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Evidence

by John E. Hall, Jr.*
W. Scott Henwood**
and Alex Battey***

I. INTRODUCTION

This year represents the last survey period in which the “old” Georgia Evidence Code, Official Code of Georgia Annotated title 24,¹ reigns. The “new” Georgia Evidence Code,² which amends the O.C.G.A. and conforms in large part to the Federal Rules of Evidence, takes effect January 1, 2013.³ Therefore, next year’s survey will undoubtedly report the ways in which Georgia courts have coped with the extensive changes. For now, courts continue to apply the existing Georgia Rules of Evidence. Cases covered in this Article were published between June 1, 2011 and May 31, 2012,⁴ and speak to a variety of topics in Georgia

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1. O.C.G.A. tit. 24 (2010).

2. Ga. H.R. Bill 24, Reg. Sess. (2012).

3. *Id.* § 1.

4. For an analysis of evidence during the prior survey period, see John E. Hall, Jr. & W. Scott Henwood, *Evidence, Annual Survey of Georgia Law*, 63 MERCER L. REV. 153 (2011).

evidence law, including Fourth Amendment search and seizure,⁵ the business records hearsay exception,⁶ the rule of completeness,⁷ the scope of expert witness testimony,⁸ and spoliation presumptions.⁹

II. CASE LAW UPDATE

The Georgia Supreme Court reviewed and issued two opinions on cases discussed in last year's article, one affirming¹⁰ and one reversing¹¹ the Georgia Court of Appeals.¹² Interestingly enough, both cases involved different aspects of Fourth Amendment protection against unlawful search and seizure.¹³

A. Fourth Amendment and Cell Phone Searches

Last year's article reported a decision by the court of appeals in which the court held that a warrantless search of electronic data stored on the defendant's cell phone was reasonable as part of a search of the defendant's vehicle incident to arrest.¹⁴ The decision by the court of appeals was important as it represented the intersection of Fourth Amendment jurisprudence,¹⁵ specifically vehicle searches incident to arrests after *Arizona v. Gant*,¹⁶ and the novel legal issues emerging with the advent of certain technologies.¹⁷ The court of appeals in *Hawkins v. State*¹⁸ first held that the search incident to arrest of the defendant's vehicle and cell phone was lawful under *Gant*,¹⁹ in which the United States Supreme Court held that during a lawful search incident to arrest, an officer may search the passenger compartment of the arrestee's vehicle and any containers therein when it is "reasonable

5. *State v. Thackston*, 289 Ga. 412, 716 S.E.2d 517 (2011); *Hawkins v. State*, 290 Ga. 785, 723 S.E.2d 924 (2012).

6. *See, e.g., Forrester v. State*, 315 Ga. App. 1, 726 S.E.2d 476 (2012).

7. *Westbrook v. State*, 291 Ga. 60, 727 S.E.2d 473 (2012).

8. *Dendy v. Wells*, 312 Ga. App. 309, 718 S.E.2d 14 (2011).

9. *Watts & Colwell Builders, Inc. v. Martin*, 313 Ga. App. 1, 720 S.E.2d 329 (2011); *Paggett v. Kroger Co.*, 311 Ga. App. 690, 716 S.E.2d 792 (2011).

10. *Hawkins*, 290 Ga. at 788, 723 S.E.2d at 926.

11. *Thackston*, 289 Ga. at 415, 716 S.E.2d at 521.

12. *Hall & Henwood*, *supra* note 4, at 159-61.

13. *Hawkins*, 290 Ga. at 785, 723 S.E.2d at 925; *Thackston*, 289 Ga. at 412, 716 S.E.2d at 517-18.

14. *Hawkins v. State*, 307 Ga. App. 253, 255, 704 S.E.2d 886, 889 (2010); *Hall & Henwood*, *supra* note 4, at 159-60.

15. *See Hall & Henwood*, *supra* note 4, at 160.

16. 556 U.S. 332 (2009).

17. *See Hawkins*, 307 Ga. App. at 257-59, 704 S.E.2d at 891-92.

18. 307 Ga. App. 253, 704 S.E.2d 886 (2010).

19. *Id.* at 255, 259, 704 S.E.2d at 889, 892.

to believe that evidence of the offense of arrest might be found in the vehicle.²⁰ Particularly, the court of appeals stated, “When an officer is authorized to search in a vehicle for a specific object and, in the course of his search, comes across a container that reasonably might contain the object of his search, the officer is authorized to open the container and search within it for the object.”²¹ The court of appeals noted that in light of the vast amount of information that the cellular phones of today are capable of storing, they should be treated by courts like containers “that store[] thousands of individual containers in the form of discrete files.”²²

The Georgia Supreme Court in *Hawkins v. State*²³ affirmed the court of appeals’s decision, reiterating that cell phones could be treated in the same manner as a traditional physical container.²⁴ In *Hawkins*, the police observed Hawkins texting as she arrived to conduct a narcotics transaction and, almost immediately after this observation, the officers received a text message from her.²⁵ Further, the officers found the cell phone within Hawkins’s vehicle during the search incident to arrest.²⁶ The defendant argued that a cell phone should not be considered a traditional container for the purposes of a search incident to arrest because it does not contain tangible objects.²⁷ However, the supreme court disagreed and held that “a cell phone is ‘roughly analogous’ to a container that properly can be opened and searched for electronic data, similar to a traditional container that can be opened to search for tangible objects of evidence.”²⁸ The court then stated that in *Hawkins* it was reasonable for the police to believe that the object of their search, particularly text messages, would be found in the cell phone.²⁹

The supreme court disagreed with the dissenting opinion of the court of appeals’s decision in *Hawkins* that the “high volume of information stored in the cell phone” should change its character from that of a traditional container.³⁰ However, the supreme court noted that caution

20. *Gant*, 556 U.S. at 335.

21. *Hawkins*, 307 Ga. App. at 256, 704 S.E.2d at 890.

22. *Id.* at 258, 704 S.E.2d at 891 (quoting Orin S. Kerr, *Search and Seizures in a Digital World*, 119 HARV. L. REV. 531, 555 (2005)).

23. 290 Ga. 785, 723 S.E.2d 924 (2012).

24. *Id.* at 786, 723 S.E.2d at 925.

25. *Id.* at 785, 723 S.E.2d at 925.

26. *Id.*

27. *Id.* at 786, 723 S.E.2d at 925.

28. *Id.* (quoting *Hawkins*, 307 Ga. App. at 257, 704 S.E.2d at 890).

29. *Id.* at 786, 723 S.E.2d at 925-26.

30. *Id.* at 787, 723 S.E.2d at 926; see *Hawkins*, 307 Ga. App. at 265-66, 704 S.E.2d at 896-97.

should be applied in setting the scope of a permissible search of a cell phone incident to arrest.³¹ Agreeing with the court of appeals in its discussion of the permissible scope of the search, the supreme court stated:

“[W]e must apply the principles set forth in traditional ‘container’ cases to searches for electronic data with great care and caution.” . . . “[S]earch must be limited as much as is reasonably practicable by the object of the search. [Cit.]” . . . Thus, when “the object of the search is to discover certain text messages, for instance, there is no need for the officer to sift through photos or audio files or Internet browsing history data stored [in] the phone.”³²

The supreme court indicated that whether a search of a cell phone was permissible will be a fact-specific inquiry.³³ Given the increasing role that cellular data plays in our lives, evidentiary issues related to the use of such data will no doubt abound in the years to come.

B. *Exclusionary Rule and Probation Revocation Proceedings*

The state’s highest court overturned a court of appeals decision regarding a different issue related to the Fourth Amendment³⁴—the exclusionary rule—which restricts admission of evidence obtained during unlawful searches.³⁵ In *Thackston v. State*,³⁶ the court of appeals held that the exclusionary rule applies to probation revocation proceedings.³⁷ In May 2011, the Georgia Supreme Court reversed that decision in *State v. Thackston*³⁸ and brought Georgia in line with “the majority of jurisdictions which have considered the issue and reached a conclusion consistent with the reluctance of courts to extend the exclusionary rule beyond the trial setting.”³⁹ The court applied the balancing test from *Illinois v. Krull*,⁴⁰ in which the likelihood of deterrence of unlawful searches is weighed against the costs of withholding information in the

31. *Hawkins*, 290 Ga. at 787, 723 S.E.2d at 926.

32. *Id.* at 787-88, 723 S.E.2d at 926 (alteration in original) (quoting *Hawkins*, 307 Ga. App. at 257-59, 704 S.E.2d at 891-92).

33. *Id.*

34. U.S. CONST. amend. IV.

35. For a thorough discussion of the exclusionary rule, see Hall & Henwood, *supra* note 4, at 160-61.

36. 303 Ga. App. 718, 694 S.E.2d 136 (2010).

37. *Id.* at 722, 694 S.E.2d at 140.

38. 289 Ga. 412, 716 S.E.2d 517 (2011).

39. *Id.* at 415, 716 S.E.2d at 520.

40. 480 U.S. 340 (1987).

truth-seeking process.⁴¹ According to the supreme court, applying the exclusionary rule to probation revocation proceedings provides minimal deterrence benefits because the rule itself assumes that law enforcement is aware that the procedure it follows in conducting searches may affect the prosecution's ability to convict a criminal defendant.⁴² Therefore, to apply the rule to probation revocation hearings would assume that police officers conduct searches with the knowledge that any evidence collected could be used in such proceedings.⁴³ For the supreme court, this was an unreasonable and unrealistic assumption.⁴⁴ Further, deterring unlawful searches was sufficiently accomplished by the application of the exclusionary rule to criminal trials.⁴⁵ The supreme court also noted that application of the exclusionary rule beyond the trial setting would "significantly alter and affect the proper administration of the probation system in this state"; therefore, the benefits did not outweigh the burdens.⁴⁶

III. BUSINESS RECORDS HEARSAY EXCEPTION

There was significant case law during this survey period interpreting the Georgia business records exception to the hearsay rule. O.C.G.A. § 24-3-14(b)⁴⁷ provides:

Any writing or record . . . made as a memorandum or record of any act, transaction, occurrence, or event shall be admissible in evidence in proof of the act, transaction, occurrence, or event, if the trial judge shall find that it was made in the regular course of any business and that it was the regular course of such business to make the memorandum or record at the time of the act, transaction, occurrence, or event or within a reasonable time thereafter.⁴⁸

The Georgia Court of Appeals in *Saye v. Provident Life & Accident Insurance Co.*⁴⁹ held that the business records exception⁵⁰ does not authorize the admission of documentary evidence of telephone conversations.⁵¹ The court determined that the trial court erred in admitting

41. *Thackston*, 289 Ga. at 413, 716 S.E.2d at 518 (citing *Krull*, 480 U.S. at 347-48).

42. *Id.* at 414-15, 716 S.E.2d at 519.

43. *Id.*

44. *Id.* at 415, 716 S.E.2d at 519.

45. *Id.*

46. *Id.* at 415, 716 S.E.2d at 519-20.

47. O.C.G.A. § 24-3-14 (2010).

48. *Id.*

49. 311 Ga. App. 74, 714 S.E.2d 614 (2011).

50. O.C.G.A. § 24-3-14(b).

51. *Saye*, 311 Ga. App. at 78, 714 S.E.2d at 619.

the evidence of the telephone conversations between a claims representative and its insured because the document was a record of a conversation.⁵²

Documents were found admissible under O.C.G.A. § 24-3-14 in *Melman v. FIA Card Services, N.A.*⁵³ In *Melman*, FIA sued Melman alleging that he owed \$38,560 stemming from purchases and advances paid by FIA.⁵⁴ FIA moved for summary judgment, attaching an affidavit of an operation analyst stating that “she was familiar with FIA’s business records, . . . [the] records were kept under her supervision and control[,] and in making the affidavit she relied upon said business records and upon her personal knowledge.”⁵⁵ The affidavit further alleged that Melman had applied for and obtained credit from FIA and had not complied with demands for payment for purchases made with said credit. Attached to the affidavit were credit card records from FIA. The trial court granted FIA’s motion, and Melman contended on appeal that the credit card records were improperly admitted as business records.⁵⁶ The appellate court concluded that the trial court had “liberally” but properly applied O.C.G.A. § 24-3-14(b).⁵⁷ The court further held that the affidavit did not need to contain an express statement attesting to the “truthfulness, accuracy[,] or completeness” of the records in order for them to qualify as business records under the hearsay exception.⁵⁸

Forrester v. State,⁵⁹ another case during the time period covered by this Article in which the court of appeals considered the business records hearsay exception, illustrates the issues that arise when hearsay exceptions are applied in criminal cases, thus implicating the Sixth Amendment’s Confrontation Clause,⁶⁰ which seeks to ensure reliability of evidence presented against a defendant in a criminal case by “subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.”⁶¹ In *Forrester*, the defendant challenged her conviction of three counts of forgery in the first degree. Forrester allegedly used counterfeit money orders to pay a security

52. *Id.* at 74, 714 S.E.2d at 616.

53. 312 Ga. App. 270, 272, 718 S.E.2d 107, 109-10 (2011).

54. *Id.* at 270, 718 S.E.2d at 108.

55. *Id.*

56. *Id.* at 270-71, 718 S.E.2d at 108-09.

57. *Id.* at 272, 718 S.E.2d at 109.

58. *Id.* at 272, 718 S.E.2d at 109-10.

59. 315 Ga. App. 1, 726 S.E.2d 476 (2012).

60. U.S. CONST. amend. VI.

61. *Forrester*, 315 Ga. App. at 5, 726 S.E.2d at 480 (quoting *Maryland v. Craig*, 497 U.S. 836, 845 (1990)).

deposit and rent payments after signing a lease on a rental property. At trial, the only evidence introduced by the State to prove that the money orders were counterfeit were the copies of the money orders, proffered under the business records hearsay exception, which were stamped "Payment Stopped Counterfeit."⁶²

On appeal, Forrester argued that the money orders were not business records under the hearsay exception because they reflected a conclusion by a third party that they were counterfeit.⁶³ The appellate court agreed, noting that the testimony of the branch manager from Bank of America, where the landlord attempted to deposit the money orders, laid the foundation for the admission of the money orders indicating that a third party, the originating financial institution, makes a determination regarding the validity of the money order and then notifies the proof department at Bank of America.⁶⁴

The court also agreed with Forrester's contention that admitting the money orders stamped "counterfeit" as proof of forgery violated her rights under the Confrontation Clause.⁶⁵ Admitting the stamp on the money orders as proof that they were counterfeit would "deprive Forrester of her right to conduct a thorough and sifting cross-examination on that determination."⁶⁶ The court determined that if the State were permitted to present this evidence, it would impermissibly shift the burden to Forrester to prove that the money orders were not counterfeit, "a burden she would have to undertake without full knowledge of the evidence against her."⁶⁷ As the stamped money orders were the only evidence presented by the State to show that the money orders were counterfeit, Forrester's forgery convictions were overturned.⁶⁸ This case illustrates the importance of this hearsay exception, and the court's opinion indicates that when a third party's conclusion is included in a writing, the business records hearsay exception will not apply, and a representative of that party must testify at trial.⁶⁹

62. *Id.* at 1-4, 726 S.E.2d at 477-79.

63. *Id.* at 4, 726 S.E.2d at 479.

64. *Id.* at 5, 726 S.E.2d at 479-80.

65. *Id.* at 5, 726 S.E.2d at 480.

66. *Id.*

67. *Id.* at 6, 726 S.E.2d at 480.

68. *Id.*

69. *Id.* at 5, 726 S.E.2d at 480 (noting that "the determination that the money orders delivered by Forrester were counterfeit was a conclusion made by a third party institution, whose representatives did not testify at trial").

IV. PRIOR CONVICTIONS: CALCULATING THE TEN-YEAR TIME LIMIT

O.C.G.A. § 24-9-84.1(b)⁷⁰ provides that prior convictions which are more than ten years old must survive stricter scrutiny in order to be admissible:

[I]f a period of more than ten years has elapsed since the date of the conviction or of the release of the witness or the defendant from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old, as calculated in this subsection, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.⁷¹

In other states with similar statutes and in other cases interpreting the Federal Rules similar to Georgia's code section, there has been much "uncertainty about what event concludes the running of the 10-year period."⁷² During the survey period, as a matter of first impression, the Georgia Supreme Court determined that, in Georgia, the end date for calculating the ten-year time period after which the higher standard kicks in is the date the witness testifies or the date that the evidence of prior convictions is introduced.⁷³

In setting Georgia's end date for the ten-year time limit for prior convictions under O.C.G.A. § 24-9-84.1(b), the state's highest court considered four alternative end dates applied in other jurisdictions.⁷⁴ The court indicated that some jurisdictions, including the Fifth Circuit, use the date the trial commences.⁷⁵ In the Eighth Circuit, the date of the defendant's indictment is the end date for the ten-year limit.⁷⁶ The prosecution in *Clay* argued that the correct date should be the date

70. O.C.G.A. § 24-9-84.1 (2010).

71. O.C.G.A. § 24-9-84.1(b).

72. *Clay v. State*, 290 Ga. 822, 833, 725 S.E.2d 260, 271 (2012) (quoting 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 609.06(2) (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 2012)).

73. *Id.* at 833, 835, 725 S.E.2d at 270, 271.

74. *Id.* at 833, 725 S.E.2d at 271.

75. *Id.* (citing *U.S. v. Cohen*, 544 F.2d 781, 784 (5th Cir. 1977)).

76. *Id.* (citing *U.S. v. Maichle*, 861 F.2d 178, 181 (8th Cir. 1988)).

employed by the Minnesota Supreme Court, the date of the newly-charged offense.⁷⁷

In rejecting the State's argument, the court disagreed with the Minnesota court's opinion that the date the witness testifies could be manipulated to allow the time limit to expire, noting that courts have sufficient discretion to take into account such attempted "dilatory tactics."⁷⁸ Further, the court disagreed with the prosecution's assertion and the court's in *Ihnot* that there was no policy justification for setting the date as the day the witness testifies.⁷⁹ The court noted that "the time of testimony is most appropriate since the jury must determine [the witness's] credibility" at that time.⁸⁰

V. RULE OF COMPLETENESS

Under Georgia law, "[w]hen an admission is given in evidence by one party, it shall be the right of the other party to have the whole admission and all the conversation connected therewith admitted into evidence."⁸¹ The goal of this rule is to prevent litigants from putting forth evidence, particularly "portions of prior statements taken out of context and . . . often 'essential in order to arrive at the true drift, intent[,] and meaning of what was said on the previous occasion.'⁸² In practice, the rule of completeness means that "if part of a conversation is introduced, all that is said in the same conversation which is relevant to the issue should be admitted."⁸³

During the survey period, the Georgia Supreme Court applied the rule of completeness in upholding Mario Westbrook's conviction of malice murder and other crimes arising out of a shooting during a dice game in Athens, Georgia.⁸⁴ The State called a witness who was present at the dice game and testified that he saw Westbrook shoot two people that night. During cross-examination, the defense counsel asked the witness whether he had ever told her that he did not see anyone get shot that

77. *Id.* (citing *Minnesota v. Ihnot*, 575 N.W.2d 581, 585 (Minn. 1998)).

78. *Id.* at 834, 725 S.E.2d at 271.

79. *Id.*; *Ihnot*, 575 N.W.2d at 585.

80. *Clay*, 290 Ga. at 834, 725 S.E.2d at 271 (quoting *Trindle v. Sonat Marine*, 697 F. Supp. 879, 882 (E.D. Pa. 1988)).

81. O.C.G.A. § 24-3-38 (2010). Federal Rule of Evidence 106 provides a similar rule: "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time." FED. R. EVID. 106.

82. *Westbrook v. State*, 291 Ga. 60, 62, 727 S.E.2d 473, 476 (2012) (quoting *Smalls v. State*, 105 Ga. 669, 671, 31 S.E. 571, 572 (1898)).

83. *Id.* (quoting *West v. State*, 200 Ga. 566, 569, 37 S.E.2d 799, 801 (1946)).

84. *Id.* at 61-62, 727 S.E.2d at 476-77.

night. In response, the witness said he did not believe she had ever asked him that question. The defense counsel called as a witness a law student intern from her office who was present during the pretrial conference and took notes regarding the substance of the conversation. The intern testified that during the meeting, the witness never stated he saw anyone get shot.⁸⁵ On cross-examination of the intern, the prosecution elicited testimony that during the interview, the witness said that he told Westbrook on the night of the crimes that “no one has guns because it’s not the type of game where you have to worry about getting robbed, they all know each other and wouldn’t do that.”⁸⁶

The court rejected the defense’s argument that the testimony was “irrelevant to the case and to the parts of the statement introduced into evidence by the opposing party.”⁸⁷ The court held instead that the evidence assisted in rebutting the defense’s allegation that the witness fabricated the testimony, “by showing that he had also made statements incriminating [the] Appellant during his pre-trial interview with defense counsel, and the statement also addressed [the] Appellant’s self-defense claim and thus was relevant to the case.”⁸⁸ The rule of completeness is not the most commonly discussed or analyzed rule in the Georgia Evidence Code; however, it can prove important in practice and is a useful tool in ensuring the opposing party is not able to mislead the jury.

VI. PERSONAL PRACTICES OF EXPERT WITNESSES

In 2009, the Georgia Court of Appeals in two cases changed a longstanding rule that expert witnesses in medical malpractice cases could not testify regarding their personal practices.⁸⁹ The court in both cases noted that differences in personal practice are insufficient to establish a breach of the standard of care.⁹⁰ However,

[n]either the jury’s ability to perform its role as arbiter of the expert’s credibility, nor the party’s right to a “thorough and sifting cross-examination,” [O.C.G.A.] § 24-9-64, is well served by a prohibition on cross-examination of the opposing party’s expert regarding personal

85. *Id.* at 61-62, 727 S.E.2d at 476.

86. *Id.* at 62, 727 S.E.2d at 476.

87. *Id.* at 62, 727 S.E.2d at 476-77.

88. *Id.* at 62, 727 S.E.2d at 477.

89. *Griffin v. Bankston*, 302 Ga. App. 647, 647, 691 S.E.2d 229, 230 (2009); *Condra v. Atl. Orthopaedic Grp.*, 285 Ga. 667, 669, 681 S.E.2d 152, 153 (2009).

90. *Condra*, 285 Ga. at 669, 681 S.E.2d at 153; *Griffin*, 302 Ga. App. at 651, 691 S.E.2d at 233.

practices that differ from the standard of care as asserted by that expert.⁹¹

During the survey period, the court of appeals had the opportunity to further clarify this rule, holding that the defendants were allowed to question expert witnesses during direct examinations about whether the expert's personal practices mirrored the defendant's conduct at issue in the case.⁹²

In *Dendy v. Wells*,⁹³ the plaintiff alleged that the defendant orthopedic surgeon violated the "standard of care by clamping a retractor on the plaintiff's sciatic nerve during the [hip] surgery."⁹⁴ Prior to trial, defendants filed a motion in limine, requesting the court to preclude the plaintiff from presenting "[e]vidence that the personal professional practices of Dr. Wells, defense expert(s), plaintiff's expert(s), or treating physicians that differ from Dr. Wells' or [his expert witness's] practice conclusively establishes [sic] the standard of care."⁹⁵ The motion was granted.⁹⁶

After the plaintiff rested, the defense counsel called an orthopedic surgeon who specialized in total hip and knee joint replacements as an expert witness. While the expert was on the stand, defense counsel elicited testimony regarding the standard of care applicable for this type of surgery.⁹⁷ The expert testified that the standard of care is a national standard and that he understood that the standard requires physicians to display "the skill and degree of care as employed by professionals generally under conditions and like surrounding circumstances."⁹⁸ Subsequently, the expert testified that Dr. Wells complied with the standard of care *and* that the expert employed the same method when conducting a hip replacement surgery.⁹⁹ Following a defense verdict, the plaintiff moved for a mistrial, arguing that the defendant repeatedly violated the motion in limine.¹⁰⁰ The trial court denied the plaintiff's motion, and he appealed, arguing that the court of appeals's holdings in *Contra* and *Griffin* did not change the prohibition under Georgia law of eliciting testimony regarding an expert witness's personal practices on

91. *Condra*, 285 Ga. at 671, 681 S.E.2d at 155.

92. *Dendy v. Wells*, 312 Ga. App. 309, 314, 718 S.E.2d 140, 144 (2011).

93. 312 Ga. App. 309, 718 S.E.2d 140 (2011).

94. *Id.* at 310, 718 S.E.2d at 141.

95. *Id.* at 310, 718 S.E.2d at 142 (alteration in original).

96. *Id.* at 313-14, 718 S.E.2d at 143-44.

97. *Id.* at 312, 718 S.E.2d at 142.

98. *Id.*

99. *Id.* at 312, 718 S.E.2d at 143.

100. *Id.* at 313, 718 S.E.2d at 143.

direct.¹⁰¹ The court of appeals rejected the plaintiff's argument and found that there was no "logical distinction" between permitting an expert to answer questions about whether his or her personal practices were different than the defendant's and whether they were the same, as long as the testimony was not used to establish the standard of care.¹⁰²

VII. SPOILIATION OF EVIDENCE

"Georgia law allows a finding of spoliation if the loss of the evidence occurs at a time when there is 'contemplated or pending litigation.'"¹⁰³ During the survey period, the Georgia Court of Appeals drew a clearer distinction between contemplated or anticipated litigation and contemplated liability.¹⁰⁴ In *Paggett v. Kroger Co.*,¹⁰⁵ the plaintiff allegedly slipped and fell while exiting his car at a gas station owned by Kroger.¹⁰⁶ The trial court granted Kroger's motion for summary judgment, and the plaintiff appealed, arguing that the trial court erred in holding that there "was no evidence of a dangerous condition at the gas station," and the plaintiff "was not entitled to a spoliation presumption based on Kroger's inability to produce a surveillance [video] of the gas station."¹⁰⁷

The plaintiff in *Watts & Colwell Builders, Inc. v. Martin*¹⁰⁸ brought a claim against the owner of the building in which she worked after the door to a handicapped bathroom stall came off its hinge and knocked her to the ground.¹⁰⁹ Following the accident, an accident report was completed, and the building's maintenance supervisor took the hinge and put it in his truck. He could not find it when he went to look for it after the plaintiff filed her complaint. The owner of the premises filed a motion for summary judgment, which was denied.¹¹⁰ On appeal, the court examined the plaintiff's claim that the alleged spoliation supported the trial court's denial of summary judgment.¹¹¹ The court disagreed, holding that "[t]he completion of the accident report, the failed attempt

101. *Id.* at 310, 718 S.E.2d at 141.

102. *Id.* at 314, 718 S.E.2d at 144.

103. *Kitchens v. Brusman*, 303 Ga. App. 703, 707, 694 S.E.2d 667, 671 (2010) (quoting *Bouve & Mohr, LLC v. Banks*, 274 Ga. App. 758, 762, 618 S.E.2d 650, 654 (2005)).

104. *See Watts & Colwell Builders, Inc. v. Martin*, 313 Ga. App. 1, 720 S.E.2d 329 (2011); *Paggett v. Kroger Co.*, 311 Ga. App. 690, 716 S.E.2d 792 (2011).

105. 311 Ga. App. 690, 716 S.E.2d 793 (2011).

106. *Id.* at 690, 716 S.E.2d at 793.

107. *Id.*

108. 313 Ga. App. 1, 720 S.E.2d 329 (2011).

109. *Id.* at 1, 720 S.E.2d at 331.

110. *Id.* at 4-5, 720 S.E.2d at 332-33.

111. *Id.* at 5, 720 S.E.2d at 333.

to retain the hinge based upon the happening of an accident alone, and the inability to locate the hinge immediately after the lawsuit was filed do not demonstrate contemplated or pending litigation at the time of the loss."¹¹²

Taken together, these cases represent a clearer demarcation of when Georgia courts will give spoliation presumptions and when Georgia courts will refuse such presumptions.

VIII. CONCLUSION

This survey period saw interesting and sometimes novel interpretations of various provisions of the Georgia Rules of Evidence as they stand today. By this time next year, we may see alterations or even an undoing of the jurisprudence described here as courts begin to grapple with the new face of Georgia evidence.

112. *Id.*
