Mercer Law Review

Volume 74
Number 1 *Annual Survey of Georgia Law*

Article 11

12-2022

Evidence

John E. Hall Jr.

W. Scott Henwood

Krysta Grimes

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

Part of the Evidence Commons

Recommended Citation

Hall, John E. Jr.; Henwood, W. Scott; and Grimes, Krysta (2022) "Evidence," *Mercer Law Review*: Vol. 74: No. 1, Article 11.
Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol74/iss1/11

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

Evidence

John E. Hall, Jr.[*]

W. Scott Henwood[**]

Krysta Grymes[***]

I. INTRODUCTION

Georgia's judicial system has continued to grapple with the novel Coronavirus (COVID-19) for more than two years[1] since the Honorable Harold D. Melton, former Chief Justice of the Supreme Court of Georgia, first issued the Order Declaring Statewide Judicial Emergency on March 14, 2020.[2] That order was extended fifteen times before finally terminating on June 30, 2021.[3]

Seemingly in response to the world of uncertainties created by COVID-19, Georgia appellate courts took the opportunity to provide some additional interpretation and explanation to various aspects of Georgia's new Evidence Code. This Article highlights some of the continuing interpretations of Georgia's evidence rules in Title 24 of the Official Code

---

*Founding Partner, Hall Booth Smith, P.C. Mercer University (B.A., 1981); Mercer University School of Law (J.D., 1984). Member, Mercer Law Review (1982–1984); Student Writing Editor (1983–1984). Member, State Bar of Georgia.

**Of Counsel, Hall Booth Smith, P.C. Georgia State University (B.B.A., 1976); Woodrow Wilson College of Law (J.D., 1978). Former Reporter of Decisions, Supreme Court of Georgia and Georgia Court of Appeals. Member, State Bar of Georgia.

***Associate, Hall Booth Smith, P.C. University of Florida (B.S., 2015); Mercer University School of Law (J.D., magna cum laude, 2018). Member, Mercer Law Review (2016–2018). Member, State Bar of Georgia. Special thanks to Catherine Kennedy McKnight and Mary Scarlett for their research assistance with this Article.

1. For an analysis of evidence during the prior survey period, *see* John E. Hall, Jr. et al., *Evidence*, *Annual Survey of Georgia Law*, 73 MERCER L. REV. 111 (2021), https://digitalcommons.law.mercer.edu/cgi/viewcontent.cgi?article=2699&context=jour_mlr [https://perma.cc/XSL5-8JXA].

2. Order of Georgia Supreme Court (Mar. 14, 2020) (declaring statewide judicial emergency).

3. *See* Order of Georgia Supreme Court (Apr. 6, 2020) and Order of Georgia Supreme Court (June 7, 2021) (extending declaration of statewide judicial emergency).

of Georgia Annotated (O.C.G.A.)[4] for the period of June 1, 2021 through May 31, 2022.[5] Specifically, this Article addresses the following topics: (1) interpretation relying on interpretations of the Federal Rules of Evidence; (2) interpretation based on Georgia authority under the former Evidence Code; and (3) utilization of both federal authority and persuasive Georgia authority applying the former Georgia Evidence Code.

II. ALIGNING GEORGIA'S NEW EVIDENCE CODE WITH THE FEDERAL EVIDENCE CODE

Even as the tenth anniversary of the implementation of Georgia's new Evidence Code approaches, Georgia's appellate courts continue to develop Georgia's evidence laws by turning to federal caselaw for guidance.[6]

A. Further Interpretation of Character Evidence Rules

O.C.G.A. §§ 24-4-413,[7] 24-4-414,[8] and 24-4-415,[9] which are based on Federal Rule of Evidence 413,[10] Rule 414,[11] and Rule 415,[12] create a true exception to the general rule that character evidence and evidence of prior crimes and acts are not admissible to prove the defendant's propensity to commit that type of offense. In *Wilson v. State*,[13] the Supreme Court of Georgia analyzed the requirement for the admission of a prior offense of child molestation.[14] The supreme court explained that Georgia Rule 414(a) supersedes Georgia Rule 404(b)'s general prohibition against the admission of propensity evidence and that the prior offenses need not have resulted in a conviction.[15] As such, the court held that evidence of the prior offense met the relevancy requirement of

---

4. O.C.G.A. tit. 24 (2022).

5. *See* Ga. H.R. Bill 24, Reg. Sess., 2011 Ga. Laws 99 (codified at O.C.G.A. tit. 24). For an analysis of evidence during the prior survey period *see* Hall et al., *Evidence*, 73 MERCER L. REV. 111.

6. *See*, *e.g.*, State v. Almanza, 304 Ga. 553, 820 S.E.2d 1 (2018); Glenn v. State, 302 Ga. 276, 806 S.E.2d 564 (2017).

7. O.C.G.A § 24-4-413 (2022).

8. O.C.G.A. § 24-4-414 (2022).

9. O.C.G.A. § 24-4-415 (2022).

10. FED. R. EVID. 413.

11. FED. R. EVID. 414.

12. FED. R. EVID. 415.

13. 312 Ga. 174, 860 S.E.2d 485 (2021).

14. *Id.* at 174–75, 860 S.E.2d at 492.

15. *Id.* at 183, 188, 860 S.E.2d at 497, 500.

Rule 414(a) and, therefore, the Catoosa County Superior Court did not abuse its discretion in admitting the defendant's prior alleged child molestation offenses.[16]

B. Further Interpretations of Evidence Rules Relating to Confessions

Under O.C.G.A. § 24-8-824,[17] to be admissible, a confession must be "made voluntarily, without being induced by another by the slightest hope of benefit."[18] In *Lewis v. State*,[19] the supreme court focused on whether the hope of benefit induced the defendant's confession.[20] Specifically, a confession is untainted where the accused was unaware of any hope of benefit.[21] In *Lewis*, the court focused on the defendant's failure to demonstrate that a police officer's statements were the reason the defendant decided to confess. Accordingly, the supreme court affirmed the Fulton County Superior Court's admission of the defendant's confession.[22]

C. Further Interpretations of the Residual Hearsay Exception

> A statement not specifically covered by any law but having equivalent circumstantial guarantees of trustworthiness shall not be excluded by the hearsay rule, if the court determines that: (1) The statement is offered as evidence of a material fact; (2) The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (3) The general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.[23]

The supreme court analyzed what constitutes sufficient "guarantees of trustworthiness" in *Ash v. State*.[24] There, the Fulton County Superior Court considered the fact that the declarant had a close relationship with the witness to be a factor supporting trustworthiness.[25] The supreme court accordingly held that there was no abuse of discretion.[26]

---

16. *Id.* at 188, 194, 860 S.E.2d at 500, 504.
17. O.C.G.A. § 24-8-824 (2022).
18. *Id.*
19. 311 Ga. 650, 859 S.E.2d 1 (2021).
20. *Id.* at 657–58, 859 S.E.2d at 9.
21. *Id.* at 658, 859 S.E.2d at 9.
22. *Id.*
23. O.C.G.A. § 24-8-807 (2011).
24. 312 Ga. 771, 784, 865 S.E.2d 150, 163 (2021).
25. *Id.* at 786, 865 S.E.2d at 163.
26. *Id.* at 786–87, 865 S.E.2d at 164.

III. A LOOK BACK AT THE FORMER EVIDENCE CODE TO UNDERSTAND THE NEW EVIDENCE CODE

Where there is no federal counterpart to a provision of the new Evidence Code, Georgia caselaw decided under Georgia's former Evidence Code provides solid groundwork for present litigants to understand how to approach the new version of the rule.[27] This was exemplified in *Merritt v. State*,[28] where the Supreme Court of Georgia looked to Georgia caselaw decided under its former version of the "holdover" rule relating to impeaching a witness based on bias or hostility toward a party.[29]

Shay Alexander Merritt (Merritt) was convicted of, *inter alia*, malice murder in connection with the shooting death of his wife, Rita Ann Merritt (Rita).[30] On appeal, Merritt claimed the Polk County Superior Court erred in two evidentiary rulings under O.C.G.A. § 24-6-622:[31] (1) the trial court erred by allowing the State to cross-examine a defense witness regarding a prior arrest; and (2) the trial court erred by not allowing evidence regarding Rita's culture.[32]

As to the first alleged error, Dr. Abbasi was called to testify about Rita's bipolar disorder diagnosis and treatment, including the medications he prescribed and how they worked and the consequences of not taking them, like suicidal ideations.[33] On cross-examination, Dr. Abbasi responded in the negative when asked whether he was biased against the State. Notwithstanding Dr. Abbasi's negative response, the State approached the bench to inform the trial court of its intention to ask Dr. Abbasi whether he was arrested in 2008 for sexual battery against his patients. Following a proffer during which Dr. Abbasi confirmed that he was in fact arrested for sexual battery in 2008, the State argued this arrest was relevant to show bias under O.C.G.A. § 24-6-622. The trial court allowed the State to pursue this line of

---

27. Merritt v. State, 311 Ga. 875, 880, 860 S.E.2d 455, 461 (2021).

28. 311 Ga. 875, 860 S.E.2d 455.

29. *Id.* at 880, 860 S.E.2d at 461.

30. *Id.* at 875, 860 S.E.2d at 458.

31. O.C.G.A. § 24-6-622 (2022). The statute provides as follows: "The state of a witness's feelings towards the parties and the witness's relationship to the parties may always be proved for the consideration of the jury." *Id.*

32. *Merritt*, 311 Ga. at 879, 860 S.E.2d at 460.

33. *Id.* at 879, 860 S.E.2d at 461.

questioning and determined it was permissible under O.C.G.A. § 24-6-622.[34]

As to the second alleged error, Merritt sought to introduce evidence relating to the fact that Rita and her family were Romanichal gypsies and alleged cultural bias against outsiders like himself.[35] Following the defense counsel's extensive questioning of Rita's sister about her family background and cultural upbringing, the trial court ruled that it would allow questions relating to the family's bias or prejudice against Merritt but not about ethnic background or cultural bias. Subsequently, during the cross-examination of Rita's sister-in-law, defense counsel made a proffer concerning the family's Romanichal culture and their alleged bias against outsiders. The trial court concluded that the prejudice created by referring to someone as a Romanichal gypsy far outweighed any relevance to the case.[36]

In reviewing the admissibility of impeachment evidence relating to bias or hostility pursuant to O.C.G.A. § 24-6-622, the supreme court turned to caselaw decided under the former evidence rules because there is no federal counterpart to O.C.G.A. § 24-6-622.[37] The supreme court decided that evidence offered to show bias is subject to the "familiar balancing test" under O.C.G.A. § 24-4-403[38] and offered examples of the proper application of this rule of evidence.[39] The supreme court then clarified that a proper foundation must also be laid prior to the introduction of testimony relating to witness bias: "before a witness may be impeached for bias or hostility toward a party, the proper foundation must be laid by cross-examining the witness regarding his ill-feelings toward that party."[40]

> Unless there is evidence produced outside the hearing of the jury from a witness examined under oath with regard to feelings concerning the

---

34. *Id.* at 879–80, 860 S.E.2d at 461.

35. *Id.* at 882, 860 S.E.2d at 462.

36. *Id.* at 882–84, 860 S.E.2d at 462–63.

37. *Id.* at 880, 860 S.E.2d at 461.

38. O.C.G.A. § 24-4-403 (2022).

39. *Merritt*, 311 Ga. at 881, 860 S.E.2d at 461–62. Previously, in 2018, the supreme court determined that the proper application of O.C.G.A. § 24-4-403 included the following: (1) "the ability to question an opposing party's expert witness about how often he had been hired by the counsel in the case and how much he had been paid"; (2) the ability "to question witnesses about reduction in prison time in exchange for cooperating with the State"; and (3) the ability "to elicit evidence that an employee witness received a promotion and pay increase as a reward for favorable testimony to defendant." Chrysler Grp., LLC v. Walden, 303 Ga. 358, 364, 812 S.E.2d 244, 250 (2018).

40. *Merritt*, 311 Ga. at 884, 860 S.E.2d at 463 (quoting Simmons v. State, 266 Ga. 223, 226–27, 466 S.E.2d 205, 210 (1996)).

> accused and any occurrence giving rise to such feelings, to create a factual basis that racial bias or prejudice exists and, in fact, influenced the witness' testimony or could be reasonably inferred to do so, such issue of racial bias or prejudice should not be injected into the proceedings, as such issue could tend to destroy the impartiality of the jury and because it would not be relevant.[41]

Based on the foregoing text, the supreme court held that the trial court abused its discretion in allowing Dr. Abbasi's testimony—although a harmless error considering the strong evidence of guilt—but did not abuse its discretion in excluding the evidence relating to alleged cultural bias.[42]

Accordingly, the supreme court looked not to federal caselaw but to former Georgia decisions to provide guidance on how to properly introduce and analyze the admissibility of testimony relating to a witness's feelings and relationship to parties under current O.C.G.A. § 24-6-622.[43]

IV. JUDICIAL NOTICE OF A PUBLIC OFFICIAL'S TENURE IN OFFICE

The Supreme Court of Georgia turned to persuasive federal authority as well as its prior caselaw interpreting the former Georgia Evidence Code in determining how to properly apply current O.C.G.A. § 24-2-201,[44]

---

41. *Merritt*, 311 Ga. at 884, 860 S.E.2d at 463 (quoting Farley v. State, 225 Ga. App. 687, 694, 484 S.E.2d 711, 717–18 (1997)).

42. *Merritt*, 311 Ga. at 881, 884, 860 S.E.2d at 462–63.

43. *See generally Merritt*, 311 Ga. 875, 860 S.E.2d 455; O.C.G.A. § 24-6-622.

44. O.C.G.A. § 24-2-201 (2022) provides as follows:

> (a) This Code section governs only judicial notice of adjudicative facts.
>
> (b) A judicially noticed fact shall be a fact which is not subject to reasonable dispute in that it is either:
>
> > (1) Generally known within the territorial jurisdiction of the court; or
> >
> > (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> (c) A court may take judicial notice, whether or not requested by a party.
>
> (d) A court shall take judicial notice if requested by a party and provided with the necessary information.
>
> (e) A party shall be entitled, upon timely request, to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, such request may be made after judicial notice has been taken.
>
> (f) Judicial notice may be taken at any stage of the proceeding.
>
> (g)
>
> > (1) In a civil proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed.
> >
> > (2) In a criminal proceeding, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

the statute governing judicial notice of adjudicative fact, and O.C.G.A. § 24-2-220,[45] the statute governing matters judicially recognized, in *Riley v. Georgia Association of Club Executives*.[46]

In *Riley*, a trade association of adult night clubs filed an action against Lynnette T. Riley, then State Revenue Commissioner, in her individual capacity, challenging the constitutionality of the statute imposing annual assessments on "adult entertainment establishments" and seeking an injunction.[47] However, the action was rendered moot upon Riley's appointment as State Treasurer, as the requested injunctive relief against Riley, as an individual, became irrelevant. Because Riley was sued in her individual capacity, her successor as Revenue Commissioner could and was not automatically substituted in her place. Additionally, the parties made no attempts to substitute Riley with any of her successors, of which there were three by the time this matter was on appeal. In fact, the appellate record was silent as to the fact of Riley's departure from State Revenue Commissioner.[48]

The supreme court, nevertheless, was able to take judicial notice that Riley was no longer State Revenue Commissioner.[49] Pursuant to O.C.G.A. § 24-2-201, a court may take judicial notice at any stage of the proceeding regardless of whether requested by a party or not.[50] The supreme court, citing a litany of federal caselaw and prior Georgia decisions, concluded the appointment of State Revenue Commissioner to be "a matter of public record capable of accurate and ready determination by reference to sources whose accuracy cannot reasonably be questioned."[51] Accordingly, the supreme court vacated the Fulton County

---

45. O.C.G.A. § 24-2-220 (2022) provides:

> The existence and territorial extent of states and their forms of government; all symbols of nationality; the laws of nations; all laws and resolutions of the General Assembly and the journals of each branch thereof as published by authority; the laws of the United States and of the several states thereof as published by authority; the uniform rules of the courts; the administrative rules and regulations filed with the Secretary of State pursuant to Code Section 50-13-6; the general customs of merchants; the admiralty and maritime courts of the world and their seals; the political makeup and history of this state and the federal government as well as the local divisions of this state; the seals of the several departments of the government of the United States and of the several states of the union; and all similar matters of legislative fact shall be judicially recognized without the introduction of proof. Judicial notice of adjudicative facts shall be governed by Code Section 24-2-201.

46. 313 Ga. 364, 870 S.E.2d 405 (2022).

47. *Id.* at 364, 870 S.E.2d at 406–07.

48. *Id.* at 364–65, 870 S.E.2d at 407.

49. *Id.* at 365–66, 870 S.E.2d at 408.

50. *Id.* at 366, 870 S.E.2d at 408.

51. *Id.*

Superior Court's rulings and remanded with the direction that Riley be dismissed from the action.[52]

V. CONCLUSION

In a much-needed time of guidance, as litigators and judges learn how to navigate the courtroom and implications of COVID-19, Georgia's appellate courts provided refined interpretations on various evidentiary subjects. As this Survey period shows, ample guidance as to how to interpret the new Evidence Code is available and the Supreme Court of Georgia also continues to clarify its proper application.

52. *Id.* at 367, 870 S.E.2d at 409.