claimed that he did not undergo a diagnostic test because he did not have the funds to pay for it. The trial court then allowed defendant to cross-examine plaintiff to establish the availability of no-fault benefits.68 The court of appeals held that this was not error.69 Plaintiff, by contending that he did not have resources to pay for the test, opened the door to the introduction of evidence of insurance coverage.

61. 261 Ga. at 409, 405 S.E.2d at 674 (Benham, J., concurring).
62. Id.
65. 1987 Ga. Laws 915 (codified at O.C.G.A. § 51-12-1(b) (Supp. 1991)).
68. Id. at 584, 394 S.E.2d at 410.
69. Id.
E. Subsequent Remedial Measures

Evidence of subsequent remedial measures is not admissible. It would seem that this principle needs no elaboration or even citation. From the first days of law school, lawyers are taught that the law seeks to encourage remedial action by allegedly negligent defendants and, therefore, such evidence will not be admitted against them. Nevertheless, in Gunter v. Jackson Electric Membership Corp.,70 plaintiffs contended that the trial court erred when it excluded from evidence portions of a report prepared by defendant concerning the incident at issue. Plaintiffs argued that the excluded portions, which detailed proposed action to avoid similar incidents, were admissible as an admission against interest.71 The court of appeals gave this argument short shrift, concluding that the admission of the report would have subverted the policy underlying the exclusion of evidence of subsequent remedial measures.72 Nevertheless, plaintiffs, as an alternative ground for their appeal, argued that the report became admissible after defendant’s employee testified on direct examination about the excluded portions of the report.73 The court held that this opened the door to admission of the report itself.74

F. Relevancy of Prior Sexual Behavior

Georgia’s rape shield statute generally prohibits the admission of evidence that relates to the past sexual behavior of a rape victim.75 The statute provides that such evidence is admissible only if the past sexual behavior directly involved the defendant, and the court finds that the evidence supports the defendant’s contention that the victim consented to the alleged rape.76 This exception is narrower than the previous exception that allowed the admission of evidence of past sexual behavior if it involved the defendant, or if the court concluded that the evidence supported a defendant’s defense of consent.77

Georgia courts have traditionally applied the rape shield statute with vigor, and this survey year was no exception. In Gibbs v. State,78 defendant unsuccessfully sought to introduce evidence that the victim claimed defendant had raped her on other occasions. However, defendant ex-

71. Id. at 630, 402 S.E.2d at 310.
72. Id.
73. Id.
74. Id. at 631, 402 S.E.2d at 311.
76. Id. § 24-3-3.
77. Id. § 24-2-3.
pressly disclaimed consent as a defense by claiming that he was attempting to impeach the credibility of the victim. The court reaffirmed that the rape shield statute provides "‘the exclusive means for admitting evidence of [] past sexual behavior,'" including the use of such evidence to impeach a witness." Therefore, the court affirmed the trial court's exclusion of this evidence. 79

Similarly, in Moore v. State, 80 the court of appeals held that the trial court properly excluded evidence of the victim's allegedly lewd behavior immediately prior to the alleged rape. 81 The court reached this conclusion because the victim's behavior did not involve defendant, and defendant was unaware that the incident had occurred; therefore, it could not be said that this incident could have led defendant to believe that the victim consented to intercourse. 82 The alleged offense in Moore occurred prior to the effective date of the amendment to the rape shield statute that made the exception conjunctive rather than disjunctive. Under the new statute, the evidence clearly would have been inadmissible because it did not involve defendant. 83

In Smith v. State, 84 the supreme court held that the rape shield statute does not bar the admission of evidence that an alleged victim made false accusations of sexual misconduct against third parties. 85 However, in Smith, the court held that before evidence of such alleged false accusations can be introduced, the trial court must make an initial determination concerning whether "a reasonable probability of falsity exists." 86 In Allison v. State, 87 defendant contended the trial court erred when it concluded that defendant had not established with reasonable probability that previous allegations of rape made by the victim were false. Defendant did, however, elicit testimony from the victim in which she admitted making the accusation (which she contended was true), and produced an independent third party who testified that the accusation was false. 88 The

79. Id. at 141, 395 S.E.2d at 388 (quoting Johnson v. State, 146 Ga. App. 277, 280, 246 S.E.2d 363, 365 (1978)).
80. Id.
82. Id. at 815, 395 S.E.2d at 14.
83. Id.
86. Id. at 136, 377 S.E.2d at 160.
87. Id. at 138, 377 S.E.2d at 160.
89. Id. at 76, 400 S.E.2d at 361.
court of appeals reasoned that defendant “could hardly have made a clearer showing.”90 Thus, the trial court abused its discretion when it concluded that there was no reasonable probability that the victim had made prior false allegations.91

IV. PRIVILEGES

Georgia law recognizes an absolute privilege against disclosure of communications between a patient and his psychiatrist92 or psychologist.93 Although the General Assembly sought to place this privilege on the same plane as the attorney-client privilege, Georgia courts admittedly have interpreted the privilege “narrowly.”94 In Annandale at Suwanee, Inc. v. Weatherly,95 for example, the court of appeals reaffirmed that the privilege encompasses only communications with a psychiatrist and psychologist and does not extend to communications with nurses, attendants, or other mental health specialists unless it is shown that they were agents of the psychiatrist or psychologist.96 Consequently, the court ordered the production of the treatment records of a mental health facility, excluding only those reports that detailed direct communications with psychiatrists and psychologists.97

The court of appeals also addressed the discoverability of records of a mental health facility in Aetna Casualty & Surety Co. v. Ridgeview Institute, Inc.98 Aetna sought production of the medical records of a former patient at defendant’s facility. The patient, a physician, was pursuing an uninsured motorist claim against Aetna in which he contended that injuries suffered in the accident forced him to switch to a less demanding specialty. In a deposition, however, the physician admitted that his change in specialty was prompted by his treatment for alcoholism at Ridgeview. Aetna sought the production of Ridgeview’s records to determine whether the physician’s decision to change specialties predated the accident.99

90. Id. at 76-77, 400 S.E.2d at 361.
91. Id. at 77, 400 S.E.2d at 361.
96. Id. at 804, 392 S.E.2d at 28 (citing Weksler v. Weksler, 173 Ga. App. 250, 326 S.E.2d 874 (1985)).
97. Id.
99. Id. at 805, 392 S.E.2d at 287.
Ridgeview contended that federal law prohibited the production of the records. The court of appeals recognized that federal law generally prohibits the disclosure of alcohol abuse treatment records by facilities receiving federal funds, but noted that a court may order the production of these records for "good cause." Federal regulations specifically provide that these records may be produced "in connection with litigation . . . in which the patient offers testimony or other evidence pertaining to the content of the confidential communications." The court of appeals concluded that the physician had placed in issue the reason for his change in specialties and, therefore, federal law did not prohibit the production of the records.

The court of appeals ordered the trial court to conduct an in camera inspection of the records to determine whether the physician should produce the records. The court specifically instructed the trial court to determine whether Georgia's psychiatrist-patient privilege would prohibit the production of the records. In this regard, Aetna argued that its need to defend the civil claim abrogated the doctor's privilege against the disclosure of his records. Aetna relied upon the Georgia Supreme Court's decision in Bobo v. State, which held that the psychiatrist-patient privilege "must give way where countervailing interests in the truth-seeking process demands such a result." Bobo, however, involved a criminal defendant's claim that the privilege impinged his constitutional right of confrontation. The court in Bobo specifically noted that the privilege "is not waived when a party who claims it is seeking to recover damages for injuries of a mental and emotional nature." The court rejected Aetna's argument that the Bobo balancing test could be applied in a civil case.

Of course, for the psychiatrist or psychologist privilege to exist, there must first be a relationship between the psychiatrist or psychologist and the patient. The court of appeals decisions in Fulbright v. State and In the Interest of R. M. are examples of the court's "narrow" interpretation of the psychiatrist-psychologist privilege. In Fulbright the court of

100. Id.
101. Id. at 806, 392 S.E.2d at 287.
103. 194 Ga. App. at 807, 392 S.E.2d at 288.
104. Id.
106. 194 Ga. App. at 807, 392 S.E.2d at 288.
108. Id. at 360, 349 S.E.2d at 692.
109. Id. at 358, 349 S.E.2d at 691.
110. 194 Ga. App. at 806, 392 S.E.2d at 288.
appeals held that the trial court did not err in permitting a psychiatrist who had examined defendant to testify. The court reasoned that defendant consulted the psychiatrist for the purpose of enlisting his aid in a related domestic action and not to obtain psychiatric treatment or counseling. Similarly, in R. M., the court held that the psychologist-patient relationship did not exist because the child’s father did not consult the psychologist for treatment, but rather saw him at the instigation of the Department of Family and Children Services.

V. Witness

A. Impeachment by Evidence of Character

In Jones v. State, a decision this survey discussed three years ago, the supreme court stopped the common prosecution practice of impeaching a defendant through evidence of prior criminal activity when a defendant has testified to less than all of his prior criminal offenses. Prosecutors still have difficulty complying with this change in the law.

In Cross v. State, the prosecutor asked defendant if he had ever used drugs and defendant responded that he had not. The prosecutor then announced, in the presence of the jury, that she intended to introduce evidence of a chemical test revealing traces of an illicit drug in defendant’s body fluids. The trial court permitted the prosecutor to introduce this evidence. On appeal, the State argued that this evidence was admissible to impeach defendant’s testimony that he did not use drugs. The court of appeals summarily rejected this argument and noted its disapproval of the prosecution’s tactic of trying to “bootstrap” the admissibility of the evidence by eliciting defendant’s denial that he had used drugs.

Conversely, in Blan v. State, defendant, who was charged with selling cocaine, testified on direct examination about his conversation with an undercover agent. During this conversation he told the agent: “I don’t fool with no crack cocaine.” The trial court then permitted the State to

113. 194 Ga. App. at 828, 392 S.E.2d at 300.
114. Id.
118. 257 Ga. at 760, 363 S.E.2d at 535.
120. Id. at 715, 397 S.E.2d at 126.
123. Id. at 671, 402 S.E.2d at 783.
impeach this testimony with evidence of defendant's conviction for possession of cocaine.\textsuperscript{124} The court of appeals concluded that defendant's statement could be construed as a denial that he had ever had any involvement with cocaine, and thus he opened the door to impeachment with evidence that he had been convicted of possession of cocaine.\textsuperscript{125}

\textbf{B. Impeachment by Evidence of Conviction}

Georgia law governing the use of convictions to impeach a witness provides an excellent illustration of why the proposed Georgia Rules of Evidence should be adopted. Remarkably, the Georgia Evidence Code does not address the use of convictions for impeachment purposes. However, common law permits the use of a felony conviction or other crime involving moral turpitude to impeach a witness's character.\textsuperscript{126} This lack of statutory guidance creates much confusion in Georgia concerning the use of convictions for impeachment. During the survey period, however, the supreme court dispelled one area of confusion.

As reported in last year's survey of Georgia evidence law,\textsuperscript{127} the court of appeals held, in \textit{Pender v. Witcher},\textsuperscript{128} that a witness could be impeached with evidence of a First Offender Act\textsuperscript{129} conviction. During this survey period, however, the supreme court reversed the court of appeals.\textsuperscript{130} The supreme court acknowledged that a witness in either a criminal or a civil case can be impeached by evidence of a conviction for a felony or crime of moral turpitude.\textsuperscript{131} O.C.G.A. provides, however, that upon satisfaction of the Act's requirements, a defendant is discharged without an adjudication of guilt and "shall not be considered to have a criminal conviction."\textsuperscript{132} Thus, because a plea under the Act does not result in a final conviction, it does not fall within the general rule that convictions are admissible to impeach character. The court noted that its decision did not affect the holding in \textit{Hightower v. General Motors Corp.}\textsuperscript{133} that evidence of a first offender record may be used in a civil case to disprove or to contradict a witness's testimony, but not to impeach his character generally.\textsuperscript{134}

\begin{thebibliography}{9}
\bibitem{124} Id. at 672, 402 S.E.2d at 783.
\bibitem{125} Id.
\bibitem{126} THOMAS F. GREEN, GEORGIA LAW OF EVIDENCE § 139 (3d ed. 1988).
\bibitem{127} See Treadwell, supra note 31, at 223.
\bibitem{128} 194 Ga. App. 72, 389 S.E.2d 560 (1989).
\bibitem{129} O.C.G.A. §§ 42-8-60 to -65 (1991).
\bibitem{131} Id. at 248, 392 S.E.2d at 8.
\bibitem{134} 260 Ga. at 249, 392 S.E.2d at 8.
\end{thebibliography}
C. Sequestration of Witnesses (and Now Parties)

The court of appeals opinion in Justice v. Kern & Co. is a disturbing decision for lawyers representing plaintiffs in personal injury actions. For these lawyers, it represents a potentially tremendous tactical advantage. The court in Justice held that a trial court may properly order a plaintiff to either testify first or be sequestered during the testimony of witnesses called by the plaintiff. This holding emanates from the supreme court’s decision in Barber v. Barber, a decision discussed in a previous survey of Georgia evidence law. In Barber, a divorce action, the supreme court held that the trial court did not abuse its discretion by “offering” plaintiff the option of either testifying first or remaining outside the courtroom while other witnesses testified. Three justices strongly dissented, arguing that the sequestration of a party violated that party's constitutional rights.

One’s opinion regarding the wisdom of the Justice holding probably turns on whether one primarily represents plaintiffs or defendants in personal injury actions. Clearly, however, the holding raises many questions. For example, to what extent is an attorney for a sequestered plaintiff prohibited from communicating with her client? Further, from a purely logical perspective, it would seem that a defendant should be subject to sequestration as well. Lawyers conceivably could find themselves in a trial where neither party appears until after the plaintiff has testified.

D. Impeachment and Examination of Witnesses Generally

Georgia law provides that a party is entitled to a “thorough and sifting cross-examination” of the witnesses called against him. Further, “[t]he state of a witness’s feelings towards the parties and his relationship to them may always be proved for the consideration of the jury.” Thus, in Boggs v. States, the court of appeals held that the trial court erred when it refused to allow a criminal defendant to cross-examine the victim about a pending damage suit filed by the victim against defendant.
Georgia law also provides that a party “may avail himself of allegations or admissions made in the pleadings of the other” even though those pleadings have not been admitted in evidence. Thus, in Carver v. Saye, the court of appeals held that the trial court erred when it prevented plaintiff from cross-examining defendant about his answer unless plaintiff first introduced the answer into evidence.

In Pryor v. State, the court of appeals reaffirmed that it is not necessary for a party to show surprise before impeaching his own witness. A party may impeach his own witness with a prior inconsistent statement even though he knows in advance that the witness's testimony will be in conflict with the prior statement.

As discussed elsewhere in this Article, child molestation cases present several complex evidentiary issues. During the survey period, the General Assembly enacted legislation to address problems presented by child victims testifying in open court and in the presence of the defendant. O.C.G.A. section 17-8-55, which became effective April 16, 1991, provides that the testimony of a child under age ten in a molestation case may be presented by means of a two-way closed circuit television. The statute provides that only the prosecutor, defendant’s attorney, technicians, and the judge are to be present with the child during his testimony. Although the defendant is not allowed to be in the room with the child, the statute provides that the defendant can “communicate with the persons in the room . . . by any appropriate electronic method.” In addition, the statute expressly provides that it shall not preclude the appearance of the child in the courtroom for the purpose of identifying the defendant.

VI. Opinion Evidence

A. Subject Matter of Opinion Evidence

During this survey period, as in past survey periods, Georgia courts struggled with the question of whether an expert in a child molestation

147. Id. at 147, 400 S.E.2d at 684.
149. Id. at 588, 402 S.E.2d at 339.
150. Id.
151. See infra notes 152-97, 206, 228-31, 249-62 and accompanying text.
153. Id.
154. Id. § 17-8-55(g).
155. Id. § 17-8-55(h).
prosecution can testify that the victim was, in fact, molested. Indeed, in
the five years that the author has written survey articles, it can safely be
said that this has been the most difficult evidentiary issue which the ap-
pellate courts have faced. Unfortunately, the issue remains unresolved.
This dilemma is understandable because prosecutors often face enormous
difficulties in prosecuting alleged child molesters, particularly when their
case depends almost entirely upon the testimony of the victim. Defend-
ants, of course, strenuously object to a witness, buttressed by the title of
expert, telling a jury that the alleged victim was, in fact, molested, partic-
ularly when there is little or no physical evidence to substantiate the
charge. The dilemma is aggravated by the wrenching emotional factors in
molestation cases.

Unfortunately, two apparently conflicting supreme court decisions have
exacerbated the difficulties inherent in this issue. In State v. Butler, the
supreme court, with three justices dissenting, held that an expert
could testify that a child had been sexually molested. The dissent ar-
gued that such testimony is merely a prosecutorial mechanism to bolster
the child's credibility, and that it completely usurps the function of the
jury. Perhaps mindful of these concerns, the supreme court in Allison
v. State held that a psychologist could not testify that an alleged mo-
lestation victim had been sexually abused. Specifically, the court held
that while a psychologist could testify as to the "lineaments" of the child
abuse syndrome, he could not testify regarding whether the child suffered
abuse, because this was a question that the jury was fully capable of an-
swering on its own. Since these decisions, the court of appeals has
struggled with this issue, pointedly noting that the supreme court has is-
sued conflicting decisions. The present survey period is no exception.

In Coxwell v. State, defendant contended that the trial court erred
when it allowed a social worker to state her opinion that the child victim
had been sexually molested. Although the opinion is not explicit on this
point, it appears that the witness was qualified as an expert based upon
her experience and training in relating to sexually molested children. The
court of appeals noted the conflict between Butler and Allison and re-
solved this conflict in favor of Allison because Allison, decided four

157. Id. at 450-51, 349 S.E.2d at 686.
158. Id. at 452, 349 S.E.2d at 687 (Smith, J., dissenting).
160. Id. at 853, 353 S.E.2d at 808.
161. Id.
164. Id. at 752, 395 S.E.2d at 39.
months after Butler, represented the supreme court's more recent expres-
sion on this issue. Accordingly, the appellate court held that the trial
court erred in allowing the social worker to testify that the victim had
been sexually molested. 165

Conversely, in Hall v. State, 166 the court of appeals relied upon Allison
to hold that expert evidence of the alleged sexual abuse was properly ad-
mitted. 167 The apparent distinction between Hall and Coxwell is that in
Hall the expert did not specifically testify that the victim had been mo-
lested. Rather, the expert testified concerning the components of the
child sexual accommodation syndrome. Other witnesses then testified
that the victim exhibited behavior consistent with the syndrome. 168 Thus,
in Hall the prosecution did not cross the line by eliciting testimony from
an expert that the victim was, in fact, molested.

In Sims v. State, 169 the supreme court had an opportunity to address
the Butler-Allison conflict but did not do so explicitly. In Sims (which
was before the supreme court because of defendant's constitutional chal-
lenge to O.C.G.A. section 24-9-5, 170 which provides a special rule for the
competency of children in child molestation cases), defendant argued that
the trial court improperly allowed a social worker to express her opinion
that the victim had been sexually molested. 171 The supreme court re-
versed, reasoning that this opinion was impermissibly based on the credi-
bility of the victim. 172 Indeed, the social worker based her opinion only on
the victim's account of the incident, which included a demonstration us-
ing anatomically correct dolls. 173 The supreme court concluded that the
inference to be drawn from this evidence was not beyond the ken of the
jurors and that they could decide for themselves whether the victim had
been molested. 174 In a footnote, the supreme court noted that the expert's
testimony was not based upon scientific evidence. 175 Thus, the supreme
court's decision in Sims sheds no light on the question of when an expert
employing scientific data can testify that a victim has been molested.

Finally, in Harris v. State, 176 the court of appeals, this time relying
upon Butler, held that a physician properly testified in a child molesta-

165. Id. at 751-53, 395 S.E.2d at 38-40.
167. Id. at 525, 396 S.E.2d at 273.
168. Id. at 523-24, 396 S.E.2d at 272.
171. 260 Ga. at 783-84, 399 S.E.2d at 926-27.
172. Id. at 784, 399 S.E.2d at 927.
173. Id. at 782-84, 399 S.E.2d at 925-27.
174. Id. at 784, 399 S.E.2d at 927.
175. Id. at 784 n.1, 399 S.E.2d at 927 n.1.
tion case that, in his opinion, the child had been sexually molested. The court of appeals distinguished Allison on the grounds that the physician's opinion was based upon a physical examination rather than the child abuse accommodation syndrome.

The supreme court granted certiorari to review the court of appeals decision in Harris and, in a decision rendered after the survey period, reversed. In a two paragraph opinion, the supreme court explained its position by stating simply that "this issue is controlled by Allison." Justice Hunt, in a dissent joined by Chief Justice Clarke and Justice Fletcher, wrote that the physician's opinion was admissible under the holding of Butler. According to Justice Hunt, the majority's reversal of the court of appeals means that it is appropriate for an expert to testify that findings are "consistent" with molestation but improper to testify that findings "indicate" that the child was molested. Justice Hunt concluded that the prosecutor should not be penalized for failing to make such a semantic distinction.

The meaning and effect of the supreme court's two-paragraph decision in Harris is difficult to discern. It may be, as Justice Hunt suggests, that a prosecutor can elicit, in effect, the same testimony simply by rewording the question so that the expert can tailor his answer accordingly. However, it is also arguable that the supreme court's opinion means that experts cannot testify that a child has been molested and this prohibition cannot be avoided through semantic niceties.

The court of appeals addressed what perhaps can be called the mirror image of the Allison-Butler issue in Jennette v. State. In Jennette defendant, who was charged with child molestation, contended that the trial court erroneously excluded expert testimony on the "lying child syndrome," and that defendant did not fit the profile of a child molester. Defendant relied upon the supreme court's decision in Smith v. State, which held evidence of the "battered woman syndrome" admissible. The court in Jennette acknowledged that the rationale of Smith had been extended to permit the admission of evidence of the "'battered

---

177. Id. at 505, 402 S.E.2d at 64-65.
178. Id.
180. Id. at 387, 405 S.E.2d at 483.
181. Id. (Clarke, C.J., Hunt & Fletcher, JJ., dissenting).
182. Id. (Clarke, C.J., Hunt & Fletcher, JJ., dissenting).
183. Id. (Clarke, C.J., Hunt & Fletcher, JJ., dissenting).
184. Id. (Clarke, C.J., Hunt & Fletcher, JJ., dissenting).
186. Id. at 581, 398 S.E.2d at 736.
188. 197 Ga. App. at 582, 398 S.E.2d at 736; 247 Ga. at 619, 277 S.E.2d at 683.
In both situations the court permitted the admission of expert testimony to buttress the credibility of, in one case, a woman claiming justification for the murder of her live-in boyfriend and, in the other, the molestation of a child. Nevertheless, the supreme court noted that this rationale is not unlimited and, in Sinns v. State, refused to extend Smith to allow expert testimony on the voluntariness of a confession. The court in Sinns wrote: "[T]he Smith holding was the result of the need to treat a unique and almost mysterious area of human response and behavior. The voluntariness of a confession is not a circumstance akin to the complex subject of battered wife syndrome." The court reasoned that the proffered testimony of the lying child syndrome was intended to attack the credibility and believability of defendant's alleged victims. Similarly, testimony that defendant did not meet the profile of a child molester was intended to bolster the credibility of his testimony. The court concluded that the determination of which testimony was credible was not a matter beyond the ken of the jurors, and "did not involve 'unique and mysterious areas of human response' necessitating expert testimony."

The court of appeals decisions in Felton v. White and Smith v. Fee demonstrate, or at least attempt to demonstrate, the confusing line of demarcation between proper expert testimony and testimony that impermissibly goes to the ultimate conclusion. In Felton a police officer testified that, in his opinion, an accident occurred because both drivers lost control of their vehicles. The officer testified that his conclusion was based upon his observations at the scene and a statement by one of the drivers. The court of appeals held that the trial court properly admitted this testimony, noting that the officer's reliance on hearsay did not render his opinion inadmissible, but only affected the weight of the testimony. In Smith, however, the court of appeals held that the trial court erred in permitting a police officer to testify that plaintiff's conduct was a

189. 197 Ga. App. at 582, 398 S.E.2d at 736.
190. 247 Ga. at 612, 277 S.E.2d at 678.
193. Id. at 387, 283 S.E.2d at 481.
194. Id.
195. Id.
196. 197 Ga. App. at 582, 398 S.E.2d at 736.
197. Id. at 583, 398 S.E.2d at 737.
201. Id. at 367-68, 398 S.E.2d at 426.
"contributing factor" in an automobile accident. The court reasoned that this testimony improperly invaded the province of the jury because it related to the ultimate issue of negligence.

In Harwood v. State, the court of appeals held that the trial court properly admitted expert testimony concerning the mathematical probabilities of self-rehabilitation of pedophiles. This testimony was offered to rebut defendant's testimony that he had rehabilitated himself following earlier incidents of child molestation. The court reasoned that even if this evidence concerned an ultimate issue, namely, the credibility of defendant's testimony, the subject matter was beyond the understanding of the average layman and, therefore, was an appropriate subject for expert testimony.

The court of appeals decision in Conyers Toyota, Inc. v. Southern Bell Telephone & Telegraph Co. also provides a good illustration of the appropriate parameters of expert testimony. In Conyers an expert testified that a guy wire for a utility pole was a hazard that should not have been located in a particular area of a parking lot. Plaintiff then sought to elicit testimony from this expert that defendant utilities, because of the nature of their business, should have appreciated the hazard created by the guy wire. Further, plaintiff sought to establish that its own employees, because they lacked engineering backgrounds, were not in a position to understand the risk. The court of appeals held that the trial court properly excluded this evidence because it did not concern a matter beyond the understanding of the ordinary juror and, further, it called for the witness to speculate.

In Fulton County v. Dangerfield, the supreme court held that the trial court improperly permitted an attorney who had represented a condemnee in a zoning matter to testify as an expert concerning the reasons for the denial of the condemnee's request for a zoning variance. It is not proper, the court held, for a witness to testify as to the intentions of another.
In *Madden v. Solomon*,\(^{214}\) the court of appeals held that a chiropractor may testify as to the results of a thermogram.\(^{215}\) The court concluded that the trial court acted within its discretion to find that the chiropractor was an expert in thermography and qualified to testify as to the results of a thermographic examination.\(^{216}\)

Finally, in *Caldwell v. State*,\(^{217}\) the supreme court held that the trial court properly admitted DNA identification evidence.\(^{218}\) The supreme court reaffirmed its rejection of the test for admissibility of novel scientific evidence applied in most jurisdictions, which turns on whether the scientific principles involved have been generally accepted in the scientific community.\(^{219}\) Georgia, however, does not follow this "rule of 'counting heads' in the scientific community . . . ."\(^{220}\) Rather, the trial court can make an independent determination of whether the scientific principles involved have "reached a scientific stage of verifiable certainty."\(^{221}\)

### B. Expert Witnesses

Determination of whether a witness is qualified to testify as an expert "is a matter addressed to the sound discretion of the trial court, and such discretion will not be disturbed unless manifestly abused."\(^{222}\) Thus, it is rare that an appellate court will overrule a trial court's conclusion that a witness possesses sufficient qualifications to give opinion testimony. However, in *Goodman v. Lipman*,\(^{223}\) the court of appeals easily reversed the trial court's conclusion that a physician was not qualified to testify that another physician was negligent.\(^{224}\) The trial court, incredibly enough, concluded that the witness was not qualified because he had not entered medical school at the time of the alleged negligent act and he did not become licensed until five years after defendant's alleged negligence.\(^{225}\) The court of appeals found absolutely no authority to support

\(^{215}\) Id. at 513, 396 S.E.2d at 246-47.
\(^{216}\) Id., 396 S.E.2d at 247.
\(^{218}\) Id. at 286-87, 393 S.E.2d at 441.
\(^{219}\) Id. at 285, 393 S.E.2d at 441.
\(^{220}\) Id. (quoting Harper v. State, 249 Ga. 519, 525, 292 S.E.2d 389, 395 (1982)).
\(^{221}\) Id. at 286, 393 S.E.2d at 441 (quoting Harper, 249 Ga. at 525, 292 S.E.2d at 395).
\(^{224}\) Id. at 632, 399 S.E.2d at 257.
\(^{225}\) Id. at 631, 399 S.E.2d at 256.
such a conclusion and remanded the case for a proper determination of
whether the witness possessed the necessary qualifications.226

VII. HEARSAY

A. Res Gestae

The proposed Georgia Rules of Evidence, if adopted, will abolish the
res gestae doctrine. From a strict academic standpoint, the res gestae
doctrine is an abomination, and its demise is long overdue.227 Arguably,
however, the res gestae doctrine serves a perversely legitimate purpose by
allowing courts to admit evidence that is not admissible under any "legiti-
mate" theory, but which justice demands should be admitted.

An example of the justifiable admission of what clearly is inadmissible
evidence is perhaps found in Dean v. State.228 In Dean, a child molesta-
tion case, the trial court admitted evidence of a statement made by a
child to his mother implicating defendant, the child's father. The child
did not testify at trial because he was incompetent. Notwithstanding de-
fendant's lack of opportunity to examine the child, the trial court admit-
ted the mother's testimony of the child's statement under the res gestae
doctrine.229 Dean is reminiscent of a case reported in a previous survey
issue, Ward v. State.230 In Ward the court of appeals conclusion that
statements made by the child twenty-four hours after the alleged act of
molestation were admissible, (notwithstanding the incompetency of the
child to testify), prompted a vigorous dissent by four judges.231 Child mo-
estation cases are difficult and gut wrenching, and one can make a strong
argument that courts should relax the rules of evidence to serve the need
of effective and sure prosecution. Of course, it can also be said that hard
cases make bad law.

The breadth of the res gestae doctrine is also illustrated by the su-
preme court decision in Phillips v. State.232 In Phillips the court held
that the trial court properly admitted two declarations of decedent con-
cerning the cause of her death.233 First, on the morning after defendant

226. Id. at 632, 399 S.E.2d at 256.
227. See, e.g., Justice Weltner's laconic lament of the res gestae "Gordian Knot," An-
229. Id. at 135, 401 S.E.2d at 42.
MERCER L. REV. 175, 201-02 (1989).
231. 186 Ga. App. at 505, 368 S.E.2d at 141 (Carley, Sagner, Pope & Benham, JJ.,
dissenting).
233. Id. at 744, 399 S.E.2d at 204.
allegedly beat the decedent severely, and upon her admission to the hospital, the decedent, although "traumatized and unable to communicate," made statements such as "[s]top it, Michael, don't do that Michael," and "I'm sorry, Michael." The next day, after being informed that she probably would not survive, the decedent stated that she did not remember what had happened except that she was attacked from behind while defendant was in the room. Clearly, the second statement was admissible as a dying declaration because the decedent was conscious of her condition and the statement concerned the person who had attacked her. Just as clearly, the first statement would not be admissible as a dying declaration because there was no evidence that the decedent was aware of her condition. Indeed, the evidence clearly established that the decedent was not lucid at the time she made the first statement. The court did not address this in the body of its opinion but stated in a footnote that the first statement would be admissible under O.C.G.A. section 24-3-3, the res gestae exception to the hearsay rule.

B. Admissions by a Party Opponent

In a previous survey, the author discussed the confusion in Georgia law surrounding the admissibility of admissions by a party opponent, in particular, admissions by an agent of a party opponent. This confusion can be contrasted with the clear statement of the Federal Rules of Evidence that admissions by a party opponent are not hearsay, and that an admission by an agent of a party opponent is admissible if it concerns "a matter within the scope of the agency or employment, made during the existence of the relationship." Under Georgia law, it would appear, although it is far from clear, that admissions by a party opponent are hearsay but may be admitted as an exception to the hearsay rule.

During the present survey year, the court of appeals addressed the issue of admissibility of admissions by an agent in Uniflex Corp. v. Saxon. In Saxon defendant asserted there had been an accord and satisfaction of plaintiff's claim, contending that a check in settlement of the claim had been forwarded to plaintiff's Florida attorney. Plaintiff denied,

234. Id. at 743, 399 S.E.2d at 204.
235. Id.
236. Id.
237. Id. See O.C.G.A. § 24-3-6 (1982).
238. O.C.G.A. § 24-3-3 (1982).
239. 260 Ga. at 744 n.2, 399 S.E.2d at 205 n.2.
240. See Treadwell, supra note 230, at 199-200.
however, that he had authorized the Florida attorney to negotiate on his behalf and claimed he had not received any proceeds from the check. Defendant, on appeal from a judgment entered in plaintiff’s favor, contended that the trial court erred in excluding evidence of a statement made by one of plaintiff’s attorneys indicating that plaintiff had retained the Florida attorney to collect the debt.\(^{244}\) Apparently, the trial court admitted this evidence to impeach the second attorney’s denial that he ever made such a statement, but did not admit it as direct evidence that the Florida attorney was the plaintiff’s agent. Defendant argued that evidence of the statement of the second attorney was admissible under O.C.G.A. section 24-3-33, which provides that admissions by an agent made during the existence and in pursuance of the agency are admissible against a principal.\(^{245}\) The court of appeals reasoned, however, that this code section must be viewed in the light of O.C.G.A. section 10-6-64, which provides that admissions by an agent are not admissible against the principal “unless they were part of [the negotiation constituting] the res gestae.”\(^{246}\) The court held that “the [second] attorney’s statements were not part of the transaction at issue in the case but were hearsay as to plaintiff and were not admissible against him as direct evidence.”\(^{247}\) This conclusion should be of particular interest to attorneys. It would seem that admissions made by an attorney concerning a disputed matter, during litigation over the disputed matter, are not admissible because they are not “part of the res gestae of the transaction.”\(^{248}\)

C. Child Hearsay Statute

Georgia’s child hearsay statute permits a witness to testify about statements made by a child describing sexual conduct or physical abuse.\(^{249}\) However, before evidence of the child’s statement can be admitted, the child must be “available to testify,” and the court must find that “the circumstances of the statement provide sufficient indicia of reliability.”\(^{250}\) The vagueness of the statute has raised questions of whether a child is “available to testify” if the child is found to be incompetent to testify. As discussed in a previous survey,\(^{251}\) the court of appeals in Ward v. State\(^{252}\) held that an incompetent child was not available to testify.\(^{253}\)

\(^{244}\) Id. at 445, 402 S.E.2d at 68-69.
\(^{245}\) Id. at 446, 402 S.E.2d at 69. See O.C.G.A. § 24-3-33 (Supp. 1991).
\(^{247}\) 198 Ga. App. at 446, 402 S.E.2d at 69.
\(^{248}\) Id.
\(^{249}\) O.C.G.A. § 24-3-16 (Supp. 1991).
\(^{250}\) Id.
\(^{251}\) See Treadwell, supra note 230, at 201-02.
This holding, though obviously correct, had the potential effect of eviscerating the child hearsay statute. Accordingly, the General Assembly, in 1989, amended the competency statute to provide that “in all cases involving child molestation, and in all other criminal cases in which a child was a victim of or a witness to any crime, any such child shall be competent to testify.” However, for alleged crimes committed prior to the effective date of the new competency statute, the general rules of competency apply. In two decisions concerning the same offense, the court of appeals addressed the point in time at which the competency of a witness is to be determined. In Hunnicutt v. State, the court of appeals remanded the case for determination by the trial court of whether the child was competent and thus “available to testify” under the Child Hearsay Statute. On remand, the trial court ruled the child was competent to testify. On appeal of this ruling, defendant contended the trial court erred because it determined the child’s competency as of the date of the competency hearing. Defendant argued that the child’s competency should have been determined as of the date of the occurrence, when the child was two years and ten months old, rather than at the time of the competency hearing, when the child was five years and three months old. The court rejected this argument, reasoning that it is only necessary that one be competent at the time testimony is given and there is no requirement that competency be determined at the time of the out-of-court statements. Defendant further argued that the trial court erred by determining the child’s competency at the time of the competency hearing, rather than at the time of the trial. The trial court concluded that it was impossible to determine the competency of the child at the time of the trial and merely concluded she was competent as of the date of the competency hearing. The court of appeals ruled that this was error. The pertinent question is whether the child was available to testify at trial, and to be available she must have been competent at that time. Because the trial court concluded that it could not determine competency as of the trial, the court of appeals held that a new trial was necessary.

253. Id. at 503, 368 S.E.2d at 140.
256. Id. at 714, 391 S.E.2d at 790-91; O.C.G.A. § 24-3-16 (Supp. 1991).
258. Id. at 573, 402 S.E.2d at 535.
259. Id.
260. Id. at 574, 402 S.E.2d at 535.
261. Id. at 573-74, 402 S.E.2d at 535.
262. Id.
263. Id. at 574, 402 S.E.2d at 535.
D. Business Records

The court of appeals decision in *Hertz Corp. v. McCray* provides an excellent outline of Georgia's business records exception to the hearsay rule. In *Hertz* the trial court refused to admit various documents as business records, notwithstanding the witness' testimony that he was familiar with the method used by plaintiff in keeping its books and records. Reviewing the business records exception, the court of appeals wrote that a witness attempting to lay a foundation for the admission of business records must be familiar with the method of keeping the records and must testify that the entries were made in the regular course of business at the time of the event or within a reasonable time thereafter. It is not necessary that this witness have personal knowledge of the correctness of the records, nor is it necessary that he had made the entries himself. Significantly, Georgia's business records exception does not require the testimony of the custodian of the documents to establish that they are business records. Anyone who is familiar with the method of keeping the documents can lay the foundation. Familiarity, the court continued, can be acquired in many ways: "The manner in which familiarity is obtained, like the question of whether the witness has personal knowledge of the particular business entry, goes only to weight and not to document admissibility." Accordingly, the court concluded that the trial court applied an "overly stringent" standard for the admission of the business records.

---

266. 198 Ga. App. at 485, 402 S.E.2d at 300.
267. Id.
268. Id., 402 S.E.2d at 301.
269. Id. at 486, 402 S.E.2d at 301.
270. Id.
271. Id.