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Evidence

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by Marc T. Treadwell*

I. OBJECTIONS

Last year's evidence survey addressed and mildly criticized the Georgia Court of Appeals holding in *Garner v. Victory Express, Inc.*[1] that a party objecting to an opposing party's closing argument must, in addition to objecting, state the action he wishes the court to take.[2] Specifically, the objecting party must request an appropriate instruction to the jury, a rebuke of counsel, or a mistrial. The failure to do so, the court of appeals held in *Garner*, constitutes a waiver of the right to raise that issue on appeal.[3] Why, it is appropriate to ask, is it necessary to request a mistrial when the court has overruled the objection? As pointed out in last year's survey, this meant in *Garner* that plaintiff's counsel, having seen his objection belittled by the trial court, should have exacerbated the situation by futilely requesting specific relief.[4]

The supreme court granted certiorari in *Garner* and, during the current survey period, reversed the court of appeals.[5] The supreme court noted that plaintiff's attorney properly and timely objected to the allegedly improper argument, and the trial court overruled the objection.[6] The supreme court agreed that the court of appeals properly applied, as it was bound to do, its decision in *Seaboard Coastline Railroad v. Wallace*,[7] requiring the objecting party to request specific

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1. 210 Ga. App. 481, 436 S.E.2d 521 (1993).
2. Marc T. Treadwell, *Evidence*, 46 MERCER L. REV. 233, 234 (1994).
3. Treadwell, *supra* note 2, at 233-34.
4. 210 Ga. App. at 482, 436 S.E.2d at 522.
5. 264 Ga. 171, 442 S.E.2d 455 (1994).
6. *Id.* at 171, 442 S.E.2d at 456.
7. 227 Ga. 363, 180 S.E.2d 743 (1971).

relief. However, the supreme court was not bound by and chose to overrule *Wallace*. While a party is free to request specific relief, the court held, it is sufficient that he merely object and "thereby implicitly request that the trial court acknowledge the impropriety of the closing argument by sustaining the objection thereto."[8] The supreme court's decision is a victory for common sense and relieves attorneys from the humiliating burden of, for example, beseeching a trial judge to rebuke defense counsel when the judge has just overruled an objection to the allegedly offensive argument.

The need for precise objections is demonstrated by two court of appeals decisions addressing the same general issue—the admissibility of withdrawn guilty pleas. In *Shoemake v. State*,[9] the prosecutor asked defendant's character witness whether she was aware that defendant had pled guilty to the charged offense—a plea that was subsequently withdrawn. Initially, defendant's attorney objected to the question because it put defendant's character at issue. Defendant then took the stand and testified about the circumstances surrounding the guilty plea and its subsequent withdrawal. When the prosecutor examined defendant about the plea, defendant's counsel again objected, arguing that the withdrawn plea was irrelevant. At the close of the evidence, defendant moved for a mistrial, claiming that the plea negotiations should be treated just as civil settlement negotiations and should not be admissible.[10]

Defendant's attorney apparently was unaware that Official Code of Georgia Annotated ("O.C.G.A.") section 17-7-93(b) specifically provides that withdrawn pleas are not "admissible as evidence against [defendant] at his trial."[11] The court of appeals ruled that defendant's initial objection—that the evidence improperly impugned her character—was without merit because defendant had placed her character in issue by calling a character witness.[12] Defendant did not specifically assert that the denial of her motion for mistrial was error and, even if she had, the court observed that "the timeliness of the motion is questionable" because it was made after the close of evidence.[13] Thus, defendant's counsel simply failed to preserve for appeal a meritorious objection to the

8. 264 Ga. at 172, 442 S.E.2d at 456.
9. 213 Ga. App. 528, 445 S.E.2d 558 (1994).
10. *Id.* at 528-29, 445 S.E.2d at 558-59.
11. O.C.G.A. § 17-7-93(b) (1990).
12. 213 Ga. App. at 529, 445 S.E.2d at 559.
13. *Id.*

admission of evidence about his client's withdrawn guilty plea. Fortunately for defendant, the court of appeals accepted the argument that the admission of the plea was an error "of such serious magnitude that even if she erred procedurally in the manner and timeliness of pursuing it, a new trial is required."[14] The court apparently was swayed by its suspicion that the prosecutor knowingly violated the statute.[15] Judge Andrews, joined by Judge Birdsong, argued in dissent that the "objection made was not good and the objection now argued and addressed by the majority was never made below."[16]

Judge Andrews returned to this issue in *Snow v. State*.[17] In *Snow*, defendant contended that the trial court erred in admitting evidence of defendant's attempt to plead guilty to the charged offense in magistrate court at an initial hearing and of his subsequent withdrawal of his plea.[18] However, defendant's counsel did not make a "specific objection to such testimony" but, rather, only objected generally to "'any statement' with respect to [defendant's] testimony about the circumstances under which his previous statements were made . . . ."[19] Writing for an undivided panel, Judge Andrews concluded that defendant's objections were insufficient to preserve the issue for appeal.[20] In a special concurrence, Judge Beasley differed with Judge Andrews' reasoning, but reached the same result.[21] She concluded that O.C.G.A. section 17-7-93 did not apply to defendant's statements in his initial appearance in the magistrate court.[22] Judge Beasley cited, but did not discuss, *Shoemake*.[23]

Motions in limine are frequently used by attorneys to resolve evidentiary issues prior to trial. The question often arises whether the grant or denial of a motion in limine preserves an issue for appeal or whether it is necessary to object again during the trial. In *General Motors Corp. v. Moseley*,[24] the court of appeals held that "where the trial court's ruling on a motion in limine is violated, further objection at trial is unnecessary to preserve the matter for appellate review."[25]

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14. *Id.*
15. *Id.*
16. *Id.* at 531, 445 S.E.2d at 560 (Andrews & Birdsong, JJ., dissenting).
17. 213 Ga. App. 571, 445 S.E.2d 353 (1994).
18. *Id.* at 571, 445 S.E.2d at 353.
19. *Id.*
20. *Id.*, 445 S.E.2d at 354.
21. *Id.* at 573, 445 S.E.2d at 355 (Beasley, P.J., concurring specially).
22. *Id.*
23. *Id. See* 213 Ga. App. 528, 445 S.E.2d 558.
24. 213 Ga. App. 875, 447 S.E.2d 302 (1994).
25. *Id.* at 877, 447 S.E.2d at 306.

II. RELEVANCY

A. *Relevancy of Extrinsic Act Evidence*

Perhaps the most problematic area of evidence law is the determination of the relevancy of extrinsic act evidence. Certainly, Georgia's appellate courts address this issue more than any other evidentiary issue. Evidence is extrinsic when it concerns conduct on occasions other than the one at issue. As a general rule, extrinsic act evidence is inadmissible. Like the rule against hearsay, however, the rule against extrinsic act evidence is known more for its exceptions than its flat prohibition. Extrinsic act evidence may be admissible for a substantive purpose, as when a prosecutor tenders evidence of a similar transaction, usually a prior criminal offense, to prove a defendant's motive to commit the charged offense. Extrinsic act evidence also may be admissible to impeach or bolster a witness, as when evidence of a felony conviction is tendered to impeach a witness's character. However, evidence which may appear to be extrinsic may not, in the sometimes arcane world of evidence, actually be extrinsic. For example, as discussed below, the *res gestae* doctrine, although typically thought of as an exception to the rule against hearsay, is often used to admit evidence of transactions or conduct other than the precise conduct or evidence at issue.

For years, Georgia courts routinely and liberally admitted evidence of similar, but totally unrelated transactions in criminal cases. However, as discussed in previous surveys, the Georgia Supreme Court in *Stephens v. State*[26] and *Williams v. State*[27] substantially tightened the rules governing the admissibility of extrinsic act evidence in criminal cases.[28] In *Stephens*, the supreme court held that the prosecution cannot rely solely on a certified copy of a prior conviction when seeking to use that conviction as similar transaction evidence.[29] Rather, the prosecution must offer evidence proving the requisite degree of similarity or connection between the extrinsic act and the charged offense.[30] In *Williams*, the supreme court, in a dramatic departure from prior practice, held that the prosecution must prove, prior to trial, three elements before similar transaction evidence can be admitted.[31] First,

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26. 261 Ga. 467, 405 S.E.2d 483 (1991).
27. 261 Ga. 640, 409 S.E.2d 649 (1991).
28. Marc T. Treadwell, *Evidence*, 45 MERCER L. REV. 229, 231 (1994); *Evidence*, 44 MERCER L. REV. 213, 216-20 (1993).
29. 261 Ga. at 469, 409 S.E.2d at 486.
30. *Id.*, 409 S.E.2d at 485-86.
31. 261 Ga. at 642, 409 S.E.2d at 651.

the prosecution must prove the relevance of the independent transaction to a legitimate issue.[32] Second, the prosecution must prove the defendant committed the independent offense or act.[33] Third, the prosecution must prove a sufficient connection or similarity between the independent transaction and the charged offense.[34] The trial court must make a specific determination that the prosecution has carried its burden of proving each of the three elements.[35]

During the present survey period, the court of appeals struggled mightily with *Williams'* procedural requirements and the failure of trial courts to comply with those requirements. The results of this struggle have not been uniformly consistent. The court of appeals in *White v. State*[36] reaffirmed its holding in *Riddle v. State*[37] that a defendant does not waive his right to appeal the trial court's failure to conduct the hearing required by *Williams* (and subsequently by Uniform Superior Court Rule 31.3) when he does not object at trial to this omission.[38] The burden of conducting the hearing is placed solely on the prosecution and the trial court, and the defendant has no responsibility to request a hearing.[39] Thus, a defendant's failure to object to the admission of similar transaction evidence on the basis that the hearing was not conducted does not constitute a waiver of his objection. However, in *Willis v. State*,[40] the court of appeals rejected defendant's contention that the trial court, although it conducted a *Williams* hearing, failed to make the findings required by *Williams* because defendant failed to object at trial.[41]

In *Banks v. State*,[42] the court of appeals considered the substantive issues raised by the admission of similar transaction evidence and, in a rare move, concluded that the trial court erred in admitting the evidence.[43] In *Banks*, the prosecution alleged defendant and an accomplice entered the home of an eighty-three year old man and, while attempting to rob him, assaulted him. The trial court admitted evidence of Banks' conviction for kidnapping a fifty-seven year old woman from

32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. 213 Ga. App. 429, 445 S.E.2d 309 (1994).
37. 208 Ga. App. 8, 430 S.E.2d 153 (1993).
38. 213 Ga. App. at 430, 445 S.E.2d at 311.
39. *Id.* (quoting *Riddle*, 208 Ga. App. at 11, 430 S.E.2d at 156).
40. 214 Ga. App. 479, 448 S.E.2d 223 (1994).
41. *Id.* at 481, 448 S.E.2d at 225-26.
42. 216 Ga. App. 326, 454 S.E.2d 784 (1995).
43. *Id.* at 328, 454 S.E.2d at 787.

a parking lot, stealing her purse, and forcing her into the trunk of her car. The trial court concluded that this prior offense was admissible to prove defendant's motive and intent to commit the charged offense.[44] However, the court of appeals disagreed that the two offenses were sufficiently similar that proof of the first proved the second.[45] In addition, and this could provide defense attorneys with a powerful weapon to prevent the admission of similar transaction evidence, the court noted that neither motive nor intent was in issue.[46] Rather, defendant contended that he did not commit the offense, not that he committed the offense but lacked the requisite motive or intent.[47]

Prosecutors have often taken advantage of the principle that if the date of an alleged offense is not an essential averment of an indictment, then the State may prove any similar offenses allegedly committed within the statute of limitations. Such evidence is not extrinsic, but rather is direct evidence of the charged offense. In *Robinson v. State*,[48] the court of appeals held that this principle is not without limitations.[49] If the indictment charges that the offense was committed in a specific manner, and the similar offense was committed in a different manner, then the similar offense is not admissible as direct evidence of the offense charged.[50] Because the indictment in *Robinson* charged that defendant committed child molestation in a specific manner, and the allegedly similar act of molestation was committed in a different manner, the court held that the trial court erred in admitting evidence of the similar offense.[51]

The admissibility of extrinsic act evidence is also frequently an issue in civil cases. However, and perhaps incongruously, courts are much more willing to admit extrinsic act evidence in criminal cases than in civil cases. Some, no doubt, would argue that courts should be more reluctant to admit highly prejudicial extrinsic act evidence in criminal cases, where life and freedom are at stake, than in civil cases. There is, however, some logic to this disparate treatment. Civil cases typically do not involve issues of intent, motive, scheme, or other issues that are in play in cases involving intentional misconduct. Rather, civil cases

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44. *Id.* at 326-28, 454 S.E.2d at 786-87.

45. *Id.* at 328, 454 S.E.2d at 787.

46. *Id.*

47. *Id.* at 326, 454 S.E.2d at 784. This argument is not available to defense attorneys in federal criminal proceedings. *See* Marc T. Treadwell, *Evidence*, 42 MERCER L. REV. 1451, 1457 (1990); Treadwell, *Evidence*, 43 MERCER L. REV. 1173, 1175-76 (1991).

48. 213 Ga. App. 577, 445 S.E.2d 564 (1994).

49. *Id.* at 577, 445 S.E.2d at 565.

50. *Id.* at 578, 445 S.E.2d at 565.

51. *Id.*

typically involve situations in which the degree of intent is much less than in criminal cases, certainly much less malevolent, and is often completely absent—such as in a typical negligence case. For example, 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 a defendant, because of negligence on a prior occasion, was more likely negligent on the occasion at issue. In a criminal case, on the other hand, evidence of a prior burglary involving facts similar to the charged offense may tend to prove the defendant's motive, intent, or plan in committing the charged offense. If so, the prosecutor is not using the prior transaction to show a defendant's proclivity toward criminal conduct (criminal defense lawyers, no doubt, scoff at this notion), but is presenting the evidence as relevant to the legitimate issue of motive, intent, or plan.

Generally, the principles governing the admissibility of extrinsic act evidence are the same for both criminal and civil cases. Evidence of similar or related transactions is not admissible to prove that a person acted in conformity with some prior conduct, but may be admissible to prove identity, motive, plans, scheme, bent of mind, notice or course of conduct, all of which are not relevant issues in a typical civil negligence case.

During the survey period, the court of appeals demonstrated the applicability of this principle in *Matt v. Days Inns of America, Inc.*[52] In *Matt*, the trial court granted defendant's motion for summary judgment in the plaintiffs' action to recover for injuries suffered when one was shot while a guest at defendant's motel. The plaintiffs alleged that defendant was negligent because it failed to provide adequate security and argued that the criminal attack was foreseeable by virtue of prior criminal activity at the motel. Although the plaintiffs adduced considerable evidence of such prior criminal activity on the motel's premises and in the areas immediately surrounding the motel, the trial court ruled that these acts were not sufficiently similar to the attack on the plaintiffs to provide notice to defendant that such an attack was possible.[53] A majority of the court of appeals held that the trial court viewed these prior incidents much too restrictively.[54] It is not necessary, the majority reasoned, that the prior criminal acts be identical or virtually identical.[55] The issue is not whether the defendant had reason to believe that a gun would be used in an attack, which would

52. 212 Ga. App. 792, 443 S.E.2d 290 (1994) *cert. granted.*
53. *Id.* at 793, 443 S.E.2d at 292.
54. *Id.* at 795, 443 S.E.2d at 293.
55. *Id.* at 794, 443 S.E.2d at 293.

make only prior offenses involving guns admissible, but "whether the prior crimes should have put an ordinarily prudent person on notice that the hotel's guests were facing increased risks."[56] The majority criticized the two dissenting judges' restrictive test for admissibility by terming it a "'free bite' analysis" that would absolve a landowner of any responsibility for an attack by a gunman because the perpetrators of the prior criminal offenses wielded knives.[57] The court of appeals formulated a straightforward test for determining the admissibility of evidence of prior criminal activity: "The test is whether the prior criminal activity was sufficiently substantially similar to demonstrate the landowner's knowledge that conditions on his property subjected his invitees to unreasonable risk of criminal attack so that the landowner had reasonable grounds to apprehend that the present criminal act was foreseeable."[58]

Before defense lawyers become too concerned about the use of extrinsic act evidence in civil cases, they should read *Browning v. Paccar, Inc.*[59] In *Browning*, plaintiffs contended that a truck manufactured by defendant was defective because the configuration of the truck's fuel and electrical systems increased the possibility of fire after a collision. On appeal of a verdict in favor of defendant, plaintiffs argued that the trial court erred in denying their motion in limine to prohibit the defense from referring to the fact that the truck had never been subjected to a recall. The plaintiffs relied on the general principle that whether a defendant was negligent or not negligent on a prior occasion is irrelevant to the issue of whether a defendant was negligent on the occasion in issue.[60] For example, it is impermissible for a doctor defending a malpractice claim to proclaim that he has never been sued before.[61] The court of appeals was not persuaded. Because plaintiffs were arguing that defendant's truck suffered a design defect that, by definition, would be common to thousands of trucks, "[t]he fact that none of such vehicles had been subjected to recall and Paccar had never been subjected to regulatory action with respect to the claimed defect despite the thousands of identical vehicles in use, tends to negate the allegation that the configuration was a dangerous design."[62]

The court's holding is significant and is arguably a substantial departure from present law. Typically, similar transaction evidence is

56. *Id.*
57. *Id.* at 795, 443 S.E.2d at 293.
58. *Id.*
59. 214 Ga. App. 496, 448 S.E.2d 260 (1994).
60. *Id.* at 496-97, 448 S.E.2d at 262.
61. Williams v. Naidu, 168 Ga. App. 539, 540, 309 S.E.2d 686, 686 (1983).
62. 214 Ga. App. at 498, 448 S.E.2d at 263.

admissible to prove what has been described as a "legitimate issue;" for example, the intent or motive of a criminal defendant or, in a civil case, the knowledge of a party. Similar transaction evidence is not admissible, however, to prove that a defendant is guilty simply because he committed a prior criminal act or to prove that a party is negligent simply because he was negligent on prior occasions. In *Browning*, however, the absence of prior incidents was admissible to prove that defendant was not culpable in the transaction at issue.[63]

The court of appeals' decision in *Garner v. Victory Express, Inc.*[64] involves a more traditional application of the principles governing the admissibility of similar transaction evidence in civil cases. In *Garner*, defendant's counsel said in closing argument that there was no evidence that defendant was not a safe, careful, and prudent driver.[65] Of course, even if there was such evidence, it would be inadmissible unless it was relevant to a legitimate issue. Just as the admission of a driver's past driving record is reversible error, an argument about the lack of such evidence is also improper. The court of appeals reversed the judgment in defendant's favor.[66]

B. Relevancy of Prior Sexual Conduct

Generally, evidence of a child's past sexual history is inadmissible in the trial of a defendant charged with molesting the child.[67] However, in *Chambers v. State*,[68] the court of appeals reaffirmed that the State may open the door to admission of such testimony when it calls an expert witness to testify that the victim has many of the common characteristics of a sexually abused child.[69] In *Chambers*, the trial court refused to admit evidence that the victim had engaged in sexual activities with others during the time that the victim claimed defendant sexually molested her.[70] The court of appeals disagreed, concluding that this evidence could suggest other possible causes for the behavior and symptoms that led the prosecution's expert to conclude that the child had been molested.[71] Thus, the evidence was relevant to prove that the child was molested by someone other than defendant.

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63. *Id.* at 496, 448 S.E.2d at 260.
64. 214 Ga. App. 652, 448 S.E.2d 719 (1994).
65. *Id.* at 652, 448 S.E.2d at 720.
66. *Id.* at 653, 448 S.E.2d at 721.
67. *See* Marion v. State, 206 Ga. App. 159, 159, 424 S.E.2d 838, 839 (1992).
68. 213 Ga. App. 284, 444 S.E.2d 833 (1994).
69. *Id.* at 286, 444 S.E.2d at 835.
70. *Id.*
71. *Id.*

Accordingly, the court of appeals reversed defendant's conviction.[72] The court, however, did not address the fact that the sexual conduct in question was apparently consensual and what effect, if any, this would have on an expert's conclusion that the child had many of the common characteristics of a sexually abused child.[73] Apparently, it was sufficient for the court that the child had engaged in sexual activities with others, regardless of whether she had participated voluntarily.[74]

C. *Relevancy of Insurance Coverage*

In *Conley v. Gallup*,[75] plaintiff alleged the trial court erred when it refused to allow cross-examination of defendant's experts concerning the fact that the experts were insured by or closely related to defendant's malpractice carrier. The trial court also prohibited plaintiff from cross-examining a defense witness about a prior inconsistent statement concerning his knowledge that defendant was insured by the insurance carrier and that defendant was represented by an attorney employed by the insurance carrier.[76] The court of appeals affirmed, reasoning that a plaintiff's right to a thorough and sifting cross-examination must yield to the rule that matters relating to insurance coverage are irrelevant.[77] To the extent the witness's association with the malpractice carrier constituted a financial interest in the case, it was not of such a nature that would warrant the introduction and the ensuing prejudice of evidence that defendant had liability insurance coverage.[78]

D. *Relevancy of Habit*

In *Horton v. Eaton*,[79] plaintiffs alleged that defendant, a radiologist, negligently failed to diagnose a cervical fracture. Defendant maintained that his reading of X-ray films was within the applicable standard of care, but defendant's expert acknowledged that defendant should have performed additional studies if the patient was complaining of neck pain. Unfortunately, the X-ray requisition form which may or may not have contained this critical information "mysteriously" disappeared from defendant's records.[80] Thus, the critical issue in the case was whether

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72. *Id.* at 287, 444 S.E.2d at 836.
73. *Id.* at 284, 444 S.E.2d at 833.
74. *See id.*
75. 213 Ga. App. 487, 445 S.E.2d 275 (1994).
76. *Id.* at 487, 445 S.E.2d at 276.
77. *Id.*
78. *Id.* at 488, 445 S.E.2d at 276.
79. 215 Ga. App. 803, 452 S.E.2d 541 (1994).
80. *Id.* at 805, 452 S.E.2d at 544.

the requisition form informed defendant that the patient was experiencing neck pain. The trial court allowed defendant to testify, based upon his knowledge of the manner in which requisition forms were typically filled in, that the requisition form in question did not contain any information suggesting that plaintiff was experiencing neck pain.[81]

On appeal from a judgment in defendant's favor, the court of appeals first noted that the absence of the requisition form was not fatal to the plaintiffs' case because O.C.G.A. section 24-4-22 allows a jury to infer that missing evidence may create a presumption against the party in control of the evidence.[82] Thus, jurors could have inferred that the missing form indicated plaintiff was experiencing neck pains. Conversely, defendant's failure to produce the requisition form (the court apparently thought that the absence of this critical document was not accidental) meant he had no evidence to support his defense that he acted properly given the information available to him. But the missing requisition form became a benefit rather than a burden to defendant because the trial court allowed him to speculate as to the contents of the document. The court of appeals interpreted this as testimony by defendant as to the habit and customs of another, testimony that is clearly improper under Georgia law, which only permits a witness to testify with regard to his own habits and customs.[83] Thus, the court reversed the trial court.[84]

E. Relevancy of Subsequent Remedial Measures

In *General Motors Corp. v. Moseley*,[85] a highly publicized product liability action, the court of appeals addressed an issue of first impression concerning the admissibility of evidence of subsequent remedial measures. In *Moseley*, the trial court denied defendant's motion in limine to prevent any references to the redesign of its vehicle. Plaintiffs argued that the redesign was not a subsequent remedial measure because the redesign process began prior to the manufacture of the subject vehicle and, in fact, a redesigned model was manufactured prior to the incident giving rise to plaintiffs' suit. In other words, plaintiffs argued that the prohibition against evidence of subsequent remedial measures should apply only to measures undertaken subsequent to an injury.[86] The court rejected this argument.[87] The court reasoned that

81. *Id.* at 806, 452 S.E.2d at 544.
82. *Id.* at 805, 452 S.E.2d at 544.
83. *Id.* at 806, 452 S.E.2d at 544.
84. *Id.* at 807, 452 S.E.2d at 545.
85. 213 Ga. App. 875, 447 S.E.2d 302 (1994).
86. *Id.* at 881, 447 S.E.2d at 309.

because vehicle design changes require years to implement, the policy concerns addressed by the rule—that subsequent remedial measures may be taken as an admission of liability—are present even though the corrective measures began years before the injury.[88] This conclusion is questionable. While the redesign of a faulty product should be encouraged, it is difficult to see how a redesign that is implemented prior to an injury can be characterized as a subsequent remedial measure. On the contrary, it would seem that such conduct is evidence of notice to the manufacturer of the defective design of its product and, because of such notice, the manufacturer should take additional steps to protect the public from harm. While it is true that the redesign of the product may take years, the manufacturer can also protect the public through other measures that have a more immediate result, such as a recall of the product.

The significance and impact of this conclusion may be muted somewhat by an issue of first impression resolved by the court of appeals in *Moseley*. Plaintiffs argued that the rule prohibiting the admission of evidence of subsequent remedial measures should be restricted to negligence actions and should not be applied in strict liability actions.[89] The court agreed, siding with other jurisdictions that allow evidence of subsequent remedial measures because it is unlikely that a manufacturer will be deterred from improving a product that has caused an injury when the failure to do so will subject the manufacturer to multiple claims by others subsequently injured by a defective product.[90] Moreover, the court noted that even in negligence actions, the rule is subject to numerous exceptions.[91] For example, evidence of subsequent remedial measures may be admitted if it demonstrates prior knowledge of a defect, causation, or the feasibility of repair or modification.[92] Thus, the court held that subsequent remedial measures may be admissible in strict liability cases.[93] In cases in which a plaintiff alleges both negligence and strict liability, the court concluded that the jury must be properly instructed with regard to the proper use and limits of such evidence and, in appropriate cases, the trial court should bifurcate the proceeding.[94]

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87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 881-82, 447 S.E.2d at 309.
91. *Id.* at 882, 447 S.E.2d at 310.
92. *Id.*
93. *Id.*
94. *Id.* at 883, 447 S.E.2d at 310.

F. Miscellaneous Relevancy Issues

In *Morris v. State*,[95] the prosecutor, in her opening statement, said that a key witness and alleged accomplice of defendant underwent a polygraph examination and that he either "checked out" or "checked out okay."[96] This witness later testified that he had taken two lie detector tests. On both occasions, the trial court denied defendant's motions for mistrial.[97] On appeal, the court of appeals began its analysis by acknowledging the general rule that evidence concerning a witness or party who has undergone a polygraph test is generally not relevant.[98] The court rejected, with some apparent disdain, the argument that the statement that the witness's polygraph examination had "checked out" was not sufficient to infer the results of the examination.[99] The mere mention that a witness has taken a polygraph examination, the court said, has been held sufficient to create the impression that the witness took and passed the test.[100] The court also rejected the State's argument that evidence of the polygraph test was relevant to explain why the police did not consider the witness a suspect.[101] The court acknowledged that evidence that a witness has taken a polygraph test may be admissible to explain conduct or motive if that witness's conduct or motive are in issue.[102] However, the court did not think the conduct and motive of the police were relevant issues.[103]

III. PRIVILEGE

In *State v. Peters*,[104] the court of appeals, addressing an issue of first impression, held that the marital testimonial privilege may be asserted notwithstanding the fact that the marriage was entered into for the purpose of preventing the spouse from testifying.[105] In *Peters*, the State's case against the defendant for the murder of her husband depended upon the testimony of defendant's paramour. The State intended to secure his cooperation by granting him immunity. However,

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95. 264 Ga. 823, 452 S.E.2d 100 (1995).
96. *Id.* at 824, 452 S.E.2d at 102.
97. *Id.*
98. *Id.* at 825, 452 S.E.2d at 102.
99. *Id.*
100. *Id.* at 824, 452 S.E.2d at 102.
101. *Id.*
102. *Id.* at 825, 452 S.E.2d at 102.
103. *Id.*
104. 213 Ga. App. 352, 444 S.E.2d 609 (1994).
105. *Id.* at 356-57, 444 S.E.2d at 612. *See* O.C.G.A. § 24-9-23 (1995).

defendant and her lover married the day before the hearing on the State's motion to grant immunity. Prior to the marriage, defendant told her daughters that she intended to marry her lover so he could not be compelled to testify against her. The trial court quashed the State's subpoena of the lover, and the State appealed.[106]

The court of appeals noted that the marital privilege is clear and unambiguous: "Husband and wife shall be competent but shall not be compellable to give evidence in any criminal proceeding for or against each other."[107] Short of a judicial revision of the statute, the court of appeals found that it could reach no conclusion other than to affirm the trial court's ruling.[108] The court of appeals acknowledged the State's argument that "'[t]he object of all legal investigation is the discovery of truth.'"[109] Certainly, the marital privilege, like any privilege, necessarily impedes the discovery of truth.[110] However, that is a judgment made by the legislature based upon what it perceives to be the importance of the marital relationship.[111] Because the legislature made such a judgment, the court of appeals was obligated to respect it.[112]

In *General Motors Corp. v. Moseley*,[113] a case discussed in more detail above, plaintiffs relied upon the testimony of an engineer, formerly employed by defendant, who had considerable knowledge of the alleged defect in defendant's vehicle and who had worked with defendant's lawyers in the defense of other cases involving the vehicle design. Defendant contended that this witness's testimony should have been excluded in its entirety pursuant to the attorney-client privilege.[114] The court of appeals disagreed. The court noted that the engineer did not testify as an expert witness, but testified concerning his knowledge of the defendant's product.[115] His knowledge did not become privileged merely because he worked with defendant's lawyers.[116] "'It is axiomatic that one cannot render privileged that which is otherwise not privileged merely by placing it in the hands of his attorney.'"[117]

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106. 213 Ga. App. at 353-54, 444 S.E.2d at 610-11.
107. *Id.* at 356-57, 444 S.E.2d at 612.
108. *Id.*
109. *Id.* at 356, 444 S.E.2d at 612 (quoting O.C.G.A. § 24-1-2 (1995)).
110. *Id.*
111. *Id.*
112. *Id.*
113. 213 Ga. App. 875, 447 S.E.2d 302.
114. *Id.* at 878-79, 447 S.E.2d at 307.
115. *Id.* at 879, 447 S.E.2d at 308.
116. *Id.*
117. *Id.* at 880, 447 S.E.2d at 308 (quoting Atlantic Coastline R.R. Co. v. Daugherty, 111 Ga. App. 144, 150, 141 S.E.2d 112, 116 (1965)).

IV. WITNESSES

A. *Impeachment by Evidence of Character*

In *DeLoach v. State*,[118] defendant called several witnesses to attest to his good character. The prosecutor asked one of these witnesses whether the witness knew that defendant had been convicted of a crime. When the witness said that he did not, the prosecutor then tendered, and the court admitted a certified copy of defendant's conviction for child abandonment. The trial court admitted the conviction as a crime involving moral turpitude and, thus, admissible to impeach general character. Defendant appealed, contending that the conviction was not admissible because child abandonment is not a crime of moral turpitude.[119] The court of appeals agreed and reversed defendant's conviction.[120] However, the court of appeals acknowledged that when a defendant puts his character in issue, the State may cross-examine character witnesses offered by defendant to test their knowledge of his character.[121] Indeed, in *Chisholm v. State*,[122] the court held that the prosecution could cross-examine character witnesses about their knowledge of defendant's commission of particular crimes or even about whether the witnesses were aware the defendant had been investigated for a crime.[123] In *DeLoach*, the court of appeals did not address whether the prosecution's questions to defendant's character witnesses were appropriate under this principle.[124]

V. OPINION TESTIMONY

The court of appeals decision in *Newberry v. D.R. Horton, Inc.*[125] is difficult to understand, but it arguably creates a de facto requirement that a party tender an expert and obtain a clear ruling from the trial judge that the party is qualified to give opinion testimony as an expert witness, a requirement not previously found in Georgia law.[126] In *Newberry*, plaintiffs alleged defendant negligently constructed their home. In support of their claim they called a witness who, after stating

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118. 216 Ga. App. 161, 453 S.E.2d 766 (1995).
119. *Id.* at 161, 453 S.E.2d at 767.
120. *Id.* at 163, 453 S.E.2d at 768.
121. *Id.* at 162, 453 S.E.2d at 767.
122. 199 Ga. App. 746, 406 S.E.2d 112 (1991).
123. *Id.* at 746-47, 406 S.E.2d at 113.
124. *See* 216 Ga. App. at 161, 453 S.E.2d at 766.
125. 215 Ga. App. 858, 452 S.E.2d 560 (1994).
126. *See id.*

his experience in the construction industry, testified that plaintiffs' house contained numerous flaws in workmanship. This witness also testified concerning the remedies for these defects and the cost of the remedies. Defendant did not object to this testimony and did not challenge the witness's credentials. At the conclusion of the evidence, the trial court directed a verdict for defendant on plaintiffs' negligent construction claim on the ground that plaintiffs failed to adduce evidence that defendant breached the standard of care required of a professional builder.[127]

In response to the plaintiffs' argument that they did offer expert testimony, the court of appeals noted that this witness "was never tendered by plaintiffs as an expert, and the trial court never ruled on his qualifications to give expert testimony."[128] The court of appeals concluded that the trial court "implicitly rejected the witness as an expert by directing a verdict for defendant on plaintiffs' negligent construction claim."[129] Judge McMurray, joined by Judge Blackburn, dissented, arguing that the witness's testimony was sufficient to raise a jury issue with regard to whether defendant breached the requisite standard of care and that because defendant did not object to this testimony, the testimony was admissible.[130]

There is no explicit requirement under Georgia law that a party "tender an expert" or obtain a court's ruling that a witness is qualified to testify as an expert.[131] Indeed, Judge Andrews has maintained, and many trial lawyers would agree, that tendering an expert in the presence of the jury is improper because a trial court's ruling that a witness is an expert may create the impression that the trial court agrees with the substance of the expert's testimony.[132] Indeed, it is safe to say that most lawyers who tender a witness as an expert are fully aware that the witness possesses the credentials to qualify as an expert and yet make the tender for precisely this purpose.[133] The conventional thinking, as suggested by the dissent in *Newberry*, is that it is incumbent upon the opposing party to attack or object to a professed

127. *Id.* at 858-59, 452 S.E.2d at 560-61.

128. *Id.*, 452 S.E.2d at 561.

129. *Id.* at 859, 452 S.E.2d at 562.

130. *Id.* at 860, 452 S.E.2d at 563 (McMurray, P.J., Blackburn, J., concurring and dissenting).

131. *See generally* Davis v. State, 209 Ga. App. 572, 574, 434 S.E.2d 132, 134 (1993).

132. *Id.* at 576 n.2, 434 S.E.2d at 135 n.2 (Andrews, J., dissenting).

133. *Davis* presents a situation in which this ploy apparently backfired. *See* 209 Ga. App. 572, 434 S.E.2d 132.

expert's credentials and qualifications.[134] Nevertheless, *Newberry* can be interpreted to stand for the proposition that caution requires a party to seek affirmatively a trial court's ruling that an expert witness is, in fact, an expert.

For a number of years, the author has attempted to catalogue the numerous cases in which the courts have struggled with the issue of whether expert testimony is admissible in criminal cases to prove or disprove that a child was sexually abused and, more recently, that a defendant was not a pedophile. Because the struggle emanated from two apparently conflicting supreme court decisions, *State v. Butler*[135] and *Allison v. State*,[136] the author has referred to this as the Butler/Allison debate.[137] During the present survey, the Butler/Allison debate reappeared, this time in the context of a commentary by Judge Andrews in a specially concurring opinion. In *Gilstrap v. State*,[138] the court of appeals summarily rejected defendant's contention that the trial court erred in not allowing his expert to render an opinion on whether he fit the profile of a pedophile.[139] Judge Andrews, although agreeing that the testimony was inadmissible, wrote that he could see little difference between expert testimony regarding abused child syndrome, which is admissible, and expert testimony that a defendant does or does not fit the profile of a pedophile.[140] Judge Andrews lamented the efforts to bring "'soft science,'" such as battered wife syndrome, abused child syndrome, post-traumatic stress syndrome, and even urban survival syndrome into the courtroom.[141] Judge Andrews acknowledged that it seems unfair that evidence of victim syndromes is admissible, but evidence of perpetrator syndromes is not: "it is difficult to explain why we should put stock in psychological evaluation and opinion with regard to syndromes pertaining to victims, yet extend no credence to syndromes or profiles relating to offenders."[142] Unfortunately, Judge Andrews continued, the supreme court has opened the door and the court of appeals has no power to close it.[143] Rather, "the best we can do is to continue to screen out other dubious syndromes as they are imagined

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134. 215 Ga. App. at 860, 452 S.E.2d at 562 (McMurray, P.J., Blackburn, J., dissenting and concurring).
135. 256 Ga. 448, 349 S.E.2d 684 (1986).
136. 256 Ga. 851, 353 S.E.2d 805 (1987).
137. Marc T. Treadwell, *Evidence*, 45 MERCER L. REV. 242, 243 (1993).
138. 215 Ga. App. 180, 450 S.E.2d 436 (1994) (Andrews, J., concurring).
139. *Id.* at 184, 450 S.E.2d at 439.
140. *Id.* at 183, 450 S.E.2d at 439.
141. *Id.*
142. *Id.* at 181, 450 S.E.2d at 439.
143. *Id.* at 184, 450 S.E.2d at 439.

and promoted by individuals who need to explain away their conduct."[144]

Perhaps consistent with Judge Andrews' disdain for soft science, the court of appeals held in *Roberson v. State*[145] that the trial court erred when it permitted a prosecution witness, a clinical social worker, to testify that the victim in a child molestation case understood the difference between the truth and a lie and the consequences of lying.[146] The court held that this amounted to an "improper bolstering of the victim's credibility."[147]

In *Chandler Exterminators, Inc. v. Morris*,[148] the supreme court held that a neuropsychologist is not qualified to testify regarding causation of physiological problems.[149] As a result of this ruling, the General Assembly amended O.C.G.A. section 43-39-1 to provide that the practice of psychology includes "diagnosing and treating mental and nervous disorders and illnesses, [and] rendering opinions concerning diagnoses of mental disorders, including organic brain disorders and brain damage."[150] In *Drake v. LaRue Construction Co.*,[151] the State Board of Workers' Compensation concluded this statute could not be applied because it became effective subsequent to the hearing.[152] The court of appeals reversed, holding that the statute, because it "concerns a rule of evidence, which is procedural," could be applied retroactively.[153]

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[154] the United States Supreme Court, in a dramatic departure from prior practice, overruled *Frye v. United States*,[155] rejecting the longstanding *Frye* test for determining whether novel or experimental test procedures for other matters that are the subject matter of expert testimony have become sufficiently established to be admissible in court.[156] In *Orkin Exterminating Co. v. McIntosh*,[157] defendant sought to rely on the more restrictive *Daubert* test to exclude plaintiff's expert testimony.[158] The

144. *Id.*
145. 214 Ga. App. 208, 447 S.E.2d 640 (1994).
146. *Id.* at 210, 447 S.E.2d at 643.
147. *Id.*
148. 262 Ga. 257, 416 S.E.2d 277 (1992).
149. *Id.* at 259, 416 S.E.2d at 278.
150. O.C.G.A. § 43-39-1 (1994).
151. 215 Ga. App. 453, 451 S.E.2d 792 (1994).
152. *Id.* at 456, 451 S.E.2d at 794.
153. *Id.*
154. 113 S. Ct. 2786 (1993).
155. 293 F. 1013 (D.C. Cir. 1923).
156. 113 S. Ct. at 2790.
157. 215 Ga. App. 587, 452 S.E.2d 159 (1994).
158. *Id.* at 592, 452 S.E.2d at 165.

court of appeals refused to adopt the *Daubert* test and reaffirmed the test traditionally applied by Georgia courts,[159] which is dependent upon a determination that the evidence in question has reached a "scientific stage of verifiable certainty."[160]

VI. HEARSAY

A. *Res Gestae*

Anyone who tells you they understand the res gestae doctrine is likely telling you a lie. The doctrine is, as held by the supreme court, an inexplicable enigma.[161] Anyone taking the time (wasting their time?) to review recent res gestae decisions will easily conclude they yield no rational legal principles. However, and with tongue in cheek, some irrational conclusions may be drawn. First, res gestae evidence is almost never admissible in civil cases.[162] This most definitely is not a legal principle, but it is undoubtedly a practical one. Second, the res gestae doctrine almost always permits the admission of hearsay in criminal cases.[163] Thus, appellate courts routinely affirm police officer testimony about statements made by witnesses incriminating a criminal defendant and yet are loathe to allow a police officer in, for example, a routine intersection collision case, to offer similar testimony.[164] No doubt there are some who find these principles somewhat incongruous. They would argue that courts should be more circumspect in admitting hearsay evidence in criminal cases than in civil cases.

The court of appeals decision in *Wilbourne v. State*[165] stands as a glaring exception to principle number two. In *Wilbourne*, the trial court admitted, through the testimony of a police officer, the statement of an alleged beating victim. The police officer arrived at defendant's house approximately three and one-half hours after an alleged altercation between defendant and the alleged victim. The victim, who had been drinking and was bruised and disheveled, told the officer that defendant had beaten her head against the floor. This testimony was the only evidence offered by the State against defendant. Defendant was

159. *Id.*

160. Manley v. State, 206 Ga. App. 281, 281, 424 S.E.2d 818, 819 (1992) (quoting Harper v. State, 249 Ga. 519, 525, 292 S.E.2d 389, 395 (1982)).

161. Andrews v. State, 249 Ga. 223, 225, 290 S.E.2d 71, 73 (1982).

162. *See, e.g.*, Lee v. Peacock, 199 Ga. App. 192, 404 S.E.2d 473 (1991).

163. *See, e.g.*, Wilbourne v. State, 214 Ga. App. 371, 448 S.E.2d 37 (1994).

164. *Id.*

165. 214 Ga. App. 371, 448 S.E.2d 37 (1994).

convicted and, on appeal, argued that the trial court erroneously admitted the victim's out of court statement.[166]

The court of appeals agreed.[167] The res gestae doctrine, the court noted, applies only to declarations that are "free from all suspicion of device or afterthought."[168] If a statement is "spontaneous or so connected to the act as to be inherently reliable," it may be admitted under the res gestae doctrine.[169] The length of time between the event and the statement is a factor in determining the spontaneity of the statement, but it is not conclusive.[170] The court noted that the victim's statement was not made at the scene of the fight, but rather while defendant was outside the house.[171] Moreover, she was upset and had been drinking.[172] The court held that the "evidence was created hours after the occurrence and bears no mark of 'spontaneity' or other such state of mind undeniably free of conscious device or afterthought . . . ."[173]

The supreme court's decision in *Jarrett v. State*,[174] on the other hand, is more consistent with the principle that res gestae evidence is almost always admissible in criminal cases.[175] In *Jarrett*, defendant was convicted of driving under the influence even though the arresting officer did not actually see him operating the vehicle. Rather, the investigating officer charged defendant after defendant's nephew stated that defendant was driving the vehicle.[176] The trial court permitted the police officer to testify about the nephew's statement even though the nephew was not present at trial. The trial court concluded, and the court of appeals agreed, that the police officer's testimony was admissible because defendant was present when it was presented and voiced no objection to the nephew's statement. This, the court of appeals held, constituted a tacit admission.[177] The supreme court granted certiorari and reached the same result, but for a different reason.[178] Concerned with the constitutional implications of permitting a jury to draw any inference based on a defendant's silence, the court held that "a witness

166. *Id.* at 371-72, 448 S.E.2d at 38.
167. *Id.* at 372, 448 S.E.2d at 38.
168. *Id.* (quoting Andrews v. State, 249 Ga. 223, 227-28, 290 S.E.2d 71, 74 (1982)).
169. *Id.*, 448 S.E.2d at 38-39.
170. *Id.*, 448 S.E.2d at 38.
171. *Id.*, 448 S.E.2d at 39.
172. *Id.*
173. *Id.* at 373, 448 S.E.2d at 39.
174. 265 Ga. 28, 453 S.E.2d 461 (1995).
175. *See id.*
176. *Id.*, 453 S.E.2d at 462.
177. *Id.*
178. *Id.*, 453 S.E.2d at 461.

in a *criminal* trial may not testify as to a declarant's statements based on the acquiescence or silence of the accused."[179] However, the court nevertheless affirmed defendant's conviction, holding that the evidence was admissible under the res gestae doctrine.[180] Similarly, in *Stovall v. State*[181] the court of appeals held that the trial court properly admitted—pursuant to the res gestae doctrine—the testimony of a police officer about a statement made to him by a robbery victim forty-five minutes after the crime was committed.[182]

The validity of the first principle—that the res gestae doctrine does not apply in civil cases—is demonstrated by the court of appeals decision in *Gordon County Farm v. Maloney*.[183] In *Maloney*, a workers' compensation case, the claimant proved through her own testimony that as a result of her injury she was unable to find employment elsewhere and that a prospective employer refused to hire her when he learned that she was receiving workers' compensation benefits.[184] The court of appeals granted the employer's application for discretionary review and reversed.[185] In response to the claimant's argument that the prospective employer's statement was admissible as part of res gestae, the court offered a rarely seen definition of res gestae. Res gestae, the court wrote, includes: "(1) statements of present sense impressions; (2) excited utterances; (3) statements of present bodily conditions; and (4) statements of present mental states and emotions."[186] Because the manager's statement indicating a refusal to hire claimant did not fall into one of these categories, it was not admissible under the res gestae exception.[187]

B. Prior Statements

Georgia has two rather unusual rules regarding the admissibility of prior statements by witnesses. In *Gibbons v. State*,[188] the supreme court held that prior inconsistent statements of a witness are admissible as substantive evidence if the witness is subject to cross-examina-

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179. *Id.* at 29, 453 S.E.2d at 463 (emphasis added).
180. *Id.* at 29-30, 453 S.E.2d at 463.
181. 216 Ga. App. 138, 453 S.E.2d 110 (1995).
182. *Id.* at 139, 453 S.E.2d at 112.
183. 214 Ga. App. 253, 447 S.E.2d 623 (1994), *cert. granted.*
184. *Id.* at 253, 447 S.E.2d at 624.
185. *Id.*
186. *Id.* at 254, 447 S.E.2d at 624 (quoting Brantley v. State, 262 Ga. 786, 790 n.4, 427 S.E.2d 758 n.4 (1993)).
187. *Id.*
188. 248 Ga. 858, 286 S.E.2d 717 (1982).

tion.[189] In *Cuzzort v. State*,[190] the supreme court, in apparent frustration over the inability to secure convictions in child molestation cases prior to the enactment of the child hearsay statute, held that a prior consistent statement is admissible as substantive evidence against an accused if the witness is present at trial and subject to cross-examination.[191]

In view of *Cuzzort's* genesis as an aid to prosecutors in child molestation cases, it is ironic that in *Harper v. State*,[192] the court of appeals reversed defendant's conviction for child molestation because the trial court refused to permit defendant's attorney's secretary to testify about an alleged pretrial statement made by the victim that was consistent with the victim's trial testimony that her father had not molested her.[193]

Both *Gibbons* and *Cuzzort* require that the declarant be subject to cross-examination.[194] Thus, in *Barksdale v. State*,[195] the court of appeals held that the trial court erred when, in reliance on *Gibbons* and *Cuzzort*, it permitted the prosecution to play the videotaped testimony of a codefendant incriminating defendant after the codefendant refused to testify, claiming that he feared retribution.[196] The court held that codefendant's refusal to testify meant there was no trial testimony—consistent or inconsistent—with the pretrial statement.[197] Consequently, the segment could not be admitted as a prior inconsistent statement.[198]

As discussed below, the court of appeals in *Foster v. State*[199] held that the trial court erroneously admitted, under the child hearsay statute, hearsay evidence of a child.[200] Relying on *Gibbons* and *Cuzzort*, the court of appeals nevertheless affirmed defendant's conviction.[201] The victim's statement to a detective, which was

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189. *Id.* at 862, 286 S.E.2d at 721.
190. 254 Ga. 745, 334 S.E.2d 661 (1985).
191. *Id.* at 745, 334 S.E.2d at 662.
192. 213 Ga. App. 505, 445 S.E.2d 548 (1994).
193. *Id.* at 507, 445 S.E.2d at 549.
194. *See* 248 Ga. 858, 286 S.E.2d 717 (1982); 254 Ga. 745, 334 S.E.2d 661 (1985).
195. 265 Ga. 9, 453 S.E.2d 2 (1995).
196. *Id.* at 11, 453 S.E.2d at 4.
197. *Id.*
198. *Id.* The court went further to hold that the admission of the statement violated defendant's Sixth Amendment right of confrontation, reasoning that the defendant's absolute refusal to testify made him unavailable for cross-examination. *Id.* at 13, 453 S.E.2d at 5.
199. 216 Ga. App. 26, 453 S.E.2d 482 (1994).
200. *Id.* at 28, 453 S.E.2d at 484.
201. *Id.* at 29, 453 S.E.2d at 485.

arguably inconsistent with her trial testimony, was admissible under *Gibbons*.[202] The victim's statements to a school counselor were consistent with her trial testimony and thus were admissible under *Cuzzort*.[203]

C. *Child Hearsay Statute*

O.C.G.A. section 24-3-16 provides for the admission of out-of-court statements made by a child concerning abuse suffered by the child.[204] This limitation—that the declarant must be the victim of the abuse—was illustrated in the supreme court's decision in *Thornton v. State*.[205] In *Thornton*, the trial court admitted the out-of-court statement of a twelve year old relative of the victim concerning defendant's alleged abuse. The relative stated that he saw defendant physically abuse his cousins.[206] Because the declarant was not a victim of sexual molestation or physical abuse, the supreme court easily, although reluctantly, reversed defendant's conviction.[207]

The child hearsay statute applies only to statements made by a child under the age of fourteen.[208] In *Foster v. State*[209] the trial court admitted the hearsay testimony of a fifteen year old victim based upon evidence that, because of mental deficiencies, the child's intellectual abilities and social skills were equivalent to those of a child younger than fourteen.[210] The court of appeals reversed, holding that the statute, by its plain language, permits the admission of hearsay testimony of children only if they are under the chronological age of fourteen years at the time of the alleged act.[211]

D. *Business Records Exception*

During the survey period, the court of appeals reaffirmed that Georgia's business records exception to the hearsay rule,[212] unlike the Federal Rules of Evidence business records exception, does not permit the admission of opinions contained in business records.[213]

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202. *Id.*
203. *Id.*
204. O.C.G.A. § 24-3-16 (1995).
205. 264 Ga. 563, 449 S.E.2d 98 (1994).
206. *Id.* at 564, 449 S.E.2d at 104.
207. *Id.* at 566, 449 S.E.2d at 106.
208. O.C.G.A. § 24-3-16 (1995).
209. 216 Ga. App. 26, 453 S.E.2d 482 (1994).
210. *Id.* at 28, 453 S.E.2d at 484.
211. *Id.*, 453 S.E.2d at 484-85.
212. O.C.G.A. § 24-3-14 (1995).
213. Dickens v. Calhoun First Nat'l Bank, 214 Ga. App. 490, 448 S.E.2d 237 (1994).

VII. AUTHENTICATION

In *State v. Berky*,[214] a closely divided court of appeals rendered a significant decision relating to the authentication requirements for videotapes. In *Berky*, the State planned to use a videotape of defendant to prove its case. Tragically, the officer who shot the videotape, which allegedly depicted defendant driving under the influence, was killed in an unrelated incident and, therefore, the State was unable to authenticate the videotape because no witness was available to testify that the videotape accurately depicted defendant driving drunk. Accordingly, the trial court dismissed the charges against defendant.[215]

The court of appeals began its analysis by noting that, under the traditional rules for the authentication of videotapes, the State could never authenticate the videotape because of the arresting officer's death.[216] However, the majority was concerned by this result in view of the "strong public interest in protecting the citizens of Georgia from drunk drivers and in supporting the prosecution of such."[217] Moreover, videotaped evidence can be extremely important and, in many instances, is more reliable than eyewitness testimony.

Traditionally, photographic evidence has been admitted to portray the testimony of witnesses. Thus, photographs and videotapes can be authenticated if a witness testifies that the photographs accurately depict something that he saw. However, advances in technology have led many courts to allow photographs and videotapes into evidence even though a witness is unable to authenticate the evidence under the traditional rules of authentication. In the latter situation, the photograph or videotape "constitutes independent probative evidence of what it shows."[218] The court of appeals termed this the "silent witness" rationale for admitting such evidence.[219] Noting that many jurisdictions have adopted the silent witness theory, the court of appeals expressly adopted the silent witness theory for admission of videotapes.[220] To authenticate the videotape, it is only necessary to establish, through expert testimony, that the videotape has not been altered,

214. 214 Ga. App. 174, 447 S.E.2d 147 (1994), *cert. granted.*
215. *Id.* at 174, 447 S.E.2d at 148.
216. *Id.* at 175, 447 S.E.2d at 148.
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at 177, 447 S.E.2d at 150.

the date and place the videotape was taken, and the "identity of the relevant participants depicted."[221]

Writing for four dissenting judges, Judge Banke criticised the majority for abandoning a "well-settled rule of evidence, apparently in reaction to the pathetic event of the arresting officer's subsequent death in the line of duty."[222]

The court of appeals faced this issue again in *Freeman v. State*[223]. In *Freeman*, the court of appeals held that the trial court properly admitted a television news videotape of a drug transaction in which defendant was allegedly involved.[224] The majority expressly relied on *Berky* and the silent witness theory even though the photographer who shot the videotape testified at trial.[225] Judge Smith concurred specially and criticised the majority for its "tacit expansion" of the silent witness rule.[226] Judge Smith argued that *Berky* should be limited to cases of necessity, and it was not necessary to apply Berky to the present case.[227] "Any expansion of the rule in *Berky* should be both explicit and required by the facts of the case presented."[228]

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221. *Id.* at 176, 447 S.E.2d at 149.

222. *Id.* at 178, 447 S.E.2d at 150 (Birdsong & McMurray, PJJ., Banke & Johnson, JJ., dissenting).

223. 216 Ga. App. 319, 454 S.E.2d 196 (1995).

224. *Id.* at 321, 454 S.E.2d at 198.

225. *Id.*, 454 S.E.2d at 197.

226. *Id.* at 322, 454 S.E.2d at 198 (Smith, J., concurring).

227. *Id.*

228. *Id.*