Evidence

by Marc T. Treadwell*

I. Introduction

In five previous Georgia and Eleventh Circuit evidence survey articles, the author extolled the virtues of the proposed Georgia Rules of Evidence.1 These rules roughly tracked the Federal Rules of Evidence and would replace Georgia's existing evidence code which is, in reality, not a code at all but rather a jumble of disjointed statutes found in several different titles of the Official Code of Georgia Annotated and countless court decisions. The proposed rules were first introduced in the General Assembly in 1989 and were approved by the Senate in 1990 and 1991 but have never been reported out of the House Judiciary Committee. Given the rather tepid treatment the rules have received by the General Assembly, the prospects for a new and improved Georgia evidence code appear to be dim. This Article, however, will continue in the tradition of past Georgia survey articles and will follow the organizational format of the Federal Rules of Evidence.

II. Objections

The need for precise objections is demonstrated by the court of appeals decision in Yelverton v. State.2 In Yelverton defendant objected to the admission of a photograph, claiming that it was irrelevant. On appeal, defendant argued that the photograph improperly put his character in

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issue. Although the general objection that the photograph was irrelevant arguably encompassed the specific objection that the photograph improperly impugned his character, the court held that the objection was insufficient. In fact it is well-established that the commonly heard objection that evidence is irrelevant, immaterial, and prejudicial is not sufficient to preserve an issue for appeal.3

Similarly, in Haynes v. State, the court of appeals held that defendant waived his right to object to the erroneous exclusion of evidence.4 In Haynes the trial court refused to allow defendant to prove that a witness had criminal charges pending against him. On appeal defendant argued that he should have been allowed to impeach the witness by establishing that he may have been offered lenient treatment in exchange for favorable testimony. Defendant, however, did not specifically urge the trial court to admit the evidence for this reason and thus did not preserve the issue for appeal.5

The appellate courts are not always so strict. In Shaver v. State, defendant clearly failed to object to the admission of hearsay evidence. A majority of the court of appeals relied upon the principle, unique to Georgia, that “hearsay has no probative value even if admitted without objection,” and because the remaining evidence was insufficient to prove defendant’s guilt, reversed defendant’s conviction.6

As most civil trial lawyers know, the supreme court held in Denton v. Con-Way Southern Express, Inc.7 that the abolition of the collateral source rule by the Tort Reform Act of 19878 violated the equal protection clause of the Georgia Constitution.9 Although a profound relief to lawyers representing plaintiffs in personal injury cases, this decision caused some consternation for lawyers who tried cases after the enactment of the Tort Reform Act but prior to Denton and who failed to object to the admission of evidence of collateral source payments. These lawyers cannot be faulted; few would have thought that the abolition of

3.  Id. at 43, 403 S.E.2d at 818.
6.  Id. at 291, 404 S.E.2d at 588.
7.  Id. at 290, 404 S.E.2d at 588.
12.  GA. CONST. art. I, § 1, para. 2; 261 Ga. at 42, 402 S.E.2d at 271-72.
the collateral source rule could have possibly violated Georgia's Constitution. Fortunately for those lawyers who did not object to the admission of collateral source payments and perhaps in implicit recognition of their plight, the court of appeals held in Anepohl v. Ferber that the failure to object to the admission of such evidence does not preclude a subsequent appeal. The court relied upon its authority to review a substantially erroneous jury charge that is harmful as a matter of law even though an objection was not made to the charge. The court held that an instruction to the jury allowing it to consider collateral source benefits when calculating damage deprived plaintiff of a fair trial.

In Rosequist v. Pratt, the court of appeals thoughtfully offered guidance to trial judges and lawyers concerning the use of motions in limine. Although the court acknowledged the utility of motions in limine to prevent the jury from hearing inadmissible evidence, the court noted the difficulty the moving party faces in establishing a basis for the exclusion of the disputed evidence because the trial judge does not know exactly what evidence will be offered at trial. Certainly all trial lawyers have heard judges say they will simply have to wait to see what the evidence shows before ruling on the admissibility of evidence. To avoid this dilemma, the court of appeals suggested that trial judges require the party offering the evidence to make an offer of proof so the trial judge will know precisely the evidence which will be tendered and the record will be preserved for appeal. If, on the other hand, the trial court grants the motion in limine, as it did in Rosequist, the court of appeals warned lawyers to make an offer of proof of the excluded evidence, something that the appellant in Rosequist neglected to do.

III. RELEVANCY

A. Relevancy of Extrinsic Act Evidence

Perhaps the most problematic area of evidence law is that concerning "extrinsic act evidence." Extrinsic act evidence, generally, is evidence of conduct on occasions other than the one at issue. Such evidence is "extrinsic" to the transaction or incident in issue, and, as a general rule, is inadmissible. Like the rule against hearsay, however, the rule against ex-
trinsic act evidence is known more by its exceptions than its flat prohibition. Extrinsic act evidence may be admissible for a substantive purpose, for example, evidence of a prior drunk driving conviction to prove entitlement to punitive damages; or it may be admissible to impeach or bolster a witness, for example, evidence of a felony conviction to impeach a witness' character.

Before addressing the exceptions to the rule excluding extrinsic act evidence, it is necessary to consider the preliminary question of whether the proffered evidence is, in fact, extrinsic to the act at issue. The res gestae doctrine, although used more frequently to admit hearsay evidence, also permits the introduction of evidence that may seem extrinsic to the act at issue but is admissible because of the relationship between the extrinsic act and the act at issue. In Rollins v. State, the trial court admitted evidence of a transaction involving police officers and a visitor to defendant's home while the officers were searching the home. The visitor, unaware of the officers' true identities, asked if defendant was home. An officer replied that defendant was not home but he had asked the officer to "take care of business for him." The visitor proceeded to purchase drugs from the officer. Defendant contended that this incident constituted similar transaction evidence within the purview of Uniform Superior Court Rule 31.3, which requires the prosecution to give defendant advance notice if it intends to use similar transaction evidence. The court of appeals disagreed, concluding that the evidence was a part of the res gestae and thus was not extrinsic to the act in issue.

Evidence of Similar or Related Transactions. It is ironic that Georgia courts routinely admit evidence of similar transactions in criminal cases, when life and freedom are at stake, but are extremely reluctant to admit evidence of similar transactions in civil cases. To a point, however, the logic for this is apparent. Civil cases typically do not involve issues of intent or motive. Thus, for example, admission of evidence of a prior automobile accident in a negligence case involving an unrelated subsequent accident would serve only to prove the improper and prejudicial point that defendant, because he was negligent on a prior occasion, was more likely negligent on the occasion at issue. In a criminal case, evidence of a prior burglary committed by a defendant which involved similar facts to the charged offense may tend to prove defendant's motive or intent in committing the charged offense. In this situation, the prior transaction is

22. Id. at 88, 413 S.E.2d at 261.
23. Id.
not being used to show that a defendant is of bad character and thus more likely to have committed the offense but rather is relevant to a legitimate issue. Thus, evidence of similar or related transactions 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.26

The reality of the situation, however, is that evidence of prior criminal acts is extremely prejudicial in a criminal case, and many criminal defense lawyers criticize the liberal use of similar transaction evidence by Georgia prosecutors. Prior surveys have noted the tendency of Georgia’s appellate courts to affirm perfunctorily convictions in which prosecutors relied heavily on evidence of other offenses allegedly committed by defendants in order to obtain those convictions.27 The supreme court seems to have recognized that this liberal policy may have been taken too far. The first indication of the supreme court’s concern came in Stephens v. State.28 In Stephens, defendant, who was charged with selling cocaine, contended that the trial court improperly admitted evidence of a prior conviction for selling cocaine. To prove the prior conviction, the prosecution relied solely upon a certified copy of the conviction. Although the prosecution offered some evidence of the details of the prior offense at a pretrial hearing to determine the admissibility of the conviction, the prosecution offered no such evidence at trial.29

In its decision, the supreme court first emphasized the general rule that evidence of prior criminal offenses simply is not admissible.30 This is true even though the prior offense involves the same type of conduct alleged in a subsequent charge. Evidence of a prior offense is admissible as similar transaction evidence only if two conditions are met. First, the prosecution must prove that the defendant committed the prior offense; and, second, "‘there must be sufficient similarity or connection between the independent crime and the offense charged, that proof of the former tends to prove the latter.’"31 Because the prosecution did not offer evidence at trial establishing the similarity between the charged offense and the prior offense, the supreme court reversed defendant’s conviction.32 Justice Bell

27. See supra note 1 and accompanying text.
29. Id. at 468, 405 S.E.2d at 485.
30. Id. at 469, 405 S.E.2d at 485.
32. Id.
dissented, contending that the conviction itself was sufficient to establish the requisite similarity between the two offenses.\textsuperscript{33}

The supreme court returned to this issue in \textit{Williams v. State},\textsuperscript{34} and issued firm guidelines for the admission of evidence of similar or related transactions.\textsuperscript{35} In \textit{Williams} defendant contended the trial court erred by admitting a certified copy of his previous conviction for possession of cocaine with intent to distribute. Defendant was on trial for a subsequent charge of possessing cocaine with intent to distribute.\textsuperscript{36} The supreme court held that the prosecution must prove three elements at the pretrial hearing required by Uniform Superior Court Rule 31.3 to determine the admissibility of similar transaction evidence.\textsuperscript{37} First, the prosecution must prove that the independent transaction is relevant to a legitimate issue.\textsuperscript{38} Second, the prosecution must prove that the defendant committed the independent offense or act.\textsuperscript{39} Third, the prosecution must prove there is a sufficient connection or similarity between the prior act or offense and the charged offense.\textsuperscript{40} The trial court then must make a specific determination that the prosecution has carried its burden in proving each of the three elements. The supreme court reaffirmed its holding in \textit{Stephens}, which held that even if the trial court determines evidence of the prior offense is admissible, the prosecution cannot simply introduce a certified copy of the conviction at trial.\textsuperscript{41} Rather, the prosecution must present evidence to the jury establishing that the accused committed the prior offense, and that the prior offense is sufficiently similar or related to the charged offense.\textsuperscript{42} In \textit{Williams} the prosecution did not inform the trial

\textsuperscript{33} Id. at 471, 405 S.E.2d at 487 (Bell, J., dissenting).
\textsuperscript{34} 261 Ga. 640, 409 S.E.2d 649 (1991).
\textsuperscript{35} Id. at 642, 409 S.E.2d at 651.
\textsuperscript{36} Id. at 641, 409 S.E.2d at 650.
\textsuperscript{37} Id. at 642, 409 S.E.2d at 651.
\textsuperscript{38} Id. It should be noted that this requirement—that the prosecutor state specifically the purpose for which the evidence is being offered—has long been advocated by Judge Beasley. See Bernyk v. State, 182 Ga. App. 329, 332, 355 S.E.2d 753, 755 (1987). In fact in a case decided just eight months before \textit{Williams}, Judge Beasley, in a concurring opinion, again urged that the “State should be required to articulate the purpose for which such damaging generally inadmissible evidence is offered, so that the court can judge whether it is relevant to an issue in the particular case, that is, whether there is a logical connection before the evidence is admitted.” Johnson v. State, 199 Ga. App. 144, 146, 404 S.E.2d 455 (1991) (Beasley, J., concurring).
\textsuperscript{39} 261 Ga. at 642, 409 S.E.2d at 651. However, as discussed in prior surveys, it is not necessary that the prosecutor prove this beyond a reasonable doubt; it is sufficient to prove by a preponderance of the evidence that a defendant committed the act or offense in question. Marc T. Treadwell, \textit{Evidence}, 40 MERCER L. REV. 225, 231 (1988).
\textsuperscript{40} 261 Ga. at 642, 409 S.E.2d at 651.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
court of the purpose for which the prior offense was being offered, thus making it "impossible for the trial court to make the essential preliminary determination as to whether the state was introducing the evidence for an appropriate purpose." Moreover, the prosecution adduced no evidence at trial other than the certified copy of the conviction. For these reasons, the supreme court reversed defendant's conviction.

The court of appeals quickly took notice of the supreme court's decisions in *Stephens* and *Williams*, and in *Little v. State*, reversed defendant's conviction because the prosecution offered no evidence of defendant's prior offenses other than certified copies of his convictions. The court also noted that the trial court failed to hold a pretrial hearing, which the supreme court held in *Williams* was required by Uniform Superior Court Rule 31.3.

The appellate courts did more during the survey period than simply adopt procedural safeguards to prevent undue prejudice to defendants. They took a more substantive look at similar transaction evidence to ensure that it was sufficiently similar to the charged offense to be admissible. In *Faison v. State*, the court of appeals, clarifying an earlier decision, held that a prior conviction for a drug offense is not automatically admissible in a subsequent trial for another drug offense. The prosecution still must show a sufficient connection or similarity between the prior offense and the charged offense before it is admissible. In *Kuchenmeister v. State*, the court of appeals held that the trial court improperly admitted evidence of defendant's prior acts of child abuse in his trial for arson. In *Burney v. State*, the court of appeals held that the trial court improperly admitted evidence of defendant's nine year old conviction for burglary in his trial for burglary and attempt to commit rape. Finally, in *Radford v. State*, the court of appeals held that in defendant's trial for theft by taking, the trial court improperly admitted evidence of defen-

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43. *Id.* at 643, 409 S.E.2d at 651.
44. *Id.*
46. *Id.* at 8, 413 S.E.2d at 497.
47. *Id.* at 7, 413 S.E.2d at 497.
51. *Id.* at 66, 403 S.E.2d at 849.
53. *Id.* at 65, 410 S.E.2d at 173.
It is dangerous to predict trends in the law. It does seem, however, that the Georgia appellate courts have radically shifted their level of scrutiny of similar or related transaction evidence.

Evidence of Character as Substantive Evidence. Last year’s evidence survey addressed the supreme court’s landmark holding in *Chandler v. State* that a defendant may introduce evidence of specific acts of violence by a victim against a third person when the defendant claims he was justified in killing the victim. Since *Chandler*, neither the supreme court nor the court of appeals has addressed a significant question arguably not answered by *Chandler*. *Chandler* can be read, and perhaps only can be read, to hold that evidence of specific prior violent acts by the victim is admissible as character evidence (rather than as similar transaction evidence), and thus, is admissible for the specific purpose of demonstrating that “it is more probable that a person will act in accordance with his character (disposition) than he will act contrary to it.” In *Chandler* the majority noted that it found Justice Weltner’s concurring opinion in *Lolly* “persuasive.” Justice Benham concurred specially in *Chandler* to note his disagreement with Justice Weltner’s concurring opinion in *Lolly* and the supreme court’s apparent adoption of this opinion in *Chandler*. Justice Benham argued that evidence of a victim’s prior violent acts should be admitted as similar transaction evidence and not as character evidence. He feared that the adoption of a character evidence analysis would be “a move to replace trial by evidence with trial by character assassination.” Justice Benham forcefully argued that “this revolutionary change in the law of evidence is a throw back to frontier days and gives judicial sanction to a new defense to murder: the victim ‘needed killing.’”

Relevancy of Prior Sexual Behavior. Georgia’s rape shield statute generally prohibits the admission of evidence of a rape victim’s past...
sexual behavior. Georgia courts have traditionally applied the statute with vigor. Recent cases suggest, however, that Georgia's appellate courts may be willing to allow defendants greater latitude to adduce evidence relating to prior sexual activity. For example, in White v. State, defendant attempted to introduce evidence establishing that the alleged victim suffered from sexually transmitted diseases and vaginal infections. Defendant offered this evidence to counter the victim's testimony that she was diagnosed as having a venereal disease two weeks after the alleged rape, that she contracted this disease from defendant, and that a physical examination conducted immediately after the alleged rape did not reveal any vaginal infections. Defendant testified that the victim was a prostitute and he refused to have sexual intercourse after he saw that the victim's body was "very filthy" and that she had "discharge."

The court of appeals reversed defendant's conviction, holding, with little discussion, that the evidence did not run afoul of the rape shield statute. The court reasoned that the proffered evidence was not evidence of the victim's past sexual behavior but was relevant to defendant's claim that he did not have intercourse with the victim because of her poor hygiene. In addition, the court admitted testimony to impeach the victim's claim that the physical examination conducted immediately after the alleged rape did not reveal vaginal infections and discharges, and to disprove the victim's claim that the defendant caused the vaginal infections.

During last year's survey period, the supreme court held that the rape shield statute does not bar the admission of evidence of an alleged victim's false accusations of sexual misconduct against third parties. The court ruled, however, that the lower court, before admitting such evidence, must make an initial determination of whether there exists a reasonable probability that the accusation is false. In Shelton v. State, the court of appeals reversed defendant's conviction because the trial court excluded evidence of false accusations without making this threshold determination. However, the court held that this error could be

67. Id. at 53, 410 S.E.2d at 441.
68. Id. at 55, 410 S.E.2d at 443.
69. Id. at 54, 410 S.E.2d at 442.
70. Id. at 54-55, 410 S.E.2d at 442-43.
72. Id. at 137, 377 S.E.2d at 160.
74. Id. at 164, 395 S.E.2d at 620.
cured by a post trial hearing to determine whether defendant could ad-
duce sufficient evidence to establish a reasonable probability of falsity.\textsuperscript{75} Consequently, the court remanded the case and, the court of appeals held
that the lower court did not abuse its discretion in concluding that the
evidence adduced by defendant at the post trial hearing was not sufficient
to establish a reasonable probability of falsity.\textsuperscript{76}

B. Evidence of Settlement Discussions

The principle that "admissions or propositions made with a view to a
compromise are not proper evidence"\textsuperscript{77} is most likely known to any trial
attorney who has attempted to negotiate a settlement. However, as illus-
trated in \textit{Dyer v. Investors Services, Inc.},\textsuperscript{78} the mere fact that evidence
relates to settlement discussions does not necessarily mean that the evi-
dence is inadmissible. In \textit{Dyer} the trial court admitted evidence of an
agreement between appellant's principals that specified who would be re-
sponsible for the debt allegedly owed to appellee. Appellant contended
that evidence of this settlement agreement was inadmissible pursuant to
Official Code of Georgia Annotated ("O.C.G.A.") section 24-3-37.\textsuperscript{79} The
court of appeals disagreed. The purpose of the prohibition against the
admission of settlement evidence is to facilitate settlement discussions
between or among parties to a dispute. The settlement agreement in
question was not an agreement between appellant and appellee but rather
was an agreement to which appellee was not a party.\textsuperscript{80} Thus, the court
held the admission of the evidence could not have frustrated any settle-
ment negotiations between the parties.\textsuperscript{81} Therefore, although evidence of
settlement discussions between parties may be inadmissible, evidence of
discussions preparatory to negotiations which do not include both parties
are admissible.

Moreover, a mere offer to pay an obligation is not necessarily consid-
ered an offer to compromise and thus inadmissible. In \textit{Rosequist v. Pratt},\textsuperscript{82} defendant, the day after her involvement in a motor vehicle colli-
sion that resulted in the death of a child, offered to pay the family's med-
ical and funeral expenses. At a pretrial hearing, the trial court ruled this
evidence inadmissible because it was in the nature of a settlement offer.\textsuperscript{83}

\textsuperscript{75} Id.
\textsuperscript{77} O.C.G.A. § 24-3-37 (1982).
\textsuperscript{79} Id. at 636, 404 S.E.2d at 251.
\textsuperscript{80} Id. at 635, 409 S.E.2d at 251.
\textsuperscript{81} Id. at 655-36, 409 S.E.2d at 251.
\textsuperscript{83} Id. at 46, 410 S.E.2d at 318.
However, the court of appeals concluded that defendant’s offer to pay hospital and funeral expenses was not made in an effort to compromise or settle a claim. The court of appeals explained that the offer was inadmissible because it was not an admission of liability. Rather, the court of appeals concluded that “activity constituting a voluntary offer of assistance made on the impulse of benevolence or sympathy should be encouraged and should not be considered as an admission of liability.” Thus, offers to pay medical expenses may be inadmissible either because they are an offer to compromise or because they are expressions of benevolence or sympathy rather than admissions of liability.

C. Miscellaneous Relevancy Issues

In Turner v. W. E. Pruett Co., plaintiff moved in limine to preclude defendant from mentioning in the presence of the jury that plaintiff filed his lawsuit only shortly before the two year statute of limitations had run. The trial court denied plaintiff’s motion after defendant’s attorney stated that although he might not include it in his opening statement, it might be mentioned during cross examination of witnesses because the delayed filing “certainly [went] to the credibility of witnesses.” At trial plaintiff’s attorney first mentioned the time of filing of the complaint. The court of appeals held that the trial court erroneously denied plaintiff’s motion. Although the court agreed that the passage of time may be relevant to the credibility of a witness’s testimony, the time that passes between the incident and the filing of the lawsuit “has absolutely no arguable relevancy whatsoever to the credibility of the plaintiff’s eyewitnesses.” The court stated that if the complaint is timely filed, the date of filing is of no relevancy to any issue in the case. Moreover, the fact that plaintiff’s attorney made first mention of the date of filing was immaterial. Clearly, plaintiff’s attorney, his motion in limine having been denied, mentioned this “harmful fact” himself in order to minimize its harmful effect. Judges Sognier, Beasley, and Andrews dissented, arguing that plaintiff could not complain because his lawyer first mentioned

84. Id.
85. Id.
88. Id. at 288, 414 S.E.2d at 249.
89. Id.
90. Id.
91. Id.
92. Id.
the subject in the presence of the jury. Moreover, the delay in filing is relevant because it arguably supports defendant's contention that the credibility of several witnesses who testified on behalf of plaintiff affected by the passage of time since they would have to come forward to give their testimony.

In *Barnes v. Wall*, the court of appeals held that the testimony of an annuity expert concerning the potential future value of a plaintiff's settlement proceeds from a codefendant is irrelevant. Although the amount received by a plaintiff in settlement from codefendant may be relevant to determine the remaining codefendant's responsibility for the plaintiff's injuries, the future value of the settlement is not.

To be relevant, evidence must logically tend to establish the proposition which it is offered to prove. Generally, the determination of relevancy is made by the court. The court of appeals decision in *Hunter v. Hardnett* addressed the role of the trial court in determining relevancy. In *Hunter* defendant claimed the trial court erred when it admitted a municipal court record of the disposition of a traffic citation against defendant. Plaintiff's suit against defendant arose from this traffic accident. The record indicated that defendant pleaded guilty and was found guilty. A plea of guilty is admissible as an admission, but an adjudication of guilt is not admissible. Defendant moved in limine to preclude the admission of the record, contending that he did not plea guilty. The court denied his motion. The court of appeals held, notwithstanding the ambiguity of the record, that it was “relevant if interpreted by the jury as plea of guilty.” Acknowledging that determinations of relevancy are generally a question for the trial court, the court stated that the jury should be allowed to consider evidence when its relevancy is doubtful. Moreover, the undue prejudice of this evidence did not outweigh its probative value. In dissent, Judge Beasley, joined by Judge Carley, wrote that the citation was inadmissible because it “did not show what it was

93. *Id.* at 290, 414 S.E.2d at 250 (Sognier, Beasley & Andrews, JJ., dissenting).
94. *Id.* at 290, 414 S.E.2d at 251 (Sognier, Beasley & Andrews, JJ., dissenting).
96. *Id.* at 228, 411 S.E.2d at 271.
97. *Id.*
98. THOMAS F. GREENE, GEORGIA LAW OF EVIDENCE § 61 (3d ed. 1988).
100. *Id.* at 443, 405 S.E.2d at 287.
101. *Id.*
102. *Id.*
103. *Id.* at 444, 405 S.E.2d at 288.
104. *Id.* at 443, 405 S.E.2d at 287.
105. *Id.*
106. *Id.* at 444, 405 S.E.2d at 288.
offered to show, that he had pled guilty.\textsuperscript{107} The citation was not admissible unless it appeared to the satisfaction of the trial court that it constituted a plea of guilty. Because of the ambiguity of the record, it was not possible, Judge Beasley wrote, for the trial court to arrive at such a conclusion.\textsuperscript{108}

IV. Privileges

When two or more people retain an attorney to represent them jointly, communications between the attorney and any of the clients are not considered privileged, insofar as the other clients are concerned. Thus, these communications are admissible in subsequent litigation between or among the clients.\textsuperscript{109} This is known as the joint attorney exception to the attorney/client privilege. In \textit{Peterson v. Baumwell},\textsuperscript{110} the court of appeals considered the effect of the presence of other parties to the litigation on the joint attorney exception to the attorney/client privilege. In \textit{Peterson} a former client of an attorney filed a crossclaim against the other former client. Both clients had sued a third party, charging that party with fraud in connection with a real estate transaction. When one client began to suspect the other client of complicity in fraud, he asserted his crossclaim. The trial court ordered the attorney who represented the clients jointly to respond to questions posed by the client asserting the crossclaim. On interlocutory appeal, the other client asserted that, notwithstanding the joint attorney exception, the attorney should not be compelled to disclose the substance of communications because of the presence of defendant, who was a stranger to the clients' relationship with their former attorney.\textsuperscript{111}

The court of appeals concluded that defendant's presence did not render the joint attorney exception inapplicable.\textsuperscript{112} First, the court ruled that the client who allegedly conspired with defendant had waived any right to contest the trial court's ruling.\textsuperscript{113} More substantively, the court ruled that the peculiar circumstances of the case did not render the joint attorney exception inapplicable.\textsuperscript{114} Defendant, the court reasoned, was allegedly a party to the conspiracy with the complaining client.\textsuperscript{115} Thus, if the attorney's information tended to prove the conspiracy, then the infor-

\textsuperscript{107} \textit{Id.} at 446, 405 S.E.2d at 289 (Beasley & Carley, JJ., dissenting).
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} \textit{Green}, supra note 98, \S 185.
\textsuperscript{111} \textit{Id.} at 284, 414 S.E.2d at 280.
\textsuperscript{112} \textit{Id.} at 285, 414 S.E.2d at 281.
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.}
mation was probably already known to defendant. Accordingly, the court concluded that the disclosure of the communications to defendant would not result in irreparable harm. In apparent dicta, the court of appeals noted that the effect of the joint attorney exception was to waive the attorney/client privilege. If this was the case, the court continued, then the presence of third parties in the litigation does not affect the joint attorney exception. If the privilege is waived, it is waived regardless of the presence of strangers to the relationship.

In Brown v. State, the court of appeals addressed rather interesting issues involving the marital privilege. Defendant in Brown was charged with stealing drugs from an evidence file in the district attorney's office while he was waiting to be called as a witness. Defendant's wife observed the theft. The trial court permitted the wife to testify and, on appeal, defendant contended that his conduct in the presence of his wife constituted a confidential marital communication and therefore was inadmissible. The court of appeals acknowledged that conduct may be considered a confidential communication entitled to the protection of the privilege, but the conduct "must be in the nature of an assertive communication where the action itself is as much a communication as would be words describing it." The court of appeals concluded that defendant had not carried his burden of proving that his conduct was intended to be a confidential communication. Judges Pope, Sognier, Carley, and Cooper dissented. Judge Pope wrote that "[d]efendant could not have more directly communicated to his wife the fact that he committed the crime than by committing it in her presence." Clearly, Judge Pope reasoned, defendant would not have stolen the drugs while his wife watched if he had not thought he could rely on the confidential relationship he had with his wife.

116. Id.
117. Id.
118. Id.
120. Id. at 188, 404 S.E.2d at 469.
122. 199 Ga. App. at 190, 404 S.E.2d at 471.
123. Id., 404 S.E.2d at 471-72.
124. Id., 404 S.E.2d at 472 (Pope, Sognier, Carley & Cooper, JJ., dissenting).
125. Id. at 191, 404 S.E.2d at 472.
126. Id.
V. WITNESSES

A. Impeachment by Evidence of Character

The supreme court's restriction of the use of similar transaction evidence and the expansion of the use of evidence of a victim's character (or at least the use of evidence of similar transactions by the victim), arguably suggests that the appellate courts are retreating somewhat from a pro-prosecution tilt. Further evidence of this trend can be found in recent decisions addressing the improper use of evidence of a defendant's bad character. Four years ago in Jones v. State, the supreme court sharply curtailed the prosecution's ability to impeach a defendant with evidence of bad character. During the current survey period, it seemed that the court of appeals was somewhat more vigorous in its efforts to stop the improper use of character evidence.

In Ledford v. State, the trial court permitted an investigating officer to testify that another witness said that defendant had a reputation "for cutting people." Noting that defendant had not placed his character in issue, the court of appeals pointedly noted that the State could cite "no controlling or persuasive authority for the proposition that the general reputation of the accused for violence may be admissible for any purpose where, as here, the accused himself has not first put his own character into issue." Accordingly, the court reversed defendant's conviction.

In Chapman v. State, the prosecution stated in its closing argument that defendant, who was charged with aggravated assault, told the investigating officer that he was not driving at the time of the alleged assault because his driver's license had been suspended. Actually, the officer merely testified that defendant said he did not have a driver's license. The court of appeals held that the prosecution's argument suggested that defendant had a criminal record and thus impugned his character. Because defendant had not placed his character in issue, the court reversed defendant's conviction.

129. Id. at 695, 415 S.E.2d at 694. The witness who allegedly made this testimony denied knowledge of defendant's reputation when he testified at trial. Therefore, if defendant's reputation had been relevant, the witness's pretrial statement would have been admissible either as impeachment evidence or as substantive evidence. O.C.G.A. § 24-9-83; Gibbons v. State, 248 Ga. 858, 862, 286 S.E.2d 717, 721 (1982).
131. Id.
133. Id. at 268, 414 S.E.2d at 241.
134. Id. at 268-69, 414 S.E.2d at 242.
135. Id.
prosecutor's incorrect statement did not place defendant's character in issue because a license can be suspended for reasons other than criminal misconduct.\textsuperscript{136}

In \textit{Johnson v. State},\textsuperscript{137} the court of appeals reversed defendant's conviction because the trial court permitted the prosecution to cross-examine defendant about his knowledge of an acquaintance's prior convictions for selling cocaine.\textsuperscript{138} Defendant, who himself was charged with selling cocaine, claimed as an alibi that he was with the acquaintance at the time of the alleged offense.\textsuperscript{139} The court of appeals concluded that the testimony was an effort to prove defendant guilty by association.\textsuperscript{140} Judge Beasley, in her dissent, argued that this evidence was relevant because it tended to explain "the absence of the only witness who allegedly could give direct evidence that defendant was not present at the scene when the crime as charged occurred."\textsuperscript{141}

Finally, in \textit{Chisholm v. State},\textsuperscript{142} the court of appeals reaffirmed that a prosecutor can ask a defendant's character witness if he has heard of specific acts of bad conduct on the part of defendant only if the questions are posed in good faith and are based upon reliable information.\textsuperscript{143}

\textbf{B. Impeachment by Evidence of Conviction}

As suggested above, when analyzing the admissibility of extrinsic act evidence, it is often critical to first determine whether the evidence is being offered for a substantive purpose or to impeach or bolster a witness. This is particularly true when attempting to determine the admissibility of a guilty plea or conviction. Georgia law governing the use of convictions to impeach a witness is difficult enough without confusing the issue by subjecting substantive evidence to the scrutiny required for impeachment evidence. Had this been done in \textit{Jabaley v. Mitchell},\textsuperscript{144} plaintiff's attorney might have received a more welcome reception in the court of appeals. In \textit{Jabaley} defendant pled nolo contendere to a misdemeanor battery against plaintiff. In plaintiff's subsequent civil suit against de-

\begin{itemize}
  \item \textsuperscript{136} Id. at 269, 414 S.E.2d at 242 (Andrews & Beasley, JJ., dissenting in part).
  \item \textsuperscript{138} Id. at 591, 415 S.E.2d at 189.
  \item \textsuperscript{139} Id.
  \item \textsuperscript{140} Id., 415 S.E.2d at 190.
  \item \textsuperscript{142} 199 Ga. App. 746, 406 S.E.2d 112 (1991).
  \item \textsuperscript{143} Id. at 746, 406 S.E.2d at 113.
  \item \textsuperscript{144} 201 Ga. App. 477, 411 S.E.2d 545 (1991).
\end{itemize}
fendant, the trial court admitted "for 'impeachment purposes,' a certified copy of Jabaley's prior plea of nolo contendere to simple battery." The court of appeals emphasis of impeachment purposes suggests that plaintiff's lawyer never contended that the plea was admissible as substantive evidence of an admission to establish defendant's liability. Consequently, the court of appeals evaluated the admissibility of the evidence strictly by the rules governing the use of convictions to impeach a witness. The court acknowledged that pleas of nolo contendere to felonies and crimes involving moral turpitude are admissible to impeach a witness. Because misdemeanor battery does not constitute a crime of moral turpitude, however, the court of appeals held that defendant's plea of nolo contendere was not admissible to impeach him.

Among the difficulties which frequently arise in determining the admissibility of convictions to impeach a witness is the question of whether a crime involves moral turpitude. During the survey period, the supreme court held that the offense of driving under the influence is not a crime of moral turpitude. A misdemeanor conviction for writing a bad check, however, does involve moral turpitude and thus, can be used to impeach.

Finally, the court of appeals reaffirmed (as it is forced to do at least once every survey period) that a conviction offered to impeach a witness's general credibility cannot be proved on cross-examination. Rather, a conviction of a felony of a crime of moral turpitude only can be established through a certified copy of the conviction.

C. Examination of Witnesses Generally

The Butler/Allison debate, so called by the author, which centers on the question of whether an expert witness can testify that an alleged victim of child abuse was in fact molested, unfortunately has begun to permeate other areas of evidentiary law. This debate arises from the incredibly difficult burden a prosecutor faces in an attempt to prove a defendant's guilt when the victim is very young, often incompetent, or otherwise unable to testify. The courts and the General Assembly seem to

145. Id. at 477, 411 S.E.2d at 546.
147. 201 Ga. at 477, 411 S.E.2d at 546. For a somewhat less clear discussion of the distinction between substantive and impeachment evidence, see the court of appeals decision in White v. State, in which the court suggests that a pending charge of prostitution against a rape victim may be admissible in the rape trial. 201 Ga. App. 53, 410 S.E.2d 441 (1991).
151. See infra text accompanying notes 166-93.
be involved in a never ending struggle to determine how this burden can be eased without impinging the rights of a defendant. In *Guest v. State*, the court of appeals sent a strong statement that may resolve at least part of this tangled web—the use of lay witnesses to bolster the credibility of a victim. In *Guest* a police officer testified that he obtained a warrant for defendant’s arrest because, after viewing the young victim’s videotaped statement, he felt the victim was “‘qualified . . . and . . . credible in [his] eyes.’” Defendant objected, contending that the credibility of the victim was a matter exclusively within the province of the jury. The trial court overruled defendant’s objection and denied his motion for a mistrial. On appeal the court of appeals disagreed even though defendant arguably “opened the door” to the detective’s testimony.

The court relied upon the supreme court’s decision in *Smith v. State*, which held that an expert cannot express an opinion that the alleged victim was being truthful in her account of molestation notwithstanding the fact that the expert’s testimony came in rebuttal to defendant’s evidence, based upon testimony by several witnesses, that the victim could not be believed under oath.

The three judge panel decision in *Guest* is perhaps of particular significance in view of the full court’s prior decision in *Calloway v. State*. In *Calloway* a social worker testified that the mother believed the victim’s account of sexual abuse by her father. A five judge majority of the court of appeals dodged the issue of whether this testimony constituted improper bolstering of a witness, noting that defendant had the opportunity to cross-examine the mother and thus the social worker’s testimony about what the mother said was admissible. Judges Beasley and Andrews, however, concurred specially, and in the concurring opinion of Judge Beasley, she wrote that the social worker’s testimony was an inadmissible opinion on the credibility of a witness. Judge Beasley nevertheless concurred because she felt this testimony was cumulative of other evidence and therefore harmless. In dissent, Judges Carley and Birdsong agreed with Judges Beasley and Andrews that the testimony was clearly inadmissible. However, they concluded that the testimony was not harm-

153. *Id.* at 507, 411 S.E.2d at 364.
154. *Id.*
156. 259 Ga. at 138, 377 S.E.2d at 161.
158. *Id.* at 273, 404 S.E.2d at 813.
159. *Id.* at 275, 404 S.E.2d at 815 (Beasley, J., concurring specially).
160. *Id.*
161. *Id.* (Carley & Birdsong, JJ., dissenting).
Interestingly, Judge McMurray wrote the majority opinion in Calloway and yet joined in the subsequent panel decision in Guest, and Judge Sognier wrote the panel opinion in Guest even though he was in the majority in Calloway. It therefore appears that the holding in Guest, rather than the holding in Calloway, reflects the true state of the law, and the court of appeals clearly will not allow any witness, expert or lay, to opine on the credibility of a victim.

D. Sequestration of Witnesses

The law governing the competency of witnesses who have violated a sequestration order is a good example of how appellate decisions can lead lawyers and judges astray. For over a decade, Georgia law clearly has been that the violation of the rule of sequestration does not render a witness incompetent but rather goes to the weight of his testimony. Nevertheless, some earlier decisions hold that a violating witness is incompetent to testify. Accordingly, the appellate courts are occasionally faced with appeals in which a witness has been excluded from testifying because he has listened to the testimony of other witnesses. In Weathers v. State, the court of appeals reaffirmed that the violation of an order of sequestration does not render a witness incompetent to testify.

VI. Opinion Evidence

A. Subject Matter of Opinion Evidence

It was bound to happen. For five years now, the author has attempted to catalog the numerous cases which have struggled with the issue of whether the prosecution, facing the difficult task of proving a defendant guilty of molesting a small child, can introduce expert testimony that the child was, in fact, sexually molested. The supreme court initiated this debate seven years ago in two seemingly conflicting decisions rendered one after the other, State v. Butler and Allison v. State. As the courts began grudgingly to allow prosecutors to use such expert testimony, it certainly was only a matter of time before defendants seized the opportu-
nity to use expert testimony on their behalf. This happened during the survey period.

Before discussing this year's cases addressing the Butler/Allison debate, it is necessary to discuss briefly the history of the debate. In Butler the supreme court, with three justices dissenting, held that an expert could testify that a child had been sexually molested. The dissent argued that such testimony is merely a prosecutorial mechanism to bolster the child's credibility and that it completely usurps the function of the jury. Then, in Allison, the supreme court held that a psychologist could not testify that an alleged molestation victim had been sexually abused. However, an expert could testify as to the "lineaments" of something called the child abuse syndrome. Since these decisions, the court of appeals, and on occasion the supreme court, has struggled with this issue. The court of appeals has noted pointedly that the supreme court, by sending conflicting signals, has hardly been helpful.

To the extent the courts have been able to render a definitive statement on this issue, it is arguably found, ironically, in Justice Hunt's dissenting opinion in Harris v. State. In Harris the supreme court reversed the court of appeals holding that the trial court properly admitted expert testimony that a victim of alleged child abuse had been sexually molested. In dissent, Justice Hunt thought the expert's opinion was admissible. Justice Hunt felt that the effect of the majority's decision was that an expert could "opine that his findings . . . were consistent with those [one] would expect to find in a child who had been molested." However, the expert could not say that "my findings indicate the child was molested . . . ." By reversing defendant's conviction, Justice Hunt argued that the State was being penalized for "semantical distinction."

Regardless of one's opinion as to whether an expert should be allowed to testify that an act of molestation has taken place, it is difficult to dispute Justice Hunt's conclusion that the courts are making semantical distinctions which really have no difference. In Cooper v. State, defendant

170. 256 Ga. at 449, 349 S.E.2d at 685.
171. Id. at 453, 349 S.E.2d at 686 (Smith, Weltner & Bell, JJ., dissenting).
172. 256 Ga. at 853, 353 S.E.2d at 808.
173. Id. at 854, 353 S.E.2d at 808.
176. Id. at 386-87, 405 S.E.2d at 482.
177. Id. at 397, 405 S.E.2d at 483 (Hunt, J., dissenting).
178. Id.
179. Id.
180. Id.
contended that the trial court erroneously admitted an expert’s testimony that the victim “fit the child abuse syndrome.” The court of appeals disagreed, citing Allison as authority and noted that it was perfectly permissible for an expert to testify that a child fits the syndrome so long as the expert does not testify that the child was, in fact, abused.

The supreme court re-entered the debate during the present survey period in McCartney v. State. Tragically, the alleged victim of abuse in McCartney died as the result of his injuries. The trial court permitted a forensic pathologist to testify that the child suffered from something variously described as childhood maltreatment syndrome, battered child syndrome, and abused child syndrome. The child abuse syndrome discussed in other Butler/Allison debate cases is a psychological or psychiatric diagnosis that is based largely upon interviews with the alleged victim. The syndrome in McCartney, however, was based upon the pathologist’s examination of the victim’s body. In McCartney the pathologist testified that the child suffered from “abused child syndrome” and that it was his “opinion that that is the manner by which these injuries occurred that resulted in the death of this child.” The supreme court concluded that the pathologist’s testimony “amounts to an opinion that the child died of abuse, and in this regard the testimony is unacceptable because it was not beyond the ability of the jurors themselves to draw the inference.” The supreme court cited Allison to support its holding.

Justices Hunt and Fletcher dissented without opinion. Presumably, the reasons for their dissent are found in Justice Hunt’s dissenting opinion in Harris which Justice Fletcher also joined.

Hall v. State appears to be the first published attempt by a defendant to utilize expert testimony to establish that a child does not suffer from child abuse syndrome and thus was not molested. In Hall defendant attempted to introduce the testimony of two witnesses about the behavior of sexually abused children and whether the victim exhibited such behavior. The trial court, however, sustained the prosecution’s objection to this evidence. On appeal the court of appeals noted that defendant “was not attempting to elicit a direct opinion on the ultimate issue of whether the victim had been molested,” which the court seemed to indicate would

182. Id. at 560, 408 S.E.2d at 798 (quoting the trial record).
183. Id.
185. Id. at 158, 414 S.E.2d at 228.
186. Id. at 159, 414 S.E.2d at 229.
187. Id.
188. Id. at 160, 414 S.E.2d at 230 (Hunt & Fletcher, JJ., dissenting).
191. Id. at 627, 411 S.E.2d at 778.
be improper under *Allison*, or whether the victim had lied about being molested, which would have been improper under *Jennette v. State*.

Rather, defendant wanted to use this testimony to establish that the victim did not exhibit the behavior which one would expect of a sexually abused child. This, the court held, was a proper subject of expert testimony and therefore the trial court erred in sustaining the prosecution's objection.

Thus, it appears that after six years, the *Butler/Allison* debate has been resolved and, as Justice Hunt noted, the resolution is primarily a semantic one. So long as a prosecutor or a defense attorney does not actually elicit testimony that a child was or was not sexually abused, it is permissible to have an expert testify that a child does or does not have the "lineaments" of the child abuse syndrome.

**B. Expert Witnesses**

May the opinion of an expert be based upon hearsay? Most lawyers would probably answer that Georgia law does not permit the admission of expert testimony if the facts upon which the opinion is based are not in evidence or if the facts are not within the personal knowledge of the expert. Actually, Georgia law is not this categorical and one can argue that Georgia courts have substantially relaxed the rule against hearsay as it applies to expert testimony. In *King v. Browning*, the supreme court held that if an expert's opinion is based upon hearsay, his lack of personal knowledge does not necessitate the exclusion of his opinion testimony but rather raises a question concerning the weight that the jury or the court should give the opinion. *King* has been cited several times for this proposition, including in Judge Beasley's dissent in *Martin v. Reed*.

Also during the survey period, the court of appeals, in *Randall Memorial Mortuary, Inc. v. O'Quinn*, struggled to find a basis to affirm the trial court's admission of expert testimony based partially on hearsay. The court conceded, perhaps unnecessarily, that an expert's opinion generally cannot be based upon hearsay. The court avoided this purported proscription by noting that the expert's opinion was based in part on his

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193. 201 Ga. App. at 627, 411 S.E.2d at 778.
194. *Id.*
197. *Id.* at 47, 268 S.E.2d at 654.
own personal observations and this was sufficient to warrant its admission into evidence.200

Clearly, the better practice is to be certain that all facts upon which an expert's opinion are based are admitted into evidence. However, lawyers should be aware that authority exists in Georgia that allows the admission of expert testimony even if it is based on hearsay.201

In Askew v. State,202 the court of appeals held that the trial court properly admitted an expert witness's testimony notwithstanding her admission, on two occasions, that she did not consider herself an expert.203 The court of appeals reached an apparent contrary conclusion during the present survey period in Martin v. Reed.204 In Martin defendants relied upon the testimony of an expert to establish that their negligence, if they were found negligent, did not cause plaintiff's injuries. The expert testified that he was incompetent to analyze x-rays. Because the analysis of these x-rays was the key issue in the case, the court of appeals concluded that his opinion had no probative value and should not have been admitted.205 In dissent Judge Beasley relied upon the court's opinion in Askew and concluded that the expert's admission of incompetency should not have disqualified him from testifying.206

Also during the survey period, the court of appeals held that a neuropsychologist can express an opinion on the causation of a mental disorder even though that mental disorder emanated from an organic cause.207

VII. Hearsay

A. Definition of Hearsay

Hearsay, of course, is an out of court statement offered to prove the truth of the matter asserted therein. This simple definition allows quick analysis of most hearsay issues; a lawyer needs only to determine whether the out of court statement is being offered to prove (a) that the assertion in the statement is true or (b) anything else. Of course, nothing in law is as simple as it seems, and the rule against hearsay is no exception. Unfortunately, however, Georgia lawyers face an additional difficulty occa-

200. Id. at 543, 414 S.E.2d at 745.
203. Id. at 282, 363 S.E.2d at 845.
205. Id. at 776, 409 S.E.2d at 876.
206. Id. at 777, 409 S.E.2d at 877.
sioned by the Georgia evidence code’s antiquated attempt to define hear-
say as “that which does not derive its value solely from the credit of the
witness but rests mainly on the veracity and competency of other per-
sons.”208 Fortunately, however, this definition is so outdated that the
Georgia courts generally ignore it and resort to the more traditional de-
nition of hearsay.

The court of appeals decision in Thompson v. State209 provides a good
example of hearsay analysis. In Thompson a police officer attempting to
verify defendant’s identity, asked a radio dispatcher to call a telephone
number which defendant said was the telephone number of his mother.
The police officer asked the dispatcher to verify defendant’s identity with
the mother. Defendant unsuccessfully objected to the police officer’s tes-
timony of the results of the dispatcher’s inquiry. The trial court reasoned
that the officer’s testimony was admissible because it was not offered to
prove the truth of the statements made by the mother and the dis-
patcher, but was offered to explain the officer’s conduct.210 The court of
appeals acknowledged that out of court statements may be admitted to
explain conduct but only if the conduct of the witness is a matter “con-
cerning which the truth must be found.”211 In other words, the witness’s
conduct must first be relevant. The court held that the police officer’s
conduct was not in issue and therefore the trial court erroneously admit-
ted the officer’s hearsay testimony.212

B. Res Gestae

The Georgia Supreme Court has held that the res gestae doctrine is an
inexplicable enigma.213 Last year’s survey suggested that perhaps the res
gestae doctrine served a “perversely legitimate purpose by allowing courts
to admit evidence that is not admissible under any ‘legitimate’ theory,
but which justice demands should be admitted.”214 However, hard cases
make bad law and it is no doubt frustrating to lawyers who find cases
affirming the admission of hearsay statements made forty-eight hours af-
after an incident, and then see the court of appeals hold in Lee v. Pea-
cock,215 that a statement made in an ambulance forty-five minutes after
an incident is not part of the res gestae.

208. O.C.G.A. § 24-3-1 (1982).
210. Id. at 646, 411 S.E.2d at 886.
211. Id. at 648, 411 S.E.2d at 887-88 (citing Momon v. State, 249 Ga. 865, 867, 294
S.E.2d 482, 482 (1982) quoting O.C.G.A. § 24-3-2 (1982)).
212. Id., 411 S.E.2d at 888.
214. Treadwell, supra note 57, at 279.
Fans of the res gestae doctrine will welcome the court of appeals decision in *Williams v. State*. In *Williams* a witness testified that the victim of an assault told her, approximately an hour after the assault, that "the boy who had driven him to Lake City hit him and robbed him." The victim was unable to testify at trial because of ill health, but his hearsay statement, as recounted by the witness, was sufficient to identify defendant as the perpetrator. However, the trial court ruled, after the witness testified, that this testimony was not part of the res gestae and thus instructed the jury to disregard the testimony. Although the remaining evidence against defendant was scant, the jury convicted him nonetheless. On appeal defendant contended that, once the testimony was excluded, the remaining evidence was insufficient to support his conviction. The court of appeals agreed. However, the court of appeals disagreed that the witness’s testimony had been properly excluded. Although the court in *Lee* went to some length to explain that a trial judge’s decision that evidence is not admissible under the res gestae doctrine would not be disturbed unless clearly erroneous and an abuse of discretion, this deference to the trial court was not apparent in *Williams*. The court simply held that the trial court "erred." The court also rejected defendant’s contention that the admission of this evidence violated defendant’s constitutional right to confront his witnesses. Applying the *Ohio v. Roberts* test, discussed below, the court stated that the res gestae doctrine is "a well-recognized exception to the hearsay rule" and thus apparently satisfied the requirement of *Roberts* that the evidence fall within "a firmly rooted hearsay exception." No doubt, there are those who will take issue with the assertion that the res gestae doctrine is a firmly rooted hearsay exception.

C. The Child Hearsay Statute

As discussed above, the use of expert testimony in child molestation cases has proven to be particularly troublesome for the appellate courts. It is no accident that the appellate courts have had nearly as much difficulty in establishing the permissible bounds for the use of hearsay evi-

217. Id. at 83, 413 S.E.2d at 256.
218. Id.
219. Id.
220. Id.
221. Id. at 84, 413 S.E.2d at 257.
222. Id.
223. 448 U.S. 56 (1980).
224. 101 Ga. App. at 84, 413 S.E.2d at 258.
225. 448 U.S. at 57.
idence in child molestation cases. In both situations the genesis of the problem is the same—prosecutors face incredibly difficult burdens in child abuse cases. Due, no doubt, to the heinous nature of the crime, the General Assembly and the courts have moved to ease these burdens. These efforts, however, have collided with constitutional and evidentiary principles designed to protect the rights of the accused. There appears to be a particularly violent collision in the offing with regard to Georgia's child hearsay statute.

Prior to the adoption of the child hearsay statute, the courts engaged in contorted gyrations to find ways to admit hearsay statements by victims of child abuse. Frequently, courts would use the amorphus res gestae doctrine.226 Even the res gestae doctrine has its limitations, however, and in Cuzzort v. State227 the supreme court, adopting a completely new rule of evidence, held that a prior consistent statement is admissible as substantive evidence against an accused.228

The General Assembly stepped into the fray in 1986 with the adoption of the child hearsay statute.229 Although the statute went a long way toward the resolution of the problem, it contained a gaping hole; the statute required that the child be "available to testify in the proceedings."230 The court of appeals held that a child found to be incompetent to testify was not available to testify and therefore his out of court statement was not admissible under the child hearsay statute.231

The General Assembly reacted quickly by amending the competency statute to provide that "[i]n [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."232

Early attacks on the constitutionality of the child hearsay statute were easily rebuffed, but the court of appeals decision in Rolader v. State233 suggests that future attacks may meet with more success. In Rolader defendant contended that the admission of a victim's out of court statement violated the Confrontation Clause of the United States Constitution.234 The court of appeals cited the landmark case of Ohio v. Roberts235 that established a two-part test for determining whether hearsay evidence vio-

228. Id. at 745, 334 S.E.2d at 662.
230. Id.
234. Id. at 139, 413 S.E.2d at 753.
lated the confrontation clause. First, the declarant must be unavailable to testify at trial. Second, the declarant's out of court statement must bear adequate "indicia of reliability." Generally speaking, reliability is inferred if the evidence falls within a firmly rooted hearsay exception. The court of appeals noted that Georgia's child hearsay statute is premised upon the requirement that the child must be available to testify before his out of court statement can be used. The court of appeals thus concluded that "to the extent that the confrontation clause conditions the admissibility of such evidence on the child's unavailability to testify, it would appear that the requirements of our statute may conflict with the requirements of the Sixth Amendment." Fortunately, the court of appeals dodged this issue, concluding that the out of court statements at issue were not sufficiently trustworthy to be admitted. Thus, there is no precedential effect to the court of appeals dicta and, in any event, Judge Beasley concurred specially, noting that she did not concur with the court's suggestion that the child hearsay statute violated the Sixth Amendment.

Actually, the dilemma is not as grave as suggested by the court. It is true that for many years courts and scholars generally assumed that Ohio v. Roberts established a universal requirement that a declarant be unavailable before his out of court statement could be used in a criminal proceeding. The rationale for this requirement was that if the declarant were available to testify, there is no need to implicate the confrontation clause by using his out of court statement. However, in Idaho v. Wright, the Supreme Court held that "the general requirement of unavailability did not apply to incriminating out-of-court statements made by a nontestifying co-conspirator." Thus, some exceptions to the hearsay rule require a demonstration of unavailability to satisfy the confrontation clause but others do not.

The Supreme Court's decision in Wright, although involving the use of hearsay evidence in child molestation cases and relied upon by defendant in Calloway, did not address the issue of whether child hearsay statutes

236. 202 Ga. App. at 139, 413 S.E.2d at 757.
237. 448 U.S. at 65.
238. 202 Ga. App. at 139-40, 413 S.E.2d at 757.
239. Id. at 140, 413 S.E.2d at 757.
240. Id.
241. Id. at 142, 413 S.E.2d at 759 (Beasley, J., concurring). A special concurrence by a member of the three judge panel of the court of appeals deprives the decision of any precedential effect. Ct. App. R. 35(b).
244. Id. at 3146.
that allow the use of hearsay even though the child is available to testify, violated the confrontation clause. Indeed, Wright did not even address directly a child hearsay statute but rather involved the admission of child hearsay under a residual exception to Idaho's rule against hearsay. Thus, the issue, which no doubt will be resolved in the near future, is whether the availability requirement of the child hearsay statute runs afoul of the unavailability requirement of Roberts. Given the courts understandable desire to facilitate the prosecution of alleged child abusers, it is reasonable to conclude that the courts will hold that the Georgia child hearsay statute, like the coconspirator exception to the rule against hearsay addressed in Wright, is not a hearsay exception that requires the declarant to be unavailable.

It is ironic that the availability requirement of the child hearsay statute, which was adopted to preserve a defendant's right to confrontation, may run afoul of the United States Supreme Court's attempt to ensure that hearsay evidence is only used in limited situations. This irony is exemplified by the court of appeals decision in Lang v. State. In Lang the trial judge concluded that a child was incompetent to testify and, thus, struck the child's in-court testimony, notwithstanding the amendment to the child hearsay statute providing that victims of child abuse are deemed competent to testify. Nevertheless, the jury convicted defendant, and on appeal he contended that the effect of the trial court's ruling, no doubt made at defendant's insistence, was to render the child unavailable to testify and, because she was unavailable, the child hearsay statute was not applicable. Therefore, defendant argued, the testimony of the victim's mother and two police officers about statements made by the child was inadmissible. The court of appeals agreed and reversed defendant's conviction. The court reversed defendant's conviction, notwithstanding his failure to object to the disputed testimony because, as

246. 110 S. Ct. at 3147.

247. Id. Wright, incidentally, held that the residual exception to the rule against hearsay was not sufficiently established to satisfy the trustworthiness requirement, and thus, the reliability of the evidence had to be established on a case-by-case basis. Id. Presumably, Georgia's child hearsay statute is also not a firmly rooted exception to the hearsay rule, and thus, the trustworthiness of evidence admitted under the statute must be determined on a case-by-case basis.


249. Id. at 837, 412 S.E.2d at 867.

250. Id. at 836, 412 S.E.2d at 867.

251. Id.
discussed above, hearsay evidence has no probative value even though it is admitted without objection.252

On a more mundane note, the court of appeals held in Gregg v. State253 that the requirement of the child hearsay statute that the court find sufficient indicia of reliability is not a condition precedent to the admissibility of the out of court statement.254 Thus, an appellate court, when considering the admissibility of an out of court statement by a child, is not limited to evidence of reliability adduced at a pretrial hearing but rather may consider the totality of the circumstances, including evidence adduced at trial. However, it is well established that the "indicia of reliability must spring from the circumstances of the statement."255 Thus, the trustworthiness of the statement cannot be established by corroborating evidence, but rather the statement "must possess indicia of reliability by virtue of its inherent trustworthiness."256

D. Statements Made for Purposes of Medical Diagnosis or Treatment

In Lee v. Peacock,257 appellant's husband fell while in appellee's store and broke his leg. Three days later, he died of complications arising from surgery on his broken leg. The trial court granted defendant's motion for summary judgment after concluding that statements made by the decedent as to the cause of the fall were inadmissible.258 First, as noted above, the trial court ruled, and the court of appeals affirmed, that the decedent's statement in the ambulance while in route to a hospital were not admissible under the res gestae doctrine.259 The trial court also held that statements recorded in medical records were not admissible to establish the cause of the decedent's fall.260 A six judge majority of the court of appeals (with two of those judges refusing to concur in the division of the opinion addressing the admissibility of the decedent's statements recorded in the medical records) affirmed, holding that "[s]uperfluous recitations in medical reports of facts reported by a patient, particularly those with a self-serving litigative potential to the maker, should be viewed most critically, as the object of all legal investigation is the search

254. Id. at 238, 411 S.E.2d at 67.
255. Id. at 240, 411 S.E.2d at 68.
258. Id. at 192, 404 S.E.2d at 473-74.
259. Id. at 193, 404 S.E.2d at 474.
260. Id.
for truth." The court held that the decedent’s description of what caused him to fall had no medical significance and, thus, was not admissible under O.C.G.A. section 24-3-4 which allows out of court statements made for purposes of diagnosis or other medical reasons. In dissent Judge Banke, joined by Judges McMurray and Cooper, argued that the decedent’s statements to the admitting physician were admissible because O.C.G.A. section 24-3-4 specifically allows the admission of statements made for purposes of medical diagnosis or treatment, including statements concerning “the inception or general character of the cause or external source thereof.” Of course, O.C.G.A. section 24-3-4 also provides that statements are admissible only “as reasonably pertinent to diagnosis or treatment.” Judge Banke asserted that statements concerning the cause of the fall are pertinent to medical treatment and were of particular medical significance in this case because of the possibility that the insured’s fall may have resulted from a seizure or some other physical infirmity.

Consistent with Lee, the supreme court held in Howard v. State that the trial court erroneously admitted a physician’s testimony about a victim’s statements concerning the circumstances of the shooting, which eventually led to the victim’s death. The supreme court reasoned that the victim’s account of what transpired was not reasonably pertinent to the doctor’s diagnosis or treatment.

E. The Residual Exception

Georgia does not have a “residual exception” to the rule against hearsay such as that found in the Federal Rules of Evidence. However, the court of appeals decision in Patterson v. State may be authority for such an exception. If so, then this rule could be enunciated as “if you need it bad enough, its admissible.” In Patterson the trial court admitted a detective’s testimony concerning a statement made by defendant’s wife which implicated defendant. The wife, after invoking her marital privi-

261. Id. at 194, 404 S.E.2d at 475.
262. Id.
263. Id. at 196, 404 S.E.2d at 476 (Banke, McMurray & Cooper, JJ., dissenting) (quoting O.C.G.A. § 24-3-4 (1982)).
264. Id.
265. Id.
267. Id. at 251, 403 S.E.2d at 205.
268. Id.
271. Id. at 443, 414 S.E.2d at 898.
lege, did not testify at trial, and thus, defendant was unable to cross-examine her concerning her statement. The court apparently concluded that the testimony was admissible under O.C.G.A. section 24-3-1(b), which provides that “[h]earsay evidence is admitted only in specified cases from necessity.” However, the court did not elaborate on how this provision justified the admission of the detective's testimony. The court rejected defendant's confrontation clause argument, finding that the dictates of Ohio v. Roberts were satisfied because the declarant was not available to testify and the detective's testimony about what the defendant's wife told him was sufficiently trustworthy.

272. O.C.G.A. § 24-3-1(b) (1982).